



POST SEMINAR REPORT

PILOT WORKSHOP ON HUMAN RIGHTS AND BUSINESS

28 JULY 2011

PRETORIA, SOUTH AFRICA.

The main objective of the seminar was to explore the role of big business in human rights protection and analyze ways of cooperative and sustainable partnership between public sectors and big business.

Corporations and enterprises could have greater power than governments. Therefore, they may breach human rights on a much larger scale. However, they could also substantially contribute to the promotion of human rights. Africa Legal Aid (AFLA) Conference was set to explore this very important topic that has not been given the attention it deserves.

The seminar was divided into four sessions:

- I. Introducing the topic of human rights and big business and the link between human rights and big business.
- II. Engaging the big business sector in human rights and justice development in Africa.
- III. Incorporating gender perspectives into human rights and business.
- IV. Addressing the role of civil society in human rights and business.

SESSION 1

INTRODUCING THE TOPIC OF HUMAN RIGHTS AND BIG BUSINESS AND THE LINK BETWEEN HUMAN RIGHTS AND BIG BUSINESS

Chair: Justice Dunstan Mlambo, *Chair, Governing Council of Africa Legal Aid, Judge
President, Labour Courts of South Africa*



Wal-mart has serious intentions of investing in South Africa. Why South Africa and not Somalia for instance? This is because the common feature in conflict ridden zones is the flight of capital and big business, as well as activity by civil society organisations.

Civil society formations are involved in a wide range of activities such as asserting human rights culture and observance. In addition, they encourage society at large to have confidence in the law and to ensure that the rule of law thrives. A thriving rule of law environment is ideal for investor confidence and attracts good business.

Most civil society formations at local levels operate on shoe-string budgets and it is a constant battle of survival. Why is this so? How seriously does big business take corporate responsibility?

The relationship between civil society and big business is a critical one. It is a relationship that needs to be matured. By the end of the conference, we should leave with workable ideas as to how we can ensure that human rights and big business coexist.”

Evelyn A. Ankumah: *Executive Director of AFLA*



The seminar is a Pilot seminar because the topic of discussion is still relatively new and has not been given the attention that it deserves. Human rights law has emerged and developed as a protection against states or governments. States and public organs have to respect and promote human rights. In reality, corporations and enterprises may have greater power than governments and may breach human rights on a much larger scale than governments. Hence there is a need to broaden the perspective. Business must respect and actively promote human rights. How can corporations be incited and even compelled to protect human rights? The topic is very delicate.

The core problem is the apparent dislike of human rights by corporations. Business tends to see it as a burden since human rights are seen as a public rather than a private task. Human rights may require investments that will not yield profits in immediately. In addition, they cost money and run counter to the very objectives for which corporations are established.

On the other hand, there is the view that human rights can be good for business. Due respect for the rule of law, for civil and political rights can help to create a stable environment for investment. Promotion of Economic, Social and Cultural Rights may increase the quality of the workforce. A favourable legal and human rights environment contributes to long term economic gains for enterprises. Human rights are also a tool and basic condition for creating a proper investment climate. For this reason, it is in their interests too to be persuaded to incorporate human rights.

In addition, governments should also be persuaded of human rights. Governments are closely linked to corporations because of the employment and revenue brought in. Governments have a duty to create jobs according to the right to work as articulated in numerous national, regional and international instruments.¹ For this reason,

¹ Article 6 of the International Covenant on Economic Social and Cultural Rights (ICESCR) for instance

governments are often inclined to back the corporations due to their dependence on the business sector. Therefore, governments should be convinced of the notion that human rights are good for business.

How do we fill the role of businesses in human rights? With regard to civil and political rights, the issue seems to be relatively simple. The passive or negative duty to respect these rights should be the same for businesses and governments. The picture is less clear for positive rights such as the Economic, Social and Cultural rights because they require active promotional measures. Corporations do not hold the same powers as governments as they are not democratic public interest actors created for the general good. It simply does not make sense to impose on corporations the same duties as on governments regarding the positive rights. At the same time, one cannot assert that because corporations are private rather than public parties, they have no duty to respect such rights. Within their spheres of influence, corporations ought to have human rights duties. What these duties entail is still arguable.

What methods can be used to address corporate responsibility and accountability for human rights? Do we choose a hard law or soft law approach? Should governments take the initiative or should self regulation be the alternative by businesses regarding human rights? Should the topic of human rights be tackled locally, nationally or internationally? International initiatives may be desirable, for instance the doctrine of limited liability. These are but a few of the questions that arise

NGOs and civil society have a huge role to play. We cannot leave it up to the business sector and governments to place the human rights and business agenda on the legal and political agenda. It is therefore for civil society and academia to push for further discussion of the agenda.

Peter Leon: *Partner and Co-Head Mining, Energy and Natural Resources, Co-Chair, Mining Law Committee, International Bar Association*

Peter Leon is involved in the International Bar Association's Model Mining Development Agreement.



According to Peter Leon, the Model Mining Development Agreement (MMDA) shows how the use of a best practice model for governance of natural resources could be a win-win situation for governments, investors and for mine communities. Often a major source of conflict is around natural resources.

In a nutshell, the MMDA is about a mining company's social license to operate. In other words, the basis on which a mining company can operate in a developing country. Mining is a very capital intensive, long term investment. A mining company needs to have stability and certainty regarding its investment, because it is a very high risk business.

It is also important that the investment for the country and communities is sustainable. Many African countries lack sustainability. Some do not have very sophisticated mining codes, while other countries, such as Tanzania, can have a mining code overridden by a mining investment agreement with the ratification of parliament.

Another setback is the lack of certainty as to what constitutes best practice in mining agreements. Thus the aim of the MMDA is to establish equity, balance and reasonableness regarding mining agreements. For the host government, there should be fair and reasonable resource rents such as taxation and the like. Regarding the community, there should be sustainability, and the development of such a community should occur in an inclusive way. The approach is therefore to move towards an interest-based negotiation process, so that the outcome is fairer.

On the macro level, what applies to mining can apply to other businesses as well. For that matter, the following factors are significant:

1. Efficient macroeconomic management.
2. An effective legal and regulatory framework.
3. Security of tenure and regulatory certainty.
4. Objective criteria for the grant of exploration and mining licenses.
5. Limited administrative discretion.
6. Efficiency in terms of administrative capacity.
7. Effective infrastructure and services.
8. Competitive fiscal and taxation conditions.
9. Effective investment protection.

What is the content of the MMDA? The most important aspect is secured tenure. In addition, there are obligations on mining company to comply with environmental requirements as set out in the MMDA.

The MMDA also introduces the establishment of Community Development Agreements. This ensures that the mining company is obliged to enter into negotiations with mine affected communities and has to enter into a Community Development Agreement with those communities. One setback in the developing world is who represents the community. Nonetheless, the community gets some sort of benefit from resource extraction. The adverse impacts of mining are therefore addressed through the agreement. In addition, the environmental, social and economic conditions which arise during mining are actually dealt with when the mine is closed to avoid effects such as a ghost town and no infrastructure for instance.

Furthermore, the international standards in the MMDA provide a higher standard than the standards in the host country in relation to mine development.

What is more, the parties to the agreement have to commit themselves to the protection and promotion of human rights of all individuals affected by the agreement.

The MMDA pushes for local procurement. This obliges the mining companies to source products that can be obtained locally from local suppliers as well as to employ local citizenry. The mining company also has to provide health programs and health

facilities to serve its employees. It has to adhere to labour standards set out of the local country's laws. There should also be good industry practice and international labour standards.

There is also a grievance mechanism for the community. The compulsory grievance mechanism prevents the community's grievances from being ignored.

The MMDA, however, is not an obligatory agreement. It is a non-prescriptive negotiation tool. It is merely a template for developing countries when negotiating with big mining companies. The MMDA tries to address the concerns that all parties have and to ensure that mining is a force for good.²

Questions and Comments Raised During Session 1

1. The MMDA seems watered down since its underlying principle seems to be management. It doesn't recognize the extent to which the communities value the land.
2. There appears to be a disconnect between communities and what is happening around them.
3. The bilateral agreements that are prescriptive on one hand and the mining code on the other hand. The conflict between the two. How does a country navigate between the two?
4. Social and environmental impacts have to be dealt with and are dealt with in the MMDA to some extent.
5. Horizontal application of the South African Bill of Rights. For instance, the role of the state where tenants are evicted by a private landlord. What is the role of the private landlord regarding the eviction of tenants? Also of concern is the applicability of the Bill of Rights regarding socio-economic rights.
6. It is important to watch how corporations and companies will pick up corporate social responsibility and how they implement their duties.

² www.mmdaproject.org.

SESSION 2:

ENGAGING THE BUSINESS SECTOR IN HUMAN RIGHTS AND JUSTICE DEVELOPMENT IN AFRICA

Chair: Hon Brigitte Mabandla, *Former Minister of Justice, South Africa*



Dr Edward Kwakwa: *Legal Counsel, World Intellectual Property Organisation (WIPO), Member of the Governing Counsel of AFLA*



Perspectives from Intellectual Property (IP) and Trade

Human rights and business is being discussed against the background of the ongoing globalization of the world economy. In terms of globalization, one of the least talked about aspects is the place of intellectual property in multilateral trade relations and in particular the impact on social, economic, technological spheres of various countries especially developing countries.

The links between intellectual property (IP), trade and development are quite well known. From a business perspective, IP is critical for providing employment, creating wealth. Of importance is the extent to which IP rights will be protected in the countries in which corporations want to invest. This is in order to ensure that the patent and assets, for instance, are well guarded.

IP is not far removed from human rights since the Universal Declaration of Human Rights (UDHR), for instance, does have specific provisions on intellectual property rights.³ However, in the human rights context, IP rights have received greater prominence because of other issues that IP right focus on regarding socio-economic development.

Protection of folklore and indigenous culture is the essence of the interface between human rights and IP rights on the other hand. The focus is on IP assets of traditional or indigenous communities. The IP rights of these people are not protected in the sense in which trademarks, patents and copyrights are protected. Indigenous peoples' rights, therefore, do not form part of an archetypal part of intellectual property as such.

Developing countries possess 80% of the world's genetic resources. Businesses in developed countries exploit those resources found largely in developing countries. Developing countries are therefore demanding protection for their IP assets. Full disclosure, informed consent and benefit sharing form the basis for protection of IP assets of indigenous communities. The human rights community is, therefore, pushing for the businesses to accept responsibility and accountability to human rights norms that belong to local communities, and businesses can benefit by making a profit, but at the same time, human rights community is also satisfied that the local communities, through whom businesses make money, are getting a benefit.

Businesses and developed countries have resisted any attempts to come up with a treaty to protect IP assets of local or traditional communities. Because businesses have refused to accept the above condition, we are now at a point where organisations such as the World Trade Organisation (WTO) are coming up with international, legally binding documents through which business will be compelled to show the extent to which it is complying with human rights standards by showing profit sharing, full disclosure and the like.

³ Article 27 of the UDHR.

Human rights and business also come up in the context of development. Development best encapsulates the crossing point between human rights and business. Millennium Development Goals (MDGs) as developed by Intergovernmental Organisations (IGOs), such as the UN, are used as the measure according to which development is calculated. The targets set may not be met by 2015, but it shows the importance of the interaction between businesses, human rights and the UN's corporate responsibility standards.

From an IP perspective, the WTO came up with the DOHA Development Round in 2001. There has been only one amendment to any WTO agreement. Article 31(f) of Trade Related Aspects of Intellectual Property Agreements (TRIPS) is the only amendment to date. It deals with compulsory licenses.⁴ According to the amendment of article 31(f) of TRIPS, generic drugs can now be exported to countries other than the country manufacturing the generic drug. This is one of the advantages of the interface between human rights and business.

Development, which is the root of almost all human activity, is therefore one of the most daunting challenges to date. It however also goes to show that the business and human rights community can coexist and thrive together.

Prof David Bilchitz: *Director, South African institute for Advanced Constitutional and International Law, Associate Professor, University of Johannesburg*



⁴ Compulsory licensing entails when a government compels another entity to undertake or manufacture generic drugs owned by pharmaceutical companies. These drugs can only be used for domestic purposes.

Constitutional Perspectives

What principles can we use as a way of ensuring that all actors in society are bound by fundamental norms? The South African Constitution focuses mainly on the vertical application of rights. That is to say the relation between the state and the individual rights.

In South Africa, the relationship between business and human rights was skewed due to apartheid. Nonetheless, the horizontal relationship is an area where justice needs to be addressed.

What role should the constitution play in relation to business and human rights? According to the Bill of Rights of South Africa,⁵ natural as well as juristic persons are bound to respect the rights in the Bill of Rights, if applicable.

The two key issues to be looked at to ascertain when the constitution applies are:

- i) Possible impact of a corporation on the rights in question
- ii) The capability of the corporation to harm the right in question

It is worth mentioning that the idea that the Constitution of South Africa⁶ applies to corporations is a radical and extremely progressive one. The general idea of corporations is to maximise profit within the rules of the game. In South Africa, the Constitution differs as the primary role for any member or body in society has to occur within the boundaries of the Constitution, as to what is legitimate to do or not to do within the Bill of Rights. This changes the corporation from having been seen as the exception, to having corporate responsibility, and from focusing on profit into an organ of society that has citizenship duties that are fundamentally part of society as well. Therefore, there is a technical shift in terms of the law and a philosophical shift that the South African Constitution has indicated in that regard.

How do we make sense of the philosophical shift? More concrete rules need to be established in order to make this applicable to corporations. One opportunity to do that was the Companies Act.⁷ In addition, the 'King three code' omitted human rights. The King three code has however been amended so that good corporate governance

⁵ Chapter 2, section 8 of Act 108 of 1996

⁶ Act 108 of 1996

⁷ Act 71 of 2008.

ensures sustainability, which in turn requires that attention be paid to human rights. This, however, is not binding on all corporations.

Outstanding issues still remain:

- a) Companies are still governed in the memoranda and articles of association by essentially profit perspectives alone. Fundamental rights should be incorporated in these documents.
- b) The roles and the fiduciary duties of the directors. Duties to ensure that the company does not violate rights. The Company Act of South Africa does contain a provision that enables courts to interpret the act in accordance with the Bill of Rights.
- c) To what extent is non-financial reporting required? There should be some mandatory non-financial reporting explaining the impact of the company's activities, such as environmental impact, social impact etc.
- d) Extraterritoriality. To what extent do companies within South Africa comply with the obligations in the Bill of Rights in their activities in other countries? Parliament should take the initiative here.
- e) What about the corporate form itself? The corporation has separate legal personality, so it is regarded as a person (juristic person). They do not always operate separately due to, for instance, the parent or holding company operating in a subsidiary company. To what extent do companies bear responsibility for the actions of other parties with whom they are involved? Will the courts pierce the corporate veil where the company violates rights through another company?
- f) Extent of the duties of corporations on the international level. Do corporations only have the duty to avoid harming human rights or do they have a duty to actively contribute to realization of fundamental human rights? Corporations usually have significant power to shift and to make contribution towards realizing rights.

Constitutional issues are about fundamental norms that bind society. How far should they be extended in relation to companies? There are lots of opportunities on the national, regional and international level to advance this perspective and to ensure that corporations are recognized as those important social actors with social responsibility as well. This is in order to go beyond voluntariness to what it really is like to have a real sense of corporate obligations.

Mr. Arnold Tsunga: *Africa Program Director, International Commission of Jurists (ICJ)*



Perspectives from Human Rights and Justice Sectors

There have been a number of views regarding human rights and justice. AFLA stated that ‘human rights is good for business.’ While it is a view generally shared by many, it is not yet settled. The tiger economies, for instance, are characterized by authoritarianism amongst other characteristics. Yet it is a contradiction to state that human rights and justice can be enjoyed in an undemocratic system. China, for instance, does not have a good human rights record. Yet, it is one of the fastest growing economies in the world.

As earlier stated, political instability has had negative effects on socio-economic rights, such as destruction of infrastructure, high levels of unemployment and in some instances, ‘misemployment’ where people are employed to violate other peoples’ rights and use their resources.

Serious political instability has taken place in countries such as Zimbabwe, Madagascar, Ivory Coast and Somalia, Democratic Republic of Congo for instance. It is very clear that serious violations of human rights occurred in such countries, whilst the economic activity was shrinking. It could be argued that violation of human rights is a more symbiotic relationship with socio-political instability. As a result, political instability then leads to economic downturn. This argument seems to explain the difference between the Asian Tiger economies, such as China, and the African economies. The common denominator seems to be that there is a lack of respect for human rights which is anchored in undemocratic and authoritarian governments or practices.

However the Asian economies were growing while the African economies were shrinking. So what is the uncommon denominator? This is where it is evident that the Asian economies were experiencing economic stability whilst in Africa, there was political instability which was seen by investors as an unfavourable environment for investment.

Another argument could be that political instability leads to the absence of the rule of law. Where there is stability, the economies grow and vice versa.

It is also submitted that the legal environment is not the same as the concept of the human rights environment. This implies that law can exist without human rights.⁸ Apartheid, for instance, existed without attention paid to human rights, the Public Order and Security Act in Zimbabwe etc.

On the other hand, the connection between human rights and justice seems to be natural. It is important to note that the concept of justice goes beyond the concept of law. It sounds logical to think that the law infused with human rights would result in justice. But law minus human rights will amount to repression as it will introduce the concepts of rule of law or rule by law. Justice in some instances is the result of the rule of law, but the same could be said of injustice, which could also arise as a result of the rule of law.

It can be argued that the law applicable to operation of corporate bodies and businesses can be incompatible with observance of human rights. In certain circumstances, companies can violate human rights without necessarily breaching the local law.

Human rights and justice in Africa need to be infused with a Pan-African meaning. Central to human rights is the concept of 'Ubuntu' which is based on respect for human dignity as an inherent quality defining us as Africans. It is an indigenous African agenda as well as an agenda for the rest of the world as it is recognized in the Universal Declaration of Human Rights.⁹

Justice in Africa is usually controlled with the law. Yet, it is important to look at justice in a broad sense to include both civil and political justice as well as economic,

⁸ See also Bilchitz above regarding King Three Code and the Companies Act regarding omission of human rights.

⁹ See paragraph 1 of the preamble of the Universal Declaration of Human Rights regarding inherent dignity.

social and cultural justice (loosely referred to as socio-economic justice). Many Africans live without dignity due to socio-economic marginalization and exclusion.

Corporate Accountability for Human Rights Abuses

In context of the prevailing global political and socio-economic order, there have been efforts by civil society, lawyers and some courts to deal with corporate complicity in human rights violations and abuses. The general perception within the human rights circles is that transnational and multinational corporations, who often have strong economies and political clout, have been primarily responsible for corporate abuses. They have operated with impunity for many reasons and this can be attributed to the fact that Africans are not aware of the impact of the companies on their rights.

Factors that prevent full accountability for violations of human rights, access to justice for reparations and effective remedies for victims of serious violations of human rights:

- a) Corruption.
- b) Lack of judicial independence, impartiality and accountability.
- c) Inability and unwillingness of the host to ensure that foreign companies operating in their territories respect human rights, environmental and social standards.
- d) Absence of adequate judicial systems that allow victims to seek justice in home states where parent companies of international corporations are based.
- e) Legal obstacles due to complex structure of multinationals.
- f) Incompatibility and inconsistency between what is permissible under corporate law and what is required under human rights law.
- g) Scope of responsibility directly imposed on business is not yet clearly defined.
- h) No clear cut forum at the international level for victims to directly address the responsibility of corporations in a consistent and systematic manner.
- i) Lack of political will or insufficient legal capacity among authorities.
- j) Insufficient legal capacity on the part of victims.
- k) Complexity of legal processes and substance.
- l) Legal costs and lack of legal aid.
- m) Insolvent or insufficiently resourced local intermediaries employed by the multinational and transnational corporations.

n) Lack of access to information.

Therefore, realization of socio-economic justice as a basis for the restoration of the full dignity of people in Africa is of utmost importance and needs to be addressed

Questions and Comments That Were Raised During the Session

1. The input is largely from an ethical dimension. Justice activism should be taken advantage of as it is lacking in Africa.
2. Corporations need to engage in social structure.
3. Human rights considerations can be argued to be financial in nature and not necessarily non-financial. This is because they have costs for both the corporations as well as for the government.
4. A seminal component that is overlooked is the policies put in place in North America and Europe regarding protection and enhancing of human rights. Such policies should be addressed.
5. Are businesses ready to engage with civil society around human rights issues? This is in context of the international crisis facing the world today as well as property issues in Africa.
6. Does the business community still see socio-economic rights as being the exclusive responsibility of the state?
7. Regarding constitutional perspectives, the primary objective of a business is profit, but constitutional imperatives have to be put on rights. We need to think more seriously about that because profit is not prescriptive. We cannot ever reach a state where you can balance human rights and a profit motive but rather how far rights can be added to business.
8. Human rights are good for business and should not be contradicted by positive benefits that companies enjoy as a result of absence of rights.
9. We are living in an era where accountability is required. Lack of accountability leads to instability which then leads to bad investment environment.
10. How do companies switch from making a profit to what needs to be done?

SESSION 3:

INCORPORATING GENDER PERSPECTIVES TO HUMAN RIGHTS AND BUSINESS

Chair: Dr. Pinkie Mekgwe, *Outgoing Deputy Director for International Education and Partnerships, University of Botswana*



With gender we are looking for a paradigm shift with regard to business. Justice is all about balance. We do need a gendered equation to everything that we do. We need to have recognition of each one of the genders. It denotes recognition of the humane just approach to issues of regulation, law governance.

The marginal usually suffer the brunt, and in gender terms, the marginal are women. Then there was a move to entrepreneurship, where women can lead. Why are we where we are at and how do they coalesce with regard to human rights and business? Why are women absent? What needs to be done?

Professor Bonita Meyersfeld: *Associate Professor, School of Law, University of Witwatersrand, Johannesburg, Managing Editor, South African Journal of Human Rights*



The Concept of Human Rights and the Market Place

In July 2005, the United Nations General Secretary appointed the Special Representative John Ruggie on business and human rights.¹⁰ His challenge was to come up with a human rights framework in international law that would provide a regulatory response to the global activities of multinational corporations. Such a framework would be able to generate regulation and international commitment. To this extent, there has been success.

In one respect, however, there has not been so much success and that is in respect of integrating gender into his mandate according to the Human Rights Council.¹¹ For many, this seemed counter intuitive because gender is generally seen as a discreet issue that could be addressed after the main issues surrounding business and human rights had been addressed. Others, however, believe that gender is a lens through which all human rights work should be examined and that includes the work of multinational corporations.

The discussion comprised three parts:

- a) The role of gender specifically in International Human Rights Law
- b) The way in which gender manifests as an issue in the topic of human rights
- c) Methodology and theoretical and practical framework so as to take gender into account in the concept of business and human rights.

¹⁰ www.business-humanrights.org

¹¹ www.ohchr.org

What constitutes gender?

Gender is about men and women despite some who argue that gender is about women's rights. Gender is about the role that society allocates to men and women. It is about the preconceived notions about how a person ought to exist in and contribute to society by virtue of their sex. These predetermined roles have a way of exacerbating social and human rights considerations. This is the focal point of the discussion.

How has gender manifested in international human rights law?

Over the last 30 years or so, individuals and groups have identified various ways in which the needs and rights of women specifically have not been addressed the network of generic international human rights law instruments. The realisation developed that women, as opposed to men, would have a particular experience in a violation and a human rights violation and the generic principles of international human rights law did not provide the type of social and physical protection that was required by virtue of the difference between women and men in terms of physical, reproductive attributes, as well as cultural and social functions.

In the United Kingdom, for instance, there exists a pay discrepancy between women and men. It is currently at 18% despite equal work and equal qualification. There was thus a need to have an express and precise articulation of the way in which women experience human rights violations compounded by this divide between men and women. To articulate a response to this, the result was that there are currently human rights laws and bodies that address rights of women specifically.

Of importance also is the integration of the rights of women into other mainstream principles and laws. The Convention against Torture (CAT) and the Millennium Development Goals (MDGs), for instance, contain provisions that specifically cater for the rights of women. This is because of the reality of sex and gender discrimination which has responded to a type of hegemonic and social existence from time immemorial. It is therefore in response to this differentiation that international law has properly engaged a gender lens.

How does this relate to business and human rights?

1. The Brettenwoods Institutions, such as the WTO and associated institutions, as well as the General Assembly of the United Nations (UN), have identified effective macroeconomic policies on women specifically and the effect that this has had on women. The Human Rights Council too has evoked the extent to which economic policies, both macroeconomic and microeconomic, influence the activities of women or the ability to develop and be seen as equal participants in the marketplace.

Why consider the mandate from the point of view of women?

The gendered lens opens up preconceived notions of the impact of human rights violations as well as throwing light on issues that would otherwise remain masked and invisible. The presence of corporations in a foreign jurisdiction is not always a negative thing. Multinational corporations have the ability to become transnational norm entrepreneurs bringing opportunity for equal employment and empowerment of marginalised groups.

There is a wholly negative aspect of multinational corporations. There are two ways in which multinationals can impact on women's rights. The first is internal to the workings of the multinational and the second is internal to the workings of the multinationals.

Internal component. Traditionally the consideration of women's rights in a corporation has revolved around employment equity. This includes equal pay for equal work, equal opportunities, quota systems and positive discrimination. Employment equity is one of many aspects of human rights that illustrate how corporate activity can impact on gender.

External component. Various external violations occur for instance corporate complicity in conflict zones which have a disproportionate impact on women. There is harm that can occur as a result of environmental change triggered by a corporate operation such as changing water courses or divergence of communities away from water sources. Since the responsibility of water rests mainly on women in Africa, this has a direct impact on the extent to which women's rights are engaged.

There may be corporate conduct that may have a neutral effect on a community's rights, but because of communal, social or state policies, the seemingly neutral

practice actually results in violations of women's rights specifically. A corporation which is seeking to meet its international standards for the protection and promotion of human rights and has a notion of a compensated workforce of women greatly enhances the consumer basis, economic prowess and ultimately business.

There are unquestionably benefits in ensuring that women's rights are not violated. So if a company wants to protect or comply with these international standards, such company would need to consider the internal and external violations, the gender specific aspects of a human rights violation and the gender specific aspects of seemingly gender neutral policies.

How should Prof. Ruggie's framework be applied and should have been described as applying to gender?

1. State duty to protect. Trite principle of international law as evidenced by the Covenant on Elimination of All Form of Racial Discrimination Against Women (CEDAW), for instance, is that a state is responsible and has a duty to refrain from violating human rights of individuals but also to take steps individually to ensure that third parties do not violate their rights. Thus, CEDAW requires that the state take measures to ensure that there is no horizontal discrimination. This is the notion of the due diligence principle. In international human rights law, the positive obligation of a state is to exercise due diligence to ensure that citizens are not negatively affected by the operations of non-state actors and that includes corporations.
2. Corporate responsibility to respect. This denotes a duty to do no harm and to ensure that the corporation's actions do not exacerbate harm. This component also engages the due diligence principle and it states that a company has a duty to do the following three steps
 - a) Look at the country in which it plans to operate and must consider if such country has a specific human rights problem.
 - b) Consider the specific aspects of the company's industry that may lead to a violation of human rights.
 - c) The company must determine whether any of its activities in that country will cause human rights violations.

The above three aspects have to be looked at through a gender lens. How does one go about this? It is suggested that a multinational corporation adopt a three pronged approach in order to ensure the protection of women's rights.

- Corporations look at the state level and ask whether the proposed corporate activity create, encourage, reinforce or exacerbate the existing gender based inequalities at a state or policy level.
- At the communal level, will the proposed corporate activity create, encourage, reinforce or exacerbate the existing gender based inequalities at the community level?
- Corporations should look to the role of the family because a great deal of conflict and violence occur at this level. In other words, will the proposed corporate activity create, encourage, reinforce or exacerbate the existing gender based inequalities at the family level?

There is a three tiered approach to answer these questions:

- Engage with female members of the community.
- Engage with female trade union representatives and if there aren't any, create them.
- Engage with local women's organisations of which there are always many.

At each level, the analysis should consider whether there are sector specific considerations given pre-existing role allocations based on gender. In addition, it should be established whether there are other exigencies in the informal economy that will lead to the disempowerment and deterioration of women's engagement.

When considering gender analysis, it is all about the way in which gendered perspectives fuel differentiation and harm. It is that harm that is aggravated but can also be ameliorated by corporations, which amelioration could empower both communities and corporations.

Palesa Sedibe Ncholo: *Business Executive*



Labour Rights of Women

Reflections on what happens on the ground.

You can judge a country's social conscience by the way it treats its most vulnerable among itself. There is inherent dignity in everybody as humans. That has to be the springboard from which everything else emerges. We never really pay much attention to the complicity of lawyers in practice in all these abuses that are taking place. Lawyers are involved in drafting documents and agreements regarding corporations. Lawyers in practice are involved in influencing relationships between the corporations and the rights of employees, for instance. Lawyers should put in a seed so that employers start taking consideration of the rights of the employees and the like.

Prior to the Minerals and Petroleum Resources Development Act of South Africa,¹² mining was not a gender friendly sector. Men were not ready to have women in the mines, they were not ready to take instruction from women, and the bosses were also unfriendly to the women in the mines.

Some questions worth consideration include:

What were the challenges regarding mining for women? Was it because physically underground mining was anaemic for women? Was it because it had always evolved as a male thing?

Fortunately, with the cooperation of government, women were introduced to the mines. Despite the danger, there were no facilities to accommodate women. It was established that despite the rigid work, women were also capable of doing the work in

¹² www.bclr.com

the mines. There however had to be a change in the mindset of the people in the mine. Women introduced in that environment had to be thick skinned.

In relation to the regulatory regime, the audits are not done as often as they should be. Change cannot come unless those with an interest do something. Despite the introduction of the Mineral and Petroleum Act, there is still not that much change on the mines.

The issue of racism and gender is a serious issue in mining; it is so systematic that it is done in such a way that it is shrouded. There are so many obstacles in the mining sector. However, women need to be introduced to the middle management. Women are still at the bottom rank.

On the other hand, there are communities that are affected by the mining. The environment should be protected. Moneys that should be allocated for rehabilitation have not been utilised by the corporations in order to rehabilitate the environment. We need to shift the way we are thinking.

Therefore, what needs to be answered is: to what extent can interested parties do something other than what has been legislated?

Questions Raised during the Session:

1. Tension between business and culturally differentiated roles.
2. In terms of labour laws, paternity issues seem to be left behind. The necessity for a gendered lens is required.
3. What is the role of education with respect to taking gender forward?
4. Legislation should be more gender specific. There is nothing stopping lawyers from ensuring that human rights are put at the forefront.

SESSION 4

THE ROLE OF CIVIL SOCIETY

Chair: Mohamed Hussain, *Immediate Past President, Commonwealth Lawyers' Association, Board Member, Absa Group, Council Member, Law Society of South Africa*



Professor Vincent Nmehielle: *Head Wits Program in Law, Justice and Development in Africa*



Transnational Corporations, Human Rights and Development: Is Social Corporate Responsibility Enough?

In Africa the issue of human rights in the marketplace is beginning to gain more ground. Since law is an instrument of change, the relevance of human rights in the marketplace cannot be overemphasized. This debate is of importance primarily because of increased business activities in Africa as a result of the attraction of multinational and transnational corporations that have become very important in Africa's quest to develop. This is not to say that local corporations are not important because they also contribute to development in a specific country. These multinational and local corporations occupy very niche positions in Africa due to their power.

Is corporate social responsibility enough to fully realise human rights in the market place?

Businesses engage with society and might interfere with rights and interests of society. Some corporations have included Corporate Social Responsibility (CSR) codes as a means of eliminating negative impact of their activities.

Should there be accountability measures beyond CSR and other such self regulating initiatives?

The intervention to address the above question is as follows:

1. Companies or transnational corporations as agents of development. This is due to the fact that they inject capital into a specific state.
2. Interaction between transnational corporations and human rights. The whole idea that companies have human rights obligations is fairly new. Horizontal application of human rights is a fairly new concept. The jurisdiction of the International Criminal Court should move from individual responsibility to corporate responsibility. In conflict zones, we should think beyond individual liability to include corporate liability. There is no doubt that companies do take part in violations of human rights.
3. CSR as used by the companies in addressing public or civil society outcries and concerns regarding corporate violation of human rights. CSR is usually adopted due to pressure from consumers or the need to differentiate from other companies. That is why and how human rights become validated from the business perspective. We need to prove that a business culture that recognises a

worker as vital to activity will be more successful than one that does not. They (CSR) are not necessarily genuine attempts at protecting human rights but it is done to build a brand.

4. Evaluation of the adequacy of CSR initiatives in dealing with the increased demand for more corporate responsibility and accountability. What civil society has to do relative to the issues of accountability versus CSR? CSR initiatives do not account for corporate responsibility because they are out of voluntariness. CSR initiatives are not mandatory. Do we need something beyond voluntariness? According to Ruggie's framework, the state has the duty to protect and the company has the duty to respect. These cannot be derived from a CSR initiative. These guidelines do not generate accountability but have the potential to do so if nations take it further.

Civil society must be the catalyst in putting forward such measures to ensure the existence of such domestic measures by outing pressure on the state and relevant agencies as part of their advocacy strategy.

Until we have the ability to hold companies liable, each state must go a step further to develop domestic law so as to hold companies accountable for human rights violations. CSRs are not enough on their own. This is where civil society steps in to ensure that companies comply.

Professor Shadrack Gutto: *Chair, Centre for Africa Renaissance Studies, University of South Africa (UNISA), Member of AFLA Governing Council*



Protecting Economic and Social Rights: Any Role for Business?

The following framework will be used to answer the topic for this session:

1. Conceptualising what business is in the 21st century and what that means for socio-economic rights

2. A case for rethinking socio-economic rights.
3. Key African precepts around socio-economic rights and responsibility of the state and the business sector.
4. Reflections on how to make businesses more responsive to human rights issues.

Business people are human beings and love human rights as long as it applies to them as people. They operate corporate entities and are driven by different imperatives to make business successful. This entity created to do business has a paradigm of pushing them to act in a way that their agenda is determined by this entity.

What is business?

Business as a combination of the business people and the entities they create, are indeed very powerful institutions in society to the extent that a ruling class arises. They are the ruling class. Then there is the governing class who work with the ruling class to be the power in society. Logically businesses become very relevant to discussing issues of socio-economic rights in particular. They rule the society because they control the economic foundations and resources and infrastructure, ideological power in society. Within the 21st Century, the governing classes within a state, as well as collectively in regional bodies like World Bank, African Union, are institutions of governance.

Rethinking socio-economic rights

The whole question around the state has transformed and become very complex but all governing classes are controlled by the ruling class. The foundations for socio-economic rights are the natural resources in a specific society. The ruling class determines how wealth is divided and utilised in society. People need to have some share in these resources. Thus, the role that civil society plays in the area of socio-economic rights is to provide the palliative that soothes the pain and suffering and inequalities in society.

Business loves property rights and security and tenure. The centre to all rights is property rights. Property rights are not conceived by advocates for socio-economic rights as the centre of socio-economic rights but business knows that it is the centre of power for instance. It is for the above reason that we should rethink economic rights.

There are a number of key African precepts around socio-economic rights and responsibility of the state and the business sector.

Questions about the right to development introduced by Africa into an international instrument¹³

We as Africans can think about what is relevant to us. These are important for us if we want to say that human rights bring the people inside the system. We do have fundamental rights in regional instruments but we do not bring them out so well in scholarship and analysis and litigation strategies.

Reflections on how to make businesses more responsive to human rights issues

We should begin scholarship activism, litigation and the like to educate and put pressure on businesses to understand that business and human rights are not necessarily mutually exclusive. Combining them does not mean that business will run as usual. Because it is in the interest for businesses to include human rights, the absence of such rights might cause upheaval, revolution and it may disturb the businesses. So it is in the companies' interests to meet basic standards of human rights so as to ensure sustainability. Secondly, when such businesses grossly undermine human rights, there must be obligations for reparations and hold businesses accountable. Lastly, Africa should be able to have the patriotic bourgeoisie. A patriotic bourgeoisie is a business entrepreneur who wants to change the world and make it better. That bourgeoisie must also understand corporate social responsibility and not just sponsoring sports clubs, entertainment groups and the like. Some must begin to start the right to education through starting up universities, and various institutions. African Bourgeoisie should think of changing society for the better.

¹³ See Article 22 of the African Charter for Human and Peoples' Rights regarding the right to development

Dr Mbere, Member of AFLA Governing Council



Call to Action: Creating a Conscientious Network of Business Representatives

There is indeed a future in the topic of human rights and business. It is a very necessary future.

The ruling class needs to continuously make sure that they do not sabotage human rights. Africa in general and all developing countries identify with this topic. Who holds multinational companies accountable to what happens in Africa? We need to have that extraterritorial reach as a continent.

There seems to be a call for AFLA to continue with dialogue on human rights and business to engage a broader audience by bringing the business people to get involved in dialogue.