

company and impose obligations as required by the employment contract. Consequently, a part of the literature has already established that the codes of conduct of transnational corporations must not be confused with circulars or instructions issued by the employer with the intention of managing the activities of the company within the limits of his power⁹. It is thus important to draw a distinction between the two concepts based on their characteristics rather than their labels:

- A labour code of conduct has a voluntary character and does not impose any obligation on the company. Such a code can also be negotiated by international unions and workers' representatives in the firm¹⁰, by non-governmental organizations, or associations which are concerned with workers' rights in developing countries¹¹. Labour policy codes are also issued by the employer voluntarily and unilaterally, and without the consent of workers' representatives, otherwise they would be collective agreements.

- Being voluntary and unilateral in character, it is the employer who issues both labour codes of conduct and labour policy codes. Yet they might address a different audience. Labour codes of conduct are self-imposed whereas transnational corporations are bound by minimum labour standards. Consequently, codes of conduct target any entity making business with transnational companies, while labour policy codes only apply to the employees of the company issuing them¹².

⁹ L.E. De La Villa Gil, *Acercas de la responsabilidad social corporativa. Algunas consideraciones críticas desde la perspectiva de las relaciones laborales*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, No. 16, 2008, p. 4. Online version available at http://www.iustel.com/v2/revistas/detalle_revista.asp?id=12&numero=16.

¹⁰ There is at least one union in charge of negotiating these codes with multinationals. In the worst scenario, the international trade union secretariat can assign to each multinational a legitimate union representing workers in the industry. W. Justice, *The international trade union movement and the new codes of conduct* in R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 97.

¹¹ The NGO Clean Clothes has created its own code of conduct model which can be implemented by transnational corporations, the social responsibility of which is certified by the same association. The original version of the code of conduct established by the NGO is available at

http://www.cleanclothes.org/documents/Full_Package_Approach.pdf.

¹² W. Justice, *The international trade union movement and the new codes of conduct* in R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 97.

- While labour codes of conduct are soft law measures, for reasons which will be discussed later, labour policy codes are hard law, directly enforceable by the company and even by workers. So, the company cannot oblige anyone to comply with a code of conduct and its breach cannot be sanctioned. Conversely, compliance with a code of labour policy may be ensured by the company, and workers who fail to comply with it can be liable to disciplinary action. Furthermore, those violating a code of labour policy are liable for damage, as demonstrated by many Supreme Court decisions in Spain (STS de 30 de November de 2011 (rec. ud. 887/2011))¹³.

- Unlike labour policy codes, labour codes of conduct are part of corporate social responsibility. The code of conduct is intended to self-impose the protection of workers' rights aside from what the law requires, in order to maintain business ethics that go beyond profit maximization¹⁴. By contrast, labour policy codes impose mandatory measures on workers. These instructions are by no means CSR measures, as they form part of the private regulation of the business activity to optimize the use of human capital by the company¹⁵.

This distinction is not a hard and fast one, since the protection of social interests may require workers to behave in a certain manner and in line with certain business instructions to meet this goal¹⁶. These ethical codes involve all workers, who are obliged to perform a series of actions or face restrictions to keep up with their business ethics. Therefore, though these ethical codes are clearly codes of labour policy, since the worker is bound to perform some duties, they can also be understood as CSR initiatives.

¹³ Referred to in A. Todoli Signes, *La insuficiente aplicación del baremo del automóvil para el cálculo de indemnizaciones por vulneración de derechos fundamentales (A propósito de la STS de 27 de diciembre de 2011)*, in *AL*, No. 15, 2012.

¹⁴ Those arguing against CSR maintain that the ultimate goal of a code of conduct is the preservation of the good name of the brand. So, the goal remains that of maximizing the benefit of the company without granting dignity to workers. In other words, non-compliance with human rights on the part of the company implies a sanction from consumers. Therefore, compliance with human rights is not an ethical issue for these companies but an economic issue, P. Redmond, *Sanctioning Corporate Responsibility for Human Rights*, in *Alternative Law Journal*, No. 1, 2002, p. 23-28.

¹⁵ J. Lahera Forteza, *Códigos de conducta laborales: poder de dirección, negociación colectiva y responsabilidad social de la empresa. Comentario a la STS de 7 de marzo de 2007*, in *RL*, No.20, 2007, p. 816.

¹⁶ *Ibid.*, p. 819.

Thus, the foregoing characteristics make it possible to draw a clear-cut difference. On the one hand, labour codes of conduct are unilateral and self-imposed regulations (but can be negotiated with employee representatives) form part of CSR and are not legally binding (soft law). On the other hand, labour policy codes are a set of instructions that the employer unilaterally imposes on workers, with a binding character (hard law) intended to comply with the company's objectives (profit-making). This distinction is important in either legal or moral terms. So far, it has been argued that one of the main reasons to adopt a code of business conduct is to promote the image of the company as a socially responsible entity. Therefore, naming a labour policy code the same as a labour code of conduct can be misleading to consumers, due to the fact that the former imposes burdens on workers and is intended to regulate HR initiatives. It implies that the company has adopted CSR policies, when its true intention is to place a limitation on workers' decision-making through the power of corporate management. It is important for consumers to be aware of the content of these codes and report any mislabeling, in order to head off this risk. As the following pages will try to explain, this distinction also points out that different types of codes exist to deal with different issues.

2. Labour Policy Codes

Labour policy codes (also called codes of ethics, business labour protocols, and codes of practice) are employer's voluntary and unilateral acts intended to supplement or describe one's working conditions in a given functional area¹⁷. According to a decision of the Spanish Supreme Court, they are intended to be binding on workers as long as they do not violate the law or a collective agreement. These codes are based on managerial powers (art. 20 ET), meaning that their source is the employment contract¹⁸. Therefore, codes of labour policy may not regulate anything that the employer has vetoed in the exercise of his power¹⁹. Contrasting this code and the employer's powers, two aspects emerge:

¹⁷ L. E. De La Villa Gil, *op. cit.*, p. 2.

¹⁸ J. Lahera Forteza, *op. cit.*, p. 1.

¹⁹ L. E. De La Villa Gil, *op. cit.*, p. 3.

- The first aspect concerns the rejection of the possibility of the unilateral labour policy code setting down regulatory powers²⁰. It is undisputed that neither the constitution nor the law attributes to employers unilateral regulatory powers to govern labour conditions and workforce behaviors. Thus, while these codes are drafted unilaterally by the company, they will never be as a legally binding as a contractual clause²¹.

- The second aspect refers to the fact that the scope of these codes is limited. They may only contain instructions that the worker can receive according to the employer's managerial power. These codes are limited by superior provisions, such as collective agreements and the employment contract. Thus, they cannot amend the clauses agreed upon in the contract, and they are effective in those situations that neither the law nor the collective agreement, nor the employment contract has regulated.

2.1. Codes of Labour Policy: Major Shortcomings

The purpose of these codes is to exercise the company's organizational power by means of instructions and circulars. A set of rules and recommendations are then issued with which all employees must comply; not only in the performance of their tasks but in any relation within the company. Significantly, these codes are widely implemented in those countries where a legal gap is created due to low levels of state regulation. However in certain countries, e.g. Spain, these legal vacuums are to be filled by collective bargaining, which significantly reduces the scope of these codes²².

Even so, there will always be gaps left by collective bargaining and labour contracts that the employer may fill with instructions, circulars, or codes of labour policy. It must be taken into account that the way the entrepreneur chooses to fill these vacuums does not change the fact that the managerial power in a company is limited by fundamental rights, labour laws, and collective agreements.

²⁰ The internal regulations that supplemented the employer's unilateral regulatory power were progressively replaced by collective bargaining, J. Sagardoy Bengoechea, *Los reglamentos de Régimen interior y el Estatuto de los Trabajadores*, in *ACARL*, No. 6, 1982, p. 17.

²¹ J. Lahera Forteza, *op. cit.*, p. 817.

²² A. Merino Segovia, *La definición de las cualidades morales y éticas de los trabajadores de la empresa de dimensión transnacional: los códigos de comportamiento ético y profesional*, in *Revista de Derecho Social*, No. 31, 2005, p. 99.

Thus, based on the decision of the Supreme Court, the penalties imposed on workers for violating a code of labour policy will be subject to judicial review, which will mainly consider the legitimate nature of the instructions given by the code²³.

In this connection, an interesting question arises in relation to ethical codes, since they contain a number of instructions that workers must follow in terms of business ethics. Ethical codes have a mixed character. First, they try to sort and organize the provision of work, increasing workers' duties while incorporating elements of social responsibility, as they are in part intended to promote high ethical standards and a positive corporate image. Ethical codes particularly target workers, and it is they who must comply with these ethical values,²⁴ otherwise they will be sanctioned.

In the author's opinion, ethical codes are also to be attributed to the employer and are thus subject to those limitations described in this section. As established by the Decision of the Supreme Court of 7 March 2007 concerning the ethical code of the Central Bank of Spain,²⁵ when these codes affect workers' fundamental rights, they have to comply with the criteria of suitability, necessity and proportionality taking into account the social benefits sought by the company²⁶.

This is an interesting innovation. So far, legal opinion was used to deal with these criteria, in consideration of either workers' rights or employers' interests. Now, the social function of the instructions issued by the company is also evaluated. Therefore, the Supreme Court suggests that a legitimate social interest may tip the balance toward management, since employers concurrently safeguard the private interests of the company (Article 38 EC), and the social interests of those concerned.

²³ A. Merino Segovia, *La definición de las cualidades morales y éticas de los trabajadores de la empresa de dimensión transnacional: los códigos de comportamiento ético y profesional*, in *Revista de Derecho Social*, No. 31, 2005 p. 105 *et seq.*

²⁴ Indeed, these codes of conduct are a set of duties and obligations concerning workers' conduct that at times are clearly defined and involve the labour relations inside and outside the company (e.g. with customers). They are defined as ethical standards, A. Bayos Grau, *Códigos de conducta y buenas prácticas de las empresas en materia laboral. El problema de su exigibilidad jurídica*, in *Estudios de derecho judicial*, No. 66, 2004, p. 252.

²⁵ As seen, a code of conduct is not binding and do not imposes any instruction on workers. Accordingly, either we are dealing with a labour policy code or a code of ethics, but not with an employment code of conduct.

²⁶ J. Lahera Forteza, *op. cit.*, p. 819.

3. Labour Codes of Conduct

By issuing labour codes, the employer agrees to implement certain minimum labour standards and requires compliance by its suppliers or contractors operating in the countries where the company is based²⁷. Thereby, they are measures which are not legally binding and are adopted by the company on a voluntary basis²⁸. Aside from these features and the mandatory laws applicable to employers, these codes are CSR measures requiring companies to behave ethically. For this reason, codes of conduct are intended to establish minimum labour rights which supplement the rules of the host country and not only apply to the company but also to those which maintain business relations with it²⁹. In other words, the company that issues a code of conduct does not seek mere compliance with the law of the country in which is located (Milton Friedman).

Companies do not try to avoid any responsibility for the protection of human rights, even if they could. This is because by outsourcing work and activities and by fragmenting the company into different legal entities, they could avoid liability for violations of these rights. Rather, this code of conduct is a tool through which parent companies are responsible for everything that happens “under their control” and are encouraged to take measures to protect workers, whether or not they are their own workers, and although they are not legally required to do so (Galbraith)³⁰.

The concept of CSR began circulating during the 1950s in the U.S. in the field of business management to convey the idea of corporate involvement in the society they belong to³¹. Years later, and as a result of this new U.S. trend, the first code of conduct was issued. In the 1970s, more codes followed to protect smaller states from the power of multinationals. So, the first codes were aimed at punishing acts such as the corruption of civil servants operating in developing countries³². By mid-

²⁷ J. Aparicio, *El Derecho del Trabajo ante el fenómeno de la internacionalización*, in *Contextos*, No. 1, 1997, p. 70.

²⁸ J. Lahera Forteza, *op. cit.*, p. 816.

²⁹ W. Justice, *op. cit.*, p. 93.

³⁰ Ironically, as Bayos (2004) has argued, the concentration of power in the hands of the parent company and the fragmentation in different legal personalities of the subsidiaries in various areas as a way to reduce the responsibility of the company were among the underlying reasons for transnationalization and globalization.

³¹ J.M. Aparicio Tovar, B. Valdés De La Vega, *op. cit.*, p. 55.

³² R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 3.

1980, the pressure on the part of public opinion to adopt such codes had diminished.³³

When in the 1990s the idea of CSR was given new momentum, transnational corporations put in place labour standards through codes of conduct.³⁴ Companies like Nike, Levi's and Reebok adopted their first codes of conduct in 1992, after being strongly criticized over the way clothes and goods were manufactured and facing allegations of using child labour³⁵. Ten years later, a World Bank report estimated that some 1,000 codes of conduct were issued to regulate labour obligations, human rights and environmental issues in supply companies.³⁶

3.1 *The Objectives of Labour Conduct Codes*

The structure of the first codes of conduct reveals the main purpose of these documents. Corporate social responsibility and labour codes of conduct originated out of an increasing public concern over the negative performances of the first multinationals adopting codes of conduct³⁷. Initially, 90% of them were issued after some scandals, particularly those concerning the bribery of civil servants in the host country on the part of employers³⁸. Other codes of conduct were established when allegations of child labour were made involving product providers.

1) Such timely move suggests that codes of conduct are intended by the company to protect the business brand³⁹. The development of new communication technologies in the last decades has contributed to focusing the interest of consumers on products and working conditions. Now, there is an increased public interest on this subject and it is easier to access accurate information about human rights violations committed by these brands⁴⁰. It must be added that the business model of these

³³ J. Kline, *International Codes and Multinational Business: Setting Guidelines for International Business Operations*, in *Quorum Books*, Westport, 1985, p. 108.

³⁴ R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 3.

³⁵ A. Bayos Grau, *op. cit.*, p. 249.

³⁶ World Bank, *Company Codes of Conduct and International Standards: An Analytical Comparison*, 2003, p. 2. The report is available at http://siteresources.worldbank.org/INTPSD/Resources/CSR/Company_Codes_of_Conduct.pdf.

³⁷ R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 2.

³⁸ J. Kline, *op. cit.*, p. 23-25, 103.

³⁹ M. Posner, J. Nolan, *op. cit.*, p. 209.

⁴⁰ R. Jenkin, R. Pearson, G. Seyfang, *op. cit.*, p. 2.

transnational corporations has become essential in marketing and distribution companies that produce very little of what they sell. Accordingly, the protection of the brand is a key strategy in their business model⁴¹. Indeed, the campaigns launched by NGOs and consumer associations in favour of workers' rights and against exploitation have the potential to seriously damage the brand image, causing the collapse of the business model. Thereby, these companies publish labour codes of conduct to promote their reputation at the international level and protect their brand. In this sense, it has been argued that at the time of adopting these codes the company is not given complete discretion, because a sanction can be imposed in the event of a reduction in sales and brand smear campaigns resulting from non-compliance with such codes⁴².

2) Strategic differentiation is also related to codes of conducts. With codes of conduct, companies try to satisfy those expressing concern over human rights. The end-result is twofold: to avoid negative publicity and to gain access to niche markets. Codes of conduct are a tool for consumers to ensure employer compliance with workers' rights. This is part of the business strategy to differentiate the company's products from competitors and to enter market niches otherwise inaccessible. The adoption of a code of conduct can also be useful to attract the standard consumer. Other things being equal, most consumers tend to prefer a brand that show respect for human rights. Thus, this distinction may once again increase sales⁴³. The mechanism described earlier is the same used by companies identifying themselves as organic or green; they advertise that they are committed to avoiding the use of pesticides or other artificial compounds. Thus, they will attract clients concerned about environmental protection and the effects on health of these products. In both cases, the company issues a unilateral message that is incorporated by its distinctive brand and targets a specific audience.

3) Codes of conduct have been criticized as a tool to promote deregulation and as an alternative to collective bargaining⁴⁴. Multinationals have shown interest in developing their own non-binding and voluntary codes of conduct, preferring them over governmental rules or collective

⁴¹ M. Posner, J. Nolan, *op. cit.*, p. 209.

⁴² P. Redmond, *op. cit.*, p. 23-28.

⁴³ A. Perulli, *Diritto del Lavoro e Globalizzazione*, Cedam, Padova, 1999, p. 300, in BAYOS GRAU A., *op. cit.*

⁴⁴ C. Rodríguez Garavito, *op. cit.*, p. 216.

agreements. As pointed out by Merino and Rentero⁴⁵, these CSR initiatives can question the law-making role of the state and the function of trade unions, replacing collective bargaining and action, and favouring privatization and government deregulation.

This concern of a part of legal opinion is also shared by the European Trade Union Confederation (ETUC), which in 2001 provided its support for CSR development initiatives, pointing out that they were complementary to the collective regulation of labour relations. According to the ETUC, these newly-issued measures should be implemented in the framework of the European Social Model and considering the position of trade unions – not NGOs – concerning the structure and content of social dialogue and collective bargaining in European national systems⁴⁶. The ETUC is not only concerned about deregulation but also about the risk that transnational corporations might contact NGOs to defend the rights of workers in lieu of traditional unions. For the ETUC, codes of conduct (soft law) only have to be used as a transitional tool, while concluding binding agreements (hard law) through collective bargaining. Legal opinion also makes clear that these codes are not intended to replace state regulation. The very fact that they are not negotiated with employee representatives – but issued unilaterally by the employer – and that they are not binding is clear evidence that the rights of workers are not sufficiently protected by these codes. The intent of these CSR initiatives should not be that of relieving the government of its obligations to safeguard workers' rights. These codes can only be used in order to achieve the goals of social and ethical responsibility aside from what is legally required of employers⁴⁷.

4) A fourth objective that can be attributed to these codes of conduct is their educational character. These codes can help workers become aware of their labour rights. For instance, those working for subcontractors in developing countries can learn when their employers violate their labour rights. And although they have no legal means to bring the case before the court, they could inform the parent company. Thereby, employers would have to modify their behavior, otherwise their contract might be terminated. Consequently, it is important that workers within the

⁴⁵ A. Merino Segovia, J. Rentero Jover, *Formulas atípicas de regulación de las relaciones laborales en la empresa transnacional: códigos de conducta y buenas prácticas*, in A. Bayos Grau, (coord.) *La dimensión europea y transnacional de la autonomía colectiva*, Bomarzo, Albacete, 2003, p. 293.

⁴⁶ A. Bayos Grau, *op. cit.*, p. 251.

⁴⁷ J. Lahera Forteza, *op. cit.*, p. 21.

enterprise network are aware of this code of conduct, have to be apprised of their rights and provided with a copy of the document in their own language. Monitoring the effective implementation of a code of conduct is one of the most controversial issues since, being not binding in character, it is necessary to find alternative ways to ensure compliance. Options include monitoring activities on the part of private companies, NGOs, local government, international unions and workers themselves. In the author's opinion, the latter, along with the support of employee representatives, is perhaps the best way to ensure such compliance⁴⁸.

5) Finally, it has been shown that the pressure exerted by NGOs and consumer associations on companies to comply with worker's rights in developing countries is more effective if they have previously adopted a corporate code of conduct. In other words, codes of conduct work as a lever for change and once in place, employers will be far more exposed to criticism if they fail to implement them. Apart from non-compliance with human rights, and with employers failing to fulfill their obligations, far less social pressure is necessary to change their behavior when they have already issued a code of conduct⁴⁹.

3.2. Types of Codes of Conduct

As seen, there are different types of codes of conducts. In what follows, the focus will be on three of them: internal, external and transnational agreements.

a) Internal Codes of Conduct

These are codes issued and adopted voluntarily by the parent company without the involvement of trade unions or other partners and are implemented by contractors or suppliers of the subsidiaries operating in host countries⁵⁰. These entities are usually characterized by the fact that they issue and enforcement the code on their own. They are perfectly modeled on the needs and objectives pursued by the company and external control is not exerted during the development and

⁴⁸ N. Ascoly, I. Zeldenrust, *Working with codes: perspectives from the Clean Clothes Campaign* in R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 177-178.

⁴⁹ C. Rodríguez Garavito, *op. cit.*, p 237.

⁵⁰ A. Bayos Grau, *Globalización y Derecho del Trabajo: Realidad y Proyecto*, in *Cuadernos de Relaciones Laborales*, No. 15, 1999, p. 37.

implementation stage. Internal codes of conduct are intended to fulfill CSR objectives, with the protection of workers' rights which becomes a public relations and marketing tool⁵¹. As seen in the previous section, a code of conduct serves many, and at times even competing, purposes. Some of them respond to business interests, others to social needs. However, the lack of control on the part of third parties sees to it that business interests are given priority over social ones⁵². Significantly, the one-sided nature of these codes and the lack of involvement of external control mechanisms are clear evidence of the unwillingness on the part of companies to comply with internal codes of conducts. They then become a means to appease most conscious consumers.

b) External Codes of Conduct

By contrast, external codes of conduct are developed by international bodies with the collaboration of trade unions and business organisations in the relevant sector. Codes of conduct drawn up by NGOs are also considered external ones. They regulate minimum labour standards for workers in certain sectors and they are adopted and implemented on a voluntary basis. For this reason, the violation of external codes on the part of companies cannot be sanctioned⁵³. They are mere publicity tools. Yet the objectives set down in these codes are not all business-related and the involvement of trade unions ensures that some social goals are pursued. A company that chooses to adopt an external code is probably more interested in CSR and in the defense of social rights than that implementing an internal one.

In the 1990s, some attempts were made at establishing international and mandatory codes that would govern the social and environmental conditions under which wares were produced and marketed. But the effort was unsuccessful and the adoption and implementation of codes is still at the employer's unfettered discretion⁵⁴.

The Code of Conduct developed at EU level to combat sexual harassment is a nice example of external codes of conduct, as are the code of practice on implementation of equal pay for men and women for work of equal value and the code of practice to remove discrimination on reason of gender or marriage, in promoting equal opportunities in employment.

⁵¹ A. Merino Segovia, J. Rentero Jover, *op. cit.*, p. 282.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 281.

They all have the objective to establish recommendations or guidelines to be followed by companies. It must be said that, while the specific recommendations made in these codes are voluntary, both sexual harassment and discrimination are prohibited by law. Accordingly, while the adoption of these recommendations is discretionary, the objectives pursued by them involve all those concerned. Criticisms on a part of legal opinion are concerned with the idea that the enforcement of the law seems to depend on its specification in the codes of conduct, an aspect which might cause serious consequences⁵⁵. The misleading assumption is that since the adoption of international codes of conduct takes place on a voluntary basis, those companies that do not want to adopt them can break the law. Moreover, one might be led to think that any law should be complemented by a code of conduct or a series of recommendations in order to be enforceable.

While it is true that EU recommendations have positive effects in terms of law enforcement, some issues might arise if they are limited to ensure minimum legal compliance. As mentioned, CSR provides business ethical standards beyond mere compliance with the law. Therefore, codes of conduct should widen the social protection granted by law in order to be of use.

Other international bodies, such as the ILO⁵⁶ and the OECD⁵⁷, have their own codes of conduct, which are configured as recommendations involving the workplace that employers should respect, irrespective of whether host countries are members. However, because of their voluntary nature, the ultimate responsibility lies with governments, which have to pressure TNCs to respect these guidelines⁵⁸.

c) Transnational Framework Agreements

Transnational Framework Agreements can be seen as external codes, since they are not drawn up by the company. Yet they differ from them as they are not issued by international organizations, but by international

⁵⁵ L.E. De La Villa Gil, *op. cit.*, p. 7.

⁵⁶ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977.

⁵⁷ Guidelines in relation to multinational companies were agreed on for the first time in 1976, and they were subsequently supplemented with a new set of documents in 2000. These guidelines have a larger scope than those of the ILO, covering environmental issues, measures against corruption or the protection of consumer interests.

⁵⁸ A. Merino Segovia, J. Rentero Jover, *op. cit.*, p. 280.

industry associations which negotiated their terms with international trade unions operating at the sectoral level⁵⁹. The purpose of transnational framework agreements is to serve as a basis for companies to develop their own codes of conduct. Although these codes do not act directly on companies, they can be fully or partly reflected in the codes that are adopted⁶⁰. They represent a model code for companies in the same sector.

3.3. Codes of Conduct and their Content

The code content might vary depending on management and the objectives set down in the preliminary phase. Yet compliance with human rights at the workplace, the promotion of decent working conditions, occupational health and safety and workers' professional growth are recurrent themes. Specifically, companies usually commit to safeguarding rules, laws and customs at the workplace⁶¹. Evidently, companies tend to focus on individual rights overlooking collective ones. Critics argue that codes of conduct are unable to ensure the right to organize and to collective bargaining in those countries where they are forbidden. Parent companies make no effort to help workers in developing countries to have the legal means to defend their own interests⁶². Workers are fully aware of the main work-related problems; yet their opinion is not taken into account, neither in the development nor in the application of these codes of conduct⁶³. Companies ignore workers' feedback when drafting such codes and do not grant them the right to associate and the power to defend themselves without resorting to codes of conduct from a parent company located in another country. Since collective rights are not ensured, workers will always depend on the employer's goodwill at the

⁵⁹ A. Bayos Grau, *op. cit.*, p. 259.

⁶⁰ A. Merino Segovia, J. Rentero Jover, *op. cit.*, p. 286.

⁶¹ Remember the criticisms made in this paper about how damaging can be a code of conduct that is limited to establishing that a company has to comply with national laws. Besides being ineffective, national labour laws are often not as stringent as to protect the rights of workers.

⁶² These collective rights would allow workers to decide what issues to address, what concessions to make and what struggles to take against their employers, and they would probably do more to improve labour standards than anything else we can think, K. Elliot, R.B. Freeman, *Can Labor Standards Improve Under Globalization?*, Institute for International Economics, Washington D.C., 2003. p. 31.

⁶³ D.W. Justice, *op. cit.*, p. 96. According to the author, the problem is that almost all companies adopting such codes operate in sectors where few workers belong to a union and in countries where trade union rights are not recognized.

parent company or on consumers in wealthy countries to promote them. This argument is ultimately based on the belief that some significant improvements in working conditions in global factories can be achieved if workers are given certain powers. Collective rights allow workers to have a say in the content and pace of their struggles with the employer and to actively participate in the regular monitoring of the daily operations of the plant. In my opinion, this is the key to lasting benefits for individual rights⁶⁴.

3.4. Codes of Conduct and Court Decisions

This section will consider two situations: the enforcement of codes which is challenged in court and the requirement on the part of the tribunal to comply with them.

a) Challenging a Code of Conduct

If, as seen, these codes impose restrictions or obligations on workers, the latter can bring the case to court to determine their lawfulness and that of the employer's possible decision to impose sanctions on them. However, a provision placing obligations on workers is not a code of conduct but a labour policy code governed by its own rules. Being voluntary in character, a labour code of conduct that establishes measures to promote labour rights cannot be challenged in court. This can happen when codes of conducts impose on workers more obligations than allowed, thus limiting their rights.

b) Requiring the Enforcement of a Code of Conduct

This second aspect is more controversial. A company promotes the adoption of a certain code of conduct, either internal or external, but it does not comply with it, nor do the companies under its control. The question is whether the controlling company can be held accountable for the infringements committed by subcontractors located overseas. According to Bayos,⁶⁵ the company can be held liable and transnational corporations can be sued in the country where they are headquartered. Bayos considers trade unions and their interest to fulfill CSR

⁶⁴ C. Rodríguez Garavito, *op. cit.*, p. 228.

⁶⁵ A. Bayos Grau, *Códigos de conducta y buenas prácticas de las empresas en materia laboral. El problema de su exigibilidad jurídica*, in *Estudios de derecho judicial*, No. 66, 2004, p. 20-22.

commitments, which have a clear relation to the notion of collective conflict. Accordingly, he is of the opinion that trade unions at the national level can take the matter to court to stop the infringement and obtain compensation.

In my opinion, the solution proposed by Bayos might be questioned. First, if the code of conduct has a unilateral and voluntary nature and no binding effect, non-compliance can neither amount to misconduct nor result in compensation. Soft law, by definition, cannot be challenged in court, otherwise the company would not have promoted the code.

As seen, its adoption is voluntary, and so is its structuring. Accordingly, if the code is drawn up and defined within the company, trade unions are not in the position to claim compensation for its breach. Things are different if the code of conduct has been agreed upon with trade unions at the company or sectoral level. In this case, the agreement becomes binding and, unless otherwise agreed, the union may seek compensation in the event of a violation. The code cannot be enforced because it does not have a normative character, but the union can claim compensation for damages caused by the breach of the agreement⁶⁶.

To sum up, I agree with Bayo that compensation can be claimed in the event of an agreement discussed with trade unions even if the company is a different legal entity from the one executing the agreement. This is because at the time of drafting these codes, it is assumed that the controlling company will make sure that any parent company will comply with them.

3.5. The Effectiveness of Labour Codes of Conduct

The court usually favours the enforcement of these codes, thus the only way to ensure compliance on the part of company is to exert social pressure (NGOs and consumer associations). Being this the case, it is crucial for those entities to collect accurate information of what happened in the parent company. This “monitoring system” consists of a set of actions and measures put in place to verify compliance with a code of conduct.

The monitoring system can be internal or external. In the first case, it is the employer that ensures compliance with the code on the part of

⁶⁶ As highlighted by A. Bayos Grau, *Códigos de conducta y buenas prácticas de las empresas en materia laboral. El problema de su exigibilidad jurídica*, in *Estudios de derecho judicial*, No. 66, 2004, p. 20-22, the breach of a code of conduct puts into question the ability of the union to act, what is essentially to the freedom of association.

affiliates and suppliers. In the second case, a third party is entrusted with code compliance. As it is with internal codes of conduct, internal systems are unreliable; being that the code of conduct is only a publicity tool, the company has no interest in disclosing violations of the code on the part of their suppliers⁶⁷.

As for external monitoring systems, it is possible to hire a private agency which operates at the parent company and performs tracking. Yet this avenue might prove unfeasible, since the private agency reports to the parent company creating a catch-22 situation.

An alternative is state control. In other words, governments in developing countries where suppliers are located can verify whether codes of conduct are being respected. The problem is that these countries are often unable to tackle multinationals preventing them from improving workers' rights, let alone to report cases of non-compliance. Therefore, this too might be an unviable option⁶⁸.

Another possibility is that of entrusting NGOs or international unions with monitoring tasks, ensuring fairness and motivation when reporting violations by manufacturers. Yet international organizations would have more difficulties in accessing internal information and ascertaining compliance with the code.

Workers should also be involved in the monitoring activity, particularly to assess the liability of the information provided on code compliance. However, making workers aware of their rights, allowing them to be part of the monitoring system and consequently safeguarding collective rights do not appeal to transnational corporations. Thus, once again, compliance with workers' rights in developing countries depends on third parties (NGOs, transnational corporations, unions operating outside the company and so forth).

Conclusions

To conclude, some distinctive traits characterize the attempt to transnational corporations to comply with labour codes of conduct: collective labour rights of workers are neither protected, nor are they taken into account for the development and monitoring of the code. Accordingly these guidelines which are intended to improve their working conditions are made by companies operating in different countries, which

⁶⁷ M. Posner, J. Nolan, *op. cit.*, p. 210.

⁶⁸ C. Rodríguez Garavito, *op. cit.*, p. 216.

are unaware of the ongoing situation and in turn, are frequently monitored by external bodies. Workers are not asked to provide their feedback on the establishment and the development of these codes.

A consequence of this state of play is that codes of conduct have been rejected for being public relations strategies orchestrated by transnational corporations in cooperation with NGOs and consumer groups, favorable to the market government⁶⁹. In the same spirit, the Permanent Peoples' Tribunal condemns the use by transnational companies of these codes, claiming that their only intent is to mask the real working conditions of the company and weaken labour laws and regulations. The voluntary character of labour codes of conduct also attracts criticism in that the existence of such regulations legitimizes the absence of a binding regulation agreed by governments at the international level⁷⁰. They also claim that the creation of these codes silences the voice of those advocating for the effective regulation of minimum labour rights.

In fact, in the 1990s, there were attempts to establish codes of conduct to set mandatory social and environmental conditions under which goods were produced and marketed. These codes would have been implemented through international organizations like the United Nations Conference on Trade and Development (UNCTD). However, during these years, multinational companies began to implement their own codes of conduct, silencing consumer associations and NGOs advocating for those initiatives. Apparently through this system, companies succeeded in avoiding the implementation of compulsory measures. The regulation process failed. Now, codes of conduct can be issued at the employer's discretion, so they still depend on the ethical values of consumers and the will of management at the parent companies.

In the author's opinion, codes of conduct which are complied with on a voluntary basis affect the international regulation of minimum working conditions. The rights of workers in developing countries cannot rest on the will of a multinational company or consumer preferences. International regulation must be in place to ensure these minimum rights in all countries. And compliance with such regulation should be mandatory and binding for companies. Finally, it is important to remember that these minimum rights cannot focus only on individual rights and health protection. It is essential to recognize the collective

⁶⁹ R. Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, in B. Santos, C. Rodríguez Garavito, *Law and Globalization From Below*, Cambridge University Press, 2005.

⁷⁰ R. Jenkins, R. Pearson, G. Seyfang, *op. cit.*, p. 5.

rights of workers in countries where the state fails to do so. Ensuring labour rights rests on the awareness of the needs of the workers in developing countries.



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