

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

Responsibility and Corporations

Saturday May 21, 10:45-12:30, New Chancellor Day Hall, room 102

Chair: Me. Gérald R. Tremblay, McCarthy Tétrault, Montréal

Introduction

Me. Gérald R. Tremblay from McCarthy Tétrault chaired this session and reminded the participants that in today's globalized society, large corporations increasingly drive development. With limited governmental control over these transnational corporations, other incentives beyond classic legal constraints are needed to shape development sustainably. The individual topics chosen by each speaker grew around this idea, all posing the essential question: How can Corporate Social Responsibility (CSR) better incorporate sustainable development?

Corporate Social Responsibility in Canada

Professor Richard Janda, Faculty of Law, McGill University, Montreal

Like so many others at the conference, Professor Janda took Justice Gonthier's notions of fraternity in law as a starting point to ask tough questions about how sustainable development can achieve its lofty goals. The professor suggests that corporate social responsibility until now has clearly failed in its attempts to internalize environmental impacts. Corporations are concerned more with profits and public relations than any true change of course from the impending destination of climate catastrophe. By showing the audience <<http://trillionthtonne.org>>, Professor Janda reminded the audience of what is at stake and how urgently systemic change is needed to right our current cataclysmic trajectory. Citing the negligible contributions to Air Canada's carbon compensation program and the failures of carbon market trading schemes, Professor Janda asked whether fraternity could be instilled as a norm to enable sustainability.

The professor suggested a speculative idea about public financing, in which fraternal concepts could be used to exponentially increase investment in public goods like the environment. Much like the money multiplier notion that drives classic lending banks, a leverage system might be established to create a multiplying effect on public goods. One recent example is the UK Big Society Bank, which takes fraternity as a starting point, and couples its loans with donations. The donations must be made to public goods that provide a tax credit, so that government funds are leveraged towards sustainability goals. Using such concepts, could CSR similarly drive real norms that enable sustainability? The professor's presentation was an eye-opening reminder of how much work still must be done, and left the attendees very reflective.

Transports des cargaison par mer, les règles de Rotterdam, leur adoption par les États-Unis, le Canada, l'Union Européene et les pays transporteurs du monde?

Professor William Tetley, Faculty of Law, McGill University, Montreal

Professor Tetley, a maritime lawyer, sought to decry the new Rotterdam shipping rules being proposed by the United States of America on the grounds that they do not conform at all to the

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principles of fraternity espoused by his friend the late Justice Charles D. Gonthier. The professor began by reflecting upon Justice Gonthier as he knew him and the different contributions that he made towards the idea of sustainability and fraternity. In paying homage to his friend, professor Tetley found he was short on time to flesh out the themes of his paper in detail, however he did direct attendees to his website and the online version of the paper so that they might read at their leisure.

Professor Tetley's presentation departed somewhat from the CSR theme of the other presenters, and looked more to the need for harmonized frameworks to govern the interconnected global web of maritime shipping. Professor Tetley addressed what he perceived to be serious shortcomings of the Rotterdam rules. The world of shipping has been governed by Hague rules and by the Convention on the Law of the Sea, but the U.S has not signed on to either. Professor Tetley suggested that the Rotterdam rules fail because they neither harmonize nor improve the law of international carriage of goods. In his paper Professor Tetley briefly outlines the case that is made to adopt the Rotterdam rules, and then proceeds in detail to explain the faults of the new convention. Principally, the professor suggests that the Rotterdam rules "provide a long, verbose convention in new, untried, untested, and unclear language." In today's age of globalized shipping, the professor suggests that we need uniformity in language, rather than a total break with the long established traditions of maritime law.

Responsibility and Sustainability in New Chilean Environmental and Institutional Reform

Professor Valentina Durán Medina, CISDL & Clinic Department, Faculty of Law, University of Chile, Santiago

Professor Durán's presentation investigated recent constitutional changes in Chile and the administrative framework adopted to achieve environmental sustainability objectives. In keeping with the theme of CSR, the discussion focused on the importance of changing mentalities and the methods of generating real awareness of environmental damages created by enterprise. To set the context, Professor Durán cited two examples showing the range of attitudes regarding sustainable development. The first quote was from former Chilean president Patricio Aylwin, who spoke of the perspective of astronauts in space who saw a finite and fragile planet. On the other end of the spectrum, the professor showed a Chilean newspaper clipping about a particular development. Here, the mentality of progress was to make significant profits first, and then, with the revenue gained, to find ex-post solutions to any environmental problems.

Professor Durán gave a very detailed talk about the new legislative and administrative reform in her country, to illustrate how a shift from shareholder focus to a stakeholder focus requires a comprehensive approach to changing mind-sets about sustainable development. The new reform looks at institutional weaknesses and the difficulty of coordinating sanctions for breaches of environmental guarantees. Article 19.8 of the Chilean constitution guarantees the right to live in a pollution-free environment, but delivering on such an obligation is a monumental task. The new reform focuses on nature protection, environmental management tools, raising environmental standards, decontamination and prevention plans, environmental education, and creates an

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environmental impact assessment system to oversee the relative effects of each measure. Professor Durán's presentation reminded attendees that CSR is only one part of changing collective mentalities about sustainable development.

Substantiating the Principle of Sustainable Development with the Principle of Fraternity: The Case of Corporate Social Responsibility

Ms. Jola Gjuzi, Ph.D. Student, Bucerius Law School, Hamburg, Germany

Ms. Gjuzi spoke about substantiating the principle of sustainable development with the principle of fraternity, particularly in the context of CSR. She examined the points of intersection between Justice Gonthier's perceptions of fraternity and sustainable development, and the idea of CSR. Like Professor Durán before her, Ms. Gjuzi emphasized that CSR was not simply a question providing and protecting collective goods. Rather, CSR is an issue of transcendental moral value, of empathy, care, and compassion. The primary focus of Ms. Gjuzi's lecture was to show that if CSR truly engages with the principles of fraternity, it will create a balance between economic and environmental goals over time.

Ms. Gjuzi drew participants' attention to the strengths and weaknesses of international declarations seeking to promote sustainable development and manifesting the spirit of fraternity. While such declarations are increasingly prominent and may gain legitimacy and enforceability over time, the dominance of transnational corporations limits the ability of black letter law to regulate sustainable development. The spirit of fraternity on the other hand, as Justice Gonthier believed, suggests that where there are relationships there are responsibilities. As transnational corporations expand their relationships into more fields, and accrue revenue streams larger than those of some nation-states, such guiding principles in business and the law can effect change. Ms. Gjuzi drew our attention to the example of the temperance rules of UN global contracts, which seek to encourage CSR values in the developing world. Ms. Gjuzi's presentation was very informative and pushed conference attendees to consider how we as stakeholders can encourage CSR through many different avenues.

Corporate Social Responsibility: A Legal Obligation of Sustainability?

Ms. Jillian Friedman, CISDL & Faculty of Law, University of Montreal, Montreal

Ms. Friedman discussed the different legal obligations of sustainability, touching on similar themes as the presenters before her. Before touching on CSR, our presenter defined what sustainable development meant for the purposes of our legal discussion. As she defined it, sustainable development is based on a principle of intergenerational justice. Borrowing from a famous Native American proverb, "we don't inherit the earth from our ancestors; we borrow it from our children." The three pillars of sustainability that Ms. Friedman outlined were the social, economic, and environmental. Departing from the principle of intergenerational justice in each of these three domains, the Quebec Sustainability Act (2006) informs the Quebec legal system.

Moving on to CSR, Ms. Friedman drew participants' attention to some of the current conflicts of the sustainable development ethic enshrined in law. Both doctrine and jurisprudence have traditionally held corporations to be bound by a legal duty to their shareholders. In some cases, the

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directors of corporations have been held legally liable for the losses of the shareholders if a sustainability measure has interfered with the short-term profits of the shareholders. Therefore, integrating sustainable development with corporations poses a challenge to the legal profession: how to break with the old tradition? Ms. Friedman drew our attention to two cases of the past decade where in fact the courts did take a more progressive approach to corporate law: *Peoples Department Stores v. Wise* and *BCE Inc. v 1976 Debenture Holders*. In both cases, the court leaned more towards a stakeholder's rights approach than a purely shareholder's rights approach. While these new decisions have helped to encourage sustainable development in corporate environments, Ms. Friedman appropriately concluded by reminding attendees of how much work must still be done in terms of creating positive obligations towards sustainable development in corporations.

Conclusions

By the end of the session, all of the participants left with a greater appreciation of CSR: its importance, the legal obstacles, possible avenues to enable it, and most significantly, the contribution that principles of fraternity can bring to its conceptualization. From Professor Janda's appreciation of the scale of environmental damage to Ms. Gjuzi's elaborate treatise on fraternity as a guiding principle for CSR to Ms. Friedman's presentation of new judicial interpretations of corporate duties towards shareholders, all of the presenters clearly linked their research to the afternoon's theme. Even so, each presenter dealt with CSR in very distinct contexts. Whether of scale, geography, or jurisdiction, the differences between the presentations also served to highlight the similarities of the issues. As highlighted at the beginning of the session and throughout several presentations, CSR is more – and must be more – than simply good public relations. As transnational companies already dwarf states in their economic power, and exist beyond the total legal control of any one state, a guiding principle of fraternity has enormous appeal in driving sustainable development.

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