



COMPLIANCE AS AN ALTERNATIVE INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS AND THE INEFFECTIVENESS OF DECREE NO. 9.571/2018

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ABSTRACT

With the advancement of globalisation, economic and technological processes, and the disruption of obsolete social standards, it is no longer acceptable for corporations to seek their development and profits without observing the pertinent aspects of the human condition, which have their guiding principles established by the United Nations Human Rights Council. Thus, in order to encourage the adoption of good practices in Human Rights by national and multinational companies, the Decree No. 9.571/2018 established the guidelines for implementing Human Rights Compliance programmes in organisations. This study analyses Decree No. 9.571/2018 and demonstrates the importance of implementing Human Rights Compliance programmes, which, in addition to providing protection and encouragement to Human Rights in the corporate-business environment, may positively influence the results and reputation of businesses in the market. While some companies are adopting Human Rights policies, from a Corporate Social Responsibility perspective, the decree under analysis is optional and does not provide an incentive for companies to implement Human Rights Compliance programmes, resulting in a guideline without practical effectiveness.

Keywords: Compliance; Human rights; Corporate Social Responsibility; Decree No. 9.571



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1 INTRODUCTION: COMPANIES, HUMAN RIGHTS AND A HISTORICAL OVERVIEW OF VIOLATIONS

In the 21st century, companies play an important role in the globalised and economically competitive world, whose circumstances aim at the search for profits - in their own countries or in their foreign subsidiaries. In contrast, they exercise a precarious role in relation to labour and social issues, in such a way that implies the violation of Human Rights or criminal legal goods (SÁNCHEZ, 2020, p. 65-66).

This is because the transformations caused in society require a better contextualization of the protected legal goods, since they were not part of the political discussion agendas that began to be perceived from the development of technologies and the heating of industrial activity, i.e., legal protection no longer acts only in the context of essentially individual interests, but now requires the protection of supra-individual, diffuse legal goods, which deal with the preservation of the environment, the economy and public health (LOUREIRO, 2017, 37).

Beyond corporate crimes, the involvement of companies in human rights violations does not come as a novelty, since many organisations have had relations with questionable practices under this focus. Thus, even if they are oscillating, the studies on the criminalization of socially harmful corporate behaviour began to contemplate the violation of Human Rights in the corporate sphere (SAAD-DINIZ, 2019, 185).

One of the best-known cases of human rights violations committed by business organisations occurred during World War II, when several companies, from the most varied branches, assisted the Nazi administration in the process of spoliation of victims mostly from Jewish communities. In addition, the companies took advantage of slave labour, establishing factories and creating labour camps, such as Auschwitz III (also known as *Monowitz*), which supplied prisoners to work in a rubber industry. The historical-investigative process carried out

by academics and the documentation drawn from the archives of the current Auschwitz-Birkenau Museum revealed that companies had no problem with using slave labour for profit.

In addition to direct involvement in crimes of genocide, there are also accusations against companies involved in ethnic cleansing, extrajudicial executions, torture, rape and the destruction of civilian homes. As is the case in Darfur, Sudan (COSTA; SILVA, 2018, p. 16)

and also, the accusation against a financial institution of having financed arms to the government of Rwanda that, in 1994, promoted genocide against ethnic groups of that country (OLIVEIRA, 2019, p. 438).



Regarding the Brazilian reality, the National Truth Commission, created in 2011 through Law No. 12.528, investigated and reported the direct participation of several companies, including a state-owned company, in the military coup of 1964 and the subsequent dictatorship that lasted until 1985. In this way, the business organisations contributed to the repression imposed by the Military Government, through financing, supplying equipment and food to the armed forces. Moreover, inside the factories there was the physical presence of government agents, and the repression and denunciation of those workers considered subversive was highly encouraged. The consequence was persecution, torture and, in many cases, some were put to death (COSTA; SILVA, 2018, p. 22-26).

In this sense, the phenomenon of corporate delinquency and defective management brought (and brings) damage to democracy, the environment and human dignity, so that illegal conducts tend to affect security and Human Rights (SANCHEZ, 2020, p. 90).

Considering this, the historical synthesis shows that, even after the internationalization of human rights, concomitant to the creation and agreement of standards and instruments that strengthen the role of business organisations, it was glimpsed, in fact, the participation of many companies in emblematic cases of destabilisation of political institutions and human rights violations.

Besides the historical digression, presented in this chapter, this research will be divided into three main axes. In the first part, the evolution of International Human Rights Law will be highlighted, with regard to the inclusion of business organisations in the responsibility for the protection and promotion of human rights. Subsequently, there will be the contextualization of the Compliance instrument for the enforcement of human rights policies, specifically in the corporate environment. Finally, we will address the nature of decree no. 9.571/2018 and its ineffectiveness in guaranteeing human rights within the corporate environment.

2 BUSINESS ORGANISATIONS AS ACTORS IN THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

Until the early twentieth century, it was understood that the duty to protect human rights was a state competence, while the responsibility of companies towards their employees and society was reduced to a philanthropic, religious and paternalistic perspective, headed by the leaders of corporations (MANCINI, 2019, 280).

The Universal Declaration of 1948 - ratified in the Vienna Declaration of Human Rights (1993) -, established the ownership of rights and directed efforts towards the reconstruction of a human rights perspective, based on an ethical reference to guide the international order, since



these rights were imploded during World Wars I and II. It is in this scenario that the conception that human rights are not a demand that should be reduced only to the role of States' actions was strengthened, but are universal and indivisible rights that require international protection and legitimacy (PIOVESAN, 2018, p. 236).

In a perspective of collective and generic perception, it is common to disassociate companies from human rights, understanding that their protection and promotion is a duty that falls solely and exclusively to the State. However, such understanding is not pertinent, since business organisms, besides exercising a private activity that is essential for the economic activity of a country, are also actors in the promotion of Human Rights due to the relationship they have with consumers, with commercial partners, employees and service providers, governments, among other members of their productive chain.

As an illustration of the expansion of corporate activities, Flávia Piovesan points out that of the 100 world economies, only 31 are States, the rest being multinationals that have revenues that exceed the Gross Domestic Product (GDP) of Countries, so that the accelerated expansion of the globalization process brings impacts on social, cultural and political contexts, reason why, it is necessary to understand the existence of new international actors, such as non-governmental organisations (NGOs), international organisations, individuals and transnational companies (PIOVESAN, 2018, p. 233-234).

Although international organisations, especially the International Labour Organisation (ILO), consider human labour as essential for the construction of their dignity as a guiding principle, from the Oil crisis (1973), corporations have become sources of political and economic decisions and there is a realization of the failure of the Welfare State, so that the regulatory and supervisory role of the State began to suffer from the influences of international financial institutions. In this perspective, the participation of countries and companies in the international market became regulated by a neo-liberal primer determined by organisations such as the World Bank, the International Monetary Fund, the World Trade Organisation and the Organisation for Economic Cooperation and Development. Thus, as globalization processes advanced, there was a reduction in social rights to the extent that neoliberal guidelines were defined by national states interested in private investments (PEREIRA; RODRIGUES, 2021, p. 75).

In this sense, this process of expansion of business organisations, often encouraged by the states themselves, increasingly reveals the influence that these organisations have on individuals, since the services and products provided by business entities help improve people's



quality of life, since they acquire a new degree of responsibility for the protection and development of human rights.

However, with corporate expansionism, especially in the 1990s, the representativeness of the States began to be questioned and pressured. Mainly because of the scenario of state dependence on economic power, which revealed its negligence in relation to the issue of norms for the protection and promotion of human rights. This became (wrongly) associated with partisan and ideological issues - thus fragmenting the social fabric and putting at risk the most vulnerable populations, such as women, black people, indigenous people and LGBTQIA+ (PEREIRA; RODRIGUES, 2021, p. 76).

Although the United Nations Organisation, since 1972, and other international organisations sought to establish an agenda that related companies and Human Rights, it was through the Global Compact, established in 1999 by the then Secretary-General of the United Nations Organisation, Kofi Annan, and launched in 2000, that a global agenda was established in which the compliance of business activity with the protection and promotion of Human Rights was aimed (DE ALMEIDA; MOREIRA, 2021, p. 5). Resulting from international standards already in force - the Universal Declaration of Human Rights; the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention against Corruption -, the aforementioned pact, which was signed by more than 160 countries, more than 14,000 companies and 70 local networks, sought to translate, a perspective of application of the principles and guarantees established through 10 universal principles that, despite the common interest of the human being, means the solution of the main socioeconomic problems borne by contemporary societies. The pact is disposed about the importance of the conformation of an ethical-corporate culture aimed at the development of corporate operations based on assessing the impacts on society, especially to the most vulnerable and marginalized groups in decision-making (PEREIRA; RODRIGUES, 2021, p. 101-102).

At the international level, there are also instruments from the International Labour Organisation, the Guidelines and the Tripartite Declaration of Principles on Transnational Corporations and Social Policy, from the Organisation for Economic Co-operation and Development, which determine guiding principles for the protection of human rights in the work and corporate-business environment. However, the norms in question have a voluntarism aspect, being soft law recommendations, without any kind of binding aspiration (DE ALMEIDA; MOREIRA, 2021, p. 5-6).



Following this logic, in 2008, appointed Special Representative of the Secretary-General, John Ruggie presented a report, which was approved by resolution A/HRC/RES/17/31 (2011), containing guiding principles on the protection of human rights in the corporate-business environment. The report is considered a conceptual framework on the subject and established as guiding principles "Protect, Respect and Remedy", which, in short, provide for the state duty against human rights abuse by third parties, including companies; of corporate responsibility regarding Human Rights, establishing a duty of care so that they do not infringe the rights of third parties and the duty to deal with the impacts of their conduct; and the need to guarantee access to resources-judicial and extrajudicial-by the victims of these abuses and violations (DE ALMEIDA; MOREIRA, 2021, p. 5-6).

Therefore, international bodies, especially the United Nations, declare that companies are actors in the protection and promotion of human rights, due to the degree of importance they have in societies, so that economic development and the obtaining of profits must, in theory, take place in compliance and observance of the basic principles of human dignity.

3 COMPLIANCE AS AN INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS IN THE CORPORATE-BUSINESS ENVIRONMENT

In compliance with the principles proposed by John Ruggie, the concept of Corporate or Corporate Social Responsibility was launched, in which a series of values, guidelines and experiences transmitted to the market, to the employees and to the societies as a whole are established, whose purpose aims at re-signifying the role of private activities in the construction of fairer, more balanced, solidary, healthy, human societies, etc. (PEREIRA; RODRIGUES, 2021, p. 79).

Although it is held that the Corporate or Business Social Responsibility is equivalent to the Compliance programmes, it should be noted that the first is associated with the management of companies, application of ethical or compensatory actions, with the preservation of the interests of stakeholders (employees, consumers, government, suppliers, service providers, society, etc.); while the second is linked to the normative conception of prevention or mitigation of risks and violation of laws that arise from the business activity (MANCINI, 2019, 278).

In other words, the Compliance programmes are, in short, an instrument that integrates a complex and organised system that aims to establish a set of procedures for risk control and preservation of values, which must be consistent with the structure and strategies of the business company. Its adoption promotes an environment of legal certainty and reliability for decision making (CARVALHO; BERTOCELLI, 2021, p. 50).



The expression *compliance* derives from the verb to comply, which reflects the context of obedience, compliance, agreement and consent. Marcela Block adds that the expression should be understood as Compliance with/comply to, i.e., "to be in conformity", with the "duty to comply" and "enforce". Therefore, institutions must comply with internal and external regulations imposed on the activities they perform (BLOK, 2020, p. 19).

Emerged as a mechanism to control the operations of corporations in the financial market, the Compliance programmes have been, over the years, acquiring relevance to prevent or mitigate the practice of crimes - especially against the Financial Systems and Public Administration. Given its preventive character, it started to be used in other sectors of the business organisations, aiming to prevent, also, the occurrence of fiscal, labour and environmental illicit acts. More recently, we have seen the implementation of Digital and Data Compliance programmes.

The connection between good governance and Compliance programmes establishes a hybrid system, with state and private rules, imposing policies to companies in several concentration branches - anti-corruption, money laundering, environmental, competition, consumer, labour, tax, among others. Thus, by establishing a system in which the rules are doubly mixed - state and supra-state and public-private -, the State resumes, in a way, the control over the economic activity, given that the Compliance programmes encourage companies to exercise and adjust their activities to the ethical and legal precepts (MIRANDA, 2019, p. 56-57).

In Brazil, although it has acquired relevance since the enactment of Law no. 12.846/2013 (Anticorruption Law), regulated by Decree no. 8.420/2015, the duty of Compliance was already provided for in the Brazilian legal system through Resolution no. 2.554/1998 of the National Monetary Council, Complementary Law no. 105/2001 and Law no. 12.683/2012, which amended Law no. 9.613/1995 that provides on money laundering crimes. And, as exposed, since the Anticorruption Law - or integrity programme, as referred by the national legislator -, Compliance acquired another status in the private sector, since it served as a stimulus for companies to become concerned and to perform their activities and business with compliance with ethical and legal standards.

Even in the face of several international norms, declarations and pacts for the protection of Human Rights, which state the relevance of business organisations in their role as actors in the protection and promotion of Human Rights, the scenario of violations of these rights in the corporate-corporate environment and in the relationship with other stakeholders, shows the importance of establishing Compliance as an instrument for the protection of Human Rights.



From the perspective of violations practiced in Brazil, it is possible to highlight the case of structural racism followed by the homicide of João Alberto de Freitas in a shop of the supermarket chain "Carrefour"; situations of racism against consumers practiced by employees of the department stores' chain "Zara"; a case of homophobia among employees of one of the shops of the chain "Americanas"; discrimination in the selection process of the drugstore chain "São João", among many other cases published - frequently - in the Brazilian press.

Nevertheless, the advancement of technology and Artificial Intelligence perpetuate and amplify existing social prejudices, since the algorithmic routines of these technologies replicate the existing ethno-social perspectives - that is, when we consider that corporations are the mirror of an excluding and prejudiced society, Artificial Intelligence systems will reflect aspects of a prevailing social structure. In this sense, Filippo A. Raso et. al. points out that systems of personnel selection process have had a discriminatory conduct by offering unequal treatment to people with the same curriculum, but with distinct race, gender or sexual orientation (RASO et. al., 2018, p.18).

Therefore, the Human Rights Compliance programme consists of a set of norms, principles and guidelines, of public or private nature, whose purpose is to establish an effective scenario of compliance and development of ethical standards of governance, transparency and justice, so as to reflect on the individual and corporate posture. Likewise, it has as principle to pay attention to the fact that the standards and conducts are in harmony with the culture of each business organisation and with the current legal system in which the productive activities and the relationship with the society are executed, in order to reconcile entrepreneurship, the national and international standards of protection to Human Rights and the personal and corporate introjection of understanding the indispensability of establishing an inclusive and diverse corporate environment that provides a business environment with observance and appreciation of human dignity. From this perspective, the conception that Corporate or Business Social Responsibility is an instrument that tends to contribute to the healthy development of the business environment and of a democratic society model is consolidated (PEREIRA; RODRIGUES, 2021, p. 150).

The importance of using Compliance as a Corporate or Business Social Responsibility tool for the protection and promotion of Human Rights goes beyond the concept of merely "being in compliance" with international laws and national standards. The idea starts from the assumption that ethics and human dignity are principles that guide the Principle of the Social Function of the Company and the business activity.



4 DECREE NO. 9.571/2018 AND ITS INEFFECTIVENESS AS A HUMAN RIGHTS PROTECTION INSTRUMENT

The Federal Constitution of 1988 is recognised as a modern constitutional charter, as it presents an extensive list of individual, diffuse and collective rights. While the Brazilian constitutional order provides for economic development, free enterprise and valuing work, it also provides for human dignity and the right to work in fair conditions. However, it is known that the constitutional idealization is very far from reality.

Obviously, the impact of human rights violations in Brazil is axiomatic for society and for the most vulnerable groups, due to the systemic, chronic and structural framework, whose violating conduct is practiced both by the State and by business organisations. However, specifically with regard to the relationship between business and human rights, Flávio de Leão Bastos Pereira and Rodrigo Bordalo Rodrigues point out that such violations also generate relevant impacts for the business environment and for the reputation of companies that practice these violations or maintain strategic partnerships with corporations that ignore human rights norms and human dignity (PEREIRA; RODRIGUES, 2021, p. 184-185).

While the international level has debated and published several norms of soft law character about the conduct and positioning of business organisations in relation to Human Rights, Brazil issued Decree 9.571/2018 establishing the National Guidelines on Business and Human Rights, which have as guiding principles the obligation of the State with the protection of these rights in business activities; the business responsibility towards Human Rights; designate access to redress mechanisms; and the implementation, monitoring and evaluation of the guidelines instituted by intervention of that decree (PASSOS, 2021, p. 379).

Based on the principles described in Article 2, or guiding axes, as defined by the norm, the decree in question defined a series of guidelines for each of these axes, which may serve as guidance for the implementation of a Human Rights Compliance programme.

According to Flávio de Leão Bastos Pereira and Rodrigo Bordalo Rodrigues, Decree No. 9.571/2018 may represent an important reference for business organisations, given that the guidelines established in the national norm may serve as a scope of customized solutions for the situation of each company (PEREIRA; RODRIGUES, 2021, p. 184-185).

However, despite being an important national milestone on the subject of Human Rights and companies, the national norm establishes a voluntary character, just like the United Nations Guiding Principles on Business and Human Rights - "Ruggie Principles" (DE ALMEIDA; MOREIRA, 2021, p. 11).



And it is on this voluntary aspect that lies one of the problems about the adherence of companies to the guidelines proposed by the decree.

The debate about the model of legal obligation is broad, because even if there is an inclination to determine a binding character, the regulation of companies to Human Rights under the soft law standards bias tends to a perspective of more agility and less dependence on institutions, given that its informal nature could insert a larger number of non-state actors, so as to benefit the enforcement of these standards and alternative methods of accountability (SAAD-DINIZ, 2019, p. 187).

According to the perspective of the Economic Analysis of Law, for example, the adequacy of the company to human rights norms tends to cause an increase in the costs of business activity, which will reflect throughout the production chain and in the relationship with stakeholders. However, the business organisation may enjoy the profitability that comes from its performance in respect to Human Rights, because besides the risk prevention and attraction of investments and trained professionals, the company may improve its reputation due to the label "Companies and Human Rights", as it is provided in Article 1, § 3, of the decree (PASSOS, 2021, p. 379).

Such analysis denotes that Decree No. 9.571/2018 is based on the Reputation Theory, since there is no type of sanction, financial or fiscal benefit or obligation for companies to adhere to the guidelines established in the national standard, so that reputation, being relevant in the globalized world, will allow the company that respects Human Rights to acquire a "title" and obtain better economic benefits (SILVA; MOREIRA, 2020, p. 8).

From this perspective, Cristiane Mancini, who understands that Corporate Social Responsibility is an important instrument of Compliance, points out that, in addition to the quality of the product or service and the ethical, responsive and transparent practices, the adherence of good practice conducts, suitability, responsibility, respect in different links of the production chain, reflect on the business reputation, which is the main driver of competitiveness, survival and business leverage (MANCINI, 2019, p. 293).

However, the mere adherence by the company to Decree No. 9.571/2018 to the reputational goal would imply the failure of the relationship between the business organisation and society, since it would not represent engagement to Human Rights that the national standard intends to establish (PASSOS, 2021, p. 383).

It is noteworthy that fundamental rights in the Brazilian legal system are effective in the scope of private relations, so that the observance and compliance of these standards is due by business organisations. In this step, unlike what is suggested by Decree No. 9.571/2018, it



should not be understood as liberality and voluntariness the observance of human rights norms by companies, because it is about impositions that must be followed, especially because, in the light of the Brazilian legal order, fundamental guarantees are effective in relations between private individuals (NETTO JUNIOR et. al, 2019, p. 15).

Furthermore, although it is notorious that the company can obtain economic benefits through the reputation that it may acquire by implementing a Human Rights Compliance programme and adapting its performance to the guidelines described in Decree No. 9.571/2018, Rafaella Mikos Passos mentions that, to date, no company has obtained from the competent authority the seal provided for in the decree in question (PASSOS, 2021, p. 383).

Thus, although Decree No. 9.571/2018 is an important milestone for the protection and promotion of Human Rights in the corporate-business environment, it is noted that the proposed Guidelines have not yet been adhered to by the private sector, so that, due to the absence of companies certified with the seal proposed in the decree, it is assumed that the national standard is insufficient to compel companies to voluntarily adapt to a Human Rights Compliance programme.

5 FINAL CONSIDERATIONS

Compliance programmes are instruments that are introduced in a corporate governance perspective, which have their origin as a control mechanism of the financial market and that due to the advances resulting from the globalization processes and the complexity of the economic-corporate relations, its implementation in other sectors of the company has acquired grounds and relevance, especially due to the objective characteristic of implementing rules and codes of ethical conduct for the prevention and mitigation of risks.

It is noteworthy that Compliance is introduced in a context of regulated self-regulation. In other words, the State, admittedly ineffective in its control functions, establishes a "distance control" of the private sector through the enactment of laws and rules, many of them of conduct. The private sector, on the other hand, which historically strives for less state intervention, establishes its self-control procedures based on legislation issued by the state.

Business organisations play an important role in the development of societies and human beings. However, many companies have participated in actions considered criminal. Moreover, history reveals that many business organisations, for the sake of profit and the greed of their leaders, have fomented wars, dictatorships and autocratic regimes, circumstances in which the most varied violations of human rights have been committed.



Although the post-war period was marked by the internationalization of Human Rights and by the concept of the dignity of the human being, it is clear that business organisations have distanced themselves from the figure of the individual holder of rights, whose perception is noted from the various standards and documents issued by international organisations, which relate the need for and greater participation of companies on this issue, in a clear conception that business organisations must align their activities and be actors of protection and promotion of Human Rights.

Thus, it is evidenced, from 1999 onwards, an advance in the international agenda, especially in the United Nations Organisation, in order to establish the conformity of the business activity with the protection and promotion of Human Rights, where we can highlight the Global Compact and the Guiding Principles on Business and Human Rights of the United Nations Organisation - the "Ruggie Principles".

However, even with the advancement of the perception of the development of the corporate activity with respect to the standards of protection of the Human Rights and the sense of Corporate Social Responsibility, the scenario of violations to the Human Rights that result from the activity performed by the companies, and many of the cases had media repercussion, it is explicit the importance of establishing the Compliance programme as an instrument to prevent and mitigate such violations.

In this context of proximity between the business activity and Human Rights, Decree No. 9.571/2018, which establishes the National Guidelines on Business and Human Rights, is now in force in the Brazilian legal system. The national norm established four basic principles that bind the State to the protection of these rights in the business sphere; the companies with their responsibility towards Human Rights and provides guidelines for redress and monitoring.

Since this is a voluntary standard, i.e., non-binding, which does not offer companies any type of tax or economic benefit or simply obliges them to adhere to the Guidelines defined in the national standard, it was assumed that companies would benefit economically from the reputation and distinction conferred by the national authority. However, the Reputation Theory did not prove effective regarding the adherence of companies to the Guidelines outlined in Decree No. 9.571/2018, given the absence of business organisations holding the distinctive seal.

Although it presents relevant Guidelines under the topic of protection of Human Rights, Decree No. 9.571/2018 is considered ineffective, since the norm was not able to encourage companies to implement specific Human Rights Compliance programmes. However, it is understood that it is up to the State to establish adequate mechanisms to bind companies to the decree.



Finally, in addition to the intensification of the studies on Decree No. 9.571/2018, especially due to the difficulties of aligning the economic and humanitarian perspectives in the same purpose and means, it is understood that the Compliance programmes can fulfil a relevant and determining role for the reduction of inequalities in the corporate-business environment and, consequently, in societies, through the promotion of diversity and inclusion policies, the adequacy of the relationship procedures with its stakeholders, the due verification and accountability of possible violations to Human Rights occurred because of the business activity, among others.

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