CORPORATE SOCIAL ACCOUNTABILITY IN INDIA

THESIS SUBMITTED TO
THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES
FOR THE AWARD OF DEGREE OF

DOCTOR OF PHILOSOPHY

BY

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UNDER THE SUPERVISION OF

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JUNE, 2017

DECLARATION

I do hereby declare that the thesis entitled **"Corporate Social Accountability in India"** for the award of the degree of Doctor of Philosophy is the record of the original research work carried out by me under the guidance and supervision of Dr. Anil R. Nair, Associate Professor, National University of Advanced Legal Studies. I further declare that this work has not previously formed the basis for the award of any degree, diploma, associateship, fellowship or any other title or recognition from any University/Institution.

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This is to certify that the thesis entitled **"Corporate Social Accountability in India"** submitted by **Sandeep M.N.** for the award of the degree of Doctor of Philosophy is to the best of my knowledge, a *bonafide* record of research work carried out by him as part-time research scholar at The National University of Advanced Legal Studies under my guidance and supervision. This thesis or any part thereof has not been submitted elsewhere for any degree.

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This is to certify that all the corrections and modifications suggested by the Research Committee in the pre-submission Seminar have been incorporated in the thesis entitled **"Corporate Social Accountability in India"** submitted by **Sandeep M.N** for the award of degree of Doctor of Philosophy.

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PREFACE

Human rights are violated in several nations by multinationals and hence there is a need to make MNCs more accountable towards society and people. The companies, like the State and other individuals, do owe an obligation to promote and respect human rights in their workplaces and community which includes providing safe and healthy working conditions, guaranteeing freedom of association, non-discrimination, protection of economic livelihood of communities, non-use of forced labour and child labour, prevention of forcible displacement of individuals, providing access to basic health, education and housing for the workers and their families and so on. On the contrary, what is generally witnessed is that the corporations engage in large scale human rights violations. The non-State actors have a major role in the day to day activities of human life including that of environmental law, labour standards and most importantly human rights. If it was the State and its agencies that used to violate human rights, at present it is the non-State actors who have taken up that role. In the current scenario it is an extremely difficult task to control the non-State actors such as multinational corporations because of their huge financial power but the fact remains that they are involved in grave violations of human rights including that of violating worker's rights, causing environmental pollution, employing child labour, violating basic access to health and shelter of workers and their families.

There have been different initiatives taken up at the international level to control the activities of corporations in the area of human rights. But all of them suffers a drawback which is nothing but the lack of effectiveness as most of them are voluntary codes and do not necessarily involve any form of sanction to corporations which do not adhere to the internationally framed codes/guidelines. Commitment of business towards community is the basic agenda of the concept of corporate social responsibility and this is precisely why the term 'social' has been used. It is logical to think that the term 'social' denotes other stakeholders such as employees, consumers, environment and other stakeholders rather than mere shareholders of the corporation. Similarly, the concept of CSR originated as a philanthropic concept and continues to be a voluntary mechanism rather than a mandatory one. This is true almost in all nations with the exception of the Indian Companies Act of 2013 which brought in a mandatory spending of a specified amount of part of the average profits of a company. The relevant criterion is mentioned under Section 135 of the Act. Spending part of the profits earned for the activities mentioned under the Act only becomes a responsibility towards the community at large and can in no way be interpreted to mean that corporates are made accountable for what they have done which have had negative impacts on the workforce, people and environment. This is precisely the basis of this research. The term 'responsibility' although connotes a positive contribution towards the society,

is not enough when considering the grave human rights abuses perpetrated by corporations at the domestic and international level. It is time that corporates are not just made responsible towards the society they operate in, but also made accountable for the violations committed by them. This study proposes a mechanism by which corporations could be made accountable and to modify the concept of CSR in India so as to bring it in tune with international human rights standards.

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LIST OF ABBREVIATIONS

AA 1000	-	Account Ability 1000
AII ER	-	All England Law Reports
Art	-	Article
C.J.	-	Chief Justice
CEDAW	-	Convention for Elimination of Discrimination against Women
CESCR	-	Committee on Economic, Social and Cultural Rights
CPC	-	Civil Procedure Code
Cr.P.C.	-	Criminal Procedure Code
CRC	-	Convention on the Rights of the Child
CSR	-	Corporate Social Responsibility
EIA	-	Environment Impact Assessment
EPFI	-	Equator Principles Financial Institutions
EU	-	European Union
FDI	-	Foreign Direct Investment
GATT	-	General Agreement on Tariffs and Trade
GDP	-	Gross Domestic Product
Govt.	-	Government
GRI	-	Global Reporting Initiative
ICCPR	-	International Covenant on Civil and Political Rights
ICERD	-	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IFC	-	International Finance Corporation
ILO	-	International Labour Organization

IPC	-	Indian Penal Code
J.	-	Justice
MNC	-	Multinational Corporation
MoEF	-	Ministry of Environment and Forests
MOU	-	Memorandum of Understanding
NGO	-	Non-governmental organization
OECD	-	Organization for Economic Cooperation and Development
PIL	-	Public Interest Litigation
SA	-	Social Auditing
SC	-	Supreme Court
Sec	-	Section
TNC	-	Trans National Corporations
TRIPS	-	Trade Related Intellectual Property Rights
UCC	-	Union Carbide Corporation
UCIL	-	Union Carbide India Limited
UDHR	-	Universal Declaration of Human Rights
UK	-	United Kingdom
UN	-	United Nations
UNCHR	-	United Nations Commission on Human Rights
UNDP	-	United Nations Development Program
UNEP	-	United Nations Environment Programme
UNGC	-	United Nations Global Compact
USA/U.S.	-	United States of America
v.	-	versus
WHO	-	World Health Organisation
WTO	-	World Trade Organisation

STATUTES, CONVENTIONS, CODES AND MULTI-STAKEHOLDER INITIATIVES

1. AA 1000
2. Abolition of Forced Labour Convention, 1957
3. African Charter on Human and People's Rights, 1981
4. Air (Prevention and Control of Pollution) Act, 1981
5. Alien Tort Claims Act, 1789
6. Australian Corporate Code of Conduct Bill, 2000
7. Australian Criminal Code Act, 1995
8. Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985
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21. Code of Criminal Procedure, 1973
22. Companies Act, 1956
23. Companies Act, 2013
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25. Company Liability Act 40 of 2007, Indonesia
26. Constitution of India, 1950
27. Constitution of the Federal Republic of Nigeria, 1999
28. Consumer Product Safety Act, 1972
29. Contract Labour (Abolition and Regulation) Act, 1970
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31. Convention concerning Forced or Compulsory Labour,1930
32. Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, 1993
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34. Convention on the Elimination of All Forms of Discrimination against Women, 1979
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40. Declaration on Fundamental Principles and Rights at Work, 1998
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48. Eco-Management Audit Scheme, 1993
49. Electronic Industry Code of Conduct, 2004
50. Employees Provident Fund and Miscellaneous Provisions Act, 1952.
51. Employees State Insurance Act, 1948.
52. Environment (Protection) Act, 1986
53. Equal Remuneration Act, 1976
54. Equal Remuneration Convention, 1951
55. Essential Commodities Act, 1955
56. EU Multi Stakeholder Forum, 2015
57. Factories Act, 1948
58. Fair Packaging and Labeling Act, 1967
59. Federal Environmental Pesticide Control Act, 1972
60. Federal Meat Inspection Act, 1906
61. Federal Trade Commission Act, 1914
62. Foreign Exchange Regulation Act, 1973
63. Flammable Fabrics Act, 1953
64. Food Safety and Standards Act, 2006
65. Forced Labour Convention,1930
66. Forest (Conservation) Act, 1980
67. Freedom of Association and Protection of Right to Organised Convention, 1948
68. Fund Convention, 1971
69. GATT, 1948
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77. Grenelle Acts,2010
78. Guidelines for International Investment, 1972
79. Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises, 2014
80. Halsbury's Laws of England, 1907
81. Human Rights Act, 1993
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83. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977 (as amended in 2000 and 2006)
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85. Income Tax, 2014
86. Indian Forest Act, 1927
87. Indian Penal Code, 1860
88. Industrial Disputes Act, 1947
89. Industries Development and Regulation Act, 1951
90. Information Technology Act, 2000
91. Interfaith Declaration, 1992
92. International Convention on Civil Liability for Oil Pollution Damage, 1969
93. International Convention on the Elimination of All Forms of Racial Discrimination, 1969
94. International Covenant on Civil and Political Rights, 1966
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130. Prevention of Food Adulteration Act, 1954
131. Prevention of Money Laundering Act, 2002
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133. Protection of Human Rights (Amendment) Act, 2006
134. Public Liability Insurance Act, 1991
135. PUMA Code of Conduct
136. Rajasthan Tenancy Act, 1955
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110. *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241
111. *Voth v. Manildra Flour Mills Proprietary Ltd.*, (1990) 171 CLR 538
112. *Wal-Mart Stores, Inc., v. Betty Dukes, et.al.*, 131 S. Ct. 2541 (2011)
113. *Wang Xiaoning v. Yahoo Inc.*, C07-02151 CW/JCS (N.D. Cal. Nov. 13, 2007)
114. *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (SDNY 28 Feb 2002)
115. *Zee Telefilms Ltd. v. UOI*, AIR 2005 SC 2977
116. *Balintulo v. Daimler AG*, 727 F.3d. 174 (2d Cir. 2013)

CHAPTER 1

INTRODUCTION – CORPORATE RESPONSIBILITY: THEORIES, DEFINITIONS AND SCOPE

1.1 Introduction

"Society thrives where business thrives. Business thrives where society thrives. And both thrive where human rights are valued and protected, where there is a genuine concern for social well-being and for the health of the planet. Business and human rights are, therefore, mutually dependent. So that's how I see businesses, not as faceless entities whose relationship to human rights consists of an episode here and an incident there, but progressive wealth creators whose core activity underpins human rights." [1]

The essence of the quote mentioned above is the main theme of this research. The effect of business enterprises can have positive and negative impacts on people and the community. The positive impact of business enterprises on the society includes availability of goods and services and employment opportunities with reasonable wages. The negative ones include violations of labour rights, limited access to health care, violations of the right to life and liberty in the form of murders, torture and extrajudicial killing.

The activities of business enterprises are increasing day by day and it is quite obvious from its reflections on the global environment. One distinct feature in

[1] Peter Sutherland (Former Chairman of Goldman Sachs), Business and Human Rights Seminar, London, December 2005 quoted in Alan Miller & Ingrid Elliot, *The New Paradigm: Opportunities for Oil Companies through Human Rights*, INTERNATIONAL ENERGY LAW & TAXATION REVIEW 281 (2006)

the case of corporate enterprises is that the effect of its activities is not only on its immediate employees but also on people living around the establishment of the enterprise. It should also be borne in mind that the corporate enterprises are not confined to a particular geographical location and the same has resulted in many cross boundary issues in various arenas of human rights.

The need for regulating corporations is very much necessary in the current scenario as apart from producing wealth they create a lot of risks to humans as well as to the ecosystem.[2] The role played by them and the impact which they can create is evident from the fact that out of the top rated economies in the year 1999, 51 percentage were corporations[3] coupled with the fact that their sales are large enough to beat the collective GDP of various countries and that the State in most of the cases has lost its valuable power to direct the nature of corporate responsibility.[4] Corporations account for about one-fifth of the total world's wealth and it is to be noted that only the United States, Germany, Japan, United Kingdom, Italy, and France have tax revenues larger than the

[2] Surya Deva, *Human Rights Realization in an Era of Globalization: The Indian Experience*, 12 BUFF. HUM. RTS. L. REV. 93, 104 (2006)
[3]Iris Halpern, *Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 129, 144 (2008)
[4] Lary Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 290 (2005)

sales of nine largest MNCs.[5] It is also an interesting fact that Walmart earns a profit which is more than the annual tax revenues of the Canadian government.[6] Moreover the functions which were part of the State duty is now exercised and controlled by big multinationals which is evident in the area of energy, water, telecommunication and transport. The focus on MNCs is especially due to their dynamic growth and the influence they have on the global network and the way their operations affect the lives of millions of people around the world. The need to provide for a legal framework to regulate the activities of MNCs is evident from the observation below,

> *"The idea of a corporation as a legal fiction without responsibilities is no more sacred or accurate than the idea of unfettered state sovereignty"*[7]

Relating CSR to the concept of responsible business practices or human rights is not an odd concept. The executive summary of the Report of the EU Multi Stakeholder Forum on Corporate Social Responsibility held at Brussels, Belgium in 2015 starts by resolving the confusion that existed with the term CSR. It specifically states that "Corporate Social Responsibility (CSR) is used as a synonym to reference 'sustainability', 'responsible business conduct' or

[5] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities,* 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)
[6] *Id.*
[7] Garth Meintjes, *An International Human Rights Perspective on Corporate Codes*, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 83-99, 86 (Oliver F. Williams ed., 2000)

'business and human rights'". While diverse, they all address "*the responsibility of enterprises for their impacts on society*" as defined by the European Commission in its 2011-2014 strategy on CSR."[8] Thus CSR in this study refers to corporate human rights accountability rather than dimensions in relation to corporate governance.

This research deals with both multinationals and transnationals. Though these terms are used interchangeably in most of the scholarly works, there exists a thin line of difference between the two. Multi-nationality can be classified into international multi-nationality or transnationals and national multi-nationality. International multi-nationality is attributed to a multinational when "there are at least two controlling parent companies of different nationalities intending to form a single economic unit"[9] such as the Royal Dutch Shell (Dutch and British) and Dunlop-Pirelli (British and Italian).[10] These forms of multinationals transcend national boundaries and are those that have multiple parenthood corporations. National multi-nationality is where "the centre of a multinational's direction is clearly in one home country and if it operates through one parent company of that nationality in exercising control over its

[8] Executive Summary, *EU Multi Stakeholder Forum on Corporate Social Responsibility*, (Aug. 9, 2015, 5.30 P.M.), http://ec.europa.eu/DocsRoom/documents/8774/attachments/1/translations/en/renditions/native

[9] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 130 (Martinus Nijhoff Publishers 2002)

[10] Other examples include Unilever LV Ltd (Dutch and British) and VFW-Fokker (German and Dutch).

affiliates" such as the Ford Motor Co. incorporated in the U.S. with its headquarters in U.S. These form of multinationals have operations or activities in more than one nation and are those that have uni-national parenthood corporations.[11]

This difference has not been acknowledged by the UN. According to one view, the term 'transnational corporation' is just a term of art preferred by the UN in place of multinational corporation'.[12] In reality, the term that was used by the UN was 'multinational corporation' and the same was changed to 'transnational corporation'. The Economic and Social Council in its Resolution 1721 (LIII) unanimously adopted to request the Secretary General to appoint a group of eminent persons to study the impact of multinational corporations on development especially in development countries.[13] The group of eminent persons, thus appointed, recommended the use of word 'enterprise' instead of 'corporation' and 'transnational' instead of 'multinational'. The reason for suggesting the term 'transnational' is because according to them, "transnational would better convey the notion that these firms operate from their home bases

[11] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 106 (Martinus Nijhoff Publishers 2002); Most of the shareholders of Ford Motor Co. are citizens and residents of U.S.

[12] Theodore H. Moran, *The United Nations and Transnational Corporations: A Review and a Perspective*, 92, (Sep. 19, 2015, 7.30 P.M.), http://unctad.org/en/docs/diaeiia200910a4_en.pdf

[13] *United Nations: Reports on the Impact of Multinational Corporations on the Development Process and on International Relations: The Report of the Secretary General to the Economic and Social Council*, 13(4) INTERNATIONAL LEGAL MATERIALS 791-869 (1974)

across national borders".[14] The debates that ensued highlighted the fact that "the term 'multinational', was seen to imply that the firms involved were owned or controlled by citizens of various nations, while in reality the overwhelming majority of them were owned and controlled by citizens of one country, the home country." The reason for recommending the term 'enterprise' in place of 'corporation' was to include firms controlling assets abroad, but was not incorporated.[15] Since then, the UN has been using the term 'transnational corporation' instead of 'multinational corporation'. However they decided to retain the term 'corporation'.

This study uses the term 'multinational corporation' for the most part. It uses 'transnational corporation' so as to signify those corporations that are headquartered in one place and incorporated elsewhere. In short, the latter terminology is used to denote companies that have multiple parenthood corporations. The term 'transnational corporation' is also used where the international or national legal framework[16] uses the same term and when a passage is quoted from another authoritative source.

[14] Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 The JOURNAL OF WORLD INVESTMENT & TRADE 11-87, 15 (2015); Though they suggested a change, they continued to use the term 'multinational corporation' so as to be in conformity with the Economic and Social Council Resolution 1721 (LIII).

[15] *Id.* at 16; According to them, the socialist countries preferred the term 'corporation' as such firms will not be covered in the interpretation of the term 'corporation'.

[16] For example, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003

Various other definitions do exist for multinational and transnational corporations. Multinational corporations have been defined as "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 activity 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."[17] According to Wallace 'multinational enterprise' is an aggregate of corporate entities, each having its own juridical identity and national origin, but each in some way interconnected by a system of centralised management and control, normally exercised from the seat of primary ownership.[18] The UN Norms on Responsibility of Multinational Corporations and other Business Enterprises with regard to Human Rights, 2003 defines a transnational corporation.[19] According to this definition, a transnational corporation refers to an economic entity operating in more than one country or a cluster of economic

[17] The Draft United Nations Code of Conduct on Transnational Corporations, 1984, Clause 1(a)

[18] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 9 (Martinus Nijhoff Publishers 2002)

[19] The UN Norms on Responsibility of Multinational Corporations and other Business Enterprises with regard to Human Rights, 2003, Para 20

entities operating in two or more countries-whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.[20]

1.2 The Justification for the Research Topic – The Link between Corporate Social Responsibility and Corporate Social Accountability

India is infamous not only for the Bhopal Gas tragedy but also for the serious human rights abuses that resulted in the process of establishing a power plant in Dabhol by the Maharashtra State government in collaboration with Enron Corporation in 1993. The protest against the deal resulted in grave atrocities committed by the police officials including torture and illegal arrests[21].The human rights abuses caused by Enron Corporation in India and the after effects of Bhopal Gas tragedy, especially the fact that the judiciary failed to provide adequate sanctions to the violators concerned, proves the need for the change in

[20] Transnational Corporation has also been defined as 'incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake. An equity capital stake of 10 per cent or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as a threshold for the control of assets. In the United Kingdom, for example, a stake of 20 per cent or more was a threshold until 1997. A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise, which is generally an equity stake of 10 per cent for an incorporated enterprise or its equivalent for an unincorporated enterprise.' In some countries, an equity stake other than that of 10 per cent is still used; *United Nations Conference on Trade and Development*, (Jan. 3, 2014, 11.30 A.M.), http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx

[21] Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13(2) ASIAN-PACIFIC LAW & POLICY JOURNAL 269 (2012)

the legal system to make the corporations socially accountable for their acts. Corporate human rights abuses across the world include the activities of Barclay's Bank in collaboration with the apartheid regime in South Africa, Wal-Mart's business with sweat shops, release of toxic gas from Trafigura in Abidjan, environmental degradation and poisoning caused by operations of Rio Tinto in Papua New Guinea and the frequent oil spill by Shell in Nigeria. All these clearly show that it is high time that a research is preferred in the area of corporate social responsibility so as to make an in depth study on the international standards and the national ones whether in the form of legal enactments or to make the corporate enterprises promote and respect human rights.

Human rights are violated in several nations by multinationals and hence there is a need to make MNCs more accountable towards society and people. It is due to the very same reason that the concept of 'corporate human rights accountability' has emerged. But it is not a concept that is found mentioned in most of the legal instruments at the national and international level. Instead, the term 'Corporate Social Responsibility' is a widely held concept. It is the term 'Corporate Social Responsibility' that appears in the statutory provisions of India[22], Denmark[23], France[24] and Indonesia[25]. Contrary to 'corporate human

[22] Section 135 of the Indian Companies Act, 2013

rights accountability', the governments of various jurisdictions are more inclined to bring in 'corporate social responsibility'. The same is evident from the general discussions[26] in common law jurisdictions such as UK and US. The other reason for considering corporate Social Responsibility (CSR) as a widely held concept is due to the fact that the concept of CSR refers to a variety of factors. It includes compliance of human rights standards, labour standards, social security measures, environmental standards, climate change measures, consumer protection and anti-corruption measures. In short, it signifies the duty of the corporations to be responsible to the society. CSR, in this work, focuses on the human rights abuses by corporations and the need to make them accountable for the same. In addition to this, this study also highlights the corporate responsibility to respect human rights.

One may wonder about the requirement of human rights provisions in a concept that is related to Corporate Law or the Companies Act. The answer to that lies in the following observation,

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[23] *Mandatory CSR Reporting for Denmark's Largest Companies (2009)*, (Nov. 18, 2015, 10.20 A.M.), http://www.greenbiz.com/news/2009/01/07/mandatory-csr-reporting-denmarks-largest-companies

[24] Nouvelles Regulations Economiques (NRE) of 2001; *Loi sur les Nouvelles Regulations Economiques (NRE)*, (Nov. 11, 2015, 4.50 P.M.), http://www.environment-database.eu/cms/glossary/45-glossary-l/3301-loi-sur-les-nouvelles-regulations-economiques-nre.html

[25] The Company Liability Act 40 of 2007, Article 74

[26] *Case Study: Corporate Social Responsibility in the US*, (June 11, 2015, 10.00 P.M.), http://www.triplepundit.com/2011/03/case-study-corporate-social-responsibility/#; *Corporate Social Responsibility - The UK Corporate Governance Code*, (June 11, 2015, 10.10 P.M.), http://www.out-law.com/page-8221

> *"Corporations are expected to observe human rights standards not on account of Court-administered coercion but because of persuasion, negotiation, consumers-investors-shareholders' behaviour, market incentives, social pressure, and social shaming."*[27]

That being the case, it is imperative that human rights do form part of Corporate Law or the Companies Act. At present, instead of this, what could be seen is that there is no background of human rights law in provisions relating to companies. Moreover the term 'corporate "social" responsibility' owes much allegiance to human rights than commercial law. A look at the Companies Act, 2013 for the term 'social' itself would prove this. It is mostly used only in the context of CSR except in two places[28]. It is true that CSR has always been used synonymously with business ethics and corporate philanthropy, but in this work, the aim is to focus on corporate human rights responsibility and not solely on business ethics or India's record of corporate philanthropic activities.

The term 'corporate social accountability' has been used as the research title since the author intends to create a regime that replaces the traditional notion of 'corporate social responsibility' associated with Corporate Law and corporate philanthropy with a human rights inclusive concept associated with ethical and responsible business practices. Generally corporate accountability has been defined in terms of financial reporting accountability and strategic decision

[27] Surya Deva, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations*, 8 Newc. L. R. 87, 110 (2004)
[28] Companies Act, 2013, Section 8 and Schedule VI.

transparency to analyse the extent to which the corporate is transparent in its activities[29]. This is purely a definition from the business point of view. This study analyses corporate accountability from the human rights point of view and in this context, corporate accountability signifies establishment of clear means for providing sanctions to corporations in case of failure to follow human rights standards, in other words, 'corporate control'[30]. Consequently, 'corporate social accountability', for the purposes of this study, is used from a human rights point of view rather than from a purely corporate one. This study is concerned about the human rights abuses that are committed by the corporates which are not addressed adequately either in the national or international framework. Thus this study will be focussed on international human rights law and not on company law or international commercial law.

The main reason behind this topic and the main reason for focusing more on corporate human rights responsibility is because the activities of the corporations have caused grave human rights violations such as violations of right to life[31], torture[32], cruel, inhuman and degrading treatment[33], violations of

[29] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 42 (SAGE Pub Ltd, London 2011)
[30] *Id.*
[31] *Report: Majority Of Earth's Potable Water Trapped In Coca-Cola Products*, (Jan. 29, 2014, 10.40 A.M.), http://www.theonion.com/articles/report-majority-of-earths-potable-water-trapped-in,38356/?utm_source=Facebook&utm_medium=SocialMarketing&utm_campaign=LinkPreview:1:Default
[32] Sinaltrainal et.al; v. Coca Cola et al, 578 F 3d 1252 (11th Cir. 2009)

principle of equal pay for equal work[34], child labour[35], forced labour[36], deprivation of property[37], injuries to health[38], exploitation of labour rights[39] and environmental rights[40] and arbitrary detentions[41]. These violations are perpetrated by the corporations either directly or by being complicit in the atrocities committed by the State parties.

1.3 Corporate Social Responsibility - Concept

From time immemorial, business and society are dependent on each other. CSR means having a responsibility towards the community. To understand Corporate Social Responsibility, the three words 'corporate', 'social' and 'responsibility' should be understood in its true sense. Broadly, CSR refers to

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[33] Stephen Foley, *Apple Admits it has a Human Rights Problem*, (Mar. 28, 2014, 2.30 P.M.), http://www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html

[34] Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002)

[35] Monica Bauer, *Always Low Prices, Rarely Human Rights: Wal-Mart and Child Slave Labor*, 2005, (Mar. 28, 2014, 8.10 A.M.), http://ihscslnews.org/view_article.php?id=68

[36] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: Report on India*, 2011, (Jan. 22, 2014, 6.30 P.M.), http://www.indianet.nl/pdf/AccessToJustice.pdf

[37] *POSCO to Withdraw Investment from Odisha?*, (Mar. 21, 2014, 1.30 P.M.), http://www.downtoearth.org.in/content/posco-withdraw-investment-odisha--49272

[38] Surya Deva, *Corporate Human Rights Accountability In India: What Have We Learned From Bhopal?*, 2012, (Feb. 20, 2014, 2.30 P.M.), http://ssrn.com/abstract=2146377

[39] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)

[40] Russell Hotten, *Volkswagen: The Scandal Explained*, 2015, (April. 10, 2014, 11.30 P.M.), http://www.bbc.com/news/business-34324772; *A Rainforest Chernobyl*, (Oct. 11, 2014, 12.30 P.M.), http://chevrontoxico.com/about/rainforest-chernobyl/

[41] L. Renganathan, *Tiruvarur Farmers to Observe Fast over ONGC Issue from Friday*, THE HINDU, July 30, 2015, (July. 31, 2015, 11.15 P.M.), http://www.thehindu.com/news/national/tamil-nadu/five-protesting-farmers-picked-up-by-police-reported-missing/article7479300.ece

the responsibility of the Corporate towards the society in the place in which they are based and wherein they operate, without denying the fact that its scope goes much beyond this. For different people, the term 'corporate social responsibility' connotes different meanings. Other popular names of CSR include profit making only, going beyond profit making, voluntary activities, concern for the broader social system, economic, legal and voluntary activities, and giving way to social responsiveness.

The philanthropic activities undertaken by industrialists like John H. Patterson of National Cash Register Corporation[42] is said to be the initial practical instances of corporate social responsibility. But the concept of CSR has seen a transition from mere philanthropy to responsible business practices. In recent times, the concept of CSR is projected on similar lines as that of corporate

[42] National Cash Register Corporation is an American company that deals with the production of cash registers that are used for registering and calculating transactions, ATMs, barcode scanners and kiosks. For a detailed idea on history of NCR, *See* http://www.ncr.com/company/company-overview/history-timeline; The welfare measures introduced in the company by John H. Patterson apart from spending two-thirds of his profit till 1913 on rescue and relief operations in a flood hit city has been stated as follows: *"Patterson granted a general wage increase, removed debris, added ventilation and shielded dangerous equipment to protect his workers. Dressing rooms and showers, available for use on company time, were introduced. A factory cafeteria serving subsidized hot lunches was opened. Free medical care was provided at an NCR dispensary. Patterson showed his usual concern for detail. Every six months NCR employees were measured and weighed; those found underweight were issued free malted milk. Combs and brushes, sterilized daily, were available for grooming and, on rainy days, company umbrellas were distributed to home-ward-bound female workers. NCR opened an employee night school, established a circulating in-house library and inaugurated a program of free lectures and concerts. Patterson's advice carried well beyond the confines of NCR. For years, he volubly advocated municipal reform in Dayton, an end to patronage, better schools and the building of parks."*; Bidhu Kanti Das, *John Patterson Rang Up Success with the Incorruptible Cashier*, (Jan. 10, 2012, 9:40 AM), http://www.daytoninnovationlegacy.org/patterson3.html; Mark Bernstein, *John Patterson Rang Up Success with the Incorruptible Cashier*, (Jan. 10, 2012, 9:30 AM) http://www.daytoninnovationlegacy.org/patterson2.html

social accountability wherein the accountability is towards the employees, consumers, community at large and the environment in addition to shareholders or investors. The various definitions to the concept of CSR prove the same.

1.4 Corporate Social Responsibility - Definition

Corporate Social Responsibility has been defined in different ways. Different countries carry out CSR based on their motivations for and against CSR and therefore in each country, one can see significant institutional and regulatory differences. Some definitions tend to be quite vague and are subject to interpretations. There are a number of concepts that are applied interchangeably with CSR. The concept of CSR has no universal definition and it has been used synonymously with concepts such as corporate accountability, corporate governance, business ethics and corporate citizenship[43]. The term 'CSR' is applied when one has to understand and assess the effects of business on society. It is now a common practice that the businesses carry out CSR activities, internal as well as external, only to maximise their profits. In most of the cases, CSR behaviour is seen only as assistance to other organisations and/or individuals in diverse fields including humanitarian, medical and social cases, environmental causes, cultural, heritage protection, philanthropic activities and sport related initiatives. It is time that the above concepts of CSR

[43] Bidhu Kanti Das & Prof. P. K. Halder, *Corporate Social Responsibility Initiatives of Oils PSUs in Assam: A Case Study of ONGC*, 2(2) MANAGEMENT CONVERGENCE 75 (2011)

are changed. CSR should be considered more than mere assistance to other organisations and profit-making. It should reach a stage where companies follow ethical and responsible business practices in all their activities and maintain adequate human rights standards in all its operations and place of business.

The definition to the concept of CSR originated way back in 1953 by H.R. Bowen who stated that "businessmen have an obligation to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society".[44]

CSR signifies that companies are responsible for their impact on society and people. According to Frederick, "The fundamental idea of 'corporate social responsibility' is that business corporations have an obligation to work for social betterment."[45] CSR is a concept in which companies voluntarily integrate social and environmental concerns into their business operations and into the interaction with their stakeholders.[46] From the viewpoint of the U.S. Committee of Economic Development[47] in 1971, "CSR is related to (i)

[44] *CR Theoretical Background*, (Nov. 16, 2012, 09:55 AM), http://www.csrquest.net/default.aspx?articleID=13126

[45] Donna J. Wood, *Corporate Social Performance Revisited*, 16(4) THE ACADEMY OF MANAGEMENT REVIEW 691-718 (1991)

[46] Tatjana Chahoud, *Shaping Corporate Social Responsibility (CSR) in India-Does the Global Compact Matter?*, (Feb. 1, 2012, 10:30 AM), http://www.die-gdi.de/uploads/media/download_document__127_KB__01.pdf

[47] CED is a non-profit organization dedicated to provide research and solutions to policy matters; https://www.ced.org/

products, jobs and economic growth, (ii) societal expectations and (iii) activities aimed at improving the social environment of the firm".[48]

The most common belief is that only States and individuals are morally responsible for their actions and corporates are not involved in the general social issues and human rights concerns[49]. The fact that international law casts obligations primarily on State entities and, in certain cases, individuals and has not considered corporations as its subjects is the best example of this. It is agonizing to notice that even the judiciary held a similar view in the past. The Court in *Dodge v. Ford Motor*[50] held that *"a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."*[51] It is true that the same case has another observation too which is in support of CSR. The Court observes thus,

> *"Although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation."*

[48] A. CRANE, A. MCWILLIAMS, D. MATTEN, J. MOON, D. SIEGEL (eds.), THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 50 (Oxford University Press 2008)
[49] TOM CAMPBELL & SEUMAS MILLER, HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS 106 (Springer Science & Business Media, 2006)
[50] 170 NW 668 (Mich) 1919
[51] The main issue in this case was whether the plaintiffs can compel the defendants to pay more dividends and increase the price of the products sold.

The positive trend towards corporate social responsibility was also seen in the case of *Herald Co. v. Seawell*[52], where the Court of Appeals for the Tenth Circuit held that "the directors may cause their corporation to purchase its own shares to prevent an outsider from taking control of the corporation, if the board fears that the outsider will not operate the corporation in the best interests of the public."[53] This ruling was based on the premise that the discretionary power that vests with the board of directors of a company also include the power to act in the interests of the public although marginally less profitable for the corporation."[54] Although there have been prior judicial decisions allowing the directors to purchase its own shares, it was allowed only when there existed a clear threat to the business interests of the corporation[55].

There are further definitions to the concept of CSR. The most comprehensive definition of CSR is as follows:

> *"Corporate Social Responsibility is a term used to express that an organization is taking responsibility for the impact of its activities upon*

[52] 4472 F.2d 1081 (10th Cir. 1972)
[53] HC Seawell, *Herald Co. v. Seawell: A New Corporate Social Responsibility?*, 121(5) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1157-1169 (1973)
[54] *Id.*
[55] *Id.*; The Indian judiciary has taken a stance that it could not authorise the making of donation for any activity when such a power is not expressly provided for by the memorandum. The S.C. in *Dr. A. Lakshmanaswami Mudaliar and ors v. Life Insurance Corporation*, AIR 1963 SC 1185 held that such a power to make donations, when not expressly provided for by the MoA, could not be found by reference to the general clause of the Memorandum giving power to do incidental things. The case was relating to a donation of Rs. 2 lakhs made from the Shareholders' Dividend Account to a Trust proposed to be formed with the object of promoting technical or business knowledge, including knowledge in insurance. The donation was made pursuant to a decision taken at an extraordinary general meeting of the shareholders of the company.

> *its employees, customers, community and the environment. It is usually used in the context of voluntary improvement commitments and performance reporting. Essentially, CSR is the deliberate inclusion of public interest into corporate decision-making, and the honouring of a triple bottom line- People, Planet and Profit*[56]*. CSR involves a commitment to behave ethically and contribute to economic development, while improving the quality of life of the workforce and their families as well as the local community at large."*[57]

World Business Council for Sustainable Development defines CSR as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workplace and their families, as well as of the local community and society at large".[58]

The term Corporate Social Responsibility (CSR) signifies the way in which a company should carry out its business so that it becomes socially acceptable and the company itself is responsible for all the effects of its activities on all of its stakeholders, including the environment. CSR in an international context

[56] The concept of 'triple bottom line' was coined by John Elkington in 1994 and has used the phrase in his work titled Cannibals with Forks: The Triple Bottom Line of 21st Century Business (New Society Publishers, 1998)

[57] Dr. Clarence J. Dias, *Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility*, 4 NUJS L. Rev. 505 (2011)

[58] WBCSD, *Corporate Social Responsibility (CSR)*, (Jan. 21, 2012, 12:30 PM), http://www.wbcsd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx; CSR has also been defined thus, "Social responsibility in the final analysis implies a public posture toward society's economic and human resources and a willingness to see that those resources are utilised for broad social ends and not simply for the narrowly circumscribed interests of private persons and firms"; WILLIAM C. FREDERICK, CORPORATION, BE GOOD: THE STORY OF CORPORATE SOCIAL RESPONSIBILITY 20 (Dog Ear Publishing 2006)

may be defined as the practice of multinationals to avoid activities that involve human rights violations. CSR is the concept where companies go beyond mere compliance of existing laws and go further in attaining a social objective[59].

The 2001 European Commission Green Paper defines it as "a concept whereby companies decide voluntarily to contribute to a better society and cleaner environment".[60] A detailed explanation of the concept of Corporate Social Responsibility is as follows.

> *"CSR is concerned with treating the stakeholders of the firm ethically or in a responsible manner. 'Ethically or responsible' means treating stakeholders in a manner deemed acceptable in civilized societies. Social includes economic responsibility. Stakeholders exist both within a firm and outside. The natural environment is a stakeholder. The wider aim of social responsibility is to create higher and higher standards of living, while preserving the profitability of the corporation, for peoples both within and outside the corporation."*[61]

According to Caroll, the social responsibility of business encompasses the economic, legal, ethical and discretionary expectations that society has of

[59] Peter Rodriguez et al., *Three Lenses on the Multinational Enterprise: Politics, Corruption, and Corporate Social Responsibility*, 37(6) Journal of International Business Studies 733-746 (2006); According to Donaldson "corporations have the capacity to use moral rules in decision-making and the capacity to control not only overt corporate acts, but also the structure of policies and rules"; THOMAS DONALDSON, CORPORATIONS AND MORALITY 30 (Prentice-Hall 1982)

[60] Commission of the European Communities, *GREEN PAPER: Promoting a European framework for Corporate Social Responsibility*, 5 (Mar. 2, 2012, 12:30 PM), http://europa.eu/rapid/press-release_DOC-01-9_en.pdf

[61] Michael Hopkins, *Corporate Social Responsibility: An Issues Paper*, International Labour Office Working Paper No. 27, (May 2004), 1, (July 22, 2015, 11.50 P.M.), http://ssrn.com/abstract=908181

organisations at a given point in time. Thus according to Caroll, the responsibilities under CSR include economic, legal, ethical and philanthropic ones.[62] According to him, business should derive profits and provide non-deficient/defective goods and services to the consumers. The responsibility of business towards the shareholders cannot be forgotten.[63] His CSR model involving economic, legal, ethical and philanthropic responsibilities was built on the model developed by Sethi in the year 1985. Sethi developed a three tier model based on Social Obligation, Social Responsibility and Social Responsiveness.[64]

The most practical definition of CSR is that CSR denotes the obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximize

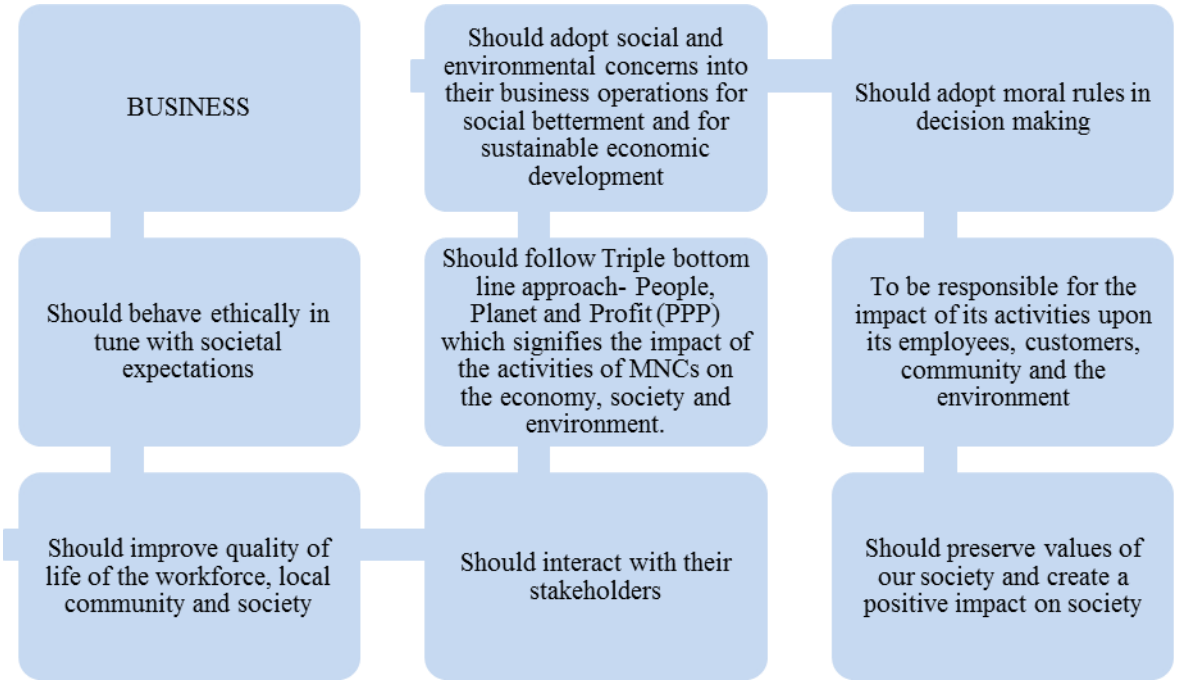
[62] Known as the Caroll's pyramid of Corporate Social Responsibility; *CR Theoretical Background*, (Nov. 16, 2012, 09:55 AM), http://www.csrquest.net/default.aspx?articleID=13126

[63] *CR Theoretical Background*, (Nov. 16, 2012, 09:55 AM), http://www.csrquest.net/default.aspx?articleID=13126; Caroll's 'Legal responsibility' meant that the business should obey the laws and 'ethical responsibility' meant that the business should avoid doing any kind of harm. Caroll's idea of good corporate citizenship was reflected in his concept of 'philanthropic responsibility' of business. The philanthropic responsibility, which is also termed as voluntary responsibility, essentially meant promotion of human welfare. It is of no doubt that the ethical and the philanthropic part overlaps each other.

[64] *Id.*; By the term 'Social Responsibility', Sethi meant that the business should address societal norms, values and expectations of performance. Social Responsiveness, according to him, was the competency of the company to engage effectively with stakeholders and to take active measures on the matters and apprehensions of stakeholders.

profit.[65] CSR is based on the concept that 'industry leaders have to manage their wealth so that it also benefits the common people'.[66]

The fact that various definitions have been attempted itself is a proof of the importance of the concept of CSR. The main elements of CSR that could be traced from the various definitions given in this chapter are the following:



In fact, CSR has become a 'unique lens' through which the attitude of the multinationals towards global economic and political environments could be understood.[67]

[65] David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STANFORD LAW REVIEW 6 (1979)
[66] Mari Tuokko, *Corporate Social Responsibility: Finland and India*, 2(2) IN LAW MAGAZINE 40 (2015)

To conclude, CSR does not mean philanthropy or in other words, contributing gifts from profits, but it denotes social responsibility in how profits are made.[68] CSR is indeed a commitment from the side of corporations that are generally expressed in their statements of business principles or codes of conduct. In short, the crux of all the above mentioned definitions of CSR is that CSR is achieved when the prime concerns such as financial, environmental and social concerns are taken into consideration by the business in its day to day activities.

The debate regarding Corporate Social Responsibility became tougher after the article of Milton Friedman in New York Magazine titled "*The Social Responsibility of Business is to Increase its Profits*". In this article he vehemently argued that if at all social responsibilities exist, it is only for individuals and not for businesses. He asserted thus,

> *"Only people have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but "business" as a whole cannot be said to have responsibilities, even in this vague sense."*[69]

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[67] Peter Rodriguez et al., *Three Lenses on the Multinational Enterprise: Politics, Corruption, and Corporate Social Responsibility*, 37(6) Journal of International Business Studies 733-746 (2006)

[68] D MCBARNET et al., THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 23 (Cambridge University Press 2007)

[69] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, NEW YORK TIMES MAGAZINE, September 13, 1970, (Jan. 14, 2012, 12:30 PM), http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.friedman.dunn.pdf

He also contended that there is a difference between social responsibilities of individuals and business and that it is only the former who is concerned with the society and the latter is concerned only with profit.[70]

Corporate Social Responsibility has also been defined in a contrasting way. It has been defined as a behaviour that involves voluntarily sacrificing profits, either by incurring additional costs in the course of the company's production processes, or by making transfers to non-shareholder groups out of the surplus thereby generated, in the belief that such behaviour will have consequences superior to those flowing from a policy of pure profit maximization[71].

1.5 Importance of Corporate Social Responsibility

Corporate Social Responsibility, in general understanding, upholds and extends the obligation that the business has, beyond its narrow scope, to society. It means a commitment that the company should have towards the sustainable economic development of the society. For this purpose, there is a need to

[70] *Id.*; This is clear from the following passage, *"Of course, the corporate executive is also a person in his own right. As a person, he may have many other responsibilities that he recognizes or assumes voluntarily to his family, his conscience, his feelings of charity, his church, his clubs, his city, his country. He may feel impelled by these responsibilities to devote part of his income to causes he regards as worthy, to refuse to work for particular corporations, even to leave his job, for example, to join his country's armed forces. If we wish, we may refer to some of these responsibilities as "social responsibilities." But in these respects he is acting as a principal, not an agent; he is spending his own money or time or energy, not the money of his employers or the time or energy he has contracted to devote to their purposes. If these are "social responsibilities," they are the social responsibilities of individuals, not business".*

[71] J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 261 (Clarendon Press, Oxford 2002)

interact with the local communities, to identify their basic needs and to incorporate the same in their business goals and strategic intend. The government considers CSR as the way in which business contributes to the nation's sustainable development goals.

Corporates have a duty to aid and assist the society to prevail over the problems of business, rather than merely existing as profit making institutions. There are a number of areas in which CSR can be practised, ranging from health and environmental issues to education, community, promotion of art and culture, and climate change. To put it simply, concept of CSR proposes that companies fulfil their duties of providing care to the society. The heart of the concept of corporate social responsibility is to reflect the social imperatives and the social consequences of business success. Thus, Corporate Social Responsibility empirically consists of clearly articulated and communicated policies and practices of corporations that reflect business responsibility for some of the wider societal good.

1.6 Background Information on the Subject

Corporate Accountability can be implemented in numerous ways and globally it has been considered to be a voluntary initiative on the part of the companies except in a few countries like India where there is a statutory regime dealing with CSR. The main modes of implementation of CSR are the following.

1.6.1 Codes of Conduct worldwide

1.6.1.1 The Interfaith Declaration

There exist codes of conduct relating to business and human rights such as 'The Interfaith Declaration: A Code of Ethics on International Business for Christian, Muslims, and Jews'[72] and the 'CAUX Round Table'[73]. It mainly deals with cross-cultural problems discerned with current business behaviour and the Declaration is only a set of guidelines for good practice and not a substitute for corporate or individual morality. One of the principles of the Interfaith Declaration states that "Business has a responsibility to future generations to improve the quality of goods and service, not to degrade the natural environment in which it operates and to seek to enrich the lives of those who work within it."[74]

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[72] *An Interfaith Declaration : A Code of Ethics on International Business for Christians, Muslims, and Jews (1994),* (Dec. 20, 2011, 10:00 AM), http://ethics.iit.edu/ecodes/node/5106

[73] *History of the Caux Round Table (CRT),* (Dec. 29, 2011, 11:00 AM), http://www.cauxroundtable.org/index.cfm?&menuid=28&parentid=2; The Interfaith Declaration: A Code of Ethics on International Business for Christian, Muslims, and Jews originated as a result of a State Visit by the British Royal Family to Jordan in March 1984 and was an attempt to discover the values, the three monotheistic faiths had in common, concerning economic activity. The Declaration is a result of deliberations by the representatives of each faith and their main agenda of discussions was the international business activity as traditional business practices varied from countries to countries with diverse religious traditions; HRH Duke of Edinburgh, HRH Crown Prince El Hassan of Jordan and Sir Evelyn de Rothschild and the group of religious thinkers invited by the main three were part of the deliberations that resulted in the Declaration. They also included members of royal families, theologians, entrepreneurs, philosophers, and investors. See *An Interfaith Declaration : A Code of Ethics on International Business for Christians, Muslims, and Jews (1994),* (Dec. 20, 2011, 10:00 AM), http://ethics.iit.edu/ecodes/node/5106

[74] *An Interfaith Declaration : A Code of Ethics on International Business for Christians, Muslims, and Jews (1994),* (Dec. 20, 2011, 10:00 AM), http://institute.jesdialogue.org/fileadmin/bizcourse/INTERFAITHDECLARATION.pdf

1.6.1.2 Caux Round Table

The Caux Round Table is mainly a set of Principles for Business, founded in 1986 by Frederick Phillips, former President of Philips Electronics, formed as a result of the collaboration between executives from Europe, Japan, and the United States.[75] It has been drafted on the lines of "The Minnesota Principles."[76] The Caux Round Table Principles for Business contain a broad set of ethical norms for businesses operating internationally or across multiple cultures.[77] It includes Principles for Responsible Business, Principles for Governments, Principles for NGOs and Principles for Ownership of Wealth.[78] A responsible business therefore contributes to the economic, social and environmental development of the communities in which it operates, in order to sustain its essential 'operating' capital – financial, social, environmental, and all forms of goodwill."[79]

[75] It originated mainly as a means of reducing escalating international trade tensions between Europe, Japan and the USA

[76] The Minnesota Principles have been developed by a group of business leaders so as to increase the objectivity and reliability of business relationships; *The Minnesota Principles: Toward An Ethical Basis For Global Business*, (Mar.10, 2012, 12:00 PM), http://mnethicsaward.org/wp-content/uploads/2010/11/MN_Principles_CEBC.pdf

[77] *History of the Caux Round Table (CRT)*, (Dec. 29, 2011, 11:00 AM), http://www.cauxroundtable.org/index.cfm?&menuid=28&parentid=2

[78] For example, Principle No. 2 states that "A responsible business recognizes that business cannot sustainably prosper in societies that are failing or lacking in economic development.

[79] Caux Round Table Principles for Business - Contribute to Economic, Social And Environmental Development, Principle 2.

1.6.1.3 Cadbury Committee

The main purpose of the establishment of the Cadbury Committee was to combat, at least to a certain extent, problems of scams that occurred in the corporate world in the 1990s[80]. The Committee in its report published on December 1992, suggested that the boards of all listed companies should comply with the Code of Best Practice and they should make a statement about their compliance with the Code in their report and accounts as well as give reasons for any areas of non-compliance.[81] The Code of Best Practice[82] specifically mandated the responsibility of each of the main functionaries of the company namely the board of directors[83], non-executive directors,[84] executive directors[85] and also detailed out aspects of financial reporting.[86]

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[80] *The Cadbury Report*, (Jan. 2, 2012, 9:00 PM), https://www.governance.co.uk/resources/item /255-the-cadbury-report; The Cadbury Committee was formed in May 1991 by the Financial Reporting Council, the London Stock Exchange and the accountancy profession to investigate into the corporate governance system in U.K. The basic objectives of the Committee were to address the financial aspects of corporate governance, uplift the low level of confidence both in financial reporting and in the ability of auditors to provide safeguards which the users of company's reports sought and expected, review the structure, rights and roles of board of directors, shareholders and auditors by making them more effective and accountable, address various aspects of accountancy profession and make appropriate recommendations, wherever necessary, raise the standard of corporate governance etc.

[81] *Id.*

[82] The Code of Best Practice is one of the recommendations of the Committee so as to achieve high standards of corporate behaviour; Report of the Committee on The Financial Aspects of Corporate Governance, (Jan, 11, 2012, 8.20 P.M.), http://www.icaew.com/~/media /corporate/files/library/subjects/corporate%20governance/financial%20aspects%20of%20corporate%20governance.ashx

[83] Board of Directors - The board should meet regularly, retain full and effective control over the company and monitor the executive management. There should be a clearly accepted division of responsibilities at the head of a company, which will ensure a balance of power and authority, such that no one individual has unfettered powers of decision. Where the chairman is also the chief executive, it is essential that there should be a strong and independent element on the board, with a recognised senior member. Besides, all directors

1.6.1.4 ISO standards

The International Standards Organisation has developed a set of standards that also includes those which are directly related to corporate citizenship such as the ISO 9000 and ISO 14000 that takes care of the quality of the products, health and safety issues and environmental protection.[87]

ISO 26000 is an international standard providing guidelines launched by the International Standards Organisation to the companies for social responsibility. It is also called as ISO SR, as it makes people aware of the social responsibility taken up by the companies and provides guidance and possible actions to the companies.[88] The ISO 26000 does not provide any requirements but rather

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should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are followed and that applicable rules and regulations are complied with.

[84] Non-Executive Directors - The non-executive directors should bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments, and standards of conduct. The majority of non-executive directors should be independent of management and free from any business or other relationship which could materially interfere with the exercise of their independent judgment, apart from their fees and shareholding.

[85] Executive Directors - There should be full and clear disclosure of directors' total emoluments and those of the chairman and highest-paid directors, including pension contributions and stock options, in the company's annual report, including separate figures for salary and performance-related pay.

[86] Financial Reporting and Controls - It is the duty of the board to present a balanced and understandable assessment of their company's position, in reporting of financial statements, for providing true and fair picture of financial reporting. The directors should report that the business is a going concern, with supporting assumptions or qualifications as necessary. The board should ensure that an objective and professional relationship is maintained with the auditors.

[87] Though these have been implemented and put into practice by various companies worldwide, the latest one in the series namely ISO 26000 assumes significance.

[88] *ISO 26000 - Social Responsibility*, (Sep. 30, 2012, 01:30 PM), http://www.iso.org/iso/home /standards/iso26000.htm; ISO 26000 is not a management system standard but its main objective is to encourage organizations to promote common understanding in the field of social responsibility.

mere guidance and hence, for the very same reason, it cannot be certified like other ISO certification.[89] The guidelines are purely voluntary in application and are developed with the assistance of experts from different groups such as consumers, industry, government, labour and NGOs.[90] The guidelines have identified core areas in the field of social responsibility such as human rights, labour practices, environment, fair operating practices, consumer issues and community involvement. The areas identified under human rights include due diligence, human rights risk situations, avoidance of complicity, resolving grievances, discrimination and vulnerable groups, civil and political rights, economic, social and cultural rights, fundamental principles and rights at work.[91] Clause 5 of the guidelines provide guidance on the relationship between an organization, its stakeholders and society, on recognizing the core subjects and issues of social responsibility and on an organization's sphere of influence.[92]

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[89] *Corporate Social Responsibility: Is It Really Mandatory?*, (Jan. 29, 2012, 1:30 PM), http://researchersclub.org/2014/09/17/corporate-social-responsibility-is-it-really-mandatory/

[90] *ISO 260000:2010 Guidance on Social Responsibility*, (April 29, 2012, 11:30 AM), https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en:sec:5

[91] Clauses 4.8 & 6.3, *GRI G4 Guidelines and ISO 26000:2010 - How to use the GRI G4 Guidelines and ISO 26000 in conjunction?*, (Jan. 30, 2012, 11:30 A.M.), http://www.iso.org/iso/iso-gri-26000_2014-01-28.pdf

[92] *ISO 260000:2010 Guidance on Social Responsibility*, (April 29, 2012, 11:30 AM), https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en:sec:5; Similarly, clause 7 provides guidance on putting social responsibility into practice in an organization which includes guidance related to understanding the social responsibility of an organization, integrating social responsibility throughout an organization, communication related to social responsibility, improving the credibility of an organization regarding social responsibility, reviewing progress and improving performance and evaluating voluntary initiatives for social responsibility.

1.6.3 Private Principles/Codes

1.6.3.1 Global Reporting Initiative (GRI)

Some of the private initiatives in so far as CSR is concerned include Global Sullivan Principles and Global Reporting Initiative. Global Sullivan Principles require multinational companies to work towards the advancement of human rights and social justice globally.[93] The Sullivan Principles were mainly directed to integrate racial groups in workplaces and to improve the quality of life of racially discriminated workers thereby to stop legal segregation based on race in South Africa.[94]

Correspondingly, Global Reporting Initiative (GRI)[95] is another initiative which has developed a comprehensive Sustainability Reporting Framework[96] that has been used globally. GRI was set up in 1997 by the Boston-based Coalition on Environmentally Responsible Economies in collaboration with the Tellus Institute[97] with the task of developing globally applicable guidelines for

[93] The principles also envisage a safe and healthy workplace, protection of human health and the environment and promotion of sustainable development.
[94] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 121 (SAGE Pub Ltd, London 2011)
[95] *GRI Network Structure*, (March 25, 2012, 10:30 AM), https://www.globalreporting.org/network/network-structure/Pages/default.aspx; The democratically elected body of the GRI, known as the stakeholder council, provides strategic advice to Board of Directors in addition to selection of directors. The GRI incorporates 11 principles such as transparency, inclusiveness, completeness, accuracy, clarity, relevance, neutrality, timeliness, sustainability context, comparability and auditability.
[96] A sustainability report is a report published by a company or organization about the economic, environmental and social impacts caused by its everyday activities.
[97] Tellus is a non-profit organisation dedicated to critical environmental and social concerns and is considered to be one of the emerging organisations in the field of sustainable

reporting on the economic, environmental, and social performance of corporations. This initiative was created through a partnership between the Coalition for Environmentally Responsible Economies and the United Nations Environment Programme (UNEP).[98] The GRI guidelines which primarily addresses economic, social and environmental reporting offer help on the format and content of reports and provide information on how to normalise and verify data.[99] The GRI involves the active participation of corporations, NGOs, accountancy organisations, business associations, and other stakeholders from around the world.[100] The GRI, which is a multi-stakeholder network of experts from different parts of the world, has developed the reporting framework after consultations with various stakeholders such as businessmen, NGOs, labour associations etc. which assists companies in reporting environmental, social, economic and governance performance.

development, The Institute, (May 25, 2012, 12:10 PM), http://www.tellus.org/about/the-institute

[98] *About GRI*, (March 25, 2012, 11:30 AM), https://www.globalreporting.org/Information /about-gri/Pages/default.aspx

[99] *GRI and Sustainability Reporting*, (March 25, 2012, 12:30 PM), https://www.global reporting. org /information /sustainability-reporting/Pages/gri-standards.aspx

[100] *GRI's Governance Bodies*, (March 25, 2012, 1:00 PM), https://www.globalreporting.org/information/about-gri/governance-bodies/Pages/default.aspx

1.6.4 Certification Standards/Quality Assurance

1.6.4.1 SA 8000

Social Accountability 8000 is a certification process and is founded on the principles of UDHR, ILO conventions and the United Nations.[101] It sets out the structures and procedures that companies must adopt in order to ensure that compliance with the standard is continuously reviewed.[102]

The Social Accountability Standard, first released in 1997, is considered as the first auditable international standard for companies seeking to guarantee the basic rights of workers.[103] SA 8000 also ensures substantial transparency using

[101] In other words, SA 8000 highly conforms to the norms and principles of international human rights, with strong roots on International Labour Organisation (ILO) conventions, the United Nation's Universal Declaration of Human Rights, and the UN Convention on the Rights of the Child.

[102] *Social Accountability International*, (June 12, 2012, 8:20 A.M.), http://www.sa-intl.org/; It evaluates the social accountability of companies in the work place by looking into the eight key areas such as child labour, forced labour, health and safety, free association and collective bargaining, discrimination, disciplinary practices, working hours and compensation.

[103] SA8000 was formulated under Social Accountability International (SAI) whose main purpose is to develop voluntary standards for corporate social responsibility focusing on the working conditions of employees. Modelled on the ISO 9000 and ISO 14000, SA 8000 was developed by the Council on Economic Priorities Accreditation Agency (CEPAA) in the USA by a diverse group of organisations, which included labour unions, human rights organisations, academia, retailers, manufacturers, contractors, as well as consulting, accounting, and certification firms. The standard is designed in such a way that one can easily measure the performance of the company in nine essential areas such as child labour, forced labour, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management practices, wherein the company is required to comply with relevant local legislation and with SA 8000's own provisions.

the requirement of public reporting on the part of the business. SA 8000 which has been revised in 2001 and 2008 helps in maintaining ethical workplaces.[104]

1.6.4.2 AA 1000

With an aim to improve accountability by a process of learning through stakeholder engagement, the Institute of Social and Ethical Accountability, U.K. has developed an accountability standard called the AccountAbility (AA1000), which it views as the path to sustainable development[105]. The main principles that are given prominence in the AA1000 are the principle of inclusivity[106], materiality[107] and responsiveness[108].

The European Union's Ecolabel, a flower, is awarded to those products and services having minimal environmental impacts.[109] It prescribes criteria for

[104] Under SA 8000, the auditors are required to check for compliance which also includes periodical revisits and follow up. The main advantage of SA 8000 is that, as it is based on international norms, consumers and suppliers who are confused with a wide variety of corporate codes to ensure compliance can verify compliance under SA 8000 rather than facing multiple audits based on different codes framed by various corporates.

[105] *The AA1000 Standards*, (Oct. 22, 2014, 3:40 P.M.), http://www.accountability.org/standards/; According to them, one has to go beyond necessary compliance with the rule of law and should make innovative approaches to social and environmental challenges for the purpose of ensuring meaningful accountability. The organisations, ranging from large corporations to governments and small community groups are required to respond to the interests of their many stakeholders who are in great need, no matter whether the stakeholders are with little or no authority.

[106] The principle of inclusivity ensures that all the stakeholders are consulted in identifying issues and tracing solutions.

[107] The principle of materiality means that the institution should be capable enough to determine the relevance and significance of an issue that is material to the sustainable performance of the institution.

[108] The principle of responsiveness denotes response of the institution to issues of stakeholders and accountability towards them.

[109] *The EU Ecolabel*, (Dec. 2, 2014, 12:30 P.M.), http://ec.europa.eu/environment/ecolabel/index_en.htm

individual products such as paper products, textiles, detergents, paints and appliances such as refrigerators or dishwashers. The intention is to make known to the consumers that the products with ecolabel on it make lesser environmental impact than other competing products.

In addition to these, there exists ISO 14000 and EMAS[110] (Eco-Management Audit Scheme) which are mainly employed by organizations to improve their environmental performances.[111]

1.7 Corporate Governance and Corporate Social Responsibility

The concept of corporate social responsibility is inter-linked and inter-related with corporate governance. Companies have understood the importance of the market oriented yet responsible behaviour in achieving sustainable business success and shareholder value control which was once perceived to be achieved solely through maximising short-term profits. They are able to manage their operations that enhance economic growth and increase competitiveness, along with environmental protection and promotion of social responsibility. The phenomenal set of systems, processes and methods that together form the business governance or corporate governance is important as it safeguards the interest of all the stakeholders. Thus both Corporate Governance and Corporate

[110] EMAS is an EU voluntary instrument that acknowledges EU organizations who improve their environmental performances.
[111] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 227, 228 (SAGE Pub Ltd, London 2011)

Social Responsibility are both extremely essential to a company. Corporate Governance ensures the smooth conduct of the various aspects of business and to assist the same, there are various internal controls, like those provided by board committees and audit teams, etc. Unlike Corporate Governance, under CSR, focus is laid on responsible business and the impact of business decisions on various stakeholders and the environment.

Shann Turnbull states that corporate governance as, "Corporate governance describes all the influences affecting the institutional processes, including those for appointing the controllers and regulators, involved in organizing the production and sale of goods and services.[112] Described in this way, corporate governance covers all types of firms whether or not they are incorporated under civil law". According to OECD, "Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which

[112] Shann Turnbull, *Corporate Governance: Its Scope, Concerns & Theories,* 5(4) CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 180-205 (1997)

the company objectives are set, and the means of attaining those objectives and monitoring performance."[113]

In simple terms, corporate governance is a system through which companies are directed and controlled. It sets in motion the standards required to improve the company's image, efficiency, effectiveness and social responsibility. Without good corporate governance practices, a good CSR practice is hard to achieve. Corporate governance should include consideration of social responsibility, the socio-cultural-environmental dimension of business procedure, legal and ethical practices with a focus on customers and other stakeholders of an organization, along with excellent managerial performance. Therefore it can be said that both these concepts are indistinguishably intertwined.

Corporate Social Responsibility is also closely linked to the concept of corporate citizenship. It has been stated that CSR may also be referred as 'corporate citizenship'. It can involve incurring short term costs that do not provide an immediate financial benefit to the company, but instead promote positive, social and environmental change.[114] Specifically, corporate citizenship

[113] OECD, *International Experts Meeting on Corporate Governance of Non-listed Companies* (2005), (Dec. 21, 2011, 7:15 P.M.), https://www.oecd.org/corporate/ca/corporategovernanceprinciples/35639607.pdf

[114] Arthaud-Day, *Transnational Corporate Social Responsibility: A Tri-dimensional Approach to International CSR Research*, 15 BUSINESS ETHICS QUARTERLY 1-22 (2005)

focuses on the "membership of the corporation in the political, social and cultural community, with a focus on enhancing social capital."[115]

On the other hand, it is to be noted that corporate governance plays a limited role in the area of corporate social responsibility issues such as violation of human rights and corruption.[116] This is essentially because corporate governance is largely domestic in nature when compared to CSR which is global. Corporate governance refers to the system by which companies are directed and controlled and comprises of issues such as constitution of boards, composition of board committees and non-executive directors and formulating procedures regarding board financial reporting and internal controls. These are essentially internal matters and thus domestic to a large extent.[117] Though the OECD Principles of Corporate Governance takes corporate governance to an international level, issues such as protection of environment, prevention of corruption and human rights abuses are extensively dealt with in OECD Guidelines for Multinational Enterprises.[118] Therefore, CSR and corporate governance, though confused as one, are in fact two separate concepts. The former deals with issues relating to ownership, control, decision-making, transparency and reporting of companies whereas the latter involves wider set

[115] KPMG, *Corporate Social Responsibility - Towards a Sustainable Future: A White Paper* (Nov. 27, 2012, 12:50 PM) http://www.in.kpmg.com/pdf/csr_whitepaper.pdf
[116] Adefolake Adeyeye, *The Limitations of Corporate Governance in the CSR Agenda*, 2010 Company Lawyer 114
[117] *Id.* at 115
[118] *Id.* at 117

of stakeholders such as consumers, NGOs, employees, government, community and suppliers.[119]

1.8 Basis of this work

The activities or stages involved in relation to a company can be classified into 1) establishment, 2) production or manufacture and 3) Marketing or selling. At each of the stages, there involves some kind of responsibility or the other. These responsibilities are not towards the same entity. The primary responsibility at the time of establishment of the company is towards its 'workforce'. Similarly, the primary responsibility at the time of production or manufacture is 'legal and ethical responsibilities' towards the society. Lastly, the company owes social and environmental responsibility at the stage of marketing or selling. But, if one is to analyze, it is quite easy to understand that at each stages of the company's development or activities, it owes it legal, ethical and environmental responsibilities towards its workforce, environment and society. Responsibilities towards its workforce/employees cannot be ignored at the time of production and likewise, responsibilities towards society and environment cannot be ignored at the time of establishment. All these can be summed up as the responsibilities of business towards securing human rights.

[119] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 31 (CAMBRIDGE UNIVERSITY PRESS, 2006)

This work is an attempt to realize the social commitments of business towards human rights in general which takes into account the international and national framework, the recent changes that has taken place in the field of legislations and judicial responses in the domestic and international law.

1.9 Need of the study

Though there are various studies on the concept of corporate responsibility, most of them are not specifically on the point of CSR in relation to Human Rights and International Business Policy. The concept has its importance for both the national and international regimes. The 2013 enactment, The Companies Act, though incorporated the concept of CSR, is not free from controversies. The definition of corporate itself is a subject of debate. At the national level, effective remedies for violation of rights, for the most part, depend on whether the violator is a State or not. There are judgments as well as legal interpretations for and against construing corporates as a subject of international law. Though, the concept of CSR is in practice worldwide, the instances of human rights abuses by Barclays, Coca-Cola, Tata, Shell, UCIL, Unocal and Nike show that the implementation of the concept has not been very effective. The need of the study is to know how corporations could be made accountable for human rights violations and to be made responsible for following human rights standards in their business operations. The Indian

legislation incorporating the concept of CSR, being a recent development, most of the studies are still in progress. This research intends to take into account the above mentioned ignored dimensions of corporate responsibility.

1.10 Statement of Problem

The main objectives of the study is to analyze the concept of multinationals at the international level, the existence of national level legislations, its effectiveness, the presence of international framework regarding corporate social accountability, the possibilities of making corporates accountable both at the national and international level, comparative analysis of the concept of corporate responsibility and attitude of the judiciary, both Indian and foreign.

To sum it up, this study will focus on:

1) The human rights abuses committed by corporations and the aftereffects of the same.

2) The legal and jurisprudential dimensions of corporations with the help of case laws and a comprehensive study of the legislations that exist at the national level.

3) The effectiveness of voluntary codes and conduct which currently exist so as to make corporations respect human rights.

4) Obligations at the international level in the light of international steps taken to combat corporate violations and how their fulfillment.

5) A detailed analysis of the CSR initiative under the Indian Companies Act of 2013.

6) A comparative study with the U.S. legal system so as to understand the approach of the legal system towards corporate human rights violations.

7) The effectiveness of judicial protection in India and outside towards corporate social accountability.

8) The need for formulating a legal framework that can incorporate corporate social accountability.

1.11 Research Question

Are the laws in India adequate enough to make corporations accountable for human rights violations caused by them?

1.12 Research Hypothesis

The existing legislations in India and the legal framework that exist at the international level do not adequately provide for corporate social accountability and there has been no transition from corporate social responsibility to a

concrete form of corporate social accountability. This hypothesis is sought to be tested in this research.

1.13 Research Methodology

The research design used for the study is largely of descriptive type and involves analysis of views expressed in various books, journal articles, case laws internet resources and news articles. All of them have been enumerated and recorded. Accessible secondary data was broadly used for the research. Nonetheless, this is a doctrinal study based on primary and secondary sources. The primary sources employed in this research include Indian and foreign legislations, policies and rules, Indian, foreign and international case laws, international instruments, EU Directives, CSR manuals and guidelines and various codes of conduct. The voluntary codes are different from ethical business codes. The latter which almost all corporates retain are principles which a company adopts in order to influence the behaviour of its employees.[120] Voluntary codes, as used in this research, involve codes of conduct adopted by various MNCs and multi-stakeholder initiatives at the international, regional and national level.

The secondary sources used in this research include scholarly books, peer reviewed journal articles, conference papers, web-based articles, government

[120] Steen Thomsen, *Business Ethics as Corporate Governance*, 11(2) EUROPEAN JOURNAL OF LAW & ECONOMICS 153-164, 155 (2001)

publication, policy papers and reports, newsletters, newspaper and magazine reports. The theories and juristic opinions of several legal scholars have also been examined to find out whether they support the existing laws. Qualitative methodology with the help of documentation review is being followed extensively in this research.

The reason for dissociating major part of corporate law from the purview of the study is because corporate law views companies as profit maximizing institutions whereas CSR treats them as social institutions.[121] Nevertheless, the core areas dealing with CSR under Companies Act 2013 and other incidental provisions along with case laws have been incorporated in this study. This does not in any way mean that changes are not mooted to be incorporated in corporate legislations.

1.14 Limitations of Research

The absence of a solid legal framework in any national jurisdiction relating to corporate human rights accountability and the absence of the same in the international arena have added some limitations on this research. A comprehensive legal framework abroad or at the international level could have helped in a comparative analysis so as to analyse the pros and cons of the same

[121] Surya Deva, *Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?*, 41 COMMON LAW WORLD REVIEW 299-321 (2012)

and to explore the options of enacting a similar one at the national level. Lack of judicial decisions specifically on corporate human rights accountability at the national level was another limitation so far as this research is concerned. There exist a few case laws in the US, the central point of which is regarding liability of corporations for human rights violations, but most of them have resulted in out of court settlement or judgments rendered in favour of corporations. The focus is limited to doctrinal research due to the natural limitations in attempting an empirical study. The possibility of non-reliable information from the part of the corporate officials was another reason to avoid empirical study. As the CSR mandate is of recent origin, it is unlikely to get information on CSR spending by the Indian companies. The law and practice of tackling corporate human rights abuses in the U.S. has been extensively discussed with the support of landmark and recent case laws brought under the Alien Torts Claim Act, but a comparative analysis is made only with those countries that have a concrete framework of corporate social responsibility/accountability. It includes analysis of the legal framework of Denmark, Indonesia and France, but considerable importance has been given to the U.S. scenario due to the presence of a specific legislation that is sufficient enough to tackle issues of extraterritorial corporate human rights violations.

Though discussions with a critical point of view have been included in this research, the non-availability of judicial thinking towards making corporates

accountable for human rights violations denied an opportunity to identify an example for our judiciary to follow. The concept of CSR has always been viewed from a business point of view. Hence discussions on CSR on the commercial law aspects are available in plenty. However, this research focuses CSR from a human rights point of view and discussions on CSR from a human rights perspective are scarce. Nevertheless, this research has made an attempt to investigate the possibilities of making corporates accountable both at the national and international level for human rights abuses.

1.15 Review of Literature

The works of Clapham shows a clear interpretation of entities that come under the concept of 'subject' under international law[122]. His work extensively deal with the way in which transnationals could be brought under the ambit of international law. The basic concepts along with strong theoretical foundations and detailed analysis could be obtained from the same. The obligations of non-state actors in the existing human rights regime and the need to develop regulations in democratic societies have been highlighted in his works[123]. Although the works of Brownlie[124] and Surya Deva[125] have recognised that

[122] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996)
[123] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (Oxford University Press 2006)
[124] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Oxford 2003)
[125] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1-57 (2003)

MNCs are not yet considered as subjects of international law, the latter has recommended for considering MNCs as subjects of international law. Ratner has even gone to the extent of stating that MNCs should be made responsible under international law as they obtain substantial aid from the state to commit violations[126]. David Kinley & Junko Tadakki relies on various other international instruments to show that international law has bestowed rights on corporations to bring claims and hence as a corollary, they should be made liable for wrongs too[127]. Olufemi O. Amao, in this context, has suggested creating an International Company Status for MNCs before operations within a particular jurisdiction[128].

A brief analysis on the Draft articles on the Responsibility of states with special emphasis on complicity has been discussed in his works as well. Alston's[129] and De Schutter's[130] edited books were in fact the starting point of this research. The idea of human rights and international business policy originated after reading the combined works of Alston and De Schutter. The challenges, enumerated in their work, that have to be dealt with while imposing human

[126] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545 (2001)
[127] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931 (2004)
[128] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)
[129] P. ALSTON (ed.), NON-STATE ACTORS AND HUMAN RIGHTS (2005)
[130] OLIVIER DE SCHUTTER, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Hart Publishing, 12th ed. 2006)

rights obligations on transnational corporations so as to achieve a sense of responsibility was the major one that attracted this research.

The main aim of this literature review was to review the existing works on the laws that exist to make the corporation liable for the human right violations committed by them. The review consisted of reviewing both the doctrines regarding criminal liability, case laws, inventing or applying these doctrines and the existence of statutes imposing corporate criminal liability. The jurisprudential dimensions of corporate personality were obtained from the works of David Millon[131] and Dias[132]. The latter describes, in detail various theories associated with corporate personality including fiction theory, natural entity theory, contract theory, realist view, concession theory, aggregate or associational theory and purpose theory in addition to the views of Hohfeld and Kelsen.

The need for the imposition of criminal liability was looked upon in the initial part of literature review and was found both at the theoretical level as well as from the analysis of case laws that the corporations are occupying a large portion of the industrial, commercial and sociological sectors that play vital role in the life, liberty and property of the citizens and they owe a reciprocal duty towards the citizens. The definition of 'person' was examined so as to

[131] David Millon, *Theories of the Corporation*, DUKE LAW JOURNAL 201-262 (1990)
[132] DIAS, JURISPRUDENCE (Lexis Nexis, 5th ed. 2013)

understand whether corporation has been included in it. The most pertinent case laws such as *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co*[133], *H.L. Bolton (Engineering Co. Ltd) v. Graham Sons Ltd*[134], *and Director of Public Prosecution v. Kent and Sussex Contractors Ltd*[135] were examined to understand and appreciate the different doctrines that have been applied to impute liability upon the corporations. More emphasis has been given to UK case laws as the doctrines related to corporate criminal liability developed in common law jurisdictions, more specifically in the UK. US case laws such as *U.S. v. Richfield Co.,*[136] have also been examined in this work. The doctrines such as identification doctrine, *respondeat superior* and theory of corporate fault have been examined in detail together with the case laws which incorporated those. The ruling in *Tesco Supermarkets Ltd v. Nattress*[137] and the subsequent case laws were also examined. The drawbacks and criticisms to the above mentioned doctrines, the inapplicability in certain circumstances also formed part of literature review. The review also took into account the instances where the principal officers of the corporations were made liable under the Indian statutes. The case law of *Aneeta Hada v. Godfather Travels and Tourists Pvt. Ltd*[138] also forms part of the review.

[133] [1915] A.C. 705
[134] [1956] 3 All ER 624
[135] [1944] 1 All ER 119
[136] 465 F 2d 58 (7th Cir.1972)
[137] [1972] AC 153
[138] (2012) 5 SCC 661

Comparative analysis of legislations incorporating corporate criminal liability were also examined and it highlighted the need for similar incorporations or changes in the Indian criminal justice administration. An evolution of case laws and recommendations made by Law Commission were examined in regard to situations where imprisonment is made a mandatory punishment. The landmark cases such as *Assistant Commissioner, Assessment-ll, Bangalore & Ors. v. Velliappa Textiles Ltd & Anr*[139], *ANZ Grindlays Bank Ltd & ors. v. Directorate of Enforcement*[140], *Standard Chartered Bank & ors. v. Directorate of Enforcement*[141] were examined to understand the evolution and the current position of law in cases whether a corporation would be prosecuted for an offence for which mandatory sentence of imprisonment is provided.

Apart from a comparative analysis of legislations that incorporate corporate liability, various national legislations have also been analysed in detail. It includes Environment Protection Act, 1986, Water Pollution Act, 1974, Air Pollution Act, 1981, Public Liability Insurance Act, 1991, Factories Act, 1948, Bonded Labour System Abolition Act, 1976, Child Labour (Prohibition and Regulation) Act, 1986, IT Act, 2000, Geneva Conventions Act, 1960, Drugs and Cosmetics Act, 1940, Payment of Bonus Act, 1965, Payment of Wages Act, 1936, Payment of Gratuity Act, 1972, Workmen's Compensation Act,

[139] (2003) 11 SCC 405
[140] (2004) 6 SCC 531
[141] (2005) 4 SCC 530

1923 and Equal Remuneration Act, 1976. A detailed examination of Indian case laws such as *Ajay Hasia v. Khalid Mujib Sehravadi*[142], *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors*[143] and *Praga Tools Corpn. v. C.A. Imanual*[144] revealed the possibility of extending writ jurisdiction against corporations as well.

The definitions of the concept of CSR were borrowed from various sources including works of Donna J. Wood[145], Tatjana Chahoud[146], Dr. Clarence J. Dias[147], Phillip Kotler and Nancy Lee[148] and Mallen Baker[149] and definitions provided by World Business Council for Sustainable Development and European Commission Green Paper. The observations related to CSR made in case laws such as *Dodge v. Ford Motor*[150] and *Herald Co. v. Seawell*[151] were also analysed in this research.

[142] AIR 1981 SC 487
[143] AIR 1989 SC 1607
[144] (1969)1 SCC 585
[145] Donna J. Wood, *Corporate Social Performance Revisited*, 16(4) THE ACADEMY OF MANAGEMENT REVIEW 691-718 (1991)
[146] Tatjana Chahoud, *Shaping Corporate Social Responsibility (CSR) in India—Does the Global Compact Matter?*, (Feb. 1, 2012, 10:30 AM), http://www.die-gdi.de/uploads/media/download_document__127_KB__01.pdf
[147] Dr. Clarence J. Dias, *Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility*, 4 NUJS L. Rev. 505 (2011)
[148] PHILIP KOTLER, NANCY LEE, CORPORATE SOCIAL RESPONSIBILITY: DOING THE MOST GOOD FOR YOUR COMPANY AND YOUR CAUSE (Wiley-India, 2008)
[149] Mallen Baker, *Corporate Social Responsibility - What does it mean?*, 60 BUSINESS RESPECT (2003), (12 Aug. 2013, 9.20P.M.), http://www.businessrespect.net/definition.php
[150] 170 NW 668 (Mich) 1919
[151] 4472 F.2d 1081 (10th Cir. 1972)

The major part of the thesis dealt with the analysis of international human rights initiatives to combat the negative impacts of corporate activities such as the Draft United Nations Code of Conduct on Transnational Corporations, the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Declaration on Fundamental Principles and Rights at Work, the UN Global Compact, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights and the UN Guiding Principles on Business and Human Rights. The work of Tatjana Chahoud also helped in understanding India's commitment to the ten principles of UN Global Compact.[152]

An evaluation on the above survey of existing literature demonstrates that there are writings on Corporate Social Responsibility. On the whole, CSR is not found in conventional statutory texts at the international level with few exceptions and hence is not a mandatory concept. For the very same reason, it was not possible to dig up preparatory works for statutes. The case laws at the national and international level are also scarce on the subject related to development of human rights dimensions of CSR and all those that have been pronounced and pending till date have been incorporated in this study. The

[152] Tatjana Chahoud, *Shaping Corporate Social Responsibility (CSR) in India—Does the Global Compact Matter?*, (Feb. 1, 2012, 10:30 AM), http://www.die-gdi.de/uploads/media/download_document__127_KB__01.pdf

underlying problem connected with the area of research is the lack of a definition for the concept of CSR and this makes it even more difficult to collect data related to it. The literature available on the subject invariably portrays that CSR is used interchangeably with corporate social accountability, corporate sustainability, business ethics and corporate citizenship. This study emphasis on the need to highlight the importance of corporate human rights accountability which should be conceived as different from the notion of CSR that the Indian legislation tries to represent. An analysis of the above literature review shows that issues such as the need for Corporate Social Accountability on account of the human rights abuses committed by corporations, effectiveness of voluntary codes and conduct that currently exist so as to make corporations respect human rights and detailed analysis of the CSR initiative under the Indian Companies Act of 2013 have not been the subject matter of any research. Hence, there is a scope for undertaking analytical and systematic research on these issues.

1.16 Research Design

This study on ‘Corporate Social Accountability in India’ has been divided into nine chapters. The first chapter is an introduction to the concept of Corporate Social Responsibility with special focus on the scope and ambit of the concept, theories, definitions and its evolution. This chapter explains the research for

selecting the research topic, ‘Corporate Social Accountability in India’ by initially bringing out the link between Corporate Social Responsibility and Corporate Social Accountability. It gives a brief idea on the negative human rights impacts caused by the activities of corporations at the national and international level. It highlights the reason for selecting Corporate Social Accountability as the main research area instead of focusing only on Corporate Social Responsibility. The chapter also gives a brief idea of the importance of Corporate Social Responsibility with special emphasis on the recent changes made at the national level (India) in the form of Section 135 of Indian Companies Act of 2013 that introduced Corporate Social Responsibility in India. This chapter also focuses on the alternatives to Corporate Social Responsibility and the conceptual differences that exist between Corporate Governance and Corporate Social Responsibility. This chapter also lays down a structural framework for the implementation of Corporate Social Accountability at the international level in the form of Corporate Codes of Conduct and various multi-stakeholder initiatives. The basis of this research work, the need of this study and its objectives have been detailed out in this chapter in addition to stating the main research question, hypothesis, the methodology employed in research and limitations encountered in the course of study.

The second chapter titled ‘Legal Liability of Corporations – Jurisprudential Analysis’ throws light upon the concept of ‘corporations’ with special focus on jurisprudential analysis of the concept. The legal personality of corporations has been analysed in detail by theoretically examining the legal doctrines that exist with regard to separate legal personality of corporations and corporate criminal liability. The legislations and policies on corporate liability that exist in various national jurisdictions, domestic and foreign case laws associated with corporate personality, etc., have also been analysed in detail in this chapter.

The third chapter provides an insight into the various human rights violations that have been committed by corporations in India and the response of the executive and judiciary towards the same. The liability of corporations under various Indian legislations has also been detailed out in this chapter. However the core area of this chapter focuses on the Indian Constitutional perspective on claiming violations of fundamental rights against corporations and the same has been analysed in detail with the help of landmark case laws.

The fourth chapter provides an international perspective on the corporate human rights violations by focusing on various infamous incidents that have occurred around the globe due to corporate activities. The focus of this chapter is on the status of corporation in international law and the responsibility of the State in case of corporate violations.

The fifth chapter also analyses the international dimension but from a different view point. It covers various international human rights initiatives formulated to combat the activities of corporations with special focus on the effectiveness of each initiative. In addition to establishing the link between corporate ethics and corporate responsibility, this chapter also traces the commitment of our nation towards the UN Global Compact which is one of the international human rights initiatives formulated to combat the undesirable activities of corporations. This chapter ends by highlighting the need for binding principles and standards in place of voluntary initiatives.

The sixth chapter is a detailed analysis on the statutory framework regarding Corporate Social Responsibility in India with a critical analysis of section 135 of the Companies Act of 2013. In addition to this, the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business of 2011, the Chatttisgarh Corporate Social Responsibility Policy of 2013 and a comparative analysis of the Indian concept of Corporate Social Responsibility under section 135 of Companies Act of 2013 and principles of UN Global Compact have been examined in detail.

Chapter seven examines the current state of the US Alien Tort Claims Act against corporate human rights violations with a detailed examination on the past and present case laws that have been adjudicated by the US Courts. Specific analysis has been made with respect to the case of *Kiobel v. Royal*

Dutch Petroleum[153] and Shell's Code of Conduct[154] and Business Principles[155]. The chapter attempts an in-depth analysis on corporate human rights liability under the Alien Tort Claims Act.

The eighth chapter, which provides the core of this research, establishes the need for Corporate Social Accountability at the national and international level in place of Corporate Social Responsibility. The same has been done by looking into the Corporate Social Responsibility policies that exist in other jurisdictions and by examining the major obstacles at the international and national level in making corporates accountable for their negative human rights impacts. The problems associated with separate legal personality of parent company and subsidiaries, limited liability doctrine and jurisdictional issues in the form of *forum non conveniens* have also been discussed in detail. The essential differences that exist between Corporate Social Accountability and Corporate Social Responsibility have been made explicit by bringing out the conceptual clarity of Corporate Social Accountability. This chapter focuses on the options that may be employed so as to bring in Corporate Social Accountability at the national and international level.

[153] 133 S.Ct. 1659 (2013)

[154] *Shell Code of Conduct*, (July 30, 2014, 9.00 A.M.), http://s06.static-shell.com/content/dam/shell/static/public/downloads/corporate-pkg/code-of-conduct-english.pdf

[155] *Shell Business Principles*, (July 30, 2014, 9.15A.M.), https://s03.static-shell.com/content/dam/shell-new/local/global-content-packages/corporate/sgbp-english-2014.pdf

The ninth chapter summarises the findings and conclusions of the research. It suggests the need to change the existing legal system. Original proposals resulting from this research are submitted in this regard.

CHAPTER 2

LEGAL LIABILITY OF CORPORATIONS – JURISPRUDENTIAL ANALYSIS

2.1 Introduction - Definition

A corporation is defined as a nexus (bundle) of contracts and those who define a corporation in these terms argue that the corporation is nothing more than the sum of all of the agreements leading to its creation.[1] According to Joel Bakan, "corporation is a pathological institution, a dangerous possessor of the great power it wields over people and societies."[2]

A more comprehensive definition has also been suggested wherein a corporation is defined as,

> *"a structure established to allow different parties to contribute capital, expertise and labour for the maximum benefit of all of them. The investor gets the chance to participate in the profits of the enterprise without taking responsibility for its operations. The management gets the chance to run the company without taking the responsibility of personally providing the funds. In order to make both of these possible, the shareholders have limited liability and limited involvement in the*

[1] Robert A.G. Monks & Nell Minow, Corporate Governance, 9 (4th ed., UK 2008)
[2] JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (New York Free Press, 2004) as quoted in JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 8 (CAMBRIDGE UNIVERSITY PRESS, 2006)

> *company's affairs. That involvement included, at least in theory, the right to elect directors and the fiduciary obligation of directors and management to protect their interests."*[3]

The term 'company' has been defined as a company incorporated under the Companies Act of 2013 or under any previous company law.[4] A company, after registration, becomes a body corporate and acquires a legal personality of its own which is separate and distinct from its members.[5] The term 'corporation' which is a wider term than 'company' includes a company incorporated outside India as well.[6] According to Maitland, "the corporation is a right-and-duty-bearing unit. Not all the legal propositions that are true of a man will be true of a corporation. For example, it can neither marry nor be given in marriage; but in a vast number of cases you can make a legal statement about x and y which

[3] Robert A.G. Monks & Nell Minow, Corporate Governance, 9 (4th ed., UK 2008); See section 255(2) of the Companies Act: Appointment of directors and proportion of those who are to retire by rotation.—"Clause (2) The remaining directors in the case of any such company, and the directors generally in the case of a private company which is not a subsidiary of a public company, shall in default of and subject to any regulations in the articles of the company, also be appointed by the company in general meeting." It has been held in *Bharat Bhushan v. H.B. Portfolio Leasing Ltd*, (1992) 74 Comp Cas 20 Del that an agreement among the shareholders may be imbibed in the articles to the effect that every holder of 10 percent shares shall have the right to nominate a director on the board. It has also been held in *Institute of Chartered Accountants of India v. P.K. Mukherjee*, 1968 (38) Comp. Cas. 628, that the directors occupy a fiduciary position in relation to the shareholders and in auditing the accounts maintained by the Directors the auditor acts in the interest of the shareholders who are in the position of beneficiaries.

[4] Section 2(20) of the Indian Companies Act, 2013

[5] A.K. MAJUMDAR & DR. G.K. KAPOOR, TAXMANN'S COMPANY LAW 8 (Taxmann, 14th ed. 2011)

[6] The Indian Companies Act, 2013, Section 2(11) - "body corporate" or "corporation" includes a company incorporated outside India, but does not include - (i) a co-operative society registered under any law relating to co-operative societies; and (ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

will hold good whether these symbols stand for two men or for two corporations, or for a corporation and a man."[7]

This chapter is intended to provide a detailed study on the various theories of corporate personality along with an analysis of the liability of a corporation under the criminal law. This chapter also provides an overview of existing legislations regarding corporate liability in other countries such as the Australian Corporate Code of Conduct Bill 2000, the Australian Criminal Code Act of 1995, the U.K. Corporate Manslaughter and Corporate Homicide Act, 2007, the UK Corporate Responsibility Bill 2003, the U.S. Model Penal Code, 1962, the US Corporate Code of Conduct Bill, 2000 and also the EU initiatives in the form of Multi-Stakeholder Forum on CSR and CSR Alliance. The jurisprudential analysis made in this chapter forms the basis for a discussion on the legal liability of corporations in the next chapter.

2.2 Theories of Corporate Personality – An Analysis

There broadly exist two kinds of viewpoints on corporate personality. One is where the corporation is considered as an entity, separate from shareholders and members and the other is where the corporation is considered merely as an

[7] H.A.L. FISHER (ed.), THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND, 307 (Vol 11 Cambridge University Press 1911)

aggregation of individuals. The latter does not recognise the separate personality of corporations.[8]

The fiction theory, also known as artificial entity theory, considers corporation as a person only because it is recognized by the law[9]. The inherent drawback of this theory is that the participation of individuals within the corporation is virtually ignored.[10] On the other hand, the natural entity theory gives importance to individual initiatives in creating a corporation.[11] It was the natural entity theory that considered corporations as natural products of individual private initiatives.[12] The contract theory was a transition from the sovereign grant to a product of contractual agreement. The realist view vests the corporation with a logic of its own, as according to them, it is not that law create its own subjects, the reality is that law is compelled to recognize the extra-legal existence of certain persons of which some are natural and some are not.[13] The concession theory, on the other hand, regards the dignity of being a

[8] David Millon, *Theories of the Corporation*, DUKE LAW JOURNAL 201-262, 205 (1990)
[9] Note, *Constitutional Rights of the Corporate Person*, 91(8) THE YALE LAW JOURNAL 1641-1658, 1646 (1982); As it has been brought into existence by the State, it can only do what the sovereign permits it; Savigny and Salmond who supported the fiction theory treated juristic persons "as if" they are persons and does not find it necessary to explain the reasons why it is so.
[10] Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law 531-566, 541 (2002)
[11] David Millon, *Theories of the Corporation*, DUKE LAW JOURNAL 201-262, 206 (1990)
[12] *Id.*
[13] Note, *Constitutional Rights of the Corporate Person*, 91(8) THE YALE LAW JOURNAL 1641-1658, 1648 (1982)

juristic person to be considered by the State. According to the aggregate or associational theory, the corporation is a set of contractual agency arrangements, consisting of a complex set of relationships between the State, shareholders, directors, employees, managers, creditors and communities.[14] To Hohfeld, "the corporate person is merely a procedural form, which is used to work out in a conventional way for immediate purposes a mass of jural relations of a large number of individuals, and to postpone the detailed working out of these relations among the individuals *inter se* for a later and more appropriate occasion."[15]

The peculiar characteristic of a corporation is that 'multiple biological human beings combine to form a single rational agent for purposes of the law'.[16] This

[14] Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law 531-566, 543 (2002); This theory does not consider corporation as an entity and hence for the very same reason does not consider a corporation as entitled to human rights. The purpose theory primarily mooted by Brinz and developed by Barker excludes juristic persons from the ambit of persons. According to this theory, juristic persons are merely "subjectless properties" designed for certain purposes and though other people may owe duties towards it, there are no correlative claims. The symbolist or bracket theory mooted by Ihering also assumes that only human beings come under the term person. According to this theory the members of the corporation and the beneficiaries of a foundation are only persons and the 'juristic person' is just a symbol to help in accomplishing the purpose of the group.

[15] DIAS, JURISPRUDENCE 267 (Lexis Nexis, 5th ed. 2013); According to Hohfeld, only human beings can have claims, duties, powers, liabilities, immunities and liberties and they are the ones who conduct transactions and become responsible. According to Kelsen it is the conduct of human beings that is the subject matter of claims and duties and a corporation is different from one of its members when his conduct is governed not only by claims and duties, but also by a special set of rules which regulates his actions in relation to the other members of the corporation.

[16] Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105(1) COLUMBIA LAW REVIEW 209-249, 226 (2005)

makes it extremely difficult for a philosophical understanding of what constitutes a person. If the same is to be judged on the basis of whether a corporation possess moral worth, the answer would have to be in the negative. It is because corporations have no intrinsic worth and it could be gathered from the observation below,

> *"The death of a corporation is cause for concern only for its effects on individuals, including unemployment, the loss of investment savings, or the termination of valuable products and services. By contrast, the death of an individual may be cause for concern regardless of its consequences, because the life of a human being has an intrinsic moral worth. While personhood's appearance in the latter case may give the false impression that the concept is intimately tied to moral worth, the term's use in the former case indicates something altogether different."*[17]

The conclusion that could be drawn from the analysis of various theories is that though there exists various theories of corporate personality, no single theory could be uniformly applied and it is doubtful as to whether judges adhere to a particular view on corporate personality.[18]

[17] *Id.* at 227

[18] Sneha Mohanty & Vrinda Bhandari, *The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis*, 32(7) COMPANY LAWYER 194, 195 (2011)

2.3 Legal Personality of Corporations

Many multinational corporations wield more effective power and wealth than many nations.[19] States and their decisions and activities can cause harm to persons and resources thereby causing human rights violations.[20] A corporation can become involved in violation of human rights law either directly as a private sector or as an actor coloured by a connection with State or as a participant in joint venture.[21] Hence it is of utmost importance that the existing legal framework is analysed so as to ascertain whether corporation can become a subject of law in general. If the corporations are involved in human rights violations, it is imperative that they are subject to appropriate sanctions. For the very same purpose, it is pertinent to establish whether corporation could be treated as a 'person' under the law. If the answer is in the affirmative, the nature of their personality and the legal doctrines establishing their personality must be scrutinised.

The term 'person' is defined in the UK Interpretation Act of 1978 to include a body of persons corporate or unincorporated.[22] One of the main reasons for

[19] For example, the annual sales of the Royal Dutch/Shell Group Oil Company are twice New Zealand's gross domestic product; See Dr. Clarence J. Dias, *Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility*, 4 NUJS L. Rev. 505 (2011)

[20] Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 801 (2002)

[21] The instances detailed out in the third and fourth chapters show the grave human rights violations committed by corporations either by itself or by being complicit with the state.

[22] The UK Interpretation Act of 1978, Section 5, Schedule 1

bringing in ‘corporations’ under the term person or, in other words, to attribute juristic personality to corporations is to confer power on collective undertakings. The other reason is to provide an opportunity to carry on business with limited liability. Though there were ambiguities with regard to the definition of the term ‘person’, it has been settled since a long time that it includes corporations unless a contrary intent appears.[23]

When one looks at the definition of person from a non-naturalistic point of view or normative point of view, it could be understood that the term comprises of corporations as well. The non-naturalistic point of view stresses on principle of rational agency, psychology, or cognitive abilities and not on the properties of a single biological human body whereas the normative point of view recognizes an entity as a valid object of legal concern and it is based on the premise that one shall not dwell into whether an entity is a person initially and then find out the moral and legal rights and responsibilities.[24]

The benefit of treating corporations as persons includes perpetuity of succession, the ability to sue and be sued in the corporate name by outsiders and by members, the ability to acquire and dispose of property as a unit, and

[23] United States v. N. Y. Herald Co., 159 Fed. 296 (S. D.N. Y. 1907); State v. Baltimore & Ohio R. R., 15 W. Va. 362 (1879) as cited in Henry W. Edgerton, *Corporate Criminal Responsibility*, 36(6) THE YALE LAW JOURNAL 827-844 (1927)

[24] Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105(1) COLUMBIA LAW REVIEW 209-249, 225 (2005); The normative point of view believes in ascribing human rights not because an entity is a person, but it is a person because we ascribe human rights to it.

the advantage that members may derive the profits while being relieved of management.[25] Corporations are regarded as separate juridical beings as if they are one single person.[26]

2.3.1 Separate Legal Personality

Though a clear-cut definition of a 'company' could not be derived from the company law, the major scheme of company law deals with the separate personality of the company as an artificial person. This separate artificial person is capable of owning property, become a party to contracts and can be a claimant or defendant in legal proceedings.[27] The separate personality of the company is highlighted in the landmark case of *Salomon v. A. Salomon and Co. Ltd.,*[28] wherein it was held that the defendant was a real company fulfilling all the legal requirements and is at law a different person altogether from the subscribers of the memorandum and though it may be that after incorporation the business is precisely the same as before it was incorporated as a company, the same persons as managers, and the same hands receive the profits, the company is not in law their agent or trustee.[29]

[25] DIAS, JURISPRUDENCE 56 (Lexis Nexis, 5th ed. 2013)
[26] Ervin Hacker, *The Penal Ability and Responsibility of the Corporate Bodies,* 14(1) JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 91-102 (1923)
[27] MAYSON et al., COMPANY LAW, 1 (OXFORD UNIVERSITY PRESS, 23rd ed. 2007)
[28] [1897] A.C. 22
[29] Observation of Lord Macnaghten in *Salomon v. A. Salomon and Co. Ltd.,* [1897] A.C. 22, 51

The concept of separate legal personality of the company is deeply engrained in common law and the same is clear from *Lee v Lee's Air Farming Ltd.*,[30] where the wife of the majority shareholder who was in fact the sole member of the corporation succeeded in claiming compensation as the wife of an "employee who lost his life in course of employment." The Court allowed the claim on the basis that Lee's Air Farming Ltd, which was the company, was the employer and Mr. Lee was the employee with a shareholding.[31]

The case laws highlighted above do not suggest that there are no ways of avoiding consequences of separate personality of the company. Identification theory[32], express statutory provisions, instances where company acts as the agent[33] and where a person employs the company to evade any obligation[34] are the ways employed to avoid the separate personality of the company.

[30] Lee v Lee's Air Farming Ltd [1959] N.Z.L.R. 393

[31] Sneha Mohanty & Vrinda Bhandari, *The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis*, 32(7) COMPANY LAWYER 194, 197 (2011)

[32] The identification doctrine has been stated to have made only changes within the paradigm; See K. Balakrishnan, *Corporate Criminal Liability: An Enigma to Deal With*, [1999] CULR 104

[33] The case of *Smith, Stone and Knight Ltd v. Birmingham Corp*, [1939] 4 All E R 116 is an example. The plaintiffs in the instant case carried on a business of manufacturing paper and they acquired a business of dealing in waste paper from a partnership. It incorporated a wholly owned subsidiary company called Birmingham Waste Co. Ltd., which nominally operated the waste paper business, but it never actually transferred the ownership of the waste paper business to that subsidiary, and it retained ownership of the land on which the waste paper business was operated. On compulsory purchase of the land on which the waste paper business was operated, the parent company was entitled to compensation both for the value of the land and for disturbance of business because it owned both the land and the business and the basic reason for such a ruling was that the waste paper business was still the business of the parent company and that it was operated by the subsidiary as agent of the parent company.

2.4 Corporation and Criminal Liability

2.4.1 The Need for Imposition of Criminal Liability

It is now a settled principle that a corporation can be indicted for criminal acts like any other entity recognized by law and the question as to whether the act of an agent is to be regarded as the act of the corporation depends on the nature of the charge, the relative position of the agent and other relevant facts and circumstances of the case.[35] The explanation for corporate criminal liability is that a corporation should be considered capable and guilty of any crime, if the persons who commit it, act in the course of their employment.[36]

It has been stated that just as individuals owe a duty not to harm others, so do companies owe a duty not to poison our water and food, not to pollute our rivers, beaches and air, not to allow their workplaces to endanger the lives and safety of their employees and the public, and not to sell commodities, or

[34] These are cases where a person, subject to a legal obligation, has employed a company to evade that obligation, the Court orders both the person and the company to comply with the obligation, describing the company as sham; In the case of *Gilford Motor Co. v. Horne*, [1933] All ER 109, Horne who was a former managing director of Gilford Motor Co. entered into a contract with the company agreeing not to solicit customers from Gilford Motor Co. at any time. Horne, later, established a new company to do what he was forbidden under the restrictive covenant. Though he argued before the Court that the new company he formed was not bound by the restrictive covenant, the court by lifting the veil of the company established by Horne found that he is liable for breach of contract with Gilford Motor Co. and that the new company was merely a sham as it was created only to evade the covenant Gilford Motor Co.

[35] R.S. Welsh, *The Criminal Liability of Corporations*, 62 LAW QUARTERLY REVIEW 345-365, 361 (1946)

[36] James Gobert, *Corporate Criminality: New Crimes for the Times*, 1994 CRIM LR 722

provide transport, that will kill or injure people.[37] The need for the imposition of criminal liability on corporations has been highlighted in *Standard Chartered Bank & ors. v. Directorate of Enforcement*,[38] where the Court observed that "The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."[39]

2.4.2 Corporate Criminal Liability

It is the moral or blameworthy element that is relevant when it comes to criminal law and it is the same that is absent in an artificial entity. But then it could be said that if corporation could benefit from the skills of their human elements, they should also bear the burden arising from the criminal conduct of those individuals, not just on the basis that they acted for the company, but that they acted as the company.[40]

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[37] Saurav Gupta, *A Comment on Criminal Liability of Corporations*, (Aug. 29, 2012, 7.45P.M.), http://www.lawyersclubindia.com/articles/A-Comment-on-Criminal-Liability-of-Corporations-3726.asp#.UgCRX5Iwppl

[38] (2005) 4 SCC 530

[39] Judgment delivered by K.G. Balakrishnan, J., Para 35.

[40] Anthony O. Nwafor, *Corporate Criminal Responsibility: A Comparative Analysis*, 2013 JOURNAL OF AFRICAN LAW 81

The word person has been defined in section 11 of the Indian Penal Code to include any company or association or body of persons, whether incorporated or not. A combined reading of section 2[41] and 11 of the IPC makes it clear that corporations can be prosecuted for offences under the IPC. Similarly, Section 3(42) of the General Clauses Act, 1987 provides that a person shall include any company or association or body of individuals, whether incorporated or not. It has been specifically stated in *Halsbury's Laws of England*, Volume 11(1), in paragraph 35 that a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those requiring *mens rea*.

The evolution of corporate criminal liability has nothing much to do with statutory provisions. In fact, it was the doctrines that were developed by the judiciary of common law countries that helped to impute corporations with criminal liability. One such legal doctrine is the 'Identification doctrine'. The Identification doctrine states that those who are in the top echelons of the company's management, who initiate company's policies and whose conduct is inseparable from the conduct of the company, provides the mental element. This was upheld in *Tesco Supermarkets Ltd v. Nattrass*[42], where it was observed that the corporations could be criminally liable where the conduct

[41] IPC, Section 2: Punishment of offences committed within India - Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which, he shall be guilty within India.
[42] [1972] AC 153

emanated from those who could be referred to as the directing mind of the corporation.[43] But in this case, the Court held that the branch manager of the company was not a person whose fault could be attributed to the company. He took instructions from and was controlled by the Board. He was not delegated any powers of the board and as such was not the directing mind and will of the company.[44] The deviation from the *Tesco case* could be seen in *Meridian Global Funds Asia Ltd v. Securities Commission,*[45] where the Court observed that in determining whether a company had failed to comply with a New Zealand statute which required it to give notice of being a substantial holder of securities in a public company as soon as it knew or ought to have known that

[43] Lord Reid, J. observed, "A Board of Directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here the Board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also to take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself."

[44] Lord Reid, J. observed, "There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company and on the assumption that there could be proceedings against him, the company would by section 24(1)(b) be absolved if the company had taken all proper steps to avoid the commission of an offence by him. To make the company automatically liable for an offence committed by him would be to ignore the subsection. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it. Nor was he within what has been called the " brain area " of the company. If the company had taken all reasonable precautions and exercised all due diligence to ensure that the machine could and should run effectively then some breakdown due to some action or failure on the part of " another person " ought not to be attributed to the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible."

[45] [1995] 2 AC 500

it had become one, the knowledge of the individual (who had the authority to acquire the securities of the company) would be attributed to the company, regardless of whether that individual was the directing mind or will. This is often referred to as the 'attribution approach'. *Moore v. I Bresler Ltd,*[46] was another case where the corporation was charged with knowingly making a false return under a taxing statute. The Court held that "those persons were important officials of the company and when they made statements and rendered returns, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts therefore were the acts of the company."[47]

But a small relaxation is given where the company itself is the victim and it is evident from the case of *Stone and Rolls Ltd v. Moore Stephens,*[48] where the Court observed that the only circumstance in which the knowledge of a person identified with a company would not be attributed to the company is where the company was the target of the wrong doing.

Another way to make corporations criminally liable and to hold them responsible for the acts of any of their agents is under *the respondeat superior* doctrine. The essential ingredients to attract this doctrine include commission

[46] [1944] 2 All ER 515
[47] Humphreys, J. observed that "it was difficult to imagine two persons whose acts would 'more effectively bind the company' and who could be said to be more obviously agents of the company."
[48] [2009] UKHL 39

of crime, within the scope of employment and with intent to benefit the corporation. The best example is the case of *New York Central & Hudson River Railroad v. U.S,*.[49] where New York Central was convicted for bribery committed by an assistant traffic manager who gave rebates on railroad rates, reducing the shipping rate for some users below the mandated rate. The U.S. has also developed a system of corporate probation which is an alternative sentencing system. This is clear from the case of *U.S. v. Richfield Co.,*[50] where the Court ordered the company to set up a programme to stop its oil pollution within 45 days.

Both these doctrines are subject to criticisms. The doctrine of *respondeat superior* has been criticized on the basis of application of tortious principles in criminal liability. The identification doctrine has been criticized due to its non-application in matters of conspiracy.[51] The management officer will not be guilty additionally of the offence of conspiring with the employer because in the identification theory, there is only one entity. The identification doctrine has also been criticized on the ground that the test may fail in cases where there exist more than one directing mind. One of the major shortcomings of the identification doctrine is that it fails to note that corporate entities function as group and not by the effort of any individual. The case of *R v. P & O European*

[49] 212 U.S. 481 (1909)
[50] 465 F 2d 58 (7th Cir.1972)
[51] Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM LF 1, 8 (1995)

Ferries (Dover) Ltd.,[52] is often cited to highlight the drawback of the identification doctrine. The case is one of involuntary manslaughter where the ship capsized resulting in the loss of 200 lives. The reason for the same was that the ship left the port with its bow doors open. The case failed since none of the employees of the company who accompanied the ship could be identified as the directing mind of the company. Thus the 'identification doctrine' has been criticized mainly for the narrowness of its horizons and for its failure to capture the complexity of the modern day company.[53] The fact that the acts of only a limited section of officers in the corporation could be attributed to the employer is another reason for condemning the identification doctrine.[54]

Another doctrine adopted, especially in the U.S., is the 'aggregation doctrine'. This doctrine aggregates all the acts and mental elements of relevant persons within the company and links the thoughts of different agents of the legal body so as to create the required mental element. Thus a process of aggregation takes place and is attributed to the corporation.[55] This doctrine made a transition in the attitude of the Courts from finding all relevant elements of knowledge in one single individual to aggregating partial details of that knowledge spread

[52] (1991) 93 Cr App Rep 72
[53] James Gobert, *Corporate Criminality: New Crimes for the Times*, 1994 CRIM LR 722
[54] Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE LJ 126, 128 (2008)
[55] Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4(1) BUFFALO CRIMINAL LAW REVIEW 641-708, 662(2000)

among different employees to establish one whole corporate collective knowledge.[56] This doctrine is also called as the 'collective knowledge doctrine' and the same is the contribution of U.S. Federal Courts.[57] The doctrine has been propounded in *United States v. Bank of New England*[58]. In the instant case, the bank was convicted for failing to file currency transactions reports, which was a requirement as per Currency Transaction Reporting Act 1994, for cash transactions above 10,000 dollars. The client named McDonough made several cash withdrawals of amounts higher than 10,000 dollars, but he did it with several cheques, each for a sum lower than 10,000 dollars. The cheques were presented simultaneously to a single bank teller. Once processed, McDonough received the amount higher than 10,000 dollars in a single transfer from the teller, but the bank did not file any currency transactions reports on these transactions. The bank was found to be criminally liable on the basis of aggregation doctrine and the observation of the Court which led to conviction is as follows,

> *"The bank's knowledge is the totality of what all of the employees knew within the scope of their employment. So, if employee A knows of one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the banks know them all. So, if you find that an*

[56] Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4(1) BUFFALO CRIMINAL LAW REVIEW 641-708, 668 (2000)
[57] E.S. Gaynor Lumber Co. v. Morrison, 60 N.W.2d 782 (Mich. Ct. App. 1982)
[58] 821 F.2d 844, 856 (1st Cir. 1987)

> *employee within the scope of his employment knew that the reports had to be filed, even if multiple cheques are used, the bank is deemed to know it. The bank is also deemed to know it if each of the several employees knew a part of the requirement and the sum of what the separate employees knew amounted to the knowledge that such a requirement existed."*

The concept of aggregation too suffers from certain shortcomings as the main problem is with connecting *actus reus* and *mens rea* and thereby to establish a substantial link between action and thought.[59] This is all the more complicated and difficult because aggregation doctrine is based on aggregating elements of one offense from the thinking of various corporate agents. There can always be possibilities of a corporate agent being unaware of the knowledge possessed by another agent.[60]

When a crime occurs in the course of business, it is likely to be the result of a breakdown in more than one sphere of the company's operation. A conceptually different approach called as the 'theory of corporate fault' is suggested which locates fault within the company itself without reference to individual liability. "The company is treated as a distinct organic entity whose

[59] The aggregation doctrine was rejected in the U.K. in the case of *R v HM Coroner for East Kent Ex p. Spooner*, (1989) 88 Cr App R 10. The reason for rejecting it is that since a natural person could not be convicted based on aggregating mens rea of other individuals, it is unjust to apply the rule to impose criminal liability on corporations.

[60] Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4(1) BUFFALO CRIMINAL LAW REVIEW 641-708, 675 (2000)

'mind' is embodied in the policies it has adopted."[61] The policy may also reflect in the company's corporate ethics. The basic reason behind suggesting the theory of corporate fault has been stated as follows: "A company that creates a situation of danger, or places an employee in a better position to perpetrate a crime has an obligation to take steps to prevent criminal harm from occurring. It means that the companies have a duty to promulgate and adopt policies directed towards the prevention of crime and to establish corporate ethos which might occur in the course of company's business." In these kind of cases, instead of proving *mens rea* by the State, the company should be allowed the defence to prove due diligence.

One of the latest cases where the personality of corporation is seen discussed is *Aneeta Hada v. M/s. Godfather Travels & Tours Pvt. Ltd*.,[62] wherein the basic issue was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The Court, by applying the doctrine of strict construction of section 141 of Negotiable Instruments Act,[63] held that the commission of offence by the company is an express condition precedent to attract the vicarious liability of others. The Court further observed

[61] James Gobert, *Corporate Criminality: New Crimes for the Times*, 1994 CRIM LR 722
[62] (2012) 5 SCC 661
[63] Section 141 of the Negotiable Instruments Act, 1882: Offences by companies. – (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

that the words "as well as the company" appearing in the section makes it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offences. The Supreme Court while holding that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative, has reproduced the observations made in the cases of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[64] , *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*[65], *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*[66] and *Iridium India Telecom Ltd. v. Motorola Inc and Ors.*[67]

In *Lennard's Carrying Company Limited v. Asiatic Petroleum Company*[68], Lord Viscount Haldane brought out the concept of alter ego doctrine. [69] In *H.L.*

[64] [1915] AC 705
[65] [1956] 3 All ER 624
[66] [1944] 1 All ER 119
[67] (2011) 1 SCC 74
[68] [1915] A.C. 705
[69] This is a case where a cargo of benzine on board ship was lost by a fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited company and the managing owners were another limited company. The managing director of the latter company was the registered managing owner and took the active part in the management of the ship on behalf of the owners. He knew or had the means of knowing of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition. The learned Judge observed that, "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an

Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.,[70] Lord Denning, observed that that a company may in many ways be likened to a human body.[71] It should be noted that the term "person" used in section 141 of the Negotiable Instruments Act denotes a corporation. The Supreme Court in *Aneeta Hada v. M/s. Godfather Travels Tours Pvt. Ltd.* observed that "there is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the

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authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. Whatever is not known about Mr. Lennard's (petitioner) position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself."

[70] [1956] 3 All ER 624

[71] According to the learned Judge, "It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. In certain cases, where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company."; In *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*, [1944] 1 All ER 119, MacNaghten, J. observed that "a body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention – indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstance may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive. I apprehend that his knowledge and intention must be imputed to the body corporate."

present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence." In other words, the Court held that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. The Court observed that it should be in this backdrop that section 141 of the Negotiable Instruments Act has to be understood. According to the Court, the said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under section 138 of the statute.

The Court referred and approved the observation made in *State of Madras v. C.V.Parekh*[72] that the first condition is that the company should be held liable, a charge has to be framed, a finding has to be recorded and the liability of the person in charge of the company only arises when the contravention is by the company itself. The case of *Sheoratan Agarwal v. State of MP*[73] which tried to distinguish *State of Madras v. C.V.Parekh,*[74] by observing that the company alone or the person alone may be prosecuted because there is no statutory compulsion that the person in charge of the company may not be prosecuted

[72] AIR 1971 SC 447
[73] AIR 1984 SC 1824
[74] *Sheoratan* was decided by a 2 judge bench and so far as they were concerned *C.V. Parekh* (which was decided by a 3 judge bench) was a binding precedent and they ought to have followed it.

unless he ranged alongside the company itself, was overruled in *Aneeta Hada v. M/s. Godfather Travels Tours Pvt. Ltd.* The case of *Anil Hada vs Indian Acrylic Limited*,[75] which followed *Sheoratan*, was also held as not laying down a proper law.

2.4.3 Cases where Imprisonment is a Mandatory Punishment

It is true that it was thought initially that a corporation could not be held criminally liable because of the requirement of guilty mind. But now an artificial person, e.g. a corporation, could be held liable for criminal acts on the basis of the *mens rea* of the person in charge of the affairs of the corporation. In short, on the basis of *alter ego* doctrine. But the basic issue in this context now is whether a corporation could be prosecuted for an offence for which mandatory sentence of imprisonment is provided. It has been pointed out that while imposing criminal liability, the legislation does not make any distinction between natural persons and corporations and hence allowing corporations to escape liability for prosecution on the plea that "when an offence is punishable with imprisonment and fine, the Court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot

[75] (2000) 1 SCC 1

be prosecuted for the offence for which custodial sentence is the mandatory punishment", will be doing violence to the statute.[76]

It should be noted that the Law Commission of India has suggested that in such cases, the Court should be empowered to sentence for fine only. The Law Commission, in its 47th report titled 'The Trial and Punishment of Social and Economic Offences' has recommended insertion of an amended section 62 of IPC which may read as follows, "In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the Court to sentence such offender to fine only."[77] Para 8.1 of the Report specifically states that though it is usual for the director or the manager of a corporation who has acted for the corporation to be punished, it is appropriate that the corporation itself is punished. The reason for the same is that the offence should be linked with the name of the corporation in the public mind and not just with the director or the manager.

In *Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles Ltd. & Anr.*[78], the Court was concerned with sections 276C, 277 and 278 read with section 278B of the Income Tax Act, 1961 which provided for mandatory imprisonment and fine. It was held that, as the Court can impose

[76] Archana Kaul, *Juristic Personality: A Novel Dimension*, (July 19, 2012, 9.25 P.M.), http://www.icsi.edu/webmodules/programmes/33nc/juristicpersonality.anoveldimensioin.pdf
[77] Chapter 8 of the Report titled 'Corporations and their Officers', 61-70
[78] (2003) 11 SCC 405

only fine so far as corporates are concerned, a legal provision which makes it mandatory to impose imprisonment cannot be applied in the case of an artificial person.

In *ANZ Grindlays Bank Ltd and ors. v. Directorate of Enforcement*[79], where the issue was whether criminal proceedings could be initiated against a company as the minimum punishment prescribed under section 56(1) of FERA 1973 is imprisonment for not less than 6 months and fine, the Court held that the decision in *Assistant Commissioner, Assessment-ll, Banglore & Ors. v. Velliappa Textiles Ltd & Anr* [80] needs reconsideration by a Constitution Bench. The Court was concerned with the issue whether the company as well as the persons referred to in sections 68(1) and (2) can be proceeded against because no criminal proceedings (imprisonment for example) could be initiated against the company as such. In regard to this, the Court observed that "in the event it is held that a case involving graver offence allegedly committed by a company and consequently, the persons who are in charge of the affairs of the company as also the other persons, cannot be proceeded against, only because the company cannot be sentenced to imprisonment, the same would not only lead to reverse discrimination but also as against the legislative intent. The intention of the Parliament is to identify the offender and bring him to book." The Court finally held that it is possible to read down the provisions of section 56 to the

[79] (2004) 6 SCC 531
[80] (2003) 11 SCC 405

effect that when a company is tried for commission of an offence under the Act, a judgment of conviction may be passed against it, but having regard to the fact that it is a juristic person, no punishment of mandatory imprisonment can be imposed. The Court specifically noted that even if the company cannot be punished, the same may not mean that the other persons referred to in sections 68(1) and (2) cannot also be punished.

In *Standard Chartered Bank & ors. v. Directorate of Enforcement*[81], it was held that a company is liable to be prosecuted and punished for criminal offences. The Court further held that "although there are earlier authorities to the fact that the corporation cannot commit a crime, the generally accepted modern rule is that a corporation may be subject to indictment and other criminal process although the criminal act may be committed through its agent. It has also been observed that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment is mandatory imprisonment and fine." The Court observed that the intention of the legislature is not to exonerate the corporate bodies from prosecution. It is a fact that imprisonment and fine is provided as punishment in graver offences and it is not logical to say that corporations can be punished only in cases where imprisonment or fine is prescribed because it is similar to saying that corporations could be prosecuted and punished only for less serious

[81] (2005) 4 SCC 530

offences. The same is clear from the following observation of the Court. "As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely those under Section 13, clause (a) of subsection (1) of Section 18; Section 18A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than one lakh, and that they could be prosecuted only when the offences involve an amount or value less than one lakh." The main argument that the Court had to deal with was that when an offence is punishable with imprisonment and fine, the Court is not left with any discretion to impose any one of them and consequently the company being a juristic

person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. The Court held that such an argument could be accepted only when imprisonment is the only punishment prescribed. Furthermore the Court observed that when imprisonment and fine is the prescribed punishment, the Court can impose the punishment of fine which could be enforced against the company and such discretion is to be read into the section so far as the juristic person is concerned.

This position was reaffirmed by the Supreme Court in the case of *Iridium India Telecom Ltd. v. Motorola Inc*[82], where the Court observed that in the case of an offence that is punishable with both imprisonment and a fine, the company can be prosecuted and the punishment will be fine alone. The Court in this case also held that the *mens rea* of corporate officers could be imputed to the company and made the following observation,

"A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons."

[82] (2011) 1 SCC 74

The case of *United States v. Union Supply*[83] has been referred to in the case of *Standard Chartered Bank & ors. v. Directorate of Enforcement*[84]. In *United States v. Union Supply*[85], the issue was whether a corporation, which violated a provision that required the wholesale dealers in oleomargarine to keep certain books and make certain returns, could be held criminally liable. The issue arose because the provision provided for mandatory punishment and the District Court held in favour of the corporation that they cannot be held criminally liable. The U.S. Supreme Court reversed the judgment of the District Court and observed that "the natural inference is that when a statute prescribes two independent penalties, it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape."

It should be noted that the ruling is applicable only in case of juristic persons and the discretion that the Court talks about applies only in these kinds of cases. If the person involved is not a juristic person, but a natural person, the Court may not be left with discretion to impose fine alone where the punishment prescribed is imprisonment and fine.[86]

[83] 215 U.S. 50 (1909)
[84] (2005) 4 SCC 530
[85] 215 U.S. 50 (1909)
[86] *State of Maharashtra v. Jugamander Lal*, AIR 1966 SC 940; where the accused was found guilty under Section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 and as per this section, any person found guilty shall be punishable on his first conviction with rigorous imprisonment for a term of not less than one year and not more than

2.5 Existing Legislations regarding Corporate Liability in Other Countries

2.5.1 Australian Criminal Code Act, 1995

One distinguishing feature of the Australian Criminal Code Act of 1995 is that it defines 'corporate culture' and the fault in cases of corporate liability is based on this concept of 'corporate culture'. Corporate Culture is defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred. It reflects a concept of collective blameworthiness, not an individual or aggregate blameworthiness. S. 12.3 of the Act states that one of the ways of proving the fault element in an offence involving a corporate body is to prove that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[87]

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three years and also with fine extending up to two thousand rupees, the Supreme Court held that But this Court held that the word 'punishable' that has been used in Section 3(1) cannot be construed as giving any discretion to the Court in the matter of determining the nature of sentence to be passed in respect of a contravention of the provision. The Court made it clear that by using the expression 'shall be punishable' the legislature has made it clear that the offender shall not escape the penal consequences. But there have been decisions to the contrary (but it should be noted that juristic persons were involved) such as *Oswal Vanaspati& Allied Industries v. State of U.P*. (1993) 1 Comp LJ 172 and *Delhi Municipality v. J.B. Bottling Company*, MANU/DE/0116/1975.

[87] *The Australian Criminal Code Act of 1995*, (Nov. 5, 2014, 8.45 A.M.), http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

2.5.2 Australian Corporate Code of Conduct Bill, 2000

The Bill was an attempt to regulate the activities of Australian corporations in other countries. The main objective of the Australian Corporate Code of Conduct Bill 2000 was to regulate Australian corporations who employ more than 100 persons in a foreign nation in matters of environmental, employment, health and safety and human rights standards.[88] Part II of the Code that talks about the 'Corporate Codes of Conduct' deals with environmental standards, health and safety standards, employment standards, human rights standards and duty to pay tax. The human rights standards of the Code are in direct relation to employment procedures as it aims at preventing discrimination in employment matters on the basis of race, colour, sex, sexuality, religion, political opinion, national extraction or social origin. The employment standards aim to prevent child labour and forced labour and also aim at securing reasonable wages, freedom of association and collective bargaining. The health and safety standards ensure that an employee works not more than 12 hours a day and in addition to that mandates that the employer shall not require employees to work for more than 5 consecutive hours without a break of at least 20 minutes. The environmental standards, in addition to providing for following precautionary principle, require collecting and evaluating information regarding the environmental impacts of its activities at least once in 12 months.

[88] The Australian Corporate Code of Conduct Bill 2000, Article 3(1)(a).

Part III of the Code deals with 'Reporting' which requires the corporations to file a Code of Conduct Compliance Report with the Australian Securities and Investments Commission before 31st of August each year, which in turn prepares an annual report to be sent to the Parliament. The report should mainly contain *inter alia* the total remuneration paid to the employees, environmental impact statement, statement of any foreseeable risk factors that might arise as a result of the activities of the corporation, statement of any contraventions of standards or laws relating to the environment, employment, health and safety and human rights by the corporation in each country in which it operates. The Code of Conduct also prescribes sanctions for not submitting the compliance report. The corporation failing to lodge a Code of Conduct Compliance Report will be fined not exceeding 2000 penalty units if it is without reasonable excuse and the executive officer for his reckless or negligent act or for avoiding to take reasonable steps or for influencing the conduct of the corporation in not filing the report will be fined not exceeding 1000 penalty units.

Part 4 that deals with 'Enforcement' provides for civil penalties and civil actions. The jurisdiction lies with the Federal Court of Australia and any person affected by the activities of the corporation in regard to violations standards contained in Part II of the Code is entitled to approach the Federal Court of Australia. The pecuniary penalty has been fixed to an amount not exceeding 10,000 penalty units.

Though the Bill was referred to the Parliamentary Joint Statutory Committee on Corporations and Securities it was not passed as they found it to be unnecessary and unworkable.[89] The Bill has also been criticized especially in regard to the jurisdictional clause. Though the Bill authorises the Federal Court of Australia to possess jurisdiction, the doctrine of *forum non conveniens* may still permit the Court to refuse jurisdiction.[90]

2.5.3 U.K. Corporate Manslaughter and Corporate Homicide Act, 2007

The U.K. Corporate Manslaughter and Corporate Homicide Act of 2007 originated as a result of the P&O European case.[91] S. 1(1) of the Act states that a company commits the offence of manslaughter if the way in which its activities are managed or organized cause a person's death; amounts to a 'gross breach' of a relevant duty of care owed by the Co. to the deceased. This is often termed as the 'management failure' model. S. 1(3) states that an organization is guilty of an offence under this section only if the way in which its activities are managed or organized by its senior management is a substantial element in the

[89] Note, *Human rights and Transnational corporations: Legislation and Government Regulation*, (Feb. 17, 2013, 8.15 A.M.), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il150606.pdf

[90] Surya Deva, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations*, 8 Newc. L. R. 87 (2004)

[91] R v. P & O European Ferries (Dover) Ltd.,(1991) 93 Cr App Rep 72; the case is related to involuntary manslaughter where the ship capsized resulting in the loss of 200 lives due to the negligence in leaving its bow doors open. In this case none of the employees of the Co. who accompanied the ship could be identified as the directing mind of the Co.; this case is referred to in this research at supra n.64.

breach referred to in sub-section (1). The term 'senior management' in the Act refers to those who initiate and/or implement the Co's policies.

The Corporate Manslaughter and Corporate Homicide Act 2007 has no extraterritorial application. But the Bribery Act of 2010 is capable of extraterritorial application and could be applied to corporate crimes as well.[92] Section 12 of the Bribery Act, 2010 relates to the territorial application of the legislation and clause 2 provides that a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and that person has a close connection with the United Kingdom. S.12(4) defines a person has a close connection with the United Kingdom to include a British citizen, a British overseas territories citizen, an individual ordinarily resident in the United Kingdom, a body incorporated under the law of any part of the United Kingdom and so on.[93]

[92] Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (ECCJ) December 2013, 39, (Nov. 5, 2012, 2.40 P.M.), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf

[93] The Bribery Act, 2010, Section 12: Offences under this Act: Territorial application (1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom. (2) Subsection (3) applies if - (a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom, (b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and (c) that person has a close connection with the United Kingdom. (3) In such a case - (a) the acts or omissions form part of the offence referred to in subsection (2) (a), and (b) proceedings for the offence may be taken at any place in the United Kingdom. (4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at

But then again major problem exists with regard to imposing civil liability on businesses. There exist a number of causes of action in torts such as nuisance or trespass to the person but it is not quite possible to initiate a claim against businesses based directly on a violation of international law or of a breach of human rights.[94] Claims brought against corporations against violation of labour rights or infringing indigenous communities' rights or other human rights abuses might have to be disregarded as there are no apt mechanisms to entertain the same.

2.5.4 UK Corporate Responsibility Bill, 2003

The UK Corporate Responsibility Bill of 2003 mandates the companies to conduct its activities in accordance with human rights, consumer protection, employment rights, goal of sustainable development, public health and safety and preservation of environment. Though the Bill provides for reporting and other procedures like any other initiatives in this regard, the distinguishing feature of the UK Bill is Clause 6 that talks about 'parent company liability'.

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the time the acts or omissions concerned were done or made - (a) a British citizen, b) a British overseas territories citizen, (c) a British National (Overseas), (d) a British Overseas citizen, (e) a person who under the British Nationality Act 1981 was a British subject, (f) a British protected person within the meaning of that Act, (g) an individual ordinarily resident in the United Kingdom, (h) a body incorporated under the law of any part of the United Kingdom, (i) a Scottish partnership.

[94] Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (ECCJ) December 2013, 39, (Nov. 5, 2012, 2.40 P.M.), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf

Clause 6 makes the parent company liable for any violations of standards prescribed under the Bill committed by the parent company or by its subsidiaries. It provides a duty to the parent company to ensure that any other entity which is under the operational control of parent company follows human rights, environmental and other standards mentioned in the Bill.[95] A stakeholder affected by the activities of the company is entitled to make a complaint to the Secretary of the State and if the company is found to be liable, either of the penalties mentioned under clause 11 would be imposed. The penalties include imprisonment and fine, prohibition from being a director of a company for a specific time period, suspension of company from trading on the Stock Exchange and to terminate the operations of the company as a whole. Though the Bill seemed effective, it was not passed as it lacked political and business backing.[96]

2.5.5 U.S. Model Penal Code, 1962

The U.S. Model Penal Code, 1962 adopts a restrictive approach and makes a classification into grave offences, other offences that require *mens rea* and strict liability offences. In the case of grave offences corporations are liable only if the commission of the offence was performed, or at least authorized,

[95] *U.K. Corporate Responsibility Bill*, (Aug. 8, 2012, 6.30 P.M.), http://www.publications. parliament.uk/pa/c m200203/cmbills/129/2003129.pdf

[96] Note, *Human rights and Transnational corporations: Legislation and Government Regulation*, (Feb. 17, 2013, 8.15 A.M.), https://www.chathamhouse.org/sites/file /chathamhouse/public/Research/International%20Law/il150606.pdf

commanded, or recklessly tolerated by the board of directors or by high managerial agent acting on behalf of the corporation within the scope of his office or employment. The second categories of offences involve offences that require *mens rea* and are ordinarily committed by corporations, e.g. collusive trading. In such cases, doctrine of *respondeat superior* applies, but it is a valid defence if the person can show that he employed due diligence to prevent its commission. In the case of strict liability offences, corporations are held liable without proof of the fault element. Whether corporation benefit from the offences does not matter and it is applied mostly where there is a statutory duty.

2.5.6 U.S. Corporate Code of Conduct Bill, 2000

The U.S. Corporate Code of Conduct Bill, 2000, also known as the McKinney Bill[97], applies to U.S. corporations operating abroad and, to be more specific, the provisions apply to a U.S. national who employs more than 20 persons in a foreign country. The employment can either be directly or through subsidiaries or subcontractors. This is clearly a deviation from the Australian Code of Conduct Bill as it applies not only to corporations operating abroad but also to citizens doing overseas business. The U.S. Bill also applies in the case of an employment through affiliates, joint ventures, partners, or licensees. The U.S.

[97] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 167 (CAMBRIDGE UNIVERSITY PRESS, 2006)

Corporate Code of Conduct Bill required corporations to provide for a healthy working environment, abstain from forced and child labour, provide for collective bargaining, follow responsible business and environmental practices and comply international human rights standards. A comparative analysis with that of the Australian Code of Conduct shows that the latter is widely worded and provides for a detailed explanation of intended beneficiaries but with specifically regard to protection of human rights, the Australian Bill restricts it to principle of non-discrimination in work places whereas the US Bill specifically calls for maintenance of minimum international human rights standards.

The Bill under section 3(b)(8) states that all businesses should design a self-financing internal program to implement and monitor the objective of the code and to ensure compliance. Adequate annual reporting procedures to Secretary of Commerce, the Secretary of Labour, the Secretary of State, and the Administrator of the Environmental Protection Agency and to the Congress have been provided under sections 7(a) and 7(b) respectively. The only reason that the corporations find for complying with the provisions of the Bill is the preference in the award of contracts and foreign trade and investment assistance as provided under section 4(a) of the Bill. The Bill is completely silent on issues of liability of the parent company for the act of its subsidiaries and issues of *forum non conveniens*. There is also no clarity on

extraterritoriality, dispute adjudication and enforcement of judgments and the biggest drawback lies in the fact that the Bill does not provide for criminal sanctions. The only sanctions provide under the Bill are the suspension of incentives provided for under section 4(a) and damages in case of liability.

2.6 Conclusion

It is undoubtedly true to say that the personality of the entity is fictitious rather than making the corporation a fiction. For example, while the personality of the State is a fiction, the existence of the State as an entity is real. If corporate personality is considered imaginary, then a corporation has no mind and is therefore incapable of entertaining malice. But, if a corporation is considered as a person, then this person can be attributed a mind and held guilty of fraud, malice or crimes involving a particular mental state. It has been stated that the corporation cannot be imprisoned because it has no body is not logical because like we imagined that a corporation is a person, we can also imagine that this person possess a body capable of being imprisoned.[98] But a threat of imaginary punishment would not deter any rational being from wrong doing. So, if the imaginary punishment involves the actual imprisonment of some of its members, they might be deterred.

[98] Arthur W. Machen, *Corporate Personality*, 24 HARV.L.REV. 347 (1910-11); The author states that a mathematician finds it difficult to carry in his head, a mathematical equation in the nature of $x^2+3ax+b^2$. He simplifies in his mental powers and converts the same into "y". Similarly the lawyer finds it unable to solve his problems if he thinks of a corporation not as a personified unit but as a shifting body of shareholders or even as a real but impersonal entity.

Though the theories on corporate personality give different perspectives due to subjective opinions of jurists, it is undoubtedly clear that corporation as entities possess rights and duties. The fact that they are recognised by the State and law as juristic persons ensures that they derive benefits in the form of registration and profit making thereafter. The community or society, in general, helps them in securing the desired resources in the form of industrial space, labour force, raw materials and natural resources and hence it is an obligation, both moral and legal, to ensure that rights of those in the community are not violated.

However, it is clear from the observations made in the case laws, both Indian and foreign, that the corporation can be held liable for crimes involving *mens rea* on the basis that the acts of the supreme directorate are the personal acts of the corporation. The instances where the principal officers of the corporations get punished are clear from section 66 of Food Safety and Standards Act, 2006[99], section 10 of the Essential Commodities Act, 1955[100] and section 140

[99] Food Safety and Standards Act, 2006, Section 66 - Offences by companies: (1) Where an offence under this Act which has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that where a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit: Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director,

of the Customs Act, 1962[101]. Indian cases like *S.M.S. Pharmaceuticals Ltd v. Neeta Bhalla*[102], *Indian Bank v. Godhara Nagrik Cooperative Credit Society Ltd*[103] and many others have made corporates and persons responsible for their acts and omissions. Where the Court established liability on the company and

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manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.-For the purpose of this section, - (a) "company" means any body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

[100] Essential Commodities Act, 1955, Section 10: Offences by companies - (1) If the person contravening an order made under section 3 is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation: For the purposes of this section, - (a) "company'' means any body corporate, and includes a firm or other association of individuals; and (b) "director'' in relation to a firm means a partner in the firm.

[101] Customs Act, 1962, Section 140: Offences by companies - (1) If the person committing an offence under this Chapter is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Chapter if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Chapter has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation - For the purposes of this section, - (a) "company" means a body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

[102] 2005 (8) SCC 89

[103] (2008) 12 SCC 541

the persons who committed the act/omission in the former case based on the provisions of Negotiable Instruments Act, 1881, in the latter, the Court referred to 'alter-ego' approach[104] and 'attribution' approach[105] and observed that banks are constructively liable for acts of their employees. But it is not a very easy task at the practical level. There is a complex procedure involved when it comes to proving the *mens rea* of the senior members of the company. To prove that the persons were in fact in charge of the company affairs is even more difficult.

Similarly, corporations should not be considered only the sum of individuals but also as an organization in itself as they possess autonomy in action such as the capacity to change the policies and due to the very same reason, they could be held responsible for the activities that have resulted from the said policies.[106] The steps taken at the domestic level in various countries to combat the activities of corporations is not devoid of shortcomings. The Corporate Code of Conduct Bills of Australia, U.K. and U.S. were not passed into binding legislations due to severe opposition from political and business groups. The opposition itself acts as proof to show that States benefit from large scale immunities provided to multinationals. Though there exist national legislations

[104] The approach applied in *Lennard's Carrying Company Limited v. Asiatic Petroleum Company*, [1915] A.C. 705

[105] The knowledge of the individual would be attributed to the company, regardless of whether that individual was the directing mind or will.

[106] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545, 476 (2001)

to combat the activities of corporations, most of them do not apply to extraterritorial violations. The EU initiatives in the form of Multi-Stakeholder Forum on CSR[107] and CSR Alliance[108] are yet to perceive that corporate accountability should be made mandatory in order to achieve the said objective of human rights protection.

[107] There was an attempt to create a guiding framework for CSR at the EU level and it took off in the form of a Multi-Stakeholder Forum (MSF) on CSR in 2002. The MSF, though envisioned a human rights framework in relation to CSR, did not have strong international human rights outlook in its final product. The main objectives of MSF were to establish common CSR guiding principles so as to promote innovation and transparency in CSR practices. The MSF was headed by the EU Commission with 18 different organizations representing trade unions, human rights NGOs, worker's organizations and so on. The 11 institutions that had observer status included the European Parliament, EU Council, ILO, OECD and UNEP. MSF mainly aimed at high level meetings to come up with a final report in 2004. Though initial discussions favoured human rights to form the core of CSR, the latter ones consisted of disagreements over CSR being mandatory or voluntary. Hence it is generally said that though the final report was published in 2004, MSF did not formulate a specific framework on CSR; Karin Buhmann, *Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: The EU case*, INTERNATIONAL JOURNAL OF LAW IN CONTEXT 139 (2011); Final Forum report, *European Multi Stakeholder Forum on Corporate Social Responsibility*, Results - June 2004, Aug. 11, 2015, 10.30 A.M.), http://www.indianet.nl/EU-MSF_CSR.pdf

[108] The CSR Alliance that was launched in March 2006 by the European Commission is mainly a follow-up of MSF and is more concerned with developing innovative CSR practices. CSR Alliance is basically a partnership building initiative with members mainly consisting of the business community. It also derives support from various business organisations. The framework of the Alliance specifically states that it is not a legal instrument but only a political umbrella for CSR initiatives by all companies including large and SMEs. The only distinguishing feature in the Alliance is that contrary to the 2003 Draft UN Norms where State is vested with the primary responsibility in relation to human rights and private actors, the Alliance believes that the primary players in CSR are the companies and that the State plays only a supportive role; *European Alliance for CSR*, (Aug. 10, 2015, 2.30 P.M.), https://www.businesseurope.eu/european-alliance-csr

CHAPTER 3

HUMAN RIGHTS VIOLATIONS AND LEGAL LIABILITY OF CORPORATIONS – INDIAN PERSPECTIVE

3.1 Introduction

It is needless to say that in most of the cases, the State acts as a contracting party between the companies. It is clear from the MoUs signed by the States that they agree to acquire land for the company and help to get environmental clearance. Thus in most of the PPPs, it is evident that the State is a party to the contract and not a guardian of public interest. The need to regulate corporations is essential as it brings together men, machines and patterns of doing things into an enormous socio-technical system that is far more complex, overwhelming and powerful.[1] The fact is that in most of the instances, a multinational corporation prevails over the State in which it is established in terms of economic power.[2] This is one of the major reasons why the State may not bring in stringent rules and laws to regulate a corporation.[3] The investment that the MNCs bring in to the host State and economic benefit resulting from

[1] K. Balakrishnan, *Corporate Criminal Liability: An Enigma to Deal With*, [1999] CULR 104, 106

[2] JOHN MADELEY, BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD'S POOR, 25 (Palgrave Macmillan 1999)

[3] RAMON MULLERAT, INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY: THE ROLE OF CORPORATIONS IN THE ECONOMIC ORDER OF THE 21ST CENTURY, 90 (Kluwer Law International 2010)

the activities of the MNC would be more attractive to the host State than the necessity to guard its citizens from abuses caused by the MNC.[4] This has resulted in severe human rights violations across India which is evident from such instances caused by Vedanta[5], Coca Cola[6], Tata[7], Union Carbide Corporation[8] and POSCO[9]. The following incidents identified during this research give a comprehensive idea on the human rights violations that have occurred in Indian as a result of the activities of various corporations.

3.2 Human Rights Violations in India

3.2.1 Vedanta[10]

Vedanta had been in the news for quite some time for failing to comply with the conditions for environmental clearance stipulated by the government. Though the company succeeded in getting a positive nod from the Court with

[4] Van den Herik Larissa & Cernic Jernej Letnar, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, 8(3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 725-743, 725

[5] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: Report on India*, 2011, (Jan. 22, 2014, 6.30 P.M.), http://www.indianet.nl/pdf/AccessToJustice.pdf

[6] Perumatty Grama Panchayat v. State of Kerala, 2004 (1) KLT 731,743; *Report: Majority Of Earth's Potable Water Trapped In Coca-Cola Products*, (Jan. 29, 2014, 10.40 A.M.), http://www.theonion.com/articles/report-majority-of-earths-potable-water-trapped-

[7] Kedar Nath Yadav v. State of West Bengal and ors, Civil Appeal No.8438 of 2016, decided by the S.C on 31-08-2016

[8] Union Carbide Corporation v. Union of India 1989 SCALE (1)380

[9] Laura Ceresna, *A Manual on Corporate Accountability in India*, 2011, (Mar. 9, 2014, 4.15 P.M.), http://business-humanrights.org/sites/default/files/media/documents/cividep-manual-corporate-accountability-india-apr-2011.pdf; *POSCO to Withdraw Investment from Odisha?*, (Mar. 21, 2014, 1.30 P.M.), http://www.downtoearth.org.in/content/posco-withdraw-investment-odisha--49272

[10] *Who we are*, ((Mar. 27, 2016, 7.30 P.M.), http://www.vedantaresources.com/about-us/our-story/who-we-are.aspx; Vedanta has operations in four continents.

regard to environmental clearance, the government later decided to withdraw the permission.[11] The subsidiary of Vedanta, Sterlite Industries (India) Ltd. had started work in joint venture with Orissa Mining Corporation without receiving necessary clearances. Though the application stated that no forest land would be required, Vedanta had used forest land for their operations. Several hectares of land to which natives had access were taken up for the project with the help of police and local administration.[12] When the matter reached the Supreme Court, the Court directed the government to conduct Gram Sabha meetings[13] to gather the opinion of Adhivasis in the area.[14] The entire 12 Gram Sabhas rejected the project which resulted in the withdrawal of permission by the government.[15]

[11] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: Report on India*, 2011, (Jan. 22, 2014, 6.30 P.M.), http://www.indianet.nl/pdf/AccessToJustice.pdf

[12] SUDEEP CHAKRAVARTI, CLEAR HOLD BUILD: HARD LESSONS OF BUSINESS AND HUMAN RIGHTS IN INDIA, COLLINS BUSINESS, 54 (U.P., 2014)

[13] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Section 5: Duties of holders of forest rights - The holders of any forest right, Grama Sabha and village level institutions in areas where there are any holders of any forest right under this Act are empowered to (a) protect the wildlife; (b)ensure that adjoining catchments area, water resources and other ecological sensitive areas are adequately protected; (c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage; (d) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with.

[14] Orissa Mining Corporation v. Union of India and ors., [2013] 6 S.C.R. 881

[15] The State government has approached the Supreme Court in 2016 for a reconsideration of its earlier decision.

3.2.2 Coca Cola

The company's activities have resulted in severe shortage of potable water in places like Kala Dera (Rajasthan)[16], Mehdiganj (UP)[17] and Plachimada (Kerala)[18]. Similar problems and protests have happened in areas of Thane District in Maharashtra and also in the Sivaganga District of Tamil Nadu, wherein there are severe water shortage problems because of this Company. Apart from over exploitation of water, the company was also accused for discharging waste water into fields and rivers and for distributing solid waste to farmers as fertilizers. The products of the company also tested positive for presence of pesticides. The recent debate is regarding the latest finding by the researchers at Oregon State University that 68 percent of the earth's supply of potable water is trapped in Coca Cola products.[19] It is strange and disheartening to note that large volumes of water, which are otherwise potable, are stored in the form of coke products and have become useless for human consumption.

[16] Amita Bhaduri, *People of a semi-arid Rajasthan village battle Coca Cola*, (Jan. 09, 2015, 11.55 P.M.), http://www.indiawaterportal.org/articles/people-semi-arid-rajasthan-village-battle-coca-cola

[17] *Coca-Cola battles water crisis in three states; Rajasthan, Meghalaya, Andhra Pradesh plants shut*, (Jan. 19, 2015, 12.05 P.M), http://www.firstpost.com/india/coca-cola-battles-water-crisis-in-three-states-rajasthan-meghalaya-andhra-pradesh-plants-shut-2623590.html

[18] Saby Ghoshray, *Searching For Human Rights to Water amidst Corporate Privatization in India: Hindustan Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19(4) GEO. INT'L ENVTL. L. REV. 643 (2007);

[19] *Report: Majority of Earth's Potable Water Trapped in Coca-Cola Products*, (Jan. 29, 2014, 10.40 A.M.), http://www.theonion.com/articles/report-majority-of-earths-potable-water-trapped-in,38356/?utm_source=Facebook&utm_medium=SocialMarketing&utm_campaign=LinkPreview:1:Default

The report says that though only three percent of earth's water is fresh, two-third of that exists in the form coke products.[20]

Perumatty Grama Panchayat v. State of Kerala[21] highlights the human rights violations, more specifically water rights, caused by the Coca Cola Company. In the case, the Court held that the underground water belongs to the public.[22] According to the Court, though it is customary right of every land owner to draw a reasonable amount of water necessary for his domestic use and agricultural purposes, there cannot be excessive extraction. The Court came to the conclusion that the Coca Cola Company disturbed the natural water cycle by extracting around 510 kilo litres of water per day, which has resulted in artificial interference with groundwater collection. Hence, the Court held that the extraction of water by the company created ecological imbalance and disallowed the company to continue extraction.[23]

[20] *Id.*

[21] 2004 (1) KLT 731; the issue arose when the Coco Cola Company set up its bottling plant in the Plachimada village and began extracting 510,000 litres of groundwater from through six borewells and two dug wells thereby denying water to the entire inhabitants of the village.

[22] The Court observed that the State and its instrumentalities should act as trustees of this great wealth and that the State has a duty to protect ground water against excessive exploitation. The inaction of the State in this regard will tantamount to infringement of the right to life of the people guaranteed under Article 21 of the Constitution of India. The right to clean air and unpolluted water forms part of the right to life under Article 21 of the Constitution. The Court further held that even in the absence of any law governing ground water, the Panchayat and the State are bound to protect ground water from excessive exploitation.

[23] Perumatty Grama Panchayat v. State of Kerala, 2004 (1) KLT 731,743

But, on appeal, the Division Bench in *Hindustan Coca-Cola Beverages (P) Ltd. v. Perumatty Grama Panchayat,*[24] held that a person has the right to extract water from the property, unless it is prohibited by a statute and hence extraction thereof cannot be illegal.[25] Although the Court acknowledges the fact that a person has the right to draw water only in reasonable limits, the Court failed to apply the same rule to the instant case especially when facts proved that extraction of around 510 kilo litres of water is taking place per day. But the HC directed the company to ensure regular water supply for residents and to prepare an action plan to cover villager's social security and health care.[26]

In this regard, it is submitted that the Court has erred in its decision in favour of the company. The Court should have avoided application of traditional property rights in water as water could not be equated to other tangible commodities. Instead, the Court could have applied the continuity doctrine and

[24] 2005 (2) KLT 554

[25] The Court held that "if such restriction is to apply to a legal person, it may have to apply to a natural person as well. The Panchayat had no ownership over such private water sources, in effect denying the property rights of the occupier. Ordinarily a person has right to draw water, *in reasonable limits,* without waiting for permission from the Panchayat and the Government. This alone could be the rule, and the restriction an exception"; Hindustan Coca-Cola Beverages (P) Ltd. v. Perumatty Grama Panchayat, 2005 (2) KLT 554

[26] The observation of the Court is that "Nevertheless, we feel that taking notice of the commitment to which reference and claim is made by the company, we have to direct that the company should actively involve in the community development programs for the people residing in the locality especially in the matter of health and drinking water supply, at the supervision of the Panchayat. The factory is drawing water resources from the Plachimada watershed, and also perhaps from other regions of Chittur Taluk through suction. Therefore, a reasonable amount of the water so drawn are to be utilised for benefit of general public, and as directed by the Panchayat from time to time."; *See* Para 54 of the judgment.

if so, the company could not have claimed any rights in the case.[27] The Division Bench has completely ignored the decentralization policy empowering the Panchayats to decide on issues relating to water at the local level.[28] It is to be noted that the ruling given by the Division Bench is well against the principles suggested by the National water Policy of 2002.[29] The latest development in this regard is that the company is about to be prosecuted under

[27] Saby Ghoshray, *Searching For Human Rights to Water amidst Corporate Privatization in India: Hindustan Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19(4) GEO. INT'L ENVTL. L. REV. 643 (2007); The continuity doctrine requires property rights to be attached to the recipient of that right based on evidence of continuous enjoyment of such property and though this is applied only in cases of contested properties, the very special status of water in its historic, cultural, and human rights angles could elevate it to contested property status. It is also stated that even though Coca Cola did not encroach into other's land to extract water, its culpability can be found in its extraction of excessive and unreasonable amounts of water.

[28] Article 243 of the Constitution of India read with 11th Schedule of the Constitution of India and the Panchayat Raj Act, 1994; Section 218 of the Kerala Panchayat Raj Act, 1994: Vesting of watercourse, springs, reservoirs, etc., in Village Panchayats - (1) Notwithstanding anything contained in the Kerala Land Conservancy Act 1957 or in any other law for the time being in force, all public water courses (other than river passing through more areas, than the panchayat area which the Government may, by notification in the gazette, specify), the beds and Banks of river streams, irrigation and drainage channels, canals, lakes, back waters and water courses and all standing and flowing water, springs, reservoirs, tanks, cisterns, fountains, wells, kappus, chals, stand pipes and other water works including those used by the public to such an extent as to give a prescriptive right to their use whether existing at the commencement of this Act or afterwards made, laid or erected and whether made, laid or erected at the cost of the panchayat or otherwise, and also any adjacent land, not being private property appertaining thereto shall stand transferred to and vest absolutely in the village panchayat.

[29] National Water Policy of 2002, Para 7.2: Exploitation of ground water resources should be so regulated as not to exceed the recharging possibilities, as also to ensure social equity. The detrimental environmental consequences of overexploitation of ground water need to be effectively prevented by the Central and State Governments. Ground water recharge projects should be developed and implemented for improving both the quality and availability of ground water resource.

Section 3.13 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[30] for wilfully polluting water sources of SCs and STs.[31]

3.2.3 POSCO

POSCO-India Private Limited is a subsidiary of POSCO which entered into a memorandum of understanding with the Orissa Government in relation to constructing steel and electricity plants. The company has been provided with Special Economic Zone status as well. The MoU signed between Odisha and POSCO is generally seen as a repetition of the situations leading to the Bhopal gas tragedy.[32] The same is usually cited in the context of the nation not learning from past instances of human rights violations caused by corporations.[33]

The Odisha government promised to transfer land for setting up POSCO's offices and headquarters and also agreed to expeditiously and within a reasonable time frame, hand over to the company non-forest government land

[30] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 3(1) (xiii): Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or a Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

[31] K.A. Shaji, *Case against Coca-Cola Unit under SC/ST Act*, THE HINDU, June 12, 2016, (June. 13, 2016, 11.30 A.M.), http://www.thehindu.com/todays-paper/case-against-cocacola-unit-under-scst-act/article8720139.ece

[32] SHIVAM GOEL, CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE: SCOPE FOR A NEW LEGISLATION IN INDIA, 152 (Partridge Publishing 2015)

[33] Surya Deva, *Corporate Human Rights Accountability in India: What Have We Learned from Bhopal?*, 2012, (Feb. 20, 2014, 2.30 P.M.), http://ssrn.com/abstract=2146377

for which the company completed all formalities.[34] The MoU also contained clauses wherein the Odisha government undertook to obtain the Central Government's approval within a short time and to defend their recommendations made in favour of the company in the appropriate judicial or quasi-judicial fora in case of any litigations.[35] A perusal of such clauses depicts creates a doubt regarding the role of the State as it shows the State as a commercial player rather than the guardian of interests of citizens.

The project has led to wide spread agitations attracting international criticisms to the project as the construction will lead to large scale displacement, water pollution and environmental pollution. The displacement is a major threat as the proposed project area is an agricultural land for the cultivation of betel vine and a forest land which is a home for tribals. Their migration leads to survival issues as they are used to their habitat for several generations. Apart from the possible drinking water shortage which can happen due to the large scale consumption of water for the project, the livelihood of fishing community will also be in question due to possible environmental pollution and shrinking of water resources.

[34] The Memorandum of Understanding between the Government of Orissa and M/S POSCO for Establishment of an Integrated Steel Plant, 2005, Clause (5)(i), (June. 23, 2016, 12.00 P.M.), http://www.orissa.gov.in/posco/POSCO-MoU.htm

[35] The Memorandum of Understanding between the Government of Orissa and M/S POSCO for Establishment of an Integrated Steel Plant, 2005, Clause (6)(v), (June. 23, 2016, 12.00 P.M.), http://www.orissa.gov.in/posco/POSCO-MoU.htm

The agitation against land acquisition has resulted in police atrocities, illegal arrests and has also resulted in the death of three anti-POSCO project activists in a bomb explosion in Patna Village on Saturday in Jagatsinghpur district.[36] In *Prafulla Samantray* v. *UOI*[37], the NGT observed that the POSCO project has been casually dealt with, without any comprehensive scientific data on the possible environment impacts, and suspended the environmental clearance given to the project by MoEF. Though the clearance was revalidated by MoEF in 2014, the same was again challenged before the NGT.[38] During the arguments, POSCO stated that it would be backing out from its Odisha project which had failed to take off since 2005 due to severe opposition from farmers and local villagers.[39] Another reason for backing out cited by POSCO is that it would not be able to complete the project by the deadline of the environmental clearance in 2017.[40] Though in 2010, the Odisha High Court cancelled the grant of prospective license to POSCO for iron ore mines[41], the Supreme Court struck down the order of the High Court in 2013. The Supreme Court held that

[36] HARI MOHAN MATHUR, RESETTLING DISPLACED PEOPLE: POLICY AND PRACTICE IN INDIA, 169 (Routledge 2012)
[37] Para 7 of Appeal No. 8/2011, decided on 30th March 2012 by the National Green Tribunal.
[38] ANNA GREAR, EVADNE GRANT, THOUGHT, LAW, RIGHTS AND ACTION IN THE AGE OF ENVIRONMENTAL CRISIS (Edward Elgar Publishing, 2015) 148
[39] *POSCO to Withdraw Investment from Odisha?*, (Mar. 21, 2014, 1.30 P.M.), http://www.downtoearth.org.in/content/posco-withdraw-investment-odisha--49272;
[40] Nitin Sethi, *Project in Odisha is Over, says Posco*, (May 27, 2016, 11.00 A.M.), http://www.business-standard.com/article/companies/project-in-odisha-is-over-says-posco-116040801130_1.html
[41] Geomin Minerals & Marketing (P) Ltd. v. State of Odisha, W.P. (C) No.23 of 2009, decided on 14th July, 2010

it was the Central Government to decide on granting of prospective license to POSCO.[42]

3.2.4 Tata Nano project – A discussion in the light of the Tata Code of Conduct

'Tata' is recognized as the corporation that spent 1000 crores on CSR activities which is probably the highest amount spent for CSR by a corporation in India. Clause 1 of its Code of Conduct provides that the Tata group is committed to the economic development of the countries in which it operates and the fact that they spent nearly 1000 crores for CSR activities proves that the company is committed to its own code of conduct.[43]

The principles that form part of clause 10 of the Code of Conduct have been properly implemented by the company.[44] Clause 10 provides that the company shall actively assist in the improvement of quality of life of the people in the communities in which it operates by encouraging volunteering by its employees and collaboration with community groups.[45] The fact that the company established Tata Steel Rural Development Society (TSRDS) to

[42] State of Odisha v. Geomin Minerals & Marketing (P) Ltd., Civil Appeal No. 4561 OF 2013, decided on 10th May, 2013

[43] *Tata Code of Conduct*, (Nov. 1, 2013, 11.10 A.M.), http://www.tata.com/aboutus/articlesinside/Tata-Code-of-Conduct

[44] *Id.*

[45] Tata Code of Conduct, Clause: 10: Corporate citizenship: A Tata Company shall be committed to good corporate citizenship, not only in the compliance of all relevant laws and regulations but also by actively assisting in the improvement of quality of life of the people in the communities in which it operates. The company shall encourage volunteering by its employees and collaboration with community groups.

enhance the quality of life of the communities in which Tata operates is a proof of the same. The TSRDS has achieved success in the development of water sources, training farmers on improved agricultural practices, promoting rural enterprise, infrastructure development to boost the village economy, encouraging animal husbandry and promoting art, culture, sports and games. It has also made significant improvements in sanitation, water conservation and tube well installation. The project of the company known as 'Project Sahyog' that trains the tribal youth on various livelihood skills, another project called 'Project DISHA'[46] (Development Initiative on Supporting Healthy Adolescents) that aims to provide access to information and better health services and another one titled 'SPARSH' (Strategies for Promotion of Adolescent Reproductive and Sexual Health) that provides information on issues related to adolescence and seeks to upgrade the status of the girl child in the community are all examples of this.[47]

Having said that, Tata is also known, rather infamously, for its activities in Singur. The plant for manufacturing their dream small car project 'Tata Nano' was initially established in Singur after which they had to shift the same to Sanand in Gujarat due to large scale protests and criticism. The land at Singur

[46] Sushmita Mukherjee, *Catalyzing Change: Lessons from DISHA - A Program to Promote Healthy Young People in India*, (Nov. 17, 2012, 09.30 A.M.), http://fpconference.org/2009/media/DIR_169701/15f1ae857ca97193ffff82b9ffffd524.pdf

[47] Shubha Madhukar, *The pink of rural healthcare*, December 2004, (June 27, 2013, 08.30 P.M.), http://tata.com/ourcommitment/articlesinside/W1vUqWIdKs8=/TLYVr3YPkMU=; https://nazzara.wordpress.com/, (June 27, 2013, 12.30 P.M.),

was acquired under the colonial Land Acquisition Act of 1894. Though the State Government transferred the most fertile land in Singur to Tata thereby depriving the rights of poor farmers, the provision of law restricted the transfer of land for private businesses only for public development projects. This was done in direct violation of second part of Clause 1 of the Tata Code of Conduct which states that "No Tata company shall undertake any project or activity to the detriment of the wider interests of the communities in which it operates".[48] The 997 acres of land out of the entire 1200 acres of land that the government acquired for Tata Nano project belonged to over 13000 farmers who were not willing to trade their land for meagre compensation. Though the company promised jobs to around 1000 people, it was not even close to adequate figures[49] and moreover this did not, in anyway, help the landless labourers who were having a livelihood from Singur agricultural land.

Though the Singur Land Rehabilitation and Development Act of 2011 that was passed by the W.B. State government enabled the government to recover the land from Tata for the landless farmers, the Division Bench of the Calcutta High Court declared it void and unconstitutional for want of Presidential

[48] *Tata Code of Conduct,* (Nov. 1, 2013, 11.10 A.M.), http://www.tata.com/aboutus/articlesinside/Tata-Code-of-Conduct

[49] It was estimated that around 15,000 people including farmers and sharecroppers would lose the job; Amitadyuti Kumar, *Headline Singur***,** (Nov. 1, 2013, 11.10 A.M.), http://www.countercurrents.org/ind-kumar301206.htm

assent.[50] Later, in the year 2013, the Supreme Court ordered to give back the land to agriculturalists as Tata had already withdrawn its project form Singur.[51] This incident, though largely affected the original inhabitants of the disputed land and poor farmers, in the end it became an issue involving Tata company, the ruling government and the opposition.

This incident not only violates the second part of clause 1 of the Tata Code of Conduct, but also violates clauses 8, 17 and 18. Clause 8 that provides for 'health, safety and environment' specifically states the company would prevent the wasteful use of natural resources. By illegally depriving the farmers of their most fertile land in Singur, the Tata company has committed violation of its own code of conduct.[52] The same instance has also violated the last two paras of Clause 17 of the Code of Conduct which states that "every employee of the company shall preserve the human rights of every individual and the community, and shall strive to honour commitments and every employee shall be responsible for the implementation of and compliance with the Code in his

[50] Tata Motors Limited & anr. v. The State of West Bengal & ors., A.S.T. No. 1862 of 2011, decided by the Division Bench of the Calcutta High Court on 22nd June, 2012.
[51] Kedar Nath Yadav v. State of West Bengal and ors, Civil Appeal No.8438 of 2016, decided by the S.C on 31-08-2016
[52] Tata Code of Conduct, Clause 8: Health, safety and environment: A Tata Company shall strive to provide a safe, healthy, clean and ergonomic working environment for its people. It shall prevent the wasteful use of natural resources and be committed to improving the environment, particularly with regard to the emission of greenhouse gases, and shall endeavour to offset the effect of climate change in all spheres of its activities. A Tata company, in the process of production and sale of its products and services, shall strive for economic, social and environmental sustainability.

environment."[53] The clause specifically provides for severe consequences, including termination of employment in cases of failure to adhere to the principles of the Code, but in this instance it was not applied as the violator was the company itself.[54] Clause 18 that provides that the company, in their business conduct, shall comply with all applicable laws and regulations in the territories in which they operate, was also violated as they illegally used the Land Acquisition Act of the country for their ulterior motives.[55]

Though Tata has promised quality of its products and services[56], the fact that Tata Nano caught fire at several instances proved otherwise.[57] The severe blow to its principles occurred when the company blamed the cause of fire on the foreign electrical equipment on top of the exhaust system, but did not offer a recall of the vehicles to ensure safety.[58] In this regard, it should be noted that clause 9 specifically provides that the company shall be committed to supply

[53] Tata Code of Conduct, Clause 17: Ethical conduct: Every employee of a Tata company shall preserve the human rights of every individual and the community, and shall strive to honour commitments. Every employee shall be responsible for the implementation of and compliance with the Code in his / her environment. Failure to adhere to the Code could attract severe consequences, including termination of employment.

[54] Tata Code of Conduct, Clause 17, last para: Failure to adhere to the Code could attract severe consequences, including termination of employment.

[55] Tata Code of Conduct, Clause 18: Regulatory compliance: Employees of a Tata company, in their business conduct, shall comply with all applicable laws and regulations, in letter and spirit, in all the territories in which they operate.

[56] Tata Code of Conduct, Clause 9: A Tata company shall be committed to supply goods and services of world-class quality standards, backed by after-sales services consistent with the requirements of its customers, while striving for their total satisfaction. The quality standards of the company's goods and services shall meet applicable national and international standards.

[57] Chetan, *Tata Nano Catches Fire In Mumbai*, (Oct. 07, 2013, 12.30 P.M.), http://www.drivespark.com/four-wheelers/2012/tata-nano-catches-fire-mumbai-003842.html

[58] The company just announced an extended warranty instead of a recall of the cars for detecting and rectifying the threat.

goods and services of world-class quality standards, backed by after-sales services consistent with the requirements of its customers, which was not followed in the situation mentioned above. Apart from the infamous operations at Singur, Tata's decision to build a port at Dharma also attracted severe criticism from various sides as it posed a threat to the Olive Ridley turtle and the unique marine ecosystems off the Orissa coast.

3.2.5 Tata Steel - Jamshedpur[59]

As per the 2011 Census report, Jamshedpur is the largest and the most populous Urban Agglomeration in the Indian State of Jharkhand.[60] Generally, the Tata Steel company is popular for implementing favourable work place conditions such as 8 hour work per day, benefits such as leave with pay and pension schemes. Nevertheless, Jamshedpur, also known as the 'City of Steel', 'Tatanagar' or, simply, 'Tata' due to the existence of the largest plant of Tata in the city, is being highly exploited. The local communities are stripped off their natural way of livelihood and the natural resources of their town are getting depleted.[61]

[59] Mathew Samuel & Shalini Rai, *Capitalist Punishment: How Tata Steel Killed a City*, 9(12) TEHELKA NEWS, 2015, (Mar. 29, 2014, 9.30 A.M.), http://www.tehelka.com/capitalist-punishment-how-tata-steel-killed-a-city/?singlepage=1

[60] *Jharkhand Population Census Data 2011***,** (Dec. 29, 2013, 11.00 A.M.), http://www.census2011.co.in/census/state/jharkhand.html

[61] Mathew Samuel & Shalini Rai, *Capitalist Punishment: How Tata Steel Killed a City*, 9(12) TEHELKA NEWS, 2015, (Mar. 29, 2014, 9.30 A.M.), http://www.tehelka.com/capitalist-punishment-how-tata-steel-killed-a-city/?singlepage=1

Tata is often credited for planning India's first industrial city, Jamshedpur. Jamshedpur Utilities and Services Company Limited, affiliated with Tata Steel, is responsible for the expansion and administration of Jamshedpur and its infrastructure. Though this is commendable, the fact remains that the people in the city do not have even have bare essentials for survival such as water to drink and fresh air to breathe. Tata dumps its slag, a glass-like by-product of iron-ore processing, into the rivers of the regions such as Subarnarekha and Kharkai. These rivers are now filled with algae-like growth due to huge amounts of industrial effluents. There is depreciation in the city's ambient air quality due to an unabated increase in the number of smoke-belching vehicles. As per survey conducted by the regional office of the Jharkhand State Pollution Control Board (JSPCB) , it was shown that that in the localities of Bistupur, Sakchi and Golmuri, three main air pollutants - sulphur dioxide, oxides of nitrogen and respirable suspended particulate matter have crossed their permissible limits.[62] Also, this city named after Jamshetji Nusserwanji Tata, the founder of the Tata Group of companies, has no municipal body, despite the attempts to give the Steel City a municipal body from 1967. This can be much attributed to the litigation between the Tata Group, one of the biggest Conglomerate in India and the government. Therefore, the people are left at the mercy of the chance and goodwill of the Tatas for their everyday requirements

[62] *Id.*

of building and maintaining roads, sewerage, supply of water, street lighting, etc. The proviso to Article 243Q of the Constitution of India allows an urban area to be specified as an industrial township rather than constituting a municipality.[63] However, the company with the self-proclaimed motto of 'Values Stronger Than Steel' and which has a global footprint, has but failed to provide even basic civic amenities to the residents of the city which include their workers as well in large proportions.

3.2.6 Sheonath River - Chhattisgarh

It is not only in Kerala that the people who were affected agitated against taking over the water available to them. For example, in the State of Chhattisgarh, people organized a movement against the privatization agenda against the government. The privatization move started when the government handed over the control of the Sheonath river to a private company named Radius Water Limited.[64] As per the agreement, Radius Water Limited was authorised to harness water sources through the construction of barrages over

[63] The Constitution of India, Proviso to 243Q: Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.
But the fact that Tata Steel was granted power to levy charges for municipal services at the time when the lease was renewed for another 20 years in August 2005 is contrary to Part IX of the Constitution.

[64] Binayak Das & Ganesh Pangare, *In Chhattisgarh, A River Becomes Private Property,* 41(7) ECONOMIC AND POLITICAL WEEKLY 611 (2006)

the river for supply of water to the Borai Industrial Growth Centre.[65] The State tried to defend the agreement initially by saying that they derived the power from the Land Revenue Code of Chhattisgarh State which vests with the government all rights in surface water including rivers. The agreement between the government and the company gave complete monopoly over the river to the company. The agreement gave power to the company to install water meters to charge for the water supplied to the industrial units. According to the clauses in the agreement, the water was not to be sold directly to the industrial units, but it should be sold to the Chhattisgarh State Industrial Development Corporation which would in turn sell it to the industries. As a result of the privatisation deal, the company gained complete monopoly resulting in forcible takeover of pumps of farmers which were used for withdrawing water from the river. The majority of the villagers were prohibited from taking water from the river even for their basic needs because of the reason that the company could not sell the specified quantity of water to the industrial units which in fact resulted in prevention of installing even tube wells by the poor farmers.[66] Right to fishing, washing clothes and even right to collect sand from the river banks were completely prohibited.[67] The fundamental rights of the villagers under

[65] Ruchi Pant, *From Communities' Hands to MNCs' BOOTs: A Case Study from India on Right to Water, Rights and Humanity*, 2003, (Mar. 30, 2014, 7.30 P.M.), http://www.ircwash.org/sites/default/files/Pant-2003-Communities.pdf

[66] *Id.*

[67] Prohibition of sand collection also resulted in loss of huge amount of revenue to the Panchayat.

article 21 to safe drinking water and livelihood were unashamedly discarded by this agreement. The people's movement against the same and media activism forced the government to consider cancelling the agreement.[68] Other reasons for considering cancellation included the hike in tariff demanded by the company over the tariff originally agreed upon and denial of government's move by the company to set up a dam on the river. The State Public Accounts Committee, after receiving permission from the Speaker for a probe into this issue, examined the agreement and inspected the area and tabled its report in the State Assembly in 2007. The report asked the government to cancel the agreement with Radius Water Limited and initiate appropriate actions against the company for violation of the agreement, the government has not initiated any action till date.[69]

3.2.7 Union Carbide Corporation

It goes without saying that the main accused in this instance is the government who relaxed various rules and regulations for setting up the plant in Bhopal. The Bhopal gas disaster has resulted in the death of more than 20,000 people in addition to causing various health and environmental problems. The Indian Supreme Court had initially ordered a compensation of 470 million dollars. Though criminal charges were dropped initially, the Court restored the criminal

[68] Binayak Das & Ganesh Pangare, *In Chhattisgarh, A River Becomes Private Property*, 41(7) ECONOMIC AND POLITICAL WEEKLY 611 (2006)
[69] Rose Mary George, *Dynamic Strategies and Static Issues in Water Governance: A Case of Water Privatization in India*, 2(1) JOURNAL OF MANAGEMENT AND POLICY 96 (2010)

charges against UCC later. The persons responsible for the disaster were charge sheeted under Section 304 IPC for causing death with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. However the Supreme Court changed it from 304 IPC to 304A IPC which provides for punishment for causing death by negligence. In June 2010, the Chief Judicial Magistrate Court convicted eight persons including UCIL and its officials under 304A IPC and directed UCIL to pay Rs 5 lakh and others to pay Rs 1 lakh in addition to two years imprisonment.[70] The Supreme Court in *Keshub Mahindra vs. State of M.P*[71] had excluded charges under sections 304 Part II, 324, 326 and 429 of the Indian Penal Code and ordered the trial court to frame charges under section 304A of the Indian Penal Code.[72] Though a curative petition was filed in the year 2010

[70] State of Madhya Pradesh through CBI v. Sri Warren Anderson, Cr. Case No. 8460/ 1996 decided on 7th June, 2010

[71] 1996 (6) SCC 129

[72] The Supreme Court observed that "a look at section 304 Part II shows that the concerned accused can be charged under that provision for the offence of culpable homicide not amounting to murder and when being so charged if it is alleged that the act to the concerned accused is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death the charge offences would fall under Section 304 Part II. However before any charge under Section 304 Part II can be framed, the material on record must at least prima facie show that the accused is guilty of culpable homicide and the act allegedly committed by him must amount to culpable homicide. However, if the material relied upon for framing such a charge against the concerned accused falls short of even prima facie indicating that the accused appeared to be guilty of an offence of culpable homicide, section 304 Part I or Part II would get out of the picture. In this connection we have to keep in view Section 299 of the Indian Penal Code which defines culpable homicide. It lays down that, 'whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide'. Consequently the material relied upon by the prosecution for framing a charge under Section 304 Part II must at least prima facie indicate that the accused had done an act which had caused death with at least such a knowledge that

to review *Keshub Mahindra vs. State of M.P.*[73], the same was dismissed. It is stated that thirty percent of injury claims in Bhopal gas tragedy were rejected and most of them received only a nominal amount towards compensation.[74] Both the government and the judiciary could be of no assistance to the innocent victims of Bhopal gas disaster. When the government could not succeed in getting adequate compensation from the violators to distribute to the victims, the judiciary failed to ensure stringent punishments to the perpetrators.

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he was by such act likely to cause death. The entire material which the prosecution relied upon before the Trial Court for framing the charge cannot support such a charge unless it indicates prima facie that on that fateful night when the plant was run at Bhopal it was run by the concerned accused with the knowledge that such running of the plant was likely to cause death of human beings. It cannot be disputed that mere act of running a plant as per the permission granted by the authorities would not be a criminal act. Even assuming that it was a defective plant and it was dealing with a very toxic and hazardous substance like MIC the mere act of storing such a material by the accused could not even prima facie suggest that the concerned accused thereby had knowledge that they were likely to cause death of human beings. In fairness to prosecution it was not suggested and could not be suggested that the accused had an intention to kill any human being while operating the plant. Similarly on the aforesaid material placed on record it could not be even prima facie suggested by the prosecution that any of the accused had a knowledge that by operating the plant on that fateful night wherein such dangerous and highly volatile substance like MIC was stored they had the knowledge that by this very act itself they were likely to cause death of any human being. Consequently in our view taking the entire material as aforesaid on its face value and assuming it to represent correct factual position in connection with the operation of the plant at Bhopal on that fateful night it could not be said that the said material even prima facie called for framing of a charge against the concerned accused under Section 304 Part II, IPC on the spacious plea the said act of the accused amounted to culpable homicide only because the operation of the plant on that night ultimately resulted in deaths of number of human beings and cattle."

[73] 1996 (6) SCC 129

[74] Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13(2) ASIAN-PACIFIC LAW & POLICY JOURNAL 269 (2012)

3.3 Liability of Corporations under various Indian Legislations

The Bhopal gas disaster has made it evident that there exist limitations in the Indian legal framework with respect to corporate human rights violations. At the same time, this incident triggered the Indian government to adopt and enact laws so as to ensure corporate responsibility. The New Economic policy in the year 1991 whose main objectives were privatization, liberalization and globalisation, helped the growth of business enterprises in India. Sadly, what is lacking is a strong regulation against corporate abuses and violations of human rights by them. That being said, it is to be noted that there exist various legislations at the domestic level that encompasses the aspect of corporate liability.

3.3.1 Environment Protection Act of 1986

One of the main reasons for the enactment of the Environment Protection Act of 1986 was the Bhopal Gas Disaster of 1984. According to Section 7 of the statute, "no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutants in excess of such standards as may be prescribed." It is to be noted that section 16 of the EPA specifically deals with offences by companies where it states that "where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was

directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly".[75] As per the EPA, "when an offence is committed by a company[76] and it is proved that the offence has been committed "with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company", such corporate officials shall also be deemed to be guilty of the offence."[77] The same provisions can be seen in the Water Pollution Act, 1974 and Air Pollution Act, 1981.[78] The cases such as *Indian Council for Enviro-Legal Action v. Union of India*[79] and *Vellore Citizen Welfare Forum v. Union of India*[80] have further strengthened the liability of companies in matters connected to environmental pollution.

[75] But if the official proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence, then he will be absolved from liability.

[76] The Environment Protection Act of 1986, Section 19, states who all could be complainants. It states thus, "Cognizance of Offences: No court shall take cognizance of any offence under this Act except on a complaint made by (a) the Central Government or any authority or officer authorised in this behalf by that Government, or (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid.

[77] The Environment Protection Act of 1986, Section 16.

[78] Section 47 and 40 respectively.

[79] The case was concerning environment pollution caused by private chemical manufacturing plants in Bicchri village in the state of Rajasthan.

[80] The case was concerning pollution caused by discharge of untreated effluent by the tanneries and other industries in the state of Tamil Nadu.

Environment Impact Assessment, which was introduced in the year 1994, had also resulted in making companies more responsible. EIA helps in foreseeing and addressing potential environmental problems at an early stage of project planning. It is helpful for both planners and government as it identifies key issues and formulates mitigating measures. Industries that require EIA are those which significantly alter the landscape, land use pattern; which involves manufacture, handling and use of hazardous materials; which are sited near ecologically sensitive area, urban centres, hill resorts, places of scientific and religious importance and industrial estates with constituent units of various types which would cause significant environmental damage.

3.3.2 Public Liability Insurance Act, 1991

The Bhopal gas disaster has paved the way for the enactment for another legislation as well. The hardships suffered in the context of getting compensation resulted in the enactment of the Public Liability Insurance Act, 1991, the basic aim of which is to provide immediate relief to persons affected by accidents. The 1992 Amendment of the PLIA, which introduced Environment Relief Fund, requires every owner to contribute to the Environment Relief Fund (ERF), an additional amount, not exceeding the amount of premium, as may be prescribed.[81] The setting up of ERF has helped

[81] The Public Liability Insurance Act, 1991, Section 7A: Establishment of Environmental Relief Fund - (1) the Central Government may, by notification in the official Gazette, establish a fund to be known as the Environment Relief Fund. (2) The Relief Fund shall be

in obtaining enough compensation if an accident results in greater number of victims or damage which is beyond the purview of the insurance company. According to Public Liability Insurance Act, 1991, the owner shall be liable to compensate in case of death or injury to any person other than a workman or damage to any property has resulted from an accident. The important part of this legislation is that those who claim compensation under the said provision shall not be required to plead and establish that the death, injury or damage was due to any wrongful act, neglect or default of any person.[82]

3.3.3 Factories Act, 1948

The Factories Act of 1948 is primarily intended for the protection of the health and safety of factory workers. The significant aspect of the Factories Act, 1948 is the definition of 'occupier' provided under Section 2 (n) of the Act. Section 2(n) defines an 'occupier' of a factory to mean the person, who has ultimate control over the affairs of the factory and in relation to a company and it has been specifically provided under Section 2(n)(ii) of the Act that any one of the

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utilised for paying, in accordance with the provisions of this Act and the scheme, relief under the award made by the Collector under section 7. (3) The Central Government may, by notification in the Official Gazette, make a scheme specifying the authority in which the relief fund shall vest, the manner in which the Fund shall be administered the form and the manner in which money shall be drawn from the Relief Fund and for all other matters connected with or incidental to the administration of the Relief Fund and the payment of relief therefrom.

[82] The Public Liability Insurance Act, 1991, Section 3: Liability to give relief in certain cases on principle of no fault - (1) Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in Schedule for such death, injury or damage. (2) In any claim for relief under sub-section (I), the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.

directors shall be deemed to be the occupier. This solves the problem of finding the person who was in charge or responsible for the activities/business of the company at the time when the offence was committed.

The Factories Act, under sections 51 and 54, regulate the working hours of factory workers. As per these sections, no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week[83] or more than nine hours in any day[84] and in case any worker works more than these limits, he is entitled to wages at the rate of twice his ordinary rate of wages. The Act specifically prohibits children below the age of fourteen to work in any factory.

3.3.4 Bonded Labour System Abolition Act, 1976

The enactment of the Bonded Labour System Abolition Act was a progressive step towards protection of vulnerable sections of society by making it a criminal offence to continue the practice of bonded labour. As per the Act, "every obligation of a bonded labourer to repay any bonded debt or such part of any bonded debt unsatisfied immediately before commencement of this Act,

[83] The Factories Act, 1948, Section 51: Weekly hours - No adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week.
[84] The Factories Act, 1948, Section 54: Daily hours - Subject to the provisions of section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day. Provided that, subject to the previous approval of the Chief Inspector, the daily maximum specified in this section may be exceeded in order to facilitate the change of shifts.

shall be deemed to have been extinguished".[85] The case of *Bandhua Mukti Morcha v. Union of India*[86] is a landmark judgment where the SC reiterated the right of bonded labourers to live with human dignity. The Court interpreted the Directive Principles of State Policy by reading the same with Article 21 in the context of right to live with human dignity.

3.3.5 The Child Labour (Prohibition and Regulation) Act, 1986

Section 3 of the Child Labour (Prohibition and Regulation) Act mandates that no "child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on." Section 7 of the Act regulates the working hours of children. As per section 7(2), "the period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour".

3.3.6 The Information Technology Act, 2000

The IT Act of 2000 was enacted to provide legal validity to e-commerce. According to Section 85 of the IT Act, 2000 'if a company contravenes any provision of this law, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the

[85] The Bonded Labour System (Abolition) Act, 1976, Section 6(1), (Dec. 5, 2013, 1.30 P.M.), http://pblabour.gov.in/pdf/rti/rti_chapter18.pdf
[86] AIR (1992) SC 38

conduct of business of the company as well as the company, shall be guilty of the contravention'. The proviso to the section states that such person shall not be liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

3.3.7 The Geneva Conventions Act, 1960

The Geneva Conventions Act, 1960 provides for criminal liability. Section 3 of the Act provides that 'if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the Conventions he shall be punished - (a) where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life; and (b) in any other case, with imprisonment for a term which may extend to fourteen years." The same Act is equally applicable in the cases of offences by companies too. Section 14(1) of the Act states that in the case of an offence by a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence. The persons will be exempt from

liability if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.[87]

3.3.8 Drugs and Cosmetics Act, 1940

The Drugs and Cosmetics Act, 1940 provides that companies can sell any drug only with a valid licence and it specifically lays down that companies cannot manufacture or sell or distribute adulterated, misbranded or spurious drugs or cosmetics. Section 18 of the legislation deals with 'Prohibition of manufacture and sale or certain drugs and cosmetics' which prohibits the sale, stock, exhibit or distribution of any drug which is not of a standard quality, or is misbranded, adulterated or spurious. The provision equally applies to any cosmetic which is not of a standard quality or is misbranded or spurious as well. The only main exemption provided under this section is for manufacturing small quantities of any drug for the purpose of examination, test or analysis.[88]

[87] Further, the section states that where an offence under this chapter has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

[88] Section 18: Prohibition of manufacture and sale or certain drugs and cosmetics. – From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf- (a): manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute– (i) Any drug which is not of a standard quality, or is misbranded, adulterated or spurious; (ii) Any cosmetic which is not of a standard quality or is misbranded or spurious; (iii) Any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof the true formula or list of active ingredients contained in it together with the quantities, thereof; (iv) Any drug which by means of any statement design or device accompanying it or by any other means, purports or claims; (v) Any cosmetic containing any ingredient, which

3.3.9 Responsibility on Companies under Labour Welfare Legislations

There are various labour welfare legislations in India such as the Payment of Bonus Act of 1965, Payment of Wages Act of 1936, Payment of Gratuity Act of 1972, Workmen's Compensation Act of 1923, Equal Remuneration Act of 1976 and so on and most of them contain provisions relating to corporate responsibilities too.

The Payment of Bonus Act, 1965 recognises the contribution of the employees towards the company's profit and thus seeks to provide a legitimate share in the company's profits.[89] The Payment of Gratuity Act, 1972 provides a social security in the form of gratuity in the event of employees' superannuation, retirement, resignation, death or total disablement.[90] The Payment of Wages

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may render it unsafe or harmful for use under the directions, indicated or recommended; (vi) Any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made there under; (b) Sell or stock or exhibit or offer for sale, or distribute any drug which has been imported or manufactured in contravention of any of the provisions of this Act or any rule made thereunder,

Provided that nothing in this section shall apply to the manufacture, subject to prescribed conditions, of small quantities of any drug for the purpose of examination, test or analysis; Provided further that the Central Government may, after consultation with the Board by notification in the Official Gazette, permit, subject to any conditions specified in the notification, the manufacture for sale or for distribution, sale, stocking or exhibiting or offering for sale or distribution of any drug or class of drugs not being of standard quality.

[89] Preamble of the statute: An Act to provide for the payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith; Section 8 of the Payment of Bonus Act of 1965: Eligibility for bonus - Every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year.

[90] Preamble of the statute: An Act to provide for a Scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. Section 4 of the Payment of Gratuity Act, 1972: Payment of gratuity - (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for

Act, 1936 ensures payment of eligible wages within the time prescribed.[91] It also prevents unauthorised deduction of wages by the employer.[92] The legislation takes care of principles of natural justice as well in case of any fine to be imposed on the employee.[93] The Workmen's Compensation Act, 1923 takes care of the responsibilities of the employers in case of personal injury to their employees in the course of employment. The Workmen's Compensation Act provides for adequate compensation to the workmen and their dependants

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not less than five years, - (a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

[91] The Payment of Wages Act, 1936, Section 3: Responsibility for payment of wages - Every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under this Act. Provided that, in the case of persons employed (otherwise than by a contractor)-- (a) in factories, if a person has been named as the manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948; (b) in industrial or other establishments, if there is a person responsible to the employer for the supervision and control of the industrial or other establishments; (c) upon railways (otherwise than in factories), if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned; the person so named, the person so responsible to the employer, or the person so nominated, as the case may be, shall also be responsible for such payment.

[92] The Payment of Wages Act, 1936, Section 7: Deductions which may be made from wages - (1) Notwithstanding the provisions of sub-section (2) of section 47 of the Indian Railways Act, 1890, the wages of an employed person shall be paid to him without deductions of any kind except those authorised by or under this Act. Explanation I --Every payment made by the employed person to the employer or his agent shall, for the purposes of this Act, be deemed to be a deduction from wages. Explanation II --Any loss of wages resulting from the imposition, for good and sufficient cause, upon a person employed of any of the following penalties, namely: (i) the withholding of increment or promotion (including the stoppage of increment at an efficiency bar); (ii) the reduction to a lower post or time scale or to a lower stage in a time scale; or (iii) suspension; shall not be deemed to be a deduction from wages in any case where the rules framed by the employer for the imposition of any such penalty are in conformity with the requirements, if any, which may be specified in this behalf by the State Government by notification in the Official Gazette.

[93] The Payment of Wages Act, 1936, Section 8(3: No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.

in case of injuries caused during the course of employment.[94] The Equal Remuneration Act, 1976 provides for equal pay for equal work to workmen.[95]

[94] The Workmen's Compensation Act, 1923, Section 3: Employer's liability for compensation - (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment his employer shall be liable to pay compensation in accordance with the provisions of this Chapter. Provided that the employer shall not be so liable (a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days; (b) in respect of any injury not resulting in death or permanent total disablement caused by an accident which is directly attributable to the workman having been at the time thereof under the influence of drink or drugs or the wilful disobedience of the workman to an order expressly given or to a rule expressly framed for the purpose of securing the safety of workmen or the wilful removal or disregard by the workman of any safety guard or other device he knew to have been provided for the purpose of securing the safety of workman. (2) If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months (which period shall not include a period of service under any other employer in the same kind of employment) in any employment specified in Part B of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment or if a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment contracts any disease specified therein as an occupational disease peculiar to that employment the contracting of the disease shall be deemed to be as injury by accident within the meaning of this section and unless the contrary is proved the accident shall be deemed to have arisen out of and in the course of the employment. Provided that if it proved that a workman whilst in the service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to that employment during a continuous period which is less than the period specified under this sub-section for that employment; and that the disease has arisen out of and in the course of the employment the contracting of such disease shall be deemed to be an injury by accident within the meaning of this section : Provided further that if it is proved that a workman who having served under any employer in any employment specified in Part B of Schedule III or who having served under one or more employers in any employment specified in Part C of that Schedule for a continuous period specified under this sub-section for that employment and he has after the cessation of such service contracted any disease specified in the said Part B or the said Part C as the case may be as an occupational disease peculiar to the employment and that such disease arose out of the employment the contracting of the disease shall be deemed to be injury by accident within the meaning of this section. (2A) If a workman employed in any employment specified in Part C of Schedule III contracts any occupational disease peculiar to that employment the contracting whereof is deemed to be an injury by accident within the meaning of this section and such employment was under more than one employer all such employers shall be liable for the payment of the compensation in such proportion as the Commissioner may in the circumstances deem just. (3) The Central Government or the State Government after giving by notification in the Official Gazette not

3.4 Legal Liability of Corporations – Indian Constitutional Perspective

Article 51(c) of the Constitution provides that the State shall endeavour to 'foster respect for international law and treaty obligations in the dealings of organized peoples with one another.' India has ratified several international human rights instruments such as the International Covenant on Civil and

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less than three months' notice of its intention so to do may by a like notification add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively and thereupon the provisions of sub-section (2) shall apply in the case of a notification by the Central Government within the territories to which this Act extends or in case of and notification by the State Government within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments. Save as provided by sub-sections (2), (2A) and (3) no compensation shall be payable to a workman in respect of any disease unless the disease is directly attributable to a specific injury by accident arising out of and in the course of his employment. Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury - (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or (b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

[95] The Equal Remuneration Act, 1976, Section 4: Duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature - (1) No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature. (2) No employer shall, for the purpose of complying with the provisions of sub-section (1), reduce the rate of remuneration of any worker. (3) Where, in an establishment on employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or work of a similar nature are different only on the ground of sex, then the higher (in cases where there are only two rates), or, as the case may be, the highest (in cases where there are more than two rates) of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers. Provided that nothing in this sub-section shall be deemed to entitle a worker to the revision of the rate of remuneration payable to him or her with reference to the service rendered by him or her before the commencement of this Act.

Political Rights,[96] the International Covenant on Economic, Social and Cultural Rights[97], the Convention on the Rights of the Child[98], the Convention concerning Forced or Compulsory Labour[99], the Genocide Convention[100], the International Convention on the Elimination of All Forms of Racial

[96] ICCPR, Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. According to the Human Rights Committee, the term 'ensure' in Article 2(1) of the ICCPR encompasses the responsibility of the State to protect individuals against violations by both State agents and private entities; See Individual report on the International Covenant on Civil and Political Rights, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties,* Report No. III, June 2007, 4, (Mar. 24, 2013, 9.30 A.M.), https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-ICCPR-Jun-2007.pdf. ICCPR, Article 5(1): Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

[97] ICESCR, Article 2(1): Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Article 5(1) of the ICESCR: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

[98] CRC, Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[99] Convention concerning Forced or Compulsory Labour, Article 4(1): The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations. Article 5(1) of the Convention concerning Forced or Compulsory Labour: No concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade.

[100] Genocide Convention, Article 4: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Discrimination[101] and the Convention on the Elimination of All Forms of Discrimination against Women[102]. These, either directly or indirectly, contain provisions relating to the human rights responsibilities of business enterprises. Sadly India is yet to ratify India international instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[103] and the Statute of the International Criminal Court[104] which are also relevant so far as the corporate human rights violations are concerned. But the major relief is the impact of judgments like *Vishaka v. State of Rajasthan*[105] where the S.C. has specifically observed that when there is no legislation to the contrary, international conventions not inconsistent with the fundamental rights can be read into the Indian context.

[101] International Convention on the Elimination of All Forms of Racial Discrimination, Article 2(1): States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.

[102] Convention on the Elimination of All Forms of Discrimination against Women, Article 2(e): States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.

[103] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4: (1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

[104] Corporate officers could be made liable under the Statute of the International Criminal Court. *See* The Statute of the International Criminal Court, Article 25: (1) The Court shall have jurisdiction over natural persons pursuant to this Statute. (2) A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

[105] (1997) 6 SCC 241

It is of no doubt that corporations owe a duty not to commit human rights violations thereby protecting the workforce, consumers, environment and community at large. The reciprocal duty on the part of the part of the companies to protect the rights of the people is clear from the quote below.

> *"It is the state that allows companies to carry on business for profit under the protective umbrella of its laws and the courts provide reliefs from unfair trade practices and mechanism for securing debts. In such a context, a reciprocal duty is vested on the company to prevent criminal harm from occurring and to adopt policies directed towards the prevention of crime by establishing a corporate ethos which gives appropriate place to protect the public from crime which might occur in the course of company's business."*[106]

Apart from this concept of right-duty correlative, it should be analysed whether a corporation qualifies itself to be a State under Article 12 of the Constitution of India or at least comes under the term 'other authority' under Article 226. The reason for such an analysis is that Part III of the Indian Constitution provides for fundamental rights with a view to secure the basic rights of citizens/persons. Part III could also be interpreted in a different way. Interpreting Part III as providing basic human rights to persons/citizens would lead to several inconsistencies and confusions as it is not possible to secure natural rights through a written document. Inconsistencies also exist when one questions the authority of the enumerated human rights under Part III before

[106] James Gobert, *Corporate Criminality: New Crimes for the Times*, 1994 Crim L.R. 722

1950. Hence, provisions under Part III could be interpreted as inherent restrictions on the State not to violate the rights provided under it. The negatively worded Article 21 would prove this. Article 21 of the Constitution of India states that State cannot deprive the right to life or personal liberty except according to the procedure established by law.[107] Thus, fundamental rights, when looked at from one angle, confer justiciable rights on the people and from another point of view are restrictions and limitations on governmental action.[108] The latter interpretation does not mean that basic human rights such as right to life, right to equality, freedom of speech and expression, freedom of movement and so on did not exist before the enactment of the Constitution. At the same time, it signifies that once these rights are infringed, the State is accountable for the same.

Enforcing fundamental rights against the State is the best means of securing one's basic human rights. Enforcing the same against private persons is difficult although there have been such instances where the same has been allowed when the activities of such private persons are of public nature or are those previously vested with the State. The following part of the research attempts to analyse whether it is possible to claim violation of the rights under Part III against bodies other than the State which includes a corporation as well.

[107] The Constitution of India, Article 21: Protection of Life and Personal Liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.
[108] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 457 (Wadhwa Nagpur, 4th ed. 1993)

The discussions start with the possibility of including corporations under the ambit of Article 12 of the Constitution of India and end with the analysis of including them under the term 'other authority' in Article 226 of the Constitution of India.

In the landmark case of *Ajay Hasia v. Khalid Mujib Sehravadi*[109], the Apex Court has laid down different tests[110] to analyse whether a corporation falls under the category of 'other authorities' under Article 12.[111]

It was held in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[112] that these tests were held not to be a rigid set of principles so that if

[109] AIR 1981 SC 487; In the instant case, a society registered under the Societies Registration Act running the regional engineering college, sponsored, supervised and financially supported by the government was held to be an 'authority' for the purpose of Article 12.

[110] The different tests were gathered from the decision of the Supreme Court in the case *Ramana Dayaram Shetty v. International Airport Authority of India & Ors.,* AIR 1979 SC 1628 wherein the Court held that article 14 applies to every state action and since 'state' is defined in article 12 to include not only the Government of India and the Government of each of the States, but also "all local or other authorities within the territory of India or under the control of the Government of India", it must apply to action of "other authorities" and they must be held subject to the same constitutional limitation as the Government.

[111] They are: (1) If the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected. (4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. (5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

[112] (2002) 5 SCC 111; the Court held that CSIR is a state thereby overruling *Sabhajit Tewari v. UOI* and *Chander Mohan* Khanna *v. NCERT,* 1992 AIR 76. The Court also observed that

a body falls under the definition of one of the tests, *ex hypothesi*, it must be considered to be a State within the meaning of Article 12. The Court in *Ajay Hasia v. Khalid Mujib Sehravadi*[113], analyses the reasons for expanding the scope of Article 12. The Court observes thus,

"The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the corporation came into being as the third arm of the Government and over the years it has been increasingly utilised by the Government for setting up and running public enterprises and carrying out other public functions. Today with increasing assumption by the Government of commercial ventures and economic projects, the corporation has become an effective legal contrivance in the hands of the Government for carrying out its activities, for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with professional skills and on business principles and it is blissfully free from "departmental rigidity, slow motion procedure and hierarchy of officers". The Government in many of its commercial ventures and public enterprises is resorting to more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases "the true owner is the State, the real operator is the State and the effective controllorate is the State and accountability for its

when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a state.

[113] AIR 1981 SC 487

actions to the community and to Parliament is of the State." It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government."

Though the Court observes that many of the State activities are either performed by the corporations wherein it can be classified as public actions or by the government through the corporations where there is an existence of deep and pervasive control of the government, it is not clear where the private corporations comes within the ambit of 'other authorities' under Article 12 of the Constitution of India.[114]

The National Commission to Review the Working of the Constitution (NCRWC) in the year 2000 has recommended that an explanation in the following lines has to be added to Article 12 of the Constitution of India. "In this article, the expression "other authorities" shall include any person in relation to such of its functions which are of a public nature."[115] Though this was not approved by the Ministry of Law and Justice, the reason for such a recommendation seems important. The reason was that the functions of a

[114] ARUNA VENKAT, ENVIRONMENTAL LAW AND POLICY 73 (PHI Learning Pvt. Ltd. 2011) expressly states that the question as to whether private companies registered under the Companies Act is a state has been left undecided by the Courts.
[115] *NCRWC Report*, (Mar. 28, 2013, 4.30 P.M.), lawmin.nic.in/ncrwc/finalreport/vich3.htm

welfare State are managed by individuals and private agencies as a result of globalisation and privatisation.[116]

The Supreme Court in *Federal Bank Ltd v. Sagar Thomas*[117], observed that even if it may be assumed that one or the other tests as provided in *Ajay Hasia* may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying out functions that are public in nature. This became the main reason for holding that a private bank (Federal Bank in this case) is not a State. The Court further observed that a private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. But an earlier decision of the Supreme Court in *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors*[118], has held that the term 'authority' used in Article 226 must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power

[116] Aakriti Mathur, *Need for Reform in Article 12 of the Constitution: Obligation of Private Entities to protect Fundamental Rights*, (Mar. 28, 2013, 5.30 P.M.), www.mightylaws.in/661/reform-article-12-constitution-obligation-private-entities-protect-fundamental-rights

[117] (2003) 10 SCC 733

[118] AIR 1989 SC 1607; the main issue in the case was whether a mandamus writ under Article 226 will lie against a public trust running a science college at Ahmedabad. Though a contention was raised that the trust was a private body and hence was not subject to writ jurisdiction, the Court held that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the state; the case was related to termination of 11 teachers and the arrears of salary and allowances, provident fund and gratuity dues and closure compensation demanded by them.

on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. It was further observed that they may cover any other person or body performing public duty. The following remarks in the judgment are worth highlighting,

> "*The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.*"

The case of *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors*[119] has been referred to in *Jagveer Singh v. Chairman Co-operative Textile Mills Ltd*[120], wherein it was held that even though the co-operative society was not a 'State' under Article 12, a writ could be issued under Article 226 because its functions are of public nature.

The inference that can be drawn from these case laws is that a writ may lie against a private corporation if it performs certain functions which can be said to be public in character and can be showed to have a positive obligation to the affected party. Another authority to support this inference is *Zee Telefilms Ltd.*

[119] AIR 1989 SC 1607

[120] 1993 (3) AWC 2349; writ was prayed in order to quash an order of suspension in contemplation of a disciplinary proceeding.

v. UOI[121], wherein it was observed that a private body which is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which are otherwise the job of the government is considered 'State'. But in *Asulal Loya v. UOI*[122], it has been held that a writ petition is not maintainable against a private limited company or a public limited company in which the State does not exercise all pervasive control.

The golden opportunity for the Courts to bring in private corporations under the ambit of Article 12 of the Constitution of India was in *M.C. Mehta v. UOI*[123]. The issue in the case was whether a private corporation such as Shriram Foods and Fertilizer Industries comes within the ambit of Article 12 so as to amenable to the discipline of Article 12 but the Supreme Court left the issue undecided.[124] The Supreme Court found that Shriram is registered under the Industries Development and Regulation Act 1951 which was enacted to give effect to the 1948 policy resolution and is coming under the second category of

[121] AIR 2005 SC 2977; ultimately held as per majority that the Board of Control for Cricket in India is not a state under Article 12.
[122] (2008) 154 DLT 314; The Court referred to *Binny Ltd v. Sadasivan and Ors*, (2005) 6 SCC 657 where the Supreme Court held that a writ petition under Article 226 is normally issued against public authorities and can also be issued against private authorities when they are discharging public functions and the decision which is sought to be corrected or enforced must be in discharge of a public function.
[123] AIR 1987 SC 1086
[124] The Court found that industries have been classified into three as according to the Industrial Policy Resolution, 1948 namely (1) those under exclusive responsibility of State, (2) those which would be progressively State owned but the private parties may supplement the effort of the State by promoting and development undertakings either on its own or with State participation[124], (3) those (remaining ones) left to the private sector.

industries. Though there were clear arguments showing that Shriram was required to obtain a licence under the Act for certain purposes, a licence under the Factories Act, a licence for its manufacturing activities from Municipal Authorities under the Delhi Municipal Act, 1957 and was subject to extensive regulation under the Water Act, 1974 as well as the Air Act, 1981, the Court summed up the entire discussion by stating that "this Court has throughout the last few years expanded the horizon of Article 12 primarily to inject respect for human rights and social conscience in our corporate structure."

But the Court propounded the concept of 'absolute liability' in this case whereby the Court observed thus,

> *"An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The enterprise must be absolutely liable to compensate for such harm and it should be no answer for the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part".*

In a recent judgment of 2014, *Dr. John Kuriakose v. State of Kerala and ors.*[125], the Kerala H.C. held that writ is maintainable even against a private management, thus overruling the decision in *Madhavan Pillai v. Balan and*

[125] WP(C).No. 36422 of 2004 (J), decided on 18.12.2014; the case is related to disciplinary proceedings initiated against a lecturer of a private institution.

others[126]. The Court in *Madhavan Pillai v. Balan*[127], has observed that the college concerned being purely a private College; the affiliation to the University would not make it a statutory body, or give the teacher, a statutory status. The interesting factor in the case of *Dr. John Kuriakose v. State of Kerala*[128], is that the judgment refers to the decision in *Praga Tools Corpn. v. C.A. Imanual*[129] which held that a mandamus can be issued against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body. It was observed thus, "It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities."[130] The Court further observed that "mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even

[126] 1979 KLT 220
[127] 1979 KLT 220
[128] WP(C).No. 36422 of 2004 (J), decided on 18.12.2014
[129] (1969)1 SCC 585; In the instant case, a group of workmen sought a writ of mandamus against the company enforcing an agreement that provided for retrenchment of 92 of the workmen. The said agreement was against the previous ones entered into between the company and trade union.
[130] *Praga Tools Corpn. v. C.A. Imanual*, (1969)1 SCC 585, Para 6 of the judgment.

contract. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226."[131]

Though the Court in *Dr. John Kuriakose v. State of Kerala*[132] refers to the observation made in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*[133] that a company incorporated under the Companies Act is not created by the Companies Act and hence not a statutory body because it is not created by a statute but created under a statute and therefore no writ can be issued against it, the Kerala HC relies on other judgments to prove that under Art. 226, the Court can issue writs against bodies incorporated under the statute and not necessarily by a statute. The Court relies on *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors*[134] to show that it's the duty conferred on the body that is important and not the form of the body.

[131] *Dr. John Kuriakose v. State of Kerala and ors.*, WP(C).No. 36422 of 2004 (J), decided by the Kerala H.C. on 18.12.2014, Para 22 of the judgment.
[132] WP(C).No. 36422 of 2004 (J), decided by the Kerala H.C. on 18.12.2014.
[133] AIR 1975 SC 1331 at p. 1339
[134] AIR 1989 SC 1607

Thus, as stated before, according to *Praga Tools Corpn. v. C.A. Imanual*[135], a mandamus can be issued against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body. It is hereby submitted that the Companies Act, 2013 makes it mandatory to spend 2% of the profits on CSR to certain companies that meet the prescribed criteria. It will be analysed in detail about the various objectives and the nature of CSR in the subsequent chapters of this work. As CSR is a duty placed by the statute, a duty in the nature of public duty, it is highly recommended that Courts should favour issuing writs to companies in case they fail to discharge the public functions in the nature of CSR imposed on them. The observation in . *John Kuriakose v. State of Kerala*[136] supports this contention. It was observed by the learned Judge in the said case that "a private body on which public duty has been imposed by a statute, can thus be commanded to perform statutory duty and any violation in performance of statutory duty can be complained in writ proceeding; thus where allegation of statutory violation is made, writ petition is clearly maintainable under Article 226 of the Constitution."[137] The decision in *Ramesh Ahluwalia v. State of Punjab*[138] further supports this contention. This case is also an authority to

[135] (1969)1 SCC 585
[136] WP(C).No. 36422 of 2004 (J), decided by the Kerala H.C. on 18.12.2014.
[137] *Dr. John Kuriakose v. State of Kerala and ors.,* WP(C).No. 36422 of 2004 (J), decided by the Kerala H.C. on 18.12.2014, Para 18 of the judgment.
[138] (2012)12 SCC 331; the case related to the decision taken by the Disciplinary Committee of a public school terminating the services of an administrative officer.

support that even a purely private body, where the State has no control over its internal affairs, would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution, for issuance of a writ of mandamus. The only condition being that it should be performing public functions which are normally expected to be performed by the State authorities.

In this regard, it is submitted that Schedule VII of the Companies Act, 2013 deals with the CSR activities and it is crystal clear that all the identified activities are expected to be performed by State authorities and are in the nature of public functions.[139] Hence the said decisions may be used as a guide to support the contention that companies, both public and private should also be brought under the ambit of writ jurisdiction, specifically with regard to CSR functions. But the fact that the CSR obligations are not mandatory and are not

[139] In Schedule VII, for items (i) to (x) and the entries relating thereto, the following items and entries shall be substitutes, namely:- (i) eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and making available safe drinking water; (ii) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and differently abled and livelihood enhancements projects; (iii) promoting gender equality, empowering women, setting up homes, and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups; (iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources, and maintaining quality of soil, air and water; (v) protection of national heritage, art and culture including restoration of buildings and sites for historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts; (vi) measures for the benefit of armed forces veterans, war widows and their dependants; (vii) training to promote rural sports, nationally recognized sports, paralympic sports and Olympic sports; (viii) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; (ix) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government; (x) rural development projects.

imposed on all corporations stand as a hindrance in achieving the said objective[140]. Moreover, even assuming that the CSR obligations would be made mandatory, the writ jurisdiction would lie only with respect to such CSR obligations and not in all cases of corporate human rights violations.

3.5 Conclusion

In addition to those mentioned in the chapter, there have been protests in various other parts of India against corporate establishments. Protests against mining activity in Chatttisgarh by South Eastern Coal India Limited which is a subsidiary of Coal India Limited and refusal to sell land in Odisha for Rungta Mines proposed by IDCO are some examples[141]. There have also been instances where the natives were misled or kept unaware of the purpose for which their land was confiscated. JSW Steel Ltd. in connivance with the Jharkhand State government misled the villagers by stating that the lands were purchased for a project to bring water for a proposed railway line[142]. Corporates have also been involved in seizure of timber in Dantewada, causing air and water pollution in various parts of Chennai (chemical industries), torture and killing of protesting civilians of a boundary wall for Tata Steel project at

[140] A detailed explanation on the shortcomings of the CSR obligation is provided in the sixth chapter of this study.
[141] Ashish Kothari, *Decision of the People, by the People, for the People*, THE HINDU (Kochi edition) Op-ed, May 18, 2016, at p. 11
[142] SUDEEP CHAKRAVARTI, CLEAR HOLD BUILD: HARD LESSONS OF BUSINESS AND HUMAN RIGHTS IN INDIA, COLLINS BUSINESS, 97 (U.P., 2014)

Kalinga Nagar in a land given to Tata that was managed by the Industrial Infrastructure Development Corporation of Orissa.

There are various legislations that exist in India and outside that deal with activities of corporations *vis-a-vis* environment, human rights, labour, criminal law and so on which have been dealt with extensively in the forthcoming chapters. These are regulations from outside and not from within the entity. The legislations that exist at the national level and international level aims at providing penalties for not complying with the set standards but it has been inadequate in shaping ethical corporate behaviour and hence there is a need to regulate from within the institution. This could be accomplished with the help of a legal framework that provides for corporate human rights accountability. The instances of corporate human rights abuses detailed out in the chapter shows the need for strengthening the provisions relating to corporate liability that exist at the domestic level or for providing for a new legal framework on corporate human rights accountability. The fact is that many legislations dealing with environmental protection and corporate liability came up after the Bhopal Gas Tragedy. This does not suggest that our nation was devoid of any form of legislations earlier. Still we had to witness the most brutal human rights violations, the after effects of which are still seen. If the absence of a concrete set of legislations was the reason for the Bhopal Gas Tragedy to occur, by the advent of new legislations, similar forms of violations ought to have never

occurred. The instances of human rights violations by Coca Cola, Tata, POSCO, Vedanta and Radius Water Limited prove otherwise.

The present judicial understanding is that the concept of 'State' under Article 12 does not extend to purely private companies which will have serious implications to the victims of environmental hazards because as the fundamental rights are available and enforceable only against the State, even the right to clean environment as a fundamental right cannot be enforced against private corporations.[143] But there are decisions that are in favour of holding corporations liable for violation of fundamental rights under the Constitution of India. The recent decision by the Calcutta High Court in *Indian Oil Officers' Association & anr v. Indian Oil Corporation Ltd & ors*[144] was also in favour of holding that a body corporate may sue and be sued for violation of Article 19 of the Constitution of India. The issue in question in the instant case was regarding the validity of a MoU entered into between the petitioners, which is a registered trade union and hence a body corporate and the Corporation. The petitioners contend that the agreement, as a whole, and specifically clauses 4,11,13,16[145], as the Corporation had obtained this

[143] ARUNA VENKAT, ENVIRONMENTAL LAW AND POLICY 73 (PHI Learning Pvt Ltd, 1st ed. 2011)
[144] W.P. No. 10016 (W) of 2015 decided on 15th June, 2016
[145] Clause 4 - Association shall on its own resolve and make endeavour to settle all the issues by mutual negotiation with the Management and shall not be part of any other federation/or collective forum. Clause 11 - Officers in Grade 'G' and above shall not be members of the Association. Clause 13 - Association will not interfere in any manner in the rights of Management concerning employment, non-employment, terms of employment and conditions

agreement by way of subterfuge, duress, coercion and undue influence[146]. The petitioners contended that the provisions of the agreement violated their fundamental rights under Article 19 of the Constitution of India and this is exactly the main issue in this case. Article 19 is available only to citizens and the association, being a body corporate, is not conferred the right under this Article. But the court comes to the conclusion that a body corporate may not only sue or be sued for violation of Article 19 but it may also sue for violation of Article 14 as well. The former part is very important as the court explicitly consents to the fact that body corporates could be sued for violation of Article 19 of the Constitution of India. But the decision is based on *Delhi Cloth & General Mills Co. Ltd. v. Union of India and Others*[147], which is in turn based on decisions such as *R.C. Cooper v. Union of India*[148] and *Bennett Coleman & Co. & Ors v. Union of India & Ors.*[149] The latter two judgments have clarified the issue of body corporate claiming violation of fundamental rights under Article 19. These decisions only convey the idea that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. In

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of service. Clause 16 - Any officer in the position of Head of Department, Location Head irrespective of the grade shall not participate in any form of agitation.
18. Any violation of this code, reported or observed

[146] According to the petitioners, three of the signatories on behalf of the Association were dismissed employees, other three were suspended officers and they all were made parties to the said agreement on promise of reinstatement, fast track promotion and desired posting.

[147] (1983) 4 SCC 166

[148] [1970] 3 S.C.R. 530

[149] [1973] 2 S.C.R. 757

short, the individual right under Article 19 is not lost by reason of the fact that he is a shareholder of the company.

The corporations discussed in this chapter, who violate human rights, possess more economic resources than most of the States and it is all the more important that they also should be brought within the category of writ jurisdiction so that they could be prevented from violating fundamental rights of the public in general. The observations made by the judges in cases such as *Dr. John Kuriakose v. State of Kerala*[150], *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors*[151] and *Praga Tools Corpn. v. C.A. Imanual*[152], coupled with the a duty of CSR spending for public nature of activities enumerated under Schedule VII of the Companies Act, 2013 provides for a considerable expectation that the Indian judiciary, in future, would favour including corporations under the ambit of writ jurisdiction. Such progressive kind of thinking would certainly help in securing adequate remedies for victims of corporate human rights abuses. For such a progressive attitude, the first step that should be taken is to make the CSR obligations under the Companies Act of 2013, mandatory.

[150] WP(C).No. 36422 of 2004 (J), decided on 18.12.2014
[151] AIR 1989 SC 1607
[152] (1969) 1 SCC 585; In the instant case, a group of workmen sought a writ of mandamus against the company enforcing an agreement that provided for retrenchment of 92 of the workmen. The said agreement was against the previous ones entered into between the company and the trade union.

CHAPTER 4

HUMAN RIGHTS VIOLATIONS AND LEGAL LIABILITY OF CORPORATIONS – INTERNATIONAL PERSPECTIVE

4.1 Introduction

It is true that there existed differences between the notion of industrial growth in the Western countries and India. The West had earlier realized the adverse impact of industrialization and has started agitating against it for years. The Indian scenario with regard to industrialization is different. There had been considerable amount of agitations in the past not against industrial growth but for securing industrial establishments in the neighbourhood as it was seen as the cure for poverty and allied problems.[1] Nevertheless, at present both our nation and the West are striving hard to make corporations accountable for the acts that they have committed in contravention to human rights and to make them bound by an adequate legal framework so that human rights abuses are not repeated.

Human rights are inherent, universal, indivisible and interdependent.[2] Multinational corporations should have respect for human rights of all relevant

[1] Dr. G.R.S. Rao, *Corporate Social Accountability in India*, (June, 1989), (July 16, 2015, 2.15 P.M.), http://www.capindia.in/download/articles/Corporate%20Social%20Accountability%20in%20India%20-%20Dr.%20G.%20R.%20S.%20Rao.pdf

[2] UNFPA, Human *Rights Principles*, (June 17, 2015, 12.00 P.M.), http://www.unfpa.org/resources/human-rights-principles

stakeholders and groups within and beyond the workplace including that of communities, consumers and vulnerable and marginalized groups. It would have been better if the business organisations develop respect for human rights in management systems, especially while making the assessment and management of human rights impact of operations and strive to ensure access to the various grievance redressal mechanisms devised to help the affected individuals. But this is not the case. Most of the multinationals are quite infamous due to the massive violations that have been perpetrated by them across borders. They are parties to human rights violations either directly or by being complicit in the activities that had resulted in such violations. It has been mentioned (before the US Supreme Court decided *Esther Kiobel v. Royal Dutch Petroleum Co.*[3]) that, more than 120 lawsuits have been brought in the U.S. Courts alone against 59 corporations over the past 25 years for aiding and abetting human rights violations caused by various foreign governments.[4]

There existed/exist different methods of regulation of multinationals namely the control approach, the voluntary approach and the co-regulatory approach.[5] The control approach signifies the regulatory framework in the 1960s and 70s

[3] 133 S.Ct. 1659 (2013)
[4] Charles E. Borden and Schan Duff, *Beyond the Guiding Principles: Corporate Compliance and Human Rights-based Legal Exposure for Business*, 1 THE BUSINESS AND HUMAN RIGHTS REVIEW 11 (2012), (July 29, 2015, 5.45 P.M.), http://www.allenovery.co m/SiteColle ctionDocuments/BHRRAutumn2012Issue1.PDF
[5] Edwin C. Mujih, *"Co-deregulation" of Multinational Companies Operating in Developing Countries: Partnering against Corporate Social Responsibility?*, 16(2) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 249 (2008)

by the respective governments over the working of multinationals. The regulation gave way to voluntary approach and the proof lies in the codes of conduct adopted by various multinationals and the formulation of UN Global Compact. Co-regulatory approach signifies the regulatory arrangements of multinationals with one or more parties such as the State, NGOs or other organizations with the objective of improving social and environmental performance of multinationals.[6] It is this association of MNCs with the State that is more dangerous to the victims as the association with the State gives the MNCs freedom from several legal obligations to protect environment, human rights and the community in general. In certain cases, the government remains silent or turns a blind eye to the human rights violations perpetrated by the multinationals.

The failure in dealing with corporate human rights violations at the international level is mainly due to the fact that multinationals are not considered as a subject of international law.[7] This is primarily because international law predominantly deals with relationship between States and multinationals fall outside its purview. This chapter deals with the status of corporation at the international level with special focus on the inadequacy of State Responsibility for acts of corporations. The chapter starts with the human

[6] *Id.*
[7] KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 214 (Cambridge University Press 2013)

rights violations by multinationals at the international level and then moves on to analyse the reasons for continued instances of such instances. There have been numerous instances of corporate human rights abuses at the international level and the most prominent among them are the following.

4.1.1 Yahoo

One example of the fact that the government in most parts of the world remains silent in case of corporate human rights abuses is evident from the case of privacy violations committed by Yahoo in China by revealing user personal data upon request by the Chinese government. The disclosure of personal information resulted in arrests of a number of Chinese civilians on the ground of them being cyber dissidents.[8] The Chinese Courts did not entertain the petitions filed against the corporation for the human rights abuses they caused in regard to privacy violations, violation of freedom of speech and expression, right to protest, personal liberty and right to communication. The is irrespective of the fact that the Constitution of the People's Republic of China has provided for the protection of the above mentioned rights except in cases of State security or of investigation into criminal offences.[9] Though the case of *Wang*

[8] Xiaoning v. Yahoo, C07-02151 CW/JCS (N.D. Cal. Nov. 13, 2007)

[9] The Constitution of the People's Republic of China, 1982, Article 40: The freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law - No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.

Xiaoning v. Yahoo Inc.[10] reached the US Courts under the Alien Torts Act, it was settled by the corporation for an undisclosed amount. In regard to this, the following observation is important,

"The fact that the Chinese Courts did not entertain the case against Yahoo for indulging in human rights abuses is not surprising, because Courts do not generally accept sensitive cases, especially if the defendants are big companies with connections with CPC/government officials."[11]

This is proof of the fact that many a times, the government as well as the Courts do not entertain petitions claiming human rights violations committed against poor victims by huge multinationals. The failure to initiate legal proceedings against Texaco in Ecuador for causing severe environmental hazards as a result of their oil exploration is another example. The difficulty to pursue legal action against corporates involved in building houses and schools which were supposed to be quake-resistant but destroyed on account of Sichuan earthquake in China due to political interference is another example for State sanctioned/protected corporate human rights violations.[12]

[10] C07-02151 CW/JCS (N.D. Cal. Nov. 13, 2007)
[11] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: People's Republic of China*, Geneva, 2010, 58 (Jan. 15, 2014, 2.30 P.M.), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/China-access-justice-publication-2010.pdf
[12] *Id.* at 63, 64

4.1.2 Coca Cola

One of the largest multinationals, both in terms of business and profits, Coca Cola has been involved in a variety of human rights abuses. In fact, a suit was filed in the US Courts against the human rights violations caused by Coca Cola. In *Sinaltrainal et al. v. Coca Cola et al.*[13], the plaintiff who is a trade union along with five others claimed compensation against Coca Cola and two other bottling companies for their alleged complicity in murders and tortures along with para military forces of the Columbian government. Though it was alleged that eight labourers were brutally murdered, the case was dismissed as it failed to establish the requisite connection between the Columbian government and Coca Cola in regard to human rights abuses. Though the fact that Coca Cola benefitted from the said murders and tortures[14] was argued, the appellate Court also turned down the appeal.[15]

4.1.3 Grunenthal

CSR is equally applicable to pharmaceutical companies. We have instances of CIPLA offering palliative care to cancer patients at the CIPLA Palliative Care and Training Centre in Pune. They also provide medication and chemotherapy to patients at reasonable and affordable prices. The initiative of Roche, which is headquartered in Switzerland, named 'community based rehabilitation' which

[13] Sinaltrainal et al. v. Coca-Cola Co., 256 F.Supp.2d 1345 (S.D.Fla.2003)
[14] The benefit to Coke was that it resulted in the destruction of the trade union and that the company could employ cheap labourers.
[15] Sinaltrainal et al. v. Coca Cola et al., 578 F 3d 1252 (11th Cir. 2009)

provides occupational therapy to physically and mentally disabled children, frequent blood donation drives and support to education through News Straits Times School Sponsorship Programme are other examples.

But there have been instances to the contrary as well. Grunenthal, a German pharmaceutical company which introduced penicillin to the German market for the first time was also known infamously for the sale of drug 'Thalidomide'. The drug that was sold as a morning sickness preventive turned out to be a teratogenic drug which resulted in deaths and birth defects in several children. Though the matter was taken up by the judiciary, it ended up in deciding to compensate the victims. Like all other known instances of corporate human rights abuses, this also resulted in a lot of victims not getting adequate compensation for the loss suffered.

4.1.4 Nike

Nike, though not directly engaged in human rights violation, has been criticized for its indirect role in human rights abuses. Nike's supply chain was grossly involved in violations such as employing child labour, poor labour conditions including overtime work, poor wages and unhealthy working environment. This is seen as an instance of failure of voluntary corporate codes of conduct as there has been an explicit violation of Nike's own codes of conduct.

Nike, an American multinational corporation, although started its business in Japan and North Korea, migrated to third world countries like Vietnam, Indonesia, China, Taiwan, South Korea, and India due to the availability of cheap labour. The media has come down heavily on Nike for running sweatshops and for not paying adequate wages to its workers at Vietnam, China and Haiti for forcing them to work overtime. It is said that the chemicals used in Nike factory have caused several kidney, liver and brain damages.[16] The absence of any protective gear has worsened the health condition of Nike employees.[17] This goes completely against the assurance given in their code of conduct that the company is keen on maintaining and safeguarding safety and health of its workers. Despite starting SHAPE (safety, health, attitude, people, environment) which is an internal monitoring system, the human rights conditions of workers are not satisfactory. Nike was also involved in indirect human rights abuses including child labour. Its dealings with Pakistani sub-contractor, SAGA sports, in the production of Nike soccer balls have been criticized globally following confirmed news that the sub-contractor adopted child labour practices.[18]

[16] DAVID C. THOMAS, READINGS AND CASES IN INTERNATIONAL MANAGEMENT: A CROSS-CULTURAL PERSPECTIVE, 141 (SAGE 2003)

[17] *Nike Lists Abuses at Asian Factories*, (Jan 16, 2014), 3.00 P.M.), https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money

[18] WILLIAM B. WERTHER, JR., DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT 286 (SAGE 2010)

The fact that Nike made false statements in their CSR policies became evident in the case of *Kasky v. Nike*[19] where the petitioner, an environmental and labour rights activist brought an action against Nike on the basis that it had made false statements in its CSR reports that its supply chain followed its code of conduct principles which were against sweat shops. The fact that the statements were false and misleading violated California's legislation on account of unfair competition and misleading advertising. The matter ended in an out of Court settlement with Nike paying a huge amount.

4.1.5 Apple

Apple has also become the matter of controversy when it comes to safeguarding the human rights of its employees. It is stated that workers at Apple in China earn only 30p an hour and is subject to exploitation in the form of long hours of work without breaks. It is reported that one of their plants in Shenzhen has witnessed at least thirteen suicides or attempted suicides.[20] China Labor Watch, a human rights organization, has found that at Apple, each employee works six hours of unpaid overtime per month, resulting in roughly $290,000 in owed wages for all workers.[21] The latest information that could be

[19] Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002)
[20] Anthony Cuthbertson, *Apple* iPhone 6s Factory Investigation Reveals Apple Still Violates Human Rights of Workers, (Mar. 28, 2016, 1.30 P.M.), http://www.ibtimes.co.uk/iphone-6s-factory-investigation-reveals-apple-still-violates-human-rights-workers-1525151
[21] Shara Tibken, *Apple Chastised for Unsafe Working Conditions in Supplier Factory*, (Mar. 28, 2014, 3.30 P.M.), http://www.cnet.com/news/apple-chastised-for-unsafe-working-conditions-in-supplier-factory/

obtained regarding human rights abuses at Apple is that the company had accepted that there have been abuses aimed at workers which the company would find and rectify.[22]

4.1.6 Texaco

The activities of Texaco in Ecuador are one of the most infamous instances of human rights violations. The oil exploration by the company in Ecuador has resulted in severe environmental hazards including release of huge quantities of toxic waste and river pollution. The release of toxic waste into open air and rivers affected the livelihood of innocent civilians. The company was also in the news for spilling oil from the Ecuadorian oil channel into the Amazon River, which in turn resulted in injuries and deaths of several people in the locality. None of the activities of the corporations that caused grave human rights violations were called into question for imposing criminal sanctions or civil penalties due to the establishment of close ties between the company and government officials of Ecuador.[23] At present, Texaco is an oil subsidiary of Chevron Corporation.

[22] Stephen Folly, *Apple Admits it has a Human Rights Problem***,** (Mar. 28, 2014, 4.45 P.M.), http://www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html

[23] *A Rainforest Chernobyl*, (Oct. 11, 2014, 12.30 P.M.), http://chevrontoxico.com/about/rainforest-chernobyl/

4.1.7 Unocal

Unocal, which merged with Chevron Corporation to become a wholly owned subsidiary in 2005, was involved in grave human rights violations including rape, torture and forced labour.[24] All these occurred during their project to lay oil pipelines at Yadana gas field in Burma. Though the case against Unocal ended in the company compensating the plaintiffs, the incident was indeed a shocking one given the fact that the atrocities, assaults and deaths were committed together with Burmese soldiers.

4.1.8 Barclays Bank

Barclay's bank was alleged to have been involved in the apartheid regime in South Africa by supporting the government in the 1970s and 80s.[25] It has been alleged that the bank funded the then Zimbabwean President to seize farmlands owned by the white farmers and drove away one lakh black workers from their homes.[26] The bank helped the apartheid regime through purchase of bonds and providing loans.[27] They are also alleged to be a part of the holocaust in Palestine by the Israel army as it had a major share in Elbit Systems which was

[24] Manuel Velasquez, *Unocal in Burma*, (Oct. 11, 2015, 10.30 A.M), https://www.scu.edu/ethics/focus-areas/business-ethics/resources/unocal-in-burma/

[25] Antony Barnett and Christopher Thompson, *Barclays' Millions Help to Prop Up Mugabe Regime*, (Oct. 13, 2014, 10.30 A.M.), https://www.theguardian.com/money/2007/jan/28/accounts.Zimbabwenews

[26] Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30(2) BERKELEY JOURNAL OF INTERNATIONAL LAW 451-524, 457 (2012)

[27] RadicalPhil, *Barclays Bank - From U.S. Philanthropy to Apartheid*, (June 11, 2016, 12.00 P.M.), https://radicalphilanthropy.org/2016/04/25/barclays-bank-from-u-s-philanthropy-to-apartheid/

the Israel's largest military company as well as the lone supplier of drones that were used against Palestinian civilians.[28]

4.1.9 Chiquita

Chiquita, the leading distributor of bananas in the United States was founded in 1899. The company was involved in making hefty payments to Columbian terrorist organizations who were involved in large scale torture, kidnappings, rape, beatings, extortion and drug trafficking. The company pleaded guilty to the charges of making payments to Colombian paramilitary organization from 1997 to 2004 and this resulted in several petitions under ATS against the company filed by private Colombian citizens with the help of U.S. non-governmental organizations for human rights violations committed by the AUC during the time period when they were under the payroll of Chiquita.[29]

Chiquita's commitment to conduct business ethically is revealed in their company's core values of integrity, respect, opportunity and responsibility. The code of conduct promises fair treatment of employees, respect for basic human rights, abolition of child labour and promoting freedom of association. But one may wonder the large gap that exists between promises in their code of conduct and instances of human rights violations. The ineffectiveness of the voluntary

[28] Michael Deas and Tom Anderson, *Barclays Boycotted over Israel Arms Trade Shares***,** (Nov. 22, 2014, 11.30 A.M.), https://electronicintifada.net/content/barclays-boycotted-over-israel-arms-trade-shares/14056

[29] *Chiquita Lawsuits (re Colombia)*, (Nov. 22, 2014, 1.35 P.M.), https://business-humanrights.org/en/chiquita-lawsuits-re-colombia

codes are all the more evident when one realizes that the company has also been accused of using pesticides and other banned toxic materials in the production of bananas in Costa Rica, Honduras and Nicaragua**.**

4.1.10 Union Carbide Corporation

Union Carbide is also known rather infamously for its activities in the West Virginia Tunnel Project. The employees who were asked to mine silica were not provided masks exposing them to silica dust which resulted in silicosis. The incident known as Hawks Nest Tunnel Disaster resulted in 476 deaths. Since 2001, UCC is a wholly owned subsidiary of Dow Chemical Company.

It is worthwhile to browse through the code of conduct of Dow and compare it with the human rights abuses its subsisidiary has caused in Bhopal. The code of conduct states that the employees and the company share the responsibility to make safety and health a daily priority and that they support each other in actions to live safely and in good health by utilising availabe resources and observing recommended practices. It is rather shocking to note that although the code of conduct expresses full co-operation by the company with the governnment officials, this could not be experienced at any stage of proceedings against the UCC for the tragedy that it caused in Bhopal in 1984. The ineffectiveness of the code of conduct is also evident from the clause that states that the company is accountable to take corrective actions when an

unsafe and hazardous situation is brought to their attention.[30] The whole world knows what in fact had happened and continues to happen in the case of Bhopal disaster.

4.1.11 Wal-Mart

Wal-Mart has been severely criticized by almost all human rights organizations worldwide for their purchase of products from overseas sweatshops. Probably, Wal-Mart helps the customers to get the products for cheaper prices as they buy products for much cheaper prices from the above mentioned sweatshops. Wal-Mart has been severely condemned for its continued business with its shrimp supplier at Narong who have been involved in non-payment of wages, child labour, demanding excessive money for work permits and so on.[31]

Though there was a claim made against Wal-Mart on ground of gender discrimination at work places in the case of *Wal-Mart Stores, Inc. v. Betty Dukes, et al.*[32], the U.S. Supreme Court ruled in favour of the company stating that the plaintiffs did not have enough in common to constitute a class. The facts of the case were that Betty Dukes, a Wal-Mart employee filed a class

[30] Dow's Code of Business Conduct: Health and Safety in the Workplace - We maintain a safe and healthy work environment and are committed to eliminating work-related injuries and illnesses; Employees and the Company share the responsibility to make safety and health a daily priority; We support each other in actions to live safely and in good health by utilizing available resources and observing recommended practices; We are accountable to take corrective action when an unsafe or hazardous situation is brought to our attention.

[31] Monica Bauer, *Always Low Prices, Rarely Human Rights: Wal-Mart and Child Slave Labor*, 2005, (Mar. 28, 2014, 8.10 A.M.), http://ihscslnews.org/view_article.php?id=68

[32] 131 S. Ct. 2541 (2011)

action suit along with five other women on the ground that the company followed lower pay for women than men for the same kind of job and there were considerable delay in promotion of women employees when compared to men. Though the class action suit represented 1.5 million women, the Supreme Court held that in order to be certified as a class, the rule of 'commonality' criterion required under R. 23(a)(2) of the Federal Rules for Class Certification needs to prove that all the 1.5 million women were subject to the same discriminatory employment policy.[33] The minority opinion, where Justices Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan join concurred in part and dissented in part, strongly believed that gender bias was evident in Wal-Mart's company culture and there existed unlawful discrimination in the pay and promotions' policies of Wal-Mart.[34]

4.1.12 PUMA

The famous sport brand 'PUMA' is also associated with grave human rights abuses. Though the motto of the brand 'Forever Faster' is in connection with its sport gear, they follow the same in violations too. Puma is infamous for labour rights violations in Mexico by forcing the labourers to work overtime without wages, paying less than the legal minimum, torturing of female workers and forcing workers to give false information at the time of auditing. Though the

[33] Majority opinion delivered by Scalia, J. in which in which Roberts, C.J., Kennedy, Alito and Thomas, JJ. joined.
[34] Wal-Mart Stores, Inc. v. Betty Dukes, et al 131 S. Ct. 2541 (2011), 28

code of conduct assures reasonable work with adequate wages on time in a safe and healthy environment and to form associations, the reality is far different from those stated in the codes of conduct.

4.1.13 ExxonMobil

Exxon Mobil which is a petro chemical manufacturer based in the US is ill-reputed for its activities in Aceh, Indonesia. The discovery of massive reserves of natural gas in north Aceh initiated liquefaction of natural gas in the area which was attempted to be resisted by the people in the locality. The government in complicit with the company deployed para-military forces which received financial support from the company.[35] They tortured, murdered and assaulted the villagers. The matter has been allowed to be proceeded in the US Courts under ATCA as the plaintiffs proved sufficient connection with the US territory so as to satisfy the 'touch and concern' test employed in *Kiobel's case*.[36]

4.1.14 Cadbury

Cadbury whose name was Cadbury's originally and was later changed in 2003 was first established in 1824 by John Cadbury. After several mergers and

[35] *ExxonMobil Lawsuit (re Aceh)*, (Oct. 15, 2015, 04.30 P.M), https://business-humanrights.org/en/exxonmobil-lawsuit-re-aceh

[36] The plaintiffs were able to show that Exxon Mobil executives in the US had received reports of human rights abuses in Indonesia by security personnel; Sarah A. Altschuller, *Corporate Social Responsibility and the Law: Alien Tort Case Development: Plaintiffs in Exxon Mobil Case Survive "Touch and Concern" Review*, (April 18, 2016, 12.30 P.M.), http://www.csrandthelaw.com/2015/07/31/alien-tort-case-development-plaintiffs-in-exxon-mobil-case-survive-touch-and-concern-review/

demergers it was lastly bought by Kraft Foods. Kraft foods later changed their name to Mondelez International. Cadbury which procured the best cocoa beans from Ivory Coast, Ghana, Nigeria and Brazil is alleged to have committed grave human rights violations by employing child labour.[37] The International Labour Rights Forum[38] states that 60% of the children working on cocoa farms are younger than 14.[39] A periodic check for non-halal ingredients by Malaysian ministry of health proved disastrous for Cadbury as the test revealed traces of pork DNA and as a result of which two of their products were recalled.[40]

4.2 Corporation under International Law

Globalisation has resulted in weakening of barriers. Though globalization, by itself, is not the result of human rights violations, weakening of barriers has resulted in broadening the fields of activities of multinational corporations.[41] Privatisation in certain public sector areas such as water, electricity, education, peacekeeping, prisons, etc. is proof of the fact that the traditional functions of

[37] International Labour Rights Forum is a human rights organization that works for worker's rights; http://www.laborrights.org/about, (April. 17, 2014, 11.00 P.M.),
[38] LOWELL JOSEPH SATRE, CHOCOLATE ON TRIAL: SLAVERY, POLITICS, AND THE ETHICS OF BUSINESS 13 (Ohio University Press 2005)
[39] Mitchell Mammel, *Child Slavery: The Bitter Truth Behind the Chocolate Industry*, (April. 10, 2014, 1.45 P.M.), http://www.terry.ubc.ca/2013/11/26/child-slavery-the-bitter-truth-behind-the-chocolate-industry/
[40] *Pork in Cadbury's: Malaysian Chocolate Recalled after DNA Traces Found*, (April. 13, 2014, 2.45 P.M.), https://www.theguardian.com/business/2014/may/28/pork-in-cadburys-malaysian-chocolate-recalled-after-dna-traces-found
[41] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 261 (1996)

the State are now vested in private entities.[42] Due to the very same reasons, the activities of multinational corporations could be seen in almost all sectors, which in turn have resulted in a rise in human rights violations. Making corporations accountable under international law is difficult as corporations do not have international legal personality.[43] The norms that exist in the international arena lack concrete obligations and they are not capable of preventing corporate human rights abuses. Hence, there is a growing need for conferring an international status on corporations so as to make them possess duties and rights under international law. The main issue in corporate human rights abuses is that the traditional international human rights law binds only States as it considers protection of individuals from excessive State power as its primary duty and hence imposes no direct obligations on MNCs.[44] Political opposition by the developed and developing countries due to the fear of enormous economic power of MNCs and the fact that company law is governed largely by respective national laws are the main reasons why MNCs are still not considered as a subject of international law.

[42] Eric De Brabandere, *Non-state Actors, State Centrism and Human Rights Obligations*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 191-209 (2009)
[43] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 65 (Oxford 2003)
[44] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 935 (2004)

There have been suggestions to the effect that multinational corporations should be treated as a subject of international law like States.[45] As regards whether they possess the requisite personality to be treated as a subject of international law, it has been stated that though essentially MNCs do not possess the capacity to make international treaties or to make claims in respect of breach of international law or enjoy any privileges or immunities like States do, they have the capacity to be a 'bearer of rights and duties under international law.'[46] Corporations are entities possessing rights under international law and the same is evident from the regional conventions on human rights. The First Protocol to the European Convention on Human Rights provides under Article 1 for peaceful enjoyment of property and the same is applicable to corporations as well.[47] The ability to possess rights, duties and powers could be attributed to the MNCs if they are given the right to participate in the negotiation of international treaties dealing with human rights. By affording a limited personality to MNCs under international law, the multinational corporation may also approach the Dispute Settlement Board of

[45] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1-57 (2003)
[46] *Id.*
[47] The European Convention on Human Rights, Protocol 1, Art.1: (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

WTO directly in cases of violation of WTO rules by member States rather than forcing the State to trail the issue with the DSB.[48]

Amongst the debates centered around the liability of corporation in place of the State, one can definitely State that the former too has greater human rights obligations as there are close ties between multinational corporations and the government. The responsibility of the multinational corporation flows from the State as it obtains the necessary requests and substantial aid from the government to commit violations.[49] The traditional school of thought stressed that only States could be subjects of international law. To the contrary, there have been suggestions to include MNCs as subjects of international law on the basis that the traditional notion of only State being the subject of international was influenced by the thinking of Western Christian World and it is time that MNCs should also be included in the list.[50] The fact that companies such as EUROFIMA[51] exist based on the international treaty signed between 25 member States can be an argument for considering MNC as a subject of international law.

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[48] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1-57 (2003)

[49] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545, 524 (2001)

[50] Wolfgang Friedman, *The Changing Dimensions of International Law*, 62 COLUMBIA LAW REVIEW 1147 (1962) as cited in Manijit Dewan and Kunal Gupta, *Multinational Corporations and International Law: An Appraisal*, (Nov. 30, 2014, 6.00 P.M.), www.manupatrafast.com/pers/Personalized.aspx

[51] *European Company for the Financing of Railroad Rolling Stock: Convention for the Establishment of the Company, 2010 edition*, (Nov. 30, 2015, 6.35 P.M.), http://www.eurofima.org/pdfs/convention_e.pdf

There are international dispute settlement mechanisms such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, that allows the States to refer a matter between a Contracting State and a national of another Contracting State (such national could be an MNC) related to investments to the International Centre for the Settlement of Investment Disputes.[52] But this is a privilege given to MNCs rather than responsibilities as this will help them to protect their investment contracts.[53] Similarly, the Seabed Dispute Chamber[54], UN Claims Commission[55] and the

[52] The Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, Article 1(2) - The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

[53] Manijit Dewan and Kunal Gupta, *Multinational Corporations and International Law: An Appraisal*, (Nov. 30, 2014, 6.00 P.M.), www.manupatrafast.com/pers/Personalized.aspx

[54] UNCLOS III, Article 187, deals with Jurisdiction of the Seabed Disputes Chamber and it states that the Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories: (c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests; (e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22 Article153 deals with System of exploration and exploitation and Section 153 (2) provides that 2. Activities in the Area shall be carried out as prescribed in paragraph 3: (b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.

[55] The United Nations Compensation Commission was created in 1991 as a subsidiary organ of the United Nations Security Council by Security Council Resolution 687 to assess claims and compensation for the loss suffered due to unlawful invasion and occupation of Kuwait by Iraq in 1990-91; http://www.uncc.ch/, (Nov. 30, 2014, 7.45 P.M.). The Governing Council of the UN Claims Commission has identified six categories of claims and one of the categories namely Category 'E' allows claims of corporations, other private legal entities and public sector enterprises.

Iran-US Claims Tribunal[56], do allow corporations to bring claims.[57] If there can be a treaty between the multinational corporation and the government to refer the matters to an international arbitration tribunal, then is no reason for not considering MNC as a subject of international law for other purposes.

Even otherwise, corporations are made liable under international law. The existence of corporate liability under various international environmental law instruments and treaties such as the Brussels Convention on the Liability of Operators of Nuclear Ships 1962[58], the Vienna Convention on Civil Liability for Nuclear Damage 1963[59] and the Convention on Civil Liability for Oil

[56] The Iran-United States Claims Tribunal was constituted in 1981 so as to decide the claims of US nationals against Iran and vice versa relating to detention of 52 United States in Tehran and subsequent freezing of Iranian assets by the US. Article VII (1) of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning The Settlement of Claims by The Government of the United States of America and the Government of the Islamic Republic of Iran states that "for the purpose of this Agreement, a "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country, hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock; http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf

[57] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 947 (2004)

[58] Article 1(3) of the Convention defines a person to include any individual or partnership, or any public or private body whether corporate or not, including a State or any of its constituent subdivisions.

[59] Article 1 (a) of the Convention states, "person" means any individual, partnership, any private or public body whether corporate or not, any international organization enjoying legal personality under the law of the Installation State, and any State or any of its constituent sub-divisions.

Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1976[60], evidences the same.[61]

There has also been a suggestion to recognise an international corporate personality for international companies and a suggestion to the UN to create a model framework for the same.[62] According to this suggestion, the companies that fall under the category of MNCs shall have to obtain International Company status (IC) before operations within the domestic jurisdiction.[63] Such a framework, if developed by the UN can clearly provide for the liability of the parent company for the activities of its subsidiary and can also provide for a common disclosure system for MNCs at the international level. The system presupposes a registry known as the global registry to be maintained by the UN which can issue IC certificates and keep a record of the international network of operations of registered International Companies.[64] The jurisdiction with regard to activities of International Company shall vest in the domestic Courts and the Courts shall be empowered to refer the disputes to the expert panel established under the UN framework with regard to interpretation and

[60] Article 1(5) of the Convention states that person means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
[61] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545, 480 (2001); The author also cites several ILO conventions and Anti-corruption instruments at the international level to prove the same.
[62] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288, 286 (2010)
[63] *Id.*
[64] *Id.*

application of the framework.[65] The establishment of the above mentioned International Company should not be perceived as a fairy-tale. The establishment of the Statute for a European company (SE) by Council Regulation (EC) No 2157/2001of 8 October 2001[66] is evidence to show that if a company law for the whole of a continent is possible, then nothing precludes the possibility of an MNC being registered at the international level. The European Company Statute allows companies operating in more than one EU member State to be established as a single company under Community law. This further allows the company to operate throughout the European Union "with one set of rules and a unified management and reporting system rather than all the different national laws of each Member State where they have subsidiaries".[67] The present European Company Statute has been framed in its most refined form after numerous amendments which took away several provisions that were incorporated earlier. Though the present statute does not expressly provide for solutions arising in the context of liabilities of parent company for the activities of subsidiaries, the European Commission's proposal to the Council of Ministers for an SE (European Company Law) in 1970 contained certain innovative provisions such as Article 239 which

[65] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288, 286 (2010)

[66] Council of the European Union, *Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)*, (Jan. 31, 2014, 4:30 PM), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001R2157

[67] *Review of European Company Statute – briefing*, (Aug. 18, 2014, 7.30 A.M.), http://www.eubusiness.com/topics/sme/european-company.10/?searchterm=None

specifically provided for liability of the parent company for the act of its subsidiaries. Article 239 of the draft of 1970 statute provided that "the controlling company of a concern shall be liable for the debts and liabilities of its dependent subsidiary companies." It further provided that "proceedings may be bought against the controlling company only after the creditor has first made a written demand for payment on the dependent subsidiary company and failed to obtain satisfaction".[68] Articles 6(3) and 223(2) provided for a rebuttable presumption that if a parent owns a majority stake in the subsidiary, it is in control of it.[69] The presumption provided was a rebuttable one as the parent company was allowed to rebut the same if it successfully provides evidence of the fact that it is merely a passive shareholder. As per article 225 of the draft, the jurisdiction regarding determination of liability vested with the European Court of Justice.[70]

There have also been interpretations to the effect that UDHR probably applies (though only ethical obligations) to corporations too.[71] Those who adhere to this view interprets the word 'everyone' in Article 29[72] and 'any State, group or

[68] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)
[69] *Id.* at 287
[70] *Id.*
[71] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 948 (2004)
[72] UDHR, Article 29: (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms,

person' in Article 30[73] to encompass non-State actors such as corporations. It has been held that States can confer international legal personality on international organisations such as the United Nations.[74] Individuals have also attained international legal personality especially under international criminal law. But the case laws on individual criminal responsibility will be of no help to determine corporates' liability under international law as the former is exclusively developed on international criminal law. Nonetheless it is time that TNCs are also granted the same status lest the domestic legal framework will continue to fail in making them accountable for human rights abuses.

4.3 Inadequacy of State Responsibility for Acts of Corporations

The obligation of the State lies not only in protecting the individuals from the acts of its agents, but also in protecting them from the acts of the private persons such as multinational corporations. In this regard it has been observed

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everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. Bryan Horrigan argues that the term 'every organ of the society' appearing in UDHR includes corporations too; BRYAN HORRIGAN, CORPORATE SOCIAL RESPONSIBILITY IN THE 21ST CENTURY: DEBATES, MODELS AND PRACTICES ACROSS GOVERNMENT, LAW AND BUSINESS 304 (Edward Edgar, UK 2010)

[73] UDHR, Article 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

[74] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 945 (2004); Reparations Case, 1949 ICJ 174

in General Comment No. 31 of the Human Rights Committee to Article 2, paragraph 1 of International Covenant on Civil and Political Rights that,

> *"The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."*[75]

As one author puts it, "a corporation can recognizably become involved in violations of human rights law either directly as a private actor; as an actor coloured by a connection with a State, State entity, or other public actor; or as a

[75] Human Rights Committee, General Comment No. 31, *Nature of the Legal Obligation Imposed on State Parties to the Covenant*, (CCPR/C/21/Rev.1/Add. 13), para. 8, (Nov. 5, 2013, 3.30 P.M.), http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D

participant in a joint venture or complicitous relation with another human rights violator."[76]

But the problem here is that in both international as well as national law the States are responsible only for the acts of their organs and are generally not made responsible in case of private corporate wrongs. In order to make the State responsible, the legal system only looks into whether the acts of the corporations were 'on behalf of the State' or 'under the control of' the State. But in most of the cases the situation is different. The corporations are either complicit in violating human rights along with the States or vice versa. But the legal framework has not yet included the factor of complicity along with acts 'on behalf of the State' or 'under the control of' the State'.

In general, even at the international level, it has been very difficult to fix legal responsibility upon the States. In *Nicaragua v. United States of America*[77], it was held that the United States of America, by training, arming, equipping, financing and supplying the Nicaraguan Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State. But the Court also held that though the U.S. encouraged

[76] Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 801 (2002)
[77] (1986) ICJ 1

Contras to commit acts that are contrary to general principles of humanitarian law, it could not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America. The relevant observation of the Court is as follows:

> *"It is claimed by Nicaragua that the United States Government devised the strategy and directed the tactics of the Contra force, and provided direct combat support for its military operations. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the Contra force, at every stage of the conflict, reflected strategy and tactics solely devised by the United States. It therefore cannot uphold the contention of Nicaragua on this point. The Court however finds it clear that a number of operations were decided and planned, if not actually by the United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer. It is also established in the Court's view that the support of the United States for the activities of the Contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, etc. The evidence does not however warrant a finding that the United States gave direct combat support, if that is taken to mean direct intervention by United States combat forces."*[78]

[78] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Apr. 9, 2013, 2.00 P.M.), http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5; The Court further observed that, "The Court has to determine whether the relationship of the Contras to the United States Government was such that it

The Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)[79] attributes the conduct of any organ of the State to the act of State. But an organ of the State has been defined to include any person or entity which has that status in accordance with the internal law of the State.[80] The 2001 Draft Articles has expanded the ambit of the term organs of the State under Articles 5 and 8. According to Article 5 the acts of any organ which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law. The commentary to the Draft Articles state that "since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5".[81]

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would be right to equate the Contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. The Court considers that the evidence available to it is insufficient to demonstrate the total dependence of the Contras on United States aid. A partial dependency, the exact extent of which the Court cannot establish, may be inferred from the fact that the leaders were selected by the United States, and from other factors such as the organisation, training and equipping of the force, planning of operations, the choosing of targets and the operational support provided. There is no clear evidence that the United States actually exercised such a degree of control as to justify treating the Contras as acting on its behalf."

[79] *Report of the International Law Commission on the Work of its Fifty-Third Session in 2001*, (Sep. 18, 2013, 3.20 P.M.), http://www.un.org/documents/ga/docs/56/a5610.pdf

[80] The Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 4.

[81] Commentary to Article 8, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001* (Sep. 18, 2013, 4.30 P.M.), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

The major change should have been brought to article 8 which in its original form states thus:

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions or under the direction or control of, that State in carrying out the conduct."

The acts of non-State actors such as TNCs in which the State becomes complicit are not given due attention in the above article. These are the reasons why it is generally said that the Draft Articles on responsibility of States for internationally wrongful acts is incapable to fix responsibility on the States involved in human rights abuses carried out by the TNCs.[82]

The US also follows certain fundamental tests to determine State action in cases of violation by private entities. The public-function test, the State-compulsion test and the governmental nexus test or the joint-action test are the ones that the US Courts follow. The public-function test fixes State action on a private party who carries out a function that has conventionally been the exclusive prerogative of the State and in such cases the private entity would be considered as a State actor. Article 5 of the Draft articles on Responsibility of States for Internationally Wrongful Acts provides for the public function test but suffers from the drawback that proof of governmental authority is required

[82] Daniele Amoroso, *Moving Towards Complicity as a Criterion of attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law*, 24 LJIL 989-1007 (2011)

which may be absent in most of the cases.[83] The State-compulsion test is based on whether the State has significantly encouraged or coerced the private party to engage in violation.[84] It is the State compulsion test that could be seen in Article 8 of the Draft articles on Responsibility of States for Internationally Wrongful Acts. The joint action test looks into whether there has been any substantial degree of cooperation between the government and private entity in effecting the violation.[85] The joint action test has not been applied by the US internationally for the failure of the State to combat human rights abuses abroad committed by MNCs.

At the same time, Article 11 of the Draft articles on Responsibility of States for Internationally Wrongful Acts could be interpreted in a way so that the above mentioned drawbacks could be remedied. Article 11 which provides for 'Conduct acknowledged and adopted by a State as its own' states that conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its

[83] The Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 5 - The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

[84] *Private Entity Acting Under Color of State Law may be Held Liable Under 42 U.S.C. Section 1983 Where An Employee, Acting Under Employer's Official Policy, Custom, or Pattern, Violates a Federally Protected Right*, (Dec. 28, 2013, 10.05 A.M.), www.lcwlegal.com/83325

[85] Wilton H. Strickland, *How to Assert a Section 1983 Civil Rights Claim Against a Private Citizen*, (Sep. 18, 2013, 5.40 P.M.), http://mylegalwriting.com/2014/11/14/how-to-assert-a-section-1983-civil-rights-claim-against-a-private-citizen/

own.[86] The further explanation to Article 11 ensures that it could be possible to fix responsibility on the States in case of human rights abuses by private entities. The explanation to the article specifically provides that "in many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities".[87] It continues to state,

"Article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[88]

But there remains a question at the practical level as to how many instances could be seen where the State has acknowledged and adopted the conduct of private person as its own. The State incurs liability also under the due diligence principle if it fails to ensure that all reasonable measures are in place to prevent unlawful conduct by non-State actors. But in spite of this, the due diligence is not practically useful in case of State complicity in private human rights abuse.[89] There exists an option to apply the overall control test in the context of making States liable for human rights abuses caused by being complicit along with MNCs. The 'overall-control' test which was evolved in cases such as *The*

[86] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001* (Sep. 18, 2013, 4.30 P.M.), http://legal.un.org/ilc/texts /instruments/english/commentaries/9_6_2001.pdf
[87] *Id.*
[88] *Id.*
[89] Daniele Amoroso, *Moving Towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law*, 24 LJIL 989-1007 (2011)

Prosecutor v. Dusko Tadic[90] and *Prosecutor v. Kordic and Cerkez*[91] provides that, for the purposes of attribution, it is not necessary that the State controlled every single act of the private group, it is enough if the private entity acted under the general direction of the State. The ICTY in *The Prosecutor v Dusko Tadic*[92], had to judge whether the Bosnian Serb army was part of the armed forces of Serbia and the Tribunal was of the opinion that acts of non-military private groups could be attributed to the State only if there is evidence of specific instructions from the part of the State or when the State has approved the conduct later[93]. The ICTY in these decisions has categorically stated that the overall control test will be satisfied if it is proved that the State provided the paramilitary organisations with financial and training assistance, military equipment, operational support and has participated in the organisation, co-ordination or planning of military operations[94].

The United Nations Guiding Principles on Business and Human Rights, 2011 contain certain principles in this regard. Principle no. 4 states that "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial

[90] Case IT-94-1-A (1999), ILM, Vol. 38, No. 6 (November 1999), 1518, at 1541
[91] Judgement of 26 February 2001, IT-95-14/2
[92] Case IT-94-1-A (1999), ILM, Vol. 38, No. 6 (November 1999), 1518, at 1541
[93] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545, 497 (2001)
[94] Daniele Amoroso, *Moving Towards Complicity as a Criterion of attribution of private conducts: Imputation to States of Corporate Abuses in the US Case Law*, 24 LJIL 989-1007, 998 (2011)

support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."[95] The commentary to the section makes it clear that where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own obligations under international law.[96] Principle No. 5 states that "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights." It has also been made clear in the commentary to the said section that the failure by States to ensure human rights obligations by business enterprises may lead to legal consequences against the State. But the United Nations Guiding Principles on Business and Human Rights are non-binding and voluntary.

4.4 Conclusion

The real life experiment conducted by Jim Keady, who was a former coach at St. John's University in New York, proves the gross violations that MNCs are accountable for. He resigned from his post from the University to join as a

[95] *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, (Sep. 28, 2013, 12:30 PM) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[96] *Id.*

labourer in a Nike sweatshop in Indonesia to study the working conditions of labourers.[97] According to his findings, even the eight hour, six day work and overtime work at those shops gave only meagre salary to labourers. The labourers could not save anything from the meagre salary for the purposes of health care or child care. They hardly had savings for basic comforts such as clothing.[98] The workers were also compelled to give false statements to factory inspectors regarding unsafe working conditions, use of harmful chemical agents and hence the conditions such as inadequate toilet facilities and unsafe working environment went unreported.

Wal-Mart is also on the list of companies that employ sweatshops and for labour rights violations such as forced overtime work and unreasonable pay in their factories in China and the Honduras.[99] But recently Wal-Mart has been showing more responsibility towards the society and human rights in general.

[97] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)

[98] *Id.*

[99] The latest in the list of corporate human rights abuses or in the category more appropriately called as 'corporate scandals', is that of Volkswagen. This refers to the violation of Clean Air Act of the US by the German car manufacturer by fitting devices that could cheat the emission controls during emission tests. The device works during emission tests showing less emissions and shuts off during normal rides after sales as a result of which the cars sold produced 40 percentage more nitrogen oxides than that appeared in the tests results. The Environmental Protection Agency has estimated that around 482,000 cars were fitted with the device but the company has itself admitted that it was used in 11 million cars sold worldwide including eight million in Europe. Studies show that the act of the company might have resulted in deaths of between 16 to 64 people in addition to causing severe respiratory failures in human beings and to the irreversible environment; Russell Hotten, *Volkswagen: The Scandal Explained*, 2015, (April. 10, 2014, 11.30 P.M.), http://www.bbc.com/news/business-34324772

The fact that it ended business with one of its major seafood suppliers due to employment of poor working conditions is an evidence of this.[100] Nestle has also been accused of procuring cocoa from farms in Ivory Coast that employ child labour.[101] There have also been instances where villagers in Goa had been subjected to illegal arrests and torture and have been expelled from gram sabha meetings for questioning mining and housing projects.[102]

The question as to whether multinational corporations can be considered as a subject under international law is difficult to answer as international law primarily is nothing but a body of rules governing the relations between States. This, by itself, will preclude all other legal personalities from the ambit of international law. The solution to overcome instances of human rights violations by multinationals should primarily come from within the mind-set of the institution. The business should always be made to keep in mind that profitability is not the sole criteria for judging the company's performance and their responsibility towards society at large also plays a major role in judging the same.

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[100] Charles E. Borden and Schan Duff, *Beyond the Guiding Principles: Corporate Compliance and Human Rights-based Legal Exposure for Business*, 1 THE BUSINESS AND HUMAN RIGHTS REVIEW 11 (2012), (July 29, 2015, 5.45 P.M.), http://www.allenovery.com/SiteCollectionDocuments/BHRRAutumn2012Issue1.PDF

[101] *Child Labour on Nestle Farms: Chocolate Giant's Problems Continue*, (Sept. 30, 2015, 8.15 A.M.), https://www.theguardian.com/global-development-professionals-network/2015/sep/02/child -labour-on-nestle-farms-chocolate-giants-problems-continue

[102] DLF project and many other; SUDEEP CHAKRAVARTI, CLEAR HOLD BUILD: HARD LESSONS OF BUSINESS AND HUMAN RIGHTS IN INDIA, COLLINS BUSINESS, xxv (U.P., 2014)

There is always a possibility of enacting a multilateral instrument recognising corporate obligations so as to promote uniformity in regulating TNCs. The very same international instrument may set up a monitoring body similar to the committees under most of the human rights instruments which can receive reports from States and various stakeholders.[103] The treaty could also lay down provisions for domestic enforcement and the State which should investigate the matter and impose sanctions, both civil and criminal.

It has also been suggested that the World Bank, being a specialised agency of the UN should be keen on safeguarding human rights and not continue with the traditional claim of its restriction in doing so due its Articles of Agreement that prevents interference in domestic political matters.[104] It has also been submitted that the International Finance Corporation, which is the private sector arm of World Bank, could also monitor the human rights, labour and environmental impacts of the activities of private entities and repudiate the loan agreed to by it to those entities in case of violations of the above mentioned rights.[105] Corresponding changes need to be made in the its funding documents and Articles of Agreement. Though the funding of Pulp Mills in Uruguay has been

[103] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545, 540 (2001); It has been suggested that though the findings would not be- judicial in nature, it can have the effect of publicizing the activities of corporations on a global scale.
[104] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 1001 (2004)
[105] *Id.* at 1002

approved by International Finance Corporation and the Multilateral Investment Guarantee Agency, initially the IFC withheld approval of funds due to the reason that the environment impact assessment carried out by the companies was inadequate.[106] But on the other hand, reality shows that IFC has been complicit in human rights abuses. It is stated that IFC owns a 5% share in the Yanacocha gold mine in Peru where mining has led to poverty and environmental degradation. IFC is also stated to have approved a 15 million dollar loan to Royal Dutch Shell in Nigeria, the activities of which have resulted in grave human rights violations. In this context, it has been suggested that the World Bank Inspection Panel and the Compliance Advisor Ombudsman of the IFC works efficiently so as to give due regard to complaints of those adversely affected by projects sanctioned by World Bank and IFC respectively.[107]

The IFC Performance Standards on Environmental and Social Sustainability, 2012 lays down standards to be maintained in the areas of Environmental and Social Risks and Impacts, Labour and Working Conditions, Pollution Prevention, Community Health, Safety, and Security and Land Acquisition and Involuntary Resettlement by the companies/clients to receive funding from

[106] *Bank Stumped on Uruguayan Paper Mills*, (July 27, 2014, 8.00 A.M.), http://www.brettonwoodsproject.org/2006/06/art-538502/

[107] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 1004, 1005 (2004); It has been specifically stated that though they are not enforcement mechanisms, their recommendations could halt or amend a project for the benefit of complainants.

IFC. It also provides that "business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to."[108] But the framework seeks to support the companies/prospective clients rather than the rights of the possible affected persons. The same is evident from the following statement which states that "where the identified risks and impacts cannot be avoided, the client will identify mitigation and performance measures and establish corresponding actions to ensure the project will operate in compliance with applicable laws and regulations, and meet the requirements of Performance Standards."[109] Projects that affect human rights in general or environment do not appear in the list of projects that are explicitly excluded by the IFC for the purposes of funding, The only related item that could be found in the exclusion list is the production or activity that involve harmful or exploitative forms of forced labour or harmful child labour.[110]

The Equator Principles, which apply globally to all industry sectors in the areas of project finance advisory services, project finance, project-related corporate loans and bridge loans, also contain similar provisions. Though it is stated that the financial institutions who adopt Equator Principles will not

[108] IFC *Performance Standards on Environmental and Social Sustainability*, 2012, 6, (July 27, 2014, 11.00 A.M.), http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES

[109] *Id.*

[110] *IFC Project Exclusion List*, (July 29, 2015, 09.15 A.M.), http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/ifc+projects+database/projects/aips+added+value/ifc_project_exclusion_list

grant finance and corporate loans to projects in cases of noncompliance by the clients[111], the principles provide a vague framework. It states that "where a client is not in compliance with its environmental and social covenants, the EPFI will work with the client on remedial actions to bring the project back into compliance to the extent feasible. If the client fails to re-establish compliance within an agreed grace period, the EPFI reserves the right to exercise remedies, as considered appropriate."[112]

[111] *About The Equator Principles*, (July 28, 2014, 1.00 P.M.), http://www.equator-principles.com/index.php/about-ep/about-ep

[112] *The Equator Principles, 2013*, 19, (July 27, 2014, 11.00 A.M.), http://www.equator-principles.com/resources/equator_principles_III.pdf

CHAPTER 5

INTERNATIONAL HUMAN RIGHTS INITIATIVES TO COMBAT CORPORATE VIOLATIONS

5.1 Introduction

It is interesting to note the remarks made by the Chairman of the Board of Union Carbide Corporation that "they (MNEs) are not likely to pile up exorbitant profits at the expense of a host nation or to run roughshod over its national interests without incurring several long term penalties."[1] But is extremely hard to believe this especially when the same corporate entity caused human rights abuses that affected lakhs of innocent people in India (*Bhopal Gas Tragedy*[2]) due to the leakage of poisonous gas (MIC) and escaped liability by just paying a negligible amount to the Indian government and when considering the fact that the high officials of the company were left unpunished.

Though we used to discuss and deliberate on acts of State and its impact on human rights of its citizens as well as the community in the recent times non-State actors have taken the place of the State. The instances of human rights violations mentioned in the previous chapter shows that it has been extremely

[1] HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS: MATERIALS & TEXT 1181 (University Case Book Series, 1st ed. 1981)
[2] Union Carbide Corporation v. Union of India 1989 SCALE (1) 380

difficult even for the State to prevent these non-State players from committing human rights abuses. The human rights abuses, both at the national and international level, clearly shows that it is high time that international standards, that too binding ones, are enacted so as to make the corporate enterprises promote and respect human rights both individual as well as collective ones. The activities of the corporations against the concept of human rights is also clear from reports of the NGOs against Shell's activities in Nigeria[3], dealings of Occidental Petroleum in Colombia[4], boycotts against ExxonMobil in Indonesia[5], Coca-Cola in Colombia[6], Unocal in Burma[7] and so on.[8]

This chapter is an attempt to detail out various human rights initiatives at the international level and its effect upon the prevention of corporate human rights violations. One of the main issues that are common to a majority of the initiatives is that most of the regulations follow a 'voluntary approach' in place

[3] *Five Years After Devastating Oil Spills in Nigeria, Shell may Finally Cough up Millions*, (May 12, 2014, 03.00 P.M.),http://www.ibtimes.com/five-years-after-devastating-oil-spills-nigeria-shell-may-finally-cough-millions-1404212

[4] U'wa *People Block Occidental Petroleum (Colombia), 1995-2001*, (May. 11, 2016, 10.30 P.M), http://nvdatabase.swarthmore.edu/content/uwa-people-block-occidental-petroleum-colombia-1995-2001

[5] *ExxonMobil Lawsuit (re Aceh)*, (Oct. 15, 2015, 04.30 P.M), https://business-humanrights.org/en/exxonmobil-lawsuit-re-aceh

[6] SHYAMI FERNANDO PUVIMANASINGHE, FOREIGN INVESTMENT, HUMAN RIGHTS AND THE ENVIRONMENT: A PERSPECTIVE FROM SOUTH ASIA ON THE ROLE OF PUBLIC INTERNATIONAL LAW FOR DEVELOPMENT 177 (Martinus Nijhoff Publishers 2007)

[7] Manuel Velasquez, *Unocal in Burma*, (Oct. 11, 2015, 10.30 A.M), https://www.scu.edu/ethics/focus-areas/business-ethics/resources/unocal-in-burma/

[8] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 282 (2009)

of binding or mandatory obligations. The philosophy behind a voluntary approach to CSR is that "the drivers for companies to act ethically and to do good, above and beyond minimum legal requirements, should come primarily from employers, investors, consumers and the general public, rather than from further governmental intervention."[9] The observance of the principles enshrined in most of the international initiatives depends upon the motivating factor behind each corporation whether to follow them or not. This part of the thesis specifically dwells on existing international human rights initiatives with regard to international business policy and analyse whether they would suffice to deal with issues of corporate human rights violations.

5.2 Corporate Ethics and Corporate Social Responsibility

Corporate Ethics comprising of ethical standards and corporate social responsibility, (a wide term used to connote the values and business practices which should be followed by the corporation), forms the corporate code of conduct in general. The reasons for introducing corporate codes of conduct are the increasing consumer awareness which has compelled the corporations to follow ethical behaviour and the pressure from civil society to adopt these

[9] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 7,8 (CAMBRIDGE UNIVERSITY PRESS, 2006)

standards which are less evil than the binding standards.[10] The advantage of voluntary codes is that they promote a culture of compliance.[11] There are private corporate codes of conduct which are created by multinationals themselves and they have several advantages such as the fact that the corporation can identify the needs of the employees and that they can also persuade other corporations to follow the same.[12] Apart from this, there are various industry association codes of conduct like the 'Responsible Care' and the 'Electronic Industry Code of Conduct'. Others such as the Rugmark, the symbol which certifies the fact that the production of the material does not involve child labour; and the codes created by NGOs such as the CERES principles created by the Coalition for Environmentally Responsible Economics are strictly non-specific codes. The non-specific codes detail out principles around which the corporations are encouraged to make their own codes.[13]

The International Chamber of Commerce was the first business organisation to adopt a set of voluntary guidelines, the Guidelines for International Investment

[10] Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law*, 22 S. AFR. J. ON HUM. RTS.76, 77 (2006)
[11] CIPE, *From Words to Action: A Business Case for Implementing Workplace Standards Experiences from Key Emerging Markets, 2009*, (July 13, 2015, 8.55 A.M.), http://www.sa-intl.org/_data/n_0001/resources/live/FromWordstoAction_SAICIPE.pdf
[12] Nancy L Mensch, *Codes, Law Suits or International Law: How Should the Multinational Corporation be Regulated with respect to Human Rights?*, 14 U. MIAMI INT'L & COMP. L. REV. 243, 251 (2006)
[13] *Id.* at 252-254

in 1972. Though the UN, in the year 1974, established the Centre on Transnational Corporations (UNCTC) to prepare a voluntary code of conduct, it was discarded in 1992 as the States could not reach a consensus.[14] There has been a simultaneous development of codes of conduct primarily focusing on non-discrimination at work and safe conditions of work such as the Sullivan principles[15] which is an NGO code, the Slepak Principles[16], Maquiladora Standards of Conduct[17] as well as the Miller Principles[18].

[14] Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law*, 22 S. AFR. J. ON HUM. RTS.76, 79 (2006)

[15] Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 GLOBAL GOVERNANCE 73, 78 (2008)

[16] The Slepak Principles, 1987 are applicable to U.S. private companies doing business in the U.S.S.R. The principles primarily require U.S. companies not to manufacture goods or provide services that replenish the USSR Army, not to employ forced labour or environmentally hazardous employment methods, provide safe workplace and not to use religious institutions as places of businesses; DENISE WALLACE, HUMAN RIGHTS AND BUSINESS: A POLICY-ORIENTED PERSPECTIVE: STUDIES IN INTERCULTURAL HUMAN RIGHTS 289 (Martinus Nijhoff Publishers 2014)

[17] Maquiladora Standards of Conduct is directed to U.S. Companies to promote safe working conditions and provide adequate standard of living for Mexican workers in U.S. companies in the Maquiladora factory zone. The Maquiladora factory zone along the U.S.-Mexico Border was infamous for pollution, unreasonable wages and unsafe working conditions. The Maquiladora Standards of Conduct contains guidelines in matters connected to hazardous waste disposal, transportation of toxic materials. It also aimed at establishing a trust for improving housing, health care and sanitary facilities of workers; DENISE WALLACE, HUMAN RIGHTS AND BUSINESS: A POLICY-ORIENTED PERSPECTIVE: STUDIES IN INTERCULTURAL HUMAN RIGHTS 290 (Martinus Nijhoff Publishers 2014); LANCE A. COMPA, STEPHEN F. DIAMOND (ed.), HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 186 (University of Pennsylvania Press, 2003)

[18] Miller Principles were introduced as a Bill in the U.S. by the U.S. Representative, John Miller, in 1991 to encourage political freedom and liberalisation in China and Tibet. Though this never became a law, it was modelled on the basis of Sullivan Principles and principally dealt with prevention of forced labour in employment; LANCE A. COMPA, STEPHEN F. DIAMOND (ed.), HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 185 (University of Pennsylvania Press, 2003)

5.3 International Multi-stakeholder Initiatives

The main merit of multi-stake holder initiatives is that it reduced the shortcomings of the voluntary codes of companies. Where voluntary CSR codes of companies were disregarded blatantly, the corporate world showed more response to multi stake holder initiatives. Learning processes and policy dialogue are the major strengths of multi stake holder initiatives. Sharing knowledge and good CSR practices on the web and other forums, discussions on relevant issues in CSR and to know the experience of other business enterprises are the major advantages of multi stake holder initiatives like the UN Global Compact.[19]

Nonetheless participation of at least the majority in the business field still remains a challenge so far as the multi stake holder initiatives are concerned. Another problem with the multi stake holder initiatives is that the participation is expensive as many factors including wages, contracts, health hazards, safety and labour relations need to be taken into consideration by the companies.[20]

[19] Tatjana Chahoud, *Corporate Social and Environmental Responsibility in India - Assessing the UN Global Compact's Role*, 26, (Sep. 13, 2013, 12:30 PM), https://www.die-gdi.de/uploads/media/Studies_26.pdf
[20] *Id.*

5.3.1 Draft United Nations Code of Conduct on Transnational Corporations

The initial attempt to regulate the activities of multinational corporations in the context of human rights was made by the Draft United Nations Code of Conduct on Transnational Corporations in 1984. Though it was an attempt to provide guidelines for TNCs and to facilitate cooperation among States with regard to activities of TNCs, it was never adopted as a consensus could never be reached and was finally abandoned.[21] Nevertheless it should be noted that the code contained certain outstanding provisions that are not contained even in the present ones. It included "non-collaboration with racist regimes, non-interference with political affairs and intergovernmental relations, training facilitation, financial transactions and investments, transfer pricing, taxation, competition, technology, and information disclosure."[22] It also provided for the U.N. Commission on Transnational Corporations as the international mechanism for implementation of the principles enshrined in the code by

[21] *Comparing the Draft United Nations Code of Conduct on Transnational Corporations with the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, (June. 12, 2015, 10.15 P.M.), http://www1.umn.edu/humanrts/ataglance/compdftun.html

[22] *Id.*; *Draft United Nations Code of Conduct on Transnational Corporations [1983 version]*, (June 22, 2015, 11.45 P.M.), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891

holding annual discussions, intergovernmental consultations and periodical assessment based on government reports.[23]

5.3.2 OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development (OECD) is an international economic organization of 34 countries. The working mechanism of OECD is structured in a way that OECD continuously monitors the events in member countries after which the OECD Secretariat collects and analyses the data thus obtained. It is then followed by discussion of policy by commmittes concerned. The Council makes decisions and the recommendations are then implemented by the respective governments.[24] The OECD is more like a forum where different national governments can work together to share experiences

[23] *Comparing the Draft United Nations Code of Conduct on Transnational Corporations with the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, (June. 12, 2015, 10.15 P.M.), http://www1.umn.edu/humanrts/ataglance/compdftun.html; The Commission was to report to the General Assembly through the Economic and Social Council annually.

[24] Decision-making power is vested in the OECD Council. It is made up of one representative per member country, plus a representative of the European Commission. The Council meets regularly at the level of permanent representatives to OECD and decisions are taken by consensus. These meetings are chaired by the OECD Secretary-General. The Council also meets at ministerial level once a year to discuss key issues and set priorities for OECD work. The work mandated by the Council is carried out by the OECD Secretariat. Representatives of the 34 OECD member countries meet in specialised committees to advance ideas and review progress in specific policy areas, such as economics, trade, science, employment, education or financial markets. There are about 250 committees, working groups and expert groups. Some 40,000 senior officials from national administrations go to OECD committee meetings each year to request, review and contribute to work undertaken by the OECD Secretariat. Once they return home, they have online access to documents and can exchange information through a special network. See http://oecd.org/about/whodoeswhat/

and seek solutions to common problems.[25] The OECD work with the respective national governments, thereby analysing and comparing information about the factors that drive economic, social and environmental change. Thus the major functions of OECD is to help governments foster prosperity and fight poverty through economic growth and financial stability.

The OECD Guidelines for Multinational Enterprises consists of recommendations for responsible business conduct. As of now almost 44 governments have undertaken to encourage their multinational enterprises to observe the guidelines wherever they operate.[26] Thus it consists of both OECD and non-OECD countries. They are guidelines jointly addressed by governments to the multinational companies. Though the guidelines were adopted in the year 1976, it has been updated 5 times, the recent one being in the year 2011.[27]

[25] *The Organisation for Economic Co-operation and Development (OECD)*, (June 22, 2015, 9.25 P.M.), http://oecd.org/about/

[26] *OECD Guidelines for Multinational Enterprises*, (June 23, 2015, 8.00 A.M.), http://www.oecd.org/investment/mne/oecdguidelinesformultinationalenterprises.htm, India is not part of the Governments adhering to the OECD Guidelines for Multinational Enterprises.

[27] The updated version consists of a new chapter on human rights consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, changes in due diligence mechanisms and responsible supply chain management, significant changes in chapters, such as Employment and Industrial Relations; Combating Bribery, Bribe Solicitation and Extortion, Environment, Consumer Interests, Disclosure and Taxation and strengthening the role of the National Contact Points (NCPs). It was the 2000 review of the OECD Guidelines that witnessed the adaptation of principles from UDHR, 1948, Rio Declaration on Environment and Development, 1992 and ILO Declaration of Fundamental Principles and Rights at Work, 1998.

Paragraph 8 of the Introduction to OECD Guidelines specifically state that the States can prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed.[28] Part I of the OECD Guidelines are divided into 11 chapters which consists of principles relating to human rights, employment, environment, consumer rights, combating corruption and so on. It also deals with competition and taxation. Chapter IV of Part I that deals with human rights provides that States have the duty to protect human rights and multinational enterprises should respect human rights; avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved; avoid causing or contributing to adverse human rights impacts and address such impacts when they occur; prevent or mitigate adverse human rights impacts that are directly linked to their business operations; carry out human rights due diligence as appropriate to their size; the nature and context of operations and the severity of the risks of adverse human rights impacts and co-operate through legitimate processes in

[28] OECD Guidelines for Multinational Enterprises, Para 8: Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting requirements by adhering countries or third countries, the governments concerned are encouraged to co-operate in good faith with a view to resolving problems that may arise.

the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.[29]

Primarily, the States are responsible for promoting the implementation of the principles in the OECD Guidelines mainly through National Contact Points (NCPs).[30] The OECD Guidelines follow a unique implementation mechanism of National Contact Points that are established by respective governments of member nations to implement the principles enunciated in the Guidelines. The National Contact Points, in turn, support the multinational enterprises and other stakeholders to take suitable actions to advance the implementation of the

[29] *OECD Guidelines for Multinational Enterprises*, (June 23, 2015, 8.00 A.M.), http://www.oecd.org/investment/mne/oecdguidelinesformultinationalenterprises.htm; Chapter V of Part I that deals with 'Employment and Industrial Relations' provides that enterprises should respect the right of workers to establish or join trade unions and representative organisations of their own choosing, respect their right of collective bargaining, abolish child labour, eliminate all forms of forced or compulsory labour, maintain equality of opportunity and treatment in employment and not to discriminate against their workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status.

[30] OECD Guidelines for Multinational Enterprises, Part II: Implementation Procedures of the OECD Guidelines for Multinational Enterprises: Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance. The business community, worker organisations, other non-governmental organisations and other interested parties shall be informed of the availability of such facilities. National Contact Points in different countries shall co-operate if such need arises, on any matter related to the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken. National Contact Points shall meet regularly to share experiences and report to the Investment Committee. Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices

Guidelines.[31] The NCPs also provide a platform for mediation and conciliation mechanisms for solving practical problems that may arise.[32] If the parties do not to reach a consensus even after the above mentioned process, the NCP shall issue a statement noting the same.[33]

The Investment Committee is responsible for interpretation and implementation of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises. The NCP works in coordination with the Investment

[31] Implementation Procedures of the OECD Guidelines for Multinational Enterprises: Procedural Guidance - Implementation in Specific Instances: The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The NCP will offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.

[32] Implementation Procedures of the OECD Guidelines for Multinational Enterprises: Procedural Guidance - Implementation in Specific Instances: In providing assistance, the NCP will: 1. Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved. 2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant: d) offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.

[33] Implementation Procedures of the OECD Guidelines for Multinational Enterprises: Procedural Guidance - Implementation in Specific Instances: At the conclusion of the procedures and after consultation with the parties involved, make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information, by issuing: a) a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision; b) a report when the parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto; c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached.

Commmittee by sending an annual report to the committee, which will make observations on the actions of the NCP.[34] In addition to this, the advisory bodies of the OECD such as Business and Industry Advisory Committee and Trade Union advisory Committee as well as non-governmental organizations or non-member nations, can also be requested by the Investment Committee to exchange their views on the OECD guidelines. This can even be requested by advisory bodies as well. All their observations need to be taken into account by the Investment Committee when submitting its report to the OECD Council.

The Procedural Guidance that is annexed to the Guidelines provides that in case of issues, the NCP will offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner. For the same, the NCP will make a preliminary assessment of whether the issues raised require further examination and if it deems so, the NCP seek advice from relevant authorities, representatives of the business community, worker organisations, other non-governmental organisations, and

[34] Implementation Procedures of the OECD Guidelines for Multinational Enterprises: The Investment Committee - The Committee will, with a view to enhancing the effectiveness of the Guidelines and to fostering the functional equivalence of NCPs: a) consider the reports of NCPs; b) consider a substantiated submission by an adhering country, an advisory body or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances; c) consider issuing a clarification where an adhering country, an advisory body or OECD Watch makes a substantiated submission on whether an NCP has correctly interpreted the Guidelines in specific instances; d) make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines; e) co-operate with international partners; f) engage with interested non-adhering countries on matters covered by the Guidelines and their implementation.

relevant experts[35]. The NCP will also consult the NCP in the other countries and seek the guidance of the Committee if it needs clarity in interpreting the Guidelines.

5.3.2.1 Effectiveness

The OECD Guidelines are essentially non-binding principles and standards for responsible business conduct and this itself is the basic shortcoming of the OECD guidelines so far as promotion of corporate social responsibility is concerned. The OECD Guidelines, although suffered from not being binding, provided a benchmark for enterprises to follow.[36] The OECD Guidelines were labelled as the most comprehensive text on corporate social responsibility.[37] The OECD Guidelines for Multinational Enterprises, though not legally binding, has established an investigatory procedure that allows the 'National Contact Points' in OECD countries to investigate allegations that companies have breached the Guidelines. It is an effective mechanism as business

[35] Implementation Procedures of the OECD Guidelines for Multinational Enterprises: Procedural Guidance - Implementation in Specific Instances: In providing assistance, the NCP will: 1. Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved. 2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant: a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and relevant experts; b) consult the NCP in the other country or countries concerned; c) seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances.

[36] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 122 (SAGE Pub Ltd, London 2011)

[37] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)

enterprises, in case of an adverse finding by the NCP, will face a risk of public condemnation and litigation under the relevant laws.

The common drawback of soft laws such as OECD Guidelines is that MNCs can apply lower standards of protection of human rights, environment and labour rights in countries that are not members to organizations such as OECD. It is true that the NCP can play a major role in promoting the Guidelines but the fact that these are voluntary and non-binding makes it difficult to implement it effectively. But at the same time, these Guidelines are a significant set of principles that provide international standards for responsible business conducts and are generally considered to be the reference point for multinational corporates. The other drawback of the Guidelines is that the National Contact Points and the Committee on International Investment and Multinational Enterprises under the OECD Guidelines perform functions that are only advisory and consultative in nature and it lacks any binding force.

The drawbacks of the OECD Guidelines for the reason of it being voluntary and non-binding is very evident from the instance of P&O's proposed port in Dahanu, India.[38] The facts of the situation is that P&O (Australia), which is a subsidiary of P&O (UK), was trying to construct a mega-industrial port in Dahanu, which is an ecologically fragile area. It breached several important

[38] Sultana Bashir & Nick Mabey, *Can the OECD MNE Guidelines Promote Responsible Corporate Behaviour? An Analysis of P&O's Proposed Port in Dahanu, India*, WWF-UK RESEARCH PAPER, November 1998, (June 29, 2015, 9.00 A.M.), http://www.oecd.org/investment/mne/2089920.pdf.

principles in the OECD Guidelines including that of human rights, employment, environment and competition policies. But the fact that the Guidelines were voluntary prevented any actions which could have been taken against the multinational company. Though P&O withdrew from the project in Dahanu due to severe local opposition, the instance undoubtedly demonstrate some of the explicit flaws in the Guidelines, the major ones being lack of clarity regarding their scope and application outside the OECD territory and their limited usefulness in encouraging socially and environmentally responsible corporate behaviour.[39] In this context, it has been noted that one of the deficiencies of the guidelines is the problem with the territorial extension of the guidelines to non-adhering States to OECD.[40] It means that enterprises from the territories of OECD adhering States are to observe the Guidelines wherever they conduct business. This has been suggested without providing for any substantive or procedural guidelines.[41]

The OECD guidelines have been successful in solving disputes such as the formulation of new resettlement plans by the company working in Zambia[42] due to persuasion by Canadian NCP, improvement of conditions of labour in

[39] *Id.*; According to the authors, the Guidelines cannot therefore be considered to be a useful tool for ensuring corporate compliance with social and environmental standards and promoting sustainable development.
[40] Stephen Tully, *The Review of the OECD Guidelines for Multinational Enterprises*, 50 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 394-404 (2001)
[41] *Id.*
[42] *Accelerating reform in Africa: Mobilising investment in Infrastructure and Agriculture - Highlights of the Policy Framework for Investment in Zambia*, (Nov 76, 2015, 11.15 P.M.), http://www.oecd.org/investment/investmentfordevelopment/47662751.pdf

Guatemala[43] and improvement of protection of human rights in regard to construction of the gas pipeline in Myanmar[44]. But the same could not change the behaviour of corporations due to limitations in enforcement mechanisms as there are no provisions for reparations or relief and that the enforcement mechanisms do not incorporate any procedures for condemning non-compliant corporations[45] and moreover the human rights clause brought out by the review in 2000 needs much more elaboration so as to clarify the extent of obligations of the corporations.[46]

5.3.3 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which was adopted in 1977 and was subsequently amended in 2000 and 2006 offer guidelines to multinational corporations, governments as well as employers and workers in relation to conditions of employment, wages and industrial relations.[47] When globalization became the

[43] Assessment of Development Results: Guatemala - OECD, (Nov 17, 2015, 12.00 P.M.), https://www.oecd.org/countries/guatemala/46820221.pdf
[44] Prof Dr Roel Nieuwenkamp, *Responsible investment in Myanmar*, (Nov 17, 2015, 10.55 A.M.), https://mneguidelines.oecd.org/Nieuwenkamp-Speech-Myanmar-Oct-2013.pdf
[45] Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. For Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 85 (1999)
[46] Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law*, 22 S. AFR. J. ON HUM. RTS.76, 84, 85 (2006)
[47] *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) - 4th Edition*, (July 16, 2015, 11.45 A.M.), http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm

centre of attraction in both the developed and developing nations, the one thing that was so evident was the emergence of multinational companies. Some even considered that the emergence of multinational corporations was a form of colonialism. The International Labor Organization was very much alarmed, or in other words doubtful about the practice of human rights standards in the workplace. Their concern over the rights of workers in the workplace was the major reason behind the ILO Tripartite Declaration. One of the main reasons for the ILO Tripartite Declaration was the notion of various nations that multinationals were the reason for the increasing gap between nations.[48] The labour related and social policy issues that occurred in the event of growth of multinational enterprises are the basic reasons for framing the ILO Tripartite Declaration. The main objectives of ILO Declaration are promoting employment, providing better labour conditions in terms of wages and industrial relations. It brings in governments, employers and workers together to support and strengthen labour rights and human rights of employees in general. The main aim of the tripartite declaration is to 'encourage the positive contribution which multinational enterprises can make to economic and social

[48] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)

progress and to minimize and resolve the difficulties to which their various operations may give rise'.[49]

The working mechanism of ILO Tripartite Declaration is that of a monitoring mechanism whereby the ILO makes surveys that oversee the extent to which the principles has been implemented by governments, employers and companies. The States are also required to submit reports regarding the implementation of the principles to the ILO for further comments of the representatives of the workers and the employers. The three foremost areas where the ILO Tripartite Declaration focuses are on employment[50], conditions of work and life[51] and industrial relations[52].

[49] Preamble of The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (July 16, 2015, 1.15 P.M.), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

[50] One of the main objectives of the ILO declaration is to promote employment with special focus on developing countries. As per the ILO Declaration, the said objective needs to be achieved in consultation with the government of the host country. The Declaration also focuses on equality of treatment and mandates the governments and companies to phase out any form of discrimination in their policies. The Declaration states that "all governments should pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin"; *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (July 16, 2015, 1.15 P.M.), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf; The Declaration also mandates the multinational enterprises to provide stable employment for their employees and observe freely negotiated obligations concerning employment stability and social security.

[51] The Declaration urges the MNEs to provide the best possible wages, benefits and conditions of work, which is at least adequate enough to satisfy basic needs of the workers and their families. It requires the MNEs to provide them basic amenities such as housing, medical care or food, which is of a good standard. The Declaration envisages multinationals to effectively abolish child labour and to take immediate and effective measures to prohibit and eliminate worst forms of child labour. It also urges the governments to ensure that both multinationals and national enterprises provide adequate safety and health standards for their

5.3.3.1 Effectiveness

The Declaration specifically provides for respecting the sovereign rights, urge the parties to follow the national laws and rules and to respect both local and international practices and standards.[53] But a problem persists if a country did not ratify any of the UN conventions or does not seem to respect human rights. However, the Declaration provides that both countries and companies should comply with these conventions even though they were not ratified by the host country.

The Declaration mainly helps multinationals and national enterprises to refer to the principles underlying international labour standards in their operations. It also provides guidance to governments seeking to attract more investment and increase trade without compromising protection of workers' rights.[54] The Tripartite Declaration provides that in the event of disagreement over the

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employees; *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (July 16, 2015, 1.15 P.M.), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

[52] The Declaration also focuses on freedom of association and freedom of exchange of views among employees. It prohibits any kind of limitation on the workers' freedom of association or the right to organize and bargain collectively. It also provides adequate protection against acts of anti-union discrimination.

[53] According to Para 8 of the Declaration, "all the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards". *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (July 16, 2015, 1.15 P.M.), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

[54] *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (July 16, 2015, 1.15 P.M.), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

application of the Declaration, the parties may submit a request to the ILO for an interpretation of the meaning of its provisions.

It is a fact that the ILO does not enforce sanctions but only records complaints against bodies that violate international rules. The situation is similar in the case of the Tripartite Declaration too. The principles of the Declaration are to be observed on a voluntary basis and hence it can be concluded that this declaration offers only guidelines to its members. The main demerit of such a system is that even the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy is also based on voluntary participation and that the Governing Body has not been vested with powers to find a violation of the principles or to award relief to the sufferers of those violations. Moreover there is little scope for extending the application of the declaration as its main focus is labour rights and employment rights. It has been stated that like the OECD guidelines, the ILO Tripartite declaration is also not very effective due to its voluntary nature and due to the absence of strict enforcement measures.[55]

The ILO Tripartite Declaration has been criticised to have done nothing much to regulate the multinational corporations because of its 'limited scope and the

[55] Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law*, 22 S. AFR. J. ON HUM. RTS.76, 88 (2006)

lack of enforcement mechanism'.[56] The mechanism of ILO Tripartite Declaration does not allow any individual to file a complaint in case of non-compliance by a member State. In case a State does not comply with the principles of the Declaration, the complaint may be filed by another Member State or any delegate to the ILO Conference. The complainant may also be a representative of employers or a representative of workers. As stated before, this does not end in any sanctions, but mere recommendations to the violator State. But the importance of such a complaint mechanism is that it helps in communicating to other member nations that one of the countries is not following human rights standards. The other advantage is that it can make the respective national governments accountable if it turns out during their periodical survey that they are not implementing the principle effectively.

5.3.4 Declaration on Fundamental Principles and Rights at Work

In addition to the ILO Tripartite Declaration, the Declaration on Fundamental Principles and Rights at Work, 1998[57] also focuses on collective bargaining, abolition of forced labour, child labour and discrimination between employees. India has only ratified the following ILO core conventions namely Forced Labour Convention, Abolition of Forced Labour Convention, Equal

[56] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)

[57] *ILO Declaration on Fundamental Principles and Rights at Work*, (July 17, 2015, 11.15 A.M.), http://www.ilo.org/declaration/lang--en/index.htm

Remuneration Convention and Discrimination (Employment Occupation) Convention. At the same time, other core conventions such as Freedom of Association and Protection of Right to Organised Convention, Right to Organise and Collective Bargaining Convention, Minimum Age Convention and Worst Forms of Child Labour Convention have not been ratified by India.

However, as per the Declaration on Fundamental Principles and Rights at Work, as a member of the ILO, India should give effect to the principles mentioned in the core conventions, irrespective of whether they have been ratified or not.[58] It is also clear from the fact that the procedure of filing Annual Review Reports as envisaged under the Declaration is nothing but the reports of countries that have not yet ratified one or more of the ILO Conventions.[59] The Annual Review Reports from non-ratifying nations give the governments a

[58] *The Text of the Declaration and its Follow-up*, (July 17, 2015, 12.10 P.M.), http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm

[59] *Follow up of the Declaration*, (July 17, 2015, 11.30 A.M.), http://www.ilo.org/declaration/lang--en/index.htm; The 2015 review of Annual Reports state that the Government of India maintains that it has no intention to ratify the Right to Organise and Collective Bargaining Convention, 1949 and the Freedom of Association and Protection of the Right to Organise Convention, 1948 due to legal incompatibility and contextual reasons. The reasons such as the lack of political will, lack of law enforcement in general and lack of awareness on the principle and right and the benefits of the Conventions are cited as the reasons for not ratifying these Conventions. It has also been stated that India is awaiting alignment of its national laws with the requirements of ILO Conventions such as the Worst Forms of Child Labour Convention, 1999 and the Minimum Age Convention, 1973. Lack of public awareness, social dialogue, and lack of organizational and human capacities of government institutions and social partners, traditional and cultural barriers and lack of monitoring, law enforcement and labour inspection to identify child labour are cited as the reasons for the delay in ratifying these Conventions. *See Review of Annual Reports under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Office, 325th Session, Geneva, 29 October-12 November 2015, (July 26, 2016, 7.00 P.M.), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_420196.pdf

chance to explain the labour welfare measures they have taken and an opportunity for the labour associations to express their views on the same. The Global Report, which is another requirement as per the Declaration, gives an idea about the global and domestic situation with regard to application of rights and principles mentioned in the Declaration.

5.3.5 UN Global Compact

The Global Compact is a result of the partnership between UN and the International Chamber of Commerce[60] and has been described as the world's largest corporate citizenship and sustainability initiative.[61] The UN Global Compact (UNGC) was launched in July 2000 as a framework for the companies for responsible business practices. The UN Global Compact is a voluntary initiative and not a regulatory instrument that relies on public accountability, transparency and disclosure to complement regulation and to provide a space for innovation.[62] The UN Global Compact has set out principles for the companies to follow in their activities in the areas of human rights[63], labour standards[64], environment and anti-corruption.[65] These principles

[60] *The World's Largest Corporate Sustainability Initiative***,** (July 16, 2015, 6.00 P.M.), https://www.unglobalcompact.org/what-is-gc

[61] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 19 (SAGE Pub Ltd, London 2011)

[62] *Corporate Sustainability in the World Economy, United Nations Global Compact*, (July 20, 2015, 3.55 P.M.), http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf

[63] Principles in the area of Human Rights - The first principle of UNGC states that "businesses should support and respect the protection of internationally proclaimed human rights." This principle reiterates the fact that like the government, individuals and other organisations, companies also do have a responsibility in ensuring protection of human rights.

By ensuring protection of human rights it should be understood that the business community should not infringe human rights. It has been stressed by the UN Human Rights Council that the corporate responsibility to respect human rights is a requirement of business everywhere. This principle encompasses within its ambit promotion of rule of law, address of consumer concerns, increase of worker production and retention and building of good community relationships. The principle gives emphasis to not only promoting human rights within the country of origin but also in other countries where the operations of the company extend. Increase of worker production means that the employees when treated with dignity and when given adequate remuneration will be more productive. Maintaining a good social and environmental record will help the companies to get more new recruits. The UN Global Compact also lays emphasis on adhering to international standards to achieve protection of human rights if there are no adequate and effective national laws for the same. The principle has got very wide ambit as it envisages three set of factors in relation to the responsibilities of the company, (1) considering the country and local context in which it is operating for any human rights challenges that context might pose, (2) determining which policies and practices might infringe human rights and adjust those actions to prevent the infringement from occurring and (3) analysis of the company's relationships with Government, business partners, suppliers and other non-State actors to consider whether they might pose a risk for the company in terms of implicating it in human rights abuse. The second principle states that "businesses should make sure they are not complicit in human rights abuses." When the company provides goods and other supplies with the knowledge that it will be used to commit abuse it is termed as direct complicity. When the company benefits from such abuses even if it does not assist them it is termed beneficial complicity and when it is silent or inactive about these abuses it is termed as silent complicity. The further explanation on complicity states that "complicity in human rights abuses occurs where a corporation knowingly provides practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the abuse." Complicity is explained in such a way that it means an act or omission (failure to act) by a company, or individual representing a company, that "helps" (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and the knowledge by the company that its act or omission could provide such help.

[64] Principles in the area of Labour - The third principle states that "businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining." Freedom of association gives both the employer as well as the workers to establish and be a part of the organisations of their own choice. Collective bargaining, if it is followed by the principle of good faith, ensures a platform where the employees can discuss the matters relating to conditions of work, relations between workers and organisations and can also include employers and trade unions as participants.

Principles No.5 and 6 state that "businesses should uphold the effective abolition of child labour" and "businesses should uphold the elimination of discrimination in respect of employment and occupation" respectively. Apart from slavery, child labour also includes trafficking and forced labour, using children for pornography, prostitution and drug trafficking and hazardous employment. The discrimination can happen indirectly in matters like recruitment, remuneration, maternity benefits, security of tenure, working hours and job security.

[65] Principles in the area of Environment & Anti-corruption - Principle no.7 states that "businesses should support a precautionary approach to environmental challenges." This can be very well understood from the principles laid down in Rio Declaration, 1992 especially No.15 which states that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to

enjoy universal consensus and has been derived from UDHR, ILO's Declaration on Fundamental Principles and Rights at Work, Rio Declaration on Environment and Development and the United Nations Convention against Corruption.[66] The UNGC is more of a platform for knowledge sharing and dialogue process. Companies see this as a platform for networking with other companies and thus to develop their CSR commitment.[67] The UNGC also ensures that the companies undertake due diligence so as to comply with its national laws and work to identify any violations of human rights and prevent it. The UNGC is assisted by the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP), the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Programme (UNDP) and the United Nations Industrial Development Organization (UNIDO).

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prevent environmental degradation". Precautionary approach seems important as the remedial costs may be huge when compared to cost for preventing environmental damage and when it comes to the company's image it will be affected in a very bad way even if the company is ready to spent for treatment costs. Principle No.8 states that "businesses should undertake initiatives to promote greater environmental responsibility." This is in close resemblance with Agenda 21 of Rio Earth Summit. Principle no.10 states that "businesses should work against corruption in all its forms, including extortion and bribery."

[66] *The Ten Principles of the UN Global Compact*, (July 16, 2015, 8.15 P.M.), http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

[67] Tatjana Chahoud, *Shaping Corporate Social Responsibility (CSR) in India-Does the Global Compact Matter?*, (Feb. 1, 2012, 10:30 AM), http://www.die-gdi.de/uploads/media/download_document__127_KB__01.pdf

5.3.5.1 Working at the National Level

Global UNGC gets its objectives implemented with the help of national networks. The two national networks of the UNGC in India are the Global Compact Society and the India Partnership Forum.[68] The main function of Global Compact Society is to establish network among UNGC participants.[69] The activities of Global Compact Society have been criticized for lack of follow-up and for not including all the stakeholders. The main objectives of Global Compact Society are the following[70]:

1. to increase awareness and to attract further participants through marketing,
2. to disseminate best practices and to promote knowledge-sharing so as to ensure a steady improvement (instead of monitoring),
3. to facilitate, select and arrange projects,
4. to organize meetings and conventions annually in cooperation with such other organizations as Federation of Indian Chambers of Commerce and Industry (FICCI) and the Confederation of Indian Industry and
5. to establish regional chapters.

[68] *India Partnership Forum (IPF) - What and Why?*, (June 23, 2013, 9.15 P.M.), http://www.indiapartnershipforum.org/whatis_ipf.htm; *Global Compact Network India*, (June 23, 2013, 7.45 P.M.), http://globalcompact.in/about-us/

[69] *About Global Compact Network India*, (June 23, 2013, 8.30 P.M.), http://globalcompact.in/about-us/about-gcn-india/

[70] *Global Compact Network India*, (June 23, 2013, 7.45 P.M.), http://globalcompact.in/about-us/

The India Partnership Forum, as the name suggests, is a forum for multi-stakeholder dialogue for promoting Corporate Social Responsibility in India. It has established a code of its own, named as the 'Social Code for Business' which is a set of principles of good corporate citizenship. The same has also been criticized for being vague when compared to the UNGC principles.[71]

5.3.5.2 Global Compact Board & Global Compact Office

Global Compact Board is a multi-stakeholder body whose functions are to provide ongoing strategic and policy advice and to make recommendations to the Global Compact Office, participants and other stakeholders.[72] The implementation of integrity measures is yet another function of the Board. Relatively, the main function of the UN Global Compact office is to provide appropriate guidance to the company concerned to remedy the alleged situation of abuse. When a matter of abuse is presented to the Global Compact Office, after judging that the matter is not frivolous, the matter is forwarded to the participating company for their written comments[73] and the Global Compact Office should be kept informed about the steps taken by the participating

[71] *India Partnership Forum*, (June 23, 2013, 7.45 P.M.), http://www.indiapartnershipforum.org/unglobal_compact.htm
[72] *Brief Bios: Global Compact Board*, (July 20, 2015, 9.25 P.M.), https://www.unglobalcompact.org/about/governance/board/members
[73] It should be submitted to the party raising the matter with a copy to the Global Compact Office

company.[74] The matter may be referred to the Global Compact Board for recommendations.[75]

Moreover the Voluntary Principles on Security and Human Rights that was established in 2000[76] also emphasize on the protection of human rights. There are various other voluntary initiatives too, as for example, the Kimberley Process Diamond Certification Scheme of 2002, the basic aim of which is to curtail the conflict diamonds that keep up the rebel groups in Angola and Sierra Leone and the Extractive Industries Transparency Initiative of 2002, the focal point of which are issues regarding the publication of revenues which in one way is the cause of internal conflicts worldwide.[77]

5.3.5.3 Effectiveness

It is agreed that the UN Global Compact is not formed as a substitute to any existing system but to complement the other initiatives to increase legitimacy

[74] *United Nations Global Compact Office*, (July 23, 2015, 6.00 P.M.), https://www.un-ngls.org/index.php/engage-with-the-un/un-civil-society-contact-points/399-united-nations-global-compact-office

[75] The UN Global Compact Board, (July 23, 2015, 11.00 P.M.), https://www.unglobalcompact.org/about/governance/board

[76] *What Are The Voluntary Principles?*, (July 22, 2015, 10.35 A.M.), http://www.voluntaryprinciples.org/principles/introduction. The Voluntary Principles on Security and Human Rights are designed to guide the companies to maintain the safety of their operations within a framework that promotes respect for human rights. The same has been established by the Governments of the United States and the United Kingdom along with companies in the extractive and energy sectors and NGOs.

[77] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 284 (2009)

and universality.[78] This is exactly true, as apart from the UN Global Compact initiatives, several other initiatives exist such as the standards set by the International Financial Corporation relating to child labour and environment, standards set by IMF and World Bank, the regional efforts such as the North American Free Trade Agreement (NAFTA) and the side agreements (on labour and environment) created thereafter, the incentive scheme under General System of Preferences by the EU creating economic preferences to developing nations that have upgraded labour and environmental regulations, the OECD Guidelines and so on.[79] But the fact as to whether a company will voluntarily join the commitment and strive to protect human rights and other related rights is doubtful as the working primarily is based on promoting companies to communicate their progress annually and listing them as non-communicating if they fail to do so if they do not do. Finally the only sanction is that such listed company will be delisted only after the expiration of one year from the initial deadline.[80] The total number of non-communicating participants, as of 2016, is

[78] B. King, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT'L L.J. 481, 483 (2001)
[79] W.H.Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact and Global Governance*, 34 CORNELL INTL.LJ 501, 505, 507-9 (2001)
[80] The non-business participants are under an obligation to submit a 'Communication on Engagement' (COE) every two years. The COE is basically a disclosure to stakeholders on the specific activities that a non-business participant has taken in support of the UN Global Compact; *The Communication on Engagement (COE) in Brief*, (Feb. 20, 2016, 10.30 A.M.), https://www.unglobalcompact.org/participation/report/coe

1587.[81] This shows that UN Global Compact has not been able to implement its principles effectively.

The most important point to be noted is that the representatives of the UN member States, especially those of the developing world, remained absent during the launch of the UN Global Compact as they feared that the corporations will continue to violate human rights and pollute environment under the legitimate protection of the UN.[82] Moreover, according to them, apart from the inexpensive membership price, all that the companies have to do in relation to protection of rights stated under the ten principles is to commit their support towards UN Global Compact and post the same on the website.[83] There have been instances where the Transnational Resource and Action Center, an NGO, criticized the tie up between the UN and the multinational companies by stating that it sends a wrong message when the Security General of the UN stands along with top officials of companies with bad reputations to promote globalization.[84] To contradict this, there are certain instances where private corporations had worked hand in hand with the UN agencies to alleviate poverty.[85]

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[81] *Non-Communicating Participants*, (May 17, 2016, 1.30 P.M.), https://www.unglobalcompact.org/participation/report/cop/create-and-submit/non-communicating
[82] B. King, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT'L L.J. 481, 482 (2001)
[83] *Id.* at 483
[84] A.M. Taylor, *The UN and the Global Compact*, 17 NY LAW SCHOOL JHR 980 (2001)
[85] UNDP and CISCO systems in the Net Aid project.

The effectiveness of voluntary adherence to the principles is doubtful and it is clear from the case of *John Doe* v. *Unocal Corp*[86] which relates to human rights violations by a US corporation called Unocal in its operations in Burma. Another fact which is to be noted is that corporations that do not deal with consumers directly, but instead sell their goods to another company, may not be so inclined to join the Global conduct and to follow its principles.[87] The practical benefits in participating in the UN Global Compact include establishing a global policy framework, partnerships with UN agencies, governments and other stakeholders so as to advance sustainability solutions, linking business units and utilizing the UN Global Compact management tools. Though the company has to follow the Global Compact principles once it becomes a part of the commitment, the basic issue is whether a company voluntarily joins the commitment and strives to protect human rights and other related rights. While it is true that companies like Royal Dutch Shell, Novo Nordisk, and BP Amoco have publicly proclaimed their cooperation with the UN and that they will safeguard human rights, it is to be seen whether they will really be following their actions. It is not sure as to how far the corporate entities other than those that are self-motivated would really work for ensuring that these rights are not infringed. It is really doubtful as to whether the

[86] 963 F. Supp. 880 (CD. Cal. 1997)

[87] M. Shaughnessy, *The UN Global Compact and the Continuing Debate about the Effectiveness of Corporate Voluntary Codes of Conduct*, COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 159, 163 (2000)

initiative will in fact be effective but if the UN Global Compact can meet the above mentioned demand along with the responsibility of being good corporate citizens, then it would be effective in fulfilling its objectives.

The UN Global Compact, as it is a voluntary initiative, has been termed as an initiative which is neither a code nor a regulation.[88] The NGOs have vehemently criticised UN Global Compact, as according to them, companies do not use the mechanism to showcase their commitment towards responsible business practices but to promote themselves as good corporate citizens without fulfilling their commitments.[89] There are also suggestions to link UN Global Compact mechanism with Global Reporting Initiative to bring in core accountability so far as corporates are concerned.[90]

5.3.6 UN Global Compact and India

So far as India is concerned, the UNGC did not considerably make a huge positive impact. One of the major criticisms to the UNGC from the side of the

[88] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)
[89] Abira Chatterjee, *Social Compliance, Social Accountability and Corporate Social Responsibility*, 44(18) Mainstream (2008), (July 21, 2015, 9.10 A.M.), www.mainstreamweekly.net/article646.html
[90] *Id.*

Indian companies is that the UNGC created only a limited impact which is clear from the low participation rate.[91]

In India more than 50 per cent of the participants joined in UNGC in the first year itself.[92] But the empirical data collected by the German Development Institute shows that almost all the Indian companies have nominated a department or a person to carry on the CSR functions. What is to be understood from this is that CSR is not integrated in the company's business. The data also showed that business in India view community development projects as the best way to carry out CSR and by community development projects, they mean giving back some of the profits that they have earned to the society.[93] As the business in India still focuses on community development as part of its CSR initiatives, the tendency is to focus more on social and environmental issues and not on specific human rights issues and issues related to anti-corruption.[94] The inference which can be drawn from this is that most of the companies

[91] Neha Mahal, *The United Nations Global Compact and Corporate Social Responsibility in India*, (March 7, 2016, 10:30 AM), http://www.cdhr.org.in/csr/un-global-compact-and-csr-in-india/

[92] Tatjana Chahoud, *Corporate Social and Environmental Responsibility in India - Assessing the UN Global Compact's Role*, 26, (Sep. 13, 2013, 12:30 PM), https://www.die-gdi.de/uploads/media/Studies_26.pdf

[93] *Communication on Progress 2015 Key Facts*, (Feb. 23, 2016, 7.30 P.M.), https://www.unglobalcompact.org/docs/communication_on_progress/cop-key-facts-2015.pdf

[94] There are instances where companies promote the welfare of the community as a whole wherein issues concerning human rights and anti-corruption are also given due focus, but priority, even in such cases, would be towards social and environmental concerns. The Twenty20 project undertaken by Kitex corporation in Kizhakkambalam in Kerala is an example of this. Though the project has helped in providing scholarships and medical expenses for the poor, the main focus is on upgrading civic amenities such as drinking water plants and roads.

might turn a blind eye towards labour and other related issues of workers, but proceed with community development endeavours and earn goodwill and reputation for the company. The implementation of the UNGC objectives did not yet find success in India as most of the companies are still not able to get all the stakeholders represented. It is clear from most of the cases that the trade unions are yet to join.[95] The process of CSR is incomplete without the participation of NGOs. In India, NGOs are not in a position to exercise too much pressure on the companies with regard to CSR measures.

It is said that most of the Indian companies are designated as non-communicating companies on the UNGC website.[96] At the global level, the participants, including business and non-business participants, have increased to 8289 in 2014. The same has increased to 8381 in the year 2015[97] and 12252 in 2016[98]. At the same time, the Global Labour Associations at the global level have gone down. This is a matter of concern.

[95] Neha Mahal, *The United Nations Global Compact and Corporate Social Responsibility in India*, (March 7, 2016, 10:30 AM), http://www.cdhr.org.in/csr/un-global-compact-and-csr-in-india/

[96] Tatjana Chahoud, *Shaping Corporate Social Responsibility (CSR) in India-Does the Global Compact Matter?*, 669 (Feb. 1, 2012, 10:30 AM), http://www.die-gdi.de/uploads/media/download_document__127_KB__01.pdf

[97] *Communication on Progress 2015 Key Facts*, (Feb. 23, 2016, 7.30 P.M.), https://www.unglobalcompact.org/docs/communication_on_progress/cop-key-facts-2015.pdf

[98] *United Nations Global Compact*, (Dec 29, 2016, 9.30 A.M.), https://www.unglobalcompact.org/

Year- 2005	**GLOBAL**	**INDIA**
Participating Companies	2323	101
Non-Communicating Companies	613	50
Global Business Associations	14	Nil
Local Business Associations	132	3
Global Labour Associations	6	Nil
Local Labour Associations	8	Nil
Global NGOs	41	Nil
Local NGOs	124	5

(Taken from Tatjana Chahoud, *Corporate Social and Environmental Responsibility in India – Assessing the UN Global Compact's Role*, 26, (Sep. 13, 2013, 12:30 PM), https://www.die-gdi.de/uploads/media/Studies_26.pdf)

Year- 2016	**GLOBAL**	**INDIA**
Participating Companies	4220	77
Non-Communicating Companies	455	16
Global Business Associations	75	1
Local Business Associations	421	3
Global Labour Associations	1	Nil
Local Labour Associations	18	Nil
Global NGOs	432	29
Local NGOs	1018	56

(Compiled by the researcher based on the data from https://www.unglobalcompact.org/what-is-gc/participants)

The total participants from India including business and non-business participants are 264. The participating companies in India declined from 101 in 2005 to 77 in 2016. It is disheartening to note that there has been considerable amount of reduction in the number of participating companies during a span of 11 years. At the same time, it is evident that global and Indian NGOs have started to make their presence in this UN multi-stakeholder initiative.

In general, though there has been a considerable reduction in the percentage of non-communicating companies when compared to the total participating companies at the global and level, it is discouraging to know that around 657 companies were expelled from UN Global Compact in 2014 alone.[99]

5.3.7 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

With the growing need to regulate multinational corporations, the UN established the United Nations Centre on Transnational Corporations (UNCTC) in 1974.[100] A group was established by the UN Economic and Social Council to work on the issue of regulating multinational corporations and one of their recommendations was to establish the United Nations Commission on Transnational Corporations which was conceived as a permanent intergovernmental forum for discussions relating to multinational corporations.[101] The United Nations Centre on Transnational Corporations worked on the enactment of a code of conduct for multinationals and the draft

[99] *UN Global Compact Expels 657 Companies in 2014*, (July 20, 2015, 11.35 P.M.), https://www.unglobalcompact.org/news/1621-01-14-2015

[100] KHALIL HAMDANI, LORRAINE RUFFING, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST 2 (Routledge 2015)

[101] *Comparing the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights with the Draft United Nations Code of Conduct on Transnational Corporations*, (Aug. 2, 2015, 10.50 P.M.), http://hrlibrary.umn.edu/ataglance/compdftun.html

code was enacted in 1983 which was subsequently revised in 1988 and 1990.[102] The 1990 amendment incorporated the need to respect human rights as it specifically provided that transnational corporations must respect human rights and fundamental freedoms in countries in which they operate and shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion.[103] Since most of the nations favoured liberalization and privatization, resulted in the end of working of UNCTC.[104]

Later, the UN Sub-Commission for the Protection and Promotion of Human Rights adopted the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights in the year 2003[105] to set up some binding human rights standards. In fact, the same was enacted to establish binding principles in place of the vacuum created by lapse in realization of voluntary corporate guidelines.[106] The fact that the 2003 UN Norms got established shortly after the launch of UN Global

[102] STEPHEN TULLY, INTERNATIONAL DOCUMENTS ON CORPORATE RESPONSIBILITY 6 (Edward Elgar Publishing 2008)
[103] *The UN and Transnational Corporations*, (July 24, 2015, 9.15 A.M.), http://www.unhistory.org/briefing/17TNCs.pdf
[104] KHALIL HAMDANI, LORRAINE RUFFING, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST 1 (Routledge 2015)
[105] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), (July 27, 2015, 10.25 A.M.), http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En
[106] Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law*, 22 S. AFR. J. ON HUM. RTS.76 (2006)

Compact made it clear that the UN was serious in its endeavour to ensure that the TNCs respect human rights.[107] The 2003 Norms were as a result of the recommendations made by the Working Group on the Working Methods and Activities of Transnational Corporations, which was established by a Sub-Commission of the UN Commission on Human Rights.[108]

The 2003 UN Norms had made a mark in the context of corporate human rights responsibility when it was drafted, as when compared to other international institutions, these norms contain obligations, not just in general terms to 'foster and respect human rights', but obligations that specifically relate to rights of workers[109], security of person[110], principle of non-discrimination[111], various

[107] Surya Deva, *United Nation's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right* Direction, 10 ILSA J INT'L & COMP L. 493, 495 (2004)

[108] David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 THE AMERICAN JOURNAL OF INTERNATIONAL LAW.901, 906 (2003)

[109] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 5: Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 6: Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 7: Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

[110] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 3: Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extra-

other labour rights[112], consumer rights[113] and environmental protection[114]. The 2003 UN Norms is not just limited to TNCs, but applies to 'other business

judicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 4: Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

[111] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 2: Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

[112] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 8: Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 9: Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

[113] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 13: Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

[114] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 14: Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bio-ethics and the

enterprises' that includes contractor, subcontractor, supplier, licensee or distributor, the corporate, partnership, or other legal form used to establish the business entity.[115] The Norms, thus ensures that the TNC makes sure that its supply chain follows due human rights obligations in its operations. Rather than merely stating, like many other initiatives in this regard, that 'States are primarily responsible for the protection of human rights', the 2003 Norms proceeds to state furthermore that 'within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups'. This was also made a part of the 'General Obligations' that form the first principle of the Norms.

Principle 'E' of the Norms that provides for 'Respect for national sovereignty and human rights' states that transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the

precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

[115] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 21.

armed forces or security forces, or any other individual or organization. This was extremely necessary in the light of grave human rights atrocities committed around the world by the MNCs in complicit with the paramilitary forces of the respective governments.

The 2003 Norms also provided for definitions of important terms such as 'transnational corporations'[116], 'other business enterprise'[117], 'stakeholder'[118] and 'human rights'[119]. When other voluntary principles left it for the subjective

[116] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 20: The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

[117] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 21: The phrase "other business enterprise" includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

[118] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 22: The term "stakeholder" includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term "stakeholder" shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others.

[119] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 23: The phrases "human rights" and "international human rights" include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law,

interpretation of these terms and adoption of meaning used in general parlance, the 2003 Norms provided for definitions of each of these vital terms, thus removing anticipated ambiguities and vagueness. Direct obligations for multinational corporations in place of obligations to the State, non-voluntary framework and rigid enforcement mechanism were the highlights of the 2003 UN Norms.[120]

The Norms established a direct link between international law norms, non-State actors, and individuals without any role for the State as a mediator. The Norms seek to incorporate its provisions in the contracts entered into between the TNCs and the stakeholders concerned relating to hiring of individuals, private militias and paramilitary groups. The Commentary to the Norms provides that "if a transnational corporation or other business enterprise contracts with a State security force or a private security firm, the relevant provisions of these Norms[121] shall be incorporated into the contract and at least those provisions

international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.

[120] Pini Pavel Miretski & Sascha-Dominik Bachmann, *The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises With Regard to Human Rights: A Requiem*, 17(1) DEAKIN LAW REVIEW 5 (2012), (July 30, 2015, 8.45 P.M.), http://ssrn.com/abstract=1958537

[121] The relevant portions mean paragraphs 3 and 4 of the 2003 UN Norms. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, Para 3: Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law; The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights:, Para 4: Security arrangements for

should be made available upon request to stakeholders in order to ensure compliance."[122] Para 15 of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights also state that "each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms."[123] It does not require further clarification that the contract thus entered into may be enforced by under the domestic law of contract. [124]

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transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

[122] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Commentary to Para 4, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003)*, (June 13, 2012, 9.00 P.M.), http://hrlibrary.umn.edu/business/commentary-Aug2003.html

[123] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 15: As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

[124] However, it is not sure whether it will affect privity of contracts.

5.3.7.1 Effectiveness

The fact that the Norms explicitly requires the TNCs to ensure that it will pursue the course of conduct that is the most protective of human rights is in fact a sword against the nationality and territorial principles. The 2003 Norms enforced the argument that corporate social responsibility is no longer synonymous with charity or maximising shareholder welfare. The Norms has proved that corporation is also a subject of international law and in this sense provided a powerful and coherent basis for regulating the activities of corporations.

The importance of the UN Norms of 2003 is that it marked the beginning of significant changes in global thinking about corporations. The main advantage of the 2003 UN Norms was that it not only laid down obligations so far as TNCs are concerned, instead, it also ensured its implementation. The 'general provision of implementation' in Para 15 and 16 provides for periodic reporting mechanism[125] and clause 18 provides for effective and adequate reparation to

[125] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 15: As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms; The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to

those that have been adversely affected by failures to comply with these Norms in the form of reparations, restitution, compensation and rehabilitation.[126] This clearly suggests that the 2003 UN Norms were quite different and practical from the rest such as the UNGC, ILO tripartite Declaration and OECD Guidelines as it specifically provided for an effective implementation mechanism, reparations in case of violations and proper redressal options.[127] The concept of enterprise liability has been provided in Paragraph 18 of the Norms which requires TNCs to provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms. The Norms pierce the corporate veil for all litigation purposes thereby solving one of the greatest difficulties in recovering against a parent corporation for the operations of its subsidiaries.

Human Rights, 2003, Para 16 of: Transnational corporations and other businesses enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other businesses enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

[126] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 18: Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.

[127] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Second part of para 18: In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

The Norms also provided for monitoring of the activities of transnational corporations by creating a web of reporting which gives importance to stakeholder input and complaints about violations of the Norms which would be made available to NGOs, unions and individuals.[128] The reason for the 2003 UN Norms casting responsibility on the TNCs is that it would be difficult for the States to implement the same considering that many of them have not ratified most of the international human rights instruments.[129] As per the Norms the failure to exercise due diligence is sufficient to incur liability so far as the TNCs are concerned. The latter part of paragraph 11 of the Norms provide that transnational corporations and other business enterprises shall not be involved in any activity that supports, solicits, or encourages States or any other entities to violate human rights. It also provides that TNCs should ensure that their goods and services will not be used to violate human rights.[130]

[128] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights in the year 2003, Para 16: Transnational corporations and other businesses enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other businesses enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

[129] *Status of Ratification of 18 International Human Rights Treaties***,** (Dec.27, 2016, 10.00 A.M.), http://indicators.ohchr.org/

[130] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 11: Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

One may wonder the need for a definition of 'other business enterprise' that appear in the 2003 UN Norms. This is significant because the main definition focuses on companies as an international enterprise and the definition of 'other business enterprise' has been provided to ensure that even an enterprise incorporated as a national enterprise, provided the activities are not entirely local, would be responsible to follow the Norms. The most important feature of the 2003 UN Norms is that it imposes human rights duties on companies directly under international law in the same manner as imposed on the States under the treaties they have entered into.[131] This, undoubtedly, became the reason for rejecting the Norms as having no legal status.

The 2003 UN Norms were not supported by the multinational corporations and their organizations such as the International Organisation of Employers, the International Chamber of Commerce, the Confederation of British Industry and the United States Council for International Business due to the basic reason that they created binding obligations on corporations.[132] One of the main criticisms to the 2003 Norms was that instead of following the traditional notion of State being the subject of international law, the norms made transnationals the

[131] John G. Ruggie, *The Construction of the UN "Protect, Respect And Remedy" Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*, 16(2) EUROPEAN HUMAN RIGHTS LAW REVIEW 127-133, 128 (2011)
[132] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)

subject of international law by casting responsibilities and obligations upon them.

Unlike other corporate codes and standards, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights obligates the corporations to adopt, disseminate and implement internal rules of operation in compliance with the Norms and also to incorporate these norms in their daily business activities.[133] But the same lacks legal force as the Norms had not been requested by the UN Commission on Human Rights which met on April 2004. It is also interesting to note that the Commission did not vote for or against the norms but simply set it aside.[134] The States as well as those with vested interests were not ready to accept the Norms as it constituted a significant departure from the set standards of international law.

[133] The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, Para 15: As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

[134] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 287 (2009)

The 2003 UN Norms on Transnational corporations were criticized for not involving all the stakeholders in its creation.[135] But the same is not true, as almost all stakeholders including World Business Council for Sustainable Development and International Business Leaders Forum were involved in its creation.[136] Although the Norms specifically provide for a non-discriminatory policy, it has been criticized for not identifying HIV/AIDS and pregnancy as the possible reasons for discrimination and not including such factors which the corporation should desist from.[137] Further criticisms include absence of supervisory mechanism to ensure monitoring process, lack of provisions clarifying the responsibility of the parent company for the acts of its subsidiaries and for making the concept of human rights universal not just in terms of aspirational but in terms of its operation as well.[138]

[135] DANIEL BRENNAN, CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 282 (Kluwer Law International 2011)

[136] David Kinley et al., *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25(1) COMPANY AND SECURITIES LAW JOURNAL 30-42 (2007), (Aug. 3, 2015, 7.15 A.M.), http://ssrn.com/abstract=962981.

[137] K. BUHMANN, L. ROSEBERRY, M. MORSING, CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL, LEGAL AND MANAGEMENT PERSPECTIVES 113 (Springer 2010); Surya Deva, *United Nation's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right* Direction, 10 ILSA J INT'L & COMP L. 493 (2004)

[138] JENA MARTIN, KAREN E. BRAVO, THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 228 (Cambridge University Press 2015); Surya Deva, *United Nation's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right* Direction, 10 ILSA J INT'L & COMP L. 493 (2004); According to the author, the 2003 UN Norms has made human rights universal not only in terms of aspiration but also in terms of its operation. For example, though it provides for 'reasonable wages', the concept varies from country to country. Same is the case with 'access to highest attainable standard of health' which also varies from nation to nation. In short, the norms should have included provisions for local differences as well.

5.3.8 United Nations Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights were introduced in the year 1976 and was updated in 2011.[139] Its main aim is to bring business enterprises within the realm of human rights.[140] It should be noted that the previous initiative by the UN on the same aspect, the 2003 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' could not be implemented due to objection from the side of governments and business community.[141] The main point of criticism against the 2003 UN Norms was that it established legal obligations for enterprises that were analogous to the legal obligations of States under international human rights law.[142]

The UN Guiding Principles are popularly known as 'Ruggie Principles' as it has been developed by Harvard Professor John Ruggie, who was appointed as the UN Special Representative for Business and Human Rights in 2005[143] to

[139] *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[140] ROBERT C. BIRD, DANIEL R. CAHOY, JAMIE DARIN PRENKERT, LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP 3 (Edward Elgar Publishing 2014)
[141] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 287 (2009)
[142] Dr Jonathan Bonnitcha, *The UN Guiding Principles on Business and Human Rights: The Implications for Enterprises and their Lawyers*, 1 THE BUSINESS AND HUMAN RIGHTS REVIEW 14 (2012), (July 29, 2015, 10.45 P.M.), http://www.allenovery.com/SiteCollectionDocuments/BHRRAutumn2012Issue1.pdf
[143] *Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 3,

recommend suggestions on limiting human rights abuses by the private sector, remedies in cases of human rights violations, empowerment of the State in these cases and to bring in more human rights dimensions to CSR.[144] It has been specifically stated that the United Nations Guiding Principles on Business and Human Rights shall apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.[145] The United Nations Guiding Principles on Business and Human Rights is not an international instrument that could be ratified by the States, but is a guidance which requires the States to ensure that the obligations set out are duly complied with in their domestic legislations.[146] The Guiding principles are in fact concrete practical recommendations and further clarifications to the UN "Protect, Respect and Remedy" Framework formulated by John Ruggie in June 2008.[147] The foundation of the framework is based on

(July 29, 2015, 4.00 P.M.), https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf

[144] *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[145] General Principles, *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[146] *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, (July 19, 2015, 3.40 P.M.), http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf

[147] The Human Rights Council has unanimously approved the Framework in 2008; *UN "Protect, Respect and Remedy" Framework and Guiding Principles*, (Sep. 5, 2015, 8.45 A.M.), http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles; Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9(2) EUROPEAN COMPANY LAW 101–109 (2012)

the following[148], (1) the State duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) greater access by victims to effective remedy, both judicial and non-judicial.

The set of principles require the States to take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[149]

Principle No. 3 (a) of the United Nations Guiding Principles on Business and Human Rights states that the States should enforce laws that require business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.[150] It is time that the States make substantial changes in the legislations relating to labour laws, environmental laws, anti-corruption laws and human rights laws in general specifying the need of corporate social responsibility and assess their adequacies and remove loopholes, if any.

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[148] General Principles, *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[149] The United Nations Guiding Principles on Business and Human Rights, Principle No. 1: States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

[150] *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

Principle No. 3 (d) of the United Nations Guiding Principles on Business and Human Rights mandate the States to encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts. The Indian Companies Act is different from this as it gives an option to the companies to evade their CSR measures by stating the reasons for not spending the required CSR amount.[151]

Principle no. 11 requires business to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved. By addressing adverse human rights impacts it means to take adequate measures for their prevention, mitigation and, where appropriate, remediation. The significant point here is that the primary human rights responsibility of businesses is preventive[152], i.e., the business enterprises should ensure that their activities do not cause human rights violations. The secondary responsibility is to provide remedy to the individuals who are affected by the human rights abuses. The secondary responsibility arises only when a business enterprise fails to achieve the said primary responsibility.

[151] CSR under Companies Act, 2013 follows a 'comply or explain' approach. Detailed discussions have been provided in the following chapter.

[152] Dr Jonathan Bonnitcha, *The UN Guiding Principles on Business and Human Rights: The Implications for Enterprises and Their Lawyers*, 1 THE BUSINESS AND HUMAN RIGHTS REVIEW 14 (2012), (July 29, 2015, 10.45 P.M.), http://www.allenovery.com/SiteCollectionDocuments/BHRRAutumn2012Issue1.PDF

The fact that business enterprises should respect human rights have been clarified in Principle no. 13.[153] Though this principle may be of some help, it seems to be very general and open to multiple interpretations. Principle no. 14 requires all business enterprises to respect human rights irrespective of their size, sector, operational context, ownership and structure. This is a lesson to us given the fact that the Indian legislation conveniently discriminates between companies who have a greater net profit and companies that don't. Thus the concept of CSR is itself very different from what it is at the international level.

Principle no. 16 is one that needs to be implemented into our national framework without delay. It stipulates that business enterprises should express their commitment to meet the responsibility through a statement of policy that is approved at the most senior level of the business enterprise and is informed by relevant internal or external expertise. This statement of policy should contain the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services and the same should be publicly available and communicated internally and externally to all personnel, business partners and other relevant parties.[154] This

[153] *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; It states that business should avoid contributing to adverse human rights impacts through their own activities, and address such impacts when they occur and should also seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

[154] *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

should be followed in the policies and procedures of the business enterprise as well.

Principles 18 to 22 talk about the CSR initiatives that the business enterprises have to follow. It is to be noted that the CSR which India wanted badly is this and not the one stipulated under the Indian Companies Act of 2013. The national legislation stipulates a percentage of amount to be paid, that too by some companies, towards CSR objectives mentioned under its VII Schedule without addressing the human rights issues caused by the very same corporations. The UN Guiding Principles is a huge departure from this and sets out the following. Principle no. 18 requires business enterprises to identify actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships and should rely on independent human rights expertise and meaningful consultation with potentially affected groups and other relevant stakeholders. Furthermore business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.[155] The UN Guiding Principles also stipulates business enterprises to track the effectiveness of their response by receiving feedback from both internal and external sources, including affected

[155] The United Nations Guiding Principles on Business and Human Rights, Principle No. 19

stakeholders.[156] Principle no. 22 mandates that where it is clear that the business enterprise has 'caused or contributed' to adverse impacts, it should remedy the same through legitimate processes.

The Guiding Principle no.25 requires the States to have adequate judicial remedies to combat corporate human rights violations.[157] The fact that our system lacks effective remedial measures, both judicial as well as legislative, is clear from past instances such as the Bhopal gas tragedy. The incident has proved that India does not have a good track of providing adequate judicial remedies for corporate human rights abuses. If instances such as Bhopal Gas Tragedy relate to instances that occur within a country's territory or jurisdiction, the instances such as human rights violations caused by Shell Oil Co. in Nigeria and the subsequent petitions before the US Courts under ATCA highlights the importance of access to judicial remedy in any country irrespective of whether the act happened within its territory or not. It is time that our nation recognises the importance of providing such a remedy. But before that, our nation should learn from its failures and defects in the trial of Bhopal Gas tragedy and correct its mistakes in the future.

[156] The United Nations Guiding Principles on Business and Human Rights, Principle No. 20
[157] The United Nations Guiding Principles on Business and Human Rights, Principle No. 25 - As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.

Principle no. 27 provides for 'State-based non-judicial grievance mechanism'. It states that States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms for the remedy of business-related human rights abuse. The explanation makes it clear as to what is the scope and meaning of non-judicial grievance mechanisms. The explanation states that national human rights institutions should have an important role to play in this regard. The shortcomings and drawbacks faced by our National Human Rights Commission needs to be rectified so as to achieve the said objective of the UN Guiding Principles.[158]

5.3.8.1 Effectiveness

The UN Guiding Principles can be considered as a global standard of expected conduct for all business enterprises, but they do not purport to create new legal obligations for business.[159] The fact that the Guiding Principles are not legally binding has created a doubt regarding its effectiveness. As it does not create any mandatory obligations, it is doubtful as to whether the business enterprises will actually follow these principles in their activities. But the fact that the Guiding Principles have already been incorporated in various soft-law instruments suggests that the business enterprises are compelled to follow these

[158] *A Bad Case: NHRC of India Clogged under Operational Inefficiency*, (Sep. 8, 2015, 4.20 P.M.), http://www.achrweb.org/Review/2005/84-05.htm

[159] Dr Jonathan Bonnitcha, *The UN Guiding Principles on Business and Human Rights: The Implications for Enterprises and their Lawyers*, 1 The Business and Human Rights Review 14 (2012), (July 29, 2015, 10.45 P.M.), http://www.allenovery.com/SiteCollectionDocuments/BHRRAutumn2012Issue1.pdf

principles. The OECD Guidelines for Multinational Enterprises have been updated to incorporate the UN Guiding Principles and though the OECD Guidelines are not legally binding, the investigatory system that permits the National Contact Points in OECD countries to investigate allegations of breach committed by companies may be a factor that forces the enterprises to follow the OECD guidelines and consequently to follow the Guiding Principles.[160]

Though the UN Guiding Principles on Business and Human Rights are non-binding and voluntary, some of the countries have made an attempt to follow the same in their domestic practices. For example, as envisaged under the UN Guiding Principles on Business and Human Rights, Finland has introduced a 'National Action Plan' in October 2014 so as to develop mechanisms that could improve the impact of business on human rights.[161] India has not implemented any kind of National Action Plan as envisaged under UN Guiding Principles on Business and Human Rights. In Finland, there exists a Committee on CSR that functions under the Ministry of Employment and the Economy, which is a consultative body that offers support for administrative decision making.[162] In

[160] Dr Jonathan Bonnitcha, *The UN Guiding Principles on Business and Human Rights: The Implications for Enterprises and their Lawyers*, 1 The Business and Human Rights Review 14 (2012), (July 29, 2015, 10.45 P.M.), http://www.allenovery.com/Site CollectionDocuments/BHRRAutumn2012Issue1.pdf; It has also been stated that "Enterprises face a risk of public censure and the potential of follow-on litigation under other applicable laws as a result of adverse findings by an NCP."

[161] Mari Tuokko, *Corporate Social Responsibility: Finland and India*, 2 IN LAW MAGAZINE 40 (2015)

[162] *National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights*, Oct. 9, 2015, 11.00 A.M.), https://tem.fi/documents/1410877/3084000

Finland, CSR is integrated into the central government programme and the 2014 CSR plan adopted by the government requires companies, State owned and those in which states possess majority shares, to provide a CSR report in their annual reports. CSR as per Finland's 2014 action plan basically focuses on socially responsible public procurement.[163] Moreover, the UN Guiding Principles has resulted in certain states in U.S. taking human rights seriously.[164] The Transparency in Supply Chains Act, 2010, which is a legislation in California, mandates that any retail seller or manufacturer that does business in California and has worldwide gross receipts in excess of USD$100m should identify the extent to which they have audited their suppliers for compliance with company standards on slavery and human trafficking.[165] In addition to this, the Dodd–Frank Wall Street Reform and Consumer Protection Act, 2010 requires entities to audit their conflict mineral supply chain to determine whether any such minerals originated from the Democratic Republic of Congo

/National+action+plan+for+the+implementation+of+the+UN+guiding+pronciples+on+business+and+human+rights/1bc35feb-d35a-438f-af56-aec16adfcbae

[163] Mari Tuokko, *Corporate Social Responsibility: Finland and India*, 2 IN LAW MAGAZINE 40 (2015)

[164] Charles E. Borden and Schan Duff, *Beyond the Guiding Principles: Corporate Compliance and Human rights-based Legal Exposure for Business*, 1 THE BUSINESS AND HUMAN RIGHTS REVIEW 11 (2012), (July 29, 2015, 5.45 P.M.) http://www.allenovery.com/SiteCollectionDocuments/BHRRAutumn2012Issue1.pdf

[165] *Id.*

in order to avoid directly or indirectly financing or benefiting armed groups operating within the country.[166]

The Guiding principles do not create binding international obligations on TNCs and do not adequately identify corporate human rights responsibilities. The only focus of the Guiding Principles is whether business enterprises respect human rights and to ensure that the ultimate responsibility is on the State.[167] This is evident from the first principle which mandates that the States have a duty to protect against human rights abuses by private actors, including

[166] The Dodd–Frank Wall Street Reform and Consumer Protection Act, 2010, Section 1502(p) – Disclosures relating to Conflict Minerals Originating in the Democratic Republic of the Congo - Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report - (i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and (ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ('DRC conflict free' is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

[167] Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48(1) TEXAS INTERNATIONAL LAW JOURNAL 33, 36 (2012)

corporations. This is in fact a diluted standard as the responsibility is on the State and not on the corporation.[168]

Principle 17 encompasses the due diligence principle according to which "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." There have been suggestions that due diligence in the Guiding Principles appears to be for the benefit of the company whereas it should actually benefit the human rights stakeholders.[169] The due diligence approach envisioned by the principles seems to preserve the business enterprise's economic interests rather than giving weightage to the main purpose (ensuring human rights protection) for which the principles were drafted.[170] The Guiding Principles have also been criticized *en masse* for failing to impose a mandatory due diligence instead of recommending one and for not effectively trying to prevent extraterritorial

[168] John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, WAKE FOREST UNIV. LEGAL STUDIES PAPER No. 1916664 (2011), 15, (July 12, 2014, 6.20 P.M.), http://ssrn.com/abstract=1916664

[169] Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9(2) EUROPEAN COMPANY LAW 101–109 (2012)

[170] Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48(1) TEXAS INTERNATIONAL LAW JOURNAL 33, 37 (2012)

human rights abuses and for providing punishment for the same and for not unequivocally recognizing the right to a judicial remedy as a human right.[171]

The Guiding Principles are based on three main focus points namely to comply with all applicable laws and respect internationally recognized human rights, wherever they operate; to seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements and to treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.[172] The basic problems here are the confusion that exist as to the ways in which human rights need to be honoured and whether acknowledging the existence of human rights in the annual report of a business enterprise or whether refusing to do business with a business partner who is infamous for human rights abuses is equivalent to honouring human rights. It is also unclear as to whether a corporate should be freed from human rights responsibility where it operates within a State that do not comply with international human rights norms.[173] The further commentary to the Guiding Principles is also not free from ambiguities as it is not clear as to what

[171] ROBERT C. BIRD, DANIEL R. CAHOY, JAMIE DARIN PRENKERT, LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP 3 (Edward Elgar Publishing 2014)

[172] Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48(1) TEXAS INTERNATIONAL LAW JOURNAL 33, 38 (2012)

[173] WOUTER VANDENHOLE, CHALLENGING TERRITORIALITY IN HUMAN RIGHTS LAW: BUILDING BLOCKS FOR A PLURAL AND DIVERSE DUTY-BEARER REGIME 25 (Routledge, 2015); Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48(1) TEXAS INTERNATIONAL LAW JOURNAL 33, 39 (2012)

exactly is the meaning of the term 'greatest extent possible' where the commentary states that a corporation only need to respect human rights to the greatest extent possible in the circumstances.[174]

The basic foundation of the framework has also been challenged on various grounds. The framework and the guiding principles place the obligation on the States to protect human rights against violations by third parties including MNCs. The limitations of the State in combating the cross border activities of MNCs and the unwillingness to do so due to the fear of losing foreign investment are the main criticisms.[175] Knowing these, the framework could have been drafted in a much more effective manner. Even the report of Special Representative of the Secretary General (SRSG) finds a distinction between corporate responsibility and corporate accountability. According to the report, corporate responsibility means the legal, social, or moral obligations imposed on companies whereas corporate accountability means the mechanisms holding them to these obligations.[176] The fact that the framework uses the term responsibility in place of accountability appears to be a conscious omission in

[174] Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48(1) TEXAS INTERNATIONAL LAW JOURNAL 33, 39 (2012)

[175] Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9(2) EUROPEAN COMPANY LAW 101–109 (2012)

[176] Human Rights Council, *Report of the SRSG - Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, A/HRC/4/35 (19 Feb. 2007)*, (July 1, 2015, 5.30 P.M.), http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf

the light of the SRSG report of 2007.[177] It is the latter that ought to be implemented at the national and international level. In addition to all the above shortcomings, the Guiding Principles ought to have made it clear as to why the companies have human rights responsibilities, but it doesn't.[178]

5.4 The Need for Binding Principles and Standards

The corporate codes of conduct could be termed mandatory as well as voluntary. It is mandatory as the companies themselves mandate its compliance on their members. It is voluntary as they are not set by government regulation.[179] It is to be noted that the voluntary initiatives provide a long term prospect but without sanction of peer or public pressure. On the other hand, the legally binding ones give assurance to norms but not their enforcement. It is in this context, it has been said that it is "the poverty of the choice between voluntary and binding models reflects that of present institutions of global governance."[180] The non-binding instruments cannot be said to have no use and instead they have shaped the internal voluntary codes of conduct of companies and also inspired domestic level litigation.[181] With regard to the scenario in

[177] *Id.*
[178] Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9(2) EUROPEAN COMPANY LAW 101–109 (2012)
[179] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 27 (SAGE Pub Ltd, London 2011)
[180] Paul Redmond, *Sanctioning Corporate Responsibility for Human Rights*, 27 ALTERNATIVE L.J. 23, 27 (2002)
[181] Iris Halpern, *Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 129, 164 (2008)

Africa it has been mentioned that a mixture of voluntary initiatives, binding regulations and adherence by States to their duties under international law are necessary to protect human rights and in general it is hoped that voluntary codes gets the force of law over time.[182]

The unsettled issues associated with voluntary multi-stakeholder initiatives are the absence of monitoring mechanisms, solutions in case of inconsistencies between local laws (varies from countries to countries) and provisions in the code, ambiguities regarding existence of auditing and its independence, absence of remedies in case of breach, absence of ensuring ethical practices in the supply chain, inconsistencies between various codes of conduct, uncertainty in the extent of participation of various stakeholders in the process and unenforceability.[183] These are the reasons why it is most often stated that the multi-stakeholder initiatives are flawed in terms of content, implementation and enforcement.[184] In addition this, it has also been stated that voluntary guidelines created by the multinational companies themselves are ineffective not just

[182] Daniel Aguirre, *Corporate Social Responsibility and Human Rights Law in Africa*, 5 AFR. HUM. RTS. L.J. 239, 241, 259 (2005)
[183] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 956 (2004)
[184] Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW, Supplement: American Law in a Time of Global Interdependence: U. S. National Reports to the 16th International Congress of Comparative Law 531-557, 541 (2002)

because they are devoid of any sanctions, but due to the likelihood of MNCs not following them, as it imposes heavy costs for compliance.[185]

The problem with the codes that corporates develop to improve the conditions of business and its workforce is that it does not embrace most of the important provisions of the OECD Guidelines for Multinational Enterprises and of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. A comparative analysis between the latter two initiatives and codes of conduct of MNCs involved in footwear, textile and clothing business shows that most of the codes of conduct lack equivalent provisions for collective bargaining or enabling authorised representatives to negotiate on labour management relations issues and for providing appropriate notice to appropriate authorities including government and workers' representatives in case of changes in operations which would have major employment effects.[186] There also exist other instances where the codes of conduct lacking effective provisions for incorporating labour rights such as the Apple Inc. acknowledging the difficulty in enforcing its code of labour rights so far as

[185] Evaristus Oshionebo, *Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry*, 15(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 107-129 (2007)

[186] Jill Murray, *Corporate Social Responsibility: An Overview of Principles and Practices*, International Labour Office Working Paper No. 34 (May 2004), 11, (July 23, 2015, 10.50 P.M.), http://ssrn.com/abstract=908230

foreign contractors are concerned that shows the ineffectiveness in implementing those.[187]

An advantageous perception of the corporate ethics and corporate social responsibility is that as they are voluntary codes of conduct diverse actors can negotiate the provisions of these codes so as to reach a consensus that satisfies all of them and if they are fairly negotiated and complied with, they can have considerable authority but the sanction element is usually softer as most of the companies may face only a damage to their reputation due to public disgrace.[188] The voluntary initiatives have no authoritative international statement of corporate responsibilities in regard to human rights protection and that the content of codes is highly variable.[189] The implementation of ILO Tripartite Declaration, OECD Guidelines and UNGC depend on the voluntary participation of multinational or national enterprises can lead to much more broader issues as it may be subjected to different interpretations in different States.

Most of the private corporate codes of conduct lack the essential features a code of conduct should have as most of them generally lay down an outline rather than concrete principles. A perusal of the Nike's code of conduct will

[187] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 28 (SAGE Pub Ltd., London 2011)
[188] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 285 (2009)
[189] Paul Redmond, *Sanctioning Corporate Responsibility for Human Rights,* 27 ALTERNATIVE L.J. 23, 26 (2002)

reveal that though there have been principles enunciated so as to prevent forced labour or child labour apart from the environmental standards and minimum wage policy, nowhere it is seen that there is an effective monitoring mechanism or reporting measures in case of violations or any sanction to ensure that they are followed.[190] An effective mechanism can be seen in the guidelines of Levi Strauss & Co. where they have stipulated that in case a contractor does not follow the requirements demanded by the guidelines it may go for a corrective action plan within a stipulated time limit and in case of further violation; it may terminate the business deal with the concerned contractor.[191] It is also stated that the private company codes as well as the industry association codes are also ineffective as they are voluntary, non-specific and lacks appropriate sanctions and it should also be noted that though NGO codes are voluntary once a company accepts it, the company agrees to the monitoring by the concerned NGO. But in most cases the corporations prefer their own codes, if at all they decide to be abide by some code, rather than the NGO codes.[192]

The need for binding standards at the international level is evident from the human rights abuses caused by Enron Corporation in India where they tortured people who demonstrated against the company's power plant due to its adverse

[190] Nancy L Mensch, *Codes, Law Suits or International Law: How Should the Multinational Corporation be Regulated with respect to Human Rights?*, 14 U. MIAMI INT'L & COMP. L. REV. 243, 252 (2006)
[191] *Id.*
[192] *Id.* at 255

impact on environment.[193] The preliminary ruling in *John Doe v. Unocal Corporation*[194] that if corporations are held responsible they may be less willing in the future to operate in countries with poor human rights records,[195] gives an impression that the State derives benefits at the cost of rights of innocent civilians. This could be remedied only with the help of mandatory codes of conduct at the international level.

Not only the corporations, but also the State should have a preference to binding standards and principles over voluntary codes. The States that rejected the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights are supporters of the voluntary initiatives, some of the examples being the United States and the United Kingdom being the facilitators of the Voluntary Principles on Security and Human Rights, and South Africa being an active player in Kimberley Process against conflict diamonds.[196] The EU Commission's Green Paper issued in 2001 states that "binding rules ensure minimum standards applicable to all, while codes of conduct and other voluntary initiatives can only complement these and promote higher standards for those who subscribe to

[193] Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13(2) ASIAN-PACIFIC LAW & POLICY JOURNAL 269 (2012)
[194] 963 F. Supp. 880 (CD. Cal. 1997)
[195] Lisa Trojner, *Key Human Rights Issues in the New Millennium*, 27(3) HUM. RTS. 8, 10 (2000)
[196] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 288, 295 (2009)

them."[197] Though it is stated that regulations do not have to be binding and enforceable to be effective and it is enough if they have the prospects to modify corporate preferences and behaviour in line with a particular goal[198], legally binding international norms can assure uniform standards of human rights observance by corporations through collective participation in standard setting and enforcement.[199] It is stated that the main reason which acts as a hindrance in controlling corporations is due to the difficulty in striking a balance between controlling the corporations such as the ones that engage in cheap labour so as to earn more profit and the requirement of the States where they are established whose only option is to allow such companies to function so as to receive the huge capital that these corporations may bring into the state.[200]

The binding principles and standards should also take note of the fact that those corporations that do not manufacture and sell goods to consumers but to other corporations are also covered and effectively monitored as they are the main ones that do not join the voluntary codes when compared to the rest. The need for a binding character is applicable also to corporate social reporting because

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[197] Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6(2) NW. U. J. INT'L HUM. RTS. 262, 273 (2008)

[198] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 41, 42 (CAMBRIDGE UNIVERSITY PRESS, 2006)

[199] Paul Redmond, *Sanctioning Corporate Responsibility for Human Rights*, 27 ALTERNATIVE L.J. 23, 24,25 (2002)

[200] Nancy L Mensch, *Codes, Law Suits or International Law: How Should the Multinational Corporation be Regulated with respect to Human Rights?*, 14 U. MIAMI INT'L & COMP. L. REV. 243, 245, 246 (2006)

if it is only a voluntary exercise, it will gradually fade away as a public relations tool and will never be considered as a serious obligation to make the corporations accountable.[201] In short the need for binding standards in place of private and other voluntary codes can be summed up in the following words, "a corporation's own claims to corporate responsibility should be viewed with the utmost scepticism - it is likely to be little more than a slogan."[202]

5.5 Conclusion

Corporate codes of conduct and multi-stakeholder initiatives, though voluntary, lay down 'explicit and transparent' guidelines that regulate the relationship between corporations and other stakeholders.[203] The application of voluntary codes and other internationally accepted standards can bring in a lot more advantages to the company as well as the workforce. One such advantage occurred to Tata Steel in India. The application of SA 8000 standards of 1997 has resulted in highlighting areas where non-compliance was evident within the Tata Steel Co. in Jamshedpur. It also helped to rectify the errors and ensure the rights of 'contract' workers in a much better way. The conditions which were improved in Tata Steel Co. as a result of adoption of SA 8000 were more effective supervision of contract workers, improved changes in training, food

[201] Julian Blanchar, *Corporate Social Reporting*, 23 ALTERNATIVE L.J. 172, 175 (1998)
[202] Stephen Rix, *Globalisation and Corporate Responsibility*, 27 ALTERNATIVE L.J. 16, 22 (2002)
[203] SUZANNE BENN & DIANNE BOLTON, KEY CONCEPTS IN CORPORATE SOCIAL RESPONSIBILITY 27 (SAGE Pub Ltd, London 2011)

provisions, health and safety.[204] But the problem with most of the corporate codes is that they are based on the concept of voluntarism and thus gives an option to the corporations to exercise their discretion whether to follow these standards in their business practices or not.

It seems that the corporations are also finding the voluntary standards acceptable as they can use their own prudence and come to a conclusion as to what all standards should be declared as acceptable. This is because the corporations were not completely in favour of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003, as most of the corporations were in opposition to the said norms and publicly lobbied States against these norms on the ground that they went too far on assigning obligations to corporations.[205]

The UN Norms and other voluntary guidelines and declarations at the international level should not be disregarded completely for want of provisions mandating compliance. These in fact portrayed the supremacy of international law over national laws by laying down international standards.[206] The case of

[204] Eileen Koul Kaufman, *The Case of Tata Steel: Including Contract Workers as India's Integral Business Stakeholders*, 24 in CIPE, *From Words to Action: A Business Case for Implementing Workplace Standards Experiences from Key Emerging Markets, 2009*, (July 13, 2015, 8.55 A.M.), http://www.sa-intl.org/_data/n_0001/resources/live/FromWordstoAction_SAICIPE.pdf

[205] Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 288 (2009)

[206] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288, 284 (2010)

Kasky v. Nike[207] is also an example of how a claim could be based on a corporate code of conduct. One of the claims against Nike was that it made public statements about healthy labour conditions in Asian factories which were in violation of consumer protection laws of California and the Federal Trade Commission Act, 1914 as it led to misleading advertisements.[208]

But the basic problem with the multi-stakeholder initiatives is that as they are voluntary standards which are devoid of binding enforcement mechanisms, they provide the corporations a large amount of discretion in applying these principles and ensuring monitoring mechanisms and how much ever benefits are said to be accrued through these non-binding voluntary codes they can never act as a substitute for binding international standards.

When one looks at the voluntary business ethics code adopted by corporations, it could be seen that almost all are identical and thus shares the same advantages and shortcomings. A study conducted on the codes adopted by Nike, Reebok and Puma whose main target was the company and its business partners revealed that they are all the same. If codes of Nike and Reebok described the issues in general, Puma's codes were specific but it involves only

[207] 45 P.3d 243 (Cal. 2002)

[208] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 958 (2004); the decision in the case would have set a benchmark for others to follow but it was dismissed on the ground that *certiorari* was carelessly granted.

fewer issues compared to the other two.[209] There was no difference in the aspect of providing sanctions. None of them effectively provided for the same. Thus, eventually, all the three codes were substantially one and the same.

In most of the cases, the regional level protections in the form of domestic legislations and case laws have been more efficient in tackling the issues and abuses created by the corporations when compared to multi-stakeholder initiatives. Greater success have been achieved by the Alien Tort Claims Act of the United States, 1789 in dealing with cases against Coca Cola, Shell, Del Monte, Royal Dutch Shell, Rio Tinto, Eastman Kodak, Unocal and the like. There have been no clear cut binding international standards to deal with the activities of the corporate sector especially in the field of human rights and tackling the issues with the help of voluntary codes of conduct and multi-stakeholder initiatives have proved to be ineffective in the light of various human rights abuses that have occurred worldwide.[210] It is often said that the support of corporate enterprises is necessary in the market especially to protect and promote the economic, social and cultural rights similar to the support of the NGOs to support the government machinery in regard to the protection of human rights. But it is really doubtful as to whether the corporate enterprises will be interested in following these standards and principles which are just

[209] Rob van Tulder and Ans Kolk, *Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry*, 32(2) JOURNAL OF INTERNATIONAL BUSINESS STUDIES 267-283 (2001)

[210] The instances referred to in the 3rd and 4th chapters are proof of this.

voluntary in nature and work for the protection of human rights in their market dealings though some of them who may be self-motivated may stick on to these principles after accepting them. Things would have been better if they had at least a strict independent monitoring mechanism but most of the corporate codes lack the same which is one of their inherent weaknesses. The chances of bringing back UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights is far from reality but there could be an option to set a new framework in tune with the same. An international human rights framework in the nature of 2003 UN Norms, which binds the corporations to follow human rights obligations and casts primary responsibility on them, is the need of the hour and the international community should strive to achieve the same.

CHAPTER 6

CORPORATE SOCIAL RESPONSIBILITY IN INDIA - AN ANALYSIS OF THE STATUTORY FRAMEWORK, AMENDMENTS AND CASE LAWS

6.1 Introduction

The business organisations operate and function within the society, take inputs from the society to earn profits and then again sell its outputs to the society itself. Thus, the underlying reason behind corporate responsibility is that these business organisations, like a citizen, will give in return to the society what it receives from it, making business and society dependent on each other.[1] The business profitability of organisations is not impinged when it follows corporate responsibility. As a matter of fact, in the long run, if not in the short-run, corporate social responsibility helps in increasing profitability.[2] Corporate social responsibility practices also help in preventing and combating corruption and bribery and in preventing the use of enterprise for money laundering and for financing criminal activities.

[1] Donna J. Wood, *Corporate Social Performance Revisited*, 16(4) THE ACADEMY OF MANAGEMENT REVIEW 691-718 (1991)
[2] J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 261 (Clarendon Press, Oxford 2002)

The prime focus of corporations was to increase their profits and hence it was corporate financial responsibility that was given importance to till recent times.[3] Recently it has been realised that corporations cannot exist without the society and hence they have started taking into account corporate social responsibility.[4] These are the times when the society regards a company as a responsible company only if it can increase its profits and increase its social value along with it. It is true that the companies who invest a lot of money and manpower are inclined towards economic goals but CSR entrusts them with a responsibility to be accountable for the consequences of their actions.

Corporate social responsibility has taken an important place in corporate strategy, planning and operational performance. A corporate enterprise should be very careful while deciding the CSR activities that they propose to undertake so as to make sure that such activities benefit even the smallest unit i.e. village, panchayat, block or district, depending on the operations and resource capability of the company. The sole criteria in evaluating a company's performance should not be profit making, but focus should be on their responsibility to the world at large. Companies should be committed to contribute to sustainable economic development, working with employees,

[3] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, NEW YORK TIMES MAGAZINE, September 13, 1970, (Jan. 14, 2012, 12:30 PM), http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.friedman.dunn.pdf

[4] D MCBARNET et al., THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 23 (Cambridge University Press 2007)

their families, the local community and society at large to improve their quality of life. Thus CSR tries to bring within it a wide range of sensitive issues such as human rights, workers' rights, supplier's relations and involvement.

The latter part of 20th century saw the development of CSR that recognized not only the shareholders but all the stakeholders as being the legitimate concern of any business.[5] In today's world, it is a matter of common experience that companies influence an average citizen's life, directly and indirectly in many ways. He may be its shareholder, employee, supplier, dealer or a customer. Even otherwise, its actions may affect him such as the pollution caused by the plant or the impact its actions can have on the general economy. Under CSR, companies accommodate the social and environmental concerns in their business operations and in their interaction with their stakeholders. Companies are increasingly accepting this concept as they are now fully aware that their responsible behavior towards the stakeholders will lead to sustainable business success. CSR is thus described best as 'the responsibility of enterprises for their impacts on society'.[6]

The modes that different countries adopt in relation to CSR vary. For example, the Occupational Pension Schemes (Investment, and Assignment, Forfeiture,

[5] Dr. Clarence J. Dias, *Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility*, 4 NUJS L. Rev. 505 (2011)

[6] Executive Summary, *EU Multi Stakeholder Forum on Corporate Social Responsibility*, (Aug. 9, 2015, 5.30 P.M.), http://ec.europa.eu/DocsRoom/documents/8774/attachments/1/translations/en/renditions/native

Bankruptcy, etc.) (Amendment) Regulations 1999 of UK required pension funds to disclose how they took into account in their investment decisions social, environmental and ethical considerations. The effect of this was that pension funds were chosen to take into account the CSR policies of the companies they invested in.[7] But India has taken a step forward when compared to other countries by mandating CSR in the national legislation itself, which is the Companies Act of 2013. The Companies Act, 2013 has ushered a wave of change by making far-reaching consequences on all companies in India. The talk of the nation, amongst all the changes brought out by the new legislation, has been the incorporation of provisions relating to corporate social responsibility. Though CSR have been done voluntarily by many companies in India, the enactment of the Companies Act 2013 has imposed bigger responsibility and accountability on the companies thereby ensuring strict compliance with CSR activities.

This chapter researches the developments that took place in relation to CSR in India before and after the enactment of Companies Act of 2013. In course of the analysis of the legal framework on CSR in India, a comprehensive study has been done on the provisions related to CSR in the Indian Companies Act, the CSR Rules and amendments thereto, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011,

[7] D. MCBARNET et al., THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 45 (Cambridge University Press 2007)

national level case laws relating to the concept of CSR and Chhattisgarh Corporate Social Responsibility Policy 2013 which follows a slight deviation from the Central Act. A comparison has been made between UN Global Compact and the provisions relating to CSR in India to get a detailed view on the obligations met by India in tune with the ten principles laid down under the UN Global Compact of 2000.

6.2 National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVG, 2011)

The National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (2011), released by the Ministry of Corporate Affairs, is an enhancement of the Corporate Social Responsibility Voluntary Guidelines of 2009. The 2011 guidelines provide a framework for responsible business practices for Indian multinational corporations. As the name suggests, the guidelines which consists of nine principles, are purely voluntary and the absence of a commanding nature is evident from the 'Introduction to the Guidelines' which states thus, *"It is expected that all business in India, including multinational companies that operate in the country, would consciously work towards following the Guidelines."*[8]

[8] The Ministry of Corporate Affairs, *The National Voluntary Guidelines on Socio-Economic and Environmental Responsibilities of Business (2011)*, (June 7, 2014, 12.00 P.M.), http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

The first principle states that companies should conduct business ethically and with transparency and accountability. The 6th core element of the first principle deserves special mention. The same has recognised the complicity of corporations with States or other parties in human rights abuses and it states that businesses should not be complicit with third parties to violate the guidelines. The second principle expects business to manufacture and distribute products that are safe and that ensures sustainability thereby promoting responsible business. The third principle ensures the safety and well-being of the labour force of the company as it requires the companies to respect labour rights including freedom of association, collective bargaining and adequate grievance redressal mechanisms and to prevent unhealthy labour practices such as unreasonable wages, child labour, forced labour and gender and other forms of discrimination at work places.[9]

The only thing that is common to NVG and CSR mandate under the Companies Act, 2013 is the 'comply or explain' approach as both of them

[9] The Ministry of Corporate Affairs, *The National Voluntary Guidelines on Socio-Economic and Environmental Responsibilities of Business (2011)*, (June 7, 2014, 12.00 P.M.), http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf; The fourth principle ensures that the companies should focus beyond the interests of shareholders so as to protect the interests of stakeholders especially those who are disadvantaged, vulnerable and marginalized by assuming responsibilities for their actions and its impact on them. The fifth principle is worded in general terms where it is stated that businesses should respect and promote human rights. The sixth principle is in connection with environmental protection as it requires businesses to prevent pollution, ensure sustainability, employ precautionary principle and focus on biodiversity conservation. Principle 7 requires the companies to work within the legal framework developed by the government in a responsible manner. The eighth principle states that business should play a part in the overall development of the country in socio-economic ways. The last principle requires businesses to safeguard the rights of consumers by promoting their freedom of choice, ensuring proper labelling and by providing safe products.

provides an option for explaining the reason for non-implementation rather than imposing sanctions. This is evident from the 'Reporting Framework' mentioned under Chapter V of the NVR which gives an option to those companies who have chosen to comply with the guidelines either wholly or in part.[10] The fact that companies can decide to follow the guidelines in part signifies that NVR is not a mandate and it is just another set of guidelines as the name itself suggests.

6.3 Corporate Social Responsibility under Companies Act of 2013

The mandate of CSR has been provided under Section 135 of the 2013 Act which ensures that in every financial year, a company, having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more, spends at least two per cent of its average net profits made during the three immediately preceding financial years in pursuance of its Corporate Social Responsibility Policy.[11] It is estimated that the companies who satisfy the said criteria of net worth/turn

[10] The Ministry of Corporate Affairs, *The National Voluntary Guidelines on Socio-Economic and Environmental Responsibilities of Business (2011)*, (June 7, 2014, 12.00 P.M.), http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

[11] The Indian Companies Act, 2013, Section 135: The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

over/net profits would be only around 8,00,000 companies which includes over 8000 public companies and multinationals.[12]

The amendments made to Schedule VII of the Companies Act, 2013 has in fact widened the scope of CSR activities[13] and the clause (x) in Schedule VII before the amendment that stated "such other matters as may be prescribed" has been removed in the newly framed version. At the same time, the new amendment has made the list exhaustive and it has to be seen whether all the essential CSR activities have come under the schedule.[14] It would have been better if the ten fundamental principles of UN Global Compact were given more attention in

[12] Ayushi Agrawal, *Going Green with Corporate Social Responsibility*, 2(4) LAW MANTRA JOURNAL (2015), (Dec. 17, 2015, 8.00 P.M.), journal.lawmantra.co.in/?p=140

[13] In Schedule VII, for items (i) to (x) and the entries relating thereto, the following items and entries shall be substitutes, namely:- "(i) eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and making available safe drinking water; (ii) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and differently abled and livelihood enhancements projects; (iii) promoting gender equality, empowering women, setting up homes, and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups; (iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources, and maintaining quality of soil, air and water; (v) protection of national heritage, art and culture including restoration of buildings and sites for historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts; (vi) measures for the benefit of armed forces veterans, war widows and their dependants; (vii) training to promote rural sports, nationally recognized sports, paralympic sports and Olympic sports; (viii) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; (ix) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government; (x) rural development projects.

[14] It has been mentioned in the Companies (Corporate Social Responsibility Policy) Rules 2014 that "Corporate Social Responsibility (CSR) means and includes but is not limited to (i) projects or programs relating to activities specified in Schedule VII to the Act", but it is silent as to what all the other activities could be.

the VII Schedule and also in the overall framework of the provisions relating to CSR in the Companies Act, 2013.

Moreover, as regards the activities mentioned under Schedule VII, it should be noted that most of the activities could be followed by the company under the guise of CSR without benefitting the intended targets. For example, the company may (though it ought to have been the legally mandated usual practice) use potable drinking water in the company's premises and ensure 'making available safe drinking water' criteria under clause (i) of Schedule VII. Similarly the requirement of 'enhancing vocational skills' criteria under clause (ii) of Schedule VII could be satisfied by enhancing the skills of company's own employees. In the same way, 'ensuring environmental sustainability' could be achieved by a company by reducing its own packaging and ensuring reduction in carbon foot print.[15] Adequate procedural safeguards should be implemented so as to ensure that companies do spend 2% of their average net profits not just for the benefit of the company but also for the holistic development of its labour force, local areas and community at large. In this regard R.2 (e) which defines 'CSR Policy' assumes significance. It specifically excludes activities that are taken in the normal course of business from the purview of CSR Policy.[16] Hence providing safe drinking water to employees,

[15] Kordant Philanthropy Advisors, *The 2% CSR Clause: New Requirements for Companies in India*, (Aug. 23, 2014, 5.30 P.M.), www.kordant.com/assets/2-Percent-India-CSR-Report.pdf

[16] The Companies (Corporate Social Responsibility Policy) Rules, 2014, R. 2(e) - CSR Policy relates to the activities to be undertaken by the company as specified in Schedule VII to the

vocational skill development to its own workforce, reduction in packaging, etc, may be seen as activities that are required in the normal course of business and cannot be claimed to be CSR activities.

6.3.1 Net Profits

The net profits as specified under S.135 (1) means 'net profits before tax' and it shall not include profits arising from branches outside India.[17] To be more precise, profits from any overseas branch of the company, including those branches that are operated as a separate company and dividends received from other companies in India, which need to comply with the CSR obligations would not be included in the computation of net profits of a company.[18]

The basic reason for excluding CSR expenses from expenditure for the purposes of section 37 of the Income Tax Act is that as CSR expenses is an application of income by the company, it cannot be treated to be 'incurred wholly and exclusively for the purpose of carrying on business'.[19] But the same

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Act and the expenditure thereon, excluding activities undertaken in pursuance of normal course of business of a company.

[17] CSR Rules, 2014, Rule 2(f).

[18] Ekta Bahl, *An Overview of CSR Rules under Companies Act, 2013*, (March 10, 2014, 8.40 A.M.), http://www.business-standard.com/article/companies/an-overview-of-csr-rules-under-companies-act-2013-114031000385_1.html

[19] There existed a confusion as to whether tax benefits could be claimed by company on the money spent on CSR activities and the same has been settled by the explanation provided to section 37(1) of the Income Tax Act, 1961 as amended in 2014 which provides thus, "*For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be*

has been criticized by bringing an analogy with the remuneration paid to the director which is allowed as 'expenditure' for the purpose of Income Tax Act. Though the remuneration of the director of the company is calculated on the basis of percentage on net profit earned by the company[20] and is treated as an allowable expenditure under the Income Tax Act on the basis that it is incurred wholly and exclusively for the purposes of carrying on business, the expenses incurred on CSR activities, which is again calculated on the basis of percentage on net profit earned by the company, is not allowed as a 'deduction' under the Income Tax Act.[21]

Nevertheless, sources admit that companies can still find a way out of the explanation provided to section 37 regarding non-consideration of CSR expenses for tax benefits. According to them, companies may either contribute to national funds such as Prime Minister National Relief Fund or Chief Minister Fund and claim deduction under S.80G of the Income Tax Act or make payment to a public sector company or a local institution for carrying out

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deemed to be an expenditure incurred by the assessee for the purposes of the business or profession"; It is also said that the draft rules contained provisions as to whether the CSR money spend would be considered as a business expenditure for the purpose of tax or not, but it seems that the legislation is silent on that.

[20] The Companies Act, 2013, Proviso to Section 197(1): Except with the approval of the company in general meeting, - (*i*) the remuneration payable to any one managing director; or whole-time director or manager shall not exceed five percent of the net profits of the company and if there is more than one such director remuneration shall not exceed ten percent of the net profits to all such directors and manager taken together; (*ii*) the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed, - (*A*) one percent of the net profits of the company, if there is a managing or whole-time director or manager; (*B*) three percent of the net profits in any other case.

[21] Nihar Jambusaria, *Corporate Social Responsibility (CSR) Deduction - A critique*, (Aug. 21, 2014, 6.15 A.M.), http://www.taxsutra.com/experts/column?sid=239

eligible projects and claim benefit under S.35AC of the Act.[22] Alternatively the company may itself spend the money on eligible projects after getting the approval of the project by the Secretary to the National Committee for Promotion of Social and Economic Welfare as per Rules 11L to 11O of the Income Tax Act and claim the deduction under the same section.[23] The company may also make payments to associations or institutions for carrying out rural development programmes and claim deductions under S.35CCA of the Income Tax Act. In addition to all the above, the company may make payment to notified agriculture extension project under S.35CCC and claim necessary deduction.[24] The proposed Companies (Amendment) Bill, 2016 recommends to substitute the word 'average net profits in Section 135(5) of the Companies Act, 2013' with 'net profits'.

6.3.2 Preference to Local Area

The mandate of spending two percentages of the average net profits would definitely be a great advantage when it comes to economic development for a country like India, as it could benefit a huge mass of its population who are illiterate and who lack access to proper sanitation. The trend that has been seen

[22] Deepak Singh Tanwar, *CSR Expenses which are Allowed to be Claimed as Deduction*, (Aug. 19, 2014, 6.00 P.M.),http://www.forum.charteredclub.com/threads/csr-expenses-which-are-allowed-to-be-claimed-as-a-deduction.6280/

[23] Nihar Jambusaria, *Corporate Social Responsibility (CSR) Deduction - A Critique*, (Aug. 21, 2014, 6.10 P.M.), http://www.taxsutra.com/experts/column?sid=239

[24] Nitisha Malpani, *Deduction of CSR expenses under Income Tax Act*, 1961, (Nov. 9, 2016, 6.00 P.M.), http://taxguru.in/company-law/deduction-of-csr-expenses-under-income-tax-act-1961.html

in India over the years is that once most of the companies set up their establishments in an area it results in violation of environmental standards or forced displacement of population or disturbance to the societal set up in that local area. Then they establish cancer research centres or other concerns in an entirely different area that qualify them as companies observing CSR practices. Tata group is one of the best examples. The instance in Singur (popularly known as Tata Nano Singur controversy), where they tried to set up a car manufacturing unit resulted in violation of human rights and caused large scale displacements. This was done without any regard to the land laws of the State. But they are known to have undertaken a lot of philanthropic activities and have established institutions of higher learning, promoted art and culture of the country and funded scientific research. POSCO steel plant in Odisha is another example which boasts of initiating educational programmes and scholarships but has caused displacement of several inhabitants and environmental hazards in the local area/proposed project area.[25] The current Companies Act of 2013 has taken care of this situation by adding a proviso to section 135 which states that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities. But there has been a suggestion that instead of giving preference to local areas as per S. 135(2) of the Companies Act 2013,

[25] Jaya Srivastava, *Social Movements, CSR and Industrial Growth: An Indian Experience,* 11 THE IUP JOURNAL OF CORPORATE GOVERNANCE 61 (2012)

preference should have been given for developmental activities in backward communities identified by the NITI Aayog.[26]

6.3.3 Social Responsibility - A Comparison between Companies Act, 2013 and UK Companies Act, 2006

The Companies Act of 2013 has given due care to the interests of the community and environment and not just to business/profit affairs of the company. As per Section 166 of the 2013 Act, the director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment. This is in tune with the provisions of similar legislation in the UK. Section 172 of the UK Companies Act 2006 states that the director of a company must act in good faith to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the impact of the company's operations on the community and the environment.[27] It states

[26] Vanya Rakesh, *Corporate Social Responsibility under Companies Act 2013: an Overview*, 2(4) LAW MANTRA JOURNAL (2015), (Dec. 8, 2015, 6.00 A.M.), http://journal.lawmantra.co.in/?p=163

[27] The UK Companies Act, 2006, Section 172: Duty to promote the success of the company: (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to - (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.

that in promoting the success of the company, the director should have regard to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company. This approach of taking into consideration the interests of the stakeholders along with that of shareholders by imposing duties on directors is termed as the duty approach.[28] Section 172(1) of the UK Company Law of 2006 brings in stakeholder concerns into the traditional shareholder-centred system and is commonly referred to as the enlightened shareholder value principle. Nevertheless, a thorough reading of Section 172 gives us the understanding that the primary interests so far as the company or the director is concerned is the shareholder itself. Though section 172 of the UK Companies Act is a progressive provision, the question still remains as to who could enforce the duties of the director. The enforcement part of the provision is doubtful as it is unclear whether non-shareholders could bring a legal action for

[28] Surya Deva, *Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?,* 41 COMMON LAW WORLD REVIEW 299-321, 303 (2012)

breach of Section 172 as the primary duty of the director is towards the company and not to individual stakeholders or other stakeholders.[29]

Similarly, according to section 417 of the UK Companies Act, 2006, the directors' report must contain a business review, the purpose of which is to inform members of the company and help them assess how the directors have performed their duty under section172. As per this section, the business review must also contain information about environmental matters including the impact of the company's business on the environment, the company's employees, and social and community issues amongst other matters.[30]

It is known to all that one of the main reasons for the 2008 financial crisis was the dereliction in the duties of the directors of most of the companies due to the

[29] Surya Deva, *Sustainable Development: What Role for the Company Law?*, 8 INTERNATIONAL AND COMPARATIVE CORPORATE LAW JOURNAL 76-102 (2011)

[30] The UK Companies Act, 2006, Section 417 - Contents of directors' report: business review (1) Unless the company is subject to the small companies' regime, the directors 'report must contain a business review. (2) The purpose of the business review is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company). (3) The business review must contain (a) a fair review of the company's business, and (b) a description of the principal risks and uncertainties facing the company. (4) The review required is a balanced and comprehensive analysis of (a) the development and performance of the company's business during the financial year, and (b) the position of the company's business at the end of that year, consistent with the size and complexity of the business. (5) In the case of a quoted company the business review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include (a) the main trends and factors likely to affect the future development, performance and position of the company's business; and (b) information about (i) environmental matters (including the impact of the company's business on the environment), (ii) the company's employees, and (iii) social and community issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies; and (c) subject to subsection (11), information about persons with whom the company has contractual or other arrangements which are essential to the business of the company. If the review does not contain information of each kind mentioned in paragraphs (b) (i), (ii) and (iii) and (c), it must state which of those kinds of information it does not contain.

pressure from shareholders for unsustainable earnings growth achieved by methods such as over-leverage, reduced investment and dangerously excessive risk.[31] These irresponsible business practices, the mistakes and wrong decisions have all resulted from the deviation in the director's responsibility of the companies. The main lesson learnt from the 2008 financial crisis is that directors need to have long term focus which will ensure and improve the long term interests of not only the shareholders but also of other stakeholders affected by the activities of the company. Thus, the understanding of the duty of the director to function keeping in mind the interests of the company as a whole are primarily required to establish responsible CSR practices.

6.3.4 CSR Committee

Section 135 of the Companies Act 2013 also provides for the establishment of the CSR Committee.[32] The Act stipulates that the Board of Directors' report

[31] Jingchen Zhao, *Promoting More Socially Responsible Corporations through UK Company Law after the 2008 Financial Crisis: The Turning of the Crisis Compass*, 22(9) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-284 (2011)

[32] The Companies Act, 2013, Section 135 (1): Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.
The Companies Act, 2013, Section 135 (2): The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee. (3) The Corporate Social Responsibility Committee shall (a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII; (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and (c) monitor the Corporate Social Responsibility Policy of the company from time to time. (4) The Board of every company referred to in sub-section (1) shall (a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the

which is required under section 134(3)[33] shall disclose the composition of the Corporate Social Responsibility Committee. The Corporate Social Responsibility Committee, with a quorum of three or more directors amongst which one should be independent, is entrusted with the task of identifying the CSR policy which the particular company is to follow. The fact that Indian Companies Act 2013 provides for constitution of a CSR committee makes it a composition approach. Composition approach is where the traditional set up of the board is changed by appointing representatives of the stakeholders or by constituting stakeholder committees like the CSR committee.[34] The proposed Companies (Amendment) Bill, 2016 recommends to substitute the word 'any financial year' with 'immediately preceding financial year' in Section 135(1) of the Companies Act, 2013.

Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and (b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

[33] The Companies Act, 2013, Section 134(3): There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include (a) the extract of the annual return as provided under sub-section (3) of section 92; (b) number of meetings of the Board; (c) Directors' Responsibility Statement; (d) a statement on declaration given by independent directors under sub-section(6) of section 149; (e) in case of a company covered under sub-section (1) of section 178, company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided under sub-section (3) of section 178; (f) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made (i) by the auditor in his report; and (ii) by the company secretary in practice in his secretarial audit report; (g) particulars of loans, guarantees or investments under section 186.

[34] Surya Deva, *Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?*, 41 COMMON LAW WORLD REVIEW 299–321, 304 (2012)

Private companies under the 2013 Act are given an exemption from constituting the CSR committee with three directors. As per Rule 5 of the CSR Rules dated 27th February 2014, a private company having only two directors on its Board shall constitute its CSR committee with two directors. Rule 5 of CSR Rules, 2014 on CSR committees mentions specifically only about public and private companies and this suggests that one person company has been excluded under the purview of CSR. The reason is quite obvious from R.6(1) of the Companies (Incorporation) Rules, 2014 which states thus,

> *"Where the paid up share capital of a One Person Company exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, it shall cease to be entitled to continue as a One Person Company."*

It is not an option given to the OPC but a mandatory requirement and the time limit provided under R.6(2) is proof for the same. According to the same, a One Person Company that meets the criteria established under R.6(1) shall convert to either a public or a private company within six months of the date on which its paid up share capital is increased beyond fifty lakh rupees or the last day of the relevant period during which its average annual turnover exceeds two crore rupees. If it is converted to a private company, then there shall be a minimum of two members and two directors and if it chooses to convert itself into a public company, there shall be at least seven members and three directors. Section 18 of the Companies Act permits a registered company of

any class to convert as a company of other class by alteration of memorandum and articles of the company.

The CSR tasks could be identified from Schedule VII of the legislation. It shall be the duty of the committee to monitor the CSR policy of the company. As per section 134 (3)(o) of the Companies Act 2013, it is mandatory that the report by the Board of Directors contain the details about the CSR policy developed and implemented by the company taken during the year. Hence after the CSR Committee formulates and recommends the CSR Policy to the Board, the Board, approves the Corporate Social Responsibility Policy for the company and disclose contents of such policy in its report and on the company's website and ensures that the CSR activities as included in its CSR Policy are followed.

6.4 The New CSR Policy - Old Wine in a New Bottle

The CSR mandate incorporated under the Companies Act of 2013 seems to be an innovative legal framework but a similar one has been mooted and implemented years before the new legislation came into force. In *Pravinbhai Jashbhai Patel & Anr. v. State of Gujarat & Ors*[35], the High Court ordered 1% of the industries' one year's gross turnover to be paid for the betterment of the

[35] (1995) 2 GLR 1210

environment which has been damaged by the pollutants from the nearby industries.[36]

The case was related to the discharge of pollutants by the industries established in Ahmedabad and the Court held that there is large scale pollution being caused by about 756 industrial units situated in the Industrial Estates of Vatva, Naroda and Odhav.

This case has been followed in the case of *Deepak Nitrite Ltd v. State of Gujarat*[37], where the issue was with regard to the large scale pollution caused by industries located in the Gujarat Industrial Development Corporation (GIDC) Industrial Estate. As the pollution was much more than the parameters set by the Gujarat Pollution Control Board and there was no treatment plants set up in many of the industries, the High Court called for turnover figures and profitability data from the industries alleged to have caused the pollution and ordered to pay 1% of maximum annual turnover of any of the preceding three years towards compensation and betterment of environment. As in the case of *Pravinbhai Jashbhai Patel & anr v. State of Gujarat & Ors*, the Court held that

[36] The Court held that, "Since for the last number of years pollution has adversely affected the villages, a lump sum payment should be made by the 756 industrial units, calculated at the rate of 1% of their one year's gross turnover for the year 1993-94 or 1995-96, whichever is more and that amount should be kept apart by the Ministry of Environment and should be utilised for the works of socio-economic uplift of the aforesaid villages and for the betterment of educational, medical and veterinary facilities and the betterment of the agriculture and livestock in the said villages."

[37] (2004) 6 SCC 402

the amount thus obtained should be kept as a separate amount by Ministry of Environment and should be utilised for the purposes such as:

1) socio-economic upliftment of population of the affected areas
2) betterment of educational, medical and veterinary facilities
3) betterment of agriculture and livestock

In this case, the Supreme Court, while not disregarding completely the finding of the High Court to pay 1% of the annual turnover, directed the High Court to investigate the matter further to clarify whether by not following the legal requirement of establishing treatment plants, the industries had in fact caused environmental degradation or not. The Supreme Court further observed that if it is proved that the industries had damaged the environment, then the High Court could implement the penalty it fixed at 1% of annual turnover.

6.5 Comply or Explain approach

The CSR requirement stipulated under the 2013 legislation may not be termed as a mandatory one. The requirement can be rather termed as the ‘comply or explain’ approach. The proviso to Section 135 clearly provides that in case the company fails to spend the requisite CSR amount, the Board shall, in its report

made under clause (o) of sub-section (3) of section 134[38], specify the reasons for not spending the amount. Thus it is not always mandatory for the companies to spend two percent of their profits and they can escape from the liability provided they specify the reasons for not spending the required CSR amount. But it is unclear about the penal consequences that the particular company need to face for not spending the amount towards CSR. The only sanction would be the one under Section 134 of the Companies Act 2013. Section 134 (8) of the Act provides for punishment for both the company and the officer in default. Section 134 (3) mandates the report by the Board of Directors to be attached to the financial and other statements laid before a company in the general meeting. Clause (o) to section 134(3) states that the details about the CSR policy developed and implemented by the company during the year are to be included in the Board of Directors' report. Any violation to include the matters mentioned under section 134(3) attracts the penalty provided under section 134(8). According to this clause, if a company contravenes the provisions of section 134, fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees shall be imposed on the company and the officer in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh

[38] Section 134(3)(o) of the Companies Act 2013 requires reporting of the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year.

rupees, or with both. But the mere presence of this section alone will not impose CSR obligations on the companies. They can easily evade the penalties by stating the reasons in the report for not spending the amount for CSR if they are unable to do so.[39] It is recommended that such an exemption can be allowed only to those who are facing deficits and not otherwise.[40] Suitable amendments need to be made in the Companies Act 2013 accordingly.

The after effect of not mentioning the reasons for not spending the CSR amount is also unclear from the provisions of the Companies Act 2013. It is in this regard that the Chhattisgarh Corporate Social Responsibility Policy 2013 assumes significance.

6.6 Chhattisgarh Corporate Social Responsibility Policy 2013

Chhattisgarh Corporate Social Responsibility Policy 2013, published in the Gazette of Chhattisgarh on May 3, 2013, mandates that public and private companies with net profits in the previous year of less than Rs 500 crore will contribute 3% of their annual profits towards CSR to the Chief Minister Community Development Fund, and those with net profits above Rs. 500 crore will contribute 2% of their annual profits towards CSR with a minimum threshold of Rs. 15 crore.

[39] The Companies Act 2013, Proviso to Section 135.
[40] Companies that do not satisfy the minimum criteria mentioned under section 135 of the Companies Act, 2013 can be exempted from spending two percent of their profits for CSR activities.

This 2013 State policy goes against the central legislation in many respects and may be held to be invalid as it is doubtful whether the State can assume such kind of power when the central legislation is in force. Moreover mandating that the amount has to go to the CM's community development fund may act as a hindrance for companies from earning the goodwill of the local area/community through developmental projects as part of CSR.[41] Nevertheless, the State policy has to be appreciated for reasons manifold. Firstly, the cut off of a net profit of Rs. 5 crore for CSR initiatives fixed by Companies Act 2013 has been removed. As per this policy, even companies whose net profits in the previous year is less than Rs 500 crore have to contribute 3% of their annual profits towards CSR to the Chief Minister Community Development Fund. This is one important aspect which is not provided in the Companies Act 2013.

Having said that, it is to be noted that the Companies Act of 2013 talked about companies having net profit of Rs. 5 crore but the State CSR policy puts it at Rs. 500 crore (more than or less than). The other difference is that the State policy only talks about the profit that has been earned in the previous year but the 2013 Companies Act talks about the profit earned in the preceding three financial years.

[41] Shalini Singh, *Chhattisgarh Wants All CSR Spending to go to CM Development Fund*, THE HINDU, September 15, 2013, (July. 30, 2015, 11.00 A.M.), http://www.thehindu.com/news/national/other-states/chhattisgarh-wants-all-csr-spending-to-go-to-cm-development-fund/article5131752.ece

The 2013 State policy also provides for punishment for non-compliance. According to the policy, industrial units that are obtaining facilities or grant from various departments of State of Chhattisgarh or according to the prevailing industrial policy will have to mandatorily deposit the money for CSR initiatives in the Chief Minister's Community Development Fund. Non-compliance of this will result in taking back of grant or facilities that have been provided by the administration. The State government cannot be blamed for taking such a bold step in this regard as many of the huge corporate houses like Jindal Steel Power Limited, JSW Steel Ltd, Bhushan Power & Steel, Vandana Group, and DB Power Ltd etc are located in Chhattisgarh.

One major criticism to the Chhattisgarh CSR policy would be that the amount deposited in the CM's Community Development Fund could be used for many purposes other than CSR objectives and there are no adequate safeguards against the same. But a perusal of Schedule VII of the Companies Act 2013 shows that one of the CSR activities stipulated under it is "contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women". If the corporate can be asked to contribute to the PM's National Relief Fund or any other schemes of the Central Government, then requiring them to contribute to the CM's fund should not provoke much criticism. It is

also to be noted that as per the 2009 decision of the Central Information Commission in *Shri A. K. Goel v. Prime Minister's Office*,[42] although the Prime Minister's National Relief Fund can be treated as a public authority, it cannot be treated as a government department and for the same reason, information on both those making contribution to this fund and those receiving benefits from it is to be treated as personal information held in confidence by the Prime Minister's National Relief Fund and therefore exempt from disclosure u/s 8(1) (j) of the Right to Information Act[43].

The State policy may seem to be a compelling measure by the government on the companies and against the concept of CSR as envisaged under the Companies Act 2013 whereby corporates are entitled to perform welfare schemes in their neighbourhood for the benefit of the society. But it should be admitted that the 2013 State policy has taken care of one major situation. CSR, if left entirely to corporates, will become an extremely distrustful activity in the future due to lack of adequate monitoring/verification by the State. The scepticism is because the companies may either prefer to explain the reasons for not spending the required CSR amount rather than spending the same or

[42] Appeal No.CIC/WB/A/2009/000217 dated 26.2.2009, decided on 18 December, 2009

[43] The RTI Act, Section 8(1)(j): Exemption from disclosure of information - Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

may reveal less turnover/profit/net worth so as to fall below the threshold stipulated under section 135 of the Companies Act, 2013.

6.7 UN Global Compact and the 2013 CSR mandate

It is doubtful whether Schedule VII encompasses all the human rights principles that were thought about in the Global Compact. Moreover it seems that the Companies Act of 2013 has given a lot more preference to CSR polices while remaining silent on ethical business practices or in other words called 'responsible business practices'.[44] For example, the first principle of UN Global Compact states that "businesses should support and respect the protection of internationally proclaimed human rights." This principle reiterates the fact that like the government, individuals and other organisations, companies also do have a responsibility in ensuring protection of human rights. By ensuring protection of human rights it should be understood that the business community should not infringe human rights. This has been stressed by the UN Human Rights Council that the corporate responsibility to respect human rights is a requirement of business everywhere.[45] This principle encompasses within its ambit promotion of rule of law, addressing consumer concerns, increase in worker production and retention and building good

[44] National Foundation for India, *Comments on Draft CSR Rules under Section 135 of Companies Act 2013*, (Dec. 22, 2015, 9.00 A.M.), http://www.nfi.org.in/sites/default/files/nfi_files/Comments%20on%20draft%20CSR%20rules.pdf

[45] *The Ten Principles of the UN Global Compact*, (July 16, 2015, 8.15 P.M.), http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

community relationships. Schedule VII only deals with the steps that the companies have to undertake towards CSR policies. Due regard has to be given to respect human rights and not to violate them during set up of the company's activities as well. For example, the activities of the corporations such as POSCO in Odisha and Tata Nano in Singur resulted in massive violations of human rights, land and environmental laws.[46] It is better not to forget the corporate human right abuses that have taken place at the national and international level, too. Asking the multinationals to invest on CSR after violating human rights and environmental standards by not following ethical/responsible business practices seems to be unrewarding.

The VII Schedule has incorporated the labour and the environmental principles/activities in a comprehensive manner and this is something which is commendable. But on the other hand it seems to have missed the anti-corruption principle of the UN Global Compact. Principle no.10 of the UN Global Compact states that "businesses should work against corruption in all its forms, including extortion and bribery."

But the effectiveness of UN Global Compact has always been in question as they are purely voluntary commitments. The companies or the participants are required to communicate their progress in implementing the ten principles

[46] Tata Nano project in Singur (West Bengal) had caused severe displacement of farmers and deprived many of land and homes due to the takeover of 997 acres of farmland by the State Government for Tata to build its factory. Though the law authorized the takeover only for public improvement projects, the project was in blatant violation of this.

annually to all the stakeholders and if they don't they will be listed as "non-communicating" on the website and the company will be delisted after the expiration of one year from the initial deadline. Though the company has to follow the Global Compact principles once it becomes a part of the commitment, the basic issue is whether a company must be left free to voluntarily join the commitment and strive to protect human rights and other related rights. It is true that the companies like Royal Dutch Shell, Novo Nordisk, and BP Amoco have publicly proclaimed their cooperation with the UN to safeguard human rights, but it is still to be seen whether they will be really following what they have proclaimed in the light of future events. If the facts alleged in the recent case of *Esther Kiobel v. Royal Dutch Petroleum Co.*[47], are assumed to be true, it can be concluded that nothing has changed much even after the advent of the UN Global Compact and that it is not a very effective step towards making companies follow responsible business practices.

6.8 CSR under the Indian Companies Act, 2013 - Major Concerns

The definition of Corporate Social Responsibility in the present Indian scenario could be seen from the Companies (Corporate Social Responsibility Policy) Rules 2014, where it has been defined thus, "Corporate Social Responsibility (CSR) means and includes but is not limited to (i) Projects or programs relating to activities specified in Schedule VII to the Act; or (ii) Projects or programs

[47] 133 S.Ct. 1659 (2013)

relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act."

It is true that the concept of CSR is not limited to the activities laid down under Schedule VII of the 2013 Act. But keeping in mind the meaning and the essence of the concept of CSR (as mentioned in the introduction), it is quite doubtful whether the essence of CSR is reflected in the definition. Moreover, if the true meaning of CSR was embedded in the definition, then there is no reason why discrimination has been shown between companies whose net profit is above Rs. 5 crore and others for CSR initiatives. The essential elements of CSR as enunciated in the above definition, which includes responsibility for the impact of its activities upon the company's employees, customers, community and the environment; voluntary improvement commitments and performance reporting; the deliberate inclusion of public interest into corporate decision-making and honouring of a triple bottom line - People, Planet and Profit, are equally applicable to all companies irrespective of their net profit or annual turnover. In the alternative, the 2013 legislation could have at least opted for a bottom down approach (employee-centered CSR approach) for companies with less net profits or annual turnover than top down

approach mentioned for companies coming under the ambit of Section 135.[48] The employee-centered approach is where CSR initiatives come from the part of the bottom level employees.

There exists no connection between the donations made by companies and CSR. CSR is and should always mean responsible and ethical way of doing business. Donations made by the company can only be termed as corporate philanthropy which could only be voluntary and cannot be imposed by law. Corporate philanthropy started from the days of John D. Rockefeller. If corporate philanthropy is meant to be CSR, then Enron which is now infamous on account of corporate fraud (Enron scandal) should top the list as it had donated, among others, £500,000 in 1991 for projects over five years to Prince Charles's trust.[49] Combining corporate donations and CSR under the umbrella of social accountability/social responsibility is equivalent to ignoring the violations that resulted in India due to Enron corporation (Dabhol power project) and accounting fraud that has resulted in the most infamous Enron scandal. This clearly shows the failure to give importance to the concept of ethical/responsible business practices in the scheme of the Companies Act of 2013. By providing for a share of the profits of the company as CSR, the Indian

[48] Walter R. Nord & Sally Riggs Fuller, *Increasing Corporate Social Responsibility Through an Employee-centered Approach*, 21(4) EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL 279-290 (2009)

[49] Kelly Parsons & Patrick Wilkins, *Corporate Social Responsibility: Visions of Utopia*, European Lawyer 12 (2003); *Charles: No Enron Regrets*, (June 27, 2014, 5.00 A.M.), *Charles defends Enron meetings*, (June 27, 2014, 5.10 A.M.), http://news.sky.com/story/80188/charles-no-enron-regrets; http://news.bbc.co.uk/2/hi/uk_news/1798728.stm

government has fallen back to the traditional norm of philanthropic aspect of CSR. It is time that the government understands and appreciates the evolution of CSR from mere philanthropy to a concept of strategic CSR and encourages the value of responsible business activities. Providing a framework where companies regard corporate social accountability as a core part of their business is the need of the hour rather than asking the corporates to invest a share of their profits for CSR activities. The problem with the latter is that the companies may have inherited huge profits through irresponsible business practices violating all the societal norms and creating human rights violations. To categorise even those companies as socially responsible merely on account of sharing a meagre part of the profits earned is unethical and goes against the fundamental notion of human rights and international business policy.

The CSR policy that the 2013 Companies Act depicts clearly shows that the small scale and other companies need not worry about responsible business practices as the CSR criteria is not based on protection of human rights but the total of turn over or profits or net worth. This definitely sends a wrong message that CSR in India depends on the size and value of the companies and it can lead to a situation where companies deliberately look for measures to show reduced turn over or profits or net worth on records. The framers of the new Companies Act of 2013 might have several justifications for leaving behind small and medium scale enterprises or for exempting companies that do not

meet the stipulated criteria under Section 135. But it is extremely disappointing to note that the framers of the Indian Companies Act failed to note the view expressed by John Ruggie[50] that certain small and medium-sized enterprises may have significant human rights impacts and should have corresponding measures regardless of their size although they might have less capacity when compared to huge companies.[51]

The major concern, apart from the ones mentioned above, is that as per section 135 of the Companies Act, 2013, a company, which is otherwise engaged in violations, will satisfy the CSR criteria, if it spends 2% of its average net profits. The social responsibilities of companies whose net profits fall below Rs. 5 Crore or who do not satisfy the criteria laid down under Section 135(1) of the Companies Act 2013 is unclear. It is true that Para 2.4(i) of the Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises (CPSE), 2014 requires the CPSEs, not falling under Section 135 of the Companies Act 2013 but has made profits in the preceding year, also to spend 2% of the profits so made in the preceding year on CSR activities. In addition to this, Para 2.4(iv) of the Guidelines also states that merely by explaining the reasons for not spending the CSR amount will not suffice so far

[50] John Ruggie was appointed as the UN Secretary-General's Special Representative for Business and Human Rights in 2005.

[51] John G. Ruggie, *The Construction of the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*, 16(2) EUROPEAN HUMAN RIGHTS LAW REVIEW 127-133, 132 (2011)

as CPSEs are concerned. According to the Guidelines, such unspent amount will be carried forward to the subsequent year for CSR activities. But the Guidelines do not act as a mandate which is clear from para 2.1 of the Guidelines which states thus,

"The Guidelines are in the nature of initiatives or endeavour which the key stakeholders expect of CPSEs in the discharge of their Corporate Social Responsibility."[52]

In addition to this, para 2.4 also states that "the following Guidelines applicable to all CPSEs are generally in the nature of guiding principles." Though the Guidelines require that while selecting CSR activities from Schedule VII to Companies Act 2013, priority should be given to issues such as providing safe drinking water, health and sanitation, educational facilities, etc, the fact that the provisions are not mandatory and is only applicable to CPSEs are the major drawbacks. In addition to this, contributions made to Swachh Bharat Kosh and Clean Ganga Fund are also considered as CSR expenditures[53] which may give rise to the same criticisms attached to donations to PM's Relief Fund under the Companies Act 2013 and donations to CM's Relief Fund under the Chhattisgarh CSR Policy.

[52] Department of Public Enterprises, *Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises (2014)*, (June 5, 2014, 12.40 P.M.), http://dpe.nic.in/sites/upload_files/dpe/files/Guidelines_on_CSR_SUS_2014.pdf
[53] *Id.*

The Companies Act of 2013 does not provide for alternatives or solutions in case a company does not give preference to the local area where it operates. Are we talking about a legal framework that does not completely prohibit the corporate/multinationals to disturb environmental safety, promote forced displacement and upset the societal set up in the local area where the company is situated but satisfies the mandate of CSR by setting up a cancer research institute or like establishments in an entirely different area?

It can only be stated that the changes that have been made in the Companies Act 2013 have not gone beyond the recommendations of the Sachar Committee constituted in 1978 to look into the social responsibilities of companies. The committee had explicitly recommended for 'openness in corporate affairs' which could be attained by disclosure of information that would benefit not only the shareholders and creditors but also the workers and the community.[54] The report further recommended social costs-benefit analysis and the necessity to file an annual social report containing details of social obligations met by the company in the previous year. The social obligations as per the report include supporting the public interest in the local area of operation, employee welfare,

[54] Tanu Verma, *Suggestions Given by Sachar Committee Regarding Social Responsibilities of Companies in India*, (May 23, 2015, 11.20 A.M.), http://www.shareyouressays.com/94289/suggestions-given-by-sachar-committee-regarding-social-responsibilities-of-companies-in-india

educational facilities and so on.[55] By any stretch of imagination one cannot find that the new legislation has made significant contemporary changes.

The requirement of spending part of the profits of the company for activities under the CSR Schedule under the Companies Act of 2013 is equal to taking us back to the origin/historical development of the concept of CSR. The Indian businessmen, between 1850 and 1914, has donated liberally for establishing educational institutions, health care facilities, homes for widows and orphanages in addition to offering scholarships to deserving students.[56] If it was voluntary then, it is not mandatory now as the companies under the very same provision of CSR in the 2013 Act (s.135) can evade their responsibility by stating the reasons for not spending the CSR amount.

The after effects/sanctions meted out to those corporations that fail to comply with Section 135 of the 2013 Act are unclear from the provisions of the Act. The effectiveness of the CSR activities, when it comes to its implementation, is also doubtful due to lack of adequate verification/monitoring by the State. A look at the CSR activities listed under Schedule VII of the Companies Act 2013 creates a doubt as to whether the government has outsourced its responsibilities to the corporations. A perusal of Schedule VII activities clearly reveals that the nation's governance, particularly in respect to social welfare,

[55] *Id.*
[56] BIDYUT CHAKRABARTY, CORPORATE SOCIAL RESPONSIBILITY IN INDIA 20 (Routledge 2011)

has been delegated to the corporations in the name of CSR. It is true that the State still continues to engage in welfare activities, but the mandatory requirement has been criticized on the basis that it indirectly forces the companies to do the job of the government which is nothing but outsourcing the primary duty of the State.[57]

The provisions related to CSR in the Indian Companies Act requires companies to spend part of the average net profits, as provided under section 135, for CSR activities. The reflection of UN Global Compact principles, such as ethical business practices and anti-corruption in business activities thereby promoting responsible business, are completely absent in Schedule VII of the Act that provides for the list of CSR activities. In short, the CSR mandate under the 2013 legislation values spending 2% of the average net profits more than ethical and responsible business practices. It is worthwhile if the Indian government takes into consideration the concerns, above mentioned, at least in the subsequent amendments to Companies Act, 2013. It is time that the Indian company law (any company law for that matter) also encourages companies to do business in a sustainable way so that the focus will not be solely on outcomes but also on processes.[58]

[57] Akanksha Jain, *The Mandatory CSR in India : A Boon or Bane*, 4(1) INDIAN JOURNAL OF APPLIED RESEARCH 301, 302 (2014)

[58] Surya Deva, *Sustainable Development: What Role for the Company Law?*, 8 INTERNATIONAL AND COMPARATIVE CORPORATE LAW JOURNAL 76-102 (2011); According to the author, outcome signifies that companies should not violate human

6.9 Conclusion

Due to the fact that multinational corporations wield more power and wealth than many of the nations across the world, they are capable of doing more harm than any other private economic institutions as their activities surpass national boundaries thereby going beyond the control of national jurisdictions in many cases. Multinational corporations do a great deal of service to the society by paying huge taxes, providing employment, contributing to charitable causes and so on. But at the same time they are also prone to corruption, are accused of providing poor and inadequate workplace conditions, causing human rights abuses, consumer disputes and violating environmental values. It is not quite sure whether it is the latter part that the CSR tries to control, but it is surely a mechanism that balances the latter with that of the former. Corporate social responsibility is based on the premise that most of the companies derive resources from the society and they are expected to return it.

By incorporating the provisions relating to CSR and CSR reporting procedures, the new Companies Act of 2013 has in fact corrected a historic wrong of making CSR a matter of discretion of companies. It is certainly a new step towards transforming the voluntary CSR initiatives to binding principles but there is still a long way to go for achieving a strict compliance with the CSR

rights or pollute the environment whereas processes signify decision-makers not to take decisions which might potentially abridge human rights or environmental rights.

policies. It could be said that the Indian Companies Act of 2013 also follows a reporting approach[59] as it requires reporting of social commitments taken up by the company in the name of CSR but an option being given either to report the CSR activities undertaken or to report the reasons for not doing so makes it a little different from the main idea of reporting approach.

CSR requirement under S. 135 of the Companies Act 2013 has also been criticized as being violative of Article 14 of the Constitution of India as it unreasonably discriminates between companies and other organizations. Where companies are required to spend 2% of their average net profits, a partnership firm or LLP is not under the same obligation even if their net worth or profit or turnover satisfies the criteria under s.135.[60]

The essence of CSR is not just sharing part of the profits earned by the company. CSR becomes meaningful only when the company follows ethical and responsible business practices in making profits. In short, it signifies being responsible in how profits are made rather than being responsible after profits are made. The initiatives of the Tata Group in providing education and health services, the activities of Infosys in the name of Infosys Foundation in areas such as education, research and community development programmes, 'Project

[59] Surya Deva, *Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?*, 41 COMMON LAW WORLD REVIEW 299-321, 305 (2012)

[60] Amudha Murthy, *Constitutional Validity of CSR*, 2(4) LAW MANTRA LAW JOURNAL (2015), (Dec. 8, 2015, 7.00 A.M.), http://journal.lawmantra.co.in/?p=141

Drishti' launched by Reliance Industries Ltd, so as to aid the visually challenged people are all part of CSR activities, but with a difference. Though these are all done before the 2013 CSR mandate, it is in tune with CSR mandate under the legislation as all the said activities have been done out of the profits earned. But the previous chapters have showed, as an example, how the Tata corporation's venture of making Nano cars defied all human and environmental rights.

The idea of CSR incorporated in the 2013 Companies Act is not new and it is clear from the activities of Jaipur Rugs Company even prior to the enactment of the 2013 Companies Act. The initiative of the company named 'JRF' (Jaipur Rugs Foundation) that provides livelihood in carpet weaving to lakhs of Indian artisans is an example. In addition to this, the company has established strategic partnerships with reputed academic institutions that provide academic coaching and mentoring to JRF, set up women empowerment initiatives, developed tourism thereby creating more job opportunities for artisans, established training centres and has made symbiotic connections with financial institutions, NGOs and local administrative bodies.[61]

The South African Companies Act of 2008 as amended in 2011 specifically provides that the purpose of the legislation is to reaffirm the concept of the

[61] Vivek Ahuja, *Success Through Social Responsibility: A Unique Business Model of Jaipur Rugs Foundation*, 11(1) THE IUP JOURNAL OF CORPORATE GOVERNANCE 56 (2012)

company as a means of achieving economic and social benefits.[62] It is this approach called as the purpose approach that should be adopted in India in addition to all the other approaches namely the duty approach, composition approach and the reporting approach.

None of the companies in India have approached the Court claiming a violation of their Article 19(1)(g) right to carry on any profession, occupation, trade or business on account of the mandate to spend 2% of the average net profits for CSR activity. They could have argued that the mandate is beyond the ambit of restrictions under Article 19(6). Probably, the reason for not claiming any infringement of their rights is because the companies are happy to divert a meagre share of their profits to CSR activities. Things would have been different if the CSR mandate in the 2013 Companies Act was to follow responsible and ethical business practices.

Article 20 of the Chinese Company Law incorporated as a result of the 2005 amendment states that the shareholders of a company shall comply with the laws, administrative regulations and articles of association, and shall exercise the shareholders' rights according to law.[63] The article further provides that

[62] *South Africa Companies Act, 2008, Section 7(d), as amended by the Companies Amendment Act 3 of 2011*, (July 25, 2014, 1.00 P.M.), http://www.justice.gov.za/legislation/acts/2008-071amended.pdf; Surya Deva, *Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?*, 41 COMMON LAW WORLD REVIEW 299-321, 306 (2012)

[63] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: People's Republic of China*, Geneva, 2010, 58, (Jan. 15, 2014, 2.30 P.M.),

none of them may injure any of the interests of the company or of other shareholders by abusing the shareholders' rights, or injure the interests of any creditor of the company by abusing the independent status of legal person or the shareholders' limited liabilities. The provision also provides for remedial measures in the nature of compensation as it provides that where the shareholder of a company abuses the rights of shareholders and thus causes losses to the company or other shareholders, he shall be liable for compensation according to law. This statutory provision, though according to some could be used for remedial measures in the case of human rights violations by corporations, mainly focuses on protection of interests of consumers. A similar provision with suitable alterations could be incorporated in the Indian Companies Act of 2013 where compensatory measures could be made mandatory in case of human rights violations by shareholders.

The fact that company is no more just a profit maximising entity but a responsible social institution is clear from the observations made in the case of *National Textile Workers' Union v. P R Ramakrishnan*.[64] There exists a

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http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/China-access-justice-publication-2010.pdf

[64] AIR 1983 SC 75; The learned judges while holding that the workers of the company can appear during the hearing of winding up petition so as to support or oppose the same observed thus, *"It is now accepted on all hands, even in predominantly capitalist countries, that a company is not property. The traditional view that the company is the property of the shareholders is now an exploded myth. There was a time when a group controlling the majority of shares in a company used to say: "This is our concern. We can do what we like with it." The ownership of the concern was identified with those who brought in capital. That was the outcome of the property-minded capitalistic society in which the concept of company*

considerable amount of difference between corporate philanthropy and CSR. But when one looks at the definitions of CSR, it seems to be the same as corporate philanthropy. The concept of CSR is related to the way business is conducted by the companies. Corporate philanthropy, on the other hand, is related to the concept where the companies give money to the local communities where they conduct business. The distinction gets more blurred when one looks at the provisions of the Companies Act of 2013. Section 135 which mandates the particular companies to invest two percent of the average net profits of the three preceding years for CSR activities does not, in any way, mandates how the business is to be conducted in a responsible way. Instead, it provides for a mandatory concept of corporate philanthropy. By mandating the companies to share their money, the government seems less bothered to enquire how they have earned the money. The sad fact is that those companies who pose a threat to the ecosystem and local inhabitants may find their names in the

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originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values. Today social scientists and thinkers regard a company as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community in which it functions. It would be wrong to look upon it as something belonging to the shareholders. It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors which contribute to the production of national wealth. There is another equally, if not more, important factor of production and that is labour. Then there are the financial institutions and depositors, who provide the additional finance required for production and lastly, there are the consumers and the rest of the members of the community who are vitally interested in the product manufactured in the concern. Then how can it be said that capital, which is only one of the factors of production, should be regarded as owner having an exclusive dominion over the concern, as if the concern belongs to it? A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions."

good books of authorities, once they provide the requisite amount for CSR activities.

The general notion is that CSR is different from legal obligations of companies and should be made voluntary.[65] In this context, it is important for the companies to understand that the real essence of CSR lies in responsible and ethical business practices rather than spending a share of their net profits on community development or to the PM's relief fund. If spending part of the profits is made synonymous to CSR, then CSR can only remain voluntary because making it mandatory would lead to a considerable decline in profits and rise in liability in business. There will also be a situation where the shareholders become reluctant to invest in companies sharing a part of the net profits in the name of CSR.

[65] John Quigley, *The Challenge of Corporate Social Responsibility in India*, 10(11) EURASIA BULLETIN (2006)

CHAPTER 7

CORPORATE ACCOUNTABILITY UNDER THE ALIEN TORT STATUTE AND THE FUTURE OF CORPORATE HUMAN RIGHTS RESPONSIBILITY

7.1 Introduction

The Alien Tort Claims Act of the United States is regarded as a significant legislation in the context of international human rights due to its impact on the human rights abuses caused even outside the US territory. The Alien Tort Statute (ATS) or the Alien Tort Claims Act (ATCA) of the United States is a 33 worded statute which provides that "the district Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This important piece of legislation allows foreign citizens to bring civil actions in cases of human rights violations even for conduct committed outside the US.

ATS is one main statute that recognises that individuals have both obligations and rights under international law. It implies that the violator need not be a State entity in all the cases and the same applies to the victim too. The details about liability under ATS is not traceable and the only major reason why ATCA was enacted was to prevent any disturbance in foreign relations by providing a forum for aliens to obtain redress for civil wrongs caused by a

violation of international law. It addresses a major concern which arose in US that its government might be made accountable by foreign governments for civil wrongs committed against their citizens by citizens of the United States due to lack of an effective forum. It has been stated that the US Congress might have enacted the ATCA to provide a forum in which the injured alien could seek relief thereby avoiding an international conflict.[1] Due to the very same reason, i.e. to successfully dissuade international conflicts, the ATCA was often used to resolve disputes between the private individuals.

Very recently, the said legislation was once again resorted to in the case of corporate human rights violations caused by Shell Oil Corporation in Nigeria but the Court refused to provide relief on the basis of ATS. The reasoning given by the Court was a big blow to the legislation as it is doubtful whether, from now on, it can be relied on in cases of human rights violations overseas. This chapter analyzes the impact of the judgment in the context of corporate human rights responsibility. It examines, as a sample, Shell's business principles in detail to ascertain the extent of its implications on a day to day basis.

This chapter, though attempts to trace liability of corporations under a foreign jurisdiction, exclusively deals with the Alien Tort Claims Act. It does not

[1] David P. Kunstl, *Kadic v. Karadzic: Do Private Individuals have Enforceable rights and Obligations under the Alien Tort Claims Act?*, 6 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 319 (1996)

research on the Torture Victim Protection Act of 1991 as the latter allows civil suits to be filed in the US only against 'individuals' who has committed torture or extra-judicial killing while acting in an official capacity for any foreign nation. The term 'individuals' specifically excludes organisations or corporations as is clear from the case *Mohamad v. Palestinian Authority*[2] where the US Supreme Court specifically held that the Torture Victim Protection Act applies exclusively to natural persons and not to any organizational entity. The Court unanimously pointed out that the term 'individual' is completely different from 'person' and also observed that the Torture Victim Protection Bill had used the term "person" instead of 'individual' and that it was specifically excluded to make it clear that it is applied only to individuals and not to corporate entities.

7.2 The Law at Present

The case of *Filartiga v. Pena-Irala*[3] was the landmark decision that confirmed the federal Court's jurisdiction under ATS over suits between non-U.S. citizens for violation of law of nations. In the instant case, two Paraguan nationals sued a former Paraguan official in the U.S. Court for alleged torture and killing of

[2] 132 S. Ct. 1702 (2012)
[3] 630 F. 2d 876 (2d Cir. 1980)

their family member in Paraguay.[4] The Court held that the conduct violated customary international human rights standards. The Court observed that the instant suit satisfied the essential conditions of ATS as it involved a tort, violation of law of nations and was brought by an alien. The Court held that it possess subject matter jurisdiction under the ATS reasoning that because "deliberate torture perpetrated under colour of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties".[5] But once we trace the development of case laws connecting corporations and ATS, it can be understood that though the application of ATS was entertained by the Courts earlier, in *Sosa v. Alwarez*[6], the Court adopted a restrictive approach by holding that the plaintiff failed to state a violation of the law of nations with the requisite "definitive content and acceptance among civilised nations."

7.2.1 Doe v. Unocal

It was the case of *Doe v. Unocal*[7], which was brought against the corporations (Unocal in this case) that brought a major change in the realm of application of ATS as till then suits were filed under ATS against individuals and not

[4] There have been previous decisions where the US Courts dealt with private claims such as *Bolchos* v. *Darell*, 3 F. Cas. 810 (D.S.C. 1795) and *Abdul Rahman Omar Adra v. Clift*, 195 FSupp 857 (1961) but these were not connected to human rights violations.
[5] Chimene I. Keitner, *Kiobel v. Royal Dutch Petroleum: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute*, 14(31) ASIL (2010), (April 14, 2014, 1.30 P.M.), https://www.asil.org/insights/volume/14/issue/31/kiobel-v-royal-dutch-petroleum-another-round-fight-over-corporate
[6] 542 U.S. 692 (2004)
[7] 395 F 3d 932 (9th Cir, 2002)

corporations. The facts of the case were that Unocal[8], which was essentially a US company, entered into an agreement with the Burmese army seeking help for the peaceful construction of oil pipelines in the Yadana gas field in Burma. As part of this, the Burmese army together with Unocal subjected the innocent villagers to forced labour, false imprisonment, assaults, deaths and other grave human rights violations.

This became the issue in *Doe v. Unocal*, where the US trial Court dismissed the charges leveled against Unocal as, according to the Court, there was no proof to show that the company conspired with the army to commit human rights abuses against the Burmese villagers. The Court held that the ATS is inapplicable to the case, though it seems that the Court had no dispute that the atrocities were committed by the army, which is very evident from the following observation:

> *"The evidence does suggest that Unocal knew that forced labor was being utilized and that Unocal and Total, a co-venturer in the Yadana project benefited from the practice. The violence perpetrated against Plaintiffs is well documented in the deposition testimony filed under seal with the Court".*

Even though the Court was convinced of the grave human rights abuses committed, it held that ATS cannot be applied over the corporation as there is

[8] Unocal was a major petroleum explorer and marketer which on August 10, 2005, merged with Chevron Corporation and became a wholly owned subsidiary.

no evidence to show that Unocal actually controlled the military units that committed the abuses. Though the plaintiffs appealed to the higher Courts, in the midst of hearing the appeal, the corporation decided to put an end to the trial by compensating the plaintiffs in 2005.

The activities that took place in Burma are a clear violation of the principles mentioned in Unocal's Code of Ethics. The Unocal's Code of Ethics and Compliance states that "We are committed to meeting the highest ethical standards in all our operations, whether at home or abroad. This includes treating everyone fairly and with respect, maintaining a safe and healthful workplace and improving the quality of life wherever we do business. It also means conducting our business in a way that engenders pride in our employees and respect from the world community." The activity of Unocal which was complicit in the abuses caused by the Burmese army explicitly violates its own code of ethics. This once again is a clear proof of the ineffectiveness of voluntary codes of conduct and for the fact that there should be a proper and effective legal framework over and above these voluntary codes to regulate and control corporates.

7.2.2 Esther Kiobel v. Royal Dutch Petroleum Co

The recent judgment regarding the application of ATS is *Esther Kiobel v. Royal Dutch Petroleum Co.*[9], wherein it was alleged that the respondent

[9] 133 S.Ct. 1659 (2013)

company aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria. The question before the Court was whether and under what circumstances the Courts may recognize a cause of action under ATS, for violation of the law of nations occurring within the territory of a sovereign other than the U.S.

It is important to understand who the respondents, the Royal Dutch Petroleum Company are. It is to be noted that Shell Transport & Trading Co and Royal Dutch Petroleum were unified into a single Dutch owned company namely Royal Dutch Shell Plc.[10] The birth of Royal Dutch Shell plc is also evident from the following, "In 2005, the Group underwent a major structural reorganisation as the near century old partnership between Royal Dutch and Shell Transport and Trading was dissolved and Shell unified its corporate structure under a single new holding company, Royal Dutch Shell plc."[11]

The Shell Petroleum Development Company of Nigeria Ltd (SPDC), a joint subsidiary of Royal Dutch and Shell Transport and Trading, was incorporated in Nigeria and was engaged in oil exploration and production in Ogoniland. There were considerable amount of resistance from the residents due to the hazardous environmental effects of the company's activities. The corporation solicited the help of the Nigerian government to suppress the protests and also

[10] John Donovan, *Speculation on Hostile bids for Royal Dutch Shell?,* (May 10, 2014, 11.00 A.M.), royaldutchshellplc.com/2013/10/09/speculation-on-hostile-bids-for-royal-dutch-shell/

[11] *1980s to the New Millennium,* (May 10, 2014, 12.30 A.M.), http://www.shell.com/global/aboutshell/who-we-are/our-history/1980s-to-new-century.html

aided and abetted the government in attacking, beating, raping, killing, unlawfully arresting the Ogoni villagers and destroying their property.[12]

The fact is that Shell has been mining oil in Nigeria for around 40 years and is also responsible for thousands of oil spills. There have been two massive oil spills in 2008 and 2009 and it is stated that the after effects still continues in the form of death of fishes and air pollution. Shell has also admitted liability in these cases but the only area of dispute was regarding the number of barrels involved in the oil spill.[13] Certain oil spills have also resulted in loss of lives of 13000 fishermen and has also affected 31000 inhabitants of 35 villages.

7.3 Decision in Kiobel - A Big Blow to Victims of Corporate Human Rights Violations

The Supreme Court of the US in *Kiobel v. Royal Dutch Petroleum*[14] held that ATS will not apply to the instant case. The Court, more specifically, Roberts, C.J., observed that the presumption against extra territoriality of a statute also applies to ATS[15] and observed that all the conduct took place outside US and

[12] The petitioners in *Kiobel* also alleged that the respondent corporation provided the Nigerian forces with food, transportation and compensation as well as by allowing the Nigerian military to use the property of the corporation as a staging ground for attacks.
[13] *Five Years after Devastating Oil Spills in Nigeria, Shell may Finally Cough Up Millions*, (May 12, 2014, 03.00 P.M.) http://www.ibtimes.com/five-years-after-devastating-oil-spills-nigeria-shell-may-finally-cough-millions-1404212
[14] 133 S.Ct. 1659 (2013)
[15] Roberts, C.J., observed thus, "the principles underlying the presumption against extra territoriality thus constrain Courts exercising their power under the ATS."; *Esther Kiobel v. Royal Dutch Petroleum Co.,* 133 S.Ct. 1659 (2013), 6

even where the claims touch and concern the territory of US, they must do so with sufficient force to displace the presumption against extra territorial application. It is unfortunate to note that the learned judge did not clarify as to what all facts can touch and concern the territory of US with sufficient force so as to displace the presumption of extra territorial application.

There were too many concurring opinions in the judgment and as such it would be clear that none of the judges agreed with one another in full. Roberts, C.J., held that "corporations are often present in many countries and it would reach too far to say that mere corporate presence suffices."[16] But it is very evident from the judgment that the Court was concerned about the foreign policy consequences if the decision was otherwise. Roberts, C.J., observed thus, "Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could haul our citizens into their Courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our Courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches."[17]

Justice Breyer, who agreed with the decision but not with the reasoning of the Court, was of the opinion that ATS would apply only where (1) the alleged tort

[16] Opinion of Roberts, C.J., in *Esther Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), 14
[17] *Id.* at 13

occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. The learned judge observed thus, "The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so. Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind."[18]

[18] Opinion of Breyer, J., in *Esther Kiobel v. Royal Dutch Petroleum Co.,* 133 S.Ct. 1659 (2013), 15

7.3.1 Analysis of the Judgment

The decision in Kiobel has been inspired from a previous judgment by the same Court in *Jose Francisco Sosa v. Humberto Alvarez-Machain*[19]. In this case Alvarez sought damages from the United States under the FTCA, alleging false arrest, and from Sosa under the ATS for a violation of the law of nations. The US Drug Enforcement Administration approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial and as planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him to US, where he was arrested. This case has no direct connection with corporate liability under the human rights regime but it clarifies the scope and extent of ATS in regard to matters that take place outside the US. For example, the main argument against the application of ATS was that no relief could be claimed under ATS as it merely vests the Courts with jurisdiction and does not create or authorise the Courts to recognise any particular cause of action without any further Act of Congress. But the Court held that though in terms, it is only jurisdictional, at the time of enactment the jurisdiction enabled federal Courts to hear claims in a very limited category defined by the law of nations and recognized at common law. The Court observed thus,

[19] 542 U.S. 692 (2004)

> *"In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."*[20]

The Court agreed with the views of Blackstone that the modest number of international law violations include violation of safe conducts, infringement of the rights of ambassadors, and piracy and it were these that the legislators had in mind when they drafted the ATS. The Court held that the federal Courts under ATS could accept only well-established, universally recognized norms of international law.

Though it was argued that the alleged facts violated UDHR and ICCPR rights, the Court held that UDHR does not of its own force impose obligations as a matter of international law and although ICCPR does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal Courts.[21]

[20] Opinion of Souter, J., in *Jose Francisco Sosa v. Humberto Alvarez-Machain,* 542 U.S. 692 (2004), 30

[21] Moreover the Court also observed that "*Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of*

The reason why it is stated that *Kiobel* is inspired by the judgment in *Sosa* is because both the judgments reveal the concerns about foreign policy consequences if their decisions were otherwise. The Court in *Sosa* observed thus, "since many attempts by federal Courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[22]

At the same time, one may not be able to say that the decision in *Sosa* deviated much from *Filartiga v. Pena-Irala*[23]. In the case of *Sosa* too, the Court analysed whether the alleged abuse violated universally accepted norms of international law of human rights and came to a conclusion that it did not. Perhaps the main reason for such a conclusion would be that it was a single instance of illegal detention, that too, for less than a day. Moreover, the person was transferred to lawful authorities and a prompt indictment was made.

As per the decision in *Sosa*, the Court must look into whether the alleged activity violated a universally accepted norm of international law and if the answer is in the affirmative, whether international law extends liability for such a violation to the perpetrator (corporation, in our case). When one looks at the principles of customary international law, it would be clear that the principle of

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customary international law so well defined as to support the creation of a federal remedy"*;* Opinion of Souter, J., in *Jose Francisco Sosa v. Humberto Alvarez-Machain,* 542 U.S. 692 (2004), 44,45

[22] *Id.* at 33

[23] 630 F. 2d 876 (2d Cir. 1980)

corporate civil liability is not universal at customary international law in order to apply ATS against corporations.[24]

The petitioners in *Kiobel* did argue on the basis of transitory torts doctrine but could not convince the Court in its application in the instant case. The transitory torts doctrine is a common law doctrine whereby if a right of action has become fixed and a legal liability incurred either by common law or statute law of a State, that liability may be enforced and the right of action may be pursued in any Court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The doctrine has been propounded in the case of *Mostyn v. Fabrigas*[25], where it has been held that an action will lie in English Court for a tort committed abroad, provided the act is 'transitory' and not 'local'. The essence of this doctrine, as described in *Mostyn v. Fabrigas*[26] is that all actions of a transitory nature that arise abroad may be laid as happening in an English county.

But the Court in *Kiobel* was inclined to the decision in *Cuba R. Co. v. Crosby*[27], wherein it was observed thus:

[24] Owen Webb, *Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'*, 20 AUSTRALIAN INTERNATIONAL LAW JOURNAL 131
[25] 1 Cowp. 161 (K.B. 1774)
[26] *Id.*
[27] 222 U. S. 473

> *"The only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place."*[28]

Here the Court seems to say that they are not yet clear as to whether the activities alleged would be in violation of law of nations.

The Court did not continue on transitory torts doctrine because according to the Court, the main question is not whether a federal Court has jurisdiction to entertain a cause of action provided by foreign or international law but the question is instead whether the Court has authority to recognize a cause of action under the U.S. law to enforce a norm of international law. Here the Court means to say that the Court does not have the authority to recognize 'any' or 'every' cause of action under US law to enforce a norm of international law and that the federal Courts under ATS could accept only well-established, universally recognized norms of international law. In simple terms, the issues alleged in *Kiobel* will not fall under well-established, universally recognized norms of international law for the purposes of ATS. This is further clarified by the following observation of the Court:

> *"The reference to 'tort' does not demonstrate that the First Congress 'necessarily meant' for those causes of action to reach conduct in the*

[28] *Cuba R. Co. v. Crosby*, 222 U. S. 473, 479

> *territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality."*[29]

This clearly shows that according to the Court all actions that take place in a foreign territory do not qualify to be a 'tort' under the ATS.

Even though resort to transitory torts may be still a possibility, it is not always easy. For example, to initiate an action in an English Court or an Australian Court, one must show that (i) the presence of the defendant corporation was within the forum at the time of service; or (ii) the corporation has submitted to the jurisdiction of the Court; or (iii) it is possible to serve the writ outside the forum which could be done normally only with the leave of the highest Court of the State.[30]

7.4 Corporate Liability under the ATS

Before reaching the Supreme Court, when the matter was before the appellate Court, it was decided that the law of nations does not recognise corporate liability and hence ATS would not apply. In fact, it is not quite sure as to whether the term 'law of nations' in ATS would include each and every new causes of action under international law or whether the Congress meant, at the

[29] Opinion of Roberts, C.J., in *Esther Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), 8

[30] Owen Webb, *Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'*, 20 AUSTRALIAN INTERNATIONAL LAW JOURNAL 131; The application of Brussels Convention is limited as one of the conditions to be satisfied for its application is that the defendant company should be domiciled in the EU.

time of drafting, to include only specific ones. The issue becomes more complex when there are even doubts regarding ATS being only jurisdictional in nature. This matter became an issue in *Kiobel's* case as well and the observation of the Court in this regard is as follows:

> *"Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, "No nation has ever yet pretended to be the custos morum of the whole world . . . (United States v. The La Jeune Eugenie*[31]*). It is implausible to suppose that the First Congress wanted their fledgling Republic - struggling to receive international recognition - to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing."*

Here, the Court seems to agree with the observation made in *Jose Francisco Sosa v. Humberto Alvarez-Machain*[32], wherein it observed that

> *"The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."*

In *IIT v. Vencap Ltd*[33], Judge Henry Friendly observed that the section's (ATS) reference to the 'law of nations' must be narrowly read if the section is to be kept within the confines of Article III of the U.S. Constitution. It is stated that

[31] 26 Federal Cases 832 (1822)
[32] 542 U.S. 692 (2004)
[33] 519 F. 2d 1001 (2d Cir. 1975)

ATS originated as a clause in section 9 of the First Judiciary Act and this was titled as an 'Act to establish the Judicial Courts of the US'.[34] It has also been stated that the Act was designed to regulate the structure and jurisdiction of the federal Court and not to create any new causes of action.[35]

If ATS is read in tune with Article III of the US Constitution it appears that the term 'law of nations' referred to in ATS is part of 'law of the US' appearing in Article III.[36] If it is so, then all matters coming under 'law of nations' (not just being violation of safe conducts, infringement of the rights of ambassadors, and piracy) may be considered as part of 'law of the US' and ATS can entertain such matters. It also means that the conditions put forward by Justice Breyer in *Kiobel* such as "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor

[34] Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VIRGINIA JOURNAL OF INTERNATIONAL LAW 587 (2002)
[35] *Id.*
[36] The U.S. Constitution, Article III, Section 2: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

(free of civil as well as criminal liability) for a torturer or other common enemy of mankind", need not be present. But it has been stated that the Constitution refers to 'treaties' which is a part of 'law of nations' in many places and if it was deemed to be included in 'law of the US', the same would not have been mentioned in different places. This takes us to the conclusion that the founders would not have thought of bringing 'the law of nations jurisdiction' under the jurisdiction of the federal Court.[37] This in turn suggests that the term 'law of nations' referred to in ATS does not encompass all/any cause of action arising in a foreign soil.[38]

But Article III, section 2 specifically states that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects." The part that States 'between citizens of different

[37] Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VIRGINIA JOURNAL OF INTERNATIONAL LAW 587, 597 (2002)
[38] *Id.*

States' is generally referred to as the 'alienage jurisdiction' and the 'law of nations' part in ATS could be the part of this alienage jurisdiction, if not part of 'law of the US' in general. But then, it necessarily requires a US defendant though the ATS does not expressly require the same. It is true that the ATS mentions only the word 'alien' and is silent about 'US citizen'. But it is said that Oliver Ellsworth who was the chief draftsman of the First Judiciary Act while mentioning in writing to Judge Richard Law of Connecticut about his proposed Act stated that the Act would possess jurisdiction over controversies between foreigners and citizens.[39] It may be that the draftsman may have changed his mind at the time of his final draft but that is something about which no one can gather proof. One may understand that the general trend of the U.S. Courts is in deciding against having jurisdiction of cases between aliens.[40]

As of now, to succeed under ATS, victims or plaintiffs need to show something more than mere corporate presence as per the judgment in *Kiobel*. Whether corporations and more specifically 'corporate conduct' would fall within the purview of ATS was left unanswered is the major setback of *Kiobel's* decision. One of the options left to the persons similarly situated as that of plaintiffs in *Kiobel's* case is to bring in 'foreign direct liability actions' by which they could claim that the parent company domiciled within the forum concerned was

[39] *Id.*
[40] Montalet v. Murray, 8 U.S. 46 (1807)

negligent in not taking due care in the subsidiary's activities in a foreign country which led to the human rights abuses there.[41] Though in this way they could establish sufficient nexus with the American soil, this doctrine has found approval only in the UK and not in many other countries.

In *Sarei v. Rio Tinto*[42], it was held that the US Court may exercise jurisdiction under ATS over foreign companies for violations of international law even when the parties are non-US citizens and even though the torts were committed abroad. Rio Tinto is one of the first companies to publish a human rights framework which was in compliance with the United Nations Universal Declaration of Human Rights, United Nations Global Compact, Centre for Responsibility in Mining and Voluntary Principles on Security and Human Rights. Notwithstanding this, the company has been condemned of gross human rights abuses including that of racial discrimination, genocide, crimes against humanity and other war crimes. It was the residents of the island of Bougainville in Papua New Guinea who filed a suit against Rio Tinto under ATS in US Court in the year 2000. The main accusations levelled against the company were that it was complicit in war crimes and crimes against humanity committed by the Papua New Guinea army during a secessionist conflict on Bougainville and that the company engaged in racial discrimination against the

[41] Owen Webb, *Kiobel, The Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'*, 20 AUSTRALIAN INTERNATIONAL LAW JOURNAL 131
[42] 671 F 3d 736 (9th Cir 2011)

black workers and caused environmental hazards that severely affected the health of the inhabitants of the village.[43]

Though the District Court held that the appropriate forum for dealing with accusations such as environmental harm, cruel, inhuman and degrading punishment and other gross violations of human rights violations was the Courts at Papa New Guinea, it admitted that the same Courts would not be capable of dealing with issues of war crimes, crimes against humanity and racial discrimination as these claims are of 'universal concern'. Though in appeal, the Court held that the claims of genocide and war crimes fell within the ATS jurisdiction and was supposed to be sent to the District Court for further proceedings, in the light of the decision in *Kiobel*, the case got dismissed in the company's favour.

The Court in *Kiobel* failed to consider whether 'aiding or abetting' human rights abuses fall within the ambit of ATS and whether 'exhaustion of domestic remedies before the national Courts' is a condition precedent to the application of ATS.[44] With regard to the former, it is also pertinent to note that there still exists confusion as to whether it is the 'purpose' test (acted with the purpose of facilitating human rights abuses) or the 'knowledge' test (acted with the

[43] *Rio Tinto Lawsuit*, (Jan. 23, 2015, 10.00 A.M.), http://business-humanrights.org/en/rio-tinto-lawsuit-re-papua-new-guinea#c9304

[44] Owen Webb, *Kiobel, The Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'*, 20 AUSTRALIAN INTERNATIONAL LAW JOURNAL 131

knowledge that the action would facilitate human rights abuses) that has to be applied in order to determine the liability of corporations.[45]

7.5 Shell's Business Principles, Code of Conduct and Kiobel's case

As stated earlier, Shell Transport's activities in the East, combined with a search for new sources of oil to reduce dependence on Russia, brought it into contact with Royal Dutch Petroleum. The two companies joined forces in 1903 to protect themselves against the dominance of Standard Oil and they fully merged into the Royal Dutch Shell Group in 1907.[46] The Shell General Business Principles governs how each of the Shell companies which make up the Shell group conducts its affairs. Principle no.5 which talks about the responsibilities to shareholders, customers, employees, those with whom they do business and society states thus,

> *"To conduct business as responsible corporate members of society, to comply with applicable laws and regulations, to support fundamental human rights in line with the legitimate role of business, and to give proper regard to health, safety, security and the environment."*[47]

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[45] Owen Webb, *Kiobel, The Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'*, 20 AUSTRALIAN INTERNATIONAL LAW JOURNAL 131

[46] *Our Beginnings*, (Feb. 3, 2015, 10.00 A.M.), http://www.shell.com/global/aboutshell/who-we-are/our-history.html

[47] *Shell Business Principles*, (July 30, 2014, 9.15A.M.), https://s03.static-shell.com/content/dam/shell-new/local/global-content-packages/corporate/sgbp-english-2014.pdf

It is unfortunate that though it has been specifically stated in their business principles that they support fundamental human rights in line with the legitimate role of business and also protect the environment, the facts in *Kiobel* and other alleged facts against Shell Corporation evidences the contrary.

The activities of the Shell group are also contrary to the Principle no. 6 that states about the responsibilities towards 'local communities'. It states that Shell companies aim to be good neighbours by continuously improving the ways in which they contribute directly or indirectly to the general well-being of the communities within which they work. It also states that they will manage the social impacts of their business activities carefully and work with others to enhance the benefits to local communities and to mitigate any negative impacts of their activities. The main reason for not adhering to these business principles is the lack of its enforcement, or in more appropriate words, the fact that they are voluntary principles and it is for the respective companies to opt either to follow or disregard them. It is true that each corporation is bound by the applicable laws and regulations of the nations in which they operate and this is found generally in the business principles of different corporations as well, for example, principle no. 8, in the case of Shell General Business Principles.[48] But this could not be implemented in all cases especially where the corporation is receiving the support of the government of the nation in which they function.

[48] Shell General Business Principles, Principle No.8: "We comply with all applicable laws and regulations of the countries in which we operate".

As is clear from the *Kiobel* case, the corporation solicited the help of the Nigerian government to suppress the protests and also aided and abetted the government in attacking, beating, raping, killing, unlawfully arresting the Ogoni villagers and destroying their property.

The Shell Code of Conduct states that the company is committed to achieving excellence in all its business activities, including health, safety and environmental performance and that its overriding goal is to operate in environmentally and socially responsible ways thereby preventing harm to people, protecting the environment and comply with all laws and regulations. It is not clear as to what would be the sanction meted out in case of violations of the code of conduct. It is true that the Code of Ethics include provisions for sanction that includes serious disciplinary actions, removal, dismissal and other remedies to the extent permitted by law but it might also be true that such provisions are not applicable in case of violations permitted by the company itself.

The case against Shell by Nigerians against human rights abuses is not the first one. A case has been filed against the activities of Shell in Nigeria[49] against their incessant gas flaring as it causes environmental pollution and severe health hazards including premature deaths. The claimants based their claims on

[49] Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd and Ors, FHC/B/CS/53/05, Federal High Court, Benin Judicial Divison, 14 November, 2005

fundamental rights provisions of the Nigerian Constitution[50] and provisions of African Charter[51]. The claimants also sought remedy from the activities of the corporation that also threatened their food security as gas flaring affected crop production to a large extent as well. Though the Court observed that the right to a clean poison-free, pollution-free and healthy environment under the Nigerian constitution is not a justiciable right, it could be made justiciable on the basis of Article 24 of the African Charter[52]. This is considered as a landmark decision because this was the first time the Court relied on a human rights provision to get the domestic rights enforced.

The Shell Code of Conduct states that "reputations are hard won and easily lost. We can all play a part in protecting and building Shell's reputation." In this context, it should be noted that probably at least now, Shell should work hard to earn back the lost the reputation or if they think they have not lost it yet, even after the *Kiobel* issue, they should perhaps define what 'reputation' means.

7.6 Conclusion

The fact that the violations were alleged to be caused by Royal Dutch Petroleum, a private corporation and thus a non-State actor, did not cause many

[50] The Constitution of the Federal Republic of Nigeria, 1999, Sections 33(1) and 34(1).
[51] The African Charter on Human and People's Rights, 1981, Articles 4, 16 and 24.
[52] The African Charter on Human and People's Rights, 1981, Article 24, states that all peoples shall have the right to a general satisfactory environment favourable to their development.

issues before the Court. The reason for the same is that in *Kadic v. Karadzic*[53], the Second Circuit division has held that State action is not always required for violation of the law of nations. In this case, the Court held Karadzic, who was the self-proclaimed commander of the Bosnian-Serb military forces, liable for human rights violations, including acts of rape, torture, extrajudicial killing, and genocide holding that the Alien Tort Claims Act provides U.S. federal Courts with jurisdiction over international human rights violations. If the decision in *Filartiga v. Pena-Irala*[54] specifically highlighted the requirement of a 'State official', the decision in *Kadic v. Karadzic*[55] was otherwise. The Court highlighted the fact that law of nations can be violated by private individuals and not necessarily by State officials and they can also be brought under the ambit of ATS. The following observation of the Court proves the same. The Court observed thus,

"We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[56]

The liability bestowed upon State actors or non-State actors is based on customary international principles and in the case of *Karadzic*, the liability was based on Genocide Convention. Hence it can be said that the decision in *Kadic*

[53] 70 F. 3d at 232 (2d Cir. 1995)
[54] 630 F. 2d 876 (2d Cir. 1980)
[55] 70 F.3d 232 (1995)
[56] *Id.* at 239

v. Karadzic[57], more specifically, recognised individual liability for genocide and war crimes. Nevertheless, this decision has in fact paved the way for suits against multinational corporations for violation of human rights. But the decision in *Kadic* will be of no help in the context of ATS or in relation to status of corporation under international law for the purposes of responsibility. This is because the case involved genocide, war crimes, and crimes against humanity which are crimes for which individual responsibility is commonly acknowledged under international criminal law.[58]

It seems that the Courts, in the past, were biased in their verdicts against corporations and that the wealthier corporations were asked to pay more money as compensation in tort cases. In this context, it is relevant to note the following observation,

> *"everything else being equal, injured parties are more likely to blame and sue deep-pocket targets; attorneys are more likely to accept cases against deep-pocket targets; and juries are more likely to find liability, and award more money, when cases involve deep-pocket defendants."*[59]

They called it the 'deep-pocket bias' then, but cases like *Kiobel* prove that situation today is otherwise in US. It has been mentioned that an action under common law torts would still be better for victims of corporate conduct than

[57] 70 F.3d 232 (1995)
[58] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 261 (1996)
[59] Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOCIETY REVIEW 121-162 (1996)

claims under ATS as common law torts would cover more instances than the 'law of nations' clause in ATS and that there is no condition precedent to exhaust domestic remedies if it is an action based on common law torts.[60] It should also be noted that actions brought under common law torts has resulted in awarding exemplary damages to victims/plaintiffs. The case of *Motto v. Trafigura*[61], where the suit against Trafigura Beheer BV for oil spill in 2006 was settled outside the Court in 2009, is an example of this.

When the Court at the appellate stage in *Kiobel's* case held in favour of the defendant corporation, Leval, J. gave a dissenting opinion and it is interesting to note his observation. According to him,

> *"Adoption of the corporate form has always offered important benefits and protections to business - foremost among them the limitation of liability to the assets of the business, without recourse to the assets of its shareholders. The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy - all without civil liability to victims. By adopting the corporate form, such an enterprise could have hired itself out to operate Nazi extermination camps or the torture*

[60] Owen Webb, *Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'*, 20 AUSTRALIAN INTERNATIONAL LAW JOURNAL 131
[61] [2011] EWCA Civ 1150

> *chambers of Argentina's dirty war, immune from civil liability to its victims. By protecting profits earned through abuse of fundamental human rights protected by international law, the rule my colleagues have created operates in opposition to the objective of international law to protect those rights."*[62]

This should be wakeup call for all those who argue that *Kiobel's* decision was just and fair.

Generally ATCA could be applied to non-State actors only if they act concertedly with State or with sufficient State aid (State action doctrine).[63] This is one of the main limitations of the ATCA statute. Even if the plaintiffs in a case prove that the matters 'touch and concern the territory of the US', the matters could get difficult. As it is known to all, establishing jurisdiction is just the primary step. When it comes to proving human rights abuses by businesses, it is also not easy to find whether the corporations have 'aided and abetted' the human rights abuses caused by another. The standard required to prosecute the corporations for 'aiding and abetting' is not yet clear. Whether 'specific knowledge' of the crimes is required or whether 'substantial assistance with the purpose of aiding unlawful conduct' is sufficient is a matter of debate. The

[62] Kiobel v Royal Dutch Shell, 621 F 3d 111, 150 (Leval J.) (2nd Cir, 2010)
[63] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 941 (2004); Exceptions may be in cases of piracy, genocide, war crimes and slave trading.

Second Circuit Court in *Presbyterian Church v. Talisman*[64], supported the requirement of 'substantial assistance with the purpose of aiding unlawful conduct, but in 2011, in *Doe v. Exxon,* the Court held that 'knowledge with substantial assistance was the appropriate standard'.[65] Now that the possibility is always to enforce international law, US Courts may adopt what has been held in the case of *Prosecutor v. Perisic*[66], by the ICTY that the prosecution has to establish that the defendant's assistance was 'specifically directed' to aiding the commission of the offence.[67] This high standard is very difficult when it comes to proving the same and it is quite obvious that corporations can find an easy way out of the prosecution in almost all the cases.

It may not be legally possible for the US Courts to entertain suits in connection with abuses that occurred in Nigeria as per the decision in *Kiobel*. This line of thought is probably because of the notion that every country possesses its own

[64] 582 F.3d 244 (2nd Cir. 2009)
[65] 45 ELR 20136. No. 01-1357, (D.D.C., 07/06/2015)
[66] In Prosecutor v. Perisic, ICTY-04-81-A, Appeal Judgment (28 February 2013), the appeals chamber of the ICTY reversed the 2011 decision convicting Perisic who was the former head of the Yugoslav Army on grounds of aiding and abetting war crimes in Bosnia-Herzegovina and Croatia. The reason for reversal is the absence of specific direction which was considered essential for proving the actus reus of aiding and abetting crimes of murder, civilian attacks, persecution, extermination, inhumane acts as crimes against humanity. The other reason for acquittal was that the former head lacked the necessary "effective control" over his subordinates; David P. Stewart & Christopher Jenks, *International Decisions: Prosecutor V. Perisic, Case No. IT-04-81-A, International Criminal Tribunal for the Former Yugoslavia, February 28, 2013*, 107 A.J.I.L. 622 (2013)
[67] Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (ECCJ) December 2013, 39, (Nov. 5, 2015, 2.40 P.M.), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf

sovereignty and to usurp into the matters of another nation is equivalent to surrender of sovereignty by the other nation.[68] Clarity can be obtained when one looks at this from a different angle. The country in whose territory the company is established has a legal duty to prevent the human rights abuses caused by the company even if it is in other countries. General Comment No.14, CESCR provides thus,

> *"States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."*[69]

Though it is in relation to protection of right to health, the rationale behind it can be equally applied to any kind of human rights abuses. Similarly, the Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights in its Forty-sixth session (2011) has observed that "it is of utmost importance that States Parties ensure access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means. States

[68] Another line of thought would be the reluctance of the country to prosecute when it itself is the perpetrator while the corporation is an accomplice.

[69] *General Comment No. 14 (2000), Article 12 of the International Covenant on Economic, Social and Cultural Rights*, (Sept. 15, 2012, 11.30 A.M.), http://apps.who.int/disasters/repo/13849_files/o/UN_human_rights.htm

Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant."[70] It clarifies 'protection of rights' to mean effectively safeguarding rights holders by States against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations.[71] Based on these premises, if not US, the country where the company is incorporated[72] can be held accountable for violations caused by Royal Dutch Petroleum in Nigeria.

An alternative or rather a far-fetched suggestion would be to amend the Torture Victims Protection Act of 1991 so as to widen the scope of defendants by including 'corporations' as well. It is indeed true that it might still be extremely difficult for the plaintiffs to prove that the defendant (individual in the original

[70] Para 5 of the Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights in its Forty-sixth session (2011), (Feb. 13, 2015, 10.35 A.M.), http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.2011.1-ENG.doc.

[71] Para 5 of the Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights in its Forty-sixth session (2011), (Feb. 13, 2015, 10.35 A.M.), http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.2011.1-ENG.doc.

[72] Royal Dutch Petroleum Co. is headquartered in Netherlands and incorporated in UK.

existing legislation) has acted in an official capacity for any foreign nation, but as a first step, US could attempt to widen the application of the legislation.[73]

It has also been stated that ATS cannot be said to be a statute of international standing as it "merely converts a violation of international law into a domestic tort".[74] This interpretation necessitates the need for a supranational legal framework. The possibility of a supranational framework being applied in the case of a domestic cause especially in the case of human rights abuses saves a lot of procedural difficulties. The same is evident from the case of *Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria*.[75] To adopt this strategy into the Indian context is beneficial, but unfortunately due to the lack of a regional human rights convention, the only option is to rely on international human rights instruments.

[73] This is because Section 2 of the Torture Victims Protection Ac, 1991 states thus, "An individual who, under actual or apparent authority, or color of law, of any foreign nation - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

[74] P. ALSTON (ed.), NON-STATE ACTORS AND HUMAN RIGHTS 314 (2005)

[75] (2005) AHRLR 151 (NgHC 2005)

CHAPTER 8

THE NEED FOR CORPORATE SOCIAL ACCOUNTABILITY IN PLACE OF CORPORATE SOCIAL RESPONSIBILITY AT THE NATIONAL AND INTERNATIONAL LEVEL

8.1 Introduction

The importance of dealing with protection of human rights in the private sphere is mainly due to the result of the globalization of the world economy, the privatization of public sectors, the fragmentation of States, and the feminization of international human rights law.[1] There has been a huge transition from the corporations in the older times to the corporations in the present days. It is true that even the British during the olden days had extended the operation of British East India Company to several jurisdictions. But the difference between this and the modern MNCs is that the former did not establish subsidiaries as they were not allowed to do so without the permission of the sovereign but the latter can establish as many subsidiaries by complying with the required laws in the territory concerned.[2] It is because of this very same reason that the British government could exercise complete control over the companies that they

[1] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 61 (1996); According to the author, the feminization of international human rights law denotes the need for applicability of human rights protection in regard to violence against women, economic and social discrimination, sexual abuse and rape during armed conflicts.

[2] Surya Deva, *Corporate Human Rights Violations: A Case for Extraterritorial Regulation*, in HANDBOOK OF THE PHILOSOPHICAL FOUNDATIONS OF BUSINESS ETHICS 1079 (CHRISTOPHER LUETEGE (ed.), 2013)

established in various jurisdictions but the present day State or legislations cannot.

It has been said that regulating the TNCs become a nightmare for the government because in most of the countries (Nigeria, for example) there exists a joint-venture partnership with MNCs that deal with oil and gas exploration.[3] In such cases, regulating the MNCs is equivalent to self-regulation.

Thus it is very clear that activities of corporations must be regulated either at the national or international level. This statement is true even when observed from a rational point of view. Corporation, a creation by law, should have limitations imposed by law. It is the emerging world order that one need to focus instead of focusing on individual State conditions and responsibility. When the concept of an emerging world order gets embedded in the minds of everyone, it will not be difficult to understand that human rights can be demanded by anyone who has no connection with the country concerned.[4] This also has the backing of the truism that right-holders have a say in their enforcement and to demand protection. This truism can be the sole reason to pressurise States or international law to impose responsibilities on corporations so as to avoid human rights abuses.

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[3] Evaristus Oshionebo, *Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry*, 15(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 107-129 (2007)

[4] Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNATIONAL LEGAL THEORY 31–47, 43 (2010)

This chapter deals with the reasons for a more concrete system of legal framework at the national and international level that provides much more than mere voluntary codes of conduct or multi-stakeholder initiatives. This part of the research also analyses the shortcomings associated with the concept of corporate social 'responsibility' at the international and national level and the need to establish a legal structure that provides for corporate social 'accountability' in its place. This chapter studies the jurisdictional issues that stand as hindrances in making corporations accountable and the possibilities to overcome the same. The chapter scrutinizes the existence of the concept of CSR in other jurisdictions to evaluate the extent of innovation that went into the Indian Companies Act of 2013 and the need to revamp the Indian concept of CSR to a system that ensures ethical and responsible business practices.

8.2 The Existence of Corporate Responsibility in other Jurisdictions

Provisions for corporate social responsibility exist in other countries as well. An analysis indicates that the mere existence of CSR in various national legislations will not suffice. While following CSR practices and having a good CSR record can act as a shield for the company against risks, this has not been completely helpful in combating the harmful activities of corporations. To this effect, it has been stated that "organisations have tried to embrace CSR as

activities in an attempt to reach out to the society, but in some cases it has not helped".[5]

The need of the hour is not just corporate social responsibility, but corporate social accountability. Corporations should be made accountable for human rights violations committed by them in various jurisdictions. It may be done either by enacting concrete legal frameworks in the respective national jurisdictions or by providing for corporate accountability in international law. The latter one requires several hurdles to be removed such as non-recognition of MNCs as subjects of international law, issues regarding legal personality of corporations and issues connected to mandatory provisions in place of voluntary initiatives. Further ones are in the form of jurisdictional issues such as *forum non conveniens*, which is discussed, in detail, in this chapter.

The aim of the companies in recent times has gone beyond the usual notions of profit maximisation, economic gains or enhancement of competencies to wider social goals like ensuring environmental protection, promotion of social responsibility including consumer interest etc. This in turn can showcase the company in good light and can have a positive impact on the wealth of the organisation. Still, most of the corporations around the world are infamous for corruption scandals, environment disasters, child labour violations and

[5] Jaya Srivastava, *Social Movements, CSR and Industrial Growth: An Indian Experience,* 11 THE IUP JOURNAL OF CORPORATE GOVERNANCE 61 (2012)

dangerous work environment. MNCs are also involved in denying the workers the right to organize by suppressing trade unions.[6] These invite the unwanted attention from regulators, courts, governments and media. These are some of the reasons behind the introduction of concept of corporate social responsibility.

Though the concept of CSR in India is one that has been widely commended and much-admired, India is not the only country that provides for CSR. Though section 135 of the Indian Companies Act, 2013 has been highly praised as providing for 'mandatory' CSR, the 'comply or explain' approach followed in the legislation makes it exceedingly futile. The following section of this chapter deals with the CSR policies in various jurisdictions that provide for a much more effective system of CSR or an equally good system of CSR like that of India.

8.2.1 CSR in Indonesia

Article 74 of the Company Liability Act 40 of 2007 provides for CSR as a mandatory procedure for natural resources-based companies. Chapter V of the Company Liability Act 40 of 2007 provides for 'Environmental and Social Responsibility' which mandates companies doing business in the field of or in relation to natural resources must put into practice Environmental and Social

[6] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 934 (2004)

Responsibility.[7] It also provides that companies that do not follow the same shall be liable to sanctions in accordance with the provisions of legislative regulations. Clause 4 of the same authorises further provisions regarding 'Environmental and Social Responsibility' to be stipulated by Government Regulations and the same has been done via Government Regulation 47 of 2012, which extends the regulation provided under Article 74 of Company Liability Act 40 of 2007.

The Government Regulation 47 of 2012 on Social and Environmental Responsibility of Limited Liability Company is to implement the provisions of Article 74 of Company Liability Act 40 of 2007. According to the GR No. 47/2012, social and environmental responsibility is the obligation of the natural resources-based companies and is carried out by the board of directors of the company's annual work plan[8] after receiving approval from the board of commissioners or the general meeting of shareholders in accordance with the

[7] Chapter V of the Company Liability Act 40 of 2007- Environmental and Social Responsibility: Article 74(1): Companies doing business in the field of and/or in relation to natural resources must put into practice Environmental and Social Responsibility; (2) The Environmental and Social Responsibility contemplated in paragraph (1) constitutes an obligation of the Company which shall be budgeted for and calculated as a cost of the Company performance of which shall be with due attention to decency and fairness; (3) Companies who do not put their obligation into practice as contemplated in paragraph (1) shall be liable to sanctions in accordance with the provisions of legislative regulations; (4) Further provisions regarding Environmental and Social Responsibility shall be stipulated by Government Regulation.

[8] The company's annual work plan is a plan that contains activities as well as budget which is essential in the implementation of social and environmental responsibility.

articles of association of the company.[9] It also provides that the implementation of social and environmental responsibilities shall be enclosed in the company's annual report and the same shall be held accountable to the general meeting of shareholders. In essence, the results of the implementation of the CSR work plan for the previous year must be incorporated in the annual report of the company given to shareholders at the annual shareholders meeting.[10] Though the regulation provides for rewards by the authorised agencies to companies that implement CSR initiatives, the form of the reward is not precisely specified in the same.

An example of the CSR stipulation in Indonesia in accordance with the above mentioned provisions is the one practised under the Government Regulation Number 23 of 2010 concerning the implementation of CSR in mineral and coal mining business activity. The concept of CSR mentioned under the Regulation is society development and empowerment around the mining licence area.[11] According to the same, the holder of a mining business licence should conduct development and empowerment programme as part of its CSR. Regrettably,

[9] Raymond Hutagaol, *Government Regulation No. 47 of 2012 on Social and Environmental Responsibility of Limited Liability Company – Indonesia*, (Nov. 26, 2015, 7.30 A.M.), http://www.hg.org/article.asp?id=26532

[10] Cornel B Juniarto & Andika D Riyandi, *Corporate social responsibility regulation in Indonesia*, (Nov. 7, 2015, 12.45 P.M.), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=103427a1-0313-4d6c-b7f7-c5deb0bedbb5

[11] Sabela Gayo, *Mandatory and Voluntary Corporate Social Responsibility Policy Debates in Indonesia*, ICIRD (2012), (Nov. 23, 2014, 3.30 P.M.),https://www.researchgate.net/publication/252508791_Mandatory_and_Voluntary_Corporate_Social_Responsibility_Policy_Debates_in_Indonesia

how much amount needs to be spent on CSR activities have not been mentioned anywhere, clearly giving rise to situations where different companies spend different amounts on their CSR activities.

The penal provisions for not complying with the said CSR responsibilities are provided in accordance with the provisions of the relevant laws such as the one in Law No 27 of 2003 concerning geothermal activities. According to this legislation, the holder of a geothermal mining business licence is required to implement a local community development and empowerment programme and in case the holder of mining business licence intentionally cancels its work area without accomplishing its responsibility to implement a local community development and empowerment programme, he will be awarded punishments in the form of imprisonment for a maximum of six months.[12]

8.2.2 CSR in France

The CSR policy adopted in France is more or less 'regulatory' rather than a 'voluntary' approach. The internationalization of the companies and worries about public image and concern of ethical risks emerging from campaigns against a corporation are also reasons for French corporations to adopt norms

[12] Cornel B Juniarto & Andika D Riyandi, *Corporate social responsibility regulation in Indonesia*, (Nov. 7, 2015, 12.45 P.M.), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=103427a1-0313-4d6c-b7f7-c5deb0bedbb5

regulating their conduct.[13] The legal obligation of CSR is provided under *Nouvelles Regulations Economiques* (NRE) of 2001 and in this context, it is said that there was a huge political influence on CSR in France and this has resulted in a regulatory approach towards CSR.[14] The *Loi sur les Nouvelles Regulations Economiques* is the legislation related to Corporate Governance in France and it deals with financial reporting, competition and other corporate activities.[15] Article 116 required listed companies to publish an annual corporate social responsibility report on the environmental, social and societal impact of their operations. Article 116 of the NRE provides for mandatory CSR reporting in France and the provision mandates companies that are listed on the primary market of Paris Stock Exchange to disclose information on CSR in their annual reports. Article 116 enlarged the scope of activities and now in addition to health and safety risks, which were already present, the companies have to evaluate the security and safety of their workplace through analysis of their installations, machinery and production processes.[16]

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[13]Ariel Colonomos & Javier Santiso, *Vive la France French Multinationals and Human Rights*, 27 HUM. RTS. Q. 1345, 1322 (2005)

[14] Anna-Lena Kuhn et al., *Does Mandatory CSR Reporting Lead to Higher CSR Transparency? The Case of France*, (Oct. 9, 2013, 4:30 PM) http://www.virtusinterpress.org/IMG/pdf/AnnaLena_Kuhn_Markus_Stiglbauer_Janina_Heel_paper.pdf

[15] *Loi sur les Nouvelles Regulations Economiques (NRE)*, (Nov. 11, 2015, 4.50 P.M.), http://www.environment-database.eu/cms/glossary/45-glossary-l/3301-loi-sur-les-nouvelles-regulations-economiques-nre.html

[16] Mary Lou Egan, *France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reporting to Promote Environmentally Sustainable Economic Development*, (Nov. 11, 2015, 8.30 P.M.), http://www.bendickegan.com/pdf/EganMauleonWolffBendick.pdf

The 2002 Decree was passed to further implement the CSR objectives and the required CSR information from companies were divided into three namely: 1) social information to employees such as working hours, health and safety conditions, non-discrimination policy, dismissal conditions and employment to specially abled persons; 2) information on companies' regional impact on suppliers and stakeholders; 3) information on business impact on environment such as use of natural resources, compliance costs, waste disposal measures, etc.[17] The biggest drawback of the law was that there was no uniform practice of CSR reporting.

In the years 2009 and 2010, France adopted two legislations titled 'the Grenelle Acts' that made the production of an annual report on CSR matters for all large companies with activities in France mandatory.[18] In 2012, the government adopted the provisions for the implementation of these laws. As per section 225 of the 2nd law of Grenelle, the companies have to provide details in their annual reports "on how they take into account the social and environmental consequences of their activity and their social commitments in favour of sustainable development."[19] When compared to the provision that existed in the

[17] Anna-Lena Kuhn et al., *Does Mandatory CSR Reporting Lead to Higher CSR Transparency? The Case of France*, (Oct. 9, 2013, 4:30 PM) http://www.virtusinterpress.org/IMG/pdf/AnnaLena_Kuhn_Markus_Stiglbauer_Janina_Heel_paper.pdf

[18] *The French Legislation on extra-financial Reporting: built on Consensus*, (Nov. 12, 2015, 9.10 A.M.), http://www.diplomatie.gouv.fr/en/IMG/pdf/Mandatory_reporting_built_on_consensus_in_France.pdf

[19] *Id.*

NRE, the new law provides CSR reporting mandatory for companies with over 500 employees and report on over 40 topics covered under three themes - social, environmental and commitments to sustainable development. The social aspect includes employment, labour relations, health and safety whereas the environmental aspect includes pollution and waste management and energy consumption. The commitments to sustainable development include social impacts, relations with stakeholders and issues related to human rights. The areas for which information is required to be submitted by companies reflects the requirements under Global Compact, Guiding Principles of Human Rights and Business, the OECD Guidelines for multinational corporations, Global Reporting Initiative and ILO Tripartite Declaration. According to the 2nd law of Grenelle approximately one third of these topics are to be presented separately and they are mandatory for listed companies while non-compulsory for the other companies. According to the legislation, the report thus filed must be subjected to verification by an independent third party[20] who will prepare a report certifying the quality of the report. In addition to this, the third party will also provide a reasoned opinion on the accuracy of information provided.[21]

[20] The third party will be normally appointed by the executive director or chief executive and accredited by the French Committee of accreditation.

[21] *The French Legislation on extra-financial Reporting: built on Consensus*, (Nov. 12, 2015, 9.10 A.M.), http://www.diplomatie.gouv.fr/en/IMG/pdf/Mandatory_reporting_built_on_consensus_in_France.pdf

The main drawback of NRE was that there was no provision imposing sanctions on companies that did not fulfil the requirement. Although the situation is the same so far as the 2nd law of Grenelle is concerned, it is said that the verification mechanisms provided by the legislation ensures that companies report their CSR activities in a much more efficient manner.

The implementation of section 225 is yet to be assessed on a detailed scale, but it is better for the nation if it does not end up with the same fate as that of Article 116 of NRE. The absence of detailed guidelines on the scope of CSR information while reporting has led to the situation where French companies individually decide on the level of design and transparency of their reports. In addition to this, most of the studies have revealed that French companies reveal less information in their CSR reports when compared to their US, UK and Dutch counterparts. This is equally applicable to the information on general CSR principles, codes of conduct, stakeholder issues, environmental safeguards, health and safety measures and so on.[22] Most of the companies' reports also lacked critical issues such as human rights violations by the companies or by the supply chain. In this context, it should be noted that in addition to ensuring CSR within the company, it is equally important that the

[22] Anna-Lena Kühn et al., *Does Mandatory CSR Reporting Lead to Higher CSR Transparency? The Case of France*, (Oct. 9, 2013, 4:30 PM) http://www.virtusinterpress.org/IMG/pdf/AnnaLena_Kuhn_Markus_Stiglbauer_Janina_Heel_paper.pdf

company incorporates the CSR strategy within its supply chain.[23] The measures such as the declarations entered into between the Body Shop and its suppliers against animal testing at present and in future should serve as an example for all the companies around the world.[24] In many of the cases, there was no uniform reporting pattern and the reason for the same is the existence of vague legal obligations. If the new law namely Article 225, can take care of this factor, then CSR reporting would be better in France.

8.2.3 CSR in Denmark

Denmark follows a system where both private and State-owned companies are required to furnish their CSR information in their annual financial reports.[25] This procedure, which is subject to verification by auditors, is seen as a move to encourage the companies in Denmark to join the UNGC or UN Principles for Responsible Investment.[26] The Danish government had devised an action plan in May 2008 where they identified four key action areas as part of CSR responsibilities of the companies namely (1) propagating business driven social

[23] Munnmun Dey & Shouvik Sircar, *Integrating Corporate Social Responsibility Initiatives with Business Strategy: A Study of Some Indian Companies*, 11(1) THE IUP JOURNAL OF CORPORATE GOVERNANCE 43 (2012)

[24] Berte van de Ven, AndeNijhoff and Ronald Jeurissen, *Sticking to Core Value: The Case of The Body Shop* in CORPORATE SOCIAL RESPONSIBILITY: A CASE STUDY APPROACH 59 (Christine A. Mallin (ed.), 2009)

[25] *Mandatory CSR Reporting for Denmark's Largest Companies (2009)*, (Nov. 18, 2015, 10.20 A.M.), http://www.greenbiz.com/news/2009/01/07/mandatory-csr-reporting-denmarks-largest-companies

[26] The Danish government (2008), *Action Plan for Corporate Social Responsibility*, (Nov. 19, 2015, 10.15 A.M.), https://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2008_06_11/Action_plan_CSR.pdf

responsibility (2) promoting businesses' social responsibility through Government activities (3) corporate sector's Climate Responsibility (4) marketing Denmark for responsible growth.

The Danish government has proposed to include around 30 action plans in these major four action areas. The government's primary action plan namely 'Propagating Business-Driven Social Responsibility' consists of encouraging Danish companies to improve their CSR work and to make it compulsory for large companies to report on CSR in the management's review of the annual report and also to set up the Social Responsibility Council whose main function is to make recommendations for the Government and companies.[27] In addition to these, the plan also consisted of initiatives such as making a biennial progress report on Danish companies' observance of the principles of UN Global Compact and PRI.

The next major plan, i.e. 'Promoting Businesses' Social Responsibility through Government Activities' consisted of ensuring that joint State supply contracts will steadily introduce requirements for social responsibility as expressed in the conventions that provide the basis for the UN Global Compact and ensure that all State procurement officers can access the guidelines for incorporating social responsibility.[28] The action plan also ensured that State-owned public limited

[27] *Id.*
[28] *Id.*

companies will mandatorily report on CSR in the management's review of the annual report and that all major State-owned public limited companies comply with the principles of the UN Global Compact.

The third key plan titled 'Corporate sector's Climate Responsibility' mainly focused on encouraging companies to include climate responsibility in their CSR reports in the management's review of the annual report.[29] The last plan viz. 'Marketing Denmark for Responsible Growth' contained more or less general objectives such as promoting Danish tools and competences in the area of corporate social responsibility.[30]

The action plan was a success, given the fact that the number of Danish companies which adopted the UN Global Compact increased gradually from 38 companies in 2008 to 200 in 2012. This also made it a requirement for 1,100 largest Danish companies and all State-owned limited liability companies to report on CSR in their annual reports. Another action plan was adopted in the year 2012 (2012-2015) which contains a total of 42 initiatives in four key areas such as:

1) Strengthening the respect for international principles

2) Increasing responsible growth through partnerships

[29] *Id.*
[30] *Id.*

3) Increasing transparency

4) Using the public sector to promote a good framework for responsible growth

The latest action plan of the year 2012-2015 proposes to strengthen respect for international principles chiefly by adopting a 'mediation and grievance mechanism for responsible business conduct' to deal with violations by Danish companies of international CSR guidelines, including human rights violations. It specifically mandates that the mediation and grievance mechanism must comply with the UN Guiding Principles on Business and Human Rights and the OECD's Guidelines on Multinational Enterprises. The government made specific objectives so as to increase responsible growth through partnerships and the main one was to help the companies develop green and innovative business models and to develop an instrument under the Business Innovation Fund that can support the companies in developing and implementing innovative green business models.[31] The last two key areas is proposed to be achieved by introducing a bill that makes it mandatory for the largest Danish companies and State-owned limited liability companies to expressly state the measures they have taken to respect human rights and reduce adverse impact on climate in their reports. The government also proposes to focus more on the

[31] The Danish Government, *Responsible growth – Action Plan for Corporate Social Responsibility (2012)*, (Nov. 14, 2015, 7.40 P.M.), http://csrgov.dk/file/318420/uk_responsible_growth_2012.pdf

employment of disadvantaged groups through collaboration between companies and the public job centres.

8.3 Overall Assessment

The Indian Companies Act of 2013 provides for CSR, which is only applicable to certain companies that falls under the criteria mentioned under Section 135. Even these companies can opt out from complying with the said provision by explaining the reasons for not doing so. Irrespective of whether the company opts to follow the CSR obligation or to explain the reasons for not following, the details about the policies implemented by the company on corporate social responsibility initiatives in case of former, and explanations for not following in case of latter needs to be mentioned in the reports of Board of Directors under Section 134 of the Indian Companies Act of 2013. On the other hand, an analysis of the CSR policies that exist in other countries such as Indonesia, France and Denmark reveal that they are as good as or better than the CSR policy adopted by India. It is true that the CSR policy adopted by Indonesia, though mandatory, is applied largely in the case of natural resources-based companies and companies engaging in mineral and coal mining business activity. But the fact that it covers both social and environmental responsibility and also provides for penal sanctions in case of default balances the former defect. Similarly, regulatory CSR approach adopted by France in the form of

mandatory CSR reporting in almost all areas such as labour, human rights and environment, although do not impose sanctions for not adhering to the provisions, provides for an effective verification of submitted reports by an independent third party. Equally important is the action plans developed by the Danish government that focus on requiring companies to follow the principles enshrined in UN Global Compact, UN Guiding Principles on Business and Human Rights and the OECD's Guidelines on Multinational Enterprises. It should be noted that the Indian Companies Act of 2013 is still far behind in incorporating the principles of UN Global Compact that leads to responsible and ethical business practices.

It is significant to observe that the method India has adopted namely, 'comply or explain' approach has been adopted earlier by France. The French law allows companies to omit information on subjects non-relevant to their activity and in such cases they must provide an explanation for why they chose not to disclose this information. But unlike the Indian legislation, it is only applicable to information on subjects that are not relevant to their activity.

Similarly, the 'CSR Committee' is not India's unique contribution to the world in matters related to CSR. The South African Companies Act 2008, under Section 72(4) provides that the Minister responsible for companies may, by regulation, prescribe that a company or a category of companies must have a social and ethics committee, if it is desirable in public interest having regard to

its annual turnover, the size of its workforce; or the nature and extent of its activities.[32]

8.4 The Major Obstacles at the International Level - Jurisdictional Issues

At present, private sector plays a significant role in the overall development of the society, and in this context, the role of the corporations stands out. The activities of the corporations always involve cross boundary activities and they choose States that have fewer human rights regulatory mechanisms. In addition to this, governments of various nations provide many incentives to corporations who are willing to enter into MoUs with them to invest in their country in the form of tax breaks and clearing the required land by providing outdated rates of compensation to those in the locality.[33]

There may arise so many issues, not just because its operations cross the boundary where it is incorporated, but also due to the fact that the company may be incorporated in one country, but may have its head offices or subsidiaries in other countries. In other words, most of the large TNCs are almost free from regulatory control as they have their "headquarters in one

[32] *South Africa Companies Act, 2008,* (July 25, 2014, 1.00 P.M.), http://www.justice.gov.za/legislation/acts/2008-071amended.pdf

[33] SUDEEP CHAKRAVARTI, CLEAR HOLD BUILD: HARD LESSONS OF BUSINESS AND HUMAN RIGHTS IN INDIA, COLLINS BUSINESS, xvii (U.P., 2014); It has also been stated that the governments behave like an 'extension of corporate will' using police and paramilitary forces against innocent civilians who resist the projects due to livelihood issues.

State, shareholders in others, and operations worldwide."[34] Claims may be made by citizens of different nations in a totally different jurisdiction and the court may face difficult issues settling the jurisdictional issues in such cases.

8.4.1 Separate Personality of Parent Company and Subsidiaries and Limited Liability Doctrine

The main problem in ensuring corporate accountability in regard to human rights abuses is due to the separate personality conferred on the parent company and its subsidiaries. In most of the cases, it is, undoubtedly, the parent company which must be made responsible, but the victims may have to seek compensation against the subsidiary company due to its separate personality.

The limited liability doctrine which makes the shareholders liable only to the extent of their liability also makes matters worse. The doctrine takes into account that the legal personality of a parent company is separate from the legal personality of its subsidiary even when it is wholly owned and controlled by the parent company. In this context, it has been observed that, "one of the primary and accepted motivations behind incorporating a company is to limit personal risks by obtaining the benefit of limited liability."[35] Though misuse of the limited liability principle can be curbed to a certain extent by piercing the corporate veil, the fact that it requires a high level of proof of the participation

[34] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) THE YALE LAW JOURNAL 443-545, 463 (2001)
[35] London & Globe Finance Corporation, Re, [1903] 1 Ch 728, 731

of the parent company and is subject to inconsistent judicial discretion limits its applicability.[36] Hence the lifting of corporate veil so as to a hold parent company liable for the acts of its subsidiary is allowed only in exceptional circumstances such as in cases where the company is a mere sham or where it commits economic offences or when it tries to avoid welfare legislation.[37]

There are cases where the courts have successfully pierced the corporate veil and made the companies liable. The Australian case of *Olson v. CSR Ltd and Midalco Ltd*[38] (formerly ABA) is another classic example of making corporations liable by piercing the corporate veil.[39] The case brought relief to Mrs. Olson who was a mesothelioma victim due to environmental asbestos exposure and was awarded an exemplary damage as compensation to the health hazards caused by the company. Although the claimant was not an employee, she contracted the disease from the asbestos fibres which her dad brought home on his work clothes and from the pollution that spread across the township. Though the defendant tried to escape from liability, the Court (Dust Diseases Tribunal of New South Wales, Australia), piercing the veil between *CSR Ltd* and *ABA* found that in fact it was *CSR Ltd* who essentially directed and

[36] David Becker, *A Call for the Codification of the Unocal Doctrine*, 32 Cornell International Law Journal 183, 198 (1998)
[37] Laura Ceresna, *A Manual on Corporate Accountability in India*, 2011, (Mar. 9, 2014, 4.15 P.M.),http://business-humanrights.org/sites/default/files/media/documents/cividep-manual-corporate-accountability-india-apr-2011.pdf
[38] Dust Diseases Tribunal of New South Wales, Dec. 24, 1994, unreported
[39] Richard Meeran, *Process Liability of Multinationals: Overcoming the Forum Hurdle,* JOURNAL OF PERSONAL INJURY LITIGATION 170 (1995)

controlled the latter and that control was absolute and pervasive. The Court held that the defendant company had knowledge of the health hazards but failed to take the required duty of care and hence was under a liability to compensate the claimant.

Notwithstanding that, it is not easy to convince the courts to pierce the veil.[40] In certain situations, like in the case of Bhopal Gas Disaster, it becomes crucial to sue a parent company, albeit the actual violation might have resulted from its subsidiaries as it may be extremely hard for victims to identify the company of a corporate group who took the decision that has caused human rights violations.[41] It may even be because the subsidiary company may not possess enough economic capacity to provide adequate compensation.[42]

Case laws show that courts follow no common or unifying principle to pierce the corporate veil.[43] In *Briggs v. James Hardie & Co Pty Ltd*[44], the Court held that the assertion that the corporate veil may be pierced where one company exercises complete dominion and control over another entity is too simplistic a statement and that the law pays scant regard to the commercial reality that

[40] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: Report on India*, 2011, (Jan. 22, 2014, 6.30 P.M.), http://www.indianet.nl/pdf/AccessToJustice.pdf

[41] International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: Report on India*, 2011, (Jan. 22, 2014, 6.30 P.M.), http://www.indianet.nl/pdf/AccessToJustice.pdf

[42] *Id.*

[43] The statement is the essence of the Court's observation in Briggs v James Hardie & Co Pty Ltd, [1989] 16 NSWLR 549

[44] [1989] 16 NSWLR 549; the case was related to a suit filed by Briggs against his former employers' holding company as he contracted health issues due to poisoning from asbestos.

every holding company does, or has the potential to, exercise control over a subsidiary.[45] This observation has been made by the Court while holding against piercing the corporate veil. The case proves us the judicial attitude that the principle of some control over the subsidiary is inadequate to pierce the corporate veil.

It is to be noted that it is not easy to find out the actual juristic persons who are responsible for human rights violations. Many a times, the real violators (parent company) are shadowed by apparent violators (subsidiaries who might be just the executors of human rights violations ordered by the parent corporation) or it is difficult to locate the real violators, in view of complex corporate structure.[46] One may also not expect a subsidiary corporation to effectively compensate the victims because of its financial incapacity.

In this regard, it has been suggested that it is better to follow a 'limited eclipsed personality' in cases of alleged human rights violations, where the separate personality of the subsidiaries of a corporate group should be eclipsed in that victims should be free to sue the immediate or ultimate parent corporation of that group as a matter of principle and the application of this would definitely

[45] Surya Deva, *Sustainable Development: What Role for the Company Law?*, 8 INTERNATIONAL AND COMPARATIVE CORPORATE LAW JOURNAL 76-102 (2011)
[46] Surya Deva, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations*, 8 NEWC. L. R. 87 (2004); The author states that though the Courts employ 'piercing the corporate veil' which helps in making the parent corporation liable, its scope is very limited as it is subject to fluctuating judicial discretion.

avoid the problem of parent corporations pleading that it is separate from its subsidiaries or that it had no control over them.[47] The reason why the term 'limited' has been used is because the principle is to be applied only to determine the question of liability within a corporate group. Most importantly, the said principle is to be limited to those cases that involve violation of human rights and to cases of purely commercial or contractual nature and not be allowed as a defence against criminal or human rights culpability.

Other than searching for traditional concepts or doctrines such as 'lifting the corporate veil' or 'proving direct participation by the parent company' to make the parent company responsible, it is better to frame the argument on these lines. The parent company can be made liable even for the acts of its subsidiaries as the act has resulted from the failure to exercise due diligence in controlling the acts of the subsidiary and ensure that human rights are complied with.[48] Thus the omission to monitor the activities of the subsidiary may be a ground for casting responsibility on the parent company.

The Courts usually ignore the separate corporate personality when it is used for manifestly improper or fraudulent purpose and the same is done by the Indian

[47] *Id.*

[48] Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (ECCJ) December 2013, 39, (Nov. 5, 2012, 2.40 P.M.), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf

Courts especially when not piercing the corporate veil would amount to an injustice being continued.[49] The example is the case of *CIT v. Meenakshi Mills Ltd*[50] where the Court held that formation of separate companies for evading tax is an unlawful purpose. In short, where the concept of separate corporate personality is used to "defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons."[51] According to English Law, in case of harm caused by a subsidiary, the parent company could be considered as a 'primary tortfeasor' as it owes a duty of care to those in its subsidiary. The case laws of *Barrow and Heys v. CSR Ltd*,[52] and *CSR Ltd v. Wren*,[53] support this. The former case established duty of the parent company to the employees of the subsidiary on the basis of managerial control over mining operations. The latter case established duty of care on the basis that the management staffs of the subsidiary (at the time of injury caused to an employee) was employees of the parent company.

The Deep Rock doctrine is another test employed in US so as to prevent abuse of limited liability. This could be explained with reference to the case of *Taylor*

[49] Sneha Mohanty & Vrinda Bhandari, *The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis*, 32(7) COMPANY LAWYER 194, 199 (2011)
[50] CIT v. Meenakshi Mills Ltd, AIR 1967 SC 819
[51] Observation of Sanborn J. in *US v. Milwaukee Refrigerator Transit Co*, 142 F. 242, 247 (E.D. Wis. 1905); Sneha Mohanty & Vrinda Bhandari, *The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis*, 32(7) COMPANY LAWYER 194, 200 (2011)
[52] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 217 (CAMBRIDGE UNIVERSITY PRESS, 2006)
[53] (1997) 22 NSWLR 463

v. Standard Gas & Electric Co,[54] where the Court held that when a subsidiary corporation declares bankruptcy, then the parent company that asserts claims against its own subsidiary get subordinated to all other creditors in the interest of equity[55].

Directors, shareholders and members incur personal liability under the 'lifting the corporate veil doctrine'. This is applied when the number of shareholders falls below the statutory minimum or when it is proved that they were carrying on the company with intent to defraud the creditors. The same is applicable in cases of fraud and when the company is used as a sham.[56] The Indian example is the case of *State of U.P. v. Renusagar Power*,[57] where it was held that Hindalco and Renusagar were principally the same legal entity. The Court applied the doctrine of piercing the corporate veil to find that Renusagar was nothing but an association of persons in which one such person was Hindalco.[58]

[54] 306 U.S. 307 (1939)
[55] Sneha Mohanty & Vrinda Bhandari, *The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis*, 32(7) COMPANY LAWYER 194, 201 (2011); The UK position seems to be that the parent company gets prior claim in insolvency despite the fact that the same may prejudice creditors.
[56] The best example is the case of *Jones v. Lipman*, [1962] W.L.R. 832 Ch D at 836 where the Court held the company as a sham created by Lipman so as to avoid recognition. In this case Lipman transferred certain land which he had contracted to sell to Jones which was a company in which Lipman and a nominee were the only shareholders and directors; Sneha Mohanty & Vrinda Bhandari, *The Evolution of the Separate Legal Personality Doctrine and its Exceptions: A Comparative Analysis*, 2011 COMPANY LAWYER 194, 198
[57] [1988] A.I.R. S.C. 1737, Opinion of Mukharhi, J. In 1988 SCR Supl. (1) 627, 631
[58] This is a case where the Court applied association theory.

8.4.2 *Forum non conveniens*

This is the time where the entire legal fraternity round the globe argues for 'foreign direct liability'[59], whereas our nation is still on the debates that are centred on foreign direct investment. One of the options to combat the activities of MNCs is to enable the home States to have laws with extraterritorial application on the basis of foreign direct liability. Foreign direct liability enables the home State to hold the parent corporation accountable for negative human rights impacts arising out of actions of its foreign subsidiaries. But the doctrine of *forum non conveniens* acts a hindrance in home States taking up the matter on the ground of inappropriate forum to try the matter. The doctrine of *forum non conveniens* has been used as a weapon by the MNCs to limit their liabilities for injuries committed abroad. The best example is that of Bhopal Gas Tragedy where the US Court dismissed the claim for compensation brought before it on the ground of *forum non conveniens*.[60] The most important point to be noted here is that in most of the cases, where the doctrine has been invoked in the Courts, the matter has been either abandoned or settled out of Court for a smaller amount of compensation.[61] The doctrine of *forum non conveniens* is applicable irrespective of whether they are bringing the suit in

[59] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)

[60] In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (1986), U.S. District Court for the Southern District of New York

[61] D. Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 LAW QUARTERLY REVIEW 39 (1987)

US, UK or Australia. The only difference is that the Australian Courts apply the test of 'clearly inappropriate forum' whereas the UK and US Courts apply the test of 'most suitable forum'. Though this sounds fundamentally different both in principle and in its application, the decision in *Voth v. Manildra Flour Mills Proprietary Ltd*[62], clearly states that, *"The 'clearly inappropriate forum' test is similar to and, for that reason, is likely to yield same results as the 'most appropriate forum' test in majority of case".*[63]

In *Spiliada Maritime Corporation v. Cansulex Ltd*,[64] the Court held that

> *"the basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."*

[62] (1990) 171 CLR 538; the case is related to claim for stay of proceedings in New South Wales on ground of *forum non conveniens* as the appellants wanted to proceed with the matter in the US. The case was related to professional negligence, where a suit was filed in New South Wales against the appellant, who was an accountant practising in USA, for damages in failing to advise on their liability to account to the Inland Revenue Service for withholding tax. The New South Wales was opted as the forum as some of the damage occurred in New South Wales. But the Court was of the opinion that New South Wales is clearly an inappropriate forum for the action to proceed as the US, on the basis of factual analysis, has got more connection with the case.

[63] (1990) 171 CLR 538, 564

[64] [1987] AC 460, 476

If the Court concludes at any stage that there is no other available forum which is clearly more appropriate for the trial of the action, which is likely to be the end of the matter. But if the Court concludes at any stage that there is some other available forum which *prima facie* is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless be granted. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages or a higher scale of damages or more generous rules of limitation if he sues in England.[65] This means that the plaintiff is under an obligation to approach a foreign forum even if it is in some respects less advantageous than the English forum. This was a case where the appellants who were the owners of the carrier '*Spiliada*' alleged that the cargo of sulphur that was loaded on to the ship by the respondents was wet, which caused corrosion to the ship. The appellants obtained leave from the English Court to serve writ outside the jurisdiction on the respondents to recover damages in respect of a contract governed by English law. Though the respondents claimed that it was Canada and not England which was the proper forum, the Court concluded that if the court concludes that there is some other available forum, which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless

[65] *Id.* at 478

there are circumstances by reason of which justice requires that a stay should nevertheless not be granted such as denial of justice to plaintiff. But then, in such cases, the burden shifts to the plaintiff to prove the same with cogent evidence.

The case of *Anvil Mining* in the Democratic Republic of Congo[66] and the related human rights abuses the company had caused, is an example of the problems with the implementation of *forum non conveniens* doctrine. The case against *Anvil Mining Co.* was brought before the Canadian Courts for their alleged involvement in 2004 with the Congolese army in Kilwa by transporting the dead bodies of those who had been murdered by the army. In addition to the logistical support, the company was also alleged to have made payments to members of the army who were involved in rape, destruction of houses, torture, and other grave human rights abuses. The company did not refute the allegations, but instead stated that they were forced to do so. Even then, the Courts in Canada could not be of any assistance to the plaintiffs as it was observed by the judiciary that the Canadian legislation do not contain provisions that recognize Quebec's jurisdiction to entertain the class action filed against the company and that since the company's office at Montreal had no involvement in the decisions related to company's participation in the

[66] Canadian Association against Impunity (CAAI) v Anvil Mining Ltd, [2012] C.A. 117 (Can. Que.), (July 23, 2014, 9.50 P.M.), http://www.canlii.org/en/qc/qcca/doc/2012/2012qcca117/2012qcca117.html

massacre at Kilwa, Quebec Courts could not entertain any claim. Moreover the Court also observed that the plaintiffs could not prove that they could not approach the Courts in Australia which, in their opinion, was the appropriate forum.[67] This observation was irrespective of the fact that the trial Court ruled in favour of the victims stating that there was a sufficient link between Quebec and the company's operations in Kilwa as Anvil Mining Co. was a Quebec company incorporated in Canada.

But there are cases where the judiciary has shown a progressive attitude to look into the possibilities of obtaining proper legal aid and fair trial in the country where cause of action arose. Rather than *prima facie* dismissing the suit on the basis of *forum non conveniens*, the courts have, in certain cases, allowed the forum approached by the plaintiffs to be the appropriate forum to adjudicate the matter. The case of *Lube and ors v. Cape PLC*,[68] is one such example. In this case the question before the Court was whether UK or South Africa was the appropriate forum and the subject matter was regarding damages for personal injuries and death, suffered as a result of exposure to asbestos and its related products in South Africa (SA). The exposure occurred in the course of plaintiff's employment and as a result of living in asbestos polluted areas in different parts of SA. The company was incorporated in England but majority

[67] Anvil Mining was headquartered in Perth, Australia and listed on the Toronto and Sydney Stock Exchanges.
[68] [2000] 4 All E R 268

of its operations were in SA. The head offices of companies operating in SA were in SA. The defendant operated a number of factories in England and other areas such as Italy. The main question before the Court was "whether a parent company which has *de facto* control over the operations of foreign subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and persons in the vicinity of the factory or other business premises, owes a duty of care to those workers and other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?" The Court after relying on *Sim v. Robinow*,[69] and *Spiliada Maritime Corporation v. Cansulex Ltd*,[70] and after being convinced about the non-availability of legal aid in SA and the lack of fair trial in SA due to lack of funding and legal representation in SA allowed plaintiff's claim to make UK the appropriate forum.[71]

In *Sim v. Robinow*,[72] Lord Kinnear held that, where a plaintiff sues a defendant as of right in the English Court and the defendant applies to stay the proceedings on grounds of *forum non conveniens*, the principle to be applied by the English Court in deciding that application in any case not governed by

[69] (1892) 19 R 665, 668
[70] [1987] AC 460, 476
[71] It was also due to the absence of expert lawyers well versed in complex mass tort action; P.T. Muchlinski, *Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review*, 2002 COMPANY LAWYER 168, 172
[72] (1892) 19 R 665, 668

Article 2 of the Brussels Convention[73] is that "the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

In *Connelly v. RTZ*[74], where the operator of a mine in Namibia claimed damages against the parent company due to negligent exposure to uranium dust

[73] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 2, states, "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the Courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."

[74] [1998] AC 854; The case of *Modi Entertainment Network v. WSG Cricket Pte. Ltd.*, A.I.R. 2003 SC 1177, contains certain parameters to determine the question of *forum non conveniens* which are the following: "(1) In exercising discretion to grant an anti-suit injunction the Court must be satisfied of the following aspects: - (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the Court; (b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and (c) the principle of comity - respect for the Court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind; (2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (*forum conveniens*) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a *forum non conveniens*; (3) Where jurisdiction of a Court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the Court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the Court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case; (4) a Court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a Court including a foreign Court, a forum of their choice in regard to the commencement or continuance of proceedings in the Court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the Court of choice because the essence of the jurisdiction of the Court does not exist or because of a vis major or force majeure and the like; (5) where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such

which led to cancer, the House of Lords did not adhere to the plea of stay of proceedings on ground of *forum non conveniens*. The reason according to the Court was that Namibia was not a proper forum on account of non-availability of legal aid.

It is also true that decisions such as *Eastman Kodak Co v. Kavlin*[75], *Martinez v. Dow Chemicals*[76] and *Wiwa v. Royal Dutch Petroleum*,[77] show that the US Courts have decided against existence of alternate forums on grounds of risk of corruption in the host State.[78] The case of *Eastman Kodak Co v. Kavlin*[79] is related to an action brought by Eastman Kodak against Kavlin for the violation of international law by committing arbitrary detention of Carballo, a rival distributor with the help of Bolivian judicial institutions. The reason for the rivalry is due to the grant of exclusive distributorship of Eastman Kodak to Carballo after cancelling the same from Kavlin. Kavlin could successfully seek

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a *forum conveniens* and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the Court of their choice which cannot be treated just an alternative forum; (6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the Court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the Court of choice in which exclusive or non- exclusive jurisdiction is created, the proceedings in that Court cannot per se be treated as vexatious or oppressive nor can the Court be said to be forum non-conveniens; and (7) the burden of establishing that the forum of choice is a *forum non conveniens* or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

[75] 978 F Supp 1078 (SD Fla 1997)

[76] 219 F Supp 2d 719 (ED La 2002)

[77] 2002 WL 319887 (SDNY 28 Feb 2002)

[78] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 123 (CAMBRIDGE UNIVERSITY PRESS, 2006)

[79] 978 F Supp 1078 (SD Fla 1997)

the help of judicial institutions in Bolivia due to the existence of close ties between the two. On a claim made by Kavlin that US is not the appropriate forum, the District Court for the Southern District of Florida held that Bolivia could not be made the appropriate forum as Kavlin could manipulate the Bolivian judicial system. The case of *Martinez v. Dow Chemicals*[80] is related an action brought in the US court by several agriculturalists in various countries due to injuries suffered from a pesticide manufactured by the respondents. Though the defendants argued that there exist other forums such as Costa Rica, Philippines and Honduras as plaintiffs have more connection with those countries, the US court was of the opinion that the defendants have not been able to satisfy the Court that Costa Rica, Honduras or Philippines are the available fora for contesting the claims of plaintiffs and that even if available, they would be adequate.

Though it could be seen that the courts are, in certain cases, progressive in its attitude towards making them the appropriate forum to adjudicate the matter, the same is not true in all the cases. The case of Anvil Mining in the Democratic Republic of Congo[81] and Bhopal Gas Tragedy[82] are examples. The crux of the judgment in *Re Union Carbide Corporation Gas Plant Disaster at*

[80] 219 F Supp 2d 719 (ED La 2002)
[81] Canadian Association Against Impunity (CAAI) v. Anvil Mining Ltd, [2012] C.A. 117 (Can. Que.), (July 23, 2014, 9.50 P.M.), http://www.canlii.org/en/qc/qcca/doc/2012/2012qcca117/2012qcca117.html
[82] 634 F Supp 842 (SDNY 1986)

Bhopal[83], meant that recourse to US Courts is not the option on grounds of low workplace, weak consumer and environmental standards in the host State. It could be argued that the reason why the US courts refused to entertain the Bhopal gas tragedy issue was because they considered the Indian forum to be adequate and appropriate unlike the forums in Costa Rica, Honduras or Philippines in the case of *Martinez v. Dow Chemicals*[84]. The observation by the Court that "this Court is firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability and further that the Indian courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims"[85] proves the same.[86]

The case of *Canadian Association against Impunity (CAAI) v Anvil Mining Ltd.*[87], and *in re Union Carbide Corporation Gas Plant Disaster at Bhopal,*

[83] *Id.*
[84] 219 F Supp 2d 719 (ED La 2002)
[85] In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 866 (1986), U.S. District Court for the Southern District of New York
[86] But the actual reason is quite different which is evident from the following observation, *"Plaintiffs, including the Union of India, have argued that the courts of India are not up to the task of conducting the Bhopal litigation. They assert that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people. The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiff's request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role."*; In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 867 (1986), U.S. District Court for the Southern District of New York
[87] [2012] C.A. 117 (Can. Que.), (July 23, 2014, 9.50 P.M.),

India in December, 1984[88], shows the challenges faced abroad and in the Indian legal scenario such as lack of clear human rights obligations of companies, difficulty in casting liability on a parent company for the conduct of its subsidiaries and the misuse of the doctrine of *forum non conveniens*.

Another option that exists with the Courts is to exercise personal jurisdiction on the basis of the connection the parent company has with the State in question like that happened in the case of *Wiwa v. Royal Dutch Petroleum*[89]. In this case, the Court held that the New York investor relations office of two foreign companies' subsidiary was sufficient enough to subject the company to personal jurisdiction under the ATCA. For the purpose of determining whether the companies were doing business in New York, the Court held that the New York investor relations office acted as the 'agent' of the parent companies. The Court took into account factors such as the time devoted by the New York investor relations office to the business and the source of funding to come to the conclusion that it was the parents companies themselves doing business in US.

http://www.canlii.org/en/qc/qcca/doc/2012/2012qcca117/2012qcca117.html
[88] 634 F. Supp. 842, 866 (1986), U.S. District Court for the Southern District of New York
[89] 2002 WL 319887 (SDNY 28 Feb 2002)

8.5 The Major Obstacles at the National Level

8.5.1 Inadequacy of Indian Concept of CSR

Most of the multinational companies make huge profits and can easily compensate the victims after committing violations. It may be also not that difficult for them to find loopholes in the legal system so as to evade the responsibility of compensating the victims. Hence it is suggested that it is the need of the hour to incorporate suitable sanctions in the Companies Act 2013 against those companies that do not follow the requisite CSR mandate. This research does not suggest that the CSR mandate under Section 135 of the Companies Act, 2013 shall be removed. The research suggests that investing 2% of the average net profits should be made mandatory for companies who fall under the requirements of S. 135 rather than allowing them to explain for not complying with the CSR requirement. It is also recommended that even companies that do not satisfy the turnover/worth/net profit criteria under section 135 should also be placed under an obligation to follow CSR though not the CSR obligation set out in section 135. It should be made clear in the 2013 legislation that irrespective of any criteria set by any of the provisions of the said legislation, all the companies in India including multinationals should incorporate ethical and responsible business practices in tune with OECD Guidelines, ILO Tripartite Declaration, UN Global Compact and National Voluntary Guidelines. The failure to observe this should result in severe

sanctions so as to ensure that the message clearly pass on to all the companies in future. The sanctions may also include withdrawal of registration of the company and revocation of grants from the government.

Looking at the different stages of evolution of CSR, as discussed in the first chapter, it can be understood that our nation has moved on to the fifth stage of development of CSR by making it mandatory, at least in principle. The need of the hour is to determine whether the objective behind CSR has been achieved at this stage. The list of items that has been highlighted in the VII Schedule of the Companies Act 2013 proves that the legislation requires the companies to spend money on the stipulated activities irrespective of how they have earned it. The legislation, although contemporary, has gone back to the older concept of corporate philanthropy and has completely ignored the need for responsible business practices. It is time that CSR should be seen as a concept which brings about a focus in 'how' business makes their money rather than on 'what' they spend it on'. This makes it sufficiently clear that the concept of CSR in India is yet to develop and reach a stage where the government and business think about CSR not in terms of how much they are spending but as responsible business practices. One may hope that the change comes sooner than never.

Some argue that voluntary CSR has resulted in the absence of effective control over companies as it can be used as a convenient excuse for not encouraging

binding legislations.[90] It has also been said that "voluntary CSR is a way of staving off regulation".[91] The present mandate of CSR imposed on companies, which are only above a certain threshold will inescapably lead to corruption as those companies, which otherwise would qualify for CSR spending, may conceal large amounts so that their net profits in the preceding three years will not reach the limit identified for CSR spending.

Ensuring corporate social responsibility is not difficult. Section 135 of the Companies Act of 2013 mandates the establishment of a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. It is the CSR Committee that recommends the Corporate Social Responsibility Policy which shall indicate the Schedule VII activities to be undertaken by the company. The CSR Committee is also empowered to recommend the amount of expenditure to be incurred on CSR activities and also to monitor the Corporate Social Responsibility Policy of the company from time to time. The law may provide for a mandatory consultation of the CSR Committee with the representatives of the local area, or in the alternative, suggest a social worker of the local area to be a part of the CSR Committee. The term 'local area' is given importance

[90] RAMON MULLERAT, INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY: THE ROLE OF CORPORATIONS IN THE ECONOMIC ORDER OF THE 21ST CENTURY, 264 (Kluwer Law International, 2010)

[91] D. MCBARNET, THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 35 (Cambridge University Press 2007)

because the proviso to section 135 specifically provides that the company shall give preference to the local area where it operates for spending the amount allocated for Corporate Social Responsibility activities. But incorporating mandatory consultation of the CSR Committee with the representatives of the local area or mandating a social worker of the local are to be a part of the CSR Committee seems as an unworkable solution to the Indian government which has a history of changing the role of Stakeholders Relationship Committee from resolving the grievances of stakeholders to resolving the grievances of security holders of the company. The present provision in the Companies Act of 2013 provides for the latter[92] whereas the former was followed in the bills of 2008 and 2009.[93] This suggests that the law, as it is, is concerned more about the debenture holders, shareholders and security holders of the companies and not at all interested in securing the rights of the people who are not part of the companies.

8.5.2 Ineffective National Legislations

It is true that there exist various legislations in India that deal with offences done by companies and penalties to curb them. Nonetheless there have been

[92] The Companies Act, 2013, Section 178(5) and (6).
[93] The Companies Bill, 2008 & 2009, Section 158(12) - The Board of Directors of a company having a combined membership of the shareholders, debenture holders and other security holders of more than one thousand at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairman who shall be a non-executive director and such other members of the Board as may be decided by the Board.
The Companies Bill, 2008 & 2009, Section 158(13) - Stakeholders Relationship Committee shall consider and resolve the grievances of stakeholders.

several corporate abuses of power resulting in large scale violations, both in the area of human rights and environment. It may solely be due to the fact that the separate independent legislations do not create a deterrent effect on companies.

One may not appreciate the need for a separate legal framework on corporate social accountability, as conducting business responsibly and the sanctions for not doing so are taken care of separately in various legislations in India. But it should be noted that India lies far behind in terms of having effective legislations so as to ensure responsible business practices. For example, let us take the example of harvesting timber in India. The legislations and the legal framework/authorities that deal with the same include Indian Forest Act of 1927, Forest Conservation Act of 1980 and concerned rules, The National Forest Policy, 1988, Compensatory Afforestation Fund Management and Planning Authority, Biological Diversity Act of 2002 and so on. One may argue that there exist necessary safeguards in the above set of legislations which are even capable of combating the activities of corporations. Based on the Companies Act of 2013 it is possible to contend that the part of the profits earned from harvesting timber (even by way of unethical practices) could be donated to the communities satisfying the CSR criteria. It is in this context that the Ghana Timber Resource Management Act of 1998 as amended in 2003 deserves special mention. The Act requires the logging companies to enter into a Social Responsibility Agreement with the community within the contract area

so as to address social needs of the communities.[94] The Timber Resource Management Act provides for a competitive bidding process. The filing of a 'Social Responsibility Proposal' is a mandatory requirement. The highest bidder gets the right usually and it is generally recommended by the Timber Rights Evaluation Committee to the Forestry Commission. The notice of grant of timber rights then issued by the Minister for Lands and Forestry will mandatorily contain a list of activities to be completed by the winner of the bid and one such legal requirement is to conclude a Social Responsibility Agreement with local communities. The agreement is nothing but "an undertaking by the winner of the bid to assist communities and inhabitants of the timber utilisation areas with amenities, services or benefits, provided that the cost of the agreed amenities, services or benefits shall be 5% of the value of stumpage fee from the timber that is harvested."[95] The Social Responsibility Agreement contains a Code of conduct and Social obligations. Social obligations are contributions to community development in the form of educational infrastructure development and health facilities. Code of conduct regulates timing of harvesting, techniques to minimise crop damage,

[94] Section 3(3)(e) read with Section 13(12)(b) & Regulation 14(1)(v) of the amended Regulations; Halina Ward, *Contributing to the Corporate Conscience*, European Lawyer 56, 58 (2003)

[95] *Legal Learning Tools: Understanding the Distribution of Benefits Derived from Timber Production in Ghana,* (January 2013), (Feb. 24, 2016, 11:30 A.M.), http://www.clientearth.org/external-resources/ghana/other-ressources/LLT%20benefit%20sharing%20in%20the%20timber%20sector.pdf; Ayine, D., *Social Responsibility Agreements in Ghana's Forestry Sector*, IIED, London, 2008, (Jan. 2, 2016, 6:00 P.M.), http://pubs.iied.org/pdfs/12549IIED.pdf; The Timber Resource Management Regulations, Section 13(12)(b).

compensation for crop damage, non-pollution of drinking water etc.[96] This shows that our national legislations are far behind in ensuring corporate accountability. It is also disheartening to note that though the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 provides for recognition of rights of communities to govern, use and conserve forests, the principle of 'fair and prior informed consent' is yet to be incorporated in the country.[97] Hence it is submitted that in place of strengthening countless national legislations and policies so as to bring in an effective system of corporate accountability, it is better and convenient to adopt a solid legal framework on CSR ensuring responsible business practices and ethical way of doing business.

Further, problems in making the corporate accountable for human rights violations include absence of specific and effective legislations and ineffective implementation of existing legislations. The best example for this is the Plachimada case. The Kerala Ground Water (Control and Regulation) Act was enacted in the year 2002 but it took one year for the government to bring the Act into force and two more years to notify the Plachimada area. Due to the

[96] Ayine, D., *Social Responsibility Agreements in Ghana's Forestry Sector*, IIED, London, 2008, (Jan. 2, 2016, 6:00 P.M.), http://pubs.iied.org/pdfs/12549IIED.pdf

[97] Ministry of Law and Justice, *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006*, (Feb. 13, 2016, 12:30 P.M.), http://angul.nic.in/tribal-act.pdf; Ashish Kothari, *Decision of the People, by the People, for the People*, THE HINDU (Kochi edition) Op-ed, May 18, 2016, at p. 11

same, when the matter reached the Court initially, the said statute was not applicable to the case.[98]

8.6 The Need for Corporate Social Accountability in addition to Corporate Social Responsibility

Human rights are by their nature moral rights, but it does not mean that they do not require legal-political protection.[99] Human rights are rights that can set limits to State sovereignty and justify accountability across borders.[100] This could be taken as the basis for establishing a national legal framework having extra territorial application so to curb corporate human rights violations or to frame a solid framework in international law.

In this context, it should be noted that it is comparatively easier for the home State rather than the host State to regulate MNCs' operations and conduct with regard to its extraterritorial actions. The obligation of a State under international law extends to ensure that the entities within its control follow human rights standards and to ensure the same, an enacted piece of legislation with some amount of extraterritorial application would not be deemed as contempt. It will only be considered as fulfilling its international obligations to oversee and control the foreign activities of businesses incorporated within

[98] Sujith Koonan, *Legal Implications Of Plachimada: A Case Study*, IELRC Working Paper 2007 – 05, 15, (Jan. 29, 2014, 9.00 P.M.), http://www.ielrc.org/content/w0705.pdf
[99] Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNATIONAL LEGAL THEORY 31–47, 37 (2010)
[100] *Id.* at 31

their jurisdiction. The host State need not have an issue, as similar laws could be made by the host State too and thus these would be seen as a matter of cooperation rather than conflict. The main reason for the law to have extraterritorial operation in the context of regulating MNCs is that as human rights are universal in nature, the corresponding duties should also be universal and there is nothing that prevents the States from following this on a mutual basis.[101]

The fact that there should be a new legal framework allowing States to have power to regulate extraterritorial activities of multinationals so as to regulate the activities of MNCs in general is evident from the discussions that occur at international platforms. During the Human Rights Council Session on 'Regulating Transnational Corporations: A Duty under International Human Rights Law' in March 2014, it was submitted that there is a need to develop a new legal instrument to regulate the activities of multinationals.[102] His

[101] JESSICA SCHECHINGER, THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW, 808 (Cambridge University Press, 2017); Surya Deva, *Corporate Human Rights Violations: A Case for Extraterritorial Regulation*, in HANDBOOK OF THE PHILOSOPHICAL FOUNDATIONS OF BUSINESS ETHICS 1085 (CHRISTOPHER LUETEGE (ed.), 2013); The author cites the illustration in the following words, "For example, if X state tries to ensure that its companies do not indulge in human rights violate while operating in Y state and Y state does the same vis-a-vis X state, such extraterritorial measures would assist both X and Y states in fulfilling their threefold duties within their respective territorial boundaries. In other words, extraterritorial regulation should be seen as complementary (rather than antagonistic) to territorial regulation."

[102] Mr. Olivier De Schutter, *Regulating Transnational Corporations: A Duty under International Human Rights Law*, Contribution of the Special Rapporteur on the right to food to the workshop "Human Rights and Transnational Corporations: Paving the way for a legally binding instrument", Ecuador, (11-12 March 2014), (Jan. 13, 2015, 8:30 A.M.), http://www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf

submission basically focussed on the fact that international human rights law have, over the years, recognised that it is primarily the duty of the States to regulate the activities of corporations so as to avoid human rights violations, to provide adequate remedies in case of violations and to extend the same duty to extraterritorial situations where the resultant violations take place outside its territory. The submission concluded by stating that the Human Rights Council should clarify the scope of States' obligations in regulating the extraterritorial activities of MNCs and to identify the best practices regarding the cooperation between States to ensure adequate access remedies for victims of human rights abuses involving MNCs.[103]

The discussion regarding the possibility of an extraterritorial approach in the form of a treaty requiring States to legislate extraterritorially opted either for the 'imputability approach' or the 'systems approach'.[104] The former one makes the parent company in the home State liable for the acts of the overseas entity if there was sufficient day to day control. The latter one is based on the responsibility of the parent company to ensure that there is an adequate system and effective monitoring over the acts of its subsidiaries. The liability ensues when the parent company fails in maintaining those. But it has also been stated

[103] *Id.*
[104] *Human Rights and Transnational Corporations: Legislation and Government Regulation*, (Feb. 17, 2013, 8.15 A.M.), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il150606.pdf

that because treaties in the form of bilateral ones are entered into between two States, a corporation cannot be held responsible for a violation by the host State of its human rights obligations as the corporation is not a party to the treaty.[105]

It has been argued that a State could use 'nationality principle' to regulate the conduct of its nationals irrespective of the territory where the violations have taken place or the 'protective or security principle' to assume jurisdiction over aliens for acts done abroad which affect the security of the State or 'universality principle' to deal with violations of universal concern.[106] The nationality principle could be difficult to apply because so far as companies are concerned, incorporation would determine nationality. The problem with this approach is that relating incorporation to nationality would never work as companies establish and operate in more than one State with shareholders having different nationalities.[107] It has been suggested that the control theory would help in the State getting an authority to regulate the extra territorial activities of the corporation as it is the parent company (home State) that essentially controls the activities of its subsidiaries. In such cases, the home

[105] OLIVIER DE SCHUTTER, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 107 (Hart Publishing, 12th ed. 2006)
[106] Morimoto, T., *Growing Industrialization and our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad*, 1(2) UTRECHT LAW REVIEW 134-159 (2005)
[107] LEANNE WEBER, ELAINE FISHWICK, MARINELLA MARMO, CRIME, JUSTICE AND HUMAN RIGHTS, 103 (Palgrave Macmillan, 2014)

State can regulate the subsidiary through the parent company.[108] The protective or security principle empowers the State to apply its law extraterritorially when a foreign company violates the human rights of its people through a local subsidiary.[109] These principles including universality should be extended in cases of violations by non-natural persons as well.

It is true that non-intervention and territorial sovereignty are important ideologies of international law but if it can be relaxed in economic matters such as securities, taxation, antitrust and matters that fall under *jus cogens*, nothing prevents it being extended to MNCs and protection of human rights.[110] Difficulties may still occur in the form of collection of evidence and enforcement of judgments but a concrete political will would solve all the major connected issues. Clear-cut legislations or suitable amendments need to be made in the domestic legislations so as to make the provisions applicable to extraterritorial activities of corporations and its subsidiaries.

It is time that the distinction between parent company and subsidiary in relation to human rights violations are removed and the violation to be considered as the act of the business enterprise and not as the individual act of the parent

[108] JESSICA SCHECHINGER, THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW, 808 (Cambridge University Press, 2017)
[109] PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, 127,130 (Wiley, 1999)
[110] Surya Deva, *Corporate Human Rights Violations: A Case for Extraterritorial Regulation*, in HANDBOOK OF THE PHILOSOPHICAL FOUNDATIONS OF BUSINESS ETHICS 1086 (CHRISTOPHER LUETEGE (ed.), 2013)

company or its subsidiary. It is time that Indian law recognises legal responsibility on parent companies as well for the human rights abuses made by its subsidiaries. It should be understood that there are several obstacles so far as the victims are concerned in getting access to effective judicial remedy. The complex structure of the corporate, intricacies regarding corporate legal personality, limitation in the nature of limited liability and problems with extraterritorial jurisdiction are a few of these. Hence, it is always desirable that the accountability is vested on the parent company domiciled in the forum State for the harm caused by its subsidiary in the host State.[111] The reasoning for bestowing accountability upon the parent company is that it owes a duty to duly monitor the activities of its subsidiaries and to make sure that they are not involved in any human rights violations wherever they are incorporated. The judiciary should be prepared to entertain grievances of corporate human rights abuses without sticking on to the limited liability doctrine and to entertain class actions especially in case of grave violations of human rights. It is better if all the nations have a common policy towards the fight against corporate human rights violations so that instances of forum shopping, *forum non-conveniens* etc., can be avoided.

[111] Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (ECCJ) December 2013, 67, (Nov. 5, 2015, 2.40 P.M.), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf

The concepts of separate legal personality and limited liability poses difficulties and it is not easy to establish vicarious liability to make the parent company liable as the subsidiary would be operating its own business and not necessarily as an agent of the parent company.[112] Hence it is time that the law looks into the possibility of the concept of 'limited eclipsed personality' to be applied so that the immediate parent company could be mandated to pay compensation for the violations committed by its subsidiary. It is also time that omission to exercise due diligence in controlling the activities of the subsidiaries resulting in human rights violations is also made punishable under law. If omission to act is sufficient enough to attract criminal liability in general cases[113], it is quite logical that the same is applied in the case of parent companies who fail to control the acts of its subsidiaries thereby resulting in serious human rights violations. When seen in the light of decisions being normally taken by the parent company, comparatively less assets and economic capacity for subsidiaries and that the parent company derives economic benefit

[112] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 223 (CAMBRIDGE UNIVERSITY PRESS, 2006)

[113] Indian Penal Code, 1960, Section 2 - Punishment of offences committed within India: Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India; Section 32 of the Indian Penal Code, 1960 - Words referring to acts include illegal omissions: In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions; Lars C. Berster, *'Duty to Act' and 'Commission by Omission' in International Criminal Law*, 10(5) INTERNATIONAL CRIMINAL LAW REVIEW, 619

from the activities of subsidiaries, it is but logical to make the parent company liable.

There should be an option for punitive damages as well in the form of international binding principles. Though punitive sanctions have also been suggested by the initiatives at the international level apart from remedies such as compensation, such international initiatives remain as voluntary principles or mere guidelines that lack binding force.[114] It is time that the international principles such as the 'United Nation's Human Rights Norms for Transnational Corporations and other Business Enterprises of 2003' are revived by incorporating provisions against the shortcomings pointed out in the earlier chapters as it provides for effective reparations and is a set of binding principles unlike any other.

The accountability of TNCs under international law could also be achieved by formulating an international legal framework following the provisions of International Convention on Civil Liability for Oil Pollution Damage and Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.[115] Article I, para 2 of International Convention on Civil

[114] For example, The United Nations Guiding Principles on Business and Human Rights, Commentary to Guiding Principle no.25, *United Nations Guiding Principles on Business and Human Rights*, (Sep. 9, 2015, 12.45 P.M.), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[115] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 994 (2004)

Liability for Oil Pollution Damage provides that 'person means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions".[116] Article 1, para 6 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment provides that 'person means any individual or partnership or anybody governed by public or private law, whether corporate or not, including a State or any of its constituent subdivisions.'[117] There have also been suggestions to formulate a compensation scheme for victims of corporate human rights violations like that in the 1971 Fund Convention associated with the International Convention on Civil Liability for Oil Pollution Damage, 1969.

It has been suggested that human rights obligations of corporations, such as non-complicity in human rights abuses or international crimes and obligations such as protection of labour rights, environmental rights, etc in addition to prevention of bribery and corruption, should be introduced into bilateral investment treaties and other international trade and investment agreements.[118]

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[116] *International Convention on Civil Liability for Oil Pollution Damage, 1969*, (Jan. 13, 2016, 9:45 P.M.), http://www.admiraltylawguide.com/conven/civilpol1969.html; the convention is a solution to the pollution posed by the worldwide maritime carriage of oil in bulk by ensuring adequate compensation and by adopting uniform international rules and procedures for determining questions of liability and compensation.

[117] *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993*, (Jan. 1, 2016, 8:30 P.M.), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007c079; the convention ensures adequate compensation for damage resulting from activities dangerous to the environment and its prevention and restoration.

[118] Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3(1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT 5-43, 42 (2012)

Such obligations shall also include non-immunity to corporate entities from civil and criminal liability in the home and host State and from any arbitral proceeding. This is especially due to the fact that WTO has resulted in human rights governance incapacity of third world States. It has been shown that the many third world States (who are WTO member States) had liberalised their agricultural markets by eliminating farm subsidies, decreasing export subsidies, decreasing tariffs on agricultural products and introducing tariffs to existing non-tariff barriers as required by the WTO Agreement on Agriculture.[119] The WTO Agreement on Agriculture Rules allows some industrialised States to retain certain subsidy programmes intact and to set high initial tariffs on several products which are fundamental to the economies of Third World States. This results in multinationals from industrialised States, who are the beneficiaries of protected subsidies, selling the agricultural products to the world market at below the cost of production (known as dumping). Hence, the third world States are unable to compete against such dumped commodities with their exports putting at risk the means of support of farmers and farm labourers.[120]

[119] To be precise, the same has been done under the structural reform programmes of the World Bank and IMF; it is of common knowledge that the liberalisation requirements imposed by the trade agreements are to be followed by the WTO member states as a complete package; Penelope Simons, *International Law's invisible hand and the future of Corporate Accountability for Violations of Human Rights*', 3(1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT 5-43, 27 (2012)

[120] Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3(1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT 5–43, 28 (2012)

Nevertheless, none of the international frameworks including the UN Guiding Principles deal with international trade law.

It has also been submitted that the principle of non-discrimination and protection of intellectual property rights in WTO is nothing but an extension of protection of international human rights and that the exceptions to WTO free trade commitment under Article XX of GATT[121] shows the possibility of integrating human rights to WTO in future. But it should be noted that these principles do not create an affirmative duty on the part of the States to impose trade restrictions on the ground of human rights protection. Moreover human rights could never be a concern under WTO as the obligations are on the States and not on corporations. The former do not expose human rights violations in its territory and even a State is a party to human rights abuses, the other contracting State may refuse to act as it might affect diplomatic relations or due to the fear of retaliatory measures.[122]

The human rights obligations of multinationals must be narrower than those of the State but it does not signify that the former should be completely absolved

[121] It lays down 10 principles where trade could be restricted of which protection of public morals (Article XX(a)) and protection of human life or human health (Article XX (b)) are included.

[122] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 1013 (2004)

from human rights responsibilities.[123] There is nothing wrong in the voluntary codes that exist at present, but the reason for demanding more effective ones is due to the inappropriateness in leaving the rights of labourers, consumers, environment and community to the voluntary good will of the corporations.[124] The problem with tortious liability is that the victims must show a breach of torts under domestic tort law rather than breach of human rights under international law.[125]

8.6.1 Corporate Social Accountability

Accountability has been clearly defined in the AccountAbility (AA 1000) of the year 2008. According to AA 1000, accountability is acknowledging, assuming responsibility for and being transparent about the impacts of your policies, decisions, actions, products and associated performance.[126] The best explanation to corporate social accountability can be found in the paragraph below. It has been stated thus,

> *"Accountability in its basic sense implies rendering of accounts and, by extension, indicate answerability to an external agency or group, and*

[123] David Kinley & Junko Tadakki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931, 966 (2004)
[124] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)
[125] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 305 (CAMBRIDGE UNIVERSITY PRESS, 2006)
[126] *AA1000 Accountability Principles Standard 2008*, 4, (Aug. 7, 2012, 11:45 AM), http://www.accountability.org/images/content/0/7/074/AA1000APS%202008.pdf

> *further implies ensuring propriety, legality and safeguarding public interest in satisfactions of the expectations of the external agency or group. Social accountability suggests accountability to the people; this is core value in a democratic setup. In a decentralised democracy the basic objective is power to the people."*[127]

Corporate accountability is often regarded as something more than corporate responsibility. Corporate accountability envisages a system where the company is not only under an obligation to account for its own performance but also that of its business partners and others included in the company's value chain.[128] Corporate Social Responsibility is a concept where corporations are encouraged to take up voluntary ethical conduct that is not legally enforceable.[129] On the other hand, Corporate Social Accountability is based on the belief that corporations should be made legally accountable for their negative human rights impacts. Corporate Social Accountability obliges corporations to follow ethical and responsible business practices so that violating human rights leads to a situation where corporations are subjected to legal sanctions.[130]

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[127] Abira Chatterjee, *Social Compliance, Social Accountability and Corporate Social Responsibility*, 44(18) Mainstream (2008), (July 21, 2015, 9.10 A.M.), www.mainstreamweekly.net/article646.html

[128] *Id.*

[129] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 195 (Oxford University Press 2006)

[130] ELISA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW 19 (Oxford University Press 2009)

It is said that some believe in discarding the term 'corporate social responsibility' and to use 'corporate social responsiveness' as the former one denotes an obligation which is not simply enough.[131] According to them, motivation lets people decide what to do, but what is required is to respond to social demands than mere motivation.[132] It is in the same lines that the term corporate social accountability has been employed. The term 'responsibility' has another drawback, too. Responsibility can always be a shared one whereas accountability is not. It is true that specifically when it comes to corporate human rights responsibility, both the State and corporates should be made accountable but it is not a shared one. Both entities become equally accountable for the human rights abuses committed.

It is not routine decision making that forms part of corporate social accountability but long term planning in addition to day to day affairs regarding responsible business activities. Continuous auditing and monitoring ensures social compliance and these are essentially required to make corporates socially accountable. These will act as a constant check on corporate abuses within and outside the particular corporate structure. Corporate social accountability necessarily involves prompt and adequate reporting of social, economic and environmental performances of the company. The reporting procedure that has

[131] Michael Hopkins, *Corporate Social Responsibility: An Issues Paper*, International Labour Office Working Paper No. 27, (May 2004), 12, (July 22, 2015, 11.50 P.M.), http://ssrn.com/abstract=908181
[132] *Id.*

been included in the Companies Act of 2013 which gives an exemption for companies that do not follow the CSR mandate by reporting the reasons for not following the CSR mandate is totally against the spirit of corporate social accountability.

Be it responsibility or accountability, what is in fact required is that the controlling minds of corporations should be exposed to the concept of human rights and should also be made aware of human rights issues faced by various communities. Thus the inhabitants of a locality where the activities of the corporation are to take place, the consumers, the investors and other stakeholders should be given a role in decision making.

Popularly, corporate social responsibility is understood as companies voluntarily integrating social and environmental concerns into their business operations rather than being only concerned with profits. It also encompasses voluntary social welfare contributions. At the same time, corporate social accountability means the continuous, systematic, and public communication of information and reasons designed to justify an organization's decisions, actions, and outputs to various stakeholders.[133] In essence, corporate social accountability means that the corporate is accountable for all its past, present and future actions to the society.

[133] Shelley Marshall & Kate Macdonald, *What is Corporate Accountability?*, (Nov. 30, 2015, 6.35 P.M.), http://www.corporateaccountabilityresearch.net/files/2011/09/What-is-corporate-accountability.pdf

8.6.2 Responsible Business Practices

The reason for mandating responsible business practices and ethical practices in their day to day working by taking into consideration environmental, employee, consumer and other related concerns is because spending a part of the profits for community development or the so called CSR activities under Schedule VII of the 2013 Companies Act is not an innovative step. Many of the public sector undertakings such as ONGC, Indian Oil, BPCL, HPCL and many other had spent 0.75% of their net profit in community development activities till the year 2008.[134] The working of most of the companies in the oil and gas sector as part of their corporate citizenship policy in various fields such as education, environmental protection, employment, poverty eradication and rural development are proof of this. It should also be noted that way before the CSR reforms in the Companies Act of 2013, the Government of India had stipulated in 2008-09 that the public sector undertakings under Oil and Gas sector should spend 2% of their net profit for CSR activities.[135]

Promotion of health care, education and improvement in water resources management as part of the 'corporate citizen policy' of ONGC and their activities in various parts of Assam substantiate the claim made above. It has been stated that ONGC has spent around Rs.64 lakhs in 2005 and 2006 on

[134] Bidhu Kanti Das & Prof. P. K. Halder, *Corporate Social Responsibility Initiatives of Oils PSUs in Assam: A case study of ONGC*, 2(2) MANAGEMENT CONVERGENCE 75 (2011)
[135] Abhay Upwanshi, *ONGC Corporate Social Responsibility*, (Nov. 30, 2015, 8.00 P.M.), http://www.csrworld.net/ongc-corporate-social-responsibility.asp

improving educational and IT facilities even without the CSR mandate.[136] In addition to offering several merit scholarships, ONGC also spends around Rs. 15 lakh per annum for the upliftment of weaker sections in Assam and has also constructed a school with modern furniture which is now one of the model schools in Cachar District.[137] The contributions and support made in the case of health sector by ONGC also proves that sharing or investing part of net profits for CSR activities has been in existence even before the advent of section 135 of the 2013 Companies Act. ONGC has been actively assisting health care and providing safe drinking water to the people of Assam and it has spent more than Rs.42 lakhs even way back in 2005 and 2006 for the same.[138] Close to Rs. 50 lakhs were spent on modern mobile cancer detection unit and it has been actively participating in health and hygiene awareness including HIV awareness besides monetary assistance to hospitals in Assam. In addition to all these, ONGC has provided for financial assistance to CT guided treatment and people who have lost property in natural calamities by contributing to the Chief Minister's Relief Fund.[139] The fact that ONGC has financially contributed to

[136] *Corporate Social Responsibility in ONGC*, (Nov. 30, 2015, 8.15 P.M.), http://www.ongcindia.com

[137] Bidhu Kanti Das & Prof. P. K. Halder, *Corporate Social Responsibility Initiatives of Oils PSUs in Assam: A case study of ONGC*, 2(2) MANAGEMENT CONVERGENCE 75, 79 (2011); ONGC has one of its offices in Cachar.

[138] Alok Misra, *Corporate Social Responsibility in ONGC*, (Nov. 30, 2015, 10.30 P.M.), http://www.bombaychamber.com/admin/images/upload/committee/2131412762080Mr_Alok_Misra_ONGC.pdf

[139] *Financial Assistance under CSR Scheme by ONGC/BPCL/GAIL/HPCL/IOCL*, (Nov. 30, 2015, 10.50 P.M.),

local area development is evident from its funding towards procurement of milk van, purchase of deep freezer and cycles for distributing milk to local area.[140] Thus it could be stated that even before the advent of the proviso to Section 135 of the 2013 Companies Act, there have been several instances like that of ONGC financial assistance provided to local areas and neighbouring areas. Hence it is the responsible business practices that our nation should moot for and not sharing a part of the net profits. The latter has already been in existence for several years.

The profit sharing for community development activities by ONGC may not be the best example to be cited especially because it is a Government entity and a monopoly. But the objectives behind citing sharing of profits by ONGC are different. Mere funding or providing financial assistance as mandated under the 2013 Companies Act cannot be termed as a responsible business practice. Funding is also not an alternative to secure human rights. If providing a share of net profits or providing financial assistance is the criteria of CSR, ONGC could always be treated as a company that follows CSR as it financially supports the needs of the local community as well neighbouring areas. The same is evident from the instances mentioned above. But once it is understood

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http://petroleum.nic.in/docs/Financial%20Assistance%20under%20CSR%20Scheme%20by%20PSU.pdf; Bidhu Kanti Das & Prof. P. K. Halder, *Corporate Social Responsibility Initiatives of Oils PSUs in Assam: A case study of ONGC*, 2(2) MANAGEMENT CONVERGENCE 75, 81 (2011)

[140] Bidhu Kanti Das & Prof. P. K. Halder, *Corporate Social Responsibility Initiatives of Oils PSUs in Assam: A case study of ONGC*, 2(2) MANAGEMENT CONVERGENCE 75, 82 (2011)

that ONGC is also involved in human rights abuses, one could come to a conclusion that CSR is not just about rendering financial support but also about ethical and responsible business practices that takes into account the social, economic and environmental development of the community.

Though ONGC is known for its philanthropic initiatives in Assam, a global outlook proves its involvement in several human rights abuses.[141] The wholly owned subsidiary of ONGC named ONGC Videsh is infamously known for involvement in the ongoing conflict in Sudan which has resulted in the death of more than 300,000 people.[142] The civil war is funded by the Government through oil revenue. The Sudanese government has already evacuated, murdered and tortured millions of civilians in the name of oil.[143] The revenue generated from oil is shared between the oil companies and the Sudanese national oil company. The companies who invest in gas projects are afforded military protection. The roads and bridges built by the oil companies are being used by the Sudanese government to launch attacks against poor innocent

[141] Arvind Ganesan, *Firms Cannot be Silent on Human Rights*, (Nov. 30, 2015, 8.45 P.M.), https://www.hrw.org/news/2007/11/11/firms-cannot-be-silent-human-rights

[142] Lison Joseph, *ONGC's Sudan Deals come under Attack*, (Nov. 30, 2015, 9.30 P.M.), http://www.livemint.com/Companies/r6fsSVRAjJjs3yYt3FJjGK/ONGC8217s-Sudan-deals-come-under-attack.html

[143] *"The Sudanese government's efforts to control oilfields in the war-torn south have resulted in the displacement of hundreds of thousands of civilians, Human Rights Watch said in a report released today. Foreign oil companies operating in Sudan have been complicit in this displacement, and the death and destruction that have accompanied it."*; Save Virunga, *The Nexus between Oil and Human Rights Violations: Sudan Case*, (Nov. 30, 2015, 11.20 P.M.),https://savevirunga.com/2013/12/02/the-nexus-between-oil-and-human-rights-violations-sudan-case-2/

civilians. The following observation shows that the oil companies are complicit in human rights abuses in Sudan,

> *"The oil companies constructed transportation infrastructure, such as the airstrip in Heglig, which was used to conduct attacks on civilians. The runway at Heglig has probably been used in many military offences, but it has been proven that they were used for military operations at least four times in the year 2000."*[144]

These circumstances did not prevent ONGC from establishing its plant and pipelines in Sudan. The oil companies in Sudan including the subsidiary of ONGC are complicit in human rights abuses as they still carry on business after being aware of the torture, killing and forced displacement of civilians for procuring more oil fields.[145] The oil companies continue to operate their business in between this turmoil and make large amount of profits amidst large scale devastations.

The news that the work of ONGC has been affecting the lives of farmers in the districts of Tiruvarur and Nagapattinam also proves that CSR is not just about financial assistance.[146] ONGC has been involved in methane extraction survey and oil exploration activities and the protests against it has led to the arrest and

[144] NIELS BEISINGHOFF, CORPORATIONS AND HUMAN RIGHTS: AN ANALYSIS OF ATCA LITIGATION AGAINST CORPORATIONS 156 (Peter Lang, 2009)
[145] *Sudan: Oil Companies Complicit in Rights Abuses*, (Nov. 30, 2015, 10.00 P.M.), https://www.hrw.org/news/2003/11/24/sudan-oil-companies-complicit-rights-abuses
[146] L. Renganathan, *Tiruvarur Farmers to Observe Fast over ONGC Issue from Friday*, THE HINDU, July 30, 2015, (July. 31, 2015, 11.15 P.M.), http://www.thehindu.com/news/national/tamil-nadu/five-protesting-farmers-picked-up-by-police-reported-missing/article7 479300.ece

detention of farmers who genuinely feel threatened as these activities might result in the stoppage of all agricultural activities in the area and there is every possibility of these agricultural areas being converted into oil fields.

8.7 Conclusion

CSR refers to the company being responsible for ethical or responsible business practices. In the Indian context, it means spending a part of company's profit or in other words philanthropy. Accountability in addition to responsibility denotes being legally liable or accountable for human rights violations committed by the company. The term 'accountability' also removes the confusion whether the liability is to be shared between the private and the public actor. There is always a possibility of interpreting responsibility to be a shared responsibility but hardly do we speak about shared accountability. Public as well as private entities should be held accountable jointly or separately rather than merely sharing responsibility.

The enactment of a legal framework that provides for liability for extraterritorial activities of MNCs is the need of the hour but the lack of legal and economic capacity when compared to large MNCs, the divergent and conflicting interpretation given to international human rights by different States, the problems posed by the defence of *forum non conveniens*, the ease of relocating the activities and resources of MNCs to another State to evade

liability, etc are the major hindrances towards it. Effective control of MNCs are not possible at the international level or regional level if there is no effective minimum legal framework at the domestic level.[147] In short, there are two different viewpoints. One, that the domestic legal framework should be made more effective to combat the activities of MNCs. The other requires an effective legal framework at the international level so that several issues including that of *forum non conveniens* and liability of parent company for the acts of subsidiaries could be taken care of.

If India is to follow the first view point, in addition to provisions that take care of responsible business practices, it is better to opt for a provision akin to that in the Nigerian Companies Act of 1968. According to section 54 of the Act,

> *"Subject to sections 56 to 59 of this Decree every foreign company which before or after the commencement of this Decree was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices*

[147] Olufemi O. Amao, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52(1) JOURNAL OF AFRICAN LAW 89-113 (2008)

and other documents, as matters preliminary to incorporation under this Decree."

In such a case, there should also be a specific provision that provides liability of parent company for the acts of its subsidiaries. This will prevent claimants from denying compensation on the ground of lack of economic capacity and effective control.

There is nothing wrong to anticipate discussions on a permanent international adjudicatory body for dealing with corporate abuses of human rights.[148] There have also been suggestions empowering WTO to impose trade sanctions for not observing human rights norms thus solving the problem of inability of the States to intervene in most cases of human rights violations.[149] The Dispute Settlement Body of the WTO could take up the matter if the aspect of human rights is also brought under the purview of WTO.[150] The main justification for

[148] David Kinley et al., *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25(1) COMPANY AND SECURITIES LAW JOURNAL 30-42 (2007), (Aug. 3, 2015, 7.15 A.M.), http://ssrn.com/abstract=962981.

[149] Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) EUR J INT LAW 753-814 (2002)

[150] Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22: Compensation and the Suspension of Concession - Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements; Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1-57 (2003); The author states that in order to achieve a relationship between WTO and human rights, a Council for Trade Related Aspects of Human Rights should be constituted under the WTO and simultaneously, a Sub-Commission on

such an idea is the reason that the Dispute Settlement Body of the WTO can award punitive or compensatory damages against the violators in addition to blacklisting the multinational corporation from further trade activities. It has also been mooted that, as there exist several international organizations such as IMF, UN, ICJ and ICC, due to the rise of global activities, there needs to be a 'global company law' for regulating the activities of multinational corporations since their activities also cross boundaries.[151] The need for a global or an international company law is because the concepts such as separate legal entity and limited liability protect the multinationals from liabilities arising out of the activities of its subsidiaries. They do not become personally liable for the liabilities though the entire working of the subsidiaries will be based on their interests.

The fact that multinationals work across borders adds more problems to the application of either domestic law or international law. It is also possible for them to identify countries and geographical locations where labour costs are cheap and environmental regulations are weak. Any trial against corporate human rights abuses is not an easy matter. Apart from all hindrances that one might think of, there are also instances where the defendant company had tried

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Human Rights and Trade should be established under the U.N. The reasoning for this is found by the author on the basis of the establishment of Council for Trade-Related Aspects of Intellectual Property Rights and Committee on Trade and Environment within WTO.

[151] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)

to delist itself from the stock exchange in which they were originally listed by selling their business to another firm in another country so that the legal claim made against them in the country where they were listed could become pointless. The case against Monterrico, a Peruvian subsidiary of Monterrico Metals PLC, incorporated in UK, for its mining activities in Peru is an example. Monterrico, from the very start of its operations in Peru, had violated the norms as required under the law of Peru which states that approval from two-thirds of the community is required to start exploration operations. The inhabitants organized peaceful marches on multiple occasions against the company's activities that could create negative impacts on the environment. The peaceful marches were confronted by the company with the help of the police which resulted in severe violence, injuries, sexual assaults, illegal detention and deaths. Although the case against the company filed in the Courts in UK for unlawfully occupying the land and the resultant human rights abuses ended in an out of Court settlement by payment of compensation, during pendency of the trial, Monterrico planned to delist from the U.K. stock exchange as the business was being sold to a Chinese firm. The main aim was to remove all assets of the company from UK so that the legal claims would become baseless. Had the judge decided against freezing the company's assets worldwide, the victims would have had a tough time pleading for justice. Though in this case the sale and consequent delisting did not affect the case, it

is a reminder to show that there can be several such instances that can arise in future. The states should ensure that adequate domestic legislations are in place to ensure that delisting or consequent transfer of assets to a foreign territory does not affect the existing claims in regard to human rights violations.

It is in this context that some scholars moot the idea of treating the corporation as distinct from the managers or employees and consider the enterprise's autonomy as a social system and an economic power of its own. This concept is termed as concept of the "enterprise-in-itself" which theorizes that the interest of the company is different from the interest of shareholders or employees.[152]

With respect to the concept of separate legal personality, in several cases, the parent company cannot be made liable because of the separate legal personality conferred on them as different from their subsidiaries. But at the practical level, it is the parent company that exercises control over the affairs of its subsidiaries, derives economic benefit out of the activities of the subsidiary and undoubtedly, it is the parent company which is usually more capable than the subsidiary to bear the burden of liability. Hence, the parent company should be in a position to take on the responsibility in case of human rights violations. That the parent company should be made liable is due to various reasons. They

[152] Olufemi O. Amao, *The Foundation for a Global Company Law for Multinational Corporations*, 21(8) INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 275-288 (2010)

derive economic benefit from the working of their subsidiaries, parent companies are more in a position to pay (deep-pocket theory) and more importantly, the parent company exercise control over its subsidiaries and its working.

Furthermore, our government has completely misunderstood the concept of CSR. It being so, retaining section 135, in the way it is, may prompt MNCs to not to establish their business in India. Having a mandatory concept like what we have in our legislation might lead to drawbacks than advantages. Only time can tell whether companies would be disinterested in their operation in India as mandating them to use two percent of their profit towards CSR would certainly result in reduction in their investment when compared to the other multinationals outside India who are not under any such mandate.[153] Evolving corporate social accountability in addition to corporate social responsibility would at least prompt those companies that follow ethical and responsible business practices to invest more in the country as they do not have to take the burden of compulsorily investing a part of their hard earned profits.

To conclude, it could be said that the existence of a human right demands the duty to establish efficient and reliable institutions to supervise its

[153] *Corporate Social Responsibility: Is It Really Mandatory?*, (Jan. 29, 2012, 1:30 PM), http://researchersclub.org/2014/09/17/corporate-social-responsibility-is-it-really-mandatory/

implementation and to safeguard it from violations.[154] The human right to life and liberty and freedom from torture demands duty on the State to establish an adequate legal framework that regulates corporate activities and to ensure that human rights are protected and not abused by the corporations.

[154] Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNATIONAL LEGAL THEORY 31-47, 42 (2010)

CHAPTER 9

CONCLUSION AND SUGGESTIONS

9.1 Introduction

The main aim of this thesis is to analyse the concept of corporate social accountability that has been evolving at the national and international scenario so as to examine whether it is sufficient enough in dealing with the negative human rights impacts created by multinational corporations. The thesis followed a doctrinal study whereby both primary as well as secondary sources, detailed out in the methodology in the first chapter, is thoroughly studied. The hypothesis formulated at the beginning of this research that the existing legislations in India and the legal framework that exist at the international level do not adequately provide for corporate social accountability is found to be true as detailed in this comprehensive study. It is understood that there is no transition from corporate social responsibility to a concrete form of corporate social accountability till date. The time is ripe for both domestic and international frameworks to consider the importance of making corporates socially accountable and to strive to create legal mechanisms for the same. The study confirms the hypothesis and leads to the conclusion that there needs to be a more stringent legal framework to provide for corporate social accountability.

The following are the findings of this research and the suggestions recommended.

9.2 Need for Conceptual Clarity

The first and foremost problem identified during this research in the study is that there is no consensus on the definition for CSR. If the same concept is to mean corporate social responsibility, corporate citizenship, corporate social responsiveness, corporate philanthropy, corporate social performance, and business ethics, there can never be clarity in its application. The problem with not having a consensus on the definition of CSR is that it makes it extremely difficult to understand the effects, advantages and demerits of CSR as the concept may not be subjected to any definite study. Once a unique definition to CSR or a consensus of what constitutes CSR is reached, further studies could be carried out as it becomes easily possible to make a comparative analysis of the concept of CSR in different countries or under various voluntary codes to highlight their shortcomings and to suggest suitable improvements. The need for a common terminology is as important as having a consensus over the definition of the concept as well. That CSR does not have a concrete definition is because the concept itself depends on the subjective notion assigned to the term CSR and it varies from person to person. If CSR means pollution free production so far as the community is concerned, for the labour force, CSR

denotes reasonable wages with humane working conditions and for the consumers it means quality in goods and services at an affordable price.

The approach adopted in this study is to critically analyse the concept of corporate social responsibility in the light of numerous instances of corporate human rights abuses at the national and international level. The fact that corporate social responsibility is still seen as a philanthropic act is the basic problem with regard to the concept of corporate social responsibility. Though certain definitions of corporate social responsibility includes the concept of ethical and responsible business practices and takes into account the aspects of honouring people, planet and profit, these do not find place in all the definitions. At the same time, there are definitions that stress on profit making to be the ultimate objective of any company and nothing else. There are also definitions that see corporate social responsibility as a process which incurs additional costs to the company. Though this study is focused on corporate social accountability, it takes the concept of corporate social responsibility as its starting point. The lack of a common definition for the concept of corporate social responsibility underscores the fact that it is not understood properly.

However, an analysis of the concept of corporate social responsibility shows that business can only prosper with the protection of values and rights of societies and that there has been a recent shift towards the same. An example is the recent efforts of Cairn Energy Ltd., in Rajasthan to protect the water

resources available to the community in which they operate. Cairn Energy is an oil and gas exploration company primarily based in Scotland and has its operations in India partnered with ONGC. The company has taken extra efforts to not interfere with the right to drinking water of the community. The company, after realising that there are possibilities of saline water getting mixed with drinking water took up the initiative of working with McGrigors Rights to discover a way of operating without affecting the right to water.[1] The company has given an undertaking that they would use water only from saline aquifers. In addition to this, the company has been a part of improving education, health care sector and providing clean and safe drinking water in the region. [2] The company has also provided funds to desalinate water and for establishing RO plants for the same in addition to establishing water harvesting structures.[3] The CSR policy of the company clearly states that the company will proactively deal with stakeholders to understand their needs and to respond to them. The CSR activities enshrined in its policy specifically provides for promoting healthcare, sanitation, providing safe drinking water, job opportunities, education and safeguarding sustainable environment.[4] The above

[1] Alan Miller & Ingrid Elliot, *The New Paradigm: Opportunities for Oil Companies through Human Rights*, INTERNATIONAL ENERGY LAW & TAXATION REVIEW 281 (2006)
[2] *Corporate Social Responsibility Policy*, (Jan. 23, 2015, 1:30 PM), https://www.cairnindia.com/sites/default/files/CSR_policy_new1.pdf
[3] Cairn India, *Community Initiatives in Rajasthan to Improve Water Availability in Barmer Area*, (Jan. 23, 2015, 1:30 PM), https://www.cairnindia.com/sites/default/files/press_releases/CILWaterrelease_0.pdf
[4] *Corporate Social Responsibility Policy*, (Jan. 23, 2015, 1:30 PM), https://www.cairnindia.com/sites/default/files/CSR_policy_new1.pdf

act of ensuring rights of the community by the company shows that there exist companies that are committed to their own voluntary CSR policies.

The concept of Corporate Social Responsibility is meant to be carried out voluntarily as part of the companies' social commitment and should not be viewed as a strategy towards investment for organizational development. While the large multinationals guide the business organisations, the small, locally based businesses can guide the smaller organisations. The business organisations should take into account the well-being of its stakeholders which ranges from customers, owners/investors, government, suppliers to even competitors. CSR includes a wide-range of activities and programs that aim to improve the social, environmental and local economic impact of the activities of the company, their influence on society, social cohesion, human rights and fair trade. The emphasis should be now and in the future, on concerns like environmental protection and the well-being of employees, the community and civil society in general.

It is time that the corporations understand that being socially responsible will not hinder their economic growth but instead help them to prosper on a larger scale. It is to be noted that if a corporate is socially responsible, it brings in a lot more advantage than when it is not responsible. It has been mentioned that "though corporate social responsibility, or in other words, corporate sustainability are considered as burdens to business rather than necessary

ingredients for better performance, they are in fact opportunities to enlist stakeholders in improving and carrying out business strategies that attract and retain customers and employees and to manage risk, to actively engage with problems, and invest in solutions".[5] But the problem with the concept is that it is very difficult to assess corporate social responsibility. The difficulty lies in assessing how much the companies have done and how much more companies need to do.

Corporations should take into consideration protection of human rights of all stakeholders and not just be involved in making profits at the cost of human rights of innocent persons involved. While focusing more on community development as part of CSR, taking care of human rights issues within the company should not be forgotten. It is said that "corporations are expected to observe human rights standards not on account of Court-administered coercion but because of persuasion, negotiation, consumers-investors-shareholders' behaviour, market incentives, social pressure, and social shaming."[6] The statement seems true, but if the corporations find it really difficult to observe human rights standards, thereby sacrificing the rights of stakeholders involved, the only remedy is to frame a concrete legal framework for corporate social

[5] CIPE, *From Words to Action: A Business Case for Implementing Workplace Standards Experiences from Key Emerging Markets, 2009*, (July 13, 2015, 8.55 A.M.), http://www.sa-intl.org/_data/n_0001/resources/live/FromWordstoAction_SAICIPE.pdf

[6] Surya Deva, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations*, 8 NEWC. L. R. 87 (2004)

accountability. The legal framework should not only focus on individual companies, but should also focus on making those supply chains accountable for any violation of human rights standards as well. Thus the major focus should not only be the company's own community development measures or environmental concerns, but also the absence of human rights abuses by their supply chains.

Creation of job opportunities cannot be the reason for discarding corporate social accountability. An impact study on a proposed pulp mill by Gunns Ltd., in Tasmania showed that the project intended to create 280 jobs to the nation's economy but at the cost of about 216 deaths due to respiratory illness and log truck accidents. Though job creation is the only advantage so far as the community or economy is concerned, the study proved that the proposed project would result in loss of 1044 jobs in the tourism sector, fishing industry and contribute to polluting the river.[7]

This, in no way, suggests that the concept of corporate social responsibility should be wiped off entirely. The problem is only when CSR exists without corporate social accountability. Corporate social responsibility can co-exist with corporate social accountability and it shall include the following:- (1) As regards the government, a company has the duty to pay taxes and other levies

[7] Kathy Gibson and Gary O'CDonovan, *Pulp, Politics, Process and Pollution: Gunns Ltd and the Tamar Valley Pulp Mill*, in CORPORATE SOCIAL RESPONSIBILITY: A CASE STUDY APPROACH 148 (Christine A. Mallin (ed.), 2009)

at the right time and must also follow various legislation, rules and regulations. Corporations should not file suits in order to avoid/delay any payments due to the government. (2) Environment and its protection have become an important issue of contemplation globally. Therefore, every organisation must adopt all possible measures to cut down the levels of pollution. (3) In industry, prima facie importance lies on corporate conduct with suppliers, customers, creditors, staff, etc. Internally, this would suggest winning over the loyalty of the staff. (4) The objective of the organisation must not rest on the motive of profit making, but rather it must ensure reasonable returns to its investors. (5) On the outside, organisations must make sure all it obligation to lenders should be made on time. While dealing with customers, only a fair price must be charged on them so that they receive the value of the money paid. (6) It is the duty of the corporate, as a responsible part of the society, to take up *suo motu* social welfare programmes or to associate itself with agencies working in the areas of health, education and general public welfare.

9.3 Corporate Liability – A Confusing Labyrinth

The jurisprudential analysis of the concept of corporation, more or less, points to the fact that most of the jurists are in favour of considering natural persons as the subject matter of claims and duties. Most of them consider corporations as a jurisprudential entity only for procedural convenience. However, it is the

concept of separate legal personality that resulted in a huge academic debate on corporations. Just when it was thought that a consensus was reached regarding separate legal personality of corporations, the need to impose criminal liability on them arose. Though there are various doctrines in establishing corporate criminal liability such as the identification doctrine, attribution approach, *respondeat superior* doctrine, aggregation doctrine and the theory of corporate fault, there is no universal consensus in following a particular doctrine so as to establish corporate criminal liability. That Indian cases such as *ANZ Grindlays Bank Ltd and ors v. Directorate of Enforcement*[8] and *Standard Chartered Bank & ors. v. Directorate of Enforcement*[9] resolved the issue associated with making corporations liable in cases where the statute provides for mandatory punishment and fine is the only relief so far as corporate criminal liability is concerned.

The method of finding fault in cases of corporate liability on the basis of 'corporate culture' as practiced under the Australian Criminal Code Act of 1995 could be borrowed into the Indian context. Part 2.5, Division 12 of the Australian Criminal Code Act of 1995 deals with corporate criminal responsibility. It includes all the common ingredients of a legislative provision on corporate criminal responsibility. Division 12.2 specifically states that the physical element of an offence committed by an employee of a body corporate

[8] (2004) 6 SCC 531
[9] (2005) 4 SCC 530

acting within the actual scope of his employment, or within his authority, must also be attributed to the body corporate. Division 12.3 states that when the matter in question is about a body corporate authorising the commission of the offence, such authorisation may be established either by proving the explicit or implied authorisation given by the board of directors or by a high managerial agent of the body corporate. In addition to this, the provision also states that corporate criminal responsibility could be established by proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision or by proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[10]

Among the legislative efforts for Corporate Code of Conduct, the UK Corporate Responsibility Bill of 2003 stands in a different league as it specifically provided for parent company liability.[11] Clause 6 of the Bill provided a duty on the parent company to ensure that any other entity under its operational control follows human rights, environmental and other standards mentioned in the Bill. Though the Australian Corporate Code of Conduct Bill 2000 and the U.S. Corporate Code of Conduct Bill, 2000 were attempts to regulate the activities of corporations in other countries, their silence on issues

[10] *The Australian Criminal Code Act of 1995*, (Nov. 5, 2014, 8.45 A.M.), http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html

[11] The Bill was not passed as it lacked political and business backing.

of parent company liability for acts of its subsidiaries made them less powerful from a social perspective compared to the UK Corporate Responsibility Bill of 2003. The respective national jurisdictions should understand the need for bringing these Bills into force rather than merely discussing and abandoning them. The initiatives for framing such a legal framework in these countries should be a motivating factor for India to come up with a comprehensive corporate code of conduct. India can expedite this process by framing borrowing the essential principles from all the three Bills on Corporate Code of Conduct cited above. For example, India could borrow the parent company liability concept from the UK; extra-territorial application, compliance reporting procedures, need for compliance with international human rights principles and provisions for incentives for compliance from the US; and sanctions in case of non-compliance from the Australian Corporate Code of Conduct Bill.

9.4 CSR in India – A Purposeless Innovation

The problem with the Indian concept of corporate social responsibility is that the Indian government has not used the concept of CSR in a wholesome manner. CSR does not merely encompass the idea of sharing a portion of the profit made by the corporations. CSR embraces the idea of social responsibility in how profits are made. Sharing 2% of the average net profits alone doesn't

fulfil the CSR obligations. It may be argued that CSR in the Indian context means more than not doing harm by contributing benefit to the community. This may be true, but what is inherently required is the development of a proper legal framework in the domestic, regional or international scenario to promote respect and observance of human rights by the corporates. Imposing a duty on them to contribute a part of the profits may be the subsequent step. The Indian Companies Act of 2013 should also encourage companies to do business in a sustainable way and focus on its processes rather than merely its outcomes. The government must decide whether to continue with the provisions mandating CSR in the 2013 legislation or to make necessary improvements in the same. A rule without adequate sanctions is as good as having no rule.

Proper Integration of National Voluntary Guidelines into the Companies Act 2013, specifically in the areas connected with CSR is also the need of the hour as it ensures investments by the companies for CSR activities and compliance with ethical and responsible business practices. That developed countries such as Australia and UK have made an attempt for a legislation of their own exclusively dealing with corporate responsibility towards environment, labour, employment and human rights is a major reason for us to come up with similar solutions since the need faced by the society in all these jurisdictions are the same.

The argument that all corporates including MNCs should be instructed to follow responsible business practices rather than contributing 2% of the average net profits as contemplated under section 135 of the Companies Act, 2013 has a more universal acceptance. This is because CSR presently varies from country to country. If it is profit sharing that is considered as CSR in India, it might be something else in another country and that puts the MNCs in a confused labyrinth. If the legal framework insists on responsible business practices to be followed in tune with OECD Guidelines, ILO Tripartite Declaration, UN Global Compact and so on, the confusion can be excluded.

One of the major criticisms with regard to the effectiveness of the UN Global Compact so far as the Indian companies are concerned was that the Indian companies uses community development projects as the best way to carry out the obligations of corporate social responsibility.[12] By community development projects, the Indian companies mean donating a part of the profits, that they have earned back, to the society. This is precisely what the new Indian Companies Act of 2013 has formulated in the form of Section 135. A drawback, which was noted as early as in 2007, is seen as a progressive step in the year 2013.

The intention is not to criticise the concept of corporate social responsibility as a whole. The concept has its own advantages. Corporate social responsibility

[12] *See* section 5.3.6 in Chapter V of this thesis.

includes the comprehensive approach a corporation takes towards the goal to meet or exceed stakeholder expectations beyond measures of revenue, profit and legal obligation. People consider industrial expansion near the place they live in as a threat and therefore they, along with consumers, investors, activist groups, government regulators and other stakeholders, tend to protest against the same. Therefore, developing rapport with the community is very necessary and the assistance of non-governmental organisations can be of much help. They can assist to convince the community regarding the expansion program and thereby help to create a proactive and social, environmental and industrial development policy. Even the organisations benefit from the same such as lower operating costs, enhanced brand image and reputation, reduced regulatory oversight, product safety and decreased liability, improved financial performance, etc. The popularity of *Classmate Notebooks*, a stationery product of ITC, because of its support towards the education of poor people is an example.[13] The concept of Corporate Social Responsibility is beneficial for the community, for the company and for the employees as undertaking CSR initiatives will definitely receive consumer's goodwill which will finally benefit the company. If the country receives two percentages of profits from the stipulated companies as part of their CSR requirement, it would inevitably lead to more economic development in terms of education, environment,

[13] *Corporate Social Responsibility: Is it Really Mandatory?*, (Jan. 29, 2012, 1:30 PM), http://researchersclub.org/2014/09/17/corporate-social-responsibility-is-it-really-mandatory/

research and development, production of essential commodities and healthcare thus mutually benefitting capital generation for the economy and financial gains for the companies.[14]

But the concern is that corporate social responsibility in India has not attained its full potential till now. The mere fact that the legislation shows discrimination between companies who are responsible towards CSR investment and those who are not is itself a clear example of the notion that the Indian government has understood the concept of CSR erroneously. In this regard, the Chhattisgarh CSR Policy is better as they mandate the CSR obligation on all companies though there is a difference in the amount that needs to be spent. Moreover, under the central legislation, the companies may always mention the reasons for not undertaking CSR activities in the report submitted to the Board and escape from its CSR obligations. There is no reason why the government should not suggest an independent authority or a committee to be constituted for a designated area based on the number of companies or on the basis of zonal division within a district for identifying the needs of the local area that can be matched with the CSR activities mentioned under Schedule VII of the Companies Act, 2013. The consultation with such an authority or committee can be made mandatory for companies having net worth of rupees five hundred crore or more or turnover of rupees one thousand crore

[14] Akanksha Jain, *The Mandatory CSR in India : A Boon or Bane*, 4(1) INDIAN JOURNAL OF APPLIED RESEARCH 301, 302 (2014)

or more or a net profit of rupees five crore or more. This will function more effectively in terms of overseeing the contributions of companies towards CSR activities rather than the CSR Committee which is an internal mechanism. It is true that section 134 of the Companies Act, 2013 provides for publication of the report and the financial statement and thus the decisions of the CSR Committee as well as the CSR activities of the company together with the amount spent on CSR could be gathered from such reports. But instead of finding the reasons for not spending the amount in the report as mentioned by the company, it is always better to see the steps taken by the company to undertake CSR activities in the local area where it is situated as per the directions of the committee or authority mentioned herein.

The present day activities in the name of CSR has been depicted brilliantly in the following paragraph,

"Singly and together CSR professional and government officials work to acquire land and are sometimes known to misrepresent patterns of land use and habitation to ensure acquisition. It is also the norm to tell the world that a primary school, health care centre, a sports scholarship or two, and state-mandated land prices will mitigate local livelihood issues and concerns. And that some trees would be planted to offset loss of foliage, waterbodies and water supply."[15]

[15] SUDEEP CHAKRAVARTI, CLEAR HOLD BUILD: HARD LESSONS OF BUSINESS AND HUMAN RIGHTS IN INDIA, COLLINS BUSINESS, xviii (U.P., 2014)

These are the same set of activities contemplated by the CSR provision in the new Indian Companies Act.[16] It is time that the government realise that CSR is much more than sharing a part of the company's profits.

It is stated that "there has to be a commitment that people should not be worse off, if they cannot be better off. The feeling of being worse off is the risk to the company. You can't just hand over a cheque and say, "See you in the next life.""[17] Probably, this is exactly what the India should learn. Handing over a cheque or spending a particular amount is not what is meant by CSR. It is responsible and ethical business practices that matters the most. What people require is the feeling that they will not be worse off. Making innocent suffer and then faking (with the stipulated amount as per S.135 of the Companies Act, 2013) as if they are being made better off is not what is intended by the concept of corporate responsibility/accountability.

Corporate Social Responsibility, formulated under the Indian Companies Act of 2013, is an old wine in a new bottle as the concept of requiring companies to invest a particular sum of money for non-profitable activities was ordered by the Indian Judiciary way before the enactment of the 2013 legislation. It is of no doubt that the spending/investment criteria mentioned under the Companies

[16] Section 135 of the Companies Act, 2013

[17] Observation of ZANDVLIET in GETTING IT RIGHT: MAKING CORPORATE-COMMUNITY RELATIONS WORK (2009) quoted in SUDEEP CHAKRAVARTI, CLEAR HOLD BUILD: HARD LESSONS OF BUSINESS AND HUMAN RIGHTS IN INDIA, COLLINS BUSINESS, xvii (U.P., 2014)

Act 2013 towards CSR activities is not the essence of CSR. If government goes forward with the statutorily defined idea of CSR, certain amendments should be made in section 135 of the Companies Act 2013 so that the requirement of spending an amount for CSR activities will not remain the same as 2% of the average net profits of the three preceding financial years for all the companies. Difference should be made in the amount to be invested by the companies towards CSR activities. A higher percentage should be required to be invested by companies who have the highest worth or turnover or net profits. The cut-off of 500 crore worth or 1000 crore turnover or 5 crore net profits needs satisfactory explanation and justification. The companies who fall below the requisite worth/turnover/net profits should also be required to invest a certain amount, if not percentage, towards CSR activities. The Centre can learn, in what manner this could be accomplished, from the Chhattisgarh CSR Policy.

The CSR Rules have merely recommended for a transparent monitoring mechanism which should be instituted by the CSR Committee for the implementation of CSR activities. Such a vague provision needs careful re-examination and alterations. It is recommended that an Ethics Committee should also be mandated in the Companies Act irrespective of the size of the company with membership from the employees, community, trade unions and other stakeholders who can interact periodically with the consumers, people from the locality, other employees, senior executives and board members. The

Ethics Committee can ensure ethical and responsible business practices including CSR initiatives, safe employment practices and adequate reporting. The Committee can also investigate into the violations of company's ethical code of conduct and other employment rules and it should be formed as soon as the company starts working on its establishment. The human rights abuses such as displacement of people, torture of inhabitants of local areas, environmental damage and land related violations can be checked by the Committee only if it is established at the very inception. The constitution of such a committee could also prevent arbitrary and unreasonable decisions taken by the Board in relation to CSR activities. For example, the Committee can always keep a check to prevent money being spent for infrastructural developments in education or health under the guise of CSR but is in fact for development of areas where a member of the Board of Directors reside.

The fact that the companies will be ready to spend part of their profits once they succeed in establishing their project by violating all labour, environmental and human rights standards is clear from the observation below,

"Working at local level, they (Coca Cola) have helped to restore centuries-old-bawaris- or community reservoirs that had fallen into disrepair. The projects have included active community involvement to remove silt, rubble and algae and to rebuild the bawari's traditional, sustainable infrastructure. The restored bawaris provide freshwater to thousands of families in surrounding

communities and have served as the focal point for community education campaigns around water conservation."[18]

This clearly shows the fate of the Indian concept of CSR before and after 2013. A company which is infamous for gross human rights, labour and environmental violations have also been included in the list of those following CSR.[19]

It is time that provisions such as Article 41 of the Italian Constitution are followed in India. Article 41 specifically states that private economic initiative cannot be conducted in conflict with social utility or in a manner that could harm safety, liberty, and human dignity and that the law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives.[20]

A legislation exclusively suitable for the purpose of dealing with human rights violations by corporations which incorporates means for victim compensation measures can be a commendable step so far as the Indian scenario is concerned. The new legislation may also adopt provisions that allow cause of action for violations of customary international law like the ATS in the US. At the same time, India cannot be a perfect jurisdiction to have a statute like the ATS to try

[18] SANJAY K. AGARWAL, CORPORATE SOCIAL RESPONSIBILITY IN INDIA, 195 (Response Publishers, New Delhi 2012)
[19] See 3.2.2 and 4.1.2 of Chapters III and IV respectively of this thesis.
[20] *Constitution of the Italian Republic*, 1947, (Feb. 4, 2013, 8.20 A.M.), http://www.jus.unitn.it/dsg/pubblicazioni/costituzione/costituzione%20genn2008eng.pdf

matters of corporate human rights abuses due to the fact that there are millions of cases pending before the State Courts as well as the Apex Court, even otherwise. Hence, suggesting one on similar lines would be a futile idea. At the same time, our nation can make sure that trials against corporates will not end in fiascos like that of the Bhopal Gas Tragedy. Instead of searching for jurisdictions for an appropriate remedy, India can make use of its own criminal justice system more effectively even for extraterritorial activities.

9.5 Corporate Liability and the Indian Constitution

The decision of the courts in India proves that it is difficult to claim violations of fundamental rights against private entities. Such a situation has made it very difficult for the citizens and other persons to get their rights enforced against the corporations who negate human rights. Though the Supreme Court in *Ajay Hasia v. Khalid Mujib Sehravadi*[21], observed that the Government, in many of its commercial ventures and public enterprises, is resorting to the help of corporations and hence there exists deep pervasive presence of the Government in cases where a corporation provides for public services, such an observation is not sufficient to conclude that private corporations could be brought under the ambit of Article 12 for the enforcement of fundamental rights. The only relief in this regard are the observations made by the Apex Court in *Anandi*

[21] AIR 1981 SC 487; In the instant case, a society registered under the Societies Registration Act running the regional engineering college, sponsored, supervised and financially supported by the government was held to be an 'authority' for the purpose of Article 12.

Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors[22] that the phrase 'any person or authority' used in Article 226 is not to be confined only to statutory authorities and instrumentalities of the State and that it may cover any person or body performing a public duty. But again, in all cases, it cannot be said that corporations that need to be made liable for human rights violations are performing public functions.

In this context, the decisions in *Dr. John Kuriakose v. State of Kerala and ors*[23] and *Praga Tools Corpn. v. C.A. Imanual*[24], seems important. The court in the former case held that writ is maintainable even against a private management under Article 226 of the Constitution of India, though not under Article 12. It is again doubtful whether this could be taken as an authority for establishing that fundamental and other rights could be enforced against corporations, public or private, under writ jurisdiction. This is primarily because the decision was rendered by the High Court of Kerala and not by the highest judicial authority. Secondly, issues exist as to whether the Court can issue writs against bodies incorporated under the statute as in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*[25], the court has held that that a company incorporated under the Companies Act is not created by the Companies Act and hence is not a

[22] AIR 1989 SC 1607
[23] WP(C).No. 36422 of 2004 (J), decided on 18.12.2014; the case is related to disciplinary proceedings initiated against a lecturer of a private institution affiliated to the M.G.University and salary of teachers and staff being paid under the direct payment scheme by the Government.
[24] (1969)1 SCC 585
[25] AIR 1975 SC 1331 at p. 1339

statutory body because it is not created by a statute, but created under a statute and therefore no writ can be issued against it.

At the same time, the observation in *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v. V.R.Rudani & Ors* that it is the duty conferred on the body that is important and not the form of the body and the decision in *Praga Tools Corpn. v. C.A. Imanual*[26], that a mandamus can be issued against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body, are relevant. If mandamus can be issued against a body to carry out the duties placed on them by a statute, as CSR is a duty placed by the statute, which is a duty in the nature of public duty, it could be said that Courts can issue writs to corporations in case of failure to carry out the public functions in the nature of CSR imposed on them. This is where two issues arise. One is that, if the said analysis is taken to be true, corporations could be brought under writ jurisdiction under Article 226 of the Constitution of India only for the purpose of CSR obligations stipulated under Section 135 read with Schedule VII of the Companies Act of 2013. The other reason, which negates all the observations made above, is that the CSR obligations under Section 135 of the Companies Act of 2013 are not mandatory. Companies could easily get away from their

[26] (1969)1 SCC 585

obligation to perform CSR activities by explaining the reasons for not complying with Section 135.

9.6 Voluntary Codes and Multi-stakeholder Initiatives – A Vicious Circle

It is high time that strong liability regimes are created in place of mere voluntary guidelines and non-binding multi-stakeholder initiatives. It may be true that voluntary codes promote a culture of compliance so far as the national as well as multinational enterprises are concerned but the basic question is that "Will it suffice?" Given the fact that there exists several human rights abuses especially by corporates either directly or by being complicit in violations, it is time that the entire legal community think about a much more stringent legal framework so as to regulate corporations. Voluntary guidelines created by the multinational companies are ineffective as they do not provide for any sanctions. Moreover it is highly unlikely that they follow them adequately due to heavy costs for compliance.

The mandatory CSR policies have been criticised on the ground that it creates no room for companies to establish voluntary codes and intervention by State into corporate activities might lead to corruption.[27] But the ineffectiveness of voluntary codes that exist throughout the international framework and the rampant corruption that exists even in the absence of mandatory CSR policies

[27] Chizu Nakajima, *The Importance of Legally Embedding Corporate Social Responsibility*, 32(9) COMPANY LAWYER 257, 259 (2011)

proved a clear answer to critics of mandatory CSR policies. Strong enforcement mechanisms and an efficient judicial system are the answers to combating corruption and it has no connection with mandatory CSR policies.

The problem is not just that there is no international framework to combat the activities of multinational corporations; the problem also lies in the effectiveness of those that exist. The lack of consensus in the international legal framework for human rights standards creates the notion that non-observance of human rights allows creation of more profits. Over emphasis on dialogue and cooperation creates an impression on the corporations that human rights can be negotiated and bargained and are not binding norms. The reliance on States to enforce human rights and lack of universal and adequate sanctions are the main drawbacks in the existing international legal framework on corporate responsibility. In this context, it is submitted that there should be a proper integration of UNGC principles into the business activities of corporations.

It has been stated that the UN should stop its effort to make a binding set of principles like the UN Norms on the Responsibilities of Transnational Corporations and instead make the nations to follow the OECD guidelines as they are comprehensive and to allow some monetary reliefs in the form of incentives or lowering the nation’s debt if they create an effective national level

legislation to combat the human rights abuses by corporations.[28] This lacks credibility as the OECD guidelines also suffer from the very same problem of being voluntary and a lack of universal participation. It is hence submitted that the UN should resume its effort in reviving the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights of 2003 as it is the only framework that met the requirement of making corporates accountable for their negative human rights impacts. It is time that we have an international framework in the form of the 2003 UN Norms that not only makes TNCs primarily accountable for their activities but also ensures that they monitor their supply chain to follow due human rights obligations in its operations. The fact that specific provisions existed in the 2003 UN Norms that provide for sanctions to TNCs that violated the Norms makes it an even better choice to be re-enacted.

The existence of codes of conduct is one thing and the practical use of these codes is another. It is the latter that is important and the one we should achieve. A notable feature is that most of the corporate codes of conduct focus only on a few select human rights principles. Another disadvantage of the voluntary codes of conduct is that as every corporate need its partners to have similar

[28] Nancy L Mensch, *Codes, Law Suits or International Law: How Should the Multinational Corporation be Regulated with respect to Human Rights?*, 14 U. MIAMI INT'L & COMP. L. REV. 243, 269 (2006)

codes of conduct in place, the variations in the standards adopted by each of them may result in occasional tensions and ambiguities.

9.7 Increasing Inapplicability of Alien Tort Statute over Corporate Human Rights Violations

It is an irony that no significant lawsuits for corporate abuses outside the US territory have been won under the ATS. Some of them ended in out of Court settlements. The case of *Doe v. Unocal*[29], where the issue was the complicity of Unocal in murder, rape and torture, was settled by paying a lump sum to the plaintiffs. Similarly the case against Chiquita ended on plea-bargain and probation[30]. The case was filed by the surviving victims of the human rights abuses by the global banana producer, Chiquita. The paramilitary squads in Colombia who killed thousands of civilians during Colombia's civil war in the 1980s and 90s were on Chiquita's payroll. Similarly, the case against Royal Dutch filed by the son of Ken Saro-Wiwa also ended in settlement.[31] Though there have been a few cases between Sosa and Kiobel, all of them resulted in favour of the defendant corporates. In *Bowoto v. Chevron*[32], where the allegation was that Chevron called in and supervised the attack by the Nigerian military on peaceful protestors murdering, injuring and detaining them, the

[29] 395 F.3d 932 (9th Cir. 2002)
[30] *Chiquita Lawsuits (re Colombia)*, (Nov. 22, 2014, 1.35 P.M.), https://business-humanrights.org/en/chiquita-lawsuits-re-colombia
[31] Wiwa v. Royal Dutch Petroleum, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002)
[32] 312 F. Supp. 2d 1229 (N.D. Cal. 2004)

Court held that the defendants are not liable as the act did not constitute a widespread or systematic attack directed at a civilian population so as to qualify as a crime against humanity. Similarly, the case of *Estate of Rodriguez v. Drummond*[33], also resulted in favour of the defendant company. In the instant case, the allegation was that Drummond hired Colombian paramilitaries to kill and torture three labour leaders in the year 2001. But the Court ultimately held the company not liable. The decision in *Kiobel* has created much more adverse results. The ATS claims made against Ford, Daimler and IBM for its human rights violations in South Africa during Apartheid failed.[34] The ATS suit brought by Turkcell against the MTN group for its corporate corrupt practices in Iran was also dropped.[35]

The case of *Al Shimari v. CACI*[36] was also decided initially on the lines of *Kiobel*. This is a case wherein four Iraqi detainees at Abu Ghraib were brutally tortured by the U.S. military contractors who were employed by CACI International, which is a U.S. corporation. Though a claim was brought under ATCA, in 2013 the District Court dismissed the case on the basis of *Kiobel*. But the Fourth Circuit Court of Appeals overturned the decision of the District

[33] 256 F.Supp.2d 1250 (N.D. Ala. 2003)
[34] Balintulo v. Daimler AG, 727 F.3d. 174 (2d Cir. 2013)
[35] Turkcell Iletisim Hiznetteri AS v. MTN group Ltd, District Of Columbia District Court, Case No. 1:12-cv-00479 (May 2013)
[36] 679 F.3d 205 (4th Cir. 2012)

Court and ordered for a fact-based inquiry[37] so as to conclude whether the claims of the plaintiff 'touch and concern' the territory of the United States as per *Kiobel's* decision. The case could not proceed as the Court dismissed the case on political grounds.[38]

Though the initial filing of cases, involving corporate human rights abuses, before the US Courts under the Alien Tort Claims Act gave hope to millions of victims worldwide, the decision in *Kiobel v. Royal Dutch Petroleum*[39] is, at present, a stumbling block in bringing corporate human rights violations under the ATCA. The decision that presumption against extra territoriality of a statute also applies to ATCA has in effect rendered the statute inapplicable to most cases of corporate human rights violations. It is hoped that the US Courts would rethink about its decision in *Kiobel* or at least clarify in a future judgment whether 'aiding or abetting' human rights violations by MNCs fall under the jurisdiction of ATS and whether 'exhaustion of domestic remedies before the national Courts' is a condition precedent to the application of ATS. These two issues were left undecided by the Court in *Kiobel*.

[37] Al Shimari v. CACI, *Right to Redress for Victims of Torture in U.S. Overseas Military Facilities*, (Mar. 3, 2015, 11.20 A.M.), http://cja.org/article.php?id=1405

[38] The Court dismissed the case on the ground that there was ambiguity in regard to what constitutes torture and a "determination of war crimes would also result in a review of sensitive military decisions, amounting to a non-justiciable political question". See Al Shimari v. CACI, *Right to Redress for Victims of Torture in U.S. Overseas Military Facilities*, (Mar. 3, 2015, 11.20 A.M.), http://cja.org/article.php?id=1405. The Fourth Circuit Court of Appeals has reinstated the case on October 21, 2016 and is still pending.

[39] 133 S.Ct. 1659 (2013)

9.8 MNC as a subject of International Law – The Need of the Hour

There is a growing need for conferring an international status on corporations so as to enable them to possess duties and rights under the international law as corporations do not have an international legal personality. If multinational corporations enjoy significant rights and benefits from international law, it is natural that they should be subjected to a corresponding set of obligations and this is all the more important at present because the traditional functions that vested in the State are now performed by non-State actors such as multinational corporations. It is time that the traditional concept of subjects of international law is changed so as to accommodate the MNC as a subject of international law. If the States are accountable for human rights violations, the same is the case with corporations, too. Making States accountable for the activities of corporations becomes difficult as is evident from the inadequate provisions of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. This is especially so in cases whether TNCs are complicit in human rights violations along with the government of a particular State. Nonetheless, it is quite logical that States are made accountable for wrongful acts of corporations as the failure is only due to State's inability to protect against human rights abuses by corporates. The principles in the United Nations Guiding Principles on Business and Human Rights, 2011 regarding State responsibility in case of human rights abuses by business enterprises could be

borrowed to the international context. At the same time, it should not be restricted to cases where business enterprises are owned or controlled by the State or where they receive substantial support from State agencies or in cases where the State contract with, or legislate for, business enterprises. This is where the United Nations Guiding Principles on Business and Human Rights have gone wrong. It is of no doubt that State responsibility for acts of corporations should be applied uniformly irrespective of whether there exist close connection between the State and the business enterprise or it should be acknowledged that MNC is also a subject of international law and thus they are accountable for their negative human rights impacts. Let us hope that the decision of the Inter American Court of Human Rights in the case of *Mayagna Awas Tingni Community v. Nicaragua*[40], holding the government of Nicaragua liable for allowing private companies to use the property (land) of indigenous people without obtaining their consent will be extended to making corporates directly accountable in future.[41]

[40] Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); the case arose as the livelihood of indigenous people were affected as they were deprived of the forest land.

[41] The case arose when the leader of the Mayagna Awas Tingni Community, after learning the government's plan to concede 62,000 hectares of tropical forest to a Korean lumber company, SOLCARSA, approached the Inter-American Commission on Human Rights against Nicaragua for failing to demarcate the land belonging to the community and to protect their property rights over its ancestral lands. The Commission submitted the case to the Inter-American Court of Human Rights and the Court decided that Nicaragua had failed to provide effective remedy to the community and has also violated their right to property. The Court vehemently criticized the State for granting the land to third parties and ordered the State to adopt measures to create an coherent mechanism for identifying and demarcation of the territory of the indigenous community.

It is true that multinational corporations do not have the capacity to make international treaties, but they are entities that possess rights under international law. The same is evident from the fact that they are entitled to rights under the First Protocol to the European Convention on Human Rights[42] and that they are entitled to make claims under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965[43], the Seabed Dispute Chamber, UN Claims Commission and the Iran-US Claims Tribunal[44].

[42] The European Convention on Human Rights, Protocol 1, Art.1: (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[43] The Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, Article 1(2) - The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

[44] UNCLOS III, Article 187 deals with Jurisdiction of the Seabed Disputes Chamber and it states that the Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories: (c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests; (e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b). Article 153 deals with System of exploration and exploitation and Section 153 (2) provides that activities in the area shall be carried out as prescribed in paragraph 3: (b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III; The United Nations Compensation Commission was created in 1991 as a subsidiary organ of the United Nations Security Council by Security Council Resolution 687 to assess claims and compensation for the loss suffered due to unlawful invasion and occupation of Kuwait by Iraq in 1990-91; http://www.uncc.ch/, (Nov. 30, 2014, 7.45 P.M.); The Iran-United States Claims Tribunal was constituted in 1981 so as to decide the claims of US nationals against Iran and vice versa relating to detention of 52 United States in Tehran and subsequent freezing of Iranian assets by the US. Article VII (1) of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning The Settlement of Claims by The Government of the

The fact that they are allowed to bring claims before international tribunals can be the same reason for considering them as subjects of international law. In addition to this, they should not be merely considered as a right-bearing unit.

The suggestion to obtain International Company Status for all multinational corporations is not a bad idea as it could be a progressive step in monitoring the activities of corporations at the international level. It is time that a statute similar to the European company (SE)[45] is enacted at the international level with provisions specifically providing for liability of the parent company for the act of its subsidiaries, similar to Article 239 of the draft of the 1970 statute. MNCs are clever enough to use tactics so as to minimise allegations of corporate human rights abuses against them. A large chunk of labour issues are solved by opting for contract labour. Human rights concerns involved in labour issues such as dismissal from employment and like matters are easily avoided

United States of America and the Government of the Islamic Republic of Iran states that "for the purpose of this Agreement, a "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country, hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock; http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf

[45] Council of the European Union, *Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)*, (Jan. 31, 2014, 4:30 PM), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001R2157

by employing contract labour thus escaping from the clutches of International Labour Act and trade union agreements.[46]

As long as the national jurisdiction has its inherent limits of inapplicability to corporate abuses outside its territorial limits, the only possible way would be to provide universal jurisdiction to an international forum over corporates. The inherent limits of national jurisdictions should be seen as a reason for establishing a permanent international adjudicatory body for dealing with corporate abuses of human rights. The strong movement for requiring an international legal framework for holding the corporates liable for not complying with universally accepted human rights norms and standards have also resulted in associating or connecting ILO with the WTO so that the regulation would be a mix of rights oriented approach of the ILO and enforcement and sanctioning approach of the WTO.[47] But there are criticisms to the same as the proficiency of trade law of developed nations could be an advantage over developing nations which may lead to structural inequalities.[48] There have also been suggestions to create a complaint system, examined by an arbitrator nominated by the UN from among persons who possess legal

[46] Bibhas Saha & Kunal Sen, *The Rising Use of Contract Workers: Is Globalization Responsible?*, (Mar. 12, 2015, 10.50 P.M.), http://www.livemint.com/Opinion/xddBTUfaNF9wszqqu53FyK/The-rising-use-of-contract-workers-is-globalization-respons.html

[47] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)

[48] *Id.*

knowledge and skill in human rights and international business policy.[49] Insertion of human rights provisions in investment agreements as well as host State agreements is another suggestion that has been publicized to combat the activities of TNCs with regard to protection of human rights.[50] But the arguments for an international framework do not stand the test of time as the world is shifting from internationalisation and Europeanisation to nationalisation, e.g. Brexit.

The law, both national and international, have been a failure in combating the activities of multinational corporations against human rights abuses. The primary reason is that the activities of multinational corporations cut across the borders and it shows the inability of States to tackle the problems caused by them. The excuse of *forum non conveniens* makes it even more difficult. That cases such as *Lube and ors v. Cape PLC*[51] and *Connelly v. RTZ*[52], were allowed to continue in the forums rather than being dismissed on the ground of *forum non conveniens* is definitely a reason for reassurance and relief, but cases such as *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd*[53], shows that there is still a need for a legal framework providing for corporate

[49] Sylvie Avignon, *Do the Codes of Conduct Become Tools of International Management? The Lawyer View*, 3 INTERNATIONAL BUSINESS LAW JOURNAL 335, 341 (2007)
[50] Note, *Human Rights and Transnational Corporations: Legislation and Government Regulation*, (Feb. 17, 2013, 8.15 A.M.), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il150606.pdf
[51] [2000] 4 All E R 268
[52] [1998] AC 854
[53] [2012] C.A. 117 (Can. Que.)

accountability, especially in cases of human rights violations. Such a legal framework may provide for domestic courts to possess jurisdiction over matters of corporate human rights violations irrespective of the *forum non conveniens* doctrine.

Any new legal framework to curb corporate human rights violations should remove the obstacles such as separate legal personality conferred on the parent company and its subsidiaries when the subject matter is connected to corporate accountability for human rights abuses. There should also be a consensus reached at the international level about a unifying principle that the Courts could follow to pierce the corporate veil. The observation of the court in *Briggs v. James Hardie & Co Pty Ltd*.[54], that "due to the law's state of flux, it is not possible to say what evidence would ultimately suffice to make out a case for piercing the corporate veil" should not be allowed to continue for an indefinite time period. The best method to be followed is to allow the immediate or ultimate parent corporation to be sued in case of corporate human rights violations, which is possible under the concept of 'limited eclipsed personality'. The failure to exercise due diligence in controlling the acts of the subsidiary can be a valid basis for imposing liability on the parent company.

[54] [1989] 16 NSWLR 549, 578; the case was related to a suit filed by Briggs against his former employers' holding company, but the same as decided on merits due to the application of statute of limitations.

The fact that multinationals possess more economic power than most of the States and the possibility of bringing in more foreign investment to a State logically compels the State to dilute the human rights standards expected out of multinationals. The need for an international independent monitoring mechanism or an enforcement mechanism or a liability regime is all the more important because the firms that are entrusted with inspection of factories always come out with inspection reports that favour the MNC as it is the MNC itself who hires them.[55] Hence there needs to be an external governing body to control the unfettered activities of MNCs though there are provisions at the national level for civil lawsuits, private actions and media exposures against violations caused by them.

The first step that could be taken towards achieving an international legal framework on corporate accountability for human rights violations is to reformulate the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Norms contain provisions that are capable of achieving corporate accountability in case of human rights abuses. The Norms take note of the situation that most of the business enterprises that operate across national boundaries are engaged in economic activities beyond the actual capacities of

[55] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003); The article notes that entities such as Pricewaterhouse Coopers perform more than 6000 inspections in a year.

any one national system[56] and that transnational corporations and other business enterprises often are involved in international human rights issues.[57] The Norms see these as the main reasons for establishing a framework to combat the activities of corporations. The Norms start from the idea that human rights are universal, indivisible, interdependent and interrelated[58] and that transnational corporations and other business enterprises as well as their officers including managers, members of corporate boards or directors and other executives and persons working for them have human rights obligations and responsibilities.[59] The Norms also take into account the principles laid down under various multi-stakeholder initiatives such as the OECD Guidelines for Multinational Enterprises 1976, ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977 and UN Global

[56] The Norms states thus, "Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system."

[57] The Norms states thus, "Noting also that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future."

[58] The Norms states thus, "Acknowledging the universality, indivisibility, interdependence and interrelatedness of human rights, including the right to development, which entitles every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized."

[59] The Norms states thus, "Reaffirming that transnational corporations and other business enterprises, their officers - including managers, members of corporate boards or directors and other executives - and persons working for them have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations."

Compact 2000.[60] The Norms, although acknowledge that the States have the primary responsibility to secure the fulfilment of protection of human rights in general and confers State responsibility on ensuring that transnational corporations and other business enterprises respect human rights.[61] In addition to this, it obligates the transnational corporations and other business enterprises to secure the fulfilment of protection of human rights.[62] Thus, the Norms are enough to impose State responsibility in cases of corporate human rights violations and for ensuring corporate accountability in case of the same. The Norms, in addition to requiring periodic monitoring and verification by the United Nations, also provides for periodic monitoring and verification by other international and national mechanisms already in existence or yet to be created.[63] This provision could be used for creating an international monitoring mechanism which will help in a transparent and independent monitoring process. The international monitoring mechanism can also be empowered to receive complaints from all stakeholders regarding violation of the Norms. The

[60] The Norms states thus, "Taking into account the standards set forth in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization; Aware of the Guidelines for Multinational Enterprises and the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development; Aware also of the United Nations Global Compact initiative which challenges business leaders to "embrace and enact" nine basic principles with respect to human rights, including labour rights and the environment."

[61] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 1.

[62] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 1.

[63] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 16.

definition of 'stakeholders'[64] provided in the 2003 Norms is wide enough to include all those who could be affected by the activities of corporations. The definitions provided in the Norms for 'transnational corporations'[65] and 'other business enterprises'[66] are equally comprehensive. The fact that 'other business enterprises' have been defined and made to follow international human rights principles in its activities ensure that human rights are not violated by TNCs or its supply chains. The Norms also mandate the States to establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other national and international laws regarding protection of human rights are implemented by transnational corporations and other business enterprises.[67] This seems sufficient to make States modify or re-enact suitable legal framework to ensure protection of human rights by transnational corporations and other business enterprises. The Norms also empower the national courts and international tribunals to apply the principles embodied in the Norms in case of violations. It should be noted that the Norms also provide adequate

[64] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 22.
[65] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 20.
[66] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 21.
[67] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 17.

sanctions against transnational corporations and other business enterprises for violation of the principles of the Norms.[68]

The 2003 Norms could also be modified to include certain additional safeguards. The Norms should consider a TNC as an 'enterprise-in-itself' thereby treating it as distinct from the managers or employees so that it can be considered as an economic power of its own. Furthermore, the Norms should incorporate the concept of 'limited eclipsed personality' to allow the immediate or ultimate parent corporation to be sued in case of corporate human rights violations. Norms for State responsibility for acts of TNCs should also be made with respect to parent company of TNCs. The Norms should mandate the obligation of a parent company to exercise due diligence in controlling the acts of its subsidiaries, failing which, liability will be imposed on the parent company. In this regard, the Norms may adopt Clause 6 of the UK Corporate Responsibility Bill, 2003 that makes the parent company liable for any violations of standards prescribed under the Bill committed by the parent company or by its subsidiaries. The same provision provides a duty to the parent company to ensure that its subsidiaries that are under its operational control follows human rights and other standards provided in the Bill.[69] The Norms may also adopt provisions for filing of Compliance Report by TNCs

[68] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Principle No. 18.

[69] *U.K. Corporate Responsibility Bill*, (Aug. 8, 2012, 6.30 P.M.), http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf

and sanctions for failing to do so from the Australian Corporate Code of Conduct Bill 2000.[70]

9.9 Definitive Legislations for Corporate Social Accountability at the National level - A Necessity

As stated earlier, the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 does not provide for adequate provisions even in cases where the State becomes complicit in human rights violations committed by TNCs. Though Article 11 seems to be enough, it explicitly states that it can be called into application only when the State acknowledges and adopts the conduct in question as its own. Hence it is imperative that when State responsibility at the international level is highly inadequate to combat the activities of corporations and there is in fact no one to be held responsible for the activities of a corporation, it is better to have a concrete national policy on corporate responsibilities.

Making States responsible for the acts of private corporations is gradually attaining the status of an international norm as the same is evident from the observation of the District Court for the Southern District of New York in the

[70] The Australian Corporate Code of Conduct Bill 2000 requires corporations to file a Code of Conduct Compliance Report with the Australian Securities and Investments Commission before 31st of August each year, which in turn prepares an annual report to be sent to the Parliament. The Code of Conduct also prescribes sanctions for not submitting the compliance report such as fine not exceeding 2000 penalty units.

case of *Wiwa v. Royal Dutch Petroleum*[71]. The basic allegation in the case was that Royal Dutch officials met with Nigerian officials in various countries (England and Netherlands) to chart out plans in connection with suppressing Ogoni rebels in Nigeria. Several human rights abuses were committed in pursuit of the discussion held and though during the trial objection was raised that no State action could be found as the acts were not committed under State control, the Court stated that for the purposes of attribution of acts to the State, it was enough that proof exists to show a conspiracy between the State and non-State actors to commit the violations. According to the Court, it was not necessary that proof should exist to show that violations were committed concertedly. It is not the only case to show that human rights abuses by private actors could be regarded as State actions. Another example is that of *Abdullahi v. Pfizer*[72] where the latter was tried for clinical drug trials on Nigerian children without any informed consent from their parents resulting in death and severe health hazards. The Second Circuit attributed these violations to the State of Nigeria as it was the Nigerian government who provided the request to US FDA to sanction export of the drugs in question and allowed the defendant the usage of hospital wards and staff for performing the tests. The attribution to the

[71] 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002)
[72] 562 F.3d 163 (2nd Cir. 2009); See Daniele Amoroso, *Moving Towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law*, 24 LJIL 989-1007, 998 (2011)

State was also on account of the fact that the government pre-dated the FDA approval letter that is required before conducting the drug trial.[73]

But the same cannot be taken as an authority for State responsibility in case of acts of private corporations. The fact that Nigerian government provided the request to US FDA to sanction export of the drugs in question allowed the defendant the usage of hospital wards and staff for performing the tests and pre-dated the FDA approval letter that is required before conducting the drug trial were the reasons cited for attributing the conduct to the State. It is not necessary that such concrete evidence is present in all the cases involving corporate human rights violations. Even if they exist, it is highly unlikely that the victims get access to them, given the fact that there often exist close ties with corporations and the government.

It is also the need of the hour that countries adopt similar provisions as that of the Brussels Convention I[74] which states that the national Courts of the European Union member States shall accept civil liability jurisdiction in cases

[73] Wiwa and Others v. Royal Dutch Petroleum, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); See Daniele Amoroso, *Moving Towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law*, 24 LJIL 989-1007, 998 (2011)

[74] The Brussels I Regulation amalgamated the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) into European Community law. See Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Report by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (ECCJ) December 2013, 39, (Nov. 5, 2015, 2.40 P.M.), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf

filed against defendants domiciled in the forum State. This is irrespective of the nationality of the defendant or the plaintiff. As per Article 60 of the Convention, a company or other legal person or association of natural or legal persons is domiciled at the place where it has either a statutory seat or central administration or principal place of business.[75]

It is always better to have a solid national framework that can have extraterritorial application in addition to an international framework that provides for corporate social accountability by removing the existing obstacles such as *forum non conveniens* and separate personality of parent corporations and subsidiaries. The international framework should recognise MNCs as subjects of international law, having mutual rights and duties, and should favour limited eclipsed personality. The national framework may be used by the home to regulate MNCs' operations, including extraterritorial operations. The fact that the host State can also enact similar legislations, that human rights are universal and the States are under an obligation to protect the same irrespective of nationality or territoriality could be seen as reasons for validating such legislations having extraterritorial application.

[75] Brussels Convention, Article 60: (1) For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business. (2) For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place. (3) In order to determine whether a trust is domiciled in the Member State whose courts are seized of the matter, the court shall apply its rules of private international law.

It is true that there are various Indian legislations that provides for corporate liability and many of them are in relation to environmental violations and labour violations. It may be a justification that our country waited for a gross corporate human rights violation to occur to bring in effective legislations. This justification sounds good when it is understood that many of the legislations protecting the workforce and environment were enacted after the Bhopal Gas Tragedy. But the Indian government can never justify the negative human rights impacts caused by POSCO, Vedanta, Coca-Cola and the Tata Nano project even after the enactment of legislations that provide for corporate liability. These instances and the human rights abuses they have caused have proved that the voice of the community is never heard before sanctioning these projects. Most of the projects significantly affect the environment and human rights of people who live in the locality including deprivation of their livelihood, forced displacement and pollution of natural resources and it is sad to note that none of the existing legislations have proved to be effective in protecting their rights. The framework of most of the national legislations in this regard is in such a way that the authorities need to wait for a violation to occur so as to take actions and sometimes even this will not suffice. The difficulties in making corporations liable due to the existence of separate personality of parent companies, jurisdictional issues in the form of *forum non conveniens* coupled with legislative provisions that do not provide for

representation of local community in matters connected to the establishment of projects in their locality, makes matters worse.

It may be claimed that Environmental Impact Assessment takes care of environmental concerns. Assuming this to be true, the EIA is not sufficient to protect the other human rights of innocent civilians that live nearby the area marked for establishment of the project. The reason why EIA is not taken as a conclusive proof of protection of environmental rights is because of the judicial decisions that have termed certain EIAs as inadequate and misleading. For example, the EIA that sanctioned a proposed airport at Aranmula, Kerala was declared as incorrect and fraudulent by the National Green Tribunal.[76] The NGT also held that the EIA report was prepared based on an inadequate study on the impact of the project and has not provided any details regarding the sociological impact of the project. One of the main faults that were discovered by the NGT was that fraudulent information was provided by the promoters of the project in regard to displacement of people and it did not address any issues regarding rehabilitation and relocation.[77]

Similar to the concept of Environmental Impact Assessment, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 has introduced the concept of 'Social Impact

[76] Sreeranganathan K.P v. UOI & ors., Judgement of the National Green Tribunal (Southern Zone, Chennai) dated 29/05/2014
[77] *Id.* at Para no. 166

Assessment' under Chapter II of the Act.[78] Section 4 of the Act requires the Government to consult the local authorities in the affected area and carry out a Social Impact Assessment study in consultation with them, if the Government intends to acquire land for a public purpose.[79] Section 5 of the Act mandates public hearing for Social Impact Assessment[80] and section 7 mandates evaluation of the Social Impact Assessment report by an independent multi-disciplinary Expert Group.[81] As per the proviso to clause 2 of section 2 of the Act, if the land is acquired for private companies, the consent of at least eighty per cent of those affected families need to be obtained. As per the same

[78] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Sections 2 to 9.

[79] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Section 4 (1); According to the section 4(4) of the Act, the Social Impact Assessment study shall include assessment as to whether the proposed acquisition serves public purpose, estimation of affected families and the number of families among them likely to be displaced, extent of lands, public and private, houses, settlements and other common properties likely to be affected by the proposed acquisition, whether the extent of land proposed for acquisition is the absolute bare-minimum extent needed for the project, whether land acquisition at an alternate place has been considered and found not feasible, study of social impacts of the project, and the nature and cost of addressing them and the impact of these costs on the overall costs of the project *vis-a-vis* the benefits of the project.[79]

[80] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Section 5: Public hearing for Social Impact Assessment - Whenever a Social Impact Assessment is required to be prepared under section 4, the appropriate Government shall ensure that a public hearing is held at the affected area, after giving adequate publicity about the date, time and venue for the public hearing, to ascertain the views of the affected families to be recorded and included in the Social Impact Assessment Report.

[81] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Section 7: Appraisal of Social Impact Assessment report by an Expert Group - (1) The appropriate Government shall ensure that the Social Impact Assessment report is evaluated by an independent multi-disciplinary Expert Group, as may be constituted by it. (2) The Expert Group constituted under sub-section (1)shall include the following, namely: (a) two non-official social scientists, (b) two representatives of Panchayat, Gram Sabha, Municipality or Municipal Corporation, as the case may be, (c) two experts on rehabilitation; and (d) a technical expert in the subject relating to the project.

proviso, the consent of at least seventy per cent of those affected families need to be obtained if the acquisition is for public private partnership projects.[82]

But the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance of 2014 has added a new provision, namely section 10A which exempts the requirement of social impact assessment in the case of certain projects.[83] By exempting 'infrastructure projects including projects under public-private partnership where the ownership of land continues to vest with the Government', the Government has

[82] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, Clause 2 of section 2 of the Act - The provisions of this Act relating to land acquisition, consent, compensation, rehabilitation and resettlement, shall also apply, when the appropriate Government acquires land for the following purposes, namely: (a) for public private partnership projects, where the ownership of the land continues to vest with the Government, for public purpose as defined in sub-section (1); (b) for private companies for public purpose, as defined in sub-section (1). Provided that in the case of acquisition for (i) private companies, the prior consent of at least eighty per cent, of those affected families, as defined in sub-clauses (i) and (v) of clause (c) of section 3; and (ii) public private partnership projects, the prior consent of at least seventy per cent of those affected families, as defined in sub-clauses (i) and (v) of clause (c) of section 3, shall be obtained through a process as may be prescribed by the appropriate Government. Provided further that the process of obtaining the consent shall be carried out along with the Social Impact Assessment study referred to in section 4.

[83] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance, 2014, Section 10A: The appropriate Government may, in the public interest, by notification, exempt any of the following projects from the application of the provisions of Chapter II and Chapter III of this Act, namely (a) such projects vital to national security or defence of India and every part thereof, including preparation for defence or defence production; (b) rural infrastructure including electrification; (c) affordable housing and housing for the poor people; (d) industrial corridors set up by the appropriate Government and its undertakings (in which case the land shall be acquired up to one kilometre on both sides of designated railway line or roads for such industrial corridor); and (e) infrastructure projects including projects under public-private partnership where the ownership of land continues to vest with the Government. Provided that the appropriate Government shall, before the issue of notification, ensure the extent of land for the proposed acquisition keeping in view the bare minimum land required for such project.

managed to vest the land to private entities, without the requirement of social impact assessment, after entering into MoUs with them.

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 provided that where an offence has been committed by any department of the Government, the head of the department shall be deemed to be guilty of the offence.[84] But the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance of 2014 replaced this provision with another provision that requires the prior sanction of the government before prosecuting the government official.[85]

Two Bills namely the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Second Amendment) Bill, 2015 were passed on February 24, 2015 and May 11, 2015 in addition to two Ordinances in 2015

[84] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013, Section 87: Offences by Government Departments - Where an offence under this Act has been committed by any department of the Government, the head of the department, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

[85] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance, 2014, Section 10A: "87. Where an offence under this Act has been committed by any person who is or was employed in the Central Government or the State Government, as the case may be, at the time of commission of such alleged offence, the court shall take cognizance of such offence provided the procedure laid down in section 197 of the Code of Criminal Procedure, 1973 is followed."

along the lines of 2014 Ordinance.[86] One of the basic objectives of all the Bills and Ordinances is to exempt the requirement of social impact assessment in the case of certain projects such as preparation for defence or defence production, rural infrastructure including electrification, affordable housing and housing for the poor people, industrial corridors set up by the appropriate Government and its undertakings, infrastructure projects including projects under public-private partnership where the ownership of land continues to vest with the Government.

Though there are various national level legislations and policies for the conservation of forests and tribals, it is discouraging to note that most of them are yet to establish corporate accountability. A comparison made, earlier in this thesis, between our legislations and Ghana Timber Resource Management Act of 1998 as amended in 2003, proves the same. The requirement of Social Responsibility Agreement with the section of the community so as to address social needs of the communities provided in the latter legislation should be adapted to the Indian context. It is also necessary that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 provides for obtaining 'fair and prior informed consent' from those in the community. Thus it is time that a proper legal framework is enacted in the country that provides for corporate accountability. Any attempt to amend the

[86] *All About the Land Acquisition Debate*, (Sep. 29, 2016, 11.30 A.M.), http://www.prsindia.org/pages/land-acquisition-debate-139/

numerous legislations that exist in the country for this purpose is a hard task and hence it is recommended to enact a separate legislation providing for corporate social accountability. Such a legal framework can also take into account the need for allowing extraterritorial operation so as to make corporations accountable for human rights violations.

9.10 Corporate Social Accountability in addition to Corporate Social Responsibility

Politically motivated legislations, absence of non-judicial or quasi-judicial mechanisms, inordinate delay in judicial process, and want of legal aid are the other major hindrances in the ways of corporate social accountability.

The plight of the victims of corporate human rights abuses is clearly shown in the following words,

> *"(W)hich of us sinners was going to cast the first stone? Not me, who lives off royalties from corporate publishing houses. We all watch Tata Sky, we surf the net with Tata Photon, we ride in Tata taxis, we stay in Tata Hotels, we sip our Tata tea in Tata bone china and stir it with teaspoons made of Tata Steel. We buy Tata books in Tata bookshops. Hum Tata ka namak khate hain. We're under siege. If the sledgehammer of moral purity is to be the criterion for stone-throwing, then the only people who qualify are those who have been silenced already. Those who live outside the system; the outlaws in the forests or those whose protests are never covered by the press, or the well-*

> *behaved dispossessed, who go from tribunal to tribunal, bearing witness, giving testimony."*[87]

It is evident that MNCs will not respect human rights and dignity at work if they are brought under voluntary codes or principles such as the OECD guidelines or ILO Tripartite Declaration or UN Global Compact. Same is the case when they are brought under a framework, in the form of Companies Act 2013, that provides for a 'comply or explain' approach. It is time that MNCs learn from their counterparts that there is a responsible way of doing business such as the large scale investment done by British Petroleum in Vietnam in computer technology for flood related damage control and the activities such as recreating forest in Turkey and providing refrigerators for storing anti-malarial vaccines done by the same company.[88] It is equally important that consumers take a bold step in deciding to support those companies that follow responsible and ethical business practices and the same applies to financial institutions. The latter should adhere to a policy where they do not fund companies who are socially irresponsible. The announcement by Dutch Bank, ING Group to

[87] Arundathi Roy's comment in Rick Cohen, *Who is Corporate Philanthropy for? Arundhati Roy Says it's not Who You Think*, NON PROFIT QUARTERLY, March 27, 2012, (Feb. 19, 2016, 7.50 P.M.), https://nonprofitquarterly.org/2012/03/27/who-is-corporate-philanthropy-for-arundhati-roy-says-its-not-who-you-think/

[88] Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities,* 25(4) HUMAN RIGHTS QUARTERLY 965-989 (2003)

refrain from providing loans to Pulp Mills in Uruguay due to the negative social and environmental impacts should be set as an example.[89]

Hence, corporate social accountability is proposed in addition to corporate social responsibility. In short, it is the not the concept of corporate social responsibility but the concept of corporate social accountability that will ensure that the corporations remain responsible in how profits are made rather than being held responsible for how profits are spent.

[89] SANJAY K. AGARWAL, CORPORATE SOCIAL RESPONSIBILITY IN INDIA, 45,46 (Response Publishers, New Delhi 2012); But later the project was funded by International Finance Corporation and the Multilateral Investment Guarantee Agency.

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APPENDIX

List of Publications by the Scholar

1. *CSR and the Companies Act 2013: Has it really achieved the objectives or are we still far from achieving a strict compliance with the CSR policies*, (LW (2014) July 25), Lex-Warrier Online Law Journal which is an open access peer-reviewed quarterly publication with ISSN 2319-8338 accessible at http://lex-warrier.in/2014/07/csr-companies-act-2013/

2. *The Shortcomings of Corporate Ethics and Corporate Social Responsibility in the Protection of Human Rights*, 2013 (1) International Journal of Research & Analysis accessible at http://www.ijra.in/uploads/41587.1505101389SANDEEP%20FULL%20PAPER.pdf (ISSN 2347-3185)

3. *The Darker side of Business vis-à-vis Human Rights: The Realm of Non-binding Norms and Ineffective Sanctions*, Emerging Trends in Human Rights published by School of Law, VIT University, Chennai (2016) with ISBN: 978-93-81992-87-8

4. *A Dream, a Hope, a Change for the better - Towards realization of Corporate Environmental Responsibility*, Lex-Terra Online Law Journal of Centre for Environmental Law, Advocacy & Research (CELAR) of NLU Assam (Issue 3, March 2016) which is an open access peer-reviewed publication with ISSN 2455-0965 accessible at http://www.nluassam.ac.in/cel5.htm

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CSR AND THE COMPANIES ACT 2013

Has it really achieved the objectives or are we still far from achieving a strict compliance with the CSR policies

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Citation: LW (2014) July 25

It is an undisputed fact that multinational corporations wield more power and wealth than many of the nations across the world.[1] Due to the very same reason they are capable of doing more harm than any other private economic institutions as their activities surpass national boundaries thereby going beyond the control of national jurisdictions in many cases. Multinational corporations do a great deal of service to the society by paying huge taxes, providing employment, contributing to charitable causes and so on. But at the same time they are also prone to corruption, accused of providing poor and inadequate workplace conditions, causing human rights abuses, consumer disputes and violating environmental values. It is not quite sure whether it is the latter part that the Corporate Social Responsibility (CSR) tries to control but it is surely a mechanism that balances the latter with that of the former. Corporate social responsibility is based on the premise that most of the companies derive resources from the society and they are expected to return it back. CSR has been defined thus:

> *"Corporate Social Responsibility is a term used to express that an organization is taking responsibility for the impact of its activities upon its employees, customers, community and the environment. It is usually used in the context of voluntary improvement commitments and performance reporting. Essentially, CSR is the deliberate inclusion of public interest into corporate decision-making, and the honouring of a triple bottom line- People, Planet and Profit. CSR involves a commitment to behave ethically and contribute to economic development, while improving the quality of life of the workforce and their families as well as the local community at large."*[2]

This paper primarily endeavours to find whether the above mentioned concept of CSR is reflected in the Companies Act 2013. The first part of the paper focuses on the requirement of the mandatory CSR policies at the national level. In this part, the extent of responsibility of the states for the activities of corporations is also analysed and some changes have been suggested in

[1] For example, the annual sales of the Royal Dutch/Shell Group Oil Company are twice New Zealand's gross domestic product; See Dr. Clarence J. Dias, 'Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility' 4 NUJS L. Rev. 495 (2011)
[2] Dr. Clarence J. Dias, 'Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility' 4 NUJS L. Rev. 505 (2011)

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this regard. The second part of this paper is on the provisions relating to CSR in the new Companies Act 2013 including its VII Schedule. It also examines whether the UN Global Compact principles are given due recognition in the provisions relating to CSR in the Companies Act. The final part deals with an analysis of Chhattisgarh Corporate Social Responsibility Policy 2013, its pros and cons and how it differs from the CSR objectives mentioned in the 2013 Act. The article ends with raising some concerns about the concept of CSR enshrined in the 2013 Act, and that if given proper attention can add new momentum towards the goal of achieving the objectives of CSR.

Inadequacy of State Responsibility: Requirement of mandatory CSR policies at the national level

As one author puts it, "a corporation can recognizably become involved in violations of human rights law either directly as a private actor; as an actor coloured by a connection with a state, state entity, or other public actor; or as a participant in a joint venture or complicitous relation with another human rights violator."[3] In both international as well as national law the states are responsible only for the acts of their organs and are generally not made responsible in case of private corporate wrongs. In order to make the state responsible, the legal system looks into whether the acts of the corporations were 'on behalf of the state' or 'under the control of' the state. But in most of the cases the situation is different. The corporations are complicit in violating human rights along with the state or vice versa and it should have been a point to include the factor of complicity along with acts 'on behalf of the state' or 'under the control of' the state.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)[4] attributes the conduct of any organ of the state to the act of state but an organ of the state has been defined to include any person or entity which has that status in accordance with the internal law of the State.[5] The 2001 Draft Articles has expanded the ambit of the term organs of the state under articles 5 and 8. According to Article 5 the acts of any organ which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law. The commentary to the Draft Articles state that "since corporate entities, although owned by and in that sense subject to the control of the State, are

[3] Jordan J. Paust, 'Human Rights Responsibilities of Private Corporations' 35 Vanderbilt Journal of Transnational Law 801 (2002)
[4] Report of the International Law Commission on the work of its fifty-third session in 2001
[5] Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

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considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5".

The major change should have been brought to article 8 which in its original form states thus:

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions or under the direction or control of, that State in carrying out the conduct."

The acts of non-state actors such as TNCs in which the state becomes complicit are not given due attention in the above article. The Draft Articles on responsibility of States for internationally wrongful acts is incapable to fix responsibility on the states involved in human rights abuses carried out by the TNCs.[6]

Thus it is stated that where the state responsibility is highly inadequate to combat the activities of corporations and there is in fact none to be responsible for the activities of the corporation, it is better to have a concrete national policy on corporate responsibilities.

Corporate Social Responsibility under Companies Act 2013

The Companies Act, 2013 has ushered a wave of change by making far-reaching consequences on all companies in India. The talk of the nation, amongst all the new changes brought out by the new legislation, has been the incorporation of provisions relating to Corporate Social Responsibility. The mandate of CSR has been provided under Section 135 of the 2013 Act which ensures that in every financial year, a company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more spends at least two per cent of its average net profits made during the three immediately preceding financial years in pursuance of its Corporate Social Responsibility Policy.[7]

The trend that has been seen in India over the years is that most of the companies set up their establishments in an area which results in violating the environmental standards or forced

[6] Daniele Amoroso, 'Moving Towards Complicity as a Criterion of attribution of private conducts: Imputation to states of corporate abuses in the US Case Law', 2011 LJIL 989

[7] Section 135 of the Indian Companies Act, 2013: The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

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displacement or disturbing the societal set up in that local area. Then they establish cancer research centres or other concerns in an entirely different area that qualify them as companies observing CSR practices. Tata group is one of the best examples. The instance in Singur (popularly known as Tata Nano Singur controversy), where they set up a car manufacturing unit violated several human rights and caused large scale displacements. This was done without any regard to the land laws of the state. But they are known to have undertaken a lot of philanthropic activities and have established institutions of higher learning, promoted art and culture of the country and funded scientific research. POSCO steel plant in Odisha is another example which boasts of initiating educational programmes and scholarships but has caused displacement of several inhabitants and environmental hazards in the local area.[8] The current Companies Act of 2013 has taken care of this situation by adding a proviso to section 135 which states that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.

The Companies Act of 2013 has given due care to the interests of the community and environment and not just in business/profit affairs of the company. As per Section 166 of 2013 Act, the director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, *the community and for the protection of environment*. This is in tune with the provisions of similar legislation in UK. Section 172 of the UK Companies Act 2006 states that the director of a company must act in good faith to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the impact of the company's operations on the community and the environment.[9]

The amendments made to Schedule VII of the Companies Act, 2013 has in fact widened the scope of CSR activities[10] and the much criticized clause (x) in Schedule VII before the

[8] Jaya Srivastava, 'Social Movements, CSR and Industrial Growth: An Indian Experience, 11 The IUP Journal of Corporate Governance 60 (2012)

[9] Section 172 of the UK Companies Act, 2006: Duty to promote the success of the company: (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.

[10] In Schedule VII, for items (i) to (x) and the entries relating thereto, the following items and entries shall be substitutes, namely:-

"(i) eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation and making available safe drinking water;

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amendment that stated "such other matters as may be prescribed" has been removed in the newly framed version. At the same time, the new amendment has made the list exhaustive and it has to be seen whether all the essential CSR activities have come under the schedule.[11] It would have been better if the ten fundamental principles of UN Global Compact were given more attention in the VII Schedule and also in the overall framework of the provisions relating to CSR in the Companies Act 2013.

UN Global Compact and the 2013 CSR mandate

The UN Global Compact was launched in July 2000 as a framework for the companies worldwide for responsible business practices. The UN Global Compact consists of principles set for the companies to follow in their activities in the areas of human rights, environment, labour standards and anti corruption. These principles enjoy universal consensus and has been derived from UDHR, ILO's Declaration on Fundamental Principles and Rights at Work, Rio Declaration on Environment and Development and the United Nations Convention against Corruption.[12] The UN Global Compact also ensures that the companies undertake due diligence so as to comply with its national laws and work to identify any violations of human rights and prevent it. It is doubtful whether Schedule VII encompasses all the human rights principles that were thought about in the Global Compact. Moreover it seems that the Companies Act of 2013 has given a lot more preference to CSR polices by remaining silent on ethical business practices or in other words called 'responsible business practices'.[13] For example, the first principle of UN

(ii) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and differently abled and livelihood enhancements projects;

(iii) promoting gender equality, empowering women, setting up homes, and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;

(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources, and maintaining quality of soil, air and water;

(v) protection of national heritage, art and culture including restoration of buildings and sites for historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;

(vi) measures for the benefit of armed forces veterans, war widows and their dependants;

(vii) training to promote rural sports, nationally recognized sports, paralympic sports and Olympic sports;

(viii) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;

(ix) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;

(x) rural development projects

[11] It has been mentioned in the Companies (Corporate Social Responsibility Policy) Rules 2014 that "Corporate Social Responsibility (CSR) means and includes but is not limited to (i) Projects or programs relating to activities specified in Schedule VII to the Act", but it is silent as to what all the other activities could be.

[12] http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

[13] http://www.nfi.org.in/sites/default/files/nfi_files/Comments%20on%20draft%20CSR%20rules.pdf

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Global Compact states that "businesses should support and respect the protection of internationally proclaimed human rights." This principle reiterates the fact that like the government, individuals and other organisations, companies also do have a responsibility in ensuring protection of human rights. By ensuring protection of human rights it should be understood that the business community should not infringe human rights. This has been stressed by the UN Human Rights Council that the corporate responsibility to respect human rights is a requirement of business everywhere.[14] This principle encompasses within its ambit promotion of rule of law, addressing consumer concerns, increase in worker production and retention and building good community relationships. Schedule VII only deals with the steps that the companies have to undertake towards CSR policies. Due regard has to be given to respect the human rights and not to violate them during set up of the company's activities as well. For example, the activities of the corporations such as POSCO in Odisha and Tata Nano in Singur have created massive violations of human rights, land and environmental laws[15]. It is better not to forget the corporate human right abuses that have taken place at the national and international level too. The activities of Barclay's Bank in South Africa, Wal-Mart in failing to discontinue dealers from committing labor misuses[16], TNCs as well as Coca Cola in Sudan, the incident of release of toxic gas from Trafigura in Abidjan affecting more than a lakh of people, the environmental degradation and poisoning caused by operations of Rio Tinto in Papua New Guinea, Texaco in Ecuado, Shell in Ogoniland, Nigeria, Union Carbide in Bhopal, issues in *Bano* v. *Union Carbide Corporation*[17], Exxon's Valdez oil-spills off Alaska are all examples of environment and human rights abuses by multinationals. Asking the multinationals to invest on CSR after violating human rights and environmental standards by not following ethical/responsible business practices seems to be unrewarding.

The VII Schedule has incorporated the labour and the environmental principles/activities in a comprehensive manner and this is something which is commendable. But on the other hand it seems to have missed the anti corruption principle of the UN Global Compact. Principle no.10 of the UN Global Compact states that "businesses should work against corruption in all its forms, including extortion and bribery."

[14] http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html
[15] Tata Nano project in Singur (West Bengal) had caused severe displacement of farmers and deprived many of land and homes due to the takeover of 997 acres of farmland by the State Government for Tata to build its factory. Though the law authorized the takeover only for public improvement projects, the project was in blatant violation of this.
[16] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2007) 6 Nw. U. J. Int'l Hum. Rts. 304
[17] 273 F.3d 120 (2d Cir 2001)

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But the effectiveness of UN Global Compact has always been in question as they are purely voluntary commitments. The companies or the participants are required to communicate their progress in implementing the ten principles annually to all the stakeholders and if they don't they will be listed as "non-communicating" on the website and the company will be delisted after the expiration of one year from the initial deadline. Though the company has to follow the Global Compact principles once it becomes a part of the commitment, the basic issue is whether a company voluntarily joins the commitment and strives to protect human rights and other related rights. It is true that the companies like Royal Dutch Shell, Novo Nordisk, and BP Amoco have publicly proclaimed their cooperation with the UN to safeguard human rights, but it is still to be seen whether they will be really following what they have proclaimed in the light of future events. If the facts alleged in the recent case of *Esther Kiobel v. Royal Dutch Petroleum Co.*[18] are assumed to be true, it can be concluded that nothing has changed much even after the advent of the UN Global Compact and that it is not a very effective step towards making companies follow responsible business practices.

The proviso to Section 135 clearly stipulates the requirement of specifying the reasons for not spending the required CSR amount but it is unclear about the penal consequences that the particular company need to face for not spending the amount towards CSR. The after effect of not mentioning the reasons for not spending the amount is also unclear from the said provisions. It is in this regard that the Chhattisgarh Corporate Social Responsibility Policy 2013 assumes significance.

Chhattisgarh Corporate Social Responsibility Policy 2013

Chhattisgarh Corporate Social Responsibility Policy 2013, published in the Gazette of Chhattisgarh on May 3, 2013, mandates that public and private companies with net profits in the previous year of less than Rs 500 crore will contribute 3% of their annual profits towards CSR to the Chief Minister Community Development Fund, and those with net profits above Rs. 500 crore will contribute 2% of their annual profits towards CSR with a minimum threshold of Rs. 15 crore.

This 2013 state policy goes against the central legislation in many respects and may be held to be invalid as it is doubtful whether the state can assume such kind of power when the central legislation is in force. Moreover the fact that the amount has to go to the CM's community

[18] 133 S.Ct. 1659 (2013)

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development fund may act as a hindrance for companies from earning the goodwill of the local area/community through developmental projects as part of CSR. Nevertheless, the state policy has to be appreciated for reasons manifold. Firstly, the cut off of a net profit of Rs. 500 crore for CSR initiatives fixed by Companies Act 2013 has been removed. As per this policy, even companies whose net profits in the previous year is less than Rs 500 crore have to contribute 3% of their annual profits towards CSR to the Chief Minister Community Development Fund. This is one important aspect which has been completely missed out in the Companies Act 2013.

The 2013 state policy also provides for punishment for non-compliance. According to the policy, industrial units that are obtaining facilities or grant from various departments of State of Chhattisgarh or according to the prevailing industrial policy will have to mandatorily deposit the money for CSR initiatives in the Chief Minister Community Development Fund. Non-compliance of this will result in taking back of grant or facilities that have been provided by the administration. The state government cannot be blamed for taking such a bold step in this regard as many of the huge corporate houses like Jindal Steel Power Limited, JSW Steel Ltd, Bhushan Power & Steel, Vandana Group, DB Power Ltd etc are in Chhattisgarh.

One major criticism to the Chhattisgarh CSR policy would be that the amount deposited in the CM Community Development Fund could be used for many purposes other than CSR objectives and there are no adequate safeguards against the same. But a perusal of Schedule VII of the Companies Act 2013 shows that one of the CSR activities stipulated under it is "contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women". If the corporate can be asked to contribute to the PM's National Relief Fund or any other Central Government, then requiring them to contribute to the CM's fund should not provoke much criticism. It is also to be noted that as per the 2009 decision of the Central Information Commission in *Shri A. K. Goel* v. *Prime Minister's Office*,[19] although the Prime Minister's National Relief Fund can be treated as public authority, it cannot be treated as a government Department and for the same reason, information on both those making contribution to this fund and those receiving benefits from it is to be treated as personal information held in confidence by the Prime Minister's National Relief Fund and therefore exempt from disclosure u/s 8(1) (j) of the Right to Information Act[20].

[19] http://indiankanoon.org/doc/1459130/

[20] Section 8(1) (j) of the RTI Act: Exemption from disclosure of information. - Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,— information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion

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This policy may seem to be a compelling measure by the government on the companies and against the concept of CSR as envisaged under the Companies Act 2013 whereby corporate are entitled to perform welfare schemes in their neighbourhood for the benefit of the society. But it should be admitted that the 2013 state policy has taken care of one major situation. CSR, if left entirely to corporates, will become an extremely distrustful activity in the future due to lack of adequate monitoring/verification by the state.

Conclusion

By incorporating the provisions relating to CSR and CSR reporting procedures, the new Companies Act of 2013 has in fact corrected a historic wrong of making CSR a matter of discretion of companies. It is certainly a new step towards transforming the voluntary CSR initiatives to binding principles but there is still a long way to go for achieving a strict compliance with the CSR policies. In the subsequent amendments, it is worthwhile if the following concerns are given adequate focus.

Main Concern: The definition of Corporate Social Responsibility in the present Indian scenario could be seen from the Companies (Corporate Social Responsibility Policy) Rules 2014 where it has been defined thus,

> *"Corporate Social Responsibility (CSR) means and includes but is not limited to (i) Projects or programs relating to activities specified in Schedule VII to the Act; or (ii) Projects or programs relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act."*

It is true that the concept of CSR is not limited to the activities laid down under Schedule VII of the 2013 Act. But keeping in mind the meaning and the essence of the concept of CSR (as mentioned in the introduction), it is quite doubtful whether the essence of CSR is reflected in the definition. Moreover, if the true meaning of CSR was embedded in the definition, then there is no reason why discrimination has been shown between companies whose net profit is above Rs. 500 crore and others for CSR initiatives. The essential elements of CSR as enunciated in the above definition which includes responsibility for the impact of its activities upon the company's

of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information

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employees, customers, community and the environment; voluntary improvement commitments and performance reporting, the deliberate inclusion of public interest into corporate decision-making, honouring of a triple bottom line- People, Planet and Profit are equally applicable to all companies irrespective of their net profit or annual turnover. In the alternative, the 2013 legislation could have at least opted for a bottom down approach (employee-centered CSR approach) for companies with less net profits or annual turnover than top down approach mentioned for companies coming under the ambit of Section 135.[21] The employee-centered approach is where CSR initiatives come from the part of the bottom level employees. The famous story of one of the largest fashion retailers, Nordstrom which refunded the customer's money who tried to return a set of tires despite the fact that Nordstrom does not sell tires is a great example of high level of customer service and employee-centered CSR approach.

Other concerns

1) The uncertainty when companies do not give preference to local area where it operates. Are we talking about a legal framework that does not completely prohibit the corporate/multinationals to disturb environmental safety, promote forced displacement and upset the societal set up in the local area where the company is situated but satisfies the mandate of CSR by setting up a cancer research institute or like establishments in an entirely different area?

2) The after effects/sanctions meted out to those corporations who fail to comply with Section 135 of the 2013 Act are not clear despite the introduction of mandatory CSR

3) It is yet to ascertain what would be the so called "social responsibilities" of companies whose net profits fall below Rs. 500 Crore or who do not satisfy the criteria laid down under Section 135(1) of the Companies Act 2013.

4) The effectiveness of the CSR activities when it comes to its implementation due to lack of adequate verification/monitoring by the state.

5) The reflection of UN Global Compact principles in the Schedule VII and generally in the CSR provisions in the 2013 legislation.

6) The failure to give importance to the concept of ethical/responsible business practices in the scheme of the Act.

[21] For more information, *See* Walter R. Nord & Sally Riggs Fuller, 'Increasing Corporate Social Responsibility Through an Employee-centered Approach' 21 Employ Respons Rights J 279 (2009)

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THE SHORTCOMINGS OF CORPORATE ETHICS AND CORPORATE SOCIAL RESPONSIBILITY IN THE PROTECTION OF HUMAN RIGHTS

*Sandeep Menon Nandakumar

Introduction

There was a time when we used to discuss and deliberate on acts of state and its impact on human rights of its citizens as well as the community. But things have changed and now the non-state actors such as the multinational corporations have replaced the position of the state in most of the academic and non-academic discussions. Moreover, in the present scenario, it has been extremely difficult for the state to control these non-state actors from abusing human rights. These multinational or transnational corporations which are in fact dominating the current world because of their huge financial power have been involved in grave violations of human rights including that of violating worker's rights, causing environmental pollution, employing child labour, violating basic access to health and shelter of workers and their families. This paper is an attempt to detail out various aspects of corporate ethics as well as corporate social responsibility and its effect upon the protection of human rights as both of them, to a very large extent, is voluntary and depends upon the motivating factor behind each corporate whether to follow them or not.

The Need for Regulating Corporations

The need for regulating corporations is very much necessary in the current scenario as apart from producing wealth they create a lot of risks to humans as well as to the ecosystem.[1] The role played by them and the impact which they can create is evident from the fact that out of the most top rated economies in the year 1999, 51 percentage were corporations.[2] It is further evident from the fact that their sales are large enough to beat the collective GDP of various countries and that the state in most of the cases has lost its valuable power to direct the nature of

[1] Surya Deva, 'Human Rights Realization in an Era of Globalization: The Indian Experience' (2006) 12 Buff. Hum. Rts. L. Rev. 93, 104
[2] Iris Halpern, 'Tracing The Contours Of Transnational Corporations' Human Rights Obligations In The Twenty-First Century' (2008) 14 Buff. Hum. Rts. L. Rev. 129 , 144

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corporate responsibility.[3] Moreover most of the functions, which were vested with the state, is now exercised and controlled by big multinationals and the same is apparent in the area of energy, water, telecommunication and transport.

The activities of the multinationals such as the activities of Barclay's Bank's business with the apartheid regime in South Africa and Wal-Mart for failing to discontinue dealers from committing labor misuses[4], TNCs as well as Coca Cola in Sudan, the incident of release of toxic gas from Trafigura in Abidjan affecting more than a lakh of people, the environmental degradation and poisoning caused by operations of Rio Tinto in Papua New Guinea, the frequent oil spill by Shell in Nigeria etc[5] clearly shows that it is high time that international standards, that too binding ones, are enacted so as to make the corporate enterprises promote and respect human rights both individual as well as collective ones. The activities of the corporations against the concept of human rights is also clear from reports of the NGOs against Shell's activities in Nigeria, dealings of Occidental Petroleum in Colombia, boycotts against ExxonMobil in Indonesia, Coca-Cola in Colombia, Unocal in Burma and so on.[6] There also have been instances where in United States in 1996, Kathey Lee Gifford who was an advocate of Children's rights was involved in a scandal of clothing line manufactured by the teen aged girls in a Honduras sweatshop.[7]

[3] Lary Cata Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2005) 37 Colum. Hum. Rts. L. Rev. 287, 290
[4] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2007) 6 Nw. U. J. Int'l Hum. Rts. 304
[5] Iris Halpern, 'Tracing The Contours Of Transnational Corporations' Human Rights Obligations In The Twenty-First Century' (2008) 14 Buff. Hum. Rts. L. Rev. 129 , 147
[6] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 282
[7] Nancy L Mensch, 'Codes, Law Suits or International Law: How Should the Multinational Corporation Be Regulated with respect to Human Rights?' (2006) 14 U. Miami Int'l & Comp. L. Rev. 243, 244

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Corporate Ethics and Corporate Social Responsibility

Corporate Ethics which comprises of ethical standards and corporate social responsibility which comprises of the values and business practices which should be followed by the corporation together forms the corporate code of conduct in general. The reasons for introducing the same have been pointed out to be that the multinational corporations have been forced by the pressure from civil society to adopt these standards which are less evil than the binding standards and the increasing consumer awareness which has made the corporations to follow ethical behaviour.[8]

There can be private corporate codes of conduct which are created by the multinationals themselves and they have several advantages such as the fact that the corporation can identify the needs of the employees which can also persuade other corporations to follow the same.[9] Apart from all these there are various industry association codes of conduct like the 'Responsible Care' and the 'Electronic Industry Code of Conduct' such as the Rugmark, the symbol which certifies the fact that the production of the material does not involve child labour; and the codes created by NGOs such as the CERES principles created by the Coalition for Environmentally Responsible Economics which are strictly non specific codes but it details out principles around which the corporations is supposed to make its own code.[10]

It is stated that it was the International Chamber of Commerce which was the first business organization to adopt a voluntary guideline which was the Guidelines for International Investment in 1972. Though the UN in the year 1974 established the Centre on Transnational Corporations (UNCTC) to prepare a voluntary code of conduct it was discarded in 1992 as the states could not reach a consensus.[11] There has been a simultaneous development of codes of conduct primarily focusing on non discrimination at work and safe conditions of work such as

[8] Danwood Mzikenge Chirwa, 'The Long March To Binding Obligations Of Transnational Corporations In International Human Rights Law' (2006) 22 S. Afr. J. on Hum. Rts.76, 77
[9] Nancy L Mensch, 'Codes, Law Suits or International Law: How Should the Multinational Corporation Be Regulated with respect to Human Rights?' (2006) 14 U. Miami Int'l & Comp. L. Rev. 243, 251
[10] *Id* at 252-254
[11] Danwood Mzikenge Chirwa, 'The Long March To Binding Obligations Of Transnational Corporations In International Human Rights Law' (2006) 22 S. Afr. J. on Hum. Rts.76, 79

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the Sullivan principles[12] which is an NGO code, the Slepak Principles, Macquidora Standards of Conduct as well as the Miller Principles.

The OECD Guidelines that provide good practice standards was adopted in 1976 and are guidelines jointly addressed by governments to the multinational companies and it is clearly mentioned that the observance of the same is voluntary and not legally enforceable.[13] In the 2000 review a new standard was set out promoting respect to human rights.[14]

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which was adopted 1977 and was subsequently amended in 2000 and 2006[15] offer guidelines to multinational corporations, governments as well as employers and workers in relation to conditions of employment, wages and industrial relations.

The UN Global Compact which was launched in July 2000 is a framework for the companies for responsible business practices and has set out principles for the companies to follow in their activities in the areas of human areas, environment, labour standards and anti corruption. It is a voluntary enterprise and not a regulatory mechanism that relies on public accountability, transparency as well as disclosure to complement regulation and to provide a space for innovation.[16]

In addition to all these, the Voluntary Principles on Security and Human Rights that was signed in 2000[17] also emphasize on the protection of human rights. There are various other voluntary initiatives too, as for example, the Kimberley Process Diamond Certification Scheme of 2002, the basic aim of which is to curtail the conflict diamonds that keep up the rebel groups in Angola and Sierra Leone and the Extractive Industries Transparency Initiative of 2002, th

[12] Thomas N. Hale, 'Transparency, Accountability, and Global Governance' (2008) 14 Global Governance 73, 78
[13] Para I (1) of OECD Guidelines: The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable.
[14] Para II (2) of OECD Guidelines: Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments; the other provisions relating to 2000 review include provisions relating to abolition to child labour and discrimination, ensuring occupational health and safety and the like.
[15] <http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_094386/index.htm accessed> 13th September 2013
[16] <http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf> accessed 11th September 2013
[17] <http://www.voluntaryprinciples.org/principles/introduction> accessed 11th September 2013

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focal point of which are issues regarding the publication of revenues which in one way is the cause of internal conflicts worldwide.[18]

The UN Sub-Commission for the Protection and Promotion of Human Rights adopted the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights in the year 2003.[19] It has set up some binding human rights standards and the same was enacted to establish binding principles in place of the vacuum created by lapse in realization of voluntary corporate guidelines.[20]

Effectiveness in the protection of Human Rights

It is to be noted that the voluntary initiatives provide a long term prospect but with the uncertain sanction of peer or public pressure where as the legally binding ones gives assurance to norms but not their enforcement and it is "the poverty of the choice between voluntary and binding models reflects that of present institutions of global governance."[21] The non binding instruments cannot be said to have no use and instead they have shaped their internal voluntary codes of conduct and also inspired domestic level litigation.[22] With regard to the scenario in Africa it has been mentioned that a mixture of voluntary initiatives, binding regulations and adherence by states to their duties under international law are necessary to protect human rights and in general it is hoped that voluntary codes over time gets the force of law.[23] It should also be noted that these voluntary initiatives do not replace exiting principles but are supplementary to them such as the standards set by the International Financial Corporation relating to child labour and environment, standards set by IMF and World Bank, the regional efforts such as the North American Free Trade Agreement (NAFTA) and the side agreements (on labour and environment) created thereafter, the incentive scheme under General system of Preferences by

[18] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 284
[19] <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En> accessed 11th October 2013
[20] Danwood Mzikenge Chirwa, 'The Long March To Binding Obligations Of Transnational Corporations In International Human Rights Law' (2006) 22 S. Afr. J. on Hum. Rts. 76
[21] Paul Redmond, 'Sanctioning corporate responsibility for human rights' (2002) 27 Alternative L.J. 23, 27
[22] Iris Halpern, 'Tracing The Contours Of Transnational Corporations' Human Rights Obligations In The Twenty-First Century' (2008) 14 Buff. Hum. Rts. L. Rev. 129, 164
[23] Daniel Aguirre, 'Corporate social responsibility and human rights law in Africa' (2005) 5 Afr. Hum. Rts. L.J. 239, 241, 259

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the EU creating economic preferences to developing nations that have upgraded their labour and environmental regulations and so on.[24] But the problem with most of the corporate codes is that most of them are based on the concept of voluntarism which gives an option to the corporations to exercise their discretion whether to follow these standards in their business practices. An advantageous perception of the corporate ethics and corporate social responsibility is that as they are voluntary codes of conduct diverse actors can negotiate the provisions of these codes so as to reach a consensus that satisfies all of them. If they are fairly negotiated and complied with, they can have considerable authority but the sanction element is usually softer as most of the companies may face only damage to their reputation due to public disgrace.[25] It is also a fact that the voluntary initiatives have no authoritative international statement of corporate responsibilities in regard to human rights protection and that the content of codes is highly variable.[26]

Most of the private corporate codes of conduct lack the essential features a code of conduct should have as most of them generally lay down an outline rather than concrete principles. A perusal of the Nike's code of conduct will reveal that though there have been principles enunciated so as to prevent forced labour or child labour apart from the environmental standards and minimum wage policy, nowhere it is seen that there is an effective monitoring mechanism or reporting measures in case of violations or sanction element to ensure that they are followed.[27] An effective mechanism can be seen in the guidelines of Levi Strauss & Co. where they have stipulated that in case a contractor does not follow the requirements demanded by the guidelines it may go for a corrective action plan within a stipulated time limit and in case of further violation; it may terminate the business deal with the concerned contractor.[28]

It is also stated that the private company codes as well as the industry association codes are also ineffective as they are voluntary, non specific and lacks appropriate sanctions. Though NGO codes are voluntary, once a company accepts it the company agrees to the monitoring by

[24] W.H.Meyer & Boyka Stefanova, 'Human Rights, the UN Global Compact and Global Governance' (2001) Cornell Intl.LJ 501, 505, 507-9
[25] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 285
[26] Paul Redmond, 'Sanctioning corporate responsibility for human rights' (2002) 27 Alternative L.J. 23, 26
[27] Nancy L Mensch, 'Codes, Law Suits or International Law: How Should the Multinational Corporation Be Regulated with respect to Human Rights?' (2006) 14 U. Miami Int'l & Comp. L. Rev. 243, 252
[28] *Id*

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the concerned NGO but in most cases the corporations prefer their own codes, if at all they decide to abide by some code, rather than the NGO codes.[29]

Though the OECD guidelines have been successful in solving disputes such as the formulation of new resettlement plans by the company working in Zambia due to persuasion by Canadian NCP, improvement of conditions of labour in Guatemala and improvement of protection of human rights in regard to construction of the gas pipeline in Myanmar, the same could not change the behaviour of corporations due to the limitations in the enforcement mechanisms as there are no provisions for reparations or relief. The enforcement mechanisms do not incorporate any procedures for condemning noncompliant corporations and have been rarely implemented[30]. It is also submitted that the human rights clause brought out by the review in 2000 needs much more elaboration so as to clarify the extent of obligations of the corporations.[31]

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy is also based on voluntary participation and the Governing body has not been vested with powers to find a violation of the principles or to award relief to the sufferers of those violations. Moreover there is little scope for extending the application of the declaration as its main focus is on labour rights and employment rights. It has been stated that like the OECD guidelines, the ILO Tripartite declaration is also not very effective due to its voluntary nature and due to the absence of strict enforcement measures.[32]

It is agreed that the UN Global compact is not formed as a substitute to any existing system but to complement the other initiatives to increase legitimacy and universality[33] but the fact as to whether a company voluntarily joins the commitment and strives to protect human rights and other related rights is doubtful as the working primarily is based on the companies communicating their progress annually and getting the corporations listed as non-communicating

[29] *Id* at 255
[30] Saman Zia-Zarifi, 'Suing Multinational Corporations in the U.S. For Violating International Law' (1999) 4 UCLA J. Int'l L. & Foreign Aff. 81, 85
[31] Danwood Mzikenge Chirwa, 'The Long March To Binding Obligations Of Transnational Corporations In International Human Rights Law' (2006) 22 S. Afr. J. on Hum. Rts.76, 84, 85
[32] *Id* at 88
[33] B. King, "The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations (2001) 34 Cornell Int'l L.J. 481, 483

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on the website if they do not do so. The only sanction element is that the company will be delisted after the expiration of one year from the initial deadline.

Unlike other corporate codes and standards, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights obligates the corporations to adopt, disseminate and implement internal rules of operation in compliance with the Norms and also to incorporate these norms in their daily business activities.[34] It is also important to note that the norms also provide for effective and adequate reparation to those that have been adversely affected by failures to comply with these Norms in the form of reparations, restitution, compensation and rehabilitation.[35] Bu it lacks legal force as it is stated that the Norms had not been requested by the UN Commission on Human Rights and it is also interesting to note that the Commission did not vote for or against the norms but simply set it aside.[36] It seems that the corporations are also finding the voluntary standards acceptable as they can use their own prudence and come to a conclusion as to what all standards should be declared as acceptable. This is because the corporations were not completely in favour of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights as most of the corporations were in opposition to the said norms and publicly lobbied states against these norms on the ground that the norms went too far on assigning obligations to corporations.[37]

[34] Para 15 of the Norms: As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

[35] Para 18 of the Norms: Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

[36] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 287

[37] *Id* at 288

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The need for binding principles and standards

The human rights abuses caused by Enron Corporation in India by torturing people who demonstrated against the company's power plant due to its adverse impact on environment should not be ignored. The preliminary ruling in *John Doe v. Unocal Corporation*[38] that if corporations are held responsible they may be less willing in the future to operate in countries with poor human rights records[39] which gives an impression favouring the corporations so that the state derives benefits at the cost of rights of innocent civilians clearly shows the need for an effective binding code of conduct at the international level.

It is interesting to note the remarks made by the Chairman of the Board of Union Carbide Corporation that "…they (MNEs) are not likely to pile up exorbitant profits at the expense of a host nation or to run roughshod over its national interests without incurring several long term penalties."[40] But it is extremely hard to believe this especially when the same corporate entity caused lot of human rights abuses that affected lakhs of innocent people in India (*Bhopal Gas Tragedy*[41]) due to the leakage of poisonous gas (MIC) and escaped liability by just paying a negligible amount to the innocent victims and when considering the fact that the high officials of the company were left unpunished.

Not only the corporations but also the state should have preference for binding standards and principles over voluntary codes as it is clear that the corporations at present prefer only the voluntary codes. It is clear from the fact that the states who rejected the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights are supporters of the voluntary initiatives, some of the examples being the United States and the United Kingdom being the facilitators of the Voluntary Principles on Security and Human Rights, and South Africa being an active player in Kimberley Process against conflict

[38] 963 F. Supp. 880 (CD. Cal. 1997)
[39] Lisa Trojner, 'Key Human Rights Issues in the New Millennium' (2000) 27 Hum. Rts. 8, 10
[40] Henry J. Steiner & Detlev F. Vagts, *Transnational Legal problems: Materials & text*, (1st edn University Case Book Series, 1981) 1181
[41] *Union Carbide Corporation* v. *Union of India* 1989 SCALE (1)380

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diamonds.[42] The EU Commission's Green Paper issued in 2001 states that "binding rules ensure minimum standards applicable to all, while codes of conduct and other voluntary initiatives can only complement these and promote higher standards for those who subscribe to them."[43] Though it is stated that regulations do not have to be binding and enforceable to be effective and it is enough if they have the prospective to modify corporate preferences and behaviour in line with a particular goal[44], legally binding international norms can assure uniform standards of human rights observance by corporations through collective participation in standard setting and enforcement.[45] It is stated that the main reason which acts as a hindrance in controlling corporations is due to the difficulty in striking a balance between the fact that the corporations engage in cheap labour so as to earn more profit whereas at the same time the state needs the capital that these corporations bring into the state which allows the state to raise its economy.[46] It is stated that the corporate codes, as they are voluntary, makes it difficult for the corporations to keep up their promises and at the same time the UN should stop its effort to make a binding set of principles like the UN Norms on the Responsibilities of Transnational Corporations and instead make the nations to follow the OECD guidelines as they are comprehensive and to allow some monetary reliefs in the form of incentives or lowering the nation's debt if they create an effective national level legislation to combat the human rights abuses by corporations.[47] But this lacks credibility as the OECD guidelines also suffer from the very same problem of being voluntary and lack of participation and anticipating a domestic legislation in each country will not be practicable as the same reasons of the nation itself getting benefitted from the MNCs applies in addition to the fact that it will be much beneficial to have an international standard set up especially when it is concerning human rights violations which has no territorial limits and frequently involving cross border issues. It has also been stated that international regulation of MNCs is preferable over national ones because of the diminishing nature of the national officials

[42] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 288, 295
[43] Jan Wouters & Leen Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2007) 6 Nw. U. J. Int'l Hum. Rts.273, 262
[44] Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (1st edn Cambridge Uni Press, New York 2006) 41, 42
[45] Paul Redmond, 'Sanctioning corporate responsibility for human rights' (2002) 27 Alternative L.J. 23, 24, 25
[46] Nancy L Mensch, 'Codes, Law Suits or International Law: How Should the Multinational Corporation Be Regulated with respect to Human Rights?' (2006) 14 U. Miami Int'l & Comp. L. Rev. 243, 245, 246
[47] *Id* at 269

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to control the behavior of corporations due to global dispersion of assets.[48] The binding principles and standards should also take note of the fact that those corporations who do not manufacture and sell goods to consumers but to other corporations are also covered and effectively monitored as they are the main ones who do not join the voluntary codes when compared to the rest. The need for a binding character is applicable also to corporate social reporting because if it is only a voluntary exercise it will gradually fade away as a public relations tool and will never be considered as a serious obligation to make the corporations accountable.[49] In short, the need for binding standards in place of private and other voluntary codes can be summed up in the following words, "a corporation's own claims to corporate responsibility should be viewed with the utmost skepticism - it is likely to be little more than a slogan."[50]

[48] Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2007) 6 Nw. U. J. Int'l Hum. Rts. 222, 250
[49] Julian Blanchar, 'Corporate Social Reporting' (1998) 23 Alternative L.J. 172, 175
[50] Stephen Rix, 'Globalisation and corporate responsibility' (2002) 27 Alternative L.J. 16, 22

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Conclusion

The basic problem with the corporate codes is that as they are voluntary standards which are devoid of binding enforcement mechanisms they provide the corporations a large amount of discretion in applying these principles and ensuring monitoring mechanisms. How much ever benefits are said to be accrued through these non binding voluntary codes, they can never act as a substitute for binding international standards. In most of the cases the regional level protections in the form of domestic legislations and case laws have been more efficient in tackling the issues and abuses created by the corporations. As, for example, greater success have been achieved by the ATCA in dealing with cases against Coca Cola, Shell, Del Monte, Royal Dutch Shell, Rio Tinto, Eastman Kodak, Unocal and the like. There have been no clear cut binding international standards to deal with the activities of corporate sector especially in the field of human rights and tackling the issues with the help of voluntary codes of conduct have proved to be ineffective in the light of various human rights abuses that have occurred worldwide. It is often said that the support of corporate enterprises is necessary in the market especially to protect and promote the economic, social and cultural rights, but it is really doubtful as to whether the corporate enterprises will be interested in following these standards and principles which are just voluntary in nature and work for the protection of human rights in their market dealings though some of them who may be self motivated may stick on to these principles after accepting them. Things would have been better if they had at least a strict independent monitoring mechanism, but most of the corporate codes lack the same which is one of their inherent weaknesses.

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The Darker side of Business vis-à-vis Human Rights: The Realm of Non-binding Norms and Ineffective Sanctions

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Abstract

The activities of business have been rapidly growing and the world is witnessing a situation wherein it is difficult for the laws to cope up with the situations posed by the activities of multinational corporations. The fact that certain multinationals possess enormous amount of economic wealth, much larger than what a nation can boast of, is also another factor for the slow pace in which legal developments are taking place. But the grave human rights atrocities that have been committed by transnationals such as Nike, Tata, UCC, Unocal, Coca-Cola and many other have made us to think and develop a scenario where laws could adequately handle the issues posed by the activities of the multinationals. It is not the problem of absence of any regulations or laws but the problem lies in its effectiveness. There exists numerous international norms including the OCED Guidelines, ILO Tripartite Declaration and the UN Global Compact but the fact that none of these are binding is a boon to the multinationals. The fact that ATS has been read down by the US in the most recent decisions also acts a setback in controlling the activities of multinationals. An analysis of international documents and the attitude of the US Courts in the application of ATS forms the major part of this paper. Though a provision in the national legislation, Companies Act 2013, was brought by India mandating the requirement of CSR, the same lacks effectiveness due to various reasons that would also form part of the paper. In short, the paper provides a comprehensive study of the legal framework that exists at the international and national level in regard to the human rights issues posed by the business activities of multinationals.

Keywords*: CSR, Companies Act 2013, ATS, UN Global Compact, ILO, OECD*

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Introduction

The activities of MNCs are increasing day by day and it has contributed both in positive and negative ways. Though the growth of business has created employment opportunities and enhanced the nation's economy, the same has resulted in violations of labour rights, interference on the right to life and liberty of innocent labourers and citizens and has resulted in other grave human rights abuses. It is in this context that the concept of corporate human rights responsibility/corporate social responsibility assumes importance

[1]. "Corporate Social Responsibility is a term used to express that an organization is taking responsibility for the impact of its activities upon its employees, customers, community and the environment. It is usually used in the context of voluntary improvement commitments and performance reporting. This is the era where the word 'business' have become synonymous with human rights abuses. From Vedanta to the recent Volkswagen scandal, we have had numerous examples of human rights atrocities caused by large scale business worldwide. The violations caused by Coca Cola as evident from cases like *Sinaltrainal et.al* v. *Coca Cola,* and *Perumatty Grama Panchayat* v. *State of Kerala*, the agitations and deaths that followed in the case of POSCO, continuous use of child labour, poor wages and unhealthy working environment in Nike's supply chain, the employees' struggle at Apple in China, the violations committed by Unocal and Barclays Bank, the gross injustice committed by Chiquita, UCC and Cadbury are all instances to prove that corporate human rights responsibility is the need of the hour.

Attempt towards implementation of corporate human rights responsibility

There exist codes of conduct worldwide so as to bring in 'human rights responsibility' in corporate activities. The primary ones in the series include 'The Interfaith Declaration: A Code of Ethics on International Business for Christian, Muslims, and Jews', the 'CAUX Round Table' and 'Cadbury Committee'. The Interfaith

[1] The author recognises 'corporate human rights responsibility' and 'CSR' to be a mutual concept and social responsibility is one of the factors included in human rights responsibility.

Declaration states that business has a responsibility to future generations to improve the quality of goods and service, not to degrade the natural environment in which it operates and seek to enrich the lives of those who work within it[2]. The Declaration is only a set of guidelines for good practice and not a substitute for binding corporate practices. The Caux Round Table also suffers from the same drawback as it is only a set of ethical norms for businesses operating internationally. The Cadbury Committee, though required the boards of all listed companies to comply with the Code of Best Practice and to list their compliance in the report and reasons for non-compliance, it was only considered as a mechanism to curb the problems of scams that occurred in the corporate world in the 1990s.

The ISO standards such as the ISO 9000 and ISO 14000 take care of the product quality and other relevant health and safety concerns and the latest one in the series is the ISO 26000 (ISO SR)[3]. It provides for social responsibility policies to be taken up by the companies and provides guidance and possible actions to the companies but again the very fact that they act as mere guidance and voluntary makes it not possible for certification.

Most of the companies worldwide have their own codes of conduct, the non-observance of which is not seen as a duty violation as all of them are merely voluntary and act as codes of good conduct but there exist initiatives at the international level such as the OECD guidelines, ILO tripartite declaration, UN Global Compact, 2003 UN Norms on Transnational corporations, SA 8000 and so on which will be reviewed in the next section.

The OECD Guidelines for Multinational Enterprises are guidelines related to responsible business conduct jointly addressed by governments to the multinational

[2] http://institute.jesdialogue.org/fileadmin/bizcourse/INTERFAITHDECLARATION.pdf

[3] The guidelines has identified core areas in the field of social responsibility such as human rights, labour practices, environment, fair operating practices, consumer issues and community involvement. The areas identified under human rights include due diligence, human rights risk situations, avoidance of complicity, resolving grievances, discrimination and vulnerable groups, civil and political rights, economic, social and cultural rights, fundamental principles and rights at work.

companies. They are non-binding principles and this itself is the basic shortcoming of the OECD guidelines so far as promotion of corporate social responsibility is concerned. The OECD Guidelines follow a unique implementation mechanism of National Contact Points that are established by respective governments of member nations to implement the principles enunciated in the Guidelines. The National Contact Points in turn support the multinational enterprises and other stakeholders to take suitable actions to advance the implementation of the Guidelines. The NCPs also provide a platform for mediation and conciliation mechanisms for solving practical problems that may arise. The drawbacks of the OECD guidelines for the reason of it being voluntary and non-binding is very evident from the instance of P&O's proposed port in Dahanu, India. The facts of the situation were that P&O (Australia), which is a subsidiary of P&O (UK), were trying to construct a mega-industrial port in Dahanu which was an ecologically fragile area. It breached several important principles in the OECD Guidelines including that of human rights, employment, environment and competition policies. But the fact that the guidelines were voluntary prevented any actions which could have been taken against the multinational company. Though P&O withdrew from the project in Dahanu due to severe local opposition, the instance undoubtedly demonstrate some of the explicit flaws of the Guidelines, the major ones being lack of clarity regarding their scope and application outside the OECD territory and their limited usefulness in encouraging socially and environmentally responsible corporate behaviour.[4] In this context, it has been noted that one of the deficiencies of the guidelines is the problem with the territorial extension of the guidelines to non-adhering states to OECD.[5]

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy offer guidelines in relation to conditions of employment, wages and

[4] Sultana Bashir & Nick Mabey, 'CAN THE OECD MNE GUIDELINES PROMOTE RESPONSIBLE CORPORATE BEHAVIOUR? AN ANALYSIS OF P&O'S PROPOSED PORT IN DAHANU, INDIA', WWF-UK Research Paper, November 1998, http://www.oecd.org/investment/mne/2089920.pdf. According to the authors, the Guidelines cannot therefore be considered to be a useful tool for ensuring corporate compliance with social and environmental standards and promoting sustainable development.

[5] Stephen Tully, 'The Review of the OECD Guidelines for Multinational Enterprises' 50 The International and Comparative Law Quarterly (2001) p. 394-404

industrial relations, promoting employment, providing better labour conditions in terms of wages and industrial relations. There is little scope for extending the application of the declaration specifically to human rights abuses by business as its main focuses are labour rights and employment rights. The ILO Tripartite declaration too shares the drawbacks of OECD guidelines as the same is also not very effective due to its voluntary nature and due to the absence of strict enforcement measures.[6]

The UN Global Compact principles enjoy universal consensus and has been derived from UDHR, ILO's Declaration on Fundamental Principles and Rights at Work, Rio Declaration on Environment and Development and the United Nations Convention against Corruption.[7] The practical benefits in participating in the UN Global Compact include establishing a global policy framework, partnerships with UN agencies, governments and other stakeholders so as to advance sustainability solutions, linking business units and utilizing the UN Global Compact management tools. Though the company has to follow the Global Compact principles once it becomes a part of the commitment, the basic issue is whether a company voluntarily joins the commitment and strives to protect human rights and other related rights. It is true that companies like Royal Dutch Shell, Novo Nordisk, and BP Amoco have publicly proclaimed their cooperation with the UN and that they will safeguard human rights, but it is to be seen as to whether they will be really following what they proclaimed in the light of future events.

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights got established shortly after the launch of UN Global Compact and this made it clear that the UN is serious in its endeavour to ensure that the TNCs respect human rights. The 2003 UN Norms had made a mark in the context of corporate human rights responsibility when it was drafted as these norms contain obligations not just in general terms to 'foster and

[6] Danwood Mzikenge Chirwa, 'The Long March To Binding Obligations Of Transnational Corporations In International Human Rights Law' (2006) 22 S. Afr. J. on Hum. Rts.76, 88
[7] http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

respect human rights', but obligations that specifically relate to rights of workers[8], security of person[9], principle of non-discrimination[10], various other labour rights[11], consumer rights[12] and environmental protection[13]. The 2003 UN Norms is not just

[8] Para 5: Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.
Para 6: Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.
Para 7: Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

[9] Para 3: Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.
Para 4: Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

[10] Para 2: Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

[11] Para 8: Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.
Para 9: Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

[12] Para 13: Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

[13] Para 14: Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies

limited to TNCs, but apples to 'other business enterprises' that includes contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity[14]. The Norms, thus ensures that the TNC makes sure that its supply chain follows due human rights obligations in its operations. Rather than merely stating, like many other initiatives in this regard, that 'states are primarily responsible for the protection of human rights', the 2003 Norms proceeds to state furthermore that 'within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups'. This was also made a part of the 'General Obligations' that form the first principle of the Norms. The 'general provision of implementation' in Para 15 and 16 provides for periodic reporting mechanism[15] and clause 18 provides for effective and adequate reparation to those that have been adversely affected by failures to comply with these Norms in the

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relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

[14] Para 21

[15] Para 15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

Para 16. Transnational corporations and other businesses enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other businesses enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

form of reparations, restitution, compensation and rehabilitation.[16] This clearly suggests that the 2003 UN Norms are quite different and practical from the rest such as the UNGC, ILO tripartite declaration and OECD Guidelines as it specifically provides for an effective implementation mechanism, reparations in case of violations and proper redressal options[17]. But the norms lack legal force as the same had not been requested by the UN Commission on Human Rights which met on April 2004 and it is also interesting to note that the Commission did not vote for or against the norms but simply set it aside.[18]

The UN Guiding Principles on Business and Human Rights were introduced in the year 1976 and was updated in 2011. Its main aim is to bring in the business enterprises within the realm of protection of human rights. It should be noted that the previous initiative by the UN on the same aspect, 'the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' could not be implemented due to the objection from the side of governments and business community. The main point of criticism against the 2003 UN Norms was that it established legal obligations for enterprises that were analogous to the legal obligations of States under international human rights law.[19] At the outset itself, it has been specifically stated that the United Nations Guiding Principles on Business and Human Rights shall apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. The United Nations Guiding Principles on Business and Human Rights is

[16] Para 18 of the Norms: Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.

[17] Second part of para 18: In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

[18] Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 Global Governance 279, 287

[19] Dr Jonathan Bonnitcha, 'The UN Guiding Principles on Business and Human Rights: the implications for enterprises and their lawyers', 2012 The Business and Human Rights Review 14

not an international instrument that could be ratified by the states but is a guidance which requires the states to ensure that the obligations set out are duly complied with in their domestic legislations[20].

The UN Guiding Principles has resulted in certain states in US taking human rights seriously.[21] The Transparency in Supply Chains Act, which is a legislation in California mandates that any retail seller or manufacturer that does business in California and has worldwide gross receipts in excess of USD$100m should identify the extent to which they have audited their suppliers for compliance with company standards on slavery and human trafficking.[22]

The UN Guiding Principles can be considered as a global standard of expected conduct for all business enterprises but they do not purport to create new legal obligations for business.[23] The fact that the Guiding Principles are not legally binding has created a doubt regarding its effectiveness. As it does not create any mandatory obligations, it is doubtful as to whether the business enterprises will actually follow these principles in their activities. Though the UN Guiding Principles on Business and Human Rights are non-binding and voluntary, some of the countries have made an attempt to follow the same in their domestic practices. For example, as envisaged under the UN Guiding Principles on Business and Human Rights, Finland has introduced a 'National Action Plan' in October 2014 so as to develop mechanisms that could improve the impact of business on human rights[24]. At the same time, India has not implemented any kind of National Action Plan as envisaged under UN Guiding Principles on Business and Human Rights.

[20] http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf
[21] Charles E. Borden and Schan Duff, 'Beyond the Guiding Principles: corporate compliance and human rights-based legal exposure for business', 2012 The Business and Human Rights Review 11
[22] Charles E. Borden and Schan Duff, 'Beyond the Guiding Principles: corporate compliance and human rights-based legal exposure for business', 2012 The Business and Human Rights Review 11
[23] Dr Jonathan Bonnitcha, 'The UN Guiding Principles on Business and Human Rights: the implications for enterprises and their lawyers', 2012 The Business and Human Rights Review 2012 14
[24] Mari Tuokko, 'Corporate Social Responsibility: Finland and India', Vol 2 Issue 2, In Law Magazine (2015)

ATS and its inapplicability

The application of Alien Tort Claims Act of the United States was recently in issue in the case of corporate human rights violations caused by Shell Oil Corporation in Nigeria[25]. It is a 33 worded statute which states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." As can be understood from the wording, it allows foreign citizens to bring civil actions in cases of human rights violations even for conduct committed outside the US. Though lawyers all around and NGOs who support human rights hailed the fact that such an issue was brought before the courts, that too under ATS, the case resulted in the unfortunate judgment as the court refused to give remedy on the basis on ATS citing that the presumption against extra territoriality of a statute also applies to ATS. It was clear that the judges were politically apprehensive of the fact that US citizens would be called before courts in another jurisdiction if ATS was applied in the case of Royal Dutch Petroleum and the same is evident from the wordings in the judgment[26]. The effect of the judgment was very evident in the subsequent pronouncements by the court. *In Sarei* v. *Rio Tinto*[27], it was held that the US Court may exercise jurisdiction under ATS over foreign companies for violations of international law even when the parties are non-US citizens and even though the torts were committed abroad. The main accusations levelled against the company were that it was complicit in war crimes and crimes against humanity committed by the Papua New Guinea army during a secessionist conflict on Bougainville and that the company engaged in racial discrimination against the black workers and caused environmental hazards that

[25] *Esther Kiobel* v. *Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013)

[26] The judgment states, "Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and in- stead defers such decisions, quite appropriately, to the political branches."

[27] 671 F 3d 736 (9th Cir 2011)

severely affected the health of the inhabitants of the village.[28] Though the District Court held that the appropriate forum for dealing with accusations such as environmental harm, cruel, inhuman and degrading punishment and other gross violations of human rights violations was the courts at Papa New Guinea, it admitted that the same courts would not be capable of dealing with issues of war crimes, crimes against humanity and racial discrimination as these claims are of 'universal concern'. Though in appeal, the court held that the claims of genocide and war crimes fell within the ATS jurisdiction and was supposed to be sent to the District court for further proceedings, in the light of the decision in Kiobel, the case got dismissed in the company's favour. Various disparities could also be seen between the activities of Shell and their business principles, but the fact that all those are voluntary make it ineffective and non-binding.

Companies Act 2013 – A botched endeavour

The reason to include CSR in the context of 'business and human rights' is essentially because CSR is a concept that is linked with the concept of human rights and the same is evident from the evolution of the concept. India, according to many, has made a tremendous improvement in the realm of its policy towards CSR by making a mandatory spending of a share of its profits towards CSR activities. Though the legislation has imposed bigger responsibility on the companies, it has failed completely in ensuring its compliance. The Act specifically states that the companies who satisfy the S.135 criteria could even get away by citing the reasons for not spending the amount for CSR activities. This 'comply or explain' approach could very well be used by a large chunk of companies to evade themselves from CSR obligations. There also exists a main concern that the companies who otherwise engage in human rights abuses will also be categorised as those following CSR if it spends 2% of its average net profits. The interesting thing is that most of us have not realised that the mandate of spending 2% of the average net profits towards CSR activities is not something new in India. The courts in India have made similar

[28] Rio Tinto Lawsuit < http://business-humanrights.org/en/rio-tinto-lawsuit-re-papua-new-guinea#c9304> accessed on 23rd January 2015.

innovative steps in cases like *Pravinbhai Jashbhai Patel & Anr. v. State of Gujarat & Ors*[29] and *Deepak Nitrite Ltd v. State Of Gujarat*[30].

Conclusion

The difficulty lies in not only having non-binding norms and principles. To bring out the liability of corporations, even under the international law, is difficult. In general, even in the international platform it has been very difficult to fix legal responsibility upon the states for the acts done by corporations. The case of *Nicaragua* v. *United States of America* is an example[31]. Moreover, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)[32] that normally attributes the conduct of any organ of the state to the act of state is also of no help as it specifically states that the organ should be empowered to exercise elements of the governmental authority to be considered as an act of the State[33]. In the alternative, the act or conduct should be under the instructions or direction or control of the state[34]. The activities of business may not always fall under the above mentioned categories explicitly. But the truth remains that in many cases of human rights violations by corporations, the state remains complicit. Reforms at the national level are also required especially in the outlook towards definition of state. It is time that the judiciary resolves the dispute as to whether private corporations are 'state' for the purpose of enforcement of fundamental rights in the light of *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya* v. *V.R.Rudani & Ors* and *Dr. John Kuriakose* v. *State of Kerala.* The concept of forum non conveniens and Separate personality for parent

[29] (1995) 2 GLR 1210
[30] (2004) 6 SCC 402
[31] In Nicaragua v. United States of America it was held that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State. But the court also held that though the US encouraged the commission by the contras of acts contrary to general principles of humanitarian law, it could not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America.
[32] Report of the International Law Commission on the work of its fifty-third session in 2001
[33] Article 5
[34] Article 8

company and subsidiaries are further hurdles towards making corporates responsible for human rights abuses. The case of Anvil Mining in the Democratic Republic of Congo and the related human rights abuses the company had caused is an example of the problems with the implementation of *forum non conveniens* doctrine. It is hoped that the norms that exist at the national and international level soon gets modified with suitable reparations and remedies so as to make them binding on corporations.

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A DREAM, A HOPE, A CHANGE FOR THE BETTER - TOWARDS REALIZATION OF CORPORATE ENVIRONMENTAL RESPONSIBILITY

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Introduction

"The only thing that never changes is that everything changes". This quote by Loius L'Amour is quite famous and popular amongst all of us. This is so true in almost all the cases and it is not really surprising that the same is the case with our legal system too. We have had landmark judgments that lasted for decades as binding precedents but were overruled by subsequent judgments or legislations. It is true that it is the beauty of the concept of precedents and inevitably a necessity in the present society. But aren't we creating a situation where we expect anything to change at any moment and to believe that nothing is static at least for some period of time. Aren't we being betrayed of an assurance that this is what 'the law is' and 'the law will be' for a given period of time.

The instances of 'CHANGE'

The fact that there have been major changes in land legislations and judgments regarding land acquisitions, its implications on constitutional rights and later amendments is known to everyone. We started off the debate in 1951 with *Shankari Prasad* v. *Union of India* followed by *Sajjan Singh* v. *State of Rajasthan* (1965), both the judgments holding that amendment is a constituent power and hence it cannot be considered as law for the purpose of Article 13 of the Constitution of India. The essence of the judgment is that fundamental rights can be amended by the Parliament. The country witnessed a change in the case of *Golak Nath* v. *State of Punjab* (1967) when the court held otherwise. A later decision by the Hon'ble Supreme Court in *Keshavananda Bharati* v. *State of Kerala* (1973) is still considered as a ground-breaking one as it propounded the basic structure doctrine for the first time and held that Parliament can amend any part of the Constitution including Part III, but without altering the basic structure. As is evident, a sea change took place in the gap of 22 years but we could always say that the law regarding land acquisition was at an evolutionary stage then. We had to wait for years for the Supreme Court to traverse through other decisions such as *Indira Gandhi* v. *Raj Narain* (1975) and *Minerva Mills* v. *Union of India* (1986) to clarify the concept of basic structure and finally in 2007, we got the answer in *I.R. Coelho* v. *State of Tamil Nadu* (2007) that even the Ninth Schedule is not immune from judicial review.

We have had instances of our courts dwelling into the most debated issue in our nation, 'reservation in educational institutions'. Though the court, through its decisions in *T.M.A. Pai Foundation* v. *State of Karnataka* (2002), *Islamic Academy* v. *State of Karnataka* (2003) and *P.A. Inamdar* v. *State of Maharasthra* (2005) held that private educational institutions that neither receive aid or grant from the state are unhampered by restrictions imposed by the state, we witnessed the so-called 'change' when Parliament altered the entire position by way of 93rd amendment in 2005. The amendment incorporated Article 15(5) in the Indian Constitution which exempted minority institutions, but brought other private educational institutions under the restrictions imposed by the state.

There was a time when the country was desperate to know the attitude of the judiciary towards the test of obscenity and in 1965, the Supreme Court in *Ranjit D Udeshi* v. *State of Maharashtra* by applying the Hicklin's test adjudged the test of obscenity in the light of its impact on vulnerable sections of the society. And just when we thought that the law is going to stay forever, in 2014 'the change' happened. In *Aveek Sarkar* v. *State of W.B.* (2014), the court held the 'community standards test' to be applicable. True, that it is a welcome change but nevertheless it is a change.

The position with regard to imposition of death penalty is not different. The observation in the case of *Sangeeth v. State of Haryana* (2013) that the circumstances of the criminal referred to in *Bachan Singh* have not been followed in most of the previous cases clearly points out the problems of 'change'. There have been decisions in 2013 in the context of death sentence that seemed to be confusing from another point of view. After elaborate discussions regarding delay as a factor in commuting death sentence to life imprisonment in cases such as *Vatheeswaran, Triveniben, Javed Ahmed* and *Sher Singh*, the S.C. in *Devender Pal Singh Bhullar v. NCT of Delhi* (2013) held that the judgments that state, "long delay may be one of the grounds for commutation of the sentence of death into life imprisonment" cannot be invoked in cases where a person is convicted for an offence under TADA or similar statutes. The same judges who decided Bhullar's case commuted death sentence to life imprisonment in another 2013 decision (*Mahindra Nath Das v. UOI*). If the delay in disposing of the mercy petition in Bhullar's case was 8 years, it was 12 years in *Mahindra Nath*. The only rationale that one can find is that the former one related to an offence under TADA and the latter one related to an offence under IPC. The beginning of 2014 has now witnessed the S.C. (*Shatrughan Chauhan & Anr* v. *Union Of India*) deciding that the delay in disposing of the mercy petition is a valid ground for commutation of death sentence. Nowhere in the judgment is it stated that the ruling does not apply to offences related to terrorism.

The frequent 'changes' that the legal system suffers may result in errors that cannot be rectified later. This is especially true in the case of death penalty. In U.S., there have been instances where death penalty was ordered but on the basis of a mistaken identity. The instance of Carlos DeLuna in US who was executed as per the order of the court but later turned out to be an innocent person is a

reminder of two things. Firstly, there can be situations like these where the courts should be vigilant enough to appreciate the right evidence before it and come to a correct conclusion. Secondly, the fact that there are no clear cut guidelines in cases regarding imposition of capital punishment and the fact that the already established principles undergo a state of flux may result in a judgment which cannot be appreciated at any cost.

The nation is currently witnessing a 'change' in the method of appointment of judges. If it was the 'collegium system' that reigned for years, it is going to be an entirely different set of procedures from now on. Though as of now, the court have retained the collegium system, it is yet to know the welcoming changes that could further happen in the method of appointment of judges.

Towards a positive change – Corporate Environmental Responsibility

Now that the different organs of our state, Parliament, Executive and the Judiciary teach us that things are subject to change, why can't we change for the better? Change can also be positive; it can be towards legalizing the conduct which was otherwise illegal. It can also be towards incorporating into our legal system, a concept which has been hitherto considered as alien by our justice administration bodies.

The non-state actors have a major role in the day to day activities almost in each and every field including that of human rights, labour standards and most importantly environmental protection amongst various other areas. If it was the state and its agencies who used to violate environmental rights, at present it is the non-state actors who have taken up that role. In the current scenario it is extremely a difficult task to control the non-state actors such as transnational corporations because of their huge financial power but the fact remains that they are involved in grave violations of human rights including that of violating worker's rights, causing environmental pollution, employing child labour, violating basic access to health and shelter of workers and their families.

The human rights abuses caused by Vedanta Corporation in India, the underground water depletion caused by Coca-Cola plant in Plachimada, the forced displacement that ensued due to activities of POSCO, the resultant land acquisition from poor farmers on account establishment of Tata Nano project in Singur, privatization of Sheonath river, emission control fraud by Volkswagen, the after effects of Bhopal Gas tragedy and especially the fact that the judiciary failed to provide adequate sanctions to the violators concerned proves the need for the 'change' in the legal system so as to make the corporations socially accountable for their acts against the environment. There exist human rights abuses in other parts of the world such as the incident of release of toxic gas from Trafigura in Abidjan affecting more than a lakh of people, the environmental degradation and poisoning caused by operations of Rio Tinto in Papua New Guinea, the frequent oil spill by Shell in Nigeria etc. All these clearly show that it is high time that there is a positive change towards

incorporating corporate environmental responsibility into our legal system.

It is true that there have been different initiatives taken up at the international level to control the activities of corporations in the area of environmental protection. Be it the OECD Guidelines or the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy or the UN Global Compact, none of them succeeded in creating binding set of standards. Contrary to this, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights in the year 2003 did set up some binding environmental standards but the same was not accepted by the international community and was set aside at a later stage.

The National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (2011), released by the Ministry of Corporate Affairs is an enhancement of the Corporate Social Responsibility Voluntary Guidelines of 2009. The 2011 guidelines are a set of framework for responsible business practices for Indian multinational corporations. Its sixth principle is in connection with environmental protection as it requires businesses to prevent pollution, ensure sustainability, employ precautionary principle and focus on biodiversity conservation. Similarly, clause (iv) of Schedule VII of the Companies Act of 2013 that deals with CSR activities specifically provides for ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources, and maintaining quality of soil, air and water. But, the Companies Act of 2013, though incorporated the requirement of CSR, it is still unclear as to the after effects/sanctions meted out to those corporations who fail to comply with Section 135 of the 2013 Act. It is also not clear as to what all are the social responsibilities of companies whose net profits fall below Rs. 500 Crore or who do not satisfy the criteria laid down under Section 135(1).

All the above mentioned steps taken at the international and national level covers only a minor portion of the concept of corporate environmental responsibility. But all of them suffers a drawback which is nothing but the lack of effectiveness as most of them are voluntary codes and do not necessary involve any form of sanction to corporations who do not adhere to the codes or guidelines at the national and international level.

Now that the 'change' cannot be avoided altogether, let's not continue to argue. Let's hope for a change; this time but a positive change, a change in the attitude of our legal system. Let's be bold to embrace the concept of corporate environmental responsibility and make sure that business entities too are held accountable for the gross violations that they cause to the environment at large. Let's hope for the laws in India to be adequate enough to make the corporations accountable for the environmental violations caused by them.

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