

Multilevel Tools for Protection of Social Rights: a Hypothesis

Akaharu Koyama

(Researcher, Faculty of Law, Waseda University, Japan)

María Katia García Landaburu

(Lecturer, Faculty of Law, Pontificia Universidad Católica del Perú)

Alberto Mattei

(PhD in European and Comparative legal studies, Faculty of Law,
University of Trento, Italy)

Francesca Marinelli

(Researcher, Faculty of Law, University of Milan, Italy)

Quentin Detienne

(Assistant, Faculty of Law, Political Science and Criminology,
University of Liège, Belgium)

Gaye Burcu Yildiz

(Associate Professor, Faculty of Political Sciences, Ankara University, Turkey)

Evelina Zurauskaite

(Lecturer, Faculty of Law and Faculty of Political Science and Diplomacy, Vytautas Magnus
University, Lithuania)

Abstract The article analyses the usage of multilevel tools (such as cooperation among international organizations, regional instruments, activities of regional and national courts and private subjects' actions) in the social rights' protection field. A closer look is given at the cooperation among international organizations (the ILO and the IMF, the World Bank Group, the OECD, the WTO and the UN) and at one of regional collaboration models within the sphere of workers' rights protection: the North American Agreement on Labour Collaboration (NAALC). Within the scenario where balance between political and judicial powers is no longer affected only at national level but should be considered also from multilevel perspective, the redefinition of the role and responsibility of regional and national courts plays an important role in the protection of fundamental social rights. It is worth mentioning the mutual influence between the CJEU and the ECtHR in their fight against discrimination. On a national level, the role of national Constitutional Courts in the field of fundamental social rights is analyzed in different countries (Asia, Europe and South America). Finally, the article studies the adoption of transnational instruments by private actors – companies and trade unions – that collectively or individually try to protect social rights at work. Two specific instruments have been chosen: transnational company agreement and code of conduct.

Summary Introduction. – 1. Global Perspective or Regional Collaboration Model? – 2. A “Virtuous Example” of Fundamental Rights Protection at the Regional Level: the “Cross-fertilization” between the European Union and the Council of Europe on Anti-discrimination Law. – 3. A Brief Overview of the Role of Constitutional Courts in Various Countries and Fundamental Social Rights. – 4. Private Actors: Transnational Company Agreements and Corporate Codes of Conduct. – 4.1. Transnational Company Agreements. – 4.2. Corporate Codes of Conduct. – 5. Conclusion.

Keywords Social rights' protection. Institutional collaboration. International Labour Organization. Regional collaboration models. Multilevel tools.

Introduction

In the times when we find: States in crisis, the phenomena like social dumping, delocalization and weakness of trade unions at national and international level, there's a need to consider whether we should stop focusing only on traditional ways and instruments for the protection of fundamental social rights and try to identify and use new, alternative and "soft" tools to protect all individuals at work in the global market.

There are many possible ways which can involve a wide range of actors: more or less intensive cooperation between international organizations, different ways of regional models of cooperation between the States and regional courts or the adoption of transnational instruments by private subjects, like trade unions or companies.

Which model or way to protect fundamental rights is the most effective, most probable to bring some (positive) results?

Of course, first we should answer the question what social rights should be considered as "fundamental". The answer to this question remains beyond the scope of this article, though. Instead, it appears to us that in order to reach a consensus about the need of effective intervention in the protection of social rights' field, the usage of multilevel tools by different actors might be appropriate.

1 Global Perspective or Regional Collaboration Model?

Looking from a global perspective, the first question to be answered would be whether the International Labour Organization (ILO) stands alone in the battle for the protection of social rights or it needs a common strategy with the "Big Brothers".

Considering the fact that a current seat of the World Trade Organization (WTO) in Geneva is occupying the same building that previously hosted the ILO staff the question of cooperation becomes more subtle and symbolic.

The cooperation between ILO and other international institutions has been improving since the emergence of latest jobs crisis in 2008. The reasons and causes of the crisis have increased the participation of the ILO in international debate to tackle the crisis. The in-house subjects to the ILO such as decent work and social protection floors have been widely used by all international actors.

The focal point of this cooperation is G20 process which gathers major economies of the world with a representation over 85% of the gross world product, 80% of world trade, and two-thirds of the world popula-

tion¹. When the financial and economic crisis spread across the globe in 2008, the leaders of the G20 countries deployed a plan to strengthen further international cooperation and coherence. In carrying out their work, the members of the G20 draw on the experience of technical experts of international organizations, chiefly the International Monetary Fund (IMF), the World Bank Group, the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO), the United Nations (UN), the Financial Stability Board (FSB) and the ILO. The milestone of this joint approach on social policies has become evident with the establishment of Taskforce on Employment under the French Presidency in order to support G20 Labour and Employment Ministers Meetings². The latest display of this cooperation can be found in two new reports which were submitted to the G20 during Labour and Employment Ministers Meeting in Melbourne on 10-11 September 2014. The first report³ prepared by the ILO, the OECD and the World Bank Group focuses on G20 labour markets with a view to respond to current challenges. The second one⁴ prepared jointly by the ILO, the OECD, the IMF and the World Bank Group addresses specifically the promotion of gender-balanced economies. Both reports incorporate predominantly the sensitivities and previous views of the ILO, such as the decent work and quality jobs. The ILO's presence is also detectable in the G20 Labour and Employment Ministerial Declaration, as the text reads «However, there is a continuing need to generate hundreds of millions of decent jobs that can lift working families out of poverty and drive sustainable development»⁵.

As for the collaboration between the ILO and the IMF, these two organisations have come together to stimulate a discussion on international cooperation and policy innovation that could improve the capacity of economies to generate enough good jobs to strengthen the social cohesion. In 2010 a joint high-level IMF-ILO conference in Oslo⁶ took place where

1 About G20: *G20 Members*, in https://www.g20.org/about_g20/g20_members (2014-11-12).

2 OECD and G20, *G20 Employment Task Force*, in <http://www.oecd.org/g20/topics/employment-and-social-policy/> (2014-11-12).

3 *G20 Labour markets: outlook, key challenges and policy responses*, in http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/reports/WCMS_305421/lang--en/index.htm (2014-11-12).

4 *G20 Achieving stronger growth by promoting a more gender-balanced economy*, in http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/reports/WCMS_305422/lang--en/index.htm (2014-11-12).

5 *The G20 Labour and Employment Ministerial Declaration Melbourne Meeting 10-11 September 2014*, in http://www.ilo.org/wcmsp5/groups/public/---dgreports/dcomm/documents/meetingdocument/wcms_307551.pdf (2014-10-20).

6 <http://osloconference2010.org/index.htm> (2014-10-20).

new ways of forging a sustainable, job-rich economic recovery were explored'. Moreover, in 2011 the IMF renewed attention to the issue of jobs, inequality and growth by creating a «Working Group on Jobs and Inclusive Growth»⁸. In addition to that, the participation of Director-General of the ILO to the IMF's annual International Monetary and Financial Committee can be considered as the acceptance of the ILO as a regular stakeholder. The Committee⁹ which is one of two ministerial committees of the IMF's decision-making body – the Board of Governors –, is one of the few suitable *fora* in IMF structure to reiterate social concerns. In its last meeting the Director-General of ILO stressed the need for strengthening demand and supply side employment and social policies¹⁰.

As for the cooperation between the ILO and the World Bank Group¹¹, both organisations share similar challenges: poverty and exclusion, a global financial and jobs crisis and growing inequality. However, each organization has different approach to the issues related to the global trade and globalization. Even the necessity of sanctions for not respecting the ILO's core labour standards was questioned in 90's by researchers from the World Bank Group¹². Throughout the history the mission of the World Bank Group evolved from being a facilitator of post-war reconstruction and development to the present-day mandate of worldwide poverty alleviation. Among other activities the World Bank Group prepares annually the 'Doing Business Report' which is criticisable from the viewpoint of the ILO. The report ranks countries for their performance on easiness of hiring and firing workers. This methodology always leads to controversy over the protection of labour which is the core of the ILO's mission. Even within the organisation, this methodology has been the focal point of discussions and an independent panel was convened for

7 For the discussion overview see: <http://osloconference2010.org/overview.pdf> (2014-10-20).

8 <http://www.ilo.org/washington/areas/multilateral-initiatives/ilo-and-imf-collaboration/lang-en/index.htm> (2014-10-20).

9 For IMF's Governance Structure see: <https://www.imf.org/external/about/govstruct.htm> (2014-10-20).

10 *ILO Statement to the International Monetary and Financial Committee 11 October 2014*, in http://ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_312630/lang-en/index.htm (2014-10-20).

11 The World Bank Group is composed by five organizations: the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the International Centre for Settlement of Investment Disputes, in <http://www.worldbank.org/en/about> (2014-10-20).

12 MASKUS, *Should Core Labour Standards Be Imposed Through International Labour Policy?*, in *Policy Research Working Paper*, no. 1817, 1997.

the review of existing method. The Independent Doing Business Report Review Panel initiated by the President of World Bank Group Jim Yong Kim has concluded that the reliance to a narrow information source and usage of aggregate rankings are the major shortcomings of the report¹³. The ILO has also expressed its dismay on 'Doing Business Report' on various occasions. In its previous evaluations the ILO emphasized that the methodology of employing workers indicator within the report yields a narrow and misleading view of the employment environment for business and this attitude results in a ranking in which some countries with a strong and competitive private sector are placed at the lower end¹⁴. The cooperation of these two organisations has improved with the impetus of G20 process: the common ideals generated a new synergy for creation of new development patterns, especially for emerging economies based on job-rich growth.

Recently, one could notice some kind of willingness to change the attitude towards labour issues in the World Bank's Social Protection and Labour Strategy 2012-2022¹⁵, to which preparation has contributed also the ILO. In fact, the discussions in previous International Labour Conferences (in 2012 and 2013) on social protection floors have helped to prepare the Strategy. The ten-year Strategy calls for investing in stronger social protection and labour systems, expanding the reach of social safety nets – programmes which should protect families from shocks, help to ensure that children grow up healthy, well-fed, and stay in school and learn, empower women and girls and create jobs. The intermediate results show that social safety programmes launched in developing countries have indeed lifted about 50 million people from absolute poverty (living on less than 1.25 \$ per day)¹⁶.

Another partner of the ILO is the OECD which promotes policies that shall improve the economic and social well-being of people around the world. The mandate of the OECD goes far beyond the ILO's but the labour policies are an undisputed part of the OECD's daily business. The collaboration between the OECD and the ILO has various aspects, such as

13 Statement from the Independent Panel in <http://www.dbrpanel.org/> (2014-10-20).

14 *The United Nations and reform: Developments in the multilateral system*, in http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_085125.pdf (2014-10-20).

15 *Resilience, Equity, and Opportunity-World Bank's Social Protection and Labour Strategy 2012-2022*, in http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/280558-1274453001167/7089867-1279223745454/7253917-1291314603217/SPL_Strategy_2012-22_FINAL.pdf (2014-10-20).

16 *The State of Social Safety Nets 2014*, 33, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/05/12/000350881_20140512111223/Rendered/PDF/879840WP0FINAL00Box385208B00PUBLIC0.pdf (2014-10-20).

corporate social responsibility (CRS), social security, job creation, labour migration, etc. In 2011 two organisations have concluded a memorandum of understanding¹⁷ to strengthen their cooperation and coordination in fields of common interest and activity. The ILO's contribution to the preparation of the policies to respond existing financial crisis remains the main course of action within this collaboration.

The question is whether this kind of global collaboration between international organizations is enough? Maybe we should look back inside the ILO and give more powers to the ILO itself? In the recent past, the international community tried to establish, although unsuccessfully, a strong relationship between trade and labour and between an economic organization and the ILO. Indeed, we shall recall the Havana Charter¹⁸ that was supposed to create a strong linkage between trade and labour standards, and between the International Trade Organization (ITO) and the ILO.

The ITO, though, never came into existence because of the lack of the willingness of some of its creators¹⁹. The question arises whether it should be feasible and realistic, instead, to give to the ILO the power to apply economic sanctions for non-compliance with the ILO labour standards. Though, it could have an effect of decreasing number of ratifications of the ILO conventions, still considering the fact that lately it is getting more and more difficult to get a consensus between the 185 ILO Members on the adoption of new conventions, maybe we could assume that the ratification is not so important anymore, at least for some Member States of the ILO. The CSR initiatives, like ILO's Tripartite declaration of principles concerning multinational enterprises and social policy (known as MNE Declaration)²⁰, the Global Compact²¹ and the OECD's Guidelines

17 Memorandum of Understanding between ILO and OECD, <http://www.oecd.org/global-relations/48013743.pdf> (2014-10-20).

18 Final Act of the United Nations Conference on Trade and Employment (Havana Charter) (1947), Art. 7.3 «In all matters relating to labour standards that may be referred to the Organization ... it shall consult and co-operate with the International Labour Organization», http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (2014-10-20).

19 HASTEDT, *Encyclopedia of American Foreign Policy*, United States, 2004, p. 182, 498; TROFIMOV, *The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective*, in *Journal of Politics and Law*, 2012, vol. 5, no. 1, p. 57, in <http://www.ccsenet.org/jpl> (2014-10-20).

20 *Tripartite declaration of principles concerning multinational enterprises and social policy*, in http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (2014-10-20).

21 *The United Nations Global Compact*, in <https://www.unglobalcompact.org/> (2014-10-20).

for Multinational Enterprises (known as OECD MNE Guidelines)²² might act as facilitators for extending the core labour standards to all countries regardless the ratification barrier.

Or maybe instead of focusing on global perspective, regional instruments and collaboration models among States which have similar economic, political and cultural environment (but not necessarily) are easier to implement. One of the examples of such regional collaboration is NAALC (*North American Agreement on Labor collaboration*)²³. It is a 'side agreement' to a free trade agreement concluded between USA, Canada and Mexico (NAFTA – *North American Free Trade Agreement*) in force since 1 January, 1994²⁴. All three Member States have different level of the protection of workers' rights and their enforcement. The idea of NAALC is to find a compromise between the harmonization of some labour standards and the application of international labour standards with a very important cross-border monitoring mechanism how Member States comply with their obligations under NAALC. It was supposed to create a strong linkage between trade and compliance of (national) labour laws with the possibility to apply economic sanctions.

According to NAALC²⁵, labour law consists of 11 guiding principles «... that the Parties are committed to promote, subject to each Party's domestic law. ...». Therefore, the commitments of the Member States under NAALC regards the implementation of (some) national labour laws covering the enumerated labour principles. A "novelty" of this Agreement is the monitoring how the States comply with obligations assumed under NAALC: it is a cross-border monitoring mechanism with the submissions regarding the violations of labour principles to be filled with National

22 *OECD Guidelines for multinational enterprises*, in <http://www.oecd.org/corporate/mne/> (2014-10-20).

23 About NAALC see among others: ATLESON, COMPA, RITTICH ET AL., *International Labor law: cases and materials on workers' rights in the global economy*, Thomson West, 2008; HEPPLE, *Labour laws and global trade*, Hart Publishing, 2005; BRONSTEIN, *International and comparative labour law. Current challenges*, Palgrave Macmillian, ILO, 2009; COMPA, *Labour rights in the FTAA in Globalization and the future of labour law*, edited by CRAIG, LYNK, 2011; BLANPAIN, CORBETT, ZIMMER ET AL., *The Global workplace International and comparative employment law-Cases and materials*, 2007; PERULLI, *Diritto del lavoro e globalizzazione. Clausole sociali, codici di condotta e commercio internazionale*, Padova, 1999; ZANOBETTI, *Diritto internazionale del lavoro. Norme universali, regionali e dell'Unione europea*, Milano, 2011; PIQUER, *NAALC: an effective compromise?* in *Global Law Working paper-New York University School of Law*, 2005, no. 1; SINGH, *NAFTA and Labor: A Canadian perspective*, in *Journal of Labour Research*, 2002, XXIII, no. 3, p. 434.

24 For more information regarding NAFTA visit the website of the US Trade Representative office at <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

25 Annex 1 NAALC. Full text of the NAALC is available at <http://new.naalc.org/naalc/naalc-full-text.htm>.

Administrative Office (NAO) based in another country(s), other than the one where the violation has occurred²⁶.

In relation to procedural rules for the violation of the “guiding principles” we can group them into three categories and each category can go through certain stages of procedure²⁷. Most submissions received by NAOs were related to the violation of the collective labour rights²⁸ which are grouped within the first category principles and can pass only the first stage of the procedure that ends with the ministerial level discussions²⁹. One could suspect that it might be a diplomatic solution for the violation of very important workers’ rights.

Despite its limited application with regards to all enumerated labour principles, the cross-border monitoring mechanism how national labour laws in each Member State are observed could be considered as a new tool for workers, trade unions and human rights NGOs to draw the attention of the society in each Member State, in the region or even on a broader level. It could be considered like another, maybe *soft law*, instrument to combat for the better and safer workplace environment at national-regional level. The major part of submissions were presented shortly after the adoption of NAALC, against Mexico as it was expected, and in relation to the violations of collective labour rights which can go only through the first stage of the procedure³⁰, during which the “uncomfortable” questions are resolved through diplomatic channels. And the other two stages of the procedure, mainly the Expert committee and the Arbitral panel with the possibility to apply economic sanctions were never used³¹. So the parties had no chance (or lack of will) to test the functioning of this unique co-operational model.

If we take a look at the most recent submissions regarding the violation of NAALC labour principles in all three Member States we will find out that the last submission with the USA office was made in 2011³² (and

26 See Art. 16.3. NAALC.

27 See: Arts 27-41 NAALC and ATLESON, COMPA, RITTICH ET. AL, *op. cit.*, p. 282 ss.

28 See: NAALC Public Communications and Results, 1994-2008, table available at <http://new.naalc.org/userfiles/file/NAALC-Public-Communications-and-Results-1994-2008.pdf>.

29 See Arts 27-41 NAALC.

30 BRONSTEIN, *op. cit.*, p. 105.

31 BRONSTEIN, *ibidem*.

32 USA NAO Submission 2011-02, available at <http://www.dol.gov/ilab/trade/agreements/naalc.htm> (2014-10-25).

is still under review) and the same is true for Canadian³³ and Mexican³⁴ NAOs. Whereas the last biennial report dates 2008-2009³⁵. Apparently, «... [some] broader discussion among the Parties to improve the implementation of North American Agreement on Labor Cooperation (NAALC)» are taking place³⁶.

Notwithstanding its limits and unclear future, «the NAALC is intended as a review mechanism by which member countries open themselves up to investigations, reports, evaluations, recommendations and other measures so that over time enhanced oversight and scrutiny will generate more effective labour law enforcement»³⁷.

While looking for other existing models of regional collaboration that would involve different type of actors we find one within European region between two judicial institutions belonging to different legal systems, namely the Court of Justice of the European Union and the European Court of Human Rights.

2 A “Virtuous example” of Fundamental Rights Protection at the Regional Level: the “Cross-fertilization” between the European Union and the Council of Europe on Anti-discrimination law

The “cross-fertilization” between the European Union (EU) and the Council of Europe (CoE) on the right not to be discriminated, one of the core ILO values listed in the 1998 Declaration, should be taken into consideration as a “virtuous example” of the synergy in the protection of fundamental rights at regional level.

Although the two organizations aim at preventing discrimination in

33 Canadian NAO Submission 2011-01, available at http://www.labour.gc.ca/eng/relations/international/agreements/naalc_pub_comm.shtml#comms (2014-10-25).

34 Mexican NAO Submission 2011-01, available at <http://www.dol.gov/ilab/trade/agreements/naalc.htm> (2014-10-25).

35 *Commission for Labor Cooperation, Bi-annual report 2008-2009*, [http://new.naalc.org/userfiles/file/INFORME-ING%20051110\(1\).pdf](http://new.naalc.org/userfiles/file/INFORME-ING%20051110(1).pdf) (2014-10-25).

36 *Statement of the NAALC Council on the Secretariat of the Commission for Labor Cooperation of the North American Agreement on Labor Cooperation*, <http://www.naalc.org/index.cfm?page=751&artcat=4&article=56> (2014-10-25).

37 COMPA, *op. cit.*, p. 252.

different areas and fields, with different goals³⁸ and tools³⁹, they started a spontaneous interaction on anti-discrimination conducts long before the introduction of the Art. 6 TEU, providing for the accession of the EU to the European Convention on Human Rights (ECHR) and stating that the fundamental rights set forth by the ECHR shall constitute general principles of the Union's law⁴⁰.

The interaction between these regional actors has been developed by means of a spontaneous phenomenon of mutual influence and endorsement, sometimes silent, sometimes accompanied by an interesting case-law cross-reference⁴¹, between the European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR).

The complex influence at issue, as pointed out by several studies recently⁴², albeit very unsystematically⁴³, has led both the CJEU and the ECtHR to reach a higher protection of the fundamental right not to be discriminated.

38 On the difference between the EU and the CoE on that issue see: HAVERKORT, SPEEKENBRINK, *European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue*, in *School of Human Rights Research, 2012*, vol. 59; Council of Europe, *Handbook on European non discrimination law*, Publications office of the European Union, Luxembourg, 2011; EUROPEAN COMMISSION, *The Prohibition of Discrimination under European Human Rights Law. Relevance for the EU non-discrimination directives - an update*, Office for Official Publications of the European Communities, Luxembourg, 2011; NICHOLAS, *Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap*, in *Cambridge Yearbook of European Legal Studies, 2006/2007*, vol. 9, p. 1 ss.

39 The European Union law includes a wide range of provisions prohibiting discriminatory conduct, e.g.: several articles of the Treaties (Arts 18, 19, 45, 157), five Directives (Dir. 2000/43/EC, Dir. 2000/78/EC, Dir. 2004/113/EC, Dir. 2006/54/EC, Dir. 2010/41/UE) and Art. 21 CFREU; while the CoE's tool against discrimination is only Art. 14 ECHR and its quite recent Protocol 12.

40 See GRAGL, *The Accession of the European Union to the European Convention of Human Rights*, Hart Publishing, 2013.

41 See *infra*.

42 BUSBY, ZAHN, *The EU and the ECHR: Collective and Non-discrimination Labour Rights at a Crossroad*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2014, vol. 30, no. 2, p. 153 ss.; BURRI, *Towards More Synergy in the interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR*, in *Utrecht Law Review*, 2013, vol. 9, no. 1, p. 80 ss.; BESSON, *Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?*, in *Human Rights Law Review*, 2008, vol. 8, no. 4, p. 647 ss.; DOUGLAS, SCOTT, *A tale of two courts: Luxembourg, Strasbourg and the growing European human rights aquis*, in *Common Market Law Review*, 2006, vol. 43, no. 3, p. 629 ss.

43 BRUUN, *Prohibition of Discrimination under Article 14 European Convention on Human Rights*, in *European Convention on Human Rights and the Employment Relation*, edited by Dorssemont, Lorcher, Schoemann, Hart Publishing, 2013; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, COUNCIL OF EUROPE, *Handbook on European non discrimination law*, *op. cit.*, p. 377; DEFEIS, *Human Rights and the European Union: Who Decides? Possible Con-*

In fact, the CJEU, by referring to the ECHR and to the ECtHR case-law, transformed the principle of anti-discrimination whose original scope was merely to facilitate the functioning of the common market, into a general principle of the EU long before the Amsterdam Treaty⁴⁴.

Likewise the influence of the EU law and the CJEU jurisprudence has led the ECtHR to move beyond the skinny provisions of the ECHR concerning the prohibition of discrimination. In fact, as a consequence of this influence the ECtHR, without emending the Art. 14 ECHR, has not only enriched the relevant notion of discrimination, e.g. including the concept of indirect discrimination, but also reinforced the protection thereto, allowing victims to rely on statistics in order to shift the burden of proof to the defendant (*i.e.* the allegedly discriminating party)⁴⁵.

In a nutshell, the EU anti-discrimination law and the case-law of the CJEU has been a 'flywheel' used by the ECtHR for the development of the protection against discrimination and *vice versa*. In fact, on the one hand, the CJEU, through the ECHR and the ECtHR case-law has started enhancing the role of the right not to be discriminated much before the EU started to focus on the human rights; on the other hand, the ECtHR, referring to the EU law and to the CJEU case-law started to develop, through the years, a more elaborated concept of discrimination, leaving room for more discretion and activism to the Court with regards to the interpretation and application of the Art. 14 ECHR.

The contribution of both these regional actors to the development of the anti-discrimination principle shows not only that «human rights provide

flicts Between the European Court of Justice and the European Court of Human Rights, in Dickinson Journal of International Law, 2001, vol. 19, no. 2, p. 301 ss.

44 MURRAY, *The influence of the European Convention on fundamental rights on community law*, in *Fordham International Law Journal*, 2010, vol. 33, no. 5, p. 1388 ss.

45 The most clear example of this evolution is expressed in ECtHR case (GC), *D.H. and Others v. Czech Republic* (Appl. no. 57325/00) where the Court expressly talks about indirect discrimination (see para. 184 where the Court says: «The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group... In accordance with ... Council Directives 97/80/EC and 2000/43/EC ... such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent») and after a few lines endorses the mechanism of the shift in the burden of proof (see § 186 ss. where the Court says: «Where an applicant alleging indirect discrimination ... establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory»). To justify this reasoning the Court expressly rely on the European Union case-law saying that «The recent case-law of the Court of Justice of the European Communities considers that where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory»).

a fresh focus for European integration in a new millennium»⁴⁶ but also that the interaction among regional actors sometimes works. This is why it should be taken into much more consideration as a valid tool for the protection of fundamental rights.

3 A Brief Overview of the Role of Constitutional Courts in Various Countries and Fundamental Social Rights

When talking about the protection of fundamental social rights it is important to take into account not only the collaboration between the two “apical” Courts at the European regional level, *i.e.* the ECtHR and the CJEU, but to have a quick glance at the role of Constitutional Courts as well. Constitutional Courts have different structures, compositions and perform functions which may vary from country to country.

Europe (including EU Member States and candidate countries such as Turkey) is characterized by the presence of various kinds of Courts: national courts, Constitutional courts, the CJEU and ECtHR⁴⁷.

If we turn East, towards Japan, we point out firstly that there is no Constitutional Court in Japan. Therefore, the function of the constitutionality control belongs to the ‘ordinary’ courts⁴⁸. According to the Art. 81 of the Constitution of Japan⁴⁹ the Judiciary has the power to determine the constitutionality of any law, order, regulation or official government action. Unlike in some European countries (e.g. Italy, Germany) where the constitutionality is judged by the court regardless of the existence of an individual litigation, in Japan the Judiciary cannot determine the constitutionality of an act, unless a matter concerning its application is referred to the court⁵⁰ (similar system can be found in the United States).

⁴⁶ DOUGLAS, SCOTT, *op. cit.*, p. 629.

⁴⁷ See in general: SCIARRA, *Integration Through Courts: Article 177 as a Pre-federal Device*, in *Labour Law in the Courts*, edited by Sciarra, Hart Publishing, 2001 p. 1 ss.

⁴⁸ Japanese judicial system is composed of the Supreme Court, and as Lower Courts, the High Court (role of appeal Court), the District Court (first instance), the Family Court, the Summary Court. So there isn't a category of the “ordinary” courts.

⁴⁹ «The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act». See more: [http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&kn\[\]=%E3%81%AB&_x=1&_y=17&ky=&page=2](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&kn[]=%E3%81%AB&_x=1&_y=17&ky=&page=2).

⁵⁰ LUNEY, Jr., *The Judiciary : Its organization and Status in Parliamentary System in Japanese Constitutional Law*, edited by Luney, Jr., Kazuyuki Takahashi, University of Tokyo Press, 1993, p. 128.

In relation to labour, the Japanese Constitution provides that «Standards for wages, hours, rest and other working conditions shall be fixed by law» (Art. 27 para. 2) and «The right of workers to organize and to bargain and act collectively is guaranteed» (Art. 28). For example, based on these constitutional provisions some labour laws were enacted, such as Labour Standards Law based on Art. 27 para. 2 and Trade Union Law based on Art. 28.

Thus, in Japan, the social fundamental rights based on the Constitution are materialized by these laws and it is rare that employers violate minimum criteria assured by legal acts, therefore cases concerning the constitutionality question judged in the courts are few⁵¹. One of such cases was *Zen-norin Keishoku-ho* case⁵² concerning the prohibition of the right to do dispute act for civil servants in public sector by law. Despite the Art. 28 of the Constitution, National Public Service Act⁵³ and Local Public Service Act provide general prohibition for public employees to strike⁵⁴. The legal society has insisted on the unconstitutionality of such provisions but when the case reached the Supreme Court it has declared that the prohibition to strike for public servants was constitutional. This judgment has been strongly criticized, until now.

In conclusion, although Japan has no constitutional court, the social fundamental rights of the Constitution are generally assured by legislation and employers' practice, except for the right to collective action for public employees.

Moving back to Europe, Constitutional Courts play a significant role in EU Member States, as well as in the rest of the countries which belong to the Council of Europe, like Turkey that it is not yet a member of the EU.

The Turkish Constitutional Court⁵⁵ deals with question of constitutionality of the acts enacted by the Parliament⁵⁶. This question is usually raised by an opposition party but also the President of the Republic, parliamentary group of the party in power and at least one-fifth of Turkish

51 One of the reasons might be the fact that the constitutionality of legal act is strictly verified by the Cabinet Legislation Bureau before its adoption.

52 Supreme Court Grand Bench 25 April, 1973, in *Kei-shu*, 1973, vol. 27, no. 4, p. 5471.

53 The text is available at [http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&kn\[\]=%E3%81%93&_x=12&_y=13&ky=&page=46](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&kn[]=%E3%81%93&_x=12&_y=13&ky=&page=46).

54 When talking about the status of public employees and public character of the work performed, the Supreme Court has given the priority to 'the public welfare' based on the Art. 13 of the Constitution over the Art. 28. For more on this topic see: ARAKI, *Labor and Employment Law in Japan*, Japanese Institute of Labor, 2002, p. 10.

55 According to the Art. 146 of the Constitution, the Constitutional Court is composed of seventeen members. The term of office is twelve years, non-renewable (Art. 147).

56 See in general: OZBUDUN, *Turk Anayasa Hukuku*, 2014.

Grand National Assembly members have the right to present an annulment action to the Constitutional Court⁵⁷.

Another function of Turkish Constitutional Court is to examine whether a specific article of a legal act is contrary to the Constitution. This appeal can be made by the civil, administrative and military courts, in relation to specific case pending at the court.

With regards to the protection of fundamental rights, individual application – “constitutional complaint” – was introduced into Turkish legal system by constitutional amendments in 2010. According to the Art. 148 of the Constitution, anyone who thinks that his/her constitutional rights set forth in the ECHR have been infringed by the public authority has a right to apply to the Constitutional Court after exhausting other administrative and judicial remedies.

One particular constitutional complaint has touched the relationship between constitutional rights and political dimension in Turkey. The case caused friction between Turkish political power and the Constitutional Court as it concerned the suppression of social networks (like *Twitter*, *Youtube* and *Google Public*) and the exercise of the freedom of expression⁵⁸.

The direct appeal to the Constitutional Court contested the violation of the freedom of expression as protected by the Turkish Constitution (Art. 26) and a number of international conventions ratified by Turkey, most notably the ECHR. In the spring 2014 the Constitutional Court accepted the complaint concerning the right to be informed and ordered the reopening of the internet sites that had been blacked out⁵⁹.

If we turn towards the South, we will find Peru with Constitutional Court composed from seven members elected by the Congress for the five-year period⁶⁰. The Court is entrusted with the defence of the principle of constitutional supremacy, whether laws or acts of State bodies’ comply with the provisions of the Constitution.

One particular tool for the protection of fundamental rights in Peruvian system, and other systems of Spanish derivation, is the *acción de amparo*, an action for the protection of constitutional rights.

The *acción de amparo* operates in case of an act or omission by any authority, official, or person that violates or threatens different rights rec-

57 See the official website of the Constitutional Court of the Republic of Turkey <http://www.anayasa.gov.tr/en/Powers> (2014-10-25).

58 See SIRIN, *Turkiye’de Anayasa sikayeti*, Bireysel Basvuru, 2013.

59 For ‘Twitter’ judgement visit <http://www.resmigazete.gov.tr/eskiler/2014/04/20140403-18.pdf> (2014-11-12). For ‘Youtube’ judgement visit <http://www.resmigazete.gov.tr/eskiler/2014/06/20140606-10.pdf> (2014-11-12).

60 See the website: <http://www.tc.gob.pe/> (2014-11-12).

ognized by the Constitution of Peru, including the right to work (Art. 27 of Constitution states that ‘The law grants the worker suitable protection against unfair dismissals’). The Constitutional Court hears, as a court of last resort, decisions refusing petitions of *amparo*.

The great influence that Constitutional Court in Peru has in labour matters can be seen from the criteria imposed in the last decade to the work stability regime. The Court has redefined the dismissal regime and specified the temporary recruitment regime⁶¹.

If we take a look at various EU countries, Constitutional Courts play different role and have different structure⁶². For example, Belgium, Italian and Portugal have plaid a peculiar role.

In Belgium there are twelve judges in the Constitutional court, which has two types of procedures: annulment of unconstitutional legal acts and preliminary ruling – through the ordinary judicial system (if requested by a party the judge must refer to the constitutional court).

With reference to the protection of fundamental social rights, in 2011 the Belgian Constitutional Court stated in a preliminary ruling that the difference between employees and workers (*ouvriers*) contained in Belgian laws⁶³ is contrary to the Constitution. It therefore ordered the legislator to harmonize the two statutes within a period of two years⁶⁴.

If we look at Italy and Portugal⁶⁵ we can notice a significant new trend with regards to the role of Constitutional Courts⁶⁶.

In Italy, the Court is composed of fifteen judges and has been playing an important role in the field of the protection of fundamental social rights since 1960s-1970s. In fact, from the 1960s the Court has increased its

61 See VILLAVICENCIO RÍOS, *El derecho al trabajo: en tránsito del despidolibre al derecho constitucional garantizado*, in <http://revistas.pucp.edu.pe/index.php/derechopucp/article/view/8906> (2014-11-12).

62 See CLAES, DE WITTE, *The role of national Constitutional Courts in the European legal space*, in *The Role of Constitutional Courts in Multilevel Governance*, edited by Popelier, Mazmnyan, Vandenbruwaene, Cambridge, Antwerp, Portland, 2013, p. 79 ss.

63 E.g. Law of 3 July 1978 concerning contracts of employment (*Loi du 3 juillet 1978 relative aux contrats de travail*) established different periods of notice (*délais de préavis*) with regards to dismissals depending on whether an employee (*employé*) or a worker (*ouvrier*) was concerned.

64 Judgment 7 July 2011 no. 125/2011 available at <http://www.const-court.be> (2014-11-12).

65 COELHO, CARO DE SOUSA, ‘*La morte dei mille tagli*’. *Nota sulla decisione della Corte costituzionale portoghese in merito alla legittimità del bilancio annuale 2013*, in *Giorn. dir. lav. rel. ind.*, 2013, p. 527 ss.

66 See GOMES, *Social Rights in Crisis in the Eurozone. Work Rights in Portugal*, in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, edited by Kilpatrick, De Witte, in *EUI Working Paper LAW*, n. 5, 2014, p. 78 ss., in <http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1> (2014-11-12).

realm of influence to protect and establish fundamental social rights at national level⁶⁷.

The Italian Constitutional Court's most recent trend to decide from a multilevel perspective can be noticed if we consider the case concerning social rights of public employees: the decision n. 207 on the fixed term contract in public sector (fixed term contracts for school teachers) in 2013⁶⁸ was the first occasion in which the Constitutional Court made a preliminary reference to the CJEU. In its request for preliminary ruling the Constitutional Court defined itself as a 'national court' referring to the CJEU. In this sense, the Italian Constitutional Court encouraged the dialogue between courts at multilevel system.

Finally, it is interesting to analyse the case of Portugal. In 2013-2014 the Portuguese Constitutional Court, composed by thirteen judges, has stepped in this multilevel system, taking a position with significant responsibility at the national level and replying to the international institutions, so called *Troika*, composed of European Commission, European Central Bank and International Monetary Fund.

In fact, in the last two years, Portugal's Constitutional Court struck down several austerity measures proposed by the government after the indications of the *Troika*, including salary cuts in the public sector. Portugal's Court ruled against the planned salary cuts in the public sector, undermining one of the key elements of spending cuts set out in the international bailout. As reported by the media, in May 2014, Portugal's Court 'ruled out cuts in pensions, sickness and unemployment benefits stating that the measures contravened the rights of citizens spelled out in the constitution'⁶⁹.

From the perspective of fundamental social rights the Portuguese case is the most significant - the Courts' redefinition of their roles and responsibilities affects the balance of (political and judicial) powers that no longer only operate at a national level but also at a multilevel perspective, where international institutions are involved.

67 See ANDREONI, *Lavoro, diritti sociali e sviluppo economico*, Torino, 2006, p. 265-308.

68 See LO FARO, *Fundamental rights challenges to Italian Labour Law developments in the time of economic crisis: an overview*, in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, edited by Kilpatrick, De Witte, in *EUI Working Paper LAW*, n. 5, 2014, p. 60 ss.

69 See <http://www.reuters.com/article/2014/05/31/us-portugal-court-idUSKBN0EB-0D020140531> (2014-11-12).

4 Private Actors: Transnational Company Agreements and Corporate Codes of Conduct

4.1 Transnational Company Agreements

After the discussions about global and regional models of collaboration, the analysis of the dialogue between the two European Courts and the role of national Constitutional Courts in the field of fundamental social rights, the look at the ways private actors, collectively or individually, try to protect (some) social rights at work would be appropriate.

Transnational company agreements (TCAs) are one of the manifestations of the phenomenon of transnational collective bargaining (TCB). While some experiences of TCB exist at sectorial or cross-sectorial level, principally within the EU, it seems that the tendency is to favour conclusion of agreements between trade unions (or more generally worker's representatives) and employers at transnational company level. However, this kind of agreement, which is often said to be one of the answers to the always growing internationalisation of economic exchanges, gives rise to lots of questions. Some questions are legal ones – What is the legal nature of these agreements? By whom can these agreements be concluded? How do they relate with national legal systems? –, others more political in a broad sense – What do these agreements mean with regards to the relationships between trade unions and employers, between trade unions themselves and between legal entities forming multinational nexus of enterprises? It is not our ambition here to deal with all these important questions. We will focus on legal instruments existing or proposed in the EU and briefly indicate some reflexions about the opportuneness of TCAs.

The EU legal system contains some instruments that may be relied on trying to solve difficulties occurring after the conclusion of transnational agreement⁷⁰. It lacks, though, of an instrument specifically dealing with the legal issues we have just mentioned. Thus, some are pleading for the adoption of a legal mechanism at the EU level which could be used by social partners having concluded an agreement at transnational level to give it binding legal effects, *if they want to* give it such effects, *i.e.* an optional mechanism⁷¹. Two important propositions have been made during

70 *E.g.* Regulations Rome I and Rome II. On this issue see among others: VAN HOEK, HENDRICKX, *International private law aspects and dispute settlement related to transnational company agreements*, Study undertaken on behalf of the European Commission VC/2009/0157, Final Report, Annex I, 2009 in <http://ec.europa.eu/social/BlobServlet?docId=4816&langId=en> (2014-11-12).

71 They are among others academics but also European institutions. See *e.g.* the European Parliament resolution of 12 September 2013 on cross-border collective bargaining

the last decade by academics to define how it could operate⁷². Both proposals insist on the necessity to involve trade unions in TCB, giving more marginal role to representative bodies of workers, *e.g.* European Works Councils. This position is justified by the need to guarantee the power of influence to the workers' negotiating agents, as well as their legitimacy to conclude collective agreements. But they differ from each other with regards to the very nature of transnational agreements. The "Ales Report" proposes a legal framework which could be used both at sectorial and company levels and whose effectiveness would rely on managerial decisions taken by each enterprise covered by the agreement and recognized as legally binding in each EU Member State. The "Sciarra Report", a more recent one, deals only with TCB at company level and promotes a system principally based on a mediation procedure rather than on legally binding act enforceable in the courts. This is justified, according to the authors of this proposal, by the fact that «Building relationships based on trust between management and workers' representatives is one of the priorities for signatory parties of TCAs»⁷³.

This assertion raise us a question whether there is indeed no real will from social partners' side to give binding legal effects to transnational agreements, as it is the case with collective agreements concluded at national level. In this respect it is interesting to try to determine why social partners have concluded such agreements in the past. It has been said that on the employers' side, one important reason for adopting a TCA is often an issue of external promotion directed towards consumers. TCAs would be in that way another instrument of CSR, besides codes of conduct (see *infra*, par. 4.2), which is effective principally thanks to the sanctions from the market⁷⁴. Another reason would be the will to create a stronger feeling of unity among different entities composing a multinational company by the internal promotion of common shared values⁷⁵.

and transnational social dialogue (2012/2292(INI)), in <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0386+0+DOC+XML+V0//EN> (2014-11-12).

72 ALES, ENGBLOM, JASPERS, LAULOM, SCIARRA, SOBCZAK, VALDÈS DAL-RÉ, *Transnational collective bargaining: past, present and future*, Report to the European Commission, in <http://ec.europa.eu/social/BlobServlet?docId=4641&langId=en> (2014-11-12) and SCIARRA, FUCHS, SOBCZAK, *Towards a legal framework for transnational company agreements*, Report to the European Trade Union Confederation, in <http://www.etuc.org/publications/towards-legal-framework-fortransnational-company-agreements#.VFS2sWft48M> (2014-11-12).

73 SCIARRA, FUCHS, SOBCZAK, *op. ult. cit.*, p. 30.

74 BARREAU, ARNAL, *Responsabilité sociale de l'entreprise, comité d'entreprise européen et négociation collective transnationale - l'exemple du groupe ACCOR*, in <http://www.cairn.info/revue-negociations-2010-2-page-21.htm>.

75 DAUGAREILH, *La négociation collective internationale*, in *Travail et Emploi*, 2005, n. 104, pp. 69, 76.

On the workers' side, the main reason would be to create obligations for the company to respect, protect or promote some rights related to work within its own entities and by the mean of its commercial contracts. It sounds obvious: trade unions are unified against the drifts of capitalism and promote solidarity between workers all around the world. But a recent survey has shown that with regards to TCB it is far from reaching unanimity among European national trade unions⁷⁶. Indeed, the attitude of trade unions depends on various factors, like *e.g.* differences between national traditions and sectors of activity. It, thus, appears that both from the employers' side and the workers' side, in reality it is not always self-evident that TCAs should have a legally binding effect, neither that there should be a TCAs at all.

Aside from these considerations of opportuneness, when assessing the existing practice of TCAs, another element of a structural nature should be taken into account as well. It is the absence of regulation of transnational collective actions⁷⁷. Could TCAs even have another aim than that of improving relationships based on trust, if trade unions are refrained from organising collective actions at transnational level because of the legal uncertainty with regards to the consequences of such actions, *i.e.* if there is indeed no other mean than trust to lead employers to conclude such collective agreements?

4.2 Corporate Codes of Conduct

From the last decades of the twentieth century, multinational companies have begun to adopt various measures to make publicly known their CRS. One of the instruments used is code of conduct which can be defined as «a statement of minimum standards together with a pledge by the company to observe them and to require its contractors, subcontractors, suppliers and licensees to observe them»⁷⁸.

These public declarations create one single level of environmental and/or social standards applicable in all countries in which the company is economically active and independently from the differences among the applicable national laws.

The main feature of the code of conduct is that companies adopt it vol-

⁷⁶ FURAKER, BENGTTSSON, *On the road to transnational cooperation? Results from a survey of European trade unions*, in *European Review of Labour and Research*, 2013, vol. 19, p. 161.

⁷⁷ On this issue, see among others DORSEMONT, VAN HOEK, *Collective action in labour conflicts under the Rome II regulation (Part I)*, in *European Labour Law Journal*, 2011, vol. 2, p. 48, 74.

⁷⁸ EU GREEN PAPER 'Promoting a European framework for Corporate Social Responsibility'. Commission of the European Communities, Brussels, 2001.

untarily. Usually the code is unilaterally drafted by the company but there are cases in which companies adhere to the code of conduct prepared by a third party (NGOs, governments, international organizations, etc.). However, the use of either requires a free and voluntary decision of the company. There are several reasons for companies to adopt such kind of instruments but the most important seems to be the concern about the corporate image.

Despite the fact that it is unilateral, the code of conduct can involve non-traditional actors such as NGOs or consumers who can put some pressure on the company to comply with it. The participation of these actors can contribute to the effectiveness of the code.

When adopting these codes of conduct companies are free to select labour standards they undertake to respect. This “pick and choose” may determine that a code of conduct will end up being just a marketing tool, without an effective impact. Indeed, the standards included in the codes can be chosen by the companies to suit their private interests without considering the needs of the workers (the freedom of association or other rights can be not included, for instance). The content of a code of conduct can be influenced by different factors, such as the sector of activity (*e.g.* in the textile industry most of the workers are women, therefore the codes of conduct usually contains anti-discrimination and gender equality clauses). It is however important to mention that during the last decades the content of these codes became more precise regarding the rights selected, including references to the ILO Declaration on Fundamental Principles and Rights at Work or specific ILO conventions, the OECD Guidelines, etc.

The code can be applied to the workers of the multinational company itself or it can also be applicable to the workers of its subcontractors (supply chain), such as in the manufacturing sector, which is very highly delocalized and decentralized and where the brand and image are very important⁷⁹. When it is applied to the supply chain by the mean of a clause inserted into the contracts with the suppliers, there is a risk that the main aim pursued by the company by the application of the code is to protect the company in case of scandal related to the supplier’s activities. Indeed, such clause permits the company to terminate the contract and ‘clean its hands’ regarding the behaviour of its contractors. Even though it is not its purpose, this sanction would affect the supplier’s workers (despite the fact that the aim was to protect their fundamental rights)⁸⁰.

79 SANGUINETI RAYMOND, *La tutela de los derechos fundamentales del trabajo en las cadenas de producción de las empresas multinacionales*, in *Derecho del Trabajo. Tendencias Contemporáneas*, Editora y Librería Jurídica Grijley E.I.R.L., 2013, p. 309, 329.

80 Daugareilh says that these clauses are “authentic small social clauses” that can produce the same perverse effects as social clause, since the failure of the other party can

The code of conduct has no legally binding effect as it is a unilateral instrument that companies adopt on a voluntary basis. However, it can have some legal consequences depending on national or supranational regulations or depending on the insertion of a specific clause in the contracts that the company concludes with its suppliers⁸¹. One of these potential legal consequences can be found in the Art. 6 of Directive 2005/29 «Unfair Commercial Practices Directive»⁸² which states that if a company does not respect to what it has committed itself by adopting a code of conduct, such a conduct may be considered as a misleading action under the wording of the Directive, and thus can lead to the application of fines.

As stated by Adalberto Perulli, the major weakness of a code lies in the application and monitoring procedures because generally the control systems are carried out by the companies themselves⁸³. This control could be improved if the company appoints an independent third party (whose conclusions are not affected by the contractual link with the company) and it would be improved much more if the company would allow the workers to participate in this control process through their representatives (*e.g.*, trade unions). A supplementary difficulty lies in the fact that the code of conduct is not always well known in all the places where the company develops its activities.

At the end, the aim of the codes of conduct seems to be the promotion of a good reputation of the company and not necessarily the protection of the social rights. For this reason the main way to guarantee the respect of the code of conduct can be the pressure that the stakeholders put on the company through information campaigns, boycotts and other kind of reactions to the non-compliance with the code's provisions⁸⁴. Despite

be solved effectively by a legal sanction (suspension or termination of the contract), which economic implications are obvious. DAUGAREILH, *Responsabilidad social de las empresas transnacionales: análisis crítico y prospectiva jurídica*, in *Cuadernos de Relaciones Laborales*, 2009, vol. 27, no. 1, p. 77, 94, in <http://revistas.ucm.es/index.php/CRLA/article/viewFile/CRLA0909120077A/32243> (2014-11-12).

81 As stated by Marrella, if the business parties declare that the code of conduct is incorporated into their contract, the *soft law* provisions of the code are transformed into legally enforceable contract clauses, even in the territory of nation States which are not parties to specific human rights treaties. See: MARRELLA, *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade*, in *Economic Globalisation and Human Rights* edited by Benedek, De Feyter, Marrella, 2007, p. 302 s.

82 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

83 PERULLI, *Globalisation and Social Rights*, in *Economic Globalisation and Human Rights* edited by Benedek, De Feyter, Marrella, 2007, p. 125.

84 It happened in the case of the factory Jerzees de Honduras, which in 2008 announced the end of its operations leaving 1,200 workers unemployed. That decision was related to the violation of the right of freedom of association, as the consultant Adrian Goldin con-

all the limits of the codes of conduct, they have served as a tool for the protection of fundamental social rights in some cases and might continue to do it in the future.

5 Conclusion

The recent economic crisis has put a new emphasis on the already well known fact that the answer to the social problems can no longer come from the States alone. The economy is now global and interconnected: labour law, if it wants to fit within this evolution, has to be re-organised in a way which takes into account the new framework of commercial exchanges. However, there is no global institution powerful (nor legitimate) enough to impose norms on economic or public private actors. As things stand, it therefore seems that a satisfying protection of social rights at international level could be reached only through a synergy between all existing actors active at different levels of “regulation” - international, regional, national, and transnational - and application of all possible social rights protection tools. According to the brief overview contained in this article, we still have a long way to go.

cluded. At the end, the pressure made by the students (more than 100 universities from United States and Canada discontinued their contracts) forced Russell Athletic to rehire the workers and take other measures to their advantage. For more information about this case see: GOLDIN, *La libertad sindical y las iniciativas voluntarias; el caso de Jerzees de Honduras*, in *El derecho a la negociación colectiva. Liber Amicorum al Profesor Antonio Ojeda Avilés*, edited by Gorelli Hernández, Consejo Andaluz de Relaciones Laborales, Consejo Andaluz de Relaciones Laborales, Sevilla, 2014, p. 191 ss.