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A SMALL STEP FORWARD TO BUSINESS' HUMAN RIGHTS COMPLIANCE

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Abstract

Businesses are an essential source of global development and wealth. However, they are not yet generally aligned enough with human rights standards. In addition to the regulatory framework adopted to date, this thesis proposes a new approach to improve human rights compliance by companies. The results of an opinion survey led to the conclusion that a business case based on a company's reputation and not exclusively on an economic benefit is the right way forward to foster business change. The author argues that consumers seeking to meet their needs defined at the top of the Hierarchy of Needs proposed by Maslow's theory will promote a parallel action by companies in favor of human rights. This thesis calls for society's awareness and appeals for consumers to be more demanding in meeting their needs in a way to increase business' human rights compliance. The findings reiterate that consumers are more conscious of their needs and long for more information, which will enable them to make a better assessment of company conduct related to human rights respect and promotion. Thus, Human Rights Promoter Score™ can play a particular role in fostering business' human rights compliance.

Keywords: business and human rights, compliance, consumer, Maslow hierarchy of needs, elements of value, enlightened capitalism

Biography

Susana Gaio has worked as a corporate Lawyer in the Portuguese telecommunications sector for more than a decade, focusing on data retention and protection, privacy, and criminal proceedings. As a moderator, she fosters cooperation between the private sector and governmental, inter-governmental and non-governmental institutions. This research was motivated by her deep corporate experience and drive for business compliancy and human rights protection.

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Table of Abbreviations

ATCA	Alien Tort Claims Act
BHRP	Business and Human Rights Program
CEO	Chief Executive Officer
ECOSOC	Economic and Social Council
FLA	Fair Labor Association
GNI	Global Network Initiative
GRI	Global Reporting Initiative
HR	Human Rights
HRC	Human Rights Council
ICC	International Criminal Court
IGWG	Open-ended Intergovernmental Working Group on proposed binding Treaty
ILO	International Labour Organization
MSIs	Multi-stakeholder Initiatives
NAP	National Action Plan
NGO	Non-Governmental Organization
NCP	National Contact Point
NPS	Net Promoter Score
OECD	Organization for Economic Cooperation and Development
OEIGWG	open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
OHCHR	Office of the High Commissioner for Human Rights
PRR	Protect, Respect and Remedy Framework
SRSG	Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises
SSE	Sustainable Stock Exchange Initiative
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCTC	United Nations Commission on Transnational Corporations
UNGP	Nations Guidelines on Business and Human Rights

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Introduction

Businesses underpin the development of the economy, wealth and global welfare. Companies are the leading employers who can provide a better life for their employees and their families. Consequently they have a positive impact on human rights. Businesses, as they appeal to consumers for new products and services, are catalysts for social and cultural revolutions, providing the satisfaction of needs and even creating new ones. They are a real source of innovation and entrepreneurship and they should be the leading enablers of human dignity, consumer's self-fulfillment and social prosperity. Businesses should and must master in human rights too.

The main reasons behind the decision to write about business and human rights are three and they have been determining guiding principles for this academic work. The first, more self-centered, is based on my need to give more human meaning to the two decades of work I have developed in the business world. I mean, my urge was to look for the reasons for sustaining business decisions more in compliance with human rights. In the end, to evaluate my decisions throughout my professional career, I became aware of how far or near those decisions were to human rights compliance and thus acted clearly and more consciously aligned with the legal frameworks that safeguard human dignity. Furthermore, in this way and with this example, I hope that other professionals in the corporate world will feel sensitized to do the same exercise of self-evaluation and act according to their convictions and that the information provided in this thesis will help them in this process. It is not intended to leave the impression that business professionals are on the opposite side to human rights defenders and that their decisions do not take human rights principles into account. Quite the contrary! There are concrete and consistent examples of many companies and managers who have mapped out a path of success by strictly supporting their business decisions in line with human rights. I want to point out that becoming aware of where we are regularly is the first step in any process of ongoing improvement.

The second reason is based in the expression of companies need to design a business plan that is increasingly and more consistent in line with human rights. Businesses have their *raison d'être* and it can be significantly different from sector to sector. However, we must believe that a general business plan in line with human rights can serve everyone equally (business and

society) and thus lead to a global movement increasingly close to aspiring to greater humanity in the business sector.

Finally, the purpose was to research how, become aware of, write about and define actions so that risk to people is at the heart of any corporate decision. Whereas business plays an important role nowadays in the development of individuals and society as a whole, it is crucial to raise the awareness of those who make business decisions, so that they see as a priority the needs and rights of any human being, as themselves. In the end, companies are not people but are ruled by people (managers). Manager's who also want to see their needs and rights safeguarded in the decisions of other companies' managers.

From an overall perspective, it is important to highlight that the world's news about business and human rights tends to be negative. This means that are widely reported human rights violations resulting from business leaders' commercial and operational decisions. Apparently, companies are far from respecting and protecting human rights, which is a problem under review on the international agenda. This dilemma has been the subject for resolution in numerous private or institutional initiatives over the last few decades. Moreover, the same problem is driving the development of an international treaty on business and human rights and the one that this research aims to analyze.

The topic is not new to the international agenda and it is not new to academic research either. There is a wealth of excellent research on the responsibility of companies to act diligently towards human rights. Numerous studies have been carried out to recognize the best way to bring business decisions closer to a general pattern of behavior that should be more focused on human rights and the development of the society in which they are integrated.

Inspirational work has been done in the business and human rights field, the Non-Governmental Organization's (NGO) reports on human rights violations as a result of business activities are a good example. However, they can leave the general impression that the companies are only "those others" who are beyond an invisible barricade and those who need to be continuously monitored because they are presumed to fail with human rights at any time. The distance between the private sector (companies) and NGOs is noticeable. There seems to be a constant misgiving among potential offenders and potential defenders. This approach can create a significant challenge in building essential empathy and trust in order to make the need for change in the business world heard, recognized and finally put into practice.

The Research Questions

If business managers do not yet make all decisions that place human risk as a priority, and if human rights violations persist in the business arena, then:

- ❖ How can business compliance be improved to ensure that business decisions are made accurately, sustainably and consistently with human rights?

This is the central question that is meant to be addressed in this thesis. And which response we intend to reach by exploring different issues like as:

1. What are the legal and non-legal frameworks on business and human rights already existing and why have they not had any outstanding results so far?
2. Which new narratives can be integrated into the corporate culture that increases human rights compliance?
3. In which way should companies redefine their goals to align their practices with the expectations of society and human rights compliance?
4. What forces outside business decision administrations can act as catalysts for change?

Will it be the state? The employees? The customers?

This qualitative case study explores the diverse regulatory mechanisms that have been established to date, explores if legal obligations remain the most effective way to bind companies to respect human rights and assess the possibilities of bringing new solutions to resolve the problem exposed. By seeking to establish contact points between all stakeholders, the research aims in particular to identify a common and impartial element that will, on the one hand, facilitate increasing the confidence of human rights defenders in business and vice versa and, ultimately, lead to business behavior in line with human rights. Therefore, the purpose of this thesis is not to raise and try to answer a new question in the business and human rights topic. It is simply aimed at finding a solution to the business mismatch with human rights, as identified above, and which persists, so the search for a solution remains. However, it is suggested to challenge this search with a new approach, a new perspective to the same old topic. The proposed approach suggests that we should genuinely put ourselves in the shoes of business managers and seek in practice a consistent and sustainable solution for all parties involved. This is the route that requires further examination through the research that it is proposed and detailed hereafter.

Theoretic framework

Several authors have defended that companies only exist to generate profit by supporting their shareholders over the past century.¹ We cannot deny that making a profit is the essence of companies, not least because some national laws² stipulate that a company which, because it does not make a profit, sees its equity reduced to 50%, can be officially dissolved.

The sustainability of companies is thus closely associated with the conception of profit and the consequent business economic growth that allows them to exist in a market economy. Aligned with this idea one can find, for example, the approach of Milton Friedman arguing that “in such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engage in open and free competition, without deception or fraud.”³ In the same line of thought the author Elaine Sternberg bases her theory on the assumption that “the defining purpose of business is maximizing owner value over the long term by selling goods or services”⁴ and offers an analytical business tool explaining why being ethical is fully compatible with doing business. Although the author argues that “business will be ethical if it seeks maximum long-term owner value in ethical ways”⁵ she is criticized for “not directly or specifically consider whether these principles will include adherence to human rights.”⁶

In fact, the business and human rights expert and author Surya Deva have been one of the critics of the theories defended by Milton Friedman and Elaine Sternberg to which he dedicated some chapters of his book “Regulating Corporate Human Rights Violations.”⁷ Without denying the business need for profit but defending a broader perspective of corporate responsibility towards society the author argues that “there is also evidence suggesting a positive relationship between

¹ Milton Friedman, *Capitalism and Freedom* (40th anniversary edition, Chicago: University of Chicago Press, 2002) 133; Elaine Sternberg, *Just Business: Business Ethics in Action* (2nd edn, Oxford: Oxford University Press, 2000) 32.

² Article 35 – “Loss of half of the capital” ‘Código das Sociedades Comerciais’ (Portuguese Companies Code).

³ Friedman (n 1) 133.

⁴ Sternberg (n 1) 32.

⁵ *ibid* 58.

⁶ Surya Deva, *Regulating Corporate Human Rights Violations* (Routledge Research in Human Rights, Law Taylor and Francis. Kindle Edition) 133. L

⁷ *ibid*.

taking on board social or human rights responsibilities and the sustainability of capitalism and free markets.”⁸

Policies of long-term corporate sustainability are already supported by studies that demonstrate that companies seek more sustainable businesses, and the concept of bringing the company closer to human rights (therefore humanizing business) gains relevance and adherence. Fortunately, companies have nowadays “found instructive ways to build sustainability into drivers of value.”⁹ According to McKinsey’s 2010 survey on sustainability, 88 percent of the 1,946 executives leading companies and representing a wide range of industries and regions have strongly agreed that they actively seek opportunities to invest in sustainability, as opposed to 23 percent of all other respondents.¹⁰ Corroborating this trend the Walmart Chief Executive Officer (CEO) Doug McMillon stated in 2015 that “increasingly, a basic expectation among customers, governments, and communities will be that the companies they do business with provide a significant net positive return for society at large, not just for investors,” even committing to the view that “every company should be able to contribute value to society through its core businesses.”¹¹ The path is thus open for humanizing business theories aspire to succeed and aim more realistically that “human rights should run into the veins of business alongside the desire to maximize profit.”¹²

The challenge of developing a theory to humanize business has been accepted and successfully delivered by the author Surya Deva who proposes a theory that could be employed to develop an effective regulatory framework to subject corporations to human rights obligations.

Therefore, Surya Deva proposed creating a draft Model Law on Business and Human Rights to regulate on the national level and which is capable of influencing corporate conduct from inside and consequently change companies' behavior. According to Surya Deva, for a regulatory model to be created effectively, one must understand that “the nature and extent of corporate

⁸ Deva, (n 6) 123-124.

⁹ Sheila Bonini and Stephan Görner, ‘The business of sustainability’ (October 2011) <<https://www.mckinsey.com/business-functions/sustainability/our-insights/the-business-of-sustainability-mckinsey-global-survey-results>> accessed 10 August 2020.

¹⁰ Sheila Bonini, Stephan Görner and Alissa Jones ‘How companies manage sustainability: McKinsey Global Survey results’ (mckinseyquarterly.com, March 2010) < <https://www.mckinsey.com/business-functions/sustainability/our-insights/how-companies-manage-sustainability-mckinsey-global-survey-results>> accessed 10 August 2020.

¹¹ Kathleen McLaughlin and Doug McMillon, ‘Business and society in the coming decades’ (April 2015) <<https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/business-and-society-in-the-coming-decades>> accessed 10 August 2020.

¹² Deva, (n 6) 259.

responsibilities (what) depends, among others, on normative rationales for corporations having such responsibilities (why). Similarly, if we know the reasons for why companies tend to comply or ignore their human rights responsibilities, these reasons can help in designing a robust regulatory framework (how).”¹³

The search for the “Holy Grail” - the business case - that sustains corporate actions in favor of human rights goes way back. While it remains undiscovered, the answer has been to regulate companies, which can certainly have a direct impact on the free market. Regulation and especially the accountability of companies will always be necessary and even indispensable, but are they the real engines of change? The truth is that regulation has not proven fruitful insofar as it has been slow to react to changes in companies. Although regulatory mechanisms are a crucial armed arm to bring companies closer to full human rights compliance, they are not the only ones. What we propose to explore in this research are motivational approaches to business compliance that can go further than regulation.

The theoretical framework proposed in this thesis is based on the assumptions that all the authors mentioned above are correct in their proposed theories. That is, companies should prioritize profit in their business decisions, as Milton Friedman advocates. That business executive should act ethically in the pursuit of profit, as proposed by Elaine Sternberg. And as Surya Deva argues, it is still important to establish laws that consider profit and corporate ethics as important factors in defining a dominant regulatory framework that imposes companies’ obligations in the area of human rights and especially an effective sanction system in case of violation of those rights.

Notwithstanding, under a human needs system approach, we will explore in this thesis the idea that corporate compliance with human rights can be closely linked and increased by customer needs. It is irrefutable that without customers, companies cannot maintain their activity for the long-term. Without customers, companies cannot even catch a glimpse of the profit. Customer finance companies in the long-term, which is why companies care and invest so much in customer satisfaction. We propose the following theoretical approach: if the demand for corporate compliance with human rights is made by those who sustain companies (the customers) and who, therefore, balance the free market, then the regulatory hand that can undermine economic liberalism can be dispensed mainly from the equation.

¹³ Deva, (n 6) 235- 239.

However, how can customers in practice demand more human rights compliance from companies? We will defend the reasoning that customers can be more demanding with companies by increasing their self's needs. In order to understand the motivations of customers and their perception of corporate human rights compliance, we have conducted an opinion study through a questionnaire¹⁴ and the conclusions, which will be presented throughout this thesis, will give us some indicators on how our proposed theory can be feasible in practice.

In order to analyze theoretically consumer's needs and motivations and support the proposed theory, we will explore the theory of human motivation developed by Abraham Maslow¹⁵ in the middle of the last century that still remains current and is used in the marketing of companies. Maslow's theory states that human beings seek the satisfaction of their needs and desires all the time in order to reach the maximum level of self-realization. And the possibility of that satisfaction is what drives and motivates us. Maslow's Theory of Human Needs proposes the representation of human needs in the form of a pyramid organized in five levels of hierarchies, namely, in order of importance. At the base are the most basic needs for human survival. On the top, there are the most complex and emotional ones that are essential for the personal and professional realization of the person. Human motivation increases as needs are met.¹⁶

The idea behind this research is to prove that: if customers raise their needs in the hierarchy proposed by Maslow's theory, then companies will have to act to ensure that the needs of their customers are met and customers remain faithful to their products or services.

Structure and Methodology

In Chapter 1, the analysis revisits the work published by different authors on the importance of business in today's societies and the main initiatives developed to regulate their pro-human rights

¹⁴ Appendix 1 – Survey.

¹⁵ Abraham H. Maslow, 'A theory of human motivation' (Psychological Review, 50(4) 1943) 370–396 <<https://psycnet.apa.org/record/1943-03751-001>> accessed 10 June 2020.

¹⁶ Magali Costa Guimarães, 'Maslow e Marketing – para além da hierarquia das necessidades' (September 2001) <https://www.researchgate.net/profile/Magali_Guimaraes2/publication/268361509_Maslow_e_Marketing_-_para_além_da_hierarquia_das_necessidades/links/54d39e780cf28e0697288119.pdf> accessed 15 July 2020; Yasemin Gedik, 'A New Window in Marketing: Digital Marketing' (Journal of Business in the Digital Age Vol. 3 Issue 1 2020 June 2020) <https://www.researchgate.net/publication/342546180_A_NEW_WINDOW_IN_MARKETING_DIGITAL_MARKETING> accessed 10 August 2020.

movement. The explanation of this theme will detail the regulatory framework that defines principles, guidelines, policies and good practices and the mandatory regulations that companies must follow. Chapter 2 relies on the results of the survey elaborated for this research, examining the almost one hundred questionnaire answers that aim to identify the knowledge of consumer's needs and rights in general and to point out the main trends of those consumers in business and human rights issues. Chapter 3 took into account different sources, including lectures and speeches available online, which were basis to present the business and human rights issue from a different perspective and field of study. This chapter details the relationship between customer needs and the Maslow's Theory and discusses how corporate and international human rights law can act in this newly proposed paradigm. The Conclusions aims to summarize what has been covered in the central thesis exposition and extract the main arguments which endorse the theoretic framework presented.

This research was developed with particular attention to the relationship of Portuguese companies with human rights, and in this sense, some highlights on the national reality will be presented during this work.

A confession must be made. I started this research with the overconfident expectation that I would find the global solution to the concerns surrounding business and human rights. The belief that I would find the silver bullet, as Prof John Ruggie defines it, which would end with less compliant business behavior regarding human rights and inspire business executives' decisions to be in full respect of those rights. It may seem a utopian dream, or can even be characterized as some naivety of the author of this thesis. It is acceptable. But I still believe in it! If we humanize companies, if we put an end to the idea that it is the company that makes decisions and confronts the people who run them and finance them with this responsibility, we will be on the right track. In the end, I limit myself to my humble significance and take a small step that is necessary to get closer to that dream day by day.

Chapter 1: The Background of Business and Human Rights Regulation

1.1.Introduction

"We believe in a world where business gets done with respect for people's dignity.

No caveats. No exceptions"

Caroline Rees, President and Co-Founder, Shift

Until the 1970s, the fundamental rights discourse focused on governments and their duty to respect, protect and fulfill those rights as holders of power and subjects of International Law.

The United Nations (UN) Report on Multinational Corporations in World Development (1973) drew the international community's attention to the impacts of multinational corporations and the need to regulate them:

*"In the past quarter of a century the world has witnessed the dramatic development of the multinational corporation into a major phenomenon in international economic relations. Its size and geographical spread, the multiplicity of its activities, its command and generation of resources around the world and the use of such resources to further its own objectives, rival in terms of scope and implications traditional economic exchanges among nations."*¹⁷

This same concern was reinforced by the United Nations Declaration for the Establishment of a New International Economic Order (1974) defining the principles that should found the new international economic order and aiming to ensure the equal development of all nations, by enlarging "regulation and supervision of the activities of transnational corporations by taking

¹⁷ UN Department of Economic and Social Affairs, 'Multinational corporations in world development' 1973) <<https://digitallibrary.un.org/record/1648044>> accessed 15 April 2020

measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries.”¹⁸

At the beginning of the 21st century, 51 of the world's 100 largest economic entities were corporations, and 49 were states.¹⁹ In 2018, “more than two-thirds of the richest 100 entities on the planet are corporations, not governments.”²⁰ Overcoming the states, companies are the main generators of wealth, nowadays, with higher revenues than the gross domestic product of some states and, not surprisingly, a few, with more employees than the number of citizens in several states²¹ (e.g., Walmart²² has revenues higher than the wealth of each of 170 countries²³, and employs more than two million people, thus surpassing the population of more than 50 countries individually. Those countries include for example, Slovenia, Estonia, Luxembourg or Iceland²⁴). These are some of the data that prove the upward trend in the exponential wealth of companies, which does not seem to slow down, and that brought Business as new player to International Human Rights Law negotiations table. Resulting from its global activity, business corporations are leading actors with a significant influence on both the global economic development and individuals rights impacts.

States that once held absolute power have today an obligation to not only respect but to increase the human rights protection within their territory by enforcing international law. Hence, the state's role must be heading towards the protection of human rights vis-à-vis third parties by adopting national standards (either through the transposition of international norms or through national legislative initiatives) which enforce the liability of business non-compliance acts.

Although states have long implemented laws aiming to protect human rights within their jurisdiction, following the procedures, principles, and commitments to which they are

¹⁸ UN General Assembly, 'Declaration on the Establishment of a New International Economic Order' (6th special session 1974) Article 4 g) <<https://digitallibrary.un.org/record/218450#record-files-collapse-header>> accessed 14 April 2020

¹⁹ Sarah Anderson and John Cavanagh, 'Top 200: The Rise of Corporate Global Power' (Institute for Policy Studies 4 December 2000) <https://ips-dc.org/top_200_the_rise_of_corporate_global_power/> accessed 10 April 2020.

²⁰ Ben Chapman, 'Majority of the world's richest entities are corporations, not governments, figures show' (Independent 17 October 2018) <<https://www.independent.co.uk/news/business/news/companies-bigger-than-governments-un-human-rights-council-meeting-a8588676.html>> accessed 16 April 2020.

²¹ Barbara Shailor 'Workers' rights in the business and human rights movement' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 194.

²² Walmart, 'Company facts' <<https://corporate.walmart.com/newsroom/company-facts>> accessed 16 April 2020.

²³ World Bank, 'World Bank national accounts data, and OECD National Accounts data files' <<https://data.worldbank.org/indicator/NY.GDPAG.MKTPAG.CD>> accessed 10 April 2020.

²⁴ World Bank, 'World Population Prospects: 2019 Revision' <<https://data.worldbank.org/indicator/SPAG.POPAG.TOTL>> accessed 10 April 2020.

internationally bound, the “laws – whether national or international – are only as strong as their enforcement capacity.”²⁵ There are countless cases in which it has been demonstrated that “Governments have failed to keep pace”²⁶ and to enforce these rules, namely because i) they lack the capacity to oversee compliance, ii) they fear to condition the development of the national economy in the face of international competitiveness, or iii) their leaders choose to subordinate the public good to private gains.²⁷

States must regulate these companies, but they no longer have power over these companies²⁸ – a phenomenon often discussed as Governance Gap - nor do they have the resources (human and technical) to maintain adequate inspection mechanisms and timely supervision to minimize any potential risk.

Companies may tend to compete by lowering human rights standards, guided by the idea that if they act respectfully, competitors will take advantage of this.²⁹ This decision may arise primarily for financial reasons or for less obvious ones, for instance the potential guilt. When one assumes responsibility for respecting and protecting something or someone, also assumes the consequences inherent in the failure of the expected behavior, as a moral duty. With no one else to blame, comes the guilt. However, if one does not take responsibility but only commits to doing the best one can, then will never be confronted with failure and held responsible for not acting by the higher standards of, for example human rights. One can believe that “what usually stops us is that we are afraid to try and to mess up, because we care so very much about helping each other and being meaningful in each other’s lives.”³⁰ In this sense, what may be behind non-compliance companies executive decisions could be the feeling that: it is not because I do not

²⁵ Justine Nolan, ‘Mapping the movement: the business and Human Rights regulatory framework’ in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 38

²⁶ Christopher Albin-Lackey, ‘Without Rules: A Failed Approach to Corporate Accountability’ (Global Policy Forum 31 January 2013) <<https://www.globalpolicy.org/global-taxes/52255-without-rules-a-failed-approach-to-corporate-accountability.html>> accessed 10 April 2020.

²⁷ Robert C. Bird, Daniel R. Cahoy and Jamie Darin Prenkert, *Law, Business and Human Rights Bridging the Gap* (Edward Elgar Publishing July 2014) 131.

²⁸ Damiano de Felice, ‘Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities’ (Human Rights Quarterly 37 (2015) 511–555) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423305> accessed 10 April 2020.

²⁹ Christine Kaufmann, ‘Holding multinational corporations accountable for human rights violations: litigation outside the United States’ in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 262.

³⁰ Jessica Jackley, ‘Poverty, money — and love’ (TEDGlobal 2010) <https://www.ted.com/talks/jessica_jackley_poverty_money_and_love/up-next?referrer=playlist-social_good_inc> accessed 20 April 2020.

know the standards, but I have doubts that whole the corporation will manage to keep it, because it is not a priority and is not intrinsic in the way each member of the company thinks and acts.³¹

The company's size is an important factor in economic, social, and individual impact, but so is their mobility. A company can be based or keep operations in one country today and tomorrow decides to move to another, mainly motivated by a more favorable country legal system where the imposition of rules tends to be less tight.³² As so, states struggle daily to balance the safeguard of human rights respect and protection standards in their territory in order to attract or maintain companies and consequently society economic development.

There is an urgent need to change this paradigm and accelerate the implementation of a vision desired for the 21st century, in which companies have obligations toward society beyond the responsibility of due diligence on human rights issues.

In order to implement human rights respect and protection for all, by all economic agents worldwide, a global regulation of companies has been pursued. According to some critics from civil society and NGOs, the subject seems to be treated in a "babysitting" style, without creating significant structural changes, paradigm shifts, or strengthening legislation over the last few decades.³³ This means that it has been adopted a more conciliatory attitude than a coercive one, which keeps pace with companies (slow) pace.³⁴ Intermittent waves of international regulation development have characterized the last fifty years, linked to the effort and perseverance required to confront countless obstacles.

³¹ Inspired on Brené Brown, "Blame" ((Royal Society for the encouragement of Arts, Manufactures and Commerce 3 February 2015) <https://www.youtube.com/watch?v=RZWf2_2L2v8> accessed 10 August 2020.

³² Damiano de Felice, 'The corporate responsibility to respect human rights' (TEDxLSE 2013) <<https://www.youtube.com/watch?v=fIBsPU6lOkU>> accessed 19 April 2020.

³³ Justine Nolan, 'Business and human rights in context' in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 4.

³⁴ Centre for Research on Multinational Corporations (SOMO) & partners 'Mind the Gap explores corporate strategies to avoid responsibility for human rights abuses & highlights need to close governance gaps' (Business & Human Rights Resource Centre July 2020) <<https://www.business-humanrights.org/en/mind-the-gap-explores-corporate-strategies-to-avoid-responsibility-for-human-rights-abuses-highlights-need-to-close-governance-gaps>> accessed 18 April 2020.

Zooming in³⁵ - On Portuguese Companies

At the end of 2018 in Portugal 1 278 164 companies were registered³⁶ although they are no public indicators of business inspectors in Portugal some supervision needs can be we can foreseen. If each business inspector works 22 days a month, 11 months a year, this gives a total of 242 working days a year. If we consider that each company needs at least one working day annually from each inspector to be analyzed, then Portugal needs 5281 inspectors to perform this function. In an overall of 683,469³⁷ public employees in 2018, business inspectors would be 0.77% of the total, if they all were contracted to meet assessed needs.

According to the answers given by Ministry of Foreign Affairs and Ministry of the Economy under the leadership of the Portuguese Ministry of Economy, a Corporate Social Responsibility Guideline Plan is being developed which will reinforce the Portuguese public policy on this matter. Furthermore “this plan aims to raise the awareness of businesses regarding adopting a socially responsible management strategy as a way of leveraging their competitiveness and sustainability, while also making an increasingly positive contribution to society. This plan will be divided into five focus areas, one of which will be Business and Human Rights. The plan is currently in the process of being finalised.”³⁸

This first chapter provides a chronological overview of the various global efforts to regulate compliance by companies with human rights standards, either through private institutional initiatives or by defining legal frameworks, thus distinguishing those that have binding force from those that do not.

³⁵ Zooming in - is an information box that aims to expose important data relating to the subject exposed focused exclusively on the reality of Portugal.

³⁶ Statistics Portugal, ‘Companies 2018’ <https://www.ine.pt/xportal/xmain?xpgid=ine_tema&xpid=INE&tema_cod=1313> accessed 10 May 2020

³⁷ Pordata, ‘Employment in General Government: Central, Regional, Local Government and Social Security Funds’ (2018) <<https://www.pordata.pt/en/Portugal/Employment+in+General+Government+Central++Regional++Local+Government+and+Social+Security+Funds-497>> accessed 10 May 2020

³⁸ Business & Human Rights Resource Centre, ‘Portugal’ <<https://www.business-humanrights.org/en/portugal-3>> accessed 15 May 2020

1.2.The dichotomy between the mandatory and the voluntary.

In an ideal world, all business decisions taken on a daily basis would be in line with the principles and concepts of human rights that were enshrined by “We the Peoples of all Nations” as stated in the Charter of the United Nations proclaimed by the UN in 1945, sustained in the 1948 Universal Declaration of Human Rights (UDHR) and expanded in subsequent Conventions, Deliberations or Guidelines adopted by International Organizations. By doing, giving, or acting out of their own free will, corporate activities should take place with strict respect for all human beings' rights and intending to protect those rights vis-à-vis third parties as well. In fact, we have witnessed many management decisions and business strategies that bring businesses closer to this ideal. For some critics, these companies conduct responds only to the global pressure arising from the various attempts to regulate their practices internationally and their impact on human rights, being nothing more than a marketing strategy.³⁹ Regardless the cause, the effect is visible, and companies are gradually incorporating human rights principles into their organizations. These principles had become part of the corporate culture allowing a more systematic change in the way companies operate in line with human rights.

1.3.Soft Law regulations

Half a century has already passed since the starting process of using 'Soft Law' to regulate the impact of business practices on human rights, “both from top-down international institutions and bottom-up stakeholders.”⁴⁰

Non-binding Law refers to standards that are not strictly mandatory, as they lack the enforceable nature inherent in any legal norm, although can assume significant regulative weight.⁴¹

³⁹ “Many NGOs protested the launch of the UN Global Compact as mere ‘blue washing” Chris Jochnick and Louis Bickford, 'The role of civil society in business and human rights' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 189.

⁴⁰ Nolan, (n 25) 33.

⁴¹ Justine Nolan, ‘The Corporate Responsibility to Respect Rights: Soft Law or Not Law?’ in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Nov. 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338356> accessed 15 April 2020.

In the context of International Law, non-binding legal standards refer to guidelines, political statements, codes of conduct, or other enactments by political bodies of universal and regional human rights protection systems, guidelines by multilateral institutions, resolutions, and declarations by non-governmental organizations.

In the process of dialogue and cooperation in which businesses have been directly involved, the aim is to bring these organizations closer to human rights principles and concepts and, encouraging a more responsible ethical conduct in decision-making and operation, thenceforth a positive impact on these rights.

The proposal in the first part of this chapter is to present the evolution of non-binding law by revising several chosen initiatives due to their scope and impact on the most significant number of enterprises or as aggregators of enterprises belonging to critical economic sectors in society. Over the last few decades, the chosen initiatives have aspired to benchmark the conduct of the business sector and promote ethical leadership on human rights.

1.3.1. The Bottom-up Initiatives

Regulatory Multi-Stakeholder Initiatives (MSIs) arises from a bottom-up institutional perspective driven by stakeholders. These kinds of initiatives are frequently born in response to emerging government gaps, in territories where states are unable or unwilling to meet their obligations to protect the rights of those under their jurisdiction.⁴² Companies choose to "opt-in" to those private initiatives that work together for compliance with human rights values and establish policies and standards, implementation procedures, and metrics for assessment, compliance, and improvement, within their sector or across sectors.⁴³

In 1996, the Clinton government in the United States of America catalyzed the creation of the Fair Labor Association (FLA)⁴⁴. This not-profit association resulted in businesses, universities, and civil society's collaborative commitment to improve working conditions in global supply chains. The FLA code of conduct for the clothing industry was adopted three years later in 1999.

⁴² Nicola Jagers, 'Will Transnational Private Regulation Close the Governance Gap?' (January 2011) <https://www.researchgate.net/publication/283410631_Will_transnational_private_regulation_close_the_governance_gap> accessed 5 May 2020.

⁴³ Dorothee Baumann-Pauly and others, 'Setting and enforcing industry-specific standards for human rights: the role of multi-stakeholder initiatives in regulating corporate conduct' in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 107.

⁴⁴ <https://www.fairlabor.org/>.

The main criticisms of this initiative draw attention to the impartiality of external inspectors and that the long period (ten years) between their visits to companies does not prevent any situation of non-compliance with human rights standards. Over the years, many companies left the organization criticizing the monitoring model as well, as they were forced to make business information available which their competitors could also assess. When the companies oversee each other, the risk is high, and was brilliantly said by the president of the Union of Needletrades, Industrial and Textile Employees, Jay Mazur “The fox cannot watch the chickens.”⁴⁵

The Global Reporting Initiative (GRI) is an independent international organization on sustainability reporting created by two NGOs pioneers in 1997. Their main goal is to help companies and governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance, and social welfare.⁴⁶ However, some questions arise regarding their understanding of suitability, namely how they measure the efficiency of their work and what results they achieve related to the risk that companies use sustainability reports to “greenwash,” since the reporting on the standards are not obligatory.⁴⁷

The Voluntary Principles on Security and Human Rights⁴⁸ have set out basic standards since 2000 on how human rights should be implemented and provided security on companies operations worldwide. The Voluntary Principles Initiative promotes the principles and their application by their members, mainly companies, and works towards meeting the international criticism against business. Their goal is achieved by minimizing security-related impacts on communities and aligning corporate policies with internationally recognized human rights principles. However, we cannot deny that when the need for security is raised, the lack of security is perceived in practice, which in itself means a violation of the right to life, liberty and security provided for in Article 3 of UDHR⁴⁹, hence, making up for this standard cannot remain in voluntary acts.

⁴⁵ David C. Thomas, *Readings and Cases in International Management: A Cross-Cultural Perspective*, (2003) 211 <[books.google](#)> accessed 15 May 2020.

⁴⁶ <https://www.globalreporting.org/Pages/default.aspx>

⁴⁷ Robin Hicks, ‘Is sustainability reporting working?’ (Eco-Business 2017) <<https://www.eco-business.com/news/is-sustainability-reporting-working/>> accessed 16 May 2020.

⁴⁸ <https://www.voluntaryprinciples.org/>.

⁴⁹ Article 3 of UDHR "Everyone has the right to life, liberty and security of person."

Regarding the financial services and investments area, the United Nations Environment Programme's Financial Initiative was established in 1992 as collaboration between the UN and the financial sector in order to address climate change. Meanwhile has set up a human rights workflow which makes possible to evaluate and respond at how those environmental rights can be integrated into the banking sector. This action was followed by the Equator Principles⁵⁰ that aim to develop a credit risk management framework that includes human rights standards. Additionally, the UN Principles for Responsible Investment were created in 2005 by institutional investors as a means of integrating environmental, social and governance principles and human rights into the asset management business. Human rights issues were as well the object of another initiative in the finance sector. The Sustainable Stock Exchange Initiative (SSE)⁵¹ founded in 2009 results of the collaboration between stock exchanges, regulators and investors to investigate how listed companies could improve corporate compliance.⁵²

The Global Network Initiative (GNI)⁵³ adopted its Principles in 2008 and currently sets out for more than 60 companies the outline of how their associates (Internet and telecommunication companies) should protect the freedom of expression and privacy rights. This initiative arises after some of its founding companies were under scrutiny by the United States Congress due to the alleged facilitation of the Chinese Government's repression of freedom of expression.⁵⁴ For some organizations⁵⁵ the initiative of GNI fell short of what had been anticipated given the time (two years) spent in negotiations and the work involved. In 2014, after the first assessment report, the organization decided to carry out an assessment process review establishing that the reports then will occur only every other year.⁵⁶ The delay in defining statutes and evaluation

⁵⁰ Established in 2002 by four banks ABN AMRO, Barclays, Citi e West LB <https://equator-principles.com/>.

⁵¹ Sustainable Stock Exchanges Initiative, www.sseinitiative.org.

⁵² Mary Dowell-Jones, 'Investors: models and strategies for engaging with Human Rights' in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis Kindle Edition) 209.

⁵³ <https://globalnetworkinitiative.org/#home-menu>.

⁵⁴ Michael Samway, 'The Global Network Initiative: how can companies in the information and communications technology industry respect human rights?' in Dorothee Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis Kindle Edition) 136.

⁵⁵ Bobbie Johnson, 'Amnesty criticises Global Network Initiative for online freedom of speech' (The Guardian 30 October 2008) <<https://www.theguardian.com/technology/2008/oct/30/amnesty-global-network-initiative>> accessed 20 May 2020; Larry Downes, 'Why no one will join the Global Network Initiative' (Forbes 30 March 2011) <<https://www.forbes.com/sites/larrydownes/2011/03/30/why-no-one-will-join-the-global-network-initiative/#695ff88ed782>> accessed 20 May 2020.

⁵⁶ Global Network Initiative, 'Public Report on the independent assessments of founding companies Google, Microsoft, and Yahoo' (January 2014) 4 <<https://globalnetworkinitiative.org/wp-content/uploads/2016/10/GNI-Assessments-Public-Report.pdf>> accessed 21 May 2020.

processes appears to be ironically problematic for technology companies that live daily on challenging the future with new services and innovational proposals. At a certain point (not identified by author Michael Samway:

“[T]he [GNI] participants agreed that an important goal of the accountability mechanism would be to provide practical feedback and guidance to the companies on the most effective practices employed to protect the free expression and privacy rights of the companies’ users in the face of threats from governments – instead of serving as an investigative effort focused on exposing missteps by the companies.”⁵⁷

Multi-Stakeholder Initiatives (MSIs) wanting to be successful ought to respond to some challenges. Primarily in the process of building trust between the various competing companies and other stakeholders and ensuring this negotiation is carried out by individuals with experience in sitting at the table with companies in a context of cooperation and establishing rules. Furthermore, MSI must ensure a regular and independent compliance assessment of business activities whose findings should turn public. In the event of any non-compliance detected, responsibilities shall be allocated, and a remedial plan shall be drawn up. The third range of challenges is related to the organization itself. MSI must continuously prove their value not only to companies but also to the public, which is expecting results. Finally, their financing must be secure but transparent, to ensure the due impartiality expected of an institution that assesses the companies which in turn sponsors it.⁵⁸

In this heading is important to highlight projects such as the "Shift's Business Learning Program [that] is carefully crafted to support companies that are serious about walking the talk to respect Human Rights,"⁵⁹ the Business and Human Rights Resource Center⁶⁰, and the Institute for Human Rights and Business⁶¹ established to provide expert guidance around business and human rights.

⁵⁷ Samway, (n 54) 143.

⁵⁸ *ibid* 145.

⁵⁹ <https://www.shiftproject.org/who-we-are/>.

⁶⁰ <https://www.business-humanrights.org/en>.

⁶¹ <https://www.ihrb.org/>.

1.3.2. The Top-down Initiatives

In the opposite vertical direction, several initiatives can be referenced as top-down proposals. The Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines) states the beginning on this path. The Guidelines first launched in 1976 with only a brief reference to human rights were review and reinforced in 2011 by incorporating the principles of the United Nations Guidelines on Business and Human Rights (UNGP). The OECD Guidelines constitute "recommendations addressed by governments to multinational companies operating in or from acceding countries."⁶² Acceding States are obliged to establish a National Contact Point (NCP) to promote the OECD Guidelines, which are of voluntary application. The OECD Guidelines had already been reviewed in 2000 when a new complaint procedure was introduced. This mechanism also called "specific instance," allows NGOs and other entities to lodge complaints about alleged violations of the OECD Guidelines. The grievances are made to the NCPs "who also have the potential of providing effective remedy," yet, without official consequences that oblige companies to demonstrate their compliance.⁶³ Notwithstanding, NCPs must make public the results of each case they consider, and their findings and recommendations should have the backing of governments, though unofficially. In consequence, the inherent strength of public exposure may lead NCPs to rely more often on reputation checks to influence corporate behavior.⁶⁴ In December 2018, adherent countries approved the second Action Plan to Strengthen National Contact Points for Responsible Business Conduct, which defines concrete ways to assist countries in setting up strong and well-functioning NCPs.⁶⁵ After fifteen years of NPC's creation by OECD, it turns out that the "most NCPs have been located in the Ministry which has responsibility for economic

⁶² <https://mneguidelines.oecd.org/mneguidelines/>.

⁶³ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton Global Ethics Series W. W. Norton & Company Kindle Edition) 1978.

⁶⁴ Juan Carlos Ochoa Sanchez, 'The Roles and Powers of the oecd National Contact Points Regarding Complaints on an Alleged Breach of the oecd Guidelines for Multinational Enterprises by a Transnational Corporation' (Nordic Journal of International Law 84(1):89-126 February 2015) 12 <https://www.researchgate.net/publication/274739343_The_Roles_and_Powers_of_the_oecd_National_Contact_Points_Regarding_Complaints_on_an_Alleged_Breach_of_the_oecd_Guidelines_for_Multinational_Enterprises_by_a_Transnational_Corporation> accessed 23 may 2020.

⁶⁵ OECD, 'Action Plan to Strengthen National Contact Points for Responsible Business Conduct 2019 – 2021' (2019) < <http://mneguidelines.oecd.org/action-plan-to-strengthen-ncps.htm>> accessed 19 May 2020.

issues and investment.”⁶⁶ While this is not the only approach available to establish this single complaint mechanism, it has proven to be the most effective format to provide a forum for discussion in order to contribute to the resolution of issues arising from the implementation of the OECD Guidelines. The proximity to the executive power that this model offers may prove essential in the implementation of the recommendations issued by the NCPs, so long as its impartiality as an autonomous institute of the State is maintained.⁶⁷

Zooming in - The Portuguese NCP

Portugal is one of the countries that have adhered to the OECD guidelines. The OECD Secretary-General has been communicating with ministers from acceding countries whose NCPs do not yet exist, have not yet communicated to the OECD investments, do not have a website, have not conducted or participated in promotional events, or have no rules of procedure. In December 2018, Portugal was one of the countries that received written communications and was invited to report progress.⁶⁸ The NCP composed by the Directorate General of Economic Activities and AICEP Portugal Global⁶⁹ was established in Portugal and the information on its procedures and processes is not yet publicly available.

⁶⁶ OECD, ‘Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015’ (2016) 7 < <http://mneguidelines.oecd.org/15-Years-of-the-National-Contact-Points-Highlights.pdf>> accessed 20 May 2020.

⁶⁷ *ibid* 12.

⁶⁸ OECD, ‘Annual Report on the OECD Guidelines for Multinational Enterprises 2018’ (2018) 50, <<http://mneguidelines.oecd.org/2018-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 22 May 2020.

⁶⁹ Portuguese National Contact Point. <<http://www.dgae.gov.pt/servicos/sustentabilidade-empresarial/ponto-de-contato-nacional-para-as-diretrizes-da-ocde-para-as-empresas-multinacionais.aspx>> accessed 20 May 2020.

Regaining the topic of top-down initiatives it has yet to be said that until 1977, the United Nations Commission on Transnational Corporations (UNCTC - founded in 1974) coordinated the Code of Conduct for Transnational Corporations⁷⁰ negotiation, intending to combat the negative consequences of business activity in recently decolonized countries. The draft Code was never officially adopted due to some resistance from transnational corporations and various western countries and since eastern European countries refuse to include state-owned enterprises as aim.⁷¹

During the same year, 1977, the International Labour Organization (ILO) proclaimed the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. However, it was only in 2000 that a more detailed reference to human rights was included in its texts. "The Declaration aims to provide guidance concerning how corporations can positively contribute to economic and social progress. It encourages companies to implement labor rights but does not contain any enforcement mechanisms to ensure they do so."⁷²

At the turn of the century, in 2000, the UN established the Global Compact. This educational initiative appeals to businesses to "align strategies and operations with universal principles on human rights, labor, environment, and anti-corruption, and take measures that promote the goals of society."⁷³ By participating, companies agree to voluntarily incorporate the ten established principles⁷⁴ into their day-to-day operations and report on its progressive implementation each year. This initiative, which currently involves more than 14,000 participants including more than 4,000 companies⁷⁵ from all continents, is mainly criticized for: i) not contributing significantly to greater human rights corporate accountability related to a limited evaluation of the substantive and generic implementation of the entire program ii) for not seeking to regulate corporate conduct by setting standards and iii) for lack of monitoring the implementation of the principles and not issuing sanctions for non-compliance.⁷⁶ The Global Compact only contemplated as an

⁷⁰ UN Centre on Transnational Corporations, 'Work by the United Nations Centre on Transnational Corporations on the Code of Conduct on Transnational Corporations, other international arrangements and agreements, and national laws and regulations relating to transnational corporations' (1986) <<https://digitallibrary.un.org/record/39601>> accessed 14 may 2020.

⁷¹ César Rodríguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press. Kindle Edition) 17.

⁷² Nolan, (n 25) 36.

⁷³ <https://www.unglobalcompact.org/what-is-gc>.

⁷⁴ <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

⁷⁵ <https://www.unglobalcompact.org/what-is-gc/participants>.

⁷⁶ Nolan, (n 25) 40.

implementation mechanism the possibility of expulsion from this "program" of a company that does not publish, annually and transparently, the progress made in complying with the principles to which they have adhered.⁷⁷ However, more recently, the Global Compact has played an important role in the implementation of UNGP. By asking pragmatically, "What is your company's relationship with the impact of Human Rights?" and evaluating the results of this pre-assessment through a flowchart.⁷⁸ This tool facilitates the summary of the actions to be developed by these companies to guide them on a path more compliant with such human rights principles.

The turn of the millennium was fruitful in initiatives related to business and their respect for human rights driven by the Millennium Declaration,⁷⁹ a document unanimously approved by the UN General Assembly that contained a declaration of values, principles, and objectives for the international agenda of the 21st century. It sets out the eight Millennium Development Goals that identify the main challenges that aim to ensure that globalization becomes a positive and equal force for all. The role of companies in the new millennium has proved to be even more preponderant and essential in meeting the Sustainable Development Goals, grouped into 17 global goals established by the United Nations General Assembly in 2005.

Additionally, by August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights unanimously reported the adoption of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms)⁸⁰ developed by five-member Working Group created in 1998 by the Sub-Commission. The Norms were built on an attempt to "impose direct responsibilities on business entities as a means of achieving global protection of all Human Rights - civil, cultural, economic, political and social - relevant to business activities"⁸¹ These initiative was as well viewed as an effort to address the

⁷⁷ Kenny Bruno and Joshua Karliner, *Earthsummit.biz: The Corporate Takeover of Sustainable Development* (Oakland, CA: Food First Books, 2002).

⁷⁸ UN Global Compact, 'What is your company's relationship to the human rights impact?' <https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGuiding_Principle_19_Flow_Chart.pdf> accessed 12 May 2020.

⁷⁹ UN General Assembly, 'United Nations Millennium Declaration' (18 September 2000) <<https://undocs.org/A/RES/55/2>> accessed 12 May 2020.

⁸⁰ UN Subcommission on the Promotion and Protection of Human Rights, 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to Human Rights' (55th session 2003) <<https://digitallibrary.un.org/record/501576>> accessed 11 May 2020.

⁸¹ UN High Commissioner for Human Rights, 'Report on the Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (UN Doc. E/ CN.4/2005/91 15 February 2005) paras 18 <<https://digitallibrary.un.org/record/542041>> accessed 9 May 2020.

inadequacy of the traditional state-centered approach to regulating business behavior in the era of globalization.

However, the Norms were the subject of a debate that opposed NGOs, advocating their enactment, and the reservations of several states in aid of companies that opposed their implementation through impetuous criticism.⁸² The main arguments against the Norms lie in the grounds that: (i) these rules are intended to burden undertakings with the duties of respecting, protecting and upholding rights which are inherent in the very states in which they operate (ii) that it should be those states which must first ensure such rights because they (traditionally considered) the sole subjects of international law, (iii) it is incomprehensible why companies should be encouraged to switch from voluntary to binding compliance with international human rights standards when the need for such a change has not been demonstrated, (iv) it is not acceptable the will to place on companies a responsibility which may not yet have been assumed internationally by the states in which territory they operate, namely if these states have not yet ratified the treaties covering such rights.⁸³

One could ask if the path has been traveled "Too far, too soon?" The Norms were conceived as a quasi-privatization of human rights by designing a global "non-voluntary" framework, establishing direct obligations for companies that would be an oversight by a rigid evaluation mechanism.⁸⁴ This proposed model, presented in the business context of the beginning of the new century, which was primarily focused in competition and economic growth, provided a non-optimistic context to reach the expected outcome. In fact, the *requiem* of the Norms was pronounced. This decision was recommended in April 2004 by the UN Commission on Human Rights (now Council), while considering that the Draft of Norms proposed by the Sub-Commission "contains useful elements and ideas" however "has no legal value."⁸⁵ That decision was confirmed afterward by the Economic and Social Council (ECOSOC) in the same proposed terms. At its 2005 session, the Commission assessed the report⁸⁶ prepared in the meantime. The report set out all stakeholders' outstanding issues and identifies options for strengthening the Norms concerning the responsibilities of transnational corporations and related commercial

⁸² Nolan (n 25) 42.

⁸³ UN High Commissioner for Human Rights, (n 81) paras 20 and 21.

⁸⁴ Nolan (n 25) 42.

⁸⁵ UN Commission on Human Rights 'Decision E/CN.4/DEC/2004/116' (60th session 2004) <<https://digitallibrary.un.org/record/522119>> accessed 5 may 2020.

⁸⁶ UN Subcommission on the Promotion and Protection of Human Rights (n 80).

enterprises towards human rights and identifies the possible means of their implementation. In the same session, the Commission gave the final verdict on these Norms indirectly when requesting the UN Secretary-General to appoint a Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (SRSBG) in order to, among others, clarify the corporate responsibility standards.

Professor John Ruggie (the SRSBG entitled by then United Nations Secretary-General Kofi Annan) formed a working group and presented in 2008 the conceptual and policy framework based on the principles of "Protect, Respect and Remedy" (PRR) and three years later, in 2011, the Guiding Principles on Business and Human Rights⁸⁷ which aim to conduct the framework operationalization and development.

The PRR framework, welcomed by the Human Rights Council (HRC) unanimously in its Resolution 8/7⁸⁸, arises from the principle that "the root cause of the business and Human Rights predicament today lies in the governance gaps created by globalization."⁸⁹ The proposed framework lies on three fundamental principles that form an integral whole, meaning that each principle supports the others in order to achieve sustainable progress:⁹⁰ They are the duty of the State to protect against Human Rights violations by others, the corporate responsibility to respect Human Rights and the need for more effective access to remedies.

By clearly differentiating and isolating the states' duties from the companies' responsibilities, businesses became more compelled to take action in human rights respect regardless of the state's protective action.⁹¹ Moreover, companies' responsibilities exist even if the states have not ratified all the human rights conventions. On the other hand, States no longer have the space to

⁸⁷ UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, (UN Doc. A/ HRC/ 17/31 21 March 2011) <https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> accessed 5 May 2020.

⁸⁸ UN Human Rights Council 'Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises' (Resolution 8/7 28th meeting 18 June 2008) <https://apag.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf> accessed 6 May 2020.

⁸⁹ UN Human Rights Council, John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (UN Doc.A/HRC/8/5 7 April 2008) para 3 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>> accessed 3 May 2020.

⁹⁰ *ibid* para 17-26.

⁹¹ *ibid* para. 9.

resign their responsibility to protect as would be facilitated if there were an overlap of subjects with the same responsibilities as proposed in the Standards described above.

The establishments of UNGP and PRR framework have "shifted the debate from doctrine to the practical question of how companies can know and show that they respect rights."⁹² Although the company's due diligence is, above all, a negative responsibility - that of avoiding harm - should include affirmative responsibilities, for example, by defining human resources policies that are more favorable to employees.⁹³

An effective redress system proposed in the Guiding Principles provides valuable guidance on the development of judicial and non-judicial, state and non-state systems that allow access to equitable remedies for business abuse victims. Moreover, a structured and enforceable complaint mechanism should be part of the corporate responsibility to respect and stated the company's human rights policy. Therefore, companies can promptly identify and deal with the problem, i.e., before any potential human rights violation is amplified. This conduct has as well a significant effect on the prevention of future human rights violations. The remedy system established on the PRR framework inspired the UN Office of the High Commissioner for Human Rights (OHCHR) Accountability and Remedy Project, adopted in November 2014, aiming to make access to effective remedy becoming a reality.⁹⁴

The Guiding Principles are responsible for putting human rights directly on the business agenda and for hosting business within the UN, and that is why they are given so much prominence in this chapter. They establish a more consensual approach involving all stakeholders and reaffirming the relevance of all human rights to business by setting the scene for industry-specific standards and mechanisms. However, they remain the subject of legitimate criticism, mainly from academia and civil society. Primarily about the in-depth research and the

⁹² John Gerard Ruggie, 'Incorporating Human Rights: lessons learned, and next steps' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition).

⁹³ Chip Pitts, 'The United Nations 'Protect, Respect, Remedy' Framework and Guiding Principles' in Dorothée Baumann-Pauly and Justine Nolan (eds) *Business and Human Rights: From Principles to Practice* (Taylor and Francis. Kindle Edition) 51.

⁹⁴ Business & Human Rights Resource Centre, 'OHCHR Accountability and Remedy Project, Business & Human Rights Resource Centre' <<http://business-humanrights.org/en/ohchr-accountability-and-remedy-project>> accessed 9 May 2020.

negotiation process itself, Professor John Ruggie is criticized for involving only “varying levels of power and control” predominantly from the Global North.⁹⁵

Furthermore, if these guiding principles apply to all states and all transnational and national companies, “regardless of their size, sector, location, ownership, and structure,”⁹⁶ they need to be brought to the attention to all managers; thus the documents need to “speak their languages.” Those principles must be legible for those who run these companies, namely for those who only know their native language. It seems that it is up to each country to adopt these principles readjusted to the national language and country-specific peculiarities on business concepts or intrinsic characteristics of the business sectors. These conditions have not been created to date.

Some authors also argue that a fourth pillar,⁹⁷ would better balance the proposed UNGPs structure. This new pillar would be fulfilled by impartial institutions that best see the protagonists in action.⁹⁸ It would be their role to point out deviations of behavior and direct leading actors to the script and again on the right path, just like the role of the “Prompter”⁹⁹ in the theatre. Often the success of a play rests in the organized work of backstage and support functions and not so much on the main actors' performance. Yet, it is necessary to have a more comprehensive view of the whole system and a more global awareness to understand that giving up the role of the protagonist does not mean being less of a protagonist in the final result. It could be that the operative maturity necessary for such conscientiousness has not yet been known, or generally acknowledged by civil society institutions.

In the past years following Working Group on Business and Human Rights¹⁰⁰ took the task of promoting the effective and comprehensive dissemination and application of the Guiding Principles on Business and Human Rights and implementing the UN PRR framework. The

⁹⁵ Bonita Meyersfeld, ‘Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate’ in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press. Kindle Edition) 175.

⁹⁶ UN Human Rights Council, (n 87) 6.

⁹⁷ “The civil society and NGOs, in particular, appeal to Prof Ruggie for a fourth pillar to give them a role in this framework that they know they have on the ground reflected in their day-to-day support to those who are the victims of the most damaging results of business activity.” Tara J. Melish, ‘Putting “Human Rights” Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights’ in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press. Kindle Edition) 76.

⁹⁸ *ibid* 80.

⁹⁹ “Prompter” was a theater professional responsible for “blowing”, in a low voice, the lines that had to be repeated, in a loud voice, by the actors.

¹⁰⁰ Created by the Human Rights Council in 2011 (Resolution 17/4), the Working Group is composed of five independent experts, with balanced geographical representation.

primary purpose is to encourage states to develop, approve, or update a National Action Plan (NAP) on business and human rights as part of the state's responsibility to promote the guiding principles.¹⁰¹ To date, only two dozen states have presented their NAP, and several more are elaborating one. Possibly a joint effort will result in a more effective compliance map, facilitating its regular review and update, and incorporating robust monitoring mechanisms.¹⁰² The European Commission has announced its intention to develop an action plan at the EU level too.¹⁰³ It seems that an incentive is needed to develop the NAPs, by including them, for example, in states' reports submitted for the Universal Periodic Review, as a way to incorporate UNGP implementation nationally.¹⁰⁴

Zooming in - Is Portugal taking a good NAP?

Yes, for a while now Portuguese authorities have “been working on the issue, and for this purpose, it has established an inter-ministerial working group within the National Human Rights Commission.”¹⁰⁵ The Portuguese National Action Plan will be incorporated into the “first integrated public policy in this area in the form of a Guidance Plan for Corporate Social Responsibility” which in its creation relies on the opinion and collaboration of “various government institutions and other civil society stakeholders, such as the relevant business associations,” aims “to highlight the fundamental elements of the United Nations Guiding Principles on Business and Human Rights, and their link to the most relevant public policies in that area ... raise companies' awareness so that they strategically integrate human rights issues into their CSR plans and activities”. Portuguese's look forward to see it publicly disclosed.

¹⁰¹ Business & Human Rights Resource Centre, ‘National Action Plans’ <<https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>> accessed 13 May 2020.

¹⁰² UN Working Group Business and Human Rights, ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (30 July 2015) para 73, <<https://digitallibrary.un.org/record/801866>> accessed 14 May 2020.

¹⁰³ Rodríguez-Garavito, (n 71) 27.

¹⁰⁴ Juana Kweitel, ‘Regulatory Environment on Business and Human Rights: Paths at the International Level and Ideas about the Roles for Civil Society Groups’ in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press. Kindle Edition) 170.

¹⁰⁵ Business & Human Rights Resource (n 38).

1.3.3. Soft law review

The above initiatives contribute to raising awareness and improving business to act following human rights, although they establish very flexible processes and mechanisms. Because they are based on general principles, they have had little success in regulating business conduct or ensuring the integration of human rights as part of corporations' culture. All initiatives deserve due respect for the commitment and dedication of the professionals involved. However, the effort seems to sin regarding the lack of interconnectivity. In an analogical way, one can evoke the action of ten charity institutions willing to help, in a particular city or state, but because they do not reconcile their efforts, their impact covers only a part instead of covering the broadest range of people they could eventually help.

It may create some confusion for business and consumers this patchwork of public and private initiatives. So many guidelines, principles, and even standards, bring questions to companies about whether to join all or only a few defined frameworks and in what form. This feeling can be mitigated by the idea of Professor John Ruggie's that "There is no single silver bullet solution to the institutional misalignments in the business and Human Rights domain." That prescribes a general, abstract, and enforceable situation for all agents, always and effectively. "Instead, all social actors - states, businesses, and civil society - must learn to do many things differently. But those things must cohere and become cumulative."¹⁰⁶

The imposition of UNGP has been postponed by the discussion of a possible International Treaty on Business and Human Rights, resuming the way it was always well done in human rights and how it should continue to be done in the opinion of some treaty advocates.¹⁰⁷ For those, a binding international treaty it is an undoubtedly more efficient silver bullet way of "convincing" companies to decide and act following human dignity.

¹⁰⁶ UN Human Rights Council, (n 89) para 7.

¹⁰⁷ <http://www.treatymovement.com>.

1.4. International Hard Law

The 1948 Universal Declaration of Human Rights proclaims itself as a:

“[C]ommon standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, ...”¹⁰⁸

Business corporations are, in fact, “organs of society,” making them recipients and subjects of the duties as UDHR establish. The Declaration was not initially in itself, a legally binding instrument. Nevertheless, some international law scholars argue that the UDHR has the status of customary international law. If not regarding all principles and rights contained in the whole document, then at least those norms accepted and recognized as *Jus Cogens*,¹⁰⁹ by the international community and individually by states (as these principles and rights are stated in national constitutions). Moreover, the Declaration sets a series of principles and rights that underlie other international instruments legally binding, including UN treaties. Reference should be made to the 1966 International Covenant on Civil and Political Rights,¹¹⁰ the International Covenant on Economic Social and Cultural Rights¹¹¹ chosen for its population high coverage directly linked to the high number of ratifications and the 2005 United Nations Convention Against Corruption (UNCAC) as an example of an international treaty that expressly defines business as a subject with a respect human rights responsibility. As far as combating and preventing corruption is concerned, UNCAC establishes binding rules on the activities of

¹⁰⁸ UN General Assembly resolution 217/A, *Universal Declaration of Human Rights* (1948).

¹⁰⁹ “*Jus cogens* (or *ius cogens*) is a Latin phrase that literally means “compelling law.” It designates norms from which no derogation is permitted by way of particular agreements. It stems from the idea already known in Roman law that certain legal rules cannot be contracted out, given the fundamental values they uphold”, more detail in <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml>> accessed 22 May 2020.

¹¹⁰ In preamble “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> accessed 22 May 2020.

¹¹¹ In preamble “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”, last access in <https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf> accessed 22 May 2020.

companies abroad, limiting their activities and promoting respect for fundamental rights through criminal regulation.¹¹²

David Bilchitz,¹¹³ defend that if states are bound by international law to the obligation to protect human rights concerning third parties, then third parties are indirectly bound by the obligation to respect human rights. Additionally, “if the third parties were not bound by International Law to comply with such requirements, then there would be no reason for the State to ensure that they do so. The State can only be required to enforce an obligation that is already recognised – expressly or implicitly – by the international treaties themselves.” In view of the above, and despite the ongoing academic discussion on whether or not companies are subject of international law, numerous regulations already bind companies to fundamental rights standards, at least in theory. Although regulations already exist, there are still numerous reports of violations of human rights and the perpetrators' lack of accountability.¹¹⁴

Because the practice is still far from the regulatory books, “a key role for an international treaty would be expressly to recognize and clarify this point, namely, that businesses have legal obligations flowing from International Human Rights Treaties and to enable actions to take place against them directly.”¹¹⁵

¹¹² Anita Ramasastry, ‘Closing the governance gap in the business and Human Rights arena: lessons from the anti-corruption movement’ in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press. Kindle Edition) 162.

¹¹³ David Bilchitz, ‘A chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRSG’s Framework and the Guiding Principles’ in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge University Press. Kindle Edition) 107.

¹¹⁴ Business & Human Rights Resource Centre, ‘Latest Legal News, Below are the latest corporate legal accountability news items’ <<https://www.business-humanrights.org/en/corporate-legal-accountability/latest-legal-news>> accessed 20 May 2020.

¹¹⁵ David Bilchitz, ‘The Moral and Legal Necessity for a Business and Human Rights Treaty’ 4 <<https://www.business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf>> accessed 20 May 2020.

1.4.1. A Business and Human Rights Treaty¹¹⁶

In June 2014, the Human Rights Council adopted Resolution 26/9 - proposed by Ecuador and South Africa - on the elaboration of an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises concerning human rights. For this purpose, on this same resolution, it was decided to “establish an open-ended intergovernmental working group (IGWG) on transnational corporations and other business enterprises with respect to human rights.”¹¹⁷

Several questions arise from this decision and the work that has already been done by the IGWG: What human rights will the treaty cover? Will it impose both negative and positive obligations? What kind of companies will be targeted? What enforcement mechanism will it be? Does it include civil and criminal sanctions? Will the enforcement mechanisms be defined at a national, regional, or global level? Finally, how will States deal with the corporate lobby to not sign a new Treaty? This paper aims not to elaborate on each issue in detail but to point out some reservations that have been identified as most relevant.

1.4.2. Can UNGP survive with a new treaty?

As already emphasized in the UNGP, states must take steps to prevent abuses by business enterprises within their jurisdiction.¹¹⁸ UNGP presupposes best practice, yet requires more time and effort to be fully developed, and meanwhile, potential victims of companies activities live in a “be patient” mantra¹¹⁹ status.

¹¹⁶ UN OEIGWG, ‘Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises’ (July 2019) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf accessed 21 May 2020.

¹¹⁷ Resolution A/HRC/RES/26/9, was approved with the final vote of twenty in favor, fourteen against and thirteen abstentions. It is further important to underscore that the home countries of the vast majority of transnational corporations opposed to the resolution. UN HRC, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (July 2014) https://apag.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 accessed 19 May 2020.

¹¹⁸ UN Human Rights Council, ‘Guiding Principles (n 87) Principle 2.

¹¹⁹ “Those who must be patient are people living in poverty while those who benefit from delayed reform are those living in comparable wealth. It suits those who have the, power to delay reform and it is an indescribable sacrifice for those in poverty to wait.” Meyersfeld, (n 95) 176.

The lack of accountability and effective remedies as a consequent of the non-recognition of binding legal obligations on companies have been, in fact, one of the more often put forward critics about the UNGP and simultaneously one of the main arguments in favor of an International binding Treaty on Business and Human Rights.

The “[UNGP] were never intended to foreclose other necessary or desirable future paths”¹²⁰, indeed for the most consensual authors, one does not preclude the other, i.e., UNGP can always withstand in the face of the signature and ratification of a Treaty, as that framework serves as the conceptual and political basis that sustain the binding rules, in a fruitful complementarity.¹²¹ In fact, the day after the vote on the Resolution 26/9, the HRC adopted a Resolution that extends the mandate of the UN Working Group on Business and Human Rights, *inter alias*, to promote best practices in the Guiding Principles implementation.¹²²

1.4.3. Which companies will be bound by the treaty?

A footnote in the Resolution 26/9 states that “other business enterprises” denote all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.¹²³ This framework places all companies, operating exclusively in the territories of the States Parties, outside the scope of the binding document. Is it credible to have a Treaty that only imposes on some companies and not on others? At the very least, it would lead to a situation of double standards distorting

¹²⁰ John Gerard Ruggie, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press. Kindle Edition) 59.

¹²¹ Amol Mehra, 'The Caravan toward Business Respect for Human Rights' (11 February 2015) <<https://www.ihrb.org/other/Treaty-on-business-human-rights/the-caravan-toward-business-respect-for-human-rights/>> accessed in 18 May 2020; International Commission of Jurists, 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (2014) <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf> accessed 18 May 2020.

¹²² UN Human Rights Council, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' (Resolution A/HRC/26/L.1 23 June 2014) <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement>> accessed in 17 May 2020.

¹²³ Ibid.

competition, as advocated by the United States of America and the European Union¹²⁴, as they refuse to participate in the process.¹²⁵

The transnational companies, as companies operating outside the territory of a single state, are the ones that, in practice, raise the most questions about human rights, especially regarding the access to remedy and redress for potential victims of their operations.¹²⁶ For instance, a victim with Nigerian citizenship will face difficulties when trying to pursue a company based in the Netherlands due to lack of financial resources to at least go to court and expose their cause, if they can get proper legal advice to know the potential violation of human rights standards that to which they are potentially being exposed. A binding Treaty could allow any victim of corporate abuses, anywhere in the world, to have access to the courts of the company's country of origin and most likely to be compensated,¹²⁷ particularly in those countries where constitutions apply directly International Law.¹²⁸

Beyond ensuring a consensual answer to the question that if a treaty will bind only states or if it will also impose direct obligations on corporations, there is an urgent need to guarantee that it will increase companies' compliance with human rights. That will bring important consequences¹²⁹ for “real people in real places”.¹³⁰ In the end, we can argue that “what promotes effective implementation of norms is not whether the norm is ultimately formally binding or not

¹²⁴ UN Human Rights Council, ‘Annex to the report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’ (A/HRC/43/55 9 January 2020) 38 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/Annex_CompilationStatements5th_session.pdf> accessed 19 May 2020.

¹²⁵ Jens Martens and Karolin Seitz, ‘The Struggle for a UN Treaty Towards global regulation on human rights and business’ (2016) <https://rosalux-ba.org/wp-content/uploads/2016/09/un_Treaty_online18.pdf> accessed 20 May 2020.

¹²⁶ Access to a remedy is itself a fundamental right as statue in Article 2 of the International Covenant on Civil and Political Rights.

¹²⁷ Friends of the Earth Europe, ‘The EU's deafening silence on a treaty against corporate human rights violations’ (2018) <<http://www.foeeurope.org/un-deafening-silence-Treaty-corporate-rights-violations-261018>> accessed 23 may 2020.

¹²⁸ Venice Commission, ‘Application of International Treaties by Constitutional Courts and Equivalent Bodies: Challenges to the Dialogue, European Commission for Democracy Through Law (29 September 2015) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2015\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2015)020-e)> accessed 21 may 2020.

¹²⁹ “The key may not be in the binding or nonbinding nature of the agreement but rather in the capacity of the agreement to trigger the positive effects that scholars identify with Human Rights treaties”. Justine Nolan, ‘The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?’ (2013) <<http://www.austlii.edu.au/au/journals/UNSWLRS/2013/72.html>> accessed 20 May 2020.

¹³⁰ Ruggie, (n 120) 58.

... but rather whether the norm is legitimized to the point of enabling civil society advocates to call their States [or companies] to account for failing to comply with these norms.”¹³¹

Whatever forms the Treaty will be shaped, we hope it will provide the necessary answers to the complexities of the issue. UN Treaty will probably, in line with the other existing treaties, bring a Committee that will help to frame and develop the norms within its future General Comments.¹³² Moreover, the Business and Human Rights matter will be brought, certainly, to the Universal Periodic Review of each State, further committing those to establish policies and plans that ensure in the short term that new companies are enlightened and committed to human rights and define a medium-term strategy for adapting those that already exist and are not yet compliant.

To date, attempts to provide reparations for victims of business’ human rights violations have been generally unsuccessful. The inquiries and findings of human rights violations have been predominantly against the states and not against companies. Notwithstanding the U.S. Alien Tort Claims Act (ATCA), that “broadly speaking, serves as a statutory instrument for universal jurisdiction over violations of international law,”¹³³ has been explored by Human Rights Lawyers as the ground for complaints against human rights violations by corporations with no positive decisions.¹³⁴ The idea that only states can be held responsible for human rights violations, not companies, is not accepted by those who defended, for example, that the International Criminal Court (ICC) holds jurisdiction over corporation’s acts even when they operate abroad. Indeed, the “recourse to International Criminal Law permits tracing some of the contours of corporate International Human Rights.”¹³⁵ The ICC does not have jurisdiction under corporations, but it has among individuals, for instance, corporate managers and those who are responsible for the business activities, when prosecuted by the most severe violations of human rights. By undertaking this option in the Rome Statute already in force, states would not be

¹³¹ Claret Vargas, ‘A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape’ Cesár Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press. Kindle Edition) 117.

¹³² Bilchitz, (n 115) 7.

¹³³ In more detail, https://www.law.cornell.edu/wex/alien_tort_statute.

¹³⁴ Inês Carreirinho de Miranda, *Getting down to business: The implementation of the United Nations Guiding Principles on Business and Human Rights and ways forward for Corporate Human Rights Responsibility* (European Master’s Degree in Human Rights and Democratisation A.Y. 2013/2014, Katholieke Universiteit Leuven – Faculty Of Law) 30.

¹³⁵ Nadia Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap* (Taylor and Francis. Kindle Edition) 103.

committing themselves more and directly in the case of a new treaty on business, and human rights to be negotiated, signed and ratified. Furthermore, to increase accountability, Member-States can resort to the regional treaties that have space for more litigation and addressing the same issue, as states control what corporations do under their territory.¹³⁶

1.5. Conclusions

We have experienced decades of exponential development, and companies have been the catalysts of this economic boom in the same proportion of their impact on human rights.

Companies, MSI, NGOs, and international or inter-governmental organizations have established standards, assessment processes, and grievance mechanisms to prevent eventual negative impacts resulting from business operations.

The focus has been on the guidelines and principles that make up soft law, yet, “soft law is not necessarily commensurate with soft results.”¹³⁷ Business awareness of human rights has generally been growing due to work developed by institutions that define human rights standards and implement monitoring mechanisms.

However, we witness a considerable influx of guidelines, codes of conduct, and good intentions but a scarcity of regulatory frameworks that effectively control companies’ activities across borders. On the other hand, the visible lack of interconnection between the various initiatives and some ambiguity leaves companies confused, and customers and employees are still generally unaware of their rights.

It seems that everyone wants the same thing: to avoid the negative impact on human rights, offenders' accountability and compensation for the potential damage caused by business practices, and the adaption of business culture in favor of the protection of fundamental rights. What differs is the form; "some want what is already done, others want a little more.”¹³⁸

¹³⁶ Bernaz, (n 135) 104.

¹³⁷ Nolan (n 129)

¹³⁸ Michael Addo, UN Working Group on Business and Human Rights on ‘Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons’ (2014) <<https://www.youtube.com/watch?v=0AIq9dtbkXI>> accessed 21 may 2020.

A Treaty would be a long-term project that should not distract from implementing the Guiding Principles that have already been adopted by consensus in the Human Rights Council.¹³⁹

It is essential to learn from the previous effort to develop International Business and Human Rights Standards. The challenge is to settle the disagreement between countries, through dialogue and a brief process of negotiations, where a greater consensus can be built and higher standards can be established, that will clarify the governance of multinational companies that, for now, remains ambiguous.

¹³⁹ John G Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' (9 September 2014) <<http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>> accessed 22 may 2020.

Chapter 2: The field search for answers

“Most importantly, we should never forget that behind every piece of statistical data are human beings who were born free and equal in dignity and rights. We must strive to make their human rights stories, especially those of the powerless, visible through robust indicators and to use them in constantly improving our human rights policies and implementation systems to bring positive change to people’s lives.”

Navi Pillay, UN High Commissioner for Human Rights, 2012¹⁴⁰

2.1.Introduction

According to what was exposed in the previous chapter, we realized that there had been already addressed many efforts to bring companies closer to human rights standards. Despite the success of countless initiatives, the truth is that the majority of companies are still far from acting consistently in a human rights committed way. Thus, the need to create a new treaty that forces companies to be more compliant subsists.

Still, the question remains. What has been missing to make this approach happen more profoundly and consistently? Which approach should be fostered among companies so that their managers realize that more humane decisions are necessarily sustainable and more profitable in the long term?

In order to answer these questions, an opinion survey was carried out. This field study aims to aggregate consumer data and transform the respondent’s perceptions and opinions into indicators that help understand better business and human rights awareness. The questionnaire results point towards the need to humanize companies, the detailed analysis will be exposed below.

¹⁴⁰ UN High Commissioner for Human Rights, ‘Foreword of the Human Rights Indicators, A Guide to Measurement and Implementation’ (2012) <https://www.ohchr.org/documents/publications/human_rights_indicators_en.pdf> accessed 10 June 2020.

2.2. The survey

The informal opinion survey was conducted and aimed to assess the population's knowledge of business and human rights issues in general and, in particular, to evaluate the individual's perception of the company's human rights standards compliance. Additionally, the purpose was to explore what they, as customers, consider being the most proper way of addressing this demanding conformity.

The collection of opinions took place between April and June 2020 through an online survey.¹⁴¹ Invitations to participate were sent to the author's network of professional and personal contacts. The survey consisted of fifteen open and closed questions and was available in six languages (English,¹⁴² Portuguese, German, Spanish, Polish and French). The 96 anonymous and valid responses obtained in this study, as they constitute a small sample, will be analyzed as a whole and not segmented by gender, age, professional background, or country of residence. However, to infer the respondents' general characteristics, a brief description of the sample's statistical data shall be provided. From the available data results, can be stated that 70% were respondent's residents in Portugal, and 30% were equally distributed among residents of Brazil, Canada, Germany, Ireland, Italy, Mexico, Netherlands and Poland. The majority of the participants were men (53%),¹⁴³ adults over 45 years old (43%),¹⁴⁴ and 55%¹⁴⁵ have their professional background in business.

2.2.1. Summary results from the analysis

In the following analysis of the survey results, the focus will be on presenting the answers given to four open-ended questions. Those aimed to assess the participants' conceptions on the relationship of companies to human rights, how they see the role of business in society, how

¹⁴¹ Survey was available through the link <https://forms.office.com/FormsPro/Pages/ResponsePage.aspx?id=4Z5ocy-0JU6l9mbR8pvAkpCmX7rcPbdDoso3FqRr0b1UNVJWUDU4M0RKVzEyUUc2QU03UDhYNlDaSi4u>.

¹⁴² Full content of the English version is available in Appendix 1.

¹⁴³ 32% female and the remaining have not expressed themselves.

¹⁴⁴ 25% aged 36 to 45, 11% from 26 to 35 and only 5% from 18 to 25.

¹⁴⁵ 11% Inter-Governmental organization, 10% independent professional, 3% academia and 3% NGO, 5% others or no professional experience.

businesses can improve their human rights compliance, and what their role as consumers is in this change. The sharing of respondent's views has been accomplished through the purest, freest and most direct expression of their ideas. Therefore, the answers are varied but very insightful. In this sense, the author opted to present the results grouped in concepts that seem characteristic and convergent to the various ideas expressed by the respondent's own words. Some inquiries' ideas will be cited in the following analysis in order to contextualize data better.

The first question that will be addressed focuses on how participants see the relationship between business and human rights broadly. The question asked was: "Which are the 3 words that best define for you the relationship between Business and Human Rights?" 86 responses were collected that revealed 231 distinct expressions that were grouped, after the analysis, into 24 distinct ideas represented in the graph below in Figure 1.

Most of the ideas put forward demonstrate respondents' positive expectations of companies' relationship with human rights, with the concept of "Respect" at the top of the list corresponding to 26 responses and "Reliability" at the end corresponding to 3 responses.

If we analyze the five most expressed words, we can realize that those in the top of the list: Respect, Responsibility, Ethics, Fairness and Equality, are concepts that call for an idea of deference of companies in the interest of human rights.

However, some less positive expressions characterize for some respondents the relationship between business and human rights. The expressions of Exploitation, Abuse, Non-existent, Unawareness, Fake/Hypocrisy, which in their total corresponds to 22 replies and constitute almost 10% of the total ideas expressed (231) reveal an apparent distrust in the actions of companies concerning human rights.

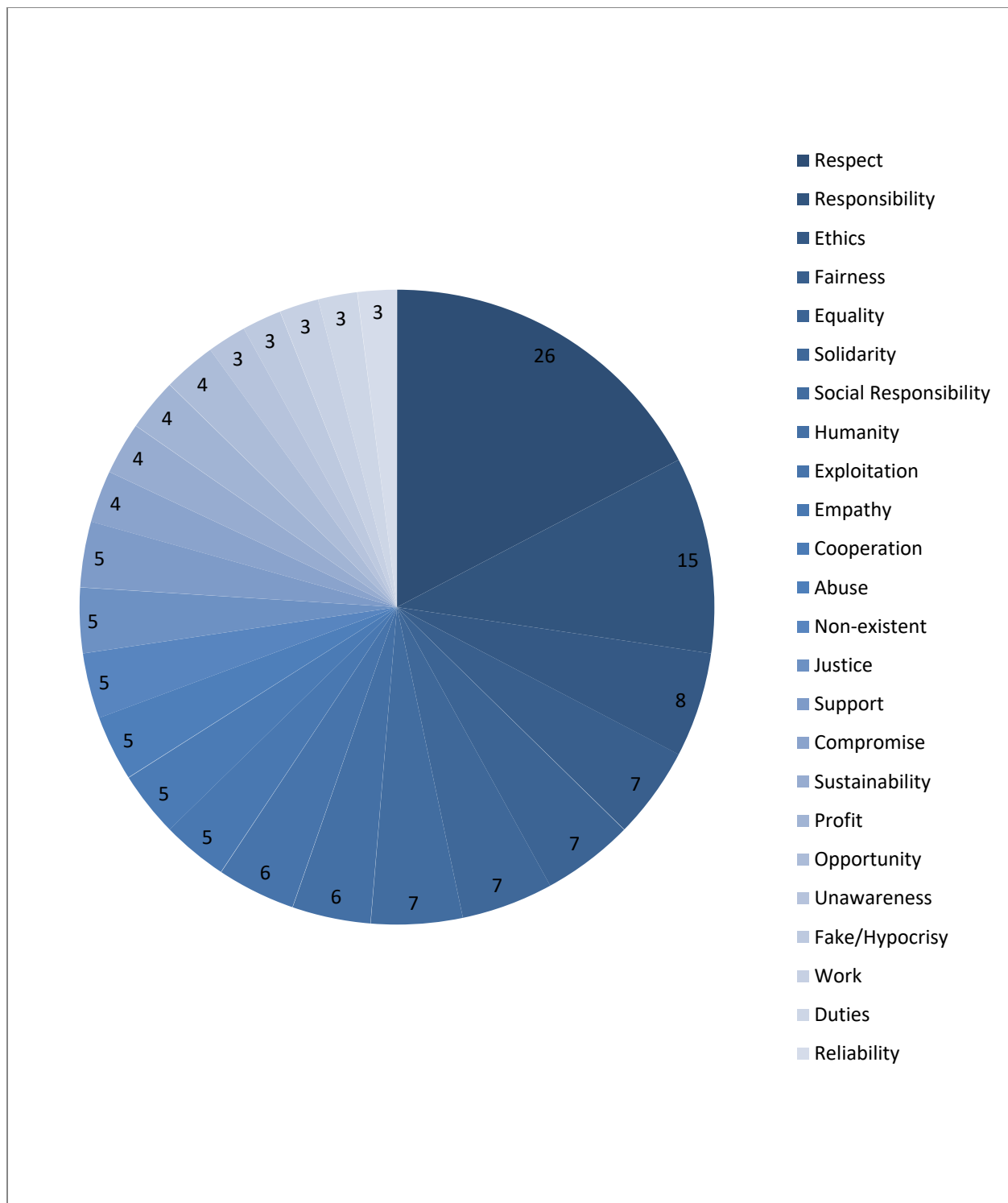


Figure 1: Responses to the question "Which are the 3 words that best define for you the relationship between Business and Human Rights?"

The second issue that will be analyzed aimed to obtain information on the drivers of change that could be most effective in leading companies to respect human rights. After a break for coffee,¹⁴⁶ the issue presented to participants was: “In your opinion, which arguments can influence a company to respect and protect Human Rights when making business decisions?” A total of 84 answers to this question were obtained, and 149 different ideas were identified and grouped first into 52 broad arguments. Then, they were classified in terms of the company’s impact and afterward characterized by impact vector identified the last two of which will be developed further.

In figure 2 below are represented the arguments expressed by more than one respondent that reveal how they consider companies to respect human rights to be most effective.

Curiously, the most expressed argument (16 mentions) was identified as "Talent Retention", which in most cases conveys the idea that the companies' employees are seen as their leading advocates and advertisers. The arguments of “lose the best employees”¹⁴⁷ or “employees feeling proud to work for the company”¹⁴⁸ were expressed in the sense that failure to respect human rights is a threat to the company's reputation and the retention of competent employees. It seems patent that people are ready to leave their jobs in companies that do not respect human rights. Some respondents also expressed that motivated employees who feel respected and secure are more productive. Thus, motivated employees can generate more positive economic results for the company where they work, as also expressed in the following obtained answer:

*"[R]espect for workers' rights has positive effects on their attendance and motivation, which in turn may be a determining factor in their productivity. On the other hand, the action that respects and protects human rights is a condition for greater prestige for the company among citizens and workers in particular, and also among national and international institutions of power and humanitarian organizations."*¹⁴⁹

However, it must be considered that the second most often state argument, the “Image,” may also underlie other individualized expressions of opinion identified such as “Reputation, Public opinion or Recognition.” Together they make up a total of 33 responses versus 16 corresponding to “Talent Retention.” In this sense, the company’s image could be considered the most

¹⁴⁶ Among the questions proposed to respondents in the questionnaire developed for this research were questions on coffee consumption. For more details see Appendix 1

¹⁴⁷ Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

persuasive and compelling argument for greater compliance with human rights, delivered from this opinion search.

Other arguments still deserve to be highlighted, namely the ones that demonstrate a broader and longer-term view of the relationship between business and human rights. In terms as “Society Awareness,” “Sustainability,” “Awareness,” “Interdependence Awareness,” “Social pressure,” “Culture and Values Change” and “Employees Awareness” relies already on an idea for a necessary in-depth analysis, awareness, and concern of human rights among decision-makers, company’s employees, customers and society at large.

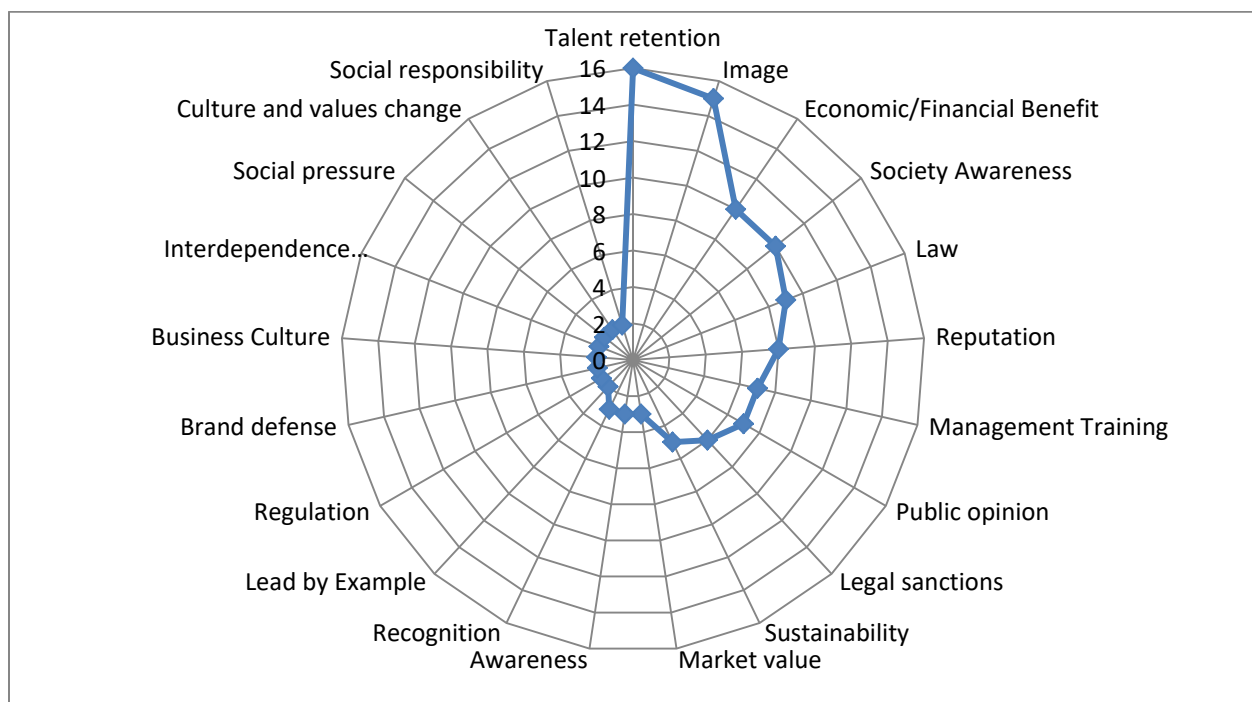


Figure 2: Responses to the question "In your opinion, which arguments can influence a company to respect and protect Human Rights when making business decisions?" that were indicated by more than one respondent.

The main arguments in the answers obtained and mentioned above can be summarized in the words of a respondent who says, “*in the future, the scarcity of human talent will require a more respectful attitude. On the other hand, the synergetic gain between companies and humanity is evident.*”¹⁵⁰

To better comprehend which level and vectors of impact on enterprises are of most value to respondents and therefore represent the most compelling arguments defended by them, the

¹⁵⁰ Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

various arguments presented were grouping into different categories. In the first stage were identified the level of impact that companies would be exposed to. At a second level, there were defined the structural vectors concerned with each impact. Thus at the first level of impact was considered the following characterizations identified in alphabetical order: Awareness, Benefit, Educational, External Control, Internal Control, Penalty, Threat, and Threat/Benefit simultaneously.

On the second level, the arguments were considered and grouped into impact vectors from among the following characterizations, also identified here in alphabetical order: Awareness, Economic, Educational, Legal, Regulatory and Reputational.

The design of the characterizations implemented in this study can be questioned, be reviewed and updated because the data is available for this work. However, it seems to be the best available proposal that allows the evaluation of the answers to the specific issue globally. To better understand the logic that supports the characterizations described above, we give some examples and details of specific treatments.

Expressed Arguments	Impact Characterization	Impact Vector Characterization
Consumer Power	Awareness	Awareness
Award	Benefit	Reputational
Tax benefits	Benefit	Economic
Lead by Example	Benefit	Reputational
Image	Benefit	Reputational
Management Training	Educational	Educational
Audit	External Control	Regulatory
Legal sanctions	External Control	Legal
Code of Conduct	Internal Control	Regulatory
Tax increase	Penalty	Legal
Threaten profits	Threat	Economic
Talent retention	Threat	Reputational

Figure 3: Characterization treatment detail

With this conceptual framework in mind, the results obtained and represented in figure 4 can be interpreted and further analyzed.

According to the respondents, the benefits are the great engine of change for companies to align with human rights. For 57 of the 84 contributors to our survey, companies are motivated by the benefits of that decision. Moreover, they expressed the idea that companies will only be more

sympathetic to human rights if they have a benefit in it. Awareness or sensitizations' to human rights issues comes second in the most defended arguments (30 responses). It is not said, intentionally, “awareness or sensitization of companies” merely, because businesses are not the only protagonists for change to happen. According to the opinion survey and as already mentioned above, human rights awareness advocated by respondents does not only refer to business decision-makers but also to employees, customers and society.

It is interesting to realize that companies' control factors and threats to business are relegated to the background and considered less persuasive arguments for change. It should also be noted that the impacts that can be seen simultaneously as threats or benefits have 10 responses and correspond essentially to arguments relating to public opinion and social pressure, and because they are dubious as to their direct impact, have been characterized in this way. The educational impact expressed is in most responses related to the idea that business managers need to be trained if we want their decisions to be more in line with human rights.

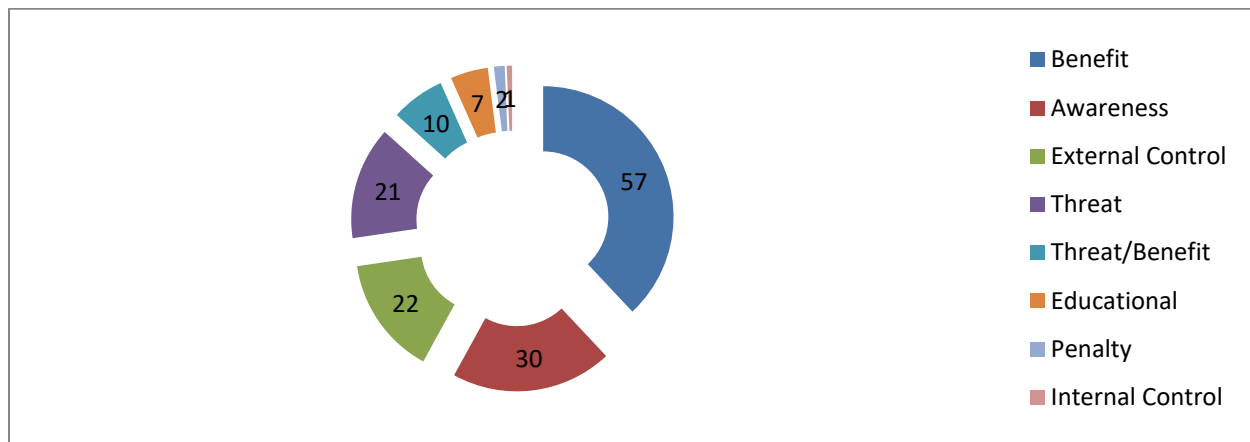


Figure 4: Arguments characterized by impact

The impact analysis conveys to the general idea that, according to our respondents, those companies are motivated first by their benefits and only then by awareness and sensitization. The awareness is developed on companies and by society in general, where the employees, clients and other individuals are included. Thus, only a broader analysis of the vectors of impact will allow having an accurate assessment of where the “Holy Grail”¹⁵¹ can be.

¹⁵¹ This expression was used in reference to the business case that sustains corporate actions in favor of human rights, as better developed in this introductory thesis chapter.

From the data detail that allows an analysis of the levels of impact presented in figure 5, can be stated that the benefits are the great motivator of change in companies, yet, and we stress the yet, are only concerned the “Reputational Benefits” 22%, those linked to their image or brand image. Surprisingly the “Economic Benefits” 16% are relegated to third place at the top of catalyzing arguments for change, overcome by “Awareness.” Besides, the impact of an "Economic Threat" seems to be less relevant than the need to look to the future and "Train Company Managers." On the other hand, if we add up the external control impacts ("External Control Legal" 14% plus "External Control Regulatory" 1%) by a total of 15%, we almost reach the level of impact of the "Economic Benefits" 16%, which means that in this study external control is almost as essential to change as economic benefits.

This data analysis conclusion might endorse many authors' arguments that only a positive business case can motivate companies to comply with human rights and that conversely, legal or regulatory control has less impact than economic benefit, which turns out to be right but for a mere one percent (1%).

Furthermore, we now have numbers that suggest that qualitative impacts ("Benefit Reputational" plus "Awareness") will be more meaningful and useful than quantitative impacts "Benefit Economic") on companies path human rights-oriented.

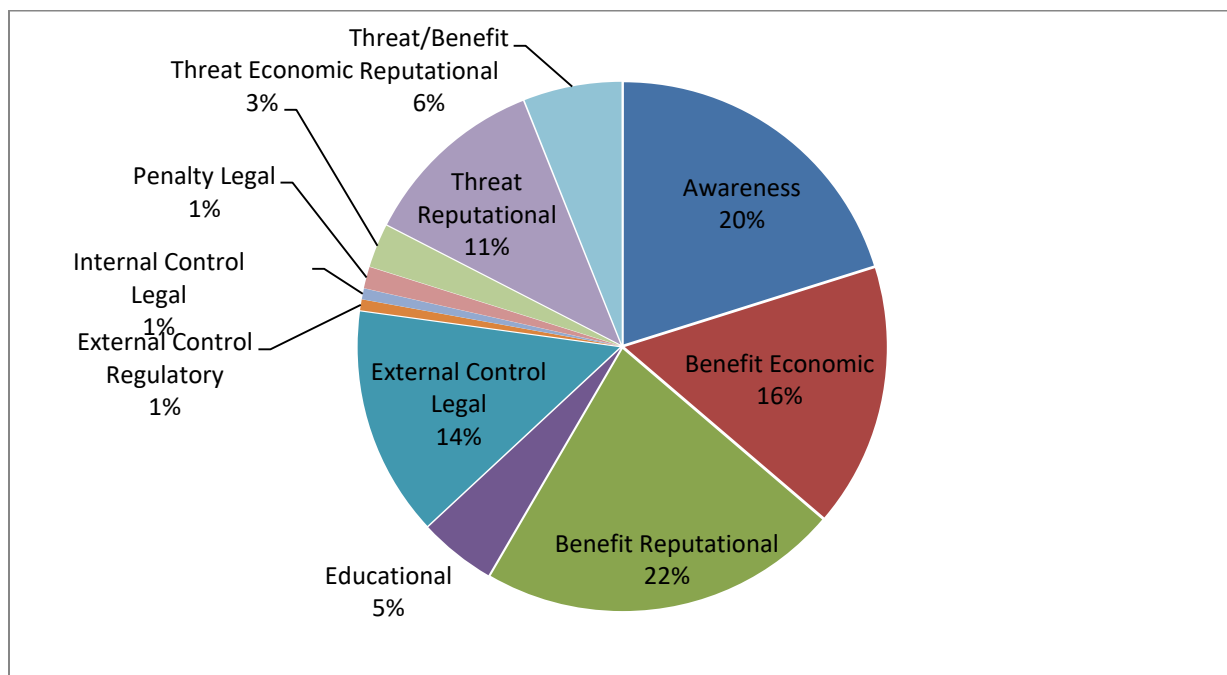


Figure 5: Level of Impacts and Vectors analysis

To conclude the analysis of the answers to this question and looking only at the vectors with the most significant influence, it becomes clearer that issues of reputation are the most important catalysts for change the corporate culture in favor of human rights, according to the opinions collected and represented in the graph in figure 6.

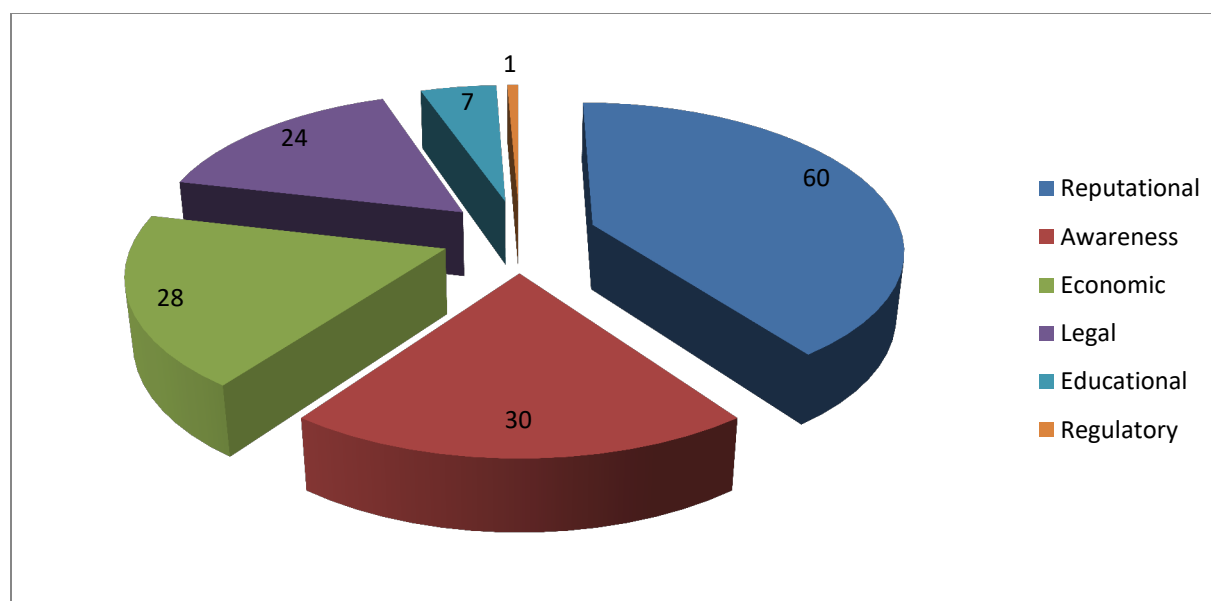


Figure 6: Impact vector analysis

The answers to this question have proved to be extremely interesting. Primarily due to the idea that there already exists a more holistic view of what makes companies change. Furthermore, society is already positively aware of this view as expressed in the answer that says, “*in addition to good compliance systems and ethics training, the understanding that companies operate in an ecosystem in which they are interconnected and interdependent.*”¹⁵² Those conceptions are increased by the idea presented by another respondent which argues that the economic factor could be the most persuasive argument “*if a company's profits were in any way indexed to KPI's [Key Performance Indicators] linked to respect for human rights, the economic/financial argument would be the most pressing.*”¹⁵³

In the third issue, 83 answers were obtained and 209 ideas were presented that responded to the question asked: “What should a company’s goals be for you?”

¹⁵² Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

¹⁵³ *ibid.*

As shown in the graph in Figure 7, 25 ideas were expressed by more than one respondent. “Profit” is on the top of the list as the main objective that businesses must achieve in practice. Nevertheless, it is important to note that only in four answers, “Profit” is stated as the sole objective of a company. In the remaining answers, 26 “Profit” as a company’s goal is always associated with another objective as or more important than the company’s profitability. As one respondent argues to the question in analysis, the company’s goals should be “*others before profit*,”¹⁵⁴ and the other goals, as can be seen in the figure above, are linked to social and labor issues yet are described in different expressions in the chart.

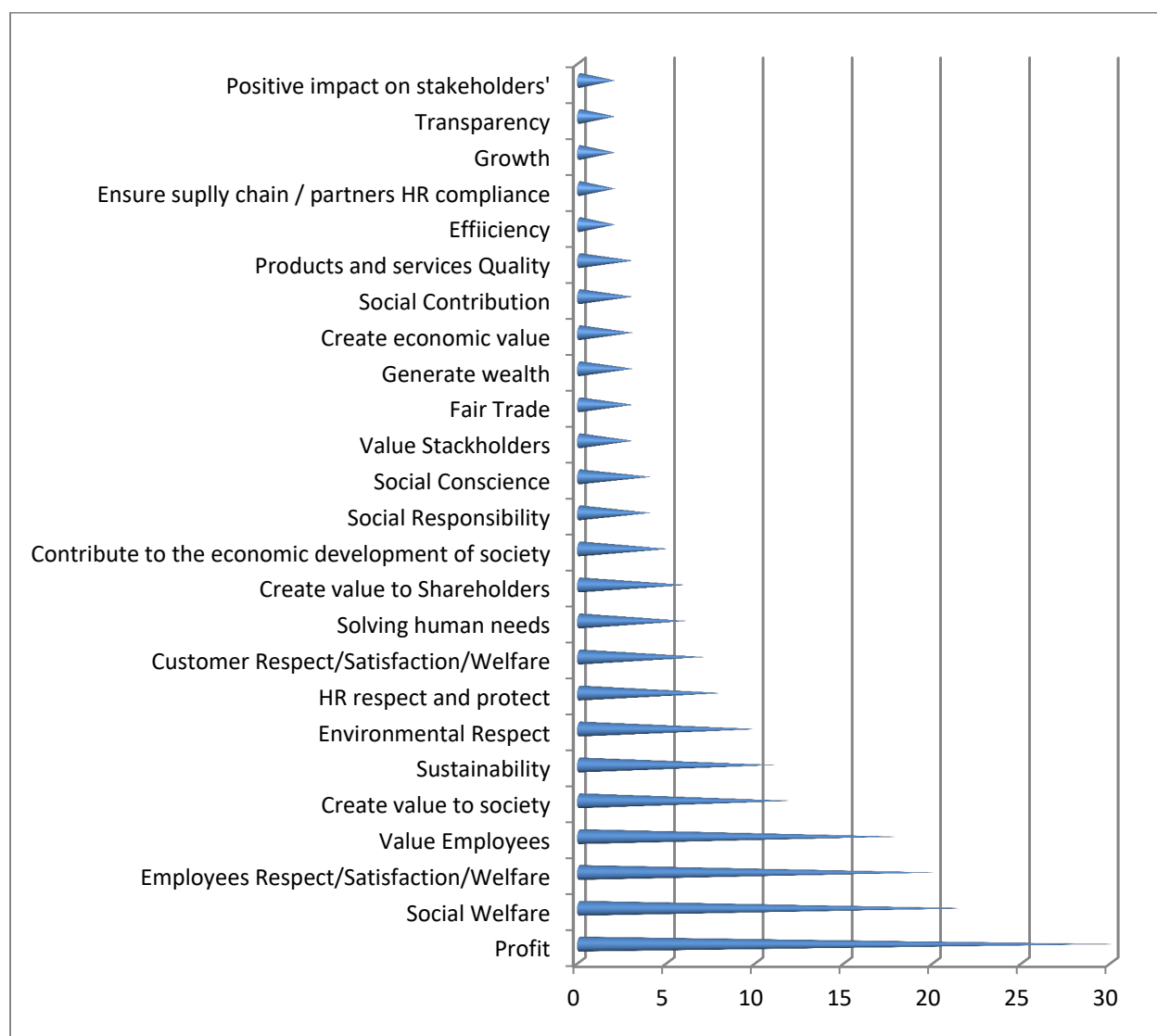


Figure 7: Responses to the question “What should a company's goals be for you?” that were indicated by more than one respondent

¹⁵⁴ Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

In a more general analysis of the impact vectors, as represented in figure 8, it can be acknowledged that social concerns should be those that will have primacy in the definition of a company's objectives according to this research. The social concerns are immediately followed by the company's self objectives, such as "Profit," "Creating Value for Shareholders," or simply "Improving productivity." Unexpectedly, issues such as the "Environment" and "Human Rights" make up only 10% of total responses, possibly due to respondents may consider those issues to be part of social concerns. We also find it peculiar that respondents attach more importance to the objectives of the economic development in general than to customer satisfaction, but we will come back to this issue later on in chapter 3.

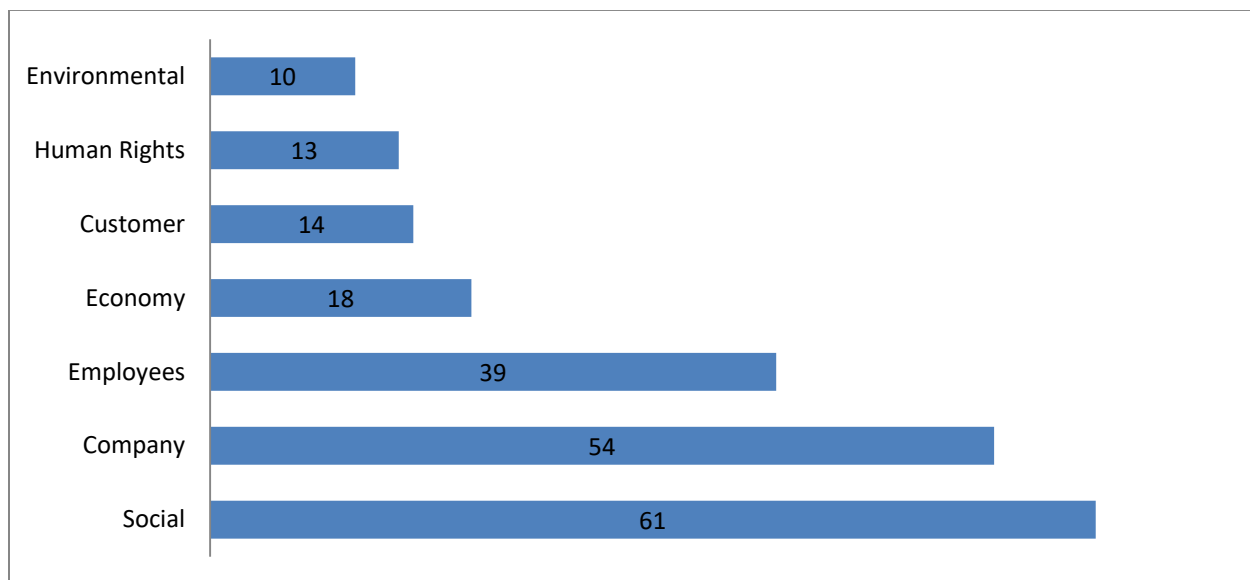


Figure 8: Macro Impact Vector Analysis

In general, it can be understood that the respondents are aware of the role that companies need to play in the future of society and the goals that they must observe in order for their actions to be more in line with human rights. In the words of a respondent, companies when defining their objectives should focus on "help build a better world; with greater dignity for the person of the worker, working conditions, adequately remunerated work, public health and the environment, broad protection of the worker, gender and opportunity equality, non-discrimination and the pursuit of activities that do not harm people or the environment. All these assumptions are perfectly compatible with a company's profit." Thus, what will be better understood in the analysis of the fourth proposed issue is what they, as consumers and customers of these

companies, are willing to do to make business more humane. In this regard, 77 answers were collected with 116 different ideas in response to the particular question “As a consumer what it takes to know about a company in terms of Human Rights, so that you can make a conscious and sustainable purchase choice?”

As shown in the graph in Figure 9, more than 30% of the respondents evaluate or consider assessing the respect of workers’ rights before buying any product or service from companies. Social and humanitarian issues are a priority for respondents in purchasing decisions. As customers, they value a company where human rights issues are respected and their managers’ decisions aim to impact society positively. Surprisingly, issues related to the consumer herself or himself, such as the quality of the service or respect for the customer, are little mentioned. Possibly those issues were not emphasized yet not being less valuable for each respondent. They could simply consider it to be intrinsic in the decision of choice. The volume of data and information obtained on this final question was substantially lower than the answers to the above questions. The reason can reside in the fact that the respondents, as consumers, in general, do not yet have the perception of what they should or can demand from businesses. In this regard, were obtained answers such as “*Honestly, this is not a concern*”¹⁵⁵ or “*In this day and age, it's very hard to distinguish a company dedicated to human rights from just propaganda so I usually don't take that into account. I try to buy locally when possible.*”¹⁵⁶ However, some consumers surveyed in this research appeared to be already very aware of the importance of human rights issues in purchasing options and are looking for information, such as someone who answers, “*I try to be aware of the origin of the products I buy. But since there is no worldwide awareness policy, it becomes difficult to have this control over everything I consume.*”¹⁵⁷ Given the current unavailability of more information to consumers on the levels of compliance of companies with human rights, some suggestions are made by respondents: “*Report with external audit conducted by independent party*”¹⁵⁸ or “*a barometer of respect for HR could be easy to understand and could help the consumer to put pressure on those who disrespect, preferring the products/services of other companies. Just like the crash tests of cars - number of stars*

¹⁵⁵ Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

according to the behavior of each company,”¹⁵⁹ or even “to have a regulator, exempt, trustworthy, without lobbies, that can certify compliance with HR, would be an added value.”¹⁶⁰

Business customers deserve more decision-making power and awareness. If they are not given the information they need, to make a conscious decision, several may feel some frustration in the process and express themselves as the respondent that honestly says “*actually... I believe might be hard to know if a company is violating or not any human rights. There is no "certification" that I'm aware of.*”¹⁶¹

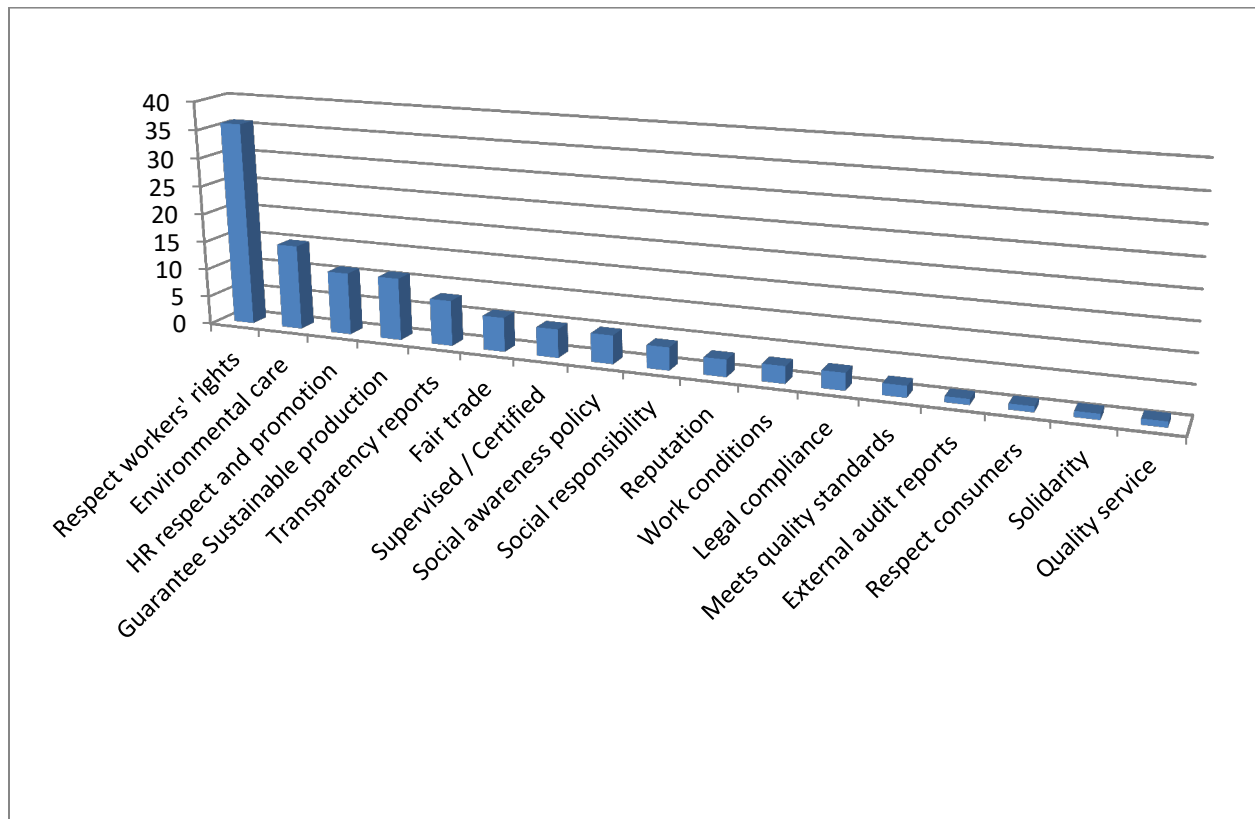


Figure 9: Responses to the question “As a consumer what it takes to know about a company in terms of Human Rights, so that you can make a conscious and sustainable purchase choice?”

It is important to remember that 70% of the data obtained comes from respondents living in Portugal. Therefore, the general perception of the study may be closely related to the country's business culture and the Portuguese government policies associated with human rights issues.

¹⁵⁹ Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

Thus, more data is presented regarding this business reality, which can help frame the answers obtained in our survey.

2.3. Other Research insights

The first Portuguese survey on responsible business conduct and human rights was referred to 239 employers' associations and took place between February and May 2018.¹⁶² This initiative was part of the "Companies and Human Rights in Portugal" project of the *Centro de Administração e Políticas Públicas*¹⁶³ of the *Instituto Superior de Ciências Sociais e Políticas*¹⁶⁴ of the University of Lisbon in partnership with the *Direção-Geral das Actividades Económicas*¹⁶⁵ of the Portuguese Ministry of Economy. The survey was part of the Business and Human Rights in Portugal project¹⁶⁶ and was developed in accordance with measure 39¹⁶⁷ of the National Action Plan for Responsible Business Conduct and Human Rights 2017-2020.

In total 246¹⁶⁸ companies participated in the survey, allowing 170 complete answers to be included in the study which results were made public at the end of 2018 and whose main insights from the overall analysis provided by the research team will be review thereafter.¹⁶⁹

¹⁶² More detail in <<https://www.dgae.gov.pt/primeiro-inquerito-nacional-sobre-conduta-empresarial-responsavel-e-direitos-humanos-2018.aspx>> accessed 15 June 2020.

¹⁶³ Susana Gaio (tr) Center for Administration and Public Policies.

¹⁶⁴ Susana Gaio (tr) Instituto Superior de Ciências Sociais e Políticas.

¹⁶⁵ Susana Gaio (tr) Directorate General for Economic Activities.

¹⁶⁶ 'Business And Human Rights In Portugal' project was coordinated by Professor Isabel Cabrita, Centro de Administração e Políticas Públicas, More information see <<http://capp.iscsp.ulisboa.pt/en/projects/ongoing-projects/2017-11-17-10-25-25/international-relations-and-strategic-studies/business-and-human-rights-in-portugal>> accessed 14 June 2020.

¹⁶⁷ Susana Gaio (tr) "39) Carrying out a survey of companies in order to analyse their perceptions of their practices of Social Responsibility and respect for Human Rights". Plano Nacional de Ação para a Conduta Empresarial Responsável e Direitos Humanos 2017-2020' (National Action Plan for Responsible Business Conduct and Human Rights 2017-2020) (Draft Version 21-12-2016) 14.

¹⁶⁸ Of 1.278.164 companies registered at the end of 2018 (n 36).

¹⁶⁹ Centro de Administração e Políticas Públicas, 'Resultados do 1º Inquérito Nacional sobre Conduta Empresarial Responsável e Direitos Humanos' (Results of the 1st National Survey on Responsible Business Conduct and Human Rights) <https://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKFwjgw_fGrtrqAhWJ3eAKHQJ6D1AQFjAAegQIAxAB&url=https%3A%2F%2Fwww.dgae.gov.pt%2Fgestao-de-ficheiros-externos-dgae-ano-2019%2F1-inquerito-nacional-sobre-conduta-empresarial-responsavel-e-direitos-humanos-pdf.aspx&usq=AOvVaw3qQQD1uQg6Qu1RiXdxBYh2> accessed 10 June 2020.

It is important to mention that of the companies surveyed 79% operated only in Portugal, 10% operated in up to five countries and 11% in more than five countries. Furthermore, 70% had up to 50 employees, 19% between 50 and 250 employees and 11% more than 250 employees.

When asked if the company were aware of the regulatory instruments relating to responsible business conduct, namely the UN Guiding Principles, Agenda 2030, UN Global Compact, ISO 26000, ILO Declaration PDFT, ILO Tripartite Declaration of Principles and OECD Guidelines, overall positive responses have not reached 50%. Furthermore, when questioned whether the company had a public statement/commitment on human rights: (37% say yes, 46% confirm they did not have and the remaining 17% did not know or preferred not to answer. The percentages of affirmative responses do not go beyond the 31% and 38% for commitments to Fundamental Rights at Work and Environmental Protection, respectively, and even down to 24% for Corruption Prevention. Concerning companies' perceptions of their practices and processes for assessing the negative impacts of their activities on human rights, only 50% of companies with more than 250 workers state that they have these procedures secured. The percentage falls to less than 20% in companies between 50 and 250 workers and is just over 10% in companies with fewer workers. Inconsistently, the percentages of positive responses increase by around 40% when asked if companies acknowledge having practices related to policies of prevention of negative impacts. What seems peculiar in these responses is the existence of policies to prevent adverse impacts without existing practices or processes to assess these impacts. It seems necessary to better understand how Portuguese companies adjust prevention policies without assessing impacts in a sustainable manner.

In summary, the study points to the reality that Portuguese companies are still less than halfway to know the human rights mechanisms they have to comply with. The first steps have already been taken through this inquiry. Wich was revelatory of the Portuguese state concerning business and human rights. Based on the information now available, the following steps can be thought out, structured, and given more certainty of involvement of the entire business, from the corner grocery store to the most significant Portuguese company operating across borders.

2.4. Conclusions

“Employees and customers are a company's greatest asset - they must be preserved.”¹⁷⁰

According to the opinions expressed in the questionnaire developed for thesis research, it can be stated that there is a clear perception by the population regarding the role of companies in current and future societies. Respect for human rights and solidarity with the society in which companies operate should be the basis of any business decision and should be perpetuated in any company's operation. Although some individuals demonstrate to be skeptical about the more humanized attitudes of companies, the truth is that most believe in more humanized business relationships, where justice and the common good are present.

As companies customers and consumers in general, the respondents express much concern about making sustainable purchases and reward fair corporate actions. However, they also express some limitations in accessing data and content that allows them to make a correct assessment of companies and consequently purchase conscious decisions. They do their best with the little information they have available and there are even those who assume that *“I would prefer to pay those extra Euros if I knew that the company is doing an extra effort to pay fair wages to their employees.”¹⁷¹*

For now, respondents place their trust in companies that most demonstrate respect for workers' rights in particular and human rights more broadly. As consumers, they give preference to those business enterprises that act with concern for the environment and ensure the sustainability of their production chain, including, in some way, by ensuring human rights compliance of their business partners. Surprisingly, respondents reveal that it will be challenging for a company to retain competent employees in the future if it does not act to promote these values and in a humanized, sustainable way.

In order for change to be conducive to more humane business, respondents have confidence in business regulation. However, they assume that the main driver of change is undoubtedly related to companies' reputation in the market, on the public opinion and by consumers in general. For those, profit or the profitability of the company and its shareholders' remuneration is the basis of

¹⁷⁰ Susana Gaio (tr) Reply to the questionnaire under review whose author we will keep anonymous.

¹⁷¹ *ibid.*

its foundation. However, it is only synonymous with sustainability if profit is combined with deep social commitments, fair employment policies that promote the well-being of its human resources and respect for customers.

Although the results obtained in our questionnaire reveal a quite homogeneous way of consumer's perception and even some innovative ideas, it would be interesting to develop a following and broader research of this type with a larger group of participants with more diverse backgrounds. Furthermore, it deserves a better understanding of what role consumers are currently available to play in this change for improved business and human rights compliance. Some responses to this issue were already obtained on far-reaching research back in 2013. Back then, the European Commission Barometer found that seventy-nine percent (79%) of Europeans were interested in what responsible business conduct is. However, sixty-two percent (62%) felt they lack accurate information on what companies do to behave responsibly towards society. Furthermore, the barometer survey results express that forty-seven percent (47%) of the respondents say they do not feel informed in corporate social responsibility actions, yet they are interested in it.¹⁷²

As it is expressed in the various data disclosed in this chapter, although they do not yet know how, consumers are ready and even somewhat eager to play an essential role in the progress and development of a society where companies are an integral and even interdependent part of the human mass that sustains them in every decision to buy goods or services.

¹⁷² TNS Political & Social, 'Flash Eurobarometer 363, How Companies Influence Our Society: Citizens' View' (Eurobarometer Almanac April 2013) 7, 9, 13, 17. This survey has been requested by the European Commission, Directorate-General Enterprise and Industry and co-ordinated by Directorate-General for Communication. <https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_363_en.pdf> accessed 20 June 2020.

Chapter 3 – Leading the companies through the Human Rights path

“For me, campaigning and good business is also about putting forward solutions, not just opposing destructive practices or human rights abuses.”

Anita Roddick¹⁷³

3.1.Introduction

The ultimate goal of many who deal with business and human rights issues seems clear - to achieve strict compliance with human rights by companies. Although the purpose sometimes may seem long and even idealistic or utopian, it is nevertheless a more or less long road to which we cannot resign ourselves from traveling it faster or slower. As a commonly used expression says: "The path is made by walking" and proposed in this chapter, it is a step towards companies to act according to human rights.

First insightful data will help us understand where we are heading on this journey and who should take the leading role in influencing companies' actions. Almost half of Europeans (49%) think that citizens should take the lead in influencing company actions through their purchasing decisions as consumers. Company managers follow this lead through their resolutions on what the company does (40%) and the final role is attributed to public authorities (national or international) through policies and regulations (36%).¹⁷⁴

These data demonstrate full alignment with the conclusions reached through the survey results analyzed in the previous chapter. Correspondingly, it was identified that reputational benefits (intrinsically associated with the expression of the will and publicity of consumers) are the main driving force that influence change, soon followed by the awareness of both society and

¹⁷³ Anita Roddick, through The Body Shop, “believed that businesses have the power to do good. That is why the Mission Statement of The Body Shop opened with the overriding commitment, ‘To dedicate our business to the pursuit of social and environmental change’. The stores and products are used to help supporting human rights and environmental issues,” The Concept of Transformational Leadership Management Essay, <<https://www.ukessays.com/essays/management/the-concept-of-transformational-leadership-management-essay.php>> accessed 28 July 2020.

¹⁷⁴ Eurobarometer Almanac 2013 (n 172) 72.

company managers and external control (legal, regulatory or monitoring by civil society institutions) assumes a less critical role in this transformation path. In the picture below, the representation of these values and the elements now exposed can be seen. The rectangles represent the various relevant stakeholders. The circles reflect the impact vectors (where the intensity of the red color increases according to their higher importance) to which companies may be susceptible and are linked with the respective stakeholders. The arrows represent the path or actions that can potentially produce a particular influence on companies to respect human rights better.

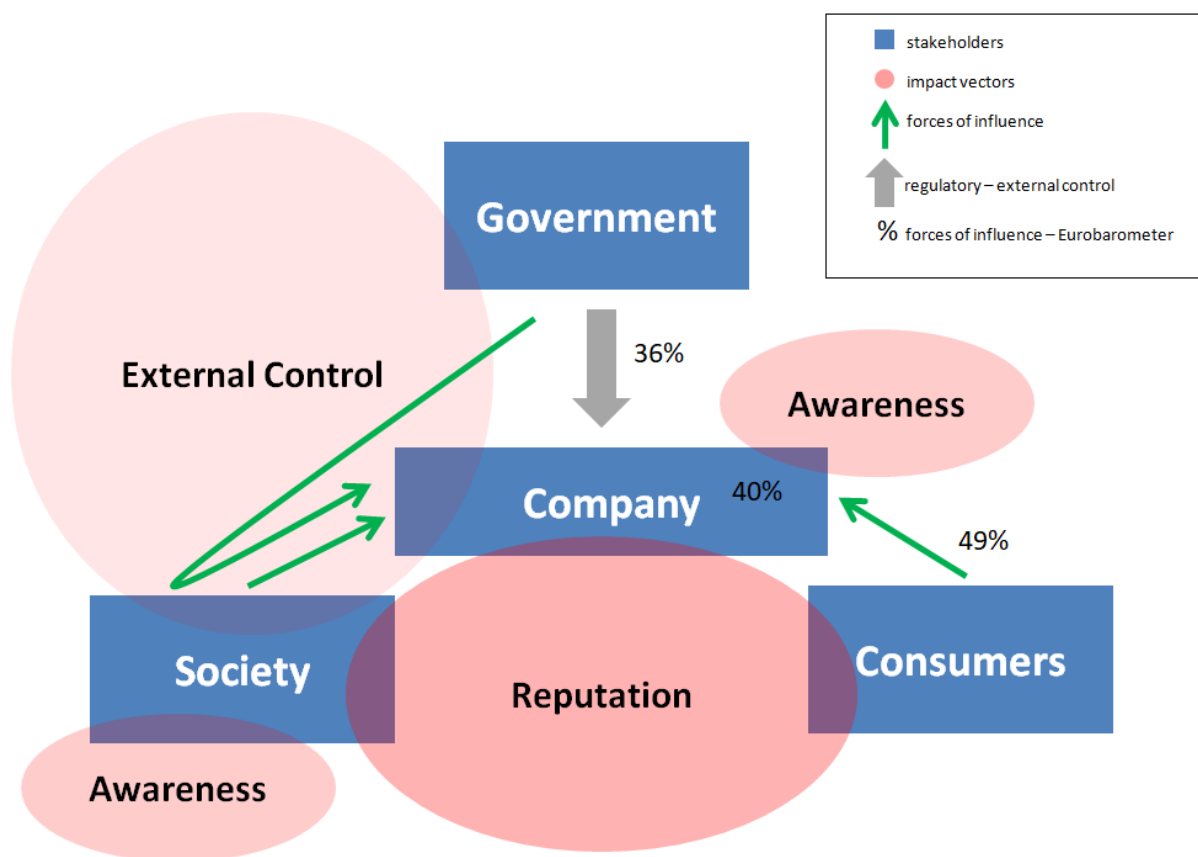


Figure 10: Representation of the forces of influence on enterprises

The proposal is to look at the various elements of the figure above, starting with the impact vectors (reputation, awareness and external control). The human rights regulatory frameworks (represented in the grey arrow out of the government box in the figure above) correspond to the leading way things have been done to impose companies' external control. Business and human

rights regulations have already been abundantly explored in academic research and also been exposed in detail in the first chapter of this thesis. Nevertheless, it is proposed in this chapter to explore a more inclusive and holistic route of external control taking into account the plurality of participants, which is represented, in the figure above, by the green arrow coming out of the government box and passing through the society box finishing in the consumers. This means that it is a path under the state initiative but lacks the support and awareness of society to have effective results.

Raising awareness among managers to promote more humane decision-making can be seen as a critical circle to thicken. However, it can be put in practice by improving management training, including, for example, by adding human rights classes in colleges,¹⁷⁵ as well as employing public or civil society awareness campaigns.

Concerning society awareness, it seems that the work carried out by NGOs has been leading in this direction. Nevertheless, it can be intensified by the consciousness of individuals who are part of society, the consumers. Typically, business decisions and the company's goals are impacted by consumers' needs and trends. As society demands certain goods and services, companies, if they want to stay in the market, have to make a parallel movement and benefit their customers according to their expectations.

Being aware of the causes of human rights and business, societies in general and consumers, in particular, have a crucial role in defining the business reputation, which is the most critical identified driver of change. Thus, society and consumer actions, driven by human rights, towards business, are then potentially the most effective. That is the reason why we focus mainly on these actors, a solution that brings the business closer to human rights.

Without denying the value and crucial need for the company's oversight and accountability made by national or international authorities through policies and regulations, this research aims to explore how the process of business compliance with human rights can be enhanced, sustained and even accelerated. Appealing to motivation instead of grounding the change in fear of failing standards seems to be a more natural, and fairer path to take. Fear and shame never lead to better decisions. In this sense, what is proposed in this chapter concerns the green arrows represented in the figure above, which means to explore how governments, society and consumers can act as

¹⁷⁵ Michael Porter, 'As presented in The case for letting business solve social problems' (TEDGlobal 2013) <https://www.ted.com/talks/michael_porter_the_case_for_letting_business_solve_social_problems/up-next?referrer=playlist-social_good_inc#t-965164> accessed 19 July 2020.

real catalysts or motivators for change in companies to make decisions more in line with human rights.

3.2.Companies make an effort with society

Over the past decades, several companies and business organizations have helped promote public awareness of human rights. This step cannot be framed only in an attitude of mere corporate voluntarism but is already part of some corporate strategies beyond mere compliance and which has been demanded by society at large.¹⁷⁶

Most recently, Harvard business guru Michael Porter has advocated a grand strategy of “creating shared value” companies creating economic value for themselves “in a way that also creates value for society by addressing its needs and challenges.”¹⁷⁷

Today’s business leaders recognize that companies must invest in organizations or programs with a broad social appeal. Thus, they make more effective contributions through an active corporate engagement that goes beyond the business philanthropy of the past when the commitment was no more than writing a Bank check or delivering donated goods.¹⁷⁸ Some good examples of this business performance are recognized but not so much advertised, such as the Unilever program and report “We can Wait”¹⁷⁹ that helps empowering women to become entrepreneurs in rural India while raising awareness of the importance of better hygiene and nutrition.¹⁸⁰ Microsoft’s “New Unlimited Potential Initiative” seeks to bridge the global technology skills gap, benefiting the millions of people by developing their skills and opening up opportunities for sustainable employment, entrepreneurship, or new business and innovation for

¹⁷⁶ John Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (John F. Kennedy School of Government - Harvard University June 2007) 29
<<https://research.hks.harvard.edu/publications/getFile.aspx?Id=262>> accessed 17 July 2020.

¹⁷⁷ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton Global Ethics Series W. W. Norton & Company Kindle Edition) 1502.

¹⁷⁸ Klaus Schwab, ‘Global corporate citizenship: Working with governments and civil society’ (January 2008)
<https://www.researchgate.net/publication/289118517_Global_corporate_citizenship_Working_with_governments_and_civil_society> accessed 12 July 2020.

¹⁷⁹ Unilever Corporation, ‘We Can’t Wait A report on sanitation and hygiene for women and girls’
<https://www.unilever.com/Images/we-can-t-wait---a-report-on-sanitation-and-hygiene-for-women-and-girls--november-2013_tcm244-425178_1_en.pdf> accessed 20 July 2020.

¹⁸⁰ Harish Manwani, ‘Profit’s not always the point’ (TED@BCG Singapore October 2013)
<https://www.ted.com/talks/harish_manwani_profit_s_not_always_the_point/up-next?referrer=playlist-social_good_inc#t-157380> accessed 20 July 2020.

the future.¹⁸¹ Another example is IKEA's "People & Planet Positive" strategy which, in a position of high commitment and collaboration, proposes to inspire, activate and lead their decision-making to address the climate change, unsustainable consumption, and inequality challenges.¹⁸²

Those are inspirational examples of companies working towards society and aiming to raise awareness of issues that are intrinsic to human rights and in some way related to the activity of those companies. Nevertheless, society should have reciprocal actions toward companies' awareness.

Focusing on this topic, one can start by asking: What role does society ultimately play in business awareness? Moreover, how can the community create responsiveness in business decision-makers and be an active actor in regulating business human rights compliance?

The straight answer to these questions can be directly related to establishing a reputational status of each company delivered by society. Yet, in which ways can society be concretely involved in it?

Indices¹⁸³, rankings¹⁸⁴ and benchmarks¹⁸⁵ are being made available around the world to draw civil society's attention to human rights issues. Nevertheless, the indicators "respond well to the UNGPs' call for companies to 'know and show' that they manage their human rights impacts, they tend to be granular in nature and developed without sufficient transparency and participation. Such an approach to measurement can disempower those who use and rely on them."¹⁸⁶ A conscientious society can be the first step towards encouraging companies to be transparent in their impact and to take steps to respect and protect human rights. However, if society awareness only falls on indexes in general, it will have to be ensured that the available information is reliable and impartial. This

¹⁸¹ Microsoft Corporation, 'Microsoft Unlimited Potential, Enabling Sustained Social and Economic Opportunity for the Next Five Billion People' (2008) <https://www.unido.org/sites/default/files/2008-03/WP_Unlimited_Potential_0.pdf> accessed 20 July 2020.

¹⁸² IKEA, 'People & Planet Positive - IKEA Sustainability Strategy' (June 2018) <https://www.ikea.com/us/en/files/pdf/7e/58/7e58334c/ikea_sustainability_strategy_people_planet_positive_v3.pdf> accessed 19 July 2020.

¹⁸³ Examples: [Dow Jones Sustainability World Index](#), the [Responsible Mining Index](#) or the [FTSE4Good](#).

¹⁸⁴ Examples: [Access to medicine Index](#) or the [Behind the Brands Company Scorecard](#).

¹⁸⁵ Examples: [Corporate Human Rights Benchmark](#), the [UNGP Reporting database](#), the [Responsible Sourcing Tool](#) or the [Know the Chain](#).

¹⁸⁶ Damiano de Felice, 'Michael Addo – Key performance indicators and the Working Group on business and human rights' (March 2014) <<https://blogs.lse.ac.uk/businesshumanrights/2014/03/14/michael-addo-key-performance-indicators-and-the-working-group-on-business-and-human-rights/>> accessed 15 July 2020.

means as well that a great responsibility falls on the reputation value process and in ensuring that it is carried out through critical yet constructive conduct.

Another approach to involve society in business awareness towards human rights has been achieved through the resolution adopted in Australia at the end of 2018 and it is represented in the figure 10 above by the green arrow coming out of the government box and passing through the society box finishing in the consumers.

“As part of the 17 UN Sustainable Development Goals, the international community has committed to ending modern slavery by 2030”¹⁸⁷ and in this regard, the Australian Parliament approved the Modern Slavery Act 2018 that established Australia’s national Modern Slavery Reporting Requirement.¹⁸⁸ The act is viewed as a polycentric and collaborative statute assigning to different actors, businesses, governments, civil society, investors and consumers a crucial role in ending modern slavery. The new bill introduces reporting obligations according to specified criteria but does not include financial penalties for companies that fail to report. The intention behind the legislation is to increase the power of public scrutiny, to create broader public awareness and understanding of the risks associated with current patterns of consumption and supply.¹⁸⁹ Simultaneously by increasing transparency, it “will create a level playing field for large businesses to disclose their modern slavery risks” and will “also drive a “race to the top” as reporting entities compete for market funding and investor and consumer support.”¹⁹⁰ On the other hand, the “Businesses that fail to take action will be penalized by the market and consumers and severely tarnish their reputations.”¹⁹¹ This means, in general, and in a positive view, that this mechanism will increase consumer confidence in companies by approaching and improving business relationships with local communities.

¹⁸⁷ Australian Government, ‘Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities’ (2018) 10 para. 17 <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>> accessed 12 July 2020.

¹⁸⁸ Australian Parliament, ‘Modern Slavery Act 2018’ (2018) <<https://www.legislation.gov.au/Details/C2018A00153>> accessed 12 July 2020.

¹⁸⁹ Business & Human Rights Resource Centre, ‘Australia: Government introduces Modern Slavery Bill 2018 to Parliament’ <<https://www.business-humanrights.org/en/australia-government-introduces-modern-slavery-bill-2018-to-parliament>> accessed 12 July 2020.

¹⁹⁰ Australian Parliament, ‘Modern Slavery Bill 2018, Second Reading, Hon Alex Hawke’ (Mitchell—Assistant Minister for Home Affairs) (28 June 2018) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/429b4c41-4a6c-465d-a259-05e8252b994d/0037%22>> accessed 13 July 2020.

¹⁹¹ *ibid.*

In this model, it is up to companies to define themselves as good examples of consistent practices that society should value and reward. Hence, companies that make a difference in business and human rights should be recognized as models to be followed and, for example, receive public awards for doing so, as a way of society promoting best practices.¹⁹² One can argue that companies are only doing their shared part in the community and should not be awarded. The truth is that hopefully, we are all doing our shared part. However, if the intent is that companies decide more in line with human rights, rewarding a company that consistently does so, it is probably an effective way to influence other companies to act accordingly. This means that the recognition of good examples among their peers can lead companies to be driven to achieve the same standards of conduct as their competitors, and probably with even more success than the imposition of many regulatory models.

The Australian law under consideration establishes that the data in public reports submitted by companies (modern slavery statements) will be consolidated into a single report produced by government authorities. This annual report presented by the Minister is intended to provide information on the implementation of the Modern Slavery Act 2018 and should contain “an overview of compliance by entities with this Act” and moreover “the identification of best practice modern slavery reporting.”¹⁹³

Furthermore, the Commonwealth Modern Slavery Act 2018¹⁹⁴ proposes that civil society must take responsibility for defining actions and strategies to raise awareness in society itself and in companies that have a direct impact on populations or their natural resources. Under the Australian Modern Slavery Act, the subject topic is modern slavery in particular, yet this form of regulation can be extended to human rights more broadly. Above and beyond, civil society should promote its engagement with business and government authorities to share expertise and enhance accountability.

Though, companies' requirement to report on their human rights impacts in periodic reports is no longer new. Indeed, the 2011 OECD Guidelines for Multinational Enterprises dedicate a section to transparency, stating that companies should ensure the disclosure of accurate information on

¹⁹² International awards on Business and Human Rights have been given to organizations or personalities who have done fabulous work in protecting human rights. However, one can question if these awards can have little impact on the business world as a competitor's award would inevitably have. About the awards more details on <https://www.humanrightsbusinessaward.org/award-recipient/al-haq/>

¹⁹³ Article 23A Modern Slavery Act 2018 (n 188).

¹⁹⁴ Australian Government, (n 187) 11.

material issues concerning their activities as well as foreseeable risk factors. Furthermore, since 2011, the United Nations Guiding Principles on Business and Human Rights call on companies to report on their impacts, especially in response to stakeholder concerns (Principle 21), and to ensure that victims of damage seeking redress have a specific right of access to information (Principle 31). However, it seems that these models focus mainly on the obligation to respond to what is imposed on companies, whereas it seems to be strongly underlying an idea of permanent and imminent risk of negative business impact on human rights. Although the change in the corporate cultural paradigm may happen in this way, it may be recognized as unfeasible since its focus is on not failing and protecting, instead of focusing efforts on defining policies of improvement.

The advantage of a polycentric model is that without dispensing the state regulation, it deepens society's influence in the process of changing business decisions, and simultaneously it makes society itself aware of the human rights issues.¹⁹⁵ In this sense, a civil society that is aware of and active in the fundamental questions that concern their population can be seen as the resource that complements the state's and other stakeholders' actions in maintaining corporate regulation, awareness and reputation. This model can prove to be advantageous and valuable in ensuring that international human rights law is effective in situations where there is a temporary or lasting governance gap.

However, one might ask whether this model is achievable in all societies? And what are the main difficulties that civil society can face with it? To assess the feasibility of any civil society involvement and actions proposed above, it is necessary to identify the main challenges and drawbacks that can be anticipated and discussed below.

3.2.1. It is not my issue!

How many individuals in civil society are willing to actively participate in a global business awareness process and for the benefit of a positive human rights impact in their community? The risk of abstention can be high. Citizens can argue that companies exclusively created the existing negative impacts on human rights and that it should be the companies to resolve it and the states

¹⁹⁵ Jolyon Ford, 'Can consumers and market actors 'regulate' corporate reporting on Modern Slavery risk?' (Business & Human Rights Resource Centre) <<https://www.business-humanrights.org/en/can-consumers-and-market-actors-%E2%80%98regulate%E2%80%99-corporate-reporting-on-modern-slavery-risk>> accessed 14 July 2020.

above their jurisdiction that should implement the respective regulatory framework and control mechanisms.

In everyday life, people are focused on their personal or professional problems and few are willing to participate more actively in these transformation movements, even if they value them and would like to be more participative in it. In this sense, it seems important, for example, to support data and information dissemination models that require the minimum time available to civil society individuals in assigning reputational value to companies.

3.2.2. Out of sight, out of mind!

What does any European breakfast have to do with the water shortage in Chile? When a European citizen is eating avocados for breakfast because they are healthy and giving him or her energy for a day of work, he or she probably will not know that the most significant production of this fruit is generating water shortages for Chilean population and can lead to kidnappings and extortions of the inhabitants of Mexico.¹⁹⁶

In this regard, how can civil society be empowered to influence the fulfillment of human rights in communities far away from their own? In response to this question, two ways seem feasible: (i) by regulating domestic companies in their operation abroad, requiring them to meet the same national standards of respect for human rights when acting in communities far from their decision-making centre, and (ii) promoting awareness in civil society on the impact of their consumption, encouraging the quest to know better the origin of the products they consume and the conditions under which they are produced.

Moreover, today's global industry must change the paradigm and ensure fair trade at fair prices between companies in developed countries and producers in developing countries, and the conscious and sustained demand of each of the consumers is vital for that shift to happen.

¹⁹⁶ 'Avocado - a positive superfood trend?' (DW Documentary May 2018) <<https://www.youtube.com/watch?v=05oMsK0-jjA>> accessed 16 July 2020; 'Mexico avocado war: Cartel seeks to control fruit trade' (December 2019) <<https://www.youtube.com/watch?v=KOGxN1tbsU8>> accessed 16 July 2020.

3.2.3. Access to data

Measurement initiatives¹⁹⁷ on business and human rights have proliferated in recent years, where “key elements of the corporate responsibility to respect human rights have been internalized by international organizations, standard-setting bodies, governments, multi-stakeholder initiatives, civil society organizations and business enterprises themselves.”¹⁹⁸

However, some questions arise on this matter, namely if the data collected is quantifiable and connectable? Moreover, the question is if it allows constant monitoring of the business conduct? To be quantifiable and interrelated and to assess each enterprise's reputation improvement, sector of activity, or local economy, it will be essential to standardize the tools of this data collection, especially the applied evaluation criteria. It must be known that the various sectors differ enormously in their vulnerability or sensitivity to reputation risk. Yet, it must be clear and easily understandable for civil society which parameters of companies' respect for human rights are assessed in each effort to provide more transparency for the society. Furthermore, what value should individuals give to each of the produced indicators? On which ones they will base their opinion about a particular company and assign it a more or less positive reputational value. The OHCHR has produced an extensive and very comprehensive guide to measure and implement human rights indicators, but it is not only focused on business relations.¹⁹⁹ The indicators related to the human rights conduct of companies will have their unique synchronicity and the specific objective of measuring their reputation in public opinion.

As regards to the most effective instruments to be employed in this process of giving power to civil society, use can be made of those already widely adopted to compare states' human rights practices, the “standard-based measures and surveys so far neglected by the business and human rights community, might also represent a fruitful strategy.”²⁰⁰ Using the same model might have advantages since “providing clear benchmarks by means of which other social actors - for

¹⁹⁷ Damiano de Felice, ‘Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities’ (Human Rights Quarterly 37 (2015) 511–555) 13–17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423305> accessed 10 April 2020.

¹⁹⁸ *ibid* 3.

¹⁹⁹ OHCHR, ‘Human Rights Indicators, A Guide to Measurement and Implementation’ (2012) <https://www.ohchr.org/documents/publications/human_rights_indicators_en.pdf> accessed 15 July 2020.

²⁰⁰ De Felice (n 197) 46.

example, civil society, workers' organizations, investors, and consumers - can hold both to account [governments and business enterprises]”²⁰¹

It seems to be crucial to ensure impartiality in obtaining data and processing it, perhaps by opting for anonymous questionnaires, but in which it is possible to identify any litigious relationship or any direct interest in the company under analysis by the respondent in a way to ensure there is no bias in the results. Finally, it is necessary to consider that although civil society has many challenges in obtaining data that allow individuals to define companies' reputational value, this search must not perish.

On the other hand, if companies' reputation in public opinion is strongly linked to the existence and repercussions of market reports, they must be disclosed clearly and concisely and individuals must be allowed to develop and proclaim their judgments regarding the company's reputation through their independent analysis of the data presented.

3.2.4. Will civil society take action?

Despite civil society's interest in promoting human rights and the understanding that raising their awareness will involve monitoring companies in line with what individuals demand, it is necessary to beware of the "attitude-behavior gap." This means that thinking good does not mean doing well and "that even self-declared ethical consumers do not necessarily change their behaviors."²⁰² Although information and means of general awareness about business and human rights compliance and corporate reputations are made available to individuals in civil society, this may not signify that such individuals decide to act accordingly.

An aggravating factor will come to consumers' minds if the state itself does not respect the reputation of companies in the market and establish business partnerships with those. In this scenario, how can society fight for and demand respect for a right from companies if the state itself does not protect it or sometimes even respects it?

Taking the example above, consumers knowing that avocado production affects people on the other side of the world does not mean that Europeans stop eating them for breakfast.

²⁰¹ Ruggie, (n 177) 464.

²⁰² Ford, (n 195).

Thus, society's involvement in raising awareness of corporate decisions' toward human rights can convey "broad assumptions and potentially inconvenient truths [which] raise the question of whether this 'outsourced regulation' model relies too heavily on the existence of a critical mass of well informed and highly engaged consumers."²⁰³

As the philosopher Thomas Reid argued back in the 18th century, a chain (society) is as strong as its weakest element.²⁰⁴ If business compliance with human rights remains dependent on the awareness of society as a whole, it will advance at the pace of the slowest individual in that society. Is this feasible in these times and with the pressing needs for respect and protection of human rights?

Besides, there is always a group of people who base their decisions less on their own opinions and who are more susceptible to be influenced. The groups of influencers, namely the social influencers, play an essential role in the awareness of society, and therefore, it is crucial to become aware of their potential instrumentalization by business marketing. Therefore, it must be ensured that influencers are involved in the main questions regarding human rights until each individual develops a critical spirit and, consequently, can be able to value and repute companies' actions concerning human rights, independently and impartially.

So far, we have looked at society as a group of individuals and assessed how this group behaves and how it can influence companies to respect and protect human rights. Henceforth, the purpose is to focus on consumers as conscious, informed and demanding individual agents who influence companies and ultimately form a more human rights conscious and articulated society.

3.3.Increase consumer's needs as a way to increase Business' Human Rights compliance

In the survey results analysis that was carried out for this research and presented in Chapter 2, it was concluded that for most respondents, companies should concentrate on making profit as a primary goal. However, respondents have attached greater importance to the objectives linked to the development of the economy in general than to customer satisfaction. This conclusion may

²⁰³ Ford, (n 195).

²⁰⁴ Thomas Reid, 'Essays on the Intellectual Powers of Man' (Cambridge University Press, 1785) 41.

imply that the consumers surveyed might be more demanding with society's needs than their interests.

Notwithstanding, as mentioned above, consumers are, and furthermore, see themselves as, a powerful and catalytic force to change business behavior. Their influence on companies is also significant because customers/consumers tend to be the main focus of the company in its business. Furthermore, consumers are human rights holders and, indeed, defenders of those, and are therefore particularly aware of the potential disregard of their rights. In other words, customers are those who can bring together the two main common interests in this research topic and who link companies and human rights and even human rights institutions.

As represented in the figure below, consumers are an external element that “can be used” as the linked force to business and the bridge of contact to the previous and various institutions that advocate human rights, especially concerning business conduct. Besides, consumers as individuals who are part of society are natural promoters of its awareness, particularly on human rights issues.

In conclusion, customers have the human rights driver, the awareness promotion role on societies, the human rights defenders' institutions' accurate support and foremost, the influence force towards companies.

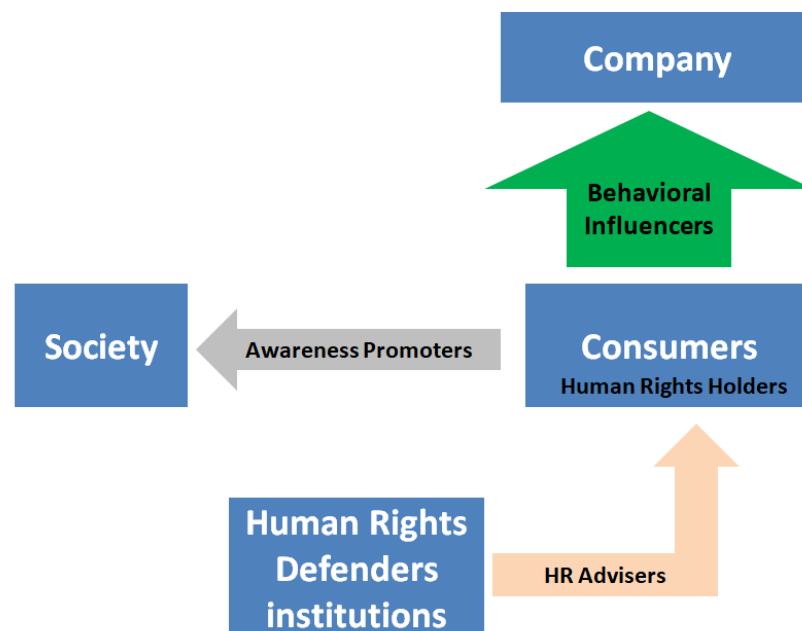


Figure 11: Consumer as the center of business' human rights compliance solution

Hence, with the consumer as the center of a solution for business and human rights compliance, this research takes the risk to present a new paradigm into the mainstream day-by-day practice. Furthermore, the direction proposed aims to promote advances in this topic's conversation, foremost by offering a model that is expected to stimulate new ideas and debates. The final intentions in exploring this path and defining a new approach are i) to motivate consumers to look at the impact of their consumption while still eating avocado for breakfast. ii) encourage human rights organizations to embark on new ways of persuading companies to support human rights. And ultimately, iii) to inspire companies to look innovatively at human rights without losing sight of their economic objectives.

Indeed, the company's managers would love to increase their value proposition to customers, promoting increased sales, revenues, shareholders value and market share. However, an important issue arises: How can all these goals be attainable by simultaneously increasing the company's delivery and protection of human rights?

The theory to be presented and which aims to give a positive answer to the above question, was inspired and developed from Alain de Botton's idea that businesses (and society, at large) now must move up the Maslow pyramid of needs²⁰⁵ towards what Alain de Botton's calls 'the deeper promise.'²⁰⁶

In order to contextualize Alain de Botton's idea with the theme presented in this chapter, a part of the content of his lecture on "advertising, branding, purpose and the pursuit of happiness"²⁰⁷ should be highlighted. In his presentation, In his presentation, Alain de Botton says he was called by the CEO of American Airbnb to help understand how the company could improve customer satisfaction because it was at lower levels than expected. The Airbnb managers had already concluded that their customers' low satisfaction was not directly due to the conditions of the rooms or breakfast they contracted through this company. Customer dissatisfaction could be

²⁰⁵ Maslow's hierarchy of needs is a motivational theory in psychology that comprises a model of five levels of human needs, often represented as hierarchical levels within a pyramid. The lower needs in the hierarchy must be satisfied before individuals seek the satisfaction of higher needs. Abraham H. Maslow, 'A theory of human motivation' (Psychological Review, 50(4) 1943) 370–396 <<https://psycnet.apa.org/record/1943-03751-001>> accessed 10 June 2020.

²⁰⁶ Alain de Botton, 'Alain de Botton's great talk on the philosophy of business and technology: the pursuit of wisdom' (GERD 2016) <<https://www.futuristgerd.com/2016/01/watch-alain-de-bottons-great-talk-on-the-philosophy-of-business-and-technology-the-pursuit-of-wisdom/>> accessed 20 June 2020.

²⁰⁷ *ibid.*

linked to the assessment of the overall travel experience, directly associated with the moments' customers had (or did not have) during their stay. Thus, Alain de Botton expressed that the solution to increasing customer satisfaction was for companies to redefine their offer to meet new demands since consumers themselves were already targeting other needs, namely those identified more at the top of the Maslow pyramid.

Although the new consumers' demandings are not transversal to all customers or all companies around the world, it seems that this presumption can be sustained to those regular clients of companies that have a transnational operation and are more commonly associated with human rights disrespect. However, this challenge will be analyzed in more detail in a later heading.

Meanwhile, the small step forward proposed ahead underlies this idea that clients/consumers are more demanding and aim to satisfy fewer basic and more important needs, thus serving as the basis for the theoretical proposal that will follow.

3.3.1. Maslow's pyramid of needs and the consumer's behavior

Abraham Maslow's "hierarchy of needs" was first published in 1943, where was presented one of the most legendary ideas in the history of psychology: Human actions are motivated by an innate desire to satisfy needs ranging from fundamental needs to the most meaningful. Those needs are distributed on a five-level pyramid and in ascending order are identified as physiological needs, security needs, the needs of love, the needs of esteem, and the need for self-actualization as the coronal of that geometrical shape.²⁰⁸

Maslow's model proposes the notion of necessity (the deprivation of certain satisfactions) as a source of energy of the motivations existing within people. Realizing that numerous patterns of fulfillment can exist, "Maslow's theory makes possible the understanding of the human being and his needs and, more than this, believes in the potential of realization of every human being through the satisfaction of his needs."²⁰⁹

²⁰⁸ Maslow, (n 205).

²⁰⁹ Maia De Oliveira, Rosa Maria y Figueira, Agostinho, 'Solidão, tecnologia e inversão de valores com base na Pirâmide de Maslow' (2017) < <https://www.aacademica.org/000-067/700.pdf> > accessed 17 July 2020.

Nowadays, and for a while now, the business marketing has familiarized itself with this model and outlined sales strategies in psychological factors that interfere with consumer purchasing behavior, and more or less aligned with the needs described in Maslow's hierarchy.²¹⁰

Hence, if business marketing can influence consumer behavior by invoking the Maslow's theory of needs, the opposite may also come true. Consumers can aim to satisfy their higher needs, towards sense-making and self-actualization, and to influence the business offerings. From this perspective and in the foreseeable future Maslow's "conceptualization of the hierarchy of needs and the self-actualizing individual seem, especially relevant as societies develop past the point where the material needs of the population are satisfied and other needs become more prominent."²¹¹

The following is an analysis of how consumers would pace this upward trajectory and how it can lead to greater compliance by companies with human rights.

3.3.2. Less commodity more self-fulfillment

Nowadays, consumers are more conscious, informed and demanding individuals who are no longer satisfied with the value that company's deliver that merely meets their basic needs. This tendency can be seen in the modern demands of consumers who look for broader experiences, self-fulfillment and not so often companies' human rights requirements.

Therefore, the purpose is to identify the various levels of satisfaction of consumers' needs according to the stages proposed by Maslow's theory by looking at coffee consumption.

For instance, consumers will increasingly require companies to deliver products or services that meet, not only, their basic needs (coffee as usual). Hence, the satisfaction of the second-level Maslow pyramid, security, can be reflected in the quality of products and services. Those must ensure straight and full compliance of internationally recognized standards value along the whole business chain. Meanwhile, coffee gives you the sense of alertness and security that you rely on

²¹⁰ Magali Costa Guimarães, 'Maslow e Marketing – para além da hierarquia das necessidades' (September 2001) <https://www.researchgate.net/profile/Magali_Guimaraes2/publication/268361509_Maslow_e_Marketing_-_para_além_da_hierarquia_das_necessidades/links/54d39e780cf28e0697288119.pdf> accessed 15 July 2020.

²¹¹ George Brooker, 'An Instrument to Measure Consumer Self-Actualization' (NA - Advances in Consumer Research Volume 02, eds. Mary Jane Schlinger, Ann Abor, MI : Association for Consumer Research 563-576 1975).

to kick start the day with the assurance that you will get things done.²¹² The delivery of a quality product or service tends to promote customer satisfaction and well-being reciprocated through customer's loyalty. The company that is transparent in collecting and storing coffee and that delivers the product consistently has more chances to retain a customer and grow the amount metric on average customer loyalty. This can mean that customers will be promoting their services or products to friends and relatives.²¹³ Besides, you drink coffee to connect with others as a social bond.²¹⁴

Similarly, an individual activist on environmental issues may recognize that the company's coffee sales aim to satisfy his or her usual needs. However, the company's activities may be based on environmental awareness. In its conduct, the company provides value not only to the consumer but also to other entities that the individual values and therefore has a positive impact on the people with whom the customer relates. Moreover, "You often boost your self confidence by holding cups printed with Starbucks logo."²¹⁵

Ultimately, "the self-actualizing person described by Maslow is a unique amalgam of hedonist and altruist, feeler and actor, detached and involved individual, judge of human nature and acceptor of human frailty."²¹⁶ Thus, at the same time that "coffee creates a moment and space for you to appreciate good things in life"²¹⁷ you are also more likely to consume products and services that increased social value. That is the reason why companies should reformulate their offer to leverage the same values (self-fulfillment and social value) by ensuring sustainable cultivation, processing, and production of coffee.²¹⁸

As presented above, there is a practical way to leverage consumers' search for more fulfilling needs and how companies must keep pace.

²¹² Isabelle Thye, 'When Coffee Meets Maslow. Why do we need coffee?' (2014) < <https://medium.com/simply-coffee/when-coffee-meets-maslow-84d9e6bdd4ec#:~:text=You%20have%20fulfilled%20the%20needs,appreciate%20good%20things%20in%20life.>> accessed 13 July 2020.

²¹³ Eric Almquist and others, 'Delivering What Consumers Really Value' (2018) 11 <https://www.bain.com/contentassets/8824d432de2441378bfc2943ad3f4d40/bain_brief-delivering_what_consumers_really_value.pdf> accessed 11 July 2020.

²¹⁴ Thye, (n 212).

²¹⁵ Thye, (n 212).

²¹⁶ Brooker, (n 211).

²¹⁷ Thye, (n 212).

²¹⁸ Coffee N Caffeine, 'Coffee: Growing, Processing, Sustainable Production' (2001) <https://www.academia.edu/36136125/Coffee_Growing_Processing_Sustainable_Production> accessed 11 July 2020.

However, the reality is that even today companies are globally focused on honoring the needs of customers at the base of the Maslow pyramid (the needs to have)²¹⁹ and seem disconnected from the attempt to meet the needs defined on the higher slopes of this pyramid (the needs to be.)²²⁰

The future, however, seems crystal clear. Those companies must reposition themselves in relation to the value delivered to customers and start climbing towards customer sense-making and self-actualization fulfillment, as represented in the figure below. This repositioning of companies was also rooted in the hope expressed by Maslow that “business could in time learn to make more of their profits from addressing not only our basic needs but also - and as importantly - our higher spiritual and psychological ones as well. That would be truly enlightened capitalism.”²²¹



Figure 12: Business focus on Maslow's hierarchy of needs²²²

²¹⁹ David Ward and Marta Lasen, 'An Overview of Needs Theories behind Consumerism' (European School of Economics, Munich Personal RePEc Archive, 2009) 5 <https://mpa.ub.uni-muenchen.de/13090/1/MPRA_paper_13090.pdf> accessed 11 July 2020.

²²⁰ *ibid.*

²²¹ The School of Life, 'Why Maslow's Hierarchy Of Needs Matters' (10 April 2019) <<https://www.youtube.com/watch?v=L0PKWTta7IU>> accessed 25 July 2020.

²²² Botton, (n 206).

In conclusion, consumers and businesses must adjust expectations and, above all, actions for the well-being and development of the individual and, ultimately, of society.

However, it is essential to realize that all businesses do not need to fight immediately for the highest level of customer needs. The theory aims to provide a framework for understanding and to categorize the potential value associated with companies that increasingly satisfy the highest needs of consumers (self-fulfillment) versus basic needs (commodity), giving them a competitive advantage. Depending on the peculiarities of the business sector, this path may be facilitated or even accelerated.

Indeed, basic needs are not yet regularly met by the majority of the world's population, and the proposed model does not ignore this reality. Progress in the hierarchy of needs, as proposed, is an individual process, although sociologically influenced. In this sense, if privileged consumers have high expectations in the chain of needs, they will directly appeal to businesses to provide high value, which corresponds above all to increase the satisfaction of social needs. In this way, a more demanding consumer may be acting indirectly in favor of those who are still at the basic or intermediate levels of satisfaction of needs.

3.3.3. Where Maslow meets Business' Human Rights compliance

The value proposition model in this research explores the link between consumers, the Maslow hierarchy of needs and human rights from two distinct perspectives.

First, the theory underlines the concept that "human rights underpin Maslow's hierarchy of needs."²²³ This means that "rights are related to concepts of self-esteem,"²²⁴ and that "without human rights, human beings cannot function at their full potential."²²⁵ Thus, when companies drive to fulfill consumer's self-actualization needs, they are directly promoting the realization of their human rights. Secondly, as it was already identified above, the satisfaction of the highest needs is also related to companies' delivery of social value, which is intrinsically inseparable from human rights.

²²³ Amnesty International Australia, 'Human Rights Online Teaching Guide' (2007) 6, <<https://www.amnesty.org/download/Documents/HRELibrary/sec010062007eng.pdf>> accessed 14 July 2020.

²²⁴ *ibid.*

²²⁵ *ibid.*

In this sense, by ensuring that consumer's rights and needs are protected and satisfied in an interrelated and indivisible way, companies will increase their human rights performance. In other words, if consumers seek broader satisfaction of their needs by climbing the Maslow pyramid, they will compel companies to deepen higher promises of human rights value on their products and services.

Supposing that a client wants to buy an avocado at a fair price for his breakfast (satisfaction of an immediate need), but wanting at the same time a guarantee of its quality, also meaning that the production did not affect population or environment and that the company has an impact strategy (satisfaction of the needs at the top of the hierarchy established by Maslow.) Thus, the avocado supplier choice will depend not only on the price offered but increasingly more on the range of needs and values offered by the companies. With their offer, companies transport individuals to the highest levels of personal satisfaction of needs. The companies that can best meet their needs will ensure a larger market share. In this proposal, companies will be able to gain more loyalty and customer protection, offering the maximum value following consumer expectations, which should be very high in favor of human rights.

This is the field that can open new perspectives, also for human rights institutions. For example, the NGO sector can widely advise consumers or establish non-commercial partnerships with companies to recommend where the high values lie and how they can be achieved, allowing this sector to continue to grow rapidly, both in terms of size and positive influence.

Once the objective is set, it remains to be seen how companies can join and implement market strategies to provide more value by meeting the highest consumer needs and acting more in conformity with human rights.

3.3.4. The Elements of ValueSM²²⁶ proposal

The path to be proposed was already half mapped out. After three decades of experience doing consumer research and observation for corporate clients Eric Almquist, John Senior and Nicolas Bloch presented the model “Elements of Value.” It is rooted in Maslow’s model, yet “extends Maslow’s hierarchy of needs by focusing on people as consumers - describing their behavior as it relates to products and services.”²²⁷

The proposal featured by Bain & Company assumes that “customers evaluate products or services based on price and perceive value. Companies tend to focus on price. It is easier to understand and manage. Value is harder to define or measure. Yet knowing what consumers value is critical when it comes to improving offerings, or creating new ones.”²²⁸

The concept originated in the exact attempt to create a framework and structure about what consumer’s value. However, the authors noticed a trend: companies were delivering many aspects of value - beyond financial value - that were critically important to customers.²²⁹ The research concludes with the definition of 30 fundamental attributes (values), derived from scores of quantitative and qualitative customer studies.²³⁰ The elements of value on the business-to-consumer (B2C) approach²³¹ are arranged in a hierarchical way that reflects Maslow’s pyramid of needs with the more complex elements of value at the top. The 30 B2C Elements of Value fall into four categories that from bottom to top are: functional, emotional, life-changing, and social impact. Some elements are more inward-looking, addressing mainly the personal needs of consumers and others invoke their relationship with society, culminating in almost exclusively social features,²³² as represented in the figure below.

²²⁶ Bain & Company, ‘Elements of ValueSM’ <<https://media.bain.com/elements-of-value/>> accessed 14 July 2020.

²²⁷ Eric Almquist, John Senior and Nicolas Bloch, ‘The Elements of Value’ (Harvard Business Review, September 2016) <<https://hbr.org/2016/09/the-elements-of-value#comment-section>> accessed 27 July 2020.

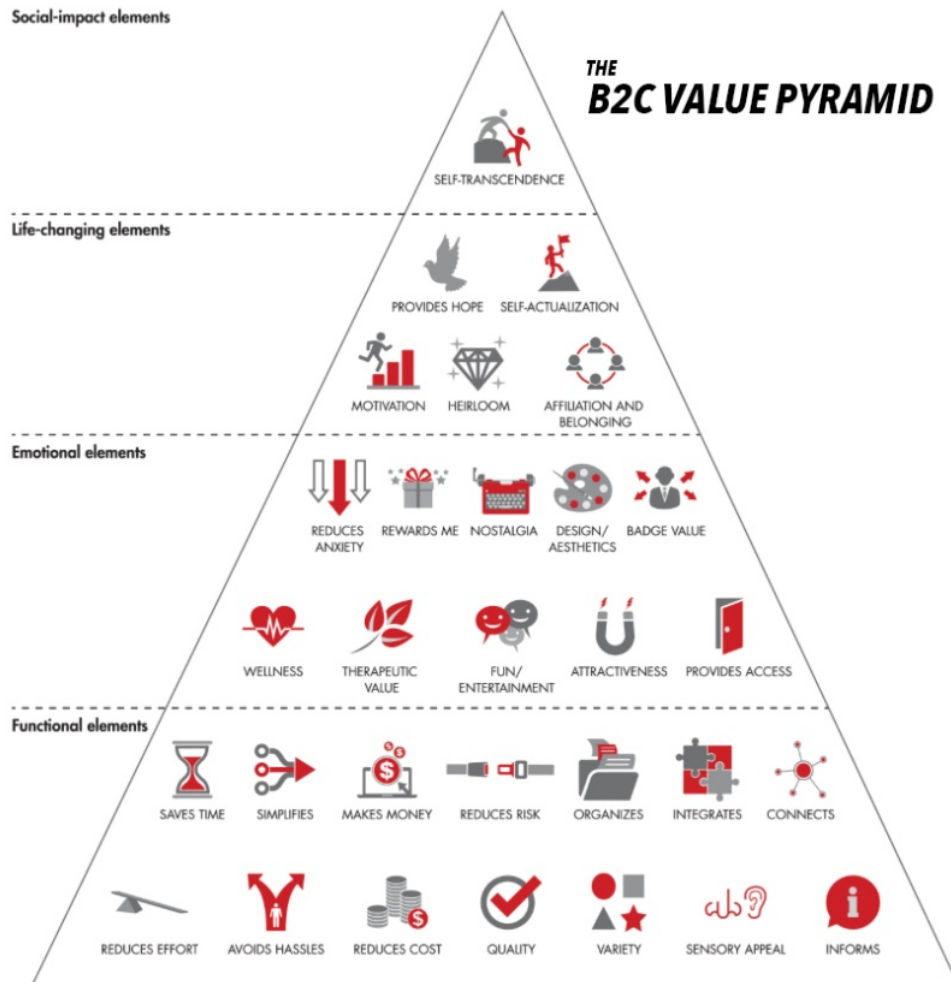
²²⁸ Bain & Company, (n 226).

²²⁹ Voice of Value, ‘Episode 3: Maslow’s Hierarchy and Elements of Value’ (Learning Center, Podcast) <<https://ecosystems.us/elements-of-value/>> accessed 25 July 2020.

²³⁰ Almquist and others (n 227).

²³¹ In addition to the scale of values for customers (B2C) which will be focus on in this study, the model presents in the same pyramid format other values identified for the business-to-business relationship (B2B). More details in <https://www.bain.com/insights/the-b2b-elements-of-value-hbr/>

²³² Almquist and others (n 227).



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Figure 13: B2C Elements of Value Pyramid

The proposal defined that “the most basic needs are functional. [Yet] Consumers also value products that meet their emotional needs. Some products have value because they are life changing and some even change the world.”²³³ Not surprisingly, with the lens of holistic value and the broader challenge of intangibles values approach, this proposal defines that “at the top of the pyramid are the inspirational elements of value: those that improve the customer’s *vision* of the future, provide *hope* for the future of the organization or the individual buyers, or enhance a

²³³ Bain & Company, (n 226).

company's *social responsibility*.”²³⁴ The more emotional elements of value, as the less transactional aspects, have been challenging to quantify and, therefore, satisfy by companies.²³⁵

Nevertheless, the elements of value research found that how many more elements “a company is able to master, the greater the returns in customer loyalty and advocacy”²³⁶ and revenues soar. Moreover, further results analysis of the application of this model has led to the conclusion that:

“[C]ompanies with high scores (8/10 or higher) on 4 elements had an average of 3 times more customer advocacy than companies with only one high score on a given element - and 20 times higher advocacy than companies with no high scores. Interestingly, quality is the element that impacts customer advocacy more than any other element across all industries studied.”²³⁷

Understanding this can help companies to assess the value elements that are currently delivered in their products and services and, in consequence, to look at the elements of the value pyramid and identify what values they can add to those by “improv[ing] their offerings, creat[ing] new ones or identify gaps that competitors might try to exploit.”²³⁸

If companies want to stay relevant, they must “look at social-impact and inspirational values because the market, the customers demand it,” mostly the millennials, which as they “increase their buying power, we see them bringing their values to the table.”²³⁹

Consumers in general, yet millennials in particular, place increasing emphasis on softer aspects of value. Feelings like the sense of help and the community's connection are essential for them, and it is all about the experience.²⁴⁰ For those consumers, the increased feeling of self-esteem and appreciation is also taken into account when buying a product, so it is essential to know that they contribute to increasing the value of society and raising awareness of human rights in companies.

²³⁴ Christian Sarkar, ‘The Elements of Value – An Interview with Jamie Cleghorn’ (The Marketing Journal 11 April 2018) <<https://www.marketingjournal.org/the-elements-of-value-an-interview-with-jamie-cleghorn/>> accessed 20 July 2020.

²³⁵ *ibid.*

²³⁶ Theo Winter, ‘The 30 Elements of Value (A New Model By Bain & Company)’ (October 2016) <[https://www.dtsydney.com/blog/the_30_elements_of_value_\(a_new_model_by_bain_and_company\)](https://www.dtsydney.com/blog/the_30_elements_of_value_(a_new_model_by_bain_and_company))> accessed 19 July 2020.

²³⁷ Winter, (n 236).

²³⁸ Bain & Company, (n 226).

²³⁹ Sarkar, ‘An Interview with Jamie Cleghorn’ (n 234)

²⁴⁰ Voice of Value, (n 229).

Nevertheless, self-transcendence is still an underrepresented element value in the most business portfolio. Giving back to society and contribute to sustainability unveils a landscape of potential growth for businesses if integrated into product value propositions.²⁴¹ However, it is important to clarify that companies are not asked to adopt a broader social responsibility policy. Moreover, they are asked to incorporate human rights into their product design by amplifying the elements of value that satisfy higher needs.

3.3.5. The price drawback

It should now be noted that in order to stand out in the value elements, companies must deliver the value they are willing to deliver, they cannot simply talk about it. Companies have the mindset of seeing value, yet worth can be in multiple and high customer requirements. And certainly, those delivered values should be worth a different price.

A low retail price can usually imply lower production costs, especially in human resources, which can lead to the use of cheap labor and even violations of human rights. However, because purchasing decisions are made by individual's value and thus can be transient and very fluctuating, companies will probably have to downplay on price, at least as the main element of choice, and maintain a recurrent assessment of the most precious elements of value that may be associated with their products and services.

Thus, by increasing the social and human rights values in their portfolio as well as diversifying their products and services, companies can expect higher customer loyalty, greater consumer willingness to try a particular brand, sustained revenue growth, growth in market share, and differentiating itself from its competitors. These are the leading companies' objectives and can be delivered within the elements of the value model approach.²⁴²

Raising awareness of companies for a conscious and humanized movement is also the consumer's role, knowing that the improvement of the lives of those throughout the value chain depends on their demand for the high value of the products and services they purchase.

²⁴¹ Voice of Value, (n 229).

²⁴² Almquist and others, (n 213) 3.

Moreover, what to do in the short term? Meanwhile, managers might ask: Can we add human rights value to our service? Which human right is at risk or can be valued within my product/service?

Companies may begin by questioning their existing customers to identify, as to their products, services, or brands, the company's position on the value elements they are (or are not) delivering.²⁴³

The short-term solution for companies to speed up the compliance process could be creating a new pyramid linking each value element with a human right. However, the simplest and quickest way to integrate human rights values into companies' portfolios is to identify them according to the superior level of the elements of the value pyramid. The values associated with the level of self-transcendence proposed in the Value Elements model can be defined globally, by sector of activity, by transnational operation, by nationality or exclusively for a local company. The important is that they act in favor of vast human rights. Each company must integrate the essential elements related to its activity, which may or may not be cumulative with those of the companies with which it disputes market share.

Interestingly, the values to be identified and the human right to be “cherished” may differ for each company, which will potentially encompass a range of human rights protection. Competition between companies may or may not be part of this process, yet this new paradigm can bring about the competitive model that companies are so used to. The important is to bring human rights intention and creativity despite: How does our value proposition compare with the competition?

3.3.6. Elements of Value as a metric of a company's reputation

Some companies have chosen to steer upwards in their industries by improving the elements that form their core value products or services. For example, “Apple excels on 11 elements in the pyramid, several of them high up, which allows the company to charge premium prices. TOMS excels on four elements, and one of them is self-transcendence, because the company gives away one pair of shoes to needy people for every pair bought by a customer,”²⁴⁴ which helped them,

²⁴³ Almquist and others, (n 227) 9.

²⁴⁴ Almquist and others, (n 227) 7.

without overhauling the products, better satisfy the needs of their customers while differentiating themselves from the competition.²⁴⁵

When assessing customer satisfaction and loyalty to business enterprises, the results suggest that “companies that score high on emotional elements tend to have a higher NPS, on average, than companies that spike only on functional elements.”²⁴⁶ The Net Promoter Score (NPS)²⁴⁷ is a methodology created by Fred Reichheld to measure the degree of consumer loyalty of any company.

The response to the ultimate question: "On a scale of 0 to 10, how much would you recommend Company X to a friend or colleague?" It immediately reveals the impact that the product or service of that company has had on the consumer and the probability that he or she will buy again from that company and even suggest the same purchase to friends. If the score awarded is between 09 and 10, the respondent will be a Promoter client of the company because he had a better life after the beginning of the relationship with the company/product/service/brand. They are loyal customers, offer feedback and are enthusiastic.

A company/product/service/brand client level of promotion can be directly associated with its reputation in the market, but it is only one factor defended by those that support a broader reputation score.²⁴⁸

Regardless of the survey techniques and statistical analysis, the metric, indicators, benchmark tools that are chosen to use, what is to be pointed out is that there must be a way of measuring the company's reputation by assessing the company's top-up value deliver in the first place. “Then leaders can learn what customers truly value and which aspects of an offering merit investment.”²⁴⁹

Thus, through mathematical accuracy, executives can make value, and consequently, human rights a priority in their decision by recognizing that elements of value are a growth opportunity for the companies too. All in one, the consumer demand to meet needs at the top level of

²⁴⁵ Ibid.

²⁴⁶ ibid 6.

²⁴⁷ Frederick F. Reichheld, ‘The One Number You Need to Grow’ (Harvard Business Review, December 2003) <<https://hbr.org/2003/12/the-one-number-you-need-to-grow>> accessed 29 July 2020.

²⁴⁸ Reputation.com, ‘Net Promoter Score vs. Reputation Score: What Are the Differences?’ (The Team at Reputation.com 6 December 2018) <<https://reputation.com/resources/blog/net-promoter-score-vs-reputation-score-what-are-the-differences/>> accessed 29 July 2020.

²⁴⁹ Christian Sarkar, ‘The Elements of Value – An Interview with Jamie Cleghorn’ (The Marketing Journal April 11, 2018) < <https://www.marketingjournal.org/the-elements-of-value-an-interview-with-jamie-cleghorn/>> accessed 4 August 2020.

Maslow's hierarchy of needs or in the Value Elements will cause companies to reshape their products and services in line with these concepts. A simple change to this perspective alone can generate profit, reputation for the company, cost savings, boosting the economy, valuing society and protecting human rights.

3.4. The small step forward to Business' Human Rights Compliance

In general, companies have their mindset in numbers, not only due to the education of their managers who may be mostly from the areas of management and economics but essentially because quantification is the most effective way of measuring something.

The great difficulty for companies concerning human rights can often be to acknowledge where they are and where they have to be. Despite the natural slowness in any change process, a clear and concise indicator can facilitate the perception of reality, policies, and action definitions in favor of the objective to which each company will commit itself. This can also be the missing step to raise business human rights compliance, for now.

We already have the tools to do it, and they just have to be adapted.

During this thesis's development, the author, inspired by the NPS indicator and aiming to give practical meaning to the study, came up with the idea of a human rights score (Human Rights Promoter ScoreTM).²⁵⁰ This project is under development, although it can be considered a 360° evaluation of companies' conduct in favor and as an example in human rights issues. Customers, companies on the supply chain, NGOs, governments, academia, and others more, would bring added value to the index, and the participation by each of these stakeholders would be associated with different degrees of importance in the overall assessment to be defined.

The format is not new for companies, professionals who analyze the data are already deployed, and companies do not need to rely on many more human rights experts, so resistance to change is not expected to be high.

²⁵⁰ Human Rights Promoter ScoreTM was registered by the author of this thesis on the 8 august 2020.

3.5.Conclusions

At the outset, we may think that human rights cannot be analyzed subjectively or cannot be associated with any emotional perspective because it is an area as seen as purely normative. It may seem that it hurts the objectivity of the right to seek added value by working on human rights in market logic. Providing an economic interpretation may not be as objective as expected when the issues are the fundamental rights that uphold human dignity. The idea is not to sell human rights to companies but to find a common way to motivate them to integrate them towards their respect and protection.

Society, in general, has a vital role to play in raising awareness among businesses. Together and in community, we need to define how we want companies to conduct their decisions in the future and what actions we should prioritize to make this happen.

In particular, consumers have the power to drive the social value of products and services offered by companies. They must demand for companies to add new value elements to their offer that can provide not only the satisfaction of basic needs but also an emotional bond, life-change or the valorization of society. That depends exclusively on the awareness, position and attitude of consumers. Companies can promise many things in advertising, but the only thing that matters, in the long run, is delivering value to consumers.

The current business-to-consumer pact should be an inter-help and tolerance agreement that aims to improve every day a little more and a bit better, society as a whole and respect individual human rights.

The path to business compliance with human rights is paved by many actions to be taken together by society, consumers, intergovernmental institutions, governments, human rights defenders, academia, and the business itself. This path can go through attributing reputational value to companies, for example, with indicators such as a Human Rights Promote ScoreTM. Businesses should reform the mechanics' paradigm associated with their activity more or less restricted to provide only a product or service that satisfies a basic need but seeks creative ways to deliver higher values.

The final key finding question that many business executives should be asking themselves and across company departments is: How can we add social and human rights values to our customers' products and services?

Conclusion

“To speed up the progress and go even faster on the set of millennium development goals that we are set as a world, we need to learn from the innovators.”²⁵¹

Melinda Gates

Due Diligence can be briefly understood as the reasonable steps that must be taken by a company to avoid committing human rights offenses. The companies’ responsibility in respecting human rights suggests merely complying with the rules. Thus, human rights will always be regarded by companies as an external element on which they must remain alert and compliance. The problem is that companies are still, nowadays, far from this comply conduct.

The purpose of this thesis was to explore how business can improve their compliance with human rights standards, aiming to ensure that business decisions are made consistently with those rights. We started by analyzing the regulatory framework on business and human rights and understanding why they have not had outstanding results. As a matter of fact, the turn of the millennium was fruitful in initiatives related to business and their respect for human rights, predominantly driven by the United Nations Millennium Declaration, which proposes challenges that must be addressed worldwide and in which businesses must be involved as influential players in society.

Especially since then, we have witnessed the emergence of many initiatives that, through voluntary or mandatory ways, have sought to raise the awareness of companies’ managers on the subject of human rights by demanding their respect and protection. The core initiatives, presented in the figure below and detailed in the first chapter, appear not to be sufficient to compel companies to comply with human rights. These initiatives were also not enough to dissuade international interests from establishing a new business and human rights treaty, which could change the way companies look at this issue.

²⁵¹ Melinda Gates, ‘What nonprofits can learn from Coca-Cola’ (TEDxChange, September 2010) <https://www.ted.com/talks/melinda_gates_what_nonprofits_can_learn_from_coca_cola/up-next?referrer=playlist-social_good_inc> accessed 31 July 2020.

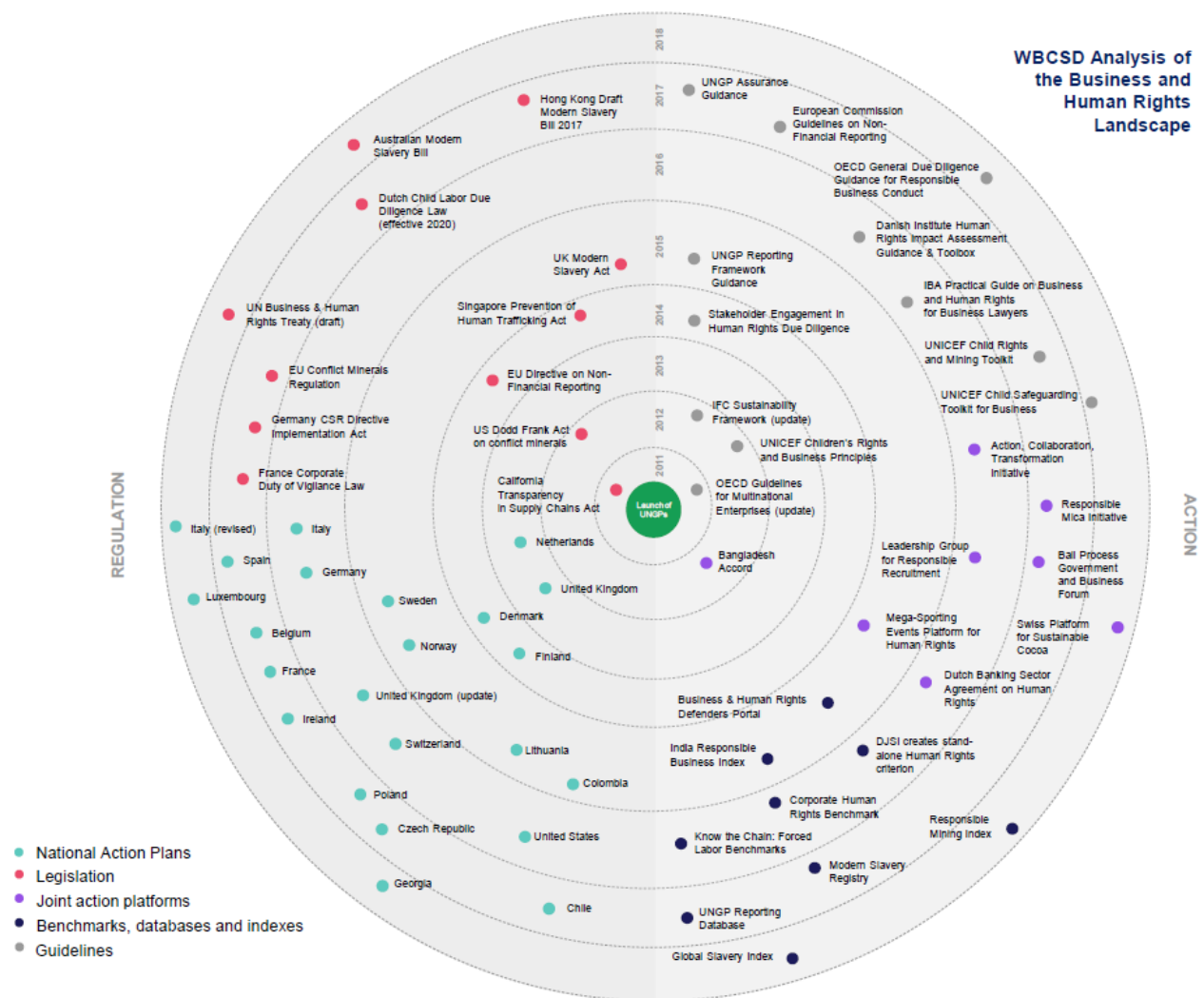


Figure 14: Business' Human Rights compliance initiatives²⁵² (CLICK on each initiative)

²⁵² Dante Pesce, 'Implementing the United Nations Guiding Principles on Business and Human Rights' (Employers Associations of the Caribbean, November 15, 2019) 6 <<http://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145886&token=b4525c2803d4729a7d01862bb26521920a0a4bd6&L=0>> accessed 10 July 2020.

Meanwhile, business awareness of human rights has generally been growing, and many corporate decision-makers already acknowledge that they must express other commitments towards the society that go beyond the simple responsibility to respect human rights.²⁵³

However, we are still far from the dream world where companies fully comply with human rights standards and significantly increase their engagement in society's interests.

The challenge of finding a way to bring business closer to human rights was accepted, yet the problem became how to develop a thesis with practical value and still theoretical meaning.

In a practical sense, it is necessary to realize that companies live in a mindset of focus on numbers and results. Although companies are permissible for theoretical arguments and diligently adhere to regulations, they are not genuinely integrating the human rights point of view in their cultures. In this sense, to impose human rights conformity behavior to businesses will be like placing a prosthesis in a body, which fulfills its function but is not an integrative part of the organism. The same goes for business organizations. If we want to promote a real impact on corporate decisions, we need to appeal to their way of thinking and present models of compliance with human rights aligned with the way managers decide that fit their objectives and, therefore, can be integrated transversally into companies. In pursuing new narratives that could be integrated into the corporate culture that increase human rights compliance, the challenge was to perceive which practical framework could be more useful.

The approach started by collecting opinions through the form of a survey. Real-time data is an effective way to know how the current situation looks and then define the path that leads us to the aspired goal. Moreover, becoming aware of how individuals think and act today concerning business and human rights has been a useful method to value which way to set for future compliance and which forces or impact vectors may have the most influence as catalysts in this demand for change.

Based on the survey responses, it was acknowledged that only 10% of respondents are still thoroughly skeptical and distrustful of companies' human rights actions. The hope lies with the 90% of potential clients of companies who conceive and support the concept of respectful and responsible business conduct concerning human rights.

²⁵³ James O'Toole, *The Enlightened Capitalists: cautionary tales of business pioneers who tried to do well by doing good* (Harper Business. Kindle Edition).

In line with the theories of Milton Friedman and Elaine Sternberg²⁵⁴, the respondents argued that profit would continue to be the main objective of companies. However, and supporting Surya Deva's arguments²⁵⁵, the inquiries stated that profitability has to be balanced with other business purposes towards society exponentially aligned with human rights and, we add, with the goals proposed by the UN for this millennium.

Companies' reputation has been identified as the main driver that can successfully impact the awareness of business decision-makers and drive the shift towards higher human rights standards on companies. Respondents attached less importance as catalysts of change to regulatory, external control factors in general, and even to the economic benefits in particular. In this view, based on economic benefits, a business case is no longer the only answer and strong persuasive argument for business' human rights compliance. Awareness of human rights and especially business reputation about these rights have been identified in this research as the way forward compliancy. Thus, the force outside business decision administrations that can act as catalysts for change, and that we have proposed to identify in this research, is in the individual's hands. This influence power should be increased in society at large, where employees, consumers and human rights advocates can be the main protagonists. The question remained as to how these actors could play their role in this stage of change.

One of the possible answers came from Australia's resolution adopted in 2018 concerning modern slavery combat. In an integrative approach respecting all subjects in a community, the Australian government presented a regulation that simultaneously enhances companies' compliance and increases the awareness and involvement of society on the issue. The obligation of companies to report the potential negative impacts of their activities, their publications and their public commitments to combat modern slavery are instruments of control that do not depend exclusively on the government but are transversal to society. In this way, the company's reputation as a result of their actions against modern slavery becomes a factor that weighs on consumers' purchasing decisions. Thus, as we defended in chapter 3, this format can be used as a crossover to all human rights if it can be ensured a perspective of highlighting good business practices and good examples of human rights governance that will act as incentives for change.

²⁵⁴ (n 1).

²⁵⁵ (n 6).

Otherwise, if we are going to deposit the same compulsory record in companies, we may have the same unconvincing result of the regulations implemented so far.

The second answer takes into account precisely the idea of conscious purchasing decisions that can thrive the relationship of companies with human rights if consumers aim to satisfy less of their basic needs and more the most meaningful needs. Those more significant needs for human beings have been identified in Abraham Maslow's Hierarchy of Needs Theory²⁵⁶ and are directly associated with the individual environment's valorization, for instance, the protection of their peers, the community as a whole, and the environment. Thus, the defended theory in this thesis calls for consumer's awareness appealing for those to be more demanding in meeting their needs. Those higher consumers' values required, although linked to society, are beneficial to consumers' too.

By seeking to climb the pyramid of needs advocated by Maslow, consumers pave the way for personal fulfillment and thus empower companies to deliver more products and services that meet customer needs, yet furthermore, the community needs in the benefit of social development goals and human rights. As noted in Chapter 3, if companies use the Maslow theory to guide consumers' purchasing decisions, then consumers should use the same theory to drive companies' human rights behavior. Consumers have the human rights driver, are informed and demanding individual agents who, with the help of human rights defenders' institutions, can form a more human rights aware society and influence companies towards compliance.

In response to the research question of how companies should redefine their goals to align their practices with the expectations of society and human rights compliance, we found that respondents in our questionnaire consider that companies should assess their social presence in a more integrative way. This means that companies should orient their operation towards goals that are inclusive of society, in line with their values and interests and, consequently, human rights respect and protection.

The way companies can walk this path was proposed by the theory of Elements of Value. The thirty business-to-consumers identified elements of value fall into four categories and are arranged in a hierarchical way that reflects Maslow's pyramid of needs with the more complex elements of value at the top. The social impact values at the top invoke an individual's relationship with society. Thus, business and marketing strategies should be oriented towards

²⁵⁶ (n 15).

increasingly meeting customer values at the top, adding social, environmental and human rights values to their products or services. The addition of these values that can be closely linked to the company's activity can gain a long-term dimension and encourage a redefinition of future sales prospects. Indeed, this approach can boost the creation of a new, unexploited market for businesses, for those consumers who already choose quality over quantity and who are more attracted by the satisfaction of their most significant needs in a sustained manner.

However, this theory can presuppose long-lasting relationships and long-term commitments, contrary to the immediate satisfaction that seems to prevail in today's society. Therefore, the concept of sustainability for businesses, companies and individuals should be encouraged by increasing the publication of many good examples of quality choices in favor of quantity. Fostering the quality, the fair and the sustainable can be harder than appealing to the lowest price. However, the last few months of the global pandemic may have made humankind a little more aware of the essential values for individuals.

Possibly this theory can only be applied, in the beginning, in developed countries and for specific business sectors, because it is based on consumer awareness, which can be easier to achieve in developed societies. Nevertheless, it can be recognized as a step towards greater social awareness and, above all, a pragmatic way of bringing companies on board.

Presenting a new concept or theory is always risky, but failing is always better than not trying. Providing new ideas and new paths and, above all, opening the subject to new discussions can also be another side of the theoretical exposition. In a research made about innovators, it was concluded that first mover's failure rate is 47%, improvers 8%.²⁵⁷ This means that we have 39% less probability of failing if we improve what others have done, instead of jumping ahead to new approaches. In this thesis, we decided to take the risk and jump ahead toward business' human rights compliance.

In conclusion, we can state that international regulation plays a vital role in building a global regime to govern business and human rights. However, its effectiveness will be maximized if it is integrated into a global strategy to raise awareness in society and, particularly, among consumers. Consumers have a decisive role, and it is not by abstaining from supply but by

²⁵⁷ Adam Grant, 'The surprising habits of original thinkers'(TED2016 February 2016) Minute 7 <https://www.ted.com/talks/adam_grant_the_surprising_habits_of_original_thinkers#t-499195> accessed 10 August 2020.

improving the quality of their needs, for their fulfillment, for society in general and human rights in particular. Some consumers surveyed in this research revealed that they are already very aware of the importance of human rights issues in purchasing options and that they are looking for more information. They want to make better decisions, but they lack data to do it conscientiously. Therefore, if the way to change things is taking the step forward and making the change effectively, we decided to accept the challenge and give that small step forward. During this thesis development, the author saw the need for a score that will provide society with more information on business' human rights compliance. This way, society and consumers can have the most accessible information about the conduct of companies concerning human rights, and thus make more conscious decisions. This idea will be developed by the author in the future and carried out through the Human Rights Promoter ScoreTM.

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Appendix 1 - Survey

Details of the survey developed for this thesis research that was made available in six languages: English, Portuguese, German, Spanish, Polish and French.

English Version

Business and Human Rights

You are invited to participate in this survey about Business and Human Rights that is being conducted by a student of the EMA program of the Global Campus of Human Rights in the context of her master's thesis. It will take approximately 10 minutes of your disponibility, and you can choose the language that best suits you in the top corner of your screen. It is very important for us to learn your opinions but your participation in this study is completely voluntary. There are no foreseeable risks associated with this project. However, if you feel uncomfortable answering any questions, you can withdraw from the survey at any point. Your survey responses will be strictly confidential and data from this research will be reported only in the aggregate. Your information will be coded and will remain confidential. If you have questions at any time about the survey or the procedures, you may contact Susana Gaio at +351 or by email at the email address susana.gaio@gmail.com. Thank you very much for your time and support.

Your Country of your residence.

What is your age?

- ☐ 8 to 25
- ☐ 26 to 35
- ☐ 36 to 45
- ☐ more than 45

What is your gender?

- ☐ Female
- ☐ Male
- ☐ Prefer not to say
- ☐

What is your professional background?

Where have you been exercising your professional career?

- ☐ Business
- ☐ Non-governmental organization (NGO)
- ☐ Intergovernmental organization
- ☐ Governmental institution
- ☐ Academy
- ☐ Media
- ☐ Independent Professional

☐ I have no professional experience

Which are the 3 words that best define for you the relationship between Business and Human Rights?
What immediately comes to mind?

Do you drink coffee daily?

☐ Yes
☐ No
☐

In your opinion, which arguments can influence a company to respect and protect Human Rights when making business decisions?
What persuade companies to respect the rights of employees, customers or other persons who are impacted by their activity?

What should a company's goals be for you?
Why or what companies should work for?

In your opinion, in which economic branche(s) companies most respect and/or protect Human Rights?
Which companies are more compliant with Human Rights? (multiple choice)

- ☐ Agriculture, Forestry, Fishery
- ☐ Arts, entertainment and recreation
- ☐ Hospitality and Tourism
- ☐ Human health and social services
- ☐ Information and Communication Technology (ICT)
- ☐ Manufacturing of food, beverages and tobacco
- ☐ Manufacturing of Textile, Apparel, Leather, Footwear and related products
- ☐ Mining and heavy industry
- ☐ Transportation and storage
- ☐ Veterinary
- ☐ Wholesale and retail trade, renting and leasing
- ☐ Business administration and Legal
- ☐ Chemical industry
- ☐ Education
- ☐ Energy and water supply, sewerage and waste management
- ☐ Finance, insurance and real estate
- ☐ Manufacturing of transport equipment
- ☐ Personal service -, administrative support service- and security and investigation activities
- ☐ Media
- ☐ Scientific and technical
- ☐ Wood processing, paper and printing
- ☐

How likely are you to consume different coffe brands?

<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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Not at all likely
 Extremely likely

Which Rights do you think are normally most violated by companies?

What Human Right do you know was violated? or which ones?

In what way do you think companies will best commit to respect Human Rights? With:

not at all influential slightly influential somewhat influential very influential extremely influential

	not at all influential	slightly influential	somewhat influential	very influential	extremely influential
Legislation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sectoral codes of conduct	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Transparency Reports	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Supervision	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
International Jurisdiction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Do you like to add other response to the previous question?

- ☐ No
- ☐

If you feel inspired share the reason for your answer to previous question.

As a consumer what it takes to know about a company in terms of Human Rights, so that you can make a conscious and sustainable purchase choice?

I will only buy services/products if the company.....

How do you rate this survey?

☐ ☐ ☐ ☐ ☐

If you would like to identify yourself, leave your email contact to receive the result of the investigation or add any other comment you consider relevant, please use the space below.

Submit