

# Before the Law and Multinational Corporations<sup>1</sup>

## Abstract:

There have already been long battles over how to regulate natural resources most efficiently in terms of equity, conservation, and economic efficiency. With the emergence of multinational corporations, this subject has become much more contested for law, economics and society, as international corporations have become powerful entities in the globalized world. The role and responsibilities of multinational corporations operating in several jurisdictions have been questioned in terms of their activities and overuse damaging over-exploitation of natural resources, the environment, and human beings. The issue of what are adequate legal safeguards to limit the actions of multinational corporations in the context of natural resource use and conservation remains highly contested until now. This chapter will assess the effectiveness of the current legal regime in limiting multinational corporations' actions and finding solutions.

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## 1. Introduction

Multinational corporations (MNCs) are one of the most critical prominent phenomena in the global world. As a capitalist form of corporation, MNC's work has structurally spanned national boundaries (Kaminga, 2017:1) and MNCs became a potent entity in the globalized world and challenged several jurisdictions through their greater power and wealth management capabilities. They now behave *state-like*, and the state as a *transcendence collectivizes* (Baxi, 2016: 23). MNC has greater strength and wealth management capabilities than many national governments, especially in the Global South. The authoritative and dominative presences of MNC in the global south, developing countries, and several jurisdictions have been contested (McInerny, 2007:1). In the present context, MNC can be defined as a business 'model' with operations in host countries outside the state in which it was absorbed (CTM, 1983).

Given that the key concern now is how to control natural resources most efficiently in terms of equity, conservation, and economic efficiency, with the emergence of MNC, this subject has become much more contested for law, economics and society. This essay first discusses the concept of MNC and their development in the classical economic theory. MNC flourished in the *laissez-faire* ecosystem with the primary purpose of profit maximization without social responsibility. To reduce the '*profit-maximization*' behaviour of MNC and demanding that businesses should have social responsibility in the greater humanitarian interest, Corporate Social Responsibility (CSR) was developed. The essay identifies CSR flaws in the context of governance. MNCs exercise direct and indirect control over land, labour, and capital in their direct relationship with natural resources, human beings, and the environment. Its impact can be observed throughout its long history. The part of the book evaluates gross human rights violations, environmental degradation, resource exploitation, and MNC justification for development (in section 2).

Under the guise of promoting good governance and bridging governance gaps (Vogel, 2009:160), the United Nations (UN) and other international organizations have sought to regulate MNC through a self-regulating approach. This chapter offers a concise history and analysis of the United Nations' handling of MNCs in section three.

The mode of international institutions is that sovereign states can obligatorily regulate the MNCs (UNGP, 2011:1), and international institutions can only voluntarily guide MNC behaviour in a better way. Municipal law regulates MNC in their territories of operation. Section 4 of this chapter focuses on the Bhopal Gas Disaster and finds significant limitations in the legal processes to regulate MNCs' destructive behaviour.

However, the issue of whether non-state entities like MNCs are subject to international law and human rights commitments remains highly contentious. The law has not yet found a way to effectively curtail the destructive behaviour of MNCs. Where does the law make its home in the aftermath of the Bhopal disaster? Is justice a resident of the jurisdiction of international law? Jurisprudence, domestic law, and international law all knelt beside MNC. Section 5 finds the homelessness of law for regulating the MNC and seeks to find some jurisprudential, value-based solutions in 'Legal Pluralism.'

## **2. Multinational Corporations and Corporate Social Responsibility**

The notion of MNC is tied with the origin of trade and cultural exchange from the early days of human society. It acquired a more structural character in the current modern state, mainly after World War II. MNC flourished in the *Laissez-faire* ecosystem with the primary purpose of profit maximization without social responsibility. *Laissez-faire* is a sub-part of classical economic theory. The allocation of production components (land labour and capital) is decided by the distinct and autonomous decisions and actions of individuals acting freely as factor suppliers, consumers, and firm managers. This eloquent description of the classical economic theory of general mechanics of the *Laissez-faire* system is coined by Adam Smith (Bowen, 2013:16). Although the Welfarist approach to Keynesian economic theory eventually grabbed some part of the power of *Laissez-faire*, free market, competition, and freedom enterprise continued to evolve in the neoliberal market. MNCs are justified based on economic growth, export-based industrialization, capital formation, technological development, a cleaner environment, poverty reduction, job creation, and skill development. In the 21st century, MNC has become one of the central institutions of the global south to regulate, but also to exploit natural resources.

MNC started their targeted operations in developing countries for cheap labour, resources, and a vast market (Ferdusay& Rehman, 2009). As a result, especially the global south is facing a detrimental impact on autonomous development, capital flight, workers exploitation, environmental degradation, tax evasion, organized crime, and health and safety hazards (Ferdusay& Rehman, 2009). This windfall benefited individual stockholders and the Global North's guest countries, where MNCs pay significant tax. On the other hand, advocates of neoliberal market-oriented economists and *Laissez-faire* assert that there are hundreds of positive impacts of MNC, such as MNC contributing almost one-third share of global GDP (Backer et., 2019) and globalizing the world through jobs and development. However, this claim is also a contentious issue in economic theory. When it comes to a much more effective framework for ensuring social justice, environmental sustainability, economic efficiency, and human rights in using natural resources, MNCs have failed miserably. The profit maximization economic theory catapulted MNC to the status of supreme entity with unlimited power shareholders and insufficient supervision.

CSR is theorized as a 'humanistic theory of welfare' by an economist and social scientist (Bowen, 2013:3-16). In theory, hope advocates that CSR will work in the greater humanitarian interest, corporations should be socially responsible, and profit should be shared. The intellectual history of CSR (Agudelo et., 2019) and its role have been defined and explored in detail in academic literature since the Second World War. Defining CSR is challenging for scholars because of its nature, scope, and especially correlation with MNCs. The umbrella term 'Social Responsibility' entails aspirations for a standard of living that is a dignified life for everyone, accountability for the overall well-being of the community, conservation of natural resources, and integrative ecological preservation. Largely, it has been characterized as the voluntary integration of social and environmental issues into company operations and interactions with stakeholders voluntarily (EC, 2011). CSR can be summarised as 'volunteerism' that is self-regulating and above and beyond legal compliance based on the 'theory of trusteeship.'

As a well-structured and highly motivated for-profit organization, an MNC organically demands strict regulation. Yet, CSR aspires to exert control based on 'volunteerism.' It appears to be hypothetical on this base. CSR principles may have a high moral standard but are not alien to human rights (Hansen, 2008: 410) and environmental rights standards. In the absence of being internationally legally binding, control is conducted based on self-regulation

initiatives beyond legal compliance (Frynas, 2012:4-17). CSR organically failed to regulate the unlimited power of MNCs in practice (Hanman & Kapules, 2004: 85). However, under pressure from the political structure and international institutional practices and to gain public legitimacy, MNCs generate social responsibility in some circumstances. Environmental, social, and development (ESG), 'green' loan and alignment with Sustainable Development Goals (SDGs), UK's Modern Slavery Act are a few examples in favour of the CSR governance module. However, it is supposed that MNCs produce some responsibility for their benefits and obtain public perceptions to legitimise themselves. Evidence of 'Greenwashing' and 'Bluewashing' manifests in the *Shell* case. Here, after significant human rights violations and a lengthy lawsuit, *Shell* 'Greenwashed' and rebranded itself for some time, spending \$ 300 million on 'investing in natural resource ecosystems' in CSR responsibility (Frynas, 2009:178).

In general, the approach of CSR is based on the 'Kantian Deontological Ethical Theory of Self-Regulation (Baxi, 2016), and the MNC approach may be called the basis of the 'Machiavellian Devious Realism Theory Profit-orientation.' CSR's ethical approach failed to counteract the rapacious MNC approach. In other words, CSR knelt beside about 62000 MNCs (MC, 2018) based on volunteerism. CSR's Deontological theoretical approach thwarts justice in principles and application to regulating MNCs.

### **3. Failure of International Governance**

Under the guise of promoting good governance and bridging governance gaps (Vogel, 2009:160), the United Nations (UN) and other international organisations have regulated MNC; based on the self-regulating principle of CSR. Since 1970, public intellectuals, human rights and environmental activists, and developing countries have been campaigning for mandatory regulation of MNCs. International bodies such as the UN, International Labour Organisation (ILO), Organisation for Economic Cooperation and Development (OECD), and European Union (EU) held the position that self-regulating is an appropriate way for corporations (Kamminga, 2004:1). As an international governing body, the UN approached MNCs uniquely. The approach of the UN is referred to as the *pragmatist* approach (Baxi, 2006:34). Muchlinski (2021: 213) divides this pragmatic approach to monitoring MNC behaviour into three phases. First the codifications of CSR (1980–90), second the phase of 'Volunteerism' (1980–90), and the last as 'Institutional Volunteerism' (1990–UNGP). Guiding

Principles on Business and Human Rights (UNGP) is supposed to be one of the milestone achievements in regulating business behaviour under the regime of CSR international governance. The Human Rights Council unanimously adopted UNGP in June 2011. UNGP guidelines are central guidelines for states and private companies on their respective business and human rights commitments. John Ruggie is a guideline proponent of UNGP. He called it a 'Principled pragmatism' approach to regulating MNC behaviour. The UN approach has shifted from *pragmatism* to *principal pragmatism* (Ruggie, 2015:1-15) after adopting the UNGP. Professor Ruggie has been criticised for abandoning the human rights issue to self-regulation and failing to provide mandatory rules. Baxi (2016: 34) referred to the proposed UNGP as having the 'dignity of a third-class funeral'! In contrast, Ruggie (2015:14) argued that the guiding principles of UNGP as 'protect, respect and remedy' had succeeded in establishing the seeds of a new global regulatory dynamic in the domain of business and human rights, but Baxi (2016:37) doubts that

*'the success stories of 'how aspirational non-binding principles,' or "soft law," can evolve continuity over time into more durable and enforceable "hard law"—either in the form of a written treaty or in the consolidation of customary international practice" need to be told again and again.'*

The Institute for Multi-Stakeholder Initiative Integrity published a report (MSI Integrity, 2020:4) with the provocative title 'Not-Fit-for Purpose', assessing the 'protect, respect, remedy' formula and the effectiveness of worldwide standard-setting initiatives addressing the impact of economic operations on human rights and the environment. The research concludes with the failure of a self-regulating-based model and 'softening' (soft law) approach to corporates through UNGP. Another previous report of UNCTAD also indicates that just 12,000 enterprises participate in the over 780,000 most mandated CSR initiatives (Peter, 2008:959). Additionally, a study conducted in South Africa suggests that MNCs are not abiding by international institutions and do not demonstrate compliance with human rights and conservation (Peter, 2008:959). The UN aimed to redress power inequalities inside multinationals' power systems to make firms accountable for human rights violations (David & Kureger, 2003:903-922) but failed to adhere to the principal Covid-period for their employees (Muchlinski, 2021:226)

In general, the UN remained in the tone of 'religious preaching' mode when addressing MNCs' legal liability, criminal culpability, and social responsibility, expressing optimism that MNC would attain *enlightenment* and develop self-awareness. Could MNCs achieve *enlightenment* or some kind of self-controlled ordering in the absence of international legislation?

#### **4. Limitations of State**

There is a general understanding that MNCs will be regulated by the state efficiently. The guidelines of UNGP also confirm this notion (UNGP, 2011:1). Are sovereign states capable of handling MNCs within their restricted authority and territorial scope globally? The Bhopal Gas Disaster of 1984 and several more incidents may help understand this dilemma. In the Bhopal gas disaster, thousands of people died due to Union Carbide Corporation's negligence (Ramanathan, 2019:141). Ranganathan asserts that there are 2,800, an official figure, and an estimated 8,000 deaths. The more important question here would be whether meanwhile we have better processes.

Over the years, more than 20,000 individuals have died because of the gas effect (Ramanathan, 2019:140). Despite the magnitude of the accident and the charge of culpable homicide, there was no extradition request for Warren Anderson, the Union Carbide Corporation (UCC) chairman. The Bhopal case exposes the incompetence of the state to dispense justice when it comes to dealing with MNCs. The Indian government initially sued UCC and its CEO in an American court on behalf of Bhopal victims. The US court rejected the case based on the principle *loci delicti commissi and forum non-conveniens*, and the case was returned to the Indian court (Baxi, 2016:25).

Because the Bhopal case has multiple narratives, a failing justice system, and limitations of state jurisprudence, Baxi (2016) discusses four catastrophic issues in court. On 3 December 1984, the first 'Bhopal Catastrophe' occurred. 'The Second Catastrophe' appeared in 1989 when the Supreme Court of India issued temporary settlement orders. The third 'Bhopal Catastrophe' happened with the distribution of some redress following settlement. A fourth Bhopal Catastrophe is imminent since the UCIL is likely to prolong further reconsideration, review, and reversal of the judgment. There is a loss of faith in the state and courts; both have

acted unfairly and failed to win justice for the victims of Bhopal (Ramanathan, 2019:139). The prevalent idea that sovereign states provide justice to their citizens mythically failed. Several cases have been filed in Indian and various other courts over the last 37 years, but victims did not get complete justice. The Indian court is ineligible (Ranganathan, 2019:140). The study of other courts also confirms that courts have not showed clarity on how MNC behaviour should be regulated. The Supreme Court of Canada, in the case of *Nevsun Resources v Araya* accepted in principle that Canadian courts have jurisdiction over human rights claims against a Canadian parent mining firm for activities of its MNC (Muchlinski, 2021: 225). On the other hand, the Second Circuit Court and Supreme Court of the US of America categorically denied intervening in the *Kiobel case* with MNC, stating that subjects of human rights legislation and jurisprudence are not under the topics of sovereign court; there are risks of inappropriate judicial intrusion in the conduct of foreign policy (Baxi, 2016: 212).

Furthermore, there are instances where the state is a co-conspirator in a crime with MNCs. In the case of Nigeria's grave human rights violation by *Shell*, the state is implicated in criminal activity with the company. The organized crime of the Nigerian state's involvement with *Shell* resulted in the deaths of hundreds of innocent people, and the law must still look into it. In multiple lawsuits filed in British and Dutch courts, Royal Dutch Shell has contended that it is not responsible for oil spills and other infractions committed by its Nigerian subsidiary (Monobit, 2019). In 1990, companies operating in Ecuador were responsible for widespread pollution, damaging the river system by discharging nearly 400 million barrels of wastewater containing carcinogenic metals (Moregna, 2020). Although the consequences of malpractices of MNCs can be witnessed on indigenous people as well, victims are still stuck for justice (Fryans, 2012: 4; Kimberlings, 2013:242) in state jurisprudence. Menski (2022) warns that time is running out for the entire world in the face of such systemic failures to secure complete justice and seek to avoid man-made toxic interventions.

Ranganathan (2019:145) contends, however, after thirty years of pursuit of justice for the Bhopal case, that some results can be found in state legislation of India regulating MNCs, such as the National Green Tribunal Act, 2010, the National Environment Tribunal Act (NETA), 1995, and the Environment Ministry's role in drafting the Public Liability (Insurance) Act (PLIA), which was adopted in 1991 (Ranganathan, 2019: 145). Furthermore, unanswered questions are what is justice or even complete justice for the Bhopal, Nigeria,

and Ecuador cases, victims? And how likely are such devastating occurrences in the future? Are states prepared on a precautionary basis for that eventuality? Numerous questions remain unanswered!

Overall, the limited jurisprudential approach of municipal courts and State capacity to manage MNC are incomplete in the established international regime (Bohoslavsky et al., 2017: 76). India's promise of 'complete justice' under Article 142 of the Constitution sounds good, but a much tougher approach appears to be necessary to counteract power abuses of MNCs. The findings show that the state's soft laws and voluntary initiatives approaches have had little effect on reversing significant environmental damage (Morgera, 2020:1-22, 69-136). The question may now be whether a toughening of environmental constitutional law holds promise, such as is beginning to be witnessed in India's renewed efforts to intervene through more judicial 'green' activism (Menski, 2022). So far, the varied versions of the catastrophe of Bhopal demonstrate that the widely held belief that states will provide justice to their citizens and that the sovereign state is the 'home of law' has failed. There are limitations in the principle of *'loci delicti commissi and forum non-conveniens'* to dealing with MNCs. In the MNC era of a sovereign state and the statelessness of law, Victims of the Bhopal, Nigeria, and Ecuador cases continue to ask where they may go to seek justice, and where is the seat of justice. It reminds us of Kafka's 'Before the law' trial (Kafka, 2009):

*'Before the law sits a gatekeeper. A man from the country comes to this gatekeeper who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later. 'It is possible,' says the gatekeeper, 'but not now.'*

Sovereign states and international institutions have acted as gatekeepers preventing justice for victims of the Bhopal, Nigeria, and Ecuador cases.

## **5. Towards International legislation: Are We not Asking for the Moon?**

It remains a point of contention that constitutes an alternative strategy for dealing with the multinational regime and its flaws in international law, municipal law, and jurisprudence. Scholarly literature is abundant (Frynas, 2009; Mcinerney, 2007; Peter, 2008; Tamvada, 2020), indicating that one of the options is to transition from volunteerism to a compulsory regime and demand international legislation. Some global south countries, activists, and

scholars also require that the UN enacts centrally binding legislation on MNC (Ruggie, 2015:1). International NGOs such as Oxfam and Amnesty International have also made similar arguments, even though the European Union's attitude has shifted towards compulsory national or supra-national legislation (Beuerle et al., 2016). Nevertheless, the issue is that the UN approach to administering human rights law is still mired in 'Pragmatism' and 'Principled Pragmatism' based on Kantian deontological ethical theory. Ruggie (2015) also confirms this approach through UNGB. The system says that the UN itself disagrees with obligatory central international legislations, realising the limits of their own power. There are already various jurisprudential and international laws seeking to impose effective major regulations on MNCs, yet they remain full of loopholes? So volunteerism and self-regulation is the most appropriate way in the present global-socio political conditions. But Ruggie (see section 2) assumed that UNGP is a 'seed' of international legislation. Thus, it can be presumed that the possibilities of obligatory legislation cannot be ignored in the future. However, it also seems an over aspirational 'miracles' assumption in this scenario and manifests that such efforts may be asking for the moon, demanding something that is simply impossible, so that all one gets is a mirror image of the real thing demanded, as Menski (2016) has argued with regard to calls for a Uniform Civil Code in India? Similarly, demanding international regulation mechanisms to control MNCs seems too focused on international law activism and discounts, as Ramanathan (2019) also seems to accept now, the potential for strengthening national regulatory and punitive frameworks.

There are pretended notions that only universal international legislation and state-sanctioned law can save environmental, and human rights law may not be implemented without it. In the age of the Anthropocene, these attitudes must be examined with some urgency (Amirante and Bagni, 2022). No law can succeed without civic participation. Neglecting Social and religious diversity, and thus the issue of values, as the first part of Amirante and Bagni, 2022 confirms, is crucial. The ethical approach of the governance model, self-regulation, and multiple laws in human rights law, human rights itself will be humanitarian, but fail when it comes to effective local activism and intervention. It is necessary to bear in mind that because the positivist approach of human rights legislation ignored the legal pluralism of indigenous peoples' rights, non-western countries' sociocultural perspectives, and even the Community-Based Resource Management System (CMNRM), MNCs may be chased by so-called profit-driven activists, lawyers, intellectuals and judges in the name of human rights and

international law. Menski (2014:96) cautioned against this in various sociocultural, personal, and indigenous laws and has recently argued for a more focused and activated approach (Menski, 2022). The human rights approach of irrational heterogeneous attitude toward indigenous, sociocultural, and personal legislation may apply to MNCs. Baxi (2016:40) also says that human rights law is a plural entity: '[T]he problem with human rights is not their interpretive plurality. They mean different things to different peoples: 'right to interpretive plurality is a human right.' Thus, even demanding the hypothetical central obliged international legislation, neglecting the current socio-political scenario, and rejecting self-regulation ultimately would be an injustice in terms of not accepting volunteerism and self-regulation as law. The ideal way is not always best, not always perfect, demanding international legislation as the moon on human rights, natural resources, and conservation (Menski, 2014:97):

*'If constitutions and international legal conventions are promising the moon and all that most people get is a distorted mirror image; something must be seriously wrong.'*

Baxi (2016:39) also endorses this approach with an updated version of Kantian justice in the form of the deontological positions of John Rawls and argues for the possibility of internationally regulating MNC through a deontological justice paradigm, which works in both ways, through self-regulation and obliged legislation. Multiple laws can co-exist at the same time; instead of asking for the moon. Baxi (2016:38) argues

*'We need to tame our approach to harnessing both the mandatory and the voluntaristic perspectives. A collaborative approach, and a growing learning curve, among states, international organizations, MNCs (as well as other business entities), and social movements for justice for the violated should be welcome in principle.'*

## **6. Conclusion**

This article has highlighted the link between *Laissez-faire*, CSR, and MNC. *Laissez-faire* allowed MNCs to thrive, as profit-driven hierarchical organizations are unconcerned about natural resource uses and conservation and thus the Anthropocene got new fuel for its destructive trajectory. CSR evolved into a self-regulating mechanism for MNC behaviour based on the notion of voluntarism. However, CSR did not respond appropriately and with

sufficient care. Second, the UN as an international principled governing body accepts self-government based on the *Kantian deontological ethical theory* of self-regulation and fails to counterbalance MNC's *profit-oriented Machiavellian deceptive realism theory*. The chapter thus identifies that the onus seems to have fallen back on state-driven regulatory and punitive measures to keep MNCs in check.

Additionally, however, the finding identifies the limitations of the state in managing MNC behaviour in terms of human rights, conservation, and natural resources. The impossibility of obtaining justice under the premise of *'loci delicti commissi and forum non-conueniens'* in cases of Bhopal, Ecuador, and Nigeria is evident. UNGP was praised as a triumph for human rights and protection against multinational corporations. This part depicts the failure of UNGP, the *'pragmatic'* approach of the UN, and Ruggie's approach of *'Principled Pragmatism'* in terms of the 'Protect Respect and Remedy' formula. Criticism of Baxi on Ruggie's approach examines failures of too optimistic jurisprudential approaches. Criticism of Menski on human rights and international legislation is considered, and it is hoped that international law jurisprudence will embrace 'legal pluralism' to allow for more effective multi-dimensional claims for 'complete justice' as identified by Menski (2022). In conclusion, while the essay did not identify any *effective adequate* legal safeguards to regulate MNC actions in natural resource use and conservation, it validated Baxi's notion of national legal safeguards coexisting with international legislation and self-regulation, which also endorses the conclusion by Menski (2006: 134) that **'[w]e still face challenges in finding 'the right law', also when it comes to controlling MNCs. So there are no effective safeguards, but the urgency of further diligent activism is undeniable.**

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