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**BUSINESS INTEGRITY
PLANS AND RISK
ANALYSIS TO HUMAN
RIGHTS**

Marcela do Amaral Barreto de Jesus Amado
PhD student in Law, Institutions and
Business – Universidade Federal Fluminense
– UFF
Niterói -RJ

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Abstract: The present work aims to discuss the treatment given to Human Rights in relations between companies and society. In a context of globalization and neoliberalism, in which capital does not submit to the limitations of traditional borders, companies with supranational action arise, whose activity can pose risks to the rights of the local community, without the nation-state having the means to carry out any responsibility. The UN and the OECD have normative instruments aimed at States, which reach business activity in a non-binding manner. Thus, in the search for greater protection, it is essential to find alternatives, which can be done when public procurement, based on Law number 14.133/2021 (New General Bidding Law) which encourages the development of integrity programs, which in their risk mapping must also deal with the threats that the activity may cause to Human Rights.

Keywords: Human Rights. Companies. Integrity Programs.

INTRODUCTION

In the current stage of globalization, with the economy guided by neoliberalism, the power of capital is not limited by traditional borders. Companies operate supranationally and move guided by the possibility of maximizing profits. In this regard, minor legislative and bureaucratic obstacles to the activity can represent the differential when choosing the territory of operation.

On the other hand, the more weakened the State, the more exposed its population will be to violations of Human Rights of different natures. At this point, the role of international institutions is extremely relevant.

The United Nations (UN) and the Organization for Economic Cooperation and Development (OECD) have normative instruments that take care of relations between companies and society, however, focusing on

the accountability of States. For the private sector, the measures are indicative, of optional observation.] Although discussions are underway within the scope of the UN Human Rights Council on the formatting of a treaty to hold companies accountable, in this area, in the short term, given the resistance offered by developed countries, there is no prospect of changing the scenario. Thus, the present work intends to demonstrate that in the face of the impasse, it is imperative to find alternatives in search of greater protection for the most vulnerable populations. This way, it is seen in the Integrity Programs of large companies an opportunity to improve the protection of Human Rights.

With this purpose in mind, legal-prospective research is carried out, insofar as it deals with trends in the protection of Human Rights, with a propositional focus within the reality of Brazilian legislation. To this end, a bibliographic review was carried out with a qualitative approach to the work coordinated by Manoela Roland on the UN Guiding Principles of Human Rights for companies and the OECD Guidelines.

At the same time, an attempt was made to analyze the Anti-Corruption Law and the New Bidding Law in their points of promotion of business integrity and, therefore, *standards* that may represent an alternative for inserting the humanitarian agenda in the routine of companies, especially those that celebrate larger contracts and, therefore, greater social impact, with the government.

SUPRANATIONAL BUSINESS ACTIVITY

Globalization has its first wave in the great navigations of the 15th century, marked by colonization and looting and the trafficking of enslaved people. The second is marked by the Berlin Conference (1884/1885), when the world was divided between the major

economic powers, characterized by the competition of national capitalism for colonial markets, which resulted in the two great wars of the twentieth century.

He discusses the theme Antônio José Avelãs Nunes, adds that the colonized peoples were the great victims of these two waves of globalization and globalization and continue to support the dependence and development impeded by the global context of neoliberalism.

Today, we live in a third wave of globalization, which presents itself as a complex factor, with philosophical, ideological and cultural reflections and which has in the economy the key to its understanding, as Antônio José Avelãs Nunes continues to teach, implies in the weakening of the role of the state in the economic area and with annulment of the national state. In fact, neoliberalism tends to ignore the state, making the economy a subject regulated by the natural laws of the market. The state would be responsible for the political and administrative organization and society the organization of productive activity regulated by the market.

In this context, the relevance of transnational 'business activities emerges, guided by planetary strategies, which boast economic and political power that go beyond the market conception of competition capitalism, and is closely linked to the ideology of the massification of consumption patterns, with the positivity of the performance society.

The author identifies that the current stage of globalization can be represented by the dominance of financial capital or what he calls "casino capitalism," in which speculators act in favor of creating a single capital market, which allows these companies to place your

investments anywhere in the world.

A process marked by disintermediation, since speculative capital has real-time access to financial markets around the world, market decompartmentation that has the monetary, financial, exchange and credit areas unified, and finally, the deregulation that implies the full liberalization of capital movements (NUNES, 2003, p.67-77). Factors that, in the view of Pierre Dardot and Christian Laval, reinforce the premise that the logic of competition in the world market has modified the way in which public action is performed:

Although the State is seen as an instrument in charge of reforming and managing society to put it at the service of the company, it itself must bow to the rules of effectiveness of private companies. [...] It is this new "disenchanted" conception of public action that leads to seeing the State as a company [...] that has a reduced role in terms of producing the "general interest". [...] There is a commodification of the public institution obliged to operate according to business rules (DARDOT; LAVAL, 2016, p.274).

It is precisely at this point that the debate about the regulation of Human Rights in the business field shows its importance. In the "casino economy," cut off from the real economy and the lives of ordinary people, the freedom granted to speculators makes any type of cogent regulation difficult, given the ever-present threat of withdrawing capital from the country's market. The more regulation and protection, the lower the interest of capital. Market forces drive policy, especially in the poorest countries.

INTERNATIONAL HUMAN RIGHTS: STATE PROTAGONISM

The installation of a transnational company

1 According to a report by the newspaper "O Globo" in early 2022, "Apple" reached US\$ 3 trillion in market value, the equivalent of just over R\$ 17 trillion. This amount is more than twice the size of Brazil's Gross Domestic Product (GDP), calculated by the IBGE (Brazilian Institute of Geography and Statistics) in 2020 at R\$ 7.5 trillion, greater than the UK economy. Available at: <https://oglobo.globo.com/economia/apple-atinge-us-3-trilhoes-em-valor-de-mercado-mais-que-toda-economia-do-brasil-25320452> . Accessed on 02.14.2022,

in a territory provides economic development, generates jobs, increases tax collection, in addition to contributing to the transfer of technology. However, sometimes this activity is potentially risky, liable to damage diffuse rights (environment, consumer, health), homogeneous collective and individual rights².

International Human Rights Law emerged in the post-war period, primarily aimed at protecting the relationship between the State and the citizen, with the aim of constituting an ethical paradigm capable of restoring the logic of reason, preventing the denying of the dignity of any human being. The concept of sovereignty gives way to the violations of national states against human dignity (FACHIN, 2016, p. 3).

The Universal Declaration starts to influence local laws, States must observe minimum protection targets established by it, in the aspect of non-derogable and binding international customary law (cogent), what Melina Girardi Fachin calls “international architecture based on a state-centric perspective” (FACHIN, 2016, P.4-5).

In this orbit of ideas, even if a violation has been committed by a private individual, international accountability in the Human Rights interface will be focused on the State. Scenario of insufficient protection when looking at the activity of transnational companies, in the context of economic neoliberalism, in which the State is weakened.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS IN BUSINESS ACTIVITY

The international accountability of companies for human rights violations gained

² Pursuant to article 81, sole paragraph, of Law number 8078/90, diffuse rights are those whose holders are indeterminate and indeterminable, their violation does not affect anyone in particular and, simultaneously, everyone. Collective rights in the strict sense are rights of a group, category or class of people. In these rights, it is possible to determine who their holders are, as there is a legal relationship between the people affected by their violation or between them and the violator of the right. Individual rights receive collective protection because of their common origin.

greater prominence from the 1970s onwards. Today, existing instruments can be divided into 1) Principles and code of conduct; 2) Guidelines for management systems and certification schemes; 3) Evaluation index; and 4) Accountability and reporting structures. In addition to these mechanisms, the search for consolidation of the issue through a binding treaty is under way, whose negotiations are still in progress (GALVÃO, 2019, p. 306).

The OECD Guidelines consist of voluntary norms aimed at adhering countries to encourage the responsible conduct of companies, through the institution of National Contact Points and the Investment Committee, which aim to implement and promote compliance with their norms, but without any character coercivity (*soft law*). They represent a framework for corporate responsibility, as they are applicable to all companies originating in OECD countries. However, the suggested instrument does not have *enforcement* mechanisms, it has a non-binding nature. Its compliance cannot be demanded through legal mechanisms (BONNOMI, 2018, p. 209).

In 2011, the United Nations established a set of objective recommendations, norms that establish a global standard of practices related to business activity in the area of human rights. This instrument establishes steps for the State to promote companies' respect for the humanitarian cause, encourages business activity to have its risks mapped. The Global Compact represents a leadership platform for the development, implementation and dissemination of corporate responsibility and sustainability practices and policies. It has the objective of integrating its principals into business activities around the world and

catalyzing actions that support the broader scope of the UN. Voluntary assumption, establishes the annual presentation of a report with the implementation of its principles by the companies, which must indicate integrity measures in this area.

As highlighted by Jéssyka Maria Nunes Galvão, another control instrument for transnationals are the certification systems, for example the International Standard (ISO 26000) which regulates the Guideline on social responsibility (GALVÃO, 2019, p. 309). Instruments that serve to encourage the adherence of companies in the face of the possibility of negative publicity, which alienates consumers who are aware and consider relevant the observance of the limits imposed by Human Rights in business activity.

Evaluation indexes still function as promotion tools, for example: the Corporate Sustainability Index (ISE), from the Stock, Commodity and Futures Exchange, which lends itself to corporate analysis of the sustainability performance of companies, which considers their economic efficiency, environmental balance, social justice and corporate governance.

In a scenario of globalization and neoliberalism, it is pertinent to highlight the critical conception of Antônio José Avelãs Nunes regarding the freedom that International Institutions have when it comes to “regulating” the performance of transnational companies:

That is why many have been claiming the need to fight against the dangers of these “dictatorships of the markets,” denouncing the “liberticidal nature of the “freedoms” of capital, unmasking this true Universal Declaration of the Rights of Capital (carried out by the IMF, World Bank, OECD, European Commission, WTO, G8, Trilateral Commission, Davos Forum and other worthy institutions), much more effective than the Universal Declaration of Human Rights. [...] The WTO places above all the

freedom of commercial exchanges and considers “free trade” when as a panacea capable of solving all problems (NUNES, 2003, p.78 and 79).

The ineffectiveness of voluntarily opting for companies to adhere to Human Rights norms encourages discussion about the need for a binding international instrument. In the UN Human Rights Council there is a movement led by developing countries, which finds considerable resistance in the richest countries with expressive reluctance from the United States and the European Community, towards the consolidation of a human rights treaty and company, the which would be extremely important since the existence of only guiding principles “duty is ignored and impunity persists” (GALVÃO, 2019, p. 312).

INTEGRITY AND HUMAN RIGHTS PROGRAMS IN BRAZIL

In the wake of Arno Scherzberg ‘s lesson, the patriarchal State (the one that autonomously governs society) is replaced by the Precautionary State, in which the classical state-juridical notion of the creation and correct application of the abstract rule based on a number of these rules, regardless of the concrete situation is obsolete. The State assumes a didactic, preventive function, in which criminalizing conduct cannot solve the problems presented and the definition of public interest cannot subtract the economic calculation from the private one. (SCHERZBERG, 2006, p. 21-33)

Thus, while the absence of binding international regulations that hold companies accountable for damages caused outside their country of origin persists, the adoption of *compliance* measures is essential and *due diligence* to raise the business standard for humane preservation.

In the lesson of Felipe de Macedo Teixeira and Luciano Vaz Ferreira, companies may

be tempted to neglect the principles and standards of proper conduct, in order to obtain a competitive advantage, however, compliance with laws and regulations is essential to preserve the relationship with the public sector, as well as a guarantee for the socioeconomic development of civil society (TEIXEIRA; FERREIRA, 2019, p.222).

Brazil has been linked to the OECD Declaration on International Investments and its Guidelines since 2003, when it was instituted, within the scope of the Ministry of Finance, a National Contact Point, whose mission is to seek its implementation in the national context, make the relationship between less conflicting company, government and society.

The Contact Point was created by Ordinance Number 92/2003 of the Ministry of Finance, therefore, it is not an international legislation internalized with the approval of the legislature, followed by a presidential decree, therefore, its performance is marked by voluntary adherence. Despite this characteristic, it represents a reasonable instrument of effectiveness, since it establishes a differentiated channel for dialogue with civil society, represented by associations and class entities and private entities. They promote a negotiated solution, based on adversarial proceedings, which gives legal certainty to the concrete case and brings the parties in dialogue together (TEIXEIRA; FERREIRA, 2019, p.242).

In parallel with the activities of the Contact Point, Leonel Lisboa highlights the

3 Principle 17: "In order to identify, prevent, mitigate and remedy the negative impacts of their activities on human rights, companies must carry out audits (*due diligence*) on human rights. This process must include an assessment of the actual and potential impact of the activities on human rights, the integration of the conclusions and its action in this respect; tracking responses and communicating how negative consequences are addressed. The audit (*due diligence*) in terms of human rights: A. It must cover the negative impacts on human rights that have been caused or that the company has contributed to its occurrence through its own activities, or that are directly related to its operations, products or services provided by your business relationships; B. Will vary in complexity depending on the size of the company, the risk of serious negative consequences on human rights, and the nature and context of its operations; C. It must be an ongoing process, given that risks to human rights can change over time, depending on the evolution of operations and the operational context of companies. Available at: < https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresuggie_mar20121.pdf > Accessed on 02.15.2022.

importance of adopting the Human Rights Risk Assessment procedure in business activities, in which there is a flagrant difficulty in perceiving the negative impact of their actions on human reality.

[...] standard performance, within corporate regulations, and observing regulatory, legal and jurisprudential standards can cause damage, often serious and irreparable, to people's lives and realize that this cannot be "part of the game". [...] even following all the rules, the peaceful worker who considers himself a good and dedicated person may be promoting Human Rights violations without him and his organization realizing it. (LISBON, 2019, p.251)

Risk assessment allows the company to verify its actions and relationships, a broad process called *due diligence* in Human Rights, whose scope is to identify, prevent and repair the negative impacts of its activities. This process must include an assessment of the actual (damage that has already occurred) and potential (risks) impact of activities on human rights, the integration of findings and your action in this regard. It must include tracking responses and communicating how negative consequences are addressed. It is a continuous process, considering that risks can change over time, depending on the evolution of operations and the operational context of companies³.

It is fundamental that the evaluation under discussion is not limited to identifying and managing important risks for the company itself, but rather, includes potential damage

that may be caused by the activity to holders of rights.

The perspective of a Human Rights Risk Assessment [...] must be on what human rights violations the company may cause; how people can have their rights violated by the presence and normal and deviant actions of the company. Therefore, a look different from the look of the company's business must be applied. This reversal of optics is a challenging exercise for any large organization. [...] (LISBON, 2019, p. 254)

This analysis must be carried out prior to the start of business activities, preferably or, at least, prior to the conclusion of a certain commercial agreement: "given that already in the preparation phase of contracts or other agreements, risks to human rights can be mitigated or aggravated, as well as inherited through merger or incorporation processes."⁴

According to Guiding Principle 18, this work must be carried out with a focus on the means and end functions (results) of the business activity, with the support of internal and/or independent specialists, in addition to including consultations with society potentially affected by the activities⁵.

The company cannot act as a facilitator or accomplice to violations, so its assessment must include the actions of its supply chain and the recipients of its resources. Given the amount that transnational companies move, the economic impact of their activities in

the territory, especially in poorer countries, the adoption of an internal policy aimed at preventing and mitigating offenses to human beings has the potential to influence a large part of the State's market.

Furthermore, as highlighted by Leonel Lisboa, special attention must be given to the allocation of company resources, sponsorships, subsidy or support. Beneficiaries must account for the result of the activity and demonstrate that they respect Human Rights⁶.

Encouraging the corporate creation of integrity programs gained considerable momentum with the enactment of Law number 12,846/2013 (Business Anti-Corruption Law). In an attempt to combat the diversion of public resources, the law points to adherence to integrity practices (*compliance*) as a viable alternative to mitigate administrative sanctions⁷.

In the same line, Law number 14,133 became the main regulatory instrument for public procurement in the country, as of April 2021. It compiled scattered rules, standardized procedures and, clearly, opted to encourage the implementation of integrity programs in business companies that do business with the public power.

Indeed, integrity programs work as a tiebreaker, a condition for rehabilitation of a convicted business company, it constitutes a parameter for the dosimetry of sanctions, in

4 The same issue, p. 13

5 Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadores_ruggie_mar20121.pdf

6 The author continues with examples and facilitated violations can range from violations of obligations in the labor relations of a benefited organization and its employees, child sexual exploitation, human trafficking. Another point of attention [...] companies, when offering training and equipment to public security forces, be they military, paramilitary or civilians, must have robust control measures to ensure that they are not directly or indirectly facilitating those forces to promote themselves human rights violations (LISBOA, 2019, p.265).

7 The indirect incentives for business organizations to adopt a set of good practices in their internal structures and in their relationship with the Public Power stem from the very repressive and inhibitory nature of the Anti-Corruption Law. [...] by creating a system aimed exclusively at making legal entities liable, backed by objective criteria for the application of severe penalties, the rules and principles arising from the norm end up generating robust stimuli for the implementation and continuous improvement of compliance programs, with a view to preventing the practice of acts considered illegal. A business choice – or omission – that goes in the opposite direction to this path can result in the devaluation of the organization in the market, high reputational risks and difficulties in establishing partnerships and business (NÓBREGA, 2020, p.21).

addition to its implementation constituting an ancillary obligation in major hiring. In addition to complying with a formality, it is essential that this requirement represents a gain in quality in hiring, which cannot be neglected with the scope of preserving the public interest, which undoubtedly includes the protection of Human Rights.

Compliance programs demand that the company carry out a risk mapping ⁸for its activity, the first step to manage it, in this fundamental process that it turns its attention to the points in which the activity can make human rights vulnerable.

FINAL CONSIDERATIONS

The panorama of Human Rights faces severe challenges in the business area. Globalization, neoliberalism, the fluidity of markets weaken the traditional notion of the State, which in many cases has no room for negotiation in the face of the power of companies with supranational operations, whose activity in the territory, in addition to economic benefits, can cause risks the human rights of that society.

The OECD Guidelines and, above all, the UN Guiding Principles are an important step in humanitarian protection and protection. The establishment of a point of contact, the possibility of resolving controversies through dialogue, without a doubt, are measures that must be celebrated. However, they are still insufficient for their intended purpose.

In this line of thought, while the work of the UN Human Rights Council in consolidating a Treaty (binding instrument) is not finished, it is imperative that alternatives are found at the national level.

Here, it is possible to highlight that, based on the Anti-Corruption Law, the Public Power already has the means to promote

integrity programs. With the April 2021 bidding law, this possibility is expanded. We encourage the hiring of companies that have an integrity program structured, however, this differential must not be a mere formality, the content of this instrument must be evaluated by the State, which must point out the need for provisions that deal with possible humanitarian violations.

8 Risks can be of different natures, operational ones are events that may compromise the organization's routine activities, legal risks arising from regulatory changes and information technology risks, equity risks, possibility of fraud and corruption against the assets or interests of the organization (MIRANDA, 2021, p.137).

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