Chapter 11

The Roles of Lawyers in Steering Corporate Governance and Responsibility Towards Addressing Social Injustice and Inequality

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Introduction

The fundamental question for the global legal profession

Is the global legal profession ready to embrace action on poverty abroad and at home as an integral aspect of the profession's own socio-ethical, professional and even legal responsibilities?[2] Put another way, can lawyers fully embrace service to the poor, the homeless and the otherwise needy on all of the levels that matter in a fully functional legal system? This means embracing the members of such communities as clients (even on pro bono terms) owed professional obligations, as disadvantaged members of local communities within the ambit of the legal profession's own corporate social responsibilities, as stakeholders whose lives are affected for better or for worse by the actions of businesses advised by lawyers, and as citizens whose denial of access to justice and basic human rights enjoyed by the middle class and the rich puts the administration of justice and the rule of law seriously to the test.

Few contemporary questions for the legal profession are as fundamental and – for some lawyers – confronting as these questions. The global legal fraternity and those who regulate them and use their services must embrace fully the multi-dimensional roles and responsibilities of lawyers in this grand global project of fighting poverty.

Framing the fundamental questions in this way is significant on five distinct but related levels. First, put in these terms, the questions suggest a connecting thread between what lawyers and business enterprises do (or do not do) and the endgame of alleviating and even eliminating poverty. In other words, the action or inaction of the global legal profession makes a difference to what happens to people afflicted by poverty and its ravages – hunger, malnutrition, disease and denial of basic human rights.

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2 This paper draws and builds upon some of the author's previous work on transnational CSR and corporate governance, focused more particularly on the law and poverty. The paper does so through the prism of connections between CSR and corporate governance, business enterprises (including legal organisations) and human rights, and the roles and responsibilities of legal and business professionals, all in the fight against poverty in a just society governed by the rule of law.

Secondly, such questions raise the prospect that the universalisation of human rights in law cannot really succeed without realisation of the human rights denied to mass populations worldwide by conditions of poverty. The multiple human rights integrally connected to poverty eradication include socio-economic rights (eg, rights to everyday subsistence, meaningful work, minimum wages, basic education, secure housing, etc) and related political and civil rights (eg, freedom of speech, advocacy, association and movement).

Thirdly, the questions posed at the outset focus attention on the thinking, regulation and behaviour of corporations, financial institutions and other market participants in meeting socio-economic needs (including poverty eradication) under post-GFC conditions. This focus is justified by the combined role of finance, investment and law in alleviating or alternatively exacerbating conditions of poverty.

Fourthly, the questions require an approach to contemporary corporate governance, responsibility and sustainability that cuts across the distinct ideas and practices that are conventionally associated with notions such as corporate governance, corporate social responsibility (CSR), 'the triple bottom line',[3] socially responsible investing (SRI) and reference to environmental, social and governance (ESG) considerations in corporate, financial and investment affairs. Finally, such questions not only point towards key roles and responsibilities in this grand project for lawyers across all arms of the global legal profession – in government, the courts, the legal academy, the Bar and law firms, and in business and NGOs – but also intimate that successful completion of this project is not possible without such a collective effort across the profession and with others in key governmental, business and societal roles.

The human face of these dimensions and concepts must be confronted. When we say in the abstract that lawyers have regulatory, advisory, litigious and other roles involving business enterprises (including law as a business enterprise in its own right) that can improve or worsen the conditions of poverty-stricken communities and hence promote or detract from the full universalisation of human rights, such abstractions sometimes cloud the harsh reality of poverty at its global, local and personal levels. Once we make the connections between the legal profession's social responsibility, business enterprises, human rights and poverty, this new lens allows lawyers and others to see some conventional aspects of their work in an unconventional perspective.

For example, a multinational corporation whose actions along its global supply and distribution chain exploit local environments, communities and employees in developing economies rightly faces not only a reputational risk but also possible community castigation as an abuser of human rights and a contributor to poverty. Public policies and business actions in one corner of the globe that contribute to investment speculation in global financial markets in basic foods, agricultural produce and other resources also contribute to poverty, starvation and illness.[4] Lawyers who take CSR and human rights seriously must also take poverty as a central aspect of human rights and social responsibility seriously too.

The need to reframe lawyerly roles and responsibilities in fighting poverty

Landmark shifts in perspective are needed to develop mainstream acceptance of the connection between poverty, law and the correlative responsibilities of lawyers. Similar landmark shifts in reframing individual and collective responsibilities have occurred in related contexts. For example, consider first the relationship between nuclear weapons and socio-ethical responsibilities. Whatever its pragmatic value, the nuclear deterrence policy of the East and West during the Cold War and its aftermath cannot withstand serious socio-ethical scrutiny after its exposure as a serious offence to principles of common morality that transcend national boundaries and historical eras.[5] Once the inherent immorality of the policy of mutually assured destruction (MAD, the deterrence policy) lies exposed, because of its inherent threat to many innocent civilian lives, commanders of nuclear submarines and political leaders of countries with nuclear weapons each hold flow-on socio-ethical responsibilities not to use or even threaten the use of such weapons.[6]

3 John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Capstone Publishing 1999).
4 See, eg, 'The Economics of Curbing Speculation in Food, Water and Vital Resources', CSRWire Daily News Alert, 30 November 2012.
5 John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press 1987).
6 *Ibid*, 347–354.

Next, reconceive this connection between nuclear weapons and socio-ethical responsibilities through the prism of human rights. The universalisation of human rights assumes significance beyond the 20th-century's Second World War that is unimaginable but for the human rights atrocities and other international war crimes of that conflict. In his latest book, Jeffery Robertson QC unifies all of these dimensions in his claim that we must abandon any post-Cold War complacency about nuclear weapons, take seriously the risk of rogue states holding nuclear weapons, and reframe our response to this risk as a fundamental threat to universal human rights, and not simply a matter of disarmament and international humanitarian law.[7]

This is far from being an esoteric academic argument, because 'nuclear weapons in themselves breach the most fundamental of human rights, the right not to be arbitrarily deprived of life, and soon will be in the grasp of men whose abuses of their own people are barbaric'.[8] Robertson's evocative imagery and conclusion explicitly reveal the landmark shift in perspective that is needed for remedial action to take root, given the imperatives that 21st-century society assigns to universal human rights: 'Unless nuclear weapons are viewed through the prism of human rights, and the capacity to make them is denied to human rights abusers and then to all other states, sooner or later a nuclear winter will change the climate before climate change changes it'.[9]

Could we be on the verge of a similar realisation of the true links between another geopolitical challenge (ie, global poverty), human rights and law, with correlative collective and individual responsibilities for the legal and business professions? On many fronts, the shared responsibility and response of organisations across the public, private and community sectors is being increasingly recognised as the only viable solution to a range of global 'wicked' problems, not least of which is the alleviation and eventual eradication of poverty in all of the communities (including communities that are part of a business supply and distribution chain) in which any business (including law firms) does business. Businesses of all kinds have corporate social responsibilities.[10] Those responsibilities embrace the recognition and practice of supporting human rights. Poverty is intertwined with concerns about human rights. Inevitably, we are drawn towards the conclusion that the universalisation of human rights can only succeed if the legal and business professions play their part, and cannot be realised fully while poverty remains at its present levels worldwide.

The impact of the GFC and the 21st-century business environment

The onset and continuing aftermath of the 2008–2009 GFC offers a timely reminder of the need for vigilance in ensuring that systems and practices of corporate governance and responsibility serve the right balance of societal interests in the right ways. The GFC also raises multi-dimensional issues about the balance between free markets and regulatory intervention, the relationship between democracy and capitalism, the interdependence of developed and developing economies and the interaction between business and society.

The GFC and its ongoing fall-out therefore place the spotlight once again on conceptions and practices of governance at all levels of society. 'Governance in the broad sense is open for debate – the role of the state, international cooperation, the scope of prudential regulation, the role of boards of directors and in particular risk management procedures and capital adequacy requirements are all being questioned', in the pithy assessment of one leading Anglo-Australian corporate law and governance scholar.[11]

All of these issues have connections to the governance, regulation and behaviour of business organisations of all kinds, from multinational corporations (MNCs) and their global supply and distribution networks and customers, to small to medium-sized enterprises (SMEs), new social enterprises and partnerships across the public, private and community (including NGO) sectors. In

7 Geoffrey Robertson, *Mullahs without Mercy: Human Rights and Nuclear Weapons* (Vintage Books 2012) 6, 11, 341; Karren Kissane, 'Crusading Lawyer Drops a Bomb or Two' The Saturday Age (Melbourne) 8 December 2012, 16.

8 *Ibid*, 6.

9 *Ibid*, 11.

10 For further argument and illustration, see, eg, Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar 2012).

11 John Farrar, 'The Global Financial Crisis and the Governance of Financial Institutions' (2010) 24(3) Australian Journal of Corporate Law 227.

turn, those connections raise their own issues about the variety of roles for lawyers in this grand global enterprise. So, in the wake of the GFC, and its exposure of market exploitation, irresponsible financing and securitisation, and resultant socio-economic harm, legitimate questions can be asked about the multiple roles that all arms of the legal profession can play in fostering a new approach to corporate governance, responsibility and sustainability worldwide in alleviating social injustice and inequality in general and poverty and all of its deprivations in particular.

Three basic ideas for lawyers to embrace

Moving this agenda forward is not possible unless we frame and act upon three fundamental ideas. The first idea is that the global challenge of successful action on poverty is now a fundamental benchmark for the success or failure of the universalisation of human rights, whatever dimensions or characterisations each of poverty and human rights might possess. The second idea is that confronting the underlying causes and effects of poverty in local communities across the globe as an aspect of fundamental human rights is now an issue of societal responsibility for business enterprises of all kinds, from MNCs, SMEs and other business enterprises (including professional services, firms, barristers' chambers and legal professional associations) to state-owned enterprises, transnational institutions and community bodies, and hence part of a new, essential and truly transnational approach to corporate governance, responsibility and sustainability in the 21st century. The third and final idea is that all arms of the legal profession have significant, coexistent and interactive roles in confronting global poverty as part of the broader social responsibility and accountability of the global legal profession as a whole, especially (but not exclusively) in the interactions between lawyers, business and human rights. If lawyers accept these ideas, they must also accept a responsibility to act on them.

Accepting this responsibility requires lawyers to work through important issues of ethical, professional and legal duties. For example, can lawyers completely avoid responsibility for the law's harmful impact upon human rights and related poverty conditions by seeking refuge in professional obligations to clients as currently conceived? The opportunities and dilemmas on this level can be illustrated as follows:

> 'Increasingly, law firms are being 'named and shamed' for whom they represent and advise. A recent example is the controversy around distressed sovereign debt or 'vulture funds', which target poor countries who are receiving international debt relief, buy their debt, often just before those debts are to be written off, and then sue the country for the full amount.
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> 'The UN Independent Expert on Foreign Debt has said that these suits can have major adverse impacts on human rights in poor countries, because they divert funds that could otherwise be spent on health, water and sanitation, food, housing and education. Several major London law firms received negative publicity for pursuing such collection claims in court and some have since publicly stated that they will not act for these entities when they are engaging in these criticised transactions. In response to the controversy, the UK has recently enacted legislation that restricts the availability of its courts for vulture fund collection suits.
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> 'Yet it is a core principle of the legal profession that all clients are entitled to legal advice and representation, whether nor not the lawyer personally agrees with their objectives. This is central to most notions of access to justice and the rule of law, which is a foundation for the corporate responsibility to respect human rights. Moreover, the obligations of a law firm to serve the interests of its clients faithfully, and to maintain the confidentiality of lawyer–client communications, are embedded in the professional legal standards that lawyers are sworn to observe.'[12]

These are serious issues and points of tension for well-intentioned lawyers, and they deserve to be worked through in their full ethical, professional and legal dimensions. However, notwithstanding such concerns, the bottom line is that lawyers need to avoid complicity in human rights harm.[13] Lawyers

12 Discussion Paper, 'Law Firms' Implementation of the Guiding Principles on Business and Human Rights', A4ID (Lawyers eradicating Poverty), November 2011, 17.

13 On this and following points in this paragraph, see the discussion and suggested actions in: Discussion Paper, 'Law Firms' Implementation of the Guiding Principles on Business and Human Rights', Advocates for International Development (Lawyers eradicating Poverty), November 2011, 17–23.

face choices about screening and representing particular kinds of clients and the circumstances under which they will and will not do so. Increasingly, law firms confront reviews of their own track record as virtuous organisations, as part of public and NGO scrutiny of organisational irresponsibility in the digital age, or under client audits of law firms as their business services providers.

Neither the content of lawyers' ethical codes and professional obligations, nor the overriding imperative to provide legal rather than commercial or ethical advice to clients, can preclude meaningful consideration of possible human rights consequences and other harm to local communities affected by clients' actions, especially under 21st-century business conditions in which political, regulatory, financial, social and other risks can legitimately figure in professional advice. Finally, whatever the outcome of such reflections about their own socio-ethical stances and their obligations to clients, lawyers also have obligations to their profession and the broader administration of justice that generate other roles and responsibilities for lawyers concerning human rights and poverty, including legal and policy advocacy and reform that makes it harder rather than easier for any business to exploit the poor and gain 'neutral' legal help in doing so.

Framing the roles of the legal profession in fighting poverty

Categorising lawyerly roles

Law wears many guises — an academic discipline (ie, law), a profession (ie, the legal profession), a business (eg, a profitable law firm), a system (ie, the legal system), a part of government (eg, law-making courts and legislatures), a public good (eg, social justice) and a core feature of democratic governance (ie, the rule of law). In the present context, all arms of the legal profession owe fidelity to law's higher-order ideals. For all arms of the broader legal profession, this means taking seriously their implicit commitment to the public goods of law-making, law reform and social justice under the rule of law, in ways that keep pace with 21st-century democratic governance and regulation, and might even extend beyond existing worthy initiatives by the legal profession as a whole.

The various possible roles for the legal profession in this grand global justice enterprise can be summarised for the purposes of this discussion as follows. Each arm of the global legal profession has a part to play in each role, to one degree or another. In that sense, the roles are function-based, rather than lawyer-based. Importantly, none of these roles are at large. While there are many ways in which lawyers worldwide might contribute collectively or individually to solving global poverty, the main emphasis here is upon the connecting thread between lawyers' societal responsibility concerning the contribution of business enterprises (including law firms and other legal organisations as business enterprises) to eradicating global poverty as an aspect of universal human rights.

Viewed in that light, the various roles of the different arms of the global legal profession in this context might be characterised as follows:

- theory-building, research and scholarship;
- legal and regulatory literacy;
- law-making and other standard-setting;
- public policy and advocacy;
- legal education and training;
- internal and external legal advice;
- adjudication, enforcement and monitoring; and
- individual social justice commitments.

Jeffrey Sachs, the Special Adviser to the UN Secretary-General on the Millennium Development Goals, which directly focus upon addressing poverty worldwide, offers a suitable starting point from which to begin examining the roles and responsibilities of lawyers across the public, private and community sectors in addressing poverty under post-GFC conditions:

> 'The marketplace does have some elements of basic fairness: hard work can produce a higher income; laziness is punished (b)ut the fairness of the marketplace should not be exaggerated… Whole regions of America and other countries have faced deep economic crisis because of shifts in global market conditions that are far beyond anyone's control. In all of these cases, the

> marketplace can be brutally unsentimental, leaving the poor to starve or die from illnesses and neglect, unless society steps forward through government or charitable relief.
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> 'Just as there are many people who don't deserve their poverty, there are many others who don't deserve their wealth… Wall Street bankers took home tens of billions of dollars in Christmas bonuses each year in the lead-up to the 2008 financial meltdown, just as they were driving their firms toward bankruptcy. Several of America's best-paid CEOs in the past decade led their companies into illegality, bankruptcy, or both.
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> 'Amazingly, even when Wall Street required government transfers to stay alive in 2009, the megabonuses persisted (and the White House looked the other way because Wall Street had financed Obama's 2008 campaign)…
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> 'Despite the claims of free-market advocates, virtually all societies throughout history have organised governmental means to ensure support for the poorest among them. Most have also placed a special responsibility on the rich to pay their share. Until the last two centuries, however, the extent of poverty was so pervasive that there was often not much that society could really do for the poor beyond emergency relief (in the case of a famine, for example). Now, with our great affluence, we can do much more. Indeed, I argued in *The End of Poverty* that we can actually end extreme poverty once and for all in our generation if the rich will accept their share of the effort to help raise the education, health, and productivity of the poor.'[14]

Whatever anyone's views of Sachs' conclusion, there are connections made and issues raised even in these short paragraphs that are hard for lawyers to ignore in terms of their own societal, organisational and individual responsibilities concerning poverty. Lawyers have roles in public, private and community organisations that can make a difference to poverty. Lawyers also have roles as internal and external advisers to corporations and other business enterprises that go to basic questions of corporate liability, accountability and responsibility for the effects of poverty in communities affected by those businesses. Lawyers operate within regulatory institutions whose actions directly or indirectly impact upon poor communities, and whose shortcomings are revealed in collective regulatory failures across the globe, which contribute to phenomena such as the GFC. Lawyers facilitate business transactions, engage in public advocacy for clients and conduct other activities that produce or curb laws and other forms of regulation that directly or indirectly affect poverty for someone, somewhere in the world. Lawyers who take seriously an organisational commitment to CSR or an individual commitment to social justice can do various things that might improve conditions of poverty, hunger, disease and so on.

One important step that cuts across many of the foregoing lawyerly activities is for lawyers in all arms of the legal profession to participate in standard-setting initiatives that address the problem of poverty. These standard-setting initiatives must be developed under contemporary conditions of governance and regulation, where governmental and non-governmental actors contribute to a variety of 'hard' and 'soft' laws. In democracy's 21st-century form, this includes lawyerly involvement in aspects of the democratic process crystallised by the US Supreme Court's Justice Stephen Breyer for the American Society of International Law in 2003. On Justice Breyer's view, there is an active alliance of academics, professionals and other non-governmental groups engaged with governmental actors in standard-setting that ultimately results in new and reformed laws.

A similar coalition of interests at national and international levels are involved in a variety of multi-stakeholder standard-setting initiatives that produce 'soft' law that later garners enough support to become transformed into 'hard' law. This organic 'bottom up' (as distinct from 'top down') view of law-shaping is another prong of democracy's contemporary evolution from simple majoritarian rule to a more citizen-engaged form, which Justice Breyer describes from an American standpoint as follows:

> 'Finally, the transnational law that is being created is not simply a product of treaty-writers, legislatures or courts. We in America know full well that in a democracy, law, perhaps most law, is not decreed from on high but bubbles up from the interested publics, affected groups, specialists, legislatures, and others, all interacting through meetings, journal articles, the

14 Jeffrey Sachs, *The Price of Civilisation: Reawakening Virtue and Prosperity after the Economic Fall* (Vintage 2012) 39–40.

> popular press, legislative hearings, and in many other ways. That is the democratic process in action. Legislation typically comes long after this process has been under way. Judicial decisions, particularly from our [US Supreme] Court, work best when they come last, after experience has made the consequences of legislation apparent.'[15]

Another necessary step is for lawyers in all arms of the legal profession to support or undertake the research that is necessary to investigate and address the links between law, human rights and poverty. This research includes cross-disciplinary and cross-jurisdictional theory-building for reform of international and national law and policy, evidence-based assessment of existing regulation and its gaps, and case studies on the legal, financial and investment architecture's impact upon human rights and poverty.

Despite all of the attention now given to, for example, CSR, ESG and human rights concerns and correlative tools for investment decision-making and business reporting, large areas of the relationship between finance, investment and law surrounding these concerns lie relatively untouched by investigation, standard-setting and remedial action.[16] Existing CSR-related decision-making and reporting measures do not address much of the socio-economic harm (including poverty) caused by irresponsible lending, sub-prime mortgages, securitisation of debt and other finance and security arrangements that the GFC has called into question.

Lawyers therefore have many different roles in a variety of public, organisational and personal capacities, all of which relate to the interaction between business and society in ways that address social inequality and injustice. In particular, these roles and capacities bear upon discrete facets of a holistic and embedded approach to corporate governance, responsibility and sustainability. Such an approach has much to offer in connecting the role of law and regulation, the work of lawyers and ongoing global challenges in achieving socio-economic prosperity and a civil society.

For that reason, the remainder of this chapter concentrates mainly upon two key lawyerly roles and responsibilities affecting poverty. They concern lawyers as professional advisers to organisational clients whose activities improve or exacerbate the conditions surrounding poverty, and lawyers as members of legal organisations, which, as business enterprises in their own right, must respect human rights whose fulfilment or abuse also affects poverty. In both cases, a legal and regulatory lens on corporate governance and CSR through the prism of business responsibility for human rights offers important insights on some of the most dramatic ways in which lawyers can do something about poverty.

Roles of the legal academy

The academic arm of the legal profession worldwide has a variety of roles in teaching, research and public policy development that align good corporate governance and responsibility with societal goals of eradicating social inequality and injustice. This includes the inculcation of ethics of social, business and professional responsibility in law and business school courses, public advocacy and thought leadership in developing appropriate models and regulation for responsible lending and business, and contributions to discipline-based and cross-disciplinary research that facilitates business contributions to socio-economic prosperity as well as the curbing of corporate irresponsibility and harm.

Despite the considerable post-GFC attention in business schools and business literature worldwide to the heightened need for business ethics in business education, training and practice, relatively less prominence has been given to the question of legal ethics and the professional responsibility of lawyers in facilitating corporate responsibility and preventing corporate irresponsibility. Here, contemporary calls for 'shared value', 'enlightened shareholder value' and compassionate, responsible and sustainable capitalism all reflect the struggle to find new ways of understanding the relationship between business, markets and society in the 21st century.

For example, the conversion to 'shared value', long-term business success, sustainable business practices and meaningful stakeholder engagement closes the gap between shareholder-centred concerns, societal concerns and the drivers of true business success in society. In this way, true business

15 Stephen Breyer, 'The Supreme Court and the New International Law' (Speech delivered at the Omni Shoreham Hotel, Washington, DC, 4 April 2003).

16 Mary Dowell-Jones and David Kinley, 'Minding the Gap: Global Finance and Human Rights' (2011) 25(2) Ethics & International Affairs 183.

value to society is viewed in terms of sustainable business success and its interdependence with broader societal systems. This has correlative implications for the operation of business and its multi-dimensional relationship to poverty, especially in the form of poor consumers, poor employees and poor communities along a business enterprise's value chain.

Roles of legal practitioners

The practising arm of the broader legal profession at large across the public, private and community sectors also has a variety of roles available to them in connecting the public, professional and personal aspects of legal work to broader concerns of social (in)equality and (in)justice. Lawyers within government have important roles to play in policy-making, law-making and regulatory investigation and enforcement surrounding both responsible and irresponsible business behaviour at home and abroad. Courts, tribunals and official regulators have roles in interpreting, applying and enforcing business, consumer and other laws with sensitivity to their societal effects.

Similarly, legal and multi-disciplinary professional services firms have important 'gatekeeper' roles in facilitating responsible corporate client behaviour, together with thought leadership roles in public policy advocacy and regulatory innovation in this area. For example, many law firms now have practice areas in corporate governance, responsibility and liability that relate to wider issues about business effects upon society. As business enterprises in their own right, many legal and professional services firms, barristers' chambers, and other legal organisations are accountable to their clients and other constituencies for their organisational approaches to matters of social responsibility and environmental sustainability.

In particular, lawyers and their organisations have important roles in helping their clients and own organisations implement the landmark UN Framework and Guiding Principles on Business and Human Rights, especially given the connection between human rights and socio-economic justice for communities affected by business for better or worse. In their various individual and institutional capacities, lawyers with relevant expertise across the various sectors can also join other participants in multiple 21st-century standard-setting initiatives focused upon responsible business in society. Accordingly, the post-GFC roles of a corporation's internal legal advisers (eg, corporate counsel) and external legal advisers (eg, law firms) in this grand enterprise of poverty eradication can be seen as links in a circular chain between law, corporate governance, CSR, human rights and poverty.

Like any business, lawyers in commercial practice must engage progressively with different orders of CSR. They must also relate their engagement with CSR to their range of professional obligations. These obligations are owed to clients, courts, the profession as a whole, the administration of justice and the broader public interest. If poverty matters to law and justice – and it does – as a fundamental concern of socio-economic justice, access to civil and criminal justice and the rule of law, then poverty must also figure somewhere in the professional obligations of lawyers.

The roles of lawyers engaged in corporate governance regulation, advice and adjudication

Corporate governance standard-setting draws upon good practice in corporate governance thinking and behaviour across jurisdictions. Hence, this area of concern is a matter for corporate law-makers, policy-makers and regulators, including courts and the lawyers who appear before them. Lawyers and judges engaged in the art of making and assessing arguments about matters of corporate law can gain insight from what has been argued and decided elsewhere, especially when there are new laws, unresolved issues or novel applications. In some developing economies, reference to the corporate legislation and case law of other countries is officially authorised for instructive purposes in interpreting and developing that country's own corporate law.[17]

Even in mature corporate regulatory systems that share a common transnational heritage and adjudicative methodology as common law systems, commonalities and contrasts in corporate legal

17 For example, section 5(2) of the current South African Companies Act says that '(t)o the extent appropriate, a court interpreting or applying this Act may consider foreign company law'. In addition, constitutional protection of human rights is also a relevant matter for South African corporate law, given that section 5(1) states that the Companies Act must be interpreted according to its designated purposes which, under section 7, include a purpose to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'.

problems, courtroom arguments and judicial outcomes across jurisdictions can be instructive in testing and developing the boundaries of corporate law. This is a matter for judges, legal practitioners and corporate counsel seeking to explore the boundaries of corporate law's development and application. Here, the extent to which stakeholder interests are required or permitted to be taken into account under corporate law and governance is important in working through the business responsibility towards human rights, including the impact upon the poor in all of the communities affected by any business.

Moreover, the progressive globalisation of law through appropriate judicial reference at the national and sub-national level to international and foreign law means that courts across jurisdictions are also part of a broader transnational enterprise in cross-fertilisation and modelling of approaches to corporate law and its outcomes and reform. For countries with a common law heritage, this broader enterprise extends beyond the commonplace reference to one another's judgments by UK, Canadian, Australian and other courts, and even beyond the shared heritage of corporate law doctrines and practices in the broader Commonwealth of Nations.[18]

At the very least, it also includes an emerging body of comparative CSR-sensitive law both inside and outside corporate law, and a transnational set of policy and regulatory drivers (eg, the facilitation of ESG considerations in investment decision-making) that are penetrating business conduct and corporate law alike. Such developments raise questions under corporate law about the scope for directors' duties to permit or even require reference to human rights and other stakeholder interests, especially under human rights due diligence (HRDD) and other business reforms signalled by the UN Human Rights Council mandate of Harvard's Professor John Ruggie, as detailed later in this chapter.

Categorising poverty's legal dimensions

The UN and national agencies now squarely identify poverty as a fundamental 'access to justice' issue.[19] All lawyers therefore must confront and take seriously in their responsibilities and actions the uncomfortable reality that law and poverty are inextricably linked, for better or worse. This connection can be stated simply and starkly, as follows: 'The law causes, and extends, poverty – and poverty causes, and extends, legal problems'.[20]

The pioneer of microcredit and social businesses in the developing world, Nobel Prize winner Muhammad Yunus, puts the connection between poverty and human rights just as starkly and simply: 'Poverty is the absence of all human rights'.[21] He similarly draws attention to the inequitable ways in which legal and financial systems harm the poor and keep them disempowered from accessing opportunities that are the basic human rights of all, as follows:

'If the poor are to get the chance to lift themselves out of poverty, it's up to us to remove the institutional barriers we've created around them. We must remove the absurd rules and laws we have made that treat the poor as nonentities … The problem I discovered in Bangladesh – the exclusion of the poor from the benefits of the financial system – is not restricted only to the poorest countries of the world. It exists worldwide. Even in the richest country in the world, many people are not considered credit-worthy and are therefore ineligible to participate fully in the economic system.'[22]

The bottom line is that lawyers must accept the sobering truth about the non-neutral position that lawyers occupy as participants in any legal system and the value-laden role of law in the fight against poverty. Once we identify the various ways in which law's institutions, structures and content 'disproportionately and deleteriously impact on the poor, the marginalised, and the disadvantaged',[23] we can move towards resolving the various ways in which criminal and civil justice exacerbates or helps the conditions of the poor:

'(P)eople living in poverty encountering the criminal justice system are deprived of the means

18 See, eg, Angelo Capuano, 'The Realist's Guide to Piercing the Corporate Veil: Lessons from Hong Kong and Singapore' (2009) 23(1) Australian Journal of Corporate Law 56.

19 See, eg, Magdalena Sepulveda, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights', UN Doc A/67/278 (9 August 2012).

20 Editorial, 'Justice and Poverty' (2012) 37(4) Alternative Law Journal, 220.

21 Muhammad Yunus, *Creating a World Without Poverty: Social Business and the Future of Capitalism* (PublicAffairs 2007) 239.

22 *Ibid*, 49.

23 See n 20 above.

> to challenge the conditions of their arrest, remand, trial, conviction, detention and release. In civil and administrative matters, where legal aid is not available, people living in poverty are often denied access to justice in matters involving property, welfare payments, social housing and evictions, and family matters such as child custody.'[24]

The connections between law, poverty and human rights are increasingly being drawn in major standard-setting documents too. The indivisible link between poverty, human rights and access to justice is crystallised in the 2012 UN report by the Special Rapporteur on extreme poverty and human rights, as follows:

> '(T)he interdependence of all human rights is unequivocal when considering the situation of persons living in poverty, which is both a cause and a consequence of a range of mutually reinforcing human rights violations. Eradicating extreme poverty not only requires improving access to housing, food, education, health services, water and sanitation, but also requires ensuring that persons living in poverty have the resources, capabilities, choices, security and power necessary to enjoy the whole spectrum of human rights.
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> 'Access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability, for several reasons.'[25]

The link between law and poverty as seen through the prism of human rights has implications for what law firms and other legal organisations do as business enterprises in their own right. This is an aspect of how business addresses human rights concerns. On this level, the responsibilities and performance of lawyers do not always meet established benchmarks for other businesses, as evident from recent international analysis of the role of law firms in this space:

> '[Law f]irms are just beginning to grapple with the fact that, as business, they have their own responsibilities not to infringe on human rights through their own operations and through their business relationships. This requires a close look at law firms' practices with respect to employees, supply chains and clients.
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> …
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> 'Regarding law firms and human rights, a review of the largest 100 law firms in the world indicates the following:
>
> - None appear to have published a high-level policy statement committing them to respect human rights in the management of their business.
> - A tiny handful of these firms have signed up to the UN Global Compact, whose first two principles relates specifically to human rights.
> - Only two of these firms have published corporate responsibility reports in accordance with the Global Reporting Initiative Guidelines, which contains key performance indicators relating to human rights.
> - Only one law firm appears to have published its policy with respect to client selection and supply chains.'[26]

In short, the conditions of poverty both affect and are affected by access to justice, human rights and other aspects of the rule of law nationally and internationally. Correlative roles and responsibilities arise for the legal and business professions as a result. The approach of all businesses towards human rights embraces responses to poverty throughout the business value-chain and in all of the communities where a business operates or otherwise derives value. At the very least, this applies to lawyers within their own legal organisations as part of their own organisational social responsibility (or CSR) in general and approach towards business respect for human rights in particular. These points assume even more significance in light of the UN-inspired 21st-century agenda on business and human rights, the contemporary overlap of corporate governance and CSR, and hence the emergence of human rights (and therefore poverty as it relates to human rights) as major concerns for aspects of corporate governance and CSR too.

Considered from that standpoint, what roles must all arms of the legal profession play in the wake of the GFC to promote the kind of corporate and financial responsibility that makes a difference to poverty

24 *Ibid.*
25 See n 19, 3 [4] above.
26 See n 12, 2, 7 above.

alleviation as a basic dimension of universalising human rights? The answer to that question depends upon changes to the 21st-century business regulatory environment and correlative reorientations of corporate governance and responsibility, as distilled immediately below.

21st-century governance and regulatory environment for action on poverty

Changes in the orientation of governance and regulation

Part of changing how we think about the responsibilities of lawyers, businesses or anyone else involves changing how we think about societal and global governance and regulation. The new paradigm for this can be described in many ways. In other work, the author describes it in terms of governance that transcends government, regulation that transcends law and responsibility that transcends enforceability.[27] The governance, regulation and responsibility of organisations across all sectors and borders now sits within such a framework, as do the correlative roles and responsibilities of business and lawyers towards CSR, human rights and poverty.

The effects of the GFC exacerbate conditions of poverty, social injustice and economic welfare that compound the geopolitical and related challenges of climate change, sustainable development, free trade and investment, socio-economic prosperity and even CSR, as identified in recent G8 and G20 summits. At the same time, there are more frameworks, standards and models for socially and environmentally responsible business than ever before in human history. These tools have been developed in an era of governance and regulatory transition on multiple fronts, involving a range of state and non-state institutions and actors, and resulting in a variety of laws and other norms affecting the interaction between business and society.

Another challenge lies in working through how changes to 21st-century society's governance and regulation, as a result of a multiplicity of governmental and other societal actors, affect and even reset the terms of engagement for societal and individual responsibilities. This is the era of what has been called 'intersystemic' and 'network' governance and regulation by multi-stakeholder coalitions across the public, private and community sectors nationally and globally, notwithstanding the role that government still plays in such matters.[28]

Nation states and governments remain central to all systems of governance, regulation and responsibility,[29] but there are ongoing fundamental changes in how governments engage with the people and how the people hold all institutional power-wielders accountable for their use and abuse of power and its effect upon their lives. While governments and multi-lateral institutions (eg, the UN, OECD and WTO) remain firmly at the helm of much national and global public policy development, non-state institutions and actors are increasingly coming to the fore, especially through multi-stakeholder, standard-setting initiatives and extra-governmental mechanisms of societal scrutiny.[30]

Changes in the orientation of democracy

Democracy itself is being recast so that its formal institutions are more amenable to the mechanisms of what is variously described as 'deliberative', 'participatory' and 'monitory' democracy.[31] This involves accountability to the people by the government of the day and all of its branches for their adherence to society's democratic preconditions, in terms that are not limited to periodic visits to the electoral booth.[32] Here, we are in transition from an almost exclusive focus upon majoritarian democracy and

27 Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar 2012).

28 See, eg, Robert Ahdieh, 'From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction' (2007) 57(1) Emory Law Journal 1, 2, 5, 7.

29 See the 'state-centric relational approach' outlined in Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press 2009).

30 See, eg, John Keane, *The Life and Death of Democracy* (WW Norton 2009) 688–689.

31 On 'deliberative democracy', see Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004); On 'monitory democracy', see Keane, n 30 above.

32 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996).

'government by representatives'[33] to embracing 'government by discussion',[34] a 'partnership conception of democracy'[35] and governance through multi-order monitoring of all institutional exercises of power over the people in the new era of 'monitory democracy'.[36]

Its rise reflects what Professor John Keane describes as 'the conviction of millions of people that periodic elections, competitive parties and parliamentary assemblies, though an important inheritance, were simply not enough to deal with the devils of unaccountable power'.[37] So too are the organs and actors of government exposed to enhanced standards of public contestability, deliberation and justification in their official decisions and actions.[38] Indeed, at least some of the values and mechanisms of deliberative democracy arguably apply beyond the public domain to the corporate and civic domains too, not least in furthering 'the aims of deliberative democracy for society as a whole'.[39] In these ways and others, the formal institutions of democracy are accommodating multiple accountabilities across multiple sectors to multiple constituencies, through a wide range of multi-stakeholder standard-setting and monitoring initiatives.

Recent examples of major global standard-setting of relevance to the triangular relationship between socio-economic inequality and injustice, corporate governance and responsibility, and lawyers' roles in civil society include key UN initiatives (eg, UN Global Compact, UN Millennium Goals, UN Principles for Social Investment, UN Principles for Responsible Investment, and UN Framework and Guiding Principles for Business and Human Rights (Ruggie Mandate)), OECD standards (eg, OECD Guidelines for Multinational Enterprises, incorporating the business and human rights standards resulting from the Ruggie Mandate), the latest EU strategy 2011–2014 for CSR, and international standards such as ISO26000 (Social Responsibility). National business regulatory regimes still lag behind such initiatives, with few notable exceptions.

However, in the 21st-century global business environment after the GFC, there is a closer alignment between the public policy needs of interdependent economies, the range of legal and other regulatory levers available to governments and others with a stake in business impacts upon society, and emerging regulatory and business models that integrate organisational, market and societal concerns. This alignment is a crucial systemic feature underpinning efficient and effective legal and regulatory responses to the related challenges of poverty, unsustainable development, socio-economic inequality and injustice and non-fulfilment of human rights.

Changes in the orientation of corporate governance and responsibility

Such 21st-century developments are also part of an ongoing transition from an old ethic of corporate governance and responsibility (at least in some major developed economies) centred upon the triangular relationship between companies, boards and investors, to a new ethic of multiple drivers of sustainable business success involving multiple constituencies across multiple organisational, sectoral and jurisdictional lines. As new economic, social and environmental interdependencies are being realised, they produce responses in community expectations and behaviour, public policy and regulation and business models and drivers.

Across the public, private and community sectors, this is resulting in a convergence of traditional notions and practices of corporate governance with evolving forms of CSR and related standards, such as the use of ESG considerations in corporate and investment decision-making. In this way, the concerns of CSR, ESG, SRI and related issues become mainstream concerns for organisational governance, business modelling and competitive market opportunities and risk assessments, with flow-on implications for the societal roles of businesses and those who advise and regulate them.

Corporate governance regulation and practice is responsive to the growing interactions between

33 See n 30, xviii above.
34 Amartya Sen, *The Idea of Justice* (Harvard University Press 2009), 324.
35 Ronald Dworkin, *Justice For Hedgehogs* (Harvard University Press 2011), 384.
36 See n 30, xxxiii above.
37 *Ibid*, 868–869.
38 See n 31 above.
39 Suzanne Corcoran, 'The Corporation as Citizen and as Government: Social Responsibility and Corporate Morality' (1997) 2(1) Flinders Law Journal 53, 33–34.

national, transnational and global norms affecting business on multiple levels.[40] Cross-jurisdictional thinking and practice of good corporate governance informs the design and implementation of corporate governance law and regulation. In Anglo-American corporate regulatory systems that broadly subscribe to market capitalism, shareholder value and board oversight of management, the law of directors' duties and defences is increasingly becoming a domain in which some of these external pressures are brought to bear. Witness, for example, the transnational public policy debate about the different possible justifications for requiring corporate directors to take account of stakeholder interests and wider social responsibilities. These justifications focus upon grounding this decision-making by corporate directors alternatively in contexts such as a traditional social compact between all societal actors, a notional licence from society about the conditions under which a business can operate, an aspect of CSR and business ethics, an action that is permitted but not required by law, or a new notion of sustainable business success in society.

At the same time, national corporate regulation increasingly has potential points of interaction with international economic law, transnational norms of finance and investment and global frameworks affecting multinational business activity, including international standard-setting for business and human rights (as detailed below). It is also responsive to ongoing changes in the tension between the oversight and management responsibilities of boards as an essential component of corporate governance.

All of this puts pressure upon our conventional frames of reference. Economically, the traditional Anglo-American view of corporations is that they exist to serve the interests of the shareholders who invest financial resources in them. At the time when many of our ideas and laws about companies were formed, it was easy to see how the owner–manager who invested all of the financial capital in a factory owned by their company might expect to reap the financial rewards alone, while having mainly a local impact for better or worse. However, to what extent can the ideas and laws about companies that have been developed primarily for industrial expansion serve today's world of transnational corporate groups, overseas supply and distribution chains, multi-stakeholder networks, institutional and individual investor profiles and multiple forms of human, intellectual and social capital?[41]

The first decades of the 21st century have witnessed new theoretical challenges to the prevailing notion of shareholder primacy, value and wealth-maximisation that arguably underlies much Anglo-American corporate governance regulation and practice.[42] Considered from the academy's perspective, these challenges stem from sources as variable as cross-disciplinary opposition to shareholder-based normative theories of corporate governance, debates about the sustainability and limits of market capitalism, and new calls for 'shared value'[43] and other models of corporate engagement with society to replace business as usual.

What still remains in doubt is the extent to which notions of 'shared value' and socially sustainable capitalism represent threats to shareholder-based norms of corporate governance and business success, or simply different ways of meeting or even reconceiving them. After all, even one of the most widely quoted opponents of CSR, Milton Friedman, once argued that his own famous statement that 'the social responsibility of business is to increase its profits' was equivalent to the argument of a CSR advocate that 'the enlightened corporation should try to create value for *all* of its constituencies'.[44]

However, at the very least, there is ongoing scholarly and regulatory renegotiation of the terms of engagement between corporate governance and CSR. In turn, this development is matched by new

40 On the general phenomenon of interaction between local, municipal and international norms in the globalisation of legal orders, see, eg, Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 485.

41 On the limits of the industrial factory-based model of corporations as a guide for 21st-century corporate governance thinking, regulation and practice, see Jay A Conger, Edward E Lawler III and David Finegold, *Corporate Boards: New Strategies for Adding Value at the Top* (Jossey-Bass 2001) 147–148; Margaret M Blair, 'Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century' in Thomas Clarke (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 184.

42 For a landmark defence of the shareholder-based norm in mature corporate regulatory systems worldwide that has generated much scholarly debate, see Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law', in Jeffrey Gordon and Mark Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge University Press 2004).

43 See, eg, Michael Porter and Mark Kramer, 'Creating Shared Value: How to Reinvent Capitalism – and Unleash a Wave of Innovation and Growth' Harvard Business Review January–February 2011, HBR Reprint R1101C.

44 See the sources and analysis in Horrigan, n 27, 92–93 above.

standard-setting for business and human rights. As we make and work through these connections, the implications for poverty and lawyerly actions become clearer.

Changes in the orientation of CSR

Recent developments in Europe, Anglo-American jurisdictions and other countries signify a growing transnational regulatory trend towards a closer alignment between CSR and corporate governance. These trends are tracked and illustrated from legal and other disciplinary perspectives by new scholarship that highlights the commonalities and contrasts of principles and other standard-setting across jurisdictions.[45]

CSR-sensitive considerations are permeating at least some aspects of corporate law across jurisdictions, as well as other aspects of corporate regulation. Even conventional regulation and practice of corporate governance and responsibility can confront CSR-related concerns in areas such as directors' duties and defences, annual corporate reporting, legal compliance and due diligence, shareholder proposals, stakeholder engagement mechanisms, investment decision-making and corporate governance standards. This is in addition to the integration of human rights within corporate compliance, due diligence and organisational risk management and reporting systems under the various UN and other global standards discussed below.

The old paradigm kept CSR separate and marginalised from the core concerns of corporate law and its relationship to business success, legal standards and market efficiency as means to the end of social equity, efficiency and effectiveness. In other words, CSR in limited forms was perceived and acted upon largely as a voluntary add-on extra, considered largely from a corporation's standpoint alone, disengaged from any real interdependence in wider aspects of societal governance and regulation, and the first thing to be cut back or thrown overboard in tough financial times. The new paradigm witnesses the integration of CSR within standard business practice, organisational governance and corporate law and regulation.

Recent regulatory developments across Anglo-American countries and on the world stage reflect the emerging global significance of the CSR agenda in corporate law and regulation in each country. CSR is now a global force, despite strong residual resistance. Recently, *The Wall Street Journal* published 'The Case Against Corporate Social Responsibility'.[46] CSR is a 'potentially dangerous … illusion' that is either 'irrelevant' or 'ineffective'. While corporations might 'do well by doing good' on occasions, 'the idea that companies have a responsibility to act in the public interest and will profit from doing so is fundamentally flawed'. Striking a balance between corporate profit-making and the common good depends ultimately upon 'government regulation' and monitorial 'watchdog' and 'advocacy' pressure from civil society, with corporate self-regulation playing a subsidiary role. So claims Associate Professor Aneel Karnani from the University of Michigan in his much-publicised recent polemic against CSR in *The Wall Street Journal*.[47]

This is the latest in a decades-long series of landmark writings in the global financial press that attacks CSR. Milton Freedman crystallised the orthodox politico-economic opposition to CSR in his much-cited 1970 article in *The New York Times Magazine*, 'The Social Responsibility of Business is to Increase its Profits'. Most recently, Professor Robert Reich's *Supercapitalism* sounded a similar warning bell against CSR, foreshadowing Karnani's concern that CSR deflects the public and governmental focus on necessary business regulation to improve social welfare and invests misplaced hope in business contributing to that public policy need of its own free will. Even *The Economist*'s landmark concession last decade that CSR has won the battle for our hearts as well as our minds was framed as a grudging concession to the inevitability to CSR's pervasiveness in 21st-century business regulation and practice. Is CSR really as bad or flimsy as the latest reaction against it suggests?

The fact that a company behaves as we would expect a company to behave in relation to all matters that affect its business operations, including its approach to CSR, does not mean that a company

45 See, eg, Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar 2012); Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis 2009).

46 Aneel Karnani, 'The Case Against Corporate Social Responsibility' The Wall Street Journal (New York), 23 August 2010.

47 *Ibid.*

has suddenly begun to behave like a government on one hand, or a community charity on the other. A parallel can be drawn with courts, which do not suddenly become legislatures or trespass beyond the judicial role simply because they take account of social or policy considerations in appropriate ways within the institutional roles and reasoning processes associated with courts and the body of existing law.

If CSR is undergoing a rapprochement with orthodox corporate governance and responsibility, that alone does not deprive CSR of its essential character. Nor should a company's integration of CSR within its strategising, decision-making and other standard business operations necessarily result in either a hollowing-out of CSR's contribution or its subsumption by the essential business imperatives of corporate profit-maximisation and shareholder wealth-generation. If the features of the surrounding business environment, multi-dimensional drivers of business success and notions of corporate governance, responsibility and sustainability can all evolve, so too can the relationship between business and society, beyond what might have been appropriate when the modern corporation first came into being or even under more recent manifestations of shareholder capitalism.

Despite its undoubted benefits, shareholder capitalism's exposed weaknesses generate calls for more sustainable forms of capitalism. The 21st-century global business and regulatory environment is driving corporate profit-making and wealth-generation to become more economically, socially and environmentally sustainable. The G8 and G20 list CSR-related concerns about responsible lending, sustainable development and climate change as geopolitical priorities. Banks and investment funds are mass signatories worldwide to the UN Principles for Responsible Investment. Consequently, they too are paying closer attention to ESG factors in their investment decisions.

Mass business adoption of the Global Compact, Global Reporting Initiative and similar standards swings the pendulum further towards CSR. Good CSR track records give business a seat at the table with government on sustainability issues. Successful businesses are aligning their business models and corporate governance accordingly. Yet, despite pockets of CSR innovation within business, many corporate regulatory systems worldwide are still playing catch-up with all of these developments.

The successful political and business resistance to reform of directors' duties and defences along CSR lines, and the correlative deflection of CSR concerns into other areas and means of regulation (eg, stakeholder engagement in corporate governance, ESG factors in investment decision-making and corporate responsibility and sustainability reporting) together suggest that further corporate law reform in these directions is neither likely nor easy, at least in the short to medium-term. However, in what regulatory scholars call a 'meta-regulatory' business environment, in which a number of different orders of governmental and non-governmental regulation are increasingly important (including business self-regulation according to accepted and monitored standards), there remains some hope that other policy and regulatory guidance might yet be forthcoming.

Those in favour of no change to corporate regulation on CSR's account habitually warn against adding to the overall regulatory burden for business or doing anything that is counterproductive to overall social welfare through effective and efficient corporate production of goods and services. However, judgments about the efficiency and effectiveness are predicated upon what is counted, what is left out of the equation and how this changes as society changes in its expectations of corporate governance, responsibility and sustainability.

Nobody on either side of this debate seriously pretends that the law of limited liability established in the late 19th century adequately accommodates all social costs of multinational corporate activity in multiple sites of business operations (eg, mass consumer or human rights abuses, long-tail liability for future tort victims, catastrophic environmental damage etc), at least when viewed through 21st-century eyes. All sides of the debate simply disagree on the appropriate corrective mechanism and whether it sits inside or outside the core concerns of corporate law. Yet, such evaluations are contingent ones.

At the very least, the global business and regulatory environment is shifting to a significant degree away from wholesale marginalisation of CSR and towards mainstreaming the regulation and practice of CSR. The rush to embrace CSR therefore cannot be marginalised as either a threat to shareholder value or else just good business sense. CSR has evolved beyond public relations, philanthropy and a voluntary business add-on to be offloaded in lean economic times (eg, the GFC). It has become part of a new order of interdependent governance and regulation involving state and non-state actors,

who tackle major social problems together. Businesses, law firms and universities, for example, are joining governments and civil society in the move towards ecological and other forms of organisational sustainability.

Once we move beyond relying on corporate success being predicated on observing a floor of minimum behaviours necessary to comply with the law, we begin a journey towards the ceiling of aspirational corporate governance, responsibility and sustainability. Similarly, once we accept that corporate directors and other actors who are legitimately pursuing the interest of shareholders as a whole are susceptible in some way not only to minimal legal requirements but also to prevailing standards of business ethics, market norms and even societal trends of a kind that relate to a company and its business, we are immediately in the domain of having to account for the range of considerations that affect corporate and boardroom decisions and how they affect them. In other words, if companies and boards must take account of a range of social, economic, environmental and other business drivers and risks beyond the minimum that they are required to do under the law, we are in a realm of debate about exactly what kinds of considerations properly bear upon enduring business success, and how.

In these ways and others, CSR's own progress in the 21st century from the periphery towards the mainstream of business regulation and practice is matched by the twin developments of at least some convergence between CSR and corporate governance, together with the emergence of a body of comparative and transnational law and regulation in which CSR concerns can arise, directly or indirectly. The groundswell of global support for standards such as those produced by the UN, OECD and others in the domain of multinational corporation activity and human rights, social and responsible investment and finance and trade, swings the pendulum further towards CSR, as does the European Commission's renewed CSR focus through its Social Business Initiative and new Strategy for CSR announced in late 2011.

The European Commission's October 2011 package of measures on responsible business includes an 'updated definition' of CSR as 'the responsibility of enterprises for their impacts on society'. Together with its 'new agenda for action' on CSR, this suggests an approach to CSR in the 21st century that entails responsibility and accountability for corporate action beyond the baseline of legal compliance.[48]

Changes in the orientation of lawyers and legal organisations towards CSR

The legal profession is slowly coming to terms with the inevitability of CSR as applied to legal organisations as business enterprises. Law firms face pressure from clients, employees and governments to demonstrate their own CSR credentials. Enlightened corporate clients now audit their professional services providers and other business chain members on their CSR track records. A law firm's CSR performance affects its reputation and its capacity to attract good employees from generations X and Y. Similarly, access to governmental work for lawyers can be linked to CSR factors, such as a firm's employment diversity, pro bono efforts and other societal contributions.

More broadly, integrating CSR within law firms means aligning it fully with their business strategy, performance indicators and other organisational systems. Advising business clients on CSR is also a mushrooming field of work for law firms and other business services providers. In terms of broader public policy and regulatory reform, lawyers for business and those affected by business in markets and communities also have special expertise and responsibility for contributions to corporate law reform initiatives that enhance the place of business in society.

What does this mean for business and those who provide professional services and advice to business? At the very least, it means rethinking corporate and professional approaches to CSR, so that organisations are better situated to deal with the 21st-century conditions of the surrounding business environment.[49] Organisational success, business modelling, competitive differentiation and market opportunities are increasingly being reconceived in terms that connect what is good for an organisation to what is good for a sustainable industry, economy and society – hence the renewed

48 A Renewed EU Strategy 2011–2014 for Corporate Social Responsibility, European Commission, COM (2011) 681 final, 25 October 2011.

49 On these and other discussions of CSR generally, see Horrigan, n 2 above.

call to see business engagement with society in terms of 'shared value'.[50] In the words of leading UK corporate governance expert and boardroom director, Sir Adrian Cadbury: 'Every company, like it or not, has a CSR policy [and] the first issue is whether they recognise the fact, and the second is how far they are alert to changes in what society expects of them in this field'.[51]

In short, four important connections can now be safely made about the response of law and lawyers in their everyday work to poverty as a factor impeding the full universalisation of human rights. First, the concerns of corporate governance and CSR are at most converging and at least overlapping and intermingling, to one degree or another, across a range of corporate regulatory and legal standard-setting initiatives. Secondly, under the impetus of a range of recent UN and other global standard-setting initiatives affecting social and financial investment, business and human rights and sustainable development, the concerns of CSR and responsible investment give prominence to human rights matters *and* relate them to broader issues of corporate governance, responsibility and sustainability.

Thirdly, this chain of relevant connections between law, human rights and poverty is completed by addressing the impact upon poor communities as a core human rights concern, and hence a concern for contemporary CSR and corporate governance too. Finally, whether as advisers to organisational clients on corporate governance and these broader connections, or as members of legal organisations with their own commitments to CSR and human rights as legal business enterprises of their own, legal practitioners cannot avoid the lawyerly roles and responsibilities towards the poor that flow at the very least from these broader connections.

Human rights standards, the Ruggie Mandate and legal roles and responsibilities

New Global Human Rights Framework, Guiding Principles and Corporate Law Tools

How do recent shifts in the orientation of governance, regulation and responsibility on the global stage translate into meaningful tools and actions in the fight against poverty as a dimension of universal human rights? A good example arises from the recent acceptance by the UN Human Rights Council (UNHRC) of both a framework and guiding principles for the global advancement of human rights by business. The three-pronged framework developed for the UNHRC by Harvard's Professor Ruggie as the UN Secretary-General's Special Representative on Business and Human Rights (UNSGSR) is entitled a 'Protect, Respect and Remedy' Framework, comprising 'three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies'.[52] Significantly, this framework is not limited to what governments might mandate by law.

Under its accompanying global Corporate Law Tools project, the UNSGSR's mandate also produced a comprehensive review of the extent to which corporate, securities and related laws in many countries promote or impede business respect for human rights. In one of the consultation documents produced under his mandate to set up his final recommendations to the UN Human Rights Council in 2011, Professor Ruggie and his team identify, among the key issues for the business responsibility to respect human rights, the following issues surrounding HRDD by companies:

> '**Assessing** actual or potential adverse human rights impacts on an ongoing basis, drawing on internal or external expert resources; involving meaningful engagement with relevant stakeholders as appropriate to the size of the business enterprise and the nature and context of its activities.
>
> **Integrating** the findings from their assessments across internal functions and processes to enable appropriate action, including by clarifying internal accountabilities and aligning personnel incentive structures.
>
> **Tracking** performance to know whether human rights risks are being effectively addressed, based on appropriate qualitative and quantitative metrics, drawing on feedback from both internal and

50 See, eg, Michael E Porter and Mark R Kramer, 'Creating Shared Value: How to Reinvent Capitalism – And Unleash a Wave of Innovation and Growth' [2011] (January–February) Harvard Business Review 1.

51 Quoted in Horrigan, n 27 above, 269.

52 Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008).

external stakeholders, and supporting continuous improvement processes.

Communicating performance on human rights in response to stakeholder concerns, including reporting formally as appropriate, taking into account any risks posed to stakeholders themselves, company personnel or to the legitimate requirements of commercial confidentiality.'[53]

This shows how HRDD can be integrated within standard corporate governance arrangements. Moreover, each of these steps lends itself to actions that directly or indirectly affect poor communities as corporate stakeholders in all of the local communities along a business value, supply and distribution chain.

In his final report in 2011, Professor Ruggie secured unanimous UN Human Rights Council endorsement for a set of guiding principles to implement the three-pronged 'Protect, Respect and Remedy' Framework for business and human rights. HRDD and human rights impact assessments (HRIAs) figure in numerous principles, as part of an overarching approach to the integration of human rights considerations within standard business systems and operations. The acceptance in mid-2011 by the UN Human Rights Council of this new overarching framework and guiding principles on business and human rights still awaits full buy-in from national implementation and integration in business regulation and practice. At the same time, these standards are progressively being incorporated or otherwise aligned with important global standards such as the UN Global Compact, revised OECD Guidelines for Multinational Enterprises and updated social and environmental standards from the World Bank's International Finance Corporation.

Implications for legal and business organisations

Organisations within the legal and business sectors face the challenge of implementing these new global human rights standards for business enterprises in ways that are properly sensitive to poverty as a human rights issue too. Statements of professional ethics and conduct governing client-related work and service to the profession and justice system must be broad enough to embrace this dimension. Legal organisations such as law firms, barristers' chambers and multi-disciplinary practices need to extend the range of their own CSR policies beyond conventional pro bono work, philanthropy and environmentally sustainable workplaces to cover the full gamut of human rights, including relief against poverty.

In their advice to clients across the public, private and community sectors, lawyers can legitimately frame policy, transactional and compliance advice in terms of financial, reputational and liability risks associated with human rights breaches or other harm to local communities, including effects upon poor communities in business locations or along a business supply and distribution chain. Consistently with the advice about the legal position in other countries, for example, the legal advice from Australia to Professor Ruggie's Corporate Law Tools Project indicated that, while there was no general and express obligation under domestic law for companies and their directors to take account of internationally recognised human rights, consideration of potential human rights implications (and hence HRDD) was a necessary or at least prudent step in numerous business contexts, as follows:[54]

1. corporate compliance with laws with specific human rights elements (eg, anti-discrimination, employment and privacy laws);
2. business impact assessments for project and infrastructure development (eg, socio-economic impact studies, environmental impact statements and HRIAs);
3. rights-related preconditions for granting governmental approvals and licences for business infrastructure and development proposals;
4. compliance with directors' duties and defences (eg, adequate consideration of the relation between rights-related stakeholder interests and long-term corporate success);
5. corporate responses to shareholder action including litigation (eg, shareholder proposals, institutional investor dialogue and climate change litigation);
6. satisfaction of ESG and SRI concerns of institutional investors;
7. conformance with investment decision-making requirements (eg, ethical, labour, environmental

53 UNSRSG, 'Mandate Consultation Outline', October 2010.

54 At the time, the author was a consultant for the international law firm that provided this advice to the UNSGSR, and he was involved in consultations about some of this advice.

and human rights considerations in choosing or realising investments); and
8. corporate governance requirements for corporate responsibility and sustainability reporting (eg, reportable human rights risks and business success drivers as 'material business risks').

The global uptake of these human rights standards puts pressure on legal and business organisations to do likewise. Building upon the large base of cross-sectoral support for the UNSRSG's outcomes that Professor Ruggie developed during his UN mandate, the framework and guiding principles have had what has been described as a game-changing impact upon the global human rights debate, resetting the cross-sectoral terms of engagement on human rights, mainstreaming business respect for human rights as an organisational concern, and paving the way for HRDD and impact assessments as part of whole-of-government and whole-of-organisation approaches to CSR, corporate governance and sustainable business in sustainable communities.[55]

Specific Guiding Principles on Human Rights

The UNSRSG's framework and guiding principles together provide a template within which business enterprises (including law firms) can manage human rights implications for poor communities affected by a business value, supply and distribution chain. A number of steps are involved. The UNSRSG's Guiding Principle 15 sets as a baseline the integration of organisational human rights policies, HRDD processes and human rights monitoring, grievance and reporting measures, as follows:

> '15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
> a) A policy commitment to meet their responsibility to respect human rights [#1 Integrated CSR/HR organisational policy];
> b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights [#2 Integrated HRDD throughout organisation];
> c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. [#3 Integrated monitoring/engagement/reporting mechanisms]'[56]

Each of those three core elements has its own guiding principle(s). The suggested elements of an organisational policy on human rights appear in Guiding Principle 16, as follows:

> '16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
> a. Is approved at the most senior level of the business enterprise;
> b. Is informed by relevant internal and/or external expertise;
> c. Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
> d. Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
> e. Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.'

The suggested elements of an organisational approach to HRDD, including HRIAs, appear in Guiding Principle 17, as follows:

> '17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out *human rights due diligence***.** The process should include assessing actual and potential *human rights impacts*, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. *Human rights due diligence*:
> a. Should cover adverse *human rights impacts* that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
> b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

55 See, eg, Interview with John Morrison, Executive Director, Institute of Human Rights and Business, 'Business and Human Rights: Countries, Companies, and the State of Play' Ethical Corporation, 27 July 2011.

56 The author has added annotating descriptions in square brackets.

c. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.'[57]

The need for whole-of-organisation integration to embed HRDD within all organisational levels and functions is encapsulated in Guiding Principle 19, as follows:

'19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

a. Effective integration requires that:
   i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
   ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
b. Appropriate action will vary according to:
   i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
   ii) The extent of its leverage in addressing the adverse impact.'

Finally, as an example of the various oversight, remedial and reporting mechanisms for embedding respect for human rights within organisational strategies, roles and processes, Guiding Principle 20 focuses upon monitoring and verification, which are themselves important accountability mechanisms, as follows:

'20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

a. Be based on appropriate qualitative and quantitative indicators;
b. Draw on feedback from both internal and external sources, including affected stakeholders.'

These Guiding Principles have a cumulative and holistic effect. They operate at progressively detailed levels of analysis and application. They are not mono-dimensional in their potential embrace of poverty as a human rights concern. At the level of organisational strategy and policy, for example, a business enterprise might take poverty seriously in a number of ways. Its charitable efforts might be directed towards the poor locally, nationally or globally, depending upon the size and nature of the enterprise. Its credentials as a virtuous organisation might be demonstrated through commitment to standards that specifically focus upon the poor directly (as in the UN Millennium Development Goals) or indirectly (as in the UNSRSG's Framework and Guiding Principles). It might cultivate partnerships with governments and NGOs in poverty relief efforts that foster trust and relationships and that also serve the business enterprise well in other contexts. It might conscientiously seek to minimise misuses of corporate power and other harm-causing effects upon the human rights of poor communities in areas of its business operations. It might also develop and support its existing and future employees in poor localities through targeted school, university and training initiatives that benefit both the organisation and employees.

Whatever the particular combination of business modelling, competitive differentiation and organisational strategy involved, a business enterprise must operationalise all of these poverty-sensitive human rights concerns through HRDD. A truly holistic approach to organisational due diligence will integrate HRDD processes and measures with other aspects of organisational due diligence. These mechanisms of HRDD must then be duly monitored, measured, verified and reported. In these ways, the avoidance of business harm to the poor and the adoption of positive actions to help the poor become a standard part of how business does business in society. These things also become a standard part of the approach, knowledge and advice of lawyers who advise, monitor or otherwise regulate business organisations of all kinds.

57 Emphasis added.

Consequential legal roles and responsibilities in relieving poverty

In short, how does all of this matter to the law, lawyers and poverty? The following summary suffices for present purposes. Together, the UNSRSG Framework and Guiding Principles on business and human rights offer a template with sufficient detail and acceptance for widespread adoption by business enterprises, including legal organisations. Lawyers' responsibilities towards the poor therefore have at least a threefold focus, upon what lawyers do in their own organisations, what lawyers do for business clients and what lawyers do in the various ways in which they criticise, monitor or otherwise regulate business actions affecting the poor.

In its application to poverty, this human rights template can stand alone or alternatively become integrated with broader organisational approaches to CSR and corporate governance. On either view, the template also provides structures and opportunities for incorporating the human rights of the poor, homeless and needy within relevant target groups and actions under relevant organisational policies and programmes. In an important sense, international law firms with offices and other presences in a number of countries are in the same position as their client MNCs. Their opportunities both to respect human rights and to fight poverty as part of that endeavour extend transnationally throughout their locational supply and distribution chains.

Concluding observations

Lawyers have positive and negative dimensions to their roles and responsibilities in law's impact on poverty, in the kinds of ways canvassed in this chapter. If some of this appears unduly negative, the answer lies in part in breaking through the indifference or unawareness among many in the global legal profession of the connections that must be drawn between law and poverty, and hence of the multiple roles and responsibilities of lawyers in taking action that makes a difference on poverty. As this chapter attempts to show, there are clear connections in the triangular relationship between the following matters: (a) the changing conditions of 21st-century societal governance, regulation and responsibility; (b) the increasing areas of overlap or convergence between corporate law and regulation, corporate and other organisational governance and CSR; and (c) the inherent links between law, human rights and poverty. The UNSGSR's Framework and Guiding Principles match this triangular relationship, and show a clear way forward for the legal profession to take action against poverty in the progress towards fully universal human rights. All of this offers lawyers, through their many arms of operation and influence, the opportunity to play the central role many have claimed for the profession in serving the fundamental interests of a just society under the rule of law.