SOCIAL AUDITING OF HUMAN RIGHTS COMPLIANCE IN TRANSNATIONAL CORPORATIONS: A JURIDICAL CRITIQUE

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Summary

Transnational corporations (TNCs) are a phenomenon of the 19th century. However, the evolution of TNCs can be traced back in ancient civilizations under different names and with different scope of their activities. In the beginning, the travelling merchants emerged and such travelling merchants were private individuals who traded across the frontiers of their lands in products produced by the skills and resources of the people of the home country. Till 14th century, these travelling merchants did the business as family traders or in groups. In 15th century, the origin of Charter Companies and the companies can be traced. There are many theories regarding nature and authority of TNCs. In this research, some of the theories discussed are: Corporate person theory, fictional or artificial entity theory, natural entity theory, contractual theory, communitaire theories, and concession theory.

According to the latest report of the UNCTAD, there are approximately 80,000 TNCs with 800,000 subsidiaries around the world. They are responsible for one fourth of the gross world product; the annual flow of foreign direct investment (FDI) they activate is, depending on the ups and downs of global economy, between 1300 and 2000 billion dollars. The activities of TNCs is classified by two theories. One theory considers TNCs as ‘Engines of Development’ whereas the other considers them as ‘Tools of Exploitation/Oppression’. To support their argument the proponents of the former highlights the role of TNCs in national economies as most dynamic actors. Further, they bring new jobs, technology, and capital, and are capable of exerting a positive influence in fostering development, by improving living and working conditions.

Whereas the supporters of the former theory stressed upon the facts that, the TNCs violate human rights by employing child labourers, discriminating against certain groups of employees, such as union members and women, attempting to repress independent trade unions and discourage the right to bargain collectively, failing to provide safe and healthy working conditions, and limiting the broad dissemination of appropriate technology and intellectual property. Corporations also dump toxic waste and their production processes may have consequences for the lives and livelihoods of neighbouring communities.
The present research address the question that whether TNCs have human rights obligation or not, if so, how these obligations can be enforced, challenges traditional concepts of international law. The traditionally preeminent position of the nation-state has played an important role in keeping the international legal system viable. From its inception, international law focused upon the sovereign territorial entity, giving natural persons and other entities a peripheral role. In the 20th century this strict subject-object dichotomy came under pressure. The types of entities with legal personality have diversified. The first example of such kind was the creation of The Free City of Danzig. This protectorate was created to solve conflicting interests between Poland and Germany. The territory was placed under the protection of the League of Nations.

TNCs traditionally have not been recognized as ‘subjects’ of international law. However, since the end of World War - II, international instruments or other legal initiatives have conferred international legal personality on a number of new non-State actors. This occurred in the Reparation for Injuries Suffered in the Service of the United Nations case. The International Court of Justice (ICJ) concluded that, in case the United Nations, has a legal personality. International legal personality entails two things: being capable of possessing international rights and duties and the capacity to maintain these rights by bringing international claims. There is evidence that TNC have had also a international legal personality and have participated in the international legal system for some time. Examples of such participation include application of public international law to contracts with state entities and participation in dispute settlement forums established either by treaty or intergovernmental organizations.

Whereas the Indian law personifies some real things and treats them as legal persons. Corporations, companies, trade unions, and friendly societies, institutions like universities, hospitals, objects like an idol, holy book Guru Granth Sahib are some examples of artificial personalities recognised by law in the modern age. The Indian law through judicial intervention recognize and upheld the concept of legal personality imposed upon on TNC and it further differentiated the fields of applicability when the question of fundamental rights come in. As Nicola Jägers reminds us, ‘legal personality is not a static concept: it is flexible and can be conferred and then later withdrawn.’ The complexity lies in that there is no central body that determines whether an entity has international legal personality. It is only through the behaviour of the principal actors, states, that we can establish which entities have legal personality.
International concern for human rights is not an entirely new subject. Concepts of human rights can be traced to antiquity – i.e., the Ten Commandments, the Code of Hammurabi’s approach to law as a means of preventing the strong from oppressing the weak, and the Rights of Athenian Citizens. Early efforts often came in response to atrocities of war and refugee problems. Religious, moral and philosophical origins can be identified not only in biblical and classical history but also in Buddhism, Confucianism, Hinduism, Judaism, Shinto, and other faiths. Rights concepts also emerged in national documents such as the Magna Carta of 1215, the Petition of Rights, 1628; the Habeas Corpus Act, 1679. Following the revolution of 1688 in England, Parliament enacted the Declaration of the Rights of Man (1689) to protect citizens from violations by the monarchy.

With the rise of nation States in the 17th century, however, classical international law rejected the notion of human rights and favoured State sovereignty. Development in the 18th and 19th centuries incremental steps to recognise individual rights and diminish the importance of sovereignty. In addition, 19th century efforts by non-state actors (that is, the first non-governmental organisations, such as the Anti-Slavery Society) to abolish the slave trade and to protect workers’ rights through unions evidenced a growing international concern for human rights and one of the earliest applications of human rights norms to non-State actors, for example, slave traders. The modern human rights movement began during World War II. The victors responded to the war and the Holocaust by forming the United Nations (UN). Soon thereafter, intergovernmental organisations in Europe and the USA also established their standards for the protection and promotion of human rights.

Most of the adopted human rights documents are based on a well established principle within the human rights field that the State has not only a duty to refrain from perpetrating human rights abuses against individuals, but also an affirmative duty to promote or ensure respect for the human rights of its citizens. This affirmative duty includes protection against human rights abuses that might be committed by non-state entities. Furthermore, under various human rights instruments non-State entities themselves appear to have duties with respect to human rights.

These instruments include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the UN Declaration on the Elimination
of Violence Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and several regional instruments.

The Indian judiciary while interpreting the law has fixed the civil as well as criminal liability of the TNCs in number of cases, for instance, *M.C. Mehta v. Union of India*, *Charan Lal Sahu v. Union of India*, *Union Carbide Corporation v. Union of India*, *Assistant Commissioner, Assessment-II v. Velliappa Textiles Ltd.*, *Standard Chartered Bank v. Directorate of Enforcement*, *Iridium India Telecom Ltd. v. Motorola Inc.*

However, the growing size and influence of these large companies became a matter of concern, especially for newly independent developing nations. They perceived TNCs as perpetuating colonial ties in economic terms and threatening political independence and development prospects. As human rights abuses have persisted worldwide and especially in developing and least developed states, so too have various attempts to establish international standards for corporate actions. Those efforts have been less than productive, because of two reasons: firstly, most of the development of international law through treaties has focused on State actors; and secondly, they have largely been without strong implementation methods or support from the United Nations (UN).

As a result, in the 1960s and 1970s, the activities of transnational corporations (TNCs) provoked intense discussions among the economists, academician, social workers, labour organisations, NGOs, political authority and even among states, related to labour and social issues, environment issues, corporate conduct and ethics, human rights, taxation, competition related aspects, that resulted in efforts to draw up international instruments for regulating their conduct and defining the terms of their relations with host countries, mostly in the developing world. These efforts were made at various level i.e., international level, regional level and at the States level.

To address effectively the activities of TNCs infringing on human rights, the need for creating a specific institutional and normative framework to complement the current general framework was advanced by number of States jointly. In 1974, the UN’s Economic and Social Council (ECOSOC) created the ‘Transnational Corporations Commission’, with 48 member States, which endeavoured itself with two priority tasks: to investigate the activities
of transnational corporations and to prepare a Code of Conduct for them. The UN Commission on Transnational Corporations prepared the draft United Code of Conduct for TNCs which was to be a statement from the international community regarding the international legal obligations of businesses. This code was discussed for thirteen years but it never saw the light of day due to the opposition of the world’s powers including transnational economic power and even the UN body never full adopted it. In the same year, ECOSOC also created, within the UN’s Office of the Secretary General, the Centre for Transnational Corporations an autonomous organism operating as the Secretariat of the Commission on Transnational Corporations.

The Organization for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws. In 1977 the International Labour Organization (ILO) adopted its Tripartite Declaration of Principles concerning Multinational Enterprises which incorporated relevant ILO Conventions and recommendations. In addition, the ILO assists private voluntary initiatives to establish and implement their own codes of conduct.

During the period when the UN, OECD, and ILO were preparing codes of conduct for business, other groups were also considering the obligations of businesses with regard to human rights conduct. Throughout the 1980s and 1990s efforts grew as an increasing number of consumers, investors, local communities, NGOs, and other started to take note of and call for action regarding human rights violations by businesses. Finally, the UN adopted two instruments: the Global Compact, 1999 and the U.N. Norms on the Responsibility for Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003 to address the issue. While the government of India has also shown its concern by framing National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011.

To address the issue regarding violation of human rights by TNCs, the researcher proposed ‘Social Auditing’ as an instrument for human rights compliance for the TNCs. This focus upon the fact that how social auditing can play an important role in protection of human rights in TNCs and further discusses the different systems of social auditing developed by various independent institutions and agencies. The term ‘social audit’ is often used to encompass a wide range of approaches to measuring, assessing, and reporting on corporate
social, environmental, and ethical performance. Social auditing is not only about adding to what is already on our plates, it’s about taking a more organized and high impact approach to meet the business objectives that we already have. The Social Auditor will work on the components of a company’s Social Policy (Ethics, Labor, Environmental, Community, Human Rights, etc.), and for each subject, he/she will analyze the expectations of all stakeholders. Several major international projects, such as Global Reporting Initiative and (Account Ability) AA1000 standards, SA8000, FLA are underway to develop generally accepted principles, standards, and reporting formats for all companies, as well as professional standards for social auditors.

However, in 1990s, a wave of suits by victims of human rights abuses abroad suing large corporations in U.S. federal courts, UK and the Dutch Court raised eye brows of not only defendant i.e. TNCs but also of the legislature in these countries. Even they observed that it is affecting the normative and procedural development of domestic and international law. Corporations have become the defendants of choice for classes of foreign plaintiffs suing in the various courts for international law and especially international human rights violations. Large entities, including Unocal, Texaco, Degussa, Ford, Daimler-Chrysler, Volkswagen, and Swiss, German, French, and Austrian banks have all been targeted in international human rights suits in the various courts by classes of plaintiffs alleging that their rights have been violated under customary international law and demanding large-scale monetary and injunctive relief. The alleged offences take place in faraway places and often in faraway times.

This new trend of “mass tort” transnational litigation is an inevitable development both in human rights litigation in the U.S. and the U.K. and in the realm of international human rights law in general. While federal courts since long been the forum for litigation of private rights and economic disputes involving corporations, this “new wave” of class litigation involves public international norms in a new context. Private civil tort remedies have been available in the U.S. for almost twenty years since the Second Circuit ruled that the dormant Alien Tort Claims Act (ATCA) could be the basis of federal court subject matter jurisdiction over an action brought by an alien against a foreign government official for violations of Customary International Law (CIL), or “violations of the law of nations.”

However, in most of the cases discussed in this research highlights two main issues one is the procedural obstacles faced by foreign claimant in establishing jurisdiction and then claiming the compensation for violation of human rights so most of claims are unsuccessful.
Secondly where there is a little hope for successful claims the parties went for settlement before the compensation is awarded. The researcher concluded the research with a firm opinion besides all other suggestions that this is the most sensitive issue which need political will, society participation and above all TNC's responsible attitude to ensure positive result.