A. THE EVOLUTION OF CORPORATE RESPONSIBILITY

Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy

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A. THE EVOLUTION OF CORPORATE RESPONSIBILITY

On July 16, 2018, the United Nations Human Rights Council released the Zero Draft of a treaty to govern corporate human rights responsibility under the aegis of international human rights law.[1] The Zero Draft seeks to address lacunae in realizing international human rights "in the context of business activities of a transnational character".[2] As a proposed instrument of international law, its novelty lies in a legally singular precept: "[B]usiness enterprises … shall *respect* all human rights".[3] But the Zero Draft's overarching structure is conventional. The direct subjects of the treaty remain states. They are responsible for strengthening and enforcing corporate human rights liability; ensuring effective redress for victims of human rights abuse; and promoting more responsible corporate behaviour across global value chains.

The Zero Draft is not momentous in itself. The drafting process has been contentious and long.[4] It has received virtually no support from the United States or Europe.[5] The likelihood of the Zero Draft blossoming into international law in its current form is low. From a legal perspective, it is unlikely to "revolutionize the world of business and human rights".[6] Rather than augury, the Zero Draft is striking as memorial. It testifies to the remarkable evolution of business and human rights — the ***social*** dimension of corporate responsibility[7] — from public relations art to legal science.

Less than a decade ago, respected legal scholars could safely find that corporate responsibility "does not appear to fit comfortably within a traditional legal setting" because law endeavours to "clarity and precision … [in] seeking a definition of key terms and concepts or guidance on what constitutes acceptable forms of conduct".[8] Corporate responsibility as a concept intrinsically lacked such virtues: it reflected an *ideal* of ethical behaviour embracing the interests of "stakeholders" beyond shareholders, but that ideal was subject to few shared metrics of right practice.[9] Indeed, even the term "stakeholder" was uncertain: "Possible definitions range from a narrow conception: 'groups vital to the success and survival of a corporation,' to a more expansive view: 'individuals and groups who may affect or be affected by the actions, decisions, policies, practices or goals of an enterprise.'"[10]

Against this fluid and uncertain backdrop, the very legitimacy of corporate responsibility as a business concern was long questioned.[11] Milton Friedman famously wrote in *Capitalism and Freedom* that advocates of corporate responsibility are beholden to

> a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one ***social*** responsibility of business — to use its resources and engage in activities designed to increase profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.[12]

This view rests on the assumption that respecting the views of non-owner stakeholders is antithetical to profit maximization, such that businesses who engage in corporate responsibility are fundamentally irrational. Its force breaks where conventional business pursuits are advanced by "ethical" corporate behaviour.

The global risk (and opportunity) landscape for business related to corporate responsibility has evolved continuously since Friedman wrote those words. In the resource sector, for instance, community conflict is a material operational risk. A major mining project will lose approximately $20 million per week of delayed production

in the event of a shutdown; costs can accrue even at the exploration stage.[13] For consumer-facing brands, corporate responsibility-related business risks are arguably more reputational rather than operational, but they are nonetheless material. In recent years, media campaigns against an array of leading global companies have been fuelled by ***environmental*** impacts of palm oil production; child labour in cocoa farming; forced labour in electronics and seafood supply chains; health and safety failures in apparel supply chains; and sexual harassment in the workplace.

Investor expectations have evolved in tandem with the shifting risk landscape. The signatories of the Principles for Responsible Investment — at last count, 2,250 financial institutions representing over USD $80 trillion in assets under management — commit to integrate corporate responsibility considerations into "investment analysis and decision-making processes".[14] And in "Corporate Sustainability: First Evidence of Materiality", a respected study that accepts Friedman's dictum while challenging its underlying assumption, the authors conclude that "investments in material sustainability issues can be value-enhancing for shareholders".[15] Marking the breadth and depth of evolving investor expectations, the CEO of BlackRock, the world's largest investment manager, committed recently to a "new model of shareholder engagement" to drive better management of corporate responsibility issues across its portfolio.[16]

Applying Friedman's dictum, the "rules of the game" have changed such that a rational, profit-maximizing business must increasingly embrace corporate responsibility as integral to its mission. But the evolving incentives for the rational business do not in themselves address the legal concerns of clarity and precision. They arguably only encourage business to cater to perception, to *appear* responsible to material stakeholders, without settling in any objective way what responsibility dictates. To the extent corporate responsibility rests on ineffable desires of undefined stakeholders, it may be akin to marketing or public relations — a corporate imperative that is inherently beyond law's grasp.

The Zero Draft rejects this conception as anachronism. If legal penalties attach to corporate failure to respect human rights, respect itself must be *justiciable*. Justiciability is "the aptness of a question for judicial solution",[17] which turns on "judicially discoverable and manageable standards for resolving it".[18] For an expectation like respect to be justiciable, there must exist a legal basis to assess relevant issues such that "the law and the court are the proper frameworks for deciding the dispute".[19] Any such legal basis is intrinsically at odds with ineffability.

The justiciability of the Zero Draft's subject matter means that the bases of legal liability must be discernible to law in form and content. In particular, any criminal and administrative sanctions must accord with the rule of law, which is the foundation of legitimate government and a bulwark against the arbitrary exercise of state power: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by rule of law."[20] Rule of law is an ideal both cherished and debated.[21] We need not venture into the quagmire. At a minimum, the ideal is of "principled predictability"[22] to enable people to make reasoned decisions aware of the consequences.[23] To that end, laws are defined by certain formal features to ensure that they mean something in particular and that people can reasonably apprehend and act on that meaning: "[L]aws must be open, clear, coherent, prospective, and stable; legislation and executive action should be governed by laws with those characteristics; and there must be courts that impose rule of law."[24]

The Zero Draft's form — bearing the imprimatur of international human rights law — aspires to legal content for the ideal of business respect for human rights. It stands in riposte to the presumed ineffability of corporate responsibility as legal discipline. The aims, structure and content of the Zero Draft endeavour instead to furnish the pursuit of corporate respect for human rights with the tools of objective and replicable reason, the hallmarks of a legal science. To realize human rights and ensure effective remedy, business respect for human rights should have a reality beyond the subjective perceptions of stakeholders. Legal responsibility cannot lie only in the eye of the beholder.

At a legal-conceptual level, the Zero Draft honours a civilizing of human rights, a translation of them from their public-sector origins into private-sector obligations. International human rights were conceived to bind states: "Their

fundamental purpose was to guarantee the freedoms of individuals against the state with its vast powers of detention, expropriation and censorship; to mitigate the imbalance between two unequal parties: the public authority and individual."[25] To apply directly as between private actors, the framework of international human rights law itself needed to be tailored to the institutional constraints of those actors. The Zero Draft reflects the results of that tailoring in distinct expectations of states and business. States bear "the obligations and *primary responsibility* to promote, respect, protect and fulfill human and fundamental freedoms".[26] By contrast, businesses "shall *respect* all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur".[27]

In this last sentence lies the map to an uncharted legal domain. *Respect*, *cause*, *contribute*, and *adverse human rights impacts* are markers to conceive a fecund and expansive legal discipline straddling public and private; national and international; commercial reality and human dignity. The boundaries of this discipline were recently marked but are already well recognized. The Zero Draft itself, however, is merely commemorative, paying homage to a paradigm shift in corporate responsibility inspired and driven by the United Nations' *Guiding Principles on Business and Human Rights* ("Guiding Principles").[28] The Guiding Principles are the origin of *business respect for human rights* as a defined term with practical contours. That critical concept is the blueprint for the Zero Draft; a proliferating legal universe of business and human rights legislation and litigation; and a principled distinction between states and business as human rights duty-bearers under international law. The Guiding Principles are, therefore, the first cause of corporate responsibility as a discipline with objective reality beyond the perceptions of stakeholders. It is in search of a justiciable approach to their meaning that the remainder of this book is devoted.

Footnote(s)

1 United Nations, Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft* (July 16, 2018), online: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

2 *Ibid*., Art. 2.

3 *Ibid*., Art. 1 [emphasis added].

4 Doug Cassel, "At Last: A Draft UN Treaty on Business and Human Rights" (August 2, 2018), online: Letters Blogatory https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/.

5 *Ibid.*

6 *Ibid.*

7 While "corporate responsibility" and similar terms such as ESG (***environmental, social, and governance***), corporate sustainability, corporate ***social*** responsibility, and corporate citizenship do not have a single, authoritative definition, they have traditionally been considered to include five elements: (1) voluntary action by a business (2) to address stakeholder concerns regarding the business's (3) ***social***, (4) economic, and (5) ***environmental*** impacts (Alexander Dahlsrud, "How Corporate ***Social*** Responsibility Is Defined: An Analysis of 37 Definitions" (2008) 15:1 Corp. Soc. Responsib. Environ. Mgmt. 1 at 4). Definitively resolving the definition of corporate responsibility is not relevant for this text, which is focused specifically on corporate human rights responsibility. We do assume, however, that corporate responsibility need not be voluntary and may be subject to regulation.

8 Michael Kerr, Richard Janda & Chip Pitts, *Corporate **Social** Responsibility: A Legal Analysis* (Markham, ON: LexisNexis Canada, 2009) at 5.

9 *Ibid*., at 6-7.

10 *Ibid*., at 13.

11 Corporate responsibility has multiple dimensions. The focus of this book is the "***social***" dimension; *i.e.*, the impact that a company can have on individuals and communities.

12 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 133.

13 Rachel Davis & Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector* (2014) at 8, online: Harvard Kennedy School sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

14 Principles for Responsible Investment, online: https://www.unpri.org/pri/about-the-pri. ESG issues, or ***environmental, social, and governance*** issues, are broadly similar to corporate responsibility concerns. The term just reflects different financial sector nomenclature.

15 Mozaffar Khan, George Serafeim & Aaron Yoon, "Corporate Sustainability: First Evidence on Materiality" Harvard Business School Working Paper, No. 15-073 (March 2015) at 16, online: http://nrs.harvard.edu/urn-3:HUL.InstRepos:14369106.

16 BlackRock, "Larry Fink's Annual Letter to CEOs: A Sense of Purpose" (2018), online: https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

17 G. Marshall, "Justiciability" in A. Guest, ed., *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961) at 269, quoted in Lorne Sossin, *Boundaries of Judicial Review: The Law of Judicial Review in Canada* (Toronto: Thomson Reuters, 2012).

18 *Baker v. Carr*, 369 U.S. 186 at 217 (1962).

19 H.C. 910/86, *Ressler v. Minister of Defense*, 42(2) P.D. 441 at 488-89 (Israel).

20 *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, U.N. Doc. No. A/810 (December 10, 1948), Preamble, online: http://www.un.org/en/universal-declaration-human-rights/index.html.

21 See, *e.g.*, Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) Public Law 467 at 467; and Timothy A.O. Endicott, "The Impossibility of the Rule of Law" (Spring 1999) 19 Oxford J. Legal Stud. 1 at 1-2.

22 Charles Sampford, "Reconceiving the Rule of Law for a Globalizing World" in Spencer Zifcak, ed., *Globalization and the Rule of Law* (New York: Routledge, 2005) 9 at 14.

23 Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195 at 198.

24 Timothy A.O. Endicott, "The Impossibility of the Rule of Law" (Spring 1999) 19 Oxford J. Legal Stud. 1 at 1-2.

25 Yoav Dotan, "The 'Public', the 'Private', and the Legal Norm of Equality" (2005) 20:2 C.J.L.S. 207 at 207.

26 United Nations Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft* (July 16, 2018), Art. 1 [emphasis added], online: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

27 *Ibid.*

28 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva: United Nations, 2011), online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

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