IALS 2013 Annual Meeting Papers

Teaching the Relationship between Business and Human Rights

Abstracts

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- Somu C S – Christ University School of Law, India
- Carmen Domínguez – Pontifica Universidad Católica de Chile, Chile
- Donald Martin Ferencz – Middlesex University School of Law, United Kingdom
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- Shashikala Gurpur and Bindu Ronald – Symbiosis Law School, India
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- Valentina Smorgunova – Herzen State Pedagogical University, Russia
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Growing attention to the protection and enforcement of socio-economic right has produced much excellent work in South African jurisprudence. There remain, however, important areas for further exploration in this research. The research will argue that recent literature has focused on questions of inclusion or entrenchment of socio-economic rights in the constitutions. The research further argues that there is room for more sustained and critical attention to the question of democracy. While more attention to democracy would certainly include descriptive understandings of trends in decision-making practices, what is even more urgent is a prescriptive exploration of the role democracy may play in shaping a more progressive future for South Africans against poverty. This paper explores the intersection of economic globalisation and the enforcement of socio-economic rights. The focus of this exploration is the right to social security. While a right to social security can be constructed at the international level, the right disappears in the face of neoliberal development measures such as those that are instituted by democratic governments in developing nations faced with limited resources.

Somu C S – Christ University School of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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- Roberto Saba, University School of Law
- Bradford Morse, University of Waikato
- Adrian Popovici, McGill University , Canada

IMPACT OF NEO- LIBERALISM ON THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTIONAL DISPENSATION

Hlako Choma
University of Venda, School of Law, South Africa

Background

Growing attention to the protection and enforcement of socio-economic right has produced much excellent work in South African jurisprudence. There remain, however, important areas for further exploration in this research. The research will argue that recent literature has focused on questions of inclusion or entrenchment of socio-economic rights in the constitutions. The research further argues that there is room for more sustained and critical attention to the question of democracy. While more attention to democracy would certainly include descriptive understandings of trends in decision-making practices, what is even more urgent is a prescriptive exploration of the role democracy may play in shaping a more progressive future for South Africans against poverty.[1] This paper explores the intersection of economic globalisation and the enforcement of socio-economic rights. The focus of this exploration is the right to social security. While a right to social security can be constructed at the international level, the right disappears in the face of neoliberal development measures such as those that are instituted by democratic governments in developing nations faced with limited resources.

Scholars have analysed in detail how neo-liberal globalization has negatively impacted democracy and sometimes hindered the enforcement of socio-economic rights. What is required is an active search for creative progressive alternatives to the current situation. Harvey states that:

> "Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills characterized by strong private property rights, free market, and free trade."[2]

And rest assured that the state has many resources at its disposal by which it forces its citizens to be free. Harvey further states that:

> "The state has to guarantee the quality and integrity of money. It must also set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper function of market. State interventions in markets (one create) must be kept to a bare minimum

1 Purcell M City-Regions, Neoliberal Globalization and Democracy: A Research Agenda, International Journal of Urban and Regional Research, Volume 31.1 March 2009 197

2 http://www.generationabubble.com/2009/09/14/new-word-order-contemporary-novels-and---9/4/2012

because, according to (neoliberal) theory, the state cannot possibly possess enough information to second-guess market (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit."

The issue of judicial enforcement will be revisited and used for delegitimation of welfare rights. The research seeks to shed light on the role of constitutional courts and to explore whether judicial enforcement of social and economic rights can bring a meaningful social change and make a real difference in reducing poverty and also make a normative distinction between positive rights and negative rights corresponding with socio-economic rights and civil and political rights

The research further focuses on the objections raised against judicial enforcement of socio-economic rights. When scrutinizing these rights, virtually all the perceived distinctions of these categories of rights, especially as entailing different enforcement dynamics, have been found without any strong foundation and that there are few differences, if any.

The research results are that in the recent past, save theoretical issues, there have been significant development of socio-economic rights jurisprudence that takes the whole debate to how best these rights should be subject to judicial enforcement rather than whether or not they should be, in the first place. India offers useful benchmarks. It is using the approach where civil and political rights in the contextual background of directive principles are applied innovatively to enforce socio-economic rights[3]. Some important inputs that some countries could draw from India is the consideration of the need to relax the rules of standing to allow for public interest litigation where interested parties, especially those working with and for indigent individuals and communities that are affected, can be allowed to undertake litigation.

Conclusion

The competing ideals of international human rights and global economic neoliberalism come into conflict when developing countries try to enforce socio-economic rights

3 Rural Litigation and Enlightenment Rendra v State if UHAR Pradesh AIR 1989 Sc 594 read with MC Mehta v India (1987) 463

4 Larson EA At the intersection of neoliberal development, scarce resources and human rights: Enforcing the right to water in South Africa

TEACHING HUMAN RIGHTS OR PERSONALITY RIGHTS IN CIVIL LAW

Carmen Dominguez H.
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I) INTRODUCTION

Civil law has been called, rightly or wrongly, the law of "the rich", expression that refers to its traditional inclination to goods, obligations and contracts and the inheritance, all of them patrimonial subjects. In addition to that, the books that deal with the general obligations and contracts, in almost all nineteenth-codes like the Chilean one - are virtually books of creditors, who are considered above debtors. Civil law appears to devote concern to everything related to the estate of the person more than the person in itself, an idea that seems supported by the fact that neither the Napoleonic Code of 1804 and those that followed it, contain a systematic regulation of the person and its inherent rights.
For others, the omission of such regulation may be due to the fact that it was not necessary, since by the time of enactment of the French Civil Code, the declaration of rights of 1789 already existed. Proof of this is that its contents came to lead most of the constitutions of the most diverse countries which came later.

Whether we agree or not with the newly exposed thesis, the fact is that today the valuation of the individual and the existence of its rights which must be protected and respected, is widely recognized in a number of international documents and in nearly all of the Constitutions of the most diverse countries. Moreover, regarding the constitutional provisions is given what is called by some, as the "constitutionalization of civil law". In them, especially lately, it is dealt neatly and in detail, what regards the man in his "fundamental rights and duties", also known as human rights. Moreover, the criminal codes protect the person, partnership, ownership and other property related in any way to the person.

With respect to civil law, the dominant orthodox position understood for a long time, that the protection and study of the property and rights of personality, which is the name that human rights receives in civil-law, was a matter reserved to political policies and criminal laws, and therefore, the task of constitutionalists and criminalists. Today, however, the prevailing trend in many systems, states that the person and property and personal rights are also essential objects for the civil law and therefore it must engage to it with special interest, as the other branches of the law do. Thus, the civil law tends to trend away from the patrimonial course that marked it for so long, to hold a vision that puts the person at the center with all its attributes, properties, rights and interests.

This change has occurred in the first place because constitutions have been more programmatic than effective in what regards the inherent rights of the person. Not to mention that the bill of rights on the ground, increases significantly by the inclusion of rights of a public nature or those related to public beings or between local public beings. On the other hand, it has been found inadequate criminal sanctions practice for full and satisfactory protection of the property and rights of personality. One simple example of this is the absence of punitive effects for civil damage. Last, and regarding the foundation that we are

concerned of, because the modern civil law, in contrast, provides effective tools for protection of the person.

II) THE ROLE OF EDUCATION IN JUR ÍDICA EXPANSION AND DEVELOPMENT OF A CIVIL Law AT A SERVICE PERSON

The reformulation of the dominant understanding about the role of civil law that, although a trend, is not yet recognized in all systems and even in those where it has been., its development is still a task in progress .

2.1 The relevance of training in civil law in the proper understanding of the function of this branch of law.

In this evolution, Civil legal education in law schools, is indispensable if we are aware that the basis of the understanding of the role of law, its content and its regulatory areas are taught to undergraduate and graduate students. And if this is applicable to legal education in all countries, it is particularly important for those belonging to the family called Germanic or Roman Civil Law where civil law is one of the core issues in the backbone of legal education. This is supported by the number of courses within the curriculum dedicated to the study of civil law in many countries such as Chile and Latin countries where in general it is the biggest among all other subjects studied.

Thus, the expansion of the role of the civil law in the protection of the person and thus the rights of the person, understanding that its work extends not only within the patrimonial field but also to equity pecuniary rights as fundamental rights is a task committed first to lecture and thus, to the law schools which should promote the expansion and understanding of it on various modes.

2.2) Relevant aspects of this training in order to generate a renewed understanding of Civil law in the protection of the person. In this regard, civil legal education should aim to several ways.

A. The precision of the concepts of the rights of the person and its delineation. Firstly, in the student correct understanding of concepts and thus, of the content of the various rights of the person or its fundamental rights. Indeed, although many of these aspects have been discussed and the issues they care about and in fact may remain are still being checked , currently this category of personality rights is recognized in the civil law of varied systems. Moreover, in many of them they have been regulated in order to limit them, delimit, specify its content, establish and regulate its protection mechanisms. Nevertheless, in all of them, important debates continue which must be submitted in the teaching process, presenting all the basics existing in different positions. In other words, education should show the various competing conceptions, without interfering with the teacher´s academic freedom to establish his position.
B. The incorporation of a critical view of civil law
   Another dimension that should be promoted is the need for ongoing review of the civil law. First, from the point of view of the constitutional sense since it forces to permanently reformulate the answers given by the standard, hierarchically inferior. The emphasis on protecting the person necessarily provides a renewal look of civil law and, therefore, of the Civil Code.
   Two, because of the permanent review of the incorporation of international treaties determined by our legal systems. The optics of the individual subjective right from which they are constructed determines a constant and uncontrollable source review for any solution by simple logic issues: individual choice is always varied, infinite, not necessarily subsumed in abstract and general rules as legal.

C. FORMS OF PROTECTION OF RIGHTS OF PERSONALITY

As DiezPicazo stated, and adequate protection of personality rights requires legislative regulation specifying its content. In fact , an only general formulation as stated in several constitutions and certainly in ours, though vital in order to inform the respect of the legal system, it requires additional precision to allow settling the many problems that protection matters rise. Indeed, if the constitutional law should formulate principles and guarantees of the person around which the legal system has erected, the exact accuracy of the rights contained therein, and of existing boundaries in both, amongst others, are lower order tasks, and in this case, for obvious reasons, of civil law.

Thus, regulation is needed to clarify concepts, distinguish rights, list classes and categories, set different modes of care (preventive and retrospective), among others. In addition it should be devoted special attention to the consequences of civil order that the violation of any such rights generates.

Thus, if the importance and usefulness of the responses contained in the Code seem sometimes displaced by constitutional means, it is not only because of an invasion of rules, but also because of the improper understanding of the value that can be provided in them, as for example, the tort action.. The same is true, to cite another example, concerning the obligations and contracts where there has been a reluctance to explore the role and utility that can provide certain general legal principles such as good faith, as a product of a strict understanding of the content of the contractual.

Therefore, if the civil code and essentially protection mechanisms contained therein, are perceived somewhat outdated, it has been in large part due to the strength-of doctrine and civil jurisprudence - to read and interpret a variety general principles contained in its rules, from the beginning, that would serve to resolve many of the problems that has arisen subsequent developments. It must be prevented that such resistance is not common to all countries as in some, they have been bold and creative even into the excess (if it can be considered as such to get to make a rule saying something exactly opposite of what was meant originally contained in it) even raising the issue of recoding.

In legal terms, these rights are or may be protected in several ways: through the action of nullity, the general limitation to the autonomy that notions of public order and good morals pose in private law. Last, the most invoked via of protection is an action for compensation of damages, which has become the favorite and most efficient form of personal tutelage , as it has been noted in Spanish law, the tort action achieves that efficiency because is the only civil action which is founded precisely only in the personhood.

VI) IN CONCLUSION

Of course, civil law isn´t a right for care nor is its task the proclamation of the general good intentions of the legislator.. However, the above in not an obstacle to recognize that he would attend important part of the guardianship of the person and that this is in no contrast with its role in heritage.. Rather, the role he has classically been assigned, it has been added the latter: the efficient protection of the person, the dignity and rights.. Thus, before questioning this shift in approach, it should rather be acknowledged that nothing has been done except expanding the importance of the civil law has in the overall context of the law.

That this renewed understanding has further development is certainly a task of primarily teaching it. Its future evolution depends on this.

Teaching Human Rights: Addressing the Illegal Use of Armed Force

Donald M. Ferencz
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Background:

At the outset, and as a matter of full and fair disclosure, I should confess that I am not an academic in the traditional sense, but I have a keen interest in criminalization of the illegal use of armed force - both as what we would, in today's world, call the crime of aggression, and also as a crime against humanity.[4]

In 1758, the Swiss jurist, Emmerich de Vattel wrote, in his *Law of Nations*, that whoever takes up arms without a lawful cause:

> "can absolutely have no right whatever: every act of hostility that he commits is an act of injustice. . . He is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy, whom he attacks, oppresses, and massacres without cause: he is guilty of a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity, — against those of his subjects who are ruined or distressed by the war, — who lose their lives, their property, or their health, in consequence of it: finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example."[5]

Almost two hundred years later, the judgment of the International Military Tribunal at Nuremberg, in the context of their verdict rendered with respect to "crimes against peace", echoed de Vattel's basic message: "To initiate a war of aggression, therefore, is

[4] I was born in Nuremberg, Germany in 1952, the son of the American Chief Prosecutor of the Einsatzgruppen case in the US-led subsequent proceedings at Nuremberg. My undergrad degree (from Colgate University) was in Peace Studies, and I'm the Director of a small family foundation, known as The Planethood Foundation, "Educating to replacing the law of force with the force of law". Depending upon who's asking, I'll also admit to being a lawyer with an MBA and to having had a 22-year career as a tax guy, before turning from commercial work to international justice issues - something I find infinitely more intrinsically rewarding! My current status as a "Visiting Professor" at Middlesex University School of Law has more to do with my having established (in 2010) the Global Institute for the Prevention of Aggression than with current teaching responsibilities (although I will admit that in 2001 I did teach as an adjunct professor at Pace University School of Law in White Plains, New York).

[5] Emmerich de Vattel, *SAXON MINISTER AT BERN AND CABINET, MEMBER AT DRESDEN, SWITZERLAND,* THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW IN FOUR BOOKS (1758), Translated into English by Joseph Chitty, Esq. (1833) Chapter 11, ¶¶ 183, 184, *available online at* http://files.libertyfund.org/files/2245/Vattel_1379_Bk.pdf.

not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." [6]

The United Nations, almost immediately upon its inception, adopted the principles of law enunciated at Nuremberg.[7] By 1984, the General Assembly had gone so far as to declare that the right to peace is a "sacred right" of all peoples.[8] The hoped-for establishment of the principle that peace is a fundamental human right is still very much a work in progress, as evidenced by the UN Human Rights Council's mandate and recent ongoing work to develop a draft United Nations declaration on this topic.[9]

As of its establishment in 2002, the International Criminal Court has provided a focal point for discussions regarding ending impunity for the worst atrocities known to humankind. The Court's system of complementarity - that is, its primary reliance, where feasible, on the jurisdiction of the national courts of the accused persons to, in appropriate cases, investigate and prosecute the core crimes over which the Court has jurisdiction – has, in turn, been a factor in stimulating national implementing legislation covering such crimes. But there's a problem relative to utilization of criminal law to help make good on peoples' right to peace: the Court still lacks jurisdiction over the crime of aggression. This is so because, when the question of granting the Court jurisdiction over the crime of aggression came up at the ICC Review Conference in Kampala, Uganda in

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[6] Judgment of the IMT, available online at the Avalon Project, http://avalon.law.yale.edu/imt/judnazi.asp. *See also* a readily searchable online version of the judgment, at page 25: http://werle.rewi.hu-berlin.de/IMTJudgment.pdf.

[7] General Assembly Resolution 95(I), *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, 11 December 1946, *available online at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement. *See also* the United Nations Audiovisual Library of International Law summary, *available online at* http://untreaty.un.org/cod/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf.

[8] General Assembly resolution 39/11, *Right of peoples to peace*, 12 November 1984, *available online at* http://www2.ohchr.org/english/law/peace.htm:
The General Assembly ,
Reaffirming that the principal aim of the United Nations is the maintenance of international peace and security,
Bearing in mind the fundamental principles of international law set forth in the Charter of the United Nations,
Expressing the will and the aspirations of all peoples to eradicate war from the life of mankind and, above all, to avert a world-wide nuclear catastrophe,
Convinced that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations,
Aware that in the nuclear age the establishment of a lasting peace on Earth represents the primary condition for the preservation of human civilization and the survival of mankind,
Recognizing that the maintenance of a peaceful life for peoples is the sacred duty of each State,
1. Solemnly proclaims that the peoples of our planet have a sacred right to peace;
2. Solemnly declares that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State;
3. Emphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations;
4. Appeals to all States and international organizations to do their utmost to assist in implementing the right of peoples to peace through the adoption of appropriate measures at both the national and the international level.

[9] *See* draft resolution of the Human Rights Council on this topic, UN document A/HRC/20/L.16 (Distr. 29 June 2012), *available online* at http://blog.unwatch.org/wp-content/uploads/orally-revised14.pdf.

2010, the crime was, yet again, essentially put into a sort of legal limbo – with no possibility of coming out of such limbo any time before 2017, at the earliest.[10]

The problem with the *status quo*:

In the words of one well-respected commentator, "Adoption of the aggression amendments, despite their many shortcomings, is a huge step towards the promotion of the human right to peace."[11] Yet, despite this assessment (with which I concur), the lack of current ICC jurisdiction over the crime of aggression leaves a glaring gap in the law: you can apparently start a perfectly *illegal* war, but, so long as you kill people according to the laws and customs of war, etc., you can't necessarily be prosecuted for committing a crime. Such a situation certainly seems at odds with the logic and the law articulated at Nuremberg.[12] Even if, as opined by five Law Lords in the recent U.K. case of R *v.* Jones, the crime of aggression does exist in customary international law, without an international court to hear such cases, we are left to rely on either the ICC or national courts with relevant codes and jurisdiction.[13]

How this issue is addressed and discussed in law schools may make a difference with respect not only to current and prospective policies around the world relating to such matters, but perhaps even to issues touching on deterrence and efforts to minimize the number of human rights abuses relating to the illegal use of armed force.

What's being done, and what still needs doing:

Currently, there is a worldwide campaign to assist with, and promote, the 30 country ratifications of the Kampala amendments which are necessary to activating the Court's jurisdiction over the crime of aggression as soon as possible.[14]

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[10] More specifically, the review conference agreed to adopt amendments which put a definition of the crime of aggression into the Rome Statute of the International Criminal Court, but, as to the question of granting the Court jurisdiction over the crime, they decided that the matter needs to be voted on again, no earlier than 2017 (at the earliest) and then only after at least 30 States Parties to the Rome Statute have deposited their instruments of ratification or acceptance of the amendments granting the Court jurisdiction over the crime of aggression. Even then, other than cases where the Security Council refers a case, all States Parties have the option of electing to opt out of the Court's jurisdiction over aggression with respect to their nationals and crimes of aggression committed on their territory. For an excellent overview of the Kampala Review Conference and the crime of aggression, *see* Stefan Barriga and Leena Grover, "A Historic Breakthrough on the Crime of Aggression"*, American Journal of International Law*, Vol. 105, No.3, June 2011, at p. 517.

[11] Professor William Schabas, who, at the time, was the Director of the Irish Center for Human Rights, as quoted from his running blog from the Kampala Review Conference, *available online at* http://iccreviewconference.blogspot.com/ (at the entry dated 12 June 2010, the final night of the Review Conference).

[12] It is certainly a repudiation of the logic of Nuremberg, as enunciated by the British lead prosecutor, Sir Hartley Shawcross, who, in his closing arguments before the IMT, stated that "The killing of combatants in war is justifiable, both in international and in municipal law, only where the war itself is legal. But where the war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands." Trial of The Major War Criminals before the International Military Tribunal, published at Nuremberg, Germany, 1948 (the Blue Series) at p. 458 (with special thanks to Manuel J. Ventura and Matthew Gillett, who cite this quotation in their paper, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, Washington University Global Studies Law Review, Forthcoming, *available online at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207126 , at p.14, footnote 7.)

[13] See R *v.* Jones et al., House of Lords Session 2005-06, [2006] UKHL 16, 29 March 2006, available online at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones.pdf.

[14] There is a recently developed website, still in formation, on this topic at http://crimeofaggression.info/.

In addition, efforts are underway to explore the possibility – in the absence of the ICC's jurisdiction over aggression – to reframe the debate over criminalization of the illegal use of armed force, at least for the time being, by exploring whether such use of force may be theoretically prosecutable as a crime against humanity, over which the Court *does* have current jurisdiction.[15]

At the student level, an organization, the International Criminal Court Student Network (ICCSN), is still in the relatively early stages of development with respect to engendering student support for and awareness regarding the ICC.[16] Among the types of things they have been involved in was the first significant post-Kampala conference on the ICC and aggression (held at Duke University Law School in November 2010).[17] An upcoming conference, entitled "Peace Through Law: the Development of an Ideal" will be held in the Hague in August, 2013.[18] At St. Anne's College, Oxford and at Middlesex University Law School, London, Global Justice Fellowships have been established to assist, among other things, with the efforts to criminalize the illegal use of armed force.

The question of how, and whether, law schools should and can be more directly involved in the processes by which law students (and others) may be made aware of the current state of affairs with respect to the crime of aggression, crimes against humanity, and the movement towards formalizing a right to peace are part of what I hope will be addressed in our time together in Mysore, India, and beyond, and I look forward to being a part of such ongoing discourse, both as an advocate, an educator, and, in appropriate cases, possibly even as a funder.

[15] See, for example, the recent essay contest at Washington School of Law in St. Louis, administered by the Whitney R. Harris World Law Institute, whose Director, Professor Leila N. Sadat, has just been appointed a Special Advisor on Crimes Against Humanity to the Prosecutor of the International Criminal Court; see contest website at http://law.wustl.edu/harris/pages.aspx?id=9126; the winning essay is referenced *supra*, at note 9 ; see also https://news.wustl.edu/news/Pages/24712.aspx regarding Professor Sadat's appointment as a Special Advisor to the Prosecutor of the ICC, as of December 2012.

[16] Their website, also still in early development is available at http://www.iccsn.com/.

[17] The program was recorded and is largely available online at http://www.iccsn.com/Duke/Duke.html.

[18] The conference website is available at http://www.iccsn.com/peacethroughlaw/.

The Relationship between Business law and Human Rights – What the *Gambazzi* case reveals about English, German and European Concepts of the Right to a Fair Trial

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

I. Human Rights and the Ordre Public

I teach private international law, and the perfect moment to address human rights is when discussing the so-called *ordre public*. Let me explain the concept behind the term *ordre public*:

European Union Law has to a large extent harmonized the rules for jurisdiction and applicable law to transnational business cases. The courts of a Member State of the European Union may be bound to apply the law of a different Member State when they are hearing a case, and judgments by courts of one Member State will be recognized and enforced in any other Member State. However, the law of another Member State must not be applied and the decision of a court of another Member State must not be recognized and enforced, if it is contrary to the public order of the second Member State, i.e. if it violates that Member State's *ordre public*. Following the case law of the European Court of Justice[19], recourse to the *ordre public* 'can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.'[20] Enter human rights.

II. The Krombach Case

A good illustration of the impact of human rights in the EU system of enforcement of decisions from other Member States is the case *Krombach*. *Dieter Krombach*, who lived in Germany, was committed for trial before a French court for alleged manslaughter of his stepdaughter. As is possible under French law, a civil claim initiated by the girl's father was

[19] The European Court of Justice is the highest court in the European Union in matters of EU law.
[20] ECJ, 02/04/2009, case C-394/07, ECR 2009, I-2563 (*Gambazzi*), para. 27.

attached to the criminal proceedings. *Krombach* refused to attend the court hearing in France, despite having being ordered to appear. As a consequence, the court, acting under the relevant French procedural rules of the time, reached its decision without hearing the defence counsel instructed by *Krombach*. *Krombach* was committed to 15 years in prison and was ordered to pay compensation to the girl's father. When the girl's father tried to enforce the civil judgment in Germany, *Krombach* argued that his debarment from defending contravened German public policy. After the German Federal Court of Justice had referred the case to the European Court of Justice for a clarification of the term 'ordre public', the ECJ decided that *Krombach's* procedural human rights had been violated and that German courts were therefore entitled to refuse enforcement of the French decision.[21] *Krombach* was equally successful with his application before the European Court of Human Rights,[22] in which he argued that France had violated his right to be heard under Art. 6 of the European Convention on Human Rights.[23] The French procedural rules which had resulted in *Krombach's* debarment from defending were subsequently changed.

III. The Gambazzi case

1. Facts of the case

While *Krombach* was not a business law case, the insolvency of a Canadian investment company, *Castor Holdings Ltd*, raised questions reminiscent of the *Krombach* case – this time with respect to English civil procedure.[24]

The collapse of *Castor Holdings* led to a cascade of law suits in Canada and all over the world. Some years after the company's insolvency, one of the major investors decided to initiate proceedings in London against the former managers, alleging fraudulent behavior. The only plausible reason for bringing the suit in London was the availability of a powerful interim measure in English law, the infamous 'freezing injunction'. Once described as one of the two nuclear weapons of English civil procedure,[25] the measure obliges the defendant to preserve and (by means of an attached disclosure order) disclose any of his assets – if need be, worldwide. A failure to comply with the order may result in a committal for contempt of court and a striking out of the defense, i.e. a debarment from defending on the merits. One of the defendants, a Swiss lawyer by the name of *Marco Gambazzi*, failed to comply with the disclosure order, arguing that he was not entitled to disclose all of the requested information as he was bound by Swiss secrecy laws regarding information about his clients. *Gambazzi's* arguments did not convince the High Court, which upheld the freezing order, debarred *Gambazzi* from defending and awarded to the plaintiffs the requested damages – totaling 240 million Canadian dollars plus 130 million dollars US[26] – without any consideration of the merits of the case!

2. The decision of the European Court of Human Rights (ECHR)

Some of the defendants applied to the European Court of Human Rights (ECHR), arguing that the UK had infringed their right to a fair trial. In other cases, the ECHR had explained that: 'Where the individual's access to justice is limited either by operation of law or in fact, the Court will examine whether the limitation posed impairs the essence of the right and, in

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[21] ECJ, 28/03/2000, case C-7/98, ECR 2000, I-1935 (*Krombach*), para. 40.
[22] The European Court of Human Rights is a supra-national court established by an international treaty, the European Convention on Human Rights. Individuals may apply to the court to seek a declaration that a signatory state has violated the European Convention on Human Rights. The ECHR is not an institution of the European Union.
[23] ECHR, 13/02/2001, case 29731/96 (*Krombach/France*).
[24] For a more detailed report on the *Gambazzi/Stolzenberg* saga and an for in-depth legal analysis, please refer to *Cuniberti*, Debarment from Defending, Default Judgments and Public Policy in Europe <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515363>.
[25] *Per* Lord Justice Donaldson in *Bank Mellat v. Nikpour* [1985] FSR 87, 92.
[26] Swiss Federal Court (Bundesgericht), 09/11/2002, case 4P.82/2004.

particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[27] Quite inexplicably, the action of the defendants in the *Gambazzi* case was declared 'manifestly ill-founded' and therefore inadmissible under Art. 35(3) of the European Convention on Human Rights. Now, arguably, the defendants deprived themselves to the right of a trial by acting in contempt of court. But the same can be said of *Krombach*, who deliberately chose not to appear before the French courts. Nonetheless, the European Court of Human Rights in the *Krombach* case found France to have impinged upon *Krombach's* right to a fair trial. While the *Krombach* case may be distinguished from the *Gambazzi* case on some aspects,[28] these factors were certainly neither obvious nor sufficiently convincing to have rendered the application to the ECHR 'manifestly ill-founded'. Interestingly enough, the French scholar *Gilles Cuniberti* notes that this is 'not the first time that the ECHR refuses to get involved in a major commercial case'.[29]

1. The decision of the European Court of Justice (ECJ)

I have mentioned earlier that the only perceivable reason why the plaintiffs had initiated proceedings in London in the first place was the availability of the *freezing injunction* in English law. None of the defendants owned any substantial assets in England. The plaintiffs consequently sought to enforce the default judgment in a number of other jurisdictions. These efforts turned out to be successful in the US and France, partially successful in Switzerland and unsuccessful in Monaco. During the enforcement proceedings in Italy, the Court of Appeal of Milan decided to request the guidance of the European Court of Justice regarding the interpretation of the public policy exception contained in Art. 27 of the Brussels Convention.

In contrast to the ECHR, the ECJ realized that the treatment of *Gambazzi* raised considerable human rights concerns, pointing out that *Gambazzi* had suffered 'the most serious restriction possible on the rights of the defense'.[30] The Court explained that it was for the Italian courts alone to decide whether the enforcement of the decision in Italy might contravene Italian public policy, but offered some advice as to what the Italian courts might consider.

The ECJ held that the Court of a Member State may deny enforcement of a decision handed down in another Member State, if, 'following a comprehensive assessment of the proceedings and in the light of all the circumstances', it appears the debarment from defending constituted 'a manifest and disproportionate infringement of the defendant's right to be heard'. In making that assessment, the Court of Appeal of Milan should consider whether (1) *Gambazzi* had the opportunity to be heard as to the subject-matter and scope of the disclosure order, (2) whether *Gambazzi* was able to fully challenge the disclosure order and (3) whether the High Court investigated the merits of the claim and whether *Gambazzi*, at any point in time, was given a chance to express his opinion on the merits.[31]

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[27] ECHR, 10/05/2001, case 29392/95 (*Z/UK*), para 93

[28] UK government submissions to the ECJ in the *Gambazzi* case, available online at *Requejo*, The Written Observations Submitted in the Gambazzi Case, November 19, 2009, <http://www.conflictoflaws.net>: (1) *Krombach* only had one chance to appear before the French courts, whereas *Gambazzi* was granted a significant period of time to adhere to the decision. (2) *Gambazzi* had the chance to appeal against his debarment from defending before the English courts.

[29] *Cuniberti*, op cit. (fn. 6).

[30] ECJ, 02/04/2009, case C-394/07, ECR 2009, I-2563 (*Gambazzi*), para. 33.

[31] ECJ, 02/04/2009, case C-394/07, ECR 2009, I-2563 (*Gambazzi*), para. 41 ff. For a critique of the decision, cf. *Cuniberti*, op cit. (Fn. 6).

After receiving the guidance of the European Court of Justice, the Court of Appeal of Milan held recognizing the judgment in Italy did not violate the Italian *ordre public* and issued a declaration of enforceability for Italy.

2. Some remarks on the German ordre public

Apparently, the plaintiffs also tried to enforce the default judgment in Germany, but nothing is known about the proceedings. I will add some thoughts on how the defendants might have resisted a declaration of enforceability on the basis of German public policy.
The right to heard is enshrined in Art. 103 of the German constitution. It is accepted that this constitutional right is subject to limitations, provided that those limitations actually contribute to judicial efficiency and legal certainty and that the party concerned had previously been given ample opportunity to participate in the proceedings.[32] The restriction of the right to be heard must therefore serve a higher purpose, it cannot be used simply to sanction the party concerned. Changing the perspective from constitutional to procedural law, one finds that German procedural law does contain time limits for a party's submissions as well as limits to particular forms of being heard. However, a complete debarment from defending in German courts is impossible – both with respect to civil and with respect to criminal proceedings.

In a decision of the year 1967, the German Federal Court of Justice ruled that a default decision which resulted from a debarment from defending due to contempt of court was not contrary to the German *ordre public*.[33] The court argued that by committing contempt, the defendant had deprived himself from the opportunity to participate in the trial. Some 40 years later, the court's view had changed.[34] In deciding upon the declaration of enforceability of an Australian case, the Federal Court of Justice explained that any limitation to the right to be heard had to be proportional. The declaration of enforceability was refused because the Australian court had debarred the defendant from defending for his failure to produce a document, even though the defendant's failure to produce the document had not hindered the Australian court in making its decision, as a copy of the document was provided to the court by other authorities.

It is suggested that the approach of this more recent decision of the Federal Court of Justice is to be preferred. A debarment from defending will result in a violation of the German *ordre public* if it does not contribute to the efficiency of the legal proceedings concerned or if there are more proportionate means of promoting that efficiency.

Where does that leave us with the *Gambazzi* case? It all turns on the question of whether *Gambazzi's* debarment from defending contributed to the efficiency of the proceedings in the High Court. The simple answer to that question is: No. The reason why Gambazzi was debarred from defending was not because he failed to produce evidence or was engaged in dilatory tactics. *Gambazzi* was sanctioned for his failure to comply with a court order in entirely different proceedings. While it is certainly true that the purpose of the *freezing order* is to freeze the defendant's assets until the decision on the merits has been rendered, debarring *Gambazzi* from defending did not in any way prevent him from dissipating his assets. There was no higher purpose to debarring *Gambazzi* from defending, save to punish him for his lack of compliance with the court's order. Such a punishment, however, is completely foreign to German law and violates the constitutional right to be heard.

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[32] German Constitutional Court (BVerfG), 05/04/1987, case 1 BvR 903/85, BVerfGE 75, 302 (316).
[33] German Federal Court of Justice (BGH), 18/10/1967, case VIII ZR 145/66, NJW 1968, 354 (355).
[34] German Federal Court of Justice (BGH), 02/09/2009, case XII ZB 50/06, NJW 2010, 153 (156). This change in perspective can most likely attributed to the fact that the German dogmatics of interpreting constitutional rights has received much fine-tuning in the second half of the 20th century.

IV. Lessons of the *Gambazzi* case

What are the lessons to be learned from the *Gambazzi* case?

First of all, the case shows that despite the existence of the European Convention on Human Rights and the European Union's Human Rights Charter, an entirely congruent concept of 'fair trial' within the European Union does not exist. Secondly, the European Court Justice (which to a large extent deals with business cases) may in some instances be more willing to tackle human rights issues that the ECHR, a court specifically established to deal with human rights violations.

Both is food for thought.

Teaching Relationship between business and human rights in India: Breaking the Silos

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'*escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well'* – Ruggie Report 2011

Critical insight in Harvard Academic Ruggie's comment above on the new angle of corporate-related human rights abuses, flows into the human rights movement as an outcome of the vital function and role of human rights studies. Steiner argues thus:

The international human rights movement can never be a finished or uncontested project. It will remain a work in process within a framework of ongoing criticism, self-assessment, and rethinking. Students and scholars will be vital contributors to that process. Many of them may see their task as suggesting how the movement can better proceed toward the realization of its ideals. But first they must see the movement as it is, and to that task they must bring their critical faculties.[37]

When one views legal education across the globe and across the nation, the unfinished agenda of human rights movement and the dynamic response of law schools with their human functionaries point to a rich range of possibilities in curriculum, pedagogy and context. In the backdrop of Ruggie Report and innovative remedying of transnational corporate torts, legal education in general and in India in particular, cannot afford to remain neutral and unchanged just because corporate or business groups form part of its important stakeholders. Although it would neither be sensible nor practical to withdraw or sever the ties, time is opportune to rethink on the connection. It is very apt to revisit such neutral (because of the short-term gains) position of legal education and to transform it into a critical dialogue.

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[37] Henry J. Steiner, 2002, THE UNIVERSITY'S CRITICAL ROLE IN THE HUMAN RIGHTS MOVEMENT, Harvard Human Rights Journal, pp. 317-326 at p.326

This paper begins by demonstrating the pressing need for linking business and human rights in law school teaching and proceeds to .locate the disconnect between business and human rights in law teaching and how they remain as silos in many ways and forms. Thereafter, the argument is developed based on the evidences of current practices of select Indian law schools to rethink the approach and develop special content and curriculum on teaching business and human rights.

Why break silos?

Today, legal scholarship and professional engagement alike are confused by the contradictory contours of human rights and business. It is in terms of relationship of human rights with the comfort of capital and hence the unquestionable nature of the pains of profit and corporate power. It further coincides with those critical moments in the recent history when globalization confronts human rights in general.

Although the primary focus of law has been on imposing obligations on business entities for the human rights, there has also been a debate whether such business entities being legal cognates of human persons are entitled to such rights. Restriction on their rights, it is feared, may also affect the interest of human beings.[38] Such complex but delicate linkages seem to breed certain arrogance about the power of trade and business. The complexity is evident in the WTO Director Genera's statement which in fact, echoes the Sullivan Report, *'one could almost say that trade is human rights in practice'*[39]
The meaningful and powerful engagement of these two areas was brought about by the recent initiative by UN, the Ruggie report of John Ruggie in 2011.Ruggie report continued the legacy established by many preceding international instruments such as the ILO Tripartite Declaration on Fundamental Principles and Rights at Work, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, the Equator Principles, the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises, The United Nations Global Compact and the Business Leaders Initiative on Human Rights.

It was submitted after six years of consultations, as special Representative for Business and Human Rights. Its contents identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights[40]. The framework put forth in the Ruggie report[41] rests on 3 pillars:

- The duty of the State to protect human rights
- The corporate responsibility to protect human rights
- Access to remedy provided by the State and the Corporates

[38] Lucien J. Dhooge, 2007,HUMAN RIGHTS FOR TRANSNATIONAL CORPORATIONS, Journal of Transnational Law & Policy; p.197

[39]WTO, 2008, '10 benefits of the trading system' available on http;//www.wto.org; also, Pascal Lamy, 'Towards Shared responsibility and greater coherence: human rights, trade and macroeconomic policy' (Speech at Colloquium on Human Rights in the Global Economy, Geneva, 13 January, 2010)
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[40] http://www.unglobalcompact.org/issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html
[41] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

The standards of behaviour adopted by transnational corporations were the predecessor to the Ruggie Report. In fairness to it, in a short time, one cannot feel the impact of Ruggie report on business behavior. The Guidelines in the said Report, however, cast obligations on the State, the corporation and the regulatory authorities and stimulated changes in regulatory framework and curriculum across the world.
Since the guidelines and the ensuing national responses take the line of self-regulation and voluntarism, many argue in favour of external enforcement. One may well appreciate the need for and the role played by the uproar of general public as evident in the recent cases of Apple and Hershey's.
Many nations on the West have incorporated the Ruggie principles into legal framework whereas in India, it is urged through Ministry communication and professional network as a voluntary guidelines[42] with an iota of demanding compliance in terms of mandatory disclosures and undertaking. The threat to human rights is imminent in such a lax climate. One of the ways by which the threat can be countervailed is by initiating human rights education especially as part of the legal studies or in its background. law schools can play a pivotal role as repositories of knowledge, expertise and resources.
Even though human rights are also taught as part of political science discipline, in keeping with the forum, specific reference here is limited to Legal education in general and Indian legal education as the specific focus. Indian legal education records the influence of such a global context as a platform and theatre of professionals and scholars. Further, it informs the outcome or the by-product, who by majority, measure their success by the corporate acceptance for jobs. Could or should law universities and legal education institutions problematize and critically engage with the position and power of human rights as values in an idealistic manner? Should it be, on the contrary, a considered pragmatic response of a developing economy's aggressive drive to succeed materially, by rejecting such idealism?

Although wedged between these opposite pulling and equally realistic arguments, authors have journeyed through the milestone reforms and standards in legal education in India looking for evidences of how the process of teaching the relationship of business and human rights exists. One can note striking parallels between corporate entities and educational institutions in organizational sense, with myriad of actors from both profit and non-profit sector as much as the public funded entities. At the same time, striking similarities shine between global instruments of human rights and universities, which include freedom of enquiry, belief, values and association.[43]

How do these Silos exist?

To the question whether the institutions of legal education exhibit these characteristics, the authors prefer to confine it to the second dimension of values as essentials in the function of teaching business and human rights. The enquiry proceeded on the basis of three questions across the top 10 law schools in the country, barring among them those affiliated to state universities as their autonomy is limited to the letter of the UGC mandate:

- What sets the context for the law school curriculum or its review? Whether that context is truly reflected in the curriculum with reference to business and human rights?
- Are there exclusive courses or programs (as a set of courses) on business and human rights?

[42] CSR Voluntary Guidelines, 2009 &National Guidelines on Social, environmental and economic responsibilities of Business, 2011, Ministry of Corporate Affairs; Guide on CSR Audit, May 2012, Internal Audit Standards Board, Institute of Chartered Accountants of India
[43]Henry J Steiner, supra, 319

- How far do human rights law courses get reflected in Business or corporate law courses or how far do the corporate or business law courses reflect the components of human rights law?

From the perspective of the first question, the authors analysed the two local bench mark documents; one the Curriculum Development Committee (hereinafter CDC Report)of the UGC[44] (the University Grants Commission), the apex body of higher education in India and two, the latest such report from the BCI (Bar Council of India)[45], professional body which regulates legal education by setting standards and prescribes to follow the model curriculum as set by UGC . Both reports set apart ten years from one another, commendably, do not repeat any idea and one is incomplete without the other. Although the recent origin of the BCI report renders a better value to it, it delinks from the history and sets out the diversity and gaps in different tiers of Indian law schools. It further, makes a generally rich contribution to systematic pedagogy and standards. However, both lack any focus on center-staging or linking business and human rights. The former report still has its gold standard of incorporating human rights as a module or as a topic across special courses and specialization groups, while the new report does not provide a single reference to the term. We used the search words such as 'business and human rights', human rights', 'Ruggie Report', 'Corporate Audit' and 'Due diligence'

The stakeholder matrix which ought to have informed the curriculum includes quality aspects of satisfaction across all seven types as prescribed in the official standards of National Accreditation Council (NAAC). However, the curriculum with reference to these themes, does not reflect any of the global standards either. The research shows that not only in limited numbers, but also, in a limited manner, Indian legal educators consider the study of human rights in the context of corporations.[46]. Despite a dated reference to limited courses[47], diploma and PG programs in human rights, evidence shows that none of the institutions in India offer an exclusive course on Business and Human rights. In contrast, in the West, the courses in universities such as University of Oslo address recent developments in linking business practices and human rights (including corporate social responsibility (CSR)) within the UN and in other international organisations, and focusses on the efforts in making human rights an important normative framework for the conduct of business in different societal and political contexts. It offers arguments in favor of and against extending human rights to the corporate sector, and discusses legal developments, including normative and remedial mechanisms. It examines strengths and weaknesses of the CSR movement and the scope for making human rights regulatory measures for corporate behavior[48]. Other Universities which offer courses on Business and Human rights include Middlesex University London, Columbia Law School (course on Transnational Business and Human Rights), Harvard Kennedy School (Business and Human Rights) and

[44] Published in 2001, around 500 pages, with elaborate model curriculum for law courses in both UG and PG programs in law, without distinguishing stand-alone and integrated programs

[45] Draft Report of the Curriculum Development Committee, vol.1, Bar Council of India published on 15 Februrary 2010 running into nearly 300 pages, is specific to both stand-alone and integrated/double degree programs, against the background of Revised Rules on Legal Education 2009, incorporates panoramic view of current scenario, model courses, teaching plan, reading list and does not include PG courses.

[46] NLSIU Bangalore, NALSAR Hyderabad, NUJS Kolkotta, GNLIU, Gujrat, NLU Jodhpur and NLU Delhi include courses on Corporate Governance, international trade law. Some of these law schools also have human rights education center. Only NLS Bangalore offers a post-graduate program in Human rights law. Some of them allow the human rights as optional to the other specialization groups of PG Programs. However, the data are crude as there is no official comprehensive document to authenticate and verify.

[47] Mool Chand Sharma, 2002,available at, http://www.hurights.or.jp/archives/human_rights_education_in_asian_schools/section2/2002/03/human-rights-education-in-indian-universities-and-colleges.html

[48] http://www.uio.no/studier/emner/jus/humanrights/HUMR5133/index.xml

Kings College London (short courses on Ethical Business and Human rights). Such a strong global relevance proves the need for introducing mandatory courses in Business and Human rights in India which will inform and critically examine both the legal developments as well as voluntary initiatives in corporations.
The second question was answered in the negative, as proved by data elicited through telephonic interviews and web information. New courses are under consideration for being developed in some of the law schools with a view to teach business and human rights as an academic discipline.

The third question was answered in a mosaic fashion. Currently, law schools in India teach business and human rights as a module in the ethics curriculum or as part of corporate law syllabus. The mutual presence of both components in courses of respective groups was evident.

In spite of the interest exhibited by students and compelling national realities of corporations and business enterprises violating human rights as in the case of Nandigram incident or Sivakasi , there is no defined syllabus exclusively on the subject as yet.

Taking stock of silos….
Besides the content and context of curriculum as above, the pedagogy and approach ask for crossing the illusory boundaries of class room, discipline, specialization and methodology. Steiner himself argues how the range of issues, activities and projects could enrich the landscape of teaching human rights[49].

The authors would like to reiterate the omniscience of human rights as a touch stone to very area of law and business law discipline in particular. The case laws of international origin, comparative legalities and transnational impact such as landmark settlement in the US case of John Doe v. Unocal Corporation in December 2004 are of great significance. They also inform the sense of law reform both in substance and strategy. In the said case, the complaint had been filed by a group of non-governmental organizations (NGOs) **and** private attorneys has espoused the cause of fourteen Burmese villagers more than eight years earlier under the Alien Torts Claims Act[50] or the rise and fall of share prices of settling and refusing plaintiffs in the recent case of IRATE v. ExxonMobil, et al., between those who reach a settlement with all the defendants and the one refusing it, the ExxonMobil.[51] It would stimulate the critical thinking, interventionist spirit and humanistic innovation in the teacher, student and the culture of the institute.

Silos of types of pedagogy, content and participants

Further, not many law schools are engaging in human rights education beyond their student community. Time and again UGC has hailed the role of law schools and law deans as the leaders in human rights education in schools and colleges in India[52]. There are evidences of

[49] Steiner, supra
[50]Mark D. Kielsgard, 2005, UNOCAL AND THE DEMISE OF CORPORATE NEUTRALITY California Western International Law Journal; p.185

[51] William Bradford, 2012, BEYOND GOOD AND EVIL: THE COMMENSURABILITY OF CORPORATE PROFITS AND HUMAN RIGHTS, Notre Dame Journal of Law, Ethics & Public Policy, p.146

[52] IX Plan Guidelines and Para 3.5 in IX Plan Guidelines For Human Rights Education, available on www.ugc.in. while the IX plan mandated environmental education as a compulsoryinterdisciplinary course for all undergraduate programs, human rights module accounted for 20per cent of its component. XI plan has streamlined human rights

a few law schools engaging in certain activities confined to certain segments. However, the predominant thrust seems to be on educating the legal and judicial personnel, government machinery and seldom on consumers or corporate leaders or business leaders or leaders-to-be. Further more, both classroom and beyond classroom teaching or training seem to suffer from the dominant focus on civil and political rights with the constitutional framework. Teaching with real life examples and a variety of tools inculcating a semantic democracy has yet to develop.

The law schools seem to have resigned the cultural and social trappings as much as economic forces underlying the deprivation of such rights and the poor context of socioeconomic and cultural rights; to the hands of non-formal training by activists and NGOs. However, one cannot understate the role of NGOs as education partners and collaborators in affective and field based learning, if judiciously combined.

Symbiosis Silos:
Own experience of authors in a private deemed university law school has been quite diverse. Through the human rights cell and by virtue of National Human Rights Commission (NHRC) grants, the team at Symbiosis Law School Pune has imparted two one-day workshops on Human rights to a total of two hundred students who came from management education stream. During the workshop documentaries and global snapshots of rights violations by state and various well-known business enterprises or their connivance in state's violations interspersed with similar Indian realities became the first and familiar point of reference. Role plays by participants themselves arrested their attention and engagement. Unfolding the legal instruments and provisions became easy. These sessions were part of a foundation course which elicited interest for advanced program in large number of participants.

In case of international exchange students and faculty at SLS, exposure to global context of Indian realities by case studies, visits and internships with local human rights NGOs stimulates a critical perspective.

Thus, the pedagogy is unconventional, inclusive and engaging. Participants are diverse and are on the progressive path of becoming human rights advocates or defenders irrespective of the career they may pursue. Some of the community and extension sessions by the first author have incorporated the same sense while training human rights teachers in the newly emerging SEZ context of Mangalore in Karnataka[53]

As a complementary development, the recommendations of the Symbiosis international university's curriculum review committee in 2011 resulted in various business courses incorporating a human rights perspective and the human rights courses referring to business context. Thus the silos started disintegrating leading the integration of specialization and advanced studies as specialization groups were allowed to opt for human rights courses in PG studies. Institute has recorded an upward trend in favour of human rights courses in student interest while choosing courses. It was within a comprehensive contemporary and relevant framework cemented by the human rights perspectives as

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education as mandatory component in all disciplines across all programs, identified the roles of law schools and ear-marked funds for different levels and activities. However, reference to its relationship with business is missing in both documents.

[53] Dr Gurpur, UGC Sponsored National Seminar in St Agnes College and University College for political science teachers and students, September 2011 and January 2012 respectively presentation focused on the human rights audit of the working of local public sector mega corporation and the proposed Mangala Cornische land acquisition process

necessary values. It was besides plularism (gender, race, minority) and international/comparative approaches.

Silos of Rhetoric and Practice within the Law Schools.

If one looks at the financial model and working of most of the law universities and law schools, one would agree that it has trappings of a venture or a corporate organization. Hence, teacher and the teaching process will be under pressure to transgress rhetoric to become a living practice. It is time for the teaching community should train itself and adapt itself to enlighten with new knowledge on human rights and non-state organizations, so that they set good living examples in front of students. Theory and practice are the other silos that require connection and integration. Human rights Practicum[54] was one of the good examples that IGNOU set before the nation by collaborating with the international partners in exposing students to a healthy mix of theory and field trips alongside projects despite their limitation of being School of law as a distance education center.

Today, legal profession also is organized in a corporate manner. What about their compliance and due diligence in the light of various global human rights standards? Perhaps, learning human rights will continue beyond law school days.

Rethinking corporate neutrality and the Middle Path

Summarizing the above, one can recall how the footsteps of global human rights movement and the ensuing influence on Indian legal education seems relevant even today, although in a changed globalizing context of states and non-state actors breaking their own silos of activity and power. One can see how Indian approach on teaching business context of human rights and the newly emerging normative framework is ripe for up-dating and rethinking.

The need emerges when one honestly and courageously abandons the belief that current Indian approach is perfect and relevant. The dominant paradigm of civil and political rights in the Constitution pervaded here for a long time until the non-justiciable directive principles as postulations of socio economic and cultural entitlements were hybridized and assimilated by judicial creativity, into the fundamental rights. Corporate actors were moderated and reminded to share profits of peoples' resources. Law School curriculum in India should integrate such insights to set the new thinking in developing different levels of courses with different learners in view as prescribed by UGC and drawing on international best practices. Such rethinking is not only in the interest of law schools, law students and law teachers but also in the interest of community and liberal democracy in general; as the wave of globalization sweeps everyone off balance. There is also a certain inhibition and bias about human rights activism and engagement of any kind, perhaps, emerging out of the fear of being brandished as 'theoretical' , ' activist (aka emotional and impulsive), not providing proper jobs. Perhaps, this accounts for the lack of exclusive the course title or program title with human rights along side its successful,attractive, maximum takers' choice of 'business or corporate law'.

The law schools are also required to sound the demise of corporate neutrality as did the states and the UN. Only then they assume the lead role as torch bearers for the future; a future well-equipped with a holistic and critical legal education. Then human rights- as

[54] In 2010, through the School of law, IGNOU.Delhi

values to be complied with, will determine the destiny of ruthless business enterprises-be it national or transnational.

Justice manifests as the equilibrium of competing and conflicting interests. Its essence comes from the grand idealism of abstract human rights norms and the pragmatic cognizance of legal expertise. Such profound expertise acts as a mechanism to support and optimize business by carving the middle path of human welfare and social responsibility. Serving the ends of justice ought to remain as the indispensable mission of every legal education enterprise; least one confronts the larger question: is India a liberal democracy or a mere guise of an authoritarian oligarchy?

The role of law schools in providing training based solutions in Human Rights and Business in Zambia

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1. INRODUCTION

It is an undisputed fact that businesses and companies play a dominant role in the lives of the communities and the individuals they serve. The law provides for the concept of 'corporate personality'[55] and its separation from natural legal persons who own, manage and administer these entities but does not emphasis the issue that these artificial persons are nonoperational without natural legal persons. There are under Company Law some exceptions to this rule but it is only the court that can lift the corporate veil for situations under Common Law and Statute Law. This means that the individuals in these entities can hide behind the corporate veil for abuse of any basic human rights of an individual in the community. The question is how these third parties can be held liable for abuses hinging on human rights which primarily are the duty of the state to uphold.

One of the core principles of the policy framework of Human Rights Council[56] is the states duty to protect against human rights abuses by third parties, including business. The challenge therefore becomes global and in the on-going world economic recessions there is need to shift the all trusting ideology of capitalism in resolving problems of human rights abuses to some other ideology. The need for the shift is very evident because business organisations have a self cantered selfish goal of maximising profits to meet the standard of life of the individuals that own them. The powers exercised by the business organisation have been and continue to remain unchecked and unregulated.

2. CORPORATE GOVERNANCE

The new ideology that was brought in advocated for change and it was called corporate governance. Good corporate governance involved risk management and internal control, accountability not to the shareholders but stakeholders and conducting business in an ethical and effective way. Due to the increased number of high profile corporate scandals

[55] The house of Lords in the case of Salomon v Salomon and Company Limited established the theory of corporate personality and held that once the corporation was formed it is an entirely different legal person form the members who compose it control it

[56] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7th April 2008

and collapses regulatory frameworks in the form of 'soft law'[57] were introduced into the corporate world. In the United States the Sarbanes-Oxley Act[58] had bought about radical changes in the amount of compulsory legal regulations which the Companies have to comply with or face multi-million dollar fines and up to twenty years imprisonment for non-compliance. One of the pillars of corporate governance is corporate social responsibility and the strong supporters of this view are that a wide range of stakeholders' goals should be pursued by the corporate world. The main argument against corporate social responsibility is that businesses do not have responsibilities, only people have responsibilities.

3. CORPORATE-RELATED HUMAN RIGHTS HARM

As businesses, government and civil society face stiffer completion, civil unrest and demand to adhere to global governance and accountability, corporate governance has not really provided the solutions to the problems. A fresh look into the age old approach of human rights abuses may provide a lasting and effective solution for the corporate world. In the last ten years or so the fresh look is too balance the single principle of the businesses which is maximisation of profits against business operated in accordance with values enshrined in the universal declaration of human rights. It is an accepted fact that by making right investment decisions the shareholders can maximise their profits in the same vein by being responsible businesses can protect human life and promote basic human rights by taking care of the environment and the communities they serve.

4. TRAINING BASED SOLUTIONS IN HUMAN RIGHTS AND BUSINESSES IN ZAMBIA

Businesses operating in Zambia are facing all the challenges experienced by the Corporate world in any other developing economies. Some of the challenges are similar to ones faced in the developed world such as maximising shareholders wealth, excessive rewarding of corporate executives, non-compliance to law, rules and regulations and ethical consideration just to mention a few. This paper will try to outline the possible solutions to some of these challenges through training. There can be long term solutions as well as short term solutions. For a futuristic solution on long term basis universities can introduce specialised training on Masters or undergraduate programme so that future Business Executives, Advocates and Shareholders understand the need to operate businesses which can balance maximising profits with corporate responsibility to uphold basic human rights. This will mean waiting for about five to ten years before practical results become visible. The alternative of mainstream parts of the syllabus on Business Law and Human Rights into the existing courses offered will mean similar results as expressed for the specialised training. It will not be useful to begin with long term programmes but they should not be discarded completely, the process should begin with shorter programmes.

5. SHORT TERM TRAINING APPROACHES

Higher education providers need a more proactive and radical approach in addressing the gaps in their training programmes. The first question to address is how to ensure that the corporate world starts discussing the concept of Business and Human Rights. The obvious answer is to make it an agenda item for the Board Meetings. Most businesses even private family owned businesses make decisions relating to policies at meetings. Lecturers and professors can take up this opportunity and seek permissions to address the Boards for ten

[57] The Cadbury, Greenbury and Hampel codes were later incorporated into the combined code which has been revised several times since 2003. These codes of best practise evolved in England but have spread to several other countries as well.

[58] 2002.

to fifteen minutes so that the directors and shareholders' interest in the topic is brought out. The address to the meeting should include recent cases where businesses have paid out large sums of money for breach of human rights. The will not only raise interest but also show to the corporate world that it pays to conduct business and uphold human rights at the same time. In the beginning the trainers can start by considering businesses in one particular sector of the economy such as construction. This approach will be proactive since the trainers will move from the classroom to the Boardroom. It will also be radical because the privacy of making decisions behind closed boardroom doors will open up with guidance and discussions through neutral experts from outside the business.

Once the barrier is crossed the next stage would be a follow up of a one day workshop for Business Executives operating in the same sector of the economy, for example the mining industry. The training should be conducted at the door steps of the Business Executive since they will always find the excuse that they do not have the time to leave their busy schedules to attend training programmes. At these training the role played by the company secretary will be very important. The recording of the discussions and the preparation of the reports will provide guidance for future decisions by the Business Executives who will have changed their pattern of thinking. The report will also be useful for the trainers to develop topics according to priority areas for future training programmes.

At a later stage a further programme can be developed where businesses from different sectors of the economy are brought together to share their experiences on Business and Human Rights. A two or three day's seminar can be organised by the School of Law. The forum to share ideas and exchange views will allow for policy development and codes of conduct which the business will adopt. This draft report will be analysed with the available resource materials at international level by the facilitators of the workshop.[59] This will also allow for the global sharing of issues on Business and Human Rights.

The final stage of the training will involve the facilitators returning back to the Boardroom meetings this time as an observer. An assessment of how the agenda item of Business and Human rights has evolved will be recorded by the facilitators. The programme will be reviewed on the basis of the findings for future implementation.

6 CONCLUSION

The long term programme will be developed from the initial short term training of Business Executives in terms of content and methodology so that future Advocates as well as Business Executives will be better informed to make corporate decisions on issues of Business and Human Rights.

[59] International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operations and Development (OECD), 'Business and Human Rights: The Role of Government in Weak Governance Zones", December 2006 and A/HRC/4/35/Add.3,A/HRC/4/35/Add.4 and 'Human Rights Policies of Chinese Companies: Results from a Survey".

TEACHING THE RELATIONSHIP BETWEEN BUSINESS AND HUAMN RIGHTS

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Over the Years, the Equation between Business and Human Rights has drastically changed. With the advent of Globalisation, business has served as a vehicle for economic, social and cultural amelioration. One can see a dramatic change in the economic scenario of developing countries like India, where the diffusion of technology, scientific culture and management skills has led to job creations and rapid economic development. The flow of Foreign Direct Investment has brought a wave of transformation, which includes not only an increase in the number of jobs, but a remarkable improvement in the overall standard of living of the people. Business has thus enriched human lives, by giving every individual various rights, ranging from the right to adequate quality food to the right to freedom of expression and access to information. However, Business has certain negative implications as well that need to be rectified. Business poses a great threat to the enjoyment to human rights through its own conduct or invasion of rights by the host government. Moreover, private business firms have violated social, economic and cultural rights on a large scale and have remained unaccountable for their acts by exploiting the inherent flaws of regulatory mechanisms.

Corporations have known to violate human rights on large scales. The sheer atrocities committed by large corporations are eulogised in the tragic accidents. The consequences are unfathomable. The Rhine Pollution by Sandoz, Exxon Valdez Oil Spill, and the Bhopal Gas Tragedy are a few examples of the condemnable social, environmental, economic and legal damages caused due to sheer negligence by corporations[60].

LIABILITY OF CORPORATIONS TO INDIVIDUALS: TEACHING THE LEGAL RELATIONSHIP BETWEEN BUSINESS AND HUMAN RIGHTS

As stated above, Business Corporations have violated the rights of the people in many respects, either socially, economically or culturally. The damage done is often irreparable and the resulting loss is often irretrievable. However, one also needs to take into account

[60] Relationship Between Business and Human Rights: A Legal Analysis (Bhandary Mangalpady)

the legal implications arising out of the actions of corporations and the obligations that every corporation is bound to adhere to. As future corporate lawyers and businessmen, it is important to study the close nexus between law and business and be aware of the rights of those people to whom corporations are eventually answerable.

CORPORATATIONS AS LEGAL PERSONALITIES

'Legal Personality' refers to the extent to which an entity is recognised by a legal system as having rights and responsibilities[61]. In domestic law, legal personality is not restricted to 'individuals' but further includes 'Business Corporation', though there has been an on-going debate on whether business corporations can be considered as 'individuals' among the international scholars. Corporations are formally considered to be 'private legal persons' and valid subjects under various national laws, although international law does not impose any obligations or duties on corporations since it does not consider them to be international personalities. However, many scholars have rendered this view obsolete, stating that such a view creates obstacles to the recognition of non-state entities as subjects of international law.After analysing the different approaches among scholars, we could conclude that states are the subjects of international law and other legal entities are not necessarily non-subjects nor are they precluded from gaining international legal personality Moreover, a subject of international law does not have to possess the same character or share all attributes of a state to fit into the definition of a subject[62].

THE DUTIES AND OBLIGATIONS OF CORPORATIONS

Now that corporations have been recognised as legal entities in the eyes of International Law, Schools must now focus on teaching the primary duties that Corporations are bound to follow.In International law, the duties of business corporations have been recognised in different human rights instruments[63]. These Human Rights principles impose six primary duties on 'business corporations[64]'. They are; firstly, equal opportunity and treatment in the work place; secondly, respect for the security of persons by refraining from engaging in war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking and other violations of humanitarian law; thirdly, protection of workers' rights through prohibitions upon slavery and forced, compulsory and child labour, maintenance of a safe working environment, payment of fair and reasonable remuneration and recognition of freedom of association and collective bargaining; fourthly, respect for the sovereignty of states, local communities and indigenous populations; fifthly, consumer protection; and finally, environmental protection. The above mentioned duties and responsibilities must be incorporated in the curriculum by Law Schools and Business Schools alike. Further, Students must be made aware of the International Regulations which control the behaviour of Corporations at a global level.

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[61] Relationship Between Business and Human Rights: A Legal Analysis (Bhandary Mangalpady)
[62] Relationship Between Business and Human Rights: A Legal Analysis (Bhandary Mangalpady)
[63] UN Sub –Commission on the Protection and Promotion of Human Rights
[64] For detailed information see, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art 5(1), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (Dec. 16, 1966) (providing that the Covenant shall not be interpreted as to imply 'for any…group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant'); International Covenant on Civil and Political Rights, G. A. Res. 2200A (XXI), art 5(1), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16, 1966); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, preamble art. 30, U.N. GAOR, 3rd Sess., 1st plenary mtg., U.N.Doc. A/810 (Dec 12, 1948 (explains that 'every…organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance' and prohibiting interpretations of the Declaration that imply for 'any…group or person an right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth here in').

INTERNATIONAL REGULATIONS TO CONTROL BUSINESS CORPORATIONS

As stated above, creating awareness among Law schools and Business Schools with regard to The International Regulatory Measures governing the Legal Relationship between Corporations and Its People is necessary. Not only must it be taught theoretically, but their practical utilization in the current scenario must be taught as well.

Traditionally, National government would regulate the conduct of business corporations falling within their jurisdictions. However, with the advent of globalization, companies began to set up subsidiaries in various countries, making them even more powerful in the World Economy. Business Corporations further increased their power in the International Legal System by expanding the legal obligations imposed on states through trade regimes and International treatises. In such circumstances it became very difficult for governments to unilaterally impose regulatory measures on business corporations violating human rights within their jurisdiction and regulating the conduct of business corporations in general. However there are certain legal provisions, applicable universally to all business corporations.The Universal Declaration of Human Rights (UDHR) focuses on the obligations of States, and also mentions the responsibilities of individuals and of 'every organ of society', which includes business corporations[65]. Under the International Covenant on Civil and Political Rights (ICCPR), each state party 'undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognised in the present CovenantAccordingly, if a corporation endangers the rights of an individual, the State has a duty toensure the respect of human rights and thus to take preventive action[66]. Other initiatives adopted in an international level were the OECD (The Organization of Economic Cooperation and Development) guidelines on Transnational Corporations, The Draft UN Code on Conduct of Transnational Corporations and the UN Global compact. Further the ILO (International Labour Organization) instruments, such as the ILO Tripartite Declarations, have laid down certain principles for multinationals in the area of social policy[67].

TEACHING THE RELATIONSHIP BETWEEN BUSINESS AND HUMAN RIGHTS FROM AN ETHICAL PERSPECTIVE.

1. Addressing Moral Norms.: The Moral Qualities of Economic Actions

While developing moral norms for acceptable economic action of corporations, the big question that arises is to whom. Opinions on this fall in two opposite camps[68]. The first being to look at the company as a whole and to address the moral imperatives at Corporations as themselves. On the other hand, there are those who believe that moral norms can be only addressed to individuals are able to reflect them and take them into account in their decisions.[69] According to Ethicist, Patricia Werhane when corporations claim their right to freedom and autonomy, they also claim them as moral rights. Along with these moral rights, come certain moral obligations which make corporations morally responsible for their actions. This responsibility concerns those aspects of economic actions in which companies as organisations must be assume responsibility towards their customers and staff and towards the society as a whole, which includes legal and moral liability.[70]
If corporations claim certain rights, they must also recognise the rights of others as well.. If they don't, they would be violating the concept of equal treatment. Corporations cannot

[65] UDHR(United Nations Declaration on Human Rights) (online UN Document PDF)
[66] International Covenant on Civil and Political Rights (U Chandra, Human Rights, (2007)
[67] Relationship between Business and Human Rights : A Legal Analysis (Bhandry Mangalpady)
[68] Walther Ch. Zimmerli and Michael S. Asslander: Book on Business Ethics
[69] Walther Ch. Zimmerli and Michael S. Asslander: Book on Business Ethics
[70] Walther Ch. Zimmerli and Michael S. Asslander: Book on Business Ethics

enjoy more freedom than what it grants its members. Similarly, members within the corporations are individually responsible for their actions as well, which brings us to the point that the entire argument on 'Responsibility' includes individual as well as collective responsibility. Every corporation has a *finis operis* or a purpose of work and a *finis operantis* which means an intention behind the work[71]. In the current scenario there seems to be a conflict between the intention of the individual or corporation and the purpose of work. For instance, in the current scenario we have corporations at are built for a morally correct purpose, but the intention with which they run that particular corporation is morally incorrect. However there are certain situations in which the purpose and the intention are morally incorrect such a corporation poses as a great threat to the rights of the people in many respects.

On the whole it appears that Moral obligation is no longer based on the obligation to obey moral law[72] or to promote 'the greatest possible quantity of happiness to the greatest number of people' [73]. Instead, one of the necessary conditions of moral actions in that it doesn't result in economic disadvantage. Managers consider moral imperatives and prohibitions while making decisions only when these imperatives do not conflict with their economic interests. There are very few managers who would exploit their commercial possibilities to promote morality. However, it is very difficult to assign responsibility with the organisation, since decisions are not taken by one person. There are a number of persons within the organisation who participate in decision making.[74]

2. ***Responsibility for Economic Action[75]***

   Traditionally Responsibility was subjected to only individuals making decisions. However, in the present scenario, decisions are made by teams and implemented collectively by them. Responsibility as a whole is not restricted towards the actions and the intention behind committing those actions, but also includes the intentional and intentional consequences and side effects. Today Corporations overlook the possibility of intentional or unintentionally consequences arising from their actions. The Power to Control and the Power to Act have begun to drift apart. Moreover, transferring the power to control to machines establishes the fact that despite having enough technical knowledge, corporations are oblivious of the subsequent economic, social or cultural consequences. Corporates must thus focus on sustainable development. They need to keep in mind that human activities and consequences have an impact on the present and the future generations. The concept of responsibility must be expanded to to include the unborn generations as well.

   Models of Ethical Assessments[76]

   Another way of teaching the relationship between Business and Human Rights in Schools would be by analysing and scrutinising the Models of Ethical Assessments. In today's global market, the ethical system must meet three conditions-:

   1. Ethics must be oriented towards problem-solving and not merely based on formal or material principles. These principles must be implemented in order to solve real life dilemmas.
   2. Models must be built in sync with value systems. The Model must serve the purpose of bridging the gap between moral value systems and self-interests.

[71] (v. Nell Breuning 1963, p.32))
[72] Kant (1788)
[73] Bentham(1789)
[74] Walter Ch. Zimmerli and Michael S. Asslander: Business Ethics
[75] Zimmerli (1987): Book on Business Ethics
[76] Zimmerli/Wolf (1993, p.316): Book on Business Ethics

3. Orientation of the consequences that arise from technological and economic actions must be given due importance.
4. Discussions on morality within value systems must take place on global platform. The outcome of these discussions should be duly implemented in Schools.
5. Ethical Evaluation of Actions is necessary. Every problem must be categorised according to its intensity. For instance, Problems involving extremely serious (social, ethical or legal) issues must take priority. A problem-oriented ethical system in law schools is required.

The Essence of Moral Leadership

Leadership is a process of morality to the degree that leaders engage with their team members on the basis of shared goals, values and motives. It is the leader ultimately who decides a corporations goals, values and motives. He determines the path that the corporation follows. This path can be morally and ethically correct or incorrect, depending on the leader's intentions, his goals and his motives. He is the driving force behind the actions of the corporations. A leader shapes the procedures and a strategy used by the corporation and is the ultimate creator of the consequences that arise out of the actions of corporations. A leader is at such a position that he has the power to influence the ideas and thought processes of his team members to a considerable extent
At every stage of decision making, a leader often goes through mental conflicts. In an idealistic situation, a good leader would face ethical dilemmas. He would streamline his actions in accordance with is value system. However present day leaders have failed to comply with the expected ethical standards to the society. Moral perspectives and implications make a very little difference to leaders of the modern generation. Instead, maximization of profits and expansion of business across borders regardless of the damaging social, ethical, cultural, legal and environmental consequences seems to be their only goal. It is thus necessary for future leaders to strike a balance between values and interests and comply with ethical standards, while striving to increase annual profits.

CORPORATE SOCIAL RESPONSIBILITY AND HUMAM RIGHTS

The corporate responsibility to respect human rights means acting with diligence to[77] avoid infringing on the rights of others, and addressing harms that do occur. Corporate responsibility to respect human rights applies across its business activities and through its relationship with third parties connected with these activities - such as business partners' and other non-state actors and State agents. [78]Corporations should need to consider the country and local contexts for any particular challenges they may pose and how those might shape human rights impacts of 'corporations' activities and relationship[79]. In the context of Business corporations, Corporate Social Responsibility mainly comprises of social and economic aspects, the social aspect being 'The People' and The Economic Aspect being 'The Profits' Protection of Human Rights is one of the fundamental principles under the United Nations. Human right abuses by states have been out rightly condemned in a series of the global issues. Though the corporations are considered as 'legal persons' under the international law, still it needs

[77] Relationship Between Business and Human Rights: A Legal Analysis (Bhandry Mangalpandy)

[78] Relationship Between Business and Human Rights Between Business and Human Rights : A Legal Analysis (Bhandry Mangalpandy)

[79] Relationship Between Business and Human Rights : A Legal analysis (Bhandry Mangalpady

clarifications for the basic issues i.e., to what extent business corporations are responsible for human rights violations[80]. In the next segment we shall assess three important case studies and establish the need for making law students aware about the importance and essence of the Concept of Corporate Social Responsibility.

TEACHING HUMAN RIGHTS: WHAT SCHOOLS MUST LEARN FROM CASE STUDIES

A very interesting, yet an effective, method of teaching the complex relationships between Business and Human Rights is through case studies. Case Studies also provide students a peep into the actual violations of Human rights by Big Corporations. Further, it teaches them the practical use and implementation of International Regulations. It is through Case studies that students of law and business can create their own analysis and formulate their own solutions and recommendations to problems. It will also give them an insight into how corporations changed their attitudes towards Human Rights and The final outcome.Students must be exposed to the most successful models of Corporate Social Responsibility This method of teaching will definitely broaden their views on Social, Economic, Cultural and Legal issues. Given below is a Glimpse one of the most Successful Models of Corporate Social Responsibility.

Volkswagen (Automobile Giant) - Then and Now

A Historical Background

During the Second World War, National Socialist forced labour became rampant in many parts of Germany. Volkswagen was no stranger to the ubiquitous mass phenomenon of forced labour. The concerned authorities made people from countries like France, Netherlands and Poland, Soviet Prisoners of War and Jews, objects of their mania for regulation[81]. They were sent all over the place and handed over to the German foremen or guards and were subjected to discriminatory conditions[82] and were brutally tortured by military guards. In the process, one could see the pitiful condition of the prisoners, who were deprived of nutrition and their basic right to health. Many workers would collapse with exhaustion at the machines. However, with the emergence of the United Nations after the Second World War. Forced Labour is now regarded as a gross violation of Human Rights. Further, the issue of compensation for forced labour remained unresolved for many years.[83]

Corporate Social Responsibility at Volkswagen: The Current Scenario[84]

Volkswagen's CSR philosophy is reconciling economic benefits with sustainable development and human progress. The key to its success lies in its sense of social responsibility. The ethical, ecological and social principles are incorporated throughout the process at Volkswagen. As a result, the

[80] Relationship Between Business and Human Rights: A Legal Analysis (Bhandry Mangalpandy)

[81] Manfried Grieger(Historical Responsibility: Corporate Forms of Remembrance of National Socialist Forced Labour at Volkswagen Plant)

[82] Manfried Grieger(Historical Responsibility: Corporate Forms of Remembrance of National Socialist Forced Labour at Volkswagen Plant)

[83] Manfried Grieger(Historical Responsibility: Corporate Forms of Remembrance of National Socialist Forced Labour at Volkswagen Plant)

[84] Reinhold Kopp and Klaus Richter (Corporate Social Responsibility at Volkswagen Group)

company, along with monetary benefits has reaped social benefits as well. Over the years, Volkswagen has proved to be one of the greatest global players with German roots.
The following are the key principles of Volkswagen's CSR strategies that have set a benchmark for future companies.

- Work holder Value: Volkswagen believes in putting its workers at the forefront. It includes its workers in policy and decision making and trains them in the process of shaping the company's future. Volkswagen has developed various Employment schemes that allowed lower costs and increased flexibility in working hours. In addition to these schemes, approximately 95% of workers are covered by Collective Bargaining Agreements.
- The Sustainable Agreement, a brainchild of the Volkswagen Group, envisages pay freezes and adjusted labour agreement models. Further it ensures no cuts in pay for the next one year
- Another interesting feature of the schemes is the investment of wagers in what are called time asset bonds, invested in capital markets. The concept of demographic working hours gives the workers the flexibility to shape their retirements on the basis of the number of saved time bound assets. Overtime hours can also be converted into time bound assets.
- Volkswagen has also introduced a variety of part-time work schemes, which enable single parents an opportunity to balance work and family commitments. In addition to these schemes, it also has agreements with various child care support bodies. It has also taken up an initiative of building kindergarten places on work sites. Maternity leave with benefits are provided.
- Equal opportunities regarding the sex, age, origin or religion of the employee are set down in its Social Charta. Malpractices, such as sexual harassment and all other forms of persecution and discrimination are termed as 'Offences and Violations of human dignity 'for which penalties are imposed. A lot has been done for the upliftment of women employees. Policies regarding measures to increase the number of women employees and their efficiency as well as policies to boosting their potentials have been implemented.
- Health Schemes and Screening Programs for Workers for the Prevention, Treatment and Cure of deadly diseases like AIDS and Cancer have been implemented.
- Volkswagen has worked really hard towards Environmental Protection and Sustainable Development It has been a signatory to the UNEP Programs and is in Cooperation with the German Nature Conservation Association (NABU) that focuses on fuel saving measures.. It is also the founding member of the World Business Council of Sustainable Development.(WBCSD)
- Finally Volkswagen has brought about Transparency and Fairness in its Systems. It has complied with the various ILO and OECD guidelines regarding free and fair working of corporations. It was a part of the Global Reporting Initiative on Sustainable Development as well. Further it has set up an Ombudsman to curb corrupt practises within the organisation.

BUSINESS: CONSUMER RIGHTS ARE HUMAN RIGHTS

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"It is wrong to think that business is incompatible with ethics. I know that it is perfectly possible to carry one's business profitably and yet honestly and truthfully. The plea that, business and ethics never agree is advanced only by those who are actuated by nothing higher than narrow self-interest. He who will serve his own ends will do so by all kinds of questionable means, but he who will earn to serve the community will never sacrifice truth or honesty. You must bear in mind that you have the right to earn as much as you like, but not the right to spend as much as you like. Anything that remains after the needs of a decent living are satisfied belongs to the community".[85]

- Mahatma Gandhi

1. INTRODUCTION

Human Rights are related to standard of living and continuous improvement of living conditions of human being. Human means a member of the homo sapiens species; a man, woman or child; a person. Rights means a things to which you are entitled or allowed; freedoms that are guaranteed. Therefore Human Rights means the rights you have simply because you are human.

"Human Rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.[86]

Human being spends a lot of time as consumers of goods or services. When they buy goods, eat in a restaurant, travel or seek the help of doctors, pharmacy, engineers and other service providers, they act as consumers. In modern society, people cannot avoid

[85] Harijan, May 4, 1935, *quoted* in the *Wisdom of Gandhi*, New York: Philosophical Library, 1967, p.49.
[86] Sec.2(1)(d) of Protection of Human Rights Act, 1993 (India).

doing this all the time. In this 'modern' society one cannot imagine the life without consuming products sold in the market. Consumption is defined as the use of goods and services. And consumption is as old as man and it is older than production. Man in ancient time was dependent more on nature and was in that sense self-sufficient and independent. Now one may look back at those days, when each individual was self-sufficient, but cannot go back and live like that. *Production, operation and commerce have become an inevitable and important part of modern life.* In a continuous effort to improve the quality of life, man has made a number of experiments and inventions, built many institutions, systems and developed knowledge in social, cultural, religious, scientific, economic and in many such other fields*. Economic activities, that is, production, distribution and consumption have become inevitable and important part of human activities.* 'With the rise in prices and standards of living, consumers have become cost conscious. Taking advantage of the helplessness of consumers, unscrupulous traders play with the life and happiness of consumers by selling adulterated articles of food, drink and drug at a cheaper rate and make huge profits. They resort to various undesirable methods of adulteration starting from the stage of manufacture to that of sale of the articles, even at the risk of the consumer's health, happiness and life. It is shocking to know that poisonous constituents are often added to articles of food and drinks and spurious drugs are sold resulting in number of deaths and causing innumerable diseases'.[87]

The ultimate purpose of offering products and services are to satisfy the needs of people, which is a part of human rights. Any misrepresented product characteristics are not simply a minor infraction or trivial breach of trust, but an intentional violation of the basic rights and interests of human beings. In particular, when consumers receive misleading information about the feature of food, medicine, electrical appliances, autos, and housing, the products can pose a threat to the users' lives or quality of living. Even if the products do not harm the consumers physically, the misrepresented information undoubtedly harms consumer spiritually. The spiritual infringement is certainly a form of damage to human rights, while consumers' physical suffering is more severe, more strongly condemned and draws more concerns than common violations.[88]

Hence, In this paper, author has made an attempt to express my view regarding how for Consumer Rights are Human Rights and how for these rights are adopted by the transnational corporations and other business enterprises at the International and National level. How best law school can teach Business and Human Rights to students.

2. UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection.

a. General Principles

- Governments should develop or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Government should set its own priorities for the protection of consumers in

[87] K.D.Gaur, "Consumer: Adulteration of Food and Drugs", in Leelakrishanan (ed.), *Consumer Protection & Legal Control*, Lucknow: Eastern Book Company, 1981, p.267.

[88] ESSAY: CONSUMER RIGHTS: A PART OF HUMAN RIGHTS Shaoping Gan; Journal of International Business Ethics Vol.1 No.1 2008.

accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures.

- The legitimate needs which the guidelines are intended to meet are the following:

(a) The protection of consumers from hazards to their health and safety;
(b) The promotion and protection of the economic interests of consumers;
(c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
(d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
(e) Availability of effective consumer redress;
(f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
(g) The promotion of sustainable consumption patterns.

- Unsustainable patterns of production and consumption, particularly in industrialized countries, are the major cause of the continued deterioration of the global environment. All countries should strive to promote sustainable consumption patterns; developed countries should take the lead in achieving sustainable consumption patterns; developing countries should seek to achieve sustainable consumption patterns in their development process, having due regard to the principle of common but differentiated responsibilities. The special situation and needs of developing countries in this regard should be fully taken into account.

- Policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic human needs of all members of society, and reducing inequality within and between countries.

- Governments should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population and people living in poverty.

- All enterprises should obey the relevant laws and regulations of the countries in which they do business. They should also conform to the appropriate provisions of international standards for consumer protection to which the competent authorities of the country in question have agreed. (Hereinafter references to international standards in the guidelines should be viewed in the context of this paragraph.)

- The potential positive role of universities and public and private enterprises in research should be considered when developing consumer protection policies.

- These guidelines should apply both to home-produced goods and services and to imports. Government in applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations.

b. International Cooperation

- Governments should develop or strengthen information links regarding products which have been banned, withdrawn or severely restricted in order to enable other importing countries to protect themselves adequately against the harmful effects of such products.

- Governments should work to ensure that the quality of products, and information relating to such products, does not vary from country to country in a way that would have detrimental effects on consumers.

- To promote sustainable consumption, Governments, international bodies and business should work together to develop, transfer and disseminate environmentally sound technologies, including through appropriate financial support from developed countries, and to devise new and innovative mechanisms for financing their transfer among all countries, in particular to and among developing countries and countries with economies in transition.

- Governments and international organizations, as appropriate, should promote and facilitate capacity-building in the area of sustainable consumption, particularly in developing countries and countries with economies in transition. In particular, Governments should also facilitate cooperation among consumer groups and other relevant organizations of civil society, with the aim of strengthening capacity in this area.

- Governments and international bodies, as appropriate, should promote programmes relating to consumer education and information.

- Governments should work to ensure that policies and measures for consumer protection are implemented with due regard to their not becoming barriers to international trade, and that they are consistent with international trade obligations.

c. Consumer Rights are Human Rights

The U.N. guidelines on consumer protection represent a consensus of international opinion on what good consumer laws and practices should be and set an internationally recognised set of minimum objectives which consumers everywhere should be entitled to expect. Due to the largely growing interdependence of the world economy and international character of many business practices, there has been increasing recognition in recent years of the international dimensions of consumer protection. Consumer policy can no longer be viewed solely in national domestic terms and adoption of the guidelines marked a further recognition of this by the United Nations.[89]

Article 25(1) *Universal Declaration of Human Rights, 1948 states that* "a standard of living adequate for the health and well-being of himself and of his family." Consumer protection is concerned with the protection of the consumer's health and, as such, is intended to enhance the standard of living and the well-being of the individual as consumer. Although the *Declaration* does not directly deal with consumer protection, its goals and objectives are synonymous to those underlying the basic right of consumer protection.

In order to give legal power to human rights and to flesh out the skeleton of the rules accepted in the *Universal Declaration of Human Rights,* the international covenants were drafted.[90] The *International Covenant of Economic, Social and Cultural Rights was* adopted by the United Nations General Assembly in1966.

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[89] S. Deutch. "Are consumer rights human rights?" – Osgoode Hall Law Journal 1995 (32)/3, pp. 551–552.

[90] See A.H. Robertson & J.G. Merrills, *Human rights in the world: an introduction to the study of the international protection of human righ,ts3d* ed. (Manchester: Manchester University Press, 1989) at 231, regarding economic, social, and cultural rights.

The *ICESCR* and its detailed list of economic rights can serve as a basis for acknowledging consumer rights. The right to an adequate standard of living briefly stated in the *Universal Declaration,* for instance, was elaborated upon in article 11 of the *ICESCR* of 1966. Article 11(1) refers to "adequate food, clothing and housing, and to the continuous improvement of living conditions." Consumer protection can be considered an implementation of these rights and a means to achieve these goals. Adequate food includes quality of food, which is achieved through consumer protection legislation. Adequate housing contains two elements: the ability to obtain housing and the adequate quality and safety of the housing. Although consumer protection was not mentioned in the *ICESCR,* it is a method by which the above goals can be achieved.[91]

The right to health, elaborated upon in article 12 of the *ICESCR,* is also closely associated with consumer protection. A basic consumer right is the "protection of consumers from hazards to their health and safety."[92] Similarly, the *ICESCR* declares the right to environmental hygiene and to the prevention of disease. Although consumer protection is not mentioned in article 12, the goals of this article can be realized through improved implementation of consumer protection in the medical field. The same is true with respect to the right to education, described in article 13 of the *ICESCR* and sections 31 to 37 of the *UNGCP.*[93] These principles show that basic consumer rights are deeply rooted in accepted international human rights and that further recognition would merely be an extension of existing rights. Another phase in the establishment of consumer rights as human rights is their inclusion in the constitutions of several countries.

With reference to the above, the consumer rights have the potential to become 'soft human rights', because they possess the three main characteristics of human rights. First, there is increasing international recognition of consumer rights in international treaties, which shows the universal acceptance of such a right. Consumer rights are rights of all individuals, as every person is a consumer from time to time. Second, consumer rights to fair trade, safe products, and access to justice are granted to maintain human dignity and well-being, notwithstanding the economic market impact. Third, consumer rights are similar to other accepted human rights in that they are intended to protect individuals from arbitrary infringements by governments[94].

3. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK[95]

"Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

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[91] Supra note 5.
[92] See *UNGCP,* s. 3(1).
[93] See *UNGCP,* ss. 31 to 37.
[94] Supra note 5.
[95] The Human Rights Council resolution 17/4 of 16 June 2011.

The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

4. BUSINESS STANDARDS-CONSUMER RIGHTS-HUMAN RIGHTS

A. International Standards

The consumer exploitation is an international disease. Everywhere the dominant manufacturer or service provider tries to exploit the consumer to get quick profit. Hence there was a necessity of consumer protection at the international level. That's the reason the World Trade Organisation (WTO) and World Health Organisation (WHO) entered into many multilateral agreements on consumer protection. Among them the Technical Barriers on Trade (TBT) and Sanitary and Phytosanitory Measures are important in consumer product safety standard. In 1985 even United Nations come out with Guidelines called "United Nations Guidelines on Consumer Protection" and in 2011 "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" to protect the Consumers at the international level.

a. Agreement on the Technical Barriers to Trade (TBT)

Technical Barriers to Trade were first addressed in the Tokyo Round of multilateral trade negotiations (1973-1979). The "old" TBT Agreement, referred to as the "Standards Code", came into force in 1980. This was a plurilateral agreement to which only 46 countries adhered. The new TBT Agreement, which came into force with the WTO in 1995, is binding on all WTO Members. It contains more stringent obligations than the preceding version of the agreement.[96]

The WTO's TBT Agreement establishes rules and procedures regarding the development, adoption, and application of voluntary product standards, mandatory product standards, and the procedures used to determine whether a particular product meets such standards. The TBT Agreement recognizes the important contribution that international standards and

[96] *WTO Agreements and Public Health*, A joint study by the WHO and WTO Secretariat. Geneva.

conformity assessment systems can make to improve efficiency of production and facilitate international trade.

WTO rules which govern technical barriers to trade applied for reasons of protecting human health are covered by either the agreement on Technical Barriers to Trade or the agreement on the application of Sanitary and Phytosanitary Measures. Under both these agreements, health is considered a legitimate objective for restricting trade.

TBT Agreement also allows the grant of specified, time-limited exceptions to developing countries that have difficulties in meeting obligations under the agreement because of their special development and trade needs, and their stage of technological development (Article 12.8).

b. The Sanitory and Phytosanitory Agreement, 1995 (SPS)

Sanitary and Phytosanitary measures generally deal with protecting human, animal and plant life. For human being SPS deals about standard measures for Additives, contaminants, toxins or disease-causing organisms in their food, beverages, feedstuffs.

The SPS Agreement establishes a number of general requirements and procedures to ensure that a Sanitary or Phytosanitory measure is in-fact intended to protect against the risk asserted, rather than to serve as a disguised trade barrier. The SPS Agreement has been recognised the International Body with respect to food safety and standards, i.e., Codex Alimentarius Commission.

c. The Codex Alimentarius Commission (CODEX)

The Food & Agricultural Organization (FAO) was fulfilling the mandate given to it at its founding during the United Nations Conference on Food and Agriculture held in Hot Springs, Virginia, in 1943, to establish quality standards that would enable international trade to meet the needs of the hungry in the postwar world. Recognizing that the safety of foods is an essential component of quality, FAO called on WHO to join it in this important work. In the following year, 1962, the Joint FAO/WHO Food Standards Programme was created, with the CODEX as its executive organ. The CODEX, an intergovernmental body opens to all member countries of FAO and WHO, is an organization in which governments make decisions, but where members of civil society can provide input and comment on the draft standards.

In 1995, the CODEX adopted four statements of principle concerning the Role of Science in the Codex decision making process and the extent to which other factors are taken into account (FAO/WHO, 1995) are as follow; Standards and other texts shall be based on sound scientific analysis and evidence based on a review of all relevant information to ensure the quality and safety of the food supply; the CODEX will have regard to other legitimate factors relevant for the health protection of consumers and the promotion of international trade; Food labeling plays an important role in both of these objectives; When members of the CODEX agree on the necessary level of public health protection but hold differing views in regard to the other legitimate factors, they may abstain from accepting the standard without necessarily preventing a decision by CODEX.

In this way the Codex standards, codes of practice, and guidelines are recommendations to governments that facilitate countries in accepting into their territories food that is safe and of good quality, property labeled and packaged, and prepared under hygienic conditions. They are accompanied by recommendations on food inspection and certification systems, as

well as methods of analysis and sampling to provide the framework for the application of standards to food products as they move in international trade.[97] If any disputes arising out of SPS Measures shall be settled under the provisions of the WTO Dispute Settlement Body.

d. International Standards Organization (ISO)

International Standards Organisation work programme ranges form standards for traditional activities, such as agriculture and construction, through mechanical engineering, to medical devices, to the newest information technology developments, such as the digital coding of audio-visual signals for multimedia applications.[98]

ISO together with IEC (International Electrotechnical Commission) and ITU (International Telecommunication Union) has built a strategic partnership with the WTO (World Trade Organisation) with the common goal of promoting a free and fair global trading system. The political agreements reached within the framework of the WTO require underpinning by technical agreements. ISO, IEC and ITU, as the three principal organizations in international standardization, have the complementary scopes, the framework, the expertise and the experience to provide this technical support for the growth of the global market.

The ISO 27th General Assembly, held on 14-16 September 2004 in Geneva, Switzerland, approved seven key objectives for the organization and defines the ensuing actions and results expected. The key objectives are: Developing a consistent and multi-sector collection of globally relevant International Standards; Ensuring the involvement of stakeholders; Raising the awareness and capacity of developing countries; Being open to partnerships for the efficient development of International Standards; Promoting the use of voluntary standards as an alternative or as a support to technical regulations; Being the recognized provider of International Standards and guides relating to conformity assessment; Providing efficient procedures and tools for the development of a coherent and complete range of deliverables.

B. National Standards: Indian Scenario

In India, the need for consumer protection is paramount in view of the fact that there is an ever-increasing population and the need for many goods and services of which is no matching supply. In India the consumer exploitation is more because of lack of education, poverty, illiteracy, lack of information, traditional outlook of Indians to suffer in silence and ignorance of their legal rights against the remedy available in such cases. It was therefore necessary that a forum be created where a consumer not satisfied with the goods supplied or services rendered may ventilate his grievance and machinery devised to afford him adequate protection.

The Indian Constitution came into force on Jan 26, 1950. Though the word consumer is not to be found in the constitution, the consumer breathes and peeps out through many of the blood vessels of the constitution. The constitution of India is a social document. It is not made only to provide a machinery of government to maintain law and order and to defend the country. The founding fathers of the constitution had a glorious vision of the establishment of a new society in India imbued with high ideals for guaranteeing the multidimensional welfare of all the people.[99] The aspirations of the people of India found an

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[97] Noami Rees and David Watson, *International Standards for Food Safety* (An Aspen Publication, USA, 2000) p.6

[98] Available at < http://www.iso.org/iso/en/ISOOnline> visited on 25-04-2012.

[99] Rao Koteswar P, "Constitution, State and Consumer Welfare*", Consumer Protection and Legal Control (*Leelakrishnan. ed., Eastern Book Company. Lucknow,1981) 81.

explicit expression mainly in the preamble, the fundamental rights and the directive principles of the state policy.

It is the state's duty to give guarantee of every one in this country has a right to live with human dignity, free from exploitation.[100] This right to live with human dignity enshrined in this article derives its life breath from the directive principles of state policy. The state shall secure a social order for the promotion of welfare of the people and shall effectively work to achieve a social order in which justice, economic and political shall inform all the institutions of the national life.[101] State has a duty to raise the level of nutrition and the standard of living to improve public health and to prohibit consumption of intoxicating drinks or drugs which are injurious to health.[102] This is considered as a primary duty of the state. In the sense, every state has to protect the rights of the consumer and ensure the use of public utility in the best possible manner. In every nation, there are large segments of the people who have insufficient resources to live under reasonably good conditions of health and decency. Therefore, the society in which they live has obligations to provide support and that support is not a charity to the citizen but as of a right.[103] Therefore, they must be brought within the scope of any law which can be envisaged for the consumer's promotion.

In India much legislation were passed to protect the consumers from manufacturers and service providers like Indian Contract Act, 1872, Sale of Goods Act, 1930, Bureau of Indian Standards, 1986, Prevention of Food Adulteration Act, 1954, The Food Safety and Standards Act, 2006, Agricultural Produce (Marking and Grading) Act, 1937, Drugs and Cosmetics Act, 1940, Competition Act, 2000, Indian Penal Code, 1860 (Sections 272-276) and finally Consumer Protection Act, 1986.

5. TEACHING BUSINESS: CONSUMER RIGHTS & HUMAN RIGHTS

Object of Course

The course seeks to help students to develop analytical skills to question and appraise human rights policies and practices at the international and national levels; enhance understanding of fact-finding methodology and develop interview skills; gain substantive knowledge of the international law and policy of human rights and consider prevailing trends in the human rights field and of the challenge and contribution of critics; perceive improvements, discern ambiguities and identify contradictions in the human rights movement; draw useful conclusions about the roles of various state and non-state actors in the identification of rights and in their promotion and enforcement; and identify potential roles for oneself in the promotion of human rights; Consumer Rights Accountability of Business Entities.

Structure of the course

a) Defining Business and Human Rights within Corporate Responsibility;

b) State Responsibilities to Protect Human Rights and Policy Dimensions

c) Human Rights Accountability of Business Entities: Theories and Practice

d) Consumer Rights Accountability of Business Entities

[100] Constitution of India, art. 21.
[101] *Ibid* art. 38.
[102] *Ibid* art. 47.
[103] Charles A. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues", 74 *Yale.L.J.* (1965). 1245, 1256.

e) Business Human Rights Best Ethical Practices

f) Norms, Standards and Codes of Conduct : International and National

g) International Trade and Human Rights Perspective in India

h) Health and Safety

i) Environmental Protection

j) Tools for Corporate Accountability

k) The Implementation Mechanisms

l) Engaging students in research, teamwork and clinical approaches.

Example: **Details of NLSIU students have filed cases through their team work and clinical approaches**

	Case Name	**Before Forum/ Commission /ASCI / High Court (Nature of Case)**	**Present Stage**
1.	NLSIU Students V. L'oreal India Pvt Ltd (Garnier Men Cream)	Karnataka State Commission Bangalore	Objections
2.	NLSIU Students V. Dove Damage Therapy Dandruff Care Shampoo Complaint No.2119/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
3.	NLSIU Students V. Nivea Energy Fresh Spray Complaint No.2120/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
4.	NLSIU Students V. Himalaya Herbals Fairness Cream Complaint No.2121/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
5.	NLSIU Students V. VLCC Health Care Ltd. Complaint No.2122/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
6.	NLSIU Students V. L'oreal India Pvt Ltd (Garnier Sun Control Cream) Complaint No.2123/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
7.	NLSIU Students V. Vivel Active Fair Cream (ITC)	-Advertisement Standard Council of India (ASCI)	Objections
8.	NLSIU Students v. Govt. of Karnataka Public Interest Litigation W.P.No.50856/2012	High Court of Karnataka -Establishment of Consumer Forum/ Appointment of Members/ Administrative Staff/ Infrastructure	Objection

Explanation:

I took a course on "*Impact of Misleading Advertisement on Consumers*" for final year under graduate law students for last three months trimester in 2012. The students did research on misleading Advertisements through print and electronic media on Cosmetics. Three students each group purchased one cosmetic and applied on themselves for two months. Then they come to know that the claims made in the advertisements are falls. Later they sent a legal notice to the manufacturers for clarification about their claim. Some of them have given unreasonable answers and rest of them were not answered. Finally Students have drafted the complaint and filed cases before District Consumer Forum. Now student are handling the cases for justice/Human Rights.

Another group of students have done empirical research on '*Implementation of Consumer Protection Act, 1986 in Karnataka State*'. The important findings of research is that the Government of Karnataka failed in establishment of effective Redressal Mechanism. Therefore students have filed Public Interest Litigation before High Court Karnataka, Bangalore. The Hon'ble Chief Justice of Karnataka by admitting the PIL served notice to the Government of Karnataka and asked explanation for non implementing Consumer Protection Act, 1986 completely.

6. CONCLUSION

Products and services safety standards play an important role in our daily lives. As standards are developed in response to our needs, it is difficult to imagine modern life without them. In one way or another, standards make life easier, safer and more comfortable. Thus it can be suggested that an initial acknowledgement of consumer rights as soft human rights, leading finally to full recognition as human rights.

Now onwards, every university should have a course exclusively on "Business: Consumer Rights and Human Rights". The Course should engage students more in classroom discussion, such as simulations, role-playing exercises, debates, research, fact-finding methodology, interview skills, Management skills, teamwork and clinical approaches.

It is a known fact that without the People's active participation, the Government, as alone body, cannot protect consumers from Business Entity. There are plenty of International and National laws to take care of consumers and their numbers are constantly increasing. However, it leaves much to be said that their effectiveness has to rely upon the alertness of consumers, and the sincerity of the authorities in their implementation.

Public Disclosure and Global Sustainable Development in the Banking Industry: The Equator Principles

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I. Introduction
II. What are the Equator Principles?
III. Literature Review
IV. Empirical Analysis
V. Conclusion

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

I. Introduction

The role of market actors in developing corporate governance standards outside of traditional, state-driven regulatory systems is a major part of what has been coined the "new governance."[104] The Equator Principles (EPs) are one of a large number of voluntary,

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non-binding mechanisms lying within this conceptual framework. The EPs were developed as a self-regulatory initiative by a group of some of the world's largest banks in 2003, and consist of ten principles aimed at improving environmental and social risk management.[105] What makes the EPs unique, however, is their focus on the financial sector and on project finance in particular. After expressly recognizing the importance of finance to sustainable development,[106] they require members, known as Equator Principle Financial Institutions (EPFIs), to analyse the social and environmental issues associated with their investments and engage and create appropriate measures to mitigate harm.[107] However, significant scholarly debate exists, as to the real impact of the EPs on sustainable development.[108] Many take the view that such standards amount to simple "greenwashing"—public relations exercises that mask the institutions' basic inaction on sustainability matters.[109]

The introduction of a public reporting requirement in Principle 10 of the EPs presents a valuable opportunity to advance this debate. In particular, this paper's empirical study of the EPFIs' reports to date provides a vantage point from which to assess the prospects for and pitfalls of "new governance" or corporate social responsibility (CSR) initiatives more generally. This paper examines the quality of 67 EPFIs' reporting and whether they are reporting below, at or above the EPs' standards. In particular, it examines the EPFIs' performance in three qualitative areas essential to meaningful CSR reporting: namely, transparency, consistency and comparability. Improvement in each of these areas is vital to the EPs serving a meaningful role in bank governance going forward. Without clear, consistent reporting that can be compared both to an individual EPFI's past information and to that of other EPFIs, EP disclosure can be of only limited use to stakeholders' monitoring efforts—and to governance generally. In doing so, it draws extrapolates on the extent to which voluntary, principles-based regulation effectively promote best practices in governance.

The paper finds that while some EPFIs have high levels of reporting, most only meet the minimum requirements of the EPs. This may be attributed to a number of factors, including the vagueness of the EPs' standards and the reluctance of individual EPFIs to make voluntary advancements in disclosure. Voluntary standards can have a substantial impact. However, the results of the EPs', particularly with respect to publicly-disclosed

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were presented at the Fifth Comparative Research Laboratory in Law and Political Economy Workshop (Toronto, 2012), the 6th Annual European Consortium for Political Research General Conference (Iceland, 2011) and, The First Annual Private Transnational Regulation: Constitutional Foundations and Governance Design Conference (Dublin, 2010).

[104] See e.g. Cynthia Williams, "Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement" (2005) UNC Legal Studies Research Paper No. 05-16, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691521&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691521>; and Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 Minn. L. Rev. 34; Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction," (2001) 28 Fordham Urb. L.J. 1611; and R.A.W. Rhodes, "The New Governance: Governing Without Government," (1996) 44 Pol. Stud. 652.

[105] "History of the Equator Principles," online: Equator Principles <http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps>.

[106] In the EPs' preamble. See "The Equator Principles: A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing" (June 2006) [Equator Principles] at 1, online: Equator Principles <http://www.equator-princples.com/principles.shtml>.

[107] *Ibid.* See also Tseming Yang & Robert V. Percival, "The Emergence of Global Environmental Law" (2009) 36 Ecology L.Q. 615 at 633.

[108] See e.g. Vivian Lee, "Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay" (2008) 6 U. J. Int'l Hum. Rts. 359.

[109] See e.g. Joe W. (Chip) Pitts III, "Corporate Social Responsibility: Current Status and Future Evolution" (2009) 6 Rutgers J.L. & Pub. Pol'y 374; Miki Kamijyo, "The 'Equator Principles': Improved Social Responsibility in the Private Finance Sector" (2004) 4 Sustainable Dev. L. & Pol'y 35 at 36.

compliance, suggest that caution should be taken to avoid relying too heavily on a principles-based, voluntary approach to regulation. Recommendations are provided for how the effectiveness of the EPs can be improved going forward, such as *Reporting Guidelines* that provide EPFIs with more detailed direction for complying with Principle 10, more stringent monitoring and regulation of reporting, and a five-year review period for the reporting practices of EPFIs and the EPs themselves. Further, results of reviews should be made public and an award should be created for firms that demonstrate true commitment to EP goals.

This paper proceeds as follows. Part II provides a brief overview of the EPs and project finance. Part III surveys the existing literature on the EPs. Part IV sets out an empirical, qualitative study of EP reporting. Finally, Part VI sets out the paper's conclusions and suggests a path forward.

II. What are the Equator Principles?

The EPs consist of ten broach principles, which set out a framework for environmental and social due diligence in project finance. They originated from a London meeting of nine large, international banks in October 2002.[110] At this meeting, the banks agreed to develop a baseline standard "to avoid the negative impacts on project-affected eco-systems and communities and, if impacts are unavoidable, to minimize effects or appropriately compensate for them."[111] In so doing, they used the safeguard policies of the International Finance Corporation and the Pollution Prevention and Abatement guidelines of the World Bank as models.[112] At their June 2003 launch, the EPs originally had the support of ten institutions—ABN AMRO Bank, N.V., Barclays plc., Citigroup, Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, The Royal Bank of Scotland, WestLB AG and Westpac Banking Corporation.[113] As of May 2012, 77 financial institutions have signed on to the EPs.[114]

The EPs concern project finance—an area of banks' activities that engages the financing of large infrastructure assets, such as power plants, toll roads and telecommunications systems and industrial assets, such as mines and petrochemical plants.[115] A typical project finance operation entails a relatively complex business structure, including consortiums of debt and equity interests in a project company using a special purpose vehicle (SPV) that is legally independent from the equity holders (known as "sponsors").[116] The project's debt is supplied by a bank or syndicate of banks, with lending often based only on the project's expected performance and forecasted cash-flows rather than the creditworthiness of the sponsor (a form of financing known as "non-recourse" or

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[110] See "History of the Equator Principles," online: Equator Principles <http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps>.

[111] Hennick Centre for Business and Law & Jantzi Sustainalytics, "Corporate Social Performance Reporting Roundtable: Consultation Paper" (Discussion paper presented at the Corporate Social Performance Reporting Roundtable, Toronto, Ontario, 7 December 2009) at 38, online: <http://hennickcentre.ca/documents/discussionpaper.pdf>.

[112] Bert Scholtens & Lammertjan Dam, "Banking on the Equator. Are Banks that Adopted the Equator Principles Different from Non-Adopters?" (2007) 35 World Development 1307 at 1309. See generally reports from the World Bank and International Finance Corporation, e.g., International Finance Corporation, *Safeguard Policies Update*, online: <http://www.ifc.org/ifcext/policyreview.nsf/Content/SafeguardPolices>; World Bank, *Pollution Prevention and Abatement Handbook, 1998,* online: <http://smap.ew.eea.europa.eu/media_server/files/l/v/poll_abatement_hanbook.pdf>.

[113] "History of the Equator Principles," *supra* note 7.

[114] See "Members & Reporting," online: Equator Principles <http://www.equator-principles.com/index.php/members-reporting/members-and-reporting>.

[115] Benjamin C. Esty, Carin-Isabel Knoop & Also Sesia Jr., "The Equator Principles: An Industry Approach to Managing Environmental and Social Risks" (2005) HBS Publishing Case No. 9-205-114 at 2.

[116] Benjamin C. Esty, "The Economic Motivations for Using Project Finance" (2002) [unpublished] at 1, online: Harvard Business School http://www.people.hbs.edu/besty/Esty%20Foreign%20Banks%203-9-03.pdf (last accessed 4 September 2012).

"limited recourse" lending).[117] These arrangements mean that project sponsors have no direct legal obligation to make debt or interest payments if the project's cash-flows prove inadequate to service them.[118] As a result, lenders seek projects with strong performance prospects. Accordingly, banks have become steadily aware of the potential for a project to be derailed by social and environmental risks—the focus of the EPs. For instance, in 1995, public hostility to the $635 million Dabhol Power Project in India, led by Enron, caused the Indian government to reverse approvals and contracts after an opposition party took power.[119] These cancellations generated a torrent of litigation, with the project only coming back into operation (with substantially more Indian control) in 2005.[120]

The EPs require EPFIs to observe the following factors before granting a loan of greater than $10 million to any given project:

- Principle 1 of the EPs requires EPFIs to review and categorize a project as either a category A, B or C project by the magnitude of its potential impacts and risks according to the IFC's standards. A project is Category A where the potential adverse social and environmental impacts are significant, Category B where such potential impacts are limited and Category C where the potential impacts are minimal or non-existent.— "
- Principle 2 requires the EPFI to conduct an assessment of the relevant social and environmental impacts and risks, and propose appropriate mitigation and management measures;
- Principle 3 directs EPFIs to refer to applicable standards in the proposed project's industry when completing their social and environmental assessment;
- Principle 4 sets out the task of developing an "action plan and management system" to describe the actions needed to implement Principle 2's mitigation measures for Category A and B projects;
- Principle 5requires EPFIs that undertake Category A or (as appropriate) Category B projects in non-high income OECD countries or non-OECD countries to consult with affected communities and disclose the proposed project in a structured and culturally appropriate manner
- Principle 6, contemplates, in addition to Principle 5, the creation of an grievance mechanism by which community members can raise concerns regarding a project's social and environmental effects on an ongoing basis;
- Principle 7requires EPFIs to retain an independent expert to evaluate and review their assessments and EP compliance generally;
- Principle 8stipulates that EPFIs include certain legal covenants in their financial contracts regarding social and environmental compliance; and
- Principle 9,compels EPFIs to require their borrowers to appoint or retain independent environmental or social experts for monitoring and reporting for all Category A projects and appropriate Category B projects.

As the foregoing suggests, the EPs are not detailed, linear rules, but leave a significant sphere of discretion to EPFIs in setting their own sustainability standards.[121] The

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[117] Scott L. Hoffman, *The Law and Business of International Project Finance* (Cambridge: Cambridge University Press, 2007) at 4.
[118] *Ibid.* at 5.
[119] U.S. House of Representatives, Committee on Government Reform, "Fact Sheet: Background on Enron's Dabhol Power Project" (22 February 2002) at 1-2, online: <http://finance-mba.com/Dabhol_fact_sheet.pdf>.
[120] *Ibid.* at 2.
[121] The relative advantages of principles-, standards- and rules-based regulation have been widely debated. See generally Pierre Schlag, "Rules and Standards" (1985) 33 UCLA L. Rev. 379; Kathleen M. Sullivan, " The Justices of Rules and Standards" (1992) 106 Harv. L. Rev. 22; Louis Kaplow, "Rules versus Standards: An Economic Analysis" (1992) 42 Duke L.J. 557; and Cass R. Sunstein, "Problems with Rules" (1995) 83 Cal. L. Rev. 953. More recently, the topic has been examined extensively in the securities regulation sphere: see e.g. William W. Bratton, "Enron, Sarbanes-Oxley and Accounting: Rules versus Principles versus Rents" (2003) 48 Vill. L. Rev. 1023; Lawrence

final Principle 10, introduced in 2006[122] dealing with EPFI reporting) is arguably the EPs' most important feature from a governance perspective. This principle requires EPFIs to, at minimum, annually report publicly about their EP compliance progress (subject to confidentiality concerns).[123] It thus reinforces Principles 1–9 by placing the banks' EP compliance practices in view of their stakeholders. Nevertheless, as the findings in this paper suggest, much remains to be done to improve the quality of EPFI disclosures. Absent significant changes, the EPs' mechanism of voluntary, principles-based disclosure may not be as effective as it could be in promoting sustainability.

III. Literature Review

Similarly to scholarly debates about other voluntary, market-based forms of regulation,[124] significant disagreement exists as to the EPs' merits in promoting corporate governance, CSR and sustainability. This section surveys the literature on the EPs, which can be categorized according to the context in which the EPs are being examined. Given their youth, the standards have attracted a relatively small amount of commentary to date.

(a) Voluntary regulation

One body of research evaluates the EPs by considering the debate between voluntary and mandatory forms of regulation. An increased diffusion of regulatory responsibilities once monopolized by government—especially toward voluntary, market-based standards—has been deemed "the new governance."[125] The EPs, particularly owing to their industry origins, fall squarely within this framework. Critics, however, see voluntary initiatives such as EP as attempts by firms to manage reputational risk by "greenwashing" their activities through stepped-up public relations efforts, but little else.[126] Under such a view, EP allows banks to free-ride on the benefits of perceived environmental stewardship (from EPFI status) without contributing positively to sustainable investment. This is supported by the fact that a number of EPFIs continue to be involved in environmentally controversial projects.[127] Moreover, the EPs' voluntary nature eliminates the possibility of enforcement, and thus, liability on the part of EPFIs thereby generating compliance concerns. For example, under Principle 8, lenders must "include covenants in project loan documentation under which the borrower agrees to maintain compliance with articulated environmental (and other) standards, lenders are not obligated to call an event of default if any such

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Cunningham, "Principles and Rules in Public and Professional Securities Law Enforcement: A Comparative U.S.-Canada Inquiry" (Paper commissioned by the Task Force to Modernize Securities Legislation in Canada, 31 May 2006), online: <http://www.tfmsl.ca/docs/V6(5A)%20Cunningham.pdf>; and Cristie Ford, "Principles-Based Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill L.J. 1; and James J. Park, "Rules, Principles and the Competition to Enforce the Securities Laws" (2012) Cal. L.R. 115.

[122] "History of the Equator Principles," *supra* note 7.

[123] Equator Principles, *supra* note 3 at 6.

[124] See e.g. ; J. Andy Smith III, "The CERES principles: A voluntary code for corporate environmental responsibility" (1993) 18 Yale J. of Int'l L. 307; Robert Tucker & Janet Kasper, "Pressures for Change in Environmental Auditing" (1998) 10 J. Man. Issues 340 (analysing the ISO 14000 standard); Errol Meidinger, "'Private' Environmental Regulation, Human Rights, and Community" (1999) Buf. Envir. L.J. 219 (analysing the Forest Stewardship Council's product certification standard, the ISO 14000 standard and the American Forest and Paper Association's Sustainable Forestry Initiative); Oren Perez, "Facing the Global Hydra: Ecological Transformation at the Global Financial Frontier – The Ambitious Case of the Global Reporting Initiative" (2006) Bar Ilan Univ. Pub. Law Working Paper No. 06-9, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949834>; David Levy, Halina Brown & Martin de Jong, "The contested politics of corporate governance: The case of the Global Reporting Initiative" (2010) 49 Bus. & Soc. 88; and Dirk Gilbert & Andreas Rasche, "Discourse Ethics and Social Accountability – The Ethics of SA 8000" (2010) 17 Bus. Ethics Q'ly 187.

[125] *Supra* note 1.

[126] *Supra* note 19.

[127] Benjamin J. Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" (2008) 46 Osgoode Hall L.J. 243 at 257. See also Elisa Morgera, "Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation" (2007) 18 Colo. J. Int'l Envtl. L. & Pol'y 151 at 187.

covenant is breached."[128] Given their focus, the EPs have also been criticized for not embracing more substantive standards on environmental issues. In particular, the EPs are silent on global warming. The World Wildlife Fund (WWF) has declared the EPs to be "lagging behind relevant international standards and best practices." Some go so far as to argue that because of the questionable legitimacy of voluntary mechanisms like the EPs, supplementary public regulation is inevitable and necessary.[129]

(b) Bank accountability

Other studies take the position that, whatever its participants' motivations, the EPs serve to increase the financial sector's accountability for its actions.[130] A "baseline" standard prevents harmful or controversial projects from receiving necessary funding, notwithstanding a host country's policies—a significant check against a "race to the bottom" in international investment. Moreover, widely-accepted standards among EPFIs could, over the long term, reduce the heavy regulatory burden associated with borrower companies, since their projects must first pass the EPs' rigors.[131]

(c) Impact on host-country regulations

The EPs can make a positive contribution to sustainability by superseding lax host-country environmental standards. Moreover, widely-accepted standards such as the EPs may create a precedent for domestic policymakers and influence-holders. For example, the judiciaries of developing nations, most notably Argentina and India, have each recognized a constitutional right to a healthy environment.[132] In India, a decision mandating that diesel buses be replaced with compressed natural gas buses has led to significant improvements in air quality.[133] Whether these developments are sufficient to dismiss the notion of an environmental and social "race to the bottom" in international investment remains unclear. However, even with strict environmental regulations in place, , developing nations may lack the resources to implement, monitor and enforce them.[134] Corruption within states' regulatory and enforcement bodies, and unequal bargaining power between developing nations' governments and large corporations, may also play a role.[135]

(d) Socially responsible investment

Other scholars have examined the EPs in the context of the socially responsible investment (SRI) movement,[136] which, in its emphasis on investment that attains both financial and social returns, is consistent with the EPs' stated goals. The connection between SRI and reduced reputational and borrower insolvency risks has led to what has been termed "the business case for SRI," which is based on the assumption that sustainable investment practices will make a firm "prosperous rather than merely virtuous." Some commentators, however, are skeptical that SRI can yield tangible consequences for climate change.[137] Presently, there is no evidence suggests that voluntary standards such as the EPs have impacted the types of projects being financed globally, leading some argue that these standards have allowed "dubious investment practices masquerading as ethical choices to proliferate."[138]

(e) Effect on transparency

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[128] Heather Hughes, "Enabling Investment in Environmental Sustainability" (2010) 85 Ind. L.J. at 624.
[129] See e.g. Richardson, *supra* note 20.
[130] See e.g. Lee, *supra* note 5 at 359.
[131] Richardson, *supra* note 20 at 246.
[132] Yang & Percival, *supra* note 4 at 635.
[133] *Ibid.* at 634.
[134] Natalie L. Bridgeman & David B. Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (2008) 20 Geo. Int'l Envtl. L. Rev. 187 at 196.
[135] *Ibid* at 197.
[136] See generally Benjamin J. Richardson, "Protecting Indigenous Peoples through Socially Responsible Investment" (2007) 6 Indigenous L.J. 1 at 7.
[137] *Ibid.* at 514.
[138] Richardson, *supra* note 20 at para 4.

The EPs have also been examined through the lens of transparency. In recent years, corporate social responsibility (CSR) advocates have used scandals to induce greater transparency from corporate actors. The Global Reporting Initiative (GRI), originally convened by a coalition of NGOs called Ceres, is one product of a paradigm shift within corporations toward a balance between shareholder and stakeholder values, termed the "triple bottom line."[139] By providing a common language and format for corporate disclosure, the GRI has led to "(1) greater transparency; (2) consistency over time; and (3) comparability across firms and industries,"[140] among its 1000-plus member organizations. Observers such as Antonio Vives suggest that full transparency can create value for firms by informing the market of the firm's environmentally responsible activities "and the expected benefits, quantifiable or not."[141] In the literature, the EPs are placed in the same category as the GRI as a mechanism for improved transparency; however, this paper suggests that the placement may be unwarranted, and that the EPs have not yet fully achieved any of the three stated benefits of the GRI. The present study seeks to fill a void of substantive analysis of the transparency resulting from Principle 10.

(f) Case studies

Much of the valuable literature on the EPs are case studies of specific EPFI projects that chronicle how the EPs have been applied in practice.[142] One example is Uruguay's Orion paper mill project which, at least initially, was financed by Calyon (the investment branch of France's Crédit Agricole) and ING Group.[143] In that case, a public "shaming" campaign was set up against the project in 2005 by an Argentina-based NGO, the Center for Human Rights and the Environment. Nevertheless, Calyon was satisfied that if the project met the IFC's minimum standards, it deserved its financing commitments. ING, on the other hand, withdrew its financing commitments. Notwithstanding these objections, the Orion paper mill project was completed in September 2007. These facts speak to both the potential of, and limitations to, the EPs as a governance mechanism. Other case studies reveal how certain EPFIs (such as Citibank and HSBC) have developed more stringent internal environmental performance standards and procedures than those required by the EPs[144].This supports a more genuine commitment to SRI and sustainable development than "greenwashing" theories would suggest. These case studies provide tangible examples of the impact of the EPs, which are often lost in quantitative, aggregated measures of bank performance.

(g) The impact of reporting requirements

Recent literature suggests that—either as a matter of investor protection or good corporate citizenship—reporting of CSR practices (or "social" reporting) has become an

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[139] Jayne W. Barnard, "Corporate Boards and the New Environmentalism" (2007) 31 Wm. & Mary Envtl. L. & Pol'y Rev. 291 at 302.

[140] *Ibid* at 303.

[141] Antonio Vives, "Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries" (2008) 83 Chi.-Kent L. Rev. 199 at 218.

[142] See e.g. Lee, *supra* note 5 and described below; Andrew Hardenbrook, "The Equator Principles: the Private Financial Sector's Attempt at Environmental Responsibility" (2007) 40 Vand. J. Transnat'l L. 197 at 215 (analysing Royal Dutch Shell's Sakhalin II project in Russia); Mike Bradshaw, "The 'Greening' of Global Project Financing: The Case of the Sakhalin-II Offshore Oil and Gas Project' (2007) 51 Can. Geo. 255.; Ikuto Matsumoto, "Expanding Failure: An Assessment of the Theun-Hinboun Hydropower Expansion Project's Compliance with Equator Principles and Lao Law" (October 2009), online: Banktrack <http://www.banktrack.org/download/expanding_failure/expanding_failure_091005.pdf> (describing the Theun-Hinboun project in Laos, as financed by a consortium that included EPFIs ANZ Banking Group, BNP Paribas and KBC); and Benjamin J. Richardson, "Can Socially Responsible Investment Provide a Means of Environmental Regulation?" (2009) 35 Monash U. L. Rev. 262 at 281 (analysing ANZ Banking Group's Gunns pulp mill project in Tazmania).

[143] See generally Lee, *supra* note 5.

[144] Julia Philpott, "Keeping it Private, Going Public: Assessing, Monitoring, and Disclosing the Global Warming Performance of Project Finance" (2005) 5 Sustainable Dev. L. & Pol'y 45 at 47. See also Alan D. Hecht, "The Next Level of Environmental Protection: Business Strategies and Government Policies Converging on Sustainability" (2007) 8 Sustainable Dev. L. & Pol'y 19 at 22.

increasingly essential part of a public corporation's disclosure obligations. Social reporting may include,

> disclosure concerning compliance with legislation, such as human rights legislation, labour codes, product safety legislation, occupational safety legislation, and environmental legislation. In addition it would require disclosure about activities that, while legal, are controversial, such as the production or distribution of violent television programs or movies, or the production or sale of military hardware, alcohol, cigarettes, handguns or pornography.[145]

Two reports published by the Asset Management Working Group of the United Nations Environment Programme Finance Initiative in 2004 conclude that the effects of environmental, social and governance (ESG) issues' on long-term shareholder value are often "profound."[146] The corollary of this is that, for securities-law disclosure regimes, a potentially-sizeable portion of environmental and social information is likely to be "material" to the value of an issuer's securities and thereby subject to disclosure.[147] Nevertheless, a body of scholarship supports listed companies' practice of under-reporting facts, particularly negative ones.[148] With respect to ESG information, investors have increasingly been apprised of this "disclosure gap." For instance, in 2010, a coalition of global investors from 13 countries (managing over $1.2 trillion in assets) wrote to 86 major issuers urging them to honour their voluntary UN Global Compact commitments on transparency.[149] In a 2011 global report on social disclosure, KPMG noted that reporting continued to grow apace during the financial crisis, with what was "once merely considered an 'optional but nice' activity" becoming "virtually mandatory for most multinational companies, almost regardless of where they operate around the world."[150] Nevertheless, "materiality"-based statutory disclosure requirements may provide insufficient clarity to companies as to when disclosure is mandatory. KPMG's report, for instance, notes that while 95% of the 250 largest companies in the world engage in social reporting, a full two-thirds of non-reporters are U.S.-based. Moreover, an approach that relies on voluntary, firm-specific standards reduces the ability of stakeholders to compare reports, thus hindering their governance impact.[151]

In sum, Principle 10's reporting requirement has the potential to provide guidance for and standardize EPFI communications so as to close this "disclosure gap" and allow bank shareholders to better assess social and environmental risks. The requirement also allows interested observers, such as NGOs, to impose external accountability by evaluating banks' true levels of EP compliance and how that compliance practically impacts lending practices. The survey in this paper, however, suggests that Principle 10's potential in this regard has yet to be fully realized.

(h) Lack of empirical research

A number of studies have called for further research and analysis into the effects of the EPs and SRIs more generally.[152] Others hold that the voluntary-versus-mandatory debate on regulation has been exhausted and focusing on the performance of firms will

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[145] Mark R. Gillen, *Securities Regulation in Canada* (Toronto: Thomson Carswell, 2007) at 356.
[146] United Nations Environment Programme, Asset Management Working Group, "The Materiality of Social, Environmental and Corporate Governance Issues to Equity Pricing" (2004), online: <http://www.unepfi.org/work_streams/investment/amwg>.
[147] See e.g. *Securities Act* (Ontario), R.S.O. 1990, c. S.5, s. 1(1).
[148] Gerard Hertig, Reinier Kraakman and Edward Rock, "Issuers and Investor Protection" in Reinier Kraakman, ed., *The Anatomy of Corporate Law*, 2d ed. (Oxford: Oxford University Press, 2009) at 279.
[149] United Nations Global Compact, News Release, "Investors step up pressure on corporate responsibility reporting" (12 February 2010), online: <http://www.unglobalcompact.org/news/9-02-12-2010>.
[150] KPMG International Cooperative, *KPMG Survey of Corporate Responsibility Reporting 2011* (2011) at 6, online: <http://www.kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Documents/Corporate-Responsibility-Reporting-O-201111.pdf>.
[151] Hertig, Kraakman & Rock, *supra* note 46.
[152] Richardson, *supra* note 20 at 259.

prove more fruitful.[153] In this paper, the author accepts the first proposition and aims, in the study that follows, to contribute to a better understanding of EPs by an examination of EPFIs' Principle 10 reporting performance.

IV. Empirical Analysis

(a) Methodology

For this study, all available EP disclosure from 67 EPFIs dating from2003 to November 2010 was collected. Disclosure was found in annual financial reports, corporate social responsibility reports or online at EPFI web pages. All available sources were investigated before data was entered to account for scattered reporting practices.[154]

Reporting quality was examined by evaluating transparency, consistency and accessibility of the disclosure. Particular attention was devoted to the presence or absence of disclosure regarding project business sector, location and amount financed. Raw data in the form of a positive ("Y") or negative ("N") marker were entered into a spreadsheet.

(b) Analysis

A qualitative analysis of EPFI data begins with considering how open EPFIs are with information regarding project financing under the EPs. Openness can take numerous forms, and this study focuses on three aspects of openness: transparency, consistency and accessibility. As these forms of openness are distinct but intrinsically related, any discussion of one will inevitably consider the others.

The analysis conducted for this study found that while substantially all EPFIs are reporting to the bare minimum required under Principle 10, their further recommended reporting, pursuant to the EP "Guidance Note on Equator Principles Implementation Reporting" (the *Reporting Guidelines*),[155] lacks consistency in format and information disclosed. This inconsistency prevents third parties from performing meaningful large-scale comparisons of EPFIs' performance in sustainable project financing. While data for the amount of high-, medium- and low-risk projects are readily available for analysis, further relevant information such as project location or business sector is either missing or presented in an inconsistent manner. Consequently, the EP *Reporting Guidelines* should be updated to establish more stringent reporting regulations in line with the high-quality reporting presented by several EPFIs. These updated *Reporting Guidelines* should include more detailed direction and standardization of reporting requirements, and require EPFIs to disclose both the location and sector of their projects—such that if EPFIs continue to report to the bare minimum standard, there will still be sufficient information available.

(a) Transparency

Roughly synonymous with "openness," transparency is the most important qualitative principle behind the EPs and the impetus for Principle 10. Numerous benefits for local stakeholders as well as the broader public are realized through transparent reporting standards. Transparent reporting ensures a public review of the EPFI's compliance with EP rules and reporting standards; via this review mechanism, it fosters public trust in the EPFI's reporting as well as project financing practices. More importantly, reporting must be transparent in order to provide local stakeholders with the tools they need to exercise their rights under the EPs.[156]

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[153] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Toronto: LexisNexis, 2009) at 30.

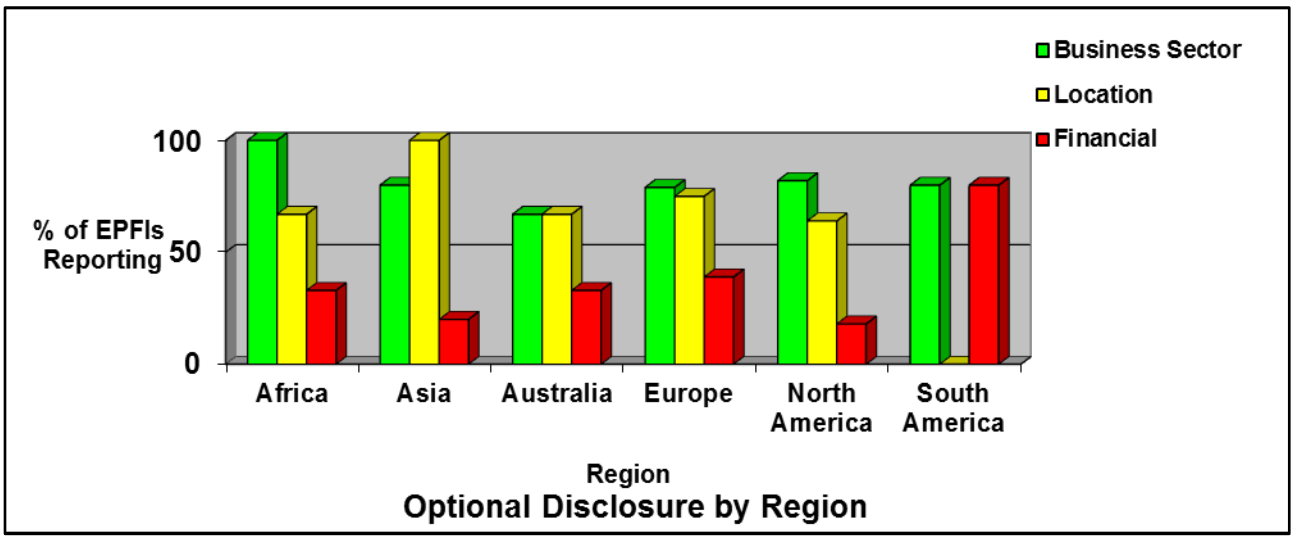
[154] The consequences of this dispersion are discussed in section IV(c),"Accessibility," below.

[155] "Guidance to EPFIs on Equator Principles Implementation Reporting" at 2, online: <http://www.equator-principles.com/documents/EPReporting_2006-06-12.pdf>.

[156] It is important to note that adopting the Equator Principles does not create any rights in, or liabilities to any person: they are merely an internal policy. Principle 6 demands that *borrowers* create a grievance mechanism for stakeholders. We believe that increased transparency by an EPFI can contribute to this Principle by providing local stakeholders with another source of information regarding projects in which they may have an interest.

The EPs have very general reporting requirements: the EPFI must only report the number of projects per EP category. This study shows that almost all EPFIs have fulfilled the basic reporting requirement. Some basic reporting failures are merely technical: EPFIs may have divided loans by category, while failing to specify exactly which deals concerned project finance.[157] However, two EPFIs failed to fulfill the basic reporting requirements: A Spanish bank, whose report is no longer accessible online, provided alternate data regarding the total value of projects financed as well as how many deals were rejected, but not the required categorical information; and Nordea, a financial group in the Nordic and Baltic region, briefly mentioned only the business sector of projects financed.[158]

EPFIs may also choose to report beyond the minimum requirements. Expanded reporting can be seen as a commitment to transparency, and provides stakeholders with valuable information regarding local projects and EPFI performance. This study focused on three expanded reporting categories: project sector, project location, and amount financed. The EP *Reporting Guidelines* specifically suggest sector and region information for EPFIs wishing to report beyond the minimum.[159]



The graph above shows that many EPFIs chose to report the business sectors of financed projects. All seven African EPFIs and a large majority (67 to 82%) of EPFIs in other regions chose to report the business sector. Despite the *Reporting Guidelines*, no standardized language for reporting sector information exists. Moreover, numerous EPFIs choosing to disclose financed business sectors do not further disclose the distribution of Category A, B and C projects within those sectors. Thus, it is difficult to make any observations regarding the precise nature of projects financed under the EPs.

Trying to determine where the projects being financed are taking place is even more difficult. Few EPFIs chose to disclose the location of projects and among reporting EPFIs there is, again, little consistency regarding the details of regional information. No South American EPFIs disclosed regional information, and a small majority (64 to 75%) of EPFIs in other regions chose to disclose the information. All Asian reporting EPFIs disclosed regional information. It would be valuable to know where projects belonging to each category are being conducted: the lack of current data prevents analysis of whether, for example, there

[157] HSBC is a noteworthy example: they apply the EPs to all loans, but our data is only concerned with project finance, and information regarding their project finance categorization has been entered as "N/A".
[158] Nordea, *CSR Report 2009* at 14, online: < http://www.nordea.com/sitemod/upload/root/www.nordea.com%20-%20uk/AboutNordea/csr/csr_2009_uk.pdf> (last accessed 4 September 2012.
[159] *Reporting Guidelines*, *supra* note 53 at 2. Also mentioned in the *Guidelines* is a breakdown by projects under review or fully funded, but reporting on this data was so rare and inconsistent among EPFIs as to be useless.

are a disproportionate number of high-risk projects in the developing world, or whether developed countries are increasingly disposed to "greener" projects.

Lastly, very few EPFIs disclose the amount of financing in each category. This data would be useful data for evaluating, for example, the value of high-risk and low right projects in a geographic area.. Eighty percent of South American EPFIs reported financial information, while other regions' EPFIs reported at rates ranging from 0 to 39%. The comparatively high rate of reporting with respect to optional information suggested in the *Reporting Guidelines*—especially compared to common disclosure not found in the *Guidelines* (e.g., financial information)—signals that EPFIs are responsive to this "best practices" document. Unfortunately, the lack of formal categorization or format requirements for this optional information makes it difficult to perform large-scale analyses of disclosed data. The creation of standards regarding, for example, the division of regional information into specified categories, would be quite beneficial.

(b) Consistency

The EP *Reporting Guidelines* make no mention of consistency, but this study nevertheless examines the consistency of reporting *within* as well as *between* EPFIs. Consistent reporting standards allow stakeholders to compare information year-to-year across member financial institutions, as well as chart an EPFI's progress not only on reporting quality, but on social and environmental performance.

The vast majority of EPFIs are consistent in their reporting quality from year to year and reporting formats are unlikely to be changed. This may be evidence of a lack of critical oversight of EP reporting standards: changes seldom occur with little pressure to increase transparency placed on those EPFIs with sub-standard reporting practices. Financial institutions that have recently signed on to the EPs should be encouraged to adopt high-quality reporting practices immediately after their grace period ends in order to avoid the complacency seen in other institutions.

Occasionally, an EPFI does experiment with minor changes in its reporting style or format. For example, one EPFI provided no location information in its 2007 report, but did provide several project examples. Its 2008 report saw an expansion of business sector categories as well as effective location disclosure, but with no project examples. In its 2009 report, while the expanded sector information remains, the location disclosure is no longer divided by EP category. It is encouraging to see an EPFI modifying its disclosure rather than remaining firmly entrenched in its reporting practices, but hopefully further changes will move towards more transparent disclosure by combining the project examples of the older reports with the enhanced categorical information found in the 2008 report.

EPFIs' reporting practices exhibit far more variance when compared to those of other EPFIs. As noted above, substantially all EPFIs report the bare minimum required under the EPs, but diverge with respect to additional information. Unfortunately, with no standardized on how to categorize the optional information there a large degree of inconsistency among the EPFIs is reporting this optional information. Project location, for example, is often categorized by OECD status, continent, region or country, with no consistency from one EPFI to the next. Project sector divisions are even more troublesome, as the terminology used to define a project's sector is less concrete than, for example, OECD status.

Beyond the three most common categories of information described earlier, EPFIs occasionally choose to divulge other information. Examples include the project status (the number of projects considered, approved, conditionally approved and rejected), descriptions of projects financed and case studies of successful or unsuccessful projects. Such information and provides important context to statistics that are otherwise shallow and abstract; however, consistency is needed in order to draw comparisons between EPFIs, regions, and other factors.

(c) Accessibility

Transparency and consistency are meaningless if information is not accessible by stakeholders. For stakeholders to make the most of the information and best practices to

develop more quickly, reports need to be relatively easy to access and the data simple to disseminate. EP rules mandate annual disclosure, but allow for a variety of reporting media, including the annual Financial Report, a Corporate Social Responsibility Report and a dedicated web page.[160]

A number of examples highlight the importance of accessibility as well as its relationship with consistency. One EPFI maintained some of the highest quality reporting through 2008 by including its EP disclosure in its Corporate Responsibility Report every year. But, EP data in its 2009 report was limited strictly to the number of projects reviewed. The 2009 report represented a transition period for the EPFI, as some information was moved to a secondary web page, with occasional reminders throughout the report to visit the new webpage for more information. None of these reminders pertained to the EPs specifically, and full EP disclosure was found on a page buried four sub-pages away from the main CSR website. Months later the EP's Reporting website, which includes links to the newest available data for each EPFI, was updated to take the interested party directly to the EPFI's new CSR website instead of the less relevant CSR Report.

Similar problems plague other EPFIs. While the EP website maintains a database of recent disclosure, it is up to each EPFI to provide a link to its most recent report, and the database is updated frequently to reflect changes. The report linked for one particular EPFI contains information up to and including 2008 on an official-looking website with no overt hints as to the archival nature of the report. Data for 2009 is actually found on a website that is superficially similar, but uses a different URL that is not immediately accessible from the 2008 version of the page. Another EPFI discloses a wealth of information, but this information is scattered between a web page containing lending history, an Excel spreadsheet, a "What We Finance" web page, and a summary report in PDF format. Only the summary report contains the required EP disclosure. Technical problems such as these do not just prevent stakeholders from accessing and comparing older data, but often prevent them from accessing the most recent information that EPFIs are required to disclose. A coherent set of reporting practices that better integrates older reporting styles into new data is vital to distributing important information to stakeholders and other interested parties. Easily accessible data is, if nothing else, a signal as to the EPFI's commitment to transparency.

(d) Positive Examples

Several EPFIs should be applauded for their current reporting practices, which present a model to follow in EP disclosure. Portugal's Millenium bcp not only disclosed all EP-required information, but went further in specifying the nature of the project, the country in which it is located, the amount financed by the bank, the main social and environmental impacts (such as "Impact on the fauna and vegetation (e.g. habitat of shrike birds"), and mitigation measures demanded ("Assist birds in accidental collisions with the aero-generators, through an agreement established with a specialized hospital").[161] All of this disclosure was effectively reported in a concise section of its annual report and not scattered across multiple forms of media. While the amount of detail reported by Millenium bcp may not be appropriate for EPFIs that finance a large number of projects, it is certainly a standard toward which other EPFIs should strive.

China's Industrial Bank Co. Ltd. (IBC) also deserves special mention for its first post-adoption report.[162] Its report takes great strides to mention the bank's adoption of the EPs, steps it has taken to promote sustainable financing, its internal control procedures and

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[160] "Guidance Note on Equator Principles Implementation Reporting" at 3, online: Equator Principles <http://www.equator-principles.com/resources/ep_implementation_reporting_guidance_note.pdf>.

[161] Millenium bcp, *2009 Sustainability Report* at 43, online: < http://mil.millenniumbcp.pt/multimedia/archive/00426/RC_Millennium_bcp_2_426801a.pdf> (last accessed 4 September 2012).

[162] China Industrial Bank Co. Ltd., *2009 Annual Sustainability Report*, online: <http://download.cib.com.cn/netbank/download/en/Sustainability/2009_report.pdf>.

training sessions, raw data concerning its initial EP financing activities, specific examples of several financed projects and comments from borrowers as well as third-parties regarding its EP activities. It is a remarkable initial report, and it is hoped that other EPFIs emerging from their grace period use IBC's reporting decisions as an example.

VI. Conclusions

The reporting requirement set out in Principle 10 introduces a valuable and tested corporate governance mechanism into the EPs—increased stakeholder scrutiny by way of mandated informational disclosure. To the extent that some theorists frame the EPs as a mere "greenwashing" exercise, a meaningful reporting system could settle such concerns by way of improved transparency, consistency and accessibility of information. However, the foregoing study, suggests that Principle 10 has not yet accomplished that objective. While some EPFIs' reports show an encouraging level of engagement with the spirit of the EPs, most only scratch the surface by clinging to the EPs' minimum requirements—a problem going to the bareness of the EPs' standards as much as to individual EPFIs' reluctance to make substantial voluntary advancements in ESG disclosure. Moreover, the EPs do not do enough to ensure consistency between the reporting practices of different EPFIs, leaving CSR-related media difficult to compare and thus less effective from an oversight standpoint. These issues would each be best remedied by more fleshed-out *Reporting Guidelines* that provide more detailed direction to EPFIs in complying with Principle 10. In particular, the *Guidelines* should require EPFIs to disclose the location and sector of their projects. This study also identified several areas in which EPFIs could, without great expense, converge with best practices in their reporting.

Determining whether banks are shifting their lending portfolios in socially-beneficial ways over time is critical to the analysis of the effectiveness of the EPs in advancing the sustainable development agenda, and of voluntary regulatory mechanisms more generally. Without accurate and detailed data presented in a consistent manner, it is impossible to conclusively establish industry trends. To better demonstrate a commitment to sustainable development among EP member banks, reporting should be monitored and regulated more stringently such that meaningful data may be obtained from the reports, allowing for more detailed research in the future and improved public accountability.

The implementation of a five-year review period for the reporting practices of EPFIs and of the EPs themselves be implemented is also recommended. This review period would allow for the development of best practices and amendments to the EPs in order to respond to deficiencies. Most importantly, the results of these reviews should be made public in order to improve accountability. This paper suggests that an award be created for firms that demonstrate true commitment to EP goals (chief among them, sustainable development). Such an award would recognize firms that have transparent reporting practices and make significant strides to mitigate the environmental and social harms created by the projects they finance, particularly those in vulnerable developing nations (i.e., those without sufficient environmental regulations), and for being leaders in environmental and social stewardship. The positive public relations from such an award would legitimize the EPs, reward those firms that are committed to them and promote the development of best practices.

Although this author holds out hope for standards such as the EPs, the implications this paper draws for the role of market-based "new governance" mechanisms in promoting CSR are nevertheless mixed. Certainly, banks' willingness to proactively engage with environmental and social risk factors and better-disclose their activities to stakeholders—all without state supervision—is a positive development for corporate governance. And the GRI's improvements to reporting transparency, consistency and comparability suggest that voluntary standards can, when designed properly, make a major contribution. Yet the EPs' results, at least with respect to publicly-disclosed compliance, suggest caution in relying too heavily on a principles-based, voluntary approach to regulation. Until all EPFIs report at

higher standards (for instance, those shown by Millennium and Industrial Bank in their reports), there is certainly a role for other regulatory approaches—particularly mandatory rules and disclosure requirements—for mitigating the agency problems associated with disclosure in environmentally- and socially-sensitive project finance operations. However, the debate between "new governance" approaches and traditional, legal forms of regulation should not be "all-or-nothing." Rather, interspersed market-based and governmental efforts at tackling social and environmental risk—areas increasingly of both private and public concern—may present the best opportunity for promoting sustainability going forward. It is hoped that the EPs, and like mechanisms, will increasingly have a role to play in this framework.

Current Practice: What Informs the Development Dimension at the WTO?

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Marrakesh Agreement establishing the World Trade Organization (WTO) recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed amongst them, secure a share of growth in international trade commensurate with the needs of their economic development."

While some 75 percent of WTO members currently are developing countries, the promises of welfare gains from trade liberalization have not materialized for many of them or have been much more modest than anticipated in the 1990s. More recently, the failure of the last several WTO ministerial meetings and the limited progress made in the ongoing Doha Development Round have brought into the limelight the complexity of the relationship between trade liberalization and development in the multilateral system.

To date, there has been no integrated or systematic legal framework to accommodate developing countries' needs in the WTO legal regime. Instead, exceptions to the general rules and disciplines provide some measure of flexibility for developing countries (dubbed "special and differential treatment," SDT). Is piecemeal and ad hoc approach is now clearly showing its limits. Multilateral negotiations over the past decade have been unsuccessful, with the WTO increasingly becoming associated with public protest rather than with the fruitful steerage of international trade. Regime established by the Uruguay Round is still very much unfinished business. Moreover, developing members have now gained a blocking power, in political terms, at the WTO. Yet members still shy away from the broader issue of the relationship between development and trade liberalization, preferring technical fi xes instead. Today, a reconsideration of the legal implications of development issues within the organization is all the more pressing to ensure the continuity of the multilateral trading regime.

HUMAN RIGHTS AND BUSINESS LAW IN THE AFRICAN CONTEXT

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The issues of human rights and business law are very important for underdeveloped countries, equally, if not more, for Africa is becoming a destination for foreign investment, private and public. Current performance of the African economy, which occurs in a context of crisis and financial market internationally, is very attractive to international investors. During the last decade, emerging economies are competing to become one on the most country investors in Africa.

The interface between business and society has been framed predominantly in such terms as business ethics, corporate social responsibility, corporate environmentalism, and sustainable development. However, an increasingly prominent debate is emerging around business and human rights. These discussions are not limited to identifying human rights merely as a moral framework for voluntary corporate citizenship. Rather, the debate turns on the extent to which international and national human rights law is applicable to private sector companies.

Meanwhile, in Africa there is an ongoing process of integration and harmonization of business law, to attract investors and transnational companies. Therefore, seventeen African countries have signed the OHADA (the Organization for Harmonization in Africa of Business Laws) Treaty, in October 1993, and the first uniform laws ("Acts") adopted pursuant to the OHADA treaty came into effect in 1998.[163] All the OHADA State's members have also signed the African Charter on Human and People's Rights, which is intended to promote and protect human rights and basic freedoms in the OAU's member states.[164]

[163] The first 16 countries that have joined OHADA include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo joined on September 2012. Angola, Ghana and Nigeria are also currently debating whether to join OHADA - for a favorable approach on the debate
see Dany Houngbedji RAUCH, Ghana may opt for Harmonised Business Law, in African Business, Feb. 2003, Issue 284, p.36; John Ademola YAKUBU, Harmonising Business Laws in Africa: How Nigeria Can Benefit, This Day (Nigeria), 9/29/2004.

[164] The African Charter on Human and Peoples' Rights (also known as the **Banjul Charter**) is an international human rights instrument which came into effect on 21 October 1986.

In contrast with the prevailing trend at the time of its adoption, the African Charter on Human and Peoples' Rights clearly recognizes the indivisibility of human rights, and enshrining economic, social and cultural rights together with civil and political rights and collective rights. In addition to such cross-cutting rights as the rights to equality and non-discrimination and the right to dignity, the African Charter guarantees the right to equitable and satisfactory conditions of work, the right to health, the right to education and the right to culture. It supplements these classic economic, social and cultural rights with such related rights as the right to property, the right to protection of the family, the right to economic, social and cultural development and the right to a satisfactory environment.

African human rights law and OHADA business law are two separate and autonomous international instruments resulting from the emergence of two parallel processes. It is therefore understandable that these two categories of standards initially maintain a relationship of cohabitation based around logic of juxtaposition and indifference. However, for both are legal orders open and flexible, their entanglement is possible.

The African Charter further subjected the aforementioned human rights to monitoring by the African Commission on Human and Peoples' Rights (African Commission) – an 11-member quasi-judicial body with promotional and protective mandates. Under its protective mandate, the African Commission is granted power to examine inter-state communications and 'communications other than those of states parties Based on the latter provision, the Commission established its individual communications mechanism, under which it considers claims of violation of rights by individuals, groups or their representatives in an adversarial procedure and issues authoritative findings and remedies.[165]

The protection of economic, social and cultural rights as substantive norms and their subjection to adjudicatory enforcement by the African Commission mean that the rights are generally justiciable. The establishment of the African Court on Human and Peoples' Rights (African Court) to complement the protective mandate of the Commission with a judicial mechanism of enforcement leading to binding judgments increases the justiciability of the economic, social and cultural rights protected under the African Charter. Although the Charter does not provide for an exhaustive list and content of economic, social and cultural rights, the authorization of the African Commission to draw inspiration from international human rights law and practice and the power of the African Court to enforce any relevant human rights instrument ratified by the states concerned may be used to close the normative gaps.

In describing the function of the OHADA Common Court of Justice and Arbitration, Article 14 of the OHADA Treaty states "The Common Court of Justice and Arbitration will rule, in the Contracting States, on the interpretation and enforcement of the present Treaty, on such regulations as laid down for their application and on the Uniform Acts." According to paragraph 2, to realize such a function: "The Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court is recognized to the national courts when hearing a case in first or second instance where the application of OHADA law is concerned. With reference to the authority of the CCJA jurisprudence Article 20 of the OHADA Treaty states: ''the judgments of the Common Court of Justice and Arbitration are final and conclusive… In no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State."

[165] Sisay, 2011

This paper will make an accurate account of the forced cohabitation between human rights and business law in the OHADA space and the nature of this cohabitation. It sounds necessary to understand this relationship in terms a dialectical tension which implies, from an analytical approach, to determine the state of cohabitation (I) the prospects for better cohabitation (II), before to conclude on few requirements for Africans law schools to use human rights and business for teaching (III).

I- OHADA and Human Rights: a state of cohabitation

The logic of cohabitation between human rights and OHADA law is a logical juxtaposition or indifference because as its name suggests, the Organization for the Harmonization of Business Law in Africa is in principle intended to deal with issues of trade and economic activities. The human rights are by definition excluded from the scope of subject matter jurisdiction. This exclusion, however justified in principle unfortunately, can be a source of contradiction and conflict between the two sets of norms.

Public international law knowing the principle of strict interpretation of the competence of international organizations, the competence of the OHADA cannot in principle be extended to areas other than those covered by the Treaty which established the organization. Thus, for the purposes of this Treaty, Article 2 states "enters the field of business law the set of rules relating to company law and the legal status of traders, to debt recovery, to collateral and enforcement, to speed recovery and business liquidation, the right to arbitration, labor law, accounting law, the right to sell and transport and other matter that the Council of Ministers decided, unanimously, to include the object in accordance with this Treaty ... ". It is therefore quite logical that in the same way that the Treaty, the subsequent Uniform Acts do not expressly refer to human rights. This is probably the same logic that governs the specialty of the Common Court of Justice and Arbitration in respect of human rights. As mentioned herein, the Common Court of Justice and Arbitration is the supranational judicial institution of OHADA, which major role is to provide common interpretation and application of the Treaty and the regulations made there under the Uniform Acts and decisions. The Court acts as a supreme court which has no jurisdiction to address the issues that are excluded from the Uniforms Acts.

Therefore, one cannot find any reference in cases so far rendered by the CCJA to fundamental human rights. Yet mutatis mutandis placed in the same situation, the European Court of Justice has contributed to the affirmation and protection of human rights by linking them to the category of general principles of community law.

The risk of conflict between the OHADA law and human rights normative principles included in the African Charter on Human and Peoples are potentially numerous, given the differences in the nature that characterize the two set of rules. To illustrate this phenomenon, we can illustrate with some potential matters of conflict between the principles of human rights and the rules of OHADA.

A first hypothesis is the discordance between Articles 2 and 3 of the African Charter on Human and Peoples' Rights and Article 69 of the Uniform Act relating to general commercial law. Articles 2 and 3 of the African Charter states the principle of non-discrimination in these words "*Everyone has the right to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter, without distinction of any kind [...], including property, birth or other status* ". Article 3 states that " *Every individual shall be equal before the law. All persons are entitled to equal protection of the law.* " In contrast to those provisions, Article 69 of Title I of the Uniform Act related to general commercial law dealing with the scope of the commercial lease provides: "*The provisions of this title shall*

apply in cities with more five thousand inhabitants, all leases on buildings falling within the following categories:

1) local or commercial buildings, industrial, craft or professional;
2) local accessories dependent on local or a commercial building, industrial, craft or professional, provided that, if such premises accessories belong to different owners;
3) bare land on which were built before or after the conclusion of the lease, buildings for industrial, commercial, craft or professional, if these buildings were raised or operated with the owner's consent or knowledge. ".

While Articles 2 and 3 of the African Charter affirms the equality before the law and equality of conditions that pass through the uniformity rule "the law must be the same for all" because all individuals are equal in essence and should be treated in the same way, Article 69 on the scope of the commercial lease just break the uniformity of the rule, in reserving the provisions of commercial lease only to counterparties residing in cities of more than five thousand inhabitants. As can be seen, this provision produces discriminatory effects that are contrary to the spirit of the principle of equality affirmed by all international instruments for the protection of human rights.

A second hypothesis is the apparent contradiction between the so called simplified procedures recovery procedures of OHADA, specially the procedure of injunction in which, at the start, the debtor who is accountable to the justice does not to be present to the trial. It is only after having been ordered to pay or to restitute or by the way of opposition when he did not default, that he will be allowed to participate to the procedure. Those procedures may be seen as unfair according to the principles of human rights like the rule of adversarial trial.

Finally, we can mention to decry the practice of forced executions in OHADA law which are essentially unfair and undermine, beyond the right to peaceful enjoyment of possessions, major fundamental right as the principle of the dignity of the debtor.

It is known that the OHADA has a value above any national law legislation and has to prevail in case of conflict since, under Article 10 of the Treaty, "Uniform Acts are directly applicable and binding in the States Parties notwithstanding any contrary provision of law, enacted before or after." As a matter of fact, the CCJA have had the opportunity to clarify the scope of Article 10. In an advisory opinion of April 30, 2001, at the request of the Republic of Côte d'Ivoire on the effect of repealing the Uniform Acts on the law, she admitted that "... Article 10 contains a rule of supranationality because it provides for direct application Uniform Acts in States parties and establishes, moreover, their supremacy over the provisions of domestic law before and after ".

Nonetheless the value of OHADA law is questionable, especially when one comes to compare it to the preeminence of human rights enacted by the African Charter. It is difficult to agree with the CCJA over this scope it gives to Article 10 of the OHADA Treaty and especially its definition to the notion of supranationality in the context of this article. In international law, supranationality means more a mode of organization that fits over the Nations which compose the hierarchical position and not a value of a standard against another. Thus, the European Community can be considered as the supranational pillar of the European Union.. In Africa, we can mention as an example the process that led to independence after the creation of the Customs Union of Central African States (UDEAC) with regard to the African sub-region later became Central Economic and Monetary Community of Central Africa (CEMAC). Therefore, the rule of law can only be the result of supranational organization which it proceeds. Unfortunately, this is not the case with

OHADA that in its current state is far from being a community organization; then its law cannot be described with a community primacy effect. It is a common law applicable to the territories of States Parties and not the constitutional law of the Member States. Therefore, on can argue in favor of the primacy of human rights against the rule of law supposed OHADA. Assuming that Article10 of the OHADA Treaty has a truly pre-eminent supremacy can it prevail over the rights of man? There is way to reply by a yes. On the contrary, if there is a rule that takes precedence over the other, it is that of human rights as universal ethical values must necessarily come before market values they can serve as a spur. Moreover, one can relate to the constitutional block which includes the principles of constitutional value related to the protection of fundamental rights.

As we can see in this brief update on the state of the relationship between human rights and OHADA law, essentially based on the logic of indifference and juxtaposition, this can only lead to a tumultuous cohabitation. Therefore it is interesting to develop for the prospects of a new form of more harmonious cohabitation.

II- Human rights and OHADA law: prospects of cohabitation

According to postulate the rule of law that OHADA law aspires to realize, the judge and the legislature are two main architects of the recognition and consecration of human rights. The Judge and OHADA legislators does not derogate from the rule of law especially in a context marked by the will of the founders of the organization to now open to the perspective of human rights.

Common Court of Justice and Arbitration may dispose of the principle of specialty of the international organizations, based on a non-contentious jurisprudence of the International Court of Justice, and by drawing on the methodology used by the European Court of Justice (ECJ) , to affirm and recognize the human rights in the OHADA law and cases.
This recognition is all the more possible that many of the rights are related to trade and economic activities. These include second-generation of rights related essentially on economic and social rights. CCJA can therefore, like the ECJ, reattach the principle of the protection of human rights within its jurisdiction to the category of general principles of law uniform. To paraphrase a jurisprudence of the ECJ, "fundamental rights would be part of the general principles of law whose CCJA ensures. In this regard, it would draw from the constitutional traditions common to the Member's States and the information supplied by international treaties for the protection of human rights which the Member's States have signed or cooperated.

Furthermore, the African Charter in this regard would be of particular significance. Fault for the organization to adhere to the African Charter in the light of the debates in Europe by the prospect of recognition, the OHADA legislators may also be based on a different logic, that the adoption of an original image of the Charter of Fundamental Rights of the European Union, which will better define the core values which are attached Africans in an organization in which the rights of rights and fundamental freedoms are gaining from the revision of Quebec, a new dimension ie the base of a democratic political space now. Indeed, this requires opening new OHADA pending the advent of a possible Charter of Fundamental Rights, to conduct already policy or rather concrete actions in favor of human rights and freedoms. These are opportunities for recognition of issues remains carriers for both human rights and for the OHADA law.

If you think the OHADA law and human rights must be interdependent, it means that the OHADA law may well be enriched by the progress of human rights especially with regard to

the rules of fair trial in which it so badly needs. According to the principle of fair trial stated in international instruments of protection of human rights that are the major International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention of Human Rights and the African Charter on Human and Peoples' Rights, "everyone has the right to have his case heard fairly." The idea of equality of arms and adversarial principle that is often lacking in litigation within OHADA, reflects the spirit in which it is considered a fair trial. It "requires that each party must be present at all stages and at all stages of the proceedings and the trial, was offered a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage relative to his opponent. "

As the adversarial principle, it involves beyond equality of arms, the active participation of stakeholders in this process upstream of the judgment. And the fairness of the trial should not simply be limited to the procedural phase, it must also extend to the phase of execution of court decisions from the famous Hornsby v. / Greece on 19 March 1997, been affirmed as a fundamental right. However, if we know how the breach of a court order can only frustrate the party in whose favor it was made, the more we know better than the execution abuse of a court decision may frustrate more the person against whom it was made. Yet there are some risks that exposes the parties at trial, the procedural rigor of OHADA law contains a rigor that militates clearly in favor of the interests of creditors and investors, and certainly violates the constitutional principle of respect for human defense that involves the French Constitutional Council as "a fair and equitable balance guaranteeing the rights of the parties." But legal and judicial rigor can also be an asset for human rights who have a low level of protection in the OHADA.

The protective device that provides the system with the African Charter rights suffers from a deficiency. It is a little device that relies on a sophisticated African Commission on Human and Peoples' certainly very active, but is and remains a non-litigation mechanism, but also and especially on a process of judicialization stammering with Court African Charter of Human and Peoples' almost stillborn that since she took office, has delivered its first judgment on jurisdiction until 15 December 2009, and it is not sure she to make others as Ouagadougou Protocol adopted in 1998 and entered into force in 2004, which was created four years later repealed by another protocol adopted by the Member States of the African Union on 1 July 2008 Although not yet in force, but already merged African Court of Human Rights with the Court of Justice of the African Union African Court of Justice and Human Rights as an principal judicial organ of the African Union. The new Court will have only a single section of human rights and peoples. It is therefore not an exaggeration to say that in the African system for the protection of human rights, the judicial guarantee is practically in a hypnagogic state (state of virtual hallucinations that occur during sleep). However, alongside this state of torpor in which bathes the African Court on Human and Peoples' reign in the OHADA a judicial mechanism perfected and proven effective. This is the Common Court of Justice and Arbitration, which has important prerogatives in advisory and contentious in that it is "the guardian of the proper application of uniform and speedy trial." Is original jurisdiction whose development can be measured through its features and functions, but also in terms of the efficiency of its judicial decisions. With regard to its characteristics, the Court presents four specific traits. Its jurisdiction is compulsory (it does not need to be accepted) and exclusive materials assigned. It can not under penalty of denial of justice refuse to rule. Its mission is to ensure the effective respect of the interpretation and application of uniform law. Moreover, access to the Court is not only reserved to the States, but also to the parties to the proceeding. Be finally referred by a national court of cassation hearing a case related to the application of the uniform law of OHADA law.

The point of view of its powers, the Court may in the dispute over the interpretation and application of the Treaty and advises. It can also be entered in the Litigation Uniform Acts. In this case, it acts as a court of cassation case because when the contested decision, it refers the case and rule on the merits.

Finally, judicial decisions are not only binding on the parties but also enforceable throughout the geographical area of OHADA. Equipped with these resources, the Court of Abidjan since she took office, a secreted abundant jurisprudence that allows it to play its full role in the legal integration. Assuming for a moment that this harmonized system of protection and credit guarantee and investment is a little time is put at the service of human rights in the OHADA. It would fill no doubt all structural deficiencies plaguing the African system for the protection of human rights which have been identified above. He would bring consistency and efficiency as it lacks.

II- Teaching human rights and business law in Africa

As can be seen in the precedent chapters, the human rights in Africa and the OHADA business law indeed coexist in the same space, not only geographical but also legal. They did not, however, have the same trend up to compete at a given time. However, we must recognize today that they are in a relationship showing forced complementarily. While human rights were originally carrying non-market values, they also progressively incarnated market values gradually joining the business law.

Informed by the conceptual underpinnings provided by the UN Framework and Guiding Principles on Business and Human Rights and the practical experience of companies trying to manage human rights impacts, more and more individuals in the private sector, government and civil society are grappling with the full range of human rights issues touching all business activity and relationships.

Demand for university and professional business and human rights education is growing. The number of courses has increased significantly in the past decade, with the subject now being taught at business schools, law schools, and schools of public policy worldwide. A market for corporate training has formed in the wake of the unanimous endorsement of the UN Guidelines by the UN Human Rights Council last June.

At the international level, the Universal Declaration of Human Rights was adopted by the UN in 1948, at the initiative of René Cassin. There was a kind of non-hierarchical recognition of the rights of so-called "first generation", the Civil and Political Rights, the first obtained knowledge liberties against the government. The globalization movement has subsequently lead to a disruption of this recognition by providing value to the economic, social and cultural rights. A "second generation" occurs that states must ensure materially.

Investors tend to view doing business in developing countries a potential risk. Although each investment decision entails taking risks, there are always some standards of protection – physical and legal – that the host state must comply with toward the potential investor. But when law is considered so obsolete to fit into the new environment in which it now finds itself operating, and its effects unpredictable, the secured environment for attracting such investment is rather unachievable. There has to be a better suited legal environment, hence a legal reform, in order to achieve this objective.

The rule of law, a prerequisite to a sustainable development is somehow a truism that has been around for many decades. Literature abounds in this sense and gives to today's

initiatives a feeling of replica of past policies. The early 1980s has also been a period when international financial institutions were very active to push for law reforms, especially in developing countries, as conditions for continued financial assistance. The phenomenon of "globalisation" met by the surge of regional trade alliances, came to add a pinch of salt in the debate, and the felt need for (developing) countries to integrate their economies into the global market considerably accentuated the postulate of development through law.

It is in this line that some African countries, at the dawn of the 1990s, felt a need to "modernise" their legal systems for the major part inherited from colonialism and which no longer suited the challenges of the – our – time. Conscious of the power of law to bring development and the desire to attract both national and international investments, the idea would soon translate into the creation of a supranational body empowered to initiate this law reform across member states.

The Organisation for the Harmonisation of Business Law in Africa – OHBLA – (known by its French acronym OHADA – *Organisation pour l'Harmonisation du Droit des Affaires en Afrique*) is created by a signed Treaty of fourteen African States in Port-Louis, Mauritius, on 17 October 1993. As the first initiative to harmonise laws in Africa,the idea behind the creation of OHADA sprang from the political will to strengthen the African legal system by enacting a secure legal framework for the conduct of business in Africa, which is viewed as indispensable for the development of the continent.

Furthermore OHADA is described as a "legal tool thought out and designed by and for Africa to serve the purpose of regional integration and economic growth on the continent".

The Organisation for the Harmonization of Business Law in Africa – OHADA – is today comprised of sixteen (16) African states from West and Central Africa. The aim, as spelled out in the Treaty, is to harmonise "business laws in the Contracting States by the elaboration and adoption of simple modern common rules" and to promote arbitration as a means of settling contractual disputes. The rationale for creating this Organisation came from the idea that the African continent needed a strong and secure legal system that would serve as engine for its development. This reform could also be credited to local traders' impetus to see their investments secured by getting rid of outdated laws, which securitisation would in turn be conducive to investment, especially foreign investments. In order to achieve its goals, OHADA issues unified legislation in the forms of Uniform Acts on several areas of business law.

Membership to the Organisation reflects a common tradition at least in two respects. First of all, with the exception of Equatorial Guinea (Spanish), Bissau-Guinea (Portuguese) and the English-speaking Cameroon, all Member States share the French language in common as their official language. Secondly they all, except again the English-speaking part of Cameroon where English Common Law applies, share a tradition of Civil law inherited from their former colonial masters. The overall aim of the "harmonisation" is to create a secured legal and judicial framework for an efficient conducting of business or economic activities that will in turn enhance competitiveness, hence economic growth. It ensures a level playing field for traders (individuals or firms) operating in each territory of the Member States by getting rid of domestic laws peculiarities.

The current relationship between business law and human rights allows going in the direction of complementarity which is based on the principle of the indivisibility of human rights. Categorize these rights rights first, second or third generation to put them all at risk. Confront them to the reponsibilty of investors and corporations in the current context of Africa.

The purpose of the OHADA is the development and adoption of common rules, simple, modern and adapted to the situation of the economies of member states. These rules remain in any case confined to business law in the strict sense or a broad and extensive business law, limited the right of economic activities.. No mention or reference, be it remote is made in the Treaty and the Uniform Acts for Human Rights. Both materials have not only separate but also and especially the law of the OHADA business is limited, while the human rights have a scope stretch to infinity.

Indeed, one can welcome the inclusion in the Preamble to the Treaty amending the Treaty on the Harmonization of Business Law in Africa,in a new direction.. It is obvious that the Preamble of the OHADA Treaty is not binding as well following the international order in the domestic law of States Parties. However, it is possible to read the Preamble giving it all the meaning it has in the understanding and interpretation of OHADA Treaty. In this respect, the legislature, under the limited scope of the OHADA could not put this desire to better take into account the standards of human rights. Adequate progress towards democracy will surely be kept as the ultimate goal in the drafting of the Uniform Acts.

The proof of this fact lies in a single instance. Indeed, the OHADA soon govern labor law of 17 States Parties. This new field by itself lead to enormous consequences in terms of the connection between business law OHADA and basic standards of human rights. Some questions of labor law are inseparable from the fundamental rules of law recognized in humans.

What should the judge of the OHADA CCJA when a dispute before working relationship that brings together various issues that one or more human rights (violations of human rights in labor relations)? This is the case where questions of dismissal for economic reasons invoked simultaneously by one party while the other claims to be a victim of discrimination. OHADA law work can make a headlong on issues as intertwined. Gymnastics that cause such exclusions will be detrimental to the effectiveness of CCJA and harmony of the entire judicial system set up under the aegis of the OHADA.

Issues that the right to strike cannot hide in the labor relations disputes OHADA consubstantially but are also related to the fundamental right of association is recognized by all international instruments on human right. These issues become even more complicated strike within OHADA when viewed under the guise of a key principle of public law such as the continuity of the public service.

Repressive control and / or administrative procedures for unfair dismissal or other labor relations procedures previously reserved in most countries the competent administrative authority.

Corruption has rightly been described as the evil that prevents OHADA take off. She noted that governance issues are wider at the crossroads of OHADA and can not be returned indefinitely indefinitely. We can develop business rules without thinking about its endemic evil of corruption. Corruption and Business Law return without hesitation sanctions, excluded from substantive jurisdiction of OHADA. Many United Nations instruments address issues of corruption and other transnational crimes in the field of business law and could inspire the legislature of the OHADA. These transnational crimes back in the regional context of the OHADA push to turn thinking of some fundamental human rights to see up closely.

Finally, it is possible that issues of social responsibility (CSR) are obscured at present by the legislature of the OHADA. Foreign investors are subject to the rules simple, modern and attractive. The meeting point of business law and human rights is inevitable CSR. Several instruments can be of help at this level though seems to be the most successful at present the Report of the Special Representative of the Secretary-General of the United Nations on issues of human rights more usually known under the name of Ruggie report. Like it or not, the Organization should seriously consider whether to bring in the covered area and with other community groups with economic or not to establish a non-optional CSR.

All these considerations are just highlighting the urgent current OHADA integrate considerations of human rights. An angle futuristic, it is also possible to predict the urgent need to develop one or more other Uniform Acts emerging business law because of the necessary coexistence of two domains els purpose of the present study.

In view of the foregoing, certain areas of business law should be subject to a future interest of OHADA it is true that the organization intends to contribute to African unity.

Links identified between business law and human rights have largely focused on procedural issues. The study of the OHADA Uniform Acts reveals a multitude of procedures laid down in each of them. The current and possible violations of fundamental rights are raised mainly in the course of the special procedures of OHADA. The difficulty is compounded by the proliferation of such procedures which follow no single guideline. In the context of a stronger necessary relationship between these two areas and taking into account the rules of human rights law in the OHADA business, which would be a preliminary step in the development of the OHADA Uniform Act procedures that would include all the general principles applicable to proceedings OHADA.

Achieving the goal of rule of law and strengthening of democracy is also an explanatory factor that requires the OHADA emancipated and integrates the principles of equality, conduct a fair trial which he can not divest.

For example, the adversarial principle which is sometimes lacking in the procedures of OHADA law is an integral part of the right to a fair trial and needs to be better assimilated into the legal corpus OHADA. According to this universal principle, "Everyone has the right to have his case heard fairly" and the communication of any document to all parties before the instance is a requirement as well as the opportunity for all parties to present a defense free no disadvantage compared to his opponent.

Procedural fairness about it is not limited merely to the stage of the proceedings, but it also extends to the phase of execution of court decisions. Procedures for enforcement of OHADA law in this regard are numerous flaws that harmonious coexistence with the standards of human rights.

Therefore this justifies the shift we can develop in our teaching about passing from reciprocal autonomy of the two materials to their cohabitation as required. This change is effective when it is placed before the advent of OHADA. Since the advent of OHADA, a sort of competition pulling a contradiction between the norms of business law and human rights seem to grow. It interferes in linear relationships and singling them or rather more complex. Much like the corporate responsibility function within a company, which can reside in many different places, there is no clear home for “business and human rights” in the university curriculum. At law schools, it may overlap traditional international and corporate law classes. At business schools, it may be viewed as a module within an ethics or sustainability track. Professors note the lack of a clear academic home as an obstacle to developing new

courses, despite strong student interest in the subject. Companies are now considering what role in-house training should play in corporate efforts to meet their responsibility to respect human rights.

Selecting topics is a challenge for teaching such a broad-ranging subject. Most courses cover some combination of: historical perspectives, core principles, standards and institutions, case studies and current issues. Course scope, naturally, is a function of the instructor's background, student perspectives, and class format. The course structure may define business and human rights within corporate responsibility; human rights standards; tools for corporate accountability; and corporate human rights best practices. It will be designed to introduce business-oriented students to international human rights standards while forcing human rights students to think like business managers. Other approaches emphasize trade and policy dimensions, and take up specific issues, such as human rights impacts on vulnerable population

The pool of teaching materials is expanding, but the definitive business and human rights textbook has yet to be written. Creating a shared language is a key challenge for practitioners and teachers alike. Human rights concepts are unfamiliar to most business managers, while corporate terminology is foreign to most advocates. Courses rely on a dynamic mixture of international legal and voluntary standards; corporate, NGO, government and international organization reports; legal proceedings; case studies; secondary sources; and selections from a burgeoning academic literature. Assembling and re-assembling one syllabus with such a rapidly developing discipline.

Business and human rights students tend to be a diverse group, from many countries with a wide range of professional experience. Teaching an emerging, multi-disciplinary subject allows for creative pedagogy. Many instructors are experimenting with alternatives to traditional lectures and classroom discussion, such as simulations, role-playing exercises, debates, teamwork and clinical approaches. Professors are sharing comparative teaching strategies for different students in different geographies. Corporate training will produce even more customized approaches.

With strong student demand and greater attention in emerging markets to the business and human rights nexus, there is an opportunity to develop new courses in African universities. Business and human rights education should be a part of curriculum development assistance between universities. Experienced teachers can assist faculty teaching the subject for the first time. Local research and teaching will strengthen the field as an academic discipline.

The Challenge of Multiculturalism and the Problem of Human Security in Modern Russia as the Subject Matter of Teaching Human Rights in Russian Universities

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Modern Russia is included into global and economical life. Last decade demonstrated the intensive social and cultural diversification in Russia, consolidation of different social, educational, professional, ethnic and religious groups. It shows the rise of cultural polycentrism of the society. The last determines the existence of social discontent in some sectors of the life of society.

The presence of different cultural features inherent in the cultural groups, certain cultural identity was never been argued among Russian scholars in the Law Schools. Existence of cultural distinctions with the inevitability determines not only various social and psychological estimations, not only the philosophical reflection pushing the problem of the cultural variety in a zone of the analysis, but also this topic becomes a subject of political debates and demands the necessity of legal regulation at the national level.

The development of the Civil society in Russia makes the topics of Multiculturalism and Tolerance, Loyalty, Trust, Obedience to Law, Human rights, Political Justice to become the key issues in the discussions of the political and legal aspects of the problem of Multicultural citizenship and Pluralism in Russian Federation. These topics are interdisciplinary and are included into political and legal discourse. During last years they were included into the curriculum of the Law Faculties. New Master Programs in teaching the Human Rights were opened. The first one – at Herzen State Pedagogical University, faculty of Law (in 2008).

Multiculturalism brings the recognition of the richness of cultural resources of various unequal ethnic, religious, gender and other groups. Positive solutions of these political and legal problems promote the new achievements of the Civil society , the removal of interethnic, social, political and spiritual intensity in Russia. It brings the establishment of human security of a citizen as a human being in Russia, helps Russian Legal system and political institutions to be in consensus with the Civil society in Russia and the traditions of the civic life of the Western countries. The implementations of the norms of the International Law into the Russian Legal system brings Russia closer to the norms (legal, political moral) of life of Europe, USA, Canada and other intellectually and politically developed countries. Teaching of the Human Rights at the Law Faculties helps to develop the high level of the legal culture in the society, because the former students are hired by different governmental, municipal, political and legal institutions. They are working as the

lawyers in the private firms and governmental institutions, as civil servants, school teachers, journalists and politicians, and etc.

Law students can see that the dispute on the rights of minorities and various political actions in the sake of their protection comes to the opening of actual discussions in Russian political and legal academic circles on the legal status of citizens and their various categories, especially, with reference to their rights - educational rights, labor rights, political, social, cultural rights of different categories of Russian citizens. These are the typical problems arising through the discussion of a problem of social and political justice, the problem oh the Human rights in Russia . These problems are the subject matter of the mandatory and optional courses not only at the Master level, but also at the Bachelor's education in Russian Law Faculties.

Teaching Human Rights at the Faculties of Law, the justice issues as the subject matters of the Russian Theory and Philosophy of Law is the real center in the circle of different problems connected with the Civil society, the citizens, the state. These problems gradually became urgent for the Russian society and the Russian Legal education. The situation is determined by the essential role of the Human rights in Russia. The protection of Human rights is the basement for the establishment of Human security in Russia. It serves as a factor of sustainable development in Russian society.

Modern sociopolitical and economic transformations in Russia converted to be the catalyst of occurrence of "ethnic question" at all levels of public life. Lately there was a rapid growth of national consciousness of Russian and non-Russian population. It is expressed, first of all, in definite requirements of national-cultural autonomies, and also shows the essential change of the character of relationship between ethnic groups, ethnic minorities. Actualization of the national and religious consciousness in Russia during last two decades could be named as a sort of explosion. It demonstrates the existence of the new political realities in modern Russia and of complicated processes of the economical and political modernization in a society. They could be estimated as powerful factors of the influence on the youth and Russian students. Including into the political and legal discourse the question of Human Rights, the problem of the political and legal control of the multicultural space of life of Russian citizens and non-citizens became actual in modern Russia.

It is important to mention that during last 10-15 years Russia became a multicultural society without a multicultural ideology. Ethnic minorities due to intolerance of some youth groups and the psychological attitudes of the adults feel and understand their own human insecurity. Xenophobia level unfortunately in public consciousness is still high.

Moscow and the Moscow region are the leaders in displaying of the national hatred , on the second place - Ingushetia ; further follow St.-Petersburg , Republic Kalmykia, the Nizhniy Novgorod region, Rostov-on-Don , Irkutsk region , Leningrad region, Stavropol region, Vladivostok ; Barnaul, Ufa, Orenburg, the Arkhangelsk region, Republic of Dagestan , Voronezh , Ekaterinburg and Sverdlovsk region, the Chelyabinsk region , Volgograd, Krasnodar, Lipetsk, Saratov and the Saratov region ; Khabarovsk ; Arkhangelsk, Samara, Krasnoyarsk, the Tver area, Khasavyurt; Vladimir, Ivanovo, Tomsk, Kostroma and Izhevsk); the Volgograd area, Omsk, Yaroslavl, Perm, Orel, Murmansk, Novosibirsk and Kaliningrad .

Such international legal documents as "the UNESCO Declaration on Race and Racial Prejudice" (1978), "the Convention on the Elimination of All Forms of Racial Discrimination" (1965), "the Declaration of Principles on Tolerance" (1995), "the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief" (1981), "the Convention on the Elimination of All Forms of Discrimination against Women" (1979), "Vienna Declaration and Program of Action" (1993) are aimed to protect the human rights, including the rights of the national minorities and are approved in Russia. Russia tries to follow the norms of the International Law and improves the national legal norms. But this process is not very quick and is very complicated. But the progress in that direction is obvious. The

studying of these documents is included into the class work with all categories of law students.

The strengthening of the activity of the law machinery in the sphere of struggle against xenophobia is observed recently. According to statistics data the number of the considered affairs and the persons involved in the criminal liability increases from year to year. The Criminal Law of the Russian Federation includes a number of articles touching the phenomenon of xenophobia.Another important phenomenon need to be mentioned. The new economical and political problem appeared in Russia during last two decades. Russia became attractive to the millions of migrants from the former Soviet Union, who are mainly Muslims. There are a lot of Chinese migrants too in Siberia and some big cities, including Moscow and St.-Petersburg. The increasing of cultural diversity of Russia could be named as the development of multiculturalism. Russia need to deal with this reality. The development of the ideology of multiculturalism is the item of the political program of many civic institutions and movements. And multiculturalism is also taught at all Russian Law Faculties.

During last years the Russian Federation has continued to pay attention to the protection of the rights of national minorities, and some subjects of the Federation have taken steps on fastening of the existing federal norms directed on the protection of minority. A number of programs directed to the development of tolerance and cross-cultural interaction has been developed. There are periodicals in languages of national minorities in the majority of subjects of Russian Federation. However, the position of representatives of national minorities has gone through some regressive changes. Last years the growth of number of crimes because of racial difference has been observed, the number of intolerant statements rose in mass media.

Various political, civil and educational programs under the statement of tolerance and recognition the principle of multiculturalism as a political and a legal principle of a civil life in Russia are developing on a Federal, Regional and Municipal government levels of the Russia Federation. We see the signs of a strengthening of legality and the law and order. It provides a legal protection of representatives of the national minorities. However it is necessary to notice that in spite of the fact of the increasing number of applications of criminal penalty for the actions directed on stimulating of national, racial and religious hatred disturbing growth of quantity of such crimes in the Russian Federation is marked.

It testifies the increasing of Government's attention to this question. In Sverdlovsk region, for example, the program named «Development of the tolerant relation to migrants» has led to creation of the Council on tolerance. The Council has united representatives of some ethnic and religious groups, the scientific and regional authorities. Furthermore became more active the propagation of tolerance and human rights in school programs. Also the program of propaganda of tolerance includes preparation of teachers and the publication of the textbooks under the legislation in the sphere of Human rights.The considerable role is played by the educational activity addressed to all groups of the population: ethnic, racial, religious, and professional. For example, in Sverdlovsk region the TV program which devoted to a cultural variety of region is founded. The editorial council of the program is elected by the national minorities representatives.

Norms of the Russian legislation are directed to the struggle against racism and extremism. In the Russian Federation the Federal Law «About struggle against extremist activity» has consummated. The new law defines extremist activity either as violent actions against the state or as the kindling of racial, national or religious discord. Also the Law includes in this definition the kindling of social discord, connected with violence

or appeals to violence, humiliation of national advantage; vandalism and mass disorders; propagation of exclusiveness, the superiority, or inferiority of citizens owing to their religion, social, racial, national, religious or language accessory, propagation and public demonstration of nazi and similar for nazi attributes or symbolics. According to this law the court can forbid media broadcasting or publications because of their guilty in distribution of extremist opinions.

It is possible to name the changes of a political and economic system, economy recession, manufacture decrease, reduction of workplaces as the reason of distribution of extremist movements. Destruction of united constitutional and legal space became the starting moment, and the occasion to creation nationalist, fascist, religious and similar formations and also the structures have risen on protection of interests of the population ostensibly. While a whole Russian situation in legal area cannot be recognized as satisfactory.

One of the ways of struggle against the negative public phenomena is a cultural and educational activity, civil-legal education of the youth. There are some regional programs. One of them is developed in one of the most multicultural city in Russia – St.-Petersburg. The Program of harmonization (how it is called) is directed on the aims of interethnic and intercultural relations, preventive maintenance of manifestations of xenophobia, tolerance strengthening in St.-Petersburg .Tolerance should be understood not simply as the tolerant relation to something to other, different from habitual to us. Tolerance assumes not only understanding, but also acceptance of the fact that the world around and the people occupying it are very various. Thus each ethnos is unique and unrepeatable. Only the recognition of ethnic and religious variety, understanding and respect of the cultural features inherent in representatives of other people and religions, in a combination to democratic values of a Civil society can promote creation of originally tolerant atmosphere of a life. It will create a real human security for all people of Russia. And this is the aim of the activity of every Law Faculty in modern Russia.

Teaching Human Rights on the Borderline between Trade and Arbitration

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Introduction

This paper discusses the changes that have occurred in the concept of the relationship between arbitration and human rights and highlights the transformation of the subject we teach, while using a topic that we deal with professionally as an example.

As a preliminary remark, it should be pointed out that we both specialise in the field of private international law and arbitration. We teach a separate course in international and national arbitration at the Faculty of Law of Masaryk University in Brno (Czech Republic).[166]

I. Arbitration vs. Protection of Fundamental Human Rights

Arbitration belongs among popular alternative methods of resolving disputes in national and particularly in international trade. It is also common in consumer law. An unquestionable advantage of arbitration lies, among other things, in its speed and the simplicity of the procedure. Arbitration is based on the principle of autonomy of the parties' will. Depending on individual doctrines, the latter principle substantially affects a number of procedural and other aspects: from the actual choice of arbitration and exclusion of jurisdiction of the common courts, to procedural acts, such as the choice of arbitrator(s), choice of the venue and language of the hearing, limitation of oral hearings, agreement with arbitrators on taking of evidence and, in certain cases, even the possibility of cancelling an award or choice of the duration of the proceedings.

However, we should ask whether these clear advantages, as mentioned above, have their limits. Or whether the limits that are regularly obeyed by (State) courts are excluded in view of the special nature of arbitration, since the choice of arbitration by the parties

[166] In view of the fact that investment arbitrations pursued between a State, on the one part, and a citizen of some other country, on the other part, have further specific features and thus require a somewhat different approach, this aspect is not discussed in this paper.

excludes jurisdiction of the common courts. Consequently, the limits in question are not those that follow from the nature of the case at hand or the ability of the arbitrator to pursue the proceedings expediently and rationally, but rather those that ensue from the right to a fair trial as one of the fundamental human rights stipulated in Article 36 of the Charter of Fundamental Rights and Freedoms, which is a component part of the Czech Constitution, and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. From this viewpoint, there are several questions that could raise certain doubts. By way of example, we could refer to the issues of appointment of arbitrators, the existence of an exhaustive list of grounds for cancellation of an arbitral award, the possibility of not ordering an oral hearing, public pronouncement of a judgment, non-existence of remedies, etc. and the issue of the permissibility of an arbitration agreement as such. And there could perhaps be others. These include questions related to arbitral proceedings as a process and the need to respect a certain paradigm in the regulation of arbitration, and also cases where national courts perform their control functions, including the power to cancel an arbitral award, or recognise and enforce an award.

The relationship between arbitration and human rights is currently discussed primarily from the viewpoint of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the Czech Republic is a party. We shall discuss this aspect in the following part.

In concluding this introduction, we should briefly mention the approach of the Constitutional Court of the Czech Republic. The latter has dealt with the aspects of arbitration in a number of its rulings and resolutions. Conclusions that can be drawn in this respect and that could also affect considerations in this field are as follows:

1. Arbitration courts are not bodies of the State and thus do not share their nature with common courts[167].

2. In the vast majority of its rulings, the Constitutional Court of the Czech Republic has preferred the contractual doctrine by qualifying arbitral proceedings as a type of settlement (composition)[168]. Only in a single decision, which it rendered last year, did it refer to arbitration as an alternative to litigation and clearly adopted the jurisdiction doctrine[169]. In the former cases, it rejected the possibility of review also on the grounds that the parties had voluntarily "extricated" themselves from the powers of the common courts.

3. Suits filed with the Constitutional Court have so far been rejected. The grounds for rejection mostly lay in failure to use all other remedies[170], the non-public nature of arbitral awards or reasons related to the special nature of arbitration (cf. above).

II. Arbitration and the European Convention for the Protection of Human Rights and Fundamental Freedoms

[167] Award IV. ÚS 174/02, Award II. ÚS 2164/10
[168] Award I. ÚS 533/10, Award III. ÚS 1425/09
[169] Award I. ÚS 3227/07
[170] Award III. ÚS 460/01

The Czech Republic became a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1991 (the Convention came into effect on 1 January 1993). The aspects of the relationship of "arbitration v. the Convention" lay outside the focus of attention for a long time. Older textbooks and courses dealing with arbitration completely ignored this issue. There were several reasons for this.

Earlier opinions were based on the concept of **full direct inapplicability** of the Convention to arbitral proceedings. Application of the Convention was dismissed on a number of grounds.

One train of arguments pointed out that an arbitral tribunal is not a court in the sense of the Convention and arbitration is therefore not covered by its scope. The Convention thus applies only to the State and its bodies and not to arbitrators.[171]

Another line of argumentation relied on the concept of "waiver of the rights contained in Article 6[172] of the Convention". Today the strict form of this argument is generally dismissed.[173] In interpretation of Article 6, the individual authorities tend to discuss which rights can be waived by an arbitration agreement and which not. And may we add – which rights can be waived tacitly and which knowingly. This debate is now augmented by the new approach to consumer arbitrations as arbitrations involving certain elements of protection. There can be no doubt that, if a certain party waives the right to judicial protection by entering into an arbitration clause, this party cannot thus waive its right to fair hearing of its case.

Arguments against application of the Convention also rely on the fact that the Convention is binding on States, specifically its contracting parties. They are deemed responsible if they recognise certain conduct as permitted although it is at variance with the law. At the same time, the Convention establishes a high standard of contractual freedom in waiver of rights.

In terms of international arbitration, we could also mention the difficulty of identifying the State to which the activities of an international arbitral tribunal can be attributed and the question of whether the country in question is, in fact, a contracting party to the Convention. Indeed, problems related to establishing the forum, de-localisation of proceedings, etc. can substantially complicate the qualification of the relationship of the country to the proceedings.

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[171] Jarrosson, C.: L'arbitrage et la convention europ´eenne des droits de l'homme. Revue de l'arbitrage, 1989, 579 p. Poudret J.F., Besson, S.: Comparative Law of International Arbitration,. London : Sweet & Maxwell, 952 p. ; Lew, J. D. M., Mistelis L. A., Kröll, S. M.: Comparative International Commercial Arbitration. The Hague : Kluwer, 2003, 953 p.

[172] Article 6 – Right to a Fair Trial

Para 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[173] Jaksic, A.: Procedural Guarantees of Human Rights in Arbitration Proceedings. Journal of International Arbitration, 2007, No. 24/2, p. 161. In similar terms, cf. also Robinson, W., Kasolowsky, B.: Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings? Arbitration International, 2002, No. 18/4, p. 464.

Of course, these considerations are not relevant for tribunals that *ex lege* replace common courts ("obligatory arbitration"). This was so, for example, in cases concerned with obligatory employment arbitration (*e.g. 37/2002, Menshakova v. Ukraine*) and other types of obligatory arbitrations (23465/03 Agrokomplex v. *Ukraine*). In this respect, we refer only and exclusively to those cases where there exists an arbitration clause and the arbitration as such is an alternative to litigation. Cases where arbitration tribunals are part of the justice system are not included. These cases are treated in the same way as court disputes and the European Convention is directly applicable to them *(8588/79, 8589/79 Bramelid and Malström v. Sweden*).

Recent studies show, and the decisions adopted confirm, that the earlier opinions on inapplicability of the Convention for the Protection of Human Rights and Fundamental Freedoms to international arbitration (meaning non-obligatory) are not absolutely unambiguous – there are certain overlapping aspects. This is true especially of the "indirect impact" on arbitration. The latest decisions concerning the Czech Republic have actually quite a "deep" impact on arbitration *(e.g. 1643/96 Suda v. Czech Republic* and *7398/07 Chadzitaskos and Franta v. Czech Republic; among others, also 19508/07 Granos Organicos Nacionales S.A. v. Germany*).

The ruling in Suda was concerned with the aspects of arbitration in relation to exercise of the rights of minority shareholders. The applicant was a minority shareholder of a joint-stock company where the general meeting decided to wind up the company and transfer its assets to the main shareholder. The contract between the joint-stock company and the main shareholder established the value of the shares for their repurchase from the minority shareholders, doing so on the basis of an expert report. In addition, the contract contained an arbitration clause that exempted review of the settlement from the jurisdiction of the common courts. The possibility of undertaking review proceedings before arbitrators was permitted by the Czech Commercial Code in the wording effective at that time. The arbitration clause granted the decision-making power to arbitrators included in a list drawn up by a legal entity, specifically a limited liability company. Each of the parties to the dispute was to choose one arbitrator and, in turn, the two arbitrators would appoint the presiding arbitrator. The applicant resolved not to avail himself of the possibility to initiate arbitration and, instead, claimed review of the settlement before a common court. The court discontinued the proceedings with reference to the existence of the arbitration clause; this decision was later upheld both by the appellate court and subsequently by the Constitutional Court of the Czech Republic.

The European Court of Human Rights (hereinafter the "Court") admitted that Article 6 of the Convention does not require that the right of access to justice be exercised before a common (governmental) court that is part of the judicial system of the given country. It noted that, as indicated above, arbitration obligatorily required by the law could be deemed to be litigation in the sense of Article 6. Furthermore, Article 6 in no way prevents the establishment of arbitration tribunals and waiver by the parties of the right to a court trial in favour of arbitration. This is true provided that the waiver is free, admissible and unambiguous. The Court also stated that, in the case at hand, where the arbitration agreement had been entered into between a joint-stock company and the main shareholder, the applicant himself had not waived the possibility of referring the dispute to a common court and thus had not waived the guarantees afforded by Art. 6 (1) of the Convention. The dispute was also not concerned with obligatory arbitral proceedings. By turning first to common courts, the applicant gave the latter the opportunity to assess the validity of the arbitration agreement. Given that the common courts had confirmed the validity of the arbitration agreement and had discontinued the proceedings, the applicant was forced to pursue his case in arbitration. Had the applicant done so, he would have risked, in the

Court's opinion, that the arbitrators entered in the list drawn up by a private company (and enforced on the applicant) could make a decision on the merits of the dispute. According to the Czech laws, a possible suit filed by the applicant with a view to cancelling such an award would be limited solely to procedural aspects and could not relate to questions of fact and law. The Court therefore concluded that the proceedings before arbitrators in the case at hand did not comply with the basic guarantees required by Art. 6 (1) of the Convention and infringed the applicant's rights to a fair trial.

And may we add that the Court also took into consideration that the provisions of the Commercial Code allowing for resolution of these disputes in arbitration had been repealed in the meantime. The explanatory memorandum for the given amendment indicated, among other things, the opinion of the Constitutional Court that, while review of settlement in arbitration was not directly at variance with the Constitution, this nevertheless was a questionable legal regulation. In its decision-making, the Court also took into account Decision No. 637/05 of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, where the latter concluded that an arbitration agreement between a company and its main shareholder was not binding on third parties including minority shareholders.

In a later decision in Chadzitaskos and Franta v. Czech Republic, the Court referred to its ruling in Suda, which it considered the basis for a decision in this joined case in view of the similar facts of the two cases. This again involved settlement with minority shareholders who filed a suit with the common courts in spite of the existence of an arbitration agreement between the company and the main shareholder. The Court noted that the case at hand turned on the question of whether the applicants had access to proceedings that would provide the necessary procedural guarantees of effective and fair resolution of their dispute. The proceedings were to be pursued before arbitrators chosen from the list kept by a private company and according to the rules issued by this company. The arbitrator was to be chosen by the private company, where the criteria for including a certain person in the list of arbitrators and the requirements on the qualifications of the arbitrators were unknown. The hearing was to be closed to the public and, moreover, the tribunal would not be established by law. The Court reached the conclusion that a situation where private proceedings pursued by private natural persons according to the rules stipulated by a private company did not comply with the requirements for a fair trial, including independence and impartiality of the person rendering the decision. This shortcoming could not be remedied by the substantially limited court review.

The Court stated the above in a situation where the Convention itself does not refer to arbitration. The impact of the Convention on arbitration is a question that must be answered by interpretation of the Convention. The discussion is concerned particularly with the impact of Art. 6 (1).Today it is undisputed that the Convention applies to all auxiliary and control procedures that take place before State courts *(e.g. 10881/84, R. v. Switzerland)*. As far as arbitration is concerned, the shift in opinion which has occurred in respect of this question involves particularly the two following aspects:

- firstly, the State may not enforce an arbitral award that would grossly breach the requirements of Art. 6 (1);
- secondly, the State must adopt measures as to guarantee the requirements of the said article also in arbitration.

A debate could also be held on the impacts of other articles, particularly Article 8 (protection of private correspondence) and Article 1 of Additional Protocol No. 1 (peaceful enjoyment of property).

The shift that has taken place over the last decade in the mutual relationship between the Convention for the Protection of Human Rights and Fundamental Freedoms and arbitration is quite significant. A major breakthrough lies in the fact that basic limits have been established for application of the Convention. Future discussions will tend to focus on the practical application of individual articles and principles.

III. Conclusion

In conclusion, we can make two brief comments. The first is concerned with the relationship between arbitration and human rights. While it is true that, by execution of an arbitration agreement, the parties waive the right to judicial protection, it is not true that they waive the right to a fair trial. And moreover, it cannot be true that, in case of waiver of judicial protection, the State may totally neglect the right to a fair trial. The questions of consumer protection in the Czech Republic and the outrageous cases that occurred in that area can be used as an example. However, it is worth noting that an amendment to Act No. 216/1994 Coll., on arbitration, reflected the requirements of European law, but did not take into consideration the Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, the Court's case-law clearly accentuates the requirement that the contracting parties secure the basic principles of fair trial, not only in proceedings before the common courts or arbitration tribunals with obligatory jurisdiction, but also before arbitration tribunals chosen voluntarily by the parties. This requirement applies not only to the process as such, but also to the procedure in waiving protection of rights before common courts and referral of this protection to arbitration. The consequences in instances where the State fails to meet such requirements were indicated by the above-described rulings.

The second conclusion relates to teaching of this subject. It is clear that teaching the subject of arbitration cannot be restricted only to regular topics, such as the doctrines of arbitral proceedings, analysis of the process of arbitration, methods of decision-making on merits of a dispute or the mechanism of recognition and enforcement of foreign arbitral awards. We should not neglect the overlapping aspects of commercial contractual relationships, arbitration and protection of human rights which affect a number of the aforementioned areas:

- the possibility of executing an arbitration agreement and impacts of an arbitration agreement on its parties and third persons;
- the duty of arbitrators and of the State to ensure equal treatment of the parties and adhere to the principles of fair trial in pursuing arbitration;
- reflection of the two preceding points in the aspects of enforcement of an arbitral award that was rendered contrary to the said principles; the possibility of cancelling such an award or refusing its recognition, including the argument of its variance with the public order (public policy);
- reflection of these aspects also in cases where the national laws do not include an explicit regulation.

Teaching Human Rights and the Role of Lawyers in Constitutional Democracy

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I will describe the challenges that, in my perspective, the teaching of human rights confront in Argentina and I will try to offer anaccount about how they can be overcome.

In order to be brief, and surely unfair with the Argentine legal system, I identify three very relevant obstacles that stand before the possibility of teaching human rights effectively. However, I believe all the three obstacles can be overcome by implementing the correct legal education reform strategies.

The first obstacle is related to the fact that the Argentine legal system belongs predominantly to the civil law tradition, which is reluctant to accept limits to the soverignity of parliament. I say predominantly, because the Argentine legal system is an hybrid one that combines many elements from civil law tadition with a constitutional law structure rooted in the American model, unlike most continental law systems from other countries. In this sense, the Argentine legal system, since its origins, has considered its written Constitution to be supreme and its courts were always charge with the responsibility of deciding when laws are constitutional by aplying a judicial review model inspired in American law. Thus, every judge has the power to make the decision of whether a particular statute, or an executive decree or regulation, complies with the Constitution and if they does not, not to apply them to a particular case brough before the court. Although it seems from my description of the system that the Constitution is supreme, in fact its supremacy is not so absolute as it appears to be. The strength of the civil or continental law tradition has led most scholars, judges and lawyers to believe that the Civil Code, not the Constitution, is the supreme law of the country. Indeed, out of the 40 or 50 courses that conform the law degree program in most Argentine Law Schools, only one or two of them are devoted to the study of the constitutional text and, in very few cases, of the constitutional interpretation that courts articulate in their decisions. Most of the remaining courses focus on the study of the Codes and the statutes that supplement it, mainly on civil law in general, family law, commercial law, labor law and criminal law. The interesting fact is that, probably with the unique exception of criminal law, none of the other courses pay enough attention, if any, to the relationship between those areas of law and constitutional law. When I ask my graduate students how many cases in which civil law and constitutional law were in conflict where studied or discussed in their civil law courses they say none or almost none. This is not only because their teachers overlook the connection between constitutional law and civil law, but mainly because judges thiemselves are not very much aware or concerned by the relationship. It is true that until very recently, we could find almost no case in which not only lower courts, but not even the Supreme Court have dare to make a decision in which a provision of the Civil Code was declared un constitutional.

A constitutional democracy such as the Argentine one, is a political system in which the Constitution functions as a limit to the democratic will of the majority. Thus, constitutional rights and freedoms should be seen as triumph cards that can stop majorities from achieving their will when it goes against those rights and freedoms. The Civil Code is not the

supreme law of the country and it is limited by the rights and freedoms that were established in the Constitution, and judges have the duty to enforce them. Lets see an example from family law. The Argentine Civil Code was passed in 1864. Since then, it has established a ban on divorce. This ban was included because of the influence of catholic canonic law in our legal system. On the other hand, the Constitution protects the right to personal autonomy, understood as the freedom of the individual to design and carry out the life that she decides to pursue for herself. This constitutional freedom would oppose no obstacle for the person to undo a marriage and to marry again with a different person if that is what she wants. This protection conflicts with the Civil Code and its ban on divorce. It was not until the early 1980s that the Supreme Court decided a case in which that provision of the Civil Code was declared unconstitutional and inapplicable to the parties that brought the case. It took the judiciary 120 years to confront the Civil Code and to rule against its mandates. Something similar has happened recently with the provision that banned marriage between two persons of the same sex. A few years ago, Congress, based on constitutional arguments of equality and autonomy, passed a law modifying the text of the Civil Code in order to allow for same sex marriage. For more than a century these constitutional discussions, that are mainly about rights and freedoms have been absent from our law schools.

The second obstacle is about the difficulties for international human rights law to become an effective limit to the power of the national state. After the Second World War, an important part of humanity reached a consensus about the need to design a global system that prevents the world to witness again the atrocities that took place in Europe and Asia in the mid of the 20th Century. International Human Rights law is the manifestation of that consensus. However, our government, as well as many other governments in the world, have not taken international human rights law seriously, not even the judiciary. Again, as it happened with constitutional law, international human rights law was let outside the classrooms. There was indeed always one an only one and separate course on international law that included some classes on international human law, but international human law was not allowed to enter all the other classrooms as if decisions made on criminal law or family law would not be ever in conflict with the international commitments of our state. After the dictatorship that ruled Argentina between 1976 and 1983 there was a revalorization of international human rights law in our law schools, as if we became aware that it was an effective antidote for preventing that the atrocities of the past could happen again. Young lawyers trained under democracy and NGOs staffed with these professionals begun in the mid 1990s to bring arguments before our courts based on international human rights treaties. Judges, forced by these arguments as well as by a constitutional reform achieved in 1994 that made international human rights law as much the supreme law of the country as constitutional law was considered to be, little by little introduced in their decisions the values and the ideals of those treaties.

The third obstacle is about legal teaching itself. Again, mainly as a consequence of the dominance of the civil law tradition, legal education has been always understood as a process by which professors who are supposed to "know" the law transfer their knowledge to passive students that receive this knowledge acritically. Lectures instead of legal discussions were the rule within the classroom and practical training was formal, strictly procedural and dry. Students at law school did not get involved in the creative process of building an argument for defending the client's rights and freedoms. Law was a text whose meaning was self-evident, although this meaning was articulated by a teacher, although she presented her description as non-value based. Additionally, recognizing that lawyers could engage in a discussion about what the law is would undermine the very understanding of legal education as mere transmission of information. Finally, law could not be "used" for advancing the rights of the vulnerable or for achieving social change because that would

imply to assert that law's meaning is not so much self-evident and this "use" would equal to manipulation of the law. In sum, this context might explain why we cannot find public interest law clinics almost anywhere in countries of the civil law tradition, and in Argentina in particular.

The teaching of human rights or of constitutional rights and freedoms has been if not absolutely absent, at least very marginal in Argentine history of legal education. The three obstacles that I have just presented seem to explain why it has happened. Before referring to posible strategies to overcome these obstacles, I think we should focus briefly on the question that seems to be implicit in those strategies -- why is it important to teach human rights in our law schools? Human rights, civil rights and freedoms are the limit that democratic majorities cannot surpass. Since the Carta Magna in 1688, through the American Constitution of 1787, the French Revolution of 1789, the constitutional movements in the post-colonial times in different regions in the 19th Century and in Latin America in particular, the constitutional law making processes from the post-colonialism of the 20th Century in Africa and parts of Asia, and ending with the new constitutions from Eastern Europe after the fall of the Berlin Wall or the current events in North Africa and the Arab region, rights were and are the only hope for those who do not share the power with the majority to prevent it from harming them. True, they are not always as effective as we would wish, but it is sometimes the only intrument that is left against the powerful, including the powerful who are democratically legitimate. Even strong democracies when facing tremendous threats suchas terrorism, pervasive urban crime, or even corruption or natural catastrophes have feel tempted to supress human rights in order to fight those threats or at least to please broad majorities of people claiming for some sort of tranquilizing action. The only or at least the last barrier against abuse of power are the ideals embedded in the rights recognized in our constitutions and treaties. They are crucial in the processes by which our executives and legislatures shape policies of all kinds and even more fundamental when judges enforce them against the political branches of government, or even other particular individuals, when those policies are in conflict with those rights. The discussion that takes place in those processes in the Executive, the legislature and the courts is mainly, although not only, articulated by lawyers. The quality of our lawyers' education on human rights will impact in the policies or the decisions that our courts make about human rights. If our lawyers, who will become, some of them, legislators or bureaucrats, or our judges, who all of them are lawyers, do not see the way in which our Civil Code should be governed by the principles and ideals that are expressed in our rights, all provisions in our statutes that are against human rights will remain untouched and will be enforced.

Regarding the importance and the relevancy of human rights, civil rights and freedoms for our legal education, I believe that two maybe simple measures, although not easy to be implemented, could greatly improve the performance of our lawyers in contributing to the strengthening of human rights in our democracies. The first measure would be to make constitutional law and international human rights law not only an important but separate subject or course in the legal training process of future lawyers, but a content that runs accross all subject matters that are taught in our law schools. We have to make our civil, commercial and criminal codes to dialogue with our constitutions and human rights treaties. If we are successful in this enterprise, we will sooner or later witness how our judges will make these legal texts dialogue in their decisions. The second measure would be to introduce public interest clinical legal education in our law schools. This pedagogic experience allows students to experience their responsibility in the handling of legal concepts and theories and provides them with the necessary sensibility about their role as lawyers in the collective building of the meaning of the law. The good news is that these

ideas have already contaminated the status quo of our law schools, and thus it is just a matter of making those incipient actions to grow.

University of Waikato
Te Piringa - Faculty of Law

Bradford W. Morse
Dean of Law

Overview of University

The University of Waikato (UOW) is located in beautiful Hamilton, New Zealand. Hamilton is the 4th largest city in the country approximately 110 kms [65 miles] south of Auckland. It was officially opened in 1964 by Governor-General Sir Bernard Fergusson. The motto of the University in te reo Māori, 'Ko Te Tangata' translates into English as 'For the People,' which captures the unique position of the University of Waikato in adhering to the original partnership relationship between the Indigenous peoples of Aotearoa – the Māori – and the British Imperial government reflected through the Treaty of Waitangi signed on 6 February 1840 that founded the new society of New Zealand. The UOW has the highest percentage of Māori students in the nation [over 20%] and includes within its 7 faculties the leading School of Māori and Pacific Development (SMPD). The UOW's decision-making structure also includes Te Rōpū Manukura, which contains representatives of all the Māori iwi [or tribes] from the central North Island.

UOW is based in New Zealand's heartland – the Waikato Region – on 65 beautiful hectares in central Hamilton, with small lakes and numerous walking trails and sporting facilities. There is also a small satellite campus in the city of Tauranga on the coastal Bay of Plenty. Our comprehensive university includes the Faculty of Arts and Social Sciences, Faculty of Computing and Mathematical Sciences, Faculty of Education, Faculty of Science and Engineering, Waikato Management School, the aforementioned SMPD and the Faculty of Law. It attracts over 12,500 students per year, with approximately 2000 of whom come from overseas.

Overview of the Faculty of Law

Te Piringa – Faculty of Law is committed to delivering distinctive degree programs through teaching and research at the highest international standard. Fundamental to achieving this goal is the capacity to provide an exceptional undergraduate degree as the key core activity of the Faculty, which continues to reflect the original rationale for its existence. The University launched its law school in 1991 with three foundational objectives: (1) to focus on teaching and writing about the law in its broader socio-economic, political, cultural and historical context rather than a mere collection of black letter rules; (2) to emphasise the acquisition of those professional skills essential to effective practise as a lawyer, such as dispute resolution, negotiation and advocacy; and (3) truly to respect the Treaty of Waitangi and its commitment to partnership through the design of its curriculum and the conducting of staff research so as to advance the appreciation of a genuinely bijuridical legal framework that draws upon the best of tikanga Māori and European law to forge a distinctly New Zealand jurisprudence. These key objectives remain points of distinction that make Te Piringa unique in legal education throughout Australasia. While other law schools in the region have come to accept the wisdom of Te Piringa's approach regarding its first goal, none have yet met the same level of commitment and creativity available in its curriculum and teaching style. Similarly, the Faculty of Law remains the leader by far in its commitment to promoting professional skill development as well as in attracting and retaining Māori law students and staff along with encouraging a bijuridical approach to legal education and research.

The Faculty's name in te reo Māori is "Te Piringa," which means the coming together of people. It was given to the Law Faculty by the late Te Arikinui Dame Te Atairangikaahu, the Maori Queen, when the Faculty buildings were opened by Tainui *tohunga* using Maori ceremonial *karakia* in 1990. The School of Law renamed itself in May of 2010 as Te Piringa – Faculty of Law to embrace the honour that had been bestowed upon it 20 years earlier as well as to stress how peoples coming together is the best vehicle through which to learn and to share knowledge.

The Faculty is further committed to enhancing and expanding its graduate programmes in order to become recognised as a national and international leader in offering research-led advanced instruction in key subject areas vital to 21st Century legal professionals and society at large. Reaching this objective requires the further entrenchment of an overarching research ethos within Te Piringa. The research profile of the Faculty is crucial to expanding our national and international reputation in our academic subjects, and in underpinning the quality of our teaching programmes. Te Piringa seeks to become a top choice for law graduates from throughout Aotearoa and overseas to pursue their LLM and PhD degrees in areas of our expertise. The law school already possesses the largest PhD program of any law school in New Zealand.

Graduate Destinations

Most of our Law graduates are employed in NZ in private practice, government service, and in-house counsel to corporations and iwi, however, a significant number do not enter the legal profession and instead use their LLB or postgraduate degree in business and other governmental roles. Some of our graduates also pursue a career in academia. Over 50% of law students are simultaneously pursuing a conjoint degree in another faculty. Te Piringa has recently been benefiting from an increase in International students in its undergraduate LLB degree. As a result of this factor, along with the shift of more and more NZ lawyers toward working overseas, it is expected that an increasing percentage of Te Piringa graduates will be seeking employment abroad, which has implications for curriculum design and the importance of international reputation and connectedness. The development of an e-Newsletter in 2011 has begun to assist the Faculty in reconnecting with many alumni and it plans to increase its efforts in this regard.

Student Profile

The approximately 1000 law students provide a very different picture than that in attendance at other law schools in New Zealand. Roughly 25% of the students are Māori and a further 9% are from the Pacific Islands. The remaining two-thirds come from many different ethnic and cultural backgrounds whose family trace their ancestry in New Zealand to the early 1800s, who are far more recent immigrants or who come directly from overseas as students. Similarly, their ages are far more diverse than the norm for NZ law schools as almost 2/3s are mature students.

Research Centres and Publications

The *Waikato Law Review* (WLR) was launched in 1993 as an annual publication (with occasional added special editions). More recently it has been restructured through the creation of an Editorial Advisory Board of pre-eminent legal scholars and jurists along with developing an internal editorial committee and appointing student associate editors. Te Piringa also publishes the *Yearbook of New Zealand Jurisprudence*, which is devoted to encouraging attention to New Zealand as a bijuridical country that should draw upon the best of traditional Māori and imported law in meeting the needs of a modern nation.

Our Faculty has a significant focus on environmental law, natural resources law, and energy law, both in New Zealand and internationally. Its specialists constitute the largest group of

legal academics in the field in New Zealand. Members are active in teaching and research on the law concerning environmental protection, biodiversity, climate change, energy efficiency, renewable energy, geothermal, heritage conservation, pollution control, water allocation, natural resources management, carbon capture storage, and the position of Maori and other indigenous peoples in relation to the environment. The Faculty works in an interdisciplinary manner with researchers in related fields at the University of Waikato and internationally.

The Faculty also offers a broad array of environmental and resource law courses at the undergraduate and postgraduate levels. The Centre for Environmental, Resources and Energy Law (CEREL) was established in 2011 and has already succeeded in attracting students (undergraduate, LLM and PhD) with an interest in the field. It also welcomes the interest of academics in research visits or in the teaching of short intensive courses.

Te Mata Hautū Taketake - the Māori and Indigenous Governance Centre (MIGC) is the latest research centre within Te Piringa. The aims of the Centre are to:

- Meet currently unmet demands for cutting edge quality research on Māori governance best practice models;
- Build a body of knowledge and wisdom to help improve Māori governance;
- Report on Māori governance best practice models, practices and institutions;
- Provide practical training for Māori and non-Māori who work in or with Māori governance organisations;
- Learn from Indigenous governance experiences globally as well as sharing Māori successes;
- Work with Māori to evaluate and report on their current governance effectiveness and enhancement for the future; and
- Seek collaborative research partnerships with Māori and other key stakeholders on Māori governance.

MIGC has already attracted important external support from government and key Māori leaders. It offers a Postdoctoral Fellowship and PhD Scholarship program as well as a Visiting Scholar program.

International Connectedness

The Faculty of Law has fully embraced the University's goals of international connectedness and building an international reputation for excellence in both teaching and research. Te Piringa became a member of the IUCN Academy of Environmental Law in 2010 and will host its annual Colloquium in 2013 in partnership with the University of New England, School of Law, which will be the first time it has ever been convened in New Zealand and only its second time in Oceania.

The Faculty of Law is also one of two members from New Zealand in the International Association of Law Schools (IALS). Te Piringa was recently featured in a 2011 issue of the Newsletter of the IALS.

Our students participate annually in law school competitions in Australia and occasionally further afield. Our involvement in international law school competitions will increase significantly over the next few years aided by the appointment of a full-time Director of Clinical Legal Education and Competitions in January 2012.

The Faculty has formed a number of new partnerships with Universities in Germany (Bremen, Muenster and European Business University), Canada (Ottawa and Windsor), USA (Oklahoma), China (Wuhan, Shanghai International Studies University and Tongji) and Fiji since 2010, which build upon previous exchange and study abroad opportunities in Europe and the USA. More such agreements that facilitate student and staff exchanges, research collaborations and recruiting FCIs are expected over the next few years, as will overseas funded research projects. These partnerships are also intended to encourage overseas scholars to visit Te Piringa while on study leave, provide similar opportunities for Te Piringa staff and to promote more collaborative research.

The Faculty further benefits from a very diverse academic staff. Almost half of the teachers are from overseas (Canada, China, Fiji, Iran, Ireland, South Africa, UK and USA) and a number are on editorial boards of international journals.

Conclusion

Te Piringa – Faculty of Law highly values its membership in IALS as we see this Association as a vital mechanism to promote critical interaction and knowledge sharing amongst law schools around the world as we all address the impacts and challenges of increasing globalisation. We welcome the dialogue that can occur through the Mysore Conference as well as in subsequent regional and annual conferences.