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THE PARADORX OF PRECISION FUTURE TRAJECTORIES FOR THE LINKAGE BETWEEN BUSINESS AND HUMAN RIGHTS

O PARADOXO DA PRECISÃO: TRAJETÓRIAS FUTURAS PARA A
LIGAÇÃO ENTRE EMPRESAS E DIREITOS HUMANOS

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Abstract

We are coming to a crossroads in the on-going project of linking human rights standards to business activity. The project can move along one of two different paths. One is to keep the commitment to human rights protection relatively general and programmatic. It calls for broad adherence to the standards but only enters into specifics reluctantly. The details of what is required of a business on any given occasion are often left to ordinary principles of management. On this first path, human rights principles open a door to victims, but do not guide them after they go through the door so that they can raise concrete objections to a piece of behaviour. Sometimes human rights law does regulate business actions at the required level of detail, but on this first strategic path these occasions will be rare. On the second, alternative, strategic path human rights play a far more detailed role in dealing with particular situations. This essay indicates several examples of such a role. It argues that the first path promises impasse between business and human rights advocates, and a severe loss of enthusiasm for the project on both sides. The second path is the one that will make a future for the linkage between business and human rights a viable one, ultimately capable of generating support from all who wish the project to move forward and to gain the momentum it needs.

Keywords

Human rights. Business. Sustainable development. Competition among basic rights. Weak consensus. Strong consensus.

Resumo

Estamos chegando a uma encruzilhada no projeto, em andamento, de ligação de direitos humanos à atividade comercial. O projeto pode mover-se em um dos dois caminhos diferentes. Um deles é manter o compromisso de proteção dos direitos humanos relativamente geral e programático, que exige ampla aderência aos padrões, mas entra em detalhes apenas com relutância. Os detalhes do que é demandado das empresas em dada ocasião são normalmente deixadas aos princípios habituais de gestão. Nesse primeiro caminho, princípios de direitos humanos abrem uma porta às vítimas, mas não as guiam após cruzarem a porta de maneira que possam levantar objeções concretas a determinado comportamento. Algumas vezes, leis de direitos humanos regulam atividade empresarial no nível exigido de detalhe, mas nesse primeiro caminho estratégico essas ocasiões serão raras. Na segunda, estratégia, alternativa, os direitos humanos cumprem um papel bem mais detalhado ao lidar com situações particulares. Este ensaio indica vários exemplos de tal papel. Argumenta-se que o primeiro caminho prenuncia um impasse entre empresas e defensores de direitos humanos, bem como uma perda severa de entusiasmo pelo projeto em ambos os lados. O segundo caminho é o que torna viável uma futura ligação entre empresas e direitos humanos, capaz de gerar apoio de todos que desejam que o projeto avance e ganhe o impulso que precisa.

Palavras-chave

Direitos humanos. Empresas. Desenvolvimento sustentável. Competição entre direitos básicos. Consenso fraco. Consenso forte.

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1. INTRODUCTION

We are coming to a cross-roads: fundamental choices have to be made about the direction to be taken for the linkage between business and human rights if it is to become convincing. While there is growing support for this linkage among all parties – business and human rights advocates – this is shadowed by the persistent inability to find genuine consensus on the concrete content and weight to give to human rights norms in trying to solve particular problems raised by business activity. My aim here is explore this tension and to see how steps forward might deal with it.

2. A CONSENSUS BUILT ON SAND

Until now a degree of consensus about the importance of human rights has been reached between business and its critics by the device of keeping things agreeably general. All sides may agree, for example, about the importance of respecting basic worker rights, or adequate access to water, or adequate protection from population displacement by business activity, but will often not agree on what counts as such a right.

The result is captured nicely in a recent critique of the way in which the UN's Sustainable Development Goals (SDGs). SDG's envisage a key role for business

“The SDGs are based largely on the hope that business really has hitched its wagon to the sustainability locomotive, and fear that a closer look might reveal that it has not. The resulting consensus – don't ask, don't tell – signals a temporary alliance of business enthusiasts and sceptics.”¹

The problem lies in what can be called **a paradox of precision**: the need to be more precise if human rights are to guide business and human rights advocates versus the fear that this attempt at precision will generate collapse of the consensus. We need greater precision but at the same time this can be an obstacle. In the face of this challenge, it is tempting to play for time – hoping that pragmatic compromise will over time allow the parties to come together more solidly than they are at the moment. However, the opposite might be true: the longer we try to temporize the more we risk losing the support of all sides. An uneasy business community on the one hand, will increasingly face a restive and disillusioned civil society on the other, and it is no solution to think that time is on our side. It is not.

3. POSSIBLE REACTIONS TO THE PARADOX OF PRECISION

The coming years will see development of several paths of action by both business and human rights advocates - which have already begun but which cannot be simultaneously pursued. Choices among them will have to be made.

3.1 AVOIDANCE

Some human rights advocates and their lawyers will stay away from human rights beyond their role in serving as a means of opening the door to addressing potential abuses in general way.

¹ State of Play: Business and the Sustainable Development Goals, Institute for Human Rights and Business (2015) p. 16

However, when the door opens, and one gets to litigation, then the parties rely on standard principles of law that develop independently of human rights standards. This is illustrated in cases in the UK recently. Major corporations, including Royal Dutch Shell, have been sued for massive damage to communities in the Niger Delta. No mention in the details of the litigation was made of human rights as contributing to the corpus of principles needed to decide the case. All was done - in a result that has so far provided a remedy for the villagers – without making use of human rights principles. Human rights here play a useful role in publicizing a problem, but thereafter risk losing some of their distinctiveness, being absorbed into general strategies on workplace, stakeholder management.

3.2 SELECTIVE ENGAGEMENT

Some of the parties will continue to selectively embrace human rights as concrete contributors to regulating business – but at the price of distance from core understandings of the rights in question. Human rights are made use of, but their content and force will be shaped in order to serve the strategic objectives of the parties. It is quite possible, for instance, that a company declares its adherence to ILO core principles governing freedom of association while refusing to accept the ILO's own interpretation of those principles, preferring the company's own.

3.3 FULL ENCOUNTER

A further choice can be made to rely on Human Rights as impartial protocols that are also more concrete than are general principles. This means relying more closely on interpretations in e.g. human rights treaty commentaries, and in regulations coming from global, regional or national legal jurisdictions. This, it is submitted, is the only viable path through the paradox of precision. The results will please those who win and displease those who lose in a concrete case that makes use of human rights principles, but the losers on any given occasion will see enough that they acknowledge as fair to make support for the framework compelling. To get us on this path calls for meeting the following challenges presented by the 'full encounter' option.

Coherent embedding: The issue of embedding the rights in the instruments and principles governing business is articulated by the UN Guiding Principles (GPs). The GPs aim to integrate respect for human rights in a wide range of substantive and procedural protocols along the chain of commercial decision making. However, the full potential of such inclusion will be sabotaged if the commitment to human rights is not sufficiently precise, knowing the confrontations that moving towards this precision will generate. The required precision concerns the appropriate weight to be assigned to the right. Here there is an ongoing risk of *inversion* – of giving human rights in a business context an interpretation that is the opposite from that which they receive outside of that context. Core human rights principles attach special weight to the rights, and only allow competing interests to override them in special cases, and then only where the means chosen among alternatives available have the least negative impact on these rights. At the moment, business is often adopting the opposite priority: human rights are welcomed into the corpus of company protocols, but often at the high price of adopting a version of such rights that has least negative impact on commercial objectives. The disillusionment from populations affected by this weakening of the promise of a human right can be intense. A recent example has arisen around the controversial Phulbari coalmine

project in Bangladesh.² This was designed to be an open-pit, surface exploitation covering a large territory, and 40 000 people are predicted to be displaced if the project goes ahead in its present form. 10 000 are due to receive alternative land while the rest of that displaced population – 30 000 people - is directed towards what the company itself admits is a precarious future in unfamiliar urban environments, furnished only with a cash sum that studies have shown is likely to quickly dissipate.³

When challenged before the OECD's UK National Contact Point to withdraw from the project because of its human rights impact, the company developing the mine, GCM, replied that to do so would lead its directors to fail to fulfill their fiduciary obligation to work for the benefit of the company's shareholders.⁴ While acknowledging the law's requirement that they 'have regard' for the impact of the mine on local communities, the company's directors shaped the scope of that duty through what they took to be the requirement that any such attention to social impacts must be given in a way that does least damage to corporate revenue. For this reason, they dismissed the call for a reduced initial size of the mine so as to give local populations more of an opportunity to adjust. That option, they argued, would go against investor interests, as it would reduce annual revenue, even though it would still leave the project profitable.⁵ Even if human rights are admitted in this reasoning along the lines advocated by the GPs, that insertion would still allocate human rights to a secondary role.⁶

Adequate precision in establishing the links between business and human rights cannot tolerate this result. Those around the world whose lives risk being upended by the dislocations demanded of them by business interests are entitled in turn to fidelity to the same weight and priority that human rights are traditionally assigned. They are entitled to the same level of protection wherever their human rights are threatened across the full spectrum of social concerns. There should be no exception to this demand when fixing the link between business and human rights. Their rights need to be given a level of precision that makes this possible.

4. RIGHTS COMPETITION

A strategy of full encounter with human rights requirements by business will have to deal convincingly with a further complication: competition among rival basic rights. These are competing claims between those in the population who gain and those who lose from a project within affected communities. It is different from the well-known tension between the desire of business to maximize commercial profit and the need to secure basic rights that may well reduce profit. Here, the group of those whose basic rights are at stake might be internally divided among themselves. For example, in

² OECD National Contact Point: a/ Initial assessment of complaint against GCM Resources Ltd; b/ Brief by the Essex Business and Human Rights Project (On file with the author)

³ Summary of the Report of the Expert Committee (REC) to Evaluate Feasibility Study Report and Scheme of Development of the Phulbari Coal Project, (2007) p. 7 On file with the author.

⁴ GCM Resources plc, 'Response to Complaint under the OECD Guidelines for Multinational Enterprises' para.177, at pp. 94-95.

⁵ OECD National Contact Point: a/ Initial assessment of complaint against GCM Resources Ltd; b/ Brief by the Essex Business and Human Rights Project (On file with the author)

⁶ See elaborations of this point under 'directions of adjustment' between rights in Sheldon Leader: 'Collateralism' in R. Brownsword (ed) *Global Governance and the Search for Justice* (Hart Publishing: 2005) p. 53-67; "Three Faces of Justice and the Management of Change": 63 *Modern Law Review* p. 55-83 January 2000, 'The Place of Labour Rights in Foreign Direct Investment' in *Global Labor and Employment Law* ed A. Morris and S. Estreicher (Kluwer 2010) p. 579 – 596; 'Human Rights and International Trade' in *Understanding the World Trade Organization: Perspectives from Law, Economics and Politics* ed. Macrory, P. et al (Springer: 2005) pp. 664-695

the Phulbari situation those who are in the immediate vicinity of a mine may well find that they have lost their community and livelihood. However, they might be confronted by an intense demand by those in the country at large for the social and welfare benefits that the mine might bring, as less expensive energy helps in the decisions to build badly needed schools and hospitals. At this point, those companies directing projects with such impacts are often tempted to take the side of those in the population who will gain at the expense of those who will lose. They are attracted, as they are in Phulbari, by the fact that a gain in human rights satisfaction from better schools and hospitals for some also matches a gain for their own profitability.

However, here again human rights principles call for greater precision. It is a well-established feature of respect for economic and social rights that where the gain to some in the satisfaction of their rights is at the expense of loss to others, then this trade-off must be strictly controlled. The principle of 'non-retrogression' in classic human rights standards does not allow such losses, even when the gain is to the basic rights of others, where the loss is imposed on the core of a human right possessed by those called on to sacrifice.⁷ One cannot push some to the wall, depriving them of minimal access to the means of long-term survival, even when the gain to others is substantial. Where, on the other hand, those who lose are displaced from by part but not the whole of their basic right, such as losing part of their land but left a remainder that does allow the core element of their right to e.g. livelihood to continue, then they are still entitled that the project displacing them takes the least damaging course available.⁸

Once again, this is a level of precision demanded of those who make use of the apparatus of human rights. It is no longer good enough for business – and the state - to point to the social gains for some in the population as a reason for imposing losses on others. Classic human rights principles demand more exactitude.

5. SPECIAL DEMANDS FOR THE MOST VULNERABLE

Along with the need to assign the appropriate weight to a human right as it competes with rival human rights, the call for greater precision in linking business activity to human rights makes a further demand: that the needs of the most vulnerable be attended to. The UN Sustainable Development Goals, for example, make clear demands that the most vulnerable in an affected population need special attention. If business is to take this demand seriously, it can sometimes require solutions that take away not only from the best-off but also from the middle range of those affected in order to give more to the worst-off. This is an issue to be faced when access to core essentials, such as water, needs to be provided. To achieve fair access may well require reducing the supply to those in the community who are best provided for in order to provide more for those less well-off. However, within the latter group is a sub-group of those who have even less, and for whom special provision has to be made. A recent example arises in the provision of water for displaced persons such as refugees. If water is supplied to a community by private commercial providers, these

⁷ See the application of the non-retrogression principle corporate activity in the EBHR brief in the Phulbari case supra n.3

⁸ For an example of a human rights based analysis of displacement, insisting that projects must follow the least displacing alternative, see the report by the World Commission on Dams. 'Dams, Displacement, Policy and Law in India'<http://siteresources.worldbank.org/INTINVRES/214578-1112885441548/20480074/DamsDisplacementPolicyandLawinIndiasoc213.pdf>

providers may be called on to meet that urgent need. This example is one within a large family of such cases in which business is called on to pay particular attention to the most vulnerable. It colors the obligation of pharmaceutical companies in designing strategies to provide access to their medicines to the worst off within a group of those susceptible to disease; it affects the contours of the right of access to adequate housing and other similar situations. Here again, the demand for greater precision in the business and human rights linkage is urgent. Business interests cannot legitimately shift the burden of the most vulnerable to the state: the failure of the state to act cannot leave the most vulnerable with no other route to their survival.

6. FACING THE COST OF BEING PROACTIVE

The urgent need for greater precision about human rights commitments for business makes itself felt here almost daily. Choices have to be made between the strategy of *avoiding* human rights damage and that of *compensating* for damage done to that right. Both, of course, are important features of implementation measures. However, it is always better that damage not happen rather than it be treated as a object to be paid for once it happens. The latter is never an adequate substitute for the former. Again, this point is easily forgotten in the pressure of negotiation about the features of a project: be it measures to avoid the failures of a dam leading to flooding, or be it measures to protect workers against risk of accidents in the workplace.. A general undertaking by a company designing a project to respect a given human right can easily and tacitly turn into an undertaking from the outset to choose to pay compensation as and when the damage happens – hoping that damage will not happen but being ready to pay in case it does– rather than engage in the more expensive and time consuming process of designing the project to avoid the damage in the first place. Business is often tempted to move too quickly to a compensation strategy, allowing damaging activity to go ahead with the promise that this will be paid for out of its resources. Full encounter with human rights principles refuses this path: giving priority to prevention of damage over compensation for damage wherever the choice between strategies is possible. This will be a particularly important choice to make in the design of project finance strategies. Lenders are often tempted to incorporate compensation rather than damage prevention strategies into their planning since this keeps project costs down.⁹

7. REMOVING HUMAN RIGHTS FROM COMPETITION AMONG STATES

A treaty on business is a vital element if the provisional consensus discussed here is not to crumble. It is wrong to think that treaty work can get in the way of adequate implementation of the UN GPs. The opposite is closer to the truth: without mutual reliance between states they will remain uncomfortable with taking unilateral implementing measures, such as National Action Plans that propose substantial innovations in policy, unilaterally. A promising route to taking early concrete steps in this innovating direction is to focus on regions and sectors of activity rather than search for

⁹ Leader, 'Risk Management, Project Finance, and Rights Based Development' in *Global Project Finance, Human Rights, and Sustainable Development*, Sheldon Leader, David Ong (eds.) (Cambridge University Press: 2011)

a global treaty capable of getting meaningful agreement between the Global North and South.¹⁰ Consider the example of the agreement among member states of the Economic Community of West African States (ECOWAS). ECOWAS has produced a directive for member states that can be seen as a regional and sectorial species of treaty on business and human rights.¹¹ The directive provides, as part of its formal commitment to these rights, that mining companies shall obtain free, prior and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations; and they shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle. The companies must also set up socio-economic development funds to which mining rights holders shall contribute by law for the development of post-mine conversion activities in the affected local communities.¹²

This directive, issuing from the treaty setting up ECOWAS, is precise and concrete enough in its requirements that member states are given the guidance about elements of corporate behaviour that must be targeted. The states can in turn re-shape – if necessary by further agreement among themselves – rules in their corporate law necessary to give effect to this primacy of human rights-driven requirements about appropriate levels of consultation and about the establishment of conversion funds for the locals affected. In particular the member states have a basis for turning back to their own corporate laws and amending them so as to hold parent companies liable for claims against subsidiaries arising from violation of these consultation and development fund requirements. That would not be a total collapse of the difference between parent and subsidiary liability, but it would be an intervention that was precisely targeted, integrating human rights requirements into a principle at the heart of corporate law.

8. CONCLUSION

If the link between business activity and human rights is to be taken seriously, then we need to avoid what was described at the beginning of this essay as the strategy of avoidance – where human rights are invoked to awaken an audience to the urgency of a problem but are thereafter left at the door of the courtroom when serious litigation begins. This reduces human rights to being useful campaigning tools on the side of advocates, and reduces them to being window dressing as companies formally declare their support for human rights standards. We also need to avoid what was described above as the strategy of selective engagement. This allows all sides to dip into the corpus of human rights norms and to select, like the best apples on tree, those features of these rights which best suits their cause while ignoring the rest.

We cannot afford an attitude of pragmatic waiting for human rights principles to link up effectively with business drivers. This will open the door to avoidance of the real impact of human rights principles by refusing to give them the required detail in the hope of preserving a fragile

¹⁰ For development of the points to follow, see Leader, 'Coherence, Mutual Assurance, and a Treaty on Business and Human Rights' in Surya Deva and David Bilchitz (eds) *Business and Human Rights: Exploring the Contours of a Treaty* (Cambridge University Press: 2017)

¹¹ ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, Article 16. http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf
See also discussion of the ECOWAS Directive in MINING AND HUMAN RIGHTS IN SENEGAL Amnesty International 2014 https://www.amnesty.nl/sites/default/files/public/p4350_senegal_mining_report_-_web_en.pdf

¹² Ibid Article 16 para 7.

consensus between business and its critics. Pragmatic delay will also fuel the temptation to selective engagement. Either of these two paths threatens to turn some to disillusionment with or to cynical manipulation of the promise that a human right can offer.

The third option of full encounter with human rights principles is a necessary step to take. It raises the requirements on business, but does not do so by a selective reading of human rights principles. The requirements described above are rooted in acknowledged demands that human rights make in the instruments, starting with human rights treaties that articulate them. One need go no further than these requirements for a foundation. They are demanding – but no more demanding than human rights are in those areas apart from business activity where they are deployed. There is no reason to think that when they migrate to the area of regulation of business that human rights should be relegated to a secondary, or collateral, role – as this threat was described. We have to embrace the urgent need for greater precision in defining the content and weight of human rights in this domain. The consensus that can be built around meeting this need will then be an enduring rather than a fragile one.

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