From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations

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FROM HUMAN TRAGEDY TO HUMAN RIGHTS: MULTINATIONAL CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

Ratna Kapur*

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They were careless people . . . — they smashed up things and creatures and then retreated back into their money or their vast carelessness . . . and let other people clean up the mess they had made . . . .


I. Introduction

The rapid growth of multinational corporate activity in developing countries has recently given rise to debate about the responsibility of multinational corporations (MNCs) to the host country

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and its citizens. Many MNCs have become at least as powerful as some of the states in which they function and are therefore in the same position as states to violate the full range of human rights. MNCs must therefore be held accountable for human rights violations to the same extent as states. The operations of MNCs in developing countries have expanded and changed so as to have a more direct impact on the lives of the local population and environment. The human harms resulting from MNC activities, ranging from environmental pollution to human casualties, are violative of existing human rights formulations.

This paper will examine the issue of mass disasters resulting from the ultrahazardous activities of MNCs to exemplify the power of these corporations to inflict serious human harms and to introduce the concept of using the discourse of human rights to discipline MNC activities. Traditional private tort law is ill-equipped to deal with mass disasters resulting from ultrahazardous activities engaged in by MNCs and ineffective in censuring their disregard for human life in the conduct of their activities in developing countries. The legal battles, following such mass disasters, have been trapped in a legal paralysis and conceptual vacuum, exemplified by the long, drawn out litigation fought pursuant to the December 1984 catastrophe at Bhopal, India.

The objective of this article is to illustrate how international human rights law ought to be enforceable against MNCs in these situations as they have emerged as powerful actors in the international arena, endowed with the ability to inflict harm and violate human rights. MNCs engaged in ultrahazardous activities are in a position to infringe upon the right to life and liberty. In order to hold them accountable for the violation of this right, the liability of

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1 There are numerous definitions of multinational corporations, W. Feld, Nongovernmental Forces and World Politics — A Study of Business, Labor, and Political Groups 22–23 (1972). The definition to be adopted herein is as follows: A multinational corporation is an entity which exercises direct or indirect control either through subsidiaries or majorities on the board of directors in different parts of the world. The definition is expressed in broad terms because a strict construction of the term would enable MNCs to limit their liability by erecting subsidiaries in the host country. The definition, therefore, includes the reality of such situations where control is actually exercised by a corporate entity in another country (see deeming provision Indian Companies Act, 1956 § 4). Therefore, even though a MNC may not have a majority shareholding in its subsidiary, it may still exercise control through the board of directors by offering incentives that render the directors beholden to the parent company. Whether the top management is situated in one headquarters company or divided into zones and separate headquarters established by each zone, the units situated in different countries are joined together by ties of common ownership or control and share a common management strategy.
MNCs must be determined according to the impact of their activities, without requiring proof of intention. In order to ensure effective relief, the victims of mass disasters must be able to secure damages for the violation of a human right. To fully guarantee and recognize the value of the right, the damages must be punitive, expressed in terms of the defendant's capacity to pay.

II. THE EMERGENCE OF MNCs AS PUBLIC ACTORS

International law has begun to recognize that a state-centered orientation is no longer sufficient for understanding the complexities of an increasingly interdependent world order. This recognition stems from the growth of the economic and political power of MNCs and the increasing complexity of their operations. Their growth has in turn endowed them with the power and ability to inflict serious harm in the environments in which they operate. International law has thus been forced to take notice of these entities and has begun to formulate ways of securing them to a uniform standard of behavior.

There is little doubt that MNCs have made, and are still making, a significant contribution to the economic development of developing countries. MNCs have the ability to participate in the integration of the world economy and promote economic and social development. The activities of MNCs have expanded quite rapidly, and they have acquired immense economic and technological power. Although their positive contribution to the world's development process has been recognized, their negative effects have been the focus of some concern to the international community. MNCs have accumulated vast amounts of power as a result of the

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2 See Lutz, Remarks on Private and Public Regulation in the United States and International Community, at the Meeting of the International Bar Association's Section on Business Law, New York, (Sept. 16, 1986) (on file with the author) (which provides an overview of the dimensions of the problem, the existing law in the U.S. and identifies the challenge for bringing international tort claims in U.S. courts).


5 See Subcomm. on Int'l Trade of the Senate Comm. on Finance, 93rd Cong., 1st Sess., The Multinational Corporation and the World Economy, 393 App. A, 404 (1973) (found that of all nation-states and corporations, the largest 99 economic entities included 40 corporations).
expansion of their activities from extractive industries into those intervening more directly in the lives of the local population. Their increase in power has generated concern over their increased potential to inflict human harms and their accountability for such harms. For example, workers employed in the factories of MNCs are frequently exposed to substandard working conditions; the environment and surrounding communities are threatened by the ultrahazardous activities engaged in by some MNCs which are not secured by adequate safety mechanisms; local farmers are arbitrarily dispossessed of their land by multinational agribusiness corporations and reduced to the status of laborers; and, MNCs have also colluded with repressive regimes, perpetuating the violation of civil and political freedoms.

This discussion raises concerns about the human rights accountability of MNCs. These concerns can be appreciated by analyzing the progress of the Bhopal litigation and the legal dilemmas encountered in determining the liability of MNCs engaged in ultrahazardous activities in developing countries that result in mass disasters.

III. BHOPAL: A CASE STUDY

The Bhopal case arose out of the death and injury caused by the release of lethal gas known as methyl isocyanate from a chemical plant operated by Union Carbide, a multinational corporation which has worldwide operations. The release occurred in Bhopal, a township situated in the state of Madya Pradesh, India. The accident resulted in the deaths of over 2,000 persons and injuries of over 200,000.

7 Id.
10 Union Carbide Corporation (UCC), incorporated under the laws of the United States, owned 50.9% of the stock in Union Carbide India Limited (UCIL). A further 22% was owned or controlled by the Government of India and the balance held publicly. UCC was engaged in the manufacture of a variety of products, including chemicals, plastics, fertilizers and insecticides, at 14 plants in India.
After the accident, the victims and their families sought to invoke the jurisdiction of United States' courts by arguing that the headquarters of Union Carbide were situated in New York and that the Indian judicial system was not adequately equipped to deal with such a situation. Union Carbide filed a motion to dismiss the action on the basis of the doctrine of *forum non conveniens*. The United States District Court for the Southern District of New York accepted this motion and dismissed the action.\(^\text{11}\) By refusing to allow the Indian government to invoke the jurisdiction of the American courts, the quantum of damages was directly affected. In effect, the court protected the defendant MNC from exposure to damages on a scale which would normally be granted by the U.S. courts by dismissing the action on the basis of *forum non conveniens*.\(^\text{12}\) The Indian government's argument was based primarily on its concern that it be able to enforce effectively any decree in its favor against

\(^{11}\) See *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (1987).

\(^{12}\) A complete discussion of this doctrine is beyond the scope of this paper, but it has been discussed by many commentators in elaborate detail. The doctrine has recently been introduced into multinational corporate litigation as a successful weapon in the hands of MNCs to insulate them from high damage awards. The doctrine, as it has evolved, has no constructive role to play in multinational corporate litigation.

In the Bhopal case, the defendant was able to successfully employ the doctrine to prevent the plaintiffs from invoking the jurisdiction of the U.S. courts. The doctrine invariably affects the quantum of damages in so far as it protects the MNC from exposure to damages on a scale which would normally be granted by U.S. courts. If the plaintiffs had succeeded in invoking the jurisdiction of the U.S. courts, any decision to apply Indian law would not affect the quantum of damages as it is part of the procedural law of the forum. Furthermore, if MNCs are under an obligation to observe and respect human rights, the doctrine, as employed in recent multinational corporate litigation, deprives the potential litigant of an effective remedy when her right is violated. It encourages MNCs to escape their obligation by simply setting up subsidiaries in the developing countries. The doctrine originally evolved to prevent extreme abuses of forum shopping. It has since developed from an almost hopeless motion to dismiss an action, into a frequently successful technique for delay. It has ceased to be the instrument of justice it was originally designed to be and has become preoccupied with the convenience of the parties. Convenience should be a diminishing concern in an age of expanding and vastly improved means of communication and transportation. For an elaborate analysis of the application of the doctrine of *forum non conveniens* in multinational litigation see generally I. Lesham, *Forum Non Conveniens* (1985); see also Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781 (1985) (discussing the defects in the doctrine and its irrational development); see Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949) (discussing how the doctrine was used mainly to permit discretionary circumvention of formal venue rules by trial judges); see also Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 930 (1947) (describing the doctrine as amorphous and serving inconsistent ends); see also Currie, *Change of Venue and the Conflict of Laws*, 22 U. Chi. L. Rev. 405, 416 (1955) (describing the doctrine as "notoriously complex and uncertain," resulting in appalling delays in selecting the appropriate forum).
the defendant. Most of Union Carbide's assets are situated in the United States. Carbide's assets in India amount to approximately eighty million U.S. dollars, an amount insufficient to satisfy any decree that might be rendered against it. Consequently, if the suit were to be filed in India, it would render any decree obtained a mere paper decree.

As the case was sent back to India, the pressure on the defendant for settlement was not as forceful due to the diminished threat of a high damages award and the lack of pressure from the American public. The litigation of the case in the Indian forum enhanced the defendant's bargaining power and ultimately forced a settlement for an amount far below that which would have been obtained had the case been litigated in the United States.

IV. The Dilemma

The American experience and the very recent Indian experience with mass tort cases exposes the limitations of traditional tort law. The following section will examine these limitations and attempt to illustrate the extent to which these limitations are indicative of a broader systemic dilemma underlying the tort law.

A. Indian Tort Law

Until the Bhopal case, Indian tort law had never been confronted with the dilemmas posed by mass disaster situations. In India the development of tort law was frustrated to the point that it was unable to deal with ordinary tortious situations let alone mass disasters. The Indian common law system inherited from the British was designed to serve the interests of the rulers rather than

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13 See Bhopal Gas Leak Disaster (Processing of Claims) Ordinance 1985 (promulgated on February 20, 1985 to enable the Indian Government to act as parens patriae on behalf of the Bhopal victims).

14 The decree would have to be enforced in American courts, a procedure which could be resisted by a due process plea by the defendants.

15 In fact, the main argument before the district court of New York in the Bhopal case on the forum non conveniens motion was not that Indian law was less favorable than the chosen American law. This factor on its own cannot defeat a motion for dismissal on the basis of forum non conveniens. See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). Instead, it focused on the institutional incapacity of the system to deal with such a mass disaster. See also U. BAXI, INCONVENIENT FORUM AND CONVENIENT CATASTROPHE 13 (1986).
respond to the needs of the Indian people. Legislation was enacted by the Parliament in London, and the highest court of appeal was the Judicial Committee of the Privy Council.

Although the legal system has largely succeeded in freeing itself from the colonial taint in the public law domain through the development of its constitutional law, the same is not true regarding the development of its private law. Since independence, judicial resources and energies have been channeled primarily into developing and expanding the area of constitutional law much to the neglect of ordinary civil litigation. The courts have been preoccupied with checking government abuse and arbitrariness generated by the existence of a highly regulated state. Parties are able to approach the highest courts directly with a petition asking that the court either invalidate legislation or set aside an administrative order that contravenes the petitioner's fundamental rights. Rigorous judicial review of governmental action and elaboration of the jurisprudence of fundamental rights has been made possible by diverting resources from private law areas and postponing the reform or rapid development of that area of the law.

The emphasis on the development of the public law has therefore impeded the growth of tort law in India. There have been no

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17 This development has been influenced by a colonial prejudice against lower courts which were mostly run by Indians. A system for interlocutory appeals was established which enabled the British-dominated superior courts to monitor the lower courts. See supra note 16; Fazal Ali J., Sha Babulal Khimji v. Jayaben D. Kania, 1981 A.I.R. (S.C.) 1786 at 1817. After independence, the liberal access afforded to the Supreme Court under Article 32 of the Indian Constitution has perpetuated this system. The article occurs in the Chapter on Fundamental Rights and confers a fundamental right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights. It confers powers on the Supreme Court to issue any directions, orders or writs for the enforcement of such fundamental rights.

In addition, in their endeavour to discourage civil litigation, the British passed a series of acts culminating in the Indian Court Fees Act 1870. The Act obliges plaintiffs in civil cases to pay court fees which are, at times, exorbitant. The effect was to discourage civil litigation for monetary damages and to divert claims to requests for equitable relief, such as injunctions, or finding a way to use the criminal court to redress a civil wrong. For a more elaborate discussion see U. BAXI, supra note 16; Sharma, supra note 16.

Furthermore, the tort law was left uncodified by the British even though all other fields of criminal, commercial and procedural law were almost completely codified by 1882, for fear that it would encourage tort litigation. A perusal of the Civil Justice Committee report, known as the Rankin Committee Report, 1924–25 at 533–36 appears in fact to have made a conscious decision to forestall the development of tort law in India, which was acquiring a modern industrial technology and products with injury producing potential.

18 See Ramamoorthy, Difficulties of Tort Litigants in India, 12 J. Ind. L. Inst. at 320 (1970).
significant doctrinal developments in tort law. The Indian Supreme Court has addressed only a handful of tort cases since its establishment in 1950. There are only 132 negligence cases reported in the All India Reports from 1914 to 1965. These cases involved neither injuries related to industrial processes, nor the use of any hazardous chemical substances, nor complex technology. The limited number of tort cases that were filed since independence were mainly preoccupied with traffic injuries and fatalities under the provisions of the Motor Vehicles Act. The cases are concerned with private risks, usually involving two parties, where the effect of the activity is immediately determinable and the damages are quantifiable. Such cases cannot provide an effective analogy or precedent to deal with the potential injuries introduced by new technology, which frequently result in mass harm which is not immediately ascertainable and, therefore, difficult to quantify in terms of damages.

Therefore, the tort law is not adequately developed to deal with and provide an effective remedy for scientific and technical hazards/disasters of the kind which occurred in Bhopal. These deficiencies should not enable MNCs to escape from their liabilities when it involves the violation of human rights, in particular the violation of the right to life.

B. United States Tort Law

In recent years, American courts have entertained an unprecedented number of claims generated by mass exposure to hazardous or toxic substances. The size and complexity of the claims have exposed the inability of the traditional tort law to deal with such cases. The American tort law regime is also incapable of dealing

19 Id.


21 See SENATE COMM. ON ENVTL AND PUB. WORKS, 97TH CONG., 2D SESS., INJURIES AND DAMAGES FROM HAZARDOUS WASTES — ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, Part I, Report and Comments 193 (Comm. Print 1982):

Available remedies are inadequate in view of the substantial number of claims that may arise, and the factual and legal complexities that will be involved in their litigation . . . . [E]xisting legal remedies and actions . . . (are) inadequate . . . to deal with the possibility of mass torts, or multiple exposures, and with claims by hundreds of victims . . . .

effectively with mass tort situations. This failure is due in part to the lack of development of a unifying federal standard to address such situations. Even if such a standard were to develop, however, it could nevertheless be evaded by MNCs.

At the federal level, numerous environmental protection statutes have been enacted to protect individuals from exposure to toxic and hazardous substances. Although these statutes impose liability for cleanup and civil penalties, they do not compensate individuals injured by such substances. Furthermore, these statutes often preempt the application of federal common law. Similar

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23 See Vairo, Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?, 54 Fordham L. Rev. 167 (1985) (discusses the possibility of creating a federal common law to displace state law in multi-tort cases).
24 Congress has enacted numerous statutes that recognize the hazardous potential of new technology to harm the environment and in turn affect the quality of life. For example, the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987), authorizes the federal Environmental Protection Agency (the “EPA”) to declare air quality standards that will limit the concentration of air pollutants. The provisions of the Act can be enforced by administrative orders issued by the EPA and through the initiation of civil actions for injunctive relief and civil penalties. Even private citizens are authorized to commence civil actions to enjoin persons from violating the emission limitations articulated under the statute. Other examples include the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), and the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6991 (1982 & Supp. V 1982), as amended by Pub. L. No. 98-616, 98 Stat. 3221 (1984), which are both designed to control pollution from ongoing industrial operations. These statutes deal with pollution control and destruction of the environment and are aimed at protecting public health and welfare. These efforts represent a continuing attempt to balance the needs of an industrial society to consume natural resources and dispose of waste materials with the interest in protecting individual health, safety and property. This process has been described as “risk management” which accepts that certain risks are inevitably created by hazardous technology. It aims to adopt preventive and remedial policies to mitigate the unfair distribution of costs and benefits resulting from the adoption and application of such technology. See Jasanoff, Judicial Gatekeeping in the Management of Hazardous Technologies (Working Paper, Programme on Science, Technology and Society, Cornell University, Ithaca, New York) (on file with author) (for further elaboration of the concept of risk management and cost benefit analysis).
25 See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), and California v. Sierra Club, 451 U.S. 287 (1981). In both of these cases, the Supreme Court held that private tort remedies fell outside the scope of the legislative intent of the relevant statutes.
deficiencies exist in state statutes dealing with ultrahazardous or dangerous activities, which perform a regulatory as opposed to a compensatory function.27

State common law, therefore, affords the only real avenue of redress for the victims. An analysis of state law reveals that there have been divergent attempts by state courts to expand concepts existing in the traditional tort law to deal with the dilemmas posed by mass torts resulting from ultrahazardous activities. This disparate approach at the state law level exposes a common underlying tension between traditional tort law, conceptualized in terms of individual responsibility and justice and equipped to deal with traditional two-party accidents, and a conception of collective responsibility and justice which provides a more appropriate and effective response to the risks of contemporary technology.

This tension is reflected in the application of various standards for liability and causation in mass tort situations. For example, in employing a negligence standard in mass torts situations, the primary impediment is that the plaintiff may find it difficult to prove unreasonable conduct. The risks resulting from exposure to hazardous substances are often not known prior to the accident.28 It is therefore difficult for the plaintiff to prove that the risks were foreseeable or that reasonable alternatives were available.

Alternatively, the application of strict liability for ultrahazardous activities or abnormally dangerous activities within the confines of tort law has also proved inadequate.29 The application of strict liability is advantageous insofar as it relieves the plaintiff of the burden of proving that the defendant's activity was negligent. Accordingly, when the activity is abnormally dangerous and causes injury, the defendant will be liable even if her conduct was reasonable.30

27 See Johns and Seltzer, Toxic Torts: Theories of Liability, Preparation and Trial of Complex Toxic Chemical or Hazardous Waste Case 1986 (316 PLI Lit 317, PLI Order No. H4-5006 Litigation and Administrative Practice Course Handbook Series, Litigation) (which analyzes the deficiencies in the remedies available at both federal and state levels to deal with mass torts and concludes that the burden is on the attorneys to develop a body of tort law to accommodate the needs of the victims of mass disasters and to secure full and fair recovery). Even those statutes providing compensation restrict recovery to the point that it is of limited utility. See Alaska Stat. § 46.03.822 (1989); Cal. Health and Safety Code §§ 25370-25395 (West 1984 & Supp. 1989).


29 See Restatement (Second) of Torts § 519 (1976).

30 See id. § 520, Comment h.
The problem is that the doctrine of strict liability has not been uniformly adopted by the states. Furthermore, it requires the plaintiff to convince the court that the toxic injury arose from an ultra-hazardous or abnormally dangerous activity. The courts have to balance a number of factors in determining this issue. The balancing test effectively transfers the standard into a de facto negligence standard. Finally, the courts have applied the standards inconsistently and have been unpredictable in determining whether an activity qualifies as an abnormally dangerous activity. Nevertheless, the application of a strict liability standard is a more attractive standard in mass disasters because it may be easier to establish than any other cause of action.

A complete discussion of the problems raised by causation is beyond the scope of this paper. A number of commentators have criticized the existing rules of causation, however, and have proposed creative suggestions for changing them to accommodate victims of mass toxic torts.

The complexities generated by the competing conceptions underlying the tort law have intimidated the courts from confronting and solving the dilemma and forced them into promoting settlement. The analysis of Indian and U.S. tort law reveals the inability of both to deal adequately with the complexities involved in mass

31 See id., which states:
   In determining whether an activity is abnormally dangerous, the following factors are to be considered:
   (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
   (b) likelihood that the harm that results from it will be great;
   (c) inability to eliminate the risk by the exercise of reasonable care;
   (d) extent to which activity is not a matter of common usage;
   (e) inappropriateness of the activity to the place where it is carried on;
   (f) extent to which its value to the community is outweighed by its dangerous attributes.


tort situations and to effectively compensate victims for the violation of the right involved. Tort law is designed to deal with private risks which are discretely produced, localized, personally controlled, or of natural origin and often immediate in their effects. The risks posed by the operations of MNCs, however, involve central or mass production, broad distribution, and temporally remote harm and are often outside the individual risk bearer's direct understanding and control. The effectiveness of tort law consequently diminishes and it ceases to offer effective deterrence, fair compensation, or a mechanism for resolving disputes.

It may be argued, however, that despite its evident inadequacies, tort law has developed and inspired legislative changes. In the U.S., for example, the tort law has instituted procedural innovations, such as class actions, joinder of parties, and the formation of trust funds in settlements to deal with some of the remedial obstacles posed by mass disaster situations. In view of its innovative capacity, the tort law could presumably adopt a strict liability standard at the federal level to address violations of human rights caused by the ultrahazardous activities of MNCs.

As long as only one legal culture is implicated, it may be possible to effectively peg corporations to a strict liability standard at the federal level. However, the structure and activities of MNCs transcend national boundaries. Effective control over the activities of MNCs cannot be exercised without the cooperation of more than one sovereign state. The absence of this cooperation has resulted in conflicts between the national sovereignty of the home and the host countries.35 MNCs, motivated by making and increasing their

35 The international community's recognition of the need to subject MNCs to international control so as to avoid conflict and to attempt to create a consensus regarding their functioning and behavior, is reflected in various codes and guidelines. For example, the Organization for Economic Cooperation and Development (the "OECD") passed the Declaration on International Investment and Multinational Enterprises in June 1976 annexing certain guidelines for multinational enterprises. Although not binding, the guidelines serve as an important source of reference and provide for a procedure to review and improve their effectiveness. See Kolvenbach, supra note 4, at 357.

profits at the least risk to themselves and at the cost of endangering human rights, could therefore evade the standard by setting up a subsidiary in the foreign host country and employing the doctrine of forum non conveniens to avoid the jurisdiction of American courts.\textsuperscript{36} Their fluid nature, derived from their transnational character, enables MNCs to choose the legal regime which will most effectively accommodate their motives and protect their interests.

To solve this dilemma, a host country might introduce legislation incorporating the doctrine of strict liability to govern the activities of MNCs functioning in their country. Although this is a plausible solution, it would require a conscious, independent act on the part of each host government to enact such legislation. Unfortunately, a government may not feel compelled to act unless it has experienced a "Bhopal type" situation. By then, it is too late. Bhopal has demonstrated the need for effective preventive action.

Similarly, private international law remains unable to accommodate such international actors. It suffers from the same limitations as domestic law insofar as it treats such entities as no different from a private person. It does not take into account the difference which power makes in their functioning. Their power is influenced not only by their international character, but also by their deeply ingrained profit instincts. Such instincts motivate decision-making and the assumption of risks at public expense, more particularly at the expense of human rights. Their decisions are facilitated by the fact that they are not bridled by any one value system and can thereby avoid any restraints such a system may impose upon them.

Furthermore, any argument based on the innovative capacity of tort law ignores the broader systemic dilemmas underlying the discussion of both United States and Indian tort law. The development of tort law is determined by the market which is governed

\textsuperscript{36} See \textit{supra} note 12 and accompanying text.
by the ethic of economic efficiency. The model is defective insofar as it refuses to acknowledge that individuals are differently situated and are not afforded equal access to the market. It is a model dominated by those who have the wealth and institutional capacity to participate in decision-making processes. Therefore, even if procedural innovations, such as class actions, make the tort remedy more accessible to victims of mass disasters involving the operations of MNCs, they serve as mere palliatives. They will invariably prove inadequate because they are the products of a tort law based on a model which marginalizes the concerns of people existing at the grassroots level. The tort law does not protect marginalized groups from being subjected to risks imposed without their consent because it considers a certain amount of risk as inevitable in the industrialization process and necessary for the promotion of economic efficiency. Thus, the systemic dilemma which encumbers the tort law cannot be resolved through cosmetic reform.

C. The Human Rights Alternative

Because tort law is concerned with economic efficiency and is incapable of providing a uniform standard to govern the conduct and behavior of MNCs, it cannot provide effective solutions to the dilemmas posed by mass disasters. The question arises whether international law can provide the arena within which to formulate a better standard. Arguably, the international community could formulate a general standard to deal with the sorts of tortious acts committed by MNCs engaged in ultrahazardous activities and resulting in large scale damage and incorporate it into the existing draft Code of Conduct for Transnational Corporations.37

The problem with this solution is that the Code has remained in draft form for over ten years. The main obstacle to its implementation is the controversy of whether the Code is self-executing and binding or requires a positive act on the part of each nation-state to incorporate the provisions into its domestic law. If the Code is binding, its effectiveness will depend on the voluntary act of each participating state. Implementation of measures dealing with MNC accountability in mass disaster situations may require sufficient bargaining power on the part of the host country in relation to the MNC to adopt these measures. In other words, power imbalances

37 See supra note 35 and accompanying text.
may inhibit some countries from being able to effectively incorporate such stringent measures against MNCs.

The solution lies in the paradigmatic shift from a market model of development to one that places basic human needs at the center of the development process, ensuring that human autonomy, dignity, and integrity are not infringed upon by more wealthy and powerful interests. This model requires the participation of marginalized groups in the decision-making processes. This participation can be effected through the discourse of human rights. The discourse provides a means by which marginalized groups can alter existing patterns of domination through communal dialogue. It enables those groups previously ignored in the developmental process to discuss the goals of development and thereby influence its content and direction. The model is based on the notion that economic efficiency is one of many values to be considered in evolving a development strategy. It does not prioritize economic efficiency to the exclusion of other values, but instead integrates it into a value system which is human-oriented. By providing space to those at the center of the development process, the model acknowledges the importance of human consent in the formulation and implementation of that process.

In addition to compensating for the inadequacies existing in traditional tort law, the resort to human rights is important because human rights possess a powerful symbolic value. It raises the intrinsic worth of the human right to life from the level of private law discourse and concern with utilitarian calculations by recognizing the power and consequently the overwhelming capacity MNCs have to inflict harm.

A model of development constructed through the discourse of human rights will influence the development and application of mechanisms designed to govern the conduct of MNCs in developing countries. If MNCs are compelled to function within the parameters of human rights, the law governing their conduct will develop accordingly. Developing through its acquaintance with the people and their circumstances, the law will be more sensitive and responsive to their environments, unlike a system developed within the model of economic efficiency, which is exclusive and oppressive. The encroachment of MNC activity on needs essential to survival prompts the construction of a human rights boundary within which the balancing of interests must take place. A model focusing on human development will furnish the minimum threshold of risk to which a community or individual may be exposed. This model will seek
to integrate the MNCs into a context which affords priority to human needs. In other words, technological capability and material output must be considered as only one of the development goals and considered in conjunction with the reduction of inequality, elimination of poverty, and satisfaction of basic needs.

It is therefore proposed that the domestic structural imbalance can be rectified by, and an international consensus found in, the discourse of human rights. The discourse can provide marginalized groups with the means to participate in decision-making processes and resist exposure to risks previously imposed without their consent. It also provides a uniform international standard to govern the conduct of MNCs operating in developing countries.

V. THE RIGHT

The right which prompts concern in relation to the conduct of MNCs engaged in ultrahazardous activities is the right to life. Traditionally the international community adhered to a narrow construction of the right to life. Provisions in the International Covenant on Civil and Political Rights and the European Convention on Human Rights have provided the basis for assertions that the right to life ought to be given a restrictive interpretation, mainly concerning protection against intentional or arbitrary deprivation.

The increased assertiveness of developing countries in the international arena, the growing awareness as to the consequences of hazardous technology, and the association of power with actors other than the traditional state, have prompted a broader interpretation of the right to life by the international community. The emergence of new actors equipped with economic power has amplified the range of harms which can be inflicted and has also exposed the right to life to threats not previously contemplated. These factors have urged a broader construction of the right to life so as to include social and economic rights.

This recognition has been affirmed on several occasions by the United Nations. In December of 1982, the United Nations General Assembly passed a resolution expressing a firm conviction that all peoples and individuals have an inherent right to life and that the safeguarding of this foremost right is an essential condition for the enjoyment of the entire range of economic, social and cultural, as well as civil and political rights.38 The Assembly requested that the

Commission on Human Rights ensure the cardinal right of all individuals to life, liberty, security of person, and to live in peace.  

The Human Rights Committee in its report to the General Assembly in 1982 endorsed the need to adopt a broad interpretation of the right. The Committee examined the reports submitted by parties to the Covenant on Civil and Political Rights. The Committee’s general comments based on this examination describe the right to life articulated in Article 6 of the Covenant as “the supreme right from which no derogation is permitted even in time of public emergency . . . .” The Committee adopted a broad approach to the inherent right to life and stated that the protection of this right required the states to adopt positive measures.  

The right to life has become a part of customary international law. This recognition has been reinforced by the international community in the form of declarations, covenants, and resolutions, and has been both implicitly and explicitly adopted in most domestic jurisdictions. This development is significant insofar as it does not depend on the executory acts of individual nation-states to be incorporated into their existing law. Although a discussion of the enforcement of the right is beyond the scope of this paper, it should be noted that once the right is accepted as a part of customary international law, the procedural mechanisms for the enforcement of the right already exist in both India and the United States.

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39 Id. By a resolution adopted in February 1982, the Commission had already expressed a firm conviction that all peoples and all individuals have an inherent right to life and to safeguard this foremost right is essential for the enjoyment of the entire range of economic, social and cultural, as well as civil and political rights. See Commission for Human Rights, Res. 1982/7 38 U.N. ESCOR Supp. (No. 2) at 112, U.N. Doc. E/1982/12 (1982). The Commission reiterated its conviction in March 1983 stating that “for people in the world today there is no more important question than that of preserving peace and ensuring the cardinal right of every human being, namely, the right to life.” See Res. 1983/43, 39 U.N. ESCOR Supp. (No. 3) at 176, U.N. Doc. E/1983/13 (1983).


41 Id. at 93.

42 Id. Clause 5 reads:

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connexion [sic], the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

43 In India, a plaintiff would be able to invoke the Supreme Court's extraordinary jurisdiction by way of an Article 32 writ petition to enforce her right to life.

In the United States, a victim may be able to invoke section 1350 of the Alien Tort Claims Act, which grants the federal district courts original jurisdiction over all actions by
existence of such domestic mechanisms is significant insofar as it is inadequate for the host government to bring an action on behalf of the victims against the MNC or the home government in an international forum because of the limited effectiveness of the international mechanisms created to implement the laws of human rights. The domestic courts can therefore be used as agents for developing international human rights law.

The evolution of the right to life in international law supports the argument that it can no longer be confined to a traditional conception associated with preventive detention, arbitrary arrest, and the death penalty.44 No conception of the right to life can ignore the social and economic dimensions of that right.45 A broad con-

an alien for a tort that has been committed in violation of the law of nations or a treaty of the United States. The scope of section 1350 was discussed in Filartiga, which supports the argument that United States common law has incorporated the law of nations, including human rights. The case concerned an action brought under section 1350 of the Alien Tort Claims Act by two Paraguayan nationals against a third Paraguayan national in a U.S. district court for the alleged death by torture of a family member. The Court of Appeals, reversing the district court, recognized the emergence through international consensus of a universal law of human rights, which afforded substantive rights to individuals and placed limits on a state's treatment of its own individuals. In order for a plaintiff to have a cause of action, it was necessary for her to be able to point to a clear substantive rule of international law, and that rule must reflect a consensus among nations. The plaintiff succeeded in invoking the jurisdiction of American courts by establishing that freedom from torture was recognized as a part of customary international law. By granting jurisdiction in cases such as Filartiga, the courts are incorporating into law the principles enunciated in various international human rights treaties and accords. Rules become binding in international law when a substantial number of nations recognize such rules in practice. International treaties and accords on their own merit do not necessarily reflect accepted norms of international law as violations of such treaties and accords continue to occur. By granting jurisdiction in Filartiga, the court not only recognized the international consensus existing against torture, as reflected in treaties and accords, but it also established torture as a violation of international law. Since international treaties and accords similarly reflect a consensus supporting the right to life, its infringement should be recognized as a violation of international law. In addition, the right not to be exposed to mortal danger is similar to torture, insofar as it is intrinsically associated with the right to life and concerns the very existence of life itself. Therefore, the right not to be exposed to mortal danger must also be deemed to fall within the scope of the right to life and its infringement recognized as a violation of international law. See generally Note, Enforcement of International Human Rights in the Federal Courts after Filartiga v. Pena-Irala, 67 Va. L. Rev. 1379 (1981). Although the far-reaching implications of the Filartiga case have been circumscribed by Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984), the basic premise articulated above remains unaltered. For an elaborate discussion on the effect of the Tel-Oren case on Filartiga, see Scoble, Enforcing the Customary International Law of Human Rights in Federal Court, 74 Calif. L. Rev. 127 (1986).

44 For further elaboration, see B.G. Ramcharan, The Concept and Dimensions of the Right to Life in International Law 1–32 (1985).

45 See H. Shue, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy 22–29 (1980). Shue carries the argument even further by asserting that minimal economic security or subsistence is a separate and independent right and as basic a right as the right
struction has been endorsed by the Indian Supreme Court and supports the argument that MNCs engaged in ultrahazardous activities owe a corresponding duty not to undermine the right to life by exposing individuals to mortal danger. 46

The scope and ambit of the right to life and liberty contained in Article 21 of the Indian Constitution have been elaborated on in a number of Supreme Court decisions. 47 The Court has held that the quality of life is intrinsically linked to the right to life. In Francis Coralie Mullin v. Union Territory of Delhi, the Supreme Court gave full expression to the dimension of the right. 48 The case involved the right of prisoners or détenues to have interviews with their lawyers, family members, and friends. In articulating the content of the right, the Supreme Court held that every act offending or impairing human dignity would constitute a deprivation of the right to life, and it would have to be in accordance with a reasonable, to physical security. Unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care all come within the parameters of subsistence, although these are not rigidly defined. Nevertheless, the idea is to provide what is needed for a decent chance at a reasonably healthy and active life of more or less normal length. He argues that no one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life. Deficiencies in the means of subsistence can be just as fatal, incapacitating, or painful as violations of physical security. The resulting damage or death can as decisively prevent the enjoyment of any right as can the effects of security violations.

Indeed, prevention of deficiencies in the essentials for survival is, if anything, more basic than prevention of violations or physical security. People who lack protection against violations of their physical security can, if they are free, fight back against their attackers or flee, but people who lack essentials, such as food, because of forces beyond their control, often can do nothing and are on their own utterly helpless.

Id. at 25.

Any reference to this right will be confined to the context of MNCs engaged in ultrahazardous activities which expose individuals to risks which are beyond their control and understanding and are imposed without their consent. Such reference is not intended to connote a broader meaning.

46 Article 21 was originally interpreted very narrowly until the case of Maneka Gandhi v. Union of India, 1978 A.I.R. (S.C.) 597. Under this interpretation, the article embodied only that aspect of the rule of law which required that no one shall be deprived of their life or personal liberty without the authority of law. This interpretation was originally construed as a guarantee against executive action unsupported by law. So long as there was some law, which prescribed a procedure authorizing the deprivation of life or personal liberty, the requirements of Article 21 were satisfied. Maneka Gandhi added a new dimension to Article 21 by requiring that the procedure must be reasonable, fair and just. This decision marked the starting point for the expansion of Article 21 in a direction which concerned itself with the quality of life. The decision in Maneka Gandhi established that Article 21 would forbid any act damaging, injuring, or interfering with the use of any limb or faculty of a person, either permanently or temporarily.

fair, and just procedure established by law.\textsuperscript{49} The right includes more than just physical survival. It includes the right to live with human dignity which encompasses the bare necessities of life. Among these necessities are adequate nutrition, clothing and shelter, facilities for reading, writing and expression in diverse forms, freely moving about, and mixing and commingling with fellow human beings.\textsuperscript{50}

Concern for the quality of life was explicitly addressed in the limestone quarrying case which concerned the environment.\textsuperscript{51} This case was the first to come before the Indian Supreme Court involving issues relating to the environment and ecological balance.\textsuperscript{52} Several environmental groups petitioned the Court to stop the limestone quarrying in the Doon Valley, a scenic region situated at the

\textsuperscript{49} Id. at 753.
\textsuperscript{50} Id. Construing Article 21 for the purpose of the facts of this case, the Court referred to Article 5 of the Universal Declaration of Human Rights and the guarantee contained in Article 7 of the International Covenant on Civil and Political Rights. The Court therefore demonstrated its concern with interpreting fundamental constitutional rights in conformity with international consensus. Both provisions are concerned with the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. See also State of Maharashtra v. Chandrabhan 1983 A.I.R. (S.C.) 803 (where the Court struck down a law providing one rupee per month as subsistence allowance as illusory, meaningless and violative of Article 21). Id. at 808. A series of conflicting decisions followed on the issue of whether livelihood fell within the scope of Article 21. See Bapi Raju v. State of Andhra Pradesh 1983 A.I.R. (S.C.) 1073 (where the Supreme Court rejected the contention that the word “life” in Article 21 includes livelihood. It upheld the validity of the 1973 Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, rejecting the contention that the act deprived the livelihood of landholders and was therefore violative of Article 21); Neeraja Chaudhary v. State of Madhya Pradesh, 1984 A.I.R. (S.C.) 1099 (holding basic necessities, such as food, clothing and shelter, were implicitly covered by Article 21); T. Venkata Redd v. State of Andhra Pradesh, 1985 A.I.R. (S.C.) 724 (rejecting that the deprivation of a job constituted deprivation of the right to life and liberty); Fertilizer Corp. Kamagar Union Sindri v. Union of India, 1981 A.I.R. (S.C.) 344 (holding that retrenchment of workmen did not amount to a violation of the right to carry on their occupation and that a right to work and earn livelihood is not a fundamental right). The issue was eventually considered by a larger bench of the Supreme Court in Olga Tellis v. Bombay Municipal Corporation, 1986 A.I.R. (S.C.) 180, 193, which held that the right to life included the right to livelihood and that the right was not confined to deprivation by enforcement of the death sentence except according to procedure established by law. “If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.” See also State of Himachal Pradesh v. Umed Ram Sharma, 1986 A.I.R. (S.C.) 847 (where the Court expressly stated that the right to life under Article 21 embraced not only physical existence, but also quality of life. The case was concerned with the access to roads by the residents of a hilly area. The Court was of the opinion that access to roads was access to life itself and therefore fell within the realm of Article 21).

\textsuperscript{52} Id. at 653.
foothills of the Himalayas. Their claim was based on the right to life in Article 21 of the Indian Constitution. The petitioners alleged that private and state-run mines were endangering the valley’s water resources and visual attractions, stripping hillsides of vegetation, and destroying the limestone belt that acted as a natural aquifer for the region.\textsuperscript{53} The Court appointed an expert committee to investigate the quarries and ordered the closure of several mines on the strength of its report. The Court expressly held that the people were entitled to live in a healthy environment, with minimal disturbance of the ecological balance, without avoidable hazard to themselves and their cattle, homes, and agricultural land. The people were also entitled to live without undue affectation of air, water, and environment.\textsuperscript{54}

This case law development indicates that the right to life has socio-economic dimensions, including a right to livelihood, to certain basic amenities, to a healthful environment, and to live with basic human dignity. The interpretation has therefore gone well beyond the very narrow scope traditionally accorded to this right. Many of the cases discussed above were brought about by individuals belonging to or working at the grassroots level of society. The expansion of the right to life has therefore been brought about as a result of the participation of marginalized groups who, through the discourse of human rights, have influenced the context and construction of the right to life.

In light of the development of the right to life in the international and Indian contexts, the more restrictive interpretation accorded to the right in the American context is no longer tenable nor determinative. There are, however, some instances where individuals and local communities have attempted to widen the scope and content of the right in the American context. This attempt has been influenced, in part, by increased exposure to the potentially hazardous effects of nuclear power, synthetic drugs, and chemicals possessing dangerous propensities, without the consent or participation of these individuals and communities in the decision-making process.

The United States Supreme Court has recognized the life-threatening potential of these developments, particularly when controlled and exploited by powerful commercial entities and not the

\textsuperscript{53} Id. at 654.
\textsuperscript{54} Id. at 656.
traditional state. For example, in Duke Power Co. v. Carolina Environmental Study Group, Inc., residents of the area surrounding the planned nuclear power facilities, an environmental group, and a labor organization, challenged the constitutional validity of the limited liability provisions incorporated in the Price Anderson Act under the fifth amendment. The Act sought to limit the liability of a single nuclear power plant accident to $560 million. The Supreme Court, reversing the trial court, rejected the plaintiff’s argument that the Act violated due process, stating that the amount available for compensation was not rationally related to the potential losses from an accident, and that the injuries are not provided with a satisfactory replacement for the common law right of recovery which was abrogated by the statute. The Court held, inter alia, that Congress could choose to limit liability in order to encourage the private development of atomic power. Nevertheless, the Court upheld the findings of the district court, which recognized that the environmental and aesthetic consequences of thermal pollution of two lakes in the vicinity of the disputed plants as well as emission of non-natural radiation into the environment were adequate to satisfy the “injury in fact” standard necessary to give standing under the U.S. Constitution.

The emerging judicial awareness has been brought about in part by the enactment of numerous nuclear and environmental protection laws designed to meet apprehensions provoked by these developments. The enactments recognize the existence of a public interest or concern for the preservation of a healthy, uncorrupted, and safe environment. This concern has found its broadest expression outside the statutory regime in the recognition of an interest in environmental well-being as an important ingredient to the quality of life and as constituting sufficient injury for standing purposes. For a more elaborate discussion as to the source of such an interest, see Burhman, Injury for Standing Purposes When Constitutional Rights are Violated: Common Law Public Value Adjudication at Work, 13 Hastings Const. L.Q. 57 (1985) (author argues that the cases represent the application of a common law public law model which enables the court to find an intangible non-economic injury where a constitutional injury is alleged); J. Vining, Legal Identity: The Coming of Age of Public Law (1978) (author describes this model as a search for interests in society that are imbued with public value and says that the courts are left to determine whether the invasion of a particular interest can be stated in terms of a public value and hence constitute an injury).

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59 Duke v. Carolina Env'tl Study Group, 438 U.S. 59, 86–91 (1978). The Court expressly left open the question whether the due process clause required the legislature to enact a compensatory scheme which either duplicated the recovery at common law or provided a reasonable substitute remedy. The Court held that the Price-Anderson Act created a fair and reasonable substitute. It found that the state tort law posed potential barriers which might make recovery under state law impossible. The Act provided a more efficient and certain avenue of compensation. Furthermore, the Supreme Court relied on congressional
The Duke Power case demonstrates the Court's willingness to recognize an interest in environmental well-being for the purposes of standing under the Constitution. The case did not address the threshold question of whether this interest was implicated in the constitutional right to life and liberty. Rather, the case was decided on due process grounds. Such an interest, arguably, is sufficient to give rise to a cause of action under tort law but would not implicate a constitutional right under the fifth and fourteenth amendments. The American courts have failed, however, to articulate the standards for determining whether a deprivation of a life and liberty interest has taken place. The United States Supreme Court's choice in Duke Power to base its decision on due process grounds, rather than deciding that the interest in environmental well-being was outside the scope of the right to life and liberty, is suggestive of the Court's openness to the argument that the interest might fall within this right.

In any case, the stricter construction accorded by United States courts to the right to life does not undermine the expansion of the right to life in both international and other domestic contexts, where the right embraces interests which are social and economic in nature. The broader interpretation represents an appreciation of the view that civil and political rights cannot exist without the simultaneous development of social and economic rights. This issue is an expression of a much larger debate in the field of human rights. The debate is concerned with the difference in approach to human rights between Western and non-Western nations. Western democracies promote and zealously protect the individual's freedom, rights, and dignity. Many developing countries base their approach on the perspective of the community and their unwillingness to allow the individual to exercise his or her rights in a way that jeopardizes the community.

assurances stipulated in the Act that in the event of a nuclear accident, it would "take whatever action is deemed necessary and appropriate to protect the public from the consequences" of the incident. The amount was therefore viewed as a floor as opposed to a ceiling on recovery.

60 See Paul v. Davis, 424 U.S. 693 (1976) (where the Court held that defamation was sufficient to give rise to a cause of action under tort law, but did not implicate a liberty interest under the 14th amendment, and therefore, did not violate due process); Baker v. McCollan, 443 U.S. 137 (1979) (holding that false imprisonment of an individual for an eight day period may give rise to a claim under state tort law but gave no rise to a claim under the fourteenth amendment).

These two views represent a duality in approach to human rights, in particular the right to life. This duality derives from the artificial distinction drawn between the individual and communitarian conceptions of human rights. The assertion of an individual right necessarily implicates a communitarian value. This value is expressed in terms of pre-existing claims, interests, or needs, the relevance or significance of which resides in public consensus. It is this collective interest that constitutes the content and is intrinsic to the very existence of an individual human right.

VI. State Action

The question arises as to when the asserted right to life falls within the confines of private law and when it assumes a public character. Human rights are traditionally only enforceable against the state. The next two subsections analyze the development of the Indian and American doctrines of state action.

A. American Doctrine of State Action

In the United States, the presence of state action is a prerequisite for the enforcement of fundamental rights under the Constitution. In 1883 the Supreme Court fully addressed the doctrine for the first time in *The Civil Rights Cases*. The Court held that Congress was not authorized under the fourteenth amendment to prohibit discrimination by privately owned inns, conveyances, and places of amusement.62 The Court's holding required that Congress provide avenues of redress against the operation of state laws and the action of state officers, executive or judicial, when these were subversive of the fundamental rights specified in the amendment.63 By implication, a constitutional claim was not available to a victim of discrimination inflicted by a private person who could secure redress by filing an ordinary civil suit.

In some situations, however, the courts have exhibited a willingness to extend the doctrine to include some private actors. Private actors that conduct themselves in a manner which resembles a state have been held accountable for the infringement of a constitutional right. For example, the public function test articulated in

62 109 U.S. 3, 25 (1883) (the Supreme Court heard five cases all "founded on the first sections of the Act of Congress known as the Civil Rights Act" and reported them under one heading titled the "Civil Rights Cases").
63 *Id.* at 11.
Marsh v. Alabama has been employed by the United States Supreme Court to hold private entities liable for the violation of constitutional rights. According to this test, functions that are intrinsically governmental in nature constitute state action regardless of who performs the function. In the Marsh case, the Court held that the defendant corporation was prevented by the first amendment from prohibiting a Jehovah's Witness from speaking within the limits of its company town. The decision indicates that the town was subject to constitutional constraints because it was acting like a state. The characterization of the town in this manner illustrates that delegation to a private entity does not enable a state to escape from its constitutional responsibilities. Subsequent cases have attempted to identify a category of responsibilities regarded as public. When private parties discharge these responsibilities pursuant to state authorization, they are subject to the same constitutional norms applied to public officials.

The willingness to treat private entities as public actors has been particularly pronounced in the context of the equal protection clause of the fourteenth amendment. The greater judicial inclination to find state action in the context of an equal protection claim suggests that the determination of a public function is correlated to the interest at stake.

Furthermore, where the opportunity to increase profits at the expense of an individual's fundamental rights presents itself, the actor has been held responsible for its decision. In Burton v. Wilmington Parking Authority, a publicly financed parking authority leased part of a parking facility to the defendant, a private restau-

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65 See Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296 (1982) (criticizes the public function approach as inviting manipulation since it is not possible to define the essence or scope of such functions with any degree of specificity).
68 See L. Tribe, American Constitutional Law 1688–1720 (1988) (suggesting that state action is determined according to the individual right asserted. Therefore, where the right enjoys a "preferred place" in the Constitution, a lesser showing of state action involvement is required to prove the act unconstitutional). The courts are therefore more willing to find state action for equal protection or first amendment rights as opposed to cases involving lack of procedural due process or the assertion of a countervailing right. See Burton v. Wilmington Parking Authority, 395 U.S. 715 (1961); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978); Moose Lodge No. 107 v. Irvis, 407 U.S. 165 (1972).
rant which practiced racial discrimination. The United States Supreme Court held that the practice was in violation of the equal protection clause. The Court found that the restaurant profited from the discrimination. Burton lends support to the argument that where the opportunity to increase profits at the expense of an individual's fundamental rights presents itself, the actor must be held responsible for its decision.

The state action doctrine was initially based on the respect accorded to individual liberty and the view that the concentration of power in the state presented the greatest risk to this liberty. The courts, however, have exhibited, to a limited extent, the shift of power from public to private hands, blurring the line of distinction originally represented by the doctrine. The courts have also exhibited a tendency to treat private entities as public actors in certain circumstances. This tendency reveals the artificial distinction between public and private actors for the purpose of asserting fundamental rights and acknowledges that delegation of power has increased the capacity of the latter to inflict harm. No concrete body of rules has developed, however, to determine when governmental or private actors are deemed to be responsible for an alleged constitutional violation. Nevertheless, the brief analysis of the criteria employed by the courts to justify the subjection of private actors to fundamental rights obligations must also be applied to MNCs to hold them accountable for their human rights obligations.

70 Id. at 726.
71 Id. at 724. But see Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (where the government was not acquiring any added value from granting a liquor license to a club restricted to whites only).
72 For a more detailed analysis of state action doctrine in the application of the American Constitution and the underlying tension between natural law and the positivist tradition, see Papers from the University of Pennsylvania, Law Review Symposium on the Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982). In particular, see Friendly, Introduction: The Public-Private Penumbra — Fourteen Years Later, supra at 1289; Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, supra at 1296; Goodman, Comment: Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone, supra at 1331; Kennedy, The Stages of the Decline of the Public/Private Distinction, supra at 1349.
73 It should be noted that in applying the “state action” doctrine, in the United States or in India, once a corporation is deemed to be a state it will be so characterized only for those activities considered public functions to which the constitutional limitation will apply, but not to those activities which are private and outside the public function context. Similarly, the argument in this paper is confined to the character of MNCs as state or quasi-sovereign for the purpose of enforcement of human rights.
B. Indian Law on State Action

The extension of the state action doctrine has been further developed in the Indian context. The tendency to bring more and more activity within the reach of constitutional limitations has been even more pronounced than in the United States. India is an extensively regulatory state and the courts have served as an effective check on government arbitrariness. This process has been facilitated by the special writ jurisdiction conferred on the Supreme Court of India by article 32 for enforcement of fundamental rights contained in Part III of the Indian Constitution. The provision enables parties to directly approach the highest court to seek invalidation of legislation or the setting aside of an administrative order that contravenes a fundamental right. The writ jurisdiction, being relatively expeditious and inexpensive, is invoked whenever possible.

The expansion of the state action doctrine has occurred through the development of the scope and ambit of article 12 of the Indian Constitution. In *Rajasthan State Electricity Board Jaipur v. Mohan Lal*, the Indian Supreme Court held that the Rajasthan Electricity Board was an authority within the meaning of "other authorities" in article 12. The majority pointed out that the expression included all constitutional and statutory authorities on whom powers are conferred by law. It was further held that any body of persons that had authority to issue directions, the disobe-

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74 Article 32 provides:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

A similar power is conferred on the High Courts to issue certain writs for the enforcement of rights conferred by Part III and for any other purpose, by Article 226 of the Constitution. 75


In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
dience of which would be punishable as a criminal offense, would come within the meaning of “State” for the purposes of article 12.76

In Sukhdev Singh v. Bhagatram, Justice Mathew articulated a more elaborate test.77 The state could no longer be understood as a “coercive machinery wielding the thunderbolt of authority,” but had to be perceived as a service corporation.78 He stated that the emerging principle was that a public corporation is an instrument or agent of the state, and thus subject to the same constitutional limitations as the state.79 This principle applied where the corporation was a creation of the state and there was an existence of power in the corporation to invade the constitutional rights of the individual.80

The doctrine of agency and state instrumentality was adopted by Justice Bhagwati in Ramana D. Shetty v. International Airport Authority.81 Justice Bhagwati identified several criteria for evaluating the existence of state action.82 The Indian Supreme Court held that it was not possible to formulate an exhaustive test to adequately determine whether a corporation was acting as an instrumentality or agency of the state.83 Although a degree of state control would not in and of itself be determinative of the issue, if such control was combined with state financial support and an unusual degree of control over management and policies of the corporation, the operation might be characterized as state action.84 The Court noted that it should not be confined to traditional conceptions of government functions when determining if a corporation is performing a governmental function.85 The Court cited with approval the view

76 1967 A.I.R. (S.C.) at 1863. Shah, J., concurring, favored a broader interpretation. He held that constitutional or statutory authorities would fall within the meaning of the expression if vested with sovereign powers, such as making binding rules and regulations. Id. at 1864.
78 Id. at 1349.
79 Id. at 1357.
80 Id.
82 Id. at 1641–42 (the criteria included (i) whether there is any state financial assistance and if so the magnitude of that assistance, (ii) any other form of state assistance, either usual or extraordinary, (iii) the nature and extent of the state’s control over the management and policies of the corporation, (iv) the monopoly status conferred or protected by the State, and (v) the nature of the functions carried out by the corporation).
83 Id. at 1642.
84 Id. at 1640. Bhagwati, J., states that “[i]t is the aggregate or cumulative effect of all the relevant factors that is controlling.” Id. at 1642.
85 Id. at 1640.
expressed by Justice Mathew in *Sukhdev Singh v. Bhagatram*, that "institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed, government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions." This doctrinal approach was unanimously affirmed in *Ajay Hasia v. Khalid Mujib Sehrawardi*.

These doctrinal developments have culminated in *M.C. Mehta v. Union of India* (hereinafter the *Shriram* decision), in which the Indian Supreme Court considered the true scope and content of articles 21 and 32 of the Indian Constitution. The issue of state action arose in the context of determining the standard of care owed by large enterprises engaged in the manufacture and sale of hazardous products and the basis on which damages should be assessed.

The case arose as a result of a leakage of oleum gas from a unit of the Shriram Foods and Fertilizer Industries, which affected several workers and the general public. The leak occurred while a writ petition was pending seeking closure of certain units of the company which purportedly posed a health hazard. The issue of whether the Court could entertain applications for compensation for loss or damage resulting from the leak, even though the petitioner did not amend the writ to include the claim for compensation, was referred to a larger bench of five judges as it involved a substantial question of law. The Court held that adopting a hypertechnical approach in dealing with such applications for the enforcement of a fundamental right to life would defeat the ends of justice.

The Court considered the scope and ambit of article 32 of the Indian Constitution. Relying on *Bandhua Mukti Morcha v. Union of India*, the Court stated that it was well settled that the article did not merely confer power to issue a direction order or writ for enforcement of the fundamental rights:

[I]t also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the

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89 For text of Article 32 of the Constitution of India, see *supra* note 74. Article 21 of the Constitution states: "No person shall be deprived of his life or personal liberty except according to procedure established by law."
power to forge new remedies and fashion new strategies designed to enforce the fundamental rights.\(^{91}\)

The Court proceeded to consider the question of whether article 21, a fundamental right, was available against a private corporation engaged in an activity that had the potential to affect the life and health of the people. According to article 12, fundamental rights enshrined in chapter III of the Constitution are only available against the "state." The Court therefore had to determine the scope of article 12 of the Constitution to ascertain whether the defendant fell within the definition of "state." The Court was able to extract a set of criteria that had evolved through the case law, by which a corporation could be termed "other authority" under article 12.\(^{92}\)

Referring to a passage in *Ajay Hasia v. Khalid Mujib*, the Indian Court emphasized that:

"Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form."\(^{93}\) [It followed therefore,] if the government acting through its officers is subject to certain constitutional limitations it must follow a fortiori that the government acting through the instrumentality or agency of a corporation should be equally subject to the same limitations.\(^{94}\)

The manner by which the corporation came into being was held to be immaterial for the purposes of determining whether the corporation was an instrument of state. The relevant inquiry was not how it had been brought into existence, but rather why it had been brought into existence.\(^{95}\)

The Indian Supreme Court proceeded to examine the petitioner’s arguments whether the defendant, a private actor, came within the ambit of article 12. The Court’s discussion focused on the government’s policy indicating that the activity of producing chemicals and fertilizers was deemed to be of vital public interest. The state should carry out such an activity although private corporations were permitted to supplement the state effort. Although it was found that the government did not control the internal management policies of the defendant company, it exercised functional

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\(^{91}\) 1987 A.I.R. (S.C.) at 1098.

\(^{92}\) *Id.* at 1093–94. However, the Court refused to decide the question in this case. *Id.* at 1097.

\(^{93}\) *Id.* at 1094 (quoting 1981 A.I.R. (S.C.) 487).

\(^{94}\) *Id.*

\(^{95}\) *Id.*
control. This control was exhibited by the government’s control over those activities of the defendant which could jeopardize public interest. The Court held that the defendant was engaged in the manufacture of a chemical deemed to be of vital public interest. As the chemical was admittedly dangerous to life, the defendant was engaged in an activity which had the potential to invade the right to life of a large section of the population.\textsuperscript{96} Therefore, the Court held that it was not only the state’s power as an economic agent, economic entrepreneur and allocator of economic benefits that should be subject to the limitations of fundamental rights.\textsuperscript{97} The Court was of the view that a private corporation under the functional control of the state, engaged in an activity hazardous to the health and safety of the community and imbued with public interest could in theory also be subject to the same limitations, but stopped short of deciding the question.\textsuperscript{98}

The Indian Supreme Court has clearly expanded the scope of articles 12 and 21 of the Indian Constitution to create respect for human rights within the corporate structure. The universalization of these principles will furnish an appropriate and uniform standard to govern the conduct and behavior of MNCs in developing countries, and, more particularly, to deal with the dilemmas confronted by courts in mass disaster situations.

C. MNCs as State Actors

Indian and American state action doctrines provide an effective analogy for characterizing MNCs as state actors or quasi-sovereigns. The various criteria articulated in the application of the state action doctrine in both Indian and American doctrines are ways of recognizing one common feature, namely, the existence and concentration of power in the concerned entity. This feature endows the entity with the ability to invade the rights of the individual. When such an ability exists, the entity must be subject to the same onerous responsibility attached to a state, to ensure the respect and protection of such rights. MNCs fall within this description as private business entities inherently affecting the public interest.

MNCs constitute the nucleus of the international business world, encouraging a growing interdependence among nation-

\textsuperscript{96} Id. at 1096.
\textsuperscript{97} Id. at 1097.
\textsuperscript{98} Id.
states. Their function as economic agencies and the allocators of economic benefits parallel what are regarded as traditional state functions. Therefore, the carrying out of functions which are intrinsically governmental is sufficient to characterize MNCs as states or quasi-sovereigns regardless of the fact that they have traditionally been regarded as private entities. Their public nature is further enhanced by their organizational structure which transcends national boundaries and thus blurs the line distinguishing them from public actors. The overwhelming association of MNCs with the scientific and technological progress of developing countries implicates them in the public interest of such countries and also contributes to their quasi-sovereign status.

In view of MNCs' acquisition of the attributes of a state, they ought to be subject to human rights obligations. They have emerged as powerful actors, endowed with the ability to inflict harm. Human rights which were designed to protect against abuses of power by a state must not be emasculated as a result of the delegation of that power.\(^99\)

**VII. Liability**

International human rights law has traditionally been confined to intentional violations by state actors. The accountability of MNCs endowed with the power to infringe human rights, however, must be determined according to the impact of the violation. Several jurisdictions have recognized that the effect of a violation of a constitutional right is sufficient to hold an actor accountable without requiring proof of intention.\(^100\) The Indian Supreme Court in the *Shriram* case confronted the problem of attributing intention to a corporate entity by conferring an absolute non-delegable duty on entities engaged in ultrahazardous activities.\(^101\) By holding such

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\(^99\) See H. Shue, *supra* note 45. Shue argues that certain minimal demands for basic rights can be made on "the rest of humanity" in this regard, which would include MNCs as they have become as powerful as nation states. In particular, that MNCs may not ignore the universal duty to avoid depriving persons of their basic rights nor may they interfere with actions, including government actions, taken to fulfill any kind of duty correlative to a basic right. Shue further argues that such rights are not confined to enforcement against members of one's own society, but are assertable against persons generally. *Id.* at 131–52.


\(^101\) 1987 A.I.R. (S.C.) at 1099.
actors absolutely liable for the harm resulting from their operations, the Court implicitly recognized the legitimacy of impact analysis in holding such actors accountable for fundamental human rights violations. The Indian Court recognized the limitations of traditional tort law in providing a standard that deals effectively with mass disasters resulting from industries engaged in ultrahazardous activities.\textsuperscript{102} The Court found that the rule in \textit{Rylands v. Fletcher} was not designed to deal with a modern industrial society.\textsuperscript{103} This rule did not contemplate the consequences and was thus inappropriate in a society where hazardous or inherently dangerous industries had become an integral aspect of the process of development.\textsuperscript{104} Therefore, the rule could not afford any guidance in creating a standard of liability which was consistent with constitutional norms and the needs of present day socio-economic structure.\textsuperscript{105}

The Indian Supreme Court set out the following principle of liability to govern enterprises engaged in ultrahazardous or inherently dangerous activities:

\begin{quote}
We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in \textit{Rylands v. Fletcher}.\textsuperscript{106}
\end{quote}

The Court held that while the enterprise was engaged in such activity, the enterprise owed an absolute and non-delegable duty to the community to ensure that no harm resulted to any individual as a result of the ultrahazardous and inherently dangerous nature of the activity undertaken. The enterprise was not entitled to a defense that it had taken all reasonable care and the harm occurred

\begin{footnotes}
\item[102] Id.
\item[103] 19 L.T.R. 220 (1868). This case established the principle that a person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief must keep it at his peril. If he fails to do so, and it escapes that person is \textit{prima facie} liable for the damage which is the natural consequence of its escape.
\item[104] 1987 A.I.R. (S.C.) at 1098.
\item[105] Id. at 1098–99.
\item[106] Id. at 1099.
\end{footnotes}
without any negligence on its part. Absolute liability was part of the social cost of carrying out such dangerous activity. The Court further noted that the enterprise alone has the resources to discover and guard against hazards or dangers posed by its activities and to warn against its potential hazards. 107

An absolute duty must be imposed on MNCs engaged in ultrahazardous activities as they are in the position to undermine the very existence of life itself. It is necessary to sustain the essential ingredients of the basic right to life. Dereliction of the duty not to expose individuals to mortal danger essentially obstructs performance of this right.

Furthermore, MNCs cannot shift their obligations to the local government. Where an MNC is situated in the same position as a state to inflict harm or threaten the substance of the right, its duty to observe such a right should be commensurate with its position. No exception should be permitted to this rule as it will merely perpetuate the notion that extrinsic circumstances should determine the value of human life as opposed to its intrinsic worth. Only the MNC is in the position to determine the ultrahazardous propensities of their activities. It is only on the basis of information supplied by MNCs that local governments license their activities.

Thus, the application of a principle of absolute liability to MNCs engaged in ultrahazardous activities recognizes the culpability of the MNC to the same extent as if the violation had been intentionally committed. 108 Without impact-based analysis, any attempt to render MNCs accountable for human rights violations will be futile.

VIII. THE REMEDY

The following section will focus on the remedy for violation of a human right resulting from ultrahazardous activities conducted by MNCs. The discussion will exemplify how human rights can be effectively secured against MNCs and also deter MNCs from inflict-

107 Id.
108 See The Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), which uses the language of obligation, stating that parties to the Covenant undertake to "respect" and "ensure" the rights stated therein to all individuals. The fact that MNCs are not parties does not detract from the force of the argument. The right to life existed before it had ever been articulated in the Covenant or any other document.
ing future harm. First to be discussed is the acceptance of damages as a remedy for the violation of a fundamental human right by courts in India as well as the United States. Second will be the introduction of a punitive measure of damages for remedying such violations, thereby acknowledging the value and content of the right concerned.

A. American Law

In the United States, the federal courts have fashioned a damage remedy for the violation of a constitutional right regardless of whether such a remedy has been explicitly sanctioned by Congress. In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, the plaintiff brought a federal action for damages alleging that the defendants had engaged in an illegal search and seizure resulting in “great humiliation, embarrassment and mental suffering.” The United States Supreme Court held that the fourth amendment was a sufficient basis for finding a right to recovery in this instance. It emphasized the individual’s personal injury and her entitlement to any available remedy for violation of the wrong committed. It awarded damages notwithstanding the absence of explicit congressional action authorizing the remedy. The Court held that the judiciary had a particular responsibility to assure the vindication of constitutional interests.

In Carlson v. Green, the United States Supreme Court went so far as to permit the plaintiff to seek damages directly under the eighth amendment, notwithstanding the availability of a congressionally authorized remedy under the Federal Torts Claim Act (FTCA). The Court held that the FTCA was not intended to be a substitute remedy for a Bivens action. Several factors weighed in favor of allowing the plaintiff to pursue a Bivens action which

110 Id. at 389–90.
111 Id. at 394–95.
112 Id. at 395.
113 Id. at 396 (quoting Bell v. Hood, 2 U.S. 678, 684 (1945)).
114 Bivens, 403 U.S. at 407. See also Davis v. Pasman, 442 U.S. 228, 248 (1979) (wherein the award of damages was held to be an appropriate remedy for an alleged due process violation under the fifth amendment).
115 446 U.S. 14 (1980).
demonstrated the Court’s willingness to recognize the value of the concerned right to the individual where neither common law nor statute provided an effective remedy.118

These cases reflect the emerging judicial approach to award damages for violations of constitutional rights in cases where no other effective common law or statutory remedy exists and there are no special factors which counsel against the judicial creation of a remedy.119

The second issue of the amount of damages the Court is willing to award has been addressed in a number of cases. Some recent cases reflect the underlying tension between traditional tort concepts of compensation and a more expansive view of compensation for constitutional violation.120 Punitive damages have been awarded

118 Id. at 18–23. The court stated that a Bivens remedy was a more effective deterrent than the FTCA because it was available against an individual for unconstitutional behavior. Furthermore, a claim for punitive damages was available under a Bivens action, but forbidden under the provisions of the FTCA. A plaintiff was also entitled to a jury trial under a Bivens action which was unavailable under the FTCA. Finally, the Bivens action was based on uniform federal laws whereas the FTCA was tied to state laws. Id. at 20–23. See also Rotenberg, Private Remedies for Constitutional Wrongs — A Matter of Perspective, Priority, and Process, 14 HASTINGS CONST. L.Q. 77 (1986).

119 The reasoning in the Bivens line of cases is subject to a special context exception. See Bush v. Lucas, 462 U.S. 367 (1983) (where the plaintiff, a federal civil service employee, was denied a damage action brought under the Constitution alleging violation of first amendment rights by his superiors. Although the available congressional remedy was not equally effective, the plaintiff’s claim was disallowed due to the “special context” of Congress’ long involvement with the federal civil service. Nevertheless, although the relief was not complete, it was held to be adequate). See also Chappell v. Wallace, 462 U.S. 296 (1983) (decided at the same time; the question was whether enlisted military personnel may sue to recover damages from superior officers for injuries suffered as a result of violation of a constitutional right. The complaint was disallowed on the ground that the special context exception applied. A soldier and his or her superior officer enjoy a unique relationship which would be undermined by making officers personally liable to those they are supposed to command). Id. at 304. See also Jones v. Reagan, 696 F.2d 551 (7th Cir. 1983). For an analysis of the effect of Chappell and Bush on the Bivens action, see Steinman, Backing off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights, 83 MICH. L. REV. 269 (1984).

120 See Carey v. Piphus, 435 U.S. 247 (1978) in which the Court, in the absence of actual injury, allowed only nominal damages. This holding implicitly limited recovery for deprivation of procedural due process to recovery for actual injury as a result of the deprivation. In the aftermath of Carey, the question remained whether substantial deprivation was similarly limited. See Memphis Community School District v. Stachura, 106 S. Ct. 2537 (1986), where the Court held that damages could be recovered for a substantial deprivation of a constitutional right when tied to an injury actually suffered. The case arose from a dispute concerning course material used by a tenured seventh grade science teacher in a Memphis public school. The plaintiff claimed compensatory and punitive damages for being deprived of liberty without due process and also claimed violation of his first amendment rights. The Supreme Court reversed the district court, which upheld the claim, and remanded it for consideration
in tort law when there has been a showing of actual injury or real harm.121 Some constitutional cases, however, represent the view that although compensation for actual injury may be sufficient to deter future violations, this is not always an appropriate remedy for constitutional violations.

In *Monroe v. Pape*, Justice Harlan, in a concurring opinion, claimed that the special kind of constitutional violation in section 1983 required a different remedy and a significantly higher level of appropriate compensation than do ordinary torts by private citizens.122 He stated that the legal history of section 1983 indicated that the constitutional deprivation “is significantly different from and more serious than a violation of a state right . . . .”123 Thus, the American courts have allowed the award of punitive damages, thereby recognizing the value of the right violated and simultaneously having a deterrent effect.124

### B. Indian Law

Until recently, damage awards were not contemplated in the exercise of the Indian Supreme Court’s original jurisdiction. Damages were not traditionally awarded against the state for violation of a fundamental right, partly due to the institution of the writ remedy which does not contemplate the granting of damage awards for the violation of fundamental rights, and also to the traditional common law notion that the “king can do no wrong.”125

of the damage award. *Id.* at 2546. It found that there was no acceptable justification for the jury instruction authorizing damages based on abstract social and historical significance of a constitutional right. *Id.* at 2543–44. Marshall, J., joined by Brennan, Blackmun, and Stevens, J.J., concurring, stated that the violation of a constitutional right resulting in non-monetary injuries, and not falling within traditional tort conceptions of emotional distress, in proper cases may constitute a compensable injury. *Memphis School Dist.*, 106 S. Ct. at 2547 (Marshall, J., concurring). The case rejected any notion of awarding damages based on the abstract value of the constitutional right. Unfortunately, the holding leads to an unwarranted distinction between a public constitutional wrong, such as environmental well-being, and a private constitutional wrong, where actual injury can be shown. See *Rotenberg*, *supra* note 118 at 87 (where Rotenberg argues that the Court could easily conclude that every constitutional wrong “is a substantial or significant or meaningful injury to the person affected”).

123 *Id.*
124 *Carlson*, 446 U.S. at 21–22.
125 This notion embraced two ideas, namely (i) the king was above the law and could not be held to wrongdoing by traditional legal norms and (ii) the king was a perfect embodiment
The Indian Supreme Court has taken some steps toward enlarging the scope of remedies available in the exercise of its original jurisdiction. In several recent cases concerned with the enforcement of article 21 of the Indian Constitution, the Indian Supreme Court has implicitly recognized its premier place in the Constitution and acknowledged the need to develop remedies consistent with the expanding content of the article. The Court therefore attempted to develop a compensatory remedy to effectively vindicate the individual’s fundamental right to life and liberty and deter the state and other powerful entities from violating it.\(^\text{126}\)

In these cases, the Court recognized that in the absence of an adequate civil remedy founded directly upon the violation of a constitutional right, the only remedy available to the plaintiffs would have been tort damages pursuant to a civil suit against the state or its officers. By using its original jurisdiction to award compensation, the Court highlighted the content and value of the right violated as well as the responsibility of the actor for the violation of the right.\(^\text{127}\) As Chief Justice Chandrachud stated in *Rudal Sah*:

> [I]n these circumstances the refusal of the court to pass an order of compensation in favour of the petitioner [would] be doing mere lip service to his fundamental right to liberty which the State Government has also grossly violated. Article 21 which guarantees the right to life and liberty would be denuded of its

of the law. However, the “petition of right” procedure introduced for suing the king demonstrated that traditional procedure was not sufficient for bringing the king back to perfection should he fall below the standard. *See also* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

\(^{126}\) *See* Rudal Sah v. State of Bihar, 1983 A.I.R. (S.C.) 1086, where the Court awarded compensation for the State’s gross violation of the petitioner’s fundamental right to life and personal liberty under Article 21. The petitioner was found to have been illegally detained without statutory justification for 14 years after being acquitted from certain criminal charges. The Court directed the State to pay the petitioner monetary compensation. The case marked the first occasion on which the Supreme Court used its original jurisdiction under Article 32 to create new remedies where such remedies were considered indispensable to the vindication of fundamental rights. *See also* Bhim Singh, MLA v. State of Jammu and Kashmir, 1986 A.I.R. (S.C.) 494, where it was found that a member of the legislative assembly of Jammu and Kashmir was arrested and detained for the malicious purpose of preventing him from attending an assembly session. The Supreme Court passed strictures and condemned the authoritarian acts of the police. The government was held responsible for the arrest and directed to pay the petitioner compensation.

\(^{127}\) For a more elaborate discussion on the expansion of remedies in the exercise of the Supreme Court’s original jurisdiction, see Patel, *New Dimension of Law Restitutive Justice*, A.I.R.J. 49 (1987).
significant content if the power of this Court were limited to passing orders of release from illegal detention.  

Chandrachud held that the violation of the right could reasonably be prevented and the mandate of article 21 duly complied with by directing its violators to make a payment of monetary compensation.

It was not until the Shriram case, however, that the Supreme Court of India forged a remedy fully commensurate with the value and content of the right being asserted. The Court recognized the need to offer more than a palliative to victims of powerful entities in the position to disregard basic human rights through the assertion of their power and restore the right to life to its position of primacy among human rights. The Shriram case also proposes a punitive measure of damages insofar as it is based on the defendant's capacity to pay. The Court appreciated the value of the right affected by the violation. It therefore articulated a punitive measure of damages against a state actor. Actual or exemplary damages, traditionally awarded in tort cases, were not deemed by the Court to be sufficient compensation for the violation of a human right. The damage measure had to have a deterrent effect. Therefore, the Court held that the measure of compensation should be correlated to the defendant's magnitude and capacity to pay.

Damages should be recoverable from MNCs for the infringement of a human right resulting from the ultrahazardous nature of their activity. The trends in both American and Indian law endorse this approach. In addition, the award must be punitive in nature if it is to have a deterrent effect and highlight the value of the right which is being infringed.

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131 Id. at 1099–1100.
132 Id. See also Dias and Baxi, Shriram Judgment, Companies “Absolutely Liable” for Industrial Hazards, BUSINESS INDIA, Jan. 12–25, at 43 (1985) (where the former Chief Justice Bhagwati discussed the Shriram decision and the reasoning underlying the principle of damages articulated by the Court).
133 It follows that the value of the right should not be undermined through the application of the doctrine of forum non conveniens. See supra note 12 and accompanying text. If capacity to pay is the determining factor in securing relief for the violation of a human right, the plaintiff must have unimpeded access to the defendant's assets sufficient to satisfy any decree awarded in her favor. The author would propose that the principle of damages based on
IX. Conclusion

The underlying concern throughout this article has been to expose the legal vacuum existing at both the domestic and international levels in governing the behavior and conduct of a powerful international entity. The multinational corporation has accumulated power and influence equipping it with the capacity to inflict as much harm as the nation-state, if not more. Yet, no mechanism exists to contain its ability to violate fundamental human rights. The reluctance to subject these actors to human rights obligations has been shown to be unacceptable and without foundation. MNCs must be held accountable for the wanton disregard exhibited for the value of life in developing countries. They cannot be permitted to export harm to other countries, and reap the full profit of their ventures without liability in an equal measure for the resulting damage. They must no longer be permitted to evade their responsibilities by retreated behind anachronistic doctrines and narrow constructions that have governed these powerful, ostensibly private entities and precluded any consideration of human rights. Human rights law can cure the existing defect in the law by supplying a common and acceptable regime for all parties.

In the context of MNCs engaged in ultrahazardous activities, the true scope and content of the right to life must be recognized and should not be fragmented by different value systems. Affluence or poverty must not overwhelm the intrinsic worth of the right. If the existence or expendability of life were determined by such external measures of value, it would impoverish human rights generally, and more specifically, negate the very concept of the right to life.

The Universal Declaration of Human Rights was the progeny of an international community aspiring for homogeneity and unity. It was an expression of the recognition of the interdependence of nations. The judiciary must adopt the spirit of this expression and not cling to narrow, parochial definitions in the arena of human rights. It must recognize that in transnational situations the interpretation of these rights must be broad enough to accommodate different value systems. Human rights do not and ought not give credence to a dual system of values.

Finally, as MNCs engaged in ultrahazardous activities are endowed with an inordinate capacity to inflict harm and cause death, capacity to pay be coupled with the traditional rule of law permitting a plaintiff to sue the defendant where the defendant resides. See Indian Code of Civil Procedure § 20.
the subjection of these actors to human rights obligations ought no longer be contingent upon the judicial manipulation of legal fictions, such as the state action doctrine. The power of these entities alone ought to suffice. Human rights law is the only force which can supply the legal framework to bridle the power of MNCs that transcend national boundaries and cannot be held accountable to any domestic legal regimes. The vindication of the value of human life, as a meaningful and concrete right in individual lives, demands no less.  


Under circumstances such as these, the issue of a Declaration of Rights would be a grave error of judgment unless it set out deliberately to unify, and not to separate, men [sic] in their different political societies. It must therefore, emphasize the identities, and not the differences, in the competing social philosophies which now arouse such passionate discussion. But even then it will have little value, even as a general expression of aspirations, unless it is both concrete enough and definite enough in character to seem clearly to possess the practical merit of being capable of application by the effort of those to whom it is addressed. It must, this is to say, be a programme and not a sermon. It must be a criterion of the actual practices of existing political countries, so framed that it is felt to be a living canon of their validity.