

Human rights in sustainable supply chains: towards corporate constitutionalization?

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Abstract

This paper aims at discussing, in the light of a transdisciplinary bibliographic review, the possibilities and practices related to corporate human rights obligations, in the systemic approach of sustainable supply chains and subcontracting networks. International and national law obligations are focused, besides the institutional and procedural structures designed in self-regulation.

Keywords: Sustainable supply chain management, Self-regulation, Human rights.

1. Introduction

Along practically the whole 20th century, the industrialization process based on the Taylorist/ Fordist paradigm prioritized, among several other aspects, wide scale production with excessive consumption of energy, water and raw materials, besides the intensive use of cheap labor. That model, with more recent variations, such as those deriving from the Japanese experience of Toyotism – of lean and flexible production – seems to present serious limitations, when its social and environmental undesirable impacts are questioned. Among these *negative externalities*, standing out are the environmental pollution of several orders (atmospheric, visual, sound), the excessive production of waste as a consequence of massive consumption patterns linked to the traditional industrialization model, the precariousness of work conditions (especially in countries considered emergent or of late industrialization), among others.

In that sense, the demands towards a sustainable paradigm of management, production and consumption implies a redesign of processes concerning the product life cycle (production, consumption and disposal) and an emphasis on the supply chain approach, *ie.*, on a systemic design and implementation of sustainability standards not in the close view of isolated business units or companies, but mainly in the wider and net view of the expanding networks in which most enterprises are interlaced. This wider conceptual and managerial construct involves not only the traditional economic requisites (transformed into the sustainable management paradigm), but also a broad concept of environmental factors. These include not only natural environment and its scarce resources, but also the whole social environment affected by the activities of production of goods and services

alongside the various productive chains. In this sense, a zero sum game is excused by public policies as much as by business strategies – it is out of consideration to generate some virtuous economic results but at the same time brush under the carpet other not so virtuous consequences. The very recent growing literature on sustainable and green supply chain management (Boone, Jayaraman, Ganeshan, 2012, Palevich, 2012, Cetinkaya *et al.*, 2011) is a testimony of the acknowledgement of this urgency to rethink and redesign production and operations.

This is the scenario where we find self-regulatory initiatives drawn by companies under pressure of governments, non-governmental organizations, social movements and even marketing and competition. But not only that: a complex legal apparatus is under construction to cover and enforce obligations directed to companies and its supply chains. The force of these apparatus rests on its foundations on human rights nationally and internationally recognized. Like States, are now companies being ‘constitutionalized’? How? These are the questions of this paper. The methodological approach to this emergent institutional model is a multi-disciplinary bibliographical review exploring the linkages between operations management and law.

2. From lean to clean: the sustainable supply chain paradigm

Since Schumpeter’s oxymoronic description of competition under capitalism (a process of *creative destruction*), with deep Marxian roots, innovation is understood as a condition sine-qua-non of survival and growth both for the economy and for each company. The comprehension of *innovation as a rupture of paradigms* is besides or before this moral of the story – innovation defined as the introduction of new goods or new methods of production or new forms of organizations, also covering the discovery of a new market and new supply sources (Schumpeter, 2003). By the other side, since Thomas Kuhn, a paradigm is understood circularly – ‘A paradigm is what the members of a scientific community share, and, conversely, a scientific community consists of mem who share a paradigm.’ (Kuhn, 2012: 175). The transitions of paradigms are, in this sense, revolutions: not results of some evolution and accumulation, but a total redescription of the problems and subsequente ways of solutions. During this transition, as Kuhn (2012: 85) says, the problems that the old paradigm can solve may coincide with the problems solvable by the new one – the use of lean strategies and techniques to solve sustainability problems, as proposed by Palevich (2012), is a symptom of this.

This logic of the scientific discoveries seems to be very similar to the transition of productive and managerial paradigms that we are watching – *from lean production to clean(er) cycles of production*. If the old big factories gave place to smaller specialized business units coordinated in networks (e.g., subcontracting networks), the network form of organization is being depth by sustainable arrangements, not only embracing business partners narrowly understood (the financers, the suppliers and the distributors), but also all stakeholders (local governments, NGO’s, local communities, worker’s families, etc.). The ‘slice’ of the supply chain that is transversal to this wider business network is then understood as an *extended and cyclical supply chain* (**figure 2.1**)

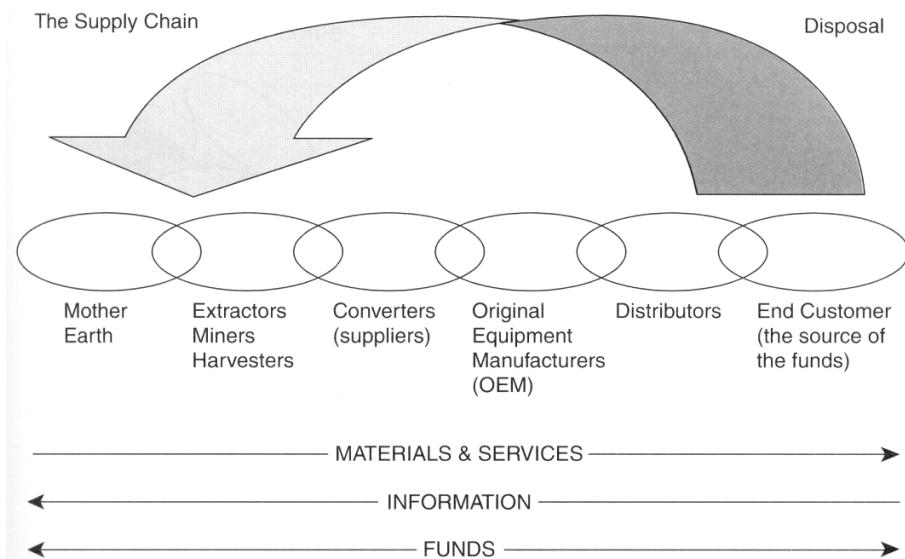


Figure 2.1 The extended supply chain (Burt, Dobler, Starling, 2004: 9)

Sustainable patterns must be not only designed to but also enforced alongside the *procurement* (of external suppliers), the *internal operations* (including logistics until the consumption and back again) and the *product development and stewardship* (through working effectively with customers and sales channels). A central role is being given to codes of conducts and standards for suppliers, and also to the setting of targets and the assessment of existing and new suppliers against defined sustainability criteria. External certification and de-selection of suppliers because of non compliance with ethical and environmental criteria are being also considered the minimal requisites for the efficiency of a supply chain (NZBCSD, 2003). As a result, decision-making process concerning supply chain management is under complexification with new variables to consider (figure 2.2).

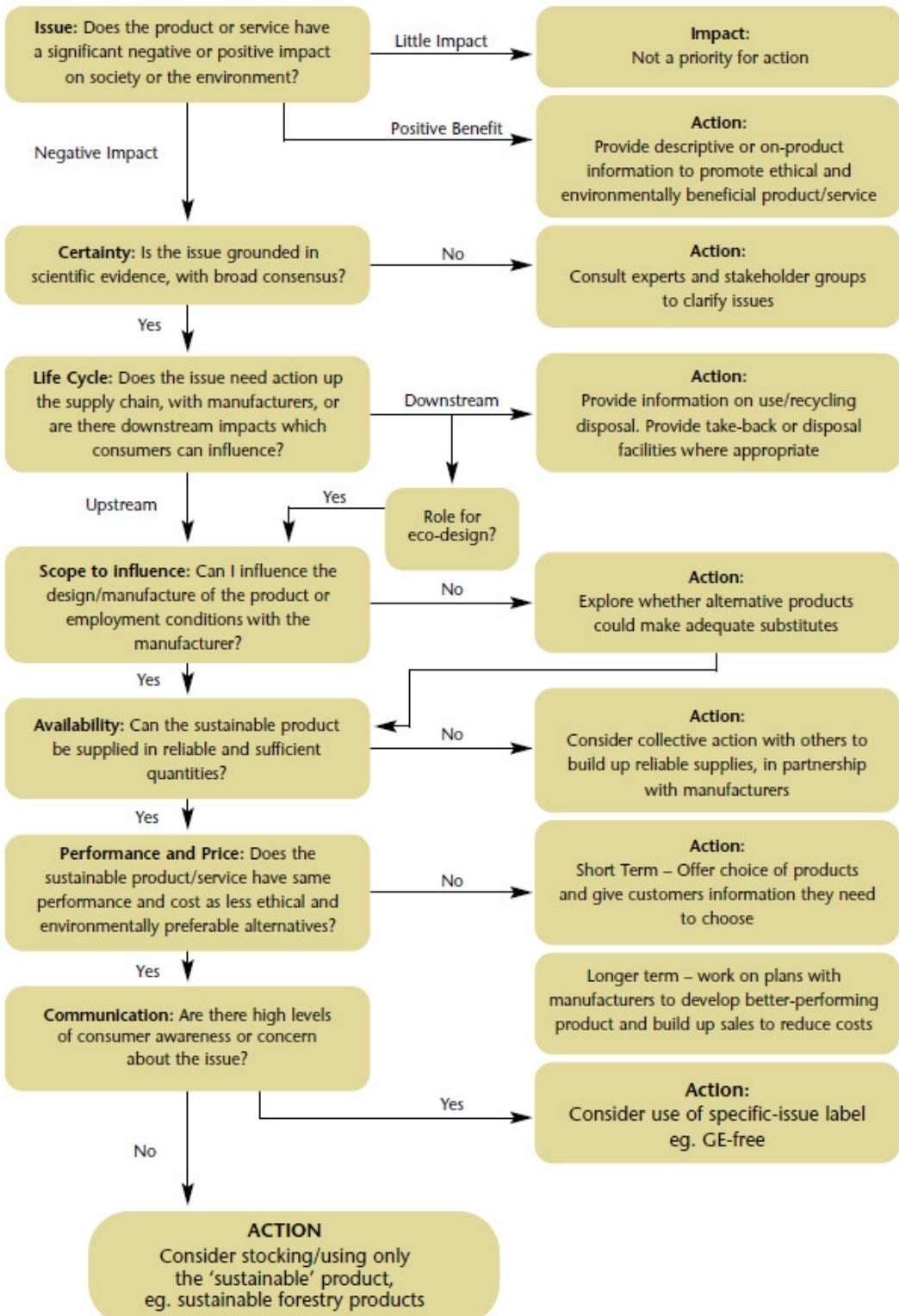


Figure 2.2 A model for decision making concerning sustainable supply chain management (NZBCSD, 2003: 17)

3. Corporate constitutionalization

We should now address the legal questions that bring new implications to supply chains design, management and accountability in the field of human rights.

3.1 Human rights and (self-)constitutionalization

The human rights are a typical modern institution, conceived and created in the context of Enlightenment and the Liberal Revolutions of the 18th century – the American and the French ones. In this scenario, they were a juridical mean and form directed to protect the individual from the State, from one side conceding freedoms (of thought, religion, property, etc.) and, vice-versa, forcing the State self-limitation, or the limitation of political power (Luhmann, 2002). The liberal *rule of law*, consecrated in the bills of rights and in the separation of Powers (both basic contents of the ‘master rule’, *i.e.*, the national Constitutions) were pressured – by workers movements and associations, for example – to a change of political, legal and economic paradigm during the 19th and the early 20th centuries. The welfare state were so designed, with variants, in a large movement, that came from the Constitutions of Mexico (1917) and German (Weimar, 1919) – and also in answer to the Russian Revolution of 1917 –, culminating in social-democratic States in the decade of 1930’s (Roosevelt in the USA, for example). Those States started to increase the list of ‘fundamental rights’ with ‘social rights’, like labor rights – and, in some cases, the rights to education, food, housing, culture, etc.

This movement of national legal orders was transferred, after World War II, to the international law, with the creation of United Nations in 1945. In the context of Cold War, as a compromise solution, UN led the process of design of an international non-binding instrument concerning human rights: the Universal Declaration of Human Rights of 1948. Only almost twenty years after it were possible to approve international biding documents in this subject; the human rights were so divided in two categories in the 1966 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Since then, other human rights (like rights of children, of women, of persons with disabilities, rights concerning racial and gender discrimination, ‘collective and diffuse rights’ – the right to peace, to development, to a healthy environment) were covered by specific covenants. At all, in 1993 Vienna Declaration and Programme of Action (§5), UN recognized that ‘[a]ll human rights are universal, indivisible and interdependent and interrelated’. In parallel to this process, human rights were declared and enforced by international regional human rights systems, like the European and the Inter-American ones.

3.2 Institutions and (self-)regulation

It is interesting to remember that the conception of (constitutional) fundamental rights and human rights as institutions (Luhmann, 2002) has deep roots on both the notion of law as institution (Santi Romano, 2008, for example) and of (new) institutional economics (*e.g.*, North, 2012, Chang, 1997). The idea of institution rests on the possibility of coordination of inputs and outputs of bureaucratic apparatuses (or equivalent ones), in direction of their performance towards economy and society. More generally, it refers to the linkage of regulation (law making and enforcement) and economic (developmental) performance.

One of the main conceptions of law as institution can be traced back Santi Romano, who in 1918 criticized the notion of State monopoly of law, understanding that there are different legal orders (= institutions), which are independent one from another, although they can develop diverse kinds of relationship among. This pluralistic view approached, then, the legal nature of regulations also by private organizations, and, then, stimulated what can be described as both the legal embeddedness of society and the social embeddedness of law. Radicalized, it implies the acknowledgement of the possibility of multiples institutional arrangements (structuring and attribution of rights and duties, for example) and claim for an ‘institutional imagination’ (Unger, 1986) to face ‘pressupposition of exhausted possibilities’ (Sciulli, 1992) – *i.e.*, the assumption a unique model of social (political, economic) arrangement.

With large influence of the organizational analysis of State (as a bureaucratic machine, as a coordinator of property rights, as a regulatory apparatus, etc.), the institutional economics focused recently the notion of ‘regulation’. As put by Chang (1997: 704), ‘[r]egulation is usually defined as the government (or the state) directly prescribing and proscribing what private sector agents can and cannot do, so that their actions do not contradict the ‘public interest’.’ Clearly, this notion rests on the classical dichotomies ‘State/ civil society’ or ‘State/ economy’, which are undermined as central to the observation of society, since the level of complexity and functional differentiation ‘cutted’ society much more radically – to the point that, in the global society, politics and economics are some functional systems among others (art, law, healthy, education, science) and State is just the central organization of political system (Luhmann, 2002, 2007). To regulate this society is, then, much more complex, in the precise sense of complexity, that is the multiplicity of possibilities (virtualities) – part of then unrealizable when structured (Luhmann, 1985).

In this drift of complexification (of society, economy and law in parallel), State directed law creation and enforcement needs to share its function with self-regulations of multiple organizations and networks – as the business companies and its supply chains. In expanding its sphere of action, however, these self-regulations face some similar problems, similar also to the ones States also faced, as attribution of basic rights (with a self-restraint of the attributor), the division of powers (or internal functional differentiation) and the proceduralization of law use – invocation and enforcement (due process). By cutting transversally many legal orders – national, international, supranational (like EU law), transnational (of private actors) and local ones –, those ‘constitutional problems’, before typical of States, remain ‘transconstitutional’ questions; and human rights are in the center of this ‘transconstitutionalism’ (Neves, 2013) and the ‘State constitutionalism’ is transformed into a ‘societal constitutionalism’ (Sciulli, 1992), sustainability being defined as the openness of a functional system (as economy) or an organization (as a company) to its natural and social environment, where are the other systems, including persons, which dignity is protected by fundamental rights (Teubner, 2012, 2006).

3.3 The complexification of law on human rights and business

Analyzed from this point of view, corporate codes of conduct, ethical guidelines and equivalent initiatives gain a new significance. Human rights claim a different threshold of interpretation (in the favor of the victims of its rights violations), but also a holistic

approach all considered in a victim-oriented perspective. This has the consequence of requiring a complexification of legal system, giving victims the possibility of access to various ways, procedures and mechanisms of accountability, monitoring and enforcement (judicial and extrajudicial ones), recognizing the potential concurrence among the legal orders (international, national, transnational, self-regulatory ones) and among the legal areas (tort, criminal responsibility, administrative procedures). This includes also the possible concurrence between the liability of legal persons (corporations) and some natural persons in defined positions of responsibility inside these organizations (Černič, 2010, Jägers, 2002). We note that the non-self-regulatory orders can extend the applicability of human rights not only in face of State (which may be liable for not have taken the precautions in the regulation of an economic activity or organization), but also in face of private enterprises (the called 'horizontal effect', 'private effect' or 'third part effect' of human rights – *drittewirkung*) (Graber, Teubner, 1998).

Legal obligations concerning corporations impact in the subject of human rights are then posed – or *may* be posed – by a series of instruments with different degrees of enforceability – like self-imposed codes of conducts, ethical guidelines or good governance requirements (drafted by NGO's, business associations, stock markets), national constitutions and ordinary legislation, possible European Union directives, European Communities' Green paper on Promoting a European framework for Corporate Social Responsibility, SA 8000 (from Social Accountability International, a private organization), the UN Global Compact initiative, OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, ILO Tripartite declaration of principles concerning multinational enterprises and social policy, technical norms imposed by regulatory bodies, recommendations from international organizations and commissions of jurists, etc.

Concerning the kind of obligations that may be directed to corporations, the scenario is also in development, as we can note through the reports of John Ruggie, the UN Special Representative on Business and Human Rights. In this sense, and also in the drift of complexification of legal system on human rights, we can detach the tripartite typology of obligations – to respect, to protect and to fulfil. This typology was developed in the 80's by Asbjorn Eide, UN Special Rapporteur on the Right to Food, and was then applied to the social, economic and cultural rights. Its origin is Shue (1996) 1980 book, where he highlighted the State duties:

- *to avoid* the deprivation of a right (v.g., the obligation not to cause harm to a person);
- *to protect* a person from the privation of her/his right by another one;
- and *to aid* that one who have been deprived of her/his right and cannot autonomously fulfil it.

Regarding corporations correlative obligations can be highlighted in their *spheres of activity and influence*. The 2003 *UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (that were not approved as a binding instrument, but remains as a guideline in this subject) define in its first paragraph: 'States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business

enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.'

Černič (2010) highlights, concerning corporations, the obligations:

- *to respect*, i.e., not to commit human rights violations or not to interfere negatively in its rights enjoyment;
- *to protect*: to adopt internal regulations and take other measures and diligences to prohibit and prevent human rights violations internally (in its own activities), but also externally, in its commercial relations with third parties (subsidiaries, subcontractors, contractors, partners, stakeholders) in its supply chains and cooperation networks, what embraces not only the duty to respect its own employees' labor rights and the rights of everyone in its 'sphere of activity and influence', but also, through employing its resources and expertise, to protect them in face of other actors (the State, suppliers, licensees, distributors, subsidiaries, etc.);
- *to fulfil*, what includes to adopt, monitor the implementation and revise periodically a human rights policy, intern codes of conduct and guidelines and codes for its partners and suppliers, including mechanism for the effective enforcement and accountability, and for efficient prevention and repression of human rights violations.
- a fourth genre of obligation is that *not to cooperate* with States in a endemic situation of human rights violations or abuses, what includes the duty of non complicity (Global Compact, principle 2) – embracing *direct complicity* (v.g., conjunct commission of violations, alongside with States, rebel groups or paramilitary ones), *indirect complicity* (when the corporation offers assistance or contribute, by action or omission, to that other actors practice violations – v.g., by the financial, technological or material resources to authoritarian regimes – or when the corporation take benefit of serious and systematic violations of human rights, like occurred in South Africa during apartheid) and *subsidiary duties* (when corporation omits itself in face of grave violations of human rights in the territory where it operates).

4. Final remarks

The pointed obligations remain not clearly designed, but offer a start point for business strategies and public policies concerning sustainable supply chain. What also remains to be clarified is the concept of *sphere of activity and influence* – notwithstanding, it reveals from now that the idea of linear supply chains must be combined with the notions of stakeholders, business partners and interorganizational or cooperation networks.

Nowadays, the main recommendation that may be highlighted for a sustainable supply chain by the optics of human rights are the following:

- to set due diligence through all its supply chain and stakeholders cooperation network (Lambooy, 2010);
- to establish external/ independent monitor and accountably mechanisms, bodies and procedures (Černič, 2010);

- to discuss and define a clearer definition of its obligations and establishment of a set of obligations that not only invoke national and international law (that are the minimum thresholds).

Corporate constitutionalization is a complex process, only beginning. If States constitutionalization offers a historical example for it, we shall recognize the specificities of the current process and that the acknowledgement of this movement is the first step to rethinking a sustainable supply chain management committed with deep problems in a multicentered society. The message of sustainability is to look around.

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