CHAPTER VI

CORPORATE CRIMINAL LIABILITY IN INDIA: THE LEGAL FRAME WORK
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6.1. Introduction

This chapter reviews various laws that might be relied on by victims to make corporation accountable for criminal 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. Yet, as will be explored below, the courts have in some cases been creative in expanding the scope of horizontal application of Fundamental Rights.

6.2. 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. As discussed below, these provisions should be quite useful in determining the basic human rights and responsibilities of companies or redressing corporate abuses.

One particular relevant Fundamental Right 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. It "includes right to live with human dignity and all that goes along with it". As the horizon of Article 21 ever widens, the Court has read into it, inter alia, the rights to health, livelihood, free and compulsory education up to the age of 14, unpolluted air, etc.

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2. Constitution of India, Articles 12-35.


environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights relating to people undergoing trials, convicts and prisoners. Article 21 has also been used to grant compensation for violations of Fundamental Rights.

While some of these Fundamental Rights are available only to Indian citizens, others are available to non-citizens as well, including juridical and

7. Unni Krishnan v. State of A.P. (1993) 1 SCC 645. Now, it was included under Art.21A


16. 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
artificial persons. Notably, some Fundamental Rights are available to be exercised by groups of people or communities. The Fundamental Rights cannot be curtailed even by a constitutional amendment if such curtailment is against the ‘basic structure’ of the Constitution.

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 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).

17. 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).

18. See, e.g., Ibid., Articles 26, 29 and 30.

19. 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, 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.
definition of 'state' under Article 1220. 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 well21, meaning their justifiability 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 Rajasthan22, 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

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20. 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."


of right to life and personal liberty by private persons. 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 due course'. This has not though happened yet and direct horizontal application of these Fundamental Rights to non-state actors poses some difficulties. Their indirect horizontal effect does though remain an option.

Article 12 of the Constitution defines the term “state” to include “the Government and Parliament of India and the Government and the legislature

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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. Justice Bhagwati in *Ajay Hasia v. Khalid Mujib*, 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

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has been held to be immaterial whether a corporation is created by or under statute.29

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 case, it is arguable that the test might not afford adequate protection of Fundamental Rights against corporations or companies given the current climate of liberalisation and free market economy in India30.

The Supreme Court decision in Zee Telefilms Ltd. v. Union of India31 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 12.32

In addition to the Fundamental Rights, Part IV of the Constitution lays down several Directive Principles\textsuperscript{33}, 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\textsuperscript{34}.

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"\textsuperscript{35}. Because of their

\textsuperscript{33} Constitution of India, Articles 36-51.

\textsuperscript{34} Ibid., Articles 39-51.

\textsuperscript{35} Ibid., Article 37.
importance in the overall scheme of things, Fundamental Rights and Directive Principles together are labelled by one leading commentator as “the conscience of the Constitution”36.

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.

The Supreme Court generally observed that37:

“...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.”


6.3. The Companies Act, 1956

The Indian Companies Act of 1956 contains several provisions that contemplate the criminal liability of companies and/or its relevant officers in various situations. Some illustrative examples should suffice here.

The majority of the sections impose liability on the company as well as officers/directors of the company. However, certain sections impose criminal liability exclusively on officers/directors of the company. The following sections in the Companies Act, 1956 impose criminal liability on the company and provide for punishment by way of fine.

- **Section 59** provides that if any prospectus is issued in contravention of section 57 or 58, the company, and every person, who is knowingly a party to the issue thereof, shall be punishable with fine which may extend to fifty thousand rupees.

  - Sections 57 and 58 provide for the procedure and circumstances under which an expert’s opinion can be given in a prospectus.

- **Sec 108-I(2)(a)** provides that every body corporate which makes any transfer of shares without giving any intimation as required by section 108B shall be punishable with fine which may extend to fifty thousand rupees. Section 108B places an obligation on bodies corporate holding 10 percent or more of the nominal value of the subscribed equity share

38. 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”.

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capital of any other company to before transferring one or more of such shares, give the Central Government intimation of its proposal to do so including the particulars of share(s) proposed to be transferred.

- **Sec. 108-I(4)(b)** mandates that if *any company* gives effect to any voting or other right exercised in relation to any share acquired in contravention of the provisions of section 108B, or which gives effect to any voting right in contravention of any direction made by the Central Government under section 108D, *company shall be punishable with fine* which may extend to fifty thousand rupees.

- **Sec. 142** provides that if default is made in filing with the Registrar for registration the particulars (a) of any charge created by the company ;(b) of the payment or satisfaction of a debt in respect of which a charge has been registered under this Part ; or (c) of the issues of debentures of a series ; requiring registration with the Registrar under the provisions of this Part, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues.

- **Sec. 162** seeks to impose criminal liability on companies that fail to comply with the provisions of secs. 159, 160 and 161 of the Companies Act. Section 159 places an obligation on companies having a share capital to prepare and file with the Registrar a return containing particulars specified in Part-I of Schedule V within a specified time.
Section 160 places a similar obligation on companies not having a share capital. Section 161 provides that such return shall be signed both by a director and a manager/secretary. It also mandates the company to file a certificate with the registrar containing certain particulars specified in the section. Now, sec 162 provides that if a company fails to comply with any of the provisions contained in section 159, 160, or 161, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

Sec. 168 provides that if default is made in holding a meeting of the company in accordance with section 166, or in complying with any directions of the Central Government under sub-section (1) of section 167, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees and in the case of a continuing default, with a further fine which may extend to two thousand five hundred rupees for every day after the first during which such default continues. Sec. 166 provides for Annual General Meeting and lays down the time frame for conducting it.

Sec. 207 imposes criminal liability on companies for not distributing dividends within thirty days for the date of declaration of such dividend. According to this section where a dividend has been declared by a company but has not been paid, or the warrant in respect thereof has not been posted, within thirty days from the date of the declaration the company shall be liable to pay simple interest at the rate of eighteen
per cent per annum during the period for which such default continues.
The section also provides that every director of the company shall, if he is knowingly a party to the default, be punishable with simple imprisonment for a term which may extend to three days and shall also be liable to fine of one thousand rupees for every day during which such default continues.

- **Sec. 218** provides for a punishment of fine on the company and every officer of the company who is in default which may extend to five thousand rupees for improper issue, circulation or publication of Balance Sheet or Profit and Loss Account.

- **Sec. 232** provides that if default is made by a company in complying with any of the provisions contained in section 225 to 231, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees. Sections 225 to 231 pertains appointment, removal of auditors, their rights and duties and the duties of the companies towards the auditors.

- **Sec. 423** provides that if default is made in complying with the requirements of section 421 or 422, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to two thousand rupees. Section 421 lays down the obligation of a receiver to file his receipts and payments with the registrar. Sec. 422 provides that where a receiver of the property of a company has been appointed, every invoice or business letter issued on
behalf of the company shall contain a statement to the effect that a receiver has been appointed.

Sec. 598 imposes criminal liability on foreign companies. Part XI of the Companies Act places certain obligation on foreign companies. Now, sec. 598 provides that if any foreign company fails to comply with any of the foregoing provisions of this Part, the company, and every officer or agent of the company who is in default, shall be punishable with fine which may extend to ten thousand rupees, and in the case of a continuing offence, with an additional fine which may extend to one thousand rupees for every day during which the default continues.

Sec. 629 A provides that if a company or any other person contravenes any provision of this Act for which no punishment is provided elsewhere in this Act or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to five thousand rupees, and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues.

Exclusive Criminal Liability of Officers/Directors:

Sec. 105 provides that if any officer of the company (a) knowingly conceals the name of any creditor entitled to object to the reduction ;(b)
knowingly misrepresents the nature or amount of the debt or claim of any creditor; or (c) abets or is privy to any such concealment or misrepresentation as aforesaid; he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

Sec. 117-C(5) if default is made in complying with the order of the Company Law Board under sub-section (4) of sec. 117-C (directing the company to redeem the debentures forthwith by the payment of principal and interest due thereon), every officer of the company who is in default, shall be punishable with imprisonment which may extend to three years and shall also be liable to a fine of not less than five hundred rupees for every day during which such default continues.

Sec. 272 imposes criminal liability on directors under certain circumstances. According to this section, 'if after the expiry of the said period of two months, any person acts as a director of the company when he does not hold the qualification shares referred to in section 270, he shall be punishable with fine which may extend to five hundred rupees for every day between such expiry and the last day on which he acted as a director'.

Sec. 279 provides that any person who holds office, or acts, as a director of more than fifteen companies shall be punishable with fine which may extend to fifty thousand rupees in respect of each of those companies after the first twenty.
Sec 374 provides that if default is made in complying with the provisions of section 372 or section 373, every officer of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees. Sections 372 and 373 regulate the purchase of shares of other companies by a company.

Sec. 420-C provides that any officer of a company who, knowingly, contravenes, or authorises or permits the contravention of, the provisions of section 417, 418 or 419, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees. Sections 417, 418 and 419 deal with employees' securities and provident funds.

Sec. 539 places criminal liability on officers and contributories of a company for falsification of books.

According to the section 'if with intent to defraud or deceive any person, any officer or contributory of a company which is being wound up (a) destroys, mutilates, alters, falsifies or secrets, or is privy to the destruction, mutilation, alteration, falsification or secreting of, any books, papers or securities ; or (b) makes, or is privy to the making of, any false or fraudulent entry in any register book of account or document belonging to the company ; he shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Sec 541 imposes criminal liability on officers of a company where proper accounts not kept. According to the section 'where a company is
being wound up, if it is shown that proper books of accounts were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of the winding up, whichever is shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable, be punishable with imprisonment for a term which may extend to one year.

Sec 630 provides that if any officer or employee of a company (a) wrongfully obtains possession of any property of a company; or (b) having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by this Act; he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may extend to ten thousand rupees.

Thus, the Companies Act specifically imposes criminal liability on companies as well as on its officers and directors under a plethora of circumstances. However, one must remember that corporate criminal liability in India can and does exist independent of the Companies 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\(^39\). 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 company law framework does not offer much hope for victims of criminal abuses, two developments seem to indicate a change in this landscape.

First, the Companies Bill, 2012 contains one provision that would, if enacted as law, have a direct relevance to human rights responsibilities of companies. Clause 178(5) 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

\(^{39}\) The Companies Bill, 2012 (Bill No. 121C of 2011) as passed by Lok Sabha on 18-12-2012, seems to fix this anomaly by increasing the amount of fine for different offences.
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 178 (6) 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 and stakeholders\(^{40}\).

The second development that deserves mention is the 2009 Corporate Social Responsibility (CSR) Voluntary Guidelines issued by the Indian Ministry of Corporate Affairs\(^{41}\). 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"\(^{42}\).

The CSR policy should cover issues such as care for all stakeholders, ethical functioning, respect for workers' rights, human rights and the

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42. Ibid., p. 11.
environment, and activities to promote social and inclusive development.\textsuperscript{43} 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.”\textsuperscript{44} The same is also appears in the Companies Bill, 2012\textsuperscript{45}.

6.4. 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 or association or body of persons, whether incorporated or not”. It is, thus, clear that corporations and partnership firms could be prosecuted for offences under the IPC\textsuperscript{46}.

But companies cannot be prosecuted for each and every offence under the IPC. For instance, they cannot be prosecuted for offences which can only

\textsuperscript{43} Ibid., pp. 11-12.


\textsuperscript{45} Clause 135 (1) Every company having net worth of Rs.five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director and Schedule-VII. See The Companies Bill, 2012 (Bill No. 121C of 2011) as passed by Lok Sabha on 18-12-2012

\textsuperscript{46} Incidentally, the IPC also protect companies. For instance, Section 499 (Explanation 2) makes defaming a company a criminal offence.
be committed by human beings (like rape or murder) or where the only punishment is imprisonment\textsuperscript{47}. 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 and circumstances which should show that the corporate body, as such, meant or intended to commit such act"\textsuperscript{48}.

Until recently, Indian courts were of the opinion that corporations could not be criminally prosecuted for offenses requiring \textit{mens rea} as they could not possess the requisite \textit{mens rea}. \textit{Mens rea} is an essential element for majority, if not all, of offenses that would entail imprisonment or other penalty for its violation. Adopting an overly generalized rationale, pre \textit{Standard Chartered Bank} decision, Indian courts held that corporations could not be prosecuted for offenses requiring a mandatory punishment of imprisonment, as they could not be imprisoned.

In \textit{A.K. Khosla v. T.S. Venkatesan}\textsuperscript{49}, two corporations were charged with having committed fraud under the IPC. The Magistrate issued process against the corporations. In the Calcutta High Court, the counsel for the defendants argued, \textit{inter alia}, that the corporations, as juristic persons, could


\textsuperscript{49} (1992) Cr.L.J. 1448.
not be prosecuted for offenses under the IPC for which mens rea is an essential ingredient. The court agreed. The court pointed out that there were two prerequisites for the prosecution of corporate bodies, the first being that of mens rea and the other being the ability to impose the mandatory sentence of imprisonment. Each of these prerequisites rendered the prosecution of the defendant corporations futile: a corporate body could not be said to have the necessary mens rea, nor can it be sentenced to imprisonment as it has no physical body.

In Kalpanath Rai v. States\textsuperscript{50}, a company, accused and arraigned under the Terrorists and Disruptive Activities Prevention ("TADA") Act, was alleged to have harbored terrorists. In a bench trial, the trial court convicted the company of the offense punishable under section 3(4) of the TADA. On appeal, the Indian Supreme Court referred to the definition of the word "harbor" ["harbour"] as provided in Section 52A of the IPC and pointed out that there was nothing in TADA, either express or implied, to indicate that the mens rea element had been excluded from the offense under Section 3(4) of TADA.

The Supreme Court referred to its earlier decisions in \textit{State of Maharashtra v. Mayer Hans George}\textsuperscript{51} and Nathulal v. State of M.P.\textsuperscript{52} and observed that there was a plethora of decisions by courts which had settled the legal proposition that unless the statute clearly excludes mens rea in the

\textsuperscript{50} (1997) 8 S.C.C 732.

\textsuperscript{51} AIR 1965 SC 722

\textsuperscript{52} AIR 1966 SC 43.
commission of an offense, the same must be treated as an essential ingredient of the act in order for the act to be punishable with imprisonment and/or fine. Taking this reasoning a step further, the Supreme Court held that an accused corporation could not possess the requisite mens rea, even if any terrorist had been allowed to occupy the rooms in its hotel. The Court observed:

"...we are aware that in many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act, etc. . . . But there is no such provision in TADA which makes the Company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offense under Section 3(4) of TADA53.

Similarly, in Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd.54, the court dismissed a complaint filed against Zee Telefilms Ltd under Section 500 of the IPC. The complaint alleged that Zee Telefilms Ltd had telecasted a program based on falsehood and thereby defamed Sahara India. The court held that mens rea was one of the essential elements of the offense of criminal defamation and that a company could not have the requisite mens rea.

In another case, *Motorola Inc. v. UO*\(^5\)\(^5\), the Bombay High Court quashed a proceeding against a corporation for alleged cheating, as it came to the conclusion that it was impossible for a corporation to form the requisite *mens rea*, which was the essential ingredient of the offense. Thus, *the corporation could not be prosecuted* under section 420 of the IPC.

It is clear that, in the past, Indian courts were of the opinion that if *mens rea* is an element of an offense, a corporation cannot be prosecuted for such an offense as it cannot possess *mens rea*.

But what if a corporation is accused of violating a statute that mandates imprisonment for its violation? 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.*\(^5\)\(^6\), a private company was prosecuted for violation of certain sections under the Income Tax Act ("ITA"). Sections 276-C and 277 of the ITA provided for a sentence of imprisonment *and* a fine in the event of a violation. The Supreme Court held that the respondent company could not be prosecuted for offenses under certain sections of the ITA because each of these sections required the imposition of a *mandatory* term of imprisonment coupled with a fine. The sections in question left the court unable to impose only a fine. Indulging in a strict and literal analysis, the Court held that a corporation did not have a

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physical body to imprison and therefore could not be sentenced to imprisonment. Further, the Supreme Court was of the view that the legislative mandate was to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Act. The Court also noted that when interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favor of the construction that exempts an accused from penalty rather than the one that imposes the penalty. 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"\textsuperscript{57}.

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[...]."\textsuperscript{58}

Explaining the rationale behind this interpretation, the judge noted:

\textsuperscript{57} (2003) 11 SCC 405, p. 432.

\textsuperscript{58} Ibid., p. 425.
"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"\textsuperscript{59}.

This question was later referred to a five-judge constitution bench, and in \textit{Standard Chartered Bank v. Directorate of Enforcement}\textsuperscript{60}, Standard Chartered Bank was being prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act of 1973 ("FERA"). Ultimately, the Supreme Court held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment of imprisonment required under the respective statute.

The Court also referred to the recommendations made by the Law Commission\textsuperscript{61}, which had noticed the legal conundrum arising out of the aforementioned situation. The Law Commission recommended the following provision to be inserted in the Penal Code:

\textsuperscript{59} Ibid., p. 428.


\textsuperscript{61} Law Commission of India, 41st Report, 1972.
a) In every case in which the offense is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

b) In every case in which the offense is punishable with imprisonment and any other punishment not being fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

c) In this section, "corporation" means an incorporated company or other body corporate, and includes a firm and other association of individuals.

Of course, Standard Chartered Bank argued that the Parliament enacted laws knowing fully well that a corporation cannot be subjected to custodial sentence and, therefore, the legislative intention was not to prosecute the companies or corporate bodies. According to it, when the sentence prescribed cannot be imposed, the very prosecution itself is futile and meaningless, and, thus, the majority decision in Velliappa Textiles had correctly laid down the law.

The Supreme Court in Standard Chartered Bank62 observed that the view of different High Courts in India was very inconsistent on this issue. For example, in State of Maharashtra v. Syndicate Transport63, the Bombay High

63. (1963) Bom LR 197
Court had held that the company could not be prosecuted for offenses which necessarily entailed corporal punishment or imprisonment; prosecuting a company for such offenses would only result in a trial with a verdict of guilty and no effective order by way of a sentence.

On the other hand, in *Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh*\(^{64}\), the appellant-company had sought to quash a criminal complaint, arguing that the company could not be prosecuted for the particular criminal offense in question, as the sentence of imprisonment provided under that section was mandatory. The Full Bench of the Allahabad High Court had disagreed\(^{65}\):

"A company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. . . . It is settled law that sentence or punishment must follow conviction; and if only corporal punishment is prescribed, a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly, then, though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it. . . . Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal; but a sentence which is less than the sentence prescribed may not in all cases be illegal"

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64. (1993) 1 ComIJ 172

65. ibid
The Supreme Court in Standard Chartered Bank\textsuperscript{66} also referred to an old decision of the United States Supreme Court, United States v. Union Supply\textsuperscript{67}. In that case, a corporation was indicted for willfully violating a statute that required the wholesale dealers in oleomargarine to keep certain books and make certain returns. Any person who willfully violated this provision was liable to be punished with a fine of not less than fifty dollars and not exceeding five hundred dollars and imprisonment for not less than 30 days and not more than six months. It is interesting to note that for the offense under Section 5 of the statute at issue, the Court had discretionary power to punish by either fine or imprisonment, whereas under Section 6 of the statute (the section that was actually violated in Union Supply), both types of punishment were to be imposed in all cases. The corporation moved to quash the indictment, and the District Court quashed it on the grounds that Section 6 was not applicable to the corporations. The United States Supreme Court reversed the District Court's judgment. Justice Holmes held:

\textquote{It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare Section 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the Judge; yet, there, corporations are mentioned in terms. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute

\begin{itemize}
  \item \textsuperscript{66} (2005) 4 SCC 530: AIR 2005 SC 2622
  \item \textsuperscript{67} 215 US 50 (1909)
\end{itemize}
prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape. In the end, it was obvious to the Supreme Court in *Standard Chartered Bank* held that the legislative intent to prosecute corporate bodies for the offenses committed by them was clear and explicit. The statute in question never intended to exonerate corporations from being prosecuted. To follow *Velliappa Textiles* would be to presume that the legislature intended to punish the corporate bodies for minor and silly offenses while it extended immunity of prosecution for major and grave economic crimes. As a specific illustration, the court pointed out that in the case of cheating and dishonestly inducing delivery of property covered under Section 420 of the IPC, the punishment prescribed is imprisonment, which may extend to seven years and fine. However, for the offense under Section 417, that is, simple cheating, the punishment prescribed is imprisonment for a term which may extend to one year, a fine, or both. If *Standard Chartered Bank*'s argument were accepted, it would mean that for the offense under Section 417 of the IPC, which is a minor offense, a company could be prosecuted and punished with a fine, whereas for the offense under Section 420, which is an aggravated form of cheating, the company could not be prosecuted as there is a mandatory sentence of imprisonment. This interpretation clearly produced an illogical result.

68. Ibid, at p.55.

The Supreme Court in *Standard Chartered Bank*\textsuperscript{70} held:

"We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offenses. The offenses mentioned under Section 56(1) of the FERA Act, 1973 . . . for which the minimum sentence of six months' imprisonment is prescribed, are serious offenses and if committed would have serious financial consequences affecting the economy of the country. All those offenses could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offenses, if these offenses involve the amount or value of more than one lakh, and that they could be prosecuted only when the offenses involve an amount or value less than one lakh".

The Supreme Court also pointed out that, as to criminal liability, the FERA statute does not make any distinction between a natural person and corporations. Further, the Indian Criminal Procedure Code, dealing with trial of offenses, contains no provision for the exemption of corporations from prosecution when it is difficult to sentence them according to a statute. The court held that the FERA statute was clear: corporations are vulnerable to criminal prosecution, and allowing corporations to escape liability based on the difficulty in sentencing would do violence to the statute.

The Supreme Court by a majority of 3:2 expressly overruled *Velliappa* case and held that a company cannot avoid criminal liability merely on the

\textsuperscript{70} Ibid.
ground that the mandatory punishment provided for a given offence is both “imprisonment and fine”. In such cases, the Court reasoned, the term “and” should be construed as “or” and the company should be punished with a fine. 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”\textsuperscript{72}.

The Court did not develop its reasoning far enough so as to specifically hold that a corporation is capable of forming \textit{mens rea} and acting pursuant to it. However, the Court held that corporations are liable for criminal offenses and can be prosecuted and punished, at least with fines. Many of the offenses, punishable by fines, however do have \textit{mens rea} as a necessary element of the offense. By implication, it can be said that post \textit{Standard Chartered} decision, corporations are capable of possessing the requisite \textit{mens rea}. As in prosecution of other economic crimes, intention could very well be imputed to a corporation and may be gathered from the acts and/or omissions of a corporation.

This legal position was reaffirmed by the Supreme Court more recently in \textit{Iridium India Telecom Ltd. v. Motorola Incorporated}\textsuperscript{73}. 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

\begin{itemize}
  \item \textsuperscript{72} Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 SCC 530 at 550, para. 31.
  
  \item \textsuperscript{73} Iridium India Telecom Ltd. v. Motorola Incorporated, Criminal Appeal No. 688 of 2005 (decided on 20 October 2010), (2011) 1 SCC 74.
\end{itemize}
being prosecuted for a larger number of criminal offences than that would otherwise be possible.\footnote{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.}

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”\footnote{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 committed beyond India in the same manner as if such act had been committed within India”.}, could potentially be used against Indian companies if the alleged conduct amounted to an offence under any Indian law.\footnote{Y V Chandrachud, Ratanial & Dhirajlal’s The Indian Penal Code, Wadhwa & Co. – Agra, 28th Edition, Agra, 1997, at p. 4; S K Sarvaria, Nelson’s Indian Penal Code, LexisNexis – New Delhi, 9th Edition, India, 2003, at pp. 56-60.} 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. In *Iridium India Telecom Ltd. v. Motorola Incorporated*, 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."

Similar to the approach adopted by UK courts, Indian courts try to identify the officers who acted as the controlling or directing mind of the company. 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

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77. Ibid., p. 39.


79. Ibid, at para. 38.


81. *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.
time. But what will be the outcome in a situation where the person authorised to act on behalf of the company is prosecuted, but the company is not charged? In *UP Pollution Control Board v. Modi Distillery*, 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. 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".

In *Anil Hada v. Indian Acrylic Ltd.*, 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

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82. 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.


84. Ibid., pp. 804-05.

85. Ibid., p. 806.

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[...])"87.

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 plan88.

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 aid89 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,

87. Ibid., p. 8.


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/officers90.

6.5. 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 criminal law violations91. India is no exception, as tort principles – primarily negligence, nuisance, strict liability and absolute liability – have been employed to hold companies accountable for their wrongdoings. Tort law in India is based in common law and is not codified92. 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.93

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.94 This is well-accepted even if the agent's acts at issue were ultra vires to the company.95 Additionally, a foreign parent company may be held liable for a tort committed by its Indian subsidiary by piercing the corporate veil.96

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


95. Ibid., pp. 36-37.

were not in conflict with Fundamental Rights under the Constitution97. As explained in the next section, the concept of constitutional 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" principle98 and the "precautionary" principle99 - 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 India100 - a case dealing with leakage of Oleum gas from one of the plants of an Indian company - developed the absolute liability principle101. The Court reasoned that the 19th century Rylands v. Fletcher102 principle of strict liability was not suitable to meet the needs of a modern industrial society and observed:


100. AIR 1987 SC 1086.


102. Rylands v. Fletcher (1868) UKHL 1.
"[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. [...] The 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"\textsuperscript{103}.

The absolute liability principle neither requires proving a "non-natural" use of land nor does it allow any of the defences accepted in \textit{Rylands v. Fletcher}\textsuperscript{104}. The principle of absolute liability has since been applied in other cases\textsuperscript{105} and also incorporated into statutes like the Public Liability Insurance Act (PLIA)\textsuperscript{106}.

6.6. Environmental laws

\textsuperscript{103} 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

\textsuperscript{104} 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.

\textsuperscript{105} See, for example, Indian Council for Enviro Legal Action v. Union of India, (1996) 3 SCC 212.

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, although their efficacy and implementation remain matters of serious concern. 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". 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." The government may, for example, lay down "standards for emission or discharge of environmental pollutants from various sources". 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.

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 similar stipulation regarding handling of any "hazardous substance" is found in Section 8. 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

110. Ibid., Section 3(1).
111. Ibid., Section 3(2)(iv).
112. Ibid., Section 5.
113. "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).
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 incident114.

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 EPA115.

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 government116. 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

114. Ibid., Section 9.
115. Ibid., Section 17.
116. Ibid., Section 19.
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 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 Act117. 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.

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

Accordingly, it introduces a provision for no-fault compensation to victims of not all industrial accidents but only those involving hazardous substances. 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. Claimants under this provision are not “required to plead


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

120. The Schedule to the PLIA, 1991 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
and establish that the death, injury or damage [...] was due to any wrongful act, neglect or default of any person”

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. In the aftermath 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). It requires every owner to contribute to the ERF an additional “amount, not exceeding the amount of

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121. Ibid., Section 3(2).
122. 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”.
123. Ibid., Section 7A.
premium, as may be prescribed\textsuperscript{124}. 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\textsuperscript{125}, 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\textsuperscript{126}.

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\textsuperscript{127}. Under the doctrine, certain common properties such as rivers, forests and the

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\textsuperscript{124} Ibid., Section 4(2C).

\textsuperscript{125} National Green Tribunal Act 2010.

\textsuperscript{126} Ibid., Section 3. It empowers the government to establish, by issuing a notification, a National Green Tribunal.

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”\textsuperscript{128}. 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.

Evolution of the “polluter pays” principle and the “precautionary principle” as part of sustainable development is also notable\textsuperscript{129}. In \textit{Indian Council for Enviro Legal Action v. Union of India}\textsuperscript{130}, 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 Bicchri 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

\textsuperscript{128} Ibid., p. 26.


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\textsuperscript{131}.

In \textit{Vellore Citizen Welfare Forum v. Union of India}\textsuperscript{132}, 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:

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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 depreation; and

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; 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.

6.7. Labour 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. 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, 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,


135. Payment of Wages Act 1936, Sections 3-5.
Conciliation Officers and special Labour Courts/Tribunals to settle such industrial disputes\textsuperscript{136}. Parties may also resort to arbitration before any dispute is referred to the Labour or Tribunal\textsuperscript{137}. 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\textsuperscript{138}. There are also provisions regulating lay off or retrenchment of workers\textsuperscript{139}. 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\textsuperscript{140}, which had its origin in the old feudal and caste systems, has been a major problem in India\textsuperscript{141}. 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\textsuperscript{142}. As recently as 2007, companies like Gap were reportedly forced to withdraw their clothing from the market due to

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  \item \textsuperscript{136} Industrial Disputes Act 1947, Sections 3, 4, 7 and 7A.
  \item \textsuperscript{137} Ibid., Section 10A.
  \item \textsuperscript{138} Ibid., Section 23.
  \item \textsuperscript{139} Ibid., Chapters V-A and V-B.
  \item \textsuperscript{140} '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.
  \item \textsuperscript{141} That is why, Article 23 of the Constitution of India, a fundamental right, prohibits forced labour.
  \item \textsuperscript{142} See Child Labour, "Bonded Child Labour in India", http://www.childlabor.in/bonded-child-labour-in-india.htm, accessed 3 February 2011.
\end{itemize}
allegations that they used bonded child labour\textsuperscript{143}. 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\textsuperscript{144}. 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\textsuperscript{145}. It provides that no person


\textsuperscript{144} Bonded Labour System (Abolition) Act 1976.

\textsuperscript{145} 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

(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
shall “compel any person to render any bonded labour or other form of forced labour”. The law extinguishes any liability to repay bonded debt and creditors are prohibited from accepting any payment against the extinguished debt. It makes it a criminal offence to continue the practice of bonded labour. 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. State governments provide additional help, such as allotment of agricultural land, provision for low-cost dwelling houses, training for acquiring new skills, and

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(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.'

146. Ibid., Section 4(2).

147. Ibid., Sections 6, 9.

148. Ibid., Sections 16-19.

education of children. It is reported that 289,225 bonded labourers had been released and rehabilitated as on 30 September 2010.

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) approached the Supreme Court in 1982 by way of a PIL lamenting the law's non-implementation. 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.

In addition to bonded labour, the practice of child labour is a serious problem in India that constitutional provisions 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

150. Ibid.
155. 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.

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forth in Part B of the Schedule is carried on. 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.

“Whoever” employs any child or permits any child to work in contravention of the provisions of Section 3 will face criminal sanctions. 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.

The implementation of the Child Labour Prohibition Act, however, remains a matter of concern. Between 2007 and 2009, the government

156. 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.


158. Ibid., Section 14.

159. Ibid., Section 16(1).
launched about 15,000 prosecutions for employing child labour\textsuperscript{160}. 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"\textsuperscript{161}.

The Factories Act, 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, over crowding, fencing of machinery, stairs and other means of access, and excessive weights\textsuperscript{162}. There are also affirmative provisions for workers' welfare, such as those requiring first-aid facilities, canteens, rest rooms and crèches (childcare facilities)\textsuperscript{163}.


\textsuperscript{161}Ibid., p. 1.

\textsuperscript{162}Factories Act 1948, Chapters III and IV.

\textsuperscript{163}Ibid., Chapter V.
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. A worker who works more than these limits is "entitled to wages at the rate of twice his ordinary rate of wages." No young child below the age of fourteen shall be required or allowed to work in any factory. 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.

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," who is "the person who has ultimate control over the affairs of the factory." The amended law thus makes directors personally responsible for the health and safety of factory workers.

164. Ibid., Sections 51, 54.
165. Ibid., Section 59(1).
166. Ibid., Section 67.
167. Ibid., Sections 71-73.
168. Ibid., Section 2(n).
169. Ibid.
170. 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.
In *J K Industries Ltd. v. Chief Inspector of Factories & Boilers*[^71], 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”.

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”[^72]. The law requires state governments to appoint inspectors[^73], who may enter any factory to conduct a range of health and safety related examinations and investigations[^74].

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;


[^72]: 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.

[^73]: Factories Act 1948, Section 8.

[^74]: Ibid., Section 9.
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, authorizes 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\textsuperscript{175}.

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\textsuperscript{176}.

\textsuperscript{175} Ibid., Sec 91(1).
\textsuperscript{176} Ibid., Sec 94.
6.8. The Essential Commodities Act, 1955

The Essential Commodities Act, 1955 gives powers to control production, supply, distribution etc. of essential commodities for maintaining or increasing supplies and for securing their equitable distribution and availability at fair prices.

Section 10 of the Act provides that the person contravening an order should not only be in charge, but also be responsible to, the company for the

177. Preamble of Act 10 of 1955

178. Section 10 - OFFENCES BY COMPANIES

(1) If the person contravening an order made under Sec. 3 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:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been 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 or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation:

For the purposes of this section,
conduct of the business as well as the company itself. In the case of *State of Orissa v. Praban Kumar Agarwalla* the offence was alleged to have been committed by the company. The company had not been proceeded against. There was no evidence on record to show that either both the accused persons and any of them was in-charge at the relevant time and was responsible for the conduct of the business. In the circumstances, the conviction of the accused persons was liable to be set aside.

**ELEMENT OF MENS REA:**

To start with *mens rea* would be attributable to them in terms of section 10(1) of the Act and they would be *prima facie* liable to be charged for having committed the offence, whether are not they had any guilty mind in the matter or not. Thus there will be a presumption of guilt at the initial stage. The provision to sub section (1) of Sec.10 lays down that, nothing contained in the section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, meaning thereby that the burden of proof of want of *mens rea* rests upon the persons charged for having committed offence, who have to prove at the trial that such contravention had taken place without their knowledge or they had exercised due diligence.

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(a) "company" means any body corporate, and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm.


180. Surendar Malik, Supreme Court on Essential Commodities, 1984, Eastern Book Co., Delhi, at p. p.130.
As a general rule of criminal law the master is not made liable for the acts of his servants and agents. But in many cases the law imposes upon the owner of the property the obligation of managing it, so that it shall not injuriously affect anyone else. In such cases where the breach of obligation is punishable criminally the owner cannot free himself from liability by delegate the management to someone else on his behalf. This is based on the rule of vicariously liability which has been accepted in various cases arising under the special enactments. Under Section 10 of the ECA, two classes of persons are contemplated who are liable to be prosecuted where the offence is committed by a company. There are persons who are directly in charge of and responsible to the company for the conduct of its business, who are per se liable, and there are other persons with whose consent or connivance the offence is committed. Under Section 10 it is the company which is primarily responsible for any offence for any offence committed under this section. Company, as the Explanation shows, means any body corporate and includes a firm or other association of individuals. Therefore, there can’t be doubt that by the use of the word ‘company’ the legislature meant the company itself which has separate legal status from that of its directors or shareholders. In the case of Sri Ram Dalmia v. State\textsuperscript{181}, it was held that it is not possible to accept the contention that as a director, the petitioner can be said to be part of the company and therefore liable. In this case there was no evidence to show that at the time of the alleged contravention, the petitioners were in charge of or responsible for the conduct of its business. Further, this section only comes into play when there has been some contravention by a corporate body which

\textsuperscript{181}1992Cr Lj 363

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can be dealt with under the provisions of the ECA. It has no application to a case where the contravention of the nature contemplated by the ECA is by an individual.

Thus in order to fasten liability on a person other than the company, and make him vicariously liable, it is essential for the company to show that such a person was in charge of the conduct of business of the company. For instance, if a proprietor of company appoints a Managing Agent to conduct the business of the company, he would be responsible to the company for the conduct of its business. An individual employee of the concern cannot be held responsible for the conduct of its business under section 10(1) for he has certain specified duties to perform, which are assigned to him. He cannot be held responsible for the conduct of its business as he is merely given charge of a particular department and is not responsible to the company for the overall conduct of the business of the company. Therefore, individual liability cannot be fastened on an employee of the company under Section 10.

It is for this reason that sub section (2) of Section 10 of the Essential Commodities Act, 1955, has been enacted which fastens liability for an offence upon any Director, Partner, Manager, etc provided it is proved that the offence was committed with his consent or connivance or its attributable to any neglect on his part. So, to hold that the Director, Partner, Manager, etc. has committed an offence, the ingredient of consent or connivance or neglect on his part must be established. Unless those ingredients are proved, such officers of the company cannot be held vicariously liable along with the
company. But merely because other directors or partners were present at the time of the offence, it cannot be concluded that they consented to the commission of the offence by the Managing Director.

In *Madan Lal v State* the Calcutta High Court held that where members of a joint family were interested in carrying on the business of running a shop, the member who in fact was running the shop cannot possibly escape liability in view of the specific provisions of this section.

A person may be a proprietor of a firm and yet may be a sleeping partner. Thus it may be that a proprietor may not be in charge of the business. The description of a person as a proprietor cannot, therefore, be so construed as to mean that he has been alleged to be the person in charge of the business. The word 'in charge of' must mean all over control of the day to day business of the firm and the mere right to participate in the business of the partnership firm under the terms of partnership.

Before an offence can be brought home to a partner by taking recourse to the provision of sub section 2 of Section 10, the offence must be attributed to his consent, connivance or neglect. However, this does not mean that an offence can be said to be disclosed against a partner even if there was no allegation in the petition of complaint that such offence was committed because of connivance or consent of the partner. An offence can be said to be disclosed if such offence can be proved if the allegations are taken at face value and accepted in their entirety. Again, by merely giving names of the partners

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183. AIR 1961 Cal 240.
of the firm, a criminal proceeding for the violation of the provision of the Essential Commodities Act 1955, cannot be proceeded against the partner. The partner can be held liable only, if (1) he was, at the relevant time, in charge of, and responsible to, the firm for the conduct of the business and (2) the offence has been committed with his consent or connivance. Thus the complaint must clearly show that a certain partner was the managing partner or was entrusted with the business of the firm and was responsible for the conduct of the business. If that description is missing from the complaint, then all the partners cannot be proceeded against for any such violation of the provisions of the Act.

An independent contractor trading for his own benefit although on a commission basis, cannot escape liability by pleading want of knowledge from the act of his servant\(^\text{184}\).

**COMPANY OR FIRM NOT CHARGED AS ACCUSED- WHETHER OTHER PERSONS CAN BE PROSECUTED?**

The Supreme Court has after rejecting the contention that the MD of a public limited company, in law, be persecuted unless the company itself was prosecuted, held in *Sheoratan Agarwal v. State of M.P.*\(^\text{185}\) that anyone of them or all of them can be prosecuted. The company alone maybe prosecuted or the person in charge may be prosecuted only. The person in charge can be prosecuted both with the company and separately. Section 10 does not lay

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185. (1984)2 Crimes 566
down any condition that the officer of the company may not be separately prosecuted if the company itself is not prosecuted.

EFFECTS OF NON COMPLIANCE OF THE PROVISIONS:

Where neither the charge sheet nor the witness discloses the name of the partners alleged to be in charge of the partnership firm and responsible for the offence as provided under section 10, proceedings against partnership are liable to be quashed in proceeding under Section.482 Cr.P.C. In absence of any material on the record to show that the partner concerned was aware of sale of 5 bags of cement, by another partner at a price higher than the controlled price of the cement, he cannot be made liable and proceeded against for the offence alleged to have been committed by another partner186. It is therefore essential, that the charge sheet should contain the facts required under Section 11 of the ECA and as required by Section 10 the connection and status of the petitioner vis-à-vis the firm and its administration must be indicated187.

Further in order to make Sub-sec 2 of the Section 10 applicable, it is not essential that the officer of the company must necessarily belong to a particular branch. In the case of State of Kerala v. Noveen Chandran188, it was held that mere fact that the defendant was a partner of the firm does not mean that he was in charge of the business of the firm. The duty of the


188. 1977 Ker LT 226
obligation to establish that the respondents had exercised all due diligence to prevent contravention of the provisions would arise only after prosecution has established the conditions mentioned in Section 10(1) were present in the case. Further, several other cases held that for this sub section to apply, there must be some allegation in the complaint that the offence was committed by the company with the consent or connivance of the director or GM concerned or was attributable to neglect, on their part.

**SECTION 10A-OFFENCES TO BE COGNIZABLE**

Under this section, every offence punishable under this Act is cognizable, notwithstanding anything contained in the Code of Criminal Procedure, 1973. This would imply that an Officer-in-Charge of a police station on receipt of information of such cognizable offence, may, without the order of a Magistrate, investigate into the offence according to the procedures laid down in the Cr.P.C. On completion of the investigation the police officer shall submit a report to the Magistrate empowered to cognizance of the offence on a police report. While submitting the report in connection with the offence to which a Section 170 of the Cr.P.C applies, meaning thereby a case in which such investigating officer has found sufficient evidence for a trial to be held by the court, it is incumbent upon such officer to forward to the Magistrate, along with the report (a) all documents or relevant extracts thereof on which the prosecution proposes to rely on, other than those already sent to the Magistrate during investigation; (b) the statement recorded under Section 161 of CrPC of all the persons whom the prosecution proposes to examine as witness.
Section 13A of the essential supplies (temporary powers) act lays down special provision regarding bail in respect of offences in regards to food grains. It was held that the court granting bail at a stage when just a charge has been made by the police under that Act and no evidence was given, can certainly consider the charge made and attending facts like police reports made in the case. It is entitled to look at the facts stated in the petition for a bail by the accused and the grounds of opposition raised by the opposition. The presumption of innocence in favour of the accused is also a relevant consideration for the court at this stage in coming to a belief that the accused is not guilty. However, if the court is not in a position to come to a positive belief that the accused is not guilty then bail has to be refused.

SECTION 10C-PRESUMPTION OF CULPABLE MENTAL STATE:

The provision of this section makes a rule of evidence. The presumption under sub section (1) would extend to the matters mentioned in the Explanation to the section. The presumption is not be exhaustive of the matters enumerated in respect of culpable mental state but only in addition. Sub section (2) introduces, in effect, another rule of presumption. A fact is proved by the evidence and a court cannot go outside the evidence laid before it. Therefore, so far as the belief of the court is concerned it has to be founded on the materials before it and the court cannot travel beyond the materials. Thus this provision would operate where the case depends on mere probability and not on clear evidence. In such a case the provision enjoins that the belief of the court about the existence of a fact beyond reasonable doubt is to prevail over preponderance of probability.
Section 11 of the Essential Commodities Act, 1955 clearly lays down that no court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code. It, therefore, implies that the legislature has thought it proper to treat the offence under this Act as falling into special category and requires that the prosecution for these offences can be instituted only by the public servants. The object behind it is to protect persons from needless prosecution at the instance of a private individual, such as rival traders and the general public.

It is well settled that a report submitted by the public servant under Section 11 of the Act must contain the facts constituting the offence. The reason behind the provision of Section 11 is the unscrupulous traders may not harass a dealer for their personal reason and satisfaction of a public servant has been provided as a protection against mala fide prosecution. What Section 11 envisages is there should be a report in writing by a public servant. There is no doubt that a police officer is a 'public servant' and his charge sheet is nothing but a report under Section 173 of the Cr PC. Thus, if the Section 11 is applicable, then the magistrate can take cognizance on the police report, i.e. charge sheet under Section 190(1)(b) CrPC.

Section 11 of the Essential Supplies (Temporary Powers) Act, 1946 came up for consideration by the Supreme Court in the case of Bhagwati Saran v. State\(^{189}\), and it was observed that the purpose of this section is to eliminate private individuals such as rival traders from initiating a proceeding.

\(^{189}\) AIR 1961 SC 928.
and for this purpose before cognizance is taken the complaint is required to emanate from a 'public servant'. In the case of *State of Madhya Pradesh v. Mojila*

it was held that Section 11 of the ECA does not confer jurisdiction on any Magistrate or court to take cognizance. There is no other section in the Act conferring such jurisdiction. There is nothing in Section 11 to indicate that it prescribe any procedure for taking cognizance of any offence. Its purpose is prohibitive and restrictive which eliminates private complains and ensures that the public officer should apply his mind to the facts of the case. This is achieved by insistence on a report in writing containing the facts constituting the offence in question.

Section 10 deals with provisions which would be applicable in case an offence is committed by a company or any officer of such company. The section basically provides that a person who is in charge of the office or was responsible to the company for the conduct of its business at the time of contravention of an order under Section 3 will be deemed to be guilty along with the company and accordingly punished.

However, it is not mandatory that the officers have to be clubbed with the company while being tried. There are two important aspects which need to be fulfilled for the courts to be able to bring the officers under Section 10. *First of all*, they have to be associated with the affairs of the company while commission of the crime, and *secondly*, that they had not exercised due diligence and the offence has been committed with their cunning and connivance.

190. 1973MPLJ 986.
6.9 The Negotiable Instruments Act, 1881

Over the past few years, the Supreme Court has gone a long way towards reducing the use of Section 138 of the Negotiable Instruments Act as the basis for the vicarious liability of directors. In, *National Small Industries v. Harmmeet Singh Pantial*¹⁹¹, the Supreme Court emphasised the high standards required in order to invoke vicarious liability of creditors under Section 141 of the Act. This is a stance which has been adopted by the Supreme Court in *K.K. Ahuja v. V.K. Vora*²⁹². Hence, under section 141 of the Act, being 'in charge of, and was responsible to, the company for the conduct of the business of the company' has been held to contain two independent requirements of both being legally in charge of, and factually responsible for the day-to-day affairs of the company.

Further, the Court has held that the complaint needs to have a specific averment of the role played by the director in the particular case. While this may be unexceptional, a decision of the single judge of the Kerala High Court in *TGN Kumar v. State of Kerala*¹⁹³ was much more far-reaching. The Court had issued a set of directions to Magistrates to treat 'technical' offences like section 138, involving 'no moral turpitude' to be treated differently from other offences. The case involved an application by an accused to dispense with


personal appearance at trial for an offence under section 138. The High Court judge allowed the application, and held that there was a

"...great need for rationalising, humanising and simplifying the procedure in criminal courts with particular emphasis on the attitude to the "criminal with no moral turpitude" or the criminal allegedly guilty of only a technical offence, including an offence under Section 138 of the N.I. Act".

For this purpose, the High Court had provided detailed guidelines to the trial courts, which exempted all accused of offences under section 138 of the Act from personal appearance at any stage of the trial, and also provided that only bailable warrants may be issued in such cases. Although the High Court did provide for this procedure to be departed from in exceptional cases, the guidelines were quite wide-ranging and significantly impinged on the discretion of the trial court.

These guidelines were appealed against to the Supreme Court, which reversed the decision of the High Court. It held that the discretion of the trial judge must be left untrammeled, and that the Supreme Court in Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd194, was right in saying that

"it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance

at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice”.

To this dictum, the Court only adds that...

“....the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial”.

The Apex reiterated its own catena of decisions, in which it has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company. The Supreme Court after reiterating its own judicial pronouncements in various decisions laid down the following principles:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

Thus, it is clear that the Supreme Court has firmly set its face against allowing a greater degree of leniency in cases involving Section 141 of the Act, even when dealing with matters of criminal procedure. Given the language of
the Code of Criminal Procedure, and the scope of appellate interference permitted into the exercise of discretion by the trial court, the decision is based firmly on statutory language and past precedent. Equally however, given the proactiviness of the Supreme Court in laying down guidelines for the exercise of discretion in other areas of the law, a watered down version of the High Court's recommendations would not have been unjustified. The requirement that personal presence should be done away with only when it inflicts "enormous suffering or tribulations" or when it is justified "due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons" is surely setting the bar too high, especially when dealing with offences under the provisions like section 138 or section 141 of the Act. However, as the law stands today, it appears that barring the satisfaction of the detailed requirements of section 141, there are no other procedural safeguards for persons accused of offences under the Act.

6.10 THE PREVENTION OF CORRUPTION ACT (POCA), 1988

A company may be held liable for corruption offences in India under POCA 1988, which primarily addresses corruption in the public sector, but also brings within its ambit, private citizens who abet the corrupt actions or omissions of public servants in respect of an official act.

Under POCA 1988, an anti-bribery offence includes the following acts\(^{195}\), committed directly or indirectly:

\(^{195}\) Section-7 to 13 of POCA
1. an act of a public servant of taking illegal gratification in respect of an official act;

2. an act of any individual taking illegal gratification to influence a public servant in respect of an official act; and

3. an act of abetment of any of the above acts, which may include the act of giving a bribe to a public servant.

The provisions of POCA 1988 apply not only to all citizens living in India, but also to all Indian citizens living outside India. While POCA 1988 does not specifically create a corporate offence relating to bribery, a company being a 'person' could be held liable under the provisions of POCA 1988. Courts may prosecute a company along with its directors or agents for offering bribe to a public servant under the offence of criminal conspiracy under the Indian Penal Code. In respect of these offences, a company would be liable for a fine, the maximum limit for which has not been prescribed.

**Serious Fraud Investigation Office (SFIO)**

In addition to the machinery existing under POCA 1988, the Indian government has set up the SFIO under the Department of Company Affairs, Ministry of Finance to professionally investigate white-collar crimes. The SFIO was set up in the backdrop of stock market scams, failure of non-

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197. Section 11 of the Indian Penal Code defines 'person' to include any company or association of body of persons, whether incorporated or not.

198. Under Sec.120A of the Indian Penal Code,
financial banking companies, phenomena of vanishing companies and plantation companies. This organisation takes up investigation of the cases of alleged frauds referred to it by the central government under Section-235 and Section-237 of the Companies Act 1956.

The criteria for referring the cases to the SFIO by the central government are:

- complexity and having inter-departmental and multidisciplinary ramifications;
- substantial involvement of public interest to be judged by size, either in terms of monetary misappropriation or in terms of persons affected; and
- the possibility of investigation leading to or contributing towards a clear improvement in systems, laws or procedures.

On the receipt of a report after the investigation, the government can, in appropriate cases, bring a petition to wind up the company. The government may also bring civil proceedings in the name of the company for recovery of damages against delinquent directors, as well as for recovery of property that has been misapplied or wrongfully retained. Criminal proceedings may be instituted against the officers of the company.

Theoretically, under Indian law a company that is found to have committed offences relating to corruption and bribery could face potentially

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199. Bharati Walmart is prosecuting under POCA. The Hindu, 23-03-2012.
unlimited fines and may even be wound up in circumstances where the court holds that it is just and equitable to do so.


As Indian companies set to expand globally, with increasing cross-border transactions and foreign investments, there is a need for them to be aware of the extraterritorial reach of foreign anti-corruption legislations, and to implement adequate compliance measures. The UK's Bribery Act 2010 (the 2010 Act), which is due to be brought into force this year, is being hailed as one of the 'toughest anti-corruption laws' in the world. In the US the Foreign Corrupt Practices Act (FCPA) 1977 (as amended in 1988) deals with anti-corruption. Both legislations have a broad reach extending to companies and persons outside of the territorial jurisdictions of their respective countries, and have significant implications for Indian companies.

The 2010 Act penalises bribery of private persons, public officials of the UK, as well as of foreign officials. All individuals who are nationals of the UK or are ordinarily resident in UK are liable to be penalised under the 2010 Act for anti-bribery offences. Further, the 2010 Act also applies to organisations that are resident in the UK or conduct some part of their business in UK. This would extend the application of the 2010 Act to any company that has a subsidiary or affiliate in the UK. Therefore, for example, if an agent of an Indian company, with a subsidiary in the UK, engages in bribery in any part of the world, it would render the company liable to prosecution in the UK.
Under the 2010 Act, a new corporate offence is created and strict liability is imposed for failure to prevent bribery by corporate entity. Under this offence companies will be liable if anyone acting under its authority commits an offence of bribery. Such persons can include employees, consultants, agents, subsidiaries and joint venture partners. The only defence available to a company would be that it has put 'adequate procedures' in place to prevent offences of bribery and failure to demonstrate such compliance could expose them to potentially unlimited fines, as well as imprisonment of their directors. Further, a person's acts or omissions done or made outside the UK would form part of such an offence if done or made in the UK and the person has a 'close connection' with the UK (Section 12 of the 2010 Act).

FCPA 1977 prohibits corrupt payments made to a 'foreign official', a foreign political party or party official, or any candidate for a foreign political office. The purpose of the bribe should be to influence or induce the official, so as to assist the person in obtaining, retaining business or directing business to any person.

Under FCPA 1977 the following persons or entities can be penalised for an offence of bribery:

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200. The UK's Bribery Act 2010 defines 'close connection' to mean a British citizen, a British overseas territories citizen, a British national (overseas), a British overseas citizen, a person who under the British Nationality Act 1981 (the 1981 Act) was a British subject, a British protected person within the meaning of the 1981 Act, an individual ordinarily resident in the UK, a body incorporated under the law of any part of the UK or a Scottish firm.

201. The Foreign Corruption Practices Act (FCPA) 1977 defines a 'foreign official' to mean any officer or employee of a foreign government, a public international organisation, or any department or agency thereof, or any person acting in an official capacity.
1. Issuers: includes US or foreign corporations that have a class of securities registered, or that are required to file reports with the Securities and Exchange Commission.

2. Domestic concerns: includes US citizens, nationals and residents, and companies and organisations managed by US laws or having a place of business in the US.

3. Any natural person carrying out an offence of bribery while in the US.

Therefore, an Indian company that is listed on the New York Stock Exchange could be held liable for violation of FCPA 1977 committed in another country. Further, a foreign company or person is subject to FCPA 1977 if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the US (whether or not they make use of US mail or other means or instrumentalities of interstate commerce)\(^{202}\). Even a minor action, such as sending an e-mail to a person in the US, will suffice to bring a person under the ambit of FCPA 1977.

Penalties under the 2010 Act extend to up to ten years' imprisonment and/or fine for individuals and potentially unlimited fines for corporates. Penalties under FCPA 1977 extend up to:

- $2m for firms;

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\(^{202}\) Prior to 1998, foreign companies, with the exception of those who qualified as 'issuers', and most foreign nationals, were not covered by FCPA 1977. The 1998 amendments expanded FCPA 1977 to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to FCPA 1977 if it takes any act in furtherance of the corrupt payment while within the territory of the US.
• fines of up to $100,000 and imprisonment of up to five years for officers, directors and stockholders; and

• fines of up to $100,000 for employees and agents.

In light of the growing power, economic, social and political, exercised by large companies and corporations in the world today, it has become necessary to regulate the moral behavior of such corporations. As the influence of multinational corporations increases, questions relating to their accountability are also raised more frequently. Law has accordingly been evolved by both judicial interpretation and legislation. The multinational entities are now required to comply with anti-corruption laws of not only their place of registration, but also of the countries they operate in. This is a step forward towards ensuring strong internal control framework to prevent and manage fraudulent activities in business organisations.

6.11. Land Acquisition Act

As in other countries, the government in India can acquire private land for public purposes. The Land Acquisition Act, 1894 provides the legal basis for such acquisition of land. Broadly speaking, this Act deals with two aspects: the acquisition of land needed “for public purposes” or “for companies”; and the method for determining the amount of compensation to be made on account of such acquisition203.

203. Land Acquisition Act 1984, Long Title.
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 there with; 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.

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. 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; 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.

204. Ibid., Section 40.
205. Ibid., Section 5.
206. Ibid., Section 5A(4).
of a district. 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.

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, Article 300A of the Constitution still affords constitutional protection and land acquisition may be challenged, inter alia, on the ground that the compensation provided was illusory.

6.12. 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

207. ibid., Section 11.
208. ibid., Section 23.
209. The Right to Property under Article 31 of the Constitution of India was repealed by the Constitution (44th Amendment) Act 1978.
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\textsuperscript{211}.

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."212. 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"213.

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" 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.

212. Section 75 of Information Technology Act, 2000,
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\textsuperscript{214}.

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\textsuperscript{215}. 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

\textsuperscript{214} S Jasanoff, "The Bhopal Disaster and the Right to Know", in Social Science & Medicine, Volume 27, 1988, p. 1113.

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:”

6.13. Legal Remedies for Corporate Crime in India

6.13.1. 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
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”\textsuperscript{216}. 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 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

\textsuperscript{216}. Constitution of India, Art 32(2).
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 injunction 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.\textsuperscript{217}

Under Article 226 of the Constitution, the High Court's 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\textsuperscript{218}, a number of factors may

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influence petitioner's choice whether to approach the Supreme Court straight away or begin with the relevant High Court\textsuperscript{219}.

Many writ petitions concerning redress for rights violations have been used by way of PIL and 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\textsuperscript{220}. 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 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\textsuperscript{221}. Third, victims can approach both the Supreme Court and High Courts for appropriate orders or directions against government authorities to ensure that


\textsuperscript{221} Ibid., pp. 623-28.
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\textsuperscript{222}, 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\textsuperscript{223}. 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\textsuperscript{224}.

\textbf{6.13.2. 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

\textsuperscript{222} 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.


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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. The Supreme Court in *MC Mehta v. Union of India (Oleum gas leak case)* 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”.

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.

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

229. 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.”


231. 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
In addition to or in lieu of damages, courts may in appropriate cases also issue an injunction 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.

6.13.3. Criminal Sanctions

three-tier system before they can establish and obtain a final executable decree for damages."


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

233. Injunction is an order issued by courts requiring a certain person to 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).

The Indian Penal Code (IPC), as well as other laws, envisages the possibility of companies being held criminally liable for certain wrongs. Sec 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.”

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\(^{235}\) 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 *JK 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"\textsuperscript{236}. 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 \textit{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”\textsuperscript{237}.

In criminal proceedings, the Indian courts may award compensation to victims under Section 357 of the Cr.P.C. 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 Cr.P.C by a 2008 amendment. This section further strengthens the position of

\textsuperscript{237} Ibid.
victims of crimes and/or their 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 Cr.P.C 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\(^\text{238}\). This Act, which has extraterritorial effect\(^\text{239}\), 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,

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\(^{238}\) 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.”

\(^{239}\) ‘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.
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."

6.13.4. PIL 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\textsuperscript{240}. In most of the cases, PIL seeks to trigger a social change or protect the interests of disadvantaged sections of society\textsuperscript{241}.

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\textsuperscript{242}: where members of a


\textsuperscript{242} 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
class have “the same interest”, the court may allow a few persons to sue on behalf of the entire class. 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. The Court developed epistolary jurisdiction


by which even letters or telegrams were accepted as writ petitions. 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. The following observation of the Supreme Court in SP 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, 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 [...].”

But it is citizen standing that has allowed public-spirited people and NGOs to not only challenge the abuse of public power of government...

Honour of the Supreme Court of India, Oxford University Press – New Delhi, India, 2000, p. 159 at p. 162-67.


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\textsuperscript{249}.

Relocation of polluting industries out of Delhi\textsuperscript{250}, the protection of Taj Mahal from polluting industries\textsuperscript{251}, and the closure of polluting tanneries near the Ganges\textsuperscript{252} 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\textsuperscript{253}, which has done its best to improve the situation and monitor compliance with its orders or directions in many cases.


\textsuperscript{253} See S P Sathe, Judicial Activism in India, Oxford University Press – New Delhi, India, 2002, at p. 208.
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. 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. For instance, the civil society felt disappointed when the Supreme Court did not intervene in matters 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.

One possible explanation is that where "PIL challenges an existing policy backed by powerful political forces, and established in the name of economic

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development, the Court's grasp of its fundamental rights mission becomes more unsteady.”

The judgment of the Supreme Court in Fertilizers & Chemicals Travancore Ltd. Employees Association v. Law Society of India 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.”

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.” “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


259. Ibid., p. 422.

260. Ibid., p. 426.
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”\textsuperscript{261}.

6.13.5. Intervention by the National Human Rights Commission

Although the Paris Principles\textsuperscript{262} 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\textsuperscript{263}. Among others, the Special Representative to the Secretary-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\textsuperscript{264}. 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

\textsuperscript{261} Ibid., p. 424.


level, at the regional level and individually at the national level"\textsuperscript{265}. The Edinburgh Declaration can be seen a step in the right direction in that it explicitly acknowledges multiple ways in which NHRI\text{s} 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\textsuperscript{266}. Section 12 of this Act provides that the NHRC shall have the power to inquire – \textit{suo motu}\textsuperscript{267}, on a petition by a victim or on order to any court – into a complaint regarding a human rights violation\textsuperscript{268}, 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

\begin{itemize}
\item \textsuperscript{266} Act No. 10 of 1994. The Act was amended by the Protection of Human Rights (Amendment) Act 2006, Act No 43 of 2006.
\item \textsuperscript{267} '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 2012.
\item \textsuperscript{268} 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.
\end{itemize}
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 India⁶⁹.

Although the NHRC may not be expressly entrusted with the task of dealing with corporate human rights abuses²⁷⁰, 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 companies²⁷¹ 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 court²⁷². There is also a possibility of the NHRC taking up “the matter with concerned

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²⁶⁹. Ibid., Sections 2(d), (f).


²⁷². 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.
public authorities for enforcement" and, in extreme cases, taking "recourse to filing petitions in courts"\(^{273}\).

### 6.13.6. 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\(^ {274}\). 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\(^ {275}\). The EIA requirement imposes restrictions and prohibitions on the

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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 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”276. 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 India277, 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.

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".

278. Ibid., paras. 29, 31-42, and 44.

The Vedanta case also shows how certain corporations 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. Its strategy partly succeeded in that the Court granted Vedanta the requested clearance in an August 2008 order, although the Court was more circumspect in its November 2007 order and did not oblige the company. In the end, the Court’s green light was not sufficient, as the government decided to withdraw the permission.

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 in the

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281. "For the above reasons and in the light of the Affidavits filed by SII, 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.


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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 & M/s VAL introduced an Interlocutory Application and the Supreme Court order, granted the environmental clearance to the proposal for diversion of 660.749 hectares of forest.

283. (2008) 2 SCC 222

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 [...]]”\textsuperscript{285}.

6.13.7. Community-based Mechanisms

Although not clearly an administrative body or procedure, mention should be made to the system of Lok Adalats\textsuperscript{286} (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. Judicial review of their awards is possible on consitutional 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.

6.14. Conclusion

India provides for Corporate Criminal Liability in broad terms. As noted earlier, after the recent ruling of the Supreme Court in \textit{Standard Chartered}\textsuperscript{287} and \textit{Iridium}\textsuperscript{288}, companies in India can be prosecuted for

\textsuperscript{285} Section 5 of Mines and Minerals (Development and Regulation) Bill of 2010

\textsuperscript{286} The Lok Adalats are established under the Legal Services Authorities Act 1987.

\textsuperscript{287} \textit{Standard Chartered Bank &Ors v. Directorate of Enforcement} (2005) 4 SCC 530: \textit{AIR 2005 SC 2622}
almost every penal offence that exists in any statute in India. The Companies Act, 1956 (the new Companies Bill, 2012) also provided for criminal liability of companies as well as its directors under a host of different circumstances.

The uninitiated in the ways and wonders of Corporate Criminal Liability often assume that as in the case of other legislations, Corporate Criminal Liability would also be better imposed in developed countries as compared to developing countries. The state of corporate criminal law enforcement today in Europe's most powerful economy, Germany is unsettled. Germany does not impose corporate criminal liability generally on its corporations even today. It recognizes Corporate Criminal Liability only in the case of administrative offenses. Similarly the 'identification' doctrine in the U.K. restricts the imposition of the Corporate Criminal Liability in the U.K. However, a developing country like India imposes Corporate Criminal Liability on a much broader scale.

A difference in approach towards Corporate Criminal Liability may however be made between democratic and non-democratic countries. Democratic countries like India, United States, U.K. etc have recognized and imposed Corporate Criminal Liability for a long time. However, non-democratic countries like China have been every reluctant in imposing Corporate Criminal Liability. It is only in the recent years that China has


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recognized Corporate Criminal Liability\textsuperscript{289}. This may be because in imposing Corporate Criminal Liability, a government is often working against the interests of powerful conglomerates and lobbyist. Without a strong support from the people of a nation, which can only be found in a democracy, it would be difficult to make such a move towards Corporate Criminal Liability. Also democracy ensures that a government can exist and remain in power even though it works against the interest of powerful corporations. Democracy thus provides a degree of independence for the governments in making laws and legislations imposing Corporate Criminal Liability.