Human Rights Perspectives in Insolvency

Master Thesis in Human Rights
15 hp

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Abstract

What human rights or fundamental rights of stakeholders do insolvency norms and laws affect? Will a human rights perspective help in striking a balance between the affected stakeholders? These are the primary questions addressed in this thesis.

The idea that human rights values are relevant to the theoretical discussion about insolvency policy is relatively novel. Insolvency after all conjures images of banks and other creditors who are simply attempting to recover their investment. A thorough examination of the dynamics of insolvency however reveals that insolvency is not just about debt collection. It is a complex process that also implicates interests and stakes beyond the interest of banks and other creditors. Globalization further exacerbates this complexity, more so under circumstances of economic decline in the world economy.

Using literature review and interdisciplinary or critical legal analysis as methods, the thesis analyzes the axiology of corporate insolvency. While “law and economics” has been identified as an influential value in policy formulation, normative values like human rights were identified to be equally relevant. The thesis draws upon stakeholder theory and corporate responsibility vis-à-vis human rights law to lay the foundation for stakeholder conflict analysis in the context of corporate insolvencies. Concluding that the likely conflict situations in corporate insolvency involve human rights, the thesis suggests the use of the proportionality principle as a balancing tool.

In the functional part of the thesis, the author analyzes the relevant provisions of the Philippine insolvency law and singles out the conceptual disconnect of the law with mainstream stakeholder theory in the way it defines the term “stakeholder.”
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1 Introduction

1.1 Purpose

The purpose of this thesis is to explore the human rights implications of insolvency norms and laws.

It may appear to the reader that the language of human rights is not germane to the discussion of insolvency laws. Insolvency after all conjures images of banks and creditors who are simply attempting to recover an investment that unfortunately turned bad. A thorough examination of the dynamics of insolvency however reveals that insolvency is not just about debt collection. It is a complex process that also implicates interests and stakes beyond the interest of banks and other creditors. Globalization further exacerbates this complexity, more so under circumstances of economic decline in the world economy.

Using literature review and interdisciplinary analysis as methods, the thesis will analyze the principles and values that characterize insolvency law. It will discuss the role of law and economics in the formulation of insolvency laws. The possible role of human rights in insolvency policy and law making will be investigated. The thesis will also test the results of the analysis to the Philippines, a legal jurisdiction that recently revised its insolvency regime in 2010.

Based on an initial research overview in preparation for the thesis, it was established that an inquiry into the intersection of human rights and insolvency law is relatively untouched in view of the dominance of the law and economics approach in insolvency theory. A research on this particular area is therefore worthwhile. Moreover, the incorporation of human rights in the discourse on the proper relations of the stakeholders of a corporation during insolvency satisfies recent calls for the democratization of the processes that lead to laws, norms or even corporate decisions. It is to be noted that a decision by a corporate board or a rehabilitation committee, a court or a legislature relating to an insolvent corporation does not only affect the local community. It has global implications.
It is also increasingly being recognized that persons (particularly employees) who are affected by business decisions ought to participate in such process\(^1\). This implies that insolvencies also involve democratization as well as stakeholder issues. The thesis thus further takes a critical look at stakeholder theory as a supportive normative theory to the human rights approach discussed here.

In analyzing the foregoing concepts and drawing conclusions from the arguments presented in the literature and the relevant laws and jurisprudence, the thesis will have answered the following research questions:

1. What human rights or fundamental rights of stakeholders do insolvency norms and laws affect?
2. Will a human rights perspective help in striking a balance between the affected stakeholders?
3. Does the Philippine law on corporate insolvency incorporate a human rights perspective?

1.2 Delimitation, Methodology and Material

To reasonably cover the topic within the time allotted, the thesis is limited to a disquisition on the human rights perspectives in the insolvency governance of business enterprises particularly corporations. Current literature shows that corporations are the entities that normally have a visible impact on human rights. It has been observed that “the corporate world touches the lives of people more closely than any other constituency, giving it immense potential for good or harm….\(^2\)” Adam McBeth, for example, writes:

> “Corporations have an obvious and direct potential to impact labor rights through the way in which they treat their workers, including the provision of reasonable rates of pay, reasonable conditions of work, a safe and healthy workplace, non-discrimination in the

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workplace, freedom of association, and the right to organize. Serious environmental damage of the kind that has been attributed to mining operations in a number of countries, including pollution of water sources, can infringe the rights to water, health and possibly life. The pollution might also infringe the rights to food and livelihood if the polluted area was used for fishing, for instance. Corporations have also been accused of complicity in serious human rights abuses perpetrated by states, particularly in relation to the use of state security forces to protect a commercial installation and crack down on dissent, potentially violating the rights to life, freedom from torture, freedom of speech, and many others. In all of these cases, the impact on the enjoyment of human rights for the individuals affected is undeniable, whether or not there was any state involvement. As Skogly notes, "[F]or the victims of human rights violations, the effects are the same whoever is responsible for atrocities." Everyone - government, institution, individual and corporation alike - is therefore capable of violating human rights.3

The thesis also employs the interdisciplinary or critical legal method. The analysis will take into account books and scholarly articles about human rights law, insolvency law, corporate/company law, and even economic theory. The insolvency law of the Philippines was selected as an appropriate case study owing to its newness and it being consistent with the author’s interest as a Philippine lawyer who hopes to gain both theoretical and practical knowledge on how the new law implicates human rights.

The materials used in this thesis were chosen using the primary search string “human rights” and “insolvency” or “human rights” and “bankruptcy”, and additional search words like “business and human rights”, “corporate responsibility”, “stakeholder theory”, among others, from relevant databases like JSTOR, Heinonline and Westlaw. Books on the said topics found at the Malmo University, Lund University and Malmo City Library were also consulted. The internet was also used to check for texts of international human rights agreements and other relevant articles. Internet sources were accessed at various times covering the period from January to May 2011.

With regard to the section about Philippine insolvency laws, the relevant materials were taken from the CDAsia database under the following

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subscriptions: Laws Premium Edition, Jurisprudence 1901-1986, and Jurisprudence 1986-2006, as well as on the on-line text of Philippine jurisprudence available at the Supreme Court of the Philippines website. In general, the discussion in the thesis draws some practical insights from the author’s experience in litigating insolvency cases that were assigned to him as then in-house counsel of the Philippine Export-Import Credit Agency.

1.3 Structure

The thesis has four main sections. Beginning with Section 2, it lays down the axiology of insolvency. It will describe the purpose of business in general as a prelude to the subsequent inquiry on whether or not the original purpose for the adoption of a corporate form of business remain to be relevant once it has become insolvent. The section concludes with a statement on the prevailing values in insolvency.

Section 3 will explore the possibility of incorporating human rights perspectives in the mainstream of insolvency governance. After a brief discussion of the relevance of human rights to business, this part of the thesis will conceptualize a possible human rights approach to insolvency governance. The section concludes with an analysis of whether or not human rights may serve as a normative basis for insolvency policy-making.

Section 4 is the functional part of the thesis. It presents a brief inquiry of selected provisions of the insolvency law of the Philippines from a human rights perspective.

Section 5 will contain the author’s final comments as well as suggestions for further study.

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4 Available at URL=<http://sc.judiciary.gov.ph/jurisprudence/decisions/index.php; The reported cases are updated up to April 2011.
2 Axiology of Insolvency Law

2.1 The Purpose of an Enterprise

No complete and meaningful diagnosis of insolvency governance could be made without understanding the reason and purpose of a corporate enterprise. Only by understanding the origin of the concept of a corporation can one truly begin to constructively criticize the concept in light of new realities.

It is an accepted notion that the modern corporation has been the product of the market system which is the essence of capitalist societies. With the right to own property as its cornerstone, market-based societies had relied upon the industry of profit-seeking men and women who want to maximize their wealth while at the same time benefiting society. Businessmen had however seen the potential for even greater profits if only they could raise more capital to invest in their chosen venture. The corporate form was thus born. Not only were entrepreneurs able to pool capital but they were also able to shield themselves from being personally liable beyond the amount they put into the corporation. As a legal fiction, it was the corporation that bore the losses alone and creditors did not have recourse to the individual shareholders whose personality were made separate and distinct from that of the corporation’s fictionalized juridical personality.

That powerful idea of a juridical entity being able to amass capital from people’s savings and create huge corporate empires was not easy to miss, and the rest is history. Today, we see corporations that are richer many times over than some countries. For example, using 1999 figures, it is depicted that 51 of the world’s largest economies are corporations and only 49 are countries; and some of these corporations have sales that are larger than the Gross Domestic Product of countries. 

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5 See Manfred B. Steiger, Globalization: A Very Short Introduction, Oxford, 2003, at p. 48-49; An example is a comparison between General Motors (sales at 176,558.00 ) and Denmark (GDP of 174,363.00.); See also, Robert D. Haas, ‘Business’s Role in Human Rights in 2048’, Realizing The Potential: Global Corporations and Human Rights, (26 Berkeley J. Int’l L. 400, 2008) at p. 400: “Consider the world's largest economic entities, including both countries and corporations .Taking Gross Domestic Product to measure the size of countries and revenues for corporations, how many of the top 100 economic entities are corporations? You may be surprised to learn that 44 of the largest economic entities in the world are corporations according to a website called the Kassandra Project. • Wal-Mart, with revenue of $351 billion, ranked just behind Greece and Austria as the 28th largest economy in the world.
Corporate power however has its downside. Some corporations have been blamed for some of the woes caused to innocent and powerless people. These soulless corporations make people feel ambivalent about its true value to society. Human rights have thus become a common pill to douse the unfettered profit-seeking behavior of corporations that causes damage to society and the environment. Still, no one can deny the fact that it is through the multiplier effect of the investments that these corporations create that realistically offers a solution to minimize poverty and suffering in this world.

Scholars have thus continued to debate whether corporations solely exist to seek profit for its shareholders or that it has a higher purpose. The famous Berle-Dodd debate in the 1930s may be considered as the beginning of such an inquiry. Berle contended that a corporation’s purpose is to serve shareholders’ interests alone and no other. He claimed that all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appear.

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7 The Oxford English Dictionary defines multiplier effect as “n. chiefly Econ. an effect whereby under certain conditions a relatively small change in input of some kind (esp. levels of investment or expenditure) may produce a relatively large change in output.” URL=<http://www.oed.com.ludwig.lub.lu.se/view/Entry/123606?redirectedFrom=MULTIPLIER%20EFFECT#eid35441984>


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• Exxon Mobil and Royal Dutch Shell follow right behind Wal-Mart and round out the top 30.
• Toyota Motor’s revenues, which rank #42, are only slightly smaller than the GDP of Thailand (#39). At number 59, Citigroup ranked just ahead of Pakistan, a country with a population of 169 million people. These statistics are more than just interesting trivia. They illustrate the power and impact that global corporations have to affect the lives of people around the world. They underscore the reality that the ‘nation-state’ is no longer the preeminent source of economic power. In addressing pressing international problems—human rights, the environment, poverty, and so on—we need to throw away our mental maps that assigned that role to governments. Like it or not, corporations have a role to play as well.”
Dodd on the other hand hinted at the reasonable idea that the purpose of corporation is to serve not only shareholder interests but to serve other interests as well. He explained thus:

 [...] Business - which is the economic organization of society - is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby curtailed.

The legal recognition that there are other interests than those of the stockholders to be protected does not, as we have seen, necessarily give corporate managers the right to consider those interests, as it is possible to regard the managers as representatives of the stockholding interest only. Such a view means in practice that there are no human beings who are in a position where they can lawfully accept for incorporated business those social responsibilities which public opinion is coming to expect, and that these responsibilities must be imposed on corporations by legal compulsion. This makes the situation of incorporated business so anomalous that we are justified in demanding clear proof that it is a correct statement of the legal situation.

 [...] That lawyers have commonly assumed that the managers must conduct the institution with single-minded devotion to stockholder profit is true; but the assumption is based upon a particular view of the nature of the institution which we call a business corporation, which concept is in turn based upon a particular view of the nature of business as a purely private enterprise. If we recognize that the attitude of law and public opinion toward business is changing, we may then properly modify our ideas as to the nature of such a business institution as the corporation and hence as to the considerations which may properly influence the conduct of those who direct its activities. 10

The debate continued well into the present and gave rise to concepts that are supportive of Dodd's idea. The umbrella concept came to be known as Corporate Social Responsibility, and this basically recognizes Dodd’s view of the corporation “as an economic institution which has a social service as well as profit-making function” and as being “affected with a public interest.” 11

Inspired by a public interest view of the corporation, theory has moved

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11 Andrew L. Friedman and Samantha Miles, Stakeholders : theory and practice, Oxford : Oxford University Press, 2006, citing Dodd at p. 31
towards a more public concept of the corporation. One advocacy group, for example, espouses an idea of a corporation under the following principles:

1. The purpose of the corporation is to harness private interests to serve the public interest.

2. Corporations shall accrue fair returns for shareholders, but not at the expense of the legitimate interests of other stakeholders.

3. Corporations shall operate sustainably, meeting the needs of the present generation without compromising the ability of future generations to meet their needs.

4. Corporations shall distribute their wealth equitably among those who contribute to its creation.

5. Corporations shall be governed in a manner that is participatory, transparent, ethical, and accountable.

6. Corporations shall not infringe on the right of natural persons to govern themselves, nor infringe on other universal human rights.\(^\text{12}\)

That the true purpose of corporation is “to make society better off\(^\text{13}\)” has been gradually inculcated and accepted in corporate theory. It is indeed beyond dispute that the corporate vehicle is but society’s instrument to achieve more lofty objectives. It is because of these higher purposes that make the corporate entity continually relevant even in the face of an impending failure. The modern corporation is a phenomenon that permeates the whole gamut of society that even in the event of possible insolvency every one continues to be interested in its affairs. And for multinational corporations (MNCs), their failure causes significant disturbance to international relations that render intergovernmental cooperation necessary\(^\text{14}\).

The following subsections will briefly discuss the stakeholder idea. Finding out who the stakeholders of a corporation are in times of success


contributes to the understanding of which stakeholders are likewise relevant in times of failure.

2.2 The Stakeholders of the Enterprise

The shareholders of corporation are its primary stakeholders. They are after all the reason why a corporation has been formed in the first place. An emphasis on this trusteeship had to be made at the height of the popularity of the corporate form when corporations began to be socialized in the sense that its ownership became diverse having been spread over millions of ordinary individuals who instead of putting their savings in a bank have chosen to buy shares of stock in corporations. Theory has it that the managers of corporations had become more powerful than their owners (stockholders) who unfortunately are so numerous and consequently faced a collective action problem.\(^\text{15}\) A clear stakeholder responsibility was thus imposed upon managers to make sure that they run the corporation according to the best interest of the shareholder and not their own as explained by the so-called “principal-agent”\(^\text{16}\) problem in the economics literature.

The stakeholder idea was heavily theorized\(^\text{17}\) by many scholars but it was the work of R. Edward Freeman that gave it its more contemporary face. Freeman’s idea is however founded on strategic management. His idea thus revolved around how an enterprise may succeed in its chosen activity. This directly took him to the realization that in order to succeed the enterprise has to grapple with various interests and stakes that impact on such an enterprise. These include non-marketplace stakeholders which if not manage strategically could affect the viability of the enterprise. Freeman thus defined a stakeholder

\(^{15}\) See, for example, Kenneth Lipartito and Yumiko Morii, ‘Rethinking The Separation Of Ownership From Management In American History’, Seattle University Law Review, Summer, 2010 (33 SEALUR 1025) citing the The Modern Corporation and Private Property by Berle and Means.

\(^{16}\) Richard A. Ippolito, Economics for Lawyers, (Princeton, 2005) at p. 372. The author emphasises the difficulty on the part of stockholders whose ownership is dispersed to ensure that the firm’s managers use the resources of the corporation to maximize earnings per share. Some of possible agency problems, he cites, are managers who might spend corporate resources to buy private jets, golf club memberships, etc.

\(^{17}\) There are 55 definitions of stakeholder covering 75 texts from 1963 until 2003 (See, Friedman and Miles, supra note 11, at p. 4-8)
as “any group or individual who can affect or is affected by the achievement of the organization’s objectives.”\textsuperscript{18} This has become the classic definition of stakeholder due to its simplicity.

Following Freeman’s theory, there are more stakeholders that need to be taken into account other than debtors and creditors. Freeman’s stakeholder map showed the following stakes: owners, financial community, activist groups, customers, customer advocate groups, unions, employees, trade associations, competitors, suppliers, government, political groups\textsuperscript{19}. His idea of the breadth of corporate stakeholder is a robust one.

Stakeholder literature is however presumed to be looking at corporations from a strategic point of view which in turn presumes that it is solvent or liquid. But since the classic definition talks of achieving corporate objectives, it can be said that the stakeholder idea also holds true even in the case of insolvent corporations whose objective at the point of insolvency may either be to restore its financial health or otherwise go into an orderly liquidation.

In insolvency, shareholders can no longer be said to be the primary stakeholder for whom the corporation through its managers owe their utmost loyalty. When a company is in the vicinity of insolvency or has in fact become insolvent, the interest of creditors becomes the primary concern of the managers. This is consistent with established corporate law principles that the duty shifts to the creditors in the event of insolvency because they become the new residual claimants of the corporate assets. The stakeholders of corporations may indeed shift depending on the environment where it operates as well on the current financial state it is in.

Who are the stakeholders of an insolvent corporation? One account proposes an “expanded” definition of stakeholder of an insolvent company that goes beyond the creditors. This view holds that an insolvent corporation includes community interests as legitimate stakeholders. It covers the state, local trade suppliers, and tort claimants as stakeholders on account of public

\textsuperscript{18} Friedman and Miles, supra note 11, at p. 1 citing Freeman

\textsuperscript{19} Id. at p. 27
interest\textsuperscript{20}. The expanded interests may also be referred to as non-market stakeholders.\textsuperscript{21}

How these community interests figure in the allocation of rights in insolvency governance vis-à-vis creditor interests will be further considered in the next section.

2.3 The Purpose of Insolvency Law

There are two schools of thought on insolvency. The prevailing school is that of the “proceduralists” represented in the main by the pioneering work of Thomas Jackson\textsuperscript{22}. The other school is composed of “traditionalists” who at its inception is represented in literature by the work of Elizabeth Warren\textsuperscript{23}. The former school submits that the purpose of insolvency is primarily to effect the orderly distribution of the debtor’s assets to its creditors, and to avoid the

\begin{itemize}
  \item To avoid premature liquidations, and restructuring schemes are a valuable mechanism to prevent them.
  \item To achieve the optimal allocation of costs of a firm failure, internally and externally.
  \item To protect the claims of various stakeholders such that there is not a race to enforce individual claims to the detriment of other claimants.
  \item To respect the statutory allocation of priority of claims while still allowing the parties the opportunity to determine whether they should compromise or defer those claims in anticipation of generating greater value in the long term.
  \item To enhance access to information about the insolvent firm in order to allow for informed negotiation of an optimal solution.
  \item To generate economic activity and to generate going forward business strategy that preserves creditors’, workers’ and other firm specific economic investments.
\end{itemize}

\textsuperscript{20} See, Janis Sarra, Creditor Rights and the Public Interest, Restructuring Insolvent Corporations, University of Toronto Press 2003, at p.106. Sarra lays down what he thinks is being referred to as public interest in the context of insolvency: “It is in the public interest to avoid premature liquidations, and restructuring schemes are a valuable mechanism to prevent them. It is in the public interest to achieve the optimal allocation of costs of a firm failure, internally and externally. It is in the public interest to protect the claims of various stakeholders such that there is not a race to enforce individual claims to the detriment of other claimants. It is in the public interest to respect the statutory allocation of priority of claims while still allowing the parties the opportunity to determine whether they should compromise or defer those claims in anticipation of generating greater value in the long term. It is in the public interest to enhance access to information about the insolvent firm in order to allow for informed negotiation of an optimal solution. It is in the public interest to generate economic activity and to generate going forward business strategy that preserves creditors’, workers’ and other firm specific economic investments.”

\textsuperscript{21} Anne T. Lawrence, ‘Managing Disputes With Nonmarket Stakeholders: Wage a Fight, Withdraw, Wait, Or Work It Out?’ California Management Review, Vol. 53, No. 1 Fall 2010, p. 90-113: “The term ‘stakeholder’ refers to persons and organizations that affect, or are affected by, a corporation’s actions—that is, all those that have a stake in what a firm does. In the stakeholder model of the firm, business organizations are seen as enmeshed in a network involving many participants, each of which shares to some degree in both the risks and rewards of the firm’s activities. My concern here is managerial responses to nonmarket or, as they are sometimes called, secondary or societal stakeholders. Market stakeholders (also called primary or economic stakeholders) are individuals and groups that engage in direct, economic exchanges of goods and services, labor, and capital with the firm; they include customers, suppliers, employees, shareholders, and creditors. Nonmarket stakeholders, by contrast, are those that, although they do not engage in direct, economic exchange with the firm, are nonetheless affected by or can affect its actions. These include the public, local communities, social and environmental activists, religious bodies, and non-governmental organizations.”


inefficiencies of letting creditors individually collect the unpaid debt from the insolvent company. Proceduralists believe that a collective insolvency procedure is beneficial to all the creditors considering the savings brought about by cooperation as well as the maintenance of the going-concern value of the debtor whose assets may be dissipated and dismembered if creditors will not cooperate with one another. The scenario is reminiscent of the famous game theory problem called “prisoner’s dilemma”. To the proceduralists, however, the only reason secured creditors would agree to an insolvency regime that allows for the collective enforcement of all claims is if the unsecured creditors will continue to respect the so-called absolute priority rule even during insolvency.24 In contrast, the traditionalists would allow the disregard of an absolute priority rule and consequently “take into account the interests of weaker or non-adjusting economic parties, such as employees, tort victims, or other stakeholders with no formal legal rights.”

Proceduralists clearly depend on the language of law and economics by simply looking at how they argue the requirements for the creditors’ bargain as well as the effects if such bargain is not accepted. The argument is that the creditor’s decision to grant a loan to a debtor and the interest rate it will impose on such transaction depends on whether or not the loan is secured as well as on the quality of the security in relation to various stress factors that includes the likelihood of insolvency. Simply stated, if the creditor is assured that it will be able to collect on the loan in case the debtor becomes insolvent then the interest rate on the transaction will be lower. Absent such assurance, the price of the loan will certainly be higher to factor in the increased risk.

This strict reliance on efficiency arguments is however criticized by Warren as merely covering up what should be other important considerations like morality and normative choices. According to her, bankruptcy law should be inclusive and should take into account non-creditor interests and parties like employees and communities. For the traditionalist, the best way to give effect to such interests is to postpone immediate sale of the insolvent estate through a


25 Id. at p. 383
workable reorganization. Karen Gross shares Warren’s thoughts that the community at large has an interest that should be considered in insolvency.

For her part, Gross considers the law and economics approach to insolvency as flawed because it does not consider the communitarian legal theory that sees individuals as not only concerned about their own well being but that of the community as well. She thus insists that the proper scope of insolvency should include community interests.

Judge Barry S. Schermer, a bankruptcy judge, dismisses Professor Gross’s theoretical suggestion with a single argument. He says that judges will have difficulty considering the community into the equation because their interest cannot be valued. Asked to decide between a bid for an insolvent company that is fixed in monetary terms and a bid that promises employment or promises to clean up the environmental problems caused by the insolvent debtor, the insolvency judge would be expected to choose the first. Judge Schermer also points out that the latter choices are policy choices that should not burden judges. This is further encapsulated in the argument that:

Judges are “disinterested arbiters” whose only task is to control the parties’ conflicting interests and to ensure the transparency and integrity of the bankruptcy procedure. By remaining disinterested, judges allow the parties to “make their own decisions and thereby choose their own destinies.”

However, this is the opposite of what traditionalists believe that “(j)udges should implement bankruptcy’s equity goals on a case-by-case basis and should be given broad discretionary powers to undertake such a role.”

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26 Id. at p. 386
28 Id. at p. 1036
30 Id. at pp. 1051-1052
31 Azar, supra note 24, at p. 388
32 Id. at p. 388
This latter distinction also shows that it is only in the traditionalist theory that human rights would make a difference. The gap-filling function of human rights is best achieved if judges are given discretion in decision making.

2.4 Comments/Analysis

The brief inquiry into the purpose of a corporate enterprise showed that its primary purpose is to maximize profits for its shareholders. It is thus not difficult to understand the arguments from the perspective of law and economics that corporate managers have a fiduciary duty to protect the stake of stockholders. Such an incentive is indeed necessary for individuals to invest in the shares of stock of corporations. Burdening the corporate managers with duties beyond the aforesaid duty to shareholders only discourages would-be investors from an otherwise viable venture that eventually impacts on the general welfare of society. Even the shifting of the fiduciary duty in favor of the creditors of a corporation in times of insolvency is also argued from a law and economics approach inasmuch as creditors are as much involved in the success and failure of the corporation as the shareholders. The creation of the trust fund doctrine in common law clearly shows that creditors are granted a preference in the disposition of the corporate assets if their credit is not paid by the corporation in the ordinary course of business. Without such preference, the cost of credit is reasonably assumed to be higher. The existence of a formal insolvency regime and the promise to creditors that their stakes are considered before that of the shareholders are therefore mechanisms that are installed on the strength of the argument in favor of efficiency and wealth maximization. Society is said to be better off with such a bargain in favor of creditors.

On the other hand, the argument calling for the consideration of an expanded purpose of corporation as well as an expanded list of stakeholders in insolvency has also been advanced. The difficulty in quantifying the value of the stakes being claimed by these expanded stakeholders is what makes it difficult to accept its incorporation in determining insolvency arrangements.

33 The doctrine states that “the assets of an insolvent were a trust fund for the benefit of creditors (See, James R. Ellis and Charles L. Sayre, ‘Trust Fund Doctrine Revisited’, 24 Wash. L. Rev. & St. B. J., 1949 at p. 44)
from a law and economics perspectives. The works of Warren and Gross have been cited as examples.

Another approach that may be relied upon by those who wish to support an expanded stakeholder list is that presented by Gould who develops her argument from democratic theory. She observes “that stakeholder theory itself likely originated within the theory of industrial democracy”\textsuperscript{34}, and endorses the following definition of stakeholders by Freeman as consistent with such a view:

Stakeholders are those groups who have a stake in or claim on the firm. Specifically, I include suppliers, customers, employees, stockholders, and the local community, as well as management in its role as agent for these groups. ... [E]ach of these stakeholder groups has a right not to be treated as a means to some end, and therefore must participate in determining the future direction of the firm in which they have a stake.\textsuperscript{35}

Gould’s account of stakeholder theory as applied to companies finds its theoretical underpinning from the all-affected principle. The argument adapted to the corporate world is that if a corporate event affects other persons, those persons should be given a say in processes that lead to decisions that affect them. She adds that the stakes of those persons become even more imperative if the event impacts on their human rights\textsuperscript{36}. She is however careful not further muddle the already fuzzy theoretical construct of stakeholder theory by not arguing for full participation by all stakeholders as it would indeed be cumbersome for a corporation to be imposed a duty to give all relevant stakeholders a voice in the management of a corporation. Instead, she proposes a classification of stakeholder interests:

This approach thus leads us to introduce a trifold division among stakeholders, in place of the more common binary division between the

\textsuperscript{34} Gould , supra note 1, at p 221 writes: “Thus in his account of the history of the stakeholder concept in the Encyclopedic Dictionary of Business Ethics, Freeman notes, citing the work of Nasi that “[t]he Swedish management theorist Eric Rhenman, perhaps the originator of the term, was instrumental in the development of stakeholder thinking in Scandinavia, where the concept became one of the cornerstones of industrial democracy.”

\textsuperscript{35} Id. at p. 222 quoting R. Edward Freeman, ‘Stakeholder Theory of the Modern Corporation’, 247

\textsuperscript{36} Id. at p. 234
groups closely related to the corporation (traditionally including customers and suppliers, even though they are not insiders) and the more tangential outside groups and interests, where the latter includes both social and nonsocial (e.g., environmental) components. On the view favored here, there are (1) the members of the corporation, along with the stockholders, (2) outside stakeholders having close and regular contacts with it – especially suppliers, customers, financiers, and the local community, with its local environment, and (3) a more distant group, including the public at large, the government, and even global social and political entities, with their broader economic and environmental interests. Furthermore, this division suggests that management may well have a fiduciary or trustee relation to the latter two groups but a more fully representative relation to the first set.

Gould’s classification may be considered as likewise informing the expanded list presented by Gross and Sarra. Gross however clarifies who gets into that expanded list of stakeholders in an insolvency context. She explains the concurrence of three key concepts of “nexus”, “injury”, and “redressability”, which Sarra adopts, in order to have a “standing” in insolvency proceedings:

First, the communities that matter are those in which an identifiable nexus exists between the debtor’s bankruptcy and the community. The nexus can take a variety of forms. It can be, for example, an ecosystem nexus, a vocational nexus or a social welfare nexus. Second, if the nexus indeed exists, then there must be some real and palpable injury that is or will be felt by the community as a consequence of the debtor’s bankruptcy. This injury does not need to be economic (although it certainly can be), but it cannot be conjectural or hypothetical. Third, the injury must be capable of being redressed in the debtor’s bankruptcy case. Some injuries caused by a bankruptcy will not be able to be remedied by, for example, adjusting the treatment of the parties within a plan of reorganization.

But all three scholars drive home the same point – participation or at least the opportunity to be heard. All three scholars do not insist on formal decision rights to be granted the said non-traditional stakeholders for the reason already explained above. Sarra notes however that greater stakeholder participation

37 All three scholars call for participation of “outside” or “distant” stakeholders using different disciplines to support their respective arguments. Gould uses democratic theory, Gross communitarian theory, and Sarra uses public interest discourse.

38 Sarra, supra note 20, at p. 97

and the concomitant additional transaction costs incurred to accommodate more parties to the process are “offset by the value ultimately generated by implementation of an effective plan.”\textsuperscript{40}

In the final analysis, however, the cited literature had only provided a passing reference to human rights (in the case of Gould) and only an implied reference to human rights in the argument for communitarian or public interest ground (in the case of Gross and Sarra).

The next section discusses a possible role for human rights in reconciling or balancing the different stakes and interests that make a claim on the future of an insolvent corporation.

\textsuperscript{40} Sarra, \textit{supra note} 20, at p. 108
3 Human Rights Perspectives in Insolvency

3.1 Human Rights as Fundamental Rights

Human rights are those rights that people have simply because they are human. The basic argument of those that rely on human rights as a unifying framework lies in the fact that human rights represent fundamental rights, rights that belong to every human being, which every civilized society ought to recognize and protect.

There are however those who dismiss human rights as devoid of any value. Foremost among these was Jeremy Bentham who disparaged human rights as “nonsense upon stilts” or as “mere bawling upon paper”. Experience however had shown that human rights have gone a long way since it first appeared in foundational documents like the American Declaration of Independence (which declared that it is self-evident that everyone had certain inalienable rights) and the French Declaration of the rights of man (which pronounced that “men are born and remain free and equal in rights”).

Human rights have continued to be accepted not as mere philosophical aspirations but had been transformed into positive law in most states as bill of rights or as specific positive undertakings from the state to protect civil, political, economic, social and cultural rights. The modern day acceptance of the existence of human rights follows from an almost universal recognition by states of the normative force of the Universal Declaration of Human Rights which proclaimed at its very outset that

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

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43 Article 1 of UDHR, URL=<http://www2.ohchr.org/english/>
The UDHR was the first major international instrument that highlighted the importance of human rights. It continues to serve as the guide for all other international and regional instruments in human rights and as a model for national constitutions and laws.\textsuperscript{44} On this latter point, Amartya Sen, for example, cites Hart as seeing human rights as parents of the law because they motivate specific legislations.\textsuperscript{45} He also cites Joseph Raz as having developed a perspective that sees human rights as the moral bases of legal initiatives.\textsuperscript{46} This conceptualization of human rights largely disproves Bentham’s attack on human rights in his famous quote that “(r)ight, the substantive right, is the child of the law, from real laws come real rights; but from imaginary laws, from laws of nature, imaginary rights.”\textsuperscript{47}

If human rights are “parents of the law”, then they are also available as normative arguments in the formulation of policy for corporate behavior in both its going-forward status and its insolvency status. The universal and indivisible nature of human rights also implies that it can be invoked by all other stakeholders in their relationship with the corporation and with the other stakeholders of the corporation.

The following section explores a possible role for human rights as they appear relevant to the proper governance of corporate insolvency as a subset of trade law.

\subsection{3.2 Human Rights Obligations of Corporations}

The existence of human rights as rights that individuals (or a collective) may demand from the state is now beyond dispute. Under international law, states are bound to respect and protect the human rights of peoples who reside in their respective jurisdictions. As members of the United Nations, states recognize the primary role that human rights play in international law. This duty is implicit in the fact that one of the purposes of the UN is

\begin{footnotesize}
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\item \textsuperscript{44} Pennegard, supra note 42, at pp. 32-33
\item \textsuperscript{45} Sen, supra note 41, at p. 363
\item \textsuperscript{46} Id. at p. 363 citing Raz
\item \textsuperscript{47} Id. at p. 361
\end{itemize}
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To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;  

This call to respect human rights is reiterated in Article 55 of the UN Charter in these words:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Read together with Article 103 of the UN Charter, the duty towards respecting, protecting and fulfilling human rights gains primacy over any other duty that states may incur in their relations with other states.

However, while these provisions clearly show that states are duty bearers, it has been asked whether powerful economic actors like corporations whose activities have affected the human rights of peoples in countries where they operate should similarly be considered as duty bearers and be obliged to respect the human rights of said peoples. With the irreversible trend towards

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50 Art. 103 states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” URL=<http://www.un.org/en/documents/charter/chapter16.shtml

globalization, one could only expect that corporations, with their economic power, will continue to play a role in global development in the same footing as states. It is thus only rational that they should be similarly bound by human rights obligations as states.

The problem with corporations becoming a subject and not merely an object of international law as well as international human rights law is that corporations are artificial entities created by national law. McBeth clarifies this point:

Corporations have traditionally been regulated by municipal law and largely ignored by international law, as their activities have historically been confined within the regulatory reach of the home state. However, many modern multinational enterprises are beyond the regulatory power of any one state. The state in which it is incorporated or domiciled – the home state – will have a certain degree of regulatory power over the enterprise, but will face jurisdictional obstacles in trying to exercise that power in relations to human rights abuses suffered in the territory of another state. Conversely, the latter state – the host state – will have jurisdiction over the events occurring on its territory, but its practical enforcement power is limited over an enterprise based in a foreign country, particularly if the local operations are conducted through a separately incorporated subsidiary. […]\textsuperscript{52}

It is because of this gap in human rights enforcement that there had been serious efforts to fill the same with soft law until such time that a comprehensive international instrument resolves the penumbra.

There are however textual bases to claim that, even without a hard law, corporations have duties to respect and protect human rights\textsuperscript{53}. The UDHR provides one basis as it is stated therein that

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their

\textsuperscript{52} Id. at p. 150

universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.\textsuperscript{54}

Additional bases are found in the International Covenant on Civil and Political Rights (ICCPR) where it is provided in Article 1 (1) that “(e)ach State Party […] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …\textsuperscript{55},” and in Article 5 (1) that “(n)othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant\textsuperscript{56}.”

Similar implications may be deduced from a reading of parallel provisions found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Even the Committee on Economic, Social and Cultural Rights has time and again made clear that the normative content of the economic, social and cultural rights defined in the Covenant encompass not only states but non-state actors as well. For example, in the case of General comment No. 21 (Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)\textsuperscript{57}, the Committee stated:

73. While compliance with the Covenant is mainly the responsibility of States parties, all members of civil society — individuals, groups, communities, minorities, indigenous peoples, religious bodies, private organizations, business and civil society in general — also have responsibilities in relation to the effective implementation of the right of everyone to take part in cultural life. States parties should regulate the responsibility incumbent upon the corporate sector and other non-State actors with regard to the respect for this right.

\textsuperscript{54} Preamble, UDHR
\textsuperscript{55} URL=\texttt{http://www2.ohchr.org/english/law/ccpr.htm}
\textsuperscript{56} URL=\texttt{http://www2.ohchr.org/english/law/ccpr.htm}
\textsuperscript{57} General Comment No. 21 was issued by the Committee on Economic, Social and Cultural Rights during its Forty-third session, 2–20 November 2009, 21 December 2009, URL=\texttt{http://www2.ohchr.org/english/bodies/cescr/comments.htm}
However, there have been significant changes in corporate culture inasmuch as corporations have voluntarily recognized their human rights responsibility in the way they have reoriented their vision and mission statements. More and more companies are referring to the UDHR on their website and realigning their statements of principles. Some companies cited to have done so are Aviva, BP, British Telecommunications, Shell and Vodafone. Novo Nordisk is cited as having conducted a review of its operations in relation to what is expected of them under the UDHR leading them to refocus their mission to achieve specific objectives like promoting “the right to health, especially with regard to diabetes care, as well as enhance its work to promote diversity.”

More formal corporate responsibility initiatives like the following reflect the new enlightenment on the part of corporations that human rights is an intrinsic part of business:

1. Global Compact
3. OECD Guidelines for Multinational Enterprises
4. OECD Principles of Corporate Governance
5. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
6. Voluntary Principles on Security and Human Rights

There is also a framework for corporate responsibility that is being proposed by John Ruggie that presents a new version of the tripartite typology. This version rests on the following pillars:

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59 Id. at p. 25-36 (Executive summary of corporate responsibility initiatives)
60 The tripartite terminology was originally introduced by Asbjorn Eide in 1987. In his article ‘Realization of Social and Economic Rights and the Minimum Threshold Approach’, Human Rights Law Journal, 1989 Vol 10, No 1-2, pp. 36-51, he explained the three levels as: “The obligation to respect requires the State, and thereby all its organs and agents to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds to satisfy basic needs (….). The obligation to protect requires from the
• the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;

• the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others, and to address adverse impacts that occur; and

• greater access for victims to effective remedy, both judicial and non-judicial.  

Calling his approach to be one of principled pragmatism, Ruggie carefully calls the expected behavior on the part of corporations as a responsibility instead of a duty. He explains:

I refer to the corporate responsibility to respect rights, rather than duty, to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies. At the international level, the corporate responsibility to respect is a standard of expected conduct that is acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and which has now been affirmed by the Human Rights Council. The corporate responsibility to respect human rights means to avoid infringing on the rights of others and addressing adverse impacts that may occur. This responsibility exists independently of states' human rights duties. It applies to all companies in all situations.

Having established the threshold question of whether or not corporations have a duty or the responsibility to respect human rights, it may now be asked what human rights issues are involved and affected when corporations become insolvent.

State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual –including the prevention of infringements of his or her material resources. The obligation to fulfill requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts. (Cited in Ida Elisabeth Koch, Human Rights as Indivisible Rights, The Protection of Socio-Economic Demands under the European Convention on Human Rights, Martinus Nijhoff Publishers, 2009, at pp 14-15)


62 Id.
3.3 Human Rights and Insolvency

As mentioned at the beginning of the thesis, the relationship between human rights and insolvency would seem odd. It would be rare to find literature on this area. On the other hand, there is extensive literature discussing human rights violations by companies and theorizing the content of the corporation’s duty to respect human rights.

On its surface, insolvency would seem to suggest the inactivity of the corporation about to be wound up. Even if the failing corporation is being rescued, no human rights implication may appear to be emergent.

A closer look at the relationships between and among the stakeholders of the corporation would however reveal that there are serious human rights implications when a business fails. This is especially true for big corporations with global operations as their failure affects the business of their trade partners and creditors. However, it often turns out that in big business failures, it is not only the so-called “traditional stakeholders” but the non-traditional stakeholders that are often greatly affected. It is not only the shareholders and creditors that lose when a business fails. Whole communities are sometimes thrown into economic difficulties that threaten their human capabilities.

Incorporating a human rights perspective in insolvency governance would primarily aim to avoid the reduction of the contractual relationships among the stakeholders into a purely profit-maximization or loss minimization activity. A mere reference to financial bottom line usually ends up in the disregard of basic human rights of stakeholders. A human rights approach could therefore provide a common or universal (and acceptable) language among the stakeholders to come up with a balanced view of how insolvency should be handled. The next section attempts to conceptualize such framework by looking at the most common stakeholder conflict situations during insolvency.

3.4 Human Rights Perspectives in Stakeholder Conflict
3.4.1 Conflict involving the right to property

It was earlier explained that while corporate managers have been thought to owe their primarily duty of loyalty and diligence to the shareholders, that duty shifts to the creditors once the corporation becomes insolvent. In such an event, the right to property may be in the minds of the shareholders and creditors. After all, the right is recognized under Article 17 of the UDHR which states:

1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property

Several regional human rights instruments also recognize this right. But whether the right accrues to corporation is problematic. This is relevant since stakeholders may be corporations, not natural persons. In the case of Europe, however, corporations are expressly granted the fundamental right to property. The relevant provision states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance

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63 “(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (2) Intellectual property shall be protected.” (Article 17 ) (1), EU Charter of Fundamental Rights, URL:=<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF)

“Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. (3) Usury and any other form of exploitation of man by man shall be prohibited by law.” (Article 21, American Convention on Human Rights. Organization of American States,, URL=<http://www.cidh.org/Basicsos/English/Basics3.American%20Convention.htm).

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” (Art. 14, African Charter on Human and Peoples' Rights, URL=<http://www.achpr.org/english/_info/charter_en.html)
with the general interest or to secure the payment of taxes or other contributions or penalties.\footnote{Article 1 of Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms URL=\text{http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm}; Note that the Protocol uses the word “possessions” instead of property. The former has an “autonomous meaning” and “encompasses all forms of interest of economic value including contractual rights ...” (See Iain Cameron, \textit{An Introduction to the European Convention on Human Rights}, 6\textsuperscript{th} Ed. 2011, Iustus Förlag, at p.139); In \textit{Anheuser-Busch, Inc. v. Portugal}, No. 73049/01 (Eur. Ct. H.R. Jan. 11, 2007) (Grand Chamber), the European Court of Human Rights interpreted Article 1 of Protocol No. 1 of the Convention as protecting the right to property of corporations.}

There would be no point for the shareholders to invoke their property right to this reversal of priority in the subsequent disposition or liquidation of the corporate assets having effectively surrendered the residual value of the corporation as a trust fund to pay their creditors. It is thus the creditor who could validly raise its right to property, either upon a choose of action\footnote{A \textit{choose in action} is defined as “the right to bring an action to recover a debt, money, or thing”. (Black's Law Dictionary, 9th ed. 2009)} or a lien\footnote{For example, a mortgage or a floating charge.} on the property of the corporate debtor. Current corporate governance and insolvency policy balance the interest of the shareholder and the creditors by allowing the shareholders to control the affairs of the corporation through its managers while recognizing the right of the creditors to intervene in the event of insolvency.

Nevertheless, while the secured creditor’s right to property clearly prevails upon those of the shareholders, that same right is not an absolute right in relation to the rights of other stakeholders especially if taken as a collective interest that is transformed into a public or societal one. Present insolvency laws recognize the validity of a temporary infringement on the property rights of secured creditors through stay or stand still orders from the insolvency court. The justification for the reasonableness of delaying the right of the secured creditor to exercise his property right, or more precisely his right to foreclose or take over specific assets promised by the corporate debtor in case of insolvency, however relies on a law and economics rationale. A more fundamental justification, one based on human rights, should complement such reasoning. The compelling argument can be plainly read from the human rights instruments quoted above. Phrases like


- “use of property in accordance with the general interest” - ECHR,
- “use of property may be regulated by law in so far as is necessary for the general interest” - EU Charter of Fundamental Rights,
- “subordinate such use and enjoyment to the interest of society” - American Convention on Human Rights,
- “right to property….may only be encroached upon in the interest of public need or in the general interest of the community” - African Charter on Human and Peoples’ Rights,

leaves no doubt that the secured creditors’ property right or that of any other stakeholder may be subjected to a reasonable degree of interference in the interest of the public, the community or society.

Judges are therefore allowed sufficient discretion in considering not only the usually myopic interests of creditors but even the interest of, using Gould description, a “distant group, including the public at large, the government, and even global social and political entities, with their broader economic and environmental interests.” No hard law is therefore necessary for judges to be able to take into consideration community interest in their determination of insolvency rescue plans. This does not mean however that a judge need only use intuition or rely on “faith” in analyzing the implication of the options presented before them. On this point, a judge may well seek the help of an amicus curiae which ironically must necessarily be an economist[67] in order to fully appreciate the implications of different scenarios.

3.4.2 Conflict involving the right to equality

The right to equality and the right to equal protection of the law are human rights that are also relevant in the insolvency context. Notably, a possible conflict between a secured and an unsecured creditor is usually hinged upon the operation of priority or preference rules. It would not be surprising then if certain stakeholders would invoke the ICCPR on the said right to equality which provides:

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[67] In the area of policy-making, for example, WIPO now has a Chief Economist in response to the clamor for a more evidence-based intellectual property policy rather than the supposedly faith-based approach that has led to unfairly strong IP rights.
Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The avowed purpose the guarantee to equal protection is “to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents”68. It relates to “the concept of equal justice under the law;” and "requires a state to govern impartially, and it may not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective; thus, for example, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and any important state purpose."69

Since the right to equal protection of the law allows reasonable distinctions among individuals, it could be submitted that a secured creditor’s lien over specific assets places it on a class that is different from an ordinary creditor70.

It is in the area of concurring credits however that problems may arise. When some concurring creditors are given special preference without compelling justification, affected creditors in the same class would naturally object.


70 Note however that in the case of large multinational creditors/suppliers, they may have a tendency to lobby for a global insolvency regime that grants them super or maximum priority at the expense of smaller and unorganized creditors/suppliers. The Cape Town Protocol developed by UNIDROIT is one such case. (See, Jay Lawrence Westbrook., et al., A Global View of Business Insolvency Systems, World Bank, 2010, at pp 264-265)
In the case of South African insolvency system\(^71\), for example, such special preferences needs to comply with Section 36 of the South African constitution which provides that the rights contained in the Bill of Rights (right to equality in this case) may be limited to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’\(^72\). Under its draft insolvency law\(^73\), at least three preferences were proposed, namely: employees of the insolvent (in respect of limited claims for arrear wages and other employment benefits), spouses or children of the insolvent (in respect of claims for arrear maintenance), and the holders of a general bond over movables. A proposed fourth preference in favor of the state was however deemed regrettable considering the abolition of crown or state preferences in other jurisdictions.\(^74\)

At any rate, policy makers in South Africa may at least be guided by jurisprudence from its Constitutional Court that clarifies this difficult balancing duty:

> Limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality … which calls for the balancing of different interests. In the balancing process, the relevant consideration will include the nature of the right, and its importance to an open and democratic society based on freedom and equality; the extent of the limitation, its efficacy and … whether the desired ends could reasonably be achieved through other means less damaging to the right in question.\(^75\)

Under South African law, ousting a secured creditor from its absolute priority position and giving another claimant a priority ahead of its secured credit may


\(^72\) Under the Constitution of South Africa, the limitations under its Bill of Rights must also take into account (a) the nature of the right, (b) the importance of the purpose of the limitations, (c) the nature and extent of the limitations, (d) the relation between the limitation and its purpose, and (e) less restrictive means to achieve the purpose. (See, Heinz Klug, The Constitution of South Africa, A Contextual Analysis, Hart Publishing 2010, at p. 117)

\(^73\) The draft was under consideration at the time Steyn’s article was written

\(^74\) Steyn, supra note 71, at p. 10

\(^75\) Heinz Klug, supra, note 72, at p. 117-118, citing S v Makwanyane 1995 (3) SA 391 (CC)
be infringing the latter’s right to property. For example, an insolvency law that
grants super-preference to employees for wage claims in arrears, or to entities
who lodge claims for the payment of the cost of an environmental ‘clean up’
would be of doubtful validity. The same would be true to an insolvency law
that grants claimants a higher rank than secured creditors and then allowing
that such claims are taken from the proceeds of the sale of property given in
security. Again, these limitations to the right to property of the secured
creditor will have to be measured against the exacting demands of human
rights as exemplified in the Bill of Rights of the South African Constitution. In
these examples,

[i]t would have to be shown that the end justifies the means, that
sufficient reason exists for interference with the secured creditors’
property rights, or, at least, that the statutory provision is reasonable and
justifiable in an open and democratic society, in terms of section 36 of
the Constitution.\(^\text{76}\)

3.4.3 Conflict involving the rights of employees

As far as the employees as stakeholders of the insolvent corporation are
concerned, their rights are fully recognized in various international
agreements\(^\text{77}\) as well as in national laws.

In a survey of 36 countries, the differing regimes on the priority of
employees vis-à-vis secured creditors were noted as may be gleaned from the
following summary\(^\text{78}\):

“A debtor-secured creditor relationship usually exists between banks and
enterprises. It is very important for enterprises to maintain their banking
relationships as a source of financing. But, employees are necessary to
actually run an enterprise. So when an enterprise falls into bankruptcy,
the question of how to deal with the interests of its two most important

\(^{76}\) Steyn., supra note 71, at p. 15

\(^{77}\) For example: ILO Protection of Workers' Claims (Employer's Insolvency)
Convention, 1992 (which provides for the protection of workers' claims by means of either a
privilege by the establishment of a guarantee institution, or both); In the case of the European
Directive of 1977”) on the approximation of the laws of the Member States relating to the
safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts
of undertakings or businesses, and Directive 2002/14/EC of the European Parliament and of
the Council of 11 March 2002 establishing a general framework for informing and consulting
employees in the European Community.

\(^{78}\) Westbrook, supra note 70, at pp. 188-189
creditors becomes important. The following describes international approaches:

a) Give the employees absolute priority protection, i.e. employee rights come prior to secured creditors’ rights. Countries with such regulations are Brazil (this section is being modified in a new law), Chile, Columbia, Indonesia (specified in the New Labour Law in 2003), and Mexico.

b) Provide absolute priority to employee creditors with certain restrictions. For example, employee creditors meeting certain requirements have priority over secured creditors within a certain period. Countries using this approach are the Czech Republic (Secured creditor’s can only be repaid preferentially from 70% of the value of the security, the remaining 30% is to be added to the bankrupt’s assets. Employees are paid preferentially with 30% of the bankrupt’s assets. Unpaid employees and secured creditors are repaid as common creditors from the remaining 70%), Russia (employee creditors come prior to fixed security after it expires), Spain (within the last 30 days).

c) Secured creditor’s come prior to employee creditors while employee creditors come prior to floating security creditors. Examples are Australia; Bermuda; England; Hong Kong, China; Israel; Romania; Scotland; Singapore; Slovakia; and Wales.

d) All secured creditors’ rights are prior to employee creditors’ rights while employee creditor rights are prior to common creditors’ rights. See Austria, Canada, Hungary, Japan, Malaysia, Norway, South Africa, Sweden, Switzerland, Thailand, Venezuela, Viet Nam, the US, and so on. Among the above, generally speaking, there are certain restrictions on employee creditors’ rights in items c) and d), including restrictions on time and amount.

e) Employee creditors do not enjoy any priority. They are repaid together with common creditors. Estonia, Germany and other countries have such regulations.79

The special circumstance or role that employees play in relation to the firms that employ them or to the economy in general is likewise widely recognized. Employees are considered “much more closely integrated within the debtor’s business than creditors whose claims against the debtor arise by way of goods supplied but not paid for or by way of loans to the debtor that are still

This particular circumstance thus justifies the preferential treatment in the distribution of the insolvent’s assets. It also justifies the participation rights granted to employees. Gould discusses this special status of employees:

“We can also observe that within the corporation, employees have a special place among stakeholders. One reason is that the other groups who may be regarded as part of the economic organization of the corporation usually have a considerably greater ability than employees do to exit from the organization. Possessing “exit,” they need “voice” less than do the employees. Although it is tempting to regard employees as free agents who may choose to work for anyone, this applies mainly to those possessing highly valuable skills. For the others, there is clearly the potential for a coercive element in obedience to management guidelines – namely, they must do so on pain of losing their employment. Indeed, they may be hard pressed to find another.”

One account in literature that highlights the difficulty in balancing the conflicting rights in a specific jurisdiction is that of Anneli Loubser who also covers the South African experience. Loubser criticizes the seeming lack of balance of two public interests involved – the interest of the community to ensure the continued employment of the people vis-à-vis the interest of the debtor to save the company from possible failure. Among these, she points out as bearing heavily on the debtor, is the duty of such debtor to disclose to the union, or if there is no union, to the employees, information concerning insolvency. She states that informing employees of the financial woes of the company while it is in the process of negotiating a possible restructuring or reorganization with its major creditors could push the panic button of all other

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80 Westbrook, supra note 70, at p 183
82 Gould, supra note 1, pp. 219-234, where she uses the human rights account in the chapter “Democratic Management and the Stakeholder Idea” p 229
stakeholders as it could normally be expected that the employees will not keep
the fact about the woes of their employer a secret.\textsuperscript{84}

There may be valid grounds in such apprehension but taking away the
instrument by which the employees’ right to democratic participation is
guaranteed would be more detrimental to the long-term viability of the
insolvent corporation. As Sarra pointedly observed, any additional transaction
costs that the stakeholders will suffer from a participative process of planning
a rescue plan will “offset by the value ultimately generated by implementation
of an effective plan.”

3.5 International Insolvency Governance in an Era of Economic
Globalization

As stated at the outset of the thesis, the current wave of globalization coupled
with a slump in the world economy had led to business closures of a similarly
global scale. The effects of the credit crunch did not only affect multinational
corporations but even those that operate only domestically. Still, it is the case
of MNCs that best exemplifies the multi-jurisdictional effect of insolvency.

An MNC that folds up due to competitive stress or a failure to manage
its credit risks creates a significant effect in the economic relations of different
stakeholders including states. The host country is affected by the prospect of
losing a source of employment and income for its citizens - a scenario that is
especially true of export-oriented developing economies that are competing
over the foreign direct investments of MNCs. A domestic corporation that has
one or more MNCs as supplier or creditor also feels the same effect. MNCs,
being economically powerful than the smaller local stakeholders, may take
advantage of that strength to ensure that they are able to recover their exposure
to the local company even if comes at the expense of the local stakeholders.

Consequently, the same rationale that explains the importance of a
predictable insolvency system in a domestic setting also applies in a setting
that involves stakeholders that reside in the different jurisdictions. It is
however difficult to resolve problems that traverse boundaries in the absence

\textsuperscript{84} Id. at pp. 57-69
of a formal global governance mechanism. States thus rely on international organizations (IOs) to fill this gap in governance and resolve problems of mutual interest to affected states.

In the area of international insolvency governance, norm setting by IOs is primarily directed towards the institution of legal certainty and the avoidance of forum shopping that go with differences in jurisdictional regimes. IOs like UNCITRAL\textsuperscript{85}, WB\textsuperscript{86}, IMF\textsuperscript{87}, EU\textsuperscript{88} and ADB\textsuperscript{89} have worked through the years to address the international aspect of insolvency.\textsuperscript{90} After all, a legal regime that is predictable and transparent assures a more robust trade and investment environment that comes about as a result of unrestricted cross-border movement of capital unburdened by added transaction costs spent to cover legal due diligence.

Complementing the law and economics approach to insolvency policy with a human rights framework would certainly help in making member-states of relevant IOs reach a consensus on the coordination arrangement for such an international system. But more important than making human rights as the common language of participants in the policy discussion at the IO level is the realization that IOs need to incorporate human rights in their policy and norm setting activities considering that MNCs’ activities traverse boundaries and


\textsuperscript{87} The International Monetary Fund published the report Orderly and Effective Insolvency Procedures, Key Issues in 1999, URL=\texttt{http://www.imf.org/external/pubs/ft/orderly/index.htm}

\textsuperscript{88} The European Union (except Denmark) is governed by the EU Insolvency Regulation (Council regulation No 1346/2000 of 29 May 2000 on insolvency proceedings, URL=\texttt{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:en:HTML}


\textsuperscript{90} For a general survey of soft law initiatives see Bob Wessels, \textit{International Insolvency Law}, Kluwer 2006, at pp 53-63
affect the well-being of stakeholders and citizens. Only by ensuring that human rights are protected and respected can the member-states of a particular IO (who are supposed to represent their respective citizens) truly say that whatever norms they define are truly democratic and take into account the concerns of all the affected interests.

3.6 Comments/Analysis

Certainly, there are certainly numerous conflict situations that may arise between and among stakeholders in an insolvent corporation but the above discussion has emphasized the most important ones.

A human rights perspective helps in understanding the just and acceptable outcomes of stakeholder conflicts that otherwise would remain questioned even after a decision has been made or enforced. This is because human rights are recognized to trump other rights or norms, particularly rights arising from economic agreements that do not have the character of a human right. The primacy of human rights is recognized by many as consistent with its universal and fundamental nature.

One UN body that maintains this position is the U.N. Sub-Commission on the Promotion and Protection of Human Rights having made in its Statement on Intellectual Property Rights and Human Rights a declaration that

3. Reminds all Governments of the primacy of human rights obligations over economic policies and agreements;

4. Requests all Governments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation;\(^{91}\)

Surprisingly however it would appear that most stakeholder conflicts that could arise in insolvency involve stakeholder claims that may be characterized as human rights. In this case, the primacy of human rights doctrine no longer holds because one human right cannot trump another human right without

destroying their indivisibility and mutually reinforcing nature. Stakeholder conflicts such as these may be called as internal conflicts to borrow the nomenclature coined by Peter Yu. According to him, while external conflicts, that is, a conflict between human rights and non-human right, result in the former trumping the latter, an internal conflict is one that involves two human rights. Following Yu’s logic, stakeholder “internal” conflict in insolvency will have to rely on some other modality of conflict resolution.

The most common modality in resolving conflicts that involve human rights is usually termed “balancing of human rights” although it would necessarily lead to the preference of one human right over another. In this regard, the process may more appropriate be called as “reconciling of rights”. Such an endeavor is surely a difficult one but decision makers (i.e. officials from the executive, a legislator, or a judge) could easily find guidance in communitarian thinking that the prevailing policy should be that which supports or furthers the objectives of society. Such a slant in favor of societal interest or the common good however should not be used to disregard the liberal rights of the people. Respect for individual autonomy dictates that any decision that affects or limits such autonomy should comply with the principle of proportionality. Absent such qualification, a balancing decision would be unacceptable.

It should be noted that the requirement of proportionality has been relied upon in the balancing of human rights by human rights bodies as in the case of Human Rights Committee where it stated in General Comment No. 31 that

6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the

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94 Article 2; 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

In its General Comment No. 17\textsuperscript{95}, the Committee on Economic, Social and Cultural Rights also made use of proportionality as a balancing tool and explained in detail how the human right of authors to their work may be limited by other norms or rights which must necessarily include those that are human rights in themselves. The Comment stated:

**Limitations**

22. The right to the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions is subject to limitations and must be balanced with the other rights recognized in the Covenant. However, limitations on the rights protected under article 15, paragraph 1 (c), must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant.

23. Limitations must therefore be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Limitations must be compatible with the very nature of the rights protected in article 15, paragraph 1 (c), which lies in the protection of the personal link between the author and his/her creation and of the means which are necessary to enable authors to enjoy an adequate standard of living.

24. The imposition of limitations may, under certain circumstances, require compensatory measures, such as payment of adequate compensation for the use of scientific, literary or artistic productions in the public interest.

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\textsuperscript{95} General Comment No. 17 “The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)” was issued by the Committee on Economic, Social and Cultural Rights during the Thirty-fifth session, Geneva, 7-25 November 2005. 12 January 2006 available at URL=<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/400/60/PDF/G0640060.pdf?OpenElement>
However, the feasibility of a human rights framework in insolvency is not solely dependent on the ability of decision makers to be able to correctly balance the conflicting claims in a proportionate manner. A similar burden is imposed on the stakeholders of the insolvent corporation, especially corporate stakeholders who wield enough economic power to have the capability to force certain results in their favor. Corporate stakeholders like banks, creditors and suppliers whose exposure to the insolvent corporation is secured by a lien on an asset of the latter could easily foreclose or proceed against the security. But such a prospect for recovery could easily be frustrated by a discontented stakeholder (an employee, for example) who could destroy the asset machinery, for example) in retaliation of the prospect of losing his or her livelihood because of a secured creditor’s adamancy. Corporations as stakeholders need to understand their human rights obligations in order to guide decisions that do not only reflect brazen financial interest but also their respect for the human rights of others, in not doing human rights harm to communities where they invest or do business with.

The earlier discussion about corporations that possess “human” rights (like the right to property) and that bear human rights obligations (as shown by their voluntary adoption of corporate social responsibility codes) lead to the conclusion, and no other, that corporations are themselves the most important player in making the incorporation of human rights in insolvency governance a feasible undertaking. This optimism on the positive response of corporation on its role in issues of global significance is consistent with the voluntary initiatives, soft laws and frameworks (including that of John Ruggie) that elevate corporate duty or responsibility to the level of a common understanding among corporations themselves.

In fine, the foregoing discussion provide sufficient basis to the usefulness of human rights as a complementary perspective to the law and economics approach in insolvency governance. This is particularly true to stakeholder conflicts where the opposing parties both rely on human rights in support of their respective positions.
4 Human Rights Perspectives on the Philippine Insolvency Law

4.1 Human Rights in the Philippines

The Philippines is one country that early on has recognized human rights as part of the laws of the land\textsuperscript{96}. The 1987 Constitution also declares that it “values the dignity of every human person and guarantees full respect for human rights\textsuperscript{97}.” Except for the issue on the non-justiciability of second-generation rights\textsuperscript{98}, human rights in the Philippines may be considered to be fully institutionalized.

Corporate duty or responsibility to respect human rights is likewise well entrenched in the Philippines. This could be presumed to be a natural effect of the presence of constitutional safeguards against violations of human rights. It could also be attributed to the local cultural trait known as “bayanihan” which refers to the practice of Filipinos to help neighbors who are in need. Usually represented by the iconic “bahay kubo” (a hut made of indigenous materials) being carried together by a group of men to signify communal belonging and assistance\textsuperscript{99}.

In the area of business, however, local businessmen may have to deal with parties who operate across cultures with no sense of communitarianism or moral cosmopolitanism that is equivalent to the local custom of coming to the aid of another or at least not doing harm to others. In the context of local

\textsuperscript{96} See, Jose B.L. Reyes, in behalf of the Anti-Bases Coalition (ABC), petitioner, vs. Ramon Bagatsing, as Mayor of the City of Manila, respondent, G.R. No. L-65366. November 9, 1983: “The Philippines can rightfully take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights even if the rights and freedoms therein declared are considered by other jurisdictions as merely a statement of aspirations and not law until translated into the appropriate covenants. In the following cases decided in 1951, Mejoff v. Director of Prisons, 90 Phil. 70; Borovsky v. Commissioner of Immigration, 90 Phil. 107; Chirskoff v. Commissioner of Immigration, 90 Phil. 256; Andreu v. Commissioner of Immigration, 90 Phil. 347, the Supreme Court applied the Universal Declaration of Human Rights.”

\textsuperscript{97} Section 11 of Article II (Declaration of Principles and State Policies)


insolvency that involves stakes belonging to multinational corporations, local stakeholders will have to deal with claims that would affect certain aspects of their lives and against whom they could raise human rights arguments (in probably the same manner as those stakeholder-conflict examples discussed earlier). The succeeding sections present a brief commentary on the Philippine insolvency from a human rights perspective.

### 4.2 Philippine Insolvency Law

Insolvency in the Philippines was for a long time governed by an antiquated law (Act No. 1956, otherwise known as the “Insolvency Law” enacted May 20, 1909). While laws were made in the 1980s that introduced the corporate rescue culture, the business sector and other stakeholders still considered the regime unpredictable and not time-sensitive.

The need for a new law that is more responsive and comprehensive to the needs of business was finally addressed with the enactment of Republic Act No. 10142, or the Financial Rehabilitation and Insolvency Act of 2010\(^{100}\) (hereinafter FRIA). It is comprehensive in that it covers not only natural persons but partnerships and corporations, or enterprise groups, as well. In the case of business insolvency, it provides stakeholders not only the natural option for the liquidation of the insolvent but also offers them a more complete menu of corporate rehabilitation remedies ranging from the formal (i.e. proceedings supervised by the court) to the informal (without court intervention).

FRIA contains the usual provisions one can expect from a modern insolvency law. It codified most of the accepted norms in stakeholder preferences such as the respect for the rights of secured creditors over their liens, and the limitation on the “equality in equity” principle that justifies the suspension of secured creditors’ rights should the court find that a plan to rescue the insolvent debtor is feasible.\(^{101}\)

\(^{100}\) Copy available at URL=<http://www.senate.gov.ph/republic_acts/ra%2010142.pdf

\(^{101}\) See Ruby Industrial Corporation et al., vs. Court of Appeals, et al., G.R. Nos. 124185-87. January 20, 1998 "[...] As between the creditors, the key phrase is equality in equity. Once the corporation threatened by bankruptcy is taken over by a receiver, all the creditors ought to stand on equal footing. Not any one of them should be paid ahead of the
It appears however that FRIA substantially limits the right of the secured creditors to their security and opens it to the possibility of dissipation while in the process of insolvency. The last proviso of Section 61 illustrates this point:

Section 61. Lack of Adequate Protection. –

[...]

Upon showing of a lack of protection, the court shall order the debtor or the rehabilitation receiver to make arrangements to provide for the insurance or maintenance of the property; or to make payments or otherwise provide additional or replacement security such that the obligation is fully secured. If such arrangements are not feasible, the court may modify the Stay Order to allow the secured creditor lacking adequate protection to enforce its security claim against the debtor: \textit{Provided, however, That the court may deny the creditor the remedies in this paragraph if the property subject of the enforcement is required for the rehabilitation of the debtor.}

It would then appear from a plain textual reading of the above provision that the expedience of a security that is a core asset of the company to be rehabilitated denies the beneficiary of the security the remedies afforded to other non-crucial holders of security. As core assets, it would be more in keeping with the objectives of insolvency to at least ensure the insurance coverage and proper maintenance of the assets.

FRIA further strengthens the equality in equity principle by codifying the “cram down” principle in the following provisions:

Section 68. Confirmation of the Rehabilitation Plan. –

[...].

For the avoidance of doubt, the provisions of other laws to the contrary notwithstanding, the court shall have the power to approve or implement the Rehabilitation Plan despite the lack of approval, or objection from the owners, partners or stockholders of the insolvent debtor: \textit{Provided, That the terms thereof are necessary to restore the financial well-being and viability of the insolvent debtor.}

[...]
Section 86. *Cram Down Effect.* - A restructuring/workout agreement or Rehabilitation Plan that is approved pursuant to an informal workout framework referred to in this chapter shall have the same legal effect as confirmation of a Plan under Section 69 hereof.…..

Finally, the FRIA appears to disregard the language of stakeholder theory in the text of the law by its very limited definition of “stakeholder” as referring, “in addition to a holder of shares of a corporation, to a member of a nonstock corporation or association or a partner in a partnership.\(^\text{102}\).”

Interestingly, however, the law also defines “party to the proceedings” as meaning “the debtor, a creditor, the unsecured creditors’ committee, a stakeholder, a party with an ownership interest in property held by the debtor, a secured creditor, the rehabilitation receiver, liquidator or any other juridical or natural person who stands to be benefited or injured by the outcome of the proceedings and whose notice of appearance is accepted by the court.” But that specific term appears only once (in the provision on conflict of interest of rehabilitation receivers). If the law intended the definition to apply to that specific case only then the constituency covered by FRIA is indeed very limited. This may not be the intention however since there are references to a wider stakeholder consideration in other parts that include:

Section 79. *Objection to the Petition or Rehabilitation Plan.* - Any creditor or other interested party may submit to the court a verified objection to the petition or the Rehabilitation Plan.…..

Section 88. *Effect of Court Action or Other Proceedings.* - Any court action or other proceedings arising from, or relating to, the out-of-court or informal restructuring/workout agreement or Rehabilitation Plan shall not stay its implementation, unless the relevant party is able to secure a temporary restraining order or injunctive relief from the Court of Appeals.

### 4.3 Comments/Analysis

A reading of the selected provisions of FRIA that were relevant to the issues raised in this thesis indicate that there could be human rights issues on the cram down both in the formal (§68) and informal setting (§86).

\(^{102}\) Section 4 (nn), FRIA
Non-consenting creditors may attack the law as being excessively pro-debtor. In case of a challenge by secured creditors, the human rights framework discussed above may have to deal with how the balancing of the conflict between the fundamental rights of secured creditors vis-à-vis the human rights of the rest of the stakeholders. In a case of that nature, however, the secured creditors are in reality not in conflict with the rest of the stakeholders but against the government itself, questioning the wisdom of the legislative branch itself for passing a law that infringes on the secured creditors’ right to property. As a challenge that relies on human rights that are themselves incorporated in the Philippine Constitution, the court will have to consider whether or not the infringing law passes the proportionality test (or strict scrutiny – the equivalent doctrine under American jurisprudence that is used in the Philippines) earlier adverted to by showing that the law (or a specific provision thereof) is the least restrictive means of achieving the rehabilitation of an insolvent corporation as compelling interest.

It should be noted that the introduction of informal rehabilitation proceedings of insolvent corporations, apart from making the process expeditious than one that depends on judicial intervention, also points towards an environment characterized by an increased awareness of corporate responsibility. Still, Philippine insolvency law requires an expanded definition of stakeholder to cover not only stockholders and owners of enterprises but those that are affected by the activities of these enterprises such as employees and communities. It is only by considering the interests of these other stakeholders that rehabilitation or liquidation in insolvency is truly human rights compliant.
5 Conclusion

Insolvency governance is an important policy concern not only of individual states but also of the international community as a whole. The mutuality of interest in this area of the law is basically influenced by the pressure of economic globalization.

Firms may become insolvent for varied reasons, and some stakeholders may forego any claims against the insolvent by treating the same as ordinary risks that come with investment decisions or by deferring to the power of secured creditors, then move on with their activities with caution. Current insolvency governance systems are generally characterized by this simple approach to business, an approach that is more in line with law and economics.

There is however a place for human rights in insolvency governance. There are normative values that may render an efficiency approach inappropriate. Community or societal interests, for example, have been shown as being as being better addressed using a human rights approach. However, since most stakeholder conflicts that occur in the context of insolvency are conflicts where both claimants rest their claim on a human or fundamental right, there is a need for decision makers to possess an understanding of the proportionality or strict scrutiny principle. This method is an effective tool in balancing the conflicting human rights claim in view of its extensive use in resolving constitutional challenges. The precise manner of how the proportionality principle ought to be applied in insolvency could be further studied.

In the case of the new insolvency law in the Philippines, it is clear from its provisions that only the traditional stakeholders of the insolvent corporation figure in the proceedings. It also narrowly defines a stakeholder as referring to the stockholders or owners of the enterprise. A critical scrutiny of the said law as to its consistency with best practices in stakeholder management may also be a good area for research.
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