

Transnational Governance Models: Codes of Conduct, and Monitoring Agencies as Tools to Increase Workers' Rights

By *Vanisha Sukdeo**

A. Introduction

This paper critically explores how to implement changes to corporate behavior in regard to labor-related issues through codes of conduct ("code" or "codes") that would strengthen the rights of workers. The corporation essentially allows for its own reformation from within. There are many ways the link between corporate governance or corporate social responsibility ("CSR") and workers' rights can be explored. The term CSR is used to differentiate from the alternate shareholder primacy model of a corporation existing solely for its shareholders and to increase profit. It stands for the idea that corporations have duties to other stakeholders beyond shareholders. Those stakeholders include, but are not limited to, employees and those who produce goods and provide services,¹ environmental agencies, and government. Codes are a soft law mechanism that may be used to create a voluntary standard or set of rules to which corporations are bound. While this may be viewed as rather insubstantial compared to legislation, codes have value in terms of allowing the two (or more) parties that are bound by the code to have direct input in drafting the code. While the inherent imbalance of power involved in the dynamics of the employment relationship between management and workers must be acknowledged and must have an impact on the creation of the code, it does allow for involvement at a level which legislation does not. Part two of this paper examines governance models, Part three discusses codes of conduct as a private regulatory framework, and Part four shows how monitoring agencies are used to ensure compliance with codes.

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¹ Sometimes those who produce goods and services for a certain company may not be "employees" of that company but still have rights and obligations that flow from such a relationship even though it may not be termed an "employment relationship."

While in law school, two other law students and I were successful in convincing Queen's University to adopt a Code of Conduct ensuring that products made with the Queen's logo would be made under fair working conditions. This early venture into the anti-sweatshop movement was instrumental in fuelling my current research. Codes are important, but only through compliance and proper enforcement do they hold true force. The student movement fighting against sweatshops was quite successful as evidenced by the number of schools that are now 'No Sweat' campuses. "Students across the US [the United States of America] have won public disclosure agreements from their administrations which require licensees to disclose factory locations. This relatively recent demand for public disclosure has been surprisingly successful (and would not have been predicted even two years ago)."²

Corporations may rally around CSR in order to appease the masses, and in recognition of the shift towards ethical consumption. This may force corporations to put substance behind their claims to be socially responsible. Because consumers are becoming more knowledgeable about products, the demand for ethical products may put pressure on corporations to adopt the same. Professor Lance Compa credits Levi's and Reebok for adopting internal codes of conduct in the 1990s.³ But he also notes that "[c]ompanies monitoring and enforcing their own codes of conduct led inevitably to charges that the fox was monitoring the henhouse."⁴ This is also shown by such organizations as the Fair Labor Association (FLA), which was essentially created by the U.S. government under President Bill Clinton, so the FLA is questioned as to whether it is as effective as it could be. The FLA is viewed as a governmental soft mechanism to counter critics rather than an effective monitoring agency. Professor Compa goes on to state that "[t]oday a new generation of codes called 'multi-stakeholder' initiatives has appeared. Companies, unions, human rights groups, community and development organizations, and other NGOs participate in formulating a code of conduct."⁵ And these groups can be described as "seeking improvement and compliance, rather than cutting off business and hurting the workers they are trying to help."⁶ This illustrates the potential for negative repercussions resulting from efforts to help workers: if a corporation is not able to meet certain standards then it might shut down, resulting in workers losing jobs. The emphasis is often on trying to reform corporate practices, not putting corporations out of business.

² Charles Sabel, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* 25, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833 (last accessed: 1 December 2012).

³ Lance Compa, *Corporate Social Responsibility and Workers' Rights* 4, available at: <http://digitalcommons.ilr.cornell.edu/articles/183/> (last accessed: 1 December 2012).

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ *Id.*

B. Governance Models

The aim is to strengthen existing labor laws and create new laws and the best way forward may be to construct methods for implementing CSR changes that involve changes to corporations themselves by either external or internal sources. This can be achieved in two ways, the first being through changes to legislation (hard law), which can be accomplished by expanding duties of directors and officers beyond shareholders to include employees. This can be attained by implementing a mandatory code of conduct for companies, possibly embedded in the *Canada Business Corporations Act* ('CBCA')⁷. This still leaves the question as to what form this would take and what an ideal code would look like. The second option would be to strengthen existing voluntary codes of conduct (which is a move from soft law to hard law) which is often termed a 'hardening of soft law'.

Answers to these questions can be used to direct policy and should be useful for government when deciding how best to implement new rules or laws and how to strengthen existing rules and laws. Option 2 of implementing more voluntary codes of conduct and strengthening existing ones is the best way forward. Trying to change legislation is more time consuming and less rewarding. Even if legislation is passed by one government it can be easily removed by the next government as is often the case in regards to labor legislation. Because labor issues are politically isolating the government in power may choose to curtail workers' rights in their administration that the next party in power may change. In the case of codes of conduct there is less chance of codes being changed as key officials may remain in those positions of power. Also, the potential consumer backlash against changing the codes may be anticipated and fought against. Codes do not have the same force that hard law offers but are a good alternative for those who are often left out of the political decision-making process.

Once codes are implemented their force and effect comes from having external monitoring agencies that are paid to monitor compliance. Depending on the code itself, the remedy for breach usually amounts to an effort to have the company fix the problem by meeting the standards of the code in question, rather than terminating the contract with the supplier automatically. The nature of the code varies from corporation to corporation but most codes identify that suppliers and sub-suppliers must be governed by the code, otherwise the efficacy is reduced. If the attempt to try to rectify the wrong does not happen, then the relationship may be terminated. "The ultimate sanction against non-compliance is the threat of being de-listed as a supplier. Codes are thus only 'voluntary' to

⁷ *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

the suppliers in that the alternative is to find new outlets.”⁸ This is often stipulated in the language of the code itself.

C. Codes of Conduct

Codes are essential in current society as the reach of transnational corporations is vast and domestic laws are not able to fully provide a regulatory system that is needed for policing such an organization. Critics may argue that codes allow corporations to get away with behavior that hard law mechanisms would punish (possibly severely so). However, as Teubner explains, “voluntary codes take the process one step further: they allow corporations to make something resembling ‘law’ without state approval *ex ante* or *ex post*.”⁹ The question becomes more akin to what corporations should do when the state fails to act, rather than corporations vying to usurp the power of the state. “What, then, is the relationship of corporate codes to law? As I have tried to show, corporate codes may be used to deflect state law, to create the illusion of law while fending off the reality of regulation.”¹⁰ However, while it may be true that corporations turn to self-regulation as opposed to calling for state regulation, it is not necessarily true that self-regulation is futile. Self-regulation may also be a first step towards increased regulation.

Codes do not offer the protection that hard law does but may allow coverage for areas that legislation does not. While legislation may govern hours of work, there is room within a code to allow for formation of advantages akin to those gained in a collective agreement. In jurisdictions where union organizing is difficult there may be ground covered in a code that may not be able to be achieved through hard law. “Codes of corporate conduct are concerned fundamentally with governance. They seek to govern conduct not just of corporations and their managers, but—more subtly—a whole range of other actors including investors, workers, customers, suppliers, creditors, insurers, competitors, legislators, regulators, inspectors, prosecutors, judges and international organizations.”¹¹ While the future outcome of numerous codes is yet to be realized, the potential of codes is compelling. Only through the establishment of voluntary codes and onwards towards getting those same rights entrenched in legislation will the fight for workers rights move

⁸ Stephanie Barrientos, *Mapping Codes Through the Value Chain: from Researcher to Detective*, in CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY, 67 (Rhys Jenkins, Ruth Pearson and Gill Seyfang eds., 2002).

⁹ Harry Arthurs, *Profit, Power and Law in the Global Economy*, in ETHICS CODES, CORPORATIONS, AND THE CHALLENGE OF GLOBALIZATION, 55 (Wesley Cragg ed., 2003).

¹⁰ *Id.* at 58.

¹¹ Stepan Wood, *Codes: Problematizations, Authorizations and the Public/Private Divide*, in ETHICS CODES, CORPORATIONS, AND THE CHALLENGE OF GLOBALIZATION, 247 (Wesley Cragg ed., 2003).

forward. "They [codes of conduct] should be seen as a contested terrain which can be used to advance the cause of workers in the South and to carve out space for them to organize and to struggle to improve their own wages and working conditions."¹² Again, a first step in the fight for workers' rights is better than waiting for a perfect model to emerge.

I. Private Regulation

Private regulation refers to non-state regulation and governance that operates outside of legislation and other hard law mechanisms. Sabel, O'Rourke and Fung describe this as a way of "ratcheting labor standards" ("RLS") without the use of hard law.¹³ Allowing labor standards to be strengthened outside of state governance is to allow private actors to set the terms of their own relationships. This may lead to a more interactive and fulfilling model of governance between the parties. However, in the alternative this may allow even floor-level standards to be undercut. What becomes the floor and what becomes the ceiling with respect to labor rights?

II. Consumer Regulation

The next step from state control to private regulation is consumer regulation. If we have moved from the state-centered model of governance and regulation to the private regulation model where non-state actors such as corporations and NGOs help to shape the legal landscape, then what is the next step? I argue that the next step is for governments to essentially hand over the mechanisms of control to consumers. Why should governments be held responsible for the goods that cross their borders when they can download that power to the ordinary consumers? Where is the government's responsibility or liability in allowing its citizens to purchase and consume products that are socially irresponsible? Whose culpability is it? I argue that these are issues that governments should be dealing with but would rather avoid by evading responsibility in the guise of CSR. If CSR is about corporations choosing to become more socially responsible then governments are able to shirk the responsibility of forcing corporations to become more socially responsible.

In the model I term "consumer regulation" the regulation of consumer goods is left to consumers themselves. While codes and certification agencies allow for compliance with a certain level of standards, they also create a corresponding obligation on consumers. If these codes and certifications exist in the world where consumers purchase goods and

¹² Rhys Jenkins, *The Political Economy of Codes of Conduct*, in CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 28 (Rhys Jenkins, Ruth Pearson & Gill Seyfang eds., 2002).

¹³ Sabel, O'Rourke & Fung, *supra* note 2.

services, is the obligation not placed on consumers to be knowledgeable about these codes and certifications? This creates a new “informed ethical consumer” one who has to not only recognize these certifications when encountered with them but also be able to understand the distinctions between the competing agencies. This new “informed ethical consumer” must know that the Forest Stewardship Council (“FSC”) and Rainforest Alliance exist and must be able to differentiate and extol the virtues of each. Not only must consumers notice such certifications but must be knowledgeable about the organizations that implement these certifications, hence not just an ethical consumer but an “informed ethical consumer.”

III. Codes Versus Certifications

Codes of conduct are rather malleable as they can be altered. This is mostly a positive aspect of codes because the expectation is that codes can be improved in later years to make sure that corporations are competitive, especially in the face of their competitors adopting similar codes. Codes are a tool of contestation as they encourage corporations to constantly improve upon the standards already agreed upon. Certification agencies, on the other hand, are rather static in that once a logo is imprinted on a product then it cannot be altered.

Also, the logos are static in the sense that once a label is affixed it cannot be changed. At the same time, what the FSC logo means today may not be what it means tomorrow. FSC in particular has been criticized for being too lenient and maybe having too many products bear their stamp of approval – leading consumers to lose trust in the symbols and what they stand for. Studies casting doubts on the authenticity of organic products leads to a sense of distrust within the movement and beyond. What is the alternative? At least some companies are trying to appease the masses by seeming to “give in” to pressure to be socially responsible. However the “informed ethical consumer” may be the only ones who are skeptical. Maybe the average consumer does not notice these symbols, or maybe they only need to see one logo on a product to be satisfied about its ethical nature. Rhys Jenkins appears to support this view:

As in the case of investors, a minority of consumers are also concerned about the ethical dimension of the products which they purchase, as illustrated by the growth in demand for fair-traded coffee and other such products. However, these examples remain niche markets, supplying a predominantly middle class and relatively affluent and educated customer base.¹⁴

¹⁴ Jenkins, *supra* note 12, at 15.

However, the view that ethical consumers are rather affluent consumers is not credible. Many consumers may simply be informed about socially responsible products and choose to purchase such. It does not mean that ethical consumers are all rich individuals who can afford the often higher prices that are linked to ethical products. Some consumers may choose to spend their money in this manner rather than on other purchasing choices. The discussion should be more focused on why certain consumers are willing to pay more for ethical products. Also, the effect of guilt may be explored to understand why people choose ethical products once they are better informed.¹⁵

IV. Increasing Labor Standards on a Worldwide Level

This type of private regulation is outside of the state-centered regulation model and instead attempts to build a standard that is not based on national borders. “[S]ome multinational corporations and non-governmental organizations have struck out on their own, agreeing voluntarily to adopt various codes of conduct and allowing outsiders to verify compliance with these codes. In some cases these efforts have yielded impressive gains.”¹⁶ In this passage, Sabel, O’Rourke and Fung imply that codes of conduct have some value in building the rights of workers. This RLS model that the authors devised does not set out a regulatory framework or a way of making the theory practical. This notion of an industry-wide standard is worth pursuing as it allows one to compare like with like, rather than trying to transcribe norms from one industry to another.

Sabel, O’Rourke and Fung then go on to state that unscrupulous companies may adopt a code and then find “pliant monitors” to attest to the corporation’s sincerity. This argument does not attack codes of conduct in and of themselves but looks past that to argue that codes could be misused. This is not a strong argument against codes. The authors appear to deride the use of codes of conduct unnecessarily. Also, this notion of RLS may ultimately lower the power of unions and in a way usurp unions. “As a transparent and encompassing knowledge-base, RLS would enable trade unions to enhance their own knowledge of best labor practices world-wide and to constantly update that knowledge as new trends emerge in sectors or regions.”¹⁷

¹⁵ I hope to explore the intersection of guilt and ethical consumption in later work, as it is important to note that once consumers are better informed they may feel guilty purchasing products that do not meet ethical standards of production.

¹⁶ Sabel, O’Rourke & Fung, *supra* note 2, at 1.

¹⁷ *Id.* at 35.

1. *The International Labor Organization*

The International Labor Organization (“ILO”) Conventions outline core labor standards. However, even Canada is not signatory to all of the conventions. Even if a country signs on to the ILO Conventions, the task of enforcing such standards operates on the domestic front. How are breaches of a country’s ILO obligations treated? What is the remedy for a breach? “The open and crucial questions, then, is how to construct a regulatory framework that protects vulnerable groups against the abuses identified in core labor standards?”¹⁸ While discussing divisions such as North-South and developed-developing it is worth exploring the notion of paternalism. “Finally and perhaps most crucially, critics of these labor standards charge that they amount to trade protectionism for the developed countries, would restrict economic activity in developing areas, and thus ultimately harm those populations that they are designed to protect.”¹⁹ Is this not a form of paternalism? We, the developed countries, telling those in developing countries what is in their best interests? At times, is this not a veiled self-interest?

Also, the inclusion of ILO Conventions in corporate codes may be misreading the intent of the ILO. As stated by Professor Jill Murray:

ILO conventions are designed to place obligations on states. That is so in a purely technical sense, because conventions are instruments which are ‘addressed’ to states. Each member state of the ILO must decide whether or not it ratifies an individual convention, and the form which implementation of a ratified convention will take.²⁰

Trying to get corporations to adopt conventions that are geared at states is ineffective as the state may possess the proper mechanisms for enforcement that a corporation may lack.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 5.

²⁰ Jill Murray, *Labour Rights/Corporate Responsibilities: the Role of ILO Labour Standards*, in *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY*, 33 (Rhys Jenkins, Ruth Pearson and Gill Seyfang, eds., 2002).

D. Monitoring Agencies

In this section the efficacy of various proposals for shaping corporate behavior to increase labor standards will be assessed. The assessment of the strengths and weaknesses of various monitoring agencies including: 1) the Worker Rights Consortium (“WRC”), and 2) Fair Labor Association (“FLA”) will be conducted. The WRC conducts independent factory investigations while the FLA does not. Look at Queen's University as an example of getting a code²¹ implemented in 2004 and then signing on with the monitoring agency WRC. The code is the first step. The implementation of the code is the most important piece. Having it be properly enforced is obviously the next most important step. A rule without a remedy is ineffective. There must be a remedy once that rule is breached. Some institutions decide to have two monitoring agencies as York University uses both the WRC²² and FLA²³. Looking at the Queen’s example section 3 of its code reads:

The University reserves the right to terminate its relationship with any licensee which continues to conduct its business in violation of the corrective action plan, in accordance with the terms set forth in the licensee agreement. This decision will be rendered by the ad hoc oversight committee responsible for implementation of the Code.²⁴

This outlines the various bodies responsible for ensuring compliance with the code. On the internal side Queen’s has an oversight committee to monitor compliance with the code and has an external third-party monitoring agency, the WRC. What happens if the two bodies are in opposition?

Codes are varied as some are stricter than others. Stricter codes may be more difficult to implement. My experience at Queen's getting the University to implement a code was informative. We started Queen’s Students Against Sweatshops (“QSAS”) with the intention of having the WRC be the monitoring agency. We were successful in that goal, but had to sacrifice certain provisions in order to get the code drafted. The pressures on advocacy

²¹ Queen’s University *Code of Conduct*, available at: <http://www.queensu.ca/studentaffairs/trademarklicensing/codeofconduct.html> (last accessed: 1 December 2012).

²² WRC, Affiliate schools, available at: <http://www.workersrights.org/about/as.asp> (last accessed: 1 December 2012).

²³ FLA, Affiliate schools, available at: <http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=CollegesUniversities> (last accessed: 1 December 2012).

²⁴ Queen’s University *Code of Conduct*, *supra* note 21.

groups (QSAS could fall under this umbrella) to conform or accept concessions is strong. What is better – having a weaker code that gets implemented or holding out for a stronger one to possibly be implemented in the future? Concessions have to be accepted and the push for a stronger code in the future must be brought about later. A starting out point is an important one. None of us viewed our code as one that was compromised compared to those in other universities. There is not much research on the use of self-monitoring, such as Nike does. “Little research exists on the impacts of codes of conduct and self-monitoring on actual labor conditions. Nike naturally asserts that they respond effectively and sufficiently to labor concerns.”²⁵ The Queen’s code references ILO Conventions 138, 182, 155 and Recommendation 164. Also ILO Conventions 87, 98 and 135 are mentioned. As Professor Sethi states, an independent external monitoring system builds public trust.²⁶ Thus a code without a monitoring agency is rather purposeless.

I. Worker Rights Consortium

The Worker Rights Consortium is an independent labor rights monitoring agency. The WRC has over 175 college and university affiliates and its primary focus is on factories that make university-related apparel. It was started in April 2000 by university administrators, students and labor experts. As noted on their website their “purpose is to combat sweatshops and protect the rights of workers who make apparel and other products.”²⁷ The WRC provides a model Code of Conduct on its website. Monitoring agencies are external organizations that are paid a fee to monitor compliance with a code. “USAS [United Students Against Sweatshops] and the CCC [Clean Clothes Campaign] have sought to establish a ‘foundation’ model that centralizes oversight and controls all payments for monitoring. The FLA and SA8000 employ a ‘consulting firm’ model which allows companies to choose and pay for their own monitors.”²⁸ The various agencies have different standards and some are more strict than others. The WRC will cancel its contract in the event of non-compliance. The FLA, on the other hand, will work towards encouraging compliance if there is a breach. “[T]he Worker Rights Consortium (WRC), developed by the United Students Against Sweatshops (USAS) in 1999, employs a different strategy focusing on

²⁵ Sabel, O’Rourke & Fung, *supra* note 2, at 22.

²⁶ S. PRAKASH SETHI ed., *GLOBALIZATION AND SELF-REGULATION: THE CRUCIAL ROLE THAT CORPORATE CODES OF CONDUCT PLAY IN GLOBAL BUSINESS*, 13 (2011): “There must be an independent external monitoring and compliance verification system to engender public trust and credibility in the industry’s claims of performance. Performance with code compliance on the part of member companies or groups must be subjected to independent external monitoring and compliance verification. It is in this area that companies and industries offer the most resistance. It is argued that external monitoring would create an environment of distrust and policing.”

²⁷ WRC, ‘Mission’, available at: <http://www.workersrights.org/about/> (last accessed: 1 December 2012).

²⁸ Sabel, O’Rourke & Fung, *supra* note 2, at 24.

information forcing, verification systems, and pro-active inspections.”²⁹ What do they do that is different from FLA? They go into warehouses and investigate. FLA is viewed as the less rigorous monitoring agency compared to the WRC. “It [WRC] puts particular emphasis on developing links with labor organizations and workers in the countries where licensed production is being undertaken. It will develop mechanisms for receiving and verifying workers’ complaints regarding violations of the code of conduct. The WRC places considerable emphasis on transparency, requiring full disclosure of plant locations and labor conditions.”³⁰ The WRC is careful to not be seen as trying to usurp the power and control of unions. The role of monitoring agencies to provide a variation on the auditing system in that the agency will ensure that proper mechanisms are in place in conformity with the code. “When codes are the result of negotiations involving a number of different stakeholders, they are likely to be more comprehensive and to have stricter monitoring than those which are unilaterally adopted by companies...Thus the WRC code which does not involve any direct corporate participation is more stringent than the FLA code which was rejected by the trade unions.”³¹ The divide between which monitoring agencies unions and other advocacy groups choose to align with speaks volumes as to which entities are more corporate driven (and perhaps controlled) than others. A lenient monitoring agency will not provide effective services in that its role is to ensure compliance with the code not merely act as a façade.

II. Fair Labor Association

The FLA was started in 1999 with the involvement of corporations. which is in contrast to the WRC which does not include corporate involvement. It may be said that having corporations involved with the founding of the FLA may result in it being viewed as less rigorous as the WRC. “The FLA is a brand accountability system that places the onus on companies to voluntarily achieve the FLA’s labor standards in the factories manufacturing their products.”³² This task seems less onerous than the WRC’s mandate. “The Fair Labor Association (FLA), convened by the Clinton administration in 1996, is the most advanced and most controversial of current initiatives to establish monitoring and verification systems.”³³ The FLA is criticized for being too much aligned with both government and corporate interests. A monitoring agency that appears to demonstrate such biases may be

²⁹ *Id.* at 23.

³⁰ Jenkins, *supra* note 12, at 27.

³¹ *Id.* at 28.

³² FLA, ‘About Us’, available at: http://www.fairlabor.org/fla/go.asp?u=/pub/mp&Page=About_Menu (last accessed: 1 December 2012).

³³ Sabel, O’Rourke & Fung, *supra* note 2, at 23.

less successful than one where the clear independence has been established since its creation. "Critics of the FLA argue that the monitoring system is neither sufficiently strong nor independent. The fact that a company can be certified when only 30 per cent of its facilities have been independently monitored, and that it has plenty of time to warn those which are to be inspected, limits the effectiveness of monitoring."³⁴ The FLA may also face criticism that is not sufficiently independent because it lacks a real "arm's length" distance from its corporate founders. "Another perverse outcome of this approach is that it may lead the code effort to be captured by the companies with the least amount of commitment to code compliance. This situation is akin to the capture theory of regulation, where the regulators are co-opted by the regulated and thus lose their legitimacy as regulators."³⁵ In this instance the monitoring agencies may be said to be occupying the role of regulators by offering services akin to auditing and sometimes drawing attention to delinquent suppliers.

E. Conclusion

This paper critically explored how to implement changes to corporate law that would increase the rights of workers through codes of conduct and monitoring systems. This paper drew on my experience in QSAS and how it fits into private transnational regulation. The monitoring agencies the FLA and the WRC were compared. The research indicated that the WRC is a more rigorous and effective monitoring agency when compared with the FLA.

³⁴ Jenkins, *supra* note 12, at 26.

³⁵ SETHI, *supra* note 26, at 11.