

UNDERSTANDING THE ROLE OF HUMAN RIGHTS IN BANKING LAW

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ABSTRACT

Banking is essential to business. As a source of capital and operating funds, guarantees and assurances, banks share in business risks and rewards and often make crucial decisions about the direction and management of business enterprises. They influence business decisions and business behaviour. Banks have a dual role: they are businesses themselves and they empower the businesses that use their credit. Because of their critical position in the commercial world, banks have a special, and particularly important, role in business and human rights. However, there is sharp disagreement on the nature and contours of that role. In fact, the responsibilities of banks under the UN Guiding Principles (UNGPs) is currently being debated. Meanwhile, banks are, and have long been, subject to intense criticism for funding corporate actions and projects that are claimed to violate human rights. In those cases, the protests are against both the borrowing company and its banks, with the banks considered responsible for human rights abuses committed by the companies they fund.

KEY WORDS: Banking Law, Human Rights, Ungp Etc

INTRODUCTION

Businesses generally, including banks, face evolving expectations regarding their approach to human rights. The UN Human Rights Council helped create this shift when it endorsed the UN Guiding Principles on Business and Human Rights in 2011. The debate over whether businesses, including banks, have human rights responsibilities has shifted to a conversation aimed at better understanding the

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nature of those responsibilities and what steps businesses should take to meet them. This report is focused on the implications of these developments for banks.

1.1 ROLE OF HUMAN RIGHTS AND ROLE OF BANKING RELATION

Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the responsibility to protect human rights has primarily fallen on governments. Beginning in the early 2000s, however, it became increasingly clear that the freedoms enshrined in the framework could also be violated—and promoted—by the private sector.

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (Guiding Principles), the first international instrument to assign companies the responsibility to respect human rights. The Guiding Principles state that governments must put in place good policies, laws, and enforcement measures to prevent companies from violating rights; that companies must refrain from negatively impacting rights even when governments are failing to create or enforce necessary laws; and that victims of corporate abuses must have access to effective remedy. As part of this responsibility, the Guiding Principles require companies to undertake due diligence to identify and manage their negative human rights impacts.

This primer identifies the 10 most relevant, urgent, and probable human rights impacts for businesses operating in the financial sector. The information here is gathered from BSR's direct engagement with financial sector companies, as well as our 25 years of experience helping companies in all sectors manage their human rights risks.

The financial sector comprises a wide range of businesses and activities, from asset owners and managers to private equity, venture capital, and commercial banking. While each of these sub-sectors will have its own human rights profile and challenges, this brief highlights universal risks for companies operating in finance.

1.2 MEANING AND DEFINITION OF BANKING LAW AND HUMAN RIGHTS

- a) **HUMAN RIGHTS:** Human rights are rights inherent to all human beings, regardless of gender, nationality, place of residency, sex, ethnicity, religion, color or and other categorization. Thus, human rights are non-discriminatory, meaning that all human beings are entitled to them and cannot be excluded from them. Of course, while all human beings are entitled to human rights, not all human beings experience them equally throughout the world. Many governments and individuals ignore human rights and grossly exploit other human beings.
- b) **BANKING LAW:** Banking law in India is regulated by the Banking Regulation Act, 1949, which regulates all banking firms in India. The act was enacted to safeguard the interests of the depositors, to control the abuse of powers by controlling the banks by any means necessary, and to further the interests of the Indian economy in general.
- c) **"BANKING"** can be defined as "the business of banking," a vibrant business that continually evolves to meet the latest financial needs and economic conditions. In order to understand how banking evolves, it is important to gain a broad understanding of financial concepts, fundamental banking functions, and the banking business in a technology-driven world.

1.3 HISTORY OF BANKING IN INDIA

Banking in India has a very special origin; it started with the giving of loans to others. Banking was synonymous with money lending. Manusmirithi speaks of deposits, pledges, loans, and interest rates. Interest could be legally charged between 2% - 5% per month, according to the transaction. The state regulated these transactions to prevent overcharging of interest by the lenders, and collection of usury was not allowed during those periods. The debtor or his family member had a pious obligation to repay the debt to the heir of the deceased person. With the development of trade and commerce, the traders evolved a system of money

transfer. The main instrument used in that period was the bill of exchange, or hundi. The Indian bankers acted as treasurers. The Indian bankers acted as treasurers and insurer money changer.

1.4 RELATION OF HUMAN RIGHTS AND BANKING LAW

“Development” is a concept that inherently intersects and overlaps with “human rights.” Development banks have a special place in the business and human rights field. The World Bank Group and its member the International Finance Corporation frequently present themselves as champions of the poor and underprivileged, while both organizations are consistently criticized by many human rights defenders. Massive infrastructure construction and large business operations funded by the World Bank are seen by some as benefiting low income countries and fundamentally improving people’s lives, and by others as land grabs devastating marginalized people, aiding tyrannical or brutal regimes and increasing inequality. The United Nations Special Rapporteur on extreme poverty and human rights, Philip Alston, has called the World Bank “a human rights-free zone.

In its operational policies, in particular, it treats human rights more like an infectious disease than universal values and obligations.” In accordance with its charter’s mandate not to interfere with borrower nations’ internal affairs, the World Bank has been reluctant to squarely align its development goal with human rights. The World Bank attempts to operate above politics, yet many human rights address fundamental political issues. The World Bank has been accused throughout its history of making loans to repressive and corrupt regimes that violate human rights. Human Rights Watch reacted to the World Bank’s updated environment and social framework with the statement: “In refusing to acknowledge its rights obligations once again, the World Bank anticipates it will be able to violate human rights without consequence.”

Development banks other than the World Bank, have varying positions on human rights, but generally follow the World Banks’ “lead.” None of the multilateral

development banks have clear policies requiring “human rights” compliance, and, at best, they refer to human rights in aspirational terms. The exception is the European Investment Bank, which is required to act in accordance with the Charter of Fundamental Rights of the European Union.^[19] All of the major regional development banks have some kind of grievance or complaint system that may include or overlap with human rights issues, such as labor rights or community health.

The World Bank has set standards that have become norms both for other development banks and some commercial banks. The **IFC Performance Standards** were adopted in 2006 and have become one of the most widespread and influential soft law standards. They are organized under eight topics and lay out required actions and rules of behavior with which IFC borrowers must comply. The Performance Standards include environmental management (for example, an Environment Impact Assessment is required for high risk projects) and recognize labor rights (parts of the International Labor Organization’s labor standards become IFC’s requirements for its borrowers). The IFC also mandates that borrowers planning investments affecting indigenous people’s lands and resources obtain the free, prior, informed consent (FPIC) of those indigenous populations.

When the Performance Standards were updated in 2012, there was hope in the business and human rights community that the update would embrace the recently endorsed UNGPs. In 2011, John Ruggie had personally sent a letter to then World Bank President Robert Zoellick lobbying for this result. The 2012 update of the Performance Standards disappointed human rights advocates. The update neither explicitly embraced and encompassed the internationally recognized human rights nor adopted the UNGPs. The Performance Standards do not refer to the UNGPs themselves, but mention the possibility of conducting human rights due diligence in one footnote. The question as to whether, under their own terms, the UNGPs applies to an entity such as the World Bank is not settled. Other development banks, however, are not limiting themselves to the World Banks’ position on human rights.

For example, in 2017, FMO, the Dutch development bank, formally adopted a policy embracing the UNGPs and requiring interim human rights due diligence that go beyond the Performance Standards.³

- a) **Voluntary initiatives.** This module would fit in either as an expansion of a section on banks and human rights or as a banking subsection, which can be added to a section on Voluntary Initiatives or Industry Groups. There is also an ongoing evolution of benchmarked standards and voluntary initiatives: the Equator Principles, the Thun Group and the Dutch Banking Section Initiative, for example, continue to change and evolve. This module may be particularly interesting to business or policy students.
- b) **Grievances and access to remedy.** This module could be part of the banking and human rights section or an addition to a section on “access to remedy.” Considering banks and their borrowers makes remedy more complicated, because there are more parties involved. This can benefit the complainant, because a bank may be sympathetic to complaints that a borrowing corporation may not be. Conversely, it can create confusion for complainants who are presented with grievance mechanisms at the operations, company and financing levels, none of which may be legitimacy or responsive. Relevant mechanisms to consider for discussion include: the NCP, the ombudsman and complaint mechanisms instituted by development banks, corporate grievance mechanisms and hotlines, and others. This module would be relevant and of interest to students in all disciplines.
- c) **Case studies.** The banking sector has some of the best-documented case studies covering complaints of corporate human rights violations. They can be used within a section on banks and human rights, but they are also useful in a general human rights course. The documented case studies can be used for intense analysis, paper topics or as the basis for role-play exercises. There are usually a variety of YouTube videos available which cover live news reports, attack

³ Shri T. Tiwari Committee, 1981, https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/CR159_198428EE4281F4E84835A7E3582E30626AF2.PDF.

summaries from project opponents and defensive pieces by project supporters. The videos can be used to introduce a claim, provide further background and to give a feel for the situation on the ground. For some of these cases, background documentation is publicly available and can be used to consider risks prospectively. For example, the students can be shown actual examples of Environmental and Social Impact Assessments and asked to consider what risks exposed in them subject the banks involved to human rights obligations. They are relevant for students in all disciplines.

1.4 LAWS IN INDIA RELATING TO HUMAN RIGHT AND BANKING

(a) Money Laundering

Money laundering is the conversion or transfer of property; the concealment or disguising of the nature of the proceeds; the acquisition, possession or use of property, knowing that these are derived from criminal acts; the participating in or assisting the movement of funds to make the proceeds appear legitimate.

Money obtained from certain crimes, such as extortion, insider trading, drug trafficking, and illegal gambling is "dirty" and needs to be "cleaned" to appear to have been derived from legal activities, so that banks and other financial institutions will deal with it without suspicion. Money can be laundered by many methods that vary in complexity and sophistication.

(b) Negotiable Instruments

Negotiable instruments are transferable, so the holder can take the funds as cash or use them for a transaction or other way as they wish. The fund amount listed on the document includes the specific amount promised, and must be paid in full either on-demand or at a specified time. A negotiable instrument can be transferred from one person to another. Once the instrument is transferred, the holder gains full legal title to the instrument.

(c) Foreign Exchange Management Act, 1999 (Fema)

The **Foreign Exchange Management Act, 1999 (FEMA)**, is an Act of the Parliament of India "to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India". It was passed on 29 December 1999 in parliament, replacing the Foreign Exchange Regulation Act (FERA). This act makes offences related to foreign exchange civil offenses. It extends to the whole of India, replacing FERA, which had become incompatible with the pro-liberalization policies of the Government of India. It enabled a new foreign exchange management regime consistent with the emerging framework of the World Trade Organization (WTO). It also paved the way for the introduction of the Prevention of Money Laundering Act, 2002, which came into effect from 1 July 2005.

1.5 INTERNATIONAL PERSPECTIVE

(a) Un Guidance Tools On Human Rights For Businesses, Including Banks

A number of UN agencies and programs have developed guidance for businesses, including banks, on human rights issues. This guidance is sometimes applicable to all businesses, or specific to the finance sector or particular topics. The OHCHR together with the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, has the mandate to lead the business and human rights agenda within the UN system, and promote the implementation of the major human rights treaties and respect for the rule of law. To fulfill this mission, the OHCHR and the Working Group emit guidance notes, and also offer country information and specific tools (including an Interpretive Guide and Frequently Asked Questions) to facilitate the implementation of the UN Guiding Principles. The UNEP FI Human Rights Guidance Tool for the Financial Sector, serves as a resource for financial institutions, in particular banks, seeking to incorporate human rights considerations in their financial decision-making and operations. The tool was launched in 2007, and was fully updated in 2011 and 2014, to reflect the evolving agenda on business and human rights, and its relevance for

the financial sector. The tool makes the business case for financial institutions to take into account human rights; addresses human rights by sectors and by topic; and provides resources that financial institutions may want to consult to deepen their knowledge on the issue. The first two principles of the UN Global Compact indicate that businesses should support and respect the protection of internationally proclaimed human rights; and that they should make sure that they are not complicit in human rights abuses. To help businesses meet these two principles, the UN Global Compact prepared the Human Rights and Business Dilemmas Forum, which explores business and human rights themes, some of which are directly relevant for the finance sector.

(b) Banks And The Un Guiding Principles

The UN Guiding Principles on Business and Human Rights (UNGPs) (see *Introducing the UN Guiding Principles on Business and Human Rights*) is the leading standard on businesses' human rights responsibilities. The OECD Guidelines for Multinational Enterprises, which applies to most large, international banks, also formally establishes the corporate responsibility to respect human rights, a key pillar of the UNGPs. In addition, all commercial banks have two distinct roles. The first is as a business enterprise in its own right, with employees, shareholders, governance, etc. As such, banks have the responsibilities mandated by the UNGPs for all businesses. For example, there can be discrimination issues with consumer lending or bank employee hiring, and occasionally other human rights issues. The second role of banks is as financier as they supply credit to other businesses. As such, banks empower businesses to act. They can decide which business to fund and often have some say in the way that the credit can be used and even how the business should be run. This role depends on the kind of credit provided. Some forms of financing tie banks so closely to their borrowers that the banks can be considered responsible for their borrowers' human rights violations. From a human rights perspective, this second role is, usually, by far the most important.

1.6 ROLE OF HUMAN RIGHTS IN BANKING

(a) The Upcoming Report To The Human Rights Council Must Specifically Identify Private Sector Banks

Private sector banks have a unique responsibility with regard to the “duty to respect” human rights. Private sector banks can, and do, enable human rights violations by financing activities of clients that violate human rights directly or through support to clients who have a role in state action that violates human rights. Private sector banks must be singled out for the need for due diligence and ensuring access to remedy in their policies because there is insufficient movement by private sector banks to create explicit human rights policies with these components. Without identification of, acknowledgement of, and direction about these issues at the highest levels, we will not see the needed progress in development of these policies. While some private sector banks have developed human rights policy statements or codes of conduct with reference to human rights, research for this report could not identify a single private sector bank that has a transparent policy containing specific due diligence procedures and corresponding grievance mechanism requirements. The need for high level guidance on specific due diligence and grievance mechanism language is demonstrated in the following examples of private sector banks that have had a role in human rights abuses, where adequate human rights policies of banks would have identified and prevented, or at least minimized these abuses, and would have provided a way to address resolution of disputes. The examples presented here were selected from many similar cases monitored by BankTrack and other NGOs⁴.

(b) Human Rights Policies For Private Sector Banks Must Provide A Roadmap For Due Diligence

Just as with corporations generally, the responsibility of private sector banks “to respect human rights ... means to act with due diligence to avoid infringing on the rights of others” However, this responsibility to conduct due diligence is amplified with respect to private sector banks because their actions may “facilitate and enable”

⁴ Supra Note 17, S. 19 (17).

human rights violations with impacts that are strongly felt, but difficult to trace back to those bearing responsibility for them from the perspective of victims. Private sector banks require specific guidance, as offered in this section, regarding how to craft policies that will help them identify when human rights due diligence should be triggered and how that due diligence should be conducted.

They do not have to start from scratch developing their human rights policies. The recently released Guide to Human Rights Impact Assessment and Management (HRIAM) sponsored by the International Finance Corporation (IFC), The Global Compact and the International Business Leaders Forum (IBLF), establishes seven key stages in assessment and management of human rights impacts. These stages are consistent with the four policy elements identified by the UN Special Representative as required for corporate human rights due diligence. The seven HRIAM stages are: Preparation, Identification, Engagement, Assessment, Mitigation, Management, and Evaluation.³⁵ We recommend that the UN Special Representative's next report to the Human Rights Council highlight that these now well-established human rights policy components are relevant and applicable for private sector banks policies in particular. Because private sector banks are influential in either causing or preventing human rights abuse, it is critical that the human rights risks present in their financed activities be recognized and addressed. Respect for human rights therefore requires that a private sector bank's due diligence procedures be at or above the global standard. This report draws on the seven HRIAM categories that apply to all companies including banks and specifically tailors them for use in developing human rights policies for private sector banks

1.7 JUDICIARY AND HUMAN RIGHT IN BANKING LAW

Case study. The banking sector has some of the best-documented case studies covering complaints of corporate human rights violations. They can be used within a section on banks and human rights, but they are also useful in a general human rights course. The documented case studies can be used for intense analysis, paper topics or as the basis for role-play exercises. There are usually a variety of YouTube videos available which cover live news reports, attack summaries from project

opponents and defensive pieces by project supporters. The videos can be used to introduce a claim, provide further background and to give a feel for the situation on the ground. For some of these cases, background documentation is publicly available and can be used to consider risks prospectively. For example, the students can be shown actual examples of Environmental and Social Impact Assessments and asked to consider what risks exposed in them subject the banks involved to human rights obligations. They are relevant for students in all disciplines.

CONCLUSION AND SUGGESTIONS

In public sector banks, the percentage of male customers is 66.70, whereas in private sector banks, it is 73.00 per cent of the total. The female customers constitute 33.30 per cent to its total in public sector banks, whereas in the private sector banks it is 27.00 per cent. Male customers in the private sector banks are the dominant group compared to the public sector banks in the study area. Regarding the profile of the selected customers from public sector and private sector banks, the most important age groups among the customers is 25 to 45 years. It is inferred that the customers in the age group 25-45 years in both the public and private sector banks is the dominant group. In respect of educational level of the customers, the analysis reveals that the graduation and post-graduation customers have availed of more internet banking services from the banks than the customers of other educational level. The analysis reveals that the first two important occupations among the customers in public sector banks are bank employees and government employees who constitute 33.00 per cent and 20.00 per cent whereas in private sector banks, 203 private company employees and bank employees constitute 31.30 per cent and 19.33 per cent respectively. Regarding monthly income of the customers, the analysis reveals that ` 30000 to ` 45000 in case of public sector banks and ` 15000 to 30000 in case of private sector banks are dominating income group in the study area.

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