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Citation: Menashe, M. (2024). CSR and the Constitutive Role of Law: Harnessing Social Norms for Labour Law Enforcement. *Industrial Law Journal*, doi: 10.1093/indlaw/dwae042

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Link to published version: <https://doi.org/10.1093/indlaw/dwae042>

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CSR and the Constitutive Role of Law: Harnessing Social Norms for Labour Law Enforcement

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ABSTRACT

This article explores how international labour law can harness social norms for the enforcement of international labour standards within private companies. By doing so, it provides a particular take on the ‘constitutive’ role of the law in shaping societal norms and economic activities. Such reliance on societal enforcement mechanisms gains particular relevance in the realm of global labour governance. With the dominance of private compliance initiatives, the law can regain influence by internalising its norms as social norms within companies, even when, strictly speaking, international law is not intended to oblige these actors. Accordingly, the article argues that international labour law holds unique cognitive and normative capacities that can shape actors’ beliefs and expectations, promoting a universal understanding of what shall be considered as the appropriate behaviour in the realm of labour. Once international labour standards become the social benchmark for evaluating companies’ codes of conduct, compliance with these norms becomes key to companies’ reputation and market access. At the same time, the transmission of legal norms to the company level is not straightforward. The article thus puts forward an evolutionary path where international labour law can induce desirable learning processes towards the gradual emergence of a social norm among companies on compliance with its legal requirements.

1. INTRODUCTION

Highlighting the interactions between law and social and economic life, the ‘constitutive idea’ serves as an invaluable lens to consider issues of legal compliance and enforcement. After all,

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if the law constructs our social and economic reality, might it also influence social norms, practices, and conventions with its own rules? This inquiry gains relevance in the field of global labour rights. With multinational corporations operating in complex global supply chains across national borders, and in the absence of government-like enforcement measures on the transnational level, harnessing social norms for law enforcement can undoubtedly be a promising route. This article explores how the constitutive role of the law can inform our understanding of multinational corporations' internal practices and the enforcement initiatives around corporate social responsibility (CSR). Relying on institutional-economic and sociological theories, this exploration will sketch the contours of such an approach, highlighting the possibilities it engenders and shedding light on its limitations.

The starting point of such an excursion is an acknowledgement that the law provides a certain framing through which societal actors perceive and understand their environment. Through its unique cognitive and normative features, the legal system can influence actors' beliefs and expectations around notions of compliance, playing a crucial role in the societal understanding of what the acceptable behaviour of actors is. Norms embedded in the societal understanding of acceptable behaviour will consequently become the socially accepted standard for evaluating actors' conduct. These social norms on how one ought to behave therefore hold implications for actors' choices of action, as only compliance with the social norm is expected to generate positive reactions by others.

In the present case, the article argues that international labour law is increasingly gaining this type of social influence on the conduct of multinational corporations. Even though it does not directly apply to these actors, international labour law is becoming increasingly influential as the social norm that guides actors' behaviour in the area of labour. In that sense, the emerging social norm on companies' standard of behaviour will serve as a constraint on their internal compliance initiatives. This is because companies will factor, as part of these initiatives, how other actors are going to respond to their level of conformity with the social norm. Indeed, when private actors voluntarily design social certification schemes or CSR initiatives, they must be attuned to the expectations of their stakeholders: These initiatives will not be as effective if, for instance, investors and consumers are not convinced that the 'right' standards were chosen. In this context, the constitutive role of law is relevant to the case of CSR and informal enforcement initiatives in the area of labour rights because it sheds light on some important features and effects of international labour law which are at play. This lens highlights the centrality of international labour law as a highly effective standard for the assessment of multinational corporations' behaviour. International labour law is relevant in that

respect for companies' reputation, which in turn bears various social and economic implications in the form of social sanctions or rewards. Accordingly, to the extent that the international legal system promotes international labour standards as the appropriate benchmark for multinational corporations, this serves as a highly powerful enforcement route worthy of further exploration.

Yet, this approach to labour law enforcement presents us with the challenge of understanding how companies internalise international labour standards as social norms. This reflection has broader implications for the limits of the constitutive role of the law in shaping and influencing social and economic phenomena. In order to better understand the constraints of these processes, the article draws on insights from evolutionary and systemic theories. According to a systems theory perspective, international labour law is seen as a social system that is separate from other sub-systems of society and cannot directly communicate with them. This means that it cannot simply transfer its norms onto companies' internal conduct and can serve merely as an external impulse without having a direct effect upon them.¹ This highlights the limitations of the law in influencing companies' social norms, especially when it is operating through voluntary CSR initiatives. For the legal system to truly influence companies this way there is a need to work along companies' inner processes, through indirect pressures that can lead to the gradual alignment with its norms. In this case, these internal processes are influenced not only by the law, but also by the economic, social, and political domains in which companies are embedded.² The ability of legal norms to internalise as social norms within companies will thus depend on their alignment with these collective practices beyond the legal system.³ By shedding light on these limitations, the article offers a useful entry point to consider possibilities around harnessing social norms for the enforcement of global labour standards within multinational corporations.

The article is structured as follows. Section 2 presents the article's theoretical framework on how social norms can be harnessed for the enforcement of legal norms. It explores the process through which the legal system can internalise its rules within society as the social norms for acceptable behaviour. The framework is then applied to the case of companies' CSR initiatives and their compliance with international labour standards. The

¹ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press 2012) 96.

² Masahiko Aoki, *Corporations in Evolving Diversity: Cognition, Governance, and Institutional Rules* (Oxford: Oxford University Press 2010) 64–106.

³ Simon Deakin, 'Juridical Ontology: The Evolution of Legal Form' (2015) 40 *Historical Social Research* 170, 182.

Section argues that we are in fact already witnessing the emergence of such a social norm among private companies, which are increasingly expected to comply with international labour law norms. Section 3 continues to employ the theoretical framework to explore how this identified process can be further enhanced. It starts by investigating the limitations that the legal system is facing in influencing the social norms that are internal to companies. In light of these constraints, it then proposes an evolutionary path for the gradual emergence of international labour law as a social norm among CSR initiatives. Section 4 concludes.

2. THE CONSTITUTIVE ROLE OF LAW: POTENTIALS FOR LABOUR LAW ENFORCEMENT

Research integrating sociological and economic theories to the study of law has been instrumental in revealing the relationships between legal and economic phenomena.⁴ Such an inquiry is crucial from the point of view of the legal field, whose role and objective is precisely to regulate the social and economic realms. It ‘enables us to appreciate how legal form and legal concepts construct the market, reflect and shape economic activity’.⁵ This applies to the legal realm in general, and also to labour market regulation, an area where the interconnectedness of the legal, the economic, and the social are hard to ignore.⁶ In that sense, drawing on sociological and economic theories can be helpful for understanding, and improving, labour law’s enforcement operations. Among these approaches, the ‘constitutive idea’ – the understanding that ‘the economy and the law are mutually constitutive, and that both are in turn mutually constitutive of wider social life, including that part of social life relating to how we think and communicate about the econo-socio-legal’ – is particularly valuable.⁷ This type of lens is inherently connected to the enforcement of legal norms, an endeavour that is in itself concerned with the way the law interacts in practice with society, managing to make real-life effects on social practices and economic activities.

A. The Theoretical Framework: Turning Legal Norms to Social Norms

⁴ Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris, ‘Introduction: Moving Towards an Economic Sociology of Law’ (2013) 40 *Journal of Law and Society* 1, 1.

⁵ Diamond Ashiagbor, ‘Race and Colonialism in the Construction of Labour Markets and Precarity’ (2021) 50 *Industrial Law Journal* 506, 508.

⁶ See, eg, Ashiagbor, Kotiswaran and Perry-Kessaris (n 4) 5; Ruth Dukes, ‘The Economic Sociology of Labour Law’ (2019) *Journal of Law and Society* 396, 397–398.

⁷ Amanda Perry-Kessaris, ‘Approaching the Econo-Socio-Legal’ (2015) 11 *Annual Review of Law and Social Science* 57, 58.

How, then, does the law construct our social and economic reality in such a way that social norms and economic activities can align with legal norms?⁸ One avenue to understand how law is translated into concrete socio-economic outcomes, and vice versa, is through the lens of systems theory. This approach is based on a particular conception of law as a complex, adaptive system, one which recognises its embeddedness in society,⁹ in the sense that it sees the legal system as constantly receptive to useful information from the environment, including the labour market and the business enterprise. The legal system holds in that sense ‘cognitive’ properties, in that it receives, stores and retains information, which is then processed and encoded according to its own legal ‘dogmatics’ and internal consistency. Thanks to these features – being operationally closed but cognitively open – legal rules are able to influence society, but do so in a way that constantly adapts to changes in the external environmental conditions.¹⁰ Hence, the systems-theoretical approach highlights the role of these cognitive foundations of the social system in the emergence of meaning as part of the ‘communicative and interpretive dimensions of human action’. Specifically, it explains how these features allow the legal system to organise information and reduce its complexity and thereby facilitate societal coordination.¹¹

Simon Deakin points to the relevance of institutional-economic theory to further understand these processes. Like systems theory, institutional economics is also concerned with the cognitive functions of social institutions, including law, in societal coordination. The law functions in that respect as a ‘public representation of common knowledge’, both reflecting and influencing societal behaviour.¹² But institutional-economic theories are also valuable to the current discussion as they are, too, related to the law’s ‘constitutive’ role in shaping societal norms and institutions. More specifically, they describe how patterns of behaviour, including of compliance with legal norms, can coalesce into a social norm. That is, a group level equilibrium, which is self-enforcing by means of convergent expectations and thus reproduces

⁸ On the interplay between the law and legal norms, and social norms and social reality more generally, see, eg, Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: D. Reidel Publishing Company 1986). The current article though focuses on a very particular type of this relationship, between international legal norms that do not apply according to these legal norms themselves to the social reality that is being influenced, and it does so through the institutional economic lens that is adopted for this inquiry.

⁹ Niklas Luhmann, *Law as a Social System* (Klaus A. Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff and Rosamund Ziegert eds, Oxford: Oxford University Press 2004).

¹⁰ Simon Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (2011) 7 *Review of Law & Economics* 659, 673–676. On the characterization and analysis of international labour law, specifically, according to systems theory, see: Maayan Menashe, ‘The Race to the Bottom Revisited: International Labour Law, Global Trade and Evolutionary Game Theory’ (2020) 40 *Oxford Journal of Legal Studies* 53, 75–77.

¹¹ Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (n 10) 660.

¹² *ibid* 659–660.

the relevant behaviour.¹³ These ideas therefore provide us with a rich theoretical lens through which to think about law's constitutive role as it applies to enforcement operations, and in particular, to multinational corporations' internal labour practices and their enforcement initiatives around CSR.

The theoretical framework put forward thus illuminates the process through which legal norms – in the current case being international labour laws – can influence, or constitute, social norms. Social norms are learned dispositions to act in certain context-specific way ('if X then do Y').¹⁴ They govern our behaviour in these circumstances by serving as the 'informal understandings that define what we expect of other people and what they expect of us'.¹⁵ Social norms convey in this respect the individual and group conceptions of right and wrong, what is 'perceived by individuals in the relevant population as obligatory, a regularity one "ought" to follow'.¹⁶ The resultant behaviour patterns 'are self-enforcing within a group: Everyone conforms, everyone is expected to conform, and everyone wants to conform when they expect everyone else to conform'.¹⁷ These expectations correspond with social reactions vis-à-vis a social norm – 'individuals generally approve (and otherwise reward) conformity and or disapprove (and otherwise punish) nonconformity' – which in turn help to sustain the social norm.¹⁸ It is exactly this self-enforcing quality that renders this concept of social norms as relevant to the current discussion.

Social norms are thus followed when individuals believe that others conform, and, when they believe that others expect them to conform and may sanction non-conforming behaviour.¹⁹ This then leads us to consider the process through which shared expectations can be created and sustained around particular behavioural regularities.²⁰ This requires the existence of 'common knowledge' within a population about the pattern of behaviour that

¹³ H. Peyton Young, 'The Evolution of Social Norms' (2015) 7 *Annual Review of Economics* 359, 361, 365.

¹⁴ Francesco Guala and Frank Hindriks, 'A Unified Social Ontology' (2015) 65 *The Philosophical Quarterly* 177, 196.

¹⁵ Peyton Young, 'The Evolution of Social Norms' (n 13) 360.

¹⁶ R. H. McAdams, 'Conventions and Norms: Philosophical Aspects' in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Oxford: Elsevier Science 2001) 2735, 2739.

¹⁷ Peyton Young, 'The Evolution of Social Norms' (n 13) 359.

¹⁸ McAdams, 'Conventions and Norms: Philosophical Aspects' (n 16) 2739. See also: H. Peyton Young, 'Social Norms' in Steven N. Durlauf and Lawrence E. Blume (eds), *The New Palgrave Dictionary of Economics* (Basingstoke and New York: Palgrave Macmillan 2008).

¹⁹ Cristina Bicchieri, Ryan Muldoon and Alessandro Sontuoso, 'Social Norms' in Edward N. Zalta and Uri Nodelman (eds), *Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, Stanford University 2011).

²⁰ Robert Sugden, 'Spontaneous Order' (1989) 3 *Journal of Economic Perspectives* 85, 96; Bicchieri, Muldoon and Sontuoso (n 19).

everyone is following.²¹ Accordingly, for this kind of equilibrium to emerge, actors must have shared beliefs about how the ‘societal game’ is being ‘played’.²² In the context of the current discussion, this then prescribes a particular role for the legal system. Laws are accordingly seen as ‘public indicators’ that provide actors with information about how others are likely to act.²³ The law, as a social system strongly grounded in its environment, is able to properly represent society’s shared beliefs and thus provide such public indicators.²⁴ This way, the legal system allows actors to take into account the beliefs of other actors and to take them into consideration in their own choices of action.²⁵ By doing so, the law ultimately promotes a shared understanding around notions of compliance. In other words, the law can be seen as a mode for coordinating – and also influencing – expectations and behaviour of actors through the articulation of shared values.

Given its normative and cognitive features, the law constitutes a particularly powerful ‘public indicator’ in society. First, the legal system carries substantial normative influence. As legislation and law enforcement are seen as ‘symbolically proclaiming society’s central moral principles’, the legal system has a role in ‘shaping widely shared moral beliefs’.²⁶ Accordingly, the influence of the law over norms and preferences can be broadly summarised in the following terms: ‘If the law says that x is “bad” (or illegal), then preferences will ultimately adjust to devalue x; and conversely, if the law says that x is “good”, then preferences will adjust to value x’.²⁷ And so the law has an important role in the establishment of social norms precisely because legal processes ‘identify norms of acceptable behavior in people’s relations with others’.²⁸ But the law has also significant cognitive dimensions in its interactions with society. ‘Cognition’ in this context refers to the manner in which we think about, or ‘cognize’ our world, and how ‘cultural organising principles’, such as those achieved by the law, frame our cognition thereby constraining the scope of behavioural choices.²⁹ A cognitive perspective on this issue ‘implies that responses to law reflect the ability of legal rules to define, constitute,

²¹ Sugden (n 20) 90; McAdams, ‘Conventions and Norms: Philosophical Aspects’ (n 16) 2739.

²² Aoki (n 2) 70–71. See also: Herbert Gintis, *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (rev edn, Princeton and Oxford: Princeton University Press 2009) 215.

²³ Aoki (n 2) 143.

²⁴ Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (n 10) 676–677.

²⁵ Aoki (n 2) 140.

²⁶ Mark C. Suchman, ‘On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law’ (1997) 1997 *Wisconsin Law Review* 475, 489–490.

²⁷ Oren Bar-Gill and Chaim Fershtman, ‘Law and Preferences’ (2004) 20 *The Journal of Law, Economics, & Organization* 331, 332.

²⁸ Peyton Young, ‘Social Norms’ (n 18).

²⁹ Suchman (n 26) 482.

and construct a shared reality in which certain behaviors become socially nonsensical'.³⁰ According to this perspective, the law influences behaviour by framing 'people's understandings of the fundamental nature of the social order'. The legal system reduces the complexity of social situations through various legal symbols and gestures; it defines how social actors are expected to behave; and it then labels actors accordingly, that is, assigns them to its specific cognitive categories.³¹ Moreover, the law also provides clarity and external validation to a social norm and by that helps support its formation and consequently maintain it.³² Another way of thinking about how the law 'constructs social reality', influencing towards particular 'social meanings'³³ is through its 'expressive' effects. Research surrounding this notion shows how the law can effectively incentivise towards compliance merely by what 'the law says' irrespective of any sanctions it imposes.³⁴ Specifically, it sheds light on how the law influences the social meaning of behaviours, which, in turn, also influences the social costs and benefits emanating from these behaviours.³⁵

The combination of these approaches on the functions of the law sheds light on how it can influence the societal understanding of what should be considered as acceptable behaviour. The law provides the framing through which societal actors perceive and understand different behaviours,³⁶ labelling them as a 'violation' or 'compliance', and accordingly as 'good' or 'bad'.³⁷ When the law is seen as embodying such an understanding, it then becomes the socially accepted standard through which to evaluate and judge actors' behaviour. The law serves in that sense as a 'benchmark' for actors in their decision-making process, as 'socially constructed

³⁰ *ibid* 476.

³¹ *ibid* 490–492.

³² Robert Axelrod, 'An Evolutionary Approach to Norms' (1986) 80 *American Political Science Review* 1095, 1106–1107.

³³ Lawrence Lessig, 'The Regulation of Social Meaning' (1995) 62 *The University of Chicago Law Review* 943.

³⁴ Richard H. McAdams, 'An Attitudinal Theory of Expressive Law' (2000) 79 *Oregon Law Review* 339, 339.

³⁵ Alex Geisinger and Michael Ashley Stein, 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 75, 84.

³⁶ This can be categorised as a type of 'issue framing', which, as described by Anne van Aaken and Jan-Philip Elm, 'influences opinion... by selectively enhancing the relative importance an individual assigns to specific beliefs with respect to the issue at hand... issue framing allows individuals to filter information to make some aspects of a broader problem more salient than others and therefore has the potential to change the way individuals deliberate and what they believe to be important' (citations omitted). See: Anne van Aaken and Jan-Philip Elm, 'Framing in and through Public International Law' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford: Oxford University Press 2021) 35, 39.

³⁷ On the use of labels to form and reinforce framing in an international law context, see: Margherita Melillo, 'Labels as the Visible Part of International Law's Invisible Frames' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford: Oxford University Press 2021) 141.

reference point[...] that serve[s] as heuristics for making individual decisions'.³⁸ Overall, the legal system can potentially internalise this way its norms as social norms within society, altering actors' perceptions and expectations about themselves, about others, and about how they perceive the expectations that others have on themselves. Consequently, these perceptions will feed into actors' social interactions, shaping how they behave and respond to others' behaviours. This way, the perceptions on the 'right' standard of behaviour bears also social and economic ramifications due to the responses of others to actors' level of conformity with this social norm. Such societal enforcement mechanisms have direct impact on actors' compliance with the law.

B. Applying the Theoretical Framework to Companies' CSR

We now move on to apply these ideas to the realm of global supply chains and CSR initiatives. The theoretical framework outlined requires us to consider the current perceptions and expectations regarding multinational corporations' acceptable behaviour. While such a task assumes that 'a distinctly global CSR regime is emerging',³⁹ we should acknowledge that it is not necessarily possible to identify a sole unifying social norm. Indeed, 'socially responsible corporate behavior may mean different things in different places to different people and at different times, so we must be careful in how we use the concept and how we define it'.⁴⁰ This is especially true at the global level, with potentially a greater number of ideas on the responsibility of business.⁴¹ At the same time, an unifying element is provided by the fact that CSR 'is rooted in the rise of a global society. Its norms and conceptions are supranational'.⁴² Due to the transnational socialisation processes of companies, contemporary CSR movements are intertwined with 'global or universal values defining what it means to be a good professionalized business'.⁴³ Following this observation, we can say that there may be shared global norms across companies' CSR practices, but with local variations. This seems to fit to the case of companies' internal labour regulatory policies because, as we shall see, we are

³⁸ Peyton Young, 'The Evolution of Social Norms' (n 13) 362.

³⁹ Jennifer Bair and Florence Palpacuer, 'CSR Beyond the Corporation: Contested Governance in Global Value Chains' (2015) 15 *Global Networks* 1, 7.

⁴⁰ John L. Campbell, 'Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility' (2007) 32 *The Academy of Management Review* 946, 950.

⁴¹ Bair and Palpacuer (n 39) 7.

⁴² John W. Meyer, Shawn M. Pope and Andrew Isaacson, 'Legitimizing the Transnational Corporation in a Stateless World Society' in Kiyoteru Tsutsui and Alwyn Lim (eds), *Corporate Social Responsibility in a Globalizing World* (Cambridge: Cambridge University Press 2015) 27, 27.

⁴³ *ibid* 59–60.

considering here norms around international labour law. These norms are exactly designed as a minimal common denominator, ensuring both a certain level of transnational harmonisation of norms while at the same time allowing their adaptation to different legal systems and circumstances.⁴⁴ It is therefore plausible to assume that a social norm could in fact emerge on the global level regarding companies' socially responsible behaviour. Alwyn Lim and Kiyoteru Tsutsui, for instance, view CSR 'as the social regulation of the economy'. They argue:

'We posit that external pressures exerted by trade and investment relationships, government actions, social movement activism, and taken-for-granted models of appropriate organizational behavior work at both global and national levels to push corporations to engage in, co-opt, or react against CSR activities. This approach has a theoretical and empirical basis in various long-standing traditions in social science research that see economic activities as embedded in social structures'.⁴⁵

To the extent that a social norm on corporate responsible behaviour has indeed emerged on a global level, this will have a direct effect on companies' policies and will be reflected in their CSR practices. Although the content of such codes of conduct is adopted on a voluntary basis, by the companies' own free will, these decisions cannot be detached from the constraints posed by the societal expectations.⁴⁶ Indeed, companies adopt CSR policies precisely in response to the expectations of actors such as civil society and consumers, which demand that they ensure acceptable labour practices in their supply chains.⁴⁷ The prevailing social norm on companies' acceptable standard of behaviour will accordingly create social pressures on companies to conform with this norm; it will be socially enforced both through positive sanctions – providing reputational benefits and social and economic opportunities to the

⁴⁴ Simon Deakin and Frank Wilkinson, 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *Industrial Law Journal* 289, 301–309.

⁴⁵ Alwyn Lim and Kiyoteru Tsutsui, 'The Social Regulation of the Economy in the Global Context' in Kiyoteru Tsutsui and Alwyn Lim (eds), *Corporate Social Responsibility in a Globalizing World* (Cambridge: Cambridge University Press 2015) 1, 2, 3.

⁴⁶ John Campbell, for example, in his inquiry into the institutional conditions affecting the tendency of companies to behave in socially responsible way, describes what he refers to as a 'subjective criteria' for defining corporate social responsibility. This approach highlights 'the perspective of the stakeholders who interact with a corporation... corporate behavior is socially responsible as long as it meets these actors' expectations regarding appropriate and acceptable corporate behavior, however they choose to define it'. See: Campbell (n 40) 950.

⁴⁷ eg, Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36 *Michigan Journal of International Law* 425, 436–437.

conforming companies – as well as through informal negative sanctions – such as economic boycotts and loss of market access to non-conforming companies.⁴⁸

The social norm serves in this respect, borrowing from Elinor Ostrom’s Institutional Analysis and Development framework, as an ‘exogenous factor’ that affects ‘the types of actions that individuals can take, the benefits and costs of these actions and potential outcomes, and the likely outcomes achieved’.⁴⁹ According to Ostrom’s framework, when actors interact with one another they are affected by social norms, among other ‘exogenous variables’, while they continuously make decisions on their choices of action. Actors evaluate the outcomes that are being achieved according to different criteria such as economic efficiency and equity, constantly striving to adjust their strategies to achieve better outcomes.⁵⁰ Applying these ideas to the present case, we can say that the social norms on how corporations should behave will influence how others respond to CSR initiatives and in turn the level of success of these initiatives, and companies are expected to adjust the labour standards in their CSR policies accordingly. In other words, when it comes to CSR initiatives, social norms will shape societal expectations and by that influence how, and which, labour standards will be enforced.⁵¹ After all, a company can decide which labour standards it wishes to include, but these actions will not be as effective if investors and consumers, for instance, will not be convinced that the ‘right’ standards were chosen. As put by Ruben Zandvliet and Paul van der Heijden:

‘CSR fills the gap between the level of (enforcement of) labour standards in the host state, and what the company itself deems morally adequate and economically viable. This determination may be influenced by consumers, NGOs, trade unions, international organizations, home state governments and peer-pressure.’⁵²

⁴⁸ McAdams, ‘Conventions and Norms: Philosophical Aspects’ (n 16) 2739; Peyton Young, ‘The Evolution of Social Norms’ (n 13) 361–362.

⁴⁹ Elinor Ostrom, *Understanding Institutional Diversity* (Princeton: Princeton University Press 2005) 15–16, 26–27.

⁵⁰ *ibid* 15, 66–67.

⁵¹ See generally, on the relationship between companies’ CSR and social norms: Lorenzo Sacconi, ‘A Rawlsian View of CSR and the Game Theory of its Implementation (Part I): The Multi-Stakeholder Model of Corporate Governance’ in Lorenzo Sacconi and others (eds), *Corporate Social Responsibility and Corporate Governance: The Contribution of Economic Theory and Related Disciplines* (Basingstoke and New York: Palgrave Macmillan 2011) 157, 170–179.

⁵² Ruben Zandvliet and Paul van der Heijden, ‘The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of the “Privatization” of International Labour Standards’ in Axel Marx and others (eds), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Cheltenham and Northampton: Edward Elgar Publishing 2015) 170, 176.

What then, can be the social norm on how companies ought to regulate their labour? The article's theoretical framework has pointed to the potential effects of the law over the social norms on acceptable behaviour, and in this case the relevant legal corpus is arguably that of international labour standards: the comprehensive system of legal instruments developed, monitored, and enforced by the International Labour Organization (ILO). Admittedly, these legal norms do not directly apply to the conduct of multinational corporations, in the sense that norms of international law are directed to states, not companies.⁵³ Yet, international labour law can, and does, influence companies by way of its influence on social norms. While multinational corporations can be confused nowadays by the numerous different perceptions on what exactly their corporate social responsibilities ought to be,⁵⁴ international labour law's normative and cognitive features arguably make it a highly effective standard for them to follow. As will be elaborated below, this field of law should also be seen as the appropriate regulatory framework for this task, given the transnational nature of multinational corporations in the contemporary global economy. Accordingly, it is suggested that international labour law plays a role in the construction of the global social environment, in a way that its own legal norms are likely to influence the social norms among global companies, influencing in turn the societal expectations from them. As companies must respond to these expectations, they will then be pressured to adhere to these norms.

C. Towards a Global Social Norm on Compliance with International Labour Law?

The current part will inquire into the prediction arising from the theoretical discussion and explore the possibility of the emergence of a social norm among companies, according to which the societal expectation is that they comply with international labour standards. In other words, it examines whether international labour law does indeed inform the current social norms on companies' acceptable behaviour. As we shall see, numerous developments in recent years seem to point towards this direction.

To start with, on a normative level, there is a growing acceptance of the broad relevance of international labour standards for the regulation of multinational corporations. At the basis of this standpoint is the realisation of the complex interdependences within global labour markets. This means that companies' actions in any given country influences workers and

⁵³ See generally: Jose E. Alvarez, 'Are Corporations Subjects of International Law' (2011) 9 *Santa Clara Journal of International Law* 1.

⁵⁴ Bair and Palpacuer (n 39) 7.

companies in other countries, and, that companies can exploit cross-border economic activity to lower working conditions. Moreover, there is an increasing awareness that an exclusive focus on inter-state relations, as manifested in the Westphalian paradigm, is inadequate as it ‘obfuscates the crucial role played by competing domestic interest groups in the international arena’.⁵⁵ As international law provides ‘a convenient exit option for those finding domestic controls too stringent’, ‘[p]roducers can evade tight domestic regulations simply by shifting their activities to a different jurisdiction’.⁵⁶ Recognisant of this, scholars have started to look beyond international law’s ‘outdated and inadequate’ ‘statist conception of responsibility’, whereby nation-states are the primary actor responsible for the working conditions within their territory.⁵⁷ Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, for example, argue that ‘the ILO should assign legal responsibility for unjust working conditions in the global labor market not only to the states in whose territory violations of labor standards arise, but also to brands and powerful TNCs [transnational corporations]’.⁵⁸

The growing expectation that private corporations will conform with international labour standards can also be seen through evolving practices. One observable ‘trend’ is the increasing efforts of various societal actors to hold companies responsible for labour rights violations under international law. As Joel Paul describes:

‘Recent developments suggest that while governments may resist the expansion of international law and legal institutions, private individuals and non-governmental organizations acting both internationally and domestically are contributing to the emergence of new international norms. These new international norms confer greater rights and obligations on private individuals and firms, shifting the focus of international law. One dramatic example of this trend is the effort to hold multinational corporations responsible for environmental damage and violations of human rights and labor rights under international law’.⁵⁹

Specifically, it is international labour standards that are being increasingly drawn on as the applicable standards for global labour regulation. Anke Hassel argues in this regard on the

⁵⁵ Eyal Benvenisti, ‘Exit and Voice in the Age of Globalization’ (1999) 98 *Michigan Law Review* 167, 169.

⁵⁶ *ibid* 169.

⁵⁷ Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, ‘Shared Responsibility and the International Labour Organization’ (2013) 34 *Michigan Journal of International Law* 675, 677–678.

⁵⁸ *ibid* 678.

⁵⁹ Joel R. Paul, ‘Holding Multinational Corporations Responsible under International Law’ (2001) 24 *Hastings International and Comparative Law Review* 285, 285–286.

emergence of a new global labour governance regime, one which ‘is based on a number of building blocks that emerged from different actors whose actions reinforced one another’.⁶⁰ Among the developments that the author describes, she highlights the influence of the ILO’s core labour standards (the principles and rights included in the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, which all ILO member states are obliged ‘to respect, to promote and to realise’, even if they have not ratified the conventions in question⁶¹), directly touching upon the societal processes explored in this article:

‘The most important shared focal point of all these developments was the acceptance of Core Labour Rights as defined by the ILO Declaration in 1998. It has provided a clear normative orientation within these processes toward a shared understanding of what constitutes decent corporate behavior with regard to global labor relations’.⁶²

Similarly, James Brudney argues, in the context of research on freedom of association provisions in multinational corporations’ codes of conduct, that while ILO conventions are not directly addressed to corporate actors, ‘[n]onetheless, the core conventions in particular are widely perceived as benchmarks for human rights in the global workplace’.⁶³

The emergence of such a social norm is also reflected in several highly influential international schemes that directly draw upon international labour standards when providing guidelines to the conduct of multinational corporations. One of these is the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration).⁶⁴ The Declaration clarifies that ‘although ILO standards are intended to apply to governments, the principles underlying these instruments apply to business as well’.⁶⁵ Another example is the UN Guiding Principles on Business and Human Rights, which refers, among others, to the ILO’s Declaration on Fundamental Principles and Rights at Work as the ‘global

⁶⁰ Anke Hassel, ‘The Evolution of a Global Labor Governance Regime’ (2008) 21 *Governance: An International Journal of Policy, Administration, and Institutions* 231, 243.

⁶¹ ILO Declaration on Fundamental Principles and Rights at Work (86th Session Geneva 18 June 1998) art. 2.

⁶² Hassel (n 60) 244.

⁶³ James Brudney, ‘Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?’ (2012) 33 *Comparative Labor Law & Policy Journal* 555, 560.

⁶⁴ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (6th edn, Geneva: International Labour Organization 2022) art 4.

⁶⁵ ILO, *The ILO MNE Declaration: What’s in it for Workers?* (Geneva: International Labour Organization 2017) 7.

standard of expected conduct for all business enterprises'.⁶⁶ The OECD guidelines for Multinational Enterprises are also relevant here, with recommendations that are 'in line' with international human rights instruments and the ILO MNE Declaration, and which 'echo relevant provisions' of the ILO's Declaration on Fundamental Principles and Rights at Work.⁶⁷ Fourth, the UN Global Compact's principles for responsible businesses also meet 'fundamental responsibilities in the areas of human rights', and are too 'derived from' the ILO's Declaration on Fundamental Principles and Rights at Work, among other instruments.⁶⁸ And, lastly, we have the proposed Binding Treaty on Business and Human Rights. The treaty, currently being developed by a UN Human Rights Council Inter-Governmental Working Group, strives to create a legally binding instrument regulating the conduct of business activities through internationally recognized human and labour rights.⁶⁹

Even unilateral private codes of conduct, which were devised solely by the companies themselves, are being increasingly aligned with international labour standards. Private codes of conduct have for many years been criticised as being no more than 'window dressing',⁷⁰ whereby companies are able to adopt more 'business-friendly', minimal rules and procedures.⁷¹ Research on this topic found that they 'vary tremendously' in terms of the issues they include, and the procedures for assessing compliance.⁷² There are numerous examples of codes that do not draw on international labour law.⁷³ It was found, for example, that corporate-influenced programs are more likely to focus on high profile issues such as child labour rather than other

⁶⁶ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (21 March 2011) paras 11–12.

⁶⁷ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Paris: OECD Publishing 2023) paras 41, 53.

⁶⁸ 'The Ten Principles of the UN Global Compact' *United Nations Global Compact* <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 30 August 2024.

⁶⁹ For the latest draft, see: UNGA 'Text of the Updated Draft Legally Binding Instrument with the Textual Proposals Submitted by States During the Ninth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (13 February 2024) A/HRC/55/59/Add.1.

⁷⁰ For discussion, see: Beryl ter Haar and Maarten Keune, 'One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh' (2014) 30 *The International Journal of Comparative Labour Law and Industrial Relations* 5, 8–15.

⁷¹ Kenneth Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton: Princeton University Press 2009) 44, 60, 75.

⁷² Richard M. Locke, Ben A. Rissing and Timea Pal, 'Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains' (2013) 51 *British Journal of Industrial Relations* 519, 524.

⁷³ For an example of research examining corporate codes of conduct in the textile industry, see: Olga Martin-Ortega and Rebecca M.M. Wallace, 'The Interaction between Corporate Codes of Conduct and International Law: A Study of Women and Children in the Textile Industry' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Cheltenham and Northampton: Edward Elgar Publishing 2005) 302.

labour rights,⁷⁴ or, on the other hand, on minimal labour standards, rather than on more robust commitments to freedom of association and collective bargaining rights.⁷⁵ While oftentimes still the case, this is arguably changing in recent years. In particular, we can notice a steady shift in CSR practice towards greater conformity with ILO norms. Lance Compa, for example, observes that ‘[c]orporate social responsibility programs and related codes of conduct now almost always include freedom of association, the right to organize, and the right to bargain collectively’.⁷⁶ Kenneth Abbott and Duncan Snidal similarly remark that ‘even though private schemes often try to innovate in terms of standards, they increasingly return to international norms as the appropriate benchmarks’.⁷⁷ Anne Posthuma and Arianna Rossi assess that the ‘vast majority of these corporate codes make reference to ILO labour standards – most commonly all or part of the Core Labour Standards... and less frequently to other ILO Conventions related to working conditions’.⁷⁸ And, Zandvliet and van der Heijden observe that ‘[c]ontemporary CSR practice shows a trend towards more complete and more specific references to international labour law... most CSR initiatives do now recognize all core labour standards’.⁷⁹ In both multistakeholder and in private codes, the explicit reference to international labour standards is done arguably in light of the legitimacy this provides to these instruments.⁸⁰

While these numerous developments on the international level are seemingly unrelated to one another, their accumulated effect suggests the emergence of a new social norm around compliance with international labour standards. When this is the prevailing norm in the global arena, multinational corporations, which are transnational actors themselves, face social pressures to conform even when they are not required to do so from a strict legal point of view. Accordingly, although companies are free to include whichever norms they wish in their codes of conduct, arguably it is the norms of international labour standards that will lead to their alignment with societal expectations. And, indeed, the steadily growing reliance on the ILO’s

⁷⁴ David Vogel, ‘Private Global Business Regulation’ (2008) 11 *Annual Review of Political Science* 261, 269.

⁷⁵ Mark Anner, ‘Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains’ (2012) 40 *Politics & Society* 609, 610–612.

⁷⁶ Lance A. Compa, ‘Corporate Social Responsibility and Workers’ Rights’ (2008) 30 *Comparative Labor Law and Policy Journal* 1, 1, 7.

⁷⁷ Abbott and Snidal (n 71) 84.

⁷⁸ Anne Posthuma and Arianna Rossi, ‘Coordinated Governance in Global Value Chains: Supranational Dynamics and the Role of the International Labour Organization’ (2017) 22 *New Political Economy* 186, 188.

⁷⁹ Zandvliet and van der Heijden (n 52) 188.

⁸⁰ Phillip Paiement and Sophie Melchers, ‘Finding International Law in Private Governance: How Codes of Conduct in the Apparel Industry Refer to International Instruments’ (2020) 27 *Indiana Journal of Global Legal Studies* 303, 329–330. Although the authors argue that such referencing is done in a way that allows them to draw on their legitimacy without creating clear or robust set of specific obligations.

international labour standards demonstrates that even though no duties are imposed on the corporation, ‘the normative framework of the ILO does not lose its relevance’.⁸¹ ILO norms and monitoring activities, although ‘only explicitly address the conduct of states, not of companies... can play an important role in diffusing transnational norms more broadly to influence the conduct of private entities’.⁸² When describing such diffusion of international legal norms to private companies and the pressures they are facing to comply, research highlights the notion of ‘consensus’ around ILO standards.⁸³ Such a consensus results, to a great extent, from the ability of international labour law processes to both reflect, and influence, global perceptions around notions of compliance, as highlighted here. Then, the ensuing consensus around these norms allows them to serve as a signal for companies on the ‘expectations for business conduct’ and as the ‘appropriate benchmark’ in the area of global labour markets.⁸⁴

Overall, these developments can be understood as an expression of the constitutive function of the law. International labour standards, while legally applicable only to the conduct of states, are nevertheless a powerful source of influence on the social norms on the global level. In that sense, they construct the way we think of the proper behaviour of transnational actors, and by doing so shape expectations in the global society. Accordingly, international labour law is being increasingly seen as the benchmark for acceptable behaviour in the field of labour market regulation, even when not legally obliging from an international law perspective. As a result of these growing societal expectations, we see more and more instances where it is being drawn upon to assess the conduct of multinational corporations.

Moreover, following the article’s framework, these developments also demonstrate the idea that patterns of behaviour coalesce into a social norm; a group-level equilibrium, which is self-enforcing by means of convergent expectations and thus reproduces the relevant behaviour. In the present case, as international labour law consolidates as the social norm in this context, companies themselves are not in a position to ignore its content. Thus, when companies commit to codes of conduct and social certification schemes, they must be attuned to the expectations of their unique stakeholders, constituents, consumers, investors, and so forth. In other words, they are to some extent confined by the perceptions of acceptable behaviour prevailing in the global society at any point in time. These processes naturally have

⁸¹ Zandvliet and van der Heijden (n 52) 188.

⁸² Michael W. Toffel, Jodi L. Short and Melissa Ouellet, ‘Codes in Context: How States, Markets, and Civil Society Shape Adherence to Global Labor Standards’ (2015) 9 *Regulation & Governance* 205, 207.

⁸³ *ibid* 207, 209.

⁸⁴ Abbott and Snidal (n 71) 84–85.

a direct impact on companies' reputation, and consequently also hold various social and economic implications. These can take the form of penalties (such as loss of market access to companies who are not following the appropriate norms of behaviour) or as rewards (such as additional market access to those who are 'playing by the rules').⁸⁵

3. ESTABLISHING A SOCIAL NORM ON COMPANIES' COMPLIANCE WITH INTERNATIONAL LABOUR LAW

Recognising the potential of these identified processes for international labour law enforcement, the current Section continues to employ the proposed framework to explore how this ongoing shift can be further enhanced. Ultimately, it sketches a way forward for the possible emergence of a social norm among multinational corporations across national borders on their compliance with international labour standards.

A. The Challenge of Internalising Labour Law Norms within Companies

While the 'constitutive' approach has immense potential for labour law enforcement, it is not without limitations. A major constraint when working through social norms, and CSR specifically, is the need of the legal system to pass through, and survive, the inner processes of corporations. Of course, the effectiveness of CSR and private regulations more generally have been much discussed.⁸⁶ This includes the risk that the voluntary, self-regulatory nature of these initiatives will lead to the subordination of the public interest at the basis of labour laws to the narrow interests of the corporations.⁸⁷ Yet, the examination of this issue through the suggested theoretical framework sheds light on how exactly the legal norms are transmitted as a social

⁸⁵ For a general overview, see: Anne van Aaken and Betül Simsek, 'Rewarding in International Law' (2021) 115 *American Journal of International Law* 195.

⁸⁶ eg, Harry W. Arthurs, 'Private Ordering and Workers Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press 2002) 470; Tim Bartley, 'Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry' (2005) 14 *Research in Political Sociology* 211; Ngaire Woods, 'Making Corporate Self-Regulation Effective in Developing Countries' (2006) 34 *World Development* 868; Vogel (n 74); Cynthia Estlund, 'Corporate Self-Regulation and the Future of Workplace Governance' (2009) 84 *Chicago-Kent Law Review* 617; Richard M. Locke and Monica Romis, 'The Promise and Perils of Private Voluntary Regulation: Labor Standards and Work Organization in Two Mexican Garment Factories' (2010) 17 *Review of International Political Economy* 45; ter Haar and Keune (n 70).

⁸⁷ Maayan Menashe, 'Private Actors as Transnational Regulators: The Case of Freedom of Association' (2020) 49 *Industrial Law Journal* 1.

norm within the company level, how they can accordingly influence the internal conduct of companies, and what are the limitations which should be taken into consideration.

A systems theory perspective directly touches upon the limitations of the legal system in influencing companies' internal norms and codes of conduct. International labour law, according to this view, is seen as a social system⁸⁸ that is separate from other sub-systems of society. This approach highlights the 'autopoietic' nature, or the self-reference and operational closure, of social systems, which means that they are autonomous, construct their own boundaries, and internally select the communications that belong to each system.⁸⁹ Therefore, social systems cannot directly communicate with each other. 'Nor are the communications of one system 'inputs' to another, causing that second system to generate determined "outputs". The operations of each system can only connect with other communications from the same system'.⁹⁰ Accordingly, in the context of the global economy, Gunther Teubner describes how global regulatory regimes cannot directly limit other social systems, including global markets. Rather than externally imposing legal rules on corporations, there is a need to create limitations from within, according to the systems' own logic.⁹¹ Indeed, '[w]hen the UN, ILO, and EU formulate soft law recommendations on the conduct of transnational corporations, they do not have a direct legal effect, rather they are transformed in a complicated "translation process" into the various 'languages' internal to corporations.⁹² Legal rules serve in this respect merely as 'templates' for corporate codes of conduct.⁹³ Yet, as we shall further discuss below, even such form of indirect pressure can still influence their practice; they reflect to corporations what are the societal expectations that are being directed to them and by that induce 'learning pressures' to adapt their codes.⁹⁴

In the current context of multinational corporations, besides the influence of the law, corporate codes of conduct are naturally influenced by the economy, which is another relevant social system.⁹⁵ The internal processes of corporations adhere in these initiatives to the logic

⁸⁸ See further: Menashe, 'The Race to the Bottom Revisited: International Labour Law, Global Trade and Evolutionary Game Theory' (n 10) 75–77.

⁸⁹ Luhmann (n 9) 7–10.

⁹⁰ *ibid* 41.

⁹¹ Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 1) 77, 83–84.

⁹² *ibid* 96.

⁹³ *ibid* 94.

⁹⁴ *ibid* 95.

⁹⁵ Gunther Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 617, 627.

of capital markets and shareholder interests,⁹⁶ that is, to principles characterised by Teubner as ‘neo-liberal’, such as the ‘almost unlimited corporate autonomy, the orientation of company law towards capital markets, and the establishment of shareholder value’.⁹⁷ The problem in our case is that these neoliberal principles stand in ‘fundamental conflict’ with global market regulations that are designed to protect employees.⁹⁸ While the ‘purpose’ of global capital markets ‘is the selfish pursuit of wealth’, any regulations protecting the interests of constituencies other than capital may reduce capital’s expected short-term gains and thereby stand in contradiction with the ‘logic of the market’.⁹⁹ Moreover, as corporations strive to maximize their autonomy, it is in their interest ‘to erode previous controls which European and international labour laws have placed on how they operate within markets’.¹⁰⁰

Taking up on these ideas, we then move on to consider how exactly the external impulses of international labour law can in fact influence companies’ internal processes. Masahiko Aoki analyses the self-governance structures of business corporations as ‘systems of associational cognition’. This is the idea that ‘inside business corporations, cognitive activities, such as information collections, processing, uses and storage, are systematically distributed and interrelated’ between management, workers, and investors.¹⁰¹ These cognitive activities are influenced, he explains, by the various domains of societal exchange that corporations are embedded in, including, predominantly, the economic-transaction domain, but also parallel social, political and legal games.¹⁰² Corporations will strive to strike a beneficial trade-off between the payoffs in the different domains.¹⁰³ The difficulty we are facing here is that international labour law is not directly applicable or enforced upon companies, hence lacks

⁹⁶ Campbell, for example, as part of his institutional analysis of corporate social responsibility, assumes that ‘the imperative of maximizing profit and shareholder value is the root cause that may prevent corporations from acting in socially responsible ways’. See: Campbell (n 40) 952.

⁹⁷ Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 1) 77.

⁹⁸ Sue Konzelmann and Frank Wilkinson, ‘The Conflicting Logic of Markets and the Management of Production’ in Cynthia A. William and Peer Zumbansen (eds), *The Embedded Firm: Labour, Corporate Governance and Finance Capitalism* (Cambridge: Cambridge University Press 2011) 318, 331.

⁹⁹ *ibid* 331–332.

¹⁰⁰ Tonia Novitz, ‘Evolutionary Trajectories for Transnational Labour Law: Trade in Goods to Trade in Services?’ (2014) 67 *Current Legal Problems* 239, 271.

¹⁰¹ Aoki (n 2) 8.

¹⁰² *ibid* 66.

¹⁰³ *ibid* 98–99.

direct consequences in the ‘legal game’.¹⁰⁴ Corporations may still, however, wish to follow its standards if these are perceived as part of the ‘social exchange game’. In that case, compliance with international labour law, including through CSR initiatives, will provide corporations with social capital which will be translated into future payoffs in other domains, such as gaining greater market access due to the improved reputation.¹⁰⁵

The next step of our exploration is to examine how international labour standards can serve part of the social exchange game that multinational corporations ‘play’ in their various interactions in the global society. In these interactions, a company will endeavour to comply with international labour standards when others expect it to follow these standards and, also, when it believes that other actors expect it to follow them.¹⁰⁶ Such a social norm on compliance with international labour law will be maintained via companies’ self-regulations ‘thanks to a system of mutually consistent beliefs by players predicting each other’s behavior and that induces them to act repeatedly according to the same rule’.¹⁰⁷ When this is the shared understanding in the global society, we can talk about the emergence of a social norm at the company level.¹⁰⁸

At the moment, however, existing practice indicates that international labour law norms have not yet reached that status of a social norm at the company level,¹⁰⁹ albeit the growing progress in this direction.¹¹⁰ Among the challenges for instance is the great deal of inconsistent

¹⁰⁴ Ruth Dukes explains, as part of her research on a global labour constitution, that Teubner's societal constitutionalism model is precisely relevant to the global labour market arena, as one possible response to circumstances where the law is unable to directly influence companies’ conduct. As she notes, the usefulness of the model is ‘to illustrate, specifically, how constitutionalisation might occur in situations in which there is no possibility of the state or the workers exerting direct control over the TNC; or to use Teubner's language, in which state organisations have insufficient power and cognitive resources to impose limitative rules and in which unions truly are external to the corporation’ (footnotes omitted). See: Ruth Dukes, ‘A Global Labour Constitution?’ (2014) 65 *Northern Ireland Legal Quarterly* 283, 297.

¹⁰⁵ See generally: Aoki (n 2) 96.

¹⁰⁶ *ibid* 96.

¹⁰⁷ Sacconi (n 51) 157.

¹⁰⁸ When such a global social norm is established (that is, in the present case, a norm of ‘compliance with international labour standards’), then ‘each member no longer needs to calculate prescribed strategies from scratch or be conscious of its rational property, collective or individual. The norm provides a cognitive frame for the members to which they can offload their cognitive burden’. See: Aoki (n 2) 98. Similarly, Teubner refers to ‘transnational corporate constitutions’, as the outcome of the intertwining of private and public corporate codes which, together, ‘juridify fundamental principles of a social order and establish rules for its self-restraint’. See: Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct’ (n 95) 620–621.

¹⁰⁹ Ruth Dukes assesses in this regard: ‘As Teubner himself goes some way to acknowledging, this account of the constitutionalisation of TNCs is highly aspirational. In reality, corporate codes that are legally binding and effectively enforced in the way that he suggests are quite exceptional; much more common are codes that lack any procedural arrangements whatsoever, that are written in a language that is “vague, hortatory, and not well suited to compelling compliance”’ (footnotes omitted). See: Dukes, ‘A Global Labour Constitution?’ (n 104) 297.

¹¹⁰ See Section 2C of this article.

practice among companies on this matter.¹¹¹ More specifically, CSR initiatives do not currently always require a sufficient level of compliance with international labour standards.¹¹² They are also still often ineffective in driving meaningful change in companies' behaviour due to lack independent enforcement and monitoring mechanisms.¹¹³ Given these shortcomings, it appears that CSR initiatives many times function today as merely 'cheap talk' on behalf of the corporation.¹¹⁴ In other words, 'with no commitment' and 'without substantive specification', CSR initiatives cannot be effective as a signalling device.¹¹⁵ This is a major problem from the perspective of the current approach for enforcement: if corporations cannot use CSR to 'signal their virtue',¹¹⁶ they would also not be able to benefit, in the social exchange domain, from any improved reputation and social capital. In these circumstances, companies are expected to focus on their benefits in the economic-transaction domain, at the expense of their commitment to international labour standards.

B. Prospects for the Gradual Enhancement of the Social Norm

These limitations do not mean that a global social norm around international labour law cannot still emerge across multinational corporations, particularly if we understand this process not as an 'all or nothing' scenario, but as a dynamic process that can develop incrementally. Just as CSR practices themselves are 'an evolving and incomplete process',¹¹⁷ so must be the social norms that are the generating force behind these practices. After all, the perceived legitimacy which CSR initiatives are dependent upon is something that continuously evolves. Being voluntary and private regulatory schemes, CSR initiatives 'perform state-like functions, yet often without the assistance or legitimation basis of governmental institutions',¹¹⁸ and are, thus, in a constant quest for recognition and acceptance.¹¹⁹ Moreover, in the transnational sphere of

¹¹¹ eg, Galit A. Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 *Harvard International Law Journal* 419, 420.

¹¹² eg, Menashe, 'Private Actors as Transnational Regulators: The Case of Freedom of Association' (n 87).

¹¹³ eg, Sarfaty (n 111) 426–427.

¹¹⁴ Sergio Beraldo and Gilberto Turati, 'The Relationship Between Competition and Trust: An Essay in an Historical and Theoretical Perspective' in Lorenzo Sacconi and Giacomo Degli Antoni (eds), *Social Capital, Corporate Social Responsibility, Economic Behaviour and Performance* (Basingstoke and New York: Palgrave Macmillan 2011) 101, 117.

¹¹⁵ Guy Mundlak and Issi Rosen-Zvi, 'Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment' (2011) 12 *Theoretical Inquiries in Law* 603, 657.

¹¹⁶ *ibid* 657.

¹¹⁷ Bair and Palpacuer (n 39) 3.

¹¹⁸ Christine Overdevest, 'Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector' (2010) 8 *Socio-Economic Review* 47, 48.

¹¹⁹ Sigrid Quack, 'Law, Expertise and Legitimacy in Transnational Economic Governance: An Introduction' (2010) 8 *Socio-Economic Review* 3, 9, 12.

multinational corporations there is ‘considerable disagreement and ambiguity’ on who has the mandate to issue rules and corporations must therefore ‘delineate what they consider as their relevant communities and to take into account the evaluation criteria their audience care about’.¹²⁰ As a consequence, CSR initiatives ‘must win the endorsement of legitimacy providing communities’.¹²¹ Actors, such as NGOs, trade unions and academics, constantly assess legitimacy claims and play a role in legitimising or delegitimising a particular private standard by the way of their interaction with it. In practice, this can be done through acts of disregarding or criticising a standard, on the one hand, or, accepting and adopting it, on the other.¹²² Weak and superficial CSR initiatives are not expected, over time, to meet the legitimacy expectations of such relevant actors, which can lead, in turn, to adjustments of their legitimacy demands.¹²³ This is an internal process of organisational learning,¹²⁴ whereby private schemes can gradually ‘ratchet up’ to gain legitimacy.¹²⁵ Stephanie Bertels and John Pelozo, for example, conducted qualitative field study with managers responsible for CSR activities, and found exactly this type of ‘ratcheting expectations’ regarding CSR norms. The diffusion of norms through mimetic forces:

‘creates a cycle whereby the general diffusion of these norms creates a new expectations gap for firms in high visibility industries. Their subsequent response will launch another cycle and, over time, raise expectations for CSR for all firms in the geographic region regardless of industry’.¹²⁶

But while these types of studies do not specify how exactly CSR norms will strengthen over time, the analysis of this study suggests that this process will lead to their improved compliance with international labour law. In this described pursuit of legitimacy on behalf of companies, the law plays an important role, and its principles of procedural fairness, transparency and impartiality, enhance the normative legitimacy of CSR initiatives¹²⁷ – something which is particularly true for international labour law, given that the work of the ILO is enjoying high

¹²⁰ *ibid* 8.

¹²¹ Overdevest (n 118) 50.

¹²² *ibid* 50.

¹²³ Quack (n 119) 3.

¹²⁴ Overdevest (n 118) 51–52.

¹²⁵ *ibid* 68–69.

¹²⁶ Stephanie Bertels and John Pelozo, ‘Running Just to Stand Still? Managing CSR Reputation in an Era of Ratcheting Expectations’ (2008) 11 *Corporate Reputation Review* 56, 56.

¹²⁷ Quack (n 119) 7, 10.

levels of expertise and legitimacy.¹²⁸ Accordingly, international labour law is arguably a central factor that is likely to be taken into account in CSR's 'ratcheting up' of standards.

Another way to think about these kinds of potential improvements in companies' CSR schemes is through the research on 'decoupling'. This term has been employed to describe a separation between companies' CSR policy commitments and their actual practice. At the basis of 'decoupling' theory is exactly the understanding that the external environment of companies, including the law, has a role in 'the social construction of reality' within which they operate.¹²⁹ Companies are 'becoming isomorphic with widely shared understandings of the social reality' and are pressured to incorporate 'elements that are externally legitimated by socially constructed beliefs in the external environment'.¹³⁰ Yet the pressures companies are facing from other societal domains generate conflicting demands within the organization, and in particular can be in conflict with its core goal of production. The result is often 'policies adopted purely as ceremonial window dressing or implemented, evaluated, and monitored so weakly that they do little to alter daily work routines'.¹³¹ But research suggests that over time, decoupling is not necessarily a stable phenomenon.¹³² Occasionally, in particular circumstances, the gap between symbolic CSR commitments and concrete conditions can be tightened,¹³³ for example where weak symbolic commitments nevertheless empower local actors to push to a more meaningful change.¹³⁴ Actors might leverage CSR arrangements, for instance, to mobilise pressures on companies through international 'naming and shaming' campaigns.¹³⁵ While these are bottom up, local incidents¹³⁶ that are often 'uneven and irregular',¹³⁷ over time, complying with these policies might become a more common and predictable phenomenon.¹³⁸ This will strengthen a societal expectation that companies should adequately comply with CSR commitments, which will contribute to the emergence of a social

¹²⁸ eg, Francis Maupain, 'A Second Century for What? The ILO at a Regulatory Crossroad' (2020) 17 *International Organizations Law Review* 291, 301; Jan Klabbers, 'The Past and Future of Governance: Epistemic Authority and the ILO' in Brian Langille and Anne Trebilcock (eds), *Social Justice and the World of Work: Possible Global Futures* (Oxford: Hart Publishing 2023) 133, 137.

¹²⁹ Patricia Bromley and Walter W. Powell, 'From Smoke and Mirrors to Walking the Talk: Decoupling in the Contemporary World' (2012) 6 *The Academy of Management Annals* 483, 484.

¹³⁰ *ibid* 487.

¹³¹ *ibid* 488–489.

¹³² *ibid* 496; Tim Bartley and Niklas Egels-Zandén, 'Beyond Decoupling: Unions and the Leveraging of Corporate Social Responsibility in Indonesia Becoming Isomorphic with Widely Shared Understandings of the Social Reality' (2016) 14 *Socio-Economic Review* 231, 232.

¹³³ Bartley and Egels-Zandén (n 132) 232–233.

¹³⁴ Bromley and Powell (n 129) 494.

¹³⁵ Bartley and Egels-Zandén (n 132) 245.

¹³⁶ *ibid* 233.

¹³⁷ Bromley and Powell (n 129) 495.

¹³⁸ Bartley and Egels-Zandén (n 132) 235.

norm on this matter. Indeed, '[o]ver time these small deviations become routinized and accepted as standard practice for getting things done'.¹³⁹ Therefore, the more companies adopt practices that actually comply with CSR policies, the more the 'market value' of such policies increases, becoming 'progressively institutionalized, or taken-for-granted, as an appropriate means of organizing production'.¹⁴⁰

C. An Evolutionary Path to Social Norm Emergence

We are now in a position to examine the predications on the gradual enhancement of CSR commitments through the lens of the study's institutional-economic approach. This theoretical lens will contribute here in its ability to suggest a path for the evolutionary emergence of international labour law as a social norm among CSR initiatives. Generally speaking, social norms emerge in an evolutionary process, out of the actions of the social actors themselves and the accumulation of precedent.¹⁴¹ Individuals interact with one another and reach decisions by responding to their environment in a dynamic process of trial and error, experimentation and adaptation.¹⁴² The more a particular pattern of behaviour gains prominence, the more others are incentivised to follow, leading to a 'positive feedback loop between social and individual behaviors', which 'reinforces the new way of doing things'.¹⁴³

Applying these insights, we can assume that CSR initiatives that comply only to some degree with labour law commitments, are still likely to benefit, to some extent, in the social and economic domains from their partial compliance. That is, there will be actors that will approve compliance and disapprove non-compliance. This is especially true given the cognitive and normative features of the law that are highly influential over these social interactions and given that we can in fact identify increasing expectations from companies to comply with international labour standards. And so, companies today are still incentivised to a certain degree to voluntarily comply with international labour standards.¹⁴⁴

¹³⁹ Bromley and Powell (n 129) 515. See also in page 495, where the authors refer to the work of Edward Zajac and James Westphal, who argue (in the context of the stock market) that 'institutionalization processes might increase the market value of a policy as more firms adopt it, despite growing evidence of decoupling'. See: Edward J. Zajac and James D. Westphal, 'The Social Construction of Market Value: Institutionalization and Learning Perspectives on Stock Market Reactions' (2004) 69 *American Sociological Review* 433, 433.

¹⁴⁰ Zajac and Westphal (n 139) 434.

¹⁴¹ Peyton Young, 'Social Norms' (n 18).

¹⁴² Peyton Young, 'The Evolution of Social Norms' (n 13) 361.

¹⁴³ *ibid* 363.

¹⁴⁴ Indeed, empirical research found greater adherence by private companies to global labour standards embodied in corporate codes of conduct, when these companies are embedded in states that actively participate in the ILO treaty regime. See: Toffel, Short and Ouellet (n 82) 206.

This behaviour of companies will then itself further generate ‘public indicators’ to other transnational actors, constituting part of the emerging social norm by ‘indicating possible directions of change in the pattern of play, even if they are still uncertain or incomplete’.¹⁴⁵ These public indicators on the new social norm that is emerging, generated simultaneously by both the legal system and societal actors,¹⁴⁶ will induce a learning process within companies which will in turn experiment with various strategies,¹⁴⁷ including with more strategies of compliance. Consequently, strategies undertaken that uphold the emergent norm will further support its solidification by its actions. This is particularly true when this norm enjoys the support of key actors,¹⁴⁸ such as lead firms in the present case.¹⁴⁹ A virtuous circle is then created between actions and perceptions: the more actors believe in the prevalence of societal norm and act accordingly, the more that such behaviour around this norm will lead to social and economic ramifications, which will again strengthen the social norm and perceptions.

Indeed, this prediction can find support in existing research in the field. Guy Mundlak and Issi Rosen-Zvi analysed CSR codes of conduct and reports, and empirically identified a process of informal convergence of labour and environmental norms between corporations. At the same time, their analysis found that the way CSR initiatives are currently designed casts doubt on their use as a signalling mechanism. The authors suggest an alternative reason, rather than signalling, for the purpose of CSR:

‘CSR codes and reports are a focal point for persuading the higher echelons of the corporate world that a new ethical discourse is indeed emerging. They are the scripts that construct the new ethics, gaining a life of their own, forging new modes of communication, and incrementally changing the rules of the corporate game and the perceptions of the corporate agents’.¹⁵⁰

¹⁴⁵ Aoki (n 2) 140. See also the discussion accompanying note 60 referencing to the study of Hassel that argues that the actions of the different actors in the new global labour governance regime reinforce one another and are in essence the ‘building blocks’ that together constitute this emerged regime.

¹⁴⁶ Axelrod (n 32) 1107.

¹⁴⁷ Aoki (n 2) 142; Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 1) 94.

¹⁴⁸ Peyton Young, ‘The Evolution of Social Norms’ (n 13) 382.

¹⁴⁹ Galit Sarfaty, for example, argues that ‘[l]ead firms are... better able to drive coordination, enforce agreements, transmit environmental and human rights norms, and conduct due diligence along their supply chains. In fact, they are “increasingly adopting corporate sustainability programs as a means to establish rules, oversight, and closer relationships with their suppliers...”’(references omitted). See: Sarfaty (n 111) 432.

¹⁵⁰ Mundlak and Rosen-Zvi (n 115) 654.

Corporations, according to the authors, use these processes to ‘building consensus’, influencing the internal conduct of the corporate world towards the convergence of labour law norms to more ethical standards. This way, social norms gradually form from practice around a ‘generally acceptable standard’.¹⁵¹ This diffusion of CSR norms was found in Mundlak and Rosen-Zvi’s study to take place primarily within a given sector, but, corresponding to the aforementioned study of Bertels and Peloza,¹⁵² in some circumstances norm convergence also took place across sectors.¹⁵³ Throughout these processes, the law has a role to play in steering towards these emerging social norms, by cognitively and normatively influencing the beliefs and expectations of transnational actors. This role of the law also comes up in Mundlak and Rosen-Zvi’s study, which observes ‘a bottom-up emergence of standardization in the shadow of the (hard) law as a focal point for the development of corporate policy that is different from the strict attempt to maximize shareholders’ rent’.¹⁵⁴

Similarly, the research of Oren Perez also sheds light on how social norms can develop among global private regimes. Focusing specifically on private environmental governance, he argues that ‘the field of private transnational governance has been subject to a process of standardization and convergence’. This, Perez argues, is due to the ‘multiple links and cross-sensitivities between the different regimes’, which have created ‘a novel ensemble regulatory structure, with positive (network) enforcement and normative externalities’.¹⁵⁵ The links among CSR initiatives can thus result in a ‘new normative order’ which interacts with ‘the internal world of global firms’, in a ‘dynamic equilibrium which enmeshes together economic, environmental and other goals’.¹⁵⁶ Another aspect in which this study is relevant to our present context is in its nuanced understanding of the role of the law in facilitating these described process while it interacts with society. Indeed, Perez’s argument on the ‘normative force’ of CSR initiatives is based on ‘a more complex understanding of the ways in which law can effectuate social change. Regulatory intervention can have multiple effects: behavioral, organizational, discursive and psychological’.¹⁵⁷

4. CONCLUSION

¹⁵¹ *ibid* 656.

¹⁵² Bertels and Peloza (n 126) 60–61.

¹⁵³ Mundlak and Rosen-Zvi (n 115) 655–656.

¹⁵⁴ *ibid* 658.

¹⁵⁵ Oren Perez, ‘Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics’ (2011) 12 *Theoretical Inquiries in Law* 543, 545.

¹⁵⁶ *ibid* 561, 564.

¹⁵⁷ *ibid* 546, 560, 561.

The constitutive idea is helpful in highlighting the role of the law in the construction of the social environment in which multinational corporations operate, and hence its role in influencing their CSR practices. By influencing the societal understanding of what should be considered as acceptable behaviour with regards to labour, international labour law shapes global society's expectations from companies. In that sense, it influences both the standards that transnational actors expect from companies, as well as the standards that companies believe that transnational actors expect from them. This way, such influence on 'the structure of knowledge' in transnational interactions has direct material consequences for the different actors. To the extent that international labour law embodies the social standard for behaviour, the expectation from multinational corporations will be to comply with no less than its legal norms. As the companies themselves will also be aware of that, they know that compliance specifically with international labour standards becomes the key that affects their reputation and, accordingly, market access.

Yet one should also be aware of the limitations of these influences. It is in this context that the study's theoretical framework helped shed light the constraints that the legal system is facing in its ability to operate through social norms, and in particular its need to pass through, and survive, the inner processes of corporations. The norms of international labour law, it was highlighted, cannot directly limit the internal conduct of multinational corporations, but only exert certain pressures from the outside. For real change to occur, the effects of the law should work in alignment with the various social domains that simultaneously influence corporations. Being aware of these limitations is a key to effectively harnessing social norms for legal enforcement.

Finally, the proposed analysis also offers us with a path where the law can nevertheless gradually internalise within multinational corporations, as the social norm on their appropriate behaviour. The evolutionary path through which social norms develop is one in which both formal laws and institutions as well as a wide range of societal actors interact with one another, exert pressures, and influence its directions. In this process various 'public indicators' are constantly generated, both by 'external' legal processes and the actions of international institutions such as the ILO as well as by the companies themselves that by their choices of action also send important messages on the evolving 'state of the play'. It is in that sense that the social norm is being co-developed by both law and society, while it is being influenced by the critical cognitive and normative steering effects of the legal system. Such a realisation

prompts us to explore how the law can work alongside various social pressures in inducing desirable types of learning processes within business corporations.