



REENGINEERING THE CORPORATION: HUMAN RIGHTS, THE
CORPORATION AND THE ENVIRONMENT.

SCHOOL OF LAW, QUEEN'S UNIVERSITY BELFAST, 28 AND 29 JUNE
2011.

SCHEDULE

TUESDAY 28 JUNE

12:00-14:00: **Lunch and Welcome in House 27 University Square, Room 27.101**

Seminar Location: Peter Froggatt Centre, Room 02.025.

14:00-14:40: Penelope Simons, Faculty of Law, University of Ottawa, Canada: International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights.

14:40-15:20: Aoife Nolan, School of Law, Durham University, United Kingdom: Human Rights Horizontality, Corporations and the Poor.

15:20-16:00: Gary Wilson, Nottingham Law School, Nottingham Trent University: Narrative Reporting, Corporate Rationality and 'Freedom in a Complex Society.'

16:00-16:20: Coffee

16:20-17:00: Karen Morrow, School of Law, Swansea University: The Probo Koala Incident and Corporate Responsibility

17:00-17:40: Louis Kotze, Faculty of Law of the North-West University, South Africa: South Africa: A Gold Rush to Nowhere? Re-evaluating the Role of the Rights-based Approach in Governing South Africa's Mining Sector (co-authored with Anél du Plessis).

19:00: Speakers' Dinner.





REENGINEERING THE CORPORATION: HUMAN RIGHTS, THE CORPORATION AND THE ENVIRONMENT.

WEDNESDAY 29 JUNE

Seminar Location: Seminar Room 1, the Institute of Governance, 53-67 University Road

10:00-10:40: Svetlana Cicmil, Bristol Business School, University of the West of England: 'How dare you? Introducing Critical Pedagogy to Conceptualise the Topic of Sustainability in Executive Business Education'

10:40-11:00: Coffee

11:00-11:40: David Nibert, Department of Sociology, Wittenberg University, USA: The Fire Next Time: The Coming Cost of Capitalism, Animal Oppression and Environmental Ruin.

11:40-12:20: Anna Grear, Bristol Law School, University of the West of England: Mind the Gap: Reflections on Corporations, Human Rights, the Environment and Legal Subjectivity in the Age of Globalisation.

12:20-14:00: Lunch.

14:00-14:40: Kirsteen Shields, School of Law, University of Dundee: Why Fairtrade is Succeeding Where International Law has Failed.

14:40-15:20: Ronnie Yearwood, SOAS, University of London: Concerning the Constrained Openness of Trade Law.

15:20-16:00: Discussion. Discussant Fiona De Londras, University College Dublin

REENGINEERING THE CORPORATION: HUMAN RIGHTS, THE CORPORATION AND THE ENVIRONMENT: ABSTRACTS.

SVETLANA CICMIL

‘HOW DARE YOU? INTRODUCING CRITICAL PEDAGOGY TO CONCEPTUALISE THE TOPIC OF SUSTAINABILITY IN EXECUTIVE BUSINESS EDUCATION’

Since the convening of the 1992 Earth Summit in Rio de Janeiro, it is clear that the rhetoric of sustainability has no doubt come to stay. In seeking to achieve the various objectives outlined in its Agenda 21, universities appear to have played a significant role in the drive towards attaining a more sustainable world and in this, key strategies have centred primarily on the ‘greening’ of the higher education curriculum. Nevertheless, in this, much of the pedagogy has remained largely normative, with a focus on science and technology as major drivers of the sustainability agenda. Sadly, very little appears to have been said about the underlying issues that have over time resulted in an unsustainable world, and this has gone mostly unaddressed in the pedagogy of sustainability and environmental crisis in higher education. In this presentation, I wish to reflect on the personal and collective struggle involved in designing and delivering a module around the theme of critical sustainability at an Executive MBA programme of a local Business School, as well as the joy and enthusiasm resulting from this experience.

A primary challenge has had to do with embedding critical theory in teaching sustainability (as risk and ethics) to Executive MBA students. So far, we as critical management educators, have operated at the edge of a paradox created by the University’s drive to ‘green’ its curriculum (in promoting sustainability education) on the one hand, and by our critical pedagogical orientation towards moral philosophy on the other. The latter view is based on our conviction that far from its being a solely economic-scientific problem, the sustainability crisis is a moral-ethical one. It is thus our belief that any approach geared towards resolving the ecological crisis must be fundamentally acknowledging of the fact that there can be no simplistic rational scientific solutions to a moral-ethical problem. As such, we hold that in order to afford a more holistic view of ‘the problem’, embodied by the present crisis, the pedagogy of sustainability must strive to address the moral and ethical issues that have led to un-sustainability in the first place. That is, sustainability education must start from a critique of the processes that have led to an unsustainable world. These include the contemporary world order with its hegemonic structures, power inequalities and resulting social injustices; a homogenising drive for the infinite growth of capitalist production which has systematically impoverished the optimal balance of the eco-system as our life support system; as well as the marginalisation of the values of the oppressed, the invisible and the silenced.

By focusing from the very start of the course on the values, the vulnerabilities, and the ideological struggle behind the sustainability crises and the proposed solutions, it is our intention to create a rhetorical space for an emotional transition, a cognitive liberation and a collective negotiation of shared reality among the students – one that disallows the traditional ontological separation between economic and ecological spheres. I will discuss in

more detail the conceptual framework that has mainly underpinned this critical pedagogic project, highlighting the pedagogic methods and tools that have been employed in creating the much needed space for collective reflection on real issues in the concrete local situations of present and lived experience. I will also reflect upon the resistance and anxiety that such critical pedagogy often creates (among the academics and students alike), and especially how this is enacted in the classroom and beyond.

ANNA GREAR

REFLECTIONS ON CORPORATIONS, HUMAN RIGHTS, THE ENVIRONMENT AND LEGAL SUBJECTIVITY IN THE AGE OF GLOBALISATION.

It has been suggested that human rights and the environment make uneasy bed-fellows due to the alleged individualism of human rights and the inherently more collective concerns of environmentalism. At the same time, it is suggested that law is overly anthropocentric – anthropomorphic even – and that legal subjectivity should be expanded to embrace new subjects (ranging from animals to post-human entities and systems such as artificial intelligences). Human rights, the environment and questions concerning legal subjectivity converge with considerable ethical urgency in the context of neo-liberal globalisation and corporate global dominance, for critical readings of neo-liberal globalisation link its relative ideological hegemony and corporate power to the growing vulnerability of human and animal populations and of the living systems that support them. This paper argues that the backdrop of contemporary globalisation – and, in particular, of the dominance of the corporate legal subject – should, as both a normative matter and a political choice, be made central to reflection upon the relationship between human rights and the environment and to reflection upon the nature of legal subjectivity itself (both as it currently exists and in any expanded future forms).

LOUIS KOTZE

A GOLD RUSH TO NOWHERE? RE-EVALUATING THE ROLE OF THE RIGHTS-BASED APPROACH IN GOVERNING SOUTH AFRICA'S MINING SECTOR (CO-AUTHORED WITH ANÉL DU PLESSIS).

South Africa's economy owes much of its robustness to the mining industry. Evidence, however, suggests that there is often a high socio-economic and ecological price to pay for these economic benefits and that mining companies increasingly employ cunning tactics to avoid the many moral and legal responsibilities they have towards people and the environment when they engage in the business of mining. Despite strong environmental and socio-economic rights protection provided by South Africa's transformative Constitution (Constitution of the Republic of South Africa, 1996) and the co-existence of a comprehensive legal framework that provides for complementary substantive and procedural entitlements in this respect, it appears as if myriad socio-economic and environmental interests of communities continue to be (often subtly) trampled on by the mining industry.

In the light of growing concerns in this respect, it seems opportune to re-evaluate the role of the rights-based approach as part of the overall environmental governance effort aimed at

regulating the South African mining sector. As a point of departure, this paper critically questions the impact of the mining industry on environmental rights, interests, and entitlements. It analyses the rights-based approach as it applies in substantive and procedural sense to the protection of community interests, specifically. The paper concludes by commenting on the continued suitability of the rights-based approach to deliver on sustainability objectives and to protect environmental rights, interests, and entitlements where the latter are affected by the mining industry.

KAREN MORROW

THE PROBO KOALA INCIDENT AND CORPORATE RESPONSIBILITY

The Probo Koala incident which involved the unlawful dumping of a significant quantity of toxic waste in Abidjan, Cote D'Ivoire in 2006 by Trafigura Ltd and its associates, resulting in harm to human health and environmental pollution, and raising significant human rights concerns, once again brought the question of regulating North/South trade in hazardous waste sharply into focus. The consequent range of legal proceedings in response to the incident in Cote D'Ivoire, the United Kingdom and the Netherlands, ranged across criminal and civil law and raised significant questions as to the viability of the domestic law of these states to give effect to the international obligations imposed by the international law regime under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 (as amended). This paper points to the difficulties of employing a Multilateral Environmental Agreement to regulate the activities of commercial actors in a waste context. In addition to the direct legal ramifications of the incident for Trafigura, an interesting additional strand of development that flowed from it saw the company making considerable efforts, through the establishment of the Trafigura Foundation in 2007, to rebrand itself as a conscientious 'global citizen'. The origins and current status of this form of corporate voluntarism will be considered as well as its likely future significance, in particular in light of increased and on-going interest (notably in the OECD and the UN Human Rights Council) in harnessing corporate citizenship to serve human rights and environmental ends. The potential of CSR to address some of the pitfalls in regulation in the context of the waste trade will be discussed as will its limitations in this regard.

DAVID NIBERT

THE FIRE NEXT TIME: THE COMING COST OF CAPITALISM, ANIMAL OPPRESSION AND ENVIRONMENTAL RUIN.

Using a historical materialist approach, it is argued that elite control and oppression of cows, pigs, horses, sheep and other large social animals have both enabled and promoted large-scale violence and warfare for thousands of years. The primary factor underlying this entangled oppression, material gain, has continued and expanded under corporate capitalism – especially through the practice of treating other animals as food. This profitable enterprise, legitimated and promoted by elite control of the state and hegemonically controlled mass media, makes the unspeakable treatment of “farm” animals acceptable while disguising the resultant chronic diseases, a form of structural violence. The oppression stemming from corporate promotion of animals as food has contributed to vast environmental harm, including water and air pollution, rainforest destruction, desertification and global warming. Those who profit from this system through constant pursuit of finite resources and growing numbers of consumers, and the state supporters of these industries, are among the leading perpetrators of contemporary “crimes of economic domination.” These corporate practices are vastly increasing the probability of international conflict and violence as countries like the United States are preparing military responses to a world of scarce finite resources, severe climate change and global food shortages.

AOIFE NOLAN

HUMAN RIGHTS HORIZONTALITY, CORPORATIONS AND THE POOR

There is widespread recognition of the growing power and influence of corporations in relation to both the satisfaction and the violation of economic and social rights (ESR), as a result of global trends towards privatisation, deregulation and globalisation. There remains, however, a general reluctance at the international, regional and domestic levels to impose enforceable ESR-related duties on such actors. This is despite the growing willingness of international and domestic authorities to recognise corporations as right-holders entitled to benefit from human rights law protections.

Opposition to the direct horizontal application of enforceable ESR-based duties to corporations/corporate representatives is frequently premised on concerns about the alleged implications of the imposition of such duties on very traditional, narrow and formal conceptions of autonomy and liberty – as well as the desire for an unimpeded ‘market’. This contrasts with concerns about vulnerability and human dignity that are of greater relevance to both the poor and to the conception of human rights generally.

The paper will critique the theoretical and practical implications of state failure to ensure that ESR-right-holders are capable of holding corporations directly to account. In doing so, it will highlight crucial differences between the corporation and the socio-economically disadvantaged person as right-holders. In particular, this will involve an analysis of the corporation as a ‘person’ for the purposes of the law. I will argue that the difference in nature between such right-holders, as well as the ‘aims’ of the rights they have been accorded,

requires two key actions from states, whether acting in the international or domestic context. First, states must adopt a very restrictive approach to recognising corporations as right-holders in situations in which such corporations act (or fail to act) so as to exacerbate the vulnerability of, and structural inequality experienced by, the poor. Second, states must demonstrate a far greater willingness to impose enforceable ESR-based duties on corporations where their actions threaten or violate the rights of the poor.

PENELOPE SIMONS

INTERNATIONAL LAW'S INVISIBLE HAND AND THE FUTURE OF CORPORATE
ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS.

The Special Representative on Business and Human Rights, Prof. John G. Ruggie, (SRSG) has released 'Guiding Principles on Business and Human Rights' aimed at implementing his 'Protect, Respect and Remedy' Framework. The *Guiding Principles* will be considered by UN Human Rights Council at its June 2011 session. Ruggie's work has been both welcomed and criticised and his *Guiding Principles* are likely to remain controversial. Neither the policy framework which is aimed at reducing the 'governance gaps' in relation to the negative human rights impacts of corporate activity, nor the *Guiding Principles*, elaborate a role for binding international human rights obligations for corporate actors. Apart from Ruggie's recommendation to the HRC to develop a process to clarify the legal obligations of business entities not to commit international crimes, Ruggie's work on this issue does not include a recommendation that the future development of binding international obligations should be one of the goals of his policy framework.

For Ruggie, '[t]he root cause of the business and human rights predicament today lies in the governance gaps – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for the wrongful acts by companies of all kinds without adequate sanctioning or reparation'. This focus on the governance gaps alone is arguably misconceived. It is not simply the governance gaps themselves that need to be addressed. One must also identify and address the root causes of those gaps. This paper argues that corporate human rights impunity is deeply embedded in the international legal system. Along with the interventions of international financial institutions in the economies of developing states, one of the most significant impediments to corporate human rights accountability is the structure of the international legal system itself. The validity of this assertion will be explored through an examination of the critiques of the international legal system by Third World Approaches to International Law (TWAIL) scholars, as well as insights drawn from feminist critiques of international law. Powerful states have used international law and international institutions to create a globalized legal environment which protects and facilitates corporate activity. Although the SRSG has identified symptoms of this reality, he has not thus far examined the deep structural aspects of this problem. It will be argued that such an examination would likely reveal a crucial role for binding international human rights obligations for business entities in any strategy to address corporate impunity.

KIRSTEEN SHIELDS

REWIRING CORPORATE COMPLIANCE WITH HUMAN RIGHTS: LESSONS FROM FAIRTRADE.

The aim of this paper is to explore the normative value of the Fairtrade movement as a small but resilient avenue of resistance within the 'transnational private law sphere'. This paper contributes to on-going critique of the increasing influence of corporate interests in international law-making by looking at the existence of alternative regulatory frameworks. The regulatory structure of the Fairtrade Movement is examined as one such alternative regulatory framework.

The central aim of this paper is to ask why Fairtrade has been successful in achieving corporate compliance with international labour law where international law has failed to do so. The focus of the paper is not to prove that Fairtrade delivers in all circumstances, rather it focuses on those instances where it has been found to deliver improved labour standards and asks why it has delivered in these instances. ~The paper starts by considering the impact of Fairtrade's monitoring mechanisms on high attainment of labour standards, before considering the relationship between distribution of ownership within the organisation and compliance with human rights norms. This discussion has resonance not only for ethical trade movements but also more generally for areas of public international law typically outwith the reach of regulation.

GARY WILSON

NARRATIVE REPORTING, CORPORATE RATIONALITY AND 'FREEDOM IN A COMPLEX SOCIETY'

'In sum the utopianism of economic liberalism sought to suspend the dominance of the social, but this dominance was reasserted in the protectionist counter-movement.'

K. Polanyi, *The Great Transformation* (1944)

This paper seeks to draw upon the work of the economic historian Karl Polanyi in order to problematise the relationship between the economic sphere and the social, ethical and political spheres. Polanyi's life work was devoted to the study of the institution of economic processes in society and in *The Great Transformation* Polanyi famously charted the rise of the self-regulating market in the nineteenth century. For Polanyi the self-regulating market was distinctive in that it necessitated the separation of the economic sphere which should be accorded a rationality based upon free exchange between self-interested individuals for gain. In order to maintain this arrangement a market society was required by which land, people and money were commodified and economic processes were disembedded from the social system. In Polanyi's view the inevitable result of this logic would be the despoliation of the environment and the destruction of society, hence the latter would seek to protect itself by what Polanyi termed the double movement. The paper will seek to build upon these foundations to explore how the rationality of economic liberalism has become central to the operation of corporations (and the financial markets that discipline them) and how narrative reporting represents an example of the introduction and acknowledgment of wider societal discourses into that dominant rationality thus allowing for the development of wider responsibilities in fields such as human rights and sustainable development.

RONNIE YEARWOOD.

CONCERNING THE CONSTRAINED OPENNESS OF TRADE LAW

Some trade lawyers argue that gateways, which are considered as avenues or openings in World Trade Organisation (WTO) law, facilitate the incorporation of non-trade norms, such as human rights and environmental law, into WTO law. The gateways metaphor proposes the acceptance into WTO law, of interests not normally considered within its legal remit. This paper aims to discuss the suitability of such a metaphor to understand the interaction between WTO law and non-trade external norms. It is submitted that although legal systems are capable of incorporating other external norms, this is only possible through their internal point of view. The result is that the legal system develops its own understanding of what the external norm entails, thereby re-constructing the external norm. Considering this, 'gateways' appears an inappropriate way to describe how external norms interact with WTO law. It is advanced that legal systems can only make sense of the external norm from their internal point of view. Therefore, an indirect strategic approach is suggested to practically and conceptually understand the interaction between WTO law and external norms. In the scenario of WTO law, I describe this as 'constrained openness'.