EXTENSION OF HUMAN RIGHTS RESPONSIBILTIES IN MNCs

Written by:

PANKAJ KUMAR SINGH
Université de Rouen, France

&

AVINASH CHENNAMADHAV
Grenoble Ecole de Management, France

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INTRODUCTION:

Modern human rights doctrine emerged historically from the struggle of the individual property holder against the autocratic monarchic state. It is, in essence, a market-based theory of rights. Thus the first human right to emerge clearly is the right to private property. This is turn gives rise, by the nineteenth century, to a conception of human rights that distinguishes different classes of actors as to the extent of their rights.

Upendra Baxi, in fact, has pointed out; "The Rights of Man" were human rights of all *men* capable of autonomous reason and will. This conception of human rights has also led to the extension of its protection to private accumulations of capital. Thus Article I of the First Protocol to the European Convention on Human Rights (ECHR) makes clear that both natural and legal persons have the right to the peaceful enjoyment of their possessions. Equally, cases have been heard by the European Court of Human Rights involving alleged violations of human rights against corporations. The traditional conception of human rights accepts only this protective approach to the relationship between corporations and human rights. Therefore there is a conceptual barrier to the extension of human rights *obligations* to private corporations.

Purpose and Scope of the paper:

Corporate violations of human rights frequently go unredressed due to significant gaps in domestic and international legal regimes. Host countries are often unwilling or unable to impose criminal sanctions or provide civil remedies, and home countries generally do not exercise jurisdiction over the extraterritorial acts of multinational corporations.[1] Most

** Vth Yr., B.A/ B.Sc, L.LB (Hons.), National University of Juridical Sciences (NUJS), Kolkata, INDIA.

[1] *See,* Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights,* NETH. J. INT'L L., Vol.46, p.171 at p.175-79 (1999) (describing general lack of regulation by home states but noting recent developments in British law that permit tort suits against British multinationals for the extraterritorial acts of foreign subsidiaries).

significantly, international law is virtually silent with respect to corporate liability for violations of human rights. International law has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations. Corporations thus remain immune to liability, and victims remain without redress.[2]

It is in this light the purpose of the paper is framed and the scope determined.

The submitted purpose of this paper is to examine the arguments put forward to uphold an extension of human rights responsibilities to MNCs. Towards this end present international legal regime obligating MNCs with human rights responsibilities is examined and an attempt has been made to suggest measures which will subject MNCs to direct and legally enforceable obligations to observe fundamental human rights. The essential objective of this paper is to harness possibilities of making the new world order of MNCs more responsible at least in the sphere of human rights as it is often said that *'with power comes responsibility'* and thus rediscovering a need to control what one would have referred to as 'the unacceptable face of capitalism.'

MULTINATIONAL CORPORATIONS:

Multinational Corporations, the term when used simply, immune of the strict definitional problems covers any company which carries on directly or indirectly business in more than one country.[3] This kind of activity is obviously not new. Some of the earliest trading companies such as the East India Company and the Hudson's Bay Company were set up for this purpose. However, this meant a home-based company which carried out overseas commercial operations. In more recent times, modern companies such as ICI have set up hundreds of foreign subsidiaries to carry out such operations. Since the Second World War there has been the rise of multinational corporations which generally have the following characteristics:

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[2] *See,* CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW, *Harvard Law Review*, Vol.114: 1943 (2001), p.2026.

(1) they extend production and marketing across national frontiers usually through foreign subsidiaries or joint venture companies;
(2) they are large in size;
(3) they tend to have centralised management and integrated production and marketing.[4]

The main reasons for the growth of multinationals are the growth of technology and the improvement of communications and transport. In particular, the use of computers and telecommunications has facilitated global management. The traditional multinational consisted of a parent company and foreign subsidiaries which produced goods locally, the transnational designs and produces goods anywhere within the system. As Peter Drucker has said, in transnationals, 'Top management is transnational, and so are the company's business plans, business strategies, and business decisions.'[5]

In a Round Table on the Code of Conduct of Transnational Corporations held in Montreux, Switzerland, in October 1986 a statement was issued noting the fundamental changes in the world economy which had taken place over the previous decade. Included in these fundamental changes was the role that multinational corporations had come to play in international economic relations. Multinationals are involved in all economic sectors and are dominant in a number of industries.[6]

Classification and Legal Structure:

In a study entitled *Multinational Enterprises*, Dr. Robert Tindall defines a multinational enterprise as a combination of companies of different nationality, connected by means of shareholdings, managerial control or contract and constituting an economic unit. He then distinguishes between national multinationals and international multinationals.[7]

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[3] *See*, John H Farrar, Brenda Hannigan, Nigel E Furey and Philip Wylie, *Farrar's Company Law*, 4th Ed., Butterworths: London (1998), p. 769. [hereinafter *Farrar's Company Law*]
[4] *Ibid.*
[5] Peter Drucker, *The New Realities* (1989), p.125 *in* John H Farrar, Brenda Hannigan, Nigel E Furey and Philip Wylie, *Farrar's Company Law*, 4th Ed., Butterworths: London (1998), p. 770.
[6] *See*, UN Economic and Social Council Organizational Session for Adoption of the Agenda and Other Organizational Matters, U.N Doc. E/ 1987/9 30 Jan 1987.
[7] *Farrar's Company Law* at p.770.

When a multinational has one parent company of a particular nationality it is a national multinational. When it has two or more controlling parent companies of different nationalities, it is called an international multinational or transnational. Examples of the first are ICI, Ford Motor Co and Mitsubishi. Examples of the second are Royal Dutch/ Shell, Unilever and the former Dunlop/ Pirelli.

Transnationals bear an ill-defined relationship with multinationals. Some of this is due to the increased use of joint venture agreements sometimes coupled with a significant but not controlling interest in the other company.

The question of definition of multinational or transnational corporations has presented difficulties for a number of international bodies. In the United Nations the Group of Eminent Persons defined transnational corporations as 'Enterprises which own or control production or service facilities outside the countries in which they are based. Such enterprises are not always incorporated or private; they can also be co-operatives or state-owned entities.[8]

In the Guidelines for Multinational Enterprises produced by the OECD the following approach was adopted using flexible, non-legal language:

> A precise legal definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different companies and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with others. The degree of autonomy of each entity in relation to others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the Guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as

[8] *Ibid* at p.771.

necessary to facilitate observance of the guidelines. The word 'enterprise' as used in these Guidelines refers to these various entities in accordance with their responsibilities. [9]

A similar approach was adopted by the International Labour Organization in its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

In the United Nations the Commission of Transnational Corporations has used a variety of definitions in its draft Code of Conduct for Transnational Corporations. In 1984 the following proposal was put forward:

> This code is universally applicable to enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others. Such enterprises are referred to in this code as transnational corporations.[10]

Thus, it is clear that no final agreement on the definitional aspect has been reached and it is almost clear from the preceding drafts that the definition/s transcend law and the corporate form.

MNCS AND HUMAN RIGHTS: International Perspective

In recent years there has been an upsurge of concern over human rights and multinational corporations (MNCs). A number of significant cases have been documented of apparent

[9] *Ibid.*
[10] United Nations Economic and Social Council *Work on the Formulation of the United Nations Code of Conduct on Transnational Corporations-Outstanding Issues in the Draft Code of Conduct on Transnational Corporations,* U.N Doc. E/C10/1985/5/2, 22 May 1985.

collusion between MNCs and host governments in major violation of human rights.[11] These have been brought to public attention through the actions of concerned individuals and groups, most notably by non-governmental organizations (NGOs) concerned with human rights. Among the most publicized cases have been the operations of Shell in Ogoniland,[12] BP in Colombia, and Unocal in Myanmar,[13] the last of these having led to landmark litigation in the United States.[14]

Thus, *prima facie*, there is a problem: multinationals can take part in alleged violations of human rights. Such allegations are not really new: concerns about the complicity of corporate and/ or commercial actors in human rights violations can be traced back through the era of apartheid in South Africa, to the use of slave labour by the Nazis in the Second World War, which has itself generated recent legal action,[15] to the exploitation of workers on colonial plantations and to the movement for the abolition of slavery in the eighteenth century.

In recent decades, multinational corporations have achieved unprecedented economic power and geographic scope,[16] which have given them enormous influence over the

[11] *See*, The Enron Corporation: Corporate Complicity in Human Rights Violations, *Human Rights Watch*, p.165.
[12] *See*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88. 92-93 (2 d Cir. 2000) (alleging Royal Dutch Shell's complicity in acts of torture, arbitrary arrest, detention and killing in the Ogoni region of Nigeria) *in* CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW, *Harvard Law Review*, Vol.114: 1943 (2001), p.2025.
[13] *See*, Doe v Unocal Corp., 963 F. Supp. 880, 883 (C.D Cal 1997) (alleging Unocal and Total S.A's complicity in acts of torture, forced labour and forced relocation committed by the Burmese military in connection with the construction of an oil pipeline) *in* Ibid.
[14] *See*, Doe v Unocal Corp., 963 F. Supp. 880 (C.D Cal 1997).
[15] There have been cases where human rights violations committed during World War II and its aftermath has been challenged. *See, In re* World War II Era Japanese Forced Labour Litigation, 114 F. Supp. 2d 939 (N.D Cal 2000); Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y 2000); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J 1999); Burger-Fischer v. Degussa AG, 65 F. Supp 2d 248 (D.N.J 1999).

[16] There is hardly any doubt that MNCs are the face of new world order- both economic as well as social. Global reach of MNCs can be understood from the following fact sheet:

- Fifty-one of the world's top 100 economies are corporations.
- Royal Dutch Shell's revenues are greater than Venezuela's Gross Domestic Product. Using this measurement, WalMart is bigger than Indonesia. General Motors is roughly the same size as Ireland, New Zealand and Hungary combined.
- There are 63,000 transnational corporations worldwide, with 690,000 foreign affiliates.

enjoyment of a broad range of human rights. These rights fall into three general categories:[17] economic, social and cultural rights; civil and political rights; and rights protected under **international humanitarian law**. The sources of these rights include numerous international treaties as well as customary international law.[18] Some care must be taken in speaking of corporate human rights violations because corporations are generally not seen as bearing legal obligations under international law.[19] The traditional notion that only states and state agents can be held accountable for violations of human rights is being challenged as the economic and social power of MNCs appear to rise in the wake of the increasing integration of the global economy that they have helped to bring about.

Furthermore, the increased vigilance and sophistication of NGOs, with their global networks of information, cooperation and skilful use of the mass media, is making ignorance of, and indifference to, the suffering of workers and others who come in contact with unscrupulous MNCs less easy to sustain. On the other hand, the vast majority of MNCs do not engage in practises or relations with states that may lead to human rights abuses. Indeed, they are becoming more sensitive to the risk of becoming parties to such actions. Thus a mood is developing which sees the subjection of MNCs to human rights scrutiny perfectly acceptable.

- Three quarters of all transnational corporations are based in North America, Western Europe and Japan.
- Ninety-nine of the 100 largest transnational corporations are from the industrialized countries.

See, Corporate Globalization Fact Sheet, *CorpWatch*, March 22, 2001 at <http://www.corpwatch.org/issues/PID.jsp?articleid=378>, last visited 20/ 07/ 03.

[17] These categories are not mutually exclusive and primarily reflect the development of three analogous, fairly discrete bodies of international law.

[18] Customary international law comprises those norms that are demonstrated by the general and consistent practices of states and accepted by them as law. Treaties and declarations may serve as evidence of custom. *See*, OPPENHIEM'S INTERNATIONAL LAW, Vol.I, p.28 (Robert Jennings & Arthur Watts eds., 9th ed., 1992).

[19] Discourse on the promotion of human rights and investigations into human rights violations have revolved primarily around nation-states. The politics of rights, legal protection of rights, and most philosophical treatments of human rights posit nations as the primary actors. All international documents on human rights limit liability for violations to "state parties".
See, William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, Human Rights Quarterly, Vol.18 (1996), p.369.

Setting aside the debate as to whether corporate interference with the aforementioned rights is, or should be, legally actionable under domestic or international law, an attempt will be made herein under to discuss how corporate activity can interfere with the enjoyment of human rights.

I. Economic, Social and Cultural Rights- Corporate interference with the enjoyment of human rights probably occurs most frequently in the area of economic, social and cultural rights.[20] Corporations interfere with the right to "the enjoyment of just and favourable conditions of work"-such as "fair wages and equal remuneration for work of equal value" and "safe and healthy working conditions"[21]- when they pay exceedingly low wages, use forced labour, or force employees to work under hazardous conditions without adequate safeguards. Corporations that dump toxic waste or cause widespread pollution interfere with the right "to the enjoyment of the highest attainable standard of physical and mental health."[22] Similarly, corporations that destroy the habitats of indigenous peoples interfere with the right of all people to "freely pursue their economic, social and cultural development," including the right not to be deprived of their own means of subsistence.[23]

II. Civil and Political Rights- Corporations may also interfere with the enjoyment of civil and political rights, as the allegations against Royal Dutch/ Shell in ***Wiwa v. Royal Dutch Petroleum Co.***[24]suggest.[25] In *Wiwa,* the plaintiffs alleged that Royal Dutch/ Shell recruited the Nigerian military to suppress opposition to the company's oil exploration activities in Nigeria's Ogoni region. The plaintiffs further alleged that the Nigerian military repeatedly arrested, jailed and tortured two leaders of the opposition movement,

[20] The discussion that follows draws on the human rights enumerated and defined in the International Covenant on Economic, Social and Cultural Rights, Dec.16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force Jan. 3, 1976). The ICESCR currently has 142 state parties.
[21] Art. 7 of ICESCR.
[22] Art. 12 (1) of ICESCR. In *Jota v. Texaco, Inc.,* 157 F.3d 153 (2d Cir. 1998), for example, the plaintiffs alleged that they suffered poisoning because Texaco had improperly dumped large quantities of toxic waste into local rivers and because the Trans-Ecuadorian Pipeline, which Texaco had constructed, had leaked large quantities of oil into the environment.
[23] Art. I (I) of ICESCR. In *Beanal v. Freeport-Mc Moran, Inc.*, 197 F. 3d 161 (5th Cir. 1999), the plaintiff alleged that the defendant's mining operations in Irian Jaya, Indonesia, had destroyed the habitat and religious symbols of the Amungme people, forcing them to relocate.
[24] 226 F. 3d 88 (2d Cir. 2000).
[25] The discussion that follows draws on the human rights enumerated and defined in the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S 171 [hereinafter ICCPR] (entered into force Mar.23, 1976). The ICCPR currently has 144 state parties.

Ken Saro-Wiwa and John Kpuinen, and that an ad hoc military tribunal convicted and hanged Saro-Wiwa and Kpuinen on fabricated murder charges. According to the plaintiffs, Royal Dutch/ Shell instigated, planned, and facilitated the human rights abuses that the Nigerian military inflicted on the Ogoni people. The company allegedly provided money, weapons, and logistical support to the military and help fabricate the murder charges against Saro-Wiwa and Kpuinen.

These allegations, if credited, would suggest that Royal /Dutch Shell interfered with the plaintiff's right to life,[26] freedom from torture, [27] freedom from arbitrary arrest and detention,[28] and a fair trial.[29]

III. Rights Protected Under International Humanitarian Law- Additionally, corporations may play a variety of roles in the most severe human rights violations, such as genocide, crimes against humanity, and war crimes,[30] which generally occur in the context of systematic mass violence. Corporations, may, for example, manufacture prohibited classes of weapons, such as biological weapons, for use against enemy troops or civilian populations.[31] They may use slave labour in wartime manufacturing.[32] Corporations may also involve themselves in warfare itself by selling the services of private security forces,[33] which are as capable of committing war crimes as any public army. In addition,

[26] Art. 6 (I) of ICCPR which reads, "Every human being has the inherent right to life. This right to life shall be protected by law. No one shall be arbitrarily deprived of his life."
[27] Art.7 of ICCPR which reads, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[28] Art.9 of ICCPR which reads, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."
[29] Art. 14 of ICCPR which reads, "In the determination of any criminal charge against him……everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
[30] For definitions of genocide, crimes against humanity, and war crimes, *See*, Rome Statute of the International Criminal Court, July 17, 1998, Arts.6-8, U.N Doc. A/CONF.183/9, 37 I.L.M. 999, p.1004-009. [hereinafter Rome Statute].
[31] *See*, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 U.N.T.S 163 (entered into force Mar.26, 1975). The convention currently has 143 state parties.
[32] *See*, *In re* World War II Era Japanese Forced Labour Litigation, 114 F. Supp. 2d 939 (N.D Cal 2000); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J 1999)
[33] *See*, CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW, *Harvard Law Review*, Vol.114: 1943 (2001), p.2029.

corporations-particularly financial institutions-may participate in state's "plunder of public or private property"[34] by laundering the proceeds of such acts.[35]

ARGUMENTS IN FAVOUR OF EXTENSION OF HUMAN RIGHTS OBLIGATIONS TO MNCS:

Hitherto, the only relationship between MNCs and human rights has been that of victim and beneficiary: the corporation can be protected from intrusions into its private rights on the part of the state by reference to human rights standards. Leaving the conceptual difficulty surrounding the notion of 'corporate human rights' to one side, what is now expected is that corporations-not unlike states-can be holders of duties to observe human rights. This goes well beyond the furthest limits of responsibility hitherto imposed by human rights law in response to violations committed by private actors. Thus far such actors could not be held directly responsible for violations of human rights. Rather, they could cause the state to be held responsible on the basis that it had neglected to control the act of the non-state actor which has led to the violation of human rights of another private party.[36]

Having said that it is to be noted that private non-state actors, such as, MNCs, do not have any positive duty to observe human rights. Their only duty is to obey law. Thus it is for the state to regulate on matters of social importance and for MNCs to observe the law. It follows also that, as pointed out above, MNCs, as private actors, can be only beneficiaries of human rights protection, not human rights protectors themselves. Against this backdrop, the principal arguments in favour of extending human rights obligation to MNCs will be considered in the following discussion:

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[34] 3 TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO.10: NUERNBERG OCTOBER 1946-APRIL 1949, at XIV (1951) (defining war crimes to include such plunder).

[35] A number of recent cases against Austrian, French, German, and Swiss financial institutions have highlighted the role that financial institutions can play in acts of plunder of public or private property. *See,* Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y 2000).

[36] *See,* Peter T. Muchlinski, *Human Rights and Multinationals: is there a problem?*, International Affairs, Vol.77, No.1 (Jan. 2001) [hereinafter Peter Muchlinski, *Human Rights and Multinationals*]

The social responsibility of MNCs

The arguments for extending social responsibility standards to corporations are well known and for long MNCs have been expected to observe socially responsible standards of behaviour, as expressed in numerous codes of conduct drawn up by intergovernmental organizations, of which the most significant have been the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977, and the **OECD Guidelines for Multinational Enterprises of 1976**, which have recently been revised in 2000. However, they are non-binding and so create no legal duties to observe the standards contained therein. On the other hand, they do create an expectation that MNCs will observe such minimum standards in the conduct of their operations.

Furthermore, MNCs themselves appear to be rejecting a purely non-social role for themselves through the adoption of corporate and industry-based codes of conduct. At the very least, these create a moral expectation that the codes will be observed. They can also gain legal force through their incorporation into contracts, as where, for example, a retailer includes ethical supplier standards in its contracts with its suppliers. In addition, national laws continue to display a concern for corporate social responsibility, whether through the development of protective standards, as exemplified by the social dimension of EU law, or through the extension of public law standards of accountability to privatised industries. Indeed, in certain Commonwealth countries, notably Namibia and Uganda, privatization has been accompanied by an extension of the jurisdiction of their respective national Ombudsman's Office and Human Rights Commission to the activities of the privatized entities.

Even at the multilateral level as evidenced by the recent revision of the OECD Guidelines, 2000 which asserts that, "Multinational enterprises should….respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." In relation to issues of employment and industrial relations the Guidelines expect MNCs to respect the rights of their employees to be represented by trade unions, to contribute to the effective abolition of child labour and to the elimination of all forms of forced or compulsory labour, and not to discriminate against their employees with respect to employment or occupation on such

grounds as race, colour, sex, religion, political opinion, national extraction or social origin, save where this furthers established government policies of greater equality of employment opportunity or relates to the inherent requirements of the job.[37]

Thus, the trend appears to be turning towards a social dimension to the activities of MNCs, one in which is an active duty to observe fundamental human rights.

MNCs can observe fundamental human rights

In response to the view that MNCs cannot be subjected to human rights responsibilities because they are incapable of observing human rights designed to direct state action, it may be said, to the contrary, MNCs can affect the economic welfare of the communities in which they operate and, given the indivisibility of human rights, this means that they have a direct impact on the extent that economic and social rights, especially labour rights in the workplace, can be enjoyed. Furthermore, although it is true that MNCs may not have direct control over matters arising outside the workplace they may nonetheless exercise important influence in this regard. Thus, MNCs may seek to defend the human rights of their employees outside the workplace, to set standards for their sub-contractors and to refuse to accept the benefits of governmental measures that seek to improve the business climate at the expense of fundamental human rights. Furthermore, when firms operate in unstable environments they should ensure that their security arrangements comply with fundamental human rights standards. Moreover, where companies have no direct means of influence they should avoid, at the very least, making statements or engaging in actions that appear to condone human rights violations. Finally, all firms should develop an internal human rights policy which ensures that such concerns are taken into account in management decision-making, and which may find expression in an internal corporate code of conduct.[38]

[37] OECD Guidelines, pp.19, 21.
[38] *See*, Peter Muchlinski, *Human Rights and Multinationals*.

Human Rights are good for business

Writing in 1998, the UN Human Rights Commissioner, Mary Robinson, asked: '*Why should business care about human rights?'* Her answer was that, 'business needs human rights and human rights needs business'. She suggested that the rationale behind this assertion was two fold: first, business cannot flourish in an environment where fundamental human rights are not respected-what firm would be happy with the disappearance or imprisonment without trial of employees for their political opinions?- and second, corporations that do not themselves observe the fundamental human rights of their employees, or of the individuals or communities among which they operate, will be monitored and their reputation will suffer. Such sentiments have also been echoed in the recent UN Global Compact initiative, which calls upon major MNCs to observe fundamental worker's rights, human rights and environmental standards, and in relation to the current moves towards the adoption of human rights code of conduct for transnational companies by the UN Sub-Commission on the Promotion and Protection of Human Rights.[39]

Business themselves may justify the adoption of human rights policies by reference to good reputation. The benefit to be reaped from espousing a stance supportive of human rights is seen as outweighing any 'free rider'[40] problem. Indeed, this problem may be an exaggerated one. It supposes that, say, the employment of child or slave labour is actually more profitable than employing adults at reasonable wages are. A firm that needs to compete at such marginal cost levels is likely to be on the brink of insolvency. Furthermore, it is likely to be in an industry where there is little, if any, investment in new technology or where such investment would make little difference to overall profitability. Very few MNCs are in such a marginal position. Generally, they can afford

[39] Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/Sub.2/2002/XX,E/CN.4/Sub.2/2002/WG.2/WP.1

[40] The problem may be articulated by noting that it is predictable that not all states and not all MNCs will take the same care to observe fundamental human rights. Thus, the more conscientious corporations that invest time and money in observing human rights and in making themselves accountable for their record in this field will be at a competitive disadvantage in relation to more unscrupulous corporations that do not undertake such responsibilities. They may also lose business opportunities in countries with poor human rights records, where the host governments may not wish to do business with ethically driven MNCs and they may not want to do business with these regimes.
See, Peter Muchlinski, *Human Rights and Multinationals*.

to be model employers. Indeed, in developing countries they are likely to be among the best, offering superior wages and conditions of work as compared with local employers. Thus MNCs are more likely to pull conditions up than to pull them down.

On the other hand, failure to pursue a human rights strategy may not affect all firms in the same way. The firms with the most to lose appear to be those in high profile, branded goods industries in which productive efficiency gains are crucial to profitability, due to essentially mature nature of their products and productive technologies. Similarly, firms with a very high market profile due to their size or centrality in their home-country markets may be more sensitive to criticism over human rights abuses. By comparison, firms operating far from the public gaze may have little to fear. Furthermore, even if a firm is identified as having a poor human rights record, and even where it is the object of a consumer boycott, the financial markets are likely to react.

Thus, it can be seen that private corporations are concerned about human rights not because they feel that they will definitely go out of business otherwise, but because they feel that their public place on the market, and/ or their brand image, require it.[41]

MNCs and INTERNATIONAL LAW:

Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights. Since the nineteenth century, international law has addressed almost exclusively the conduct of states. Traditionally, states were viewed as the only "subjects" of international law, the only entities capable of bearing legal rights and duties.[42]

Over the last fifty or so years, though, the gradual establishment of an elaborate regime of international human rights law and international criminal law has begun to redefine the individual's role under international law. It is now generally accepted that individuals

[41] *Ibid.*

have rights under international human rights law[43] and obligations under international criminal law. This redefinition, however, has occurred only partially with respect to legal persons such as corporations: international law views corporations as possessing certain human rights, but it generally does not recognize corporations as bearers of legal *obligations* under international criminal law. The absence of criminal liability results mainly from the different approaches that national legal systems have taken to corporate criminal liability. Although many common law and some civil law jurisdictions recognize corporate criminal liability, many do not.

The disagreement among states about corporate criminal liability was apparent at the 1998 Rome Conference on an International Criminal Court. The draft statute under consideration at the Rome Conference included a French proposal to extend the ICC's jurisdiction to legal persons. Despite three weeks of negotiations on various versions of this proposal, delegates failed to reach agreement. As a result, the Statute of the International Criminal Court adopted at the conclusion of the Rome Conference provided for jurisdiction only over natural persons.

Despite the Rome Conference's failure to adopt the proposal on jurisdiction over legal persons, recent developments in treaty law[44] provide a model for the regulation of

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[42] This position has softened. *See,* Case Concerning Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ 174. Multinationals have no right of appearance, intervention or consultation in the World Court vide Art. 34 of Statute of the International Court of Justice.

[43] Although international human rights law grants rights to private individuals, it does not impose direct obligations on non-state actors. Instead, international human rights law imposes obligations directly on states and requires states to prevent violations by state and non-state actors.
See, CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW, *Harvard Law Review*, Vol.114: 1943 (2001), p.2031.
It is to be noted that compliance with international human rights obligations i.e respect for human rights at home is more responsive to domestic forces (the problem states may be *unable* or *unwilling* persists), to the domestic constitutional structure, than to any international culture pressing for compliance with international human rights norms. The causes of human rights violations are cultural, political, internal, close to home-an underdeveloped commitment to constitutionalism, to the rule of law, to the idea of individual rights, to limitation on government etc. Horizontal enforcement, the principal inducement for international compliance generally, also works differently and less effectively for human rights. The correct approach should be *multilateral* approach.
See, Louis Henkin, *International Law: Politics, Values and Functions* in 216 Collected Courses of the Hague Academy of International Law 13, Vol. IV (1989), p.351.

[44] *See,* Council of Europe Criminal Law Convention on Corruption, 38 I.L.M 505; The Inter-American Convention against Corruption, 35 I.L.M 724; The OECD Convention on Combating Bribery of foreign Public Officials in International Business Transactions, Dec.17, 1997.
See also, Draft Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/Sub.2/2002/XX,E/CN.4/Sub.2/2002/WG.2/WP.1

corporate conduct in the area of human rights. Several multilateral treaties that address bribery, corruption, and organized crime recognize that legal persons can commit international crimes and require that state parties provide legal remedies. The most recent example is the United Nations Convention Against Transnational Organized Crime, which was opened for signature on December 12, 2000. the convention defines the international crimes of participation in an organized criminal group, money laundering, corruption, and obstruction of justice, and obliges state parties to establish criminal, civil or administrative liability for legal persons who commit these crimes.

Such multilateral treaties mark an important development in international law: they not only recognize that legal persons such as corporations can commit international crimes, but also provide regimes for national enforcement.

It is submitted that MNCs by their very nature are legal creatures 'born' in particular national jurisdictions. Hence, any amount of multilateral approach can only proceed by controlling the states which can then control the MNCs: international law may not be able to control the MNCs directly. The approach, should therefore, be to impose international legal obligations on states, to ensure that MNCs, or segments of MNCs over which they have control attain appropriate standard of behaviour.[45]

The most effective approach, similar to aforementioned one, would be to establish an international treaty that specifies the human rights obligations of corporations and requires state parties to provide criminal, civil or administrative remedies for violation of those obligations.[46]

[45] *See, Farrar's Company Law* at p.772.
[46] CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW, *Harvard Law Review*, Vol.114: 1943 (2001), p.2046-48.

MNCS AND THE CONSTITUTION OF INDIA:

The starting point of any discussion surrounding the aforementioned topic starts from Art.12 of the Constitution.[47] Art. 12 lays down the bodies against which fundamental rights can be exercised i.e a writ under Art.32 can be issued. However, to be precise, Art.12 lays down *those bodies against whom, only fundamental rights which can be exercised against the State* can be exercised. Thus, Art.12 excludes the individual, against whom fundamental rights such as Art.17 (right against untouchability) can be exercised.

The bone of contention is whether private MNCs[48] come under "other authorities" as provided in Art.12 of the Constitution.

Private Corporations and "other authorities"**:**

Mathew, J. said in Sukhdev v Bhagatram[49], *" I also wish to make it clear that I express no opinion on the question whether private corporations or other like organizations, though they exercise power over their employees which might violate their fundamental rights would be "State" within the meaning of Art.12."*[50]

It is humbly submitted that none of tests laid down in the *R.D Shetty Case* or tests elaborated in *Khalid Mujib's Case* would assist in bringing private MNCs into the ambit of the Article through "other authorities", so as to exercise fundamental rights against them, as it is evident from the term 'private' that governmental influence is absent, which is almost a pre-requisite for every test laid down in the aforementioned cases.

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[47] Art.12 reads, "….."the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or *other authorities within the territory of India* or under the control of the government of India."

[48] MNCs can be either private or public or both. For example, ONGC has both private and public participation. In fact the Supreme Court of India, in *Ajay Hasia v Khalid Mujb*, (1981) 1 SCC 722 laid down certain tests to determine whether a corporation is an instrumentality or agency of the State and thus comes under "other authorities" part of Art. 12. This case has to be read with *R.D Shetty v I.A.A.I*, (1979) 3 SCC489. The tests which had been articulated by the Supreme Court are as follows:

1. entire share capital being held by the government.
2. financial assistance by the state meeting the entire expenditure of the corporation.
3. state-conferred or state-protected monopoly.
4. deep and pervasive state control.
5. function of public importance and closely related to governmental functions.
6. a government department transferred to a corporation.

[49] (1975) 1 SCC 459.

[50] *Ibid* at para. 112.

The Supreme Court in a full-bench decision in the *Shriram Case*[51], in effect, exercised Art.32 against a private corporation, on the ground of violation of right to life under Art.21. However a constitution bench of the Supreme Court in *M.C Mehta v Union of India*[52] left the question of Private Corporation being brought into the ambit of Art.12 open for a proper and detailed consideration in future. In *Union Carbide Corporation v Union of India*[53] , the Supreme Court has clarified that, *"In M.C Mehta case……..this court could not reach the conclusion that Shriram came within the meaning of "State" in Art.12 and be subjected to a proceeding under Art.32 of the Constitution."*

It is submitted that Supreme Court in these cases has only articulated confusion. One is left wondering whether the court is trying to avoid dealing with the question which is manifested when we consider that the question was not answered in *Sukhdev Case* citing the reason of huge backlog of cases, while addressing, albeit vaguely, the question of bringing in private corporations into the ambit of Art.12.

The court apprehended the expansion of "other authorities" to adversely affect the autonomy of every autonomous body. After all, what is autonomy? Is it the right to function efficiently without governmental intervention or is it the license to violate fundamental rights of the man, quite often lacking entitlements, continuing to do so unabated and finally getting away with it.

It would be apposite at this juncture to refer to the recommendation of the National Commission to Review the Working of the Constitution (NCRWC). It recommended an explanation to be added to Art.12 which would read: *"In this Article, the expression 'other authorities' shall include any person*[54] *in relation to such of its functions which are of public nature."*[55]

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[51] (1986) 2 SCC 176.
[52] (1987) 1 SCC 395.
[53] (1991) 4 SCC 584.
[54] A Company is a separate legal personality (person) owing to the landmark decision of the House of Lords in *Salomon v Salomon & Co. Ltd,* 1897 AC 22.
[55] Report of the National Commission to Review the Working of the Constitution, Universal Law Publishing Co. Pvt. Ltd., Vol.1 (2002).

If the above-mentioned explanation is added by way of a constitutional-amendment, it would conclusively deal with the question of whether a Writ under Art.32 can be issued against a private corporation. This recommendation merely talks about the functional character of the body, and thus brings private corporations into the ambit of Art.12, as against the test of public functions laid down by *R.D Shetty Case* and subsequent cases which needs the same function to be impregnated with governmental character.

The recommendation of the 'explanation' has been adopted from Sec. 6 (3) (b) of the U.K Human Rights Act, 1988 which reads to define public authority as "any person certain of whose functions are functions of a public nature."[56]

Thus, it is humbly submitted that the need of the hour is to subject private corporations and hence private MNCs to constitutional limitations as private corporations and MNCs are playing major roles in almost every economic, social as well socio-economic sphere.

CONCLUSION:

Very few international initiatives address questions of regulating the behaviour of multinational corporations. Those initiatives that do exist are voluntary and non-binding. They focus on the economic impact of these enterprises, while only briefly or indirectly speaking of the corporate impact on rights. For instance, the UN Commission on Transnational Corporations has called on multinationals to: respect human rights; abstain from involvement in, and subversion of, domestic politics in host nations; practise non-discrimination; respect host government's priorities on employment, the environment, and socio-economic policy etc. these are only recommendations. There are basically no binding legal obligations on MNCs to promote or to protect human rights. Human rights obligations for transnational corporations as a function of legal rights obligations is a "null set".

Human rights philosophers commonly argue that rights and obligations fall only upon governments. Many others argue that human rights constitute principally claims against

governments because practises for recognizing and maintaining rights are purely within the domain of public (state) actors.

In this light an attempt was made in the current project to take stock of the extant situation governing MNCs and Human Rights and the running theme has been responsible corporate behaviour.

Though conceptual as well as legal barrier persists but recent developments have gone on to show that responsible MNCs are a norm and not an exception. Quite a few approaches have been discussed in the paper but it is submitted that all of them lead to one path: responsibility. Responsibility owed by the MNCs as an organ of the society and as mandated by Preamble to UDHR which states that "*every individual and every organ of society*" should promote respect for human rights and secure their universal and effective recognition and observance.

[56] Consultation Paper on Enlargement of Fundamental Rights, NUJS Library Documentation (2002-2003).

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- Art. 6 (I) of ICCPR which reads, "Every human being has the inherent right to life. This right to life shall be protected by law. No one shall be arbitrarily deprived of his life."
- Art.7 of ICCPR which reads, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
- Art.9 of ICCPR which reads, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."
- [1] Art. 14 of ICCPR which reads, "In the determination of any criminal charge against him……everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."Art. 7 of ICESCR.
- Art. 12 (1) of ICESCR. In *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), for example, the plaintiffs alleged that they suffered poisoning because Texaco had improperly dumped large quantities of toxic waste into local rivers and because the Trans-Ecuadorian Pipeline, which Texaco had constructed, had leaked large quantities of oil into the environment.
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