

Access to Justice:

Human Rights Abuses Involving Corporations

INDIA



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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

The 1984 Bhopal gas disaster involving Union Carbide provoked a marked shift in perceptions concerning the conduct of corporations in India, leading to the enactment of stricter laws, emergence of new legal principles through the judiciary and development of enforcement mechanisms. India's legal system, including its judicial organs, provides people with a number of avenues to seek access to justice in corporate-related human rights abuses. Some of these means have yet to be tested, while others need to be made more effective. Human rights concerns arise from corporate activity and struggles over control of land and water and mineral resources, widespread corruption, inadequate or vague laws, endemic judicial delays, and lack of robust enforcement mechanisms to make companies accountable. The laws of civil responsibility and other forms of liability have not been adequately concretised in emerging areas, including biotechnology and genetically modified organisms. The report maps the existing legal framework, identifies limitations and suggests areas where more substantial and sustained reforms are needed to guarantee redress to victims of corporate human rights abuses in India.



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A Project of the International Commission of Jurists

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Introduction

This report aims to critically examine legal remedies, both judicial and non-judicial, available under Indian law to victims of human rights abuses by companies. There are three main objectives of this examination: (i) to assess the efficacy of the existing regulatory framework; (ii) to identify major obstacles that victims experience in holding companies accountable for breaching their human rights obligations; and (iii) to outline recommendations that should help in overcoming these obstacles.

Access to justice and availability of effective legal remedies are crucial to the general protection of human rights and also in addressing violations by businesses. They are also essential to the work of judges and lawyers who promote the rule of law and human rights. Nevertheless, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practice in India reveals the obstacles but also the potential of the existing legal framework to ensure these rights. Scrutiny of state practices in this area will, moreover, help the international community discover new ways of addressing the challenge of corporate human rights abuse.

To contribute to understanding of the problem and to assist in formulation of a new agenda to strengthen access to legal remedies for business abuses, the International Commission of Jurists (ICJ) has undertaken a project on Access to Justice for victims of corporate human rights abuse. This project has produced a series of country studies on Brazil, Colombia, People's Republic of China, Democratic Republic of the Congo, India, The Netherlands, Nigeria, the Philippines, Poland and South Africa, along with surveys from additional countries. The present study is the latest of these country studies.

As in many other developing countries, there are numerous instances of all types of companies – from Indian to Indian subsidiaries of foreign companies and joint venture enterprises – abridging the human rights of Indian people. In fact, one may trace early instances of corporate human rights abuses to illegal business activities such as the slave trade or opium trafficking by the British East Indian Company.¹ More recent examples include the gas leakage at Union Carbide's chemical plant at Bhopal,² Enron's Dabhol power project in Maharashtra,³ Tata's

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1. See Donald C Dowling, "The Multinational's Manifesto on Sweatshops, Trade/Labour Linkage, and Codes of Conduct", in *Tulsa Journal of Comparative and International Law*, Volume 8, 2000, p. 528; Mike Marqusee, "Whitewashing the Past", in *Guardian*, 24 May 2002, <http://www.guardian.co.uk/education/2002/may/24/artsandhumanities.highereducation>, accessed 2 February 2011.
 2. Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On*, Amnesty International, London, 2004 (hereinafter Amnesty International, *Clouds of Injustice*).
 3. Human Rights Watch, "The Enron Corporation: Corporate Complicity in Human Rights Violation", 23 January 2002, <http://www.hrw.org/reports/1999/enron/>, accessed 2 February 2011.

proposed car plant in Singur, West Bengal,⁴ and Vedanta's mining operations in tribal areas of Orissa.⁵

There are, however, crucial differences between the abuses committed by the British East India Company during the 17th and 18th century and the modern corporate human rights violations of the 20th and 21st century. Whereas the British East India Company did business as an agent of a colonial power, some companies now exert so much power and influence that many states willingly act as their agents and serve business interests, sometimes at the cost of the rights of poor populace. Moreover, states nowadays might not be willing to cancel the operating license of a company that infringed on human rights. In contrast, the British government in 1858 could, and eventually did, revoke the trading charter issued to the British East India Company. Such distinctions point to a change that has taken place in the relationship of companies and states.

It is also appropriate at this stage to note two key events that have significantly impacted the general landscape and legal regime for corporate human rights abuses. First was the Bhopal gas disaster of December 1984, mentioned above, which has to date killed more than 20,000 people⁶ and caused other ongoing medical problems and environmental degradation. Bhopal not only exposed limitations of legal norms in holding a multinational company accountable for a number of human rights violations but also triggered the amendment of laws and evolution of new legal principles through the judiciary. The second event was the adoption of the New Economic Policy by the Indian government in the early 1990s.⁷ The resulting environment of liberalisation, privatisation and disinvestment gave companies more opportunities not only to do business but also to exploit people and natural resources for economic gains. The government enacted special pro-business laws. On the flip side, these policies also led to organisation and institutionalisation of people's resistance through civil society networks as well as the evolution of a more activist judiciary that seeks to strike a balance between development policies and human rights. Both these events will be discussed in detail at certain points in this report.

The study utilizes the definitions and methodology adopted by the broader ICJ Access to Justice and Legal Remedies Project. It makes use of relevant legislation,

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4. See Gargi Gupta, "Singur farmers: Why they oppose Tata plant", 9 December 2006, <http://www.rediff.com/money/2006/dec/ogtata.htm>, accessed 2 February 2011; Kolkata, "How Tata got Singur cheap", in *The Hindustan Times*, 11 September 2008, <http://www.hindustantimes.com/How-Tata-got-Singur-cheap/Article1-337064.aspx>, accessed 2 February 2011.
 5. "Environment Ministry stalls Vedanta's Niyamgiri project in Orissa", in *The Economic Times*, 24 August 2010, <http://economictimes.indiatimes.com/news/news-by-industry/indl-goods/-svs/metals--mining/Environment-Ministry-stalls-Vedantas-Niyamgiri-project-in-Orissa/articleshow/6425059.cms>, accessed 2 February 2011.
 6. Amnesty International, *Clouds of Injustice*, *op. cit.*, note 4, p. 12.
 7. See Surya Deva, "Human Rights Realisation in an Era of Globalisation: The Indian Experience", in *Buffalo Human Rights Law Review*, Volume 12, 2006, pp. 116-118.

judicial decisions, case studies, media reports and scholarly writings to support its findings. The study draws from the researchers' consultations and meetings with communities and their representatives, lawyers and judges across India, in particular in Calcutta, Bombay, Chennai and Bangalore between late 2009 and early 2010. For obvious reasons, the primary focus will be on situations where violations take place within the territorial boundaries of India. Nevertheless, the extraterritorial dimension of the regulatory framework will be considered in appropriate cases. Such an extraterritorial inquiry into the potential of regulatory framework has become inevitable in light of increasingly global operations of Indian companies.

Part 1 of the report outlines the Indian legal framework relevant to the protection of human rights and the delineation of responsibilities of companies. It will analyse relevant provisions of the Constitution, criminal law, environmental laws, workers' welfare laws, tort law, and development-related land acquisition laws to ascertain the circumstances under which they may be invoked. Part 2 then offers a critical account of the legal remedies available to victims of corporate human rights abuses in India. Special attention will be paid to judicial innovations in this area. Part 3 elaborates various obstacles and limitations that victims face in their quest to secure justice. It is argued that despite a robust legal framework, victims' ability to seek justice is seriously undermined by these identified obstacles. The final section draws several general conclusions and outlines India-specific recommendations that should assist victims and the legal community to overcome obstacles to holding corporations accountable for human rights abuses.

Indian numbers used in this text should be understood as follows: One lakh (1,00,000) is equivalent to a hundred thousand (100,000), and one crore (1,00,00,000) is equivalent to ten million (10,000,000).

The law is stated as of February 2011.

1. Legal Liability for Corporations Under Indian Law

This part reviews various laws that might be relied on by victims to make companies accountable for human rights abuses. In addition to its ordinary laws, India is special in that several provisions of the Constitution – especially the Fundamental Rights and Directive Principles of State Policy (Directive Principles) – are horizontally applicable against companies. This is remarkable because the Indian Constitution was drafted in the late 1940s, when the notion of human rights was still fundamentally state-centric.⁸ Yet, as will be explored below, the courts have in some cases been creative in expanding the scope of horizontal application of Fundamental Rights.

1.1 International Human Rights Law

India has acceded or ratified a number of international human rights instruments that have direct or indirect relevance to the human rights responsibilities of companies. Some of the main instruments include: the Geneva Conventions (ratified 9 November 1950); the Convention concerning Forced or Compulsory Labour (ratified 30 November 1954); the Equal Remuneration Convention (ratified 25 September 1958); the Genocide Convention (ratified 27 August 1959); the International Convention on the Elimination of All Forms of Racial Discrimination (ratified 3 December 1968); the International Covenant on Civil and Political Rights (acceded 10 April 1979); the International Covenant on Economic, Social and Cultural Rights (acceded 10 April 1979); the Convention on the Rights of the Child (acceded 11 December 1992); the Convention on the Elimination of All Forms of Discrimination against Women (ratified 8 August 1993); the Abolition of Forced Labour Conventions (18 May 2000); and the Convention on the Rights of Persons with Disabilities (ratified 1 October 2007).⁹

There are, however, two areas of concern. First, the Indian government has entered substantive reservations to many of these instruments,¹⁰ thus diluting the effect of its treaty obligations. Second, India has yet to ratify several important international instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Rome Statute of the International Criminal Court, and the Freedom of Association and Protection of the Right to Organise Convention. In order to fulfil its duty under Article 51(c) of the Constitution, which provides that the state shall endeavour to ‘foster respect for

8. See generally Mahendra P Singh, “India: Protection of Human Rights against State and Non-state Actors”, in Oliver & Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study*, Routledge – Cavendish, London, 2007, p. 180.

9. University of Minnesota Human Rights Library, “Ratification of International Human Rights Treaties – India”, <http://www1.umn.edu/humanrts/research/ratification-india.html>, accessed 2 February 2011.

10. Rule of Law in Armed Conflict Project, “India: International Treaties Adherence”, http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=107, accessed 2 February 2011.

international law and treaty obligations in the dealings of organized peoples with one another', the Indian government ought to ratify these instruments.

On the positive side, one may note the active role played by the judiciary in implementing international human rights obligations. Despite the fact that India follows a dualist model that requires domestic legislation to implement international treaties, the courts have relied on international treaties in several cases to fill in gaps or resolve ambiguities in municipal laws, especially when doing so promotes the Fundamental Rights provisions of the Constitution.¹¹ For instance, the Supreme Court in *Vishaka v. State of Rajasthan* observed that any 'International Convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.'¹²

1.2 Constitutional Law

Part III of the Indian Constitution sets out a comprehensive list of Fundamental Rights – from equality before the law to the freedom of speech and expression, the freedom to form associations or unions, the freedom to assemble peacefully, the protection against double jeopardy, the right to life and personal liberty, the freedom of religion, prohibition of discrimination, prohibition of trafficking in human beings and forced labour, prohibition of employment of children below the age of fourteen in any factory, mine or hazardous employment, and the protection against unlawful arrest and detention.¹³ As discussed below, these provisions should be quite useful in determining the human rights responsibilities of companies or redressing corporate human rights abuses.

One particularly relevant Fundamental Rights provision is Article 21. It provides that "no person shall be deprived of his life or personal liberty except according to the procedure established by law." This provision has proven to be a residual source of many other Fundamental Rights. "Life" in this article has been interpreted by the courts to mean more than mere physical existence.¹⁴ It "includes right to live with human dignity and all that goes along with it."¹⁵ As the horizon of Article 21 ever widens, the Court has read into it, *inter alia*, the rights

11. See NHRC, "International Human Rights Law and Its Relation to National Law", <http://nhrc.nic.in/Publications/Disability/Chapter04.html>, accessed 2 February 2011.

12. AIR 1997 SC 3011, para. 7.

13. Constitution of India, Articles 12-35.

14. See, for the evolution of such an interpretation, *Kharak Singh v. State of UP* AIR (1963) SC 1295; *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494; *Olga Tellis v. Bombay Municipal Corporation* AIR (1986) SC 180; *Francis Coralie v. Union Territory of Delhi* AIR (1981) SC 746; *Bandhua Mukti Morcha v. Union of India* AIR (1984) SC 802; *Consumer Education & Research Centre v. Union of India* (1995) 3 SCC 42; *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490; *Visakha v. State of Rajasthan* AIR (1997) SC 3011. In some of these cases the Court has relied upon the observation of Justice Field in *Munn v. Illinois* 94 US 113 (1876).

15. *Francis Coralie v. Union Territory of Delhi*, AIR (1981) SC 746, 753 (*per* Justice Bhagwati).

to health,¹⁶ livelihood,¹⁷ free and compulsory education up to the age of 14,¹⁸ unpolluted environment,¹⁹ shelter,²⁰ clean drinking water,²¹ privacy,²² legal aid,²³ speedy trial,²⁴ and various rights relating to people undergoing trials, convicts and prisoners.²⁵ Article 21 has also been used to grant compensation for violations of Fundamental Rights.²⁶

While some of these Fundamental Rights are available only to Indian citizens,²⁷ others are available to non-citizens as well,²⁸ including juridical persons. Notably, some Fundamental Rights are available to be exercised by groups of people or communities.²⁹ The Fundamental Rights cannot be curtailed even by a constitutional amendment if such curtailment is against the 'basic structure' of the Constitution.³⁰

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16. *Parmanand Kataria v. Union of India* AIR (1989) SC 2039; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996) 4 SCC 37.
 17. *Olga Tellis v. Bombay Municipal Corporation* AIR (1986) SC 180; *DTC Corporation v. DTC Mazdoor Congress* AIR (1991) SC 101.
 18. *Unni Krishnan v. State of AP* (1993) 1 SCC 645.
 19. *Indian Council for Enviro Legal Action v. Union of India* (1996) 3 SCC 212; *M C Mehta v. Union of India* (1996) 6 SCC 750; *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647; *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664.
 20. *Gauri Shankar v. Union of India* (1994) 6 SCC 349.
 21. *A P Pollution Control Board II v. M v. Nayudu* (2001) 2 SCC 62.
 22. *Kharak Singh v. State of UP* AIR (1963) SC 1295; *Govind v. State of MP* AIR (1975) SC 1378; *R Raj Gopal v. State of Tamil Nadu* (1994) 6 SCC 632; *PUCL v. Union of India* AIR (1997) SC 568; *'X' v. Hospital Z* (1998) 8 SCC 296.
 23. *M H Hoskot v. State of Maharashtra* AIR (1978) SC 1548; *Hussainara Khatoon v. State of Bihar* AIR (1979) SC 1369; *Khatri v. State of Bihar* AIR (1981) SC 928; *Suk Das v. Union Territory of Arunachal Pradesh* AIR (1986) SC 991.
 24. *Hussainara Khatoon (I) to (VI) v. Home Secretary, Bihar* (1980) 1 SCC 81, 91, 93, 98, 108 and 115; *Kadra Pahadiya v. State of Bihar* AIR (1982) SC 1167; *Common Cause v. Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775; *Rajdeo Sharma v. State of Bihar* (1998) 7 SCC 507 and (1999) 7 SCC 604.
 25. *Sunil Batra v. Delhi Administration* AIR (1978) SC 1675; *Prem Shankar v. Delhi Administration* AIR (1980) SC 1535; *Munna v. State of UP* AIR (1982) SC 806; *Sheela Barse v. Union of India* AIR (1986) SC 1773.
 26. *Rudul Sah v. State of Bihar* (1983) 4 SCC 141; *Bhim Singh v. State of J & K* (1985) 4 SCC 677; *Nilabati Behra v. State of Orissa* (1993) 2 SCC 746.
 27. See, for example, Article 15(2) of the Constitution of India (Right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them to access and use of public places, etc); Article 15(4) (Special provision for advancement of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes); Article 16 (Equality of opportunity in matters of public employment); Article 19 (rights regarding six freedoms); Article 29 (Protection of interests of minorities).
 28. See, for example, *Ibid.*, Article 14 (Right to equality); Article 15(1) (Right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them); Article 20 (Protection in respect of conviction of offences); Article 21 (Protection of life and personal liberty); Article 22 (Protection against arrest and detention); Article 25 (Freedom of conscience and right to profess, practice and propagate religion).
 29. See, e.g., *Ibid.*, Articles 26, 29 and 30.
 30. The judiciary is the 'sole' and 'final' judge of what constitutes basic structure of the Constitution. Over a period of time various provisions have been given the higher pedestal of basic structure or basic features of the Constitution, e.g., independence of judiciary, judicial review, rule of law, secularism, democracy, free and fair elections, harmony between Fundamental Rights and Directive Principles, right to equality,

The crucial question for the current study is: which Fundamental Rights, if any, could be invoked against companies? Some of the Fundamental Rights have been guaranteed exclusively against the state. For instance, Article 15(1) provides that the “State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” It will not be possible to invoke such a provision directly against a company unless that company could fall, as explained below, within the definition of ‘state’ under Article 12.³¹ Nevertheless, there remains of course an argument that the state would breach its obligations if it failed to prevent and remedy such discrimination on the part of private companies.

Some Fundamental Rights, on the other hand, are expressly guaranteed against non-state actors as well,³² meaning their justiciability does not require state action. Direct horizontal application of this class of Fundamental Rights against companies should not be problematic. Moreover, in *Vishaka v. State of Rajasthan*,³³ a case dealing with sexual harassment of working women, the Supreme Court extended the protection of Article 21 to non-state actors. In certain other instances, the courts have invoked Article 21 to redress violation of right to life and personal liberty by private persons.³⁴ Against this background, Professor Singh, a leading constitutional law scholar, has argued that like Article 21, ‘several other fundamental rights such as Articles 19, 20, 22, 25, 26, 29(1), 30(1) and 32, which have no reference to state, may acquire that distinction in

and right to life and personal liberty. It should further be noted that the content of basic structure is still not final in the sense that more provisions could be added to this list. See Mahendra P Singh (ed.), *Shukla's Constitution of India*, Eastern Book Co. – Lucknow, Eleventh Edition, India, 2008, pp. 1002-1014. (hereinafter Singh, *Shukla's Constitution of India*); M P Jain, “The Supreme Court and Fundamental Rights” in S K Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach*, Oxford University Press – New Delhi, India, 2000, pp. 1, 8-13.

31. One may of course use Article 15(2) against non-state actors: “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to – (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.”
32. Austin cites three Fundamental Rights provisions (i.e., Articles 15(2), 17 and 23) that have been ‘designed to protect the individual against the action of other private citizen’. Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Clarendon Press – Oxford, United Kingdom, 1966, p. 51. (hereinafter Austin, *Cornerstone of a Nation*); It seems that the protection of a few more Fundamental Rights could be invoked against private individuals. See Vijayashri Sripati, “Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)”, in *American University International Law Review*, Volume 14, 1996, pp. 447-48; Namita Wahi, “Human Rights Accountability of the IMF and the world Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability”, in *UC Davis Journal of International Law & Policy*, Volume 12, 2006, pp. 386-88.
33. *Vishaka v. State of Rajasthan* AIR (1997) SC 3011. See also *Apparel Export Promotion Council v. Chopra*, AIR (1999) SC 625.
34. See, for example, *M C Mehta v. Union of India* (1987) 1 SCC 395; *Consumer Education & Research Centre v. Union of India* (1995) 3 SCC 42; *Kirloskar Brothers Ltd. v. ESIC* (1996) 2 SCC 682; *Bodhisattwa Gautam v. Subra Chakraborty* AIR (1996) SC 922; *Vishaka v. State of Rajasthan* AIR (1997) SC 3011; ‘X’ v. *Hospital Z*’ (1998) 8 SCC 296; *M C Mehta v. Kamal Nath* AIR (2000) SC 1997.

due course.’³⁵ This has not though happened yet and direct horizontal application of these Fundamental Rights to non-state actors poses some difficulties.³⁶ Their indirect horizontal effect does though remain an option.³⁷

Article 12 of the Constitution defines the term “state” to include “the Government and Parliament of India and the Government and the legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.” The courts have interpreted “other authorities” expansively, so that any state “agency or instrumentality” will fall within its ambit.³⁸ Justice Bhagwati in *Ajay Hasia v. Khalid Mujib*,³⁹ laid down the following criteria for determining whether an entity is an instrumentality or agency of the State:

- whether the government holds the *entire share capital* of the corporation;
- whether *financial assistance* of the state covers almost the corporation’s entire expenditure;
- whether the corporation enjoys *monopoly status* which is conferred or protected by the state;
- whether there is *deep and pervasive state control*;
- whether the *function of the corporation is of public importance* and closely related to governmental functions; or
- whether a government *department is transferred to the corporation*.

These criteria are neither exhaustive nor conclusive and the court is supposed to decide a case on the basis of facts and circumstances, although it has been

35. Mahendra P Singh, “Fundamental Rights, State Action and Cricket in India”, in *Asia Pacific Law Review*, Volume 13, 2006, p. 203 at p. 204 (hereinafter Singh, “Cricket in India”). The rationale behind this view – that “the definition of state cannot and must not be used for restricting the application of a fundamental right only against the state while in its contents and nature a right is not so restricted” – has some validity. Singh, *Shukla’s Constitution of India*, *op. cit.*, note 30, p. 24. See also Mahendra P Singh, “India: Protection of Human Rights against State and Non-state Actors” in Oliver & Fedtke (eds), *op. cit.*, note 8, pp. 180, 189-92.

36. Surya Deva, “The State of Affirmative Action amidst Privatisation: Some Critical Reflections” in Swati Deva (ed), *Law and (In)equalities: Contemporary Perspectives*, Easter Book Company – Lcuknow, India, 2010, pp. 25, 34-35 (hereinafter Deva, “The State of Affirmative”).

37. See Sudhir Krishnaswamy, “Horizontal Application of Fundamental Rights and State Action in India” in C Raj Kumar & K Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment*, Oxford University Press – New Delhi, India, 2007, p. 47 at p. 67-73.

38. See *Electricity Board, Rajasthan v. Mohan Lal*, (1967) 3 SCR 377; *Sukhdev Singh v. Bhagtram*, (1971) 3 SCR 619; *R D Shetty v. International Airport Authority*, AIR (1979) SC 1628; *Ajay Hasia v. Khalid Mujib*, AIR (1981) SC 487; *Pradeep Kumar v. Indian Institute of Chemical Biology* (2002) 5 SCC 111.

39. *Ajay Hasia v. Khalid Mujib* AIR, (1981) SC 487 at 496.

held to be immaterial whether a corporation is created by or under statute.⁴⁰ The implication of this interpretation of Article 12 is that the protection of all Fundamental Rights could be claimed against *public* companies, while only those Fundamental Rights that expressly or by judicial interpretation apply horizontally may be claimed against *private* companies.

Despite this significant broadening of the concept of “other authorities” in *Ajay Hasia*, it is arguable that the test might not afford adequate protection of Fundamental Rights against private companies given the current climate of liberalisation and free market economy in India.⁴¹ The Supreme Court decision in *Zee Telefilms Ltd. v. Union of India*⁴² seems to affirm this, holding that the Board of Control for Cricket in India (BCCI) – a registered society that has a complete monopoly in conducting and regulating the game of cricket in India – does not fall within the meaning of “state” in Article 12.⁴³

In addition to the Fundamental Rights, Part IV of the Constitution lays down several Directive Principles,⁴⁴ which embody what are generally understood as socio-economic rights. Article 38 provides the essence of the Directive Principles: that the state shall not only strive to promote the welfare of the people by securing a social order in which social, economic and political justice shall inform all the institutions of the national life, but also try to minimise income inequality. Other relevant Directive Principles are the right to adequate means of livelihood; distribution of ownership and control of the community’s material resources so as to serve the common good; operation of the economy so as not to result in the concentration of wealth and means of production to the common detriment; equal pay for equal work; equal justice and free legal aid; organisation of village *panchayats* (council) as units of self-government; right to work and public assistance to the needy; maternity relief; living wages and just working conditions; early childhood care and education for all children up to 6 years of age; promotion of educational and economic interests of vulnerable segments of society; improvement of public health; protection of environment; and promotion of international peace and security.⁴⁵

Although the Directive Principles are not enforceable by any court, they are “fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.”⁴⁶ Because of their importance in the overall scheme of things, Fundamental Rights and Directive Principles together are

40. *Som Prakash Rekhi v. Union of India*, AIR (1981) SC 212.

41. See Deva, “The State of Affirmative Action”, *op. cit.*, note 3636.

42. *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649.

43. See, for a critique of the decision, Singh, “Cricket in India”, *op. cit.*, note 35.

44. Constitution of India, Articles 36-51.

45. *Ibid.*, Articles 39-51.

46. *Ibid.*, Article 37.

labelled by one leading commentator as “the conscience of the Constitution.”⁴⁷ Accordingly, courts have used the Directive Principles to extend the scope of Fundamental Rights, with Article 21 being the most significant beneficiary of such judicial interpretation.

Unlike some Fundamental Rights, the language of all Directive Principles – without any exception – uses the word “state”. Thus, they technically cannot be employed directly against companies, especially because Directive Principles are not justiciable. The Directive Principles might, nevertheless, become indirectly relevant through their use in interpreting Fundamental Rights. In some cases, courts have generally observed that even private corporate actors would be subject to the mandate of Directive Principles.⁴⁸

1.3 Companies Act

The Indian Companies Act of 1956 contains several provisions that contemplate the criminal liability of companies and/or its relevant officers in various situations.⁴⁹ Some illustrative examples should suffice here. Section 168 makes a company and its officers criminally liable if an annual general meeting is not held in accordance with Section 166. Criminal sanctions (in terms of fine) against companies and their officers will also follow under Section 162 for not filing annual returns with the Registrar. Similarly, Section 232 provides that if there is a breach of provisions related to auditing, the company and its officers will be punished with fine. Criminal penalty is also stipulated by Section 218 for an improper issue, circulation or publication of balance-sheet or profit and loss account.

Furthermore, other provisions of the Companies Act contemplate criminal sanctions only against corporate officers. Section 63 provides that if a prospectus includes any *untrue statement*, ‘every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both’. Similarly, any person who fraudulently induces another person to invest in shares/debentures shall be punishable under Section 68. Section 207 provides that if a dividend declared by a company is not paid to the shareholders within thirty days of such declaration, every director shall be criminally liable if she was knowingly a party to the default.

47. Austin, *Cornerstone of a Nation*, *op. cit.*, note 32, p. 50.

48. *Kirloskar Brothers Ltd. v. Employees State Insurance Corp.*, 1996 SCALE 1. Again, in *Air India Statutory Corporation v. United Labour Union*, (1997) 9 SCC 377, the Court observed that: “It is axiomatic, whether or not industry is controlled by Government or public corporations [...] or private agents, juristic persons, their constitution, control and working would also be subject to the same constitutional limitations in the trinity, viz., Preamble, Fundamental Rights and the Directive Principles.”

49. Section 2(30) of the Indian Companies Act, 1956 defines ‘officer’ as including “any director, manager or secretary, or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act”.

This quick review of the provisions of the Companies Act indicates that although corporations and/or their officers could be held criminally liable, the liability arises for breach of narrow corporate governance issues. It will, therefore, be difficult to invoke these provisions in cases where the allegation is that a given company harmed the interests of stakeholders beyond shareholders, investors or managers by, for example, violating human/labour rights or polluting the environment. In addition, even for those violations included in the Companies Act, the fine that may be imposed against companies is very insignificant: only about USD100 in several instances.⁵⁰

It should also be noted that the Companies Act imposes some limitations as to how criminal proceedings can be initiated against corporations or their officers. For example, every offence under this Act is made a non-cognizable offence, meaning that the police cannot investigate the matter or arrest any person without a court order. Section 621 provides that “no court shall take cognizance of any offence against this Act, which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, or of a shareholder of the company, or of a person authorised by the Central Government in that behalf.”

Although the current companies law framework does not offer much hope for victims of human rights abuses, two developments seem to indicate a change in this landscape. First, the Companies Bill 2009 contains one provision that would, if enacted as law, have a direct relevance to human rights responsibilities of companies. Section 158(12) states that the “Board of Directors of a company having a combined membership of the shareholders, debenture holders and other security holders of more than one thousand at any time during a financial year *shall constitute a Stakeholders Relationship Committee* consisting of a chairman who shall be a non-executive director and such other members of the Board as may be decided by the Board.” Clause (13) further provides that this Committee “shall consider and resolve the grievances of stakeholders.” This new proposal is consistent with the trend seen in many countries to introduce a mechanism – which may take different forms – in company law to address the interests of non-shareholder stakeholders.⁵¹

The second development that deserves mention is the 2009 Corporate Social Responsibility (CSR) Voluntary Guidelines issued by the Indian Ministry of

50. The Companies Bill 2009 (Bill No. 59 of 2009) seems to fix this anomaly by increasing the amount of fine for different offences.

51. See Surya Deva, “Sustainable Development: What Role for the Company Law?”, in *International & Comparative Corporate Law Journal*, Volume 8, 2010, p. 76 (hereinafter Deva, “What Role for the Company Law?”).

Corporate Affairs.⁵² The Guidelines lay down the following as a *fundamental principle*:

“Each business entity should formulate a CSR policy to guide its strategic planning and provide a roadmap for its CSR initiatives, which should be an integral part of overall business policy and aligned with its business goals. The policy should be framed with the participation of various level executives and should be approved by the Board.”⁵³

The CSR policy should cover issues such as care for all stakeholders, ethical functioning, respect for workers’ rights, human rights and the environment, and activities to promote social and inclusive development.⁵⁴ The Guidelines further provides that the CSR policy should provide for an “implementation strategy” and that companies “should allocate [a] specific amount in their budgets for CSR activities.”⁵⁵

1.4 Criminal Law

The Indian Penal Code (IPC) of 1860 is the main corpus of criminal law. Section 2 of the IPC provides that every “person shall be liable to punishment under this Code”. Section 11 defines “person” to include “any Company of Association of body of persons, whether incorporated or not.” It is, thus, clear that corporations and partnership firms could be prosecuted for offences under the IPC.⁵⁶

But companies cannot be prosecuted for each and every offence under the IPC. For instance, they cannot be prosecuted for offences which can only be committed by human beings (like rape or murder) or where the only punishment is imprisonment.⁵⁷ The legal position on corporate criminal liability is stated as follows in a leading commentary on the subject:

“The question, whether a corporate body should or should not be liable for criminal actions, resulting from the acts of some individual, must depend upon the nature of the offence, [...] the relative position of the office or agent vis-à-vis the corporate body and the other relevant facts

52. Ministry of Corporate Affairs, Government of India, New Delhi, *Corporate Social Responsibility Voluntary Guidelines 2009*, December 2009, http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf, accessed 2 February 2011.

53. *Ibid.*, p. 11.

54. *Ibid.*, pp. 11-12.

55. *Ibid.*, p. 13. See, for a critical review of the Guidelines, Umakanth Varottil, “India’s Corporate Governance Voluntary Guidelines 2009: Rhetoric or Reality?”, 5 July 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1634821, accessed 2 February 2011.

56. Incidentally, the IPC also protect companies. For instance, Section 499 (Explanation 2) makes defaming a company a criminal offence.

57. Y v. Chandrachud (chief ed.), *Ratanlal & Dhirajlal’s The Indian Penal Code*, Wadhwa & Co. – Agra, 28th Edition, Agra, 1997, p. 2.

*and circumstances which should show that the corporate body, as such, meant or intended to commit such act.”*⁵⁸

What will be the situation if an offence under the IPC or any other law is punished with *both* imprisonment *and* fine? Could a company be convicted for such offences? In *Assistant Commissioner v. Velliappa Textiles Ltd.*,⁵⁹ the Supreme Court found itself divided on this question. Two out of the three judges held that since a company is incapable of undergoing imprisonment, prosecution of a company for an offence for which imprisonment was mandated could not be maintained. The majority held that the “job of plugging the loopholes must strictly be left to the legislature and not assumed by the court”.⁶⁰ The dissenting judge, on the other hand, adopted the rule of purposive interpretation. Identifying the two functions the court had to perform, namely ascertaining guilt and imposing a sentence, the judge observed that the “mere fact that a company cannot be sent to jail or made to undergo imprisonment cannot lead to an inference that it should not be prosecuted at all. In the event of its conviction, an appropriate fine can be imposed upon it which is also one of the punishments provided[...].”⁶¹ Explaining the rationale behind this interpretation, the judge noted:

*“Courts would be shirking their responsibility of imparting justice by holding that prosecution of a company is unsustainable merely on the ground that being a juristic person it cannot be sent to jail to undergo the sentence. Companies are growing in size and have huge resources and finances at their command. In the course of their business activity they may sometimes commit breach of the law of the land or endanger others’ lives. More than 4,000 people lost life and thousands others suffered permanent impairment in Bhopal on account of gross criminal act of a multinational corporation. It will be wholly wrong to allow a company to go scot-free without even being prosecuted in the event of commission of a crime only on the ground that it cannot be made to suffer part of the mandatory punishment.”*⁶²

This question was later referred to a five-judge constitution bench, and in *Standard Chartered Bank v. Directorate of Enforcement*,⁶³ the Supreme Court by a majority of 3:2 expressly overruled *Velliappa* and held that a company cannot avoid criminal liability merely on the ground that the mandatory punishment provided for a given offence is both “imprisonment *and* fine”. In such cases, the Court

58. S K Sarvaria, *Nelson’s Indian Penal Code*, LexisNexis – New Delhi, 9th Edition, India, 2003, p. 39.

59. *Assistant Commissioner v. Velliappa Textiles Ltd.*, (2003) 11 SCC 405.

60. (2003) 11 SCC 405, p. 432.

61. *Ibid.*, p. 425.

62. *Ibid.*, p. 428.

63. *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530: AIR 2005 SC 2622.

reasoned, the term “and” should be construed as “or” and the company should be punished with a fine.⁶⁴ Justice Balakrishnan observed:

*“As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such [...] discretion is to be read into the Section so far as the juristic person is concerned. [...] As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is [...] blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.”*⁶⁵

This legal position was reaffirmed by the Supreme Court more recently in *Iridium India Telecom Ltd. v. Motorola Incorporated*.⁶⁶ Therefore, a company can be prosecuted for an offence that is punishable with *both* imprisonment *and* a fine. In such cases, the punishment will of course be merely fine. This purposive interpretation opens the possibility of companies being prosecuted for a larger number of criminal offences than that would otherwise be possible.⁶⁷

The IPC has extra-territorial effect. Section 4 states that the IPC’s provisions apply also to any offence committed by any citizen of India in any place without and beyond India. Since this provision uses the term “citizen” rather than “person”, it may not be able to be invoked against Indian corporations for criminal activities outside of India. However, Section 3, which deals with criminal activities committed “beyond India” and which uses the term “person”,⁶⁸ could potentially be used

64. See, for an analysis, Shashank P Kumar, “Standard Chartered Bank Case: A Jurisprudential Analysis”, in *SSRN Working Paper Series*, July 2006, <http://ssrn.com/abstract=1348425>, accessed 3 February 2011.

65. *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530 at 550, para. 31.

66. *Iridium India Telecom Ltd. v. Motorola Incorporated*, Criminal Appeal No. 688 of 2005 (decided on 20 October 2010).

67. This purposive interpretation was consistent with the recommendation of the Law Commission made in its 41st and 47th reports. M Vidhan, “Company’s Liability where Imprisonment is Mandatory Part of Sentence”, in *The Practical Lawyer*, July 2006, p. 6, http://www.ebc-india.com/practicallawyer/index.php?option=com_content&task=view&id=6646&Itemid=1, accessed 3 February 2011.

68. Section 3 of the Indian Penal Code, 1860 reads: “Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act

against Indian companies if the alleged conduct amounted to an offence under any Indian law.⁶⁹ Section 32 of the IPC makes it clear that criminal liability could also arise for illegal “omissions”. This provision could be useful in implicating a company whose failure to perform a legal duty resulted in some injury to person or property.

Except for strict or absolute liability offences, *mens rea* is a prerequisite for imposing criminal liability. The courts have held that the *mens rea* (the mental element of a crime, e.g., knowledge or intent) of corporate officers could be imputed to the company.⁷⁰ In a recent case, the Supreme Court rejected the argument that a company cannot be punished for an offence that required *mens rea*. The Court held:

*“[...] a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.”*⁷¹

Similar to the approach adopted by UK courts,⁷² Indian courts try to identify the officers who acted as the *controlling* or *directing* mind of the company.⁷³ This principle has been recognised in certain statutes that expressly impute liability to the officer who was “in charge of and was responsible to the company for the conduct of the business” at the relevant time.⁷⁴ But what will be the outcome in a situation where the person authorised to act on behalf of the company is prosecuted, but

committed beyond India in the same manner as if such act had been committed within India.”

69. Commentaries on the IPC do not expressly discuss this aspect. See, for example, Chandrachud, *op. cit.*, note 57, p. 4; Sarvaria, *op. cit.*, note 58, pp. 56-60.

70. *Ibid.*, p. 39.

71. *Iridium India Telecom Ltd. v. Motorola Incorporated*, Criminal Appeal No. 688 of 2005 (decided on 20 October 2010), para. 38.

72. See David Ormerod, *Smith & Hogan Criminal Law*, Oxford University Press – Oxford, 11th Edition, 2005, United Kingdom, pp. 235-236.

73. *SMS Pharmaceuticals Ltd. v. Neeta Bhalla*, (2005) 8 SCC 89. The ‘alter ego’ approach, the ‘attribution’ approach and ‘constructive liability’ have been mentioned as possible routes to establishing liability of companies for acts of its employees. *Indian Bank v. Godhara Nagrik Cooperative Credit Society Ltd.*, (2008) 12 SCC 541 at pp. 549-50.

74. Section 70 of the Prevention of Money Laundering Act 2002, for example, provides: “Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.” See also Section 141 of the Negotiable Instruments Act 1881 and Section 85 of the Information Technology Act 2000.

the company is not charged? In *UP Pollution Control Board v. Modi Distillery*,⁷⁵ the Supreme Court considered this question in a case involving the discharge of noxious and polluted trade effluents from a factory into a river, which constituted a breach of the Water (Prevention and Control of Pollution) Act of 1974. The Court held that the managing director, directors and other persons responsible for the company's conduct could be prosecuted even if, due to a technicality, the company was not prosecuted.⁷⁶ The court reasoned that it would be a travesty of justice if a big business entity were "allowed to defeat the prosecution launched and avoid facing the trial on a technical flaw which is not incurable".⁷⁷

In *Anil Hada v. Indian Acrylic Ltd.*,⁷⁸ the Supreme Court further clarified that such statutory provisions do *not* make prosecution of a person who was in charge or responsible for the business or the company, or a director, manager or officer of the company conditional on prosecution of the company. As part of the prosecution, it may be necessary to establish that the company was guilty of the offence, but "if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction[...]."⁷⁹

The IPC contemplates the possibility of joint criminal liability for two or more corporations, or for a corporation and its officers who committed a wrong, if the criminal act is done in furtherance of the "common intention" of all parties. Section 34 lays down the rule as follows: "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." The essence of the provision is acting in concert in pursuance of a pre-arranged plan.⁸⁰ Companies could also be prosecuted for aiding or abetting criminal activities under Sections 107 and 108 of the IPC, e.g., for intentionally providing financial or logistic aid⁸¹ to, say, abduct or kill leaders of a trade union. Furthermore, Section 120A of the IPC punishes criminal conspiracy – when two or more *persons* agree to do an illegal act or a legal act by illegal means. This provision again could be invoked against companies. However, the case law seems to require "two natural persons" to trigger this provision. Accordingly, the director of a "one man" company cannot conspire with his company, a company could be found to conspire with two or more of its directors/officers.⁸²

75. *UP Pollution Control Board v. Modi Distillery*, (1987) 3 SCR 798.

76. *Ibid.*, pp. 804-05.

77. *Ibid.*, p. 806.

78. *Anil Hada v. Indian Acrylic Ltd.* (2000) 1 SCC 1.

79. *Ibid.*, p. 8.

80. Chandrachud, *op. cit.*, note 57, p. 30.

81. Sarvaria, *op. cit.*, note 58, pp. 917-19.

82. Chandrachud, *op. cit.*, note 57, p. 153.

1.5 Tort Law

To date, tort law has proven all over the world to be the strongest basis for suits against companies for a range of human rights violations.⁸³ India is no exception, as tort principles – primarily negligence, nuisance and strict/absolute liability – have been employed to hold companies accountable for their wrongdoings. Tort law in India is based in common law and is not codified.⁸⁴ One major consequence of non-codification is that Indian tort law developed in a slow and haphazard manner. In fact, this was one of the main arguments made by the Indian government to convince a US court to hear the case arising out of the Bhopal gas leakage.⁸⁵

Companies can be held liable for torts committed by their agents or servants “to the same extent as a principal is liable for the torts of his agent or an employer for the torts of his servant, when the tort is committed in the course of doing an act which is within the scope of the powers” of companies.⁸⁶ This is well-accepted even if the agent’s acts at issue were *ultra vires* to the company.⁸⁷ Additionally, a foreign parent company may be held liable for a tort committed by its Indian subsidiary by piercing the corporate veil.⁸⁸

Two principles developed by the Indian courts deserve a special mention here. First of all, the Indian Supreme Court has over the years evolved the concept of “constitutional torts”, whereby it treats harm to life and liberty as a violation of Fundamental Rights enumerated in the Constitution and awards compensation for such wrongful conducts. The courts have also read into Indian law the provisions of international human rights conventions ratified by India but not implemented in domestic legislation, provided they were not in conflict with Fundamental Rights under the Constitution.⁸⁹ As explained in the next section, the concept of consti-

83. Apart from cases pursued in the US under the Alien Tort Claims Statute, see cases such as *Briggs v. James Hardie & Co Pty Ltd.* (1989) 16 NSWLR 549 and *CSR Limited v. Wren* (1998) 44 NSWLR 463 (in Australia); and *Adams v. Cape Industries Plc* (1990) 2 WLR 786, *Connelly v. RTZ Corp plc* (1997) 4 All ER 335 and *Lubbe v. Cape plc* (2000) 1 WLR 1545 (in the UK). See generally Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing – Oxford, United Kingdom, 2004.

84. An attempt was though made during the late 19th century to codify it and Sir Frederick Pollock had, in fact, prepared a draft of the Civil Wrongs Bill. See Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, Stevens – London, Thirteenth Edition, United Kingdom, 1929, pp. 618-686.

85. “Affidavit of Marc S Galanter in Support of the Union of India’s Contention”, as reproduced in N R Madhava Menon (ed.), *Documents and Court Opinions on Bhopal Gas Leak Disaster Case*, NLSIU – Bangalore, India, 1991, pp. 15, 19-23. See also Marc Galanter, “Legal Torpor: Why so Little has Happened in India After the Bhopal Tragedy?”, in *Texas International Law Journal*, Volume 20, 1985, pp. 273, 275-80.

86. G P Singh, *Ratanlal & Dhirajlal’s the Law of Torts*, Wadhwa – Nagpur, 23rd Edition, India, 1997, p. 34.

87. *Ibid.*, pp. 36-37.

88. *Union Carbide Corporation v. Union of India*, (1988) MPLJ 540.

89. *Sunil Batra v. Delhi Administration*, AIR (1980) SC 1579; *Prem Shankar Shukla v. Delhi Administration*, AIR (1980) SC 1535; *Sheela Barse v. Secretary, Children’s Aid Society*, AIR (1987) SC 656; *Nilabati Behera v. State of Orissa*, AIR (1993) SC 1960; *PUCL v. Union of India*, (1997) 3 SCC 433; *D K Basu v. State of West Bengal*, (1997) 1 SCC 416.

tutional torts – under which the courts combine constitutional law, tort law and environmental law jurisprudence – has contributed to the evolution of several important principles. The judiciary has, for instance, declared that the “polluter pays” principle⁹⁰ and the “precautionary” principle⁹¹ – which both aim to reduce externalities and force companies to internalise the negative environmental costs of their business operations – are law of the land as part of sustainable development.

Second, in 1986 the Supreme Court in *M C Mehta v. Union of India* – a case dealing with leakage of Oleum gas from one of the plants of an Indian company – developed the absolute liability principle.⁹² The Court reasoned that the 19th century *Rylands v. Fletcher*⁹³ principle of strict liability was not suitable to meet the needs of a modern industrial society and observed:

*“[A]n enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. [...] [T]he enterprise must be absolutely liable to compensate for such harm and it should be no answer for the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.”*⁹⁴

The absolute liability principle neither requires proving a “non-natural” use of land nor does it allow any of the defences accepted in *Rylands v. Fletcher*.⁹⁵ The principle of absolute liability has since been applied in other cases⁹⁶ and also incorporated into statutes like the Public Liability Insurance Act (PLIA).⁹⁷

90. *Indian Council for Enviro-Legal Action v. State of Rajasthan*, (1996) 3 SCC 212.

91. *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647.

92. AIR 1987 SC 1086. See Anil Divan, “The Supreme Court and Tort Litigation” in B N Kirpal et al (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press – New Delhi, India, 2000, p. 404 at p. 409-18.

93. *Rylands v. Fletcher* (1868) UKHL 1.

94. AIR 1987 SC 1086 at 1099 (emphasis added). For an analysis of this and related court orders, see Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials, and Statutes*, Oxford University Press – New Delhi, India, 2002, pp. 520-36.

95. The main distinction between absolute liability and strict liability is that no defences are available in case of former, while they are allowed in the latter. Englard explains: “[S]trict liability is by no means a monolithic concept; it starts from what might be called absolute liability, a form of liability which excludes any defences, be they of causal nature or of other nature. In its most extreme form, it does not require any causal connection between the person held liable and the damaging event. Other kinds of strict liability progress, on a gradually attenuating scale, until the transition to liability based on fault.” Izhak Englard, *The Philosophy of Tort Law*, Dartmouth – Aldershot, United Kingdom, 1993, p. 21.

96. See, for example, *Indian Council for Enviro Legal Action v. Union of India*, (1996) 3 SCC 212.

97. Divan & Rosencranz, *op. cit.*, note 92, p. 88.

1.6 Environmental Laws

Post-Independence India was quite late in undertaking to create a legal framework for environmental pollution. It was not until the 1970s that the government started enacting environmental laws, such as the Wild Life (Protection) Act 1972; Water (Prevention and Control of Pollution) Act 1974; Forest (Conservation) Act 1980; Air (Prevention and Control of Pollution) Act 1981. Even still, it was the Bhopal Gas Disaster of December 1984 that changed the landscape, triggering the enactment of the Environment (Protection) Act (EPA) in 1986 and other laws, and also raising awareness amongst a range of stakeholders as to the seriousness of handling environmental issues.

Currently, India has a rich corpus of environmental laws,⁹⁸ although their efficacy and implementation remain matters of serious concern.⁹⁹ Nevertheless, a few examples from the statutory provisions and judicial decisions will be given to illustrate the potential that the existing framework offers in holding companies accountable for environmental pollution.

The EPA defines “environment” and “environmental pollution” broadly. Section 2(a) states that the term “environment” *includes* “water, air and land and the interrelationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.” Pollution to the environment is caused when a “pollutant” (i.e. any solid, liquid or gaseous substance) is found to be present in the environment to such concentration that it “may be, or tend to be, injurious to environment”.¹⁰⁰ The EPA gives the Central Government “the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution.”¹⁰¹ The government may, for example, lay down “standards for emission or discharge of environmental pollutants from various sources”.¹⁰² The government can also issue appropriate directions to any person, officer or any authority, including the direction to close, prohibit or regulate any industry, operation or process.¹⁰³

Section 7 of the EPA provides that no person carrying on any industry, operation or process “shall discharge or emit or permit to be discharged or emitted any environmental pollutants in excess of such standards as may be prescribed.” A

98. See Vikas Vashishth (ed.), *Bharat's Law and Practice of Environmental Laws in India*, Bharat Law House – New Delhi, India, 1999; Divan & Rosencranz, *op. cit.*, note 92.

99. See, e.g., C M Abraham & Armin Rosencranz, “An Evaluation of Pollution Control Legislation in India”, in *Columbia Journal of Environmental Law*, Volume 11, 1986, p. 101.

100. Environment (Protection) Act 1986, Section 2(b),(c).

101. *Ibid.*, Section 3(1).

102. *Ibid.*, Section 3(2)(iv).

103. *Ibid.*, Section 5.

similar stipulation regarding handling of any “hazardous substance” is found in Section 8.¹⁰⁴ If a discharge of “any environmental pollutant in excess of the prescribed standards occurs or is apprehended to occur due to any accident or other unforeseen act or event,” the responsible persons shall “prevent or mitigate the environmental pollution caused as a result of such discharge” and also inform designated government agencies of the fact of such incident.¹⁰⁵

Failure to comply with the provisions of the EPA or the rules/orders/directions made under its authority carries serious sanctions. Section 15 states that any such breach shall “be punishable with imprisonment for a term which may extend to five years with fine which may extend to one lakh rupees, or with both”. The law expressly contemplates the possibility that even government departments and their heads may be held liable for offences under the EPA.¹⁰⁶ A remarkable feature of the EPA is that it allows the possibility of “any person” initiating a complaint for criminal offences under this law, a privilege that is normally vested exclusively with the government.¹⁰⁷ This complaint process could be quite useful in situations where the government is unwilling – because of collusion or complicity – to initiate a complaint against a polluting company.

When addressing environmental pollution by companies, attribution of liability to corporate officials is a key and complex issue. To address it, Section 2(f) of the EPA defines an “occupier” in relation to any factory or premises, as “a person who has, control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.” Liability could be attributed to the “occupier”.

Section 16 of the EPA specifically deals with offences by companies. It states that “where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly”. This section provides a defence for a corporate official “if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.” Section 16 of the EPA also deals with individual liability of corporate officials. It stipulates that when an offence is committed by a company and it is proved that the offence has been committed “with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary

104. “Hazardous substance” means “any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plant, micro-organism, property or the environment.” *Ibid.*, Section 2(e).

105. *Ibid.*, Section 9.

106. *Ibid.*, Section 17.

107. *Ibid.*, Section 19.

or other officer of the company”, such corporate officials shall also be *deemed to be guilty* of the offence.

It is worth noting that this EPA approach of concurrent corporate criminal liability was adopted from the Water Pollution Act and the Air Pollution Act.¹⁰⁸ It moreover continues to be incorporated in other statutes that contemplate corporate criminal liability. Section 85 of the Information Technology Act 2000, for instance, has adopted an identical scheme of concurrent liability of natural and legal persons.

The difficulties experienced by victims in securing some form of immediate compensation following an industrial disaster such as Bhopal led to the enactment of the Public Liability Insurance Act (PLIA) in 1991. The PLIA aims to provide “immediate relief” to “persons affected by accident[s] occurring while handling any hazardous substance and for matters connected therewith or incidental thereto.”¹⁰⁹ Accordingly, it introduces a provision for no-fault compensation to victims of not all industrial accidents but only those involving hazardous substances.¹¹⁰ Section 3(1) of the PLIA provides that where death or injury to any person (**other than a workman**) or damage to any property has resulted from an accident, the owner shall be liable to give the specified compensation.¹¹¹ Claimants under this provision are not “required to plead and establish that the death, injury or damage [...] was due to any wrongful act, neglect or default of any person.”¹¹²

In order to allow owners to recover the paid compensation amount from insurance companies, the PLIA requires all owners of enterprises handling any hazardous substance to buy, before starting the activity, insurance policies to insure against the liability for payment of specified interim compensation.¹¹³ In the aftermath

108. Water Pollution Act 1974, Section 47; Air Pollution Act 1981, Section 40.

109. The Public Liability Insurance Act 1991.

110. ‘Hazardous substance’ means any substance or preparation which is defined to be a hazardous substance under the EPA. *Ibid.*, Section 2(d).

111. The Schedule to the PLIA specified the maximum amount of compensation. It states:

“(i) Reimbursement of medical expenses incurred up to a maximum of Rs. 12,500 in each case.

(ii) For fatal accidents the relief will be Rs. 25,000 per person in addition to reimbursement of medical expenses if any, incurred on the victim up to a maximum of Rs. 12,500.

(iii) For permanent total or permanent partial disability or other injury or sickness, the relief will be (a) reimbursement of medical expenses incurred, if any, up to a maximum of Rs. 12,500 in each case and (b) cash relief on the basis of percentage of disablement as certified by an authorised physician. The relief for total permanent disability will be Rs. 25,000.

(iv) For loss of wages due to temporary partial disability which reduces the earning capacity of the victim, there will be a fixed monthly relief not exceeding Rs. 1,000 per month up to a maximum of 3 months: provided the victim has been hospitalised for a period of exceeding 3 days and is above 16 years of age.

(v) Up to Rs. 6,000 depending on the actual damage, for any damage to private property.”

112. *Ibid.*, Section 3(2).

113. *Ibid.*, Section 4. Section 2(g) defines an “owner” of a company as “any of its directors, managers, secretaries or other officers who is directly in charge of, and is responsible to, the company for the conduct of the business of the company”.

of Bhopal, the insurance industry was, however, unwilling to provide such an unlimited insurance coverage. The PLIA was, therefore, amended in 1992 to allow the Rules made under the Act to cap the total amount that the insurance company could pay for each accident. The newly inserted Section 4(2B) provided that the “liability of the insurer under one insurance policy shall not exceed the amount specified in the terms of the contract of insurance in that insurance policy.”

The 1992 Amendment of the PLIA also introduced a provision for setting up an Environment Relief Fund (ERF).¹¹⁴ It requires every owner to contribute to the ERF an additional “amount, not exceeding the amount of premium, as may be prescribed”.¹¹⁵ The ERF was essentially created to make up for the shortfall in compensation if a given accident produces more victims or greater damage than can be handled by the insurance company.

In order to deal with cases arising from such hazardous accidents in an effective and expeditious manner, the National Environment Tribunal Act 1995 (NETA) proposed to establish a specialized tribunal. But this law has not yet been implemented, so the proposed mechanism could not be put in place. Rather, in June 2010, the Indian Parliament enacted the National Green Tribunal Act,¹¹⁶ which seeks to establish a new quasi-judicial body comprising both judicial and expert administrative members at the national level. This Green Tribunal is intended to deal with all environment-related civil cases not only under the EPA, the PLIA and the NETA, but also under water/air pollution laws and the laws dealing with forest conservation and biodiversity.¹¹⁷

Beyond statutes like the EPA and the PLIA, what has been more truly groundbreaking is the judicial evolution of several principles that greatly enrich India’s environmental jurisprudence. The Supreme Court, for instance, held that the ancient Roman doctrine of “public trust” is part of Indian law.¹¹⁸ Under the doctrine, certain common properties such as rivers, forests and the air are held by government in trust for the free and unimpeded use of the general public. The Court held that the state “as a trustee is under a legal duty to protect the natural resources” and that these “resources meant for public use cannot be converted into private ownership.”¹¹⁹ The Court quashed the permission/lease granted to the company in question to establish a Motel and ordered it to pay compensation by way of cost for the restitution of the environment and ecology of the area.

114. *Ibid.*, Section 7A.

115. *Ibid.*, Section 4(2C).

116. National Green Tribunal Act 2010.

117. *Ibid.*, Section 3. It empowers the government to establish, by issuing a notification, a National Green Tribunal.

118. *M C Mehta v. Kamal Nath*, (1997) 1 SCC 388, <http://judis.nic.in/supremecourt/chejudis.asp>, accessed 3 February 2011.

119. *Ibid.*, p. 26.

Evolution of the “polluter pays” principle and the “precautionary principle” as part of sustainable development is also notable.¹²⁰ In *Indian Council for Enviro-Legal Action v. Union of India*,¹²¹ the question before the Supreme Court was the nature of the remedy available for hazards to health and the environment caused by private chemical manufacturing plants in Bichri village in the state of Rajasthan. Since the plants were operating without having obtained clearance from the Pollution Control Board, the Court found them absolutely liable for the harm caused. It moreover applied the “polluter pays” principle and ruled that “the responsibility for repairing the damage is that of the offending industry.” The polluting companies were thus ordered to bear the costs of remedying the damage caused by their business activities. The Court also ordered a closure of these polluting units because they had continuously violated the law, did not implement the court orders and tried to conceal the sludge. There have been several other instances in which the Supreme Court ordered the closure or relocation of polluting industries.¹²²

In *Vellore Citizen Welfare Forum v. Union of India*,¹²³ The Supreme Court again emphasised the application of the “polluter pays” principle. More importantly, the Court held this principle and the precautionary principle to be integral part of sustainable development. In the instant case, a public interest litigation (PIL) was filed regarding pollution caused by enormous discharge of untreated effluent by the tanneries and other industries in the state of Tamil Nadu. The untreated effluent had been discharged in a river that was the main source of water supply to the residents of the area. The Court observed that, although the leather industry is of vital importance to the country, generating foreign exchange and providing employment, it has no right to destroy the ecology, degrade the environment and pose health hazards. Referring to international jurisprudence, the Court held that the “precautionary principle” and the “polluter pays” principle are essential features of sustainable development. The Supreme Court went on to outline the precautionary principle in municipal law as entailing the following:

- that environmental measures by the government and other authorities must anticipate, prevent and counter the causes of environmental degradation;
- that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as the reason for postponing measures to prevent environmental depredation; and

120. See Harish Salve, “Justice between Generations: Environment and Social Justice” in Kirpal et al (eds.), *op. cit.*, note 90, p. 360 at p. 369-73.

121. *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212. See Shubhankar Dam & Vivek Tewary, “Polluting Environment: Is a “Polluted” Constitution Worse than a Polluted Environment?”, in *Journal of Environmental Law*, Volume 17, 2005, p. 383 at p. 386-87.

122. See Vashishth, *op. cit.*, note 98, pp. 20-21.

123. *Vellore Citizen Welfare Forum v. Union of India* AIR (1996) SC 2715. See Vashishth, *op. cit.*, note 98, pp. 114-15.

- that the “onus of proof” is on the actor or the developer to show that his action is environmentally benign.

This conceptualisation of sustainable development principles comes from cases specifically related to companies and has been affirmed in subsequent cases;¹²⁴ thus, it is beyond a doubt that citizens and NGOs could employ both the precautionary principle and the “polluter pays” principle against companies that pollute.

1.7 Workers’ Welfare Laws

There is a plethora of laws that seek to protect the interests of workers in India, e.g., the Workmen’s Compensation Act 1923, the Trade Unions Act 1926, the Payment of Wages Act 1936, the Industrial Disputes Act 1947, Factories Act 1948, the Employees State Insurance Act 1948, the Employees Provident Fund and Miscellaneous Provisions Act 1952, the Mines Act, the Maternity Benefit Act 1961, the Contract Labour (Abolition and Regulation) Act 1970, the Payment of Gratuity Act 1972, the Equal Remuneration Act 1972, the Bonded Labour System (Abolition) Act 1976 and the Child Labour (Prohibition and Regulation) Act 1986.¹²⁵ A more recent addition is the Unorganised Workers’ Social Security Act 2008, which seeks to provide for the social security and welfare of unorganised workers such as those who work from home or are self-employed.

As suggested by their titles, these laws seek to protect a wide range of interests of workers and shield them from exploitation by employers. Most of these welfare laws were enacted by the government of an independent India and they reflect a desire to implement the Fundamental Rights and Directive Principles enumerated in Parts III and IV of the Constitution. A few of the laws, though, were enacted during the British rule, The Payment of Wages Act 1936, which obligates every employer to pay wages to employed workers as per the specified wage-period,¹²⁶ and the Trade Unions Act of 1926, which facilitates the establishment and registration of trade unions to pursue the collective protection of workers’ rights, are two such examples.

Just before independence, the Industrial Disputes Act was enacted in March 1947. This law prescribes a mechanism to settle industrial disputes between employers and workers. Section 2A declares that any dispute over a worker’s termination, retrenchment or dismissal will be treated as an industrial dispute. The Act provides for establishing Works Committees, Conciliation Officers and special Labour

124. *M C Mehta v. Union of India*, Writ Petition (Civil) No. 4677 of 1985 (judgment dated 11 October 1996) (1997) 3 SCC 715; *Research Foundation for Science Technology & Natural Resources Policy v. Union of India*, Writ Petition (Civil) No. 657 of 1995 (judgment dated 5 January 2005).

125. See Mohan R Pillay, Paul R Sandosham & Nandakumar Ponniya (eds.), *Doing Business in India*, Sweet & Maxwell – Singapore, 2004, pp. 197-214.

126. Payment of Wages Act 1936, Sections 3-5.

Courts/Tribunals to settle such industrial disputes.¹²⁷ Parties may also resort to arbitration before any dispute is referred to the Labour or Tribunal.¹²⁸ There is a prohibition on strike and lock out while the dispute is being considered by the Labour/Tribunal, while the dispute is in arbitration or conciliation proceedings or if the settlement/award is in force.¹²⁹ There are also provisions regulating lay off or retrenchment of workers.¹³⁰ As will be seen below, some of the provisions related to strike and lay off/retrenchment have been modified in Special Economic Zones (SEZs), which has been a matter of controversy and opposition by trade unions.

Bonded labour,¹³¹ which had its origin in the old feudal and caste systems, has been a major problem in India.¹³² Bonded labour can also take the form of child bonded labour under which a child may be sold to a lender in satisfaction of a loan.¹³³ As recently as 2007, companies like Gap were reportedly forced to withdraw their clothing from the market due to allegations that they used bonded child labour.¹³⁴ Although the Indian government had ratified the ILO Convention No. 29 (Forced Labour Convention of 1930) on 30 November 1954, the bonded labour system was only abolished by ordinance in 1975.¹³⁵ In 1976, this ordinance was replaced by the Bonded Labour Abolition Act. The Act seeks to abolish the bonded labour system with a view to preventing the economic and physical exploitation of vulnerable sections of society.¹³⁶ It provides that no person shall “compel any

127. Industrial Disputes Act 1947, Sections 3, 4, 7 and 7A.

128. *Ibid.*, Section 10A.

129. *Ibid.*, Section 23.

130. *Ibid.*, Chapters V-A and V-B.

131. “Bonded labour” refers to a system under which a person offers labour for very little or no pay to repay a debt. The value of the work done by bonded labourers “is invariably greater than the original sum of money borrowed.” See Anti-slavery, “What is bonded labour?”, http://www.antislavery.org/english/slavery_today/bonded_labour.aspx, accessed 3 February 2011. See Child Labour, “Bonded Child Labour in India”, <http://www.childlabor.in/bonded-child-labour-in-india.htm>, accessed 3 February 2011.

132. That is why, Article 23 of the Constitution of India, a fundamental right, prohibits forced labour.

133. See Child Labour, *op. cit.*, note 131.

134. “Gap pulls “child labour” clothing”, in *BBC News*, 28 October 2007, http://news.bbc.co.uk/2/hi/south_asia/7066019.stm, accessed 3 February 2011.

135. Bonded Labour System (Abolition) Act 1976.

136. Section 2(g) of the Bonded Labour System (Abolition) Act defines ‘bonded labour system’ as follows:

“*bonded labour system*” means the system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that,--

- (i) in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by any document) and in consideration of the interest, if any, on such advance, or
- (ii) in pursuance of any customary or social obligation, or
- (iii) in pursuance of an obligation devolving on him by succession, or
- (iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or

person to render any bonded labour or other form of forced labour.”¹³⁷ The law extinguishes any liability to repay bonded debt and creditors are prohibited from accepting any payment against the extinguished debt.¹³⁸ It makes it a criminal offence to continue the practice of bonded labour.¹³⁹ It thus acknowledges and abolishes the existence of an extreme form of exploitation in the labour market.

The responsibility for implementing the Bonded Labour Abolition Act rests with state governments. The central government has, however, launched a rehabilitation scheme that provides every freed bonded labourer with Rs. 20,000 assistance, paid equally by the central and state governments.¹⁴⁰ State governments provide additional help, such as allotment of agricultural land, provision for low-cost dwelling houses, training for acquiring new skills, and education of children.¹⁴¹ It is reported that 289,225 bonded labourers had been released and rehabilitated as on 30 September 2010.¹⁴²

Lack of implementation has been a major issue ever since the enactment of this law. An NGO led by Swami Agnivesh, *Bandhua Mukti Morcha* (Bonded Labour Liberation Front)¹⁴³ approached the Supreme Court in 1982 by way of a PIL lamenting the law’s non-implementation.¹⁴⁴ In response, the Court issued detailed directions to the government. But, due to the government’s failure to comply with these directions, the NGO approached the Court again in 1992.¹⁴⁵

(v) by reason of his birth in any particular caste or community, he would--

- (1) render, by himself or through any member of his family, or any person dependent on him, labour or service to the creditor, or for the benefit of the creditor, for a specified period or for an unspecified period, either without wages or for nominal wages, or
- (2) forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or
- (3) forfeit the right to move freely throughout the territory of India, or
- (4) forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent on him, and includes the system of forced, or partly forced, labour under which a surety for a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that in the event of the failure of the debtor to repay the debt, he would render the bonded labour on behalf of the debtor.’

137. *Ibid.*, Section 4(2).

138. *Ibid.*, Sections 6, 9.

139. *Ibid.*, Sections 16-19.

140. Ministry of Labour, Government of India, “Bonded Labour”, <http://www.labour.nic.in/annrep/files2k1/lab9.pdf>, accessed 3 February 2011.

141. *Ibid.*

142. Rajya Sabha, “Bonded labourers in the country”, 1 December 2010, <http://labour.nic.in/pib/PressRelease/RS%20-%20Bonded%20Laboureres%20in%20the%20country%201-12-2010.pdf>, accessed 3 February 2011.

143. Swami Agnivesh.com, “About Bandhua Mukti Morcha (BLLF)”, <http://www.swamiagnivesh.com/aboutbmm.htm>, accessed 3 February 2011.

144. *Bandhua Mukti Morcha v. Union of India*, AIR (1984) SC 802.

145. *Bandhua Mukti Morcha v. Union of India*, AIR (1992) SC 38.

In addition to bonded labour, the practice of child labour is a serious problem in India that constitutional provisions¹⁴⁶ and the Child Labour Prohibition Act seek to address. Section 3 of this Act mandates that no “child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on.”¹⁴⁷ The Schedule to the Act specifies 18 occupations and 65 processes in which the employment of children below the age of 14 years is prohibited. In 2006, this Schedule was amended to further prohibit employment of children as domestic helpers as well as in restaurants, tea shops, hotels and *dhabas* (road-side eateries). The law also regulates the number of hours for which children may work in permitted enterprises, entitles them to one holiday every week and authorizes rules for their health and safety.¹⁴⁸

“Whoever” employs any child or permits any child to work in contravention of the provisions of Section 3 will face criminal sanctions.¹⁴⁹ Although there is no provision explicitly establishing criminal liability for companies employing child labour, the term “whoever” indicates that they could be prosecuted for a breach of this law. In addition to police officers or inspectors, the law permits “any person” to file a complaint of the commission of an offence under this Act in any court of competent jurisdiction.¹⁵⁰

The implementation of the Child Labour Prohibition Act, however, remains a matter of concern. Between 2007 and 2009, the government launched about 15,000 prosecutions for employing child labour.¹⁵¹ Nevertheless, because of widespread poverty, many more children still work in hazardous enterprises, as indicated by the following information the government provided to Parliament in November 2010:

*“According to the Census 2001 figures there were 1.26 crores working children in the age group of 5-14 out of which approximately 12 Lakhs children were working in Hazardous Occupations and Processes. However, as per survey conducted by National Sample Survey Organization (NSSO) in 2004-05, the number of working children was estimated 90.75 lakh.”*¹⁵²

146. Article 24 of the Constitution of India prohibits the employment of children below the age of 14 years in any factory, mine or hazardous employment. Moreover, Article 21A obligates the government to provide free and compulsory education to all children of the age of six and fourteen years.

147. This provision does not apply “to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by or receiving assistance or recognition from, Government.” *Ibid.*, Section 3, Proviso.

148. Child Labour Abolition Act 1986, Sections 7, 8 and 13.

149. *Ibid.*, Section 14.

150. *Ibid.*, Section 16(1).

151. Lok Sabha, “Working children in the age group of 5-14 years”, pp. 2-3, <http://labour.nic.in/pib/PressRelease/LS-Working%20children%20in%20the%20age%20group%20of%205-14%20years-29-11-10.pdf>, accessed 3 February 2011.

152. *Ibid.*, p. 1.

The Factories Act of 1948 is another law that seeks to protect the interests of labourers working in factories. The Act contains extensive provisions aimed at safeguarding the health and safety of factory workers. There are provisions, for example, regulating cleanliness, disposal of waste and effluents, ventilation and temperature, dust and fume, lighting, drinking water, latrines and urinals, overcrowding, fencing of machinery, stairs and other means of access, and excessive weights.¹⁵³ There are also affirmative provisions for workers' welfare, such as those requiring first-aid facilities, canteens, rest rooms and crèches (childcare facilities).¹⁵⁴ The Factories Act provides that no adult worker shall be "required or allowed to work" in a factory for more than forty-eight hours in any week or more than nine hours in any day.¹⁵⁵ A worker who works more than these limits is "entitled to wages at the rate of twice his ordinary rate of wages."¹⁵⁶ No young child below the age of fourteen shall be required or allowed to work in any factory.¹⁵⁷ A child between the ages of fourteen and fifteen years may be employed in a factory, but there are special safeguards to protect their rights.¹⁵⁸

Important amendments to this law were made in the aftermath of the Bhopal disaster. The 1987 amendment provided that, in the case of a company, a director would be deemed to be the "occupier",¹⁵⁹ who is "the person who has ultimate control over the affairs of the factory".¹⁶⁰ The amended law thus makes directors *personally* responsible for the health and safety of factory workers.¹⁶¹ In a subsequent case, the Supreme Court characterised this amendment as a response to "the escape routes which the employers had found to shift their responsibilities on some employee or the other and escape punishment and penalty."¹⁶² Section 7A of the Factories Act further provides, "Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory."¹⁶³ The law requires state governments to appoint

153. Factories Act 1948, Chapters III and IV.

154. *Ibid.*, Chapter V.

155. *Ibid.*, Sections 51, 54.

156. *Ibid.*, Section 59(1).

157. *Ibid.*, Section 67.

158. *Ibid.*, Sections 71-73.

159. *Ibid.*, Section 2(n).

160. *Ibid.*

161. Where the occupier is able to demonstrate that it was not him, but someone else, who was the actual offender, he would have to prove to the satisfaction of the court that he had exercised due diligence to enforce the execution of the Act and 'that the said other person committed the offence in question without his knowledge, consent or convenience.' *Ibid.*, Section 101, as amended in 1987.

162. *J K Industries Ltd. v. Chief Inspector of Factories & Boilers* (1996) 6 SCC 665 at 678.

163. This section also imposes other specific obligations (such as related to maintenance of the plant and machinery, and supervision and training of workers) on occupiers that were triggered by Bhopal.

inspectors,¹⁶⁴ who may enter any factory to conduct a range of health and safety-related examinations and investigations.¹⁶⁵

The newly inserted Chapter IVA of the Factories Act also added special provisions relating to “hazardous processes”, another direct response to the Bhopal gas leakage. The chapter provides, among others, for:

- the constitution of Site Appraisal Committees to decide where a factory may be located;
- compulsory disclosure of information about potential risk and hazard to the Chief Inspector of Factories, the local authority and the general public in the vicinity;
- limits on permissible exposure to chemical and toxic substances;
- drawing up of on-site emergency plans and detailed disaster control measures; and
- workers’ right to participate in safety management.

Recognising that concerns for industrial secrecy may discourage companies from disclosing certain information about their factories, the Factories Act, authorises the state government inspector to collect and check samples if he suspects any contravention of the Act or is of the opinion that bodily injury may be caused or the health of workers may be adversely affected.¹⁶⁶

Breach of the provisions of the Factories Act is made a criminal offence. Section 92 prescribes that “the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to two years or with fine which may extend to one lakh rupees or with both, and if the contravention is continued after conviction, with a further fine which may extend to one thousand rupees for each day on which the contravention is so continued.” There is also an enhanced penalty if a person commits an offence for which he has been convicted before.¹⁶⁷

1.8 Land Acquisition Act

As in other countries, the government in India can acquire private land for public purposes. The Land Acquisition Act of 1894 provides the legal basis for such acquisition of land. Broadly speaking, this Act deals with two aspects: the acquisition of

164. Factories Act 1948, Section 8.

165. *Ibid.*, Section 9.

166. *Ibid.*, Sec 91(1).

167. *Ibid.*, Sec 94.

land needed “for public purposes” or “for companies”; and the method for determining the amount of compensation to be made on account of such acquisition.¹⁶⁸ The government does not, however, enjoy an unqualified power to acquire land for companies. When acquired for a company, the purpose of acquisition should be:

- to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith; or
- to construct some building or work for a company which is engaged in any industry which is for a public purpose; or
- for the construction of some work that is likely to prove useful to the public.¹⁶⁹

When the government is satisfied that land is needed for a public purpose or for a company, it shall publish a notification in the official Gazette.¹⁷⁰ Section 5A states that any person “interested in any land” may object to the acquisition of land within 30 days of such published notification. However, a person is only “deemed to be interested in land” if he would be entitled to claim compensation if the land was acquired under this Act;¹⁷¹ thus, third parties or civil society cannot raise objections. If the government rejects any objection, it issues a declaration to acquire the land under Section 6, subject to the provision of compensation to be determined by the collector of a district.¹⁷² The collector’s award as to the amount of compensation is final unless the matter is referred to court under Section 18. In determining the amount of compensation for the acquired land, a court will consider, *inter alia*, the market-value of the land at the date of the publication of the initial notification and the damage sustained by the interested person.¹⁷³

The Land Acquisition Act thus places both substantive and procedural restrictions on the sovereign power of the government to acquire land from private parties. If the government tries to disregard these limitations in acquiring land for companies, the affected people may challenge the acquisition of their land. Moreover, land cannot be acquired without providing compensation. Despite the repeal of the right to property as a Fundamental Right in 1978,¹⁷⁴ Article 300A of the Constitution still affords constitutional protection and land acquisition may

168. Land Acquisition Act 1984, Long Title.

169. *Ibid.*, Section 40.

170. *Ibid.*, Section 5.

171. *Ibid.*, Section 5A(4).

172. *Ibid.*, Section 11.

173. *Ibid.*, Section 23.

174. The Right to Property under Article 31 of the Constitution of India was repealed by the Constitution (44th Amendment) Act 1978.

be challenged, *inter alia*, on the ground that the compensation provided was illusory.¹⁷⁵

1.9 Information, technology and freedom of information

Technology is having an increasing impact, in both positive and negative ways, on the realisation of human rights. The internet is a case in point: it can be used to promote as well as abridge human rights such as the freedom of speech and expression, the right to information and the right to privacy.¹⁷⁶ In this context, some provisions of the Information Technology Act 2000 (IT Act) may be relevant to holding companies accountable for human rights abuses. Section 65 makes publication of obscene information in electronic form an offence punishable “on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees.” Breach of confidentiality and privacy, meanwhile, are addressed by Section 72. This section provides that any person who has secured access to any electronic record, book, register, correspondence, information or document through any of the powers conferred under this Act, and who discloses such material without the consent of the concerned person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

The IT Act has extraterritorial effect and its provisions apply to any offence or contravention committed outside India by any person irrespective of his nationality if “the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.”¹⁷⁷ Section 85 states that if a company contravenes any provision of this law, “every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention”. Such person may only escape liability “if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.”¹⁷⁸

In 2005, the government also enacted the Right to Information Act to enable citizens to access the information under the control of public authorities so as to enhance transparency and accountability in governance. This law may be useful in two ways. First, companies that are “owned, controlled or substantially financed”

175. Singh, *Shukla's Constitution of India*, *op. cit.*, note 30, p. 846.

176. See generally Jack M Balkin, “How Rights Change: Freedom of Speech in the Digital Age”, in *Sydney Law Review*, Volume 26, 2004, p. 5; Surya Deva, “Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?”, in *George Washington International Law Review*, Volume 39, 2007, p. 255.

177. Information Technology Act 2000, Section 75.

178. *Ibid.*, Section 85. See Vivek Sood, *Cyber Law Simplified*, Tata McGraw-Hill Publishing Co. – New Delhi, India, 2001, p. 87.

by the government will be within the definition of “public authority” under Section 2(h) of the Act. This means that if such public companies are alleged to be involved in human rights abuses, Indian citizens could seek relevant information for use both inside and outside of courts. Second, all companies depend on government authorities for certain aspects of their business operations, such as contracts, licenses and tenders, and project approvals. If information about the nexus between companies and the government can be obtained, this will help in uncovering secrecy surrounding various deals that may affect the general public. As a case in point, a scholar has argued that the Bhopal disaster could have been avoided, or at least its impact greatly lessened, if relevant people had access to the right information to take appropriate preventive action.¹⁷⁹

Section 8 of the Right to Information Act prescribes the circumstances in which access to information may be denied. One of the grounds that may be invoked by government authorities or government companies is that disclosure of certain information, such as commercial confidence, trade secrets or intellectual property, would harm the competitive position of a company. But if the competent authority is satisfied that public interest warrants disclosure, such information could be accessed despite these concerns.

An order of 3 September 2009 of the Central Information Commission (CIC) in a case under the Act shows the potential impact of this law.¹⁸⁰ When the Bombay Environmental Action Group (BEAG) asked for access to the investment contract relating to work to be done for the Mumbai Port Trust, the request was denied on the ground of the “confidentiality clause” in the agreement, a clause by which the parties to the contract agreed not to divulge any part of the contract to a “third person”. The CIC agreed with BEAG’s contention that “a PPP (Public Private Partnership) agreement involving the nation’s physical resources and its infrastructure, which had critical environmental, social and human aspects, apart from its technical and financial aspects, could not be a matter between the bureaucracy of the government and the private party alone. The people of the country are entitled to know the truth about the PPP agreements, in general as well as in specific details.” The CIC reasoned that a “matter of such critical importance to the country cannot be negotiated and settled behind the back of its people.”

179. S Jasanoff, “The Bhopal Disaster and the Right to Know”, in *Social Science & Medicine*, Volume 27, 1988, p. 1113.

180. Central Information Commission, “Decisions”, http://www.rti.india.gov.in/CIC_Decisions1.php, accessed 3 February 2011.

2. Available Legal Remedies for Corporate Human Rights Abuse

2.1 Damages and injunction

The most commonly available and invoked legal remedy is to sue a company involved in human rights abuses for damages or compensation. This is generally done under tort law principles. But compensation can also be sought, as explained later, under writ petitions filed under Articles 32 and 226 of the Constitution, or under statutory provisions.

Damages awarded by the courts under tort law may be “substantial” or “exemplary”. While the former is aimed at compensating the victims, the latter seeks to have a deterrent effect.¹⁸¹ The Supreme Court in *MC Mehta v. Union of India (Oleum gas leak case)*¹⁸² proposed a new yardstick for measuring the quantum of compensation payable by a company involved in hazardous or inherently dangerous activity. The Court observed that in such cases the compensation “must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.”¹⁸³ However, as this observation was *obiter dictum* and not directly applied to the facts of the case, it remains to be seen if the courts in future would adopt it. As of now, damages awarded in “tort actions in India are notoriously low” and thus do not have much deterrent effect.¹⁸⁴ This was, in fact, one of the reasons why the Indian government filed a suit against Union Carbide Corporation (UCC) before the US courts rather than in India.

Although there is no express provision, it seems that the Indian courts may award interim compensation pending the final outcome of the legal proceedings if a *prima facie* case for liability is made out. There is at least one clear precedent for such an award. The District Court in the Bhopal gas leak case relied on its power under Section 94(e) and Section 151 (inherent power) of the Code of Civil Procedure¹⁸⁵ and awarded Rs 350 crore as interim compensation to the victims. On appeal, however, the High Court reduced the sum to Rs 250 crore and also

181. Divan & Rosencranz, *op. cit.*, note 92, pp. 88-89.

182. *MC Mehta v. Union of India (Oleum Gas Leak case)* (1987) 1 SCR 819.

183. *Ibid.*, p. 844.

184. Divan & Rosencranz, *op. cit.*, note 92, p. 89.

185. Section 94(e) reads: “In order to prevent the ends of justice from being defeated, the Court may [...] make such other interlocutory orders as may appear to the Court to be just and convenient.” Section 154 states: “Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

overruled the inherent power rationale of the District Court for awarding interim compensation.¹⁸⁶ The High Court rather relied on the English common law principle that allows courts to award interim damages in tort cases.¹⁸⁷ As previously mentioned, interim compensation may also be claimed under statutes like the PLIA.

In addition to or in lieu of damages, courts may in appropriate cases¹⁸⁸ also issue an injunction¹⁸⁹ against a company that is breaching rights of individuals and causing harm to the person or property. Courts may issue an “interim injunction” in exercise of their power under Sections 94 and 95 of the Code of Civil Procedure 1908. The Supreme Court and the High Court can also issue any directions or orders, including injunctions, while reviewing writ petitions under Articles 32 and 226 of the Constitution. In the past, courts have issued numerous injunctions against polluting industries to protect the environment generally and rivers, lakes and historical monuments in particular.¹⁹⁰

2.2 Criminal sanctions

The Indian Penal Code (IPC), as well as other laws, envisages the possibility of companies being held criminally liable for certain wrongs. Section 305 of the Code of Criminal Procedure 1973 (CrPC), which prescribes procedure for when a corporation or a registered society is the accused, also implies that companies can be prosecuted for crimes. It states that where “a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial.”

186. Divan & Rosencranz, *op. cit.*, note 92, p. 548.

187. The lawyer, who had led UCC’s appeal before the Supreme Court against the order of the High Court, observed in 2004:

“It is now more than 15 years since that case was argued by me in the Supreme Court of India. I must confess that when I first read Justice Sheth’s judgment, I was not at all impressed by the reasoning and attacked it with considerable force before the Constitution Bench of the Supreme Court. I had submitted that it was illogical. But as they say, wisdom comes (sometimes!) with age. Looking back, I find that the judgment does afford as good a rationale as any I can see, absent enacted law, for relieving hardship caused to litigants in a mass tort action – they have to wait for years in a three-tier system before they can establish and obtain a final executable decree for damages.”

Fali S Nariman, “Some reflections”, in *Seminar*, December 2004, <http://www.india-seminar.com/2004/544/544%20fali%20s.%20nariman.htm>, accessed 3 February 2011.

188. For example, where award of damages will not provide an adequate remedy.

189. Injunction is an order issued by courts requiring a certain person a specified action. Injunctive orders are mostly negative in content (i.e., refrain from doing something), but may also impose positive obligations (e.g., clean the polluted river).

190. See, for example, *A P Pollution Control Board II v. Professor M v. Nayudu*, (2000) Supp 5 SCR 249. See also Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, Kluwer Law International – Hague, Netherlands, 2004, pp. 232-33; Adrian Bradbrook et al (eds.), *The Law of Energy for Sustainable Development*, Cambridge University Press – Cambridge, United Kingdom, 2005, pp. 571-572.

Of the criminal sanctions conceived by Section 53 of the IPC, fine and forfeiture of property could be imposed on corporations; their officers may also be punished with imprisonment. The amount of fine is specified in various provisions. However, if no amount is specified, Section 63 states that the amount of fine may be “unlimited”, but it shall not be “excessive”. As explained in the previous section, the Supreme Court’s creative interpretation in *Standard Chartered Bank*¹⁹¹ allows companies to be prosecuted even for those offences for which the prescribed punishment is both “imprisonment *and* fine”. The Court reasoned that in such instances the term “and” should be interpreted as “or” so as to impose fine on companies.

Both companies and their officers in charge can also be held liable for strict or absolute liability offences, which require no *mens rea*. While dealing with the meaning of the term “occupier” under the Factories Act, the Supreme Court in *J K Industries Ltd. v. Chief Inspector of Factories & Boilers* held the offences under the Act “are strict statutory offences for which establishment of *mens rea* is not an essential ingredient. The omission or commission of the statutory breach is itself the offence.”¹⁹² But more important was the Court’s ruling in relation to the liability of company directors as “occupiers”. The Court held:

*“The rule of strict liability is attracted to the offences committed under the Act and the occupier is held vicariously liable along with the Manager and the actual offender, as the case may be. Penalty follows actus reus, mens rea being irrelevant. As already noticed, where the company owns a factory it is the company which is the occupier, but, since company is a legal abstraction without a real mind of its own, it is those who in fact control and determine the management of the company, who are held vicariously liable for commission of statutory offences. The directors of the company are, therefore, rightly called upon to answer the charge, being the directing mind of the company.”*¹⁹³

In criminal proceedings, the Indian courts may award compensation to victims under Section 357 of the CrPC. Section 357(1) allows courts to award compensation for “any loss or injury caused by the offence” out of the fine imposed. However, if the sentence does not include a fine, the courts may use Section 357(3) to “order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.” Another provision (Section 357A) has been added in the CrPC by a 2008 amendment. This section further strengthens the position of victims of crimes and/or their

191. *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530.

192. *J K Industries Ltd. v. Chief Inspector of Factories & Boilers*, (1996) 6 SCC 665 at 692.

193. *Ibid.*

dependents by enabling them to seek compensation from the government under a newly established compensation scheme.

As in many other countries in the common law tradition, victims in India generally have no right to participate directly in criminal trials. But, the 2008 amendment of Section 372 of the CrPC changed this position slightly, providing that “the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation”. This provision may be helpful in situations where the government decides to “go soft” in prosecuting powerful companies.

India is not yet a party to the Rome Statute of the International Criminal Court. Nevertheless, grave breaches of the four Geneva Conventions entail crimes warranting serious punishment under the Geneva Conventions Act 1960.¹⁹⁴ This Act, which has extraterritorial effect,¹⁹⁵ is applicable to companies. Section 14(1) states: “If the person committing an offence under this Chapter is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.”

2.3 Writ petitions

The previous section has already discussed the wide ambit of Fundamental Rights provisions in Part III of the Constitution and their judicial expansion by the courts. If there is a violation of any of these Fundamental Rights, one may approach the Supreme Court (or a High Court, as noted below) for redress. The Court “shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights”.¹⁹⁶ The scope of remedial powers under this provision, itself a Fundamental Right, is quite wide. In the *Oleum Gas Leak* case, the Supreme Court made this clear when it observed:

“... under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental

194. Section 3 of the Geneva Conventions Act, 1960 provides:

“If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the Conventions he shall be punished –

(a) where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life; and

(b) in any other case, with imprisonment for a term which may extend to fourteen years.”

195. ‘When an offence under this Chapter is committed outside of India, he may be dealt with in respect of such offence as if it has been committed within India at which he may be found.’ Geneva Conventions Act, *ibid.*, Section 4.

196. Constitution of India, Art 32(2).

or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed[...]. If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases.”¹⁹⁷

Under Article 226 of the Constitution, the High Courts also have the power to issue orders or writs “for the enforcement of any of the rights conferred by Part III and for any other purpose.” As compared to the Supreme Court, the power of High Courts is wider because their power to admit writ petitions is not limited to violations of Fundamental Rights and because they can issue directions or orders to “any person”, not merely government authorities. In Fundamental Rights cases, the jurisdiction to entertain writ petitions is concurrent. Considering that the principle of *res judicata* applies to writ petitions under Articles 32 and 226,¹⁹⁸ a number of factors may influence petitioner’s choice whether to approach the Supreme Court straight away or begin with the relevant High Court.¹⁹⁹

Many writ petitions concerning redress for human rights violations have been used by way of PIL and we will further note below the usefulness of writ petitions to PIL. Here it should suffice to say that the Supreme Court has given diverse kinds of directions on a wide range of matters – from release and rehabilitation of bonded labourers to workplace sexual harassment of women and measures controlling pollution of the Ganges River.²⁰⁰ In the specific context of companies, the writ petition power can be used in three different ways. First, if a Fundamental Right is infringed by a public company that falls within the meaning of “other authorities” under Article 12 of the Constitution or the Fundamental Right is one that

197. *M C Mehta v. Union of India* (1987), (1) SCR 819 at 830 (emphasis added). See also S P Sathe, *Judicial Activism in India*, Oxford University Press – New Delhi, India, 2002, pp. 232-35.

198. Singh, *Shukla’s Constitution of India*, *op. cit.*, note 30, pp. 628-29. The writ of habeas corpus is an exception to this rule. *Ibid.*, p. 629.

199. Divan & Rosencranz, *op. cit.*, note 92, pp. 129-30.

200. See Singh, *Shukla’s Constitution of India*, *op. cit.*, note 30, pp. 322-23.

is horizontally enforceable against non-state actors, the victims can approach the Supreme Court directly. Second, victims can approach High Courts in cases against any company for violation of a legal right. But this is a discretionary remedy and High Courts may decline a petition on various well-established grounds such as that there is a disputed question of fact or that an alternative remedy is available.²⁰¹ Third, victims can approach both the Supreme Court and High Courts for appropriate orders or directions against government authorities to ensure that relevant laws are properly implemented or that effective steps are taken to secure corporate compliance with Fundamental Rights provisions.

Although the Supreme Court has cautioned against using the writ petitions as a substitute to ordinary civil suits,²⁰² there has been a phenomenal growth in the number of writ petitions being filed. There are a number of reasons for this trend: as compared to normal civil suits, it is much faster and inexpensive to obtain a relief through writ petitions.²⁰³ As noted in Part 3 of the report, the case backlog in lower civil courts is much worse than before the Supreme Court and the High Courts. Similarly, instead of paying *ad valorem* court fees, one has to pay only nominal fixed fee for filing writ petitions. For instance, the court fee for filing a civil writ petition before the Supreme Court is merely Rs 50.²⁰⁴

2.4 Public interest litigation and the expansion of *locus standi*

The crucial question with writ petition is who has the requisite *locus standi* to file? The traditional position in India and other common law countries was that only an aggrieved person, whose rights are infringed, has standing to approach the court. But over the years, there has been a liberalisation of the standing rules with the evolution of PIL. PIL generally refers to litigation aimed at espousing a public cause rather than the interest of one individual. PIL differs from traditional litigation not only in substance but also form, procedure and available remedies.²⁰⁵ In most of the cases, PIL seeks to trigger a social change or protect the interests of disadvantaged sections of society.²⁰⁶

201. *Ibid.*, pp. 623-28.

202. In *MC Mehta v. Union of India*, (1987) 1 SCR 819, the Supreme Court observed the following: "Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32." *Ibid.*, p. 830.

203. Divan & Rosencranz, *op. cit.*, note 92, p. 123.

204. Supreme Court of India, *Supreme Court of India: Practice and Procedure*, New Delhi, 3rd Edition, India, 2010, p. 27, <http://www.supremecourtindia.nic.in/handbook3rdedition.pdf>, accessed 3 February 2011. There is no fee for filing a criminal writ petition.

205. Divan & Rosencranz, *op. cit.*, note 92, pp. 133-134. See also Surya Deva, "Public Interest Litigation in India: A Critical Review", in *Civil Justice Quarterly*, Volume 28, 2009, p. 19.

206. See generally Po Jen Yap & Holning Lau (ed.), *Public Interest Litigation in Asia*, Routledge – London, United Kingdom, 2010.

Before moving on to discuss the PIL jurisprudence, one should differentiate it from class action litigation. Order 1, Rule 8 of the Code of Civil Procedure recognises the possibility of class action:²⁰⁷ where members of a class have “the same interest”, the court may allow a few persons to sue on behalf of the entire class.²⁰⁸ Furthermore, Section 91 of the Code provides: “In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted [...] with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.” It should be noted that these class action provisions of the Code are founded on efficiency in litigation rather than the “access to justice” or people’s participation in governance concerns that have driven PIL in India.

Two judges of the Indian Supreme Court (Justice Bhagwati and Justice Iyer) prepared the ground, from mid-1970s to early 1980s, for the birth of PIL in India. This included modifying the traditional requirements of *locus standi*, liberalising the procedure to file writ petitions, creating new Fundamental Rights or expanding their scope, overcoming evidentiary problems, and evolving innovative remedies.²⁰⁹ The Court developed epistolary jurisdiction by which even letters or telegrams were accepted as writ petitions.²¹⁰ It also recognised “representative standing” and “citizen standing” as exceptions to the traditional standing rule; while the former enables the poor, ignorant or oppressed to be represented by someone else, the latter allows a citizen to sue in her own right on matters of common public interest.²¹¹ The following observation of the Supreme Court in *S P Gupta v. Union of India* is considered a classic exposition of the representative standing rule:

“It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right [...] and such person or determinate class of persons is by reasons of poverty,

207. It reads: “(1) Where there are numerous persons having the same interest in one suit, – one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested; the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.”

208. Divan & Rosencranz, *op. cit.*, note 92, p. 154.

209. See Jeremy Cooper, “Poverty and Constitutional Justice”, in *Mercer Law Review*, Volume 44, 1993, pp. 611 at p. 616–632; Sheetal B Shah, “Illuminating the Possible in the Developing World”, in *Vanderbilt Journal of Transnational Law*, Volume 32, 1999, p. 435 at p. 467–473; Vijayashri Sripati, “Human Rights in India Fifty Years after Independence”, in *Denver Journal of International Law and Policy*, 1997, p. 93 at p. 118–125; Sathe, *op. cit.*, note 224, pp. 201–45; Ashok H Desai & S Murlidhar, “Public Interest Litigation: Potential and Problems” in Kirpal et al (eds.), *op. cit.*, note 90, p. 159 at p. 162–67.

210. *Sunil Batra v. Delhi Administration*, AIR (1980) SC 1579; *Dr Upendra Baxi v. State of UP*, (1982) 2 SCC 308.

211. See Divan & Rosencranz, *op. cit.*, note 92, pp. 135–139; Singh, *Shukla’s Constitution of India*, *op. cit.*, note 30, pp. 331–34.

*helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ [...]”.*²¹²

But it is citizen standing that has allowed public-spirited people and NGOs to not only challenge the abuse of public power of government authorities but also expose corruption and redress official inaction that resulted in the violation of human rights, pollution to the environment or breach of the rule of law.²¹³ Relocation of polluting industries out of Delhi,²¹⁴ the protection of Taj Mahal from polluting industries,²¹⁵ and the closure of polluting tanneries near the Ganges²¹⁶ are often cited as some of the many success stories of PIL. Among others, the environmental lawyer M C Mehta and NGOs like Common Cause and People’s Union for Democratic Rights have been instrumental in bringing many of these issues before the Supreme Court,²¹⁷ which has done its best to improve the situation and monitor compliance with its orders or directions in many cases.

The proliferation of PIL and civil society activism has not, however, been free from difficulties. Apart from raising jurisprudential concerns related to disturbing the constitutional roles of different government organs, the PIL process has also been abused by people to settle personal or political scores.²¹⁸ There are also serious problems with lack of implementation of judicial directions, the result of which is that the human rights situation might not change much in practice despite continuous monitoring by courts. The continuing employment of child and/or bonded labour in factories and industries is illustrative. Moreover, there are indications that the dynamics of PIL may be changing.²¹⁹ For instance, the civil society felt disappointed when the Supreme Court did not intervene in matters

212. *S P Gupta v. Union of India*, (1981) Supp SCC 87, 210. See also *PUDR v. Union of India*, AIR (1982) SC 1473; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 S.C.C. 161.

213. Divan & Rosencranz, *op. cit.*, note 92, pp. 138-39; Singh, *Shukla’s Constitution of India*, *op. cit.*, note 30, pp. 205-11, 322-23; Sathie, *op. cit.*, note 224, pp. 215-27; Desai & Murlidhar, *op. cit.*, note 236, pp. 168-76.

214. Darshini Mahadevia, “Sustainable Development in India: An Inclusive Perspective” in *Development in Practice*, Volume 11:2/3, 2001, p. 242 at p. 251.

215. *M C Mehta v. Union of India*, (1996) 10 Suppl SCR 973; *M C Mehta v. Union of India*, (2003) 3 Supp SCR 925. See also Divan & Rosencranz, *op. cit.*, note 92, pp. 261-269.

216. *M C Mehta v. Union of India*, (1988) 1 SCR 279; *M C Mehta v. Union of India*, (1988) 2 SCR 530. See also Divan & Rosencranz, *op. cit.*, note 92, pp. 210-15.

217. See Sathie, *op. cit.*, note 224, p. 208.

218. See, for example, *Subash Kumar v. State of Bihar*, AIR (1991) SC 420; *Janta Dal v. H S Chowdhary*, (1992) 4 SCC 305; *S P Anand v. H D Deve Gowda*, (1996) 6 SCC 734; *Raunaq International Ltd. v. IVR Construction Ltd.*, (1999) 1 SCC 492. See also “Supreme Court Caution on Abuse of PIL”, in *The Hindu*, 22 December 2004, <http://www.hinduonnet.com/thehindu/2004/12/22/stories/2004122202951200.htm>, accessed 3 February 2011; J Venkatsean, “Slap Exemplary Costs for PIL Abuse: Supreme Court”, in *The Hindu*, 25 January 2010, <http://www.hindu.com/2010/01/25/stories/201001255571100.htm>, accessed 3 February 2011.

219. Surya Deva, “Public Interest Litigation in India: A Quest to Achieve the Impossible?” in Yap Po Jen & Holning S Lau (eds), *Public Interest Litigation in Asia*, Routledge – New York, United States, 2010, p. 57.

of economic liberalisation and the government's disinvestment policies or in the Narmada dam project where the displacement and rehabilitation of many people were at stake.²²⁰ One possible explanation is that where "PIL challenges an existing policy backed by powerful political forces, and established in the name of economic development, the Court's grasp of its fundamental rights mission becomes more unsteady."²²¹

The judgment of the Supreme Court in *Fertilizers & Chemicals Travancore Ltd. Employees Association v. Law Society of India*²²² also appears to deviate from its earlier responses to risks created by hazardous processes. In this case, the company imported ammonia in special refrigerated ships and stored it in a storage tank located on Willingdon Island. The ammonia was then moved by rail to the mainland where it was stored in a bigger tank before being pumped into its consuming plant. The public interest petitioner went to court anticipating a "devastating catastrophe [...] in the event of a major leak in the [...] ammonia tank."²²³ An air crash, an act of sabotage, or an earthquake could lead to loss of life on a tragic scale. The High Court agreed that the tank should be shut down, but the Supreme Court took a different and more pragmatic stand. Considering that risk and hazard is inherent in the modern world, the court calculated the "utilities which exist in public interest [...] and human safety".²²⁴ "In modern times", the court said, "we have nuclear plants which generate electricity. Their structural integrity and their operations are vulnerable to certain risks. However, generation of electricity is equally important and within the prescribed limits society will have to tolerate existence of such plants[...]. If the arguments of the [...] petitioner are accepted then no such utility can exist, no power plant can exist, no reservoir can exist, no nuclear reactor can exist."²²⁵

2.5 Intervention by the National Human Rights Commission

Although the Paris Principles²²⁶ do not expressly mandate National Human Rights Institutions (NHRIs) to promote and protect human rights in the private sphere, NHRIs have the potential to be quite useful in redressing human rights violations by companies.²²⁷ Among others, the Special Representative to the Secretary-

220. *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405; *Balco Employees Union v. Union of India*, AIR (2001) SC 350; *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664.

221. "PIL and Indian Courts", in *Combat Law*, Volume 6, Nov.-Dec. 2007.

222. *Fertilizers & Chemicals Travancore Ltd. Employees Association v. Law Society of India*, (2004) 4 SCC 420.

223. *Ibid.*, p. 422.

224. *Ibid.*, p. 426.

225. *Ibid.*, p. 424.

226. Principles relating to the Status of National Institutions, adopted by the General Assembly Resolution 48/134 of 20 December 1993.

227. See Surya Deva, "Corporate Human Rights Abuses: What Role for the National Human Rights Institutions?" in Hitoshi Nasu & Ben Saul (eds.), *Human Rights in the Asia Pacific Region: Towards Institution Building*, Routledge, forthcoming in 2011.

General (SRSG) has recommended to governments to reconsider the current limited role of NHRIs and recognise that they could play an important role as a “state-based non-judicial” mechanism providing access to justice.²²⁸ The recent Edinburgh Declaration has also emphasised the important role that NHRIs “can play in addressing corporate-related human rights challenges, both as a body at the international level, at the regional level and individually at the national level.”²²⁹ The Edinburgh Declaration can be seen a step in the right direction in that it explicitly acknowledges multiple ways in which NHRIs can enhance protection against corporate human rights abuses.

India established the National Human Rights Commission (NHRC) under the Protection of Human Rights Act in 1993.²³⁰ Section 12 of this Act provides that the NHRC shall have the power to inquire – *suo motu*,²³¹ on a petition by a victim or on order to any court – into a complaint regarding a human rights violation,²³² and intervene in any proceeding involving any allegation of violation of human rights pending before a court. The same provision also empowers the NHRC to review the factors that inhibit the enjoyment of human rights and recommend appropriate remedial measures; undertake and promote research in the field of human rights; spread human rights literacy among various sections of society; encourage the efforts of NGOs working in the field of human rights; and perform such other functions as it may consider necessary for the protection of human rights. Under the Protection of Human Rights Act, the term “human rights” means the rights relating to life, liberty, equality and dignity of the individual either (i) guaranteed by the Indian Constitution or (ii) embodied in the international conventions (such as the ICCPR, ICESCR and other conventions which the government may specify) that are enforceable by courts in India.²³³

228. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further Steps Toward the Operationalisation of the “Protect, Respect and Remedy” Framework*, A/HRC/14/27, 9 April 2010, para. 97.

229. Tenth International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (Edinburgh Declaration) (adopted 10 October 2010), para. 11, http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf, accessed 3 February 2011.

230. Act No. 10 of 1994. The Act was amended by the Protection of Human Rights (Amendment) Act 2006, Act No 43 of 2006.

231. ‘*Suo motu*’ means acting on its own without any request made by others. See, for a recent instance of *suo motu* action, NHRC, “NHRC Takes *Suo Motu* Cognizance of Media Reports on Striping of a Woman at a Police Post”, 14 June 2010, <http://nhrc.nic.in/dispArchive.asp?fno=2063>, accessed 4 July 2010.

232. If an inquiry reveals violation of human rights, the NHRC may recommend the relevant government agency to take appropriate action against the concerned persons, or approach the Supreme Court/High Courts for orders or directions. Human Rights Act 1993, Section 18.

233. *Ibid.*, Sections 2(d), (f).

Although the NHRC may not be expressly entrusted with the task of dealing with corporate human rights abuses,²³⁴ in actual practice, the NHRC has intervened in some business and human rights matters, for example, in several cases involving the employment of bonded labourers by companies²³⁵ and sexual harassment at workplace. It also took cognizance of a case related to large-scale violence in protest against the acquisition of land to establish a Special Economic Zone in Nandigram, West Bengal. Furthermore, the NHRC may inquire into corporate human rights abuses on the request of a court.²³⁶ There is also a possibility of the NHRC taking up “the matter with concerned public authorities for enforcement” and, in extreme cases, taking “recourse to filing petitions in courts”.²³⁷

2.6 Administrative measures

Companies generally operate within a vast corpus of statutes and regulations. They require approval or licenses from government authorities to conduct their business, must comply with standards set by the government and must make certain disclosure in relation to their affairs. If such operational regulations are breached by companies people directly aggrieved or NGOs can approach the relevant government agencies to take appropriate action against the defaulting business entities. We have already seen that Indian environmental laws in particular allow stakeholder activism in enforcing issues of public interest.²³⁸ The Freedom of Information Act may also be used to first acquire the relevant information and then seek remedial administrative measures such as cancellation of license.

Another regulatory tool that may prove useful is the Environment Impact Assessment (EIA) requirement introduced by the government in 1994.²³⁹ The EIA requirement imposes restrictions and prohibitions on the expansion and modernisation of specified developmental or industrial projects being undertaken in any part of India unless environmental clearance has been accorded by the central government or the Environment Impact Assessment Authority, as the case

234. Justice Malimath, a former member of the NHRC, categorically stated that the NHRC “cannot entertain complaints of violation of human rights against non-State actors.” *Justice v. S Malimath*, “Report of the National Human Rights Commission of India” in Kamal Hossain et al (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World*, Kluwer law International – Hague, Netherlands, 2002, p. 211 at p. 213.

235. Case No. 663/19/1999-2000; Case No. 513/7/1998-99; Case No. 22/212/96-LC (FC), <http://nhrc.nic.in>, accessed 3 February 2011.

236. The Supreme Court, for instance, had already requested the NHRC to monitor the implementation of the Bonded Labour (Abolition) Act by its order in WP (Civil) No. 3922 of 1985.

237. NHRC, India, “UN Special Representative’s Visit to NHRC”, <http://nhrc.nic.in/dispatchive.asp?fno=1750>, accessed 23 November 2009.

238. See also Divan & Rosencranz, *op. cit.*, note 92, pp. 132-33.

239. Ministry of Environment and Forests, “Environment Impact Assessment Notification SO60(E)”, 27 January 1994, [http://www.moef.nic.in/legis/eia/so-60\(e\).html](http://www.moef.nic.in/legis/eia/so-60(e).html), accessed 3 February 2011. The EIA regime was substantially revised in 2006, <http://www.moef.nic.in/legis/eia/so1533.pdf>, accessed 3 February 2011.

may be. In giving environmental clearance to new projects, “public consultation” (including public hearing) is contemplated so that “the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained”.²⁴⁰ Such public consultations may provide people adversely affected by development projects with an opportunity to have their say in the approval process.

If any project is not approved in accordance with the procedure laid down for EIAs, it is conceivable that the concerned people could challenge the environmental clearance granted to a company. In fact, in *Utkarsh Mandal v. Union of India*,²⁴¹ the Delhi High Court considered an appeal against environmental clearance granted for renewal of the mining lease in Goa. The court quashed the environmental clearance after finding several procedural improprieties in the approval process, including that the Executive Summary of the EIA was not made available 30 days before the date of the public hearing, the Chairperson of the Environmental Advisory Committee (Mines) was himself a director of four mining companies, and the EAC (Mines) did not fairly deal with the objections raised by 67 persons at the hearing.²⁴²

The way civil society worked together to highlight human rights violations and environmental pollution caused by mining and refinery operations of Vedanta in the state Orissa is another good example of how administrative measures might work in practice. A recent Amnesty International report highlights the issues at stake:

*“[T]he refinery expansion and mining project have serious implications for the human rights of local communities, including their rights to water, food, health, work and an adequate standard of living. Local communities have received little or no accurate information on the refinery, its proposed expansion or the mining project. Processes to assess the impact of the projects on local communities have been wholly inadequate, and both the state and national governments have failed to respect and protect the human rights of communities as required under international human rights law. The companies involved [...] in the mine and refinery projects have ignored community concerns, breached state and national regulatory frameworks and failed to adhere to accepted international standards and principles in relation to the human rights impact of business.”*²⁴³

240. Ministry of Environment and Forests, “EIA 2006 Notification”, para. 7 <http://www.moef.nic.in/legis/eia/s01533.pdf>, accessed 3 February 2011.

241. *Utkarsh Mandal v. Union of India*, Writ Petition (C) 9340 of 2009 and CMA No.7127 of 2009 and 12496 of 2009, decision dated 26 November 2009, <http://www.indiankanoon.org/doc/1910152/>, accessed 3 February 2011.

242. *Ibid.*, paras. 29, 31-42, and 44.

243. Amnesty International, “Don’t Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India”, ASA 20/001/2010, February 2010, p. 6.

In the instant case, Vedanta did not comply with the conditions for environmental clearance. This led the government to issue a show-cause notice²⁴⁴ to Vedanta in August 2010. On 20 October 2010, the central government directed Vedanta to not only comply with conditions stipulated in environmental clearance for its mining operations but also take several other steps, namely continuous monitoring of air quality, conserving energy, and raising green belts.²⁴⁵ However, the government decided, on the same day, to withdraw the permission granted to Vedanta to expand its Alumina refinery and directed it not to carry out any further construction in relation to the expansion project.²⁴⁶ The latter decision was taken based on the report submitted by Dr N C Saxena Committee, which had concluded that Vedanta began construction activity without obtaining the environmental clearance and had violated various laws.²⁴⁷

A striking revelation in the Saxena Committee's letter to the Environment Minister was the state government's "deliberate non-cooperation" in providing information to the Committee.²⁴⁸ The letter also indicated collusion between Vedanta and the state government officials: "If the state government illegally prioritizes the short-term interests of a private company by sacrificing a sensitive ecological and hydrological area that is rich in biodiversity, and an ecosystem that supports the livelihood and culture of the [...] Tribal Groups, it will be violating the rights of forest-dwelling Scheduled Tribes under the [Forest Rights Act] as well as the Environment Protection Act and the Forest Conservation Act."²⁴⁹

The Vedanta case also shows how certain companies try to abuse the judicial process. Vedanta tried to bypass the statutory process of seeking approval from the government and approached the Supreme Court directly for approval.²⁵⁰ Its strat-

244. A 'show-cause notice' seeks an explanation from other party. If no satisfactory explanation is provided, a certain legal order may be passed.

245. Ministry of Environment and Forests, "Direction under Section 5 of the Environment (Protection) Act, 1986 regarding 1MTPA Alumina Refinery and 75 MW Captive Power Plant at Lanjigarh in Dist. Kalahandi in Orissa by M/s Vedanta Aluminium Limited", 20 October 2010, <http://moef.nic.in/downloads/public-information/Vedanta-direction-secs.pdf>, accessed 3 February 2011.

246. Ministry of Environment and Forests, "Direction under Section 5 of the Environment (Protection) Act, 1986, regarding withdrawal of ToRs, Cancellation of Public Hearing and action under Provision of the Environment (Protection) Act, 1986 in view of undertaking construction activity without obtaining prior environmental clearance pertaining to the Expansion from 1 to 6 MTPA Alumina Refinery and from 75 to 300 MW Captive Power Plant at Lanjigarh in Dist. Kalahandi in Orissa by M/s Vedanta Aluminium Limited", 20 October 2010, <http://moef.nic.in/downloads/public-information/letter-vedanta-secs.pdf>, accessed 3 February 2011.

247. Ministry of Environment and Forests, *Report of the four member committee for investigation into the proposal submitted by the Orissa mining company for bauxite mining in Niyamgiri*, 16 August 2010, pp. 84-87, http://moef.nic.in/downloads/public-information/Saxena_Vedanta.pdf, accessed 3 February 2011.

248. NC Saxena, "(Letter to Minister)", 23 August 2010, http://moef.nic.in/downloads/public-information/Letter_to_Minister_23_Aug.pdf, accessed 3 February 2011.

249. *Ibid.*

250. Office of Shri Goolam E. Vahanvati, Attorney General for India, Supreme Court, "Opinion of the Attorney General", 20 July 2010, <http://moef.nic.in/downloads/public-information/attorney-general-of>

egy partly succeeded in that the Court granted Vedanta the requested clearance in an August 2008 order,²⁵¹ although the Court was more circumspect in its November 2007 order and did not oblige the company.²⁵² In the end, the Court's green light was not sufficient, as the government decided to withdraw the permission.

Box 1. Legal Responses to Proliferation of Mining

There has been a proliferation of mines in tribal areas, resulting in conflict between tribal rights and the interests of mining companies. Mining companies operating in tribal areas are subject to the Forest Conservation Act 1980, the Forest Rights Act and the Wildlife Protection Act.

The entry of foreign companies into mining has been questioned in the case of *M/s Vedanta Alumina (M/s VAL)*. The Supreme Court order dated 23/11/2007 in the matter of *T. N. Godhavarman Tirumulkpad v. Union of India* quoted an extract from an economic daily which, *inter alia*, read: "Vedanta Resources is accused of having caused environmental damage and contributed to human and labour rights violations", the ethics council said." The Supreme Court said: "We do not wish to express any opinion on the correctness of the said report. However, we cannot take the risk of handing over an important asset into the hands of the company unless we are satisfied about its credibility."

Setting out a series of facts and circumstances in relation to *M/s VAL*, the Court concluded that "keeping in mind the totality of the above factors, we are not inclined to clear the project."

"Liberty is, however, given to [*M/s Sterlite Industries (India) Ltd. (SIIL)*] to move this court if they agree to comply with the following modalities as suggested by this Court. It is made clear that such an application will not be entertained if made by *M/s VAL* or by Vedanta Resources."

In a sequel to the above order, *M/s SIIL* introduced an Interlocutory Application and the Supreme Court order dated 8/8/2008, granted the environmental clearance to the proposal for diversion of 660.749 hectares of forest.

-india20072010.pdf, accessed 3 February 2011.

251. "For the above reasons and in the light of the Affidavits filed by SIIL, OMCL and State of Orissa, accepting the Rehabilitation Package, suggested in our Order 23.11.07, we hereby grant clearance – to the forest diversion proposal for diversion of 660.749 ha of forest land to undertake bauxite mining on the Niyamgiri Hills in Lanjigarh. The next step would be for MoEF to grant its approval in accordance with law." *T N Godavaraman Thirumulpad v. Union of India*, (2008) 9 SCC 711, para. 9.

252. *T N Godavaraman Thirumulpad v. Union of India*, (2008) 2 SCC 222.

Source: http://moef.nic.in/downloads/public-information/rpt_usha.pdf

The recent draft Mines and Minerals (Development and Regulation) Bill of 2010, restricts the entrance of foreign companies in mining by providing that “no person shall be eligible for grant of a mineral concession unless such person is an Indian National or a Company[...]” (Section 5).

2.7 Community-based mechanisms

Although not clearly an administrative body or procedure, mention should be made to the system of *Lok Adalats* (people’s courts). Under the system of *Lok Adalats*, a panel of mediators handles cases in an informal manner if both parties consent for their dispute to be heard by a given *Lok Adalat*. The settlement reached by *Lok Adalats* is binding on both parties and is generally final, with no appeal to any court permitted. The *Lok Adalats* are established under the Legal Services Authorities Act 1987. Judicial review of their awards is possible on constitutional grounds. Although several million cases are reportedly been settled by *Lok Adalats* it is not clear to what extent they have been effective in cases involving companies.

3. Legal and Procedural Obstacles

There are a number of factors that impair the capacity of victims of human rights abuses involving companies to seek a remedy in the Indian legal system. While the legal framework may at times limit the scope of available remedies, in most situations it is the non-enforcement or lax enforcement of laws that poses the most critical problem. Many people cannot afford to pay fees of courts and lawyers to seek justice. Those who can overcome this barrier face endemic delays in court proceedings that effectively result in justice being denied. Even if one is able to secure a court order, its implementation relies on an executive branch that not only lacks resources and management capacity but is also corrupt. The state's increasing role as an agent serving business interests further conflicts with its role as a protector of rights. "Strategic lawsuits against public participation" (SLAPP) are an increasingly common practice. The jurisprudence of corporate veil piercing remains undeveloped and the doctrine of *forum non conveniens*, which proved a big hurdle in the Bhopal litigation, poses an as-yet unresolved obstacle. Similarly, there are still no robust substantive, procedural or institutional responses to the challenges posed by mass torts.

Some of these obstacles are reviewed below. Case studies such as Bhopal, Plachimada and Vedanta will be used to demonstrate how these obstacles have hindered victims pursuing companies for redress of human rights abuses.

3.1 Lack of laws and lax enforcement

India struggles with both lack of laws and lax implementation of existing laws. On many occasions, courts had to issue guidelines to fill in legislative gaps in matters ranging from sexual harassment at workplace to bonded labour, arrest and detention procedure, and ragging at universities.²⁵³ One would have hoped for the legislature to take up these matters and introduce appropriate statutory provisions, but this has not happened. Law also seems to lag behind in meeting the challenges of new technology. For instance, it remains unclear which safety standards should be applied to approve new genetically modified (GM) crops such as Bt. Brinjal.²⁵⁴ Law or policymakers will have to find answers to these questions in years to come.

Even if the need for a new law is recognised, there is generally no urgency. The process of enacting laws may take several years; in some cases, enacted laws are

253. See Surya Deva, "Constitutional Courts as Positive Legislators: The Indian Experience" in Allan R Brewer-Carias (General Reporter), *National Reports on 'Constitutional Courts as Positive Legislatures'*, XVIII International Congress of Comparative Law – Washington, United States, 2010, p. 347.

254. See "Six top science bodies' verdict: Bt brinjal safe", in *The Hindustan Times*, 24 September 2010, <http://www.hindustantimes.com/Six-top-science-bodies-verdict-Bt-brinjal-safe/Article1-603915.aspx>, accessed 3 February 2011.

not notified, so they never come into force even after the Parliament's approval. By way of illustration, a law to implement the Fundamental Rights against the employment of bonded labour was only enacted in 1976, 26 years after the adoption of the Constitution. More recently, a process to replace the 1956 Companies Act began in 2004, but a bill was prepared only in 2008, and this lapsed, so now the 2009 Bill is still under consideration of the Parliament.²⁵⁵ Similarly, as seen before, the tribunal proposed in 1995 under the NETA has still not been established fifteen years later.

The Plachimada case, the factual and legal summary of which is below, provides another example of the government's slow response in bringing a law into effect. Konnan writes:

*"The Kerala government introduced the Kerala Ground Water (Control and Regulation Act) in the year 2002. The Kerala government took one year to bring the Act into force. Further it took two more years to notify the Plachimada area. Therefore the statute is not applicable to the Plachimada case. Had the government implemented the Act in time, it would have been a subject of discussion in the Court. It is quite strange that **when the people of Plachimada were fighting against the groundwater pollution and depletion, when various NGOs were publishing reports regarding the pollution and connected problems, the Act was 'sleeping' in the files. This shows the irresponsibility of the government.**"*²⁵⁶

However, a more serious problem arguably is the non- or under-enforcement of the existing laws, for the extensive corpus of laws that does exist. In the Bhopal case, safety laws (albeit underdeveloped at that time) were not properly enforced by the relevant government agencies. In addition, the central and state governments arguably facilitated the occurrence of Bhopal by approving improper planning, not fully appreciating the hazardous nature of the process in the chemical plant, and allowing slums to develop in the immediate vicinity of the plant.²⁵⁷ Similarly, in the Plachimada case, it is alleged that the government institutions tasked to regulate pollution and groundwater failed to perform their duties and safeguard the interests of villagers in Kerala.²⁵⁸ It was only in June 2010 that the state government of Kerala decided – subsequent to the report of a high-power committee appointed by the government on the recommendation of the State Ground Water

255. Companies Bill 2009, Statement of Objects and Reasons, pp. 179-80.

256. Sujith Koonan, *Legal Implications of Plachimada: A Case Study* (IELRC Working Paper 2007-05), p. 15, <http://www.ielrc.org/content/wo705.pdf>, accessed 3 February 2011 (emphasis added).

257. Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, University of Toronto Press – Toronto, 1993, pp. 15-16, 23-24; Lalit Shastri, *Bhopal Disaster: An Eye Witness Account*, Criterion Publications – New Delhi, 1985, pp. 29-30, 77-78; William Bogard, *The Bhopal Tragedy: Language, Logic, and Politics in the Production of a Hazard*, Boulder, Westview Press – Colorado, 1989, p. 29; Dan Kurzman, *A Killing Wind: Inside Union Carbide and the Bhopal Catastrophe*, McGraw-Hill – New York, 1987, p. 32.

258. Koonan, *op. cit.*, note 284, pp. 4-6.

Board – to set up a special tribunal ‘to assess the actual compensation due to every applicant and issue orders to the company for compliance’.²⁵⁹

There are several reasons for lax implementation and enforcement of laws. Administrative agencies often fail to implement – ‘for lack of staff, money or will’ – the environmental laws under which they operate.²⁶⁰ These impediments are not unique to environmental statutes: implementation of all kinds of laws suffers due to institutional incapacity, lack of resources, corruption, and a culture of indifference to the rule of law.

Box 2. The Coca Cola Plant in Plachimada, Kerala

In March 2000, the village-level administrative body, the Perumatty Gram Panchayat in Palakkad District in the southern state of Kerala, granted a licence to Coca Cola to set up its bottling plant at village Plachimada on a total area of 35 acres. Coca Cola began extracting 500,000 litres of groundwater from through six bore wells and two dug wells. Of this, while 150,000 litres was used in the manufacture of the beverage, the remaining was used in incidental activities like washing of the bottles and treatment of the effluent generated as a result of subjecting the extract to a process of reverse osmosis for ensuring purity of the water mixed with the concentrate. Within two years there were numerous complaints from the communities residing around the area of the plant of acute drinking water scarcity and environmental problems. As a result, the panchayat cancelled the licence on May 15, 2003, after considering Coca Cola’s reply to the notice issued to it by the panchayat. Upon Coca Cola’s challenge to this decision, the state government put the cancellation on hold and directed the panchayat to constitute an expert committee to examine the soil and groundwater samples to ascertain the truth of the complaints. Aggrieved by this decision, the panchayat petitioned the High Court of Kerala. A single judge bench accepted the contention that water was a public resource and its excessive extraction by a private actor could not be permitted by the state, which was a public trustee of the precious community resource. Coca Cola was restrained from extracting further groundwater through the wells on its land. On appeal by the company, a two-judge bench of the High Court reversed the single judge and directed the panchayat to renew the licence. This it did after receiving the report of an expert committee it had constituted. The panchayat has appealed the case to the Supreme Court, where it is pending.

259. R Krishnakumar, “Plachimada’s Claims”, in *Frontline*, Volume 27:15, 17-30 July 2010, <http://www.flonnet.com/fl2715/stories/20100730271503300.htm>, accessed 3 February 2011.

260. Divan & Rosencranz, *op. cit.*, note 92, p. 87.

Source: S Muralidhar, “The Right to Water: An Overview of the Indian Legal Regime” in Eibe Riedel & Peter Rothen (eds). *The Human Right to Water* (Berlin: Berliner Wissenschafts-Verlag, 2006), pp. 65-81.

Lack of or poor enforcement of laws reduces the victims of abuse’s chances to seek and obtain a remedy when the wrongful act is not defined, is poorly defined and/or control mechanisms are unclear or dysfunctional.

3.2 Absence of robust institutional mechanisms

Protection of rights requires not only effective remedies but also effective institutions to adjudicate disputed claims and enforce orders. Apart from courts, we also need non-judicial or quasi-judicial mechanisms to safeguard human rights. Courts in India are by and large independent²⁶¹ and at times provide a viable option to hold companies and their officials accountable for human rights violations. However, as discussed below, the efficacy and independence of courts is seriously undermined by two factors: corruption and huge backlogs of cases. Urgent reforms are required to restore the faith of people in the judiciary “as a bastion of rights and justice”.²⁶² Reforms are required to improve the process of appointing judges, enhance the number of judges and courts, strengthen accountability mechanisms, promote alternative dispute resolution, improve access to justice, and remove procedural flaws that cause delays in justice delivery. The Law Commission of India in its 230th Report has made some useful suggestions that should be debated and acted upon promptly.²⁶³

As far as the availability of non-judicial mechanisms is concerned, they either do not exist or lack resources and capacity to offer much hope for effective justice. As noted before, the tribunal proposed by the NETA never came into existence. Thus, the vast corpus of environmental laws is not supported by a special environmental tribunal to settle disputes related to water and air pollution or to handle forest conservation and biodiversity issues. Another glaring institutional deficit in India is the absence of any equal opportunity commission. Constitutional guarantees of prohibition against discrimination do not go far enough in redressing discrimination by non-state actors such as companies. A logical step would be to establish a commission to deal with allegations of discrimination between private parties,²⁶⁴

261. See Mahendra P Singh, “Securing the Independence of the Judiciary: The Indian Experience”, in *Indiana International & Comparative Law Review*, Volume 10, 2000, p. 245.

262. Austin, *Cornerstone of a Nation*, op. cit., note 32, p. 175.

263. Law Commission of India, *Reforms in the Judiciary: Some Suggestions*, 230th Report, August 2009, <http://lawcommissionofindia.nic.in/reports/report230.pdf>, accessed 3 February 2011.

264. The Sachar Committee also recommended the establishment of an Equal Opportunity Commission. Government of India, *Report on Social, Economic and Educational Status of the Muslim Community of*

because constitutional provisions as well as the institutional framework (both judicial and non-judicial) are predominantly geared to addressing human rights violations by state agencies.

India has established Human Rights Commissions at both national and state levels. These bodies could provide an additional forum in which to protect human rights against the private sector. But as pointed out before, although the Protection of Human Rights Act does not expressly empower Human Rights Commissions to deal with corporate human rights abuses it does not prohibit it either. A conventional understanding of human rights as applying only vertically between the public authority and the individuals creates an avoidable barrier to the potential of these bodies to assist with sensitizing business to human rights concerns.

3.3 Corruption

Corruption is rampant in India. The 2010 Corruption Perceptions Index places India at 87th position out of a total 178 countries in the world.²⁶⁵ A recent study by Transparency International revealed that more than fifty per cent of Indians have paid bribes.²⁶⁶ Due to the operation of a parallel “black” economy, it is reported that “India has lost more than \$460bn since Independence because of companies and the rich illegally funnelling their wealth overseas”.²⁶⁷ Thus, it is accurate to say that corruption in political and public offices has grown to “alarming proportions”.²⁶⁸ Corruption, which seems to have become a “fact of life”,²⁶⁹ also negatively affects India’s image in the eyes of foreign investors.²⁷⁰

Corruption pervades all institutions that make, implement and adjudicate the law.²⁷¹ Several scams involving members of parliament, ministers, civil servants,

India, 2006, p. 240.

265. Transparency International : the global coalition against corruption, “Corruption Perceptions Index 2010”, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results, accessed 3 February 2011.

266. “India Tops List of Countries where Bribery is Way of Life”, in *The Times of India*, 9 December 2010, <http://timesofindia.indiatimes.com/india/Corruption-on-the-rise-54-Indians-paid-bribe-last-year/articleshow/7071768.cms>, accessed 3 February 2011.

267. “India lost \$462bn in illegal capital flows, says report”, in *BBC News*, 19 November 2010, <http://www.bbc.co.uk/news/world-south-asia-11782795>, accessed 3 February 2011.

268. K N Gupta, *Corruption in India*, Anmol Publications Ltd. – New Delhi, India, 2003, p. 2.

269. N Vittal, *Corruption in India: The Roadblock to National Prosperity*, Academic Foundation – New Delhi, India, 2003, p. 17.

270. Paul de Benden & Jui Chakravorty, “New corruption scandal deals blow to India’s image”, in *Reuters*, 25 November 2010, <http://www.reuters.com/article/idUSTRE6AO19P20101125>, accessed 3 February 2011.

271. “Every sector of governance apparatus is marred by this problem with only certain variations in the level of corruption.” C Raj Kumar, “Corruption and its Impact on Human Rights and the Rule of Law: Governance Perspectives” in Kumar & Chockalingam (eds.), *op. cit.*, note 37, p. 153.

police officers, and judges have been reported over the years.²⁷² Although there was some hope that the introduction of a free market economy might limit corruption, this has not happened.²⁷³ It seems that the opening up of the economy continues to provide extensive opportunities to demand bribes, say, for offering licenses and approvals.²⁷⁴ This is also affirmed by a survey in which 74 per cent of people in India feel that corruption has increased in the last three years.²⁷⁵

It is generally believed that corruption is more prevalent in lower courts. To make matters worse, accountability measures such as impeachment of the judges of higher judiciary does not seem to work and the Bar is also failing in its role to check the Bench.²⁷⁶ The idea of establishing a National Judicial Commission to enhance accountability of the judges of the higher judiciary has been discussed since the 1990s, but without yet being realised.²⁷⁷ Any attempt to bring more transparency and accountability is seen as interference in independence of the judiciary. It is remarkable that recently the Supreme Court itself challenged a judgment of the Delhi High Court in which the court had ruled that the office of the Chief Justice of India comes within the ambit of the Right to Information Act.²⁷⁸ It will be interesting to see how the Supreme Court strikes a balance between

272. "Corruption in India", <http://www.corruptioninindia.org>, accessed 3 February 2011.

273. Pillay et al (eds.), *op. cit.*, note 125, pp. 17-18.

274. Professor Pranab Bardhan explains 'why corruption, once associated with the discretionary powers of the earlier "license-permit raj," seems to be on the rise in India, instead of falling with the abolition of that control regime.' Pranab Bardhan, 'India Battles for Transparency – Part II', in *YaleGlobal Online*, 24 December 2010, <http://yaleglobal.yale.edu/content/india-battles-transparency-%E2%80%93-part-ii>, accessed 3 February 2011.

275. Transparency International: the global coalition against corruption, "Global Corruption Barometer 2010", http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results, accessed 3 February 2011. The barometer captured views of more than 91,500 people in 86 countries and territories.

276. For example, an attempt to impeach a Supreme Court judge (Justice Ramaswami), against whom the corruption charges were upheld by the Inquiry Committee, failed in 1993. Singh, *Shukla's Constitution of India*, *op. cit.*, note 30, p. 476; Prashant Bhushan, "A Historic Non-Impeachment", in *Frontline*, 4 June 1993, http://www.judicialreforms.org/files/cover_story_ramaswami.pdf, accessed 3 February 2011. See also A G Noorani, *Constitutional Questions and Citizens' Rights*, Part II, Oxford University Press – New Delhi, India, 2006, pp. 11-24, 47-55; Rajeev Dhavan, "Judicial Corruption", in *The Hindu*, 22 February 2002, <http://www.hinduonnet.com/2002/02/22/stories/2002022200031000.htm>, accessed 3 February 2011.

277. See Noorani, *op. cit.*, note 306, p. 98; J Venkatesan, "Set up National Judicial Commission", in *The Hindu*, 17 September 2008, <http://www.hindu.com/2008/09/17/stories/2008091756491400.htm>, accessed 3 February 2011; Rajindar Sachar, "National Judicial Council", http://www.pucl.org/Topics/Law/2006/judicial_council.html, accessed 3 February 2011. See also Campaign for Judicial Accountability & Judicial Reforms (CJAR), <http://www.judicialreforms.org/>, accessed 3 February 2011.

278. It was contended, among others, that the information held by the Chief Justice of India is sensitive and that a public disclosure of such information under the Right to Information Act would undermine the independence of judiciary. "SC challenges HC verdict bringing CJI office under RTI ambit", in *Indian Express* 8 March 2010, <http://www.indianexpress.com/news/sc-challenges-hc-verdict-bringing-cji-office/588254/>, accessed 3 February 2011. The Delhi High Court rejected this appeal of the Supreme Court. See, for an analysis, Shayonee Dasgupta & Sakshi Agarwal, "Judicial Accountability and Independence: Exploring the Limits of Judicial Power", in *NUS Law Review*, Volume 2, 2009, p. 779 at p. 789-793.

the independence of judiciary and the need for transparency in decision making under the Act.²⁷⁹

This kind of all-pervasive corruption has two direct implications for access to justice: first, companies might be able to influence the course of justice through their economic power and political connections; second, victims might lose confidence and incentive to use the legal system to seek redress for violations of their human rights.²⁸⁰

3.4 Delay in judicial process

Despite numerous judicial pronouncements on speedy justice,²⁸¹ the judicial process in India is a live example of ‘justice delayed is justice denied’. Data on the number of cases pending before different courts helps to understand the scale of the problem. At the end of November 2010, there were 54,644 cases pending before the Supreme Court, of which 35,206 have been pending for more than one year.²⁸² The number of pending cases has gone up in the last few years from 39,780 at the end of December 2006 to 49,819 at the end of December 2008.²⁸³ More worrying, however, is the number of pending cases before the High Courts and lower courts. At the end of December 2008, a total number of 3,874,090 cases were pending before different High Courts and 26,409,011 before lower courts.²⁸⁴ These figures have gone up since then, and it is reported that about 25 per cent of the cases pending with High Courts had remained unresolved for more than ten years.²⁸⁵

Against this background, one can believe commentators who stated that six to eight years may pass between filing and judgment in writ petitions in Bombay and Delhi High Courts.²⁸⁶ The situation might not be much different in other High Courts, especially those based in larger states, and is perhaps much worse in lower courts. From this one can easily imagine the number of years a victim might

279. “Judges’ postings under RTI? SC decides to decide”, 27 November 2010, <http://www.indianexpress.com/news/judges-postings-under-rti-sc-decides-to-decide/716868/>, accessed 3 February 2011.

280. “Undoubtedly, the form of corruption in India and its adverse effects on human rights have shaken the foundations of the rule of law upon which a modern society rests. Gradually, Indian people have lost faith in the governance system and developed a scepticism as corruption affects their survival.” Kumar, *op. cit.*, note 299, p. 154.

281. *Hussainara Khatoon v. State of Bihar*, AIR (1979) SC 1364; *Common Cause v. Union of India*, (1996) 4 SCC 33 and (1996) 6 SCC 775; *All India Judge’s Association v. Union of India*, (2002) 4 SCC 247.

282. Supreme Court of India, “The monthly statement of pending cases for the month of November, 2010”, <http://supremecourtindia.nic.in/pendingstat.htm>, accessed 3 February 2011.

283. Supreme Court of India, “Court News” (October-December 2006), p. 6; Court News (October-December 2008), p. 7.

284. Supreme Court of India, “Court News” (October-December 2008), pp. 8-9.

285. Centre on Public Law & Jurisprudence, Jindal Global Law School (JGLS), *Justice without Delay: Recommendations for Legal and Institutional Reform*, JGLS – New Delhi, 2010, p. 8.

286. Divan & Rosencranz, *op. cit.*, note 92, p. 132. See also Galanter, *op. cit.*, note 85, pp. 276-77.

have to spend in litigation from the lower civil court to the Supreme Court.²⁸⁷ It is trite to say that this monumental delay discourages victims from approaching courts and thus denies them of their right to access to justice. Galanter and Krishnan make the following assessment of the current situation:

*“... the courts, and tribunals where ordinary Indians might go for remedy and protection, are beset with massive problems of delay, cost, and ineffectiveness. Potential users avoid the courts; in spite of a longstanding reputation for litigiousness, existing evidence suggests that Indians avail themselves of the courts at a low rate, and the rate appears to be falling.”*²⁸⁸

A number of reasons have been identified for delay in judicial process – from population and litigation explosion to inadequate number of judges, insufficient resources and infrastructure, cumbersome court procedures, and delaying tactics adopted by lawyers, such as seeking unnecessary adjournments and filing frivolous applications.²⁸⁹ Multiple steps are urgently needed to fix this situation.²⁹⁰ In the meantime, judicial delays will continue to operate as obstacles in victims’ quest to hold companies accountable for human rights violations, especially when companies employ delay as a defence. Poor victims are particularly likely to suffer from this delay.²⁹¹

3.5 Ignorance of one’s rights and indifference to rights of ‘others’

India is a country that has only about 65 per cent literacy.²⁹² Despite the continuing economic boom in recent years, it is estimated that about 37 per cent of the population live below the official poverty line,²⁹³ and 80 per cent of the people

287. “In the present set-up it often takes 10 – 20 – 30 or even more years before a matter is finally decided.” Law Commission of India, *Reforms in the Judiciary: Some Suggestions*, 230th Report. August 2009, para. 1.16, <http://lawcommissionofindia.nic.in/reports/report230.pdf>, accessed 3 February 2011.

288. Marc Galanter & Jayanth Krishnan, “Bread for the Poor”: Access to Justice and the Rights of the Needy in India, in *Hastings Law Journal*, Volume 55, 2004, p. 789.

289. JGLS, *Justice without Delay*, *op. cit.*, note 315, pp. 10-12. Professor Marc Galanter, a leading expert on Indian law, argues that there are two main reasons for delay: structural factors like budgetary limitations and poor facilities, and the strategies employed by lawyers as well as litigants. *Ibid.*, p. 26.

290. “There is wide agreement that access to justice in India requires reforms that would enable ordinary people to invoke the remedies and protections of the law.” Galanter & Krishnan, *op. cit.*, note 318, p. 790.

291. See Granville Austin, *Working a Democratic Constitution – The Indian Experience*, Oxford University Press – New Delhi, 1999, p. 640 (emphasis in original), and generally p. 663 (hereinafter Austin, *Working a Democratic Constitution*).

292. Know India, “Literacy”, <http://india.gov.in/knowindia/literacy.php>, accessed 3 February 2011.

293. “India Raises Poverty-Rate Estimate”, in *Wall Street Journal*, 18 April 2010, <http://online.wsj.com/article/SB10001424052748704508904575191550764145376.html>, accessed 3 February 2011. See also The World Bank, “New Global Poverty Estimates – what it means for India”, <http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/o,,contentMDK:21880725~pagePK:141137~piPK:141127~theSitePK:295584,00.html>, accessed 3 February 2011.

live on less than \$2 a day.²⁹⁴ Low levels of literacy and extensive poverty together pose serious challenges to the realisation of human rights. Many people, especially those living in rural areas, do not have adequate awareness of their rights, thus becoming easy targets of exploitation. There is of course a growing network of human rights-conscious civil society organisations, but levels of human rights awareness amongst the masses still remain low. Even where some people may understand their rights, there may still be ignorance about the available legal mechanisms that could be employed to enforce these rights. Either kind of ignorance is detrimental to effective access to justice.

On the other end of the spectrum are people who are aware of their rights and would do everything to safeguard them, but would not bother to act if the human rights of “others” are at stake.²⁹⁵ Austin terms the Indian society a “survival society”: “The uncertainty – social *and* economic – of the world around him focuses the individual’s attention on survival for his own sake and for those whom he is primarily responsible, his family.”²⁹⁶ The increasingly individualistic focus may adversely affect commitment to community values and public interests such as human rights or protection of the environment.

3.6 Expansive litigation, limited legal aid

Considering the number of years that one might have to spend in Indian courts litigating against companies, one can imagine the extent of expenses involved – from lawyers’ and court fees to costs of collecting evidence, preparing documents and travelling to courts – in the legal process. Two aspects that are likely to cause hardship to victims of corporate human rights abuses are noted here: *ad valorem* court fees and cost of legal services.²⁹⁷

Under the Indian law, petitioners filing civil suits have to pay *ad valorem* court fees – a fee paid in proportion to the value of the claim made.²⁹⁸ So, if a large amount

294. Livemint.com, The Wall Street Journal, “80% of Indians live on less than \$2 a day: WB”, 16 October 2007, <http://www.livemint.com/articles/2007/10/16235421/80-of-Indians-live-on-less-th.html>, accessed 3 February 2011.

295. There are of course notable exceptions and in many situations, people and NGOs have fought for the human rights of others. But this again seems to have become a ‘business’ in recent times, raising concerns about their legitimacy and accountability. See Robert L. Hardgrave & Stanley A. Kochanek, *India: Government and Politics in a Developing Nation*, Thompson, 7th Edition, India, 2008, p. 238. See generally Jem Bendell, *Debating NGOs Accountability*, United Nation – New York, 2006..

296. Austin, *Working a Democratic Constitution*, *op. cit.*, note 321, p. 640 (emphasis in original), and generally pp. 640-44.

297. “Seeking justice in court was expansive for the common man, often prohibitively so. Two reasons were the cost of a lawyer, and the existence of the fee system under which a litigant had to pay a fee to register his case.” Austin, *Working a Democratic Constitution*, *op. cit.*, note 321, p. 141.

298. Court Fees Act 1870, Schedule I. Court fee varies in different states. See generally Law Commission of India, *Revision of Court-fees Structure*, 189th Report, February 2004, pp. 40-62, <http://lawcommissionofindia.nic.in/reports/189th%20Report%20on%20Revision%20of%20Court%20fee.pdf>, accessed 3 February 2011.

is sought in compensation from a company, as may be necessary, for instance, in mass tort cases, the current court fees system might discourage victims from suing the company or seeking adequate compensation from it. This system of court fees was apparently introduced by the British to discourage litigation.²⁹⁹ After independence, the system has continued to serve as one of the devices to limit vexatious claims. Against this background, the Law Commission of India in 2004 noted that court fee “should not adversely affect the right of access to justice” and that “the amount collected by way of court fee should not be more than the expenditure incurred in administration of civil justice.”³⁰⁰ More recently, the Commission in 2009 recommended the government to consider introducing maximum chargeable court fees.³⁰¹

In addition to court fees, victims would need considerable resources to hire competent lawyers so as to have any chance of success against a team of corporate lawyers. Lawyers are not permitted to charge contingent fees.³⁰² So, if no pro bono assistance is available,³⁰³ this system is likely to operate as an obstacle, unless legal aid is available. Article 39A of the Constitution provides the following Directive Principle: “The State shall [...] provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”³⁰⁴ Moreover, access to legal aid has been interpreted by the Supreme Court to be a Fundamental Right.³⁰⁵ In *Suk Das v. Union Territory of Arunachal Pradesh*, the Supreme Court noted:

*“It may [...] now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involved jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21.”*³⁰⁶

Nevertheless, the availability of legal aid remains limited in practice. Only in 1987 did the government enact the Legal Services Authorities Act to give a statutory

299. Galanter, *op. cit.*, note 85, pp. 273, 274.

300. Law Commission of India, *op. cit.*, note 328, p. 123. See also *P M Ashwathanarayana Setty v. State of Karnataka*, AIR 1989 SC 100.

301. Law Commission of India, *Need to fix Maximum Chargeable Court-fees in Subordinate Civil Courts*, 220th Report, March 2009, para. 3, <http://lawcommissionofindia.nic.in/reports/report220.pdf>, accessed 3 February 2011.

302. Galanter, *op. cit.*, note 85, p. 278.

303. This is again not widely or easily available. Austin, *Working a Democratic Constitution*, *op. cit.*, note 321, p. 664.

304. See also Section 304 of the Code of Criminal Procedure 1973.

305. *M H Hoskot v. State of Maharashtra*, (1978) 3 SCC 544; *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 81; *Khatri v. State of Bihar*, (1981) 2 SCR 408.

306. *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) SCR (1) 590, 594.

base for the legal aid scheme.³⁰⁷ Section 12 of the Act states that every person ‘who has to file or defend a case shall be entitled to legal services’ if she falls within the list of specified categories of people³⁰⁸ or has annual income less than Rs. 12,000 if the case is before the Supreme Court and less than Rs. 9,000 if the case is before other courts. Furthermore, the concerned Legal Aid Authority must be ‘satisfied that such person has a prima-facie case to prosecute or to defend.’³⁰⁹ The Act, thus, offers legal aid to very limited number of people. This may not be accidental, because, as Austin notes, ‘the government-established legal aid agency is financially undernourished.’³¹⁰

3.7 Undeveloped tort law and class actions to deal with mass torts

Mass torts, and a multiplicity of victims, pose both substantive and procedural problems that are not resolved by the traditional law of tort. Attempts to identify the individual victims and the extent of injury and loss caused to each of them makes a situation of mass tort overwhelming, challenging the potential and capacity of the judicial process. But the tort law in India has not yet embraced, for instance, epidemiology or presumption of causation as evidentiary tools to fix liability in mass torts.³¹¹ When dealing with writ petitions filed as PIL, the Supreme Court has relied on reports of fact-finding committees or statutory bodies to hold companies accountable. But there has not been much progress in mass tort litigation at lower courts. There are still not many mass tort cases and the damages awarded by courts tend to be quite low.³¹²

Moreover, although the Indian law allows class action, in practice this device has hardly been used in tort litigation.³¹³ The Bhopal gas leakage presented a very good opportunity to invoke class action in a mass tort case. But the Indian government ended up acting as *parens patriae* and enacting a special law – the Bhopal Gas Leak Disaster (Processing of Claims) Act³¹⁴ – to cover all the victims. Section 3 of the Act vested in the central government an “exclusive right to represent, and act in place of (whether within or outside India) every person who has made, or

307. But the Act was enforced only in November 1995.

308. Like a member of a Scheduled Caste or Scheduled Tribe, a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution, a woman or a child, a mentally ill or otherwise disabled person, or an industrial workman.

309. Legal Services Authorities Act 1987, Section 13. Section 2(a) of this Act stipulates that “case” includes a suit or any proceeding before a court.

310. Austin, *Working a Democratic Constitution*, *op. cit.*, note 321, p. 141.

311. Epidemiology – a study of patterns or history of illness and its association with some common external factors – is used indicate a casual link between the injury and the conduct of the actor.

312. Galanter, *op. cit.*, note 85, p. 276.

313. Divan & Rosencranz, *op. cit.*, note 92, p. 155.

314. Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (No. 21 of 1985).

is entitled to make, a claim” arising out of the Bhopal disaster. This extraordinary power was conferred on the government to deal with Bhopal claims “speedily, effectively, equitably and to the best advantage of the claimants.”³¹⁵ In order to balance this exceptional provision, Section 4 of the Act preserved the victims’ limited right to have their views taken into account by the Indian government and be represented by a lawyer of their choice in the suits or proceedings initiated by the government.³¹⁶

One can see that this law severely curtailed the right of victims to participate in civil litigation. In fact, this was one of the grounds on which the constitutional validity of the Bhopal Act was challenged before the Supreme Court. The Court upheld the validity of the Act.³¹⁷ The Supreme Court reasoned that the Bhopal Act merely allowed the government to fulfil its constitutional obligations and that, considering the plight of the impoverished, the urgency of the victims’ need, the presence of the foreign contingency lawyers, the involvement of a powerful foreign multinational, and the nature of injuries and damages, the Act cannot be condemned as unreasonable. However, this decision effectively excluded the possibility of victims filing any class action against Union Carbide Corporation (UCC) or the Indian government. So, class action by and large remains an undeveloped and untested area of law.

3.8 Difficulties in criminal prosecution of companies

As explained previously, Indian law allows companies as well as its officers to be held criminally liable for specified wrongs. However, prosecuting and convicting companies and their officers is not easy in practice. The Bhopal case exemplifies this. After the civil suit was dismissed from the US court, legal proceedings began in India and, in February 1989, a court-approved settlement was reached. The settlement order of the Supreme Court read: “The 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 gas disaster [...] and *not as fines, penalties, or punitive damage.*”³¹⁸ So, UCC agreed to award compensation not in pursuance of any legal liability but as a token of mercy shown to the Bhopal victims.³¹⁹ The settlement

315. *Ibid.*, Preamble.

316. ‘Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.’ *Ibid.*, Section 4.

317. *Charan Lal Sahu v. Union of India*, AIR (1990) SC 1480.

318. *Union Carbide Corporation v. Union of India* AIR (1990) SC 273 at 275 (emphasis added).

319. Baxi, “An Introduction” in Baxi & Dhanda”, *Valiant Victims*, xlii-xliii. UCC consistently took the stand that its responsibility for Bhopal is only “moral”. Kim Fortun, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders*, University of Chicago Press – Chicago, 2001, pp. 98-101.

order gave no reasons for how the figure of US\$470 million was reached.³²⁰ But more critically, the order also quashed pending criminal proceedings against UCC and Union Carbide India Ltd. (UCIL). The settlement evoked public outrage and fierce criticism,³²¹ and its constitutional validity was assailed on several grounds. Although the Supreme Court upheld the settlement award, it agreed to reinstate criminal charges against UCC-UCIL and their personnel in October 1991.³²²

But the criminal proceedings moved at a snail's pace and had many twists and turns. The Central Bureau of Investigation (CBI) had filed a charge sheet in December 1987 against UCC, UCIL, Warren Anderson and other officials for both "culpable homicide not amounting to murder" (Section 300-II, IPC) and "causing death by negligent act" (Section 304A, IPC). However, the Supreme Court in 1996 diluted the charges levelled against the Indian accused from Section 304-II to Section 304A of the IPC – thus significantly lowering the severity of potential punishment, that is, from "imprisonment for life or imprisonment of either description for a term which may extend to ten years" under Section 304-II to "imprisonment of either description for a term which may extend to two years, or with fine, or with both" under Section 304A.³²³ Warren Anderson and UCC have not submitted themselves to the jurisdiction of the court in Bhopal and remain proclaimed offenders. The request of the Indian government for the US government to extradite Anderson to India to face criminal charges was rejected in July 2004.³²⁴

As recently as in June 2010, a criminal court convicted eight persons (UCIL and seven of its officials) for causing death by negligence under Section 304A of the IPC.³²⁵ Whereas the court directed UCIL, the former company, to pay Rs 5 lakh (about USD11,000) in fines, other natural defendants were sentenced to two years in prison and a fine of about Rs one lakh (about USD2,200) each. In response to the public outrage that the verdict attracted, the government proposed several steps to pacify the public sentiments.³²⁶ The government filed a special leave petition (SLP) in the Supreme Court seeking review of the 1996 judgment that had

320. *Ibid.*, p. 38.

321. For a detailed critique, see Baxi, *op. cit.*, note 349, pp. xxxv-l.

322. *Union Carbide Corporation v. Union of India*, AIR (1992) SC 248. See Cassels, *op. cit.*, note 285, pp. 241-46.

323. *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129; S Murlidhar, "Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims 'Twenty Years' of Courtroom Struggles for Justice", *IELRC Working Paper* 2004/5, pp. 34-35.

324. It is worth noting that the Indian Attorney General had advised the government that the proceedings in the US for extradition of Anderson 'are not likely to succeed and, therefore, the same may not be pursued against.' Soli Sorabjee, "Litigation: Opinion of the Attorney General", in *Frontline*, Volume 19:1, 5-18 January 2002, <http://www.hinduonnet.com/fline/fl1901/19011020.htm>, accessed 3 February 2011.

325. Suchandana Gupta, "Bhopal Gas Case Verdict: Justice Delayed, Denied", in *The Times of India*, 8 June 2010, <http://timesofindia.indiatimes.com/india/Bhopal-gas-case-verdict-justice-delayed-denied/articleshow/6021821.cms>, accessed 3 February 2011.

326. "GoM for Hike in Payout, Review of Verdicts", in *The Times of India*, 22 June 2010, <http://timesofindia.indiatimes.com/india/GoM-for-hike-in-payout-review-of-verdicts/articleshow/6076562.cms>, accessed 3 February 2011.

diluted the criminal charge from “culpable homicide not amounting to murder” to “death by negligence”.³²⁷ Although the Court rejected this SLP, it has allowed – in an unprecedented move – a curative petition to revisit the 1996 judgment.³²⁸ More than 26 years after the gas leak, it is still unknown if the current legal process will result in a more appropriate level of criminal sanctions.

The Bhopal case demonstrates very clearly how difficult, time consuming and resource-intensive the quest to impose criminal liability on a company can be, even in a situation where the conduct was within the purview of criminal law provisions and there was a strong public demand for justice. First of all, it is not easy in practice to prove the required *mens rea* against senior officers of a company involved in the alleged criminal activity.³²⁹ Even if a given statute states that the officer who was “in charge of and was responsible to the company for the conduct of the business” at the relevant time can be criminally held liable, the prosecution still has to prove that the concerned officer was *really* in charge or responsible for conducting company’s business. In fact, it was this kind of difficulty that led the 1987 amendment of the definition of “occupier” under the Factories Act. The amended Section 2(n) of the Act creates a statutory fiction that in case of a company, ‘any one of the directors shall be deemed to be the occupier’ and consequently held liable accordingly.

Second, gaining access to internal corporate documents, which might provide critical evidence, is often not possible. Although the Indian courts have the power to order discovery,³³⁰ the use of discovery process in practice is limited as compared to a jurisdiction like the US. Third, the task of criminal prosecution becomes more challenging if an overseas parent company is involved, over which the courts might not be able to secure effective jurisdiction. Fourth, extradition is never easy if there is an attempt to prosecute a corporate officer living in a foreign country, because governments of developing countries do not generally have the resources and/or the required political will to go after big companies for fear of investment backlash.

327. “Supreme Court Sore Over Delay in Bhopal Gas Tragedy Case”, in *The Hindu*, 8 August 2010, <http://www.hindu.com/2010/08/08/stories/2010080859750400.htm>, accessed 3 February 2011.

328. Dhananjay Mahapatra, “SC Reopens Bhopal Case, Notices to Accused on Homicide Charge”, in *The Times of India*, 1 September 2010, <http://timesofindia.indiatimes.com/india/SC-reopens-Bhopal-case-notices-to-accused-on-homicide-charge/iplarticleshow/6469576.cms>, accessed 3 February 2011.

329. This difficulty will of course not apply in strict liability offences.

330. Order XI, Rule 12 of the Code of Civil Procedure provides:

“Any party may [...] apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.”

3.9 Difficulties in piercing the corporate veil

Like the position in most of other common and civil law countries,³³¹ companies in India enjoy separate legal personality. The same principle applies in relation to companies of a corporate group, though courts may pierce corporate veil in certain limited situations, e.g. when the subsidiary is incorporated to evade taxes or engage in other fraudulent conduct, or if it acts an agent of the parent company.³³² However, it is not generally easy to convince the courts to pierce the veil.

This limitation causes a hardship to the victims of corporate human rights abuses, because on various occasions it becomes necessary for them to sue a parent company, even though the actual violation might have resulted from the acts of its subsidiaries. For example, it may be difficult for victims to ascertain which company of a corporate group actually took a decision, or the subsidiary in question might lack the economic capacity to provide adequate compensation.³³³ In the Bhopal gas leak case, both of these factors were present.³³⁴ So, when the Indian government decided to sue UCC, the parent company incorporated in the US, it relied, among others, on the enterprise principle. The government had pleaded the following:

*“The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality there is but one entity, the monolithic multinational. [...] Persons harmed by the acts of multinational corporation are not in a position to isolate which unit of the enterprise caused the harm.”*³³⁵

Although the single enterprise argument was not accepted by Justice Keenan in the US,³³⁶ Justice Seth of the Madhya Pradesh High Court was willing to pierce the corporate veil to hold UCC accountable. Justice Seth reasoned that “much

331. See Special Representative of the Secretary General (SRSG) on Business and Human Rights, *Corporate Law Project: Overarching Trends and Observations*, July 2010, p. 9.

332. *LIC of India v. Escorts Ltd.*, AIR (1986) SC 1370; *Workmen v. Associated Industries Ltd.*, AIR (1986) SC 1; *State of U P v. Renuagar Power Co.*, (1988) 4 SCC 59; *New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478. See also Avtar Singh, *Principles of Mercantile Law*, Eastern Book Company – Lucknow, 7th Edition, India, 2000, pp. 770-72.

333. Surya Deva, “Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations”, in *Newcastle Law Review*, Volume 8, 2004, p. 87 at p. 98-98.

334. See Union of India’s Complaint, as quoted in Upendra Baxi and Thomas Paul (eds), *Mass Disasters and Multinational Liability: The Bhopal Case*, N M Tripathi Pvt. Ltd. – Bombay, 1986, p. 4.

335. Union of India’s Plaint in *Union of India v. Union Carbide*, before the District Court, Bhopal, reprinted in Upendra Baxi & Amita Dhanda (eds.), *Valiant Victims and Lethal Litigation: The Bhopal Case*, N M Tripathi Pvt. Ltd. – Bombay, India, 1990, p. 6.

336. Joseph, *op. cit.*, note 83, p. 140.

water has flown down the Ganges since it was first held in *Soloman v. Soloman & Company* (1897 AC 22) as an absolute principle that a corporation or company has a legal and separate entity of its own.”³³⁷ After reviewing the case law in India and the UK, he held:

*“[T]here is no reason why when the corporate veil can be lifted in the cases of tax evasions, enforcement of welfare measures relating to industrial workmen [...] it cannot be lifted on purely equitable considerations in a case of tort which has resulted in a mass disaster and in which on the face of it the assets of the alleged subsidiary company are utterly insufficient to meet the just claims of multitude of disaster victims.”*³³⁸

The judgment of the Supreme Court in *M C Mehta v. Union of India* seemingly endorsed the enterprise principle by consciously using the term “enterprise” rather than a company.³³⁹ The Court observed:

*“We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area owes an absolute and non-derogable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held to be strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity.”*³⁴⁰

Since an out-of-court settlement was reached in the Bhopal case in February 1989, no opportunity arose for determinative judicial application of the enterprise

337. *Union Carbide Corporation v. Union of India*, (1988) MPLJ 540, reprinted in Baxi & Dhanda (eds.), *op. cit.*, note 365, p. 378.

338. *Ibid.*, pp. 378-79.

339. *M C Mehta v. Union of India*, (1987) 1 SCC 395.

340. *Ibid.*, pp. 420-21 (emphasis added).

principle or piercing of corporate veil. A valuable opportunity was thus lost for firmly grounding the principle in contemporary Indian law.

3.10 *Forum non conveniens*

Forum non conveniens “is a common law doctrine which permits [...] courts to dismiss cases on the basis that the balance of relevant interests weighs in favour of trial in a foreign forum.”³⁴¹ The test that courts apply to dismiss a case on the ground of *forum non conveniens* varies between countries.³⁴² In the Bhopal case, Judge Keenan for the US District Court on 12 May 1986 dismissed the suit on the ground of *forum non conveniens*.³⁴³ As all private and public interest factors favoured the dismissal of the suit,³⁴⁴ Keenan 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 liability.”³⁴⁵ The judge was also of the view that this will afford the Indian judiciary an “opportunity to stand tall before the world” and dispel any signs of judicial imperialism.³⁴⁶ But Judge Keenan required UCC to agree in advance to submit to the jurisdiction of the courts of India.³⁴⁷ The US Court of Appeals affirmed the order of dismissal on the ground of *forum non conveniens*.³⁴⁸

The dismissal of the suit from the US courts was seen as a victory for UCC, which did prefer to litigate, if at all, in India.³⁴⁹ From the victims’ perspective, on the other hand, it was a major blow to their hopes of securing adequate compensation. Other victims of corporate human rights abuses have similarly experienced the obstacle of *forum non conveniens*.³⁵⁰ Although there have been some positive

341. Joseph, *op. cit.*, 83, p. 87, and generally pp. 87-99.

342. See Peter Prince, “Bhopal, Bougainville and Ok Tedi: Why Australian *Forum non Conveniens* Approach is Better”, in *International & Comparatively Law Quarterly*, Volume 47, 1998, p. 573.

343. *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 634 F. Supp. 842 (1986). For a detailed critique of Judge Keenan’s decision, see Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case*, N M Tripathi Pvt. Ltd. – Bombay, India, 1986, pp. 2-30.

344. Whereas ‘private interest’ factors concern the interests of the specific litigants to an action, ‘public interest’ factors affect not merely given litigants but the society generally. On this issue, the US Supreme Court decisions in *Gulf Oil Corp. v. Gilbert* 330 US 501 (1947) and *Piper Aircraft Co. v. Reyno* 454 US 235 (1981) are considered authoritative and were relied on by Judge Keenan to reason out why India was a more convenient forum to adjudicate the Bhopal case.

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

346. *Ibid.*, p. 867.

347. *Ibid.*

348. *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 809 F. 2d 195 (1987).

349. R Clayton Trotter et al, “Bhopal, India and Union Carbide: The Second Tragedy”, in *Journal of Business Ethics*, Volume 8, 1989, p. 439 at p. 447. Fortun notes that the “news of the settlement caused UCC stock to rise \$2 a share, or 7 per cent.” Fortun, *op. cit.*, note 349, p. 26.

350. Rogge argues: ‘Is it possible for the citizens of developing countries to bring a class action suit in American courts for the negligent actions of a US-based transnational corporation? The experiences of plaintiffs

judicial developments since Bhopal,³⁵¹ the doctrine is still going to cause hardship if Indian victims decide to pursue a company in US courts for acts committed in India.

On the other hand, the doctrine could also cause hardship to foreign victims who decide to sue Indian companies before Indian courts. The Supreme Court has not yet had to deal with the issue in the context of human rights litigation. But some judgments on this subject matter³⁵² seem to indicate that the Indian courts are likely to follow the UK cases like *Spiliada* on this issue.³⁵³

3.11 Weak implementation of court judgments

In view of a number of obstacles highlighted above, it clearly is not easy for victims of corporate human rights abuses to obtain justice. Even if they are able to secure a favourable outcome, there is no guarantee that a court order in their favour will be fully implemented. Leaving aside those instances where it might be impracticable to carry out courts' idealistic orders, weak implementation of judicial orders arise mostly because of corruption, powerful actors whose interests are at stake, governmental indifference, or institutional incapacity to implement orders.

The Bhopal case again illustrates this obstacle. Time and again, victims' groups or socially active lawyers have had to approach the Supreme Court to ensure that interim relief is provided, that compensation reaches rightful victims swiftly and efficiently, and that the settlement money lying with the government is distributed to all victims on a pro rata basis.³⁵⁴ This recourse to the judiciary was necessitated because the government's efforts to provide compensation, medical care and rehabilitation to victims were hampered by the sheer number of victims, bad

from developing countries show that it is extremely difficult. *Almost invariably, in mass transnational tort actions, transnational corporations invoke the common law doctrine of the inconvenient forum – forum non conveniens – as a first line of defence.*' (emphasis added) Malcolm J Rogge, "Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of *Forum Non Conveniens* in Re: Union Carbide, Alfaro, Sequihua and Aguinda", in *Texas International Law Journal*, Volume 36, 2001, p. 299.

351. See, for example, *Connelly v. RTZ Corp plc*, (1997) 4 All ER 335 (HL); *Lubbe v. Cape plc*, (2000) 1 WLR 1545 (HL). The decision of the European Court of Justice in *Owusu v. Jackson* (2005) 2 WLR 942 is also significant in that the Court held that the dismissal of a suit on the ground of *forum non conveniens* will be incompatible with the European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention), reprinted in 8 *ILM* 229 (1969). (NB- a revision of this rule was under way in 2010)
352. *Modi Entertainment Network v. W S G Cricket Pte. Ltd.*, Appeal (civil) 422 of 2003, decided on 21 January 2003; *Mayar (HK) Ltd. v. Owners & Parties, Vessel M v. Fortune Express*, Appeal (civil) 867 of 2006, decided on 30 January 2006.
353. *Spiliada Maritime Corp v. Cansulex Ltd.* [1986] 3 All ER 843.
354. See, for some of the early orders regarding interim relief, Baxi & Dhanda, *Valiant Victims*, *op. cit.*, note 365, pp. 667-79. In an order passed on 19 July 2004, the Supreme Court ordered the settlement amount lying with the government to be distributed among all the victims on pro rata basis. J Venkatesan, "Court Orders relief to Bhopal Gas Victims", in *The Hindu*, 20 July 2004, <http://www.thehindu.com/2004/07/20/stories/2004072008760100.htm>, accessed 3 February 2011.

planning, corruption, a cumbersome claims process, difficulty in medical categorisation, inefficient administration, and an opportunistic cartel of doctors, lawyers and aid disbursement agencies.³⁵⁵

In PIL cases also there are several instances where petitioners have to approach the Supreme Court to seek enforcement of previous orders or guidelines, such as implementation of bonded labour law, protection of Taj Mahal from polluting industries, and preservation of the Ganges from effluents emanating from tanneries. Just one example should suffice to illustrate this point. The petitioner of the first *Bandhua Mukti Morcha* case³⁵⁶ had to approach the Supreme Court again, pleading that the 21 directions concerning bonded labour issued by the Court in its December 1983 judgment have not been properly implemented. In the resulting August 1991 judgment, the Court observed:

*“The State of Haryana, we must say, has not taken our intervention in the proper spirit and has failed to exercise appropriate control though some eight years back this Court had in clear terms laid down the guidelines and had called upon the public authority to take charge of the situation and provide adequate safeguards.”*³⁵⁷

3.12 Development-driven land acquisition

In the recent times, the government’s exercise of power under the Land Acquisition Act has proved to be contentious, especially if the land is acquired for establishing factories or for other development purposes. The resistance faced by the acquisition of land for construction of large dams on the Narmada River symbolises a conflict between common developmental goals and the human rights of displaced people.³⁵⁸ Another instance of the controversial exercise of the power under this law is the acquisition of about 1,000 acres of land by the West Bengal government in Singur for Tata’s car manufacturing unit. It is highly debatable whether the acquisition of land for a car manufacturing factory can be considered a ‘public purpose’, especially when very few farmers were willing to sell their land to the government.³⁵⁹ There were also issues about the loss of livelihood of the displaced people and how the government used force against protesting farmers.

355. See Kurzman, *op. cit.*, note 285, pp. 156-66; Amnesty, *Clouds of Injustice*, *op. cit.*, note 4, pp. 63-67; Sukumar Muralidharan, ‘Bhopal: Continuing Institutional Crisis’, in *Economic & Political Weekly*, Volume 39, 2005, p. 5196.

356. *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, AIR (1984) SC 802.

357. *Bandhua Mukti Morcha v. Union of India*, (1991) SCR 3 524 at 545.

358. The resistance has been led by the *Narmada Bachao Andolan* (NBA) (Save the Narmada Movement). For a narrative on the issues and the movement against the Sardar Sarovar dam across the river Narmada, see Sanjay Sangvai, *The River and Life: Peoples’ Struggle in the Narmada Valley*, Earthcare Books – Mumbai, 2nd Edition, India, 2002.

359. See Suchita Mazumdar, “Development through Displacement: A Study of Singur, West Bengal” in K R Gupta (ed.), *Special Economic Zones: Issues, Laws and Procedures*, Atlantic Publishers – New Delhi, India, 2008, p. 88 at p. 99, 104. See also Pranab Kanti Basu, “Land Acquisition: Impossibility of Corporate Social

The Land Acquisition (Amendment) Bill 2007 had proposed to make some important changes in the existing Act,³⁶⁰ so as to respond to some of the criticisms levelled against the government's land acquisition practices. First, it proposed to delete a reference to the government acquiring the land 'for companies'.³⁶¹ Second, the definition of 'person interested' was proposed to be expanded to include "tribal and other traditional forest dwellers, who have lost any traditional rights recognised under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006."³⁶² Third, a clearer definition of "public purpose" was proposed. It would, for example, include "the provision of land for infrastructure projects of the appropriate Government, where the benefits accrue to the general public."³⁶³ Fourth, it was proposed that a "social impact assessment study" must be done if the acquisition of land displaces 400 or more families.³⁶⁴ Fourth, criteria were proposed to guide the collector in assessing and determining the market value of land.³⁶⁵ Fifth, it was proposed to establish a Land Acquisition Compensation Disputes Settlement Authority in every state to deal with disputes related to land acquisition and compensation.³⁶⁶ Sixth, to prevent the misuse of the land acquired for a public purpose, it was proposed to insert a new section in the Land Acquisition Act preventing the transfer of land so acquired for any purpose except for a public purpose and without prior governmental approval; and if the acquired land remains unutilised for five years, it shall revert to the government.³⁶⁷

Farmers all over the country have also resisted government's acquisition of their agricultural land for setting up Special Economic Zones (SEZs).³⁶⁸ The establishment of SEZs under the Special Economic Zones Act 2005 (SEZ Act) raises issues quite similar to the ones that arise on acquisition of land under the Land Acquisition Act. In both cases, the government is alleged to be acquiring land from poor farmers to serve the economic interests of companies, though the exercise

Responsibility" in K Ravi Raman & Ronnie D Lipschutz (eds.), *Corporate Social Responsibility: Comparative Critiques*, Hampshire: Palgrave Macmillan – Hampshire, United Kingdom, 2010, p. 201.

360. Land Acquisition (Amendment) Bill 2007, Bill No. 97 of 2007, http://www.prsindia.org/uploads/media/Land%20Acquisition/1197003952_Land_20Acq.pdf, accessed 3 February 2011. See Statement of Objects and Reasons, *Ibid.*, pp. 12-13. The Bill has now lapsed, but the government is trying to re-introduce the Bill with more amendments.

361. *Ibid.*, Clauses 2, 3 and 6.

362. *Ibid.*, Clause 5.

363. *Ibid.*, Clause 5. However, a provision of the Bill that allows the government to acquire the remaining 30 per cent of the land if the private company buys the other 70 per cent of the proposed land remains controversial.

364. *Ibid.*, Clause 8.

365. *Ibid.*, Clause 13.

366. *Ibid.*, Clause 17.

367. *Ibid.*, Clause 22.

368. Dionne Bunsha, "Rural Resistance", in *Frontline*, 7-20 October 2006, <http://www.hinduonnet.com/fline/fl2320/stories/20061020004700900.htm>, accessed 3 February 2011.

of this power is always justified on public interest grounds. Some of the problems that SEZs raise are: forceful acquisition of land, inadequate compensation, use of agricultural land for industrial purposes, forced displacement, rehabilitation of displaced people, and environmental pollution.³⁶⁹ The government is criticised, in particular, for becoming a “land broker” for private companies,³⁷⁰ thus raising concerns about government’s collusion with private companies.

The SEZ Act deals with the establishment, development and management of the SEZs for promoting exports.³⁷¹ Formal or in-principle approval to more than 700 SEZs have been granted since the Act came into force in June 2005.³⁷² While notifying an area as SEZ, the central government should take into account the following factors:

- generation of additional economic activity;
- promotion of exports of goods and services;
- promotion of investment from domestic and foreign sources;
- creation of employment opportunities;
- development of infrastructure facilities; and
- maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States.³⁷³

The government, thus, need not consider issues of mass displacement or environmental hazards or sustainable development. The whole focus of the law seemingly is on attracting foreign investment by offering a range of incentives. The SEZ Act, therefore, establishes a system of “single window clearance” for approving SEZ applications,³⁷⁴ envisages trial of all civil suits and certain criminal cases arising in SEZs in a special designated court to ensure a speedy disposal of cases,³⁷⁵ and offers extensive fiscal incentives.³⁷⁶ The central government can also suspend or modify the operation of any central law or regulations within the SEZ, except those related to “trade unions, industrial and labour disputes, welfare of labour

369. “Special Economic Zones” in Gupta (ed.), *op. cit.*, note 389, p. 1 at p. 23-24 and generally pp. 23-48. See also *Seminar*, Issue 582 (February 2008), <http://www.india-seminar.com/semsearch.htm>, accessed 3 February 2011.

370. “Special Economic Zones” in Gupta (ed.), *op. cit.*, note 389, pp. 24-28.

371. Special Economic Zones Act 2005, Long Title.

372. Government of India, “Approved SEZs in India”, <http://www.sezindia.nic.in/about-asi.asp>, accessed 3 February 2011.

373. Special Economic Zones Act, Section 5.

374. *Ibid.*, Section 13.

375. *Ibid.*, Section 23.

376. *Ibid.*, Chapter VI.

including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits".³⁷⁷

The SEZ Rules 2006 permit state governments to declare SEZs as "public utility service" under the Industrial Disputes Act.³⁷⁸ The implication of this declaration is that the workers' right to strike is restricted.³⁷⁹ The state governments have also been given an option to repeal Chapter V-B of the Industrial Disputes Act, so as to give companies operating in SEZs more freedom to lay off and retrench workers.³⁸⁰ The government of the state of Maharashtra, for instance, has invoked this power to limit the scope of application of Chapter V-B to units operating in SEZs.³⁸¹ These developments raise legitimate concerns about the abridgment of labour and human rights similar to those in SEZs all over the world.³⁸²

In some instances, the government has used violence against people protesting the acquisition of land to establish SEZs.³⁸³ In Nandigram, West Bengal, the situation became so serious that the National Human Rights Commission (NHRC) *suo motu* took cognizance and investigated the matter.³⁸⁴ The NHRC made the following observation that captures that conflicting interests at stake:

*"Whether agricultural land should be acquired or not for industry or projects like SEZ is a moot question. **Agriculture being the only source of livelihood for the farmers, compensation in terms of money for acquisition of their land may not be adequate.** In the process of rehabilitation of such displaced people as a result of acquisition of land, the Government should take the local people into confidence and **it should also ensure alternative means of livelihood and shelter for the displaced.** Whether in addition to monetary compensation, any other land can be given to relocate or can be linked to the project for which the land is acquired by **allocating adequate number of shares and providing employment to at least one member of each affected family and similar other measures may be considered.** The agriculturists may not be in a position to appropriately or wisely invest the money received by way of compensation. **Necessary***

377. *Ibid.*, Section 49.

378. Special Economic Zones Rules 2006, Rule 5(5)(g).

379. Industrial Disputes Act 1947, Section 22(1).

380. See "Special Economic Zones" in Gupta (ed.), *op. cit.*, note 389, p. 45.

381. Government of Maharashtra, "State Government's Policy regarding Setting Up of Special Economic Zones in Maharashtra 2001", para. 10, <http://www.sezindia.nic.in/writereaddata/statePolicies/maharashtrapolicy.pdf>, accessed 3 February 2011.

382. See Christina Binder, "Economic Growth at the Price of Human Rights Violations? The Protection of Human/Labour Rights in Export Processing Zones", in *City University of Hong Kong Law Review*, Volume 2, 2010, p. 99.

383. "Special Economic Zones" in Gupta (ed.), *op. cit.*, note 389, p. 27.

384. Case No. 872/25/2006-07. NHRC, "Commission's Order on Nandigram Issue", 8 February 2008, <http://nhrc.nic.in/dispatcharchive.asp?fno=1527>, accessed 3 February 2011; NHRC, India, "13th Annual Meeting of APF", <http://nhrc.nic.in/dispatcharchive.asp?fno=1634>, accessed 3 February 2011.

*steps may have to be taken by the Government to appoint advisors for making right investment.”*³⁸⁵

3.13 State-business nexus and the transformation of the state role

The nexus between state agencies and private companies can take various forms, ranging from direct complicity in abuses on the one hand to business relations based on “public-private partnerships” (PPPs). Not every state-business nexus is harmful for the realisation of human rights. But, some may adversely impact the protection of human rights. For instance, if the state is too focused on creating and sustaining a pro-business and pro-investment environment, its policies and actions might impair the capacity of victims to hold companies accountable. Indian experiences already show such bias: the government procuring agricultural land for companies (Nandigram), diluting labour and environmental laws in SEZs, not vigorously pursuing the extradition of corporate official guilty of a crime (Bhopal), letting a company extract unreasonable quantity of groundwater (Plachimada), or granting a mining license to a company in total disregard of several laws and the interests of its own people (Vedanta).

The emergence of the state as a contracting party in PPPs has changed relationships between the state, the corporation, and project-affected people. Memoranda of Understanding (MoU) and contracts demand that the state deliver on promises it makes in these documents to speed up the processes of land acquisition, environmental clearances and forest permissions. This shifts the role of the state as a regulator and protector of the public interest to that of a party to a contract with performance of the terms of the contract as its elevated concern.

The MoU between the government of the state of Orissa and POSCO for establishment of an integrated steel plant is illustrative of this changed dynamic.³⁸⁶ POSCO proposed to set up a plant with a capacity of 12 million tonnes per annum in the state of Orissa at Paradeep, in Jagatsinghpur district. The government of Orissa explained that “desirous of utilizing its natural resources and rapidly industrializing the State, so as to bring prosperity and well being to its people, [it] has been making determined efforts to establish new industries in different locations. In this context, the government of Orissa have been seeking to identify suitable promoters to establish new Integrated Steel Plants in view of the rich iron ore

385. NHRC, “Commission’s Order on Nandigram Issue”, 8 February 2008, <http://nhrc.nic.in/dispatchive.asp?fno=1527>, accessed 3 February 2011 (emphasis added).

386. “Memorandum of Understanding between the Government of Orissa and M/s POSCO for Establishment of an Integrated Steel Plant at Paradeep”, 22 June 2005, <http://www.orissa.gov.in/posco/POSCO-MoU.htm>, accessed 3 February 2011. The MoU was renewed for another five years. Dilip Bisoi, “Orissa to Renew Posco MoU for 5 more years”, in *Financial Express*, 22 June 2010, <http://www.financialexpress.com/news/orissa-to-renew-posco-mou-for-5-more-years/636718/>, accessed 3 February 2011.

and coal deposits in the State.”³⁸⁷ The government of Orissa undertook to “identify, acquire and transfer a suitable tract of land between 20 and 25 acres” for setting up its registered office and national headquarters in the capital city of Bhubaneswar.³⁸⁸ POSCO requires thousands of acres of land for setting up the steel project and associated facilities, including a port, and for developing an integrated township. Under the MoU, the government Orissa not only undertook to “facilitate all clearances and approvals of the Central Government, if required” but also agreed to “expeditiously and within a reasonable time frame, hand over to the company non-forest government land for which the company has completed all formalities.”³⁸⁹

Once land is secured, POSCO will need raw materials to implement its business plans. The government of Orissa agreed to recommend to the Central Government and “use its best efforts to obtain the Central Government’s approval within the minimum possible time for the grant of prospecting licenses and the captive mining leases for the iron ore mines”.³⁹⁰ The government of Orissa agreed to recommend such mining areas as are free from litigation as well as encumbrances. But importantly, the government of Orissa in the MoU promised to “diligently defend their recommendations made in favour of the Company in the appropriate judicial, quasi judicial fora” if there is a litigation at any stage.³⁹¹ This contractual promise, in effect, implies that if people of Orissa challenge any decision of the government, the state government would side with POSCO, rather than its own people, whose human rights it is constitutionally obliged to safeguard.

The MoU also makes provisions for the state government to ensure access to other POSCO’s basic necessities such as water, drainage, power and security,³⁹² public services of which many people living in the state of Orissa only dream. But, perhaps the most critical aspect is the intent demonstrated by the government of Orissa in the MoU to get all necessary environmental clearances at all costs and as quickly as possible:

- (i) The Government of Orissa agrees to *facilitate* and *use its best efforts* to enable the Company to obtain a “No Objection Certificate” (NOC) through the State Pollution Control Board in the *minimum possible time* for the development and operation of the Project.

387. “Memorandum of Understanding between the Government of Orissa and M/s POSCO for Establishment of an Integrated Steel Plant at Paradeep”, 22 June 2005, para. 2, <http://www.orissa.gov.in/posco/POSCO-MoU.htm>, accessed 3 February 2011.

388. *Ibid.*, para. 5.

389. *Ibid.*

390. *Ibid.*, para. 6.

391. *Ibid.*

392. *Ibid.*, paras. 7-9 and 17.

- (ii) The Company will conduct a *rapid* Environment Impact Assessment (“EIA”) and prepare a detailed EIA Report and an Environment Management Plan (“EMP”) for the Project. The Government of Orissa agrees to *provide any assistance requested by the Company* during the time the EIA is conducted and the EMP is prepared.
- (iii) The Government of Orissa agrees to *use its best efforts to procure the grant of all environmental approvals and forest clearances from the Central Government within the minimum possible time* for the Project.³⁹³

The implication of these MoU promises is now known. The government of Orissa has not only sought central government approval to divert 1,253 hectares of forest land for this project, but has also certified that no tribal people or traditional forest dwellers live in this area acquired by POSCO.³⁹⁴ These actions and claims have been countered by civil society.³⁹⁵ In fact, the central government, noting several environmental breaches, has recently imposed many additional conditions while approving the POSCO project.³⁹⁶ The central government has also asked the government of Orissa to provide a categorical assurance that there would be no breach of the Forest Rights Act 2006 in diverting the forest land to POSCO.³⁹⁷

The privatisation of distribution of water has also raised questions of access, affordability and control of such a natural resource. The idea that rivers and other sources of water belong to the state which can use its power in deciding whether, and how, they may be commoditised can be problematic. In Chhatisgarh, a state-owned industrial development corporation reportedly contracted with a private company permitting the company to exercise exclusive rights to 23.5 kms of river Sheonath.³⁹⁸ Under a build-own-operate-transfer (BOOT) arrangement, the company was allowed to construct barrages to divert water into a reservoir. The company was then to sell the water to the state-owned corporation, which would in-turn sell it to ultimate users in an industrial township in the vicinity. The fishing community that lost access to the river and the small farmers who were dependent on the river for irrigation, were immediately affected. Unrelenting protests forced the government to announce the cancellation of the agreement.³⁹⁹ But for

393. *Ibid.*, para. 11 (emphasis added).

394. Ministry of Environment and Forests, “POSCO: Final Order and Other Relevant Documents”, 31 January 2011, p. 1, <http://moef.nic.in/downloads/public-information/Posco31012011.pdf>, accessed 3 February 2011.

395. See, e.g., *Fact Finding Report on Human Rights and Environmental Violations of the POSCO Project in Orissa, India*, <http://material.ahrchk.net/india/AHRC-PRL-028-2010-01.pdf>, accessed 3 February 2011; “Holding their ground against POSCO”, in *India Together*, 11 July 2010, <http://www.indiatogether.org/2010/jul/env-posco.htm>, accessed 3 February 2011.

396. Ministry of Environment and Forests, “POSCO: Final Order”, *op. cit.*, note 424, pp. 3-5.

397. *Ibid.*, pp. 6-8.

398. Pragnya Bhattamishra & Kumar Saurabh Singh, “River for Sale: The Sheonath Controversy”, in *Indian Juridical Review*, 2004, pp. 239-243.

399. “Deal Shelved”, in *Down to Earth*, 15 May 2003, p. 20.

the state-business nexus, this agreement should not have taken place in the first instance, especially after the judicial recognition of the “public trust” doctrine (see above chapter 1).

3.14 Privatisation of formerly public functions

In a free market economy, privatisation of functions that used to be administered by public bodies brings some unique challenges. The state-centric human rights laws and institutions might not, for instance, be directly triggered by violations done by private companies, or non-state actors might see a conflict between profit maximisation and compliance with basic human rights norms. Some examples below will illustrate these unique challenges. The privatisation of security services, a task that used to be monopolised by the state, necessitated the enactment of the Private Security Agencies Act in 2005. Nevertheless, this shift raises new questions about the liability of such private security personnel and companies in those cases where they use excess or unnecessary force.

Another problem is posed by the practice adopted by banks to employ “recovery agents” to collect payments from people who default in repaying a loan. In a number of cases that reached the courts, the loans at issue were for the purchase of vehicles. The methods used by recovery agents included harassment, beating up the defaulter, and forcible recovery of the vehicle which would then be sold by the bank to satisfy the loan. In 1995, the Supreme Court condoned the “re-possession” of a vehicle by a recovery agent based on failure to pay the due instalments.⁴⁰⁰ But in less than a decade after this decision, the situation acquired an unanticipated seriousness. Forcible possession of a vehicle which was then sold at a throwaway price prompted the Delhi State Consumer Commission to comment: “Finance companies and banks cannot be allowed to take law in their hands. [...] People cannot be permitted to settle their civil disputes through criminal force and in the streets. [...] [T]he agreement [...] did not empower the appellant to take the law into his own hands by sending musclemen to the house of the consumer and taking forcible possession of the vehicle.”⁴⁰¹

In *Tapan Bose v. ICICI Bank Ltd.*,⁴⁰² the forcible recovery involved attacking and seriously injuring an occupant of the car. A criminal case was registered. The Delhi State Consumer Redressal Commission observed that “if any service provider wants to engage private agency for recovery of dues it has to authorise it to only recover it through legal method, say, by suit for recovery and not through any other methods, say, by employing threats, harassment, force and causing injuries

400. *K A Mathai v. Kora Bibikutty*, (1996) 7 SCC 212-213.

401. *Citicorp. Maruti Finance Ltd. v Smt Vijayalaxmi*, Appeal No. A-65/2004 dated 10.3.2003 in the State Consumer Redressal Commission. Delhi. See also, *M/s. Magna Leasing Ltd. v. Bharat Singh*, Appeal No. A-954/2006 dated 8 December 2006 in the State Consumer Redressal Commission., Delhi.

402. Complaint Case No. CC 2007/ 49 dated 2 November 2007 in the State Consumer Redressal Commission, Delhi.

from whom some amount is due or indulging in other act which verges on criminal offence.” Furthermore, where the repossession is without the force of law, “such financier has to compensate the consumer on account of mental agony, harassment, humiliation, emotional suffering and injury suffered by the consumer and insult he and his family members suffer.”⁴⁰³

The Reserve Bank of India (RBI) in 2005 issued a set of guidelines to prescribe, among others, fair debt collection practices. Banks or their agents “should not resort to intimidation or harassment of any kind, either verbal or physical, against any person in their debt collection efforts, including acts intended to humiliate publicly or intrude the privacy of the credit card holders family members, referees and friends, making threatening and anonymous calls or making false and misleading representations.”⁴⁰⁴

In *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*, the Supreme Court recognised the right to health to be a fundamental right under Article 21 of the Constitution.⁴⁰⁵ What implications does this recognition have when private companies start offering medical services? In 2009, the Delhi High Court dealt with a situation that had arisen when the Delhi Administration entered into a joint venture arrangement with a corporation, Apollo Hospital, to provide health care.⁴⁰⁶ The agreement stipulated that, when completed, the multi-speciality hospital would provide free facilities of medical, diagnostic and other necessary facilities to 40 per cent of the patients attending the outpatient department of the hospital. The government held a 26 per cent equity share capital in the proposed company. The hospital was to run on a “no profit, no loss” basis. The government provided fifteen acres of prime land in the city for this project at a token rent of Rs 1 per month. After the hospital had begun to operate, disputes arose as to the scope of its obligation to provide free treatment. Rejecting all arguments of the hospital, including that it was a commercial enterprise, the Court directed it to provide free treatment as per the agreement. It observed:

“By agreeing to be a partner with the state in the matter of healthcare, with stipulations of free health care to the specified extent, [the company] had taken onto itself the mantle of the state instrumentality. The discourse on ‘right to health’ would show that it hardly lies in the mouth of the private player to turn around and abdicate its responsibility, after having offered its services for establishing a multi-disciplinary super-speciality on the terms inclusive of benevolent arrangements for the poor and the indigent

403. *Ibid.*, para. 31 (vii).

404. Reserve Bank of India, “Credit Card Operations of Bank”, para. 5(iii)(c), <http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=2627&Mode=0>, accessed 3 February 2011. The guidelines were revised in 2008, http://rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=4141, accessed 3 February 2011.

405. *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*, (1996) 4 SCC 37.

406. *All India Lawyers’ Union (Delhi Unit) v. Government of NCT of Delhi*, WP(C)5410 of 1997, dated 22 September 2009, <http://www.indiankanoon.org/doc/1508125/>, accessed 3 February 2011.

and in the bargain having secured State largesse in the form of prime parcel of public land and monetary contribution.”⁴⁰⁷

This case is indicative of issues that may arise when a corporation takes on the obligations of the state. Similarly, this ruling is likely to acquire significance, *inter alia*, in the field of primary education when the state seeks private players to deliver the constitutional goal of universal primary education.

3.15 SLAPP suits

In recent times, companies have resorted to the so-called Strategic Lawsuit Against Public Participation (SLAPP) suits against human rights campaigners and activists.⁴⁰⁸ Although these attempts have ultimately failed in most cases, they nonetheless succeed in harassing the concerned social activists and thus further the underlying intention to silence the voices that challenge companies' business operations. SLAPP suits not only undermine the right to freedom of speech and expression but also discourage people's participation in decision-making processes affecting them. A few illustrative examples are given below to show how vigorously companies have used the legal process to crush dissent and silence civil society.

Mining activity in the coastal state of Goa has proliferated as burgeoning investment in infrastructure has exponentially increased the demand for iron ore. Sebastian Rodrigues, who blogs against mining operations, has had a defamation claim worth Rs 5 billion filed against him by the Fomento group of industries, accusing him of publishing “false and defamatory articles”.⁴⁰⁹ In 2001, a suit against the Narmada Bachao Andolan (NBA) (Save the Narmada Movement) sought to restrain it from making public statements on its hydroelectric power project in Madhya Pradesh.⁴¹⁰ Similarly, the Centre for Science and Environment (CSE) was confronted with a SLAPP suit in 2003 when Pepsi went to court after CSE published reports of a study that revealed that samples of bottled soft drinks were found to contain pesticides residues.⁴¹¹ More recently, in July 2010, TATA filed a defamation suit against Greenpeace in the Delhi High Court for defamation and wrongful use of the Tata trademark in their online video game called “Turtle vs

407. *Ibid.*, para. 30.

408. See Rajeev Dhavan, “Whistles, strings and slapps”, in *The Hindu*, 12 December 2003, <http://www.hinduonnet.com/2003/12/12/stories/2003121201851200.htm>, accessed 3 February 2011.

409. “SLAPing Down Public Protest”, 26 January 2009, <http://mandgoa.blogspot.com/2009/01/slapping-down-public-protest.html>, accessed 3 February 2011.

410. Sunita Narain, “We the Regulators”, 31 August 2003, <http://www.downtoearth.org.in/node/13397>, accessed 3 February 2011.

411. Centre for Science and Environment, “CSE Welcomes High Court Decision”, <http://www.cseindia.org/node/510>, accessed 3 February 2011.

Tata”.⁴¹² The background for this game is the Greenpeace campaign against TATA’s port at Dhamra, Orissa, on the ground that it would destroy the habitat of the Olive Ridley turtles.⁴¹³ At the time of writing this report, the High Court had declined to issue an injunction against Greenpeace for it to remove the game at issue.⁴¹⁴

In another case, Dow Chemical Co. approached the Madras High Court seeking an “injunction to restrain the International Campaign for Justice in Bhopal and others from picketing, holding demonstrations outside its office in Chennai, harassing and preventing employees from entering or leaving the premises.”⁴¹⁵ The protest was reportedly against Dow’s refusal to own up to its responsibility for cleaning up the toxic contaminants that had remained in the factory premises in Bhopal and which were said to be poisoning the ground water in the area. Dow sought various relief, including a decree for a sum of Rs. 1,000,000 together with interest on account of loss of business suffered by them and another Rs.1,000,000 together with interest for defamation and loss of reputation suffered by them.⁴¹⁶

Justice Chandru of the Madras High Court rejected Dow’s request for a gag order against the named respondents, because vital constitutional rights were at stake. The court opined:

*“It must be noted that the people of India empowered with a constitutional right provided in the Constitution of India, are entitled to make grievance on any issue. Their mouths cannot be gagged either by the Government using its police power or the Courts by the grant of preventive injunctions. Before the issuance of a prior restraint on a citizen’s right to free expression guaranteed under Article 19(1)(a) or their right to hold peaceful assembly under Article 19(1)(b), there must be established a clear case of infringement of the right of an aggrieved person. Otherwise, the courts are bound to protect the rights of parties to express their protest on public issue.”*⁴¹⁷

The High Court held that the people of India have a right to protest, even against a multinational company, and that unless “a situation is shown where the life and liberty of an aggrieved individual or an organization is threatened from its

412. Greenpeace, “TATA Tries to Silence Critics, Takes Greenpeace to Court”, 16 December 2010, <http://greenpeace.in/turtle/news/tata-tries-to-silence-critics-takes-greenpeace-to-court>, accessed 3 February 2011.

413. The Hoot, “A cheeky video game by Greenpeace but corporate giant Tata is not amused”, 5 August 2010, <http://www.thehoot.org/web/freetracker/story.php?storyid=134§ionId=15>, accessed 3 February 2011.

414. Greenpeace, “Play Turtle vs TATA”, 28 January 2011, <http://www.greenpeace.org/india/en/Get-Involved/Turtle-vs-TATA/>, accessed 3 February 2011.

415. See The Hoot, *op. cit.*, note 443.

416. *Dow Chemical International v. Nithyanandam and International Campaign for Justice in Bhopal*, OA 395-397 of 2009 in Civil Suit No. 356 of 2009 (order dated 9 July 2009, Madras High Court), para. 4.

417. *Ibid.*, para. 22.

very existence or their right to carry on business is curtailed, neither the State Authorities nor the court will rush to prevent such actions through preventive orders or impose prior restrains.”⁴¹⁸

This judgment of the Madras High Court seems to strike the right balance between protecting commercial interests of companies and constitutional or human rights of individuals or organisations. However, it is still too early to say that certain companies will be discouraged by such judicial orders from filing SLAPP suits in future. So, the threat of being hit with a SLAPP remains, at least for now, as demonstrated by cases such as those of TATA's against Greenpeace.

⁴¹⁸. *Ibid.*, para. 27.

Conclusions and Recommendations

It is now widely accepted that companies impact, both positively and adversely, the realisation and protection of human rights. It is their negative impact, however, that has attracted the most attention in recent years. Companies can adversely impact human rights by acting alone, through their business partners or in concert with government agencies.

India is no exception, as this study reveals. India – the largest democracy in the world with a fair degree of political stability, a reasonable level of law and order, commitment to the rule of law, a robust constitutional incorporation of human rights, extensive statutory legal framework, independent judiciary, free press, and vibrant civil society – offers various judicial and non-judicial remedies for human rights abuses involving corporations. Several past case studies seemingly affirm this faith. Victims, or public-spirited individuals and civil society acting on their behalf, have been able (with a varying success) to seek justice against companies both inside and outside courts through a range of available remedies. Tata's decision to withdraw from Singur, the government's withdrawal of Vendanta's mining license in Orissa and the on-going struggle in Plachimada over unreasonable extraction of ground water by soft drink companies are illustrative of this success. On the other hand, there is of course the experience of Bhopal, where the court-approved settlement provided compensation to victims, but justice was hardly done and criminal cases against UCC-UCIL and their employees have yet to be finally settled.

One factor that stands out and deserves special mention in helping victims' cause for justice is the willingness of the Indian higher judiciary to fashion creative remedies (e.g. compensation for violation of constitutional rights), legal principles (e.g. absolute liability and polluter pays) and processes (e.g. relaxed *locus standi* requirement in PIL cases). But judicial activism has its limitations and courts cannot always meet societal expectations of justice.⁴¹⁹ Moreover, courts are neither the suitable forum nor were they meant to provide the governance framework or run the country on a day-to-day basis, a task which more appropriately belongs to the other two branches of the government. Indian courts also lack resources commensurate with their workload and are engulfed with endemic delays and corruption. This report has highlighted a number of additional serious obstacles that make the task of seeking justice against corporations very difficult, if not impossible in certain cases. Some measures that should be taken to lessen this difficulty are identified below.

419. See Balakrishnan Rajagopal, "Judicial Governance and the Ideology of Human Rights: Reflections from a Social Movement Perspective" in Kumar & Chockalingam (eds.), *op. cit.*, note 37, p. 200.

Better implementation of laws and court decisions

The study reveals that India already has in place an extensive list of laws that can be invoked by people to hold companies accountable for human rights violations. However, there are two problems that should be rectified. First, as illustrated in Part 3, the executive in several instances does not put into force a law that has been enacted by the legislature. Second, even if a law is published by the executive, its enforcement is often lacking in view of inadequate manpower, under-developed infrastructure, administrative apathy and red-tape or corruption. Both these factors leave a wide gap between law on paper and law in practice, something that is not desirable for efficacy and efficiency of a legal system. Among others, one issue that deserves attention is the over-reliance on the “command and control” model of regulation in which the state is almost the sole source of giving commands and ensuring their implementation.

The Indian government should seriously consider introducing a range of incentives and disincentives to promoting self-regulation with appropriate external surveillance to supplement the state-centric regulation and involve other societal constituents to enforce agreed human rights norms.⁴²⁰

Like laws, court decisions too suffer from a lack of implementation by the relevant government agencies. As we have seen, courts had to be approached again and again for implementation of their guidelines and directions in relation to, for example, child/bondage labour, environmental pollution or the right to a speedy trial. In some other cases like guidelines against sexual harassment of women at workplace in *Vishaka*, it is doubtful if they *in themselves* have had a significant impact in creating a safer environment enhancing safeguarding the dignity and rights of working women.⁴²¹ Despite several legislative attempts, no law has yet been enacted by the parliament to deal with sexual harassment in a comprehensive manner.⁴²² Considering that orders passed by the Supreme Court are enforceable like any law enacted by the parliament and all civil and judicial

420. See generally Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* Oxford University Press – New York, United States, 1992; Fiona Haines, *Corporate Regulation: Beyond 'Punish' or 'Persuade'*, Clarendon Press – Oxford, United Kingdom, 1997; Neil Gunningham, Peter Grabosky & Darren Sinclair, *Smart Regulation: Designing Environmental Policy*, Clarendon Press – Oxford, United Kingdom, 1998; Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy*, Cambridge University Press – Cambridge, United Kingdom, 2002.

421. See, for example, NDTV, “Harassment Cases: M S Gill Promises Justice”, 26 July 2010, <http://www.ndtv.com/article/sports/harassment-cases-ms-gill-promises-justice-39810>, accessed 3 February 2011. Courts have to still intervene in many sexual harassment matters to secure justice for victims. See Charu Sharma, “The Battle against Sexual Harassment: Are Women still the Beast of Burden?” in Swati Deva (ed.), *Law and (In)equalities: Contemporary Perspectives*, Eastern Book Company – Lucknow, India, 2010, p. 73 at p. 89-97.

422. See National Commission for Women, India, “Sexual Harrasesment at Workplace”, <http://ncw.nic.in/frmReportLegal07.aspx>, accessed 3 February 2011; expressindia.com, “Sexual harassment Bill ready with new clause”, 19 May 2010, <http://www.expressindia.com/latest-news/Sexual-harassment-Bill-ready-with-new-clause/620581/>, accessed 3 February 2011.

authorities are supposed to act in aid of the Court,⁴²³ the government agencies should do all within their means to implement in both letter and spirit judicial orders and directions aimed at safeguarding human rights.

Locating stakeholders' interests in company law

Traditionally, Indian companies (at least prominent ones) practiced social philanthropy.⁴²⁴ But such corporate philanthropy is neither widely practiced nor adequate to promote a general corporate culture to respect human rights and embrace sustainable business policies. In recent years, it is increasingly felt that company law has an important role to play in developing a corporate culture in which business decisions are informed by a concern for human rights. Company law can achieve this in several ways, e.g., by imposing duties on directors to take into account the interests of stakeholders, specifying a social purpose of the company, mandating stakeholders' representation in corporate boards, and by requiring companies to disclose their non-financial performance.⁴²⁵

The Indian Companies Act of 1956 hardly does anything to encourage companies to be socially responsible or locate the interests of non-shareholder stakeholders. Section 158(12) of the draft Companies Bill 2009 makes a departure by requiring certain kinds of companies to constitute a 'Stakeholders Relationship Committee' to consider and resolve the grievances of stakeholders. This proposed provision, however, does not go far enough. It is desirable that the Indian parliament uses this opportunity to revise its company law to bring it consistent with international trends. The new company law should impose a duty on directors to consider the interests of stakeholders and require companies to disclose their non-financial performance in annual reports. Apart from acting as a trigger to develop a corporate culture to conduct sustainable business, this would also allow stakeholders to exert some pressure on companies that indulge in human rights violations or pollute the environment.

Improving access to justice

Although the judiciary in India is independent of interference from the other two branches of the government, several factors discourage or prevent victims to obtain access to justice in a speedy and inexpensive manner.⁴²⁶ To begin with, the number of judges and courts in India is much lower as compared to other

423. Constitution of India, Articles 142 and 144.

424. A C Fernando, *Business Ethics: An Indian Perspective*, Pearson Education – New Delhi, 2009, pp. 236-37.

425. Deva, "What Role for the Company Law?", *op. cit.*, note 51, pp. 87-88.

426. Galanter and Krishnan observe that 'the courts, and tribunals where ordinary Indians might go for remedy and protection, are beset with massive problems of delay, cost, and ineffectiveness.' March Galanter & Krishnan, *op. cit.*, note 318, p. 789.

countries.⁴²⁷ What makes the situation worse that even this limited number of sanctioned positions remains unfilled at all levels. The number of reported vacancies in different courts, in fact, looks alarming: 4 out of 26 in the Supreme Court, 266 out of 866 in the High Courts, and 3,239 out of 16,158 in the District and Subordinate Courts.⁴²⁸ This is one important factor, among others,⁴²⁹ contributing to huge backlog of cases.⁴³⁰ The situation has not improved much despite the relative success of *Lok Adalats* (the people's courts)⁴³¹ that were provided a legal status by the Legal Services Authorities Act.⁴³²

In addition to the relatively low number of courts and judges, the high costs of litigation and the limited availability of legal aid mean that only people with deep pockets would have a real chance to avail judicial means to make companies accountable for human rights abuses. If we leave aside the PIL cases, the class action remains undeveloped and under-used to seek legal remedies through civil suits. The cumulative effect of all these factors is that despite the availability of institutions to seek justice, bringing perpetrators of human rights abuses to justice remains largely a mirage for many victims.

A range of measures should be taken to redress the current situation.⁴³³ The number of courts and judges should be enhanced, vacancies should be filled promptly, a better use should be made of *Lok Adalats* and alternative dispute resolution means, tailored disincentives created for vexatious and frivolous litigants, legal aid made available to a larger section of people, lawyers encouraged to do more *pro bono* work, and court fees system overhauled so as to not become a source of revenue for the state.⁴³⁴

427. Whereas India has only 10.5 judges per million people, many other countries have 50 to 150 judges per million people. Law Commission of India, *120th Report on Manpower Planning in Judiciary: A Blueprint*, 1987, p. 3; Law Commission of India, *189th Report on Revision of Court Fees Structure*, 2004, p. 32.

428. Supreme Court of India, *Court News*, July-September 2008, pp. 6-7.

429. See Nick Robinson, "Expanding Judiciaries: India and the Rise of Good Governance Court", in *Washington University Global Studies Law Review*, Volume 8, 2009, pp. 20-27. See also Law Commission of India, *125th Report on the Supreme Court: A Fresh Look*, 1988.

430. "The Union Government and the States in India had not toned up the judicial system in the last five decades so that today we are faced with tremendous backlog of cases in our Courts." Law Commission of India, *189th Report on Revision of Court Fees Structure*, 2004, p. 32.

431. See Galanter & Krishnan, *op. cit.*, note 318.

432. Under the system of *Lok Adalats*, a panel of mediators deals cases in an informal manner if both parties consent their dispute to be heard by a given *Lok Adalat*. So far several million cases have been settled by *Lok Adalats*. See Galanter & Krishnan, *op. cit.*, note 318, pp. 799-800. The settlement reached by *Lok Adalats* is binding on both parties and is generally final, as no appeal to any court is permitted. Legal Services Authorities Act 1987, Section 21. Judicial review of the award under constitutional provisions is though possible.

433. "There is wide agreement that access to justice in India requires reforms that would enable ordinary people to invoke the remedies and protections of the law." Galanter & Krishnan, *op. cit.*, note 318, p. 790.

434. See JGLS, *op. cit.*, note 315; Galanter & Krishnan, *op. cit.*, note 318.

Strengthening institutional mechanisms

In addition to courts, quasi-judicial and non-judicial institutions play an important role in enforcing human rights responsibilities, more so in the context of India where access to courts is expansive and entails endless delays. This study briefly examined the potential of the NHRC in assisting victims of corporate human rights violation in seeking justice. The government may contemplate a more robust and direct role for the NHRC by an amendment of the Protection of Human Rights Act so as to expressly empower the national as well as state commissions to investigate human rights abuses by companies. Courts should also consider making greater use of the NHRC in investigating alleged human rights abuses.

To deal with varied environmental matters, it is critical for the government to establish the much-delayed tribunal at the national as well as state levels. The National Green Tribunal should not only be established soon but also provided with adequate resources to deal with all kinds of pollution complaints against companies.

Apart from these specialised commissions, the Indian government may also consider establishing a national commission that can take cognizance of discrimination and unequal treatment in the private sector. Such bodies have played a useful role in various jurisdictions such as Canada, Hong Kong, Australia and Canada.

Dealing with the menace of corruption

It is hardly disputed that corruption in governance institutions (e.g., bureaucracy, police, government agencies, and courts) undermines the chances of victims seeking justice and/or enforcing orders against companies. The corruption menace remains unabated in India despite higher judiciary's strong stance against corruption in government institutions and legislative measures such as the Right to Information Act, the Prevention of Corruption Act, and the Prevention of Money Laundering Act.⁴³⁵ Several measures taken by the Central Vigilance Commission, a watchdog that was constituted in 1964 and made an independent statutory body in 2003 to deal with corruption in public offices,⁴³⁶ are also seemingly not having enough preventive or deterrent effect.⁴³⁷

435. See Transparency International, "Overview of Corruption and Anti-corruption Efforts in India", January 2009, <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=188>, accessed 3 February 2011.

436. Central Vigilance Commission, "Background", http://cvc.gov.in/cvc_back.htm, accessed 3 February 2011.

437. Central Vigilance Commission, "Initiatives Taken by the Commission", <http://www.cvc.nic.in/newinit16092010.htm>, accessed 3 February 2011. The CVC has recently prepared a draft of the National Anti-Corruption Strategy. Central Vigilance Commission, "National Anti-corruption Strategy (Draft)", 20 September 2010, <http://www.cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf>, accessed 3 February 2011.

What should or could be done then? It has been suggested that corruption in India should be fought through right-based approaches.⁴³⁸ However, even if corruption-free governance is made a fundamental or constitutional right, still it would need to be enforced through and implemented by the same institutions that are impaired by corruption. A more viable alternative might be to establish an independent, powerful institution to deal with corruption cases swiftly and resolutely. Dhume recently argued: “If India wants to be taken seriously as a world power, it must establish [...] institutions to fight corruption. A good place to start would be an independent anti-corruption commission backed with investigative powers, prosecutorial heft and fast-track courts.”⁴³⁹

Transparent, participatory and humane developmental process

Last but not least, it is critical that the process of development – in which companies are playing and would continue to play a key role – is made more transparent, participatory and humane. Many allegations of a nexus between the state and the business have arisen because of a low level of transparency and participation of all relevant stakeholders in the decision-making process. The government agencies should ensure that governance deficits are remedied in future.

Equally important is the need to adopt more humane policies of development. Development processes sometimes bring disadvantage to some sectors of society. In this context, it is important that while making a balance-sheet of pros and cons, the government gives adequate consideration to the interests of those adversely affected by development projects. In addition to expanding and strengthening the scope of human rights/environment impact assessment, rehabilitation of displaced people should be ensured. The state should not abdicate its duty to protect human/labour rights of its people and preserve the environment at the behest of interests of the business sector.

438. See, e.g., Kumar, *op. cit.*, note 299, pp. 168-81.

439. Sadanand Dhume, “India Battles for Transparency – Part I”, in *YaleGlobal Online*, 22 December 2010, <http://yaleglobal.yale.edu/content/india-battles-transparency-part-i>, accessed 3 February 2011.

Bibliography

Legislation (Acts, Rules and Bills)

Air (Prevention and Control of Pollution) Act, 1981.

Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

Bonded Labour System (Abolition) Act, 1976.

Child Labour (Prohibition and Regulation) Act, 1986.

Code of Criminal Procedure, 1973.

Contract Labour (Abolition and Regulation) Act, 1970.

Companies Act, 1956.

Companies Bill, 2009.

Constitution of India, 1950.

Employees Provident Fund and Miscellaneous Provisions Act, 1952.

Employees State Insurance Act, 1948.

Environment (Protection) Act, 1986.

Equal Remuneration Act, 1972.

Factories Act, 1948.

Forest (Conservation) Act, 1980.

Geneva Conventions Act, 1960.

Human Rights Act, 1993.

Indian Penal Code, 1860.

Industrial Disputes Act, 1947.

Information Technology Act, 2000.

Land Acquisition Act, 1984.

Land Acquisition (Amendment) Bill, 2007.

Legal Services Authorities Act, 1987.

Maternity Benefit Act, 1961.

Mines Act, 1952.

National Environment Tribunal Act, 1995.

National Green Tribunal Act, 2010.

Negotiable Instruments Act, 1881.

Payment of Gratuity Act, 1972.

Payment of Wages Act, 1936.

Prevention of Money Laundering Act, 2002.

Private Security Agencies Act, 2005.

Protection of Human Rights (Amendment) Act, 2006.

Public Liability Insurance Act, 1991.

Unorganised Workers' Social Security Act, 2008.

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

Special Economic Zones Act, 2005.

Special Economic Zones Rules, 2006.

Trade Unions Act, 1926.

Water (Prevention and Control of Pollution) Act, 1974.

Wild Life (Protection) Act, 1972.

Workmen's Compensation Act, 1923.

Cases (India and other jurisdictions)

A P Pollution Control Board II v. M v. Nayudu, (2001) 2 SCC 62.

Adams v. Cape Industries Plc, (1990) 2 WLR 786.

Air India Statutory Corporation v. United Labour Union, (1997) 9 SCC 377.

Ajay Hasia v. Khalid Mujib, AIR (1981) SC 487.

All India Judge's Association v. Union of India, (2002) 4 SCC 247.

All India Lawyers' Union (Delhi Unit) v. Government of NCT of Delhi, WP(C) 5410 of 1997.

Anil Hada v. Indian Acrylic Ltd., (2000) 1 SCC 1.

Apparel Export Promotion Council v. Chopra, AIR (1999) SC 625.

Assistant Commissioner v. Velliappa Textiles Ltd., (2003) 11 SCC 405.

Balco Employees Union v. Union of India, AIR (2001) SC 350.

Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, AIR (1984) SC 802.

Bandhua Mukti Morcha v. Union of India, (1991) SCR 3 524.

Bhim Singh v. State of Jammu & Kashmir, (1985) 4 SCC 677.

Bodhisattwa Gautam v. Subra Chakraborty, AIR (1996) SC 922.

Briggs v. James Hardie & Co Pty Ltd., (1989) 16 NSWLR 549.

Charan Lal Sahu v. Union of India, AIR (1990) SC 1480.

Citicorp. Maruti Finance Ltd. v. Smt Vijayalaxmi, (2007) BusLR 105 NCDRC.

Common Cause v. Union of India, (1996) 4 SCC 33.

Common Cause v. Union of India, (1996) 6 SCC 775.

Connelly v. RTZ Corp plc, (1997) 4 All ER 335

Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

CSR Limited v. Wren, (1998) 44 NSWLR 463.

D K Basu v. State of West Bengal, (1997) 1 SCC 416.

Delhi Science Forum v. Union of India, (1996) 2 SCC 405.

Dow Chemical International v. Nithyanandam and International Campaign for Justice in Bhopal, OA 395-397 of 2009 in Civil Suit No. 356 of 2009.

Dr Upendra Baxi v. State of UP, (1982) 2 SCC 308.

DTC Corporation v. DTC Mazdoor Congress, AIR (1991) SC 101.

Electricity Board, Rajasthan v. Mohan Lal, (1967) 3 SCR 377.

Fertilizers & Chemicals Travancore Ltd. Employees Association v. Law Society of India, (2004) 4 SCC 420.

- Francis Coralie v. Union Territory of Delhi*, AIR (1981) SC 746.
- Gauri Shankar v. Union of India*, (1994) 6 SCC 349.
- Govind v. State of MP*, AIR (1975) SC 1378.
- Gulf Oil Corp. v. Gilbert*, 330 US 501 (1947).
- Hussainara Khatoon v. State of Bihar*, AIR (1979) SC 1364.
- Indian Bank v. Godhara Nagrik Cooperative Credit Society Ltd.*, (2008) 12 SCC 541.
- Indian Council for Enviro-Legal Action v. State of Rajasthan*, (1996) 3 SCC 212.
- Iridium India Telecom Ltd. v. Motorola Incorporated*, Criminal Appeal No. 688 of 2005.
- J K Industries Ltd. v. Chief Inspector of Factories & Boilers*, (1996) 6 SCC 665.
- Janta Dal v. H S Chowdhary*, (1992) 4 SCC 305.
- K A Mathai v. Kora Bibikutty*, (1996) 7 SCC 212.
- Kadra Pahadiya v. State of Bihar*, AIR (1982) SC 1167.
- Keshub Mahindra v. State of Madhya Pradesh*, (1996) 6 SCC 129.
- Kharak Singh v. State of UP*, AIR (1963) SC 1295.
- Khatri v. State of Bihar*, AIR (1981) SC 928.
- Kirloskar Brothers Ltd. v. Employees State Insurance Corp.*, (1996) SCALE 1.
- LIC of India v. Escorts Ltd.*, AIR (1986) SC 1370.
- Lubbe v. Cape plc*, (2000) 1 WLR 1545 (HL).
- M C Mehta v. Union of India*, (1987) 1 SCR 819.
- M C Mehta v. Union of India*, (1996) 10 Suppl SCR 973
- M C Mehta v. Union of India*, (1997) 3 SCC 715.
- M C Mehta v. Kamal Nath*, AIR (2000) SC 1997.
- M C Mehta v. Union of India*, (2003) 3 Supp SCR 925.
- M H Hoskot v. State of Maharashtra*, AIR (1978) SC 1548.
- M/s. Magna Leasing Ltd. v. Bharat Singh*, Appeal No. A-954/2006.

Mayar (HK) Ltd. v. Owners & Parties, Vessel M v. Fortune Express, Appeal (Civil) 867 of 2006.

Modi Entertainment Network v. W S G Cricket Pte. Ltd., Appeal (Civil) 422 of 2003.

Munn v. Illinois, 94 US 113 (1876).

Munna v. State of UP, AIR (1982) SC 806.

Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664.

New Horizons Ltd. v. Union of India, (1995) 1 SCC 478.

Nilabati Behera v. State of Orissa, AIR (1993) SC 1960.

Olga Tellis v. Bombay Municipal Corporation, AIR (1986) SC 180.

P M Ashwathanarayana Setty v. State of Karnataka, AIR (1989) SC 100.

Parmanand Kataria v. Union of India, AIR 1989 SC 2039.

Paschim Banga Khet Mazdoor Samiti v. State of West Bengal, (1996) 4 SCC 37.

Piper Aircraft Co. v. Reyno, 454 US 235 (1981).

Pradeep Kumar v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.

Prem Shankar Shukla v. Delhi Administration, AIR (1980) SC 1535.

PUCL v. Union of India, AIR (1997) SC 568.

PUDR v. Union of India, AIR (1982) SC 1473.

R D Shetty v. International Airport Authority, AIR (1979) SC 1628.

R Raj Gopal v. State of Tamil Nadu, (1994) 6 SCC 632.

Rajdeo Sharma v. State of Bihar, (1998) 7 SCC 507 and (1999) 7 SCC 604.

Raunaq International Ltd. v. IVR Construction Ltd., (1999) 1 SCC 492.

Research Foundation for Science Technology & Natural Resources Policy v. Union of India, Writ Petition (Civil) No. 657 of 1995.

Rudul Sah v. State of Bihar, (1983) 4 SCC 141.

Rylands v. Fletcher, (1868) UKHL 1.

S P Anand v. H D Deve Gowda, (1996) 6 SCC 734.

S P Gupta v. Union of India, (1981) Supp SCC 87.

Sheela Barse v. Secretary, Children's Aid Society, AIR (1987) SC 656
Sheela Barse v. Union of India, AIR (1986) SC 1773.
SMS Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89.
Som Prakash Rekhi v. Union of India, AIR (1981) SC 212.
Spiliada Maritime Corp v. Cansulex Ltd., (1986) 3 All ER 843.
Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 SCC 530.
State of U P v. Renusagar Power Co., (1988) 4 SCC 59.
Subash Kumar v. State of Bihar, AIR (1991) SC 420.
Suk Das v. Union Territory of Arunachal Pradesh, AIR (1986) SC 991.
Sukhdev Singh v. Bhagtram, (1971) 3 SCR 619.
Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.
Sunil Batra v. Delhi Administration, AIR (1980) SC 1579.
T N Godavaraman Thirumulpad v. Union of India, (2008) 9 SCC 711.
Union Carbide Corporation v. Union of India, (1988) MPLJ 540.
Union Carbide Corporation v. Union of India, AIR (1990) SC 273.
Union Carbide Corporation v. Union of India, AIR (1992) SC 248.
Unni Krishnan v. State of AP, (1993) 1 SCC 645.
UP Pollution Control Board v. Modi Distillery, (1987) 3 SCR 798.
Utkarsh Mandal v. Union of India, Writ Petition (C) 9340 of 2009.
Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647.
Visakha v. State of Rajasthan, AIR (1997) SC 3011.
Workmen v. Associated Industries Ltd., AIR (1986) SC 1.
X v. Hospital 'Z', (1998) 8 SCC 296.
Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

Books and Reports

Amnesty International, *Don't Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India*, ASA 20/001/2010, February 2010.

Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On*, Amnesty International, London, 2004.

Austin, Granville, *Working a Democratic Constitution – The Indian Experience*, Oxford University Press, New Delhi, 1999.

Austin, Granville, *The Indian Constitution: Cornerstone of a Nation*, Clarendon Press, Oxford, 1966.

Ayres, Ian & Braithwaite, John, *Responsive Regulation: Transcending the Deregulation Debate* Oxford University Press, New York, 1992.

Baxi, Upendra & Dhanda, Amita (eds.), *Valiant Victims and Lethal Litigation: The Bhopal Case*, N M Tripathi Pvt. Ltd., Bombay, 1990.

Baxi, Upendra & Paul, Thomas (eds.), *Mass Disasters and Multinational Liability: The Bhopal Case*, N M Tripathi Pvt. Ltd., Bombay, 1986.

Bendell, Jem, *Debating NGOs Accountability*, United Nations, New York, 2006.

Bogard, William, *The Bhopal Tragedy: Language, Logic, and Politics in the Production of a Hazard*, Westview Press, Colorado, 1989.

Bradbrook, Lyster & Ottinger, Xi, *The Law of Energy for Sustainable Development*, Cambridge University Press, Cambridge, 2005.

Cassels, Jamie, *The Uncertain Promise of Law: Lessons from Bhopal*, University of Toronto Press, Toronto, 1993

Centre on Public Law & Jurisprudence, Jindal Global Law School (JGLS), *Justice without Delay: Recommendations for Legal and Institutional Reform*, JGLS, New Delhi, 2010.

Chandrachud, Y V, *Ratanlal & Dhirajlal's The Indian Penal Code*, Wadhwa & Co., 28th Edition, Agra, 1997.

Deva, Swati (ed.), *Law and (In)equalities: Contemporary Perspectives*, Easter Book Company, Lucknow, 2010.

Divan, Shyam & Rosencranz, Armin, *Environmental Law and Policy in India: Cases, Materials, and Statutes*, Oxford University Press, New Delhi, 2002.

Engel, Izhak, *The Philosophy of Tort Law*, Dartmouth, Aldershot, 1993.

Fernando, A C, *Business Ethics: An Indian Perspective*, Pearson Education, New Delhi, 2009.

Fortun, Kim, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders*, University of Chicago Press, Chicago, 2001.

Gunningham, Neil, Grabosky, Peter & Sinclair, Darren, *Smart Regulation: Designing Environmental Policy*, Clarendon Press, Oxford, 1998.

Gupta, K N, *Corruption in India*, Anmol Publications Ltd., New Delhi, 2003.

Gupta, K R (ed.), *Special Economic Zones: Issues, Laws and Procedures*, Atlantic Publishers, New Delhi, 2008.

Haines, Fiona, *Corporate Regulation: Beyond 'Punish' or 'Persuade'*, Clarendon Press, Oxford, 1997.

Hardgrave, Robert L & Kochanek, Stanley A, *India: Government and Politics in a Developing Nation*, Thompson, 7th Edition, India, 2008.

Hossain, Kamal et al (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World*, Kluwer Law International, The Hague, 2002.

Joseph, Sarah, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2004.

Kirpal, B N et al (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, New Delhi, 2000.

Koonan, Sujith, *Legal Implications of Plachimada: A Case Study*, IELRC Working Paper 2007-05.

Kumar, C Raj & Chockalingam, K (eds.), *Human Rights, Justice, and Constitutional Empowerment*, Oxford University Press, New Delhi, 2007.

Kurzman, Dan, *A Killing Wind: Inside Union Carbide and the Bhopal Catastrophe*, McGraw-Hill, New York, 1987.

Law Commission of India, *Manpower Planning in Judiciary: A Blueprint*, 120th Report, New Delhi, 1987.

Law Commission of India, *Need to fix Maximum Chargeable Court-fees in Subordinate Civil Courts*, 220th Report, New Delhi, 2009.

Law Commission of India, *Reforms in the Judiciary: Some Suggestions*, 230th Report, New Delhi, 2009.

Law Commission of India, *Revision of Court-fees Structure*, 189th Report, New Delhi, 2004.

Law Commission of India, *The Supreme Court: A Fresh Look*, 125th Report, New Delhi, 1988.

Menon, Madhava R (ed.), *Documents and Court Opinions on Bhopal Gas Leak Disaster Case*, NLSIU, Bangalore, 1991.

Murlidhar, S, *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims 'Twenty Years' of Courtroom Struggles for Justice*, IELRC Working Paper 2004/5.

Noorani, A G, *Constitutional Questions and Citizens' Rights*, Part II, Oxford University Press, New Delhi, 2006.

Ormerod, David, *Smith & Hogan Criminal Law*, Oxford University Press, 11th Edition, Oxford, 2005.

Parker, Christine, *The Open Corporation: Effective Self-regulation and Democracy*, Cambridge University Press, Cambridge, 2002.

Pillay, Mohan R, Sandosham, Paul R & Ponniya Nandakumar (eds.), *Doing Business in India*, Sweet & Maxwell, Singapore, 2004.

Po Jen Yap & Holning Lau (ed.), *Public Interest Litigation in Asia*, Routledge, London, 2010.

Pollock, Fredrick Sir, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, Stevens, 30th Edition, London, 1929.

Prime Minister's High Level Committee, Government of India, *Report on Social, Economic and Educational Status of the Muslim Community of India*, New Delhi, 2006.

Raman, K Ravi & Lipschutz, Ronnie D (eds.), *Corporate Social Responsibility: Comparative Critiques*, Palgrave Macmillan, Hampshire, 2010.

Razzaque, Jona, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, Kluwer Law International, The Hague, 2004.

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further Steps Toward the Operationalisation of the "Protect, Respect and Remedy" Framework*, A/HRC/14/27, 9 April 2010.

Sangvai, Sanjay, *The River and Life: Peoples' Struggle in the Narmada Valley*, Earthcare Books, 2nd Edition, Mumbai, 2002.

Sarvaria, S K, *Nelson's Indian Penal Code*, LexisNexis, 9th Edition, New Delhi, 2003.

Sathe, S P, *Judicial Activism in India*, Oxford University Press, New Delhi, 2002.

Shastri, Lalit, *Bhopal Disaster: An Eye Witness Account*, Criterion Publications, New Delhi, 1985.

Singh, Avtar *Principles of Mercantile Law*, Eastern Book Company, 7th Edition, Lucknow, 2000.

Singh, G P, *Ratanlal & Dhirajlal's the Law of Torts*, Wadhwa, 23rd Edition, Nagpur, 1997.

Singh, Mahendra P, *Shukla's Constitution of India*, Eastern Book Co., 11th Edition, Lucknow, 2008.

Sood, Vivek, *Cyber Law Simplified*, Tata McGraw-Hill Publishing Co., New Delhi, 2001.

Supreme Court of India, *Supreme Court of India: Practice and Procedure*, New Delhi, 3rd Edition, 2010.

Vashishth, Vikas (ed.), *Bharat's Law and Practice of Environmental Laws in India*, Bharat Law House, New Delhi, 1999.

Verma, S K & Kusum (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach*, Oxford University Press, New Delhi, 2000.

Vittal, N, *Corruption in India: The Roadblock to National Prosperity*, Academic Foundation, New Delhi, 2003.

Book Chapters and Journal Articles

Abraham, C M & Rosencranz, Armin, "An Evaluation of Pollution Control Legislation in India", in *Columbia Journal of Environmental Law*, Volume 11, 1986, 101.

Balkin, Jack M, "How Rights Change: Freedom of Speech in the Digital Age", in *Sydney Law Review*, Volume 26, 2004, 5.

Basu, Pranab Kanti, "Land Acquisition: Impossibility of Corporate Social Responsibility" in K Ravi Raman & Ronnie D Lipschutz (eds.), *Corporate Social Responsibility: Comparative Critiques*, Palgrave Macmillan, Hampshire, 2010, 201.

Bhattamishra, Pragnya & Singh, Kumar Saurabh, "River for Sale: The Sheonath Controversy", in *Indian Juridical Review*, 2004, 239.

Binder, Christina, “Economic Growth at the Price of Human Rights Violations? The Protection of Human/Labour Rights in Export Processing Zones”, in *City University of Hong Kong Law Review*, Volume 2, 2010, 99.

Cooper, Jeremy, “Poverty and Constitutional Justice”, in *Mercer Law Review*, Volume 44, 1993, 611.

Dam, Shubhankar & Tewary, Vivek, “Polluting Environment: Is a “Polluted” Constitution Worse than a Polluted Environment?”, in *Journal of Environmental Law*, Volume 17, 2005, 383.

Desai, Ashok H & Murlidhar, S, “Public Interest Litigation: Potential and Problems” in Kirpal et al (eds.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, New Delhi, 2000, 159.

Deva, Surya, “Constitutional Courts as Positive Legislators: The Indian Experience” in Allan R Brewer-Carias (General Reporter), *National Reports on ‘Constitutional Courts as Positive Legislatures’*, XVIII International Congress of Comparative Law – Washington, 2010, 347.

Deva, Surya, “Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations”, in *Newcastle Law Review*, Volume 8, 2004, 87.

Deva, Surya, “Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?”, in *George Washington International Law Review*, Volume 39, 2007, 255.

Deva, Surya, “Corporate Human Rights Abuses: What Role for the National Human Rights Institutions?” in Hitoshi Nasu & Ben Saul (eds.), *Human Rights in the Asia Pacific Region: Towards Institution Building*, Routledge, forthcoming in 2011.

Deva, Surya, “Human Rights Realisation in an Era of Globalisation: The Indian Experience”, in *Buffalo Human Rights Law Review*, Volume 12, 2006, 116

Deva, Surya, “Public Interest Litigation in India: A Critical Review”, in *Civil Justice Quarterly*, Volume 28, 2009, 19.

Deva, Surya, “Sustainable Development: What Role for the Company Law?”, in *International & Comparative Corporate Law Journal*, Volume 8, 2011, 76.

Deva, Surya, “The State of Affirmative Action amidst Privatisation: Some Critical Reflections” in Swati Deva (ed), *Law and (In)equalities: Contemporary Perspectives*, Easter Book Company, Lucknow, 2010, 25.

Divan, Anil, “The Supreme Court and Tort Litigation” in B N Kirpal et al (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, New Delhi, 2000, 404.

Dowling, Donald C, “The Multinational’s Manifesto on Sweatshops, Trade/Labour Linkage, and Codes of Conduct”, in *Tulsa Journal of Comparative and International Law*, Volume 8, 2000, 528.

Galanter, Marc S, “Legal Torpor: Why so little has Happened in India after the Bhopal Tragedy?” in *Texas International Law Journal*, Volume 20, 1985, 273.

Galanter, Marc & Krishnan, Jayanth, ““Bread for the Poor”: Access to Justice and the Rights of the Needy in India’, in *Hastings Law Journal*, Volume 55, 2004, 769.

Jain, M P, “The Supreme Court and Fundamental Rights” in S K Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India – Its Grasp and Reach*, Oxford University Press, New Delhi, 2000, 1.

Jasanoff, S “The Bhopal Disaster and the Right to Know”, in *Social Science & Medicine*, Volume 27, 1988, 1113.

Krishnaswamy, Sudhir, “Horizontal Application of Fundamental Rights and State Action in India” in C Raj Kumar & K Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment*, Oxford University Press, New Delhi, 2007, 47.

Kumar, Raj C, “Corruption and its Impact on Human Rights and the Rule of Law: Governance Perspectives” in C Raj Kumar & K Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment*, Oxford University Press, New Delhi, 2007, 153.

Mahadevia, Darshini, “Sustainable Development in India: An Inclusive Perspective” in *Development in Practice*, Volume 11:2/3, 2001, 242.

Malimath, v. S Justice, “Report of the National Human Rights Commission of India” in Kamal Hossain et al (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World*, Kluwer Law International, The Hague, 2002, 211.

Mazumdar, Suchita, “Development through Displacement: A Study of Singur, West Bengal” in K R Gupta (ed.), *Special Economic Zones: Issues, Laws and Procedures*, Atlantic Publishers, New Delhi, 2008, 88.

Muralidharan, Sukumar, “Bhopal: Continuing Institutional Crisis”, in *Economic & Political Weekly*, Volume 39, 2005, 5196.

Prince, Peter, “Bhopal, Bougainville and Ok Tedi: Why Australian Forum non Conveniens Approach is Better”, in *International & Comparatively Law Quarterly*, Volume 47, 1998, 573.

Rajagopal, Balakrishnan, “Judicial Governance and the Ideology of Human Rights: Reflections from a Social Movement Perspective”, in C Raj Kumar & K

Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment*, Oxford University Press, New Delhi, 2007, 200.

Robinson, Nick, “Expanding Judiciaries: India and the Rise of Good Governance Court”, in *Washington University Global Studies Law Review*, Volume 8, 2009, 1.

Salve, Harish, “Justice between Generations: Environment and Social Justice” in Kirpal et al (eds.) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, New Delhi, 2007, 360.

Shah, Sheetal B, “Illuminating the Possible in the Developing World”, in *Vanderbilt Journal of Transnational Law*, Volume 32, 1999, 435.

Sharma, Charu, “The Battle against Sexual Harassment: Are Women still the Beast of Burden?”, in Swati Deva (ed.), *Law and (In)equalities: Contemporary Perspectives*, Eastern Book Company, Lucknow, 2010, 73.

Singh, Mahendra P, “Fundamental Rights, State Action and Cricket in India”, in *Asia Pacific Law Review*, Volume 13, 2006, 203.

Singh, Mahendra P, “India: Protection of Human Rights against State and Non-state Actors”, in Oliver & Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study*, Routledge-Cavendish, London, 2007, 180.

Singh, Mahendra P, “Securing the Independence of the Judiciary: The Indian Experience”, in *Indiana International & Comparative Law Review*, Volume 10, 2000, 245.

Sripati, Vijayashri “Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)”, in *American University International Law Review*, Volume 14, 1996, 447.

Sripati, Vijayashri, “Human Rights in India Fifty Years after Independence”, in *Denver Journal of International Law & Policy*, Volume 26, 1997, 93.

Trotter, Clayton R. et al, “Bhopal, India and Union Carbide: The Second Tragedy”, in *Journal of Business Ethics*, Volume 8, 1989, 439.

Wahi, Namita, “Human Rights Accountability of the IMF and the world Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability”, in *UC Davis Journal of International Law & Policy*, Volume 12, 2006, 386.

Electronic Resources

"Affidavit of Mr Prashant Bhushan", <<http://www.scribd.com/doc/38528460/Prashant-Bhushan-s-Supplementary-Affidavit-in-SC>> (last accessed 3 February 2011).

"Affidavit of Mr Shanti Bhushan", <<http://www.scribd.com/doc/37842301/Shanti-Bhushan-s-Affidavit-in-SC>> (last accessed 3 February 2011).

Anti-slavery, "What is bonded labour?", <http://www.antislavery.org/english/slavery_today/bonded_labour.aspx> (last accessed 3 February 2011).

Bardhan, Pranab, 'India Battles for Transparency – Part II', *YaleGlobal Online*, 24 December 2010, <<http://yaleglobal.yale.edu/content/india-battles-transparency-%E2%80%93-part-ii>> (last accessed 3 February 2011).

Bendern, Paul De & Chakravorty, Jui, "New corruption scandal deals blow to India's image", *Reuters*, 25 November 2010, <<http://www.reuters.com/article/idUSTRE6AO19P20101125>> (last accessed 3 February 2011).

Bhushan, Prashant, "A Historic Non-Impeachment", *Frontline*, 4 June 1993, <http://www.judicialreforms.org/files/cover_story_ramaswami.pdf> (last accessed 3 February 2011).

Bunsha, Dionne, "Rural Resistance", *Frontline*, 7-20 October 2006, <<http://www.hinduonnet.com/fline/fl2320/stories/20061020004700900.htm>> (last accessed 3 February 2011).

Campaign for Judicial Accountability & Judicial Reforms (CJAR), <<http://www.judicialreforms.org/>> (last accessed 3 February 2011).

Central Information Commission, "Decisions", <http://www.rti.india.gov.in/CIC_Decisions1.php> (last accessed 3 February 2011).

Central Vigilance Commission, "Background", <http://cvc.gov.in/cvc_back.htm> (last accessed 3 February 2011).

Central Vigilance Commission, "Initiatives Taken by the Commission", <<http://www.cvc.nic.in/newinit16092010.htm>> (last accessed 3 February 2011).

Central Vigilance Commission, "National Anti-corruption Strategy (Draft)", 20 September 2010, <<http://www.cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf>> (last accessed 3 February 2011).

Centre for Science and Environment, "CSE Welcomes High Court Decision", <<http://www.cseindia.org/node/510>> (last accessed 3 February 2011).

Child Labour, “Bonded Child Labour in India”, <<http://www.childlabor.in/bonded-child-labour-in-india.htm>> (last accessed 3 February 2011).

Corruption in India, <<http://www.corruptioninindia.org>> (last accessed 3 February 2011).

Dhavan, Rajeev, “Judicial Corruption”, *The Hindu*, 22 February 2002, <<http://www.hinduonnet.com/2002/02/22/stories/2002022200031000.htm>> (last accessed 3 February 2011).

Dhavan, Rajeev, “Whistles, strings and slaps”, *The Hindu*, 12 December 2003, <<http://www.hinduonnet.com/2003/12/12/stories/2003121201851200.htm>> (last accessed 3 February 2011).

Dhume, Sadanand, “India Battles for Transparency – Part I”, *YaleGlobal Online*, 22 December 2010, <<http://yaleglobal.yale.edu/content/india-battles-transparency-part-i>> (last accessed 3 February 2011).

Environment Ministry stalls Vedanta’s Niyamgiri project in Orissa”, *The Economic Times*, 24 August 2010, <<http://economictimes.indiatimes.com/news/news-by-industry/indl-goods/-svs/metals--mining/Environment-Ministry-stalls-Vedantas-Niyamgiri-project-in-Orissa/articleshow/6425059.cms>> (last accessed 2 February 2011).

Gadgil, Vidyadhar, “SLAPPING Down Public Protest”, 26 January 2009, <<http://mandgoa.blogspot.com/2009/01/slapping-down-public-protest.html>> (last accessed 3 February 2011).

Gap pulls “child labour” clothing’, *BBC News*, 28 October 2007, <http://news.bbc.co.uk/2/hi/south_asia/7066019.stm> (last accessed 3 February 2011).

Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflict Project, “India: International Treaties Adherence”, <http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=107> (last accessed 2 February 2011).

Government of India, “Approved SEZs in India”, <<http://www.sezindia.nic.in/about-asi.asp>> (last accessed 3 February 2011).

Granito, Alison, “80% of Indians live on less than \$2 a day: WB”, 16 October 2007, <<http://www.livemint.com/articles/2007/10/16235421/80-of-Indians-live-on-less-th.html>> (last accessed 3 February 2011).

Greenpeace, “Play Turtle vs TATA”, 28 January 2011, <<http://www.greenpeace.org/india/en/Get-Involved/Turtle-vs-TATA/>> (last accessed 3 February 2011).

Greenpeace, "TATA Tries to Silence Critics, Takes Greenpeace to Court", 16 December 2010, <<http://greenpeace.in/turtle/news/tata-tries-to-silence-critics-takes-greenpeace-to-court>> (last accessed 3 February 2011).

Gupta, Gargi, "Singur farmers: Why they oppose Tata plant", 9 December 2006, <<http://www.rediff.com/money/2006/dec/09tata.htm>> (last accessed 2 February 2011).

Gupta, Suchandana, "Bhopal Gas Case Verdict: Justice Delayed, Denied", *The Times of India*, 8 June 2010, <<http://timesofindia.indiatimes.com/india/Bhopal-gas-case-verdict-Justice-delayed-denied/articleshow/6021821.cms>> (last accessed 3 February 2011).

Haq, Zia, "Six top science bodies' verdict: Bt brinjal safe", *The Hindustan Times*, 24 September 2010, <<http://www.hindustantimes.com/Six-top-science-bodies-verdict-Bt-brinjal-safe/Article1-603915.aspx>> (last accessed 3 February 2011).

"How Tata got Singur cheap", *The Hindustan Times*, 11 September 2008, <<http://www.hindustantimes.com/How-Tata-got-Singur-cheap/Article1-337064.aspx>> (last accessed 2 February 2011).

Human Rights Watch, "The Enron Corporation: Corporate Complicity in Human Rights Violation", 23 January 2002, <<http://www.hrw.org/reports/1999/enron/>> (last accessed 3 February 2011).

"India lost \$462bn in illegal capital flows, says report", *BBC News*, 19 November 2010, <<http://www.bbc.co.uk/news/world-south-asia-11782795>> (last accessed 3 February 2011).

"India Tops List of Countries where Bribery is Way of Life", *The Times of India*, 9 December 2010, <<http://timesofindia.indiatimes.com/india/Corruption-on-the-rise-54-Indians-paid-bribe-last-year/articleshow/7071768.cms>> (last accessed 3 February 2011).

Kim and Huang, "Fact Finding Report on Human Rights and Environmental Violations of the POSCO Project in Orissa, India", <<http://material.ahrchk.net/india/AHRC-PRL-028-2010-01.pdf>> (last accessed 3 February 2011)

Know India, "Literacy", <<http://india.gov.in/knowindia/literacy.php>> (last accessed 3 February 2011).

Krishnakumar, R, "Plachimada's Claims", *Frontline*, 17-30 July 2010, <<http://www.flonnet.com/fl2715/stories/20100730271503300.htm>> (last accessed 3 February 2011).

Kumar, Shashank P, “Standard Chartered Bank Case: A Jurisprudential Analysis”, *SSRN Working Paper Series*, July 2006, <<http://ssrn.com/abstract=1348425>> (last accessed 3 February 2011).

Lok Sabha, “Working children in the age group of 5-14 years”, <<http://labour.nic.in/pib/PressRelease/LS-Working%20children%20in%20the%20age%20group%20of%205-14%20years-29-11-10.pdf>> (last accessed 3 February 2011).

Mahabal, Kamayani Bali, “A cheeky video game by Greenpeace but corporate giant Tata is not amused”, 5 August 2010, <<http://www.thehoot.org/web/freetracker/story.php?storyid=134§ionId=15>> (last accessed 3 February 2011).

Mahapatra, Dhananjay, “8 of 16 former Chief Justice of India corrupt: Former Law minister”, *The Times of India*, 16 September 2010, <<http://timesofindia.indiatimes.com/india/8-of-16-former-Chief-Justice-of-India-corrupt-Former-Law-minister/articleshow/6565382.cms>> (last accessed 3 February 2011).

Mahapatra, Dhananjay, “These are big people, I’m scared: Judge Reghupathy”, *The Times of India*, 16 December 2010, <<http://timesofindia.indiatimes.com/india/These-are-big-people-Im-scared-Judge-Reghupathy/articleshow/7108712.cms>> (last accessed 3 February 2011).

Mahapatra, Dhananjay, “SC Reopens Bhopal Case, Notices to Accused on Homicide Charge”, *The Times of India*, 1 September 2010, <<http://timesofindia.indiatimes.com/india/SC-reopens-Bhopal-case-notices-to-accused-on-homicide-charge/iplarticleshow/6469576.cms>> (last accessed 3 February 2011).

Marqusee, Mike, “Whitewashing the Past”, *Guardian*, 24 May 2002, <<http://www.guardian.co.uk/education/2002/may/24/artsandhumanities.highereducation>> (last accessed 2 February 2011).

“Memorandum of Understanding between the Government of Orissa and M/s POSCO for Establishment of an Integrated Steel Plant at Paradeep”, 22 June 2005, <<http://www.orissa.gov.in/posco/POSCO-MoU.htm>> (last accessed 3 February 2011).

Ministry of Corporate Affairs, Government of India, “Corporate Social Responsibility Voluntary Guidelines 2009”, December 2009, <http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf> (last accessed 2 February 2011).

Ministry of Environment and Forests, “Direction under Section 5 of the Environment (Protection) Act, 1986 regarding 1MTPA Alumina Refinery and 75 MW Captive Power Plant at Lanjigarh in Dist. Kalahandi in Orissa by M/s Vedanta Aluminum Limited”, 20 October 2010, <<http://moef.nic.in/downloads/public-information/Vedanta-direction-sec5.pdf>> (last accessed 3 February 2011).

Ministry of Environment and Forests, “Direction under Section 5 of the Environment (Protection) Act, 1986, regarding withdrawal of ToRs, Cancellation of Public Hearing and action under Provision of the Environment (Protection) Act, 1986 [...] in Orissa by M/s Vedanta Aluminium Limited”, 20 October 2010 <<http://moef.nic.in/downloads/public-information/letter-vedanta-sec5>> (last accessed 3 February 2011).

Ministry of Environment and Forests, “EIA 2006 Notification”, <<http://www.moef.nic.in/legis/eia/so1533.pdf>> (last accessed 3 February 2011).

Ministry of Environment and Forests, “POSCO: Final Order and Other Relevant Documents”, 31 January 2011, <<http://moef.nic.in/downloads/public-information/Posco31012011.pdf>> (last accessed 3 February 2011).

Ministry of Environment and Forests, Environment Impact Assessment Notification SO 60(E), 27 January 1994, <[http://www.moef.nic.in/legis/eia/so-60\(e\).html](http://www.moef.nic.in/legis/eia/so-60(e).html)> (last accessed 3 February 2011).

Ministry of Environment and Forests, “Report of the four member committee for investigation into the proposal submitted by the Orissa mining company for bauxite mining in Niyamgiri”, 16 August 2010, <http://moef.nic.in/downloads/public-information/Saxena_Vedanta.pdf> (last accessed 3 February 2011).

Ministry of Labour, Government of India, “Bonded Labour”, <<http://www.labour.nic.in/annrep/files2k1/lab9.pdf>> accessed 3 February 2011. (last accessed 3 February 2011).

Narain, Sunita, “We the Regulators”, 31 August 2003, <<http://www.downtoearth.org.in/node/13397>> (last accessed 3 February 2011).

Nariman, Fali S, “Some reflections”, *Seminar*, December 2004, <<http://www.india-seminar.com/2004/544/544%20fali%20s.%20nariman.htm>> (last accessed 3 February 2011).

National Commission for Women, India, “Sexual Harassment at Workplace”, <<http://ncw.nic.in/frmReportLegal07.aspx>> (last accessed 3 February 2011).

National Human Rights Commission (NHRC), “NHRC Takes Suo Motu Cognizance of Media Reports on Striping of a Woman at a Police Post”, 14 June 2010, <<http://nhrc.nic.in/dispatchArchive.asp?fno=2063>> (last accessed 3 February 2011).

NDTV, “Harassment Cases: M S Gill Promises Justice”, 26 July 2010, <<http://www.ndtv.com/article/sports/harassment-cases-ms-gill-promises-justice-39810>> (last accessed 3 February 2011).

NHRC, “Commission’s Order on Nandigram Issue”, 8 February 2008, <<http://nhrc.nic.in/dispatchArchive.asp?fno=1527>> (last accessed 3 February 2011).

NHRC, “Commission’s Order on Nandigram Issue”, 8 February 2008, <<http://nhrc.nic.in/dispatch.asp?fno=1527>> (last accessed 3 February 2011).

NHRC, “International Human Rights Law and Its Relation to National Law”, <<http://nhrc.nic.in/Publications/Disability/Chapter04.html>> (last accessed 2 February 2011).

NHRC, “UN Special Representative’s Visit to NHRC”, <<http://nhrc.nic.in/dispatch.asp?fno=1750>> accessed 23 November 2009 (last accessed 2 February 2011).

Office of Attorney General for India, “Opinion of the Attorney General”, 20 July 2010, <<http://moef.nic.in/downloads/public-information/attorney-general-of-india20072010.pdf>> (last accessed 3 February 2011).

Rajagopal, Krishnadas, “Judges’ postings under RTI? SC decides to decide”, 27 November 2010, <<http://www.indianexpress.com/news/judges-postings-under-rti-sc-decides-to-decide/716868/>> (last accessed 3 February 2011).

Rajya Sabha, “Bonded labourers in the country”, 1 December 2010, <<http://labour.nic.in/pib/PressRelease/RS%20-%20Bonded%20Laboureres%20in%20the%20country%201-12-2010.pdf>> (last accessed 3 February 2011).

Reserve Bank of India, “Credit Card Operations of Bank”, para. 5(iii)(c), <<http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=2627&Mode=0>> (last accessed 3 February 2011).

Sachar, Rajindar, “National Judicial Council”, <http://www.pucl.org/Topics/Law/2006/judicial_council.html> (last accessed 3 February 2011).

Saxena, N C, “Letter to Minister”, 23 August 2010, <http://moef.nic.in/downloads/public-information/Letter_to_Minister_23_Aug.pdf> (last accessed 3 February 2011).

Sharma, Amol, “India Raises Poverty-Rate Estimate”, *Wall Street Journal*, 18 April 2010, <<http://online.wsj.com/article/SB10001424052748704508904575191550764145376.html>> (last accessed 3 February 2011).

“Supreme Court Caution on Abuse of PIL”, *The Hindu*, 22 December 2004, <<http://www.hinduonnet.com/thehindu/2004/12/22/stories/2004122202951200.htm>> (last accessed 3 February 2011).

Supreme Court of India, “The monthly statement of pending cases for the month of November, 2010”, <<http://supremecourtindia.nic.in/pendingstat.htm>> (last accessed 3 February 2011).

“Supreme Court Sore Over Delay in Bhopal Gas Tragedy Case”, *The Hindu*, 8 August 2010, <<http://www.hindu.com/2010/08/08/stories/2010080859750400.htm>> (last accessed 3 February 2011).

Swami Agnivesh.com, “About Bandhua Mukti Morcha (BLLF)”, <<http://www.swamiagnivesh.com/aboutbmm.htm>> (last accessed 3 February 2011).

“Tenth International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights” (Edinburgh Declaration) (adopted 10 October 2010), <http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf> (last accessed 3 February 2011).

Thacker, Teena, “Sexual harassment Bill ready with new clause”, 19 May 2010, <<http://www.expressindia.com/latest-news/Sexual-harassment-Bill-ready-with-new-clause/620581/>> (last accessed 3 February 2011).

Transparency International, “Corruption Perceptions Index 2010”, <http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results> (last accessed 3 February 2011).

Transparency International, “Overview of Corruption and Anti-corruption Efforts in India”, January 2009, <<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=188>> (last accessed 3 February 2011).

Transparency International, “Global Corruption Barometer 2010”, <http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results> (last accessed 3 February 2011).

University of Minnesota Human Rights Library, “Ratification of International Human Rights Treaties – India”, <<http://www1.umn.edu/humanrts/research/ratification-india.html>> (last accessed 2 February 2011).

Varottil, Umakanth, “India’s Corporate Governance Voluntary Guidelines 2009: Rhetoric or Reality?”, 5 July 2010, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1634821> (last accessed 2 February 2011).

Venkatesan, J, “Set up National Judicial Commission”, *The Hindu*, 17 September 2008, <<http://www.hindu.com/2008/09/17/stories/2008091756491400.htm>> (last accessed 3 February 2011).

Venkatsean, J, “Slap Exemplary Costs for PIL Abuse: Supreme Court”, *The Hindu*, 25 January 2010, <<http://www.hindu.com/2010/01/25/stories/2010012555711100.htm>> (last accessed 3 February 2011).

Vidhan, M, “Company’s Liability where Imprisonment is Mandatory Part of Sentence”, *The Practical Lawyer*, July 2006, <<http://www.ebc-india.com/>

practicallawyer/index.php?option=com_content&task=view&id=6646&Itemid=1
(last accessed 3 February 2011).