



Recebido: 13.04.2020

Aceito: 20.05.2020

Publicado: 03.08.2020

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LIABILITY OF COMPANIES FOR DAMAGES IN THEIR PRODUCTION CHAIN: A STUDY BASED ON THE REALITY OF THE BRAZILIAN GARMENT INDUSTRY

RESPONSABILIZAÇÃO DAS EMPRESAS POR DANOS EM SUA
CADEIA PRODUTIVA: UM ESTUDO A PARTIR DA REALIDADE
DA INDÚSTRIA TÊXTIL BRASILEIRA

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Abstract

Many companies' productive structure still makes modern slavery possible, under the aegis of decreasing production costs and increasing profitability. This situation is highlighted in the textile industry, in which large brands outsource suppliers and, successively, small workshops that may use slave labor. Considering the legal difficulty of holding companies accountable for human rights violations that occurred in their production chain, the objective of this study is to carry out an exploratory, documentary and bibliographic research of the international legal system on the subject. It is concluded that, despite the advances, there is still a legal gap to ensure this accountability.

Keywords

Modern slavery. International law. Business and human rights. Sweating system. Productive chain responsibility.

Resumo

A estrutura produtiva de muitas empresas ainda possibilita a escravidão moderna, sob a égide da diminuição do custo de produção e aumento da lucratividade. Essa situação é ressaltada na indústria têxtil, na qual grandes magazines subcontratam fornecedores e, sucessivamente, pequenas oficinas de produção que, não raro, utilizam trabalho escravo. Considerando a dificuldade legal de responsabilização das empresas por violações a direitos humanos ocorridas em sua cadeia produtiva, o objetivo deste estudo consiste em realizar uma pesquisa exploratória, documental e bibliográfica do sistema legal internacional sobre o tema. Conclui-se que, apesar dos avanços, ainda há uma lacuna legal para determinar essa responsabilização.

Palavras-chave

Escravidão moderna. Direito internacional. Direitos humanos e empresas. *Sweating system*. Responsabilidade da cadeia produtiva.

1. INTRODUCTION

Slavery, although formally abolished from various international and national laws, is still a common practice worldwide, although it has been adapted to the needs and circumstances of modern market, being known as modern-slavery, which consists:

[...] a supposedly free workforce is weakened by in-work poverty pay rates, reduced trade union power, and secondary labour markets where replacement labour is plentiful for employers, creates a climate of stress and fear, and a culture of compliance and obedience (Lashley, 2018, p. 20).

Data from The Global Slavery Index 2018 (WALK FREE FOUNDATION, 2018, p. 76) reveals that 40.3 million people live in conditions similar to slavery all around the world. The same report informs that in the American Continent it is estimated a number of 1,950,000 (one million nine hundred and fifty thousand) workers in this condition.

In Brazil, based on the aforementioned research, there are 1.8 slaves for every thousand inhabitants, with an estimated number of 369,000 (three hundred and sixty-nine thousand) people in conditions similar to slavery in national territory (WALK FREE FOUNDATION, 2018, p. 78). Data provided by the Brazilian SIT (Secretariat of Labor Inspection), reveals that 54,687 (fifty-four thousand six hundred and eighty-seven) slaves were rescued by the agency's inspections from 1995 to 2019. Of these, in rural slave labor there were 42,573 (forty-two thousand five hundred and seventy-three) people rescued, for 12,114 (twelve thousand one hundred and fourteen) people rescued in urban environment¹.

About the means of modern slavery found, most are still concentrated in the rural area, however, given the need to delimit the theme and scope of this research, this study focuses on modern slavery that occurred in urban environment, specifically in the garment industry, mainly because it is one of those industries that year after year reinvent themselves to keep primitive situations of exploitation (BIGNAMI, 2011, p. 1).

The exploitation of labor in conditions similar to slavery is not new nor is it far from being eradicated in the textile industry. In fact, it is a well-known fact that garment companies have gained notoriety for adopting strategies to avoid responsibility, especially with outsourcing (and outsourcing the outsource) to reduce production costs. The workers precariousness in this industry has gained prominence largely due to a well-known production system: *fast fashion*².

In this system, the new company is organized in a network, which does not necessarily signal a simple coordination relationship. On the contrary: this multiple-armed body often has a heart that drives the traffic in benefits and a brain that produces and passes on its wishes. So, what is horizontal in appearance can remain vertical in essence (freely translated from VIANA, 2008, p. 195).

The requirement of constant materials supply from the fast fashion system causes outsourced companies to be neglected by the main brand, so it is not uncommon to find sweatshops among the outsourced companies. This production system called "sweating system" generates:

¹ More data can be found in BRASIL. Portal de Inspeção do Trabalho. **Radar SIT**. Disponível em < <https://sit.trabalho.gov.br/radar/> >, acesso em 18.06.2020.

² According to Tokatli (2007, p. 23) "Fast fashion requires that, first, the retailers have rapidly increasing numbers of stores worldwide—preferably directly owned and operated outlets in secure countries and franchised outlets in risky ones—so that they can reach more and more customers around the globe. Second, there is the need to connect customers' demand with the upstream operations of design, procurement, production and distribution. This means the development of an information infrastructure with highly responsive communication channels to ascertain better transfer of hard data and anecdotal information from trend setters/spotters and customers to designers and production staff. Third, fast fashion requires short development cycles, rapid prototyping, small batches and variety so that customers are offered the latest designs in limited quantities that ensure a sort of exclusivity. Fourth, a very fast and highly responsive supply chain (a 'super-responsive' or 'rapid-fire' supply chain) is needed to make certain that deliveries are sufficiently frequent (Ferdows et al., 2004; Reinach, 2005, 49; Dunford, 2006). Finally, because most fast fashion retailers are publicly traded companies and their success is now measured by stock performance, they are increasingly under pressure to perform well on the stock markets".

[...] the return of various ills to our society, such as the reduction in the life workers expectancy, the return of tuberculosis to the workplace, debt bondage, human trafficking, the remercantilization of work (freely translated from BIGNAMI, 2011, p. 1).

Another concept that must be analyzed is “social dumping”. Often used in order to decrease the cost of production to maximize profits and increase competitiveness. For example, in the São Paulo sweatshops, the fashion designer receives a very small amount per piece produced. They are paid, per piece, not per hours, as legislation requires. “The workshop owner receives an amount that varies from R\$ 1.50 to R\$ 3.00³ per piece, and pays R\$ 0.50, R\$ 0.30 or up to R\$ 0.10 to the tailor” appoints the final report of São Paulo City parliamentary committee of inquiry (BRASIL, Comissão Parlamentar de Inquérito. Município de São Paulo. Processo n. 0024/2005, p. 29).

Brazil, despite having recently received international acclaim for its policy to address slave labor, since such policy acquired some relevance in the Brazilian political agenda only at the beginning of the current century, more precisely from 2003 (ARBEX et al, 2018, p. 112), has not yet adopted a legislation and has not formulated public policies to respond to the problems generated by the sweating system and social dumping practices.

So, even with internationally praised policies and action plans to combat slave labor, with emphasis on two measures for the eradication of slave labor, the mobile inspection groups and the so-called “dirty list”, it is still needed more measures to reduce or end this type of human rights violations, especially in the textile sector and its peculiar worker exploitation characteristics. In this context, there is a discussion, not only in Brazil, but worldwide, to make the main brand responsible of the entire production chain as an alternative to address slave labor.

Analyzing, then, the subject, it appears that the responsibility, because of the strategies used by textile brands, usually falls only in small workshops (outsourced companies), leaving the real instigators of the situation unharmed.

[...] voluntary corporate social responsibility (CSR) and self-regulation initiatives are insufficient as instruments to address human rights violations in the global clothing industry. More legislation is needed (freely translated from SOMO; REPÓRTER BRASIL, 2015, p. 5).

The research that generated this article has, as main objective, to perform a general analysis on the accountability of companies in relation to their production chain based on the reality of the Brazilian textile industry, where modern slavery in the sweatshops are often found.

The investigated hypothesis is the legal possibility of making the main brands accountable in relation to the production chain as an alternative for reducing slave labor and the movements that are being taken in this direction.

Therefore, the research is relevant because slavery still takes away basic rights of underprivileged populations and the search for alternatives to solve these problems is shown necessary.

Regarding the method, the research, as far as depth is exploratory, using sources of documental and bibliographic nature. In order to reach a conclusion, the inductive method was used,

³ In current quotation, the workshop owner receives 0,28 to 0,56 US dollars cents and the tailor gets 0,09 to 0,05 US dollars cents per piece.

because data found brings some elements to reach a conclusion, but not a definitive one. More studies can be performed to deepen the subject.

Thus, the discussion begins with the analysis of social dumping and the sweating system as factors that allow modern slavery in Brazil and worldwide.

2. “SOCIAL DUMPING” AND “SWEATING SYSTEM” AS MEANS OF WORKER’S EXPLOITATION

Modern slavery in Brazil is a reality. There are some circumstances that encourage the exploitation of slave labor. Initially, it is necessary to refer to poverty and lack of basic conditions of some countries as factors that stimulate their population emigration. Thus, these migrants end up putting themselves in situations of extreme precariousness, while they seek to achieve a better living condition than they had in their homeland. This is a worldwide movement, according to the International Labor Organization (ILO), in its report entitled *ILO Global Estimates on International Migrant Workers: Results and Methodology* (2018), as it estimates international migrant workers for the year of 2017, in which there are 164 million migrant workers in the world, of which 58.4% are men and 41.6% women. Most of them are aged between 25 and 64 years, representing 86.5% of the total. It is also worth mentioning that Latin America and the Caribbean are regions that occupy third place in the ranking of regions that receive most migrant workers, representing 13.9% of the total, behind only North America (23%) and North, Southern and Western Europe (23.9%).

These numbers help to explain why there are so many people who are exploited in Brazilian sweatshops.

Whether they come from other continents or from South America itself, these travelers in general find themselves fleeing inhospitable places, conflict areas, situations of extreme need and lack of prospects, and here they arrive with the hope of less troubled and more prosperous times. The image of strength and land of opportunity that São Paulo projects is opposed to the scarcity of resources and perspectives of the migrants' place of origin (freely translated from BRASIL, Comissão Parlamentar de Inquérito. Município de São Paulo. Processo n. 0024/2005, p. 22).

The precarious situation of the textile industries in São Paulo is directly related to the Bolivians immigration to the city, because, according to the Parliamentary Commission of Inquiry to investigate exploitation of slave-like labor, chaired by then councilor Claudinho de Souza, in 2006, “the hardest hit by the exploitation of slave-like labor are undocumented or illegal Bolivian immigrants” (BRASIL, Comissão Parlamentar de Inquérito. Município de São Paulo. Processo n. 0024/2005, p. 23). The situation of the worker subject to such conditions is aggravated when he/she is a foreigner, as in the sweating systems, because generally the worker is an illegal immigrant, without identification documents and without sufficient understanding of the language (freely translated from GAMA E NETTO, 2018, p. 26).

According to Buechler (2004, p. 17) the development of sweatshops in São Paulo reflects a pursuit for new opportunities for Bolivians who fled from a disastrous economy at home, but this kind of industrialization is a reflection to a global economic structure.

An example is the case of the famous chain of stores Zara, main brand in the Inditex group. According to Zani (2018, p. 38 - 40), in 2011, in São Paulo, this company had, in May and June,

subcontracted workshops where it was found workers in slave-like conditions by inspections carried out by the Regional Superintendence of Labor and Employment of São Paulo (SRTE/SP). In these cases, 67 workers were found exploited, living in deplorable conditions and receiving insignificant financial rewards for their service.

Also, according to Zani (2018, p. 38 - 40), Zara has hired the intermediary AHA Indústria e Comércio de Roupas LTDA who directly hired the sweatshops which exploited slave labor. After verifying the relationship between the companies, structural accountability was recognized in 2017, by the Regional Labor Court of the 2nd region recognizing Zara's (as the main brand) accountability.

This briefly presented facts are examples of what the literature call as "sweating system" and "social dumping", which concepts will be deepened below.

2.1 SWEATING SYSTEM AS A PRODUCTION SYSTEM: THE LATENT DEMONSTRATION OF MODERN SLAVERY

As previously mentioned, sweating system is a production system that favors the occurrence of slave labor. It's an evolution of the organized industrial system, where workers are brought together in a facility in order to achieve more economic conveniences than they would if the workers were at home (BIGNAMI, 2011).

This system, as history made it clear, resulted in a disregard for the health and safety of workers in working environment, such as abusive working hours, child labor, women's abuse, in addition to the emergence of new diseases or the worsening of some that already existed, due to the productive standards imposed by the system.

The development of this system resulted in the creation of sweatshops, a term derived from the "sweating system", which became an effective production mean. The sweating system is characterized by being a:

In the term sweating system [...] the production is all divided into a chain of small and micro companies that compete with each other, bringing down the value of work and causing the terrible conditions in the work environment. Each production cell is responsible for manufacturing a part of the part. Subcontracting arising from this relationship is established due to the lower price and the contract is made on the basis of the part produced and by delivery time. This logic goes down through the social layers, according to the level of outsourcing, until it reaches the worker, who also completely absorbs the production system, working and earning per piece and competing with his peers for more work and, consequently, more money. (freely translated from BIGNAMI, 2011, p. 7).

Thus, the concept of sweatshop is directly related to the sweating system, as it is the place where the system is located. Therefore, sweatshop is "an intermediate environment between the residence and the worker's workshop, with deficient conditions for controlling production and protecting workers" (CARVALHO, 2015, p. 60).

The sweating system has some differences from the traditional factory system. First, a big difference between the two systems is the way of hiring the employee, after all, while the factory system has a direct relationship between the employee and the employer, the sweating system moves these parts away, resulting in the hiring of smaller companies to produce specific parts of the final product.

This difference in hiring between the two systems does not guarantee that the worker will be kept unharmed. Thereby, in the factory system “production [...] is all concentrated in a work cell and the worker's residence is separated from the plant” (BIGNAMI, 2011, p. 7), while in small and micro companies that are the result of sweating system subcontracting, workers are in the so-called sweatshops.

In Brazil, this type of exploitation is noted in the textile industry in São Paulo, and the grievous way workers are treated is notable:

[...] in the most acute cases of this precarious process, there is real, tried or consummated violence. There are reports of female workers who are victims of sexual harassment and violence in the workplace, in addition to humiliations and vexations of all kinds, always under the threat of deportation and denouncement to the Federal Police (freely translated from BIGNAMI, 2011, p. 26).

Buechler (2004, p. 3) emphasizes that Brazilian garment industry use one type of external flexibilization, which is outsourcing production to homeworkers and sweatshops, that contributes to an unfair profit distribution, that are characteristics of the sweating system.

According to Teixeira (2008, p. 102) in most cases, the bigger company controls the entire production processes in the chain, defines the quantity of pieces, clothes models, measures, quality, accessories and the delivery deadlines. These specifications are passed on to suppliers, who in fact do not have the productive capacity to perform the services and, therefore, end up subcontracting small specialized sewing workshops.

It is worth mentioning that such sweatshops are encouraged to exist, because, according to Bignami (2011, p. 21), in order to reduce costs, there is a productive reorganization, through which the clothing companies subcontract service providers to do specific jobs, such as the sewing workshops, which only sew the pieces to send the garments at a lower price. The sweatshops are meant to reduce production costs, because even the smaller company's owners are replaceable, if one of these small factories closes, they just hire another one. So, if you look at production specialties in which small factory produces a specific part of the production, it's noticeable that they are an extension of the big brand (HERNANDEZ, 2018, p. 44). It is also worth mentioning that large companies in the Brazilian commercial scenario have already been caught in this type of situation. In this context, Suzuki (2016, p. 148) states that:

The use of slave labor, mainly the Bolivian immigrant, was present in the production of well-known brands, both the popular Pernambucanas, Marisa, etc., as well as the more sophisticated brands such as Zara, Le Lis Blanc, Gregory, Cori, etc.

This organization system that aims to reduce the cost of production causes unfair competition, generating greater profitability by disregarding the country's legal rules. That is what characterizes “social dumping”.

2.2 SOCIAL DUMPING AS AN ACTION THAT STIMULATES SLAVE LABOR

“Social dumping”, like the “sweating system”, also has the potential to harm workers. Likewise, many people end up working in slave-like conditions when social dumping is verified. Thus,

to understand the concept of social dumping, it is necessary to understand dumping that is primarily inserted in the economic field, being defined as:

The expression dumping the verb "dump" meaning to dispose of something and deposit it in a certain place, leaving it there as if it were 'garbage'. In the international market, a company performs dumping when: (a) it has a certain power to set the price of its product in the local market (company in imperfect competition); and (b) has the prospect of increasing profit through sales in the international market. This company then sells its product on the foreign market at a price lower than that sold on the local market, causing a high loss of well-being to the national consumer, because local residents are unable to buy the good at the price to be sold abroad (freely translated from MASSI; VILLATORE, 2015, p. 41-42).

Therefore, dumping happens when a company, with the pure and simple intention of increasing its profitability, acts in order to circumvent the free market laws.

The concern with social dumping gained notoriety with the mark of the irregular division of world income, more precisely in the differences between developed and developing countries. This is clear because:

[...] the first complaints of social dumping came from so-called developed states against those in development, and this concern was, unfortunately, not in favor of workers, but because of the loss of competitiveness of the former to the detriment of the latter (freely translated from VILLATORE; GOMES, 2009, p. 9).

Thus, as developing States sought to increase their importance in the market, they took advantage of social dumping to attract companies and increase their market share. Moreover, one of the ways to commit dumping is "through state subsidies, when the country itself lowers or exempts companies from paying charges or paying amounts with different purposes, such as drawing the attention of new companies on the spot" (freely translated from VILLATORE; GOMES, 2009, p. 8). This form of repercussion of dumping has its effects felt in every society. "The rampant practice of dumping causes [...] diffuse transindividual damage, in which its effects are imposed on the social organism" (freely translated from PARDIN, 2015, p. 55).

Thus, according to Pardin (2015, p. 54), social dumping is "an unfair act by some employers for which they fail to fully remunerate their workers or fail to recognize some inherent right to them, in search of greater profitability". Another concept of social dumping can be found in Villatore, Gomes (2009, p. 8). For them, "social dumping occurs with the disregard of some labor rules to reduce labor costs, increase exports and attract foreign investment".

Brazilian justice courts already recognize social dumping as an illegal conduct, even though there is no specific legislation about the theme. As an example, the Brazilian regional labor court of the 1st region has ruled on social dumping, that it is an act on the part of the entrepreneur to obtain advantages, financially speaking, acting with an unequal competitiveness in the market.

SOCIAL DUMPING. ADMISSIBILITY. The institute can be understood as a practice of obtaining financial advantages that allow its agent to compete in conditions of inequality in the market, harming the whole society, constituting an illegal act for the abusive exercise of the right, exceeding the economic and social limits. However, only repeated and contumacious aggressions against labor rights provide the remedy in question. Therefore, if the voluntary and repeated non-compliance with labor standards is not proven, there is no need to talk about the payment of the referred indemnity. (freely translated from

BRASIL, TRT-1 - RO: 0000167-10.2012.5.01.0045 RJ, relatora: Patricia Pellegrini Baptista Da Silva, data de julgamento: 13/08/2014, 3ª turma, data de publicação: 26/08/2014).

Still on the concept of social dumping, it is important to mention Santos (2015, p. 66) freely translated from Portuguese to English:

[...] we can present the concept of Social Dumping as an anti-legal business management practice, shaped by unfair competition and the absence of objective good faith, which seeks primarily to win market shares for products and services, whether in the national or international market, causing losses not only to low-income workers hired under irregular conditions, withholding labor and social security rights, as well as to other companies in the sector.

Therefore, social dumping is originally observed when the product is sold by the cost price, or even below, in order to gain competitive advantage and, by consequence, market expansion. It's considered an unfair practice, because illegal means are used to get advantages in a competitive market (VIEIRA, 2003, p. 25). One of these illegal means, is to disrespect labor standards. So social dumping can be verified with disregard of labor standards, but this is only one of the means markets have to reduce production costs and gain competitive advantage.

This denotes the existence of a relationship between one of the means to carry out social dumping and modern slavery. The entrepreneur, as he seeks to increase his profitability, reduces the cost of production to the maximum, many times the easier target to reduce cost is salary and work conditions. Thereby slave labor appears as one of the main options.

In the Brazilian reality, social dumping can be verified even in the commercial chains of high standards clothing:

We have several examples in Brazil of social dumping in the clothing industry, designer clothing, especially those that have international distribution networks or channels, creation of labor cooperatives in the interior of Brazil, through foreign companies, use child labor, excessive extension of the working day, without the corresponding payment of overtime, etc. (freely translated from SANTOS, 2015, p. 67).

This statement exemplifies the relationship between social dumping and sweating system, after all, the first requires an illegal act to have a competitive advantage in the market and the second would be one of the strategies for the latter to be carried out.

After discussing these practices, now it will be discussed what it has been done to repel them.

3. THE COMPANY'S SOCIAL RESPONSIBILITY IN THE TRINOMIAL "PROTECT, RESPECT AND REMEDY"

There is no doubt that modern slavery is a direct violation of human rights, specifically as provided for in art. 4, of the Universal Declaration of Human Rights (UN, 1945), which prescribes "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms". Most of modern slavery cases involves subjects of rights that are not included in the list of subjects of law within the scope of international law, namely, companies. As seen in the previous examples, neo-slavery is a global problem that does not respect the physical or legal borders of countries, as, for example, it is common to encounter the exploitation of a Bolivian worker, in a sweatshop in São Paulo, which directly benefits a Spanish brand.

In view of these circumstances, one of the issues most dealt with in the human rights discussion today is the relationship between these protections and companies. Thus, it is noteworthy that the first “debates on the role of companies in the international arena took place mainly with the work of the United Nations Economic and Social Council” (freely translated from FACHIN et al, 2016, p. 8) and gained further importance nowadays. Therefore, it is crucial to understand the concept of Corporate Social Responsibility (CSR):

CSR functions as a built-in, self-regulating mechanism whereby businesses monitor and ensure their adherence to law, ethical standards and international norms. Social responsibility encompasses the obligation of managers to choose and act in ways that benefit both the interests of the organization and those of society as a whole (ZHAO, 2016, p.104).

It is a self-regulatory mechanism to entrepreneurs how to act within international legal norms and follow established ethical standards. For that purpose, on June 16, 2011, the United Nations (UN), through the Special Representative of the Secretary General for Business and Human Rights, John Ruggie, presented the Guiding Principles on Business and Human Rights (MAZZUOLI, 2018, p. 570). The Guiding Principles on Business and Human Rights for implementing the UN Protect, Respect and Remedy Framework, established 31 (thirty-one) principles that followed the plan put into practice by the same author three years earlier (FACHIN et al, 2016, p. 9).

The principles launched by Ruggie are one of the measures of his project to improve the relationship between business and human rights, which began in 2008 with the launch of his report entitled “Business and Human Rights: Towards Operationalizing the ‘Protect, Respect, and Remedy’ Framework ”(ALTSCHULLER et al, 2015, p. 213). This report presents the three paths in which the measures must be taken, being represented by the terms “protect, respect and remedy”. According to Mazzuoli (2018, p. 571), the first provides the State responsibility to prevent human rights abuses by third parties, including companies; the second takes place at the company level, in which they must respect human rights and take steps to prevent such violations; finally, the third term is in the situation where the rights have already been violated, in which it is necessary to promote compensation of those who suffered the violations.

It is worth mentioning that the principles did not intended to create new rules at the international level, leaving it up to the States to create the rules internally, as well as using them as a guide to existing standards (FACHIN et al, 2016, p. 10). Nevertheless, when realizing that the Guiding Principles in Business and Human Rights were not effective enough to protecting human rights (because it is considered soft law), an open intergovernmental working group was created on the United Nations to discuss a legally binding international instrument, as will be discussed below. For now, it is important to discuss what these principles refers about the company’s obligation to respect human rights, including its productive chain. Indeed, there are some points directly related to corporate responsibility as can be seen below.

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and

Rights at Work. (UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011, p. 13)

It is noted that the companies must respect human rights and must take *due diligence* to avoid any involvement or promoting impact that suppresses the basic rights of others. They also declare that the company must respect the principles of any international law, mainly those contained in charter of Human Rights and the principles preserved by the International Labor Organization.

13. The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. (UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011, p. 14)

In principle number 13 (UNITED NATIONS HUMANS RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011) two requirements are set for enterprises. The first mentions prevention of human rights violations by companies and that when their activities have an impact on these rights, the companies should be focused on addressing the consequences of such violations. It is also emphasized that companies must act to privilege and contribute to the protection of human rights. In topic B, it is stated that when their operations, products or services or in their commercial relations, may violate fundamental rights, even without the company's contribution, actions must be taken to prevent them before the facts occur, or, at least the company must face the consequences of these violations.

It is worth noting that principle 14 (UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011, p. 15) makes it clear that this conscious performance is valid for all existing companies, regardless of size, sector, structure or owner. Furthermore, all must protect human rights in their line of work, however, the measures adopted to protect them may vary according the specific line of work circumstances, as well as the negative impacts that their activity is able to generate on human rights.

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. (UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011, p. 15/16)

In principle number 15 (UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011, p. 15/06), it is stated that companies must make a political commitment to take responsibility with respect for human rights. Thus, they must have policies that correctly dialogue with the principles they propose to defend. Furthermore, in topic A, it is mentioned that the company officially accepts such principles and attitudes in order to protect and defend human rights. In topic B, there is an audit process for accountability, prevention and mitigation of the company's impacts on human rights. In topic C, it is informed about the company's responsibility to develop

projects that can repair the negative consequences that it may have generated, contributed or made directly.

Also, on the “protect, respect and remedy” project, an open-ended intergovernmental working group on transnational companies and other types of companies with respect to human rights (OEIGWG, its acronym in English) was established. Created in June 2014, it has the responsibility to dedicate itself to the creation of a binding international standard that deals with human rights violations by companies, through a legally binding international instrument. Since then, by a mandate issued by the United Nations Human Rights Council, the group was responsible for deliberations on the content, nature, scope and form of this future international standard (UNITED NATIONS HUMAN RIGHTS COUNCIL, 2019, p. 1).

The group advanced in this objective and elaborated a draft of this legally binding international instrument, which was even already revised as will be discussed below.

4. LIMITATIONS OF THE INTERNATIONAL SYSTEM TO PROTECT WORKERS IN THE PRODUCTIVE CHAIN AGAINST MODERN SLAVERY

The eradication of slave labor, especially taking into consideration the strategies developed by companies to dilute responsibility throughout the production chain, must come from a combination of efforts, not only by the States, but also by the companies.

After the implementation of the Ruggie principles, there was no definitive solution to such violation, after all, the States and the UN have not yet been able to create a strong text that will make companies comply with their commandments, so that only so-called soft laws were created, leaving companies to decide whether to follow. It is still notable that the power of the companies are obstacles to the creation of this stronger binding treaty, with coercive power, however, without these, the accountability of companies has already proved ineffective (MOREIRA, 2020, p. 6).

International treaties hold only States responsible because it has an obligation to enforce their rules before private companies that violate human rights within their territory. On the other hand, private agents have no legal responsibility for these violations and this is shown as a major set back of the main objective of international human rights law, which is the protection of the individual (FACHIN et al, 2016, p. 11). Therefore, these large companies, which have great economic power, sometimes greater than that of many States⁴, should be held accountable for violations and this, internationally speaking, should occur for the dynamic and evolutionary interpretation of international law (freely translated from CANÇADO TRINDADE, 1999 *apud* FACHIN et al, 2016, p. 12). The fact that companies are not subjects of law in the international context is a limitation to demand respect and accountability on Ruggie principles matter.

This situation of not considering the company that receives the final product as responsible can be observed in large magazines that operate in Brazil. So it was with M. Officer, Riachuelo and C&A⁵, who had their brand labels found in the workshops subcontracted by their suppliers, who

⁴ In fact, surveys show that 69 of the world's 100 largest economies belong to companies as it can be seen in GREEN, Duncan. The world's top 100 economies: 31 countries; 69 corporations. The World Bank Blog. Disponível em < <https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corporations> >, acesso em 23.06.2019.

⁵ Several reports resulting from inspections by the regional labor superintendence caught companies like M. Officer (a brand considered to be of high standard) receiving products or supplies from quartered companies exploiting Bolivian workers in

exploited slave labor in São Paulo, and who, despite news and complaints, said they were surprised by slave labor in its production line when summoned by the PCI (parliamentary committee of inquiry) of the municipality of São Paulo to verify exploitation of slave-like labor. These companies stated that as a measure to avoid such situation, their suppliers must sign a term of commitment so that they do not exploit child labor or workers' in slave-like conditions, considering this as a sufficient attitude as *due diligence* on its productive chain (BRASIL, Comissão Parlamentar de Inquérito. Município de São Paulo. Processo n. 0024/2005, p. 31-32). The PCI concluded that, in order to avoid slave labor in the textile sector in São Paulo, it's necessary to enable companies' accountability in its production chain.

So far, São Paulo's Municipal Law is one of the very few examples of legislation that enables responsibility in the production chain, as more detailed below.

Another issue worth mentioning is that companies use a supposed respect for workers' rights as a marketing strategy, after all, a company that respects human rights ends up attracting consumers who are concerned with the topic, the opposite is also true, after all when some news gains relevance in the international press, there are boycotts of products of companies that violate rights, such as:

example of the pressure exerted by public opinion on nike [...] (the company faced boycotts and demonstrations of all kinds and had to respond to accusations that it exploited child labor in Indonesia and other Asian countries) (freely translated from BRASIL, Comissão Parlamentar de Inquérito. Município de São Paulo. Processo n. 0024/2005, 2006, p. 31).

For this issue of advertising, Brazil has an important protection measure, which is the "dirty list", an official rank that discloses which companies were caught using modern slavery. In this regard, the company Zara, which committed itself to follow the principles mentioned above, took action in the Brazilian judicial system in order to question the "dirty list".

In 2012, Zara Brasil filed a lawsuit against the Brazilian State, in order to revoke its name inclusion in the dirty list. The company has challenged not only its legal responsibility, but also the constitutionality of the "dirty list". In the process, an outright decision was granted to withdraw the company's name, but this decision was reviewed in higher courts, when the inclusion in the dirty list was confirmed (BRASIL. Tribunal Regional do Trabalho da 2ª Região. Processo n. 00016629120125020003, Relator Ricardo Artur Costa e Trigueiros, DJT 17.11.2017)

This attitude violates the very principles that the company says it follows, as well as trying to prevent one of the combating slave labor measures in Brazil from being used. This situation exemplifies the need for legal accountability for the entire production chain, because even though

conditions of modern slavery. M. Officer, in fact, was caught twice with slave labor in its production chain, according to news attached to the final CPI report. In 2018, the company could have its municipal registration to operate revoked for ten years in an unprecedented decision in Brazil, but the measure to be valid it is necessary to wait for the end of the judicial process. It is interesting to note that, even in these neighborhoods, the garments already came out with the brand's label. Another company that stood out was the Spanish company Zara, who admitted the existence of slave labor in its production chain, and was fined twice by the Ministério Público do Trabalho (equivalent to prosecutor's office that supervise labor relations in Brazil). Details of these cases can be found at <https://reporterbrasil.org.br/2011/08/roupas-da-zara-sao-fabricadas-com-mao-de-obra-escrava/>, acesso em 18.06.2020 e WACLAWOVSKY, Luciana. M. Officer é condenada por trabalho escravo e terá registro cassado por dez anos. Central Única dos Trabalhadores (CUT). 2018. Disponível em <

the speech guarantees a performance contrary to human rights violations, on the other hand the company legally seeks ways to make state work unfeasible in trying to reduce or end slave labor cases.

The company's alleged commitment to human rights can be considered incompatible with the explicit attempt to undermine a tool that, according to the International Labor Organization (ILO), is an international example of good practice in combating slave labor (freely translated from SOMO; REPÓRTER BRASIL, 2015, p. 57).

Another limitation is clear because leaving audits and certifications to the private sector and with the only moral obligation given to the companies that command the economic sector, is not sufficient, considering that slave labor was found on the production chain of manufacturers that bear the seal of the Brazilian Textile Retail Association (ABVTEX), one of the main companies that certify products in the textile sector in Brazil (freely translated from REPÓRTER BRASIL; SOMO, 2015, p. 58).

It is also important to note that the accountability of the production chain could be included as an effective measure in the guiding principles of companies in their relations with human rights. Analyzing the first principle, it is noted:

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication (UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 2011, p. 3).

It so happens that, as the principle drafts, the States are responsible for taking measures to prevent, investigate, punish and discourage violations through effective public policies.

Despite this obligation, as it is an issue that has only recently been discussed, there are not many examples of State initiatives applying public policies to provide the necessary protection, especially in relation to the production chain. Notwithstanding, there are examples of countries that have already started to implement these policies, such as the Netherlands, which already establishes responsibility in the production chain in its legal system.

In this legislation, if a company hires another to do work that would be its assignment, it puts the employees of the contractor at its disposal, thus characterizing the chain responsibility. The responsibility of the chain is verified when each subcontractor executes a part of the production line of the contractors, if the links in the chain have contracts or agreements to carry out the work or tasks and if the employees who perform the work are not paid in integrality, the responsibility can be directed to all companies that are part of the chain, observing the specificities of the law (NETHERLANDS MINISTRY OF SOCIAL AFFAIRS AND EMPLOYMENT, 2015, p. 1).

Another example is São Paulo Municipal Law 16.606/2016, which amended Law 10.205/1986, which deals with the issuance of operating licenses for commercial shops, established the payment of fines and even the closure of the establishment that "directly or indirectly" is held responsible for conducts that constitute reducing the person to a condition analogous to slavery. Despite the legislative progress, the research found only one case in which a company was taken accountable for modern slavery in its production chain, as cited above (M. Officer had its license revoked for ten years, because the brand was convicted to held slave labor in its production chain, but the judicial process that discuss the case didn't come to an end to this date).

In view of these limitations, the Open Intergovernmental Working Group realized the need to develop a binding international standard for effective protection of human rights by companies.

5. THE PROPOSAL OF A BINDING INTERNATIONAL STANDARD: AN ANALYSIS OF THE PROPOSAL IN RELATION TO THE RESPONSIBILITY OF THE PRODUCTION CHAIN

The Zero draft, as already mentioned, is a rule that has been discussed to address the violation of Human Rights by companies by an Open Intergovernmental Working Group (OEIGWG) with a mandate to elaborate a legally binding international instrument to deal with human rights and companies. One of the concerns of this working group is precisely the need to guarantee that human rights are respected in the production chain. In January 2019, the first draft of this international standard was released, the so-called "zero draft". However, in the sixth session of this working group, a review was carried out (United Nations. OEIGWG. OEIGWG CHAIRMANSHIP REVISED DRAFT, 2019).

In this revised document the before mentioned concern was clearly addressed, as can be seen from its goals:

Art 2 - 1. The purpose of this (Legally Binding Instrument) is:

- a. To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities;
- b. To prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;
- c. To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses. (OEIGWG CHAIRMANSHIP REVISED DRAFT, 2019, p. 4)

The need to reinforce the respect, protection, promotion and fulfillment of human rights by companies in their activities is evident. To prevent the occurrence of violations and abuses of these protections, as well as to provide access to justice and compensation for those who suffered the abuses, and to increase international cooperation to protect these basic rights in companies' commercial relations.

Observing these objectives, the "revised draft" contemplates the possibility of accountability in the production chains, as it turns out that the term "contractual relationship" is mentioned several times, as for example:

Art. 1 - 4. "Contractual relationship" refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State. (OEIGWG CHAIRMANSHIP REVISED DRAFT, 2019, p. 4)

Analyzing the article, the concern to hold companies accountable for violations of human rights is evident, even if this violation occurred with those who they only maintain a contractual relationship.

In the case of slave labor, the text also shows concern with this matter, after all, in Article 6, item 7, it defines that the States should seek in their domestic legislation, in the criminal, civil or

administrative field, laws that punish the legal entity if they commit a crime that violates human rights. Thus, in its letter "H", there is a direct citation of slave labor and violations that resemble this type of conduct.

Art. 6 - 7. Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences:

h. slavery and slavery-like offences. (OEIGWG CHAIRMANSHIP REVISED DRAFT, 2019, p. 9)

Finally and perhaps what deals with the topic more directly, it is important to reproduce article 6, item 6.

Art. 6 – 6 States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place. (OEIGWG CHAIRMANSHIP REVISED DRAFT, 2019, p. 9)

The aforementioned item clearly demonstrates the concern with the responsibility of the production chain in cases of violations of human rights, after all it says that the signatory States must provide in their domestic laws the responsibility of legal or physical persons that fail in their inspection and, thus, allow other individuals or legal entities with whom they have contractual relationships to violate human rights. It should also be noted that this punishment must occur when the company supervises or controls the activity that caused the damage or should foresee the risk of violating human rights in its business activities, including transnational relations. This item demonstrates the concern with the responsibility of the production chain and, consequently, with the situations of the textile sector and subcontracting.

Thus, for all that has already been exposed, the international community understand that establishing accountability in the production chain could be an effective way of inhibiting slave labor. Furthermore, the State must be attentive to manifest itself and take the necessary measures to achieve this aim. The same conclusion is shared by the NGO's SOMO and Reporter Brasil:

In order to face abuses of labor rights in (sub) contracted units, the Brazilian government must clearly establish, by law, the objective responsibility of companies located at the top of the production chain for violations of human and labor rights in the production of their own brands (freely translated from REPÓRTER BRASIL; SOMO, 2015, p. 62).

In conclusion, the objective responsibility applied to the company in its production chain, could cause the top of the pyramid to become concerned with its suppliers, which could generate a ripple effect, with the disincentive for subcontractors to violate human rights. Therefore, there could be an impact on the entire production chain, and even on the market itself, in order to eradicate slave labor in the known modalities. Placing punitive risks at the top of the production chain would serve as an incentive for buyers to effectively control working conditions. It would also create a stimulus for them to adapt their purchasing practices to a fairer distribution of the costs and benefits of the supply chain, which, in turn, could end one of the main incentives for precarious work.

Finally, the accountability of the production chain is shown as an alternative to combat slave labor, since, at the same time, they are directed to the cost dilution strategies of the production chain, namely, social dumping and sweating system, demanding due diligence of companies in their production chain, under penalty of liability for violations.

6. FINAL CONSIDERATIONS

As explained in the introduction, the problem addressed in the research is the investigation of strategies for diluting the responsibility of garment companies and how these strategies contribute to the occurrence of slave labor. It became evident that the main strategies of the major clothing brands are to have a constant product line, which is only operational with the subcontracting of other companies, practice known as “fast fashion”.

In this context, the big brands subcontract smaller companies that, on the other hand, subcontract other even smaller companies to produce the products or part of the clothes that will be sold by the big brand. These smaller companies are often installed in unhealthy places, use the labor of illegal immigrants and, often, employ workers in conditions similar to slavery. These small improvised factories are called “sweatshops”.

To cut production costs, major brands pay the lowest price possible for the clothes produced by sweatshops, which encourages disrespect for labor rights by subcontractors. As a result, it is clear that companies lack *due diligence* in their production chain, which, as seen above, is a breach of their obligations to protect human rights.

Based on this scenario, it was demonstrated that there is a growing international concern with the performance of these large companies, mainly because their performance can cause social, life and environmental damage. Despite this, there is still no consensus regarding the possibility of considering legal entities as subjects of international law, which makes it difficult to develop global public policies in relation to their performance and, mainly, their accountability when their acts violate or encourage the violation of human rights.

For this reason, the United Nations has mandated an open-ended intergovernmental working group (OEIGWG) to develop a binding international standard for the protection of human rights in relation to the performance of companies, especially, transnational companies. To date, a draft has been drawn up, which has already been revised, and in this last proposal, it is evident that companies can be held responsible when violations of human rights occur in their production chain. This treaty has not yet been approved, but it would already be a first step towards curbing slave labor in the textile industry's production chain.

On the other hand, the research reached a conclusion that one big limitation to held companies responsible for violations of human rights in the international scenario is that the States must take the necessary steps to change legislation and apply the remedy solutions.

There is no competent international court to try companies in cases where violations occur due to the influence of a Spanish company on Brazilian soil, for example. This factor makes accountability more difficult. It is certainly a point that should be reviewed in the binding international instrument formulated by the OEIGWG.

Despite this, it was clear that some countries such as the Netherlands, for example, already have national laws that aim to protect workers along the production chain. However, this legislation would not be sufficient due to the limitations suggested in the previous paragraph.

Therefore, the main contribution of this article is the demonstration of a legal gap, which makes it difficult for companies to be held responsible for violations in their production chain when this production takes place in more than one country, in more than one region of the planet. Despite the drafting of a binding international treaty, there will still be room for the adoption of strategies that hinder accountability, especially when the company subcontracts companies outside its territory, as it will be more difficult for the judiciary of another country to reach its assets.

That said, there is still a long way to go in order to eradicate slave labor in the productive chain of the garment industry, not only in Brazil, but also all around the world.

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