

CORPORATE SOCIAL RESPONSIBILITY AND HUMAN RIGHTS

RESPONSABILIDADE SOCIAL DAS EMPRESAS E DIREITOS HUMANOS¹

Article received on: 3/18/2023

Article accepted on: 9/19/2023

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The authors declare no conflict of interest.

Abstract

This article aims at the study of corporate social responsibility concerning the human rights of stakeholders. It analyses the relationship between public and private law and what has been done to ensure that the interests of stakeholders, in particular human rights, are protected in business transactions. Using the hypothetical-deductive method and bibliographic research, international covenants and domestic legislation are analyzed, and we found that there is a movement in the international community to regulate the subject, moving towards the creation of an international instrument

Resumo

Este artigo tem como objetivo o estudo da responsabilidade social corporativa em relação aos direitos humanos dos stakeholders. Examina a relação entre o direito público e o privado e o que tem sido feito para que as transações empresariais protejam os interesses dos stakeholders, em particular, os direitos humanos. Utilizando o método hipotético-dedutivo e a pesquisa bibliográfica, são analisados os pactos internacionais e a legislação interna, demonstrando-se que há um movimento na comunidade internacional que visa regular o tema, caminhando para a criação de um instrumento internacional que vincule

1 The study was carried out with the support of the Coordination for the Improvement of Higher Education Personnel (CAPES).



that links transnational operations to human rights and that some countries have recently taken internal initiatives to make their implementation and protection more effective, whose purpose is to add universal values and principles to corporate responsibility.

Keywords: human rights; development; corporate social responsibility; stakeholders.

as operações transnacionais aos direitos humanos, visto que alguns países, recentemente, tomaram iniciativas internas para tornar sua aplicação e proteção mais eficazes, visando agregar valores e princípios universais à responsabilidade corporativa.

Palavras-chave: direitos humanos; desenvolvimento; responsabilidade social corporativa; stakeholders.

Introduction

Globalization has spurred an uptick in international commercial transactions, coupled with the promise that business would propel global development, thus curbing scarcity and social disparities.

Nevertheless, over the past few decades, companies have incurred losses in terms of their social and environmental footprint, which have not been offset by the contrast in economic advancement. In response to these challenges, there has been a growing emphasis on the study and implementation of measures on social responsibility. These measures are designed to curb the adverse impacts of companies, safeguard the interests of stakeholders, and ensure the sustainability of the environment, with a particular focus on safeguarding human rights.

Within this context, a pressing need arises to strike a balance between public and private interests, prompting a scrutiny of the interaction between public law norms and private law norms in the realm of Corporate Social Responsibility (CSR). It is worth noting that such norms are not subject to oversight by the national judiciary and still lack a comprehensive legal framework at the international level, particularly concerning the protection of human rights.

This study employs the hypothetical-deductive method and conducts bibliographical research by analyzing international agreements and domestic legislation pertaining to the implementation of CSR in both Europe and the United States.

1 Corporate social responsibility

Corporate social responsibility (CSR) is a topic currently under scrutiny, primarily centered on its underlying principles of business ethics and voluntary participation (BITTAR-GODINHO, 2019). Additionally, it is beyond dispute that human rights, enshrined in international law, apply to business practices.

To grasp the essence of RBC², it is imperative to consider the hypothesis that every company must observe and uphold the human rights of its stakeholders. Thus, the question arises: is there a connection between public law norms, especially those governing human rights, and CSR? This is the debate presented in this article.

Companies, regardless of their size, must promote ethical, sustainable, and socially responsible practices. This has led to a growing focus on Corporate Social Responsibility (CSR)³, inevitably leading to a clash between voluntary and mandatory regulations, encompassing both public and private law principles, and encompassing the tension between the public⁴ and private interests.

It is worth noting that, historically, the conflict between public law and private law became notably pronounced in the mid-20th century, highlighted by the decision of the German Federal Constitutional Court (TCFA) in the Lüth case of 1958 (CANARIS, 2003). Since then, this debate has gained momentum and has even been criticized by some as the “Constitutionalization of Law in its entirety” (*Vergrundrechtlichung des gesamten Rechts*). However, on the other hand, the implementation of fundamental rights has also been celebrated (ALEXY, 2009).

The conflict between public law and private law prompted the broadening of legal protection for fundamental rights beyond a subjectivist approach, in which fundamental rights were solely the responsibility of the State. Since then, fundamental rights have been conceived as both a consequence of the formulation of concrete principles guiding legislative measures and a source of inspiration for the legal system. This perspective presupposes the application of rights to individuals and enables the harmonious interpretation of the provisions of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) in conjunction with fundamental rights. This led to the adoption of *Drittwirkung*, meaning the irradiation of legal provisions. Consequently, human rights transitioned from a unilateral orientation focused on state intervention to a demand for universal validity (ANZURES GURRÍA, 2010).

Within the realm of corporate social responsibility, which is fundamentally

2 The holistic nature of Corporate Social Responsibility (CSR) is intricately intertwined with a company’s strategies, policies, goals, and day-to-day operations. This complexity is further compounded by the necessity for public policies focused on preserving biodiversity, thereby ensuring a high quality of life for both present and future generations (DOMINGOS; VEIGA, 2017).

3 Throughout this text in Portuguese, the terms *Responsible Business Conduct* (RBC) and *Corporate Social Responsibility* (CSR) were used interchangeably, aligning with traditional doctrine.

4 Democratic constitutions, especially in Brazil, are fundamentally centered on the protection of human dignity. Therefore, the public interest is not isolated but encompasses the fundamental interests enshrined within the constitutional order (CRISTÓVAM, 2015).

voluntary (BITTAR-GODINHO, 2019), the inquiry arises: with this new interpretation, how would the connection between private law and fundamental rights be applied? Would there be an obligation to comply with and respect CSR? Some scholars assert that fundamental rights apply in the context of private law norms, a position endorsed by the German Federal Constitutional Court, which ruled with control over proportionality and the prohibition of excess in light of fundamental rights norms when compared to private law norms.

Certain countries have attempted to regulate the protection of human rights and the exercise of CSR, such as France with the law on the protection of human rights in national companies (FRANCE, 2017), the United States with the *Benefit Corporations*, and Italy with the *Società Benefit*.

Given the intricate social, environmental, and ethical challenges faced by companies—whether small-scale enterprises or global giants—and the multiple actors involved, finding a precise expression that encapsulates what CSR truly represents seems challenging.

The ISO 26000 guide introduces the concept of “social responsibility” (ISO, 2010), defined as the impact of decisions and activities on society and the environment, encompassing ethical and transparent behavior that contributes to health and social well-being.

The European Commission has also defined CSR in a similar vein⁵. It should be noted that companies are expected to proactively prevent, manage, and mitigate any adverse impacts that could harm human rights.

However, as societal consciousness evolves, particularly within the context of human rights, contemporary companies face increasingly discerning and engaged stakeholders (ARGANDOÑA RAMIZ, 2012) who seek to understand not only the price and quality of a product or service but also the company’s performance (CABALLERO MARTIZ, 2015). They want to know if the company operates according to ethical and transparent principles, including whether it respects and upholds human rights in its production processes.

Additionally, there has been a streamlining of non-governmental organizations (NGOs), which have often manifested their pointed concerns with those accountable for corporate sustainability decisions, which has prompted companies

⁵ For further guidance on the *Corporate Social Responsibility (CSR)/Responsible Business Conduct (RBC)* policy, refer to key documents issued by the European Union, such as: EU (2023a) and Wickert and Risi (2019). Responsible Business Conduct addresses not only the concerns of *stakeholders* but also the issues related to negative environmental and social impact. It is meant to strike a balance between economic growth and human development through strategic business management (UNIDO, 2013).

to become increasingly attentive to mitigating their exposure to social and environmental risks.

With increasingly demanding and engaged stakeholders, conflicts arise between private and collective interests. This raises the question of what is the true role and objective of a company: is it solely about maximizing shareholder wealth, or does it also involve promoting social development?

When reflecting on this question, it is worth noting Carroll's (1979) observation that companies have not only economic and legal obligations but also ethical and philanthropic responsibilities⁶. In other words, companies must fulfill their legal and financial duties while also acting ethically and contributing to societal and environmental well-being.

In this context, it is evident that companies are increasingly expected to undertake responsibilities that extend beyond profit generation, given their capacity to create wealth and their significant societal impact. Therefore, they must look beyond the internal responsibility⁷ that comes with Corporate Governance (CG), also paying attention to external responsibility.

In the classical perspective, Keynes (1978) emphasized the importance of companies managing their actions based on ethical values and cultivating responsible behaviors. This is meant to serve the interests of shareholders and all those whose lives are influenced by the outcomes of a company's actions.

Consequently, CSR progressively becomes an extension of Corporate Governance and is deemed a means to balance the private interests of the company with the collective interests expressed by stakeholders. Carroll (1991) aptly defined this "balance" as the practice of reconciling a company's economic and social orientations, along with the expectations of its stakeholders.⁸

While CSR is indeed acknowledged for its role in preventing harm (negative dimension), it also encompasses values such as transparency, dialogue, and collaborative participation. This approach generates value for a community of individuals rather than merely establishing connections with assets and contracts (ARGANDOÑA RAMIZ, 2012).

6 Rethinking business management is essential to ensure sustainable development that enhances the dignity of both present and future generations (MADRUGA, 2014).

7 Internal governance pertains to the management and functioning of the organization, while external governance concerns the company's role in society (PARENTE, 2013).

8 This perspective is aligned with the United Nations Sustainable Development Goals (SDGs), since, in addition to the State, companies are also subject to legal responsibility. Consequently, the State can be held accountable for failing to fulfill its negative obligations, i.e., when it neglects its duty to oversee companies adequately (COURTIS, 2007).

Undoubtedly, there has been a heightened emphasis on the public interest, signifying a notable shift in focus from private to public concerns. This shift is driven by the persistent pursuit of the attainment of human rights.

1.1 Human rights: a brief overview

Human rights found their roots in the declarations of the 18th century, including the *Declaration of Independence* (US, 1776) and the *Bill of Rights* (US, 1791) in America, and the *Déclaration des Droits de l'Homme et du Citoyen* (FRANCE, 1789) in France. However, it is worth noting that the internationalization of human rights occurred in the 20th century with the adoption of the Universal Declaration of Human Rights in 1948. Such declarations asserted that rights are both universal and inalienable, setting a crucial precedent⁹ for the global protection of human rights.

This complementary function highlights a gap in private law concerning the application of human rights, given the primacy of human and fundamental rights in shaping the legal system (COURTIS, 2007). Moreover, the principle of the predominance of public interest over private interest underscores that the application of human rights predominantly falls under public law, while private law still lacks regulations of this nature.

It's important to understand that CSR is voluntary and discretionary. When it is not adhered to, it does not constitute a violation of the law but rather represents a form of amoral corporate governance—compliance with the law without consideration for the impact on stakeholders.

In cases of human rights violations, sanctions typically fall under the purview of national legislation. There is no overarching legal framework in international law that regulates and prescribes sanctions for companies that violate human rights. Nonetheless, in recent years, there have been shifts in the value structure and regulatory impact of CSR, as well as developments in CSR practices in European countries¹⁰. Notably, the proposal for a Directive (EUROPARL, 2023) on Corporate Sustainability Due Diligence in the European Union was presented in 2022.

⁹ Human dignity as the central core of the protection of the Law. On this subject, see: Lorenzetti (1998).

¹⁰ Focusing on the protection of human rights and the incorporation of ESG (environmental, social and governance) parameters in companies, the German Supply Chain Law, approved on July 16, 2021, imposes *due diligence* obligations to avoid violations of human rights along production chains. It represents a significant stride towards ensuring that companies take responsibility for their actions and their societal and environmental impact.

1.2 Global Compact

Discussions on corporate human rights compliance emerged within the United Nations Subcommittee on the Prevention of Discrimination and Protection of Human Rights in the mid-1990s¹¹. Nonetheless, it was questioned whether this constituted a debate surrounding a fresh interpretation of the Corporate Social Responsibility (CSR) discourse or whether it was merely a political and academic discussion of limited significance and relevance to the business sector. The doubts surrounded the validity of investing time and effort in an issue that most companies dismissed as a responsibility of the State, rather than the private sector (LEISINGER, 2012).

Despite the questioning, there were movements advocating for the discussion of the applicability of human rights to corporations. In 1999, UN Secretary-General Kofi Annan presented the Global Compact at the World Economic Forum in Davos (ANTAL; SOBCZAK, 2007).

The Global Compact, officially known as the United Nations Global Compact¹², introduced voluntary principles geared toward safeguarding human rights, the environment, and combating corruption (UN GLOBAL COMPACT, 2023a). Companies that have endorsed the Compact pledge to incorporate its principles into their corporate governance, issue annual progress reports on its implementation (voluntary and unilateral), and publicly endorse the Global Compact and its principles.

1.3 United Nations Human Rights Council Resolution 17/4

The debate surrounding corporations and human rights continued to expand, culminating in the adoption of Resolution 17/4 during the 17th Session of the

11 The 1990s bore witness to several significant international conferences and agreements that continue to shape contemporary perspectives on environmental concerns and the safeguarding of human rights. Some of the most notable are: The (a) Montreal Protocol (1987): This accord emerged as a response to the depletion of the ozone layer, with the objective of regulating harmful chemicals; (b) Earth Summit, United Nations Conference on Environment and Development in Rio de Janeiro (1992): This event marked a pivotal moment in global awareness of environmental issues; (c) COP1 (1995): The inaugural Conference of the Parties convened in Berlin, Germany; (d) COP3 (1997): The Kyoto Protocol, an international treaty aimed at curtailing greenhouse gas emissions contributing to global warming, was adopted in Kyoto, Japan; (e) COP21 (2015): The Paris Conference yielded the Paris Agreement, a pact under the scope of the UNFCCC addressing the mitigation, adaptation, and funding of greenhouse gas emissions, commencing in 2020. Each of these developments played a crucial role in shaping our present understanding of environmental issues and charting the way forward. It is acknowledged that both corporations and governments share a socio-environmental responsibility, evident in their policies and practices, which must align with the Sustainable Development Goals (DOMINGOS, 2020).

12 Presently, the initiative boasts over 20 years of experience and nearly 70 local networks worldwide (UN GLOBAL COMPACT, 2023b).

United Nations Human Rights Council on June 16, 2011. Titled “Human Rights and Transnational Corporations and Other Business Enterprises”, the resolution was introduced to avert and redress the adverse impacts of business operations on human rights.

During the session in which it was approved, Professor John Ruggie (2017), the UN Special Representative for Business and Human Rights from Harvard University, included the Guiding Principles for the implementation of the UN Framework in his final report. These principles are encapsulated by the mantra “Protect, Respect, and Remedy”, meaning that “the principles are not the culmination, but the foundation of the principle itself”¹³. Consequently, the conversation on this matter gained prominence in the realm of public-private dialogue, encompassing topics such as the obligation to report¹⁴ and the establishment of national human rights observatories to enforce regulations and mechanisms aimed at preventing human rights infringements.

At the national level, several countries are taking proactive steps to regulate this matter, forging connections between private law and human rights. Notable examples include France, Germany, Italy, and, more recently, the European Union, which introduced a Directive Proposal¹⁵ in Brussels in February 2022 to assess the potential inclusion of human rights safeguards within the corporate responsibility regulations applicable to European businesses.

2 Internal aspects of corporate social responsibility connections

2.1 France

Ariane Berthoin Antal and André Sobczak underscore the significant influence of history, culture, and religion in shaping the concept of corporate social responsibility (CSR) in France. In the 1980s, the term Corporate Citizenship was coined, contributing to the notion that employees should not merely be citizens of the State but should also possess influence within their respective companies, entailing the right to participate in consultations and access to information. The conception of the relationship between a company and society in France differs notably from the Anglo-American context. This distinction is particularly evident

¹³ For more information, see: Leisinger (2012, p. 64-79) and Veiga e Silva (2016).

¹⁴ The obligation to report entails the provision of a comprehensive statement encompassing data analysis, research findings, sustainability criteria, environmental risk assessments, and various other factors (DOMINGOS, 2020).

¹⁵ The so-called “*Corporate Sustainability Due Diligence*” Directive Proposal, dated February 23, 2022.

in the pronounced role of the State and its impact on the market. The notion that self-regulation devoid of state influence equates to a form of privatization is emphasized (ANTAL; SOBCZAK, 2007).

On February 21, 2017, the French National Assembly sanctioned the Corporate Responsibility Law, introducing a fresh paradigm of corporate responsibility that carries implications for the accountability of both the parent company and its subsidiaries. These implications arise from the relationships of dominance or control that exist within companies along the production chain (FRANCE, 2017).

Articles L225-104 and L225-105 were integrated into the *Code de Commerce* (FRANCE, 1807) via *Loi No. 2017-399 de 27 mars 2017* (FRANCE, 2017). These articles establish the legal framework for the *company's duty of vigilance*, mandating the development of a plan designed to identify risks and prevent actions that could obstruct the realization of the company's commitment to human rights and fundamental freedoms.

The new provisions are encompassed within the *Code de Commerce* under *LIVRE II: Des sociétés commerciales et des groupements d'intérêt économique* (Commercial companies and economic interest groups); *TITRE II: Dispositions particulières aux diverses sociétés commerciales* (Specific provisions for various commercial companies); *Chapitre V: Des sociétés anonymes* (of joint-stock companies); precisely in *Section 3: Des assemblées d'actionnaires* (shareholders' assembly) (FRANCE, 1807).

The duty of care for administrators¹⁶ concerning human rights, as evident, has been incorporated within the section on shareholder decisions. This placement is reasonable, as shareholders bear responsibility for the investment strategy decisions adopted by the company. Consequently, when the duty of vigilance is breached (arising from decisions of the Board of Directors), the company is liable for any damages to stakeholders.

Companies have a duty to monitor and publish reports on the implementation of human rights, including companies within the production chain. Moreover, stakeholders possess the right to directly report violations by companies, with the law specifying applicable sanctions for breaches of the monitoring duty.

It is imperative to underscore the significance of measures geared toward

16 The duty of care for administrators is an internal regulation specific to commercial companies, primarily directed at administrators in their managerial roles. Its regulatory significance is linked to the specification of a standard of conduct in accordance with prudent business practices (e.g., art. 225 et seq. of the Spanish Companies Law or art. 64 of the *Código das Sociedades Comerciais de Portugal*) (VEIGA, 2021).

safeguarding human rights and the environment, as mandated by the Corporate Responsibility Law (FRANCE, 2017). These measures not only ensure the protection of individuals' fundamental rights but also promote sustainability and the preservation of our invaluable ecosystem. Consequently, the full implementation and rigorous adherence to these measures by all corporations are of paramount importance.

2.2 The United States

In the United States, there is a distinct entity known as *Benefit Corporations*, which differs from traditional for-profit companies (BARNES, WOULFE; WORSHAM, 2018). What sets them apart is their explicit commitment to a group of stakeholders. These entities aim to generate profit while simultaneously fulfilling a social responsibility.

The pioneering state in the regulation of Benefit Corporations¹⁷ was Maryland, which initiated this approach in 2010. Since then, more than 30 states, including Washington, D.C., and Puerto Rico, have followed suit and implemented legislation that allows companies to organize as such.

Benefit Corporations in the United States commit to achieving a general public benefit, extending their obligations beyond the interests of shareholders to include stakeholders.

In some states, such as Delaware (DELAWARE, 2013), specific purposes must be defined. These companies are also required to produce an annual report assessing their performance in fulfilling said general public benefit.

It's important to note that while this legislation emphasizes the pursuit of the common good and respect for stakeholders, it, to some extent, provides a level of protection for the companies themselves. This protection arises from the absence of sanctions in cases of non-compliance with their assumed obligations, and the matter of human rights violations remains somewhat unclear.

The U.S. Benefit Corporation legislation exclusively applies to companies based in the United States that have met the legal requirements for this distinct organizational structure.

¹⁷ Ventura's analysis (2023) of social enterprises is pivotal for comprehending this emerging phenomenon, with a particular focus on dual-purpose hybrid companies. These are private organizations that, in addition to seeking economic profitability, are committed to social and environmental objectives through their commercial activities. This dual focus on economic and societal goals distinguishes them and underscores the evolving role of companies in contemporary society.

2.3 Italy

From a similar standpoint, Italy has also instituted Benefit Corporations, referred to as *Società Benefit*, through *Decreto-Legge* 1882 of 17 *Aprile* (ITALY, 2015b)¹⁸. Italian legislation drew inspiration from the American model, leading to several similarities between the two.

With this decree, Italy became the first country in Europe to regulate companies with economic-social objectives and the first to have legislation at a national level. In contrast to the United States, where regulatory laws are state-level, Italy's approach allowed companies to modify their articles of association and adopt the status of *Società Benefit*.

This transition shifted their focus from solely pursuing profit and benefiting shareholders to actively working for the greater public good and embracing responsible, sustainable, and transparent actions toward stakeholders (RICCO; MAZZESCHI, 2017). Annually, companies are required to submit a report on their efforts to promote the common good, which must be presented alongside their financial statements.

To ensure that companies adhering to the *Società Benefit* status honor their commitments, Section 381 of the *Decreto da Legge 1882* outlines the civil liability of administrators in case of non-compliance with the obligations they have undertaken:

381. L'inosservanza degli obblighi di cui al comma 380 puo' costituire inadempimento dei doveri imposti agli amministratori dalla legge e dallo statuto. In caso di inadempimento degli obblighi di cui al comma 380, si applica quanto disposto dal codice civile in relazione a ciascun tipo di societa' in tema di responsabilita' degli amministratori (ITALIA, 2015b)¹⁹.

As with the previous examples concerning the internal treatment and liability of companies in cases of human rights violations, it is crucial to note that the applicability of these standards is confined to the countries in which they were adopted. They do not extend to transnational operations.

2.4 Spain

In the Spanish context, it is worth noting certain initiatives by public authorities that indicate a growing inclination towards indirectly acknowledging a

¹⁸ It came into force on January 1, 2016.

¹⁹ Art. 381: "Failure to adhere to the obligations outlined in Section 380 may constitute a breach of the duties imposed on directors by legal provisions and bylaws. In case of violation of the obligations specified in Section 380, the relevant provisions of the Civil Code pertaining to the liability of administrators for each type of company shall be enforced" (ITALIA, 2015b, free translation).

model of harmonizing corporate interests with the concerns of “non-shareholder stakeholders”. This is also evident in the regulation of *soft law* documents aimed at publicly listed companies. Somewhat tentatively, the former “Unified Code of Good Governance” from 2006 (CNMV, 2015) recommended, firstly, that listed companies’ boards of directors take on the responsibility of adopting a comprehensive CSR policy, and secondly, that the board itself adhere to the CSR measures it had voluntarily adopted.

This initiative from the 2006 Unified Good Governance Code was incorporated into the Capital Companies Law (LSC), as approved by Royal Legislative Decree 1/2010 (ESPAÑA, 2010) on July 2. This law, subsequently amended by Law 31/2014 (ESPAÑA, 2014), declared that the adoption of a CSR policy in publicly listed companies is non-delegable and, therefore, remains within the exclusive purview of the board of directors.

The path followed by Spanish regulations and self-regulation was put into practice with the Code of Good Governance in February 2015 (CNMV, 2015), which prominently reiterated the recommendations of the 2006 version. In fact, the current Code of Good Governance (June 2020) (CNMV, 2015) recommends to the boards of directors of publicly listed companies, in its recommendation 12, to “conduct their activities based on good faith, ethics, and respect for widely accepted customs and best practices. They are encouraged to strive to reconcile their social interests with, when applicable, the legitimate interests of their employees, suppliers, customers, and other stakeholders who may be affected, as well as to consider the impact of the company’s activities on the broader community and the environment”.

Furthermore, the adoption of a CSR policy²⁰ within the voluntary scope has historically been incorporated into the provisions of the 2006 Unified Good Governance Code (CNMV, 2015), along with new nuances introduced into the Capital Companies Law (LSC) following the 2014 reform²¹. While it is not an obligatory recognition of competence, the management body commits to addressing CSR policy commitments. The management body is responsible for ensuring compliance with accepted CSR measures, preferably through an auxiliary CSR committee comprising suitable supervisors who conduct periodic assessments of the promotion of social interests, consideration of other legitimate stakeholders,

20 Specifically, Recommendation 53 of the Good Governance Code of February 2015, subparagraphs c), d), e), and f), pertaining to the Corporate Social Responsibility Committee.

21 The Capital Companies Law (LSC) is a consolidated text approved by Royal Legislative Decree 1/2010 of July 2. This law was subsequently amended by Law 31/2014, dated December 3, to enhance corporate governance (ESPAÑA, 2014).

and a review of the CSR policy. The CSR committee guides the creation of value (VEIGA, 2020), the CSR strategy, practices, and compliance assessment, while also overseeing relationships with stakeholders²². In general, the recommendations of the Good Governance Code evoke the economic theory of creating shared value and its legal counterpart, the North American Enlightened Shareholder Value (ESV) (MEGÍAS LÓPEZ, 2017).

3 UN Human Rights Council Resolution 26/9 and European Union Guidelines

At the international level, even with the adoption of the Global Compact, the matter of safeguarding human rights remains unresolved, given that international human rights agreements remain voluntary in nature.

Furthermore, each country follows its unique approach to human rights, whether they have been affirmed or not. Some nations have more robust legal protections in place, while others keep weaker frameworks. Consequently, a situation persists in which companies can operate with scant regard for human dignity, engaging in transnational business activities in countries with ineffective safeguards for human rights.

Nonetheless, there is a growing recognition in the international community of the necessity for binding initiatives to hold companies accountable²³ by regulating their conduct in transnational operations.

In this context, during the 26th Session of the UN Human Rights Council, Resolution 26/9 (UN, 2014) was adopted: “Development of a legally binding international instrument on transnational corporations and other business enterprises concerning human rights”. It laid the groundwork for the establishment of an open intergovernmental working group tasked with creating a legally binding framework for the protection of human rights in the context of the activities conducted by transnational corporations and other commercial entities:

1. Decides to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises concerning human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in interna-

²² For further insights on self-regulation and the implementation of CSR, see Veiga and Silva (2016).

²³ Companies must be prepared to achieve outcomes that go beyond mere financial success, focusing on enhancing the quality of social life and implementing measures to prevent environmental harm. As highlighted by Leisinger (2006), companies employ specific tools to lead their employees, suppliers, and other stakeholders, as these values serve as guiding principles in their daily operations.

tional human rights law, the activities of transnational corporations and other business enterprises (UN, 2014)²⁴.

The aforementioned Resolution signifies the commencement of efforts aimed at crafting an international instrument that imposes obligations on corporations and establishes mechanisms for monitoring and ensuring accountability in cases of potential human rights violations that may arise during the course of transnational activities.

4 New challenges for corporate responsibility in Europe

All economic activity has an impact on society, whether it is positive, such as job creation and the provision of goods and services, or negative, such as environmental damage. The primary goal of Corporate Social Responsibility (CSR) is to encourage responsible business practices that mitigate the adverse effects of corporate activities on both society and the environment.

The European Commission (2023) has actively promoted awareness and educational initiatives for the implementation of sustainable development goals, as outlined in the UN 2030 Agenda for Sustainable Development (DOMINGOS, 2021). Consequently, in 2021, the European Commission adopted strategies to promote Corporate Social Responsibility in strategic sectors to protect human rights. In this context, CSR is deemed crucial for risk and cost management, as well as for fostering innovation by providing solutions to both the community and the market.

The European Commission is working to enhance its environmental and social impact reporting to guide the formulation of public policies aimed at environmental protection, following Directives 2014/95/EU (EU, 2014) on non-financial reporting (NFRD) and 2013/34/EU (EU, 2013) on accounting. It is worth noting that publicly listed companies, banks, insurance firms, and other entities designated as public interest entities by national authorities are subject to these guidelines.

Mandatory reporting covers various aspects, including environmental issues, social concerns, employee treatment, human rights, anti-corruption and anti-bribery measures, gender equality, and the educational and professional

²⁴ 1. The decision has been made to establish an open intergovernmental working group on transnational corporations and other business enterprises concerning human rights. This group's mandate is to formulate an internationally legally binding instrument for regulating the activities of transnational corporations and other business enterprises within the framework of international human rights law (UN, 2014, free translation).

qualifications of management boards following EU Directive 2014/95. Such data significantly aids in effective risk monitoring.

Hence, the understanding of the risks associated with a breach of due diligence must extend beyond the company and the directly affected individuals to also consider the impact on the environment (DOMINGOS, 2021). Often, environmental damage is irreparable, as highlighted by a study conducted by the European Union (EU, 2023).

Corruption indeed hinders the achievement of the UN 2030 Agenda and violates the principles of human rights protection. Therefore, the publication of reports on company websites, as well as government websites, promotes greater transparency in the public-private relationship and encourages citizen participation in social oversight (DOMINGOS; CRISTÓVAM, 2022). Reliable data in these reports is crucial for the due diligence²⁵ process, mitigating the risks associated with engaging unscrupulous companies and suppliers.

The EU Eco-Management and Audit Scheme (EMAS) (ESPAÑA, 2023) is a community eco-management and audit system developed by the European Commission to enable companies and other organizations to assess and enhance their performance, leading to economic growth and ISO 14001 compliance (ISO, 2023). The EMAS relies on its capacity to reduce the environmental impact and enhance the organization's legal compliance system by fostering greater employee participation. Adopting sustainable and responsible practices not only safeguards the company from potential legal disputes but also contributes to the preservation of biodiversity.

In the realm of corporate social responsibility, it is apparent that respecting environmental product criteria is just one aspect. Companies must align with the European Union's policies on sustainable development, trade, and socio-environmental progress on a global scale, collaborating with international partners and incorporating CSR criteria into trade agreements and impact assessments, ensuring the sustainability of international agreements. This serves as a sustainability guideline for the European Union, helping reduce disparities among Member States.

As stated in an article by the Confederation of Portuguese Business (CIP), the proposed directive on mandatory due diligence has raised significant concerns within the business community, especially regarding market competitiveness (CIP, 2022). The CIP (2022) poses questions for the European Union to assess the actual economic impact of the proposal to provide legal certainty.

²⁵ For further insights on due diligence in public contracts, please refer to: Domingos (2020).

CIP considers that due diligence legislation is unsuitable for corporate governance, and they establish balanced enforcement mechanisms primarily based on reasonableness and proportionality in civil liability. In this context, companies advocate for a more level playing field and suggest that change should be achieved through a bottom-up and educational approach, along with delineating and rationalizing the authority's power in due diligence obligations.

Meanwhile, the European Green Deal (EU, 2023b), seeks to mitigate climate change and make the modern economy²⁶ more sustainable and competitive. The pact provides: (a) the exhaustion of net greenhouse gas emissions by 2050; (b) decoupling the idea of “growth” from the exploitation of resources; and, (c) cooperative work so that no region is left behind. The European Green Deal is funded by the NextGenerationEU Recovery Plan and supported by the EU budget.

Currently, the European Commission has presented the “Corporate Sustainability Due Diligence” proposal (EUROPARL, 2023). This proposed guideline on corporate sustainability due diligence establishes that corporations must be accountable for environmental damage, health, and human rights violations across their global production chains. This initiative represents a significant advancement in promoting corporate responsibility and safeguarding the environment and human rights. While the proposal is pending approval by the European Parliament, it already signals a European trend towards adopting such standards. Consequently, companies will be required to implement due diligence processes throughout their production chains, obligating European firms to oversee compliance with European standards by their subsidiaries operating in third countries—thus extending the norm's extraterritorial reach. Unlike CSR, which is voluntary, the adoption and transposition of the Directive into the domestic laws of EU member states will ensure direct guarantees of human rights to individuals residing outside the EU. This will apply to acts conducted by European companies or their subsidiaries.

The Proposal for a Corporate Sustainability Due Diligence Directive represents a departure from the typical application of internationally effective standards, as the prevailing rule has been the principle of territoriality, meaning that laws apply solely within a specific geographic jurisdiction (a country, region, or city). However, the European Union is committed to extending the moral influence of its legal framework beyond its geographical boundaries. The EU recognizes

26 An example of efforts in this direction is the work conducted by Lab Europe, which aims to promote best practice standards among companies through responsibility and transparency (B LAB EUROPE, 2023).

that the transnational business activities of European companies directly impact the opinions of European consumers. These consumers are increasingly concerned about product origins, production processes, and the ethical-legal considerations that companies must adhere to.

Additionally, the EU aims to evaluate European companies with highly advanced international risk prevention mechanisms. By mandating increased due diligence for certain types of companies in the context of transnational markets, trust in European companies operating in the international arena is bolstered. Moreover, this contributes to greater confidence in the legal security of international contracts, which is *sine qua non* for the credibility of companies in the global economic marketplace.

Conclusion

From the above, it is possible to summarize some significant points as conclusions. Firstly, the notion that fundamental rights should safeguard relationships between individuals, a concept rooted in German doctrine, which counters the influence of Public Law on Private Law. In this context, to uphold human rights, CSR emerges as a tool to strike a balance between business activities and fundamental rights. Moreover, CSR is progressively converging with private law, underscoring gaps within the corporate legal framework.

Secondly, there has been a historical progression in the ethical and legal development of CSR, starting with its role in addressing international order. In 1999, the Global Compact was established, outlining principles to which transnational companies could voluntarily adhere. Resolution 17/4 of the Human Rights Council (UN, 2011) was also adopted, which shed light on the issue of companies and human rights, in addition to highlighting the need to prevent and remedy the adverse impacts on human rights of actions international business of companies.

The third phase in the evolution of corporate social responsibility within the realm of human rights began in 2017 with the enactment of the Corporate Responsibility Law in France, which added the corporate responsibility model and the duty of vigilance into the French corporate legal system, complete with sanctions for non-compliance with due diligence regulations, especially within French corporate groups.

Furthermore, the United States and Italy introduced the Benefit Corporation concept. The matter of human rights remains somewhat ambiguous within their respective legal systems. This corporate concept serves as a starting point and

an incentive for companies to extend their efforts beyond profitable production and create a positive tangible impact on society and the environment, with an eye toward the organization's sustainability.

Spain tentatively introduced Corporate Social Responsibility (CSR) into the 2006 and 2015 Good Governance Codes, which recommended the establishment of a social responsibility committee to the boards of directors of publicly listed companies, a recommendation reiterated in the 2020 Good Governance Code.

Among the solutions proposed by the four nations mentioned, the French approach appears the most suitable. It is not tied to a specific business model but rather to large national companies or those predominantly operating within French territory, with subsidiaries engaged in production in third-party countries. France has been a pioneer in this arena, serving as a prototype for the proposed 2022 Corporate Sustainability Due Diligence Directive.

While each country follows its unique approach to implementing Corporate Social Responsibility (CSR) and upholding human rights, there exists a clear need for a legally binding international instrument that offers robust protection for human rights in the business realm. This transcends mere voluntariness, imposing an obligation to observe and respect human rights, fostering a unified global approach to the matter.

It has been assessed that the European Union is contemplating the regulation of corporate liability for violations related to human rights, health, and environmental protection. Assuming the adoption of the proposed Corporate Sustainability Due Diligence Directive, Member States will be compelled to regulate themselves. This presents an opportunity for a genuine expansion of the application of European values and principles in the domain of corporate social responsibility, contributing to the effectiveness of international human rights protection.

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Authors' participation

Both authors played an active role in crafting this article, sharing their expertise and experiences on the subject. Fábio da Silva Veiga took charge of collating and scrutinizing the bibliography, which was subsequently reviewed and updated by Isabela Moreira Domingos. Additionally, Fábio da Silva Veiga authored the introduction, theoretical framework, and methodology in Portuguese, while Isabela Moreira Domingos translated and crafted the results, discussion, and conclusions in Spanish and Italian. Finally, pertinent revisions were made to enhance and refine this article, adhering to the standards and criteria of the journal.

How to mention this article (ABNT):

VEIGA, F. S.; DOMINGOS, I. M. Responsabilidade social das empresas e direitos humanos. *Veredas do Direito*, Belo Horizonte, v. 20, e202545, 2023. Available at: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/2545>. Access on: Month. day, year.