Is Consumer Rights Human Rights?

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Are Consumer Rights Human Rights?

Abstract
Consumer protection has gained great importance since World War II. Similarly, the concept of human rights has become increasingly prevalent. Substantive and procedural tests of human rights support the contention that the tendency toward broadening the definition of human rights allows us to include consumer rights within that definition. In a consumer-oriented society, protection of the individual consumer is perceived as part of maintaining human dignity—especially against big business organizations, monopolies, cartels, and multinational corporations. Well-accepted doctrines of human rights, therefore, such as the emphasis on an individual’s prosperity, honour, and dignity, can serve as the basis for recognizing consumer rights as human rights. An examination of several basic international and national documents reveals that it is due time to acknowledge consumer rights as human rights.
ARE CONSUMER RIGHTS HUMAN RIGHTS?©

By Sinai Deutch*

Consumer protection has gained great importance since World War II. Similarly, the concept of human rights has become increasingly prevalent. Substantive and procedural tests of human rights support the contention that the tendency toward broadening the definition of human rights allows us to include consumer rights within that definition. In a consumer-oriented society, protection of the individual consumer is perceived as part of maintaining human dignity—especially against big business organizations, monopolies, cartels, and multinational corporations. Well-accepted doctrines of human rights, therefore, such as the emphasis on an individual’s prosperity, honour, and dignity, can serve as the basis for recognizing consumer rights as human rights. An examination of several basic international and national documents reveals that it is due time to acknowledge consumer rights as human rights.

La protection du consommateur a pris une position d’importance depuis la deuxième guerre mondiale. De la même façon, le concept des droits de la personne est devenu de plus en plus répandu. Des preuves substantives et fonctionnelles soutiennent l’assertion que le tendance à élargir la définition des droits de la personne nous permet d’y inclure les droits du consommateur. Dans une société qui apprécie le consommateur, on voit la protection du consommateur individuel comme intégrale au soutien de la dignité humaine—surtout contre les grandes organisations commerciales, les monopoles, les cartels et les corporations multinationales. Par conséquent, des doctrines acceptées à l’égard des droits de la personne, tels que la prosperité, l’honneur, et la dignité, peuvent bien servir de base dans la reconnaissance des droits du consommateur comme droits de la personne. Un examen de plusieurs documents internationaux et nationaux révèle qu’il est temps de reconnaître les droits du consommateur comme droits de la personne.

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I. INTRODUCTION

After World War II, the recognition of consumer law as a separate branch of rules and principles developed. This development was part of a profound social change in the attitude of individuals and governments, caused by the great increase in consumer goods and services. In recent years, this attitude has led to a surge in the volume of consumer legislation throughout the world. Although today there is

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2 Mickleburgh, ibid. at 3; Curran, ibid. at 1; and Deutch, ibid. at 134.


a strong movement toward deregulation,\(^4\) the general understanding is that consumer rights should be guaranteed, at least at their existing level. Despite changes of government, there is an agreement that consumer rights should remain protected.\(^5\)

Human rights generally bind governments and administrative bodies, but they also have an \textit{indirect} impact on individuals and on private law.\(^6\) Although some are of the view that human rights are irrelevant to private law,\(^7\) and others suggest that human rights can be directly applied to it,\(^8\) the more accepted view is that they should only be applied indirectly.\(^9\) Consumer rights, however, are legal rights\(^10\) that

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\(^4\) Harvey & Parry, \textit{supra} note 1 at 6-28.

\(^5\) Harvey & Parry, \textit{ibid.} at 12-16; and J.A. Spanogle, "Regulation of the Bank-Customer Relationship in the United States" (1993) 4 J. Banking & Fin. L. & Practice 18 at 23. In Israel, during the 1980s and 1990s, the majority in the Knesset shifted several times. These changes had no influence on consumer legislation. Laws proposed by one government were approved in a Knesset under the majority of another party.


bind both individuals and governments. This raises the question of what can be the advantage of recognizing consumer rights as human rights. It seems that, notwithstanding their legal status, consumer rights can still benefit from being acknowledged as human rights.\(^{11}\)

The thesis of this paper is that basic consumer rights should be considered human rights. The difficulty is that characterizing many values as human rights might weaken the idea and importance of human rights as compared to other legal rights. It has been argued that admission of new rights could create a damaging climate in terms of the value and validity of existing human rights.\(^{12}\) Thus, the proclamation of new human rights can be justified only when the need is sufficiently great and when the chance of acceptance by the international community is strong.

Despite these considerations, I believe that consumer rights have reached a point that justifies a serious consideration of whether or not to recognize them as human rights. Opponents of additional human rights perpetuate the myth that human rights are limited in number.\(^{13}\) Their opinions are not shared by the entire international community, but instead reflect the American view.\(^{14}\) Certainly, if there is a readiness to acknowledge new rights,\(^{15}\) the international consensus that consumers should be protected mandates inclusion of consumer rights. The tendency to broaden the scope of various rights and to include the variants as constitutional rights furthers the argument. If basic consumer rights are not admitted as human rights, they will be overridden when in conflict with other constitutional rights. For instance, part of Israel's constitutional law is the new Basic Law:  

\(^{11}\) The subject of the possible effect of recognizing consumer rights as human rights is beyond the scope of this paper. In brief, the effect of recognition could influence the following issues: (1) creating additional legislation on consumer protection where such legislation is lacking; (2) promoting the enforcement of existing laws and regulations; (3) balancing consumer rights and other conflicting human rights, such as freedom of contract or freedom of occupation; (4) influencing governments and the judiciary to intervene within the existing legal rules and regulations; and (5) interpreting current legal rules to avoid conflict with other human rights. (Each of these statements can be supported, discussed, and elaborated upon; however, as noted, it is beyond the scope of this paper.)


\(^{13}\) *Ibid.* at 45.

\(^{14}\) See section IV.C, below.


\(^{16}\) See section IV.D, below.
Freedom of Occupation.\textsuperscript{17} This law states that every citizen may practise any occupation and that the freedom can be restricted only by a statute enacted for a proper cause and for the public benefit. The same principle applies to the right to obtain a licence to practise a certain trade. When a licence is denied for the purpose of consumer protection, it is possible that a court might decide that freedom of occupation, as a constitutional right, overrides consumer rights. Although freedom of occupation can be limited with proper cause, it is for the court to determine what constitutes a proper cause. When constitutional rights are under attack, the tendency of the court is to restrict their infringement. Acceptance of consumer rights as human rights, however, would enable them to become equal to the constitutional right of freedom of occupation. They would then be able to compete on an equal basis with other human rights values.

Consumer rights, it seems, have a better chance of being identified as human rights than some of the "new" rights. Rather than being entirely new rights, they are an elaboration and expansion of recognized economic rights. Such recognition, of course, will not be achieved without opposition, and it is possible that it is premature to characterize consumer rights as mandatory human rights. It is, therefore, advisable to acknowledge them at this stage as "soft" human rights.\textsuperscript{18} The notion of soft rights in the area of consumer law is a well-


\textsuperscript{18} See Marks, supra note 15 at 437. He maintains that during the emergence of recognition of human rights there are stages when it is "difficult to distinguish ... between 'hard' law and 'soft' law." He also explains that sometimes it is difficult to separate emerging social values from well-established legal rules.
known concept.\textsuperscript{19} Because soft law is not mandatory, it has a better chance of being adopted without too much opposition.

Consumer rights derive mostly from private law, but they also include public law. Consumer law is a mixture of contract, tort, criminal, and administrative law.\textsuperscript{20} Regardless of the ongoing debate as to the importance of the various components of consumer law,\textsuperscript{21} it is clear that consumer law includes private and public law, and substantive and procedural law.\textsuperscript{22} Identification of this area as human rights, therefore, might have a direct effect on the public aspect of consumer rights.\textsuperscript{23}

Formal recognition of international human rights is declared by international organizations and then published in international documents.\textsuperscript{24} Consumer rights have not yet reached this stage. It is


\textsuperscript{20} For instance, the Israeli Consumer Protection Law, 5741-1981, supra note 3, includes contractual remedies (s. 32), tort remedies (s. 31), criminal sanctions (s. 23), and administrative remedies (ss. 28 and 30). The same variety of remedies exist in other areas of consumer protection, such as banking, insurance, and sale of apartments.

\textsuperscript{21} Some argue that private law, and especially contract law, is an important tool to consumer protection. See Deutch, supra note 1. Others argue that contract law is not a suitable tool for consumer protection. See J. Goldring, “Consumer Law and Legal Theory: Reflections of a Common Lawyer” (1990) 13 J. Consumer Policy 113 at 121-23; and Sir G. Borrie, The development of consumer law and policy—bold spirits and timorous souls (Agincourt, Ont.: Carswell, 1984).


\textsuperscript{23} The Consumer Protection Law, 5741-1981, supra note 3, contains mostly criminal and administrative sanctions. Various licensing requirements for the purpose of consumer protection are certainly administrative regulations.

\textsuperscript{24} See section IV.A., below.
argued that such recognition is due, and the purpose of this paper is to supply the theoretical background for that recognition. The decision of which rights should be categorized as human rights is basically political; consequently, the importance of a theoretical background is questionable. It has been argued that a new human right cannot be developed until a proper theory has been established. On the other hand, the notion that human rights should be developed solely upon a theoretical plan can lead to total inaction. In reality, theory and practice are interdependent. Theory is shaped by practice just as practice is influenced by theory. All human rights texts reflect some theoretical assumptions; there is a strong correlation between action and the justification for the action. Since consumer rights have yet to be classified as human rights, the justification for their reclassification should be presented.

In order to answer the question of whether or not consumer rights can be classified as human rights, the following issues will be discussed: (1) whether there is an accepted definition of human rights that will assist in establishing consumer rights as human rights?; (2) whether consumer rights fulfil the substantive tests of human rights?; and (3) whether there is a formal basis in international documents for acknowledging consumer rights as human rights? The answers will be based upon the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1985 United Nations Guidelines for Consumer Protection. Does the UNGCP mark the beginning of international recognition of consumer rights as human rights?

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26 10 December 1948, GA Res. 217A (III), UN Doc. A/810 [hereinafter Universal Declaration].


II. WHICH RIGHTS ARE HUMAN RIGHTS?

A. Difficulties of Definition

To suggest the recognition of consumer rights as human rights raises the question: what are human rights? Not merely a legal issue, the answer involves many philosophical aspects. In fact, many of the scholars who explored it were philosophers. The term human rights includes two components, "rights" and "human rights." Rather than examining the definition of "right," this paper addresses the question of when a right becomes a human right.

The problem is twofold. First, assuming that agreed lists of recognized human rights exist, do they preclude the development of new human rights? Second, assuming that the recognition of new human rights is possible, what are the criteria and the tests for classifying rights as human rights? Only if there are guidelines toward a definition of human rights is it possible to proceed and examine whether there is a justification to classify consumer rights as human rights at this stage or in the foreseeable future.

A thorough analysis of many books, articles, and documents on human rights reveals that various attempts to define human rights have led to very meagre results. There is no accepted, exhaustive list of human rights and attempts to formulate such a list have been essentially unsuccessful. As Professor Dinstein describes, "On the whole ... the layman's question: 'What exactly are my human rights?' can be answered

29 In a leading symposium edited by the United Nations Educational, Scientific and Cultural Organization (UNESCO), which preceded the Universal Declaration, most of the articles were published by philosophers. See UNESCO, Human Rights: Comments and Interpretations (New York: Columbia University Press, 1949) App. IV for a list of contributors and members of the UNESCO committee. See also E.H. Pollack, ed., Human Rights: Amintaphil I (Buffalo: Jay Stewart Publications, 1971) iii-vi for a list of contributors; and see R.J. Vincent, Human rights and international relations (Cambridge: Cambridge University Press, 1986) 153-58, where most references are to philosophers and political scientists.

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only unevenly and tentatively.” Professor Dinstein explained that this problem is due to the fundamental divergencies of ideology in the world. Despite various attempts to establish guidelines for human rights, there is still a major problem of concretization. He concluded that the goal of limiting sweeping generalizations remained as elusive as it ever did.

Leading human rights scholars agree that there is no clear answer to this problem. One scholar noted that it remained “unclear what the criteria are for deciding whether a particular claim is a human right.” Another scholar claimed that confusion still exists regarding “the list of rights which belongs to the category of human rights.” These doubts and questions are shared by the majority of scholars who write on this subject.

The difficulties involved in defining human rights were presented in the documents preceding the Universal Declaration. For the symposium initiated by the United Nations Educational, Scientific and Cultural Organization (UNESCO), and in preparation of the declaration, a memorandum and a questionnaire were sent to eminent scholars regarding the “theoretical bases of the rights of man.” The memorandum, the questionnaire, and the answers were published and served as the basis for the final results of the UNESCO inquiry on the theoretical basis of human rights. This work led to the Universal Declaration of Human Rights, adopted on 10 December 1948 by the General Assembly of the United Nations at the Palais de Chaillot. In the final summary of the UNESCO committee of experts, the difficulties of establishing a complete index of human rights were emphasized several times.

The Universal Declaration, based on the shared convictions of

32 Ibid. at 14.
34 Marks, supra note 15 at 435.
35 See, for example, Shestack, supra note 30 at 75.
37 The influence of this work on the Declaration was stressed in the preface to the Declaration. See ibid. at 273.
38 See ibid. at 258-59 that the common convictions of United Nations members are “stated in terms of different philosophic principles and... divergent political and economic systems.” See ibid. at 263: “The Committee is fully aware that these working definitions are susceptible of highly diverse particularisations and that they contain, therefore, great ambiguity.”
the various members of the United Nations, was not intended to serve as a definitive list.

Forty-five years have elapsed since the adoption of the Universal Declaration. It is, therefore, due time to consider the necessity of acknowledging new rights. But which rights deserve to be recognized as international human rights? In particular, should consumer rights be considered as universal human rights?

There are two main approaches in answering these questions. The first is to include as human rights only those rights declared as such by institutions of the United Nations. By this approach, consumer rights cannot yet be recognized as human rights since they have not yet been acknowledged as such by the institutions of the United Nations. The second approach is to establish guidelines to outline the characteristics of human rights. Rights that fulfill these requirements will be considered to be human rights. By this approach, the characteristics of consumer rights should be analyzed in order to establish whether they can be considered human rights. Although both attitudes suffer certain deficiencies, delineated later, they can nevertheless assist us in answering the above questions.

B. Procedure: Declaration by United Nations

The first approach is based upon the premise that a right only becomes an international human right when so declared by the United Nations General Assembly.39 This attitude is supported by several scholars, but it suffers from some deficiencies. The United Nations General Assembly was never recognized as the supreme legislator of international law and there is no shared understanding that every United Nations resolution can turn a right into a human right.40 Even if a United Nations resolution cannot turn a right into a human right, however, a repetition of a rule might have a normative power, which could lead to the creation of a customary human right norm. Some scholars also question the desirability of certain provisions declared by

39 See Bild, supra note 33 at 173.

40 See R.A. Falk, "On the Quasi-legislative Competence of the General Assembly" (1966) 60 Am. J. Int'l L. 782 at 783-91, noting that the resolutions of the Assembly are not binding per se and that the General Assembly has only limited power regarding international legislation. See also M. Mendelson, "The Legal Character of General Assembly Resolutions: Some Considerations of Principles" in K. Hossain, ed., Legal Aspects of the New International Economic Order (London: Frances Pinter, 1980) 95 at 95.
international covenants and conventions as human rights. According to these views, it is quite clear that not every United Nations resolution will be sufficient to transform any privilege into a human right. There is strong criticism regarding the tendency of various United Nations organizations to proclaim additional human rights without taking the necessary procedural steps to approve the resolutions. This tendency was described as haphazard and anarchic; therefore, various procedural reforms were suggested. Even supporters of a dynamic approach to the expansion of human rights will not accept the notion that a General Assembly resolution can transform any right into a human right. The process of international recognition is nonetheless vital in affirming the international status of a human right. I would consider it to be a procedural requirement for defining a right as a human right. This measure will be analyzed later in order to examine whether consumer rights are, or have, the chance to be recognized as human rights in the foreseeable future.

The first approach recognizes international human rights only as those rights that were officially affirmed as human rights in the 1948 Universal Declaration and in international covenants such as the 1966 ICCPR and the 1966 ICESCR. The titles of the two covenants can serve as the elementary classification of human rights into five groups: (1) civil, (2) political, (3) economic, (4) social, and (5) cultural. The international covenants were approved in 1966, more than twenty-five years ago, and whether or not it is desirable to consider them as a final list of human rights is questionable. Rights are based on human needs. Those needs change from time to time. There is no reason to prevent the inclusion of additional rights. The fact that certain rights were recognized many years ago does not necessarily make them more


\[\text{See Falk, supra note 40; and Alston, ibid. at 607-14.}\]

\[\text{Dinstein, supra note 31 at 16-17.}\]

\[\text{See G.T. Butcher, } "\text{The Immediacy of International Law for Howard University Students" (1988) 31 How. L.J. 435 at 446, observing that to consider only civil and political rights as human rights }\text{"is the luxury of the well-endowed." Civil rights without economic rights are relatively meaningless.}\]
important than the rights that were only recently approved. It is evident that the age of a right provides no assurance of its potential implementation. Although “freedom of religion is one of the most ancient concepts, ... it has so far proved impossible to reach a consensus” as to its substance.46 On the other hand, a relatively new right such as freedom from discrimination has received wide support and a certain level of implementation.47

C. Substance: Characteristics of Human Rights

There is no doubt as to the importance of the rights enumerated in the international covenants. The question is whether the covenants constitute an exhaustive definition of human rights. In my opinion, to classify the human rights recognized in the international covenants as a complete list would be too conservative because as social needs emerge, the need for legislation to satisfy them leads to the development of additional human rights.48 However, even according to those that are willing to accept new human rights, the importance of the recognized rights in the international covenants cannot be disregarded. The Universal Declaration and the two international covenants undoubtedly serve as the basis of international human rights.

The second approach is to present guidelines, which will identify the characteristics of human rights, and then to analyze consumer rights according to these guidelines. Many attempts have been made to define the characteristics of human rights. Although these attempts suffer from serious limitations, they shed light on the nature of human rights. Some of them will be examined in order to study their usefulness as guidelines toward the recognition of consumer rights as human rights. For instance, Cranston has suggested that a “human right is something that pertains to all men at all times,”49 “economic and social rights’ cannot logically be considered universal human rights,”50 “another test of a human right is that it shall be a genuinely universal moral right. ... A

47 Ibid.
50 Ibid. at 54.
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further test of a human right, or universal moral right, is the test of paramount importance,¹ and finally, a "human right is something of which no one may be deprived without a grave affront to justice."² This approach, which defines human rights as rights of the greatest importance, is weighted with at least two flaws. First, clear criteria as to what makes a right "very important" and as to who decides whether or not they are met are non-existent. Second, categorization of human rights as only those of the greatest importance leads to the rejection of economic and social rights as human rights,³ although these rights have been declared as human rights in the international covenants. This conservative approach, which is also the official attitude of the United States administration, was rejected by almost all members of the United Nations.⁴ While there are basic differences between civil and political rights on the one hand and between economic and social rights on the other hand, discussed later, it is commonly agreed that all are human rights. The Cranston quotation also suggests that all human rights are general and, as such, relevant to the entire world community.⁵ This statement fits most human rights. But human rights are intended also to protect children, minorities, and women as underprivileged groups; they cannot be defined as rights of the general public. The above characterization can therefore serve as a description of human rights, but not as a definition.

Other attempts to define human rights have not been more successful. One scholar delineated the following as a description of human rights:

In a legal sense the term human rights is used to designate those liberties of thought and action that the international community and international law seek to protect, not only against infringement by other individuals but also by the government of states, including the states of which the individuals in question are nationals.⁶

¹ Ibid. at 67.
² Ibid. at 68.
⁴ See B. Stark, "Economic Rights in the United States and International Human Rights Law: Toward an 'Entirely New Strategy' " (1992) 44 Hastings L.J. 79 at 80, stating that the ICESCR was ratified by 104 nations and that "the United States is the only major industrialized democracy that has not yet ratified the Covenant." See also Alston, supra note 41, for an analysis of the United States opposition to the ICESCR and of the ways to overcome this opposition.
⁵ Supra note 49. See also Vincent, supra note 29 at 9.
This passage certainly cannot be considered to be a definition of human rights. Human rights are not limited to "liberties of thought and action" since they include various rights that require action such as the right to education. Today, the right to education is widely recognized in international documents and in domestic legislation,\(^5\) which proves that human rights are not confined to liberties. Despite this criticism, the description includes guidelines, such as the need for international recognition of human rights and the suggestion that these rights should include protection against states and against individuals. Other scholars highlight additional characteristics of human rights, such as the need to focus on the individual and to emphasize the individual's prosperity, honour, and development.\(^5\) Certain human rights, some scholars maintain, can be categorized as the right to human dignity.\(^5\)

D. Summary

Despite the differences between the two approaches, they represent the two basic requirements for a right to be considered a human right. The first approach, which considers as human rights only those rights that have been approved by organizations of the United

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\(^5\) This issue has been discussed in numerous articles and books. See, for example, Shestack, supra note 30 at 75-98, dealing with the sources of human rights and presenting eleven old and modern theories on human rights; Alston, supra note 12 at 36-54, reviewing the “needs not covered by existing human rights,” the “need for new human rights,” the process by which rights become part of international law (at 39), the lack of conceptual clarity regarding human rights, the criticism on the limited approach to human rights (at 46), and the connection between basic needs and human rights (at 50ff); and Marks, supra note 15, addressing the new generation of human rights (at 439-41) and responding to the objection to the creation of new human rights (at 451-52). Prosperity of individuals and their self-fulfillment are a rationale for human rights as expressed in many writings on freedom of expression. See, for example, A. Barak, “Freedom of Expression and its Limits” (1991) 40 HaFaraklit 5 [in Hebrew]; and T. Scanlon, “A Theory of Freedom of Expression” in R.M. Dworkin, ed., The Philosophy of Law (London: Oxford University Press, 1977) 153.
Nations, stresses the procedure of declaring human rights. The second approach, which delineates various characteristics of human rights, emphasizes the substance of human rights, or those demands of substantive value that justify the recognition of a right as a human right. Neither strategy can exclusively serve as the test of human rights. Both are inconclusive and subject to criticism. Rights that fulfill both requirements, however, are certainly human rights. Human rights are, therefore, based on both procedural and substantive requirements. Both conditions should be met before deciding whether consumer rights can be acknowledged as human rights. In order to explore whether consumer rights meet the substantive criteria presented in the previous pages, some of their basic features will be examined in the next section.

III. SUBSTANTIVE TESTS OF HUMAN RIGHTS

A. Characteristics of Human Rights

Substantive tests are essential for the recognition of a right as a human right. In the previous section, certain characteristics of human rights were cited, which can serve as guidelines to assess whether consumer rights are human rights. Some of the guidelines are that (1) human rights should pertain to the entire human community and not to any specific group; (2) human rights are the characterization of the individual as a primary concern, emphasizing the individual's prosperity, honour, and development; and (3) human rights are rights of the individual against powerful governments.

Consumer rights are rights of the individual and not rights of a group. Consumers are not a separate group of people, since every person is a consumer from time to time. With respect to products and services needed for private use, every vendor is also a consumer.

60 See, Alston, supra note 42 at 608, where he criticizes the adoption of new human rights without establishing adequate procedures and without due consideration. He suggests procedural reforms to ensure that new rights will not be proclaimed without proper scrutiny.

Accordingly, consumer rights are rights of the individual and, as such, should be acknowledged as human rights.

Consumer rights focus on the individual to whom basic rights to fair trade and safe products are granted. One of the main ideas behind consumer protection is that the individual is entitled to protection notwithstanding that, on the basis of a cost-benefit analysis, the economy might benefit if the individual consumer receives defective goods or hazardous products. Similarly, one of the main features of human rights is an emphasis on the individual as opposed to the collective. The acknowledgement that human rights protect the individual's prosperity, honour, and development makes consumer rights suitable to be declared as human rights.

Several human rights can be classified under the heading of the right to human dignity. In an editorial comment in a leading journal on human rights, the importance of human dignity was presented as a "universal social good." Human dignity as a human right has been recognized in various United Nations documents. As a universal value, human dignity is relevant to economic and social rights. It draws upon the intrinsic worth of every person. The comment concludes that, by relying upon the conception of human dignity, "we can extend and strengthen human rights by formulating new rights or construing existing rights to apply to new situations." In a consumer society, protection of the individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to a fair contract, and the right of access to courts, a person's dignity is disregarded. At the end of the day, these rights are no less important than other human rights.

Consumer rights are similar to other accepted human rights in other aspects as well. Human rights are intended to protect the individual from arbitrary infringements by government. In the same way, the individual consumer is entitled to protection against big business organizations, monopolies, cartels, and multinational corporations. The big business organization should be considered less...
like an individual, who bargains on equal terms, and more like a government, which controls the private consumer.

There is a school of thought that considers standard contracts as private lawmaking by large economic corporations. The inequality of bargaining power leads to contracts of adhesion and to the erosion of the basic right to negotiate. Where an individual consumer is one party and a strong economic organization is the other party, the organization can impose its will on the consumer on “a take it or leave it” basis, thereby disregarding the consumer’s honour and dignity. Since every person is a consumer from time to time, it is a common problem. In order to introduce equality and justice into the market, the inequality must be alleviated by consumer protection legislation. Consumer rights are intended to prevent abuse of power and, in this sense as well, are similar to other well-defined economic human rights, which protect the individual against abuse of power by governments.

It is also necessary today to regulate consumer protection on an international level. More and more transactions are conducted by transnational corporations. Commerce has become increasingly international and the problem of hazardous goods and defective products is not merely a national concern. These developments have already led to some international recognition of consumer rights by the United Nations and other international organizations. This paper

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68 Kessler, ibid.

69 See ICESCR, arts. 7, 9; and Universal Declaration, arts. 1, 17, 22, 23.


71 See section IV.A, below.
claims that the time is ripe to go further and to recognize basic consumer rights as human rights.

Modern theories of human rights\(^{72}\) also provide a solid ground for admitting consumer rights as human rights. One approach suggests a theory of justice,\(^{73}\) perceiving principles of fairness, self-respect, and equality\(^{74}\) as the foundation of human rights. These principles are the basis of consumer protection and accordingly can justify the acknowledgement of consumer rights as human rights. Another modern theory of human rights that can ground recognition is the theory based on dignity,\(^{75}\) which maintains that human dignity is an ultimate value. As previously explained, one of the goals of consumer protection is protection of the dignity of the consumer. Therefore, this theory can serve as an additional support for accepting consumer rights as human rights.

B. Consumer Rights as New Human Rights

According to some substantive tests of human rights, consumer rights can be recognized as human rights. These tests, although not conclusive, supply sufficient guidelines in delineating the main features of human rights. The above analysis suggests that consumer rights satisfy part of the substantive tests of human rights. Hence, the suggestion to include them as human rights has merit.

This suggestion also raises the question of whether new human rights as the third generation of rights should be acknowledged as human rights.\(^{76}\) The assumption is that there are three generations of human rights.\(^{77}\) Although some writers question the desirability of distinguishing between generations of human rights,\(^{78}\) this classification

\(^{72}\) See Shestack, supra note 30.

\(^{73}\) See ibid. at 90-94.


\(^{75}\) Shestack, supra note 30 at 95-97.

\(^{76}\) Robertson & Merrills, supra note 25 at 255-56.

\(^{77}\) The term "generations" as opposed to "categories" indicates that human rights are dynamic and developing, rather than stationary. See Marks, supra note 15 at 439, where he explains that the objection to slavery was a change of the nineteenth century as opposed to the eighteenth century.

\(^{78}\) See, for example, M. Mushkat, The Human Rights: Reflections on the Holocaust, The Waldheim case and the struggle for peace (Tel Aviv: Papyrus, 1990) at 102 and 116 [in Hebrew]. He questions whether the division between different generations assists in enforcement of human
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is nevertheless accepted by most. The first generation deals with civil and political rights while the second generation addresses economic, social, and cultural rights. The first generation of human rights includes the rights developed in England and France during the seventeenth and eighteenth centuries. The second generation of rights was influenced by the revolutions of the early twentieth century and, consequently, deals with economic, social, and cultural rights. These rights are characterized by intervention rather than abstention of the state and include the right to decent working conditions, the right to social security, and the right to education and health. Second generation rights are positive rather than negative. They were acknowledged in the Universal Declaration of 1948 and in the ICESCR of 1966.

Third generation rights encompass rights that have not been recognized as international human rights, but that were nevertheless approved by various organizations of the United Nations. They attempt to extend the scope of human rights beyond those found in the Universal Declaration and the two international covenants. The new rights include the right to development, the right to share the common heritage of humankind, and the right to peace. This new generation of human rights met strong opposition, which has not yet subsided. Indeed, Professors Robertson and Merrills raise the issue of whether these concepts are "human rights in any meaningful sense of the term." Their answer is that they should not be considered human rights. They give three reasons for their position. Their first argument notes that "the word 'human' in the expression 'human rights' has a specific

79 See Marks, supra note 15 at 437-38. The French and American revolutions, he says, "have left a permanent imprint" on the first generation of human rights. These rights "were conceived negatively as 'freedoms of' rather than as positive 'rights to' " (freedom of religion, freedom of opinion, expression, assembly, movement, and more). See also Robertson & Merrills, supra note 25 at 3.

80 See, for example, Alston, supra note 42; Marks, supra note 15 at 440; and R.Y. Rich, "The Right to Development as an Emerging Human Right" (1983) 23 Vir. J. Int'l L. 287.

81 Robertson & Merrills, supra note 25 at 255-59. See also Marks, ibid. at 440-41, where he claims that the first two generations of human rights are a result of three revolutions, the bourgeois revolution, the socialist revolution, and the anticolonialist revolution. The human rights that emerged from these revolutions were confronted by strong opposition. Therefore, it is not surprising that the third generation of human rights includes rights that are not part of the first two generations, but that have a reasonable chance "of being accepted as international human rights" in the foreseeable future. The third generation rights are "rights of solidarity."

82 Robertson & Merrills, ibid. at 257-59.

83 Ibid. See also Marks, supra note 15 at 251, referring to the strong opposition to new human rights.
meaning. ... Rights pertaining to human beings by virtue of their humanity. The Preamble of the ICESCR and of the ICCPR state that “these rights derive from the inherent dignity of the human person.” Robertson and Merrills argue that human rights are rights of the individual, stemming from the individual’s nature as a human being, and not rights of groups, associations, or other collectivities. With a few exceptions, both covenants are concerned with individual rights. Accordingly, “human rights” should be designated to individuals rather than to groups and collectivities. Rights of groups and collectivities should be named “collective rights” and not “human rights.” Consumers, however, do not act as a group or as a collectivity. Every person is a consumer from time to time. This particular criticism of new human rights is, therefore, irrelevant to consumer rights. It also seems that in a consumer society where every person purchases consumer goods and services, the right of a consumer to be protected is an essential part of the right to the adequate standard of living already recognized under Article 11 of the ICESCR. Robertson and Merrills’ second argument against the recognition of new rights as human rights deals with the use of the term “rights” in this context. They argue that new human rights, such as economic development and environmental protection, are not rights in any meaningful sense. They should be objectives of social policy and items on a political programme, but they are not legally enforceable claims. Advocates of new human rights confuse objectives of social policy with legal rights. This view is certainly not pertinent to consumer rights. Although thirty years ago consumer rights were more related to social policy than to binding rules, today consumer rights are legal rights under most legal systems. There is no question regarding their nature as legal rights. The question of this paper is whether or not they can also be considered human rights.

84 Robertson & Merrills, ibid. at 257-58.
85 Ibid. at 258.
86 See also H.H. Cohn, The Law (Jerusalem: Bialik Institute, 1991) at 595 [in Hebrew]; and Universal Declaration, art. 25.
87 Robertson & Merrills, supra note 25 at 259. See also A.P. Rubin, “Are Human Rights Legal?” (1990) 20 Israel Y.B. Hum. Rts. 45, stating that human rights are legal only if adopted into legal documents.
88 In this respect, consumer rights are inherently different from other “new” human rights. For instance, the basic needs approach has been approved in a series of international documents and resolutions, but it contains goals and recommendations rather than legal rights. See Alston, supra note 12 at 23-26.
Professors Robertson and Merrills' third argument against the recognition of new human rights is founded on the fact that these rights are not part of international treaties. They suggest that there is a distinction between moral rights and legal rights. There may be a moral right to a clean environment, but there is no such legal right until it has been incorporated into an international treatise. They argue, therefore, that until the process of lawmaking has taken place, new human rights remain inside the realm of goals and objectives and outside the domain of legal rights. Since consumer rights have not yet been recognized as human rights in any United Nations covenants, this position is indeed relevant to consumer rights. It reiterates the premise that the validity of human rights should also be evaluated according to the procedural requirements for the recognition of human rights in international institutions and documents. Consumer rights have not yet reached the stage of formal recognition. The essence of this paper is to examine whether consumer rights should be incorporated into future international documents, maintaining that since substantively they can be considered human rights, incorporation should take place in the near future. The next section attempts to prove the international community's readiness to approve consumer rights as human rights, as reflected by various statements in international documents.

IV. PROCEDURAL TESTS OF HUMAN RIGHTS

A. Introduction

One of the requirements for acknowledging rights as human rights is the integration of the rights into formal international documents. The importance of procedure in accepting rights as human rights cannot be underestimated. It is clear that, over the years, the *Universal Declaration* and the two international covenants have contributed to the development of human rights and have prompted international recognition of human rights. Because of these

89 Robertson & Merrills, *supra* note 25 at 259.

90 See Alston, *supra* note 42 at 609, about the need for procedural reform in this area and, at 617-18, on the usefulness of procedural requirements.

91 See L.B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States" (1982) 32 Am. U. L. Rev. 1 at 17: "The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations."
documents, undoubtedly there is wide recognition of civil, political, economic, and social rights.

Although formal acceptance is not the sole test of a human right, it is certainly a strong indication of that right. Accordingly, when consumer rights attain international recognition by the organizations of the United Nations, their status as international human rights will be more likely. Since consumer rights are basically economic rights, their recognition should be based upon the declared economic rights of the *Universal Declaration* and the covenants. Although none of the documents explicitly identified consumer rights as economic rights, there is sufficient evidence in the documents to support the claim of indirect acknowledgement.

B. 1948 *Universal Declaration of Human Rights*

The first international document to deal with the issue of economic rights as human rights was the *Universal Declaration of Human Rights*, which was based on the United Nations *Charter*. Article 55 declares that “the United Nations shall promote: ... c. universal respect for, and observance of, human rights and fundamental freedoms.” The United Nations conferred power on the United Nations Economic and Social Council (ECOSOC) to promote these goals.93

UNESCO did preparatory work for the *Universal Declaration*, which was adopted by the General Assembly on 10 December 1948 in resolution 217A (III).94 The *Declaration* was the first comprehensive human rights declaration to be proclaimed by an international organization. The detailed catalogue of economic and social rights proclaimed by the *Declaration* is of special significance to consumer protection. Among other rights, the *Declaration* states the individual’s “right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity”95 and the “right to a standard of living adequate for the health and well-being of himself and of his family.”96

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94 See Robertson & Merrills, *supra* note 25 at 259.

95 Art. 23(3).

96 Art. 25(1).
Though the *Universal Declaration* is not a treaty, it received binding status over the years. Unfortunately, however, it suffers from serious semantic problems. As Professor Dinstein describes, its language is cryptic, impolitic, and laconic. Although the language of the *Declaration* is general, it is quite clear that consumer protection was not intended to be part of the *Declaration*. On the other hand, since one of the aims of consumer protection is to assist people in reaching an adequate standard of living, the phrases "just and favourable remuneration" and "an adequate standard of living" can serve as a basis for consumer protection in a broad sense. Some workers' unions accordingly established departments of consumer protection to promote an adequate standard of living by minimizing excessive prices resulting from the purchase of defective or overpriced products. Article 25(1) of the *Declaration* states the right of the individual to "a standard of living adequate for the health and well-being of himself and of his family." Consumer protection is concerned with the protection of the consumer's health and, as such, is intended to enhance the standard of living and the well-being of the individual as consumer. In summary, although the *Declaration* does not directly deal with consumer protection, its goals and objectives are synonymous to those underlying the basic right of consumer protection.

C. 1966 *International Covenant of Economic, Social and Cultural Rights*

In order to give legal power to human rights and to flesh out the skeleton of the rules accepted in the *Universal Declaration*, the international covenants were drafted. The *International Covenant of Economic, Social and Cultural Rights* was adopted by the United Nations

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97 See Sohn, [*supra* note 91] at 16-17; and Robertson & Merrills, [*supra* note 25] at 27.

98 [*Supra* note 31] at 14.

99 One convincing example is the Israeli case. In 1969, the Israeli Labour Federation (ILF) established the Consumer Protection Authority, which has subsequently received statutory powers after being officially acknowledged in five Israeli laws. For instance, section 16(1) of the *Standard Contracts Law, 5743-1982*, 1982, 37 L.S.I. 6 states, "The Attorney-General ... any customers' organisation ... may apply to the Tribunal." Under sections 3 and 4 of *Standard Contracts Regulations*, 1983, Kovetz Ha-Takanot 1518 [in Hebrew], the Consumer Protection Authority of the Histadrut is authorized to appear in the Tribunal. The ILF represents more than 80 per cent of Israeli workers and has statutory powers in labour disputes. Around the world, however, there are only a few consumer organizations that have been established by trade unions.

100 See Robertson & Merrills, [*supra* note 25] at 231, regarding economic, social, and cultural rights. See also Buergenthal, [*supra* note 93] at 30.
General Assembly and was ready for ratification by December 1966. Ten years later, the ICESCR came into effect after ratification by thirty-five countries. To date, it has been approved by 104 countries.$^{101}$

There is a negative attitude in the United States towards the ICESCR. The United States remains the only industrialized democracy that has not approved it.$^{102}$ Even in the 1990s, after the approval of the ICCPR, there is no readiness to ratify the ICESCR.$^{103}$ This objection is a cornerstone in the foreign policy of the United States, as published in various documents.$^{104}$ The United States' position is that human rights include only civil liberties and political rights.$^{105}$ This stance refuses to acknowledge economic rights as human rights.$^{106}$ Such an approach is critical to the question of whether consumer rights can be recognized as human rights. Consumer rights deal with economic relations between consumers and dealers, and between consumers and the authorities. Thus, they would be appropriately categorized as a species of economic rights. Nevertheless, according to United States policy, the chances of admitting consumer rights as human rights are not realistic.

The United States' view on economic rights is not, however, shared by most countries, and the United States' standpoint on the ICESCR has been often criticized. Some critics$^{107}$ reject the claim that ratifying the ICESCR would be inconsistent with United States domestic policy. They contend that the non-ratification might have an adverse effect on human rights in the United States. In a recent article, Professor Stark suggests the United States should reconsider its attitude to economic rights after the collapse of the Soviet bloc.$^{108}$ Additional reasons justify a new approach to this subject, such as the April 1992 ratification of the ICCPR.$^{109}$ The importance of economic rights to Americans who are poor,$^{110}$ and the similarity of the ICESCR to

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$^{101}$ See Stark, supra note 54. The ICESCR was signed by Israel but not confirmed until 1991.

$^{102}$ Ibid.

$^{103}$ See Alston, supra note 41.

$^{104}$ See ibid. at 372.

$^{105}$ Cranston, supra note 53 at 50-53.

$^{106}$ Alston, supra note 41 at 372 and at 375.

$^{107}$ Ibid. at 382-84.

$^{108}$ Supra note 54 at 84.

$^{109}$ Ibid. at 80 and 86.

$^{110}$ Ibid. at 85.
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domestic state constitutions.\textsuperscript{111} State courts have in fact recognized economic rights as constitutional rights in many areas.\textsuperscript{112} These reasons and others\textsuperscript{113} justify the ratification of the *ICESCR* by the United States. If accepted, this new approach would enhance the possibility of recognizing consumer rights as human rights in the United States. In any case, the theme of this paper is based not on the existing views in the United States, but rather on the approach of the international and European community.

There is another argument against the position that only civil and political rights are human rights. "Though it is obvious that the right to life is superior to the right to paid vacations, this is not an excuse to reduce human rights to very basic rights only."\textsuperscript{114} Certain economic rights, such as the right to subsistence, are as important as the right to security. Within each group of rights are rights of varying degrees of importance. The distinction is not merely between groups, but is also between various rights within each group.\textsuperscript{115} Another important distinction is between values within different societies. The freedom from hunger is of great import in underdeveloped societies, where it is of more importance than certain civil liberties. A similar hierarchy also applies to consumer rights. The right to safe drinking water and to product safety are afforded greater weight than the right to a fair contract. This proves that seemingly less significant rights, in context, can be identified as human rights. Both economic rights and consumer rights, therefore, can arguably be recognized as human rights.

It should be noted that although the *ICESCR* was approved by the United Nations at the same time as the *ICCPR*, there is a substantial difference between these two covenants. While the obligations assumed by the contracting parties in the *ICCPR* were intended for immediate application, the obligations described in the *ICESCR* were intended to be implemented in the future.\textsuperscript{116} The *ICESCR* includes a list of standards, which the members of the United Nations undertook to promote, and which they pledged to secure progressively with regard to their resources. They were not intended to be immediately implemented

\textsuperscript{111} Ibid. at 99-103.
\textsuperscript{112} Ibid.
\textsuperscript{113} Such as the fact that economic rights recognized in international documents are indirectly influential, but not legally binding. Ibid. at 101 and at 105.
\textsuperscript{114} Vincent, supra note 29 at 12.
\textsuperscript{115} See Vincent, ibid.
\textsuperscript{116} See Robertson & Merrills, supra note 25 at 229-30; and Buergenthal, supra note 93 at 37.
because of the great expense involved in implementing economic rights, an expense that many developing countries could not and cannot afford.

Confronted by objections on both socialist\textsuperscript{117} and capitalist ideological grounds, most economic rights have been neither substantially progressed nor implemented.\textsuperscript{118} Another reason for the lack of realization and implementation of human rights is that countries are not willing to restrict their authority. Human rights can only become part of the legal system in response to legal pressure both at home and abroad.\textsuperscript{119} Despite its deficiencies, the ICESCR is a binding international treaty.

The ICESCR and its detailed list of economic rights can serve as a basis for acknowledging consumer rights. The right to an adequate standard of living briefly stated in the Universal Declaration, for instance, was elaborated upon in article 11 of the ICESCR of 1966. Article 11(1) refers to “adequate food, clothing and housing, and to the continuous improvement of living conditions.” Consumer protection can be considered an implementation of these rights and a means to achieve these goals. Adequate food includes quality of food, which is achieved through consumer protection legislation. Adequate housing contains two elements: the ability to obtain housing and the adequate quality and safety of the housing. The first is an issue of public policy and public expense. The second is based upon consumer protection legislation and is regulated by various legal means.\textsuperscript{120} Thus, although consumer protection was not mentioned in the ICESCR, it is a method by which the above goals can be achieved.

\textsuperscript{117}See Dinstein, supra note 31 at 23ff. See also Alston, supra note 41 at 366.

\textsuperscript{118}Dinstein, ibid. at 23, discusses the Socialist bloc objection to the right to property. Today, after the collapse of the Communist bloc, this right has been acknowledged in most countries of Eastern Europe. The right to freedom from hunger and the right to an adequate standard of living have not substantially progressed due to opposition by capitalist or Marxist economic philosophies. See also Stark, supra note 54 at 81-84.

\textsuperscript{119}See Dinstein, ibid. at 28.

An analysis of several other provisions of the *ICESCR* proves that they too can serve as a basis for declaring consumer rights as human rights. The preamble to the *ICESCR* does not include any operative provisions, but it does lay the foundation for the *ICESCR*. It declares that its principles “derive from the inherent dignity of the human person.” As previously explained, the dignity of the individual is also a basis for consumer protection.

Article 11, mentioned above, also includes provisions requiring the improvement of methods of food production and distribution.\(^{121}\) Improving the distribution of food includes improving not only methods of distribution but also methods of hygienic distribution,\(^{122}\) price control,\(^{123}\) and other means of consumer protection. Contaminated and overpriced food certainly cannot be considered properly-distributed food. Accordingly, consumer protection is vital for implementing *ICESCR* principles.

The right to health, elaborated upon in article 12 of the *ICESCR*, is also closely associated with consumer protection. A basic consumer right is the “protection of consumers from hazards to their health and safety.”\(^{124}\) Similarly, the *ICESCR* declares the right to environmental hygiene and to the prevention of disease. Although consumer protection is not mentioned in article 12, the goals of this article can be realized through improved implementation of consumer protection in the medical field.

The same is true with respect to the right to education, described in article 13 of the *ICESCR* and sections 31 to 37 of the *UNGCP*. These principles show that basic consumer rights are deeply rooted in accepted international human rights and that further recognition would merely be an extension of existing rights.

Consumer rights are not explicitly mentioned in the *ICESCR*; nonetheless, they are not new rights, but rather are a broadening of current rights. Since the basic principles of consumer protection are implied in the *ICESCR*, formal acknowledgement of these rights will not

\(^{121}\) *ICESCR*, art. 11(2).

\(^{122}\) The *Commodities and Services (Control) Law*, 5718–1957, 1957, 12 L.S.I. 24, ss. 4-16, empowers the authorities to regulate the production of certain products when such an act is necessary to ensure regular supplies or regular services. In Cr. App. 150/63 A.-G. v. Ostericker (1963), 17 P.D. 2088, the Israeli Supreme Court decided that clean and hygienic supply is part of regular orderly supply. In the same sense, improved methods of production and distribution of food should include hygienic methods of distribution.

\(^{123}\) *Commodities and Services (Control) Law*, ibid. at ss. 20-29.

\(^{124}\) See *UNGCP*, s. 3(1).
be a deviation from existing rules of human rights. In addition, a declaration of consumer rights as human rights will not create most of the problems involved in the acceptance of new human rights because consumer rights are already characterized as legal rules in domestic legislation in most countries. International recognition by the United Nations is all that is lacking. The process by which a specific right becomes part of international law is a lengthy one and includes various steps.\textsuperscript{125} In my opinion, consumer rights are already on the track toward international incorporation as human rights. In the following section, a major step in the direction of recognizing consumer rights as international human rights, the UNGCP, unanimously adopted by the General Assembly in 1985, is reviewed.


The UNGCP constitutes another step in the international recognition of consumer rights as human rights. Although not binding, it is the first and most important international document including consumer rights on an international scale.

The UNGCP was unanimously approved by the United Nations General Assembly on 9 April 1985.\textsuperscript{126} Guidelines differ from treaties, since they are not binding on the parties who have consented to them. While a treaty binds all parties who have signed, ratified, or approved it, guidelines impose only moral and political obligations. Unanimous approval of the guidelines, however, may contribute to or be evidence of the formation of international customary law.\textsuperscript{127}

The International Organization of Consumer Unions (IOCU) initiated activities and extensive lobbying, which led to the adoption of the UNGCP by the United Nations. The IOCU encompasses more than

\textsuperscript{125} See Bilder, supra note 33 at 173-74. The analysis by Bilder shows that consumer rights seemingly fulfill them. Those requirements, however, have no binding force and, therefore, will not be analyzed in detail. See also Alston, supra note 12 at 38 and at n. 89.

\textsuperscript{126} UNGCP, supra note 28 at 2.

\textsuperscript{127} There are, however, views that there are considerable difficulties in the way non-binding guidelines becoming binding as customary international law. See D. Harland, “International Agreements and Guidelines as a Means of Consumer Protection” (1992) 38 J. Behav. & Soc. Sci. 114 at 119 and sources therein; and R. Kanniah, International Law and the Consumer Interest - A select annotated bibliography of international instruments relating to consumer protection (Penang, Malaysia: International Organization of Consumer Unions, 1990).
170 leading consumer organizations from more than 60 countries.\textsuperscript{128} The activities of \textit{iocu} to promote the adoption of the guidelines started in 1975 and lasted for 10 years until the resolution was finally adopted by the United Nations.

In 1975, at the \textit{iocu} World Congress in Australia, a resolution was passed urging that (1) the United Nations Secretary-General prepare and issue a report on consumer protection; (2) the United Nations Ecosoc appoint a group of experts to prepare a Model Code for Consumer Protection; and (3) the United Nations General Assembly consider and recommend the adoption of that Model Code by member states of the United Nations. In Autumn 1982, after the Ecosoc preparatory work, the first draft of the \textit{UNGCP} was circulated to various governments for comment. \textit{iocu} took an active part in the ensuing negotiations and extensive discussions on subsequent drafts of the \textit{UNGCP}, which led to the consensus resolution and the unanimous adoption of the \textit{UNGCP} on 9 April 1985.\textsuperscript{129}

The seven objectives of the \textit{UNGCP} are delineated in section 1 of the document.\textsuperscript{130} In the preamble of this section, the resolution

\begin{itemize}
  \item \textsuperscript{130} The seven objectives are:
  \begin{itemize}
    \item (a) To assist countries in achieving or maintaining adequate protection for their population as consumers;
    \item (b) To facilitate production and distribution patterns responsive to the needs and desires of consumers;
    \item (c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;
    \item (d) To assist countries in curbing abusive business practices ...;
    \item (e) To facilitate the development of independent consumer groups;
    \item (f) To further international co-operation in the field of consumer protection;
    \item (g) To encourage the development of market conditions which provide consumers with great choice at lower prices.
  \end{itemize}
\end{itemize}
emphasizes that “consumers should have the right of access to non-
hazardous products, as well as the importance of promoting just,
equitable and sustainable economic and social development.” The 
UNGCP presents general principles and the governments are called 
upon to develop their consumer protection policies in line with these 
principles. Each government must set its own priorities according to the 
economic and social circumstances of its country and population. In this 
respect, the UNGCP resembles the ICESCR, which was not intended to 
be immediately implemented due to the expense involved in its 
enforcement. The fact that consumer protection is subject to the 
conditions of each country indicates that consumer protection is not a 
luxury for the industrialized countries, but is also intended for the 
developing countries, according to their ability and needs. 
The UNGCP states six main needs:

(a) The protection of consumers from hazards to their health and safety; (b) The 
promotion and protection of the economic interests of consumers; (c) Access of 
consumers to adequate information ...; (d) Consumer education; (e) Availability of 
effective consumer redress; [and] (f) Freedom to form consumer ... organizations. 

Governments were called to implement these policies. These 
principles are elaborated upon in seven chapters of the UNGCP. The 
first deals with physical safety; the second concerns promotion and 
protection of consumers’ economic interests; the third requires the 
formulation of safety and quality standards of consumer goods and 
services; the fourth demands the establishment of distribution 
facilities for essential consumer goods and services; the fifth 
delineates measures enabling consumers to obtain redress; the sixth 
obliges governments to establish education and information

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131 See Harland, supra note 19 at 250. 
132 UNGCP, s. 3. 
133 UNGCP, s. 4. For a discussion of the UNGCP, see Harland, supra note 19 at 249-50, 
indicating that the objectives are “essentially a restatement of basic rights declared by President 
Kennedy to the U.S. Congress in March 1962.” See also Harland, (1991), supra note 129, dealing 
with the implementation of the UNGCP. 
134 UNGCP, ss. 9-12. 
135 UNGCP, ss. 13-23. 
136 UNGCP, ss. 24-26. 
137 UNGCP, s. 27. 
138 UNGCP, ss. 28-30.
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programmes,\textsuperscript{139} and the seventh presents measures relating to specific areas, such as food, water, and pharmaceuticals.\textsuperscript{140}

A close analysis of the \textit{UNGCP} reveals that it can be viewed as an implementation of the \textit{ICESCR} and the \textit{Universal Declaration}. The two most relevant provisions that deal with the requirement of an adequate standard of living are article 25 of the \textit{Declaration} and article 11 of the \textit{ICESCR}.\textsuperscript{141} This demand can be satisfied \textit{inter alia} by an adequate system of consumer protection. The first group of rights under the \textit{UNGCP} dealing with physical safety is an expansion of the right to health described in article 12 of the \textit{ICESCR}.\textsuperscript{142} Promotion of economic interests of consumers is also a realization of basic rights in the \textit{ICESCR}. Section 13 of the \textit{UNGCP} states that government policies should enable consumers to obtain optimal benefit from their economic resources and the first section of the \textit{UNGCP} emphasizes the government’s role in promoting “just, equitable, economic and social development.” This requirement is an extension of the requirement for an adequate standard of living and reasonable remuneration, which appears in the \textit{ICESCR}.

Article 55 of the United Nations \textit{Charter} declares that the United Nations shall promote “higher standards of living ... and conditions of economic ... progress and development.” The \textit{UNGCP}, which intends to promote these goals, deals with the basic foundation of human rights.\textsuperscript{143}

The adoption of the \textit{UNGCP} by the United Nations led to three types of reactions. For the purpose of simplification, these attitudes will be associated with three scholars who published their views on this subject: Professor Wiedenbaum,\textsuperscript{144} who reacted negatively, Ms.
Peterson,145 who responded enthusiastically, and Professor Harland,146 who reacted positively. The latter is representative of the common attitude to the UNGCP.

In two articles, Professor Wiedenbaum presented a case against the UNGCP. One article preceded the adoption of the UNGCP147 and the other appeared after its adoption.148 In the first article, Wiedenbaum argued that the United Nations should focus on its basic role as peacekeeper, that the UNGCP would establish a supranational authority of international regulation, and that the United Nations would become the international consumer regulator.149

In Wiedenbaum’s second article, he maintained that the UNGCP promotes interference with international agencies in domestic affairs.150 Relying on influential economists, he expressed a view against government regulation of consumer affairs, arguing that regulation leads to inferior products at a higher price.151 Wiedenbaum claimed that the UNGCP would lead to a waste of economic resources and that these issues should not be subject to any government regulation.152 In his conclusion, he wrote that the United Nations should not be the global regulator of private economic activities.

Professor Wiedenbaum’s criticism is based upon two premises, an objection to government regulation in the area of consumer protection and an objection to international regulation of economic activities. The view opposing government regulation to protect consumers is the common attitude of proponents of the “economic

145 Esther Peterson is currently a representative of the International Organization of Consumer Unions (Iocu) before ECOSOC at the United Nations. She served under two United States Presidents as Special Assistant to the President for Consumer Affairs and as Chairman of the President’s Committee on Consumer Interests. From 1970 to 1977, Ms. Peterson was Vice President of Consumer Programs and Consumer Adviser to the President at Giant Food Corporation. E. Peterson, “The Case Against ‘The United Nations Guidelines for Consumer Protection’ ” (1987) 10 J. Consumer Policy 433 at 439.

146 Professor David Harland is Professor of Law in the University of Sydney Law School. Professor Harland is a leading international scholar in consumer law and has published several papers on the UNGCP. Harland, supra note 19 at 266.


148 Supra note 144.

149 Supra note 147.

150 Supra note 144 at 425.


152 Ibid. at 429.
approach to law."\textsuperscript{153} This approach is, however, not the majority view among legal scholars. The majority view asserts that market principles cannot serve as the sole means of consumer protection. Market efficiency alone should not be the ultimate justification for uncontrolled contractual power.\textsuperscript{154} Thus, the economic approach to law was rejected as a major factor in shaping the law of consumer protection.\textsuperscript{155}

Wiedenbaum’s opposition to United Nations involvement in economic affairs is not limited to consumer protection. It also represents the American approach to economic rights, reviewed above. This approach is not shared by the international community; the United States is the only democratic industrialized country that has not yet ratified the \textit{ICESCR}.\textsuperscript{156} This minority view should not hinder recognition of consumer rights on an international level.

One point of Professor Wiedenbaum’s writing does, however, support the thesis of this section. Wiedenbaum claimed that the \textit{UNGCP} is not really voluntary. Citing various sources, he concluded that it “is hardly the language or attitude of the true voluntarism.”\textsuperscript{157} He further concluded that the next step in international regulation of consumer protection would transform the \textit{UNGCP} into international regulations, treatises, and directives.\textsuperscript{158} In this respect, I agree with his conclusion. Although the \textit{UNGCP} is not a mandatory international document, it is not fully voluntary and it does have an effect on national and international consumer protection law. Wiedenbaum’s conclusion is


\textsuperscript{155} The economic approach to law was explicitly rejected in a leading decision of the Israeli Supreme Court. See F.H. 20/82 \textit{Adres Homrei Benyan Ltd. v. Harlow and Jones G.M.B.H.} (1990), 42(1) P.D. 221 at 235-37 and 277-79, rejecting the doctrine of the “efficient breach.”

\textsuperscript{156} See Stark, \textit{supra} note 54; and Alston, \textit{supra} note 41. In addition, it should be noted that article 1(3) of the United Nations Charter, \textit{supra} note 92, set out the role of the United Nations to “achieve international co-operation in solving problems of an economic, social, cultural or humanitarian character.”

\textsuperscript{157} Wiedenbaum, \textit{supra} note 144 at 426.

\textsuperscript{158} \textit{Ibid}. at 430.
based on the responses of numerous committees and organizations to the UNGCP. For instance, the Australian National Consumer Affairs Advisory Council has noted that the UNGCP has delineated internationally-recognized minimum standards that every consumer can expect to be applied.\textsuperscript{159}

The enthusiastic response of Esther Peterson to the UNGCP presents a view that expressly recognizes consumer rights as human rights. In an article published shortly after the adoption of the UNGCP, she wrote:

International guidelines can serve as a *Charter of Human Rights* in the consumer area. That does not mean that every nation would scrupulously obey and implement those principles. Many may not. But the existence of a UN-sponsored *Charter of Consumer Rights* can simply not be ignored by any nation which wishes to be considered civilized.

These guidelines are, at most, expressions of support for the kind of consumer protection which have been in effect in the US, and for consumers in most other industrial nations as well.\textsuperscript{160}

This statement is probably the first to expressly acknowledge consumer rights as human rights. Although this statement lacks any legal status, it paves the way for acknowledgement in the future. In a later article, in response to Professor Wiedenbaum’s criticism, Ms. Peterson explained that the UNGCP cannot impose any duty on any nation “except to the extent that civilized nations and civilized people elect to adopt or adapt them to their own needs.”\textsuperscript{161} But this argument and others\textsuperscript{162} came as an answer to the criticism of the UNGCP and do not change her basic attitude that the UNGCP is a step toward admitting consumer rights as human rights.

The common attitude to the UNGCP is presented by Professor Harland, who considers them international soft law.\textsuperscript{163} He noted the increasing recognition of the international characteristics of consumer

\textsuperscript{159} *Australia and the United Nations Guidelines for Consumer Protection* (Canberra: Attorney-General’s Department, 1986). See discussion below regarding the effect of the UNGCP.


\textsuperscript{161} Peterson, supra note 145 at 436.

\textsuperscript{162} See *ibid.* at 438, suggesting that there is a case for regulation and “that legitimate business throughout the world needs the kind of consumer protections” detailed in the UNGCP.

\textsuperscript{163} Harland, supra note 19 at 251. Regarding the value of ‘soft law’ in the area of consumer protection, see supra note 19. See also, Reich & Smith, supra note 19.
In concluding remarks, he explained that the principal significance of the UNGCP is that it represents international agreement toward the minimal principles that consumer protection should contain and that its unanimous adoption is a significant development in international recognition of the principles of consumer protection.

Harland's emphasis is on the international nature of consumer rights rather than the value of consumer rights as basic rights or as human rights. But, as already indicated above, part of the formal requirements for acknowledging a right as a human right is its international recognition. Accordingly, the international status of consumer rights is a meaningful step in that direction.

The years that have passed since the adoption of the UNGCP are insufficient to assess its influence on consumer protection in the world. There are several examples, however, of action taken by countries following the UNGCP. In a lengthy article, Professor Harland details actions, subsequent to the adoption of the UNGCP, taken in several countries including Uruguay, Ecuador, Australia, Korea, Malaysia, Brazil, Argentina, Chile, Peru, and the Philippines. These activities, although less drastic than some opponents of the UNGCP had anticipated, indicate that the UNGCP, even without binding power, has substantial influence on consumer protection in many countries. Similarly, in 1992, the Secretary-General of the United Nations published a report on consumer protection elaborating on the record

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164 Harland, ibid. at 259, emphasizing the activities of the Organization of Economic Cooperation and Development.

165 Ibid. at 262.

166 Ibid. at 263. See also, Harland, (1988), supra note 129.

167 See section IV.A, above.


169 Harland, (1991), ibid. at 244-45, deals with the possible impact of the UNGCP on various means of consumer protection. Over 50 pages (189-245) of this article address this subject.

170 Ibid. at 197-201, Harland describes the actions taken by those countries, such as legislation and establishment of consumer protection departments. He also details the extensive action taken by consumer organizations throughout the world, with special emphasis on cooperation in South Pacific and Asian countries.

of implementation of the UNGCP in the seven years that had passed since adoption. The report detailed the influence of the UNGCP on the domestic and international activities of several countries.\(^\text{172}\)

\textbf{E. Significance of International Recognition}

The \textit{UNGCP} is part of a trend in recent years to adopt international agreements as a means of consumer protection.\(^\text{173}\) The importance of the international dimension of consumer protection was emphasized in the remarks of the Secretary-General of the United Nations.\(^\text{174}\) Recently, a list of seventy-nine international agreements, protocols, guidelines, recommendations, resolutions, and declarations relating to consumer protection were published.\(^\text{175}\) Not all of the documents directly relate to consumer protection and most of them deal with areas closely associated with consumer protection such as hazardous technologies, infant feeding, marketing and advertising, pharmaceuticals, product liability, and product safety. Some are documents of the United Nations and others are of the European Economic Community or the Organization for Economic Cooperation and Development, both of which have considerably fewer members than the United Nations.

Despite the numerous international documents on consumer protection, they do not constitute binding international law. Professor Harland states that “it is possible that some recent activities will in time lead to such a development.”\(^\text{176}\) He questions whether this development will occur in the near future regarding the \textit{UNGCP}, but it might occur in more restricted areas such as hazardous waste or product liability.\(^\text{177}\) Although the consumer protection documents can at best be considered international soft law,\(^\text{178}\) this does not diminish their international value.

\(^{172}\) \textit{Ibid.} at 103-06. The list of countries includes New Zealand, the Netherlands, Finland, Poland, Malaysia, Uruguay, Brazil, Argentina, Chile, Peru, and Mexico.

\(^{173}\) Harland, \textit{supra} note 127.


\(^{175}\) See Kanniah, \textit{supra} note 127.

\(^{176}\) Harland, \textit{supra} note 127 at 119.

\(^{177}\) \textit{Ibid.} at 120-21.

\(^{178}\) See \textit{supra} note 19. For scholars who have approved the use of the term “international soft law,” see Chinkin, \textit{supra} note 19; and Wellens & Borchardt, \textit{supra} note 19.
Due to lack of enforcement, the impact of international law is not necessarily based upon formal legal status. 179 As previously explained, the UNGCP has already had an effect on both domestic legislation and international cooperation. 180

It is clear, however, that major steps have been taken in the direction of granting international status to consumer protection in the past decade. The great majority of the international documents on consumer protection were approved during the 1980s and, while not formally binding, they are certainly a step toward creating mandatory norms of international law. This effect of the UNGCP and other international documents is vital in changing consumer protection rules from domestic rules to international law and, eventually, to international human rights.

Recently, the Secretary-General of the United Nations published a report on consumer protection. 181 In the introduction to the report, the Secretary-General stated:

On 9 April 1985, in resolution 39/248, the General Assembly adopted by consensus the guidelines for consumer protection, a document which has been likened to an international consumer bill of rights. Indeed, in the intervening seven years, the guidelines have often been cited as a single most important set of principles for consumer protection in the world. 182

The report elaborates in great detail the background to the UNGCP and its implementation by governments, international cooperation, United Nation organizations, and non-governmental organizations. 183 This report, which precedes the full review anticipated by 1995, emphasizes the role of IOCU in promoting the implementation of the UNGCP. 184 The report concludes with the remark that “the moral force of this international consensus has given countries the impetus to introduce general laws and raise consumer policy to the constitutional level.” 185 The UNGCP is a recognition by the international community that consumer protection is not merely an issue of domestic interest. This

179 See Harland, supra note 127 at 121.


182 Ibid. at 97 [emphasis added].

183 Ibid. at 102-16.

184 Ibid. at 101-02 and at 105-08; and above at section IV.D.

recognition has already led to an increase in consumer legislation—sometimes even in constitutional documents. The special importance of this report is that, in an official document of the United Nations endorsed by the Secretary-General, it was recognized that the UNGCP is a document comparable to an international consumer bill of rights and that it can serve as a basis to domestic constitutional legislation.

F. Significance of Constitutional Recognition

Another phase in the establishment of consumer rights as human rights is their inclusion in the constitutions of several countries. The constitutional provisions on consumer protection in Spain, Portugal, Brazil, and Switzerland will be briefly discussed. These provisions reflect the apprehension of the fundamental responsibility of the state to protect consumers, not only for economic efficiency, but also as part of the quest for "social justice and human rights." Article 51 of the 1978 Spanish Constitution can serve as an illustration of the acknowledgement of basic consumer rights as human rights. This Article relates to basic consumer rights, such as education, information, health, and analogous legitimate interests. The Constitution also requires the Government to promote information and education of consumers and to recognize the role of consumer

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186 There are also similar provisions in the Philippines and Japan. Japan's Consumer Protection Fundamental Act outlines general consumer policy, but does not include specific rights and duties. See Harland, (1991), supra note 129 at 209-10.

187 Ibid. at 210 [emphasis added].

organizations. Based upon the Constitution, the General Law for the Defence of Consumers and Users was published on 24 July 1984. This law clearly acknowledged the Constitution as its legal foundation.

The enactment of these constitutional provisions reflects the belief that consumer rights are basic rights. Article 51 is part of Chapter III of the Constitution, which deals with "Guiding Principles of Economic and Social Policy." The sections preceding article 51 specify rights such as the right to social and economic progress, social security, health, education, culture, housing, and the specific rights of underprivileged groups. These rules are based on the 1966 ICESCR. The integration of consumer rights into these rights is a strong indication of their role as human rights.

Article 60 of the 1982 Portuguese Constitution declares consumer rights as constitutional rights. The article delineates consumer rights to health, safety, protection of economic interests, fair advertising, and the right of consumer associations to be heard. It is part of Section III of the Constitution, which is entitled "Economic, social and cultural rights and duties" and which uses terms similar to those of the 1966 ICESCR. The Section includes the right to social security, the right to health, the right to housing, the right to quality of life, the right to work, as well as rights of workers, rights of consumers, and rights of

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189 The text of article 51, in Consumer Legislation in Spain, ibid. at 10 is:

1. The government authorities shall provide for the education and information of consumers and users and shall defend, by effective measures, the integrity, health and legitimate interests thereof.

2. The government authorities shall promote the information and education of consumers and users, encouraging consumer and user organizations, and shall hear such organizations in matters which affect them as determined by law.

3. Within the scope of the preceding paragraphs, the laws shall regulate internal commerce and the regime for authorizing commercial products.


191 Articles 40-50 of the Constitution. See Blaustein & Flanz, supra note 188.

192 Article 60 of the Portuguese Constitution states:

1. Consumers shall have the right to goods and services of good quality, to training and information, to the protection of their health, safety and economic interests, as well as to compensation for damages.

2. Advertising shall be regulated by the law; all forms of hidden, indirect and fraudulent advertising shall be prohibited.

3. Consumer associations and consumer co-operatives shall be entitled, in accordance with the law, to the support of the State and to being heard on the questions concerning consumer protection.

See Blaustein & Flanz, ibid., vol. 13.
private enterprises. The placement of consumer rights in the Constitution in the same section with other economic rights ensures their status as part of economic human rights. These constitutional provisions were the basis for the 1981 *Consumer Protection Law* of Portugal.

In Brazil, the comprehensive 1990 code of consumer protection states that it is based on articles 5 XXXII and 170 V of the federal Constitution. Article 5 is part of Title II - Fundamental Rights and Guarantees and is also part of Chapter I - Individual and Collective Rights and Duties. Article 170 delineates the general principles of economic activities. In each article, consumer rights are part of the basic human rights to life, liberty, equality, security, and property. The comprehensive code of consumer protection declares basic consumer rights and is based on the principles and the rules of the *UNGCP* in both structure and content.

On 14 June 1981, following a referendum, which is obligatory for any changes in the Constitution, article 31sexies was added to the federal Constitution of Switzerland. The confederate structure of Switzerland permits the general assembly to enact laws only when they are based on a specific provision in the Constitution. It is clear,

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193 Arts. 58-66, *ibid*.

194 The Constitution was approved in 1976.

195 Law No. 8078, 11 September 1990 [unofficial translation by P. Neto]. See also Blaustein & Flanz, *supra* note 188.

196 Articles 4, 5 and 6 of Law No. 8078, *ibid*. Article 5 XXXII of the Constitution declares: "The State shall promote the protection of the consumer, in such manner as the law may provide." Article 170 V of the Constitution states: "The purpose of the economic order ... is to assure each person a measure of dignity in his existence according to the dictates of social justice, the following principles being observed: ... V. Consumer protection." See Blaustein & Flanz, *ibid*.


1. While safeguarding the general interests of the Swiss economy, and the freedom of trade and commerce, the Confederation enacts measures for the protection of consumers.

2. Within the field of federal legislation concerning unfair competition, consumer organizations have the same rights as have professional trade and industry associations.

3. For settlement of disputes arising from contracts between consumers and suppliers up to a value to be determined by the Federal council, the cantons will make provision for arbitration or for rapid and simple legal procedures.

See also, Blaustein & Flanz, *supra* note 188, vol. 16, at art. 31sexies and at 4, "Chronological Update."

198 Stauder, *ibid*.
however, that being a Swiss constitutional right is not an indication of status as a basic value. Proximate provisions deal with various issues such as hunting and fishing, railways, film production, subsidies, customs, price control, cooperation with economic institutions, and the requirement for reserves in case of economic crisis. These are certainly not human rights. One point to be stressed is that this article was enacted with the intention to strike a balance between consumer rights and other economic rights, which had already been safeguarded in the Swiss Constitution.

To the enacting country, the constitutional provisions on consumer protection are of varied value and importance. The inclusion of a consumer protection clause in the Swiss Constitution is not necessarily indicative of its importance and status. On the other hand, its incorporation into the constitutions of Spain, Portugal, and Brazil mark a major step in the direction of recognizing consumer rights as human rights. The fact that several countries have enacted constitutional provisions on consumer protection may be regarded as another illustration of the importance of consumer protection and of the readiness to recognize consumer rights as part of human rights.

V. SUMMARY AND CONCLUSION

This paper proposes a novel thesis, which may be received with some skepticism by the reader. It suggests an initial acknowledgement of consumer rights as soft human rights, leading finally to full recognition as human rights. In order to forward this idea, the paper first examines the question of which rights are considered human rights. Although a definitive answer to this question can hardly be reached, there are arguably sufficiently agreed-upon features of human rights that can serve as criteria for defining consumer rights as human rights.

In the second section, it is argued that both substantive and procedural tests are required for recognizing a right as a human right. An examination of these tests in the next section reveals that human rights and consumer rights are considerably similar. This conclusion can be supported by some modern theories on human rights. One can, of course, argue that the inclusion of consumer rights as human rights is part of the international community's general tendency to acknowledge new rights, a trend that has been criticized by many scholars. The paper,

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199 Arts. 25-32, in Blaustein & Flanz, supra note 188.
however, maintains that any objection to the adoption of new human rights is essentially irrelevant to consumer rights.

The procedural basis for acknowledging consumer rights as human rights was elaborated upon in the fourth section. The international documents discussed in that part demonstrate the trend toward formal admission of consumer rights as human rights in international law. It is indeed due time, both in domestic and international law, for such a recognition.

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200 See also, Harland, supra note 127 at 120-21, who refers to Hague conventions, European Community directives, and other documents.