

# Business and Human Rights: Dialectics of Interaction

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## ABSTRACT

Adoption of the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises indicates gradual change in human rights theory. However the Convention for the Protection of Human Rights and Fundamental Freedoms is the most universal international treaty and the European Court of Human Rights was created to ensure its implementation. The Convention lays down vertical dimension of human rights and the practice of the Court allows to speak about the necessity to adjust the theory of human rights in the context of extending the duty to respect human rights to business. The classical theory of human rights, according to which the addressee of human rights is the state (which has responsibilities for human rights recognition, provision and protection) does not meet modern challenges with the spread of influence of business upon the field of human rights and the activities of transnational corporations, in particular, because of the necessity to extend the duty to respect and provide human rights to businesses. Business is an important subject in the field of human rights implementation, but until recently, it was not obliged to respect human rights. An important factor in changing the theory of human rights was the activities of transnational corporations. The main provisions implemented in international law are the following: the state has both positive and negative obligations in the field of human rights, an obligation to protect them from breaches by third parties, in particular, by business. To do this, the state should adopt quality legislation providing for the liability of persons breaching human rights; the state is obliged to create effective remedies for human rights violations, both judicial and extrajudicial; the state is also obliged to create conditions for functioning of non-state remedies; business must respect human rights by exercising human rights due diligence. Aspects of the mutual influence of human rights and business at the international level are determined by the practice of the European Court of Human Rights (the Court), the analysis of which allows to conclude on both the impact of business on human rights and the impact of rights on business. The impact of business on human rights can be both positive (when business promotes further human rights development or directly implements human rights) and negative. However, the most common in practice of the Court are cases in the field of media, legal business and financial and property cases. Human rights might constrain the development of a particular business (Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine stipulates that development of biology and medicine should be used for the benefit of society, but without prejudice to human dignity). One of the aspects of interaction between human rights and business is that businesses can apply for human rights protection to the European Court of Human Rights.

**Keywords:** *business, human rights, European Court of Human Rights, Guiding Principles on Business and Human Rights, obliged to respect human rights, OECD Guidelines for Multinational Enterprises*

## 1. INTRODUCTION

The human being, his/her fundamental rights and freedoms are recognized as the fundamental values in a civilized society. The doctrine of human rights, which began to emerge after the Second World War, is based on the premise that human rights are vertical: their destination is

the state; it is the responsibility of the state to provide human rights.

At the same time, at the end of the 20th – beginning of 21st century, there is a significant development of information technology, in particular, scientific and technological revolution led to business growth. Business in the post-industrial era is increasingly becoming the subject influencing human rights, the role of the state and

is the factor in the necessity to rethink the established views on the foundations of the statehood, sovereignty, and the role of the state in particular.

Considering that the basis of the stable development of the state is the presence of the middle class, which is composed mainly of small and medium-sized entrepreneurs, as well as the fact that business people spend an average of one-third of an astronomical day in the workplace, it is business that becomes the means for a realization of a person and the issues of human rights protection are becoming of particular relevance.

Thereafter, it should be added the permanent challenge of finding a balance between the interests of the business owner and the employees: on the one hand, increase in profits, intensification of production or expansion of services, maximizing the use of potential opportunities of workers, and on the other hand, the right to adequate remuneration for labor, rest of employees, the right to privacy. In addition, business largely influences the rights of particular groups of people: people with disabilities, migrants, older people, women, and children.

Therefore, business in the modern society plays an important role in society, becoming the factor that significantly influences the implementation of human rights, which necessitates rethinking of the established theory of human rights in the part of the addressee of the claims: if in the classical sense human rights are addressed to the state which has the obligation to respect, protect and safeguard human rights, then in the modern dimension business is increasingly becoming the addressee of claims. Given the importance of knowledge of the field of business, human rights, in particular, taking into consideration the current trends in the field of business and the lack of researches in this field, the purpose of this paper is to identify possible aspects of the interaction between business and human rights, which can become epistemological tool for further cognition of the specific directions of their interaction.

### **1.1. Related Work**

The issues of interaction between business and human rights in the practice of the European Court of Human Rights remain unexplored today. Separate conclusions of the scholars used in this paper are given to highlight some aspects of the subject of the study.

### **1.2. Our Contribution**

The classical theory of human rights, according to which the addressee of human rights is the state (which has the responsibility for recognition, provision and protection of human rights) with the spread of the influence of business upon the field of human rights, the activities of transnational corporations do not meet modern challenges and require adjustment, in particular, because of the necessity to apply to businesses the duty to respect and

provide human rights.

Some steps have been taken internationally to do so through the adoption of Guiding Principles on Business and Human Rights and The OECD Guidelines for Multinational Enterprises. These instruments are the first international standard that defines the basis for the recognition of human rights by businesses.

Today, the aspects of the mutual influence of human rights and business at the international level are determined by the practice of the European Court of Human Rights (the Court), the analysis of which allows us to conclude on both the impact of business on human rights and the impact of rights on business. An important aspect of the positive impact of business on human rights is promotion of their development (business might in some cases be the subject of an appeal to the Court. Human rights can be a deterrent to business development.

The study of the relationships between human rights and business was based on the analysis of the practice of the European Court of Human Rights. 39 judgments of the European Court of Human Rights against Austria, Belgium, Bulgaria, Germany, Ireland, Russia, Slovakia, Turkey, Ukraine, United Kingdom, and France have been analyzed. The study of the practice was implemented using logical methods of analysis and synthesis, as well as a systematic method. The analysis of the standards of international treaties in the field of business and human rights was conducted using the hermeneutical method.

### **1.3. Paper Structure**

The first part of the paper analyzes the current state of legal regulation of relations “human rights” – business at the international level. The following section summarizes the practice of the European Court of Human Rights concerning the interaction between business and human rights.

## **2. BACKGROUND**

Today, few deny the importance of human rights. “Human rights are in the basis of justice. Any human rights violation is a breach of justice, even if not each injustice violates human rights” [1]. Today, however, the issue of securing and protecting them, including from the business side, is important. Some aspects of this challenge were explored by Kim Sorensen, emphasizing: “The proliferation of private military and security companies (‘PMSCs’) in the wake of the end of the Cold War has prompted a variety of reactions concerning the regulation of PMSCs in the ‘market for force’. Some underscore a lack of accountability of the industry and regard PMSCs as having an inimical impact on human rights; others argue that PMSCs are legitimate actors in international society, able to provide efficient and effective support for humanitarian intervention and peacekeeping” [2].

The issue of the impact of business on human rights has become global, which is linked to the impact of business and, in particular, of transnational corporations on human rights. A. Almadani (2014) has systematically explored the impact of globalization on certain social phenomena, including human rights [3].

Scott J. Shackelford concluded that “To help meet the multifaceted challenges replete in a rapidly globalizing world – and owing to the relative lack of binding international law to regulate both cyber security and the impact of business on human rights – companies are rethinking what constitutes “due diligence” [4].

Issues “whether human rights were sufficiently protected and promoted in Australia and how we could better protect and promote human rights” [5], were also studied by Catherine Branson.

The papers of these authors became the basis for our research. However, the studies of the dialectics of the interaction between human rights and business through the analysis of the European Court of Human Rights practice have not, in fact, been conducted.

A number of international instruments have been adopted to resolve it. The Guiding Principles on Business and Human Rights, approved in 2011 by the UN Human Rights Council is among them. The Guiding Principles on Business and Human Rights have become the first international standard to overcome and prevent the risk of business adversely affecting human rights, reinforcing the human rights commitment of businesses. They are the basis for further refining business regulation (especially considering the Guiding Principles on Business and Human Rights are the soft law. The document itself states that “Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken [6]. The basis of this document is just the recognition of the State's obligations in the field of human rights, as well as the recognition of “the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights” [6].

Cognitive in this aspect is the article “Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session” [7], which covers attitudes towards issues of human rights and business.

The term “business” in this document means any company and enterprise, regardless of size, ownership and management, location, affiliation to the private or public sector, its status (local, national, multinational). However, special attention should be paid to government-related businesses (state-owned enterprises, institutions, or those with the state-owned share capital), that is, in our view, conditioned by the State's obligations in the area of respect, provision and protection of human rights; possible abuses by the state to create the best conditions for such business, the provision of tax benefits, the elimination of competition, which cannot but influence the sphere of human rights, moreover, not only business workers, but people who are in the territory of the state or under the jurisdiction of the state in general.

The analysis of this document makes it possible to conclude that: the Guiding Principles are based on the following:

a) The state has both positive and negative obligations in the field of human rights, an obligation to protect them from violations by third parties, in particular, from business. To do this, the state should adopt quality legislation that provides for the liability of persons who violate human rights;

b) The state is obliged to create effective remedies for human rights, both judicial and extrajudicial. The state is also obliged to create conditions for functioning of non-state remedies;

c) Business should respect human rights by exercising human rights due diligence, and preventing possible negative interference with human rights implementation (in addition, not only business workers but also locals who might suffer because of environmentally harmful activities of an enterprise).

Every society organization is obliged to respect human rights and promote human rights implementation.

Another crucial instrument in the field of business relations regulation in the aspect of human rights provision is the OECD Guidelines for Multinational Enterprises, containing recommendations for the authorities of states where multinational enterprises multinational corporations operate.

The purpose of implementation of these guidelines is the responsible business conduct of multinational enterprises, which is consistent with the policy of national authorities, increasing the contribution of multinational corporations to sustainable development [8]. Compliance with these principles by transnational corporations is voluntary, not subject to state coercion, it is not *jus cogens*, but it is the subject to soft law, however, individual provisions might be implemented into national legislation or governed by international obligations. In addition, these principles differ from other instruments that constitute soft law by the existence of bodies dealing with complaints as to their violation, the obligation of national states to establish National Contact Points being the focal point of discussing possible implementation issues of the principles provisions and directly implement them in the relevant territory.

These guidelines provide that transnational corporations should respect internationally recognized human rights in their activities; refrain from discrimination or disciplinary actions against employees. In addition, transnational corporations should respect human rights, avoid human rights abuses, and resolve conflicts where they have been found themselves in through the unfavorable influence on human rights [8].

In this context it should be noted that the state can abuse its powers in the context of human rights restriction, as well as other participants’ who are human rights addressees and who significantly influence the implementation of human rights, which is why the state's interference in the field of individual autonomy should be properly justified and appropriate [9]. “The principles, norms and standards had value-oriented goals that included considerations pertaining to the common good,

which included, inter alia, collective security, the promotion and protection of human rights and international criminal justice” [10].

However, perhaps the most universal international treaty (though of regional importance, the universal means of the possibility of protecting all human rights, which are systematically set forth in this document) is the Convention for the Protection of Human Rights and Fundamental Freedoms, to ensure the implementation of which the European Court of Human Rights was created for. The judgments of the Court are of precedent nature, thus affecting the law system of almost 50 states. Although the Convention itself was adopted in 1950, the dynamic interpretation of its provisions by the Court allows it to be in line with reality, to be a “living instrument” of human rights provision. In many respects, it is precisely this Convention that lays down vertical dimension of human rights (human rights are the duty of the state) and it is the practice of the Court that allows to speak of the necessity to adjust the theory of human rights in the context of extending the obligation to business to respect human rights.

So, how do human rights and business correlate coming out of the practice of the Court?

#### 1. Impact of human rights on business.

Usually, human rights are understood as the basic legal capabilities necessary for the existence and development of a person, which are recognized as universal, natural, inalienable, universal and equal for everyone (each) and must be guaranteed by the state in the scope of international standards.

Human rights are addressed (according to the established theory) to a state where there are positive and negative obligations as to human rights implementation. At the same time, the state is obliged to prevent interference with human rights (their violation) by other parties, including other people (horizontal effect of human rights). In order to fulfill these obligations, the state adopts legislation that sets out an exhaustive list of grounds for restriction of human rights, requirements for individuals and legal entities to respect human rights and promote their implementation, as well as the responsibility to individuals and legal entities for violation of these norms of legislation.

For example, national legislation of a number of states and international law contain a direct ban on perform forced or compulsory labor. This norm is enshrined in Art. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms [11].

It should be noted that the European Court has repeatedly emphasized that the Convention is a living instrument that must be applied in the light of current conditions and that stricter human rights standards require greater firmness in assessing violations of the fundamental values of a democratic society (Siliadin v. France [12]; Stummer v. Austria [13]).

It was precisely the absence of the rules in the national law providing for liability for performance of forced or compulsory labor, which led to the applicant being exploited by a person who ran a business providing careers

and security personnel for profit (C.N. v. The United Kingdom [14]). What is to be understood as forced or compulsory labor the Court has indicated in the Van der Mussele case [15], the case of Graziani-Weiss v. Austria [16]; the case of Stummer v. Austria [13]: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

The analysis of the Court practice suggests concluding that the promotion of human rights implementation by legal or medical businesses is not regarded as forced labor. Thus, in the Van der Mussele case the applicant was a trainee lawyer appointed to defend the indigent defendants free of charge [15], in the case of Bucha v. Slovakia the applicant was a lawyer appointed to defend his client free of charge [17], in the case of Graziani-Weiss v. Austria the applicant was a lawyer challenging the obligation to be appointed as a guardian [16], in the case of X. v. Germany the applicant was a notary who was to receive a lesser remuneration for working for a non-profit organization [18]. In the case of Steindel v. Germany the point is that the duty of a doctor is to participate in the provision of emergency medical care [19], and in the case of Reitmayr v. Austria – about the obligation to carry out free medical examinations [20].

In this context (the ratio of human rights, economy, and business) it is worth mentioning the paper of Brian Z Tamanaha “Failing Law Schools” [21]. In a review of this paper, M.A. Olivas states: “Professor Tamanaha is at his best in chronicling these developments, carefully laying out the way that debt issues arose and giving examples of the extraordinary amounts being incurred by the increased costs of legal education—ones that have affected students at all levels of law schools” [22].

Quite often applicants file claims for wage arrears, lesser wages (property rights violations, or a fair trial claims). Thus, in the case of Sokur v. Ukraine, the applicant appealed to the national courts against the company for wage arrears and then to the European Court of Human Rights for failure to comply with Article 6 § 1 of the Convention of the national court decision in favor of the defendant which was not carried into effect [23]. In the case of Antonov v. Russia the applicant complained that he had been transferred by his employer to a less paid job [24].

It should be noted that human rights can limit the development of a particular business. For example, the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine stipulates that the development of biology and medicine should be used for the benefit of society, but without prejudice to human dignity. This is “the first legally-binding international text designed to preserve human dignity, rights and freedoms, through a series of principles and prohibitions against the misuse of biological and medical advances” [25].

Therefore, it is human dignity and human rights being the factors that hinder the development of biotechnology.

#### 2. Influence of business upon human rights.

Business can have a positive and a negative impact on human rights. The positive aspect of influence, in its turn,

can have several directions: the first is to promote the development and formation of human rights; the second is the implementation of existing human rights in the field of business. We can note that we do not consider the second one because it is reduced to the implementation of human rights and manifested in respect for the human rights by business.

Therefore, the first of these directions, particularly negative aspect of impact of business on the implementation of human rights, deserves special attention, since the latter have become a factor in the necessity to rethink human rights theory and the violation of human rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, is the basis for appeal to the European Court of Human Rights.

Although the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights both refer to an indication “the human being”, the subject of appeal can be both the natural person and the legal entity (however, a non-governmental entity or non-governmental organization, since the state cannot claim itself). Therefore, some businesses may seek protection for their “human rights”. On the whole, it should be noted that the share of such cases in the Court is small, but such cases are not isolated. So, among the most well-known cases where the business is a party are the following:

- in the field of media: the case of *Handyside v. the United Kingdom*, in which the complainant complained of a violation of the right to freedom of thought, expression and the right to own property because of decision to confiscate the textbook “Little Red Schoolbook” and instituting criminal proceedings against the publisher for

### 3. CONCLUSION

The adoption of the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises indicates a gradual change in human rights theory. Today, business is an important subject in the field of human rights, but until recently it was not obliged to respect human rights. An important factor in changing the theory of human rights was the activities of transnational corporations.

The European Court of Human Rights practice analysis allows to conclude that human rights and business interact mutually. Human rights can impede business development, particularly in the field of biotechnology (which cannot infringe on human dignity). As the practice of the European Court of Human Rights indicates, the impact of business on human rights can be both positive (when business promotes further human rights development or directly implements human rights) and negative. However, the most common in practice of the Court are cases in the fields of media, legal business and financial and property cases.

It is understanding of the described aspects of the interaction between human rights and business that should

violating the Obscene Publications Act [26]; the case of *Sunday Times v. United Kingdom (No.1)*, in which the applicants argued that the injunction to refrain from publishing an article in the “Sunday Times” was a violation of the right to freedom of expression [27]; *Gürbüz and Bayar v. Turkey* has dealt with criminal proceedings against the owner and editor-in-chief of a daily newspaper for publishing statements by Abdullah Öcalan, the chairman of the Kurdistan Workers 'Party, an illegal armed organization, and Murat Karayılan, one of the members of the Kurdistan Workers' Party, in the newspaper *Ülkede Özgür Gündem* [28];

- in the area of legal business: *Niemietz v. Germany*, in which a search of a lawyer's office was regarded as a violation of the right to inviolability of dwelling [29];

- in the medical field: in the case of *Open Door and Dublin Well Woman v. Ireland* it has been challenged the prohibition by the Irish national courts for advising or assisting pregnant Irish women on information on abortion [30];

- in the field of business: the case of *Sovtransavto Holding v. Ukraine* the applicant complained of insufficient compensation for the liquidation of the company, violation of the right to a fair trial [31]; the case of *East / West Alliance Limited v. Ukraine* on return of its property [32]; the Case of *Agrokompleks v. Ukraine*: the applicant company complained about the length and unfairness of the proceedings regarding debt collection and violation of its property rights [33]; the case of “*Bulves*” *AD v. Bulgaria* [34] and the case of *Intersplav v. Ukraine* [35] concerned value added tax.

become the basis for further improvement of international business regulation.

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