MNCs and the Human Rights Regulatory Challenge: A Critique of 'Integrated Theory of Regulation' and the Case for a Possible Alternative

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I. Introduction

As the major drivers of globalisation, multinational corporations (MNCs)[1] are in large part responsible for the benefits associated with it. The International Chamber of Commerce has suggested that "globalisation has made the world economy more efficient and has created hundreds of millions of jobs, mainly, but not only, in developing countries".[2] This does not mean that globalisation and the activities of MNCs are all about global economic progress and job creation in developing markets, because the activities of MNCs also produce certain adverse

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1 The acronym MNCs will be used to represent "multinational corporations", the preferred term used throughout this article to denote major multinational business corporations. Other terminologies such as "multinational enterprises" (MNEs) and "transnational corporations" are also used to identify multinational (global) corporate business operations, but the differences in terminologies is not material to discussions on the impact of global corporate business activities in developing markets. For a definition of the various terminologies and their origin, see Peter M Muchlinski, *Multinational Enterprises and the Law* (2nd ed, OUP 2007) 5–8.

2 International Chamber of Commerce, 'Brief on Globalization' (Organization for Security and Co-operation in Europe, November 22, 2000) <https://www.osce.org/secretariat/42286?download=true> accessed 5 December 2017.

effects that impact upon the human rights of communities when they operate in developing markets.[3]

It is this adverse effect of MNC activities, and the lack of adequate remedies for the victims, that are the focus of this article. This has become especially relevant given the frequency with which non-governmental organisations (NGOs) and activists have publicised instances of business conduct that has violated universally agreed upon human rights norms since the last decade of the last century.[4] The outrage that followed some of the major human rights and environmental disasters in developing markets[5] is one of the major factors that has influenced the development of new initiatives on Business and Human Rights (BHR), which has led to the emergence of various Corporate Social Responsibility (CSR) codes by some major MNCs and Voluntary Codes of Conduct (VCC) by inter-governmental institutions since the 1990s.[6]

However, notwithstanding the growing body of regulatory initiatives that seek to make MNCs accountable, environmental damage and human rights breaches

[3] Muchlinski (n 1) 487–489: "When operating in developing countries, where comparable employers may not exist, MNEs should provide the 'best possible wages, benefits and conditions of work, within the framework of government policies'. These should be related to the 'economic position of the enterprise, but should be at least adequate to satisfy basic needs of the workers and their families'…"

[4] See, for example, *Human Rights Watch and Center for Human Rights & Global Justice*, 'On the Margins of Profit: Rights at Risk in the Global Economy' (Human Rights Watch, February 2008) <http://www.hrw.org/sites/default/files/reports/bhr0208webwcover.pdf> accessed 19 October 2017; *Human Rights Watch*, 'The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (Human Rights Watch, January 1999) <http://pantheon.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 19 March 2016.

[5] Some examples of environmental and human rights disasters that have generated global outrage include the destruction of Ecuadorian Amazon by Texaco: see *The Inter-American Commission on Human Rights*, 'Report on the Situation of Human Rights in Ecuador' reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.96 Doc 10 Rev 1 (1997); the activities of Shell that caused the environmental degradation in Ogoni and the eventual hanging of Ken Saro Wiwa and his eight Ogoni kinsmen on 1 November 1995: see '1995: Nigeria Hangs Human Rights Activist' *BBC News* (London, 10 November 1995) <http://news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm> accessed 26 January 2015; and the collapse of a factory building in Sava, Bangladesh, 13 March 2013: see 'Bangladesh building collapse death toll passes 500' *BBC News* (London, 3 May 2013) <http://www.bbc.co.uk/news/world-asia-22394094> accessed 2 March 2016.

[6] Christen Broecker, '"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability' (2008–2009) 41 NYU J. Int'l L & Pol 159, 160.

are still prevalent in developing markets.[7] This has led to the conclusion by some commentators that existing legal and regulatory regimes for regulating MNCs are inadequate.[8] As a result, commentators have increasingly focused on the obligation of MNCs under existing international norms, especially human rights law, as a means of regulating MNCs to make them accountable for their human rights violations.[9] Some scholars have developed alternative regulatory theories in this regard. One of them is the main subject of this investigation: the "integrated theory of regulation" developed by Deva Surya to solve what he termed the difficulty in regulating a difficult regulatory target—MNCs.[10]

Deva and most of the current human rights law scholarship are agreed on the need for a legal or regulatory framework that could address the current situation of corporate impunity for human rights violations in developing markets. The complex nature of modern MNCs and their global operations make them a difficult regulatory target because they operate in developing markets through their subsidiaries, which often take the form of special purpose vehicles (SPVs). However, it is argued that the law that regulates their entry into a developing market could also be relied upon to regulate their conduct within the jurisdiction with a view to preventing corporate human rights violations. The place of domestic law, especially corporate law,[11] as a regime for addressing corporate responsibility in this regard will be discussed later on, but in order to be able to effectively challenge

[7] See the *UN Commission on Human Rights* (UNCHR), 'Interim Report of the Special Representative to the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' (22 February 2006) E/CN.4/2006/97 para 30; see also: United Nations Environmental Programme (UNEP), 'Environment Assessment of Ogoniland (UNEP, 2011) <https://www.zaragoza.es/contenidos/medioambiente/onu//issue06/1130-eng.pdf> accessed 23 January 2015.

[8] Sukanya Pillay, 'And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protection' (2003–2004) 81 U Det Mersy L Rev 489, 522; Surya Deva, *Regulating Corporate Human Rights Violations: Humanising Business* (Routledge 2012) 12.

[9] See, for example, Michael K Addo, 'Human Rights and Transnational Corporations—An Introduction' in Michael K Addo (ed), Human Rights Standards and the Responsibility of Transnational Corporations (The Hague: Kluwer Law International 1999); Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 56; Pillay (ibid); Deva (ibid).

[10] Deva (n 8) 50–51.

[11] Corporations and companies will be used interchangeably throughout this article to represent the for-profit business structure that provides its "owners" (members/shareholders) with limited liability. Corporate law and company law will also be used interchangeably to represent the law that regulate them. We acknowledge that in certain jurisdictions, notably the US, different legal regimes regulate companies and corporations but such difference is not material to the discussion here because our reference jurisdictions in this article—the UK and some major developing markets that operate as common law jurisdictions, such as India, South Africa and Nigeria—do not operate different corporate law regimes for companies and corporations. For an analysis of the differences, see Joseph Shade, Business Associations in a Nutshell (3rd edn, West Academic Publishing 2010) 46–50.

Deva's views on the subject of regulating MNCs, it is important to first identify and analyse the basis for his views.

Deva identifies three sets of question that represent what he terms the three broad challenges to the goal of humanising business—why, what and how (the WWH challenge).[12] First, why corporations should have human rights responsibility; secondly, what the exact nature and scope of corporate human rights responsibility is; and thirdly, how corporations, especially MNCs, can be held accountable for human rights violations.[13] To resolve these challenges, he begins by identifying the existing problems. He employs Bhopal as a case study to investigate how MNCs are able to violate human rights and escape liability in developing markets by exploiting the loopholes in existing regulations.[14]

Deva's choice of Bhopal, a remote Indian town and the site of a disastrous toxic gas leakage during the night of 2 December 1984 from the methyl isocyanate storage tank of the Bhopal chemical plant owned and operated by Union Carbide India Limited (UCIL), a subsidiary of Union Carbide Company (UCC),[15] is important to the issues addressed in this article for two reasons. First, it reveals the manifest failure of traditional corporate law concepts to deal adequately with the MNC phenomenon.[16] Secondly, it brings to the fore some of the factors that make MNCs operating in developing markets a difficult regulatory target.

Deva extensively discusses how the control of UCIL by the parent UCC contributed to the accident that occurred in Bhopal.[17] He is inconclusive as to whether the manner in which UCIL, as the Indian subsidiary, was controlled played an important part in that accident, or that a different corporate governance structure would probably have produced a different outcome. Thus, the overall aim of this article is to identify how the interaction between the corporate governance structure and the actual manner of control can be a basis for suggesting an alternative approach to integrated regulation that could promote more responsible corporate behaviour, and thereby minimise corporate human rights abuses in developing markets.

The rest of this interrogation is spread across four main parts. Part II will discuss Deva's case study, Bhopal. This will provide a rational basis to analyse the

[12] Deva (n 8) 1.

[13] ibid.

[14] ibid 2.

[15] Union Carbide Company (UCC) is the American parent company of Union Carbide India Limited (UCIL). The acronyms UCC and UCIL will be used throughout this article to represent the Union Carbide Company and Union Carbide India Limited. See Deva (n 8) 29.

[16] Muchlinski (n 1) 321.

[17] Bhopal represents the gas leak in the Union Carbide Corporation (UCC) plant in Bhopal India in 1984 in which over 15,000 (fifteen thousand people) died. Deva (n 8) 24–45.

challenges to human rights regulation in developing markets. Part III will review the three levels of the theory while Part IV will critique the theory and identify the basis for an alternative approach to integration. Part V concludes the article.

II. The Bhopal Case Study as the Basis for Integrated Theory of Regulation

The power and economic influence of UCC and the demand for foreign investment played a major part in the post-entry negotiations between UCC and its host (India), as well as the manner in which the company operated in the country. According to Deva, the company was able to capitalise on the Indian Government's desire to industrialise by exploiting existing laws and effectively bypassing their application of it to its own operation in a spectacular fashion. First, the Industrial Development and Regulation Act 1951 reserved the formulation of pesticide activities for small local Indian firms, and the Foreign Exchange Regulation Act 1973 also limited foreign ownership of Indian firms to 40%.[18] UCC was able to bypass the obstacles imposed by both pieces of legislation to establish UCIL, a company engaged in activities reserved for local firms. It is important to understand the effect of majority control in corporate decision-making in order to fully appreciate why it was important to UCC and its contribution to the Bhopal disaster.

It is a general rule of company law that ownership of shares in a company having share capital qualifies the holder as a member of the company.[19] In other words, shareholding is synonymous with membership.[20] The desire for majority control by UCC in this case is instructive. Company law virtually separates ownership and control and the key players in the formal decision-making structure of companies, especially public companies, are a group called the 'board of directors'.[21] Thus, the powers of the shareholders to initiate corporate actions is very limited, as they are only entitled to approve or disapprove a few board actions.[22]

It is noteworthy that the separation of ownership and control is partial or non-existent where there is majority control that is where the corporation has a

[18] ibid 26.

[19] See *Companies Act 2006* (hereinafter, "UK CA 2006"), s 112; Companies & Allied Matters Act (Cap C20) (Laws of the Federation of Nigeria 2004) (CAMA), s 79; The Companies Act 2013 (No 18 of 2013) (hereinafter, "Indian CA"), ss 2(55) and 45–50.

[20] Derek French *et al*, *Mayson, French and Ryan on Company Law* (34th edn, OUP 2013) 165.

[21] *Aranson v Lewis* 473 A.2d 805 (Del 1984) 811; UK CA 2006 (n 19), s 71; CAMA (n 19), ss 244 and 63(3); Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008) 4.

[22] Bainbridge (ibid).

dominant shareholder who owns more than 50% of the outstanding voting shares.[23] In this case a shareholder is able to control the board and the management of the company. This is the typical structure of a corporate group involving a MNC and its group members (subsidiary or subsidiaries), usually structured in a 'pyramid' hierarchical form of ownership, where a parent company wholly owns (or holds the majority shares in) the subsidiary or subsidiaries and may in fact dominate their management.[24]

The total control that UCC exercised over the Indian subsidiary UCIL, which was achieved by persuading the Indian government to grant them an exemption from the 40% rule,[25] merits further discussion because of the implication of foreign control to the Bhopal disaster. UCC did in fact exercise real control over the subsidiary, UCIL, a company engaged in carrying on a hazardous activity at the Bhopal plant. Thus, based on its ownership of the majority of equity (50.9%) in the subsidiary,[26] UCC controlled the composition of the board of directors of UCIL and also had full control over its management.[27] The control by the parent company extended beyond representation on the board of directors "to the taking of key decisions regarding issues such as technology, plant design, safety, storage and handling of MIC,[28] training of employees and financial viability of the firm".[29]

This excessive "centralisation not only resulted in a rift between the formulation of 'global' policies and their 'local' implementation, but also contributed to a communication and management gap between UCC and the and UCIL".[30] J. Cassels explains how this rift played a part in the occurrence of Bhopal thus: "[s]afety information was not properly communicated from the head office, and what information was communicated was ignored".[31] In addition, there was also the problem of differences in the expectations of the parent MNC and the Indian government, because the Indian subsidiary did not meet the profit expectation of the parent company.[32] As a result, UCC was not very interested in the proper management or successful running of its subsidiary UCIL and thus resorted to cost-cutting measures. The company adopted inferior standards in terms of its

[23] Adolf A Berle and Gardiner C Means, *The Modern Corporation & Private Property* (10th reprint, Transaction Publishers 2009) 84–116.
[24] Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 16.
[25] Deva (n 8) 26.
[26] Muchlinski (n 1) 315.
[27] ibid.
[28] MIC is the acronym for methyl isocyanate, the chemical that caused the explosion in the Bhopal plant.
[29] Deva (n 8) 28.
[30] ibid.
[31] J. Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press 1993) 20.
[32] Deva (n 8) 28.

staff training and maintenance of the Bhopal plant in comparison to the standard operated in West Virginia and other plants belonging to the parent UCC.[33]

The Indian government on the other hand preferred that the Bhopal plant should continue to operate safely but could not rein in the company, not only because it manufactured pesticides locally, but also because it provided much needed employment. At this point, issues of safety and the environment took a back seat because these were not the priorities of UCC[34] at the time. The application of inferior technology in the Bhopal plant, in addition to compromised safety standards and poor staff training, at a company like UCIL that was involved in dealing with or storing MIC, an ultra-hazardous and dangerous substance,[35] meant that Bhopal was a disaster waiting to happen.

The major problem in this unfolding situation at the Bhopal plant is that, at the decision-making level inside UCIL, there was no representative committed to defending the rights and interests of the vulnerable groups that is those exposed to the dangers of an accident, especially the workers and the local community. This is because the Indian Companies Act 2013 (hereinafter, "Indian CA"),[36] just like equivalent legislation in most developing markets, —such as Nigeria's Companies and Allied Matters Act 2004 (CAMA)[37]—and even in major economic jurisdictions (especially in the common law world),[38] recognises only two decision-making elements: the board of directors, and the company in the annual general meeting. This makes governance of the corporation fundamental to our criticism of Deva's suggested approach, and relevant to any proposal that seeks to address corporate human rights violations. Thus, it is important to mention here that decision-making inside the corporation does not generally include those most affected by the activities of the corporation, such as local communities. In the case of UCC

[33] Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (Amnesty International 2004) 42–43.

[34] Deva (n 8) 29.

[35] UCC's *Reactive and Harzadous Chemicals Manual*, states that MIC is 'a harzardous material by all means of contact' and recognised poison by inhalation', UCC, *Bhopal Methyl Isocyanate incident Investigation Team Report*, Danbury, March 1985 as quoted in Amnesty International (n 33) 11.

[36] Indian CA, ss 88–122 and 279. This is in pari materia with ss 165–192, 285–292, Companies Act 1956 (Act No 1 of 1956) (hereinafter, "Indian CA 1956"), the extant corporate legal regime in India at the time of the Bhopal incident.

[37] See CAMA, ss 211–244, 279.

[38] In the UK, the power to govern the company is shared between the shareholders and the board of directors and it is a contractual relationship and it is the articles that determines the extent of management power conferred on the board. See, UK CA 2006 (n 19), s 257; the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 2, Sch 1 art 3 (Model Articles for Private Companies Limited by Shares); reg 4, Sch 3 art 3 (Model Articles for Public Companies).

and its subsidiary, UCIL, and consistent with how many MNCs are organised and structured, the parent UCC controlled the functioning of its subsidiary.[39]

Another major factor that arguably encourages corporate irresponsibility in developing markets is the lack of access to legal remedies as a result of the inefficiency of their judicial infrastructure. In the case of Bhopal, the convoluted battle to secure compensation for the victims revealed the profound deficiency in the Indian judicial infrastructure, which is the general trend in many developing markets.[40] In the Bhopal disaster case, the Indian government, which secured the exclusive right (through the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985)[41] to represent the victims, considered it best to sue the parent company UCC in a US court. UCC on the other hand pushed for the trial to take place in an Indian court where they could rely on the weakness of the system to manipulate the process in order to induce a settlement.[42] The other reason that the Indian government preferred to pursue the matter in a US court was because of the "general incompetence of the Indian courts and the legal system to handle effectively a case of this magnitude".[43]

The case which the Indian government commenced in the US court was, however, eventually dismissed on the grounds of *forum non conveniens*, as the judge declared that he was "firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liabilities".[44] As will be illustrated, the later litigation that took place in the Indian courts confirmed not only the general incompetence earlier pleaded by the Indian government in the US court, but also the dilemma that dealing with MNCs poses for developing markets.

Two developments in the trial that took place in India highlights the sensitivities of the Indian authorities and the inefficiency of the Indian judicial infrastructure. First, the case was not vigorously prosecuted because the Government of India neither wanted its role in the Bhopal disaster exposed and subjected to international

[39] Deva (n 8) 28.

[40] An example is in Nigeria where a case of *Shell Petroleum Development Company Nigeria Ltd v Joel Anaro & Ors* (2015) LPELR-24750 (SC) concerning human rights abuse took 32 years to resolve. See Ade Adesomoju, 'Oil Spills: 32 Years After, Supreme Court Orders Shell to pay N30m Compensation' *The Punch* (Nigeria, 6 June 2015) <https://punchng.com/news/oil-spill-32-years-after-scourt-orders-shell-to-pay-n30m-compensation/> accessed 3 March 2016.

[41] Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (No 21 of 1985).

[42] Deva (n 8) 40.

[43] ibid 38.

[44] *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984* (1986) 634 F Supp 842, 866.

scrutiny nor did it want the Bhopal litigation to discourage other MNCs from investing in India.[45]

Secondly, UCC was able to exploit the inefficiency of the Indian judicial infrastructure to such effect that throughout the period of litigation, from the district court through to the High Court and Supreme Court, the matter never proceeded to an assessment on the merits of the case. This is because, in the words of Deva, "UCC played its cards skilfully (*e.g.* delaying proceedings, increasing the complexity of the case, …, filing cross-appeals, challenging powers and jurisdiction of the Indian courts, and even conveying a veiled threat about the non-enforceability of an Indian judgement against UCC in the US)".[46] This is with a view to coercing "the government to enter into a settlement".[47] Thus, after years of frustrating litigation, the India Supreme Court finally approved a settlement between UCC and the Indian government by its two orders dated 14 and 15 February 1989,[48] in the following words: "[t]he aforesaid payments [US$470 million] shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal disaster… and not as fines, penalties, or punitive damage".[49]

The Bhopal case represents a typical scenario of a human rights violation in developing markets[50] and the type of redress available to the victims of such violations. In such situations, Deva argues that existing regulatory mechanisms are inadequate to deal with human rights violations and he proposes his "integrated theory of regulation" as a process of integrating different available levels of regulation to effectively deal with corporate human rights abuses.

III. Deva's Integrated Theory of Regulation

Deva identifies three levels of regulation for his integrated approach that is aimed at adequately regulating MNCs to ensure human rights integrity in developing markets. It is instructive that the underlying reason why Deva suggests an integrated approach is that the structure and operation of MNCs make them a difficult regulatory target, which cannot be adequately regulated by a single regulatory theory or strategy. However, as will be discussed later on,[51] Deva did not specifically address the important issue of how the very structure of the modern corporation may itself be fundamental to the Bhopal case and generally contribute

[45] Deva (n 8) 39.
[46] ibid 40
[47] ibid.
[48] *Union Carbide Corporation v Union of India* AIR 1990 SC 273.
[49] Deva (n 8) 275.
[50] ibid 24.
[51] See Part III.B below.

to corporate disregard for human rights; instead, he focuses on transnational regulation as a strategy for providing adequate remedy to human rights victims.

As this article proceeds to review the levels of regulation proposed by Deva, it is important to note that employing a mix of regulatory regimes is in principle a useful strategy for the effective regulation of modern multi-layered corporations operating multi-nationally. Therefore, there is no attempt here to contest the efficacy of Deva's multi-layered regulatory approach. However, the problem is that Deva's remedial focus fails to address the problem posed by the structure of the modern corporation. This is the basis for this review that aims to explore how a change in corporate governance structure may be an alternative basis for promoting international human rights standards.

A. A review of Deva's proposed regulation at the institutional level

Deva argues that there is a need for regulation at the institutional level. According to him, the place of the corporation as an important institution in society makes regulation at the institutional level imperative.[52] By regulation at the institutional level, Deva means the putting in place of codes of conduct, guidelines, principles, charters or policy statements by each business enterprise.[53] Deva distinguishes his suggested corporate code from the "self-regulating" corporate codes voluntarily adopted by most major MNCs. According to him, the proposed code is a modified version of self-regulation.[54] He identifies two aspects of modification. First, in designing the proposed code, the concerned institution is to be guided by the content of regulatory initiatives at the national and international levels, as well as by input from its stakeholders. Secondly, the stakeholders of the institution concerned will try to ensure that—through a range of strategies and sanctions—the initiatives adopted are implemented in their letter and spirit by the concerned corporation.[55]

Deva rightly anticipates that opinions may sometimes diverge between a particular MNC and its stakeholders about the contents of the code. To resolve such differences when they arise, he proposes that the institution concerned should adopt the view reflective of its position and issue an explanatory note along with the adopted code to explain the circumstances that required deviations *vis-a-vis* existing national or international regulations, or why certain suggestions of

[52] Deva (n 8) 204.
[53] ibid 204.
[54] Deva (n 8) 204, citing Michael Clark, *Regulation: The Social Control of Business between Law and Politics* (Macmillan Press Ltd 2000) 3.
[55] Deva (ibid).

stakeholders have not been included in the code.[56] The implication of resolving the divergence of opinions between a MNC and its stakeholders in this manner is that the proposed code does not necessarily have to strictly conform to any national or international regulations to guide the operations of the MNC concerned with respect to human rights, as long as the non-conformity can be explained.

There are many problems with the corporate code suggested by Deva as a regulatory tool intended to make MNCs take their human rights responsibilities seriously. First, his attempt to differentiate his own suggested code from the other corporate codes currently adopted and operated by most major MNCs clearly exposes the deficiencies inherent in his proposal. He acknowledges that there is a preponderance of voluntary corporate codes adopted by major MNCs with respect to human rights,[57] and states that the regulatory initiative which he proposes at the institutional level will be voluntary in the sense that government will not enforce it, but maintains that the code will not be altogether without teeth. In his view, the teeth will be provided by the institutional compliance mechanisms put in place by the concerned MNC as well as the activities of stakeholders and civil society groups.[58] However, it is argued that there is nothing in the proposed code that makes it any different from other corporate codes. There is nothing new in his suggestion that the formulation of his proposed code will be guided by the content of regulatory initiatives at the international and national levels. The analysis of corporate codes by the European Commission reveals that most corporate codes are already guided by the contents of major international regulatory initiatives and human rights instruments.[59]

Secondly, civil society groups and other stakeholders already play prominent roles with regard to the implementation of corporate codes.[60] Deva's tenuous case for stakeholders to have a role in the implementation of his suggested code

[56] ibid 207.

[57] *Business and Human Rights Resourse Centre*, 'Company policy statements on human rights' <https://www.business-humanrights.org/en/company-policy-statements-on-human-rights> accessed 16 February 2016.

[58] Deva (n 8) 207.

[59] *European Commission*, 'An Analysis of Policy References Made by Large EU Companies to Internationally Recognised CSR Guidelines and Principles' (March 2013) 7 <https://ec.europa.eu/docsroom/documents/10372/attachments/1/translations/en/renditions/native> accessed 16 February 2016.

[60] Organisation for Economic Cooperation and Development, *Making Code of Conduct Work: Management Control System and Corporate Responsibility* (OECD Publishing 2001/03) 3 <http://dx.doi.org/10.1787/525708844763> accessed 16 February 2016.

contradicts his earlier view that the code does not necessarily have to conform to any national or international guidelines or incorporate the opinions of stakeholders.[61]

Thirdly, apart from the fact that the MNCs themselves are to formulate the proposed code, implementation of and compliance with the code will also depend on the adopting corporations. Given the focus of MNCs on profit, it is doubtful that they will put in place any compliance mechanism with the necessary teeth, especially if compliance with such a code will in any way affect their economic interest. Deva himself had earlier argued that "in the absence of a clear, positive relation of codes of conduct to business profits, several corporations may be hesitant to adopt and/or implement corporate codes; corporations will not regulate themselves into competitive disadvantage".[62]

How Deva's proposed code could have been useful to his case study, Bhopal, remains to be seen. The MNC that was supposed to design and adopt the code in this case, UCC, was not particularly interested in the successful running of the company because the Bhopal plant was considered unprofitable.[63] The failures that led to the Bhopal disaster did not result from the absence of a code but from economic considerations that led UCC to adopt inferior safety and maintenance standards. Therefore, it is argued that Deva's proposed code would have been unable to change the Bhopal situation.

B. A review of Deva's proposed regulation at the national level

Deva argues that regulation at the national level is an "indispensable medium to control and redress corporate human rights abuses",[64] but he does not think that the current regulations at such levels are enough to control and redress abuses. To achieve regulatory efficiency, he suggests that a regulatory regime at the national level should aim to influence corporate conduct both from the *outside* and the *inside*. He therefore suggests the revision of existing national laws that touch on human rights—such as labour law, investment law, environmental law, consumer protection law, *et cetera*—or the enactment of new laws to incorporate principles governing corporate human rights responsibilities.[65]

Deva's emphasis on an approach that involves changing corporate conduct from the inside is instructive. He criticises the external influence model's focus on the outcome of corporate decisions, which he argues merely specifies an outcome to be achieved on a given issue, and then responds with either a sanction or a

[61] Deva (n 8) 207.
[62] Deva (n 8) 78.
[63] ibid 28–29.
[64] ibid 28.
[65] ibid 209.

reward.[66] According to Deva, most laws that try to regulate corporate conduct in the area of human rights fall into this category, and he argues that this approach is insufficient to regulate human rights-related issues concerning MNCs.[67]

It is also instructive that corporate law is Deva's focus "regarding bringing about changes from the inside (*i.e.* in the process of corporate decision making)".[68] He argues that changes in corporate law are required because the premise on which the fundamental principles of the corporate law of all advanced economies are based has changed drastically, which makes it difficult to inject human rights responsibility into corporate decision-making.[69] This problem, according to him, arises from the uni-focal nature of the present corporate law (or practice), "conceiving corporations solely or primarily as profit maximizing entities, which puts pressure on corporate managers to pursue the goal of maximizing profit with total disregard for the interests of stakeholders other than shareholders".[70]

Deva argues that there are many approaches that could be adopted to bring about the proposed change; in fact, he cites some countries that have already amended their corporate law to broaden its scope to encompass the interests of other stakeholders beyond shareholders (such as the United Kingdom (UK), South Africa, and India).[71] The implication and extent of the obligation of corporate directors to other stakeholders under these regimes are discussed below.

Deva's reference to the way in which MNCs misuse the twin principles of separate legal personality and limited liability to evade their liability for human rights violations[72] is instructive. He acknowledges the importance of these principles and argues that they should not be allowed to become a standard refuge for corporate irresponsibility.[73] However, the problem is that his proposed approach to avoiding the misuse of the principles does not in reality reflect change from the inside. This is because he adopts the three *remedial responses*: (1) allowing case-by-case *ad hoc* exceptions to the twin principle; (2) the enterprise principle; and (3) the network liability approaches canvassed by Peter Muchlinski.[74]

It is important to point out that the responses canvassed by Muchlinski above are aimed at 'lifting the corporate veil' as a means of justifying group liability in circumstances where the subsidiary of a MNC has insufficient assets to meet the

66 ibid 208.
67 ibid.
68 Deva (n 8) 211.
69 ibid.
70 ibid.
71 ibid 196–197.
72 ibid 212.
73 ibid 213.
74 Muchlinski (n 1) 321–326.

claims against it,[75] as happened in the Bhopal case. These remedial solutions to corporate violations of human rights are at variance with Deva's proposed change of corporate conduct from the inside, which he acknowledges involves a review of the current corporate legal regime to broaden its scope to include the interests of other stakeholders.[76] The mismatch between, on the one hand, Deva's identified problem of the misuse of the twin principles of separate legal personality and limited liability, and on the other, his suggested solution to the problem deserves further treatment here because of its implication for the regulation of corporate violations of human rights.

There is an important point to note here about the modern corporation and its two guiding principles: separate legal personality and its close cousin, limited liability. Both features were developed to support the 19th century focus of nation states on the use of the corporation as a structure for promoting economic activities.[77] The legal personality principle, on the one hand, created the capacity for parties to act as a single entity in law—to sue and be sued, to hold and transfer title to real or personal property and to act with legal effect under a common seal.[78] The result is that the enterprise is able to continue undisturbed in law by a change of shareholders or a change in their fortune because, by virtue of the principle, corporate assets are shielded from both the shareholders and their creditors.[79] The limited liability doctrine, on the other hand, encouraged contribution from diverse investors by limiting the risk to their personal wealth, as limited liability provides a statutory assurance that "nobody risks more than he chips in".[80]

However, in this modern era of corporate group and multi-national operations by major MNCs, the twin concepts of separate personality and limited liability has brought about a new challenge. This is because of the extension of these concepts to corporate groups (a concept by which a MNC is permitted to hold the majority or all the shares in a subsidiary or subsidiaries), a phenomenon that developed after these principles were established.[81] This has generated much concern in

[75] ibid 313.

[76] Deva (n 8) 211–212.

[77] James W Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780–1970* (The University Press of Virginia 1970) 22.

[78] ibid 19.

[79] John Armour and his colleagues termed the legal personality doctrine 'entity shielding' device "to emphasize that it involves shielding the assets of the entity—the corporation—from the creditors of the entity's owners". See John Armour et al, 'What is Corporate Law?' in Reinier Kraakman *et al*, *Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2009) 5–8.

[80] Frank H Easterbrook and DR Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1996) 40.

[81] Phillip I Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (OUP 1993) 139.

the commercial world, as courts are often called upon to answer the question of whether those corporations which are members of a group are to be treated as a single economic entity (enterprise theory). In this regard, the courts have often rejected the idea that corporations in a corporate group be treated as a single economic entity.[82] The celebrated case of *Adams v Cape Industries Plc*[83] epitomises the judicial view that the 'veil of incorporation' cannot be disregarded in order to hold a parent company liable for the act or omission of the subsidiary.[84]

It is in light of judicial pronouncements, such as the dictum by Slade LJ in the *Adams* case above, that Muchlinski's suggestion is relevant as a strategy for attaching legal liability to a parent company for the acts or omissions of its subsidiary. In fact, Muchlinski criticised the UK Company Law Review Steering Group[85] for failing "to confront the question whether the *Adams* case went too far in blocking veil lifting in appropriate cases, such as where involuntary creditors needed to seek out the resources of the group as a whole for adequate compensation".[86]

Thus, it is for the purposes of securing adequate compensation for corporate tort victims that Muchlinski chose to base his analysis of corporate group liability on two competing objectives. One of those objectives is relevant to the present discussion: "the need to ensure that the resulting allocation of risk in the group does not end in a failure to compensate third parties for losses caused by the activities of group members".[87] In this regard, where there is an allegation of a human rights violation, the enterprise theory could be adopted to treat the whole group as one enterprise as this would satisfy the objective of proper compensation of third parties affected by human rights violations. It is in furtherance of this view, and to support his own suggestion of how to avoid the misuse of the separate legal personality principle, that Deva argues forcefully for the adoption of the theory of 'limited eclipse personality'. This theory is proposed to temporarily eclipse the separate legal personality of the subsidiaries of the corporate group in the case of alleged human rights violations, so that the victims are free to sue the immediate or ultimate parent corporation of that group as a matter of principle.[88]

In view of the above, even though this article agrees with Deva on the indispensability of national laws for controlling and redressing corporate human rights violations, it disagrees with his proposed remedial approach for the following

[82] See *Adams v Cape Industries Plc* [1990] BCLC 479, 513.
[83] ibid.
[84] ibid 513.
[85] The Company Law Steering Group, *Modern Company Law for a Competitive Economy* (London: Department for Trade and Industry, 2001).
[86] Muchlinski (n 1) 326.
[87] ibid 321.
[88] Deva (n 8) 213.

reasons. First, Deva himself acknowledges that command and control rules, which influence the corporate conduct from outside, by merely specifying an outcome to be achieved and responding with sanctions, are not sufficient.[89] This informs his proposed change from the inside, which does not merely "influence corporate decisions but also decision-making processes by changing the internal structure of corporations".[90] However, as the above discussion has shown, Deva's remedial-based solution does not address the unifocal nature of present corporate law and practice, and thereby fails to consider his proposed change from the inside that will provide a basis to influence corporate decisions and promote human rights integrity.

Secondly, Deva's reliance on the remedial approach considerably diminishes the opportunity for him adequately to address his proposed change from the inside, which is supposed to inject human rights responsibility into corporate decision-making.[91] In particular, his proposal is not consistent with the so-called amendment of the corporate legal regime in the UK, India, and South Africa, which—according to him—imposes duties on corporate managers to take the interests of non-shareholders into account. Under the new corporate law regimes in the countries he identifies above, the internal structure of the corporation is not in reality affected by the introduction of those provisions that, according to Deva, broadens the scope of corporate law to accommodate the interests of stakeholders.[92] This is because the changes he identifies do not provide for non-shareholders per se or to be part of the decision-making process, and no mechanism is provided through which non-shareholders can hold those who make the decisions to account.

For example, s 172 of the Companies Act 2006 (hereinafter, "UK CA 2006"), which Deva relied on to identify the UK as one of those jurisdictions which have made changes in their corporate law to accommodate non-shareholder stakeholder interests, is merely an embodiment of the concept of 'enlightened shareholder value' (ESV).[93] The ESV theory itself did not completely depart from the vision that directors are to manage the corporation in such a way as to ensure that the wealth of shareholders is maximised. The theory is achieved in the UK CA 2006 "through the high-level 'statement of directors' duties' set out in the Act[94] to clarify the duties and responsibilities of directors".[95] The theory maintains that the interest of shareholders is the principal obligation of directors and requires that directors

[89] Deva (n 8) 208.
[90] ibid.
[91] ibid 211.
[92] ibid 196–197.
[93] Jean Jacques du Plessis *et al*, *Principles of Contemporary Corporate Governance* (3rd edn, CUP 2015) 60.
[94] UK CA 2006 (n 19), s 172.
[95] du Plessis (n 93) 60.

pursue shareholders' interests but that, in doing so, they are to have regard to the interest of other stakeholders.[96]

In view of the above, it is argued that s 172 of the UK CA 2006 did not alter the traditional UK corporate governance structure that is designed to protect shareholders. In fact, some commentators take the view that s 172 is unlikely to strengthen the position of other stakeholders and thus suggest that fundamental changes to the current UK corporate legal framework would be necessary for them to have effective influence.[97] Thus, the system is inadequate for protecting the interests of non-shareholders because, absent the change from the inside which Deva proposes, non-shareholder constituencies will have to depend on those laws that influence the corporation from outside, which Deva himself criticises.

C. A review of Deva's proposed regulation at the international level

Another aspect of Deva's 'integrated approach' is an international framework that can formulate corporate human rights responsibility and ensure its implementation by MNCs as a way to overcome the limitations of national regulatory initiatives.[98] It is noteworthy that Deva issues a caveat on the numerous obstacles against such effort. According to him, "an agreement on developing international norms and international enforcement mechanisms is not proving to be an easy one in view of the numerous looming challenges".[99]

Deva premises his proposed regulation at the international level on international agreement about corporate human rights responsibilities, which he expects to be given a more precise meaning at the national level.[100] This raises some fundamental questions because international agreements are important sources of international law,[101] and national law is the medium through which States implement their obligations under international law.[102] This makes a review of the interaction between domestic law and international law—especially international human rights law—relevant. Understanding how issues of human rights and

[96] UK CA 2006 (n 19), s 172(1)(b), (c) and (d).

[97] John Birds et al (eds), *Boyle & Birds' Company Law* (9th edn, Jordan Publishing Limited 2014) 371–375.

[98] Deva (n 8) 214.

[99] ibid.

[100] ibid 215.

[101] Thomas Buergenthal and Sean Murphy, *Public International Law in a Nutshell* (4th edn, West Academic Publishing 2007) 24, citing the Statute of the International Court of Justice (ICJ Statute) (18 April 1946) Article 38(1)(b).

[102] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 270.

business corporations are addressed at the international level will provide the appropriate basis to determine how Deva's proposed international regulation could meaningfully address corporate human rights violations in developing markets.

International human rights instruments are devoted to recognising the individual's rights and the corresponding obligations of States. The International Covenant on Civil and Political Rights (ICCPR)[103] clearly states the obligation on each State party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR.[104] However, the emergence of powerful non-state actors—especially MNCs—on the international stage has engendered new concerns about corporate accountability for human rights. This has brought about a renewed interest in the question whether there are real, direct legal obligations for non-state actors, especially MNCs, contained in international human rights instruments.[105] As a result, there has been an emerging broad interpretation of the rights enshrined in the International Bill of Rights (IBR)[106] in the context of corporate human rights concerns which were not there at the time existing rights were first formulated.[107]

Thus, in this context, while states are clearly the primary addressees of human rights obligations, corporations are also bound by those rules of international law that are applicable to all persons (natural and non-natural including business corporations) in society.[108] An example is the preamble to the Universal Declaration of Human Rights (UDHR) which states that "every individual and every organ of society should promote respect for basic human rights". Apart from the UDHR, both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[109] also recognise private obligations in their preambles, which is stated in the following terms: "the individual, having duties to other individuals

[103] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, 173.

[104] ibid Article 2(1).

[105] August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), Non-State Actors and Human Rights (OUP 2005) 70–71.

[106] "International Bill of Rights" is the expression used for the Universal Declaration of Human Rights, the ICCPR and the International Covenant on Economic, Social and Cultural Rights.

[107] Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996).

[108] Reinisch (n 105).

[109] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, 5.

and to the community of which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".

Even though corporations are bound by those rules of international law that are applicable to all persons in the IBR, "such rules are mostly restricted to fundamental norms such as those enjoining genocide, torture, slavery and forced labour, crimes against humanity,…".[110] In fact, "outside the European Union Framework, it is only in exceptional circumstances that corporations are expressly and directly regulated under international human rights law".[111] Related to this is the fact that there are only few mechanisms under international law[112] to enforce human rights norms against private actors outside the criminal sphere.[113] Thus, the responsibility for implementation and enforcement of international human rights norms against private actors such as MNCs lies primarily at the national level.[114] Accordingly, human rights standards can only be applied indirectly to corporations. In the case of MNCs operating in developing markets, any enforcement in relation to a breach of their obligation to respect human rights is either through the State in which they are incorporated (their home State)[115] or through the State in which they are operating (the host State).[116]

However, because of the obstacles to home States' regulation of foreign subsidiaries of locally incorporated companies, responsibility for domestic implementation and enforcement of international norms lies with the host States through their national laws and judicial institutions.[117] It is on this basis that some States, such as Nigeria, have been held responsible for their failure to prevent or remedy human rights abuses committed by private actors such as MNCs.[118] In the landmark case of *SERAC and CESR v Nigeria*,[119] the African Commission held that the obligation to protect human rights is a positive duty which requires States to

[110] Paul Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance' (2003) 37 Int'l L. 68, 71.

[111] ibid 72.

[112] See, for example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th edn, Geneva: International Labour Office 2006), for non-binding interpretative procedures with respect to the Guidelines and Declarations that they have adopted concerning international business operations.

[113] Redmond (n 110) 72.

[114] ibid.

[115] *The Barcelona Traction Co* (Belgium v Spain) [1970] ICJ Rep 3.

[116] Redmond (n 110) 72.

[117] ibid.

[118] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria Communication* No 156/96 (Unreported, African Commission on Human and Peoples' Rights, 27 October 2001); *SERAP v Federal Republic of Nigeria*, Judgement ECW/CCJ/JUD/18/12 (14 December 2012).

[119] *SERAC v Nigeria* (ibid), para 59.

"take measures to protect beneficiaries of the protected rights against all political, economic and social interferences".[120]

The implication of the positive responsibility on States for human rights is that the implementation and enforcement of the private obligations recognised in both the preamble to the UDHR, the ICCPR and the ICESCR depends for the most part on a State's capability to protect individuals within its territory by adequately regulating every individual (including MNCs) and organs of society operating within its jurisdiction. For a State to fulfil its obligation to protect human rights requires that it not only provide adequate access to a remedy for human rights victims, but also take appropriate steps to prevent such violations through legislative or administrative means.[121]

There are several major problems identified as challenges to fulfilling the obligation to respect, protect, promote, and fulfil human rights for developing markets. First, the acknowledged economic power and influence of modern MNCs,[122] which affords them a power greater than some States to affect the realisation of rights.[123] Deva himself acknowledges how the economic power and influence of UCC played a major part in the manner in which the company operated in India, and how it contributed to the Bhopal disaster.[124] Secondly, the inefficient judicial infrastructure associated with developing markets is a major impediment to the implementation and enforcement of international norms, and renders any proposed regulation at the international level that focuses on providing remedies for human rights victims unsuitable, especially for developing markets.

In view of the fact that Deva expects his proposed international regulation to be given a more precise meaning at the national level, what institution will hold MNCs to account where they fail to comply with their human rights responsibilities under his proposed international framework? If municipal institutions will be required to enforce human rights responsibility under his proposed international

[120] Ibid, para 46.

[121] Dinah L Shelton, Advanced Introduction to International Human Rights Law (Edward Elgar Publishing Limited 2014) 214.

[122] See Sara Anderson and John Cavanagh, *Top 200: The Rising of Corporate Global Power* (New Press 2000), which concludes at 3 that "General Motors is now bigger than Denmark; DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; Sony is bigger than Pakistan", and that "top 200 corporations combined sales are bigger than the combined economies of all countries minus the biggest 10" at <https://corpwatch.org/downloads/top200.pdf> accessed 19 December 2017. See also John Gerard Ruggie, 'American Exceptionalism, Exemptionalism and Global Governance' (2004) John F Kennedy Sch of Govt, Working Paper No RWP04-006 1, 14, at <http:www.ssrn.com/abstract=517642> accessed 4 January 2016.

[123] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 AJIL 819, 824.

[124] Deva (n 8) 26–27.

framework, then the basis for Deva's international regulation is indeed faulty, as it will be unable to effectively support his integrated approach.

IV. A Critique Of 'Integrated Approach' And The Case For Interest Group Participation In Decision-Making

Deva's integrated approach—which requires a regulatory regime at three levels, each of which should complement the other in enforcing human rights responsibilities of MNCs[125]—makes sense if one considers the structure of MNCs and their global operation, but there are some major problems with Deva's suggested approach to integration. It is instructive that he strongly contends that corporations should have social responsibility. He argues that, as members of society, they are expected "to play their part by taking appropriate measures within their respective areas of operation: for example, ensuring that effluents from their factories are not discharged into rivers to preserve the environment".[126]

Deva is right in this respect because playing their part will include acting as responsible members of society and respecting the rights of others, such as local communities and the environment. However, to ensure that corporations behave responsibly will require some form of regulation as well as effective procedure for securing compliance. Thus, in view of the weak legal environment in developing markets, the focus here is on broadening the scope of corporate law to accommodate those that are most affected by corporate externalities as a strategy for promoting responsible corporate decision-making, and ensuring compliance with human rights standards. Deva himself agrees on the need to broaden the scope of corporate law to encompass the interests of other stakeholders beyond shareholders.[127] But he did not offer any suggestion as to how corporate law reform could form the basis for his suggested integration. It is argued that Deva's approach to integration is incomplete because he did not identify any platform at the national level for integrating international human rights standards.

In order to appreciate the uncertainty of Deva's approach to his suggested integration, it is important to offer a brief analysis of how he expects that the integrated application of the three levels of regulation might lead to a more responsible conduct by MNCs in developing markets. Deva adopts a 'top down' approach because, according to him, there is an emerging consensus on corporate human rights responsibilities at the international level which has gained recognition in various international instruments and major international

[125] Deva (n 8) 203.
[126] ibid 123.
[127] ibid 211–212.

regulatory initiatives,[128] such as the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)[129] and the UN Guiding Principles (UNHRC Guiding Principles).[130] This may be the case, but it is how this responsibility could be translated in the national context that is the issue.

Deva argues that regulatory initiatives at the institutional and national levels should conform to global human rights standards, but also suggests that some modifications to international human rights standards should be permitted at the national level to meet local circumstances.[131] However, he appears to contradict this position by suggesting that MNCs would be expected to apply home country or international standards in host countries. It is difficult to see how the permission to modify international human rights standards to *meet local circumstances*[132] will not negatively affect the application of home country or international standards in host countries, especially if it will be economically rewarding to apply a different (low) standard in a host country.

Another problem with Deva's approach to integration is that even though international norms and various regulatory initiatives may emphasise the responsibilities of businesses in some respects, his so-called 'top down' approach did not specify any process for the adoption of human rights responsibilities by businesses within the national or institutional context. He argues that a 'bottom up' approach will also be at work under his integration theory.[133] By this he means that the standards adopted by companies at an institutional level and those formulated by governments at a national level will form the basis for an agreement on standards at international level.[134]

It is clear inconsistency for the same author who argues that international regulatory initiatives would form the basis for regulatory standards at institutional and national levels to suggest that standards adopted and formulated at the same institutional and national levels will form the basis for agreements at the

[128] Deva (n 8) 202.

[129] Organisation for Economic Cooperation and Development, 'OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context' (25 May 2011) <https://www.oecd.org/corporate/mne/48004323.pdf> (hereinafter, "OECD Guidelines") accessed 4 January 2016.

[130] UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (21 March 2011) A/HRC/17/31.

[131] Deva (n 8) 202.

[132] Emphasis added.

[133] Deva (n 8) 202.

[134] ibid.

international level. Even though Deva argues that this is "[t]he crucial aspect of this integration process as a continuous upward-downward cycle of dialogue and evolution between regulatory initiatives at three levels",[135] it is doubtful that such 'top down' and 'bottom up' oscillations within his integration theory could provide an appropriate basis for a consistent regulatory regime for addressing corporate human rights abuses.

A. Interest group participation in decision-making as a strategy for integrating international norms at the national level and the basis for participation

It is agreed that international human rights standards, and other international norms and international regulatory initiatives should influence the contents of a national framework that aims to regulate corporate human rights violations in developing markets. However, it is argued that the focus of such regulation should be on how to prevent violations, rather than on how to provide effective remedies for victims. This makes it important to identify those international norms that espouse prevention as a basis upon which to build a national legal framework on corporate responsibility for human rights in developing markets.

The idea of a regulated corporate responsibility for human rights or what is commonly referred to as Corporate Social Responsibility (CSR) is not new. Campbell argues that "(CSR) thinking on corporate legal liability… can be taken to be established matters of fact in contemporary society".[136] This is not far from the prevailing position with regard to CSR and its regulation. Even the UNHRC Guiding Principles and the appended commentary that seek to implement the 'Protect, Respect and Remedy' Framework requires States to enact laws that "require, promote or guide companies to respect their human rights responsibilities".[137]

Thus, those developing markets where human rights violations are most prevalent should take steps to address the violations through legislation, including the amendment of their corporate laws. By broadening their scope so as to accommodate the interests of other stakeholders, States can fix the problem of linking corporate irresponsibility to the structure of corporate law.[138] This

[135] ibid.

[136] Tom Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2009) 529.

[137] UNHRC, 'New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council' (16 June 2011) HR/PUBC/11/04 Principle 3.

[138] Robert C Hinkley, 'Developing Corporate Conscience' in Stuart Rees and Shelly Wright (eds), *Human Rights and Corporate Responsibility—A Dialogue* (Annandale: Pluto Press 2000) 287–290.

is because "[i]t is within the firm that the internal economic calculations and decisions are made—which do not include the external social costs or benefits that these decisions may impose outside the firm".[139]

In this regard, it is important to note that the kind of harm addressed in this article is not gratuitously inflicted for its own sake, as a means of deliberate repression or abuse, but emerges as a by-product of the scramble for economic development. It is for this reason that it is now widely accepted within the international legal order that development must be sustainable if it is not to prove as counterproductive as the Bhopal case and other such human rights disasters in developing markets. In the context of preventing environmental harm, international environmental law has developed approaches to prevention as elaborated in the extensive body of international environmental treaties[140] and related instruments[141] that explicitly and implicitly set out the principle of prevention with a focus on public and interest group participation.

The Rio Declaration on Environment adopted at the UN Conference on Environment and Development (UNCED) in 1992,[142] especially Principle 10, is regarded as the broadest and perhaps the most appropriate normative foundation for developing public and interest group participation at the national level as a strategy for preventing environmental harm.[143] It provides that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the

[139] Eric W Orts, *Business Persons: A Legal Theory of the Firm* (OUP 2015) 22.

[140] Ramsar Convention on Wetlands of International Importance 1971 (adopted 2 February 1991, entered into force 21 December 1975) 996 UNTS 245, 11 ILM 963; Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 28 ILM 657; United Nations Framework Convention on Climate Change (adopted 4 June 1992, entered into force 21 March 1994) (1992) 31 ILM 849; Convention on Biodiversity (adopted 6 June 1992, entered into force 29 December 1993) (1992) 31 ILM 818; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) (1994) 33 ILM 1328.

[141] Declaration of the United Nations Conference on the Human Environment (June 1972) UN Doc A/CONF/48/14/REV.1; World Charter for Nature (adopted 29 October 1982) (1983) 22 ILM 455; Rio Declaration on Environment and Development (adopted 12 August 1992) (1992), adopted by the UN Conference on Environment and Development (UNCED) UN Doc A/CONF.151/26 (Vol I).

[142] UNGA 'Report of the United Nations Conference on Environment and Development' (12 August 1992) UN Doc A/CONF.151/26 (Vol I).

[143] Dinah L Shelton, 'Introduction' in Dinah L Shelton (ed), *Human Rights and the Environment Volume 1* (Edward Elgar Publishing Limited 2011) x.

relevant level. At the national level, each individual shall have… the opportunity to participate in decision-making processes".[144]

However, public participatory rights in decision-making process did not begin with their adoption in the international environmental law arena. International human rights law has long recognised civic participation in public affairs as a procedural right for ensuring the participation of those that may be affected by the decisions made by public authorities, in the decision-making process. The ICCPR guarantees the right of every citizen "[t]o take part in the conduct of public affairs, directly or through freely chosen representatives".[145]

It may be argued that international human rights law did not make detailed provision for prevention as a strategy for achieving human rights standards, and thus lacks the normative basis upon which to build public participation in the context of private sector operations. However, international environmental law, and especially the Rio Declaration, provides a normative basis for public and interest group participation especially in matters of economic development, which also involves MNCs. Although the Rio Declaration is 'soft law' and therefore has no binding authority in its own right, it has been suggested that environmental protection may be cast as a means to the end of fulfilling human right standards.[146] In this regard, existing human rights such as the right to life[147] and the right to a satisfactory environment[148] have been mobilised and reinterpreted as guaranteeing, to an extent, the public right to information and participation in decision-making processes.[149] This is because these are the very rights that are at issue in most developing markets.

In addition to the emphasis on public and interest group participation under international norms, emerging international regulatory initiatives—especially the OECD Guidelines and the UNHRC Guiding Principles—also emphasise the participation of potentially affected groups in decision-making concerning activities that are likely to have a serious human rights impact.[150] This is instructive

[144] Rio Declaration (n 142), Principle 10.
[145] ICCPR (n 103) Article 25.
[146] Anderson (n 107) 3.
[147] *Oneryildiz v Turkey* (2004) ECHR 657, paras 62 and 84–88.
[148] *SERAC v Nigeria* (n 118), para 41.
[149] Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Routledge 2016) 6.
[150] OECD Guidelines (n 123) para 14; UNHRC Guiding Principles (n 124) Principle 17.

because it comes from initiatives endorsed by the private sector.[151] The adoption of interest group participation in decision-making and the recognition of the authority of national governments to enact laws necessary to promote respect for human rights suggests that the regulatory target will be bound, or at least guided, by many of the principles expressed in such initiatives.

In view of the above, it is argued that what is currently required is an appropriate procedure for implementing the participatory principle as enunciated in the various international instruments, rather than the formulation of new human rights standards or specific international human rights norms for corporations as Deva suggests.[152] Thus, although Deva proposes regulations at three levels, it is argued that integration at the national and international levels could be usefully exploited in a manner that is different from his suggested approach in order to promote a more responsible corporate behaviour in developing markets. This could be achieved by exploiting State obligations under international instruments to develop a national legal framework that focuses on the participation of affected groups in decision-making concerning development activities that are likely to generate human rights harm. This will provide the opportunity for States to hold MNCs accountable to human rights standards.

B. Corporate law as the platform for integration and the case for local communities' representation on corporate boards

The inadequacy of existing legal and regulatory regimes that seek to address corporate human rights violations in developing markets is implicit in the growing cases of human rights violations in countries like Nigeria. Audrey Gaughran, Global Issues Director at Amnesty International, has described the human cost of such violations in the Niger Delta as horrific.[153] Some commentators have attributed this situation of impunity to the weak legal environment, especially the weak, corrupt and inefficient legal enforcement regimes, and point to the preference of human rights victims for foreign litigation, especially in the US under the Alien

[151] Both the OECD Guidelines and the UNGPs emerged as alternatives to influence UN's attempts at 'codification' to move away from highly regulatory position of MNC control as envisaged by both the UN Economic and Social Committee in 1974 (in the case of the OECD Guidelines), and the Economic and Social Council 1972 (in the case of the UNGPs). This provided the basis for the adoption of non-binding principles that could earn corporate as well as civil society support. See Muchlinski (n 1) 658–659; Deva (n 8) 106.

[152] Deva (n 8) 202.

[153] Amnesty International, 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' (*Amnesty International*, 19 March 2015) <https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/> accessed 13 December 2017.

Tort Claims Act (ATCA)[154] and more recently in the UK,[155] as a consequence of the weak legal environment in emerging markets.[156]

It is in view of the above that the participation of potentially affected groups in the affairs of the corporations operating in developing markets is proposed as a strategy for promoting responsible corporate decision-making and minimising the harm-creating potential of MNCs. It is argued that it makes sense to have this participation at the corporate board level because decisions of the board are necessary for undertaking the activities that create human rights abuses addressed in this article. Obviously, this is a question of corporate governance, since corporate governance is "the system by which companies are directed and controlled".[157] This makes it imperative to critically analyse the basis for the current corporate governance regimes' focus on shareholder value in order truly to understand how the underlying principles could usefully support the proposal for interest group participation in corporate affairs.

As matter of law, corporations must have a corporate board.[158] Apart from the German system with its two-tier board structure that permits employees representatives to sit on corporate boards,[159] corporate law in the UK (and in countries, including Nigeria and India,[160] that practice the UK's 'shareholder

[154] *Esther Kiobel v Royal Dutch Petroleum Co* (2013) 133 S Ct 1659; *Doe v Unocal* (2002) US App LEXIX 19263, *35–*36 (9th Cir 2002); *Wiwa v Royal Dutch Petroleum Co and Shell Transport and Trading Co* (2000) 226 F 3d 88.

[155] *His Royal Highness Emere Godwin Ebebe Okpabi and Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Limited* [2017] EWHC 89 (TCC); *Dominic Liswaniso Lungowe and Others v Vedanta Resources Plc and Konkola Mines Plc* [2017] EWCA Civ 1528, [2018] WLR 3575; *Bodo Community v Shell Petroleum Development Company* (Nigeria) Ltd [2014] EWHC 1973 (TCC).

[156] Richard Meeran, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (CUP 2015) 382–383.

[157] See the definition of "corporate governance" in the *Report of the Committee on the Financial Aspect of Corporate Governance* (hereinafter, "Cadbury Report 1992") (Committee on the Financial Aspect of Corporate Governance, 1992); *The King Report on Corporate Governance* (hereinafter, "King 1994") (Institute of Directors in South Africa, 1994).

[158] See the UK CA 2006 (n 19), which prescribes 1 director in s 154(1), and a minimum of 2 directors for public companies in s 154(2). In Nigeria, The CAMA (n 19) prescribes a minimum of 2 directors in s 246(1).

[159] Johannes Schregle, 'Co-determination in the Federal Republic of Germany: A Comparative View' (1978) 117 Int'l Lab Rev 81, 83–99.

[160] Rafael La Porta *et al*, 'Law and Finance' (1998) 106(61) Journal of Pol Economy 1113, 1136.

supremacy' model[161]) focuses exclusively on the company and its shareholders.[162] In fact, under this model, corporate governance is considered effective if it provides mechanisms for regulating the exercise of directors' powers in order to restrain them from abusing their powers, just to ensure that they focus on their primary duty "to promote the success of the company for the benefit of its members as a whole".[163]

To ensure directors' fealty, only the shareholder group is granted powers under corporate law, at least in the 'shareholder supremacy' model jurisdictions, to control the board of directors or review its activities. The UK Companies Act 2006 (UK CA 2006) grants voting rights to shareholders,[164] including the right to vote on the appointment[165] and removal[166] of directors. In addition, it provides certain safeguards and control mechanisms for shareholders to rein in directors to ensure adequate protection for their class.[167] Under s 994(1) of the UK CA 2006, a member has powers to petition for relief against unfairly prejudicial conduct of the company's affairs. To reinforce shareholder protection, Part 30 (ss 994–999) of the Act gives the courts a very wide-ranging jurisdiction to remedy conduct

[161] Different corporate governance theorists classify corporate in various ways. However, the taxonomy that is relevant to our discussion here is that which categorises corporate governance according to the interests that the corporation serves, because of the distinction it makes between a corporate governance system that emphasises shareholder primacy (represented by the UK and the US), which is classified as the shareholder model, and the other end of the taxonomy, namely, a system that accounts for a wider group of constituents (represented by Germany), and classified as the stakeholder model. See the classification by Stephen Bainbridge (n 21) 8–9.

[162] Christine A Mallin, *Corporate Governance* (5th edn, OUP 2016) 178–184.

[163] UK CA 2006 (n 19), s 172.

[164] ibid ss 281–287. See also, in Nigeria's CAMA, ss 224–232.

[165] UK CA 2006 (n 19), s 160; CAMA (n 19), ss 247–249.

[166] UK CA 2006 (n 19), s 168; CAMA (n 19), s 262.

[167] Protection for creditors also exists under the CA 2006 and IA 1986. See Insolvency Act 1986, ss 213–214 with regard to director's responsibility to the company's creditors, in order to ensure that a company is not involved in fraudulent or wrongful trading. See also s 172(3) requiring directors, in certain circumstances, to consider or act in the interest of creditors of the company; and *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250. However, it is important to note that the sections cited above are only applicable when a company has entered formal insolvency proceedings and therefore differ from provisions which give control rights to shareholders. They are remedial rather than directional.

of a company's affairs "that is unfairly prejudicial to the interest of its members generally or of some part of its members".[168]

Notwithstanding all the rights and powers granted to members by statute, many commentators still doubt that shareholders could meaningfully exercise control over corporate boards in view of their dispersion, which has resulted in the effective separation of ownership from control in the firm, at least under the UK model.[169] However, MNCs and their subsidiaries present a different case. The power of the parent in the MNC to control the subsidiary or subsidiaries, is not in any doubt. As noted earlier, this is because of the way MNCs are usually structured.[170]

The common explanation for the vesting of voting and sundry rights in shareholders is that shareholders are the only corporate constituency with a residual claim, an unfixed, *ex post* claim on corporate assets and earnings.[171] This is the basis for the economic efficiency view, the one offered by Easterbrook and Fischel.[172] According to this view, because of shareholders' position as the last in the corporate revenue distribution chain, they "have the strongest economic incentive to care about the residual claim, which means that they have the greatest incentive to elect directors committed to maximizing firm profitability".[173] Many commentators, including this author, disagree with this view. In fact, some argue that it represents the "superficial analogy of the seventeenth century between contributors to a joint stock and members of a guild",[174] which no longer reflects the current reality.[175]

The focus of corporate boards on the shareholder constituency is primarily aimed at protecting it from the economic damage that may result from opportunistic behaviour by corporate managers.[176] This is perfectly in order but, in modern times, production processes do not pose only economic dangers. As a result of the increasing use of technologies and hazardous materials by modern corporations,

[168] See Part 30 (ss 994–999) CA 2006; members are sometimes permitted by the court to bring "derivative claims" in the name of the company. A "derivative claim" by a member of a company may be brought under CA 2006, Part 11 (ss 260–264). Relief on the grounds of unfairly prejudicial and oppressive conduct, derivative action and the powers of the court are also contained in CAMA (n 19), ss 310–333.

[169] Berle and Means, (n 23) 4–10; Bainbridge, (n 21) 4.

[170] See Mevorach (n 24).

[171] Bainbridge (n 21) 50.

[172] Easterbrook and Fischel (n 80) 66–72.

[173] Bainbridge (n 21) 50

[174] Abram Chayes, 'The Modern Corporation and the Rule of Law' in Edward S Mason (ed), *The Corporation in Modern Society* (Harvard University Press 1966) 41.

[175] Blumberg (n 81) ix.

[176] Charlotte Villiers, *Corporate Reporting and Company Law* (CUP 2006) 2, 18–19; French, Mayson and Ryan (n 20) 429.

especially those involved in mining and manufacturing, they also pose direct and serious threats to the health of communities surrounding their plants,[177] with far-reaching consequences.

Some of the most often-cited examples of human rights and environmental disasters that have occurred as a result of the neglect of the interests of other stakeholders include the blast at BP's Texas City Oil refinery which cost the lives of fifteen workers and injured 170 others; the Bhopal gas leak from the storage tank owned and operated by Union Carbide India Limited (UCIL), which claimed over 15,000 lives of the company's workers and local residents according to the 2003 official government report of the Bhopal Gas Tragedy Relief and Rehabilitation Department, State of Madhya Pradesh.[178] Others include the Bangladeshi factory building (Rana Plaza) collapse,[179] and the environmentally devastating oil spills in the Nigerian Niger Delta.[180]

As a result of the growing dangers that the modern corporation poses to its neighbours and other constituents, some commentators have argued that shareholders should no longer have a claim to priority consideration in corporate governance systems.[181] Current scholarship identifies other stakeholder groups affected by corporate activity to include (in no particular order) employees, suppliers, customers, creditors, local communities, governments and the environment.[182] However, the following analysis suggests that local communities that host the operating facilities of MNCs are the most vulnerable group with regard to the effects of corporate activity on human rights, and thus the group with the greatest incentive to promote more human rights-friendly corporate decision-making.

The emphasis on a special right for local communities in this article is based on two related factors that underpin the relationship between corporations and stakeholders. First, different relationships with the corporation have different characteristics. They may be voluntary or involuntary, and may be direct or indirect.[183] Relationships with shareholders and sundry stakeholders who do

[177] Ralph Nader, Mark Green and Joel Seligman, *Taming the Giant Corporation* (W W Norton & Company Inc 1976) 130.

[178] Amnesty International, *Clouds of Justice: Bhopal Disaster 20 Years On* (London: Amnesty International 2004) 12.

[179] 'Bangladesh Factory Collapse Toll Passes 1,000' *BBC* (London, 10 May 2013) <www.bbc.co.uk/news/world-asia-22476774> accessed 30 March 2017.

[180] See Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violation in Nigeria's Oil Producing Communities' (*Human Right Watch*, January 1999) <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 26 April 2017.

[181] Marvin A Chirelstein, 'Corporate Law Reform' in James W McKie (ed), *Social Responsibility and the Business Predicament* (Washington DC: The Brookings Institution 1974) 67.

[182] Mallin (n 162) 74–77.

[183] Thomas Donaldson, Corporations & Morality (Englewood Cliff: Prentice-Hall Inc 1982) 32.

business with the corporation such as customers, creditors, suppliers and labour are mostly voluntary. The obligations that flow from such a relationship are direct and protected by statute or under contract.[184] Shareholders are protected under corporate law, insolvency law protects creditors, and customers and suppliers are protected under contract too.[185] Employment law, contracts and pension agreements protect labour. Relationships with local communities are the direct opposite. They are mostly involuntary and obligations that flow therefrom are indirect because they are not necessarily specified under statute or under contract.[186]

Secondly, relationships with the corporation could be determinable or permanent. Voluntary relationships with corporations are always determinable. For example, a shareholder who is dissatisfied with the activities of a corporate board may take the exit option by selling his shares, and a worker is free at any time to resign his appointment. However, the relationship between the corporation and local communities is mostly of a permanent and inescapable nature.[187]

In view of the above, and given the foundational role of government in providing the legal infrastructure for corporations, it might be useful to exploit the potential of corporate law to protect those most affected by corporate externalities. Achieving this will require a review of the corporate legal architecture to incorporate such interests, especially those of local communities in the corporate governance structure, thereby making them part of corporate decision-making process.

The suggestion for corporate law reform to incorporate interests other than shareholders in the corporate governance structure is not entirely new. The recognition and general attention paid to other stakeholders in corporate law statutes and regulations both nationally[188] and internationally[189] points to the growing consensus on the new understanding of the corporation as affecting a wide range of people beyond just shareholders. In fact, some continental European jurisdictions have long recognised the important stake that other stakeholders,

[184] Donaldson (n 183) 32.

[185] It is acknowledged that other forms of regulations such as consumer protection laws also protect customers.

[186] Donaldson (n 183) 32.

[187] Andrew Crane, Dirk Matten and Laura J Spence (eds), *Corporate Social Responsibility: Readings and Cases in a Global Context* (2nd edn, Routledge 2014) 292.

[188] See, for example, the UK CA 2006 (n 19), s 172; the Indian CA (n 19), s 135; and the South African Companies Act 2008, s 7.

[189] See, for example, the OECD Guidelines (n 123) para 44; and the UNHRC Guiding Principles (n 124) Principle 17.

especially employees, have in the corporations and provides for their participation in corporate governance.

The German "Co-determination" regime with its two-tier board structure of a supervisory board and a management board[190] is the common reference regime for external stakeholder participation in management at board level in Continental Europe. The German system permits at least one stakeholder group—labour—to sit on German corporate boards alongside the directors.[191] Thus, the external stakeholder model envisaged in this article is mirrored in the German concept of other stakeholders' participation on corporate boards as a strategy for ensuring that issues concerning them is given due attention at corporate board level.

However, since MNCs operate in developing markets through their subsidiaries, the new framework will be primarily concerned with those subsidiaries, and perhaps the MNC as a shareholder. This is based on the fact that incorporation in our reference jurisdictions is mandatory for corporations that seek to undertake any business activity in those countries. For example, s 54 of CAMA permits a MNC to incorporate a subsidiary in Nigeria to carry on its business functions. Thus, the proposed framework does not regulate the MNC *per se*, except with regard to its involvement in the subsidiary. The underpinning principle of the proposed framework is the balance of interests: business corporations' right to operate without unlawful interference and to make profit, and their host communities' right to a healthy environment and respect for and protection of their human rights.

It is expected that the proposed regime will be criticised just like the German co-determination regime, especially with regard to its effect on other stakeholders and on a company's business policy. For example, in their suggestion for board restructuring to accommodate other stakeholder interests, Nader *et al* did not propose interest groups participation on corporate boards primarily because of what they considered a major defect of the German Co-determination regime. According to them, "[l]abor representatives apparently are indifferent to most problems of corporate management that do not affect labour. They seem as deferential to operating executive management as present American directors are".[192]

Although it is not possible to undertake a more detailed critique of the German co-determination because of the limited space allowed for this research, it suffices to state that there are studies that rebut the claims by Nader *et al* and other critics. In a 1976 survey of European experience with industrial democracy

[190] Co-determination Act, Law of May 1976, (1976) BGBI 1 1153.
[191] Mallin (n 162) 20.
[192] Nader, Green and Seligman (n 177) 124.

and worker representation at board level prepared for the Bullock Committee,[193] Batstone observed that German labour directors do not take advantage of their board position to redefine corporate objectives or challenge management strategy but generally support programmes such as investment that will strengthen the position of the company.[194]

However, despite the criticisms, the importance of co-determination as a strategy for promoting co-operation within the enterprise cannot be overemphasised. Bringing labour within the management structure and making their interests an integral part of the company satisfies the underlying idea of co-determination, which is to provide a rational means of handling and settling disputes at the enterprise level.[195] This is especially important to the discussion here, given that this article has identified the participation of local communities representatives at board level as a strategy for guaranteeing that issues concerning the human rights of MNC host communities are given due attention at board level. There is a clear symmetry between this strategy and the principles that underpin the co-determination regime. It is on this basis that I propose to explore the option of a corporate legal framework that draws on the principles of co-determination by developing a corporate board participatory regime involving local community representatives in corporate decision-making, especially for developing markets.

V. Conclusion

One major point of agreement that this article shares with Deva is on the impact that the growing power and influence of MNCs and their operations in developing markets is having on the human rights of local communities, and the urgent need to fashion a workable regulatory regime to adequately address the problem. National laws are currently incapable of regulating a difficult regulatory target like a MNC because of their domestic focus amongst other deficiencies. However, this article's point of disagreement is that corporate law in individual jurisdictions has the inherent potential to adequately regulate MNC conduct and thus prevent corporate violations of human rights.

Even though it is agreed that there are many factors that promote corporate irresponsibility in developing markets, it is nevertheless instructive that Deva

[193] The Bullock Committee was set up 3 December 1975 by the then Secretary of States for Trade, Peter Shore, 'to consider ways of extending industrial democracy in the private sector of industry' in the UK. See the preface to Eric Batstone and Paul Davies, *Industrial Democracy: European Experience* (The Stationery Office 1976).

[194] Eric Batstone, 'Industrial Democracy and Worker Representation at Board Level: A Review of the European Experience' in Eric Batstone and Paul Davies, *Industrial Democracy: European Experience* (The Stationery Office 1976) 25.

[195] ibid.

acknowledges that the change in corporate structure is fundamental to the present situation of corporate impunity for human rights violations. He also agrees that municipal laws and institutions are important even though he insists that they are incapable of effectively regulating MNCs. However, the fact that Deva did not specifically address how re-modelling of corporate law could address the fundamental problem posed by the current corporate structure that underscores his focus on a remedial solution.

The problem with the focus on a remedial solution is that the weaknesses associated with judicial institutions in developing markets makes a regime that focuses on remedy (and not prevention) an unreliable option. It also makes a human rights approach that is based on Deva's strategy of integrated regulation an unreliable option too. Therefore, it is argued that developing markets require a regime that accords with available corporate support institutions (which include securities law, securities regulations, securities enforcement and, the one most relevant to external stakeholders—public enforcement, such the courts) within the jurisdiction. In this regard, a legislative option with a focus on prevention, which emphasises public participation in corporate decision-making based on international norms, could be formulated to provide a more reliable basis to regulate MNC conduct. This will provide the opportunity for potentially affected groups, especially the local communities in developing markets to hold MNCs accountable to human rights standards.

However, because of the limited space allowed for this research, it is not possible to fully develop the suggested model in greater detail. Therefore, further research is recommended to develop the details of the procedure which would be regulated by the corporate legal regime.