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FOREWORD

Close involvement with society is the destiny of Law and law makers. In order to understand the concurrence of the latest developments in the area of law and society at large, NULJ has yet again achieved relevance by presenting a very diverse and meaningful collection of articles. We are a movement journal - committed to supporting, enhancing, and privileging all the diverse voices in and outside the country. This of course may lead to a contribution leading to the steady march towards justice. We are a collaborative journal, uniting the energy of law school students, lawyers, activists, and community members to generate important practitioner-oriented scholarship. We are a journal striving to live by the social justice values we espouse by sharing resources, rejecting internal hierarchy, and promoting vigorous discussion, and even dissension, within the pages of our journal. The authors have presented ideas and trajectory of thought process that would surely lead us to new paths of enquiry and deliberations. The NULJ Team appreciates their valiant efforts and looks forward to continued support and zeal in encouraging us.

We believe that as a reader you are as inspired, as impassioned, and as motivated to action as we have been through this process. We hope that you will allow us to partner with you in making our unique corner of the earth a more just and equitable place to live.

Prof. (Dr.) Purvi Pokhariyal
Chief Executive, Nirma University Law Journal
I/c Director, Institute of Law, Nirma University

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A MOVEMENT WITHOUT A LANGUAGE

Vivek Dhareshwar*

It seems obvious that the Anna Hazare led movement has petered out. What is far from obvious is why the movement, even at its peak, seemed destined to end in disarray. Its limitation as a movement sprang from its inability to articulate what it was fighting against. But it is important to acknowledge that it was indeed a movement, for only then can we appreciate the deeper significance of its failure.

When, in April, Anna Hazare sat on his hunger strike, the government seemed disoriented, if not paralyzed. The pedantic and condescending Chidambaram, the posh and glib Sibal, seemed unsettled. Manmohan Singh seemed more weightless than ever. In fact, the government for a few days seemed deprived of legitimacy. I don't think we had ever witnessed anything like this. No one doubted that Anna Hazarewas instantly the voice of a movement. Not thathe was notknown, but precisely because he was known, the authority he now commanded seemed all the more surprising.After Hazare called off the fast, and the stage was taken over by the negotiators, not many would have believed he would be able to repeat the act again. But come August, his authority and leadership seemed enhanced, the movement stronger and wider, and the government seemed composed of card-board

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figures, their utterances and gestures completely vacuous. So we seemed to have witnessed something significant, we seemed to be in the middle of a movement that was in many ways unprecedented.What has, however, prevented us from appreciating the real nature of the movement is in fact its very objective of fighting "corruption." If there is a seeming paradox here, it will not go away until we make the phenomenon that "corruption" putatively refers to and the evaluative discourseof "corruption" itself less opaque. In other words, we had a movement that did not understand what it was fighting for or against!

Whether we take the phenomenon or the moral judgment, there is nothing obvious about corruption. In fact, just a moment's reflection on the standard utterances, which rarely varies, we hear all round us—from scholars to journalists to politicians to ordinary Indians—will make this clear. It is "ubiquitous," "all pervasive," "the rot," so goes the rant by some morally upright figure, "has set in deep," and so forth. Even if we assume that this can be made sense of, a very hard assumption to make, the conclusion or, at any rate, the implication turns out to be the opposite of what the discourse set out to observe and condemn: there is indeed logic, a pattern and systematicity to the actions and the practices they are embedded in. Our first task has to be the cognitive one of spelling out that logic, that frame of action, not the moral one of condemning it without understanding. We want rich, clear and non-adhoc explanation of patterns of action that by all accounts have such systematicity and ubiquity. Let me admit that it is not an easy point to grasp, but unless we do so we will continue the tirade without even realizing where that moralizing stance comes from. What creates the difficulty is that there are two frames in operation (socially rather than merely cognitively). One of them is actionably effective but otherwise unacknowledged and the other one cognitively/morally/legally operant and officially or publicly legitimate. Let me explicate this with some example, beginning at the relatively easier end, as it were.

Let's take nepotism, one of the species of corruption, again supposedly rampant in India. Many left economists routinely condemn the nepotistic practices of Indian capitalists. But when the same leftists advance the careers of their progeny, somehow they seem to use a different frame. I am not suggesting that they are being hypocritical—the point is more subtle or elusive. They simply don't regard that advancement as nepotism. Another example might clarify this better: you return from Oxbridge with a degree. Your uncle who is a vice-chancellor and a figure who is a well-wisher of your family tells you to join his University. He means it as a gesture that simultaneously benefits the University and your family. The ethical language in which he might express this sentiment and justify it would not have a whiff of "nepotism." And yet he might well be delivering a harangue on nepotism that is corroding the vitals of the nation, come convocation day.

So what happens when the left economist sits in the cognitive/evaluative framework (or when the liberal patriarch delivers his harangue)? It is doubtful if any cognition happens. Certain ways of speaking or writing are adopted, which marks one out as a scholar or an intellectual. One of our most distinguished economists once illustrated the lack of certain values among the poorer and illiterate section of Indians with a report of an interview with a woman, a poor laborer, who, when asked about her well-being, replied that "we are not well" (and she wasn't using the royal we) because there was much illness in her family. Assuming that this is a factually correct report, one would have thought that the woman's response reveals an ethical universe understanding which might be richly instructive for social scientists. Instead, her answer is supposed to show that she doesn't understand "freedom" and "choice" and such exalted values. As one of Kannada's most sensitive literary scholar KeertinathKurtkoti once pointed out, when intellectuals use "feudal" to characterize certain behavior, attitude, and values, they are using it as a term of condemnation rather than understanding, for the experience is ours, but the understanding is someone

else's. He was skeptical that we can arrive at genuine understanding this way. The point is generalizable: when we use the cognitive/evaluative frame for our putative "observation" (in much of social scientific writing or journalistic reportage) very little cognition or understanding takes place. Instead we "observe" inefficiency, venality, nepotism, lack of decision-making ability, and so on.All actions thus appear as violation of rationality and morality.

We are now in a position to appreciate a remarkable feature of the word "corruption" that is playing such a crucial role in our lives.That word is not a translation of a native or vernacular word, which should have been the case if the two frames overlapped even significantly if not fully. And whatever word functions as a translation of "corruption"--in Kannada, and perhaps in many other Indian languages, it is "bhrashtachar"--simply has to depend on the original to import the right (whatever that is) connotation and evaluative force. (Brashta is someone who departs from the path of dharma, and achara is practice. I doubt that this term has any currency; I suspect people simply use "corruption.") So we do not employ it to understand something, here actions of a certain kind, but deploy it to classify and judge acts. Since there is no understanding, the deployment appears quite arbitrary. Let me make clear this idea of deployment of discourse with another familiar example. Take "Hinduism." It is not difficult to show that this term has no referent despite the fact that it has been deployed to refer to any number of things, it being entirely indeterminate what can be included in it. Though we can understand why it was postulated into existence (because, roughly, Europeans could only make sense of the diverse practices they saw by drawing them together into a religion called "Hinduism"), it is clear that it cannot provide any understanding or experiential salience to Indians. That the discourse of "Hinduism" is now being deployed by Indians themselves does not make the entity come into being, but creates situations that can range from the harmless, if a little awkward (say Gandhi's use of it) to the

positively disastrous, say its use in politics. But one or the other, it eventually does have the effect of masking the experience of Indians when they wittingly or unwittingly deploy it. Corruption too was a non-empirical observation/judgment of the Indian transactions by the Westerners (in fact, most of Asia that they came into contact was thought to be corrupt). The domain it covered and sought to attack was the whole social ethical world (what I have been calling the actional frame). Like in the case of "Hinduism," when Indians begin to deploy the "corruption" discourse, the consequences range from the harmlessly ridiculous to the dangerously corrosive. The deployment of this frame and the way of speaking that goes with it has such a grip on us now that it begins to obfuscate whatever implicit understanding we might have had of our own ethical universe and the frame that is operative there. When we deploy the discourse of "corruption," we exempt ourselves from understanding the actions that we want to classify or judge as "corrupt."

The obfuscation or destruction of the reflective universe of this frame should not be understood sectorially (modern versus traditional). It is perfectly possible for the items of the so called tradition to be deployed, that is appear in the cognitive/evaluative frame in which "corruption" "right" or the language of democracy operates. Let us take seriously the idea that understanding actions in any deep sense itself involves ends; but these are not subjective ends. Although the actional frame is still operative, the reflection on ends of action and experience that was part of that frame has become fractured, indistinct, and its transmission sporadic, in part because of the onslaught from the other frame. So when we look at a whole range of actions—the lineman who demands money to fix the phone for which he gets paid, the minister who demands money to grant license, the professor who uses his connections to get his son a job, the bureaucrat who demands a trip abroad to clear collaboration, the powerful family that expects that its progenies will, as a matter of course, occupy the most powerful elected office

of the land —in one frame they all get classified as “corrupt.”But in the other frame, our evaluations of some of the cases above may be totally different. For example, although most us would want to make critical remarks about the hold of the Gandhi family, a large number—sometimes the very same people—would also regard Rahul Gandhi as having a privileged claim to the prime ministerial chair.And some instead of regarding the professor's act as nepotism, may consider it as laudable, an act that possibly saved the department.What I am straining to get at is that even when we are deploying “corruption” to condemn certain actions, there is, at least in some case, almost simultaneously a different understanding which may get displayed in the action we take but not register in our discourse.

If the cognitive/evaluative frame has fractured, suppressed and rendered silent the actional frame or universe, in another way the force of the latter has appropriated for itself the structures, the institutions, the language that appear in the former. The complication that results from this awaits even an initial description let alone a theorization. What the political parties—all of them without exception—have done to politics and its institutions cannot be understood without understanding this process.(Are the Reddy brothers who controlled both Karnataka politics and the BJP aberrations or do they embody, in an extreme form, what politics has come to be? What about the DMK family's manipulations? How can a non-electable economic bureaucrat occupy the most powerful political office?) Nor can we simply repeat the liberal normative justification of parliamentary democracy without understanding how that institution and its deployments have been tamed. For what we are confronting in India is a pragmatic use of the very deployments that appear in the cognitive/evaluative frame. Nationalism, the institution of the state, the language of rights are also deployments, that is, they have not, at least not yet, found a way into our experience and self-understanding. It is an open questionwhether any deployed structures or any of its elements can re-conceptualized, understood and made part of one's

experience. Gandhi did not think it is possible; and he placed his trust in creating sites of ethical learning to revitalize our ethical universe outside the state and its institutions.In the last few weeks it has been often enough asked if the Hazare movement is Gandhian. If the movement confines itself to reforming the state, to adding further powers to its institutions or further institutions to itspowers, then clearly there is nothing Gandhian about it. If, on the other hand, it realizes that the mass support is really an expression of a universe that has been muted and thereby induces reflection on structures that have fractured our experience, then the movement has every chance of being Gandhian in the sense of fighting off enslavement to the several deployments.

Many commentators have noted, either as criticism or as irony, that many who participated or supported the movement would be themselves corrupt. I think I have tried to show why there is no irony here and why the criticism is misplaced. Now I can say why I began with the seemingly paradoxical remark to the effect that the very objective of the movement obscures why the movement has come into being: the massive deployment of the discourse of corruption indexes the extent to which the actional frame has been deprived of its language of reflection. Anna Hazare, coming as he does from that universe, stands in for that language though he cannot speak it, overwhelmed as he is by the discourse of corruption. The movement will indeed achieve what some of its participants have been calling the second Independence if it seeks cognitive and ethical independence, if it seeks a language which unifies experience and understanding. That is what Gandhi sought to do. Unfortunately, neither Hazare nor his followers have sought to understand the phenomenon they are attacking, preferring instead the simplistic alternative of moralizing.

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"EAT, PRAY, LAW": IMPLICATIONS OF THE ABSENCE OF A COHERENT REGULATORY REGIME AND THE PROBLEM OF GENETICALLY MODIFIED FOOD IN INDIA

Viswambharan V.S.*

The article involves an examination of the legal regime governing genetically modified foods in India. It contains a brief conspectus of the history of GM crops in India, including Bt Cotton and Bt Brinjal. The essence of the GM debate is sought to be encapsulated. In the course of unfolding the facts and core issues, the lacunae in regulation are sought to be highlighted. The confusion and concerns (including a Public Interest Litigation before the Supreme Court) which led up to the drafting of the Biotechnology Regulatory Authority of India (BRAI) Bill are discussed. The historical conspectus helps to put the critical evaluation of the BRAI Bill, which follows, in context. A detailed figure describing the regulation of genetically engineered organisms, inter alia, is provided. The functions of various regulatory bodies like the Genetic Engineering Approval Committee, inter alia, are outlined. Relevant provisions of pertinent legislations, such as the Seeds Bill, 2004, Prevention of Food Adulteration Rules, 1955 and Food Safety and Standards Act, 2006 are evaluated. The exclusion of the Food Safety and Standards Act, 2006 by the BRAI Bill is critically assessed, with special reference to packing and labeling requirements and important general principles, bearing on human life,

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health and consumers' interests. The following shortcomings of the BRAI Bill are critically analysed at length: overriding the State legislature, violating the fundamental freedoms of speech and expression, the right to life and health and the right to information, and legal lacunae engendered due to exclusions and omissions which are pointed out. The article concludes, highlighting the need for a responsible regulatory framework which builds on the current food safety and bio-safety laws, incorporates safety thresholds and democratic values, and is committed to the protection of human life and health.

THE STORY OF G.M. CROPS IN INDIA – THE CONNIVING DECEPTION

The term Genetically Modified Food or G.M.F. is most commonly used to refer to crop plants created for human or animal consumption using the latest molecular biology techniques.[1] These plants have been modified in the laboratory to enhance desired traits such as increased resistance to pests, herbicides or improved nutritional content.[2] In legal terms, genetically engineered or modified foods means "food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology."[3]

India had not approved the commercial planting of any GM crops until March 2002, when the Indian Genetic Engineering Approval Committee

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[1] Charles W. Schmidt, *Genetically Modified Foods: Breeding Uncertainty*, Environ Health Perspect (August 2005); 113(8): A526–A533; *See also*, Deborah B. Whitman, *Genetically Modified Foods: Harmful or Helpful?*, CSA Discovery Guide (2000) *available at* http://www.csa.com/discoveryguides/gmfood/overview.php.

[2] Deborah B. Whitman, *Id. See also,* RAY V. HERREN, INTRODUCTION TO BIOTECHNOLOGY: AN AGRICULTURAL REVOLUTION 118 (New York: Cengage Learning, 2013).

[3] Section 37(E), *Draft Rules to Amend Prevention of Food Adulteration Rules, 1955*, Indian Health Ministry, Notification dated 10th March 2006.

(G.E.A.C.)[4] finally approved the commercial production of three varieties of G.M. cotton amid widespread protests by anti-GM activists.[5] Thus, this approved GM cotton, commonly referred to as "Bt Cotton", became the first genetically modified crop in India. The Bt-cotton technology was introduced in India by Mahyco (Maharashtra Hybrid Seeds Company) in collaboration with U.S. Company Monsanto.[6] Bt cotton carries the Cry1Ac gene derived from the soil bacterium - Bacillus thuringiensis.[7] The Bt gene expression confers high level of tolerance to the bollworm complex.[8] The trials conducted prior to commercialization clearly established the superior performance of Bt cotton, as demonstrated by increased yield, increased profits and reduced pesticide application.[9]

Following the approval of GEAC, commercial cultivation of Bt cotton was undertaken during 2002 in six states in India: Andhra Pradesh, Gujarat, Madhya Pradesh, Karnataka, Maharashtra and Tamil Nadu.[10] A nationwide survey of more than 3,000 farmers by AC Nielsen found that with Bt Cotton cultivation, profits increased by 78 percent, on average, over farmers who planted traditional varieties.[11] Yields also increased 29 percent, on average in

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[4] The Genetic Engineering Approval Committee (G.E.A.C.) is the apex regulator of genetically modified foods in India. The committee permits the use of genetically modified organisms and products thereof for commercial application in India. Thus, the committee is also the authority to approve for conduct and evaluation of large scale field trials and release of transgenic crop in to the environment. *See also,* Indian Biosafety Rules & Regulations, *available at* http://dbtbiosafety.nic.in/committee/geac.htm.

[5] T. M. Manjunath, *Bt-Cotton in India: Remarkable Adoption and Benefits*, Foundation for Biotechnology Awareness and Education, *available at* http://www.fbae.org/2009/FBAE /website/our-position-bt-cotton.html; *See also,* Heike Baumüller, *Domestic Import Regulations for Genetically Modified Organisms and their Compatibility with WTO Rules: Some Key Issues*, International Centre for Trade and Sustainable Development (ICTSD), TKN Executive Report (August 2003) *available at* www.iisd.org/tkn/pdf/tkn_domestic_regs_sum.pdf.

[6] P.V.Naphade et. al., *Bt Cotton: First successful GM crop of India* (Oct. 23, 2008) *available at* http://www.icac.org/meetings/plenary/67_ouagadougou/documents/english/os2/os2_e_chaporkar.pdf at 2.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Asia Pacific Consortium on Agricultural Biotechnology, *Bt Cotton in India - A Status Report*, APCoAB (2006) *available at* http://www.parc.gov.pk/bt_cotton.pdf.

[11] Ikisan, *Bt Cotton and India*, *available at* http://www.ikisan.com/BT%20Cotton/BT%20Cotton.htm.

addition to the 60 percent decline in pesticide use.[12] The survey also found that some Bt cotton farmers were paid 8 percent more for their crop because it was of a higher quality.[13]

In the meantime, there were reports on the contrary as well. The Gene Campaign's study of the first Bt cotton harvest in Andhra Pradesh and Maharashtra had shown that 60% of the farmers who cultivated Bt cotton in these regions had suffered such losses that they could not even recover their investment.[14] A report from Nimad district in Madhya Pradesh states that Bt cotton is causing allergic reactions in those coming into contact with it and cattle have perished near Bt cotton fields in another district.[15]

Despite such reports, scholars opine that Bt cotton technology has been very effective overall in India.[16] With the overall success of Bt cotton in India, Mahyco targeted its next plant for genetic modification - Brinjal. The Brinjal (egg plant), which originated in India, is popular worldwide.[17] In India, it accounts for half a million hectares of land and an output of 8.4 million tonnes.[18]

Bt Brinjal, developed by Mahyco, is a transgenic brinjal created out of inserting a gene [Cry 1Ac] from the soil bacterium Bacillus thuringiensis into

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[12] *Id.*

[13] *Id.*

[14] Suman Sahai, *A Disaster Called Bt Cotton* (Dec. 1, 2005) *available at* http://www.genecampaign.org/Publication/Article/BT%20Cotton/A-disaster-called-btcotton.htm.

[15] *Id.*; *See also*, Suman Sahai, *Bt Cotton is a failure* (July 10, 2005) available at http://www.genecampaign.org/Publication/Article/BT%20Cotton/BtCotton-is-failure.pdf; *See also*, DAVID A. ANDOW, ANGELICA HILBECK ET. AL, 4 ENVIRONMENTAL RISK ASSESSMENT OF GENETICALLY MODIFIED ORGANISMS: CHALLENGES AND OPPORTUNITIES WITH BT COTTON IN VIETNAM (Cambridge: CAB International 2008).

[16] Guillaume P. Gruère, Purvi Mehta-Bhatt & Debdatta Sengupta, *Bt Cotton and Farmer Suicides in India: Reviewing the Evidence* (October 2008) *available at* http://www.ifpri.org/sites/default/files/publications/ifpridp00808.pdf.

[17] Praful Bidwai, *Opening the Door to Bt Brinjal: A Step Towards Disaster* (Oct. 26, 2009) *available at* http://business.rediff.com/column/2009/oct/26/bt-brinjal-a-step-towards-disaster.htm.

[18] *Id.*

Brinjal.[19] The insertion of the gene into the Brinjal cell in young cotyledons is done through an Agrobacterium-mediated vector, along with other genes like promoters, markers etc.[20] This gives the Brinjal plant resistance against lepidopteran insects like the Brinjal Fruit and Shoot Borer (Leucinodes orbonalis) and Fruit Borer (Helicoverpa armigera).[21] It is reported that upon ingestion of the Bt toxin by the insect, there would be disruption of digestive processes, ultimately resulting in the death of the insect.[22] The Bt brinjal trials conducted by Mahyco indicated a significant gain in terms of reduced insecticide sprays and increased marketable yields of Bt Brinjal.[23]

After conducting the requisite trials, Mahyco applied for commercializing Bt Brinjal in 2008.[24] During the whole time, from the research to field trials, Mahyco's research data and field trial reports of Bt Brinjal was kept as confidential information by the Genetic Engineering Approval Committee and never released to the public.[25] It is noteworthy at this juncture that the modes of scientific governance have often been a cause for concern when they do not have accountability and there is a huge backwash of adverse public reaction. There should be proactive public involvement and deliberation, the examination of scientific concerns in the light of public values and ethics, openness and accountability in the scientific and regulatory process and greater voice to the public, in tune with democratic

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[19] *Bt Brinjal – A Briefing Paper*, Centre for Sustainable Agriculture (June 1, 2006) *available at* http://assamagribusiness.nic.in/bt_brinjal_briefing_paper.pdf at 1.

[20] *Id.*

[21] India Summary, *What is Bt Brinjal? Why Bt Brinjal in India is banned after Bt Brinjal controversy?* (Feb. 10, 2010) *available at* http://www.indiasummary.com/2010/02/10/what-is-bt-brinjal-why-bt-brinjal-in-india-is-banned-after-bt-brinjal-controversy/.

[22] *Id.*

[23] G. Padmanaban, *Bt brinjal – Bane or Boon?*, Current Science (Dec. 25, 2009) *available at* http://www.ias.ac.in/currsci/dec252009/1715.pdf.

[24] BS Reporter, *Bt Brinjal May be Released Commercially by Year-end* (April 15, 2009) *available at* http://www.business-standard.com/india/news/bt-brinjal-may-be-released-commercially-by-year-end/355113/.

[25] Aruna Rodrigues, *Bt Brinjal In India: Why It Must Not Be Released*, Council for Responsible Genetics *available at* http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=43&archive=yes.

values.[26] All this presupposes the open availability of information based on which a transparent regime can be immensely benefited by informed debate.

The aforesaid confidentiality of the Bt brinjal trials invited huge protest from the public, a general outcry that genetically modified foods pose serious health hazards.[27] Scientists and Activists also noted:

> *"No GM Brinjal has been released for an advanced stage of field trials in open conditions anywhere in the world and that this is the first time that GEAC could be giving permission for large scale open trials for a food crop in India – a country which has repeatedly proven itself incapable of regulating GM technology and has allowed contamination as a routine affair."*[28]

Soon, a writ petition was filed before the Supreme Court by Greenpeace[29] citing the weakness of the regulatory mechanism followed by G.E.A.C. and on further application, the court directed the release of technical data relating to GM Brinjal in October, 2006.[30] On being directed by the Supreme Court to publish Mahyco's bio-safety dossier on Bt brinjal on the GEAC's website, all that the G.E.A.C. put out was Mahyco's analysis and conclusions.[31] It withheld all the raw data that would have helped experts outside the G.E.A.C. to make an independent assessment of the bio-safety claims.[32] Finally, it took a contempt petition before the Supreme Court for

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[26] STUART LANE, FRANCISCO KLAUSER, MATTHEW B. KEARNES, CRITICAL RISK RESEARCH: PRACTICES, POLITICS AND ETHICS 103 (Oxford: John Wiley & Sons 2012).

[27] B.S. Reporter, *supra* note 25.

[28] Bt Brinjal – Briefing Paper, *supra* note 20.

[29] Greenpeace is an international organisation that prioritises global environmental campaigns. Headquartered globally in Amsterdam, the Netherlands, Greenpeace has 5 million supporters worldwide, and national as well as regional offices in 42 countries *available at* http://www.greenpeace.org/india/en/about/History/.

[30] Raw Earth Living, *Legal Cases Laid Ground for Bt Brinjal Ban in India* (Feb. 25, 2010) *available at* http://rawearthliving.wordpress.com/2010/02/25/legal-cases-laid-ground-for-gmo-bt-brinjal-ban-india/.

[31] Manoj Mitta, *Challenges posed by Bt Brinjal* (Feb. 6, 2010) *available at* http://articles.timesofindia.indiatimes.com/2010-02-06/india/28128712_1_bt-brinjal-public-consultations-food-crop/3.

[32] *Id.*

the G.E.A.C. to disclose the raw data, at last, in August 2008, covering, among other things, a 90-day feeding study on rats.[33]

This was soon followed by independent international scientists, researchers and activists sharply criticizing the tests conducted by Mahyco as severely deficient.[34] Among the international independent scientists, two eminently qualified independent scientists, Judy Carman and Gilles-Eric Seralini, were in the forefront to critique the feeding studies of the Mahyco bio-safety dossier of Bt brinjal.[35]

Dr. Judy Carman from the Institute of Health and Environmental Research Inc., Australia, notes:[36]

> *"One of the greatest concerns about the process of genetic engineering is that the actual process of inserting the gene may cause the plant to up-regulate or down-regulate the normal genetic expression of the plant and hence to produce more of something harmful to human health, or less of something beneficial to human health. Yet, the compositional analyses presented to the Indian Government by Mahyco do not assess these known likelihoods.*
>
> *A sample size of only three Bt brinjal and three non-BT brinjal were used to determine the differences in composition between the GM and non-GM brinjal. This is woefully inadequate to determine compositional differences between two crops.*

[33] *Id.*

[34] Aruna Rodrigues, *supra* note 26.

[35] *Id.*

[36] Judy Carman, *A Review of Mahyco's GM Brinjal Food Safety Studies*", IHER Report, Chap. 7, Vol. 1, 5 (Jan. 2009); *See also,* Judy Carman, *The Inadequacy of GM Brinjal Food Safety Studies*, (Feb. 11, 2010) *available at* http://www.gmwatch.org/latest-listing/1-news-items/11932-the-inadequacy-of-gm-brinjal-food-safety-studies-dr-judy-carman.

> *The analyses presented also do not take into account compositional differences found under different growing conditions in different areas of India. For example, no work seems to have been done on whether the concentration of harmful components of Bt brinjal increase under different climatic conditions, eg heat or water stress.*
>
> *There is a bland statement by the producers of GM brinjal that their crop is substantially equivalent without even describing the scientific criteria they have used to determine substantial equivalence or any pass/fail level they may have within these criteria."*

He concluded by saying that the information presented to the Indian Government does not meet accepted scientific standards of reporting. Thus, Bt Brinjal cannot be said to be safe for consumption.

Further, Gilles-Eric Seralini, a French Professor from the Committee for Independent Research and Information on Genetic Engineering (CRIIGEN), carried out his own independent assessment of Monsanto-Mahyco's dossier and notes:[37]

> *"Bt brinjal produces a protein in the vegetable cells that induce antibiotic resistance. This is recognised as a major health problem and is inappropriate for commercialised use. It may also indicate that old GM technology is being used as the technology has already moved on from antibiotic resistance marker genes.*
>
> *Bt brinjal appears to have 15 percent less calories and different alkaloid content compared to non-GM brinjal. It contains 16-17 mg/kg Bt insecticide toxin. When fed to animals, effects were*

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[37] Sam Burcher, *Bt Brinjal Unfit for Human Consumption*, ISIS Press Release (Feb. 9, 2009) *available at* http://www.i-sis.org.uk/Bt_Brinjal_Unfit.php.

> *observed on blood chemistry with significant differences according to the sex of the animal or period of measurement. Other effects were on blood clotting time (prothrombin), total bilirubin (liver health), and alkaline phosphate in goats and rabbits.*
>
> *Changes in lactating cows were observed in increased weight gain, intake of more dry roughage matter and milk production up by 10-14 percent as if they were treated by a hormone.*
>
> *Rats fed Bt brinjal had diarrhoea, increased water consumption; decrease in liver weight, and liver to body weight. Feed intake was also modified in broiler chickens."*

He also concluded his report stating Bt Brinjal is not fit for human consumption.

Since international experts gave adverse feedback on the raw data, the G.E.A.C. set up an expert committee under its co-chairman, Mrs. Arjula Reddy, in January 2009, in a bid to allay public apprehensions.[38] The expert committee concluded that Bt brinjal was "safe for environmental release in India" and that its benefits "far outweigh the perceived and projected risks".[39] The committee's report came on October 8 and the G.E.A.C. gave its clearance six days later despite the dissent recorded by the Supreme Court's nominee to the G.E.A.C., Mr. P.M. Bhargava, stating "he is not against genetically modified food but the proposal should not be supported as the safety assessment in his view was not complete".[40]

In response to these comments, Mahyco says that "all of our studies followed norms prescribed by G.E.A.C. (India's apex GM regulator). We are at

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[38] Manoj Mitta, *supra* note 32.
[39] *Id.*
[40] *Id.*

advanced stages of field trial for GM brinjal and our results are extremely promising."[41]

Mahyco is quite right in saying that they have followed norms prescribed by the G.E.A.C.[42] This was exactly the question of concern in the public interest writ petition brought up before the Supreme Court of India: that there are no proper bio-safety regulations for the environmental release of transgenic crops in India, with the apex regulator, the G.E.A.C., essentially adopting a style that lacks regulations for G.M.O.s.[43]

Further, during the course of the public interest litigation, the apex court was appalled to discover that the G.E.A.C. was rubberstamping recommendations made by the Review Committee on Genetic Manipulation (R.C.G.M.), which is part of the Department of Biotechnology, an avowed promoter of GM crops. The evidence of the G.E.A.C.'s cavalier attitude lay in its minutes which showed that in a single meeting it had cleared 91 field trials across 10 food crops.[44] Furthermore, a bench headed by the Chief Justice of India, his lordship Y.K. Sabharwal, felt compelled to pass an interim injunction as the G.E.A.C. had evidently abdicated its duty to independently examine the environmental and biosafety aspects of the proposed G.M. crops.[45] All of this resulted in the Supreme Court passing a stay on all activities of G.E.A.C. and suspending its powers.

Just eight months later, the composition of the bench was changed according to the Supreme Court rules and a new bench headed by Justice Sabharwal's successor, his lordship K.G. Balakrishnan, vacated the stay on the G.E.A.C.[46] As soon as the stay was vacated, G.E.A.C. immediately approved Mahyco's

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[41] Aruna Rodrigues, *supra* note 26.

[42] *Id.*

[43] *Id.*

[44] GM Watch, *Serious Regulatory Lapses over Bt Brinjal* (Feb. 6, 2010) *available at* http://www.gmwatch.org/index.php?option=com_content&view=article&id=11907:serious-regulatory-lapses-over-bt-brinjal.

[45] *Id.*

[46] Manoj Mitta, *supra* note 32.

pending application for permission to initiate large-scale field trials of Bt brinjal on 14th October, 2009.[47] Thus, after carrying out large-scale field trials for two years, Mahyco cleared the final regulatory hurdle in 2009 for commercial cultivation of Bt brinjal.[48] The public went wild over the whole issue and all protests finally resulted in the government issuing a moratorium on Bt Brinjal.[49]

With the issues in relation to Bt Brinjal resulting in suspicious conception of the G.E.A.C. and the Supreme Court declaring that the regulatory mechanisms for genetically modified food is in shambles, it was felt that a new law should be in place to regulate genetically modified foods, i.e. the Biotechnology Regulatory Authority of India Bill (BRAI Bill) must be passed.[50] The BRAI was also recommended a single window system for testing, clearance and monitoring of genetically modified foods thereby promising transparency.[51]

Yet again, from the time the draft BRAI Bill was made available, there were huge protests to the Bill with many researchers, activists and ministers openly declaring that the BRAI Bill is a mockery of law and should not be passed. Despite huge protests, the cabinet approved the Biotechnology Regulatory Authority of India (BRAI) bill on 17th August, 2010 and will be tabled in the Parliament soon.[52]

Amid all these issues, this article is inclined to analyse the laws in India for governing genetically modified foods. It is because though Monsanto-

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[47] *Id.*; *See also,* G. Padmanaban, *supra* note 24, at 1715.

[48] Gm Watch, *supra* note 45.

[49] Prashant, *Cabinet Approves Biotechnology Regulatory Authority of India Bill* (Aug. 17, 2010) *available at* http://greenbio.checkbiotech.org/news/cabinet_approves_biotechnology_regulatory_authority_india_bill.

[50] *Stakeholder's Interfere on GM Food Crops*, Meeting Report, Asia-Pacific Consortium on Agricultural Biotechnology (APCoAB) and Trust for Advancement of Agricultural Sciences (TAAS) (May 19, 2011) *available at* http://www.apaari.org/wp-content/uploads/downloads/2011/05/Pro_GMcrops_052011.pdf.

[51] *Id.*

[52] Prashant, *supra* note 50.

Mahyco's actions were unacceptable and scientists state that Bt Brinjal has not undergone satisfactory tests, the agriculture gaint, Mahyco, followed all the rules and regulations prescribed by the G.E.A.C. and other statutes. Thus, the attempt of this article is to analyze and establish the effectiveness of the existing laws on genetically modified food in India. Further, since the BRAI bill has been approved by the Cabinet and the Minister of Department of Biotechnology affirmed that the bill will be passed in the coming session of the parliament[53], this article will attempt to examine the efficiency and transparency of the BRAI bill to predict what the future legal scenario of genetically modified foods in India would look like.

THE LAWS GOVERNING GENETICALLY MODIFIED FOODS IN INDIA

The regulatory mechanism on genetically modified food in India originates with the Environment Protection Act, 1986. As per this Act, genetically modified organisms and foods are categorized as hazardous substance for which rules and regulations should be specifically established.[54] In compliance with the Act, the Ministry of Environment and Forests established the rules for governing genetically modified organisms and food.

Of all the rules and regulations established by the Ministry of Environment and Forest, the "Rules for the manufacture, use, import, export and storage of hazardous micro organisms, genetically engineered organisms or cells, 1989" are of prime importance. This regulation, established with a view to protect the environment, nature and health while promoting the application of gene technology and micro-organisms, lays down the rules governing genetically modified foods.

[53] Nandita Vijay, *National Biotechnology Regulatory Authority Bill to be Passed in Current Parliament Session* (May 9, 2011) *available at* http://www.pharmabiz.com/PrintArticle.aspx?aid=62775&sid=1.

[54] The Environment (Protection) Act, 1986, No. 29 of 1986, (23rd May, 1986), Proviso to Sec. 8.

As per Rule 4 of the said Rules, 1989, four authorities are established to address all issues on genetically modified organisms and foods. The **Recombinant DNA Advisory Committee (RDAC)** takes note of developments at national and international levels in Biotechnology towards the currentness of the safety regulation for India on recombinant research use and applications.[55] This committee develops long term policy for research and development in Recombinant DNA research, formulating the safety guidelines for Recombinant DNA Research to be followed in India, and to recommended type of training programme for technicians and research fellows for making them adequately aware of hazards and risks involved in recombinant DNA research and methods of avoiding it.[56]

The **Review Committee on Genetic Manipulation (RCGM)** establishes procedural guidance manual for regulating activity involving genetically engineered organisms in research, production and applications related to environmental safety.[57] The **Institutional Biosafety Committee (IBC)** is the nodal point for interaction within institutions for implementation of the guidelines.[58] Any research project which is likely to have biohazard potential (as envisaged by the guidelines) during the execution stage or which involve the production of either microorganisms or biologically active molecules that might cause bio-hazard should be notified to ISC.[59] The **Genetic Engineering Approval Committee (GEAC)** has been set up for approval of activities involving large scale use of hazardous microorganisms and recombinants. It is this committee that grants approval for commercializing genetically modified foods.[60] The following table clarifies the function of the said authorities.

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[55] Section I, Part III, Recombinant DNA Safety Guidelines, 1990, Department of Biotechnology, Ministry of Science and Technology, Govt. of India. Guidelines *available at* http://www.envfor.nic.in/divisions/csurv/geac/annex-5.pdf

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] V.G. Ranganath, *The Perspective and Legal Control of Genetically Modified Foods in India* (April 12, 2010) *available at* http://www.airwebworld.com/articles/index.php?article=1545#sdfootnote32anc.

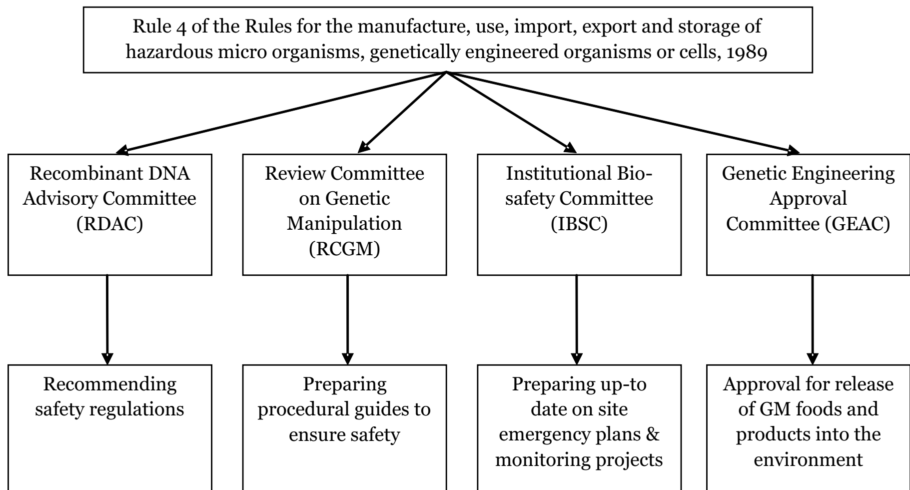

Figure 1: Table on competent authorities and their functions under the rules governing G.M.Os, 1989

As discussed, the G.E.A.C. (Genetic Engineering Approval Committee) was the authority that granted approval for the Bt cotton way back in 2002 and Bt Brinjal in 2009.

To further facilitate the activities, these authorities or institutional committees are further governed by the Department of Biotechnology guidelines, Recombinant DNA Safety Guidelines, 1990, Revised Guidelines for Safety in Biotechnology, 1994 and, Revised Guidelines for Research in Transgenic Plants and Guidelines for Toxicity and Allergenicity Evaluation of Transgenic Seeds, Plants and Plant Parts, 1998.

In addition, there are many other statutes that govern genetically modified food. They are:

1. For Genetically Modified Seeds

The rules in relation to genetically modified seeds are covered by the "Seeds Bill, 2004". As per the said bill, a committee shall be formed with the power

to specify the minimum limits of germination, genetic and physical purity and seed health[61] and declare the mark or label to indicate that such seeds conform to the said minimum standards established by the bill.[62]

The Section 15 of the Seeds Bill, 2004 affirms that no seed of any transgenic variety shall be registered unless the applicant has obtained clearance under the provisions of the Environment (Protection) Act, 1986.[63] It is noteworthy herein that the term "transgenic variety" means seed or planting material synthesized or developed by modifying or altering the genetic composition by means of genetic engineering.[64] This registration is a prerequisite for commercializing the genetically modified seed.

Further, this bill also establishes the guidelines for export and import[65] of genetically modified seeds and lays down the punishment[66] for contravening the provisions of the bill.

Though these provisions on genetically modified seeds seem all-inclusive, these provisions are only on paper and not in action. For example, even before the approval of the first official Bt hybrids in 2002, illegal Bt cotton seeds were used in India.[67] In 2001, the unlicensed Bt cotton hybrid NB-151 (from the company NavBharat) which was cultivated in more than 10,000 acres contained Monsanto's Cry1Ac gene; however, neither had it obtained

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[61] Seeds Bill of 2004, Bill No. LII of 2004, Bill Serial No.: SER1/BILL2004/RAJYA/3248LRS, Sec. 6(a).

[62] *Id.,* Section 6(b).

[63] *Id.,* Section 15.

[64] *Id.,* Section 2(22).

[65] The Section 36(1) of the Seeds Bill states:

All import of seeds shall be subject to the provisions of the Plants, Fruits and Seeds (Regulation of Import into India) Order, 1989, or any corresponding order made under section 3 of the Destructive Insects and Pests Act, 1914; shall conform to minimum limits of germination, genetic and physical purity, and seed health as prescribed under section 6; and shall be subject to registration as may be granted on the basis of information furnished by the importer on the results of multi-locational trials for such period as may be prescribed to establish performance.

[66] Section 38, *Id.*

[67] Prakash Sadashivappa and Matin Qaim, *Bt Cotton in India: Development of Benefits and the Role of Government Seed Price Interventions*, AgBioForum 12(2) 2009.

license nor undergone the necessary biosafety procedures.[68] Further, in 2004-05, illegal seeds reached an estimated area of 2 million acres.[69]

2. For the importation of Genetically Modified Food

The importation of genetically modified food is regulated through many statutory regulations, all of which must be complied. The statutory regulations are:

a. Foreign Trade (Development and Regulation) Act, 1992

This Act declares that the Central Government has the power to make provisions for the development and regulation of foreign trade by facilitating imports and increasing exports.[70] Further, the Central Government can also make provisions for prohibiting, restricting or regulating, the import or export of any class of goods including genetically modified foods.[71]

b. Customs Act, 1962

The Section 11 of the Customs Act, 1962 provides that the Central Government has the power to prohibit, either absolutely or subject to conditions, the import or export of any good for certain purposes. These purposes include:

- the protection of human, animal or plant life or health[72]; or
- any other purpose conducive to the interests of the general public[73].

It is noteworthy that all imports fall within 4 categories in India: **freely importable items** which are items that do not require import licences;

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[68] *Id.*
[69] *Id.*
[70] Foreign Trade (Development and Regulation) Act of 1992, Aug. 7, 1992, Act No. 22 of 1992, Sec. 3.
[71] *Id.,* Section 3(2).
[72] Customs Act of 1962, Act No. 52 of 1962, Dec. 13, 1962, Section 2(1)(k).
[73] *Id.,* Section 2(1)(v).

licensed imports which are items that can only be imported with licence. The current "negative list" of items in this category includes several broad product groups that are classified as consumer goods; products related to safety and security; seeds, plants and animals; some insecticides, pharmaceuticals and chemicals; etc.[74]; **canalised items** which are items imported only by specified public-sector agencies; and **prohibited items** which are completely banned from importation. All genetically modified foods fall within the category of licensed imports.

Further, customs inspectors have considerable authority and discretion in matters of inspection and valuation of imported items.[75] Any imported goods or parts of any shipment may be examined and tested.[76] Customs officials may require the importer to furnish information or produce any contract, broker's note insurance policy, catalogue or other document to help ascertain the rate of duty or tariff valuation.[77]

c. Prevention of Food Adulteration Rules, 1955:

The proviso to Section 48F of the Prevention of Food Adulteration Rules, 1955[78] specifically notes that all importers must submit proper documents supporting the purported clearance at the time of import.[79] This provision applies to all foods irrespective of whether it is genetically modified or not.

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[74] *Indiamart, Importing to India – Regulations and Procedure*, *available at* http://finance.indiamart.com/exports_imports/importing_india/regulations/index.html.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Prevention of Food Adulteration Rules of 1951, S.R.O. No. 2106, Sept. 12, 1955.

[79] Section 48-F, Draft Proposal to amend Food Adulteration Rules, 1955 states:

48-F Restriction on Sale of Genetically Modified Food: No person shall except with approval of and subject to the conditions that may be imposed by the Genetic Engineering Approval Committee (GEAC) constituted under the Environment Protection Act, 1986, manufacture, import, transport, store, distribute or sell, raw or processed food or processed food or any ingredient of food, food additives or any food product that may contain GM material in the country:

Provided that in case of imported genetically modified foods, the importer shall submit documents supporting the purported clearance at the time of import.

Apart from this, the Act does not prescribe any other import rules or restrictions on genetically modified food.

d. Food Safety and Standards Act, 2006

This Act prescribes the rules for importing of food to India. As per the Act, no person shall import into India[80]:

- any unsafe or misbranded or sub-standard food or food containing extraneous matter;
- any article of food for the import of which a licence is required under any Act or rules or regulations, except in accordance with the conditions of the licence; and
- any article of food in contravention of any other provisions of the Act.

If one feels that India has wide provisions to regulate the importing of genetically modified foods, then it is, sadly a misconception. In May 2, 2008, Greenpeace picked up three random products containing corn from Le Marche, a super market in Vasant Vihar, Delhi and send them to an independent lab, Hong Kong Food Testing Laboratory (Hong Kong DNA Chips, Ltd).[81] The products were sent for DNA analysis for confirmation of the presence of G.M. ingredients. The PCR (polymerase chain reaction) analysis confirmed the presence of the GM ingredients in the corn chips.[82]

The tests conducted revealed that Pepsico's Doritos Corn Chips contain genetically modified Mon 863 and NK 603 variety corn ingredients. An independent study on Mon 863 has been published by German scientists which states:

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[80] *Id.,* Section 25.

[81] Greenpeace, *Greenpeace uncovers illegal GM food in India*, Press release (May 2, 2008), *available at* http://www.greenpeace.org/india/en/news/greenpeace-uncovers-illegal-gm/.

[82] The test results are available with Greenpeace and is shared on request. To obtain the test result contact, *visit*: http://www.greenpeace.org/india/en/.

"We observed that after the consumption of MON863, rats showed slight but dose-related significant variations in growth for both sexes, resulting in 3.3% decrease in weight for males and 3.7% increase for females. Chemistry measurements reveal signs of hepatorenal toxicity, marked also by differential sensitivities in males and females. Triglycerides increased by 24–40% in females (either at week 14, dose 11% or at week 5, dose 33%, respectively); urine phosphorus and sodium excretions diminished in males by 31–35% (week 14, dose 33%) for the most important results significantly linked to the treatment in comparison to seven diets tested."[83]

The above said independent study states that Mon 863 and NK 603 are both unsafe for human consumption.

On notifying the concerned authorities, Greenpeace received responses from the Director General of Health services, Director General of Foreign Trade and the Genetic Engineering Approval Committee, the three agencies involved in regulation of import of Genetically Modified food in the country, declaring that no permission has been granted for the import and sale of any Genetically modified Food in India other than purified Soya oil.[84] The issue was soon buried and no actions were further taken regarding this matter. It is still unanswered as to how the illegal genetic modified foods were imported to India when the same was not even approved?

This explicitly shows that though India has wide provisions on importing of genetically modified foods, the law is still meek and weak.

3. For Labeling Genetically Modified Food

The only existing law in relation to packing and labeling of genetically modified food are the provisions contained in Food Safety and Standards

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[83] Gilles-Eric Seralini, Dominique Cellier and Joel Spiroux de Vendomois, *New Analysis of a Rat Feeding Study with a Genetically Modified Maize Reveals Signs of Hepatorenal Toxicity*, Arch. Environ. Contam. Toxicol 52, 596–602 (2007).

[84] Greenpeace – Illegal G.M.F., *supra* note 82.

Act, 2006[85]. In accordance with Section 23 of the Food Safety and Standards Act, 2006, no person can manufacture, distribute or sell any packaged food products which are not marked and labeled. In addition to this, every food business operator will ensure that the labeling and presentation of food and the information which is made available about them through whatever medium, does not mislead consumers.[86]

Apart from this, there was a draft proposal to amend the Prevention of Food Adulteration Rules, 1955 to add a provision for labeling of genetically modified food. As per the draft proposal, Section 37-E was to be inserted, according to which all genetically modified food whether it is primary or processed or any ingredient of food, food additives or any food product that may contain GM material shall be compulsorily labeled.[87] Further, the label of all packages of GM Foods shall indicate that they have been subject to genetic modification.[88] In addition to this, the label of the imported GM Food shall also indicate that the product has been cleared for marketing and use in the country of origin so that the verification, if needed can be taken up with that country without having to resort to testing.[89]

This draft proposal was never incorporated into the Prevention of Food Adulteration Rules, 1955. Therefore, at the time being, the law governing packing and labeling of genetically modified food is the Food Safety and Standards Act, 2006.

It is noteworthy at this juncture that the BRAI Act affirms all genetically modified food will be exempted from the purview of the Food Safety and Standards Act, 2006.[90] Therefore, in future, the BRAI governs the

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[85] The Food Safety and Standards Act of 2006, No. 34 of 2006, (August 23, 2006).
[86] *Id.,* Section 23.
[87] Section 37 E, Prevention of Food Adulteration Rules, 1955.
[88] *Id.,* Section 37-E (b).
[89] *Id.,* Section 37-E(c).
[90] Section 3, Part II, Schedule II, BRAI Bill, 2009.

importation of genetically modified food. This exemption provision in BRAI Act has a major flaw which is proven in the forthcoming pages of the Article.[91]

4. For Safety and Security of Genetically Modified Food

The Food Safety and Standards Act, 2006 affirms that the Food Authority of India shall regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food.[92]

Further, as per Article 16(3) of the Act, some of the main functions of the food authority includes providing scientific advice and, collecting scientific and technical data on food consumption and the exposure of individuals to risks related to the consumption of food. Furthermore, the Act also prescribes General principles to be followed in respect of administration of the Act, namely[93]:-

(a) endeavour to achieve an appropriate level of protection of human life and health and the protection of consumer's interests;

(c) if harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure appropriate level of health protection may be adopted;

(e) all the measures adopted shall be reviewed within a reasonable period of time;

(f) if it is suspected that a food may cause risk for human health, then, the Food Authority and the Commissioner of Food Safety shall take appropriate steps to inform the general public of the nature of the risk to health.

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[91] Creating Legal Lacunae, *infra*.

[92] Food Safety and Standards Act of 2006, Section 3(j).

[93] *Id.,* Section 18(1).

Thus, the Act strives to ensure that only safe and secure foods reach the public. Again, as already mentioned, all of these provisions will have no application in future once the BRAI Act gets passed by the parliament due to the exemption provision.[94]

THE FUTURE OF GENETICALLY MODIFIED FOOD IN INDIA

As already mentioned, the BRAI Bill was approved by the cabinet on 17th August, 2010. Since the Bill has already been approved by the Cabinet, the Bill will be tabled before the parliament in the coming session and passed. However, this Bill is under serious criticism from the public. The following is an analysis of the BRAI Bill and the possible implications of the Bill.

The Biotechnology Regulatory Authority of India Bill if passed will be the most draconian Act ever to be enacted by the parliament. In addition to violating the fundamental rights enshrined in the Constitution of India, the BRAI Bill is unconstitutional in toto. The following analysis establishes this fact in detail:

1. **Overriding the powers of the State Legislature**:

The Article 2 of the BRAI Bill notes

> *"It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of organisms, products and processes of modern biotechnology industry."*

Further, Article 81 of the BRAI Bill states

> *"Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

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94 Creating Legal Lacunae, *infra*.

In short, Article 2 affirms that the Union or the parliament along with the central government shall take all actions in relation to the regulation of genetically modified foods and other products. In addition, Article 81 strengthens Article 2 by stating that even if there exist laws which are contrary to empowering Union with the sole power to regulate genetically modified organisms and products, Article 2 will prevail over such other existing law. Though these might sound as bona fide provisions, they are explicitly against the Constitution of India, 1950.

The seventh schedule of the Constitution of India contains three lists specifically; Union list (List I), State list (List II) and Concurrent list (III). As per Article 246 of the Constitution of India, the Union list enumerates the matters or items on which the parliament has the exclusive right to legislate[95], the state list enumerates matters or items on which the state legislature has the exclusive right to legislate[96] and the concurrent list enumerates matters or items on which both the parliament and the state legislature has powers to legislate[97]. Thus, as per the Constitution of India, it is unconstitutional for the parliament to legislate on any matters enumerated in the State list unless the state legislatures specifically authorize the parliament to legislate.[98]

Most notably, the item 14 of State List (List II)[99] is

> *"Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases."*

This clearly implies that any laws regulating Genetically Modified foods and mass cultivation of the same should be addressed by the state legislature as it

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95 Const. of India, art. 246(1).
96 *Id.,* art. 246(4).
97 *Id.,* art. 246(2).
98 *Id.,* art. 249(1).
99 *Id.,* Schedule VII, *Id.*; *available at* http://www.indeaparis.com/forms/7th_schedule.pdf .

is within the power of the state legislature. Further, through Article 81, the provision of the BRAI Bill will override all the laws made by the state government and gain control over item 14 specified in the state list (List II) of the Seventh schedule of the Constitution which is not possible unless the Constitution itself is amended.

In addition to this, the item 6 of the State List (List II) is public health.[100] This means that laws that affect public health must be addressed by the state legislature and the parliament does not have any powers to legislate on issues affecting public health.

Thus, on matters relating to agriculture, protection against pests and issues affecting public health, legislation must originate from the state. Instead, the Article 2 of the BRAI Bill strips the state legislature of all the powers and declares that the Union (parliament) shall deal with all the issues related to genetically modified food, which is unconstitutional. As already established in *Kesavananda Bharati v. State of Kerala*[101], the federal character of the Constitution which divides the power to legislate between the parliament and the state legislature is a basic structure of the constitution which cannot be altered or destroyed.

The most surprising element is that the framers of the BRAI Bill acknowledge that the Bill will have implications on health and agriculture. This fact is explicit from the Preamble of the BRAI Bill which states that modern biotechnology involving genetically modified organisms offers opportunities to address important needs related to *health*, *agriculture*, food production and environment.[102] The preamble also states that measures for the safe and responsible use of biotechnology for safeguarding the health and safety of the people of India is one of the primary concern of the Act.[103]

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[100] *Id.,* Item 6. List II, Schedule VII.
[101] 1973 (4) SCC 225 at 230.
[102] BRAI Bill of 2009, Preamble.
[103] *Id.*

Thus, it is surprising that the framers overlooked the fact that public health and agriculture including pest control are exclusive subjects of state legislature and therefore, Article 2 and 81 are unconstitutional. Further, the whole BRAI Act becomes unconstitutional as the state legislatures have not authorized the parliament to approve the BRAI Bill. This is notable from the open opposition to the BRAI Bill from state governments in Kerala, Orissa, Madhya Pradesh, Assam and several other states.[104]

2. Violating Right to Speech and Expression

Yet another crucial fact is that the BRAI Bill also contains provisions which violate the right to speech and expression. The Article 63 of Chapter XIII on offenses and penalties of the BRAI Bill states:

> *"Whoever, without any evidence or scientific record misleads the public about the safety of the organisms and products specified in Part I or Part II or Part III of the Schedule I, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and with fine which may extend to two lakh rupees or with both."*

It is noteworthy that the genetically modified products covered in Schedule I includes any genetically engineered plant that may have application in agriculture, fisheries, forestry[105] or used as food[106].

Meanwhile, the Indian constitution asserts the right to speech and expression through Preamble[107] *and Article 19(1) (a)*[108]. *The Article 19(1) (a),*

[104] Mahim Pratap Singh, *BRAI Biotech Bill Restructures Republic of India* (Aug. 27, 2010), Online: Food Freedom, *available at:* http://foodfreedom.wordpress.com/2010/08/27/brai-biotech-bill-restructures-republic-of-india/.

[105] BRAI, 2009, Section 1(a), Part 1, Schedule 1.

[106] *Id.,* Section 1(b), Part 1, Schedule 1.

[107] Preamble to the Constitution of India, 1950 reads "We, the People of India, having solemnly resolved to constitute India into a soverign, socialist, secular, democratic, republic and to secure to all its citizens... LIBERTY of thought, *expression*, belief, faith and worship.

[108] Article 19(1)(a) of the Constitution reads: "All citizens shall have the right to freedom of speech and expression"

being a part of the various rights guaranteed under the part III of the constitution, becomes a fundamental right for all citizens and non citizens. The "freedom of speech and expression" in Article 19(1)(a) means the right to express one's convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner.[109] The judicial precedents, applying the principle of golden rule of interpretation, have further recognised that the freedom of speech and expression is a natural right which a human being acquires on birth.[110]

Thus, it is the privileged right of the Indian citizen to believe what he considers to be true and to speak out his mind with the best of tastes; and speak perhaps, with greater courage than care for exactitude.[111] Thus the *freedom of speech and expression includes the freedom of propagation of ideas, their publication and circulation and the right to answer the criticism leveled against such views.*[112]

Thus, Section 63 of the BRAI Bill which criminalizes expressing or publishing any comments on genetically modified food is violative of the freedom of speech and expression which guarantees to all citizens the right to freely express one's views and convictions with greater courage than care for exactitude. The ultimate objective of the freedom of speech and expression is to serve the social purpose of discovering the truth, participating in decision making and to stimulate adequate social change[113] which the BRAI Bill seeks to curb.

Further, the right to publishing criticizing materials, which quotes opinions and comments, without scientific record or evidence, has always been the

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[109] Life Insurance Corporation of India v. Manubhai D Shah, (1992) 3 SCC 637 at 642.

[110] L.I.C. v. Professor Manubhai D. Shah, AIR 1993 SC 171 at 178.

[111] Sheela Barse v. Union of India, (1986) 3 SCC 596 at 598.

[112] Maneka Gandhi v. Union of India, AIR 1978 SC 597 at 599; *See also*, H.M.SEERVAI, CONSTITUTIONAL LAW OF INDIA 121 (4th ed., 1993).

[113] Attorney-General v. Times Newspapers Ltd, (1973) 3 All E.R. 54 at 57; People's Union for Civil Liberties and Anr v. Union of India and Ors, AIR 2004 SC 1442 at 1447.

right of the press under Article 19(1)(a) of the Constitution of India. This is notable in the case of *Indian Express Newspapers Pvt. Ltd.* v. *Union of India*[114], where the Supreme Court after understanding the importance of the right of the press to express its views asserted at page 315,

> *"In today's free world freedom of Press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non formal education possible in large scale particularly in the developing world where television and other kind of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspaper, being purveyors of news and views, having a bearing on public administration, very often carry material which would not be palatable to Governments and other authorities. The authors of the articles which are published in the newspapers have to be critical of the action of the government in order to expose its weaknesses."*

This assertion is again notable in the case of *Sheela Barse* v. *Union of India and others*[115]; wherein the Supreme Court acknowledged that "the press has the broader right to criticise the systemic inadequacies in the governmental actions in the interest of the larger public."

All of the aforesaid assertions made by the Supreme Court has its base or origins rested in *Virendra* v. *State Of Punjab*[116], where, observing the views in *Romesh Thapper Case*[117], the Supreme court held that, "Prohibiting Newspaper from publication of its own views or criticisms of the

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[114] AIR 1986 SC 315.
[115] (1986) 3 SCC 596 at 599.
[116] AIR 1957 SC 896 at 901.
[117] 1950 AIR SC 124 at 126.

correspondents about the burning topic of the day is a serious encroachment of the valuable right of freedom of speech and expression."

Thus, Article 63 which criminalizes criticizing genetically modified food with imprisonment or fine is a blatant violation of the fundamental right enshrined in Article 19(1) (a) of the Constitution of India including the right of all persons and the press media to criticize.

In addition to this, most curiously, while every little term in the BRAI Bill such as a "company" or a "director" has been defined, no explanation or definition has been given for terms used in section 63 such as "evidence", "scientific record" and "misleading".[118] Thus, what is misleading and what is the threshold for misleading is entirely questionable.

Above all, Dr. P.M. Bhargava, founder of the Centre for Cellular and Molecular Biology, has made a very crucial comment

> *"There is no penalty if someone promotes GMOs without safety tests but there is a penalty if someone wishes to inform the public about the hazards of GMOs."*[119]

This statement is very true as the BRAI Bill, in reality, does not contain any penalty or sanction if a person promotes genetically modified food which is unsafe.

Further, as P.V. Satheesh, the National Convenor of Southern Action on Genetic Engineering, explains:[120]

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[118] Dinesh C Sharma, *Govt Moots Jail for GM Food Critics* (Feb. 19, 2010), *available at* http://indiatoday.intoday.in/site/story/Govt+moots+jail+for+GM+food+critics/1/84730.html.

[119] *A Comment on the Biotechnology Regulatory Authority of India (BRAI) Bill*, Centre for Indian Political Research and Analysis (April 14, 2010), *available at* http://www.cipra.in/paper/BRAI.html.

[120] *Genetic Engineering in Food and Farming and its Legal Implications: A Round Table for Strategy Building*, July 17 & 18, 2010, Hyderabad (1st ed., 2010) *available at* http://www.ddsindia.com/www/pdf/NALSAR%20publication.pdf.

> *"The Biotechnology Regulatory Authority of India [BRAI] came out with a clause in which it says if you criticise Genetic Engineering or any of those policies without "understanding", you are liable to be imprisoned for six months. Imagine this. I am eating my food and I think that this food might be poisonous. If I say that this food might be poisonous, what I get is a jail sentence. And this is the democratic India that we are talking of."*

Thus, Section 63 which punishes anyone for speaking, writing or publishing anything on genetically modified foods which are misleading in nature is clearly against Article 19(1) (a) of the Constitution of India.

3. Violating the Right to Information

The Section 27(1) of the BRAI Bill states that in spite of what the Right to Information Act, 2005 states, all information in relation to genetically modified organisms and food shall be retained as confidential and not disclosed to any other party. Quite explicitly, through Section 27(1) of the BRAI Bill, the framers of the Bill are trying to circumvent the fundamental right established through Article 19(1) (a) of the Constitution of India, specifically the right to Information. A past experience of India rings a bell at this clause – the fiasco over Section 33 of the Representation of People Act, 1951.

The Supreme Court in the case of *Union of India v. Association for Democratic Reforms*[121] declared that in a democracy the 'little man' or 'voter citizen' of the nation would have the basic elementary right to know full particulars of a candidate who is to represent him either in the Parliament or Legislative Assembly, where laws to bind his liberty and property may be enacted. The voters have a fundamental right under Art. 19(1) (a) to get information regarding the education, antecedents, assets etc. of the candidates contesting to the Parliament or Legislative Assembly.

[121] AIR 2002 SC 2112 at 2114.

In this case the Supreme Court directed the Election Commission to issue a notification making it compulsory for those who contest elections to make available information about their education, assets, liabilities and criminal antecedents for the benefit of voters. Thereupon the election commission issued a notification making it compulsory to give details of candidates along with their papers.

Thus the 170th Report of the Law Commission on Reform of Electoral Laws and the Report of the Vohra Committee on criminalisation of politics have equipped the elector with an informed choice. Candidates are now required to disclose criminal records, educational qualifications, and their assets and liabilities.

In order to overcome the impact of the decision of the Supreme Court and the notification of the Election Commission, the parliament amended the Representation of the People Act, 1951 (R.P. Act) and inserted S. 33 B, "notwithstanding anything contained in any judgment of any court or any order of the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder". The impact of the amendment was that the candidates were not to give any details as per the notification of the Election Commission.

Thus, in *People's Union for Civil Liberties (PUCL)* v. *Union of India*[122], the petitioners challenged the constitutional validity of Sec. 33 B of the R.P. Act. The Supreme Court struck down Sec. 33 B as it is violative of citizens' fundamental right to get information included in the freedom of speech and expression under Art. 19(1) (a) of the Constitution of India. The Supreme Court also observed that the voting at an election is a form of expression and a fundamental right under Art. 19(1) (a) of the constitution.

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[122] (2004) 9 SCC 580 at 585.

To give further effect to this judgment passed in 2004, a new Act namely, "Right to Information Act, 2005" was passed which asserts that democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.[123]

Through Section 27(1), the BRAI Bill is attempting to circumvent the Right to Information Act, 2005 and the judicially accepted principle that the right to information is a part and parcel of Freedom of Speech and Expression guaranteed to one and all. Thus, if the Bill is passed, history will be repeated. It is because, similar to the direction given in *Union of India v. Association of Democratic Reforms*[124], G.E.A.C. was previously directed by Supreme Court to release the Bt Brinjal dossiers and it took a contempt petition to finally expose the trial data. Further, with Section 27(1), the BRAI Bill will officially circumvent the previous judgment which is similar to the attempt made through inserting Section 33B in the Representation of People's Act, 1951.

Furthermore, even before the judgment in *People's Union for Civil Liberties (PUCL)* v. *Union of India*[125] the Right to Information had been declared as a fundamental right. In the case of *S.P. Gupta vs. Union of India*[126], popularly known as Judges case, judges claimed for privilege in respect of the disclosure of certain documents submitted before them by the Government of India, the Supreme Court had to intervene and by a generous interpretation of the guarantee of freedom of speech and expression elevated the right to know and the right to information to the status of a fundamental right, on the principle that certain unarticulated rights are immanent and implicit in the enumerated guarantees.[127]

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[123] Right to Information Act of 2005, No. 22 of 2005 (June 15, 2005), Preamble.
[124] Union of India v. Association of Democratic Reforms, *supra* note 122.
[125] (2004) 9 SCC 580 at 585.
[126] AIR 1982 S.C. 149.
[127] *Id.* at 153.

Thus, in India, the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a).[128] It is therefore explicit that Section 27(1) is against the fundamental right guaranteed through Article 19(1) (a) of the Constitution of India.

Further, Section 27(2) states that BRAI will not reveal any information on genetically modified food to any party unless BRAI ensures that it will not cause any harm to any person. In addition to the fact that the provision is poorly drafted, what does BRAI imply by the term "not causing any harm to any person"? There is no definition or explanation attached to this section that clarifies BRAI's take or position on the threshold of "not causing any harm to any person."

4. Violation of Right to Life and Health

The BRAI Bill recognizes two types of trials in relation to genetically modified organisms and food. They are: Clinical Trial and Field Trial. "Field Trials" means a field experiment of growing a genetically engineered organism or food.[129] The interesting part is to examine the definition of the term "clinical trial".

The Section 3(g) of the BRAI Bill, 2009 notes

"clinical trial" means systematic study of any new organism or product specified in Schedule I ***in human*** for the purpose of generating data for discovering or verifying its clinical, pharmacological (including pharmacodynamic and pharmacokinetic), biological, or, adverse effects with the objective of determining safety, efficacy or tolerance of that organism or product. [emphasis added]

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[128] S.P. Gupta v. President of India and Ors., 1982 AIR SC 149, 234; *See also,* Secretary, Ministry of Information & Broadcasting v. Cricket Association of West Bengal, 1995(2) SCC 161.
[129] BRAI Bill of 2009, art. 3 (n).

Since the product specified in Schedule 1 Part I of the BRAI Bill also includes genetically modified foods[130], it is implied that a new genetically modified plant can be directly tested in humans to study the adverse effects to determine the safety of the genetically modified food. There is no requirement that it should be tested firstly on any other organisms.

The Section 33 of the BRAI Bill may console any person concerned with the above section as it notes that all forms of field trial or clinical trial must be authorized by the authority established under the Act. This begs the question what if any person contravenes this provision, i.e. What will happen if a person goes ahead with clinical trial without being authorized by the authority?

The answer lies in the penalties provision covered in Chapter XIII. As per Section 62(1) of Chapter XIII of the Bill,

> *"Whoever, himself or by any other person on his behalf, conducts clinical trials with organisms or products specified in Part II of Schedule 1, in contravention of section 33 shall be punished with imprisonment for a term which shall not be less than five years but which may extend to ten years and with fine which may extend to ten lakh rupees or with both."*

Thus, as per the provision on penalties, a person who conducts clinical trials without the authorization of the authority is punishable with imprisonment as well as fine.

Most importantly, the Schedule 1 of the BRAI Bill has three parts. Part I of Schedule I affirms that the organisms and products regulated by the

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[130] *Id.,* Part I, Schedule I.

Organisms and products covered in Part I includes (a) Any genetically engineered plant, animal, micro-organism, virus or other animate organism that may have application in agriculture, fisheries (including aquaculture), forestry or food production; and (b) Any genetically engineered plant, animal, micro-organism, virus or other animate organism used as food.

authority includes genetically modified organisms, virus, plants, animals and other organisms. The Part II of Schedule I affirms that the authority has power to regulate DNA vaccines developed from genetically modified organisms for therapeutical purposes. The Part III affirms that all other genetically modified organisms and products not falling within Part I and Part II will also be regulated by the authority.

The Bill recognizes clinical trials for all the parts of Schedule I but the penalties provision clearly skips Part I of the Schedule which deals with genetically modified food. Thus, as per the BRAI Bill, if a person conducts trial on humans with genetically modified foods, he cannot be punished. This also implies, if someone creates a genetically modified food, he or she can directly conduct human trials even without conducting any preliminary trials on rats or other animals without incurring any liability.

Till to date, even in U.S., there has been no direct human clinical trial of genetically engineered foods.[131] The only published human feeding experiment revealed that genetic material inserted into GE soy transfers into the DNA of bacteria living inside our intestines and continues to function.[132] Even after one stops eating GE foods, one may still have the GE proteins produced continuously inside him or her.[133]

In such circumstances, a law that allows for direct human clinical trials, which can cause serious health hazards, to study the adverse effects can be extremely dangerous if there is no sanction to curb blatant and rash experimentation.

Further, the Supreme Court of India has already established that the "Right to Health" is a fundamental right covered in Article 21 of the Constitution of

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[131] *Genetically Engineered Food Alters Our Digestive Systems!* (June 20, 2011), *available at* http://nexusilluminati.blogspot.com/2011/06/genetically-engineered-food-alters-our.html.

[132] *Id.*

[133] *Id.*

India. This is notable in a plethora of judgments discussing the substantive content of the right to life, where the Supreme Court has established that the right to live with human dignity includes the right to good health.[134] Therefore, Section 3(g) which allows for human trials which can cause serious health hazards is clearly violative of Article 21 of the Constitution of India.

5. Creating Legal Lacunae

The framers of the BRAI Bill have overlooked a very serious issue in the nature of creating legal lacunae through certain provisions of the Bill. Most importantly, the Section 3, Schedule II, Part II of the BRAI Bill specifically states that the provisions of the "Food Safety and Standards Act, 2006" will not have any application whatsoever on any genetically modified organisms or products that are covered under the BRAI Bill.

Since the Schedule I Part I of the BRAI Bill covers all types of genetically modified foods, it is explicit that the provisions of the Food safety and standards Act, 2006 will have absolutely no application on any genetically modified foods.

As already mentioned, considering the fact that the draft proposal to amend the Food Adulteration Rules, 1955, to incorporate provisions for labeling, was never implemented, there is only one particular statute that establishes the law in relation to labeling genetically modified foods – The Food Safety and Standards Act, 2006. there will be no law for labeling genetically modified food.

Further, the BRAI Bill, though very comprehensive, clearly skips any mention of labeling and therefore lacks any provision or regulation for labeling of genetically modified food. Thus, with BRAI officially declaring

[134] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 811, 812; CESE Ltd. v. Subhash Chandra Bose, AIR 1992 SC 573. 575; Vincent v. Union of India, AIR 1987 SC 990 at 994.

that Food Safety and Standards Act, 2006 will not have any application in respect of genetically modified foods, there will be no law, no rule and no regulation which affirms that genetically modified foods should be labeled.[135] In essence, it creates a legal lacuna as it would no longer be necessary to label genetically modified food. This is extremely dangerous as common man will not be able to differentiate between genetically modified food and organic food as there is no labeling to distinguish them. This is to be understood in the context of labeling being the operative part of the consumer's 'right to choose'.[136]

6. Cognizance of the offences and Lack of Jurisdiction

As per Section 70 of the BRAI Bill, all courts are barred from taking cognizance of any offence punishable under the Bill, unless a complaint has been filed by the authority or any person authorised by it. Thus, though the Bill states it is an offense to submit false information and conduct unauthorized field trials and clinical trials, it cannot be challenged unless the authority feels so.

In addition to this, the BRAI also establishes that no civil court shall have any jurisdiction in respect of any matter which the appellate tribunal under the Bill is empowered to decide.[137] Further, no injunction can be granted by any court in respect of any action taken under the Act.[138]

All of these provisions make the BRAI Bill a closed one with very limited interventions. It is because no one can be charged or held liable even if he

[135] Generally, two types of labeling regimes are now followed in various countries: voluntary labeling guidelines (eg. Argentina, Canada, U. S. A.) or mandatory labeling requirements (eg. Australia, E. U., Japan, Brazil, Korea, China). See Jana Zel, Mojca Milavec, Danny Morrisset et al., *How to Reliably Test for GMOs* 7 (Springer Briefs in Food, Health and Nutrition, New York: Springer, 2012).

[136] YVES BERTHEAU (ED.), GENETICALLY MODIFIED AND NON-GENETICALLY MODIFIED FOOD SUPPLY CHAINS 1.4.1. (Oxford: John Wiley & Sons, 2013).

[137] BRAI Bill, Section 77.

[138] *Id.*

conducts open field trials without authorization unless the authority decides to take action. Further none of courts have any jurisdiction to deal with the offenses listed in the Bill. All of these issues take a higher tone as the authority and the adjudicatory board established through the Bill is not bound by the Code of Civil Procedure, 1908[139] and Indian Evidence Act, 1872[140] but guided only through the principles of natural justice[141].

CONCLUSION

As noted above, India's legislative efforts to regulate genetically modified foods have been in shambles as of this date. Though India has a large number of statutes to regulate genetically modified foods, the experience of illegal imports of Bt cotton and Doritos corn chips categorically points out that the laws in relation to importing, commercializing and labeling are ineffective.

At the same time, the public at large is against genetically modified food because of various reasons. Firstly, though initial responses and results were overwhelming, Bt Cotton has been termed as unsuccessful and hazardous by farmers themselves. In his work on "*Persistent Narratives: Why is the "Failure of Bt Cotton in India" Story Still with Us?*", Ron Herring[142] quotes Sadeque and states:

> *"After grazing on Bt cotton leaves, in just four villages in Andhra Pradesh, 1800 sheep died horrible, agonizing deaths within 2-3 days from severe toxicity. Other disaster reports find leaf wilt, root rot, increased drought susceptibility, and a wide variety of ills... There are also reports of allergies not only among farmworkers but also itching and rashes in people wearing*

[139] *Id.,* Section 56(7).
[140] *Id.,* Section 56(3).
[141] *Id.,* Section 56(7).
[142] Ron Herring, *Persistent Narratives: Why is the "Failure of Bt Cotton in India" Story Still with Us?,* 2009 AgBioForum, 12(1): 17.

> *clothing made from Bt cotton.... Other reports have emerged from India on the ill health effects of Bt cotton on both people and animals. It is being held responsible for causing untimely deaths, decline in milk quality and quantity, and serious reproductive failures. Many workers in cotton gin factories have to take antihistamines daily before they can start work."*

Though Ron Herring's work disproves that Bt Cotton can cause the deaths and health hazards as the reports establish, a major portion of the public has the misconception that Bt crops can cause serious health hazards. In addition, the farmers of Khargoan district where Bt was declared to be 100% failure are up in arms against Monsanto-Mahyco and are demanding compensation from the company for the failure of their crop.[143] Further, in Vidarbha, primarily cotton growing area in Maharashtra, Bt cotton crop has been declared as failed in 30,000 hectares and the farmers of the area are demanding a compensation of Rs. 5000 million (500 crores rupees) to meet their economic loss lest they would take a legal action against the Government of Maharashtra and Monsanto-Mahyco for allowing sale of inadequately tested GM seeds.[144]

This misconception was further stemmed with the recent official statement released by Monsanto-Mahyco on March 6, 2010. For the first time anywhere in the world, Monsanto has admitted that insects have developed resistance to its Bt cotton crop.[145] During field monitoring of the 2009 cotton crop in Gujarat, Monsanto and Mahyco scientists detected unusual survival of pink bollworm to first-generation single-protein Bollgard cotton. Testing was conducted to assess for resistance to Cry1Ac and the Bt protein in

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[143] "*Failure of Bt Cotton in India*", Press Release of Research Foundation for Science, Technology and Ecology (RFSTE) (Sept. 26, 2002), *available at* http://www.biotech-info.net/bt_failure.html.

[144] *Id.*

[145] Priscilla Jebaraj, *Bt cotton ineffective against pest in parts of Gujarat, admits Monsanto* (March 6, 2010), *available at* http://www.thehindu.com/news/national/article183353.ece.

Bollgard cotton and pink bollworm confirmed absolute resistance to Cry1Ac.[146]

The company is advocating that Indian farmers switch to its second-generation product to delay resistance further.[147] Monsanto's critics say that this just proves the ineffectiveness of the Bt technology, which was recently sought to be introduced in India in Bt brinjal as well[148] to which Monsanto-Mahyco replied that "Resistance is natural and expected"[149]. This reply did not satisfy the millions who were promised that Bt cotton is the ultimate solution to all pest related issues in cotton cultivation.

On top of all these issues, the level of secrecy maintained by the G.EA.C. while approving genetically modified foods has created huge suspicion among the public. This is clearly notable from the Bt Brinjal issue in which the Supreme Court had to intervene and direct the G.E.A.C. and the responsible authority to release the dossiers of Bt Brinjal.

Further, a new evil is prowling around the corner – the BRAI Act. As already mentioned, the BRAI Act can have serious implications including explicitly violating and abridging the fundamental rights established through the constitution of India. In addition to this, the Section 81 of the BRAI Bill also states that the provisions of the BRAI Bill will prevail in spite of any other laws prevailing in India if it is contrary to those BRAI provisions.

However, it has been already established by the Supreme Court in *Minerva Mills Ltd. v. Union of India*[150] that the parliament has no power to abrogate or emasculate the fundamental rights through statutes. Thus, unless the

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[146] Zia Haq, *Bt Cotton Flunks Pest Resistance Test in Gujarat* (March 5, 2010), *available at* http://www.hindustantimes.com/Bt-cotton-flunks-pest-resistance-test-in-Gujarat/H1-Article1-515648.aspx.

[147] Priscilla Jebaraj, *supra* note 146.

[148] *Id.*

[149] Dinesh C. Sharma, Bt Cotton has Failed Admits Monsanto (March 6, 2010), *available at* http://indiatoday.intoday.in/site/story/Bt+cotton+has+failed+admits+Monsanto/1/86939.html.

[150] (1980) 3 SCC 625, 632.

constitutional provisions on freedom of speech and expression, freedom of information, right to life and health, and the federalism which are all part of basic structure of the constitution are amended, the BRAI Bill will be unconstitutional and end up getting struck down by the Supreme Court.

Thus, as explained, the BRAI is also no better in terms of maintaining the level of transparency that satisfies the common man. Due to the draconian clauses in BRAI Bill, the parliament, the central government and Monsanto-Mahyco will face unparalleled protests if the Bill is as approved by the parliament and notified in the official gazette. With Mr. M.K. Bhan, the secretary of Department of Biotechnology stating that the BRAI Bill will be passed by the parliament in the coming session[151], citizens are demanding the arrest of the Minister for Science and Technology, Mr. Prithviraj Chavan for establishing the Biotechnology Regulatory Authority of India (BRAI) at the Anusandhan Bhavan Premises, Delhi[152].

All of these issues establish that the future of genetically modified foods is bleak in India. At present, a lot of suspicion is attached to all genetically modified foods as the regulatory authority passed foods without proper safety trials and most trial details being declared confidential. As a final nail in the coffin, big names, such as Monsanto, have gained huge negative reputation among literate members of the society. Thus, the only way genetically modified foods can appeal to the masses is to ensure that there is 100% transparency. In respect of the misconception the public has, time will eventually heal it provided transparent and safe genetically modified foods reach the market. The need of the hour is a comprehensive, coherent and responsible regulatory framework which meets safety standards, incorporates the democratic values of openness, transparency and public

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[151] Nandita Vijay, *supra* note 54.

[152] Green Peace, Citizens demand arrest of Minister Prithiviraj Chavan, demand BRAI bill be withdrawn (April 20, 2010), *available at* http://greenpeace.in/safefood/news-blog/citizens-demand-arrest-of-minister-prithiviraj-chavan-demand-brai-bill-be-withdrawn/.

participation, does not erode the present framework of food and bio-safety laws or seek to place itself outside their scope and purview (but rather seeks to build constructively on it), and does not, by way of omissions and exclusions, fudge or gloss over important health and safety issues.

HUMAN RIGHTS OBLIGATIONS OF BUSINESS: APPRAISING THE POTENCY OF JOHN RUGGIE'S UN FRAMEWORK OF "PROTECT, RESPECT AND REMEDY" BY STATES AND CORPORATIONS

Michael C. Ogwezzy*

Businesses are increasingly focused on the impact they have on individuals, communities and the environment. It is clear that one of the central measures of a company's social responsibility is its respect for human rights while most companies recognize the moral imperative to operate consistent with human rights principles, recognition is growing that respect for human rights also can be a tool for improving business performance. Many organizations have realised the importance of value-based business and promote value-based principles in business believing that building a respectful, diverse, and ethical culture is a business necessity. The framework for determining what human rights issues are linked to business was addressed through the UN Global Compact, which calls upon business to "support and respect the protection of internationally proclaimed human rights within their sphere of influence and make sure they are not complicit in human rights abuses. But the debate concerning the responsibilities of business in relation to human rights became more prominent in the 1990s, as oil, gas, and mining companies expanded into increasingly difficult areas, and as the practice of offshore production in clothing and footwear drew attention to poor working conditions in global

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supply chains. In 2004, the Sub-commission of the then UN Commission on Human Rights produced a set of "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" The Norms essentially sought to impose as binding obligations on companies directly under international human rights law the same range of duties that states have accepted for themselves: namely, "to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights," with the only distinction being that states would have "primary" duties and companies would have "secondary" duties, and that the duties of companies would take effect within their (undefined) "spheres of influence". Business was vehemently opposed to the Draft Norms. In 2005, then UN Secretary-General, Kofi Annan appointed a UN Special Rapporteur, John Ruggie to take steps in resolving the argument over the draft norms. In a report released in 2008, he outlined his well known "Protect, Respect and Remedy" framework. Based on three years of extensive consultations, the framework clarified the responsibilities that states and businesses have with regard to human and labour rights and argued for the need for access to remedy. Ruggie later produced the Guiding Principles, which specify what the implementation of the framework means in practice. In June 2011 the UN Human Rights Council, in an unprecedented move, unanimously adopted the Guiding Principles. It was decided that these principles should serve as the framework for further policy development and standard-setting on businesses and human rights. Hence this paper will appraise the potency of this UN framework responsibility in addressing human rights obligations associated with businesses globally.

INTRODUCTION

Human rights have pervaded much of the legal and political discourse since the Second World War. While the struggle for freedom from oppression and

misery is probably as old as humanity itself, it was the massive affront to human dignity perpetrated during that War, and the need felt to prevent such horror in the future, which put the human being back at the centre and led to the codification at the international level of human rights and fundamental freedoms. Article 1 of the Charter of the United Nations declares "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as one of the purposes of the Organization.[1] Human rights therefore are the most fundamental rights of human beings. They define relationships between individuals and power structures, especially the State and entities like business corporations. Human rights delimit State powers and, at the same time, require States and business concerns to take positive measures in ensuring an environment that enables all people to enjoy their human rights without impediments.[2] In the past, when human rights were still regarded as a country's internal affair, other States and the international community were prevented from interfering, even in the most serious cases of human rights violations, such as genocide. That approach, based on national sovereignty, was challenged in the twentieth century, especially by the actions of Nazi Germany and the atrocities committed during the Second World War. Today, human rights promotion and protection are considered a legitimate concern and responsibility of the international community and that is why this research will examine the UN John Ruggie Framework and how it addressed human rights obligations of states and corporations in their business activities.[3]

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[1] Manfred Nowak, *et al*, *Human Rights: A Handbook for Parliamentarians, Inter-Parliamentary Union*, Office of the United Nations High Commissioner for Human Rights, Geneva iii (2005).

[2] *Id.* at 1.

[3] *Id.* at 8.

CORPORATE SOCIAL RESPONSIBILITY OF BUSINESS AND HUMAN RIGHTS

With globalisation, corporate social responsibility (CSR) has become an important theme around the world. Companies are confronted with this theme from various angles: corporate responsibility is taking up more and more space in the press. Consumer organisations increasingly demand information about production conditions and routes to market. Nongovernmental organisations (NGOs) and trade unions approach companies with requests and demands regarding their commitment to society. Lastly, politicians have also discovered CSR as an area for policy-making and international organisations such as the European Commission are considering standardisation and regulation. Corporate social responsibility (CSR) describes companies' responsibilities vis-à-vis society in the areas of environment, social issues and economy. CSR initiatives are the contributions that companies make in areas where they interact with wider society in the framework of their business activities.[4]

Until recently, human rights have played a rather marginal role in and for the conceptualization of Business and Corporate Social Responsibility (CSR).[5] In 2003, Mary Robinson stated that "it remains the case that

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[4] Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA), *International Aspects of Corporate Social Responsibility (CSR)- Practical Advice for Companies*, European Union and International Social Policy Department, Berlin 4-5 (2006).

[5] Corporate Social Responsibility (CSR) is associated with the conduct of corporations and in particular whether corporations owe a duty to stakeholders other than shareholders. Whilst the phrase "Corporate Social Responsibility"' may be gaining momentum, the concept itself is not new. A single globally accepted definition of CSR does not exist, as the concept is still evolving. Though, CRS can be defined in the following manner: The commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life', 'Operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business', 'A set of management practices that ensure the company minimises the negative impacts of its operations on society while maximising its positive impacts', 'The integration of business operations and values whereby the interests of all stakeholders including customers, employees, investors, and the environment are reflected in the company's policies and actions'. (Kim Kercher, *Corporate Social Responsibility Impact of Globalisation and International Business*, Faculty of Law, Corporate Governance eJournal, Bond University (Oct. 9, 2012) *available at* http://epublications.bond.edu.au/cgej/4.

virtually all of the corporate social responsibility debates around the world made no reference to international human rights standards."[6] Similarly, Campbell observes that for a large part, CSR codes and policies have avoided the terminology of human rights in the past. This, it seems, to have changed especially with the publication of the two reports of UN Secretary-General's Special Representative on business and human rights (SRSG).[7] John Ruggie, in 2008 caught the attention of scholars concerned with CSR and has led to a noticeable increase in human rights related literature in the field[8] and the so-called "business and human rights debate" [9] is now on the CSR radar.[10] In 2008 he published the two much anticipated reports, which summarized his extensive effort during the previous three years. In those reports, Ruggie introduced a tripartite framework consisting of a corporate responsibility to respect human rights, the state duty to protect human rights, and the need for more effective access to remedy in cases of human rights abuse hence the topic "business and human rights", today predominantly revolves around Ruggie's framework.[11]

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[6] M. Robinson, "Foreword" in R. SULLIVAN, BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 9-12 (Sheffield: Greenleaf Publishing 2003).

[7] T. Campbell, *A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations*, BUSINESS ETHICS QUARTERLY 16/2: 255-269, 256 (2006). *See also,* W. Crag, *Human Rights and Business Ethics: Fashioning a New Social Contract*, JOURNAL OF BUSINESS ETHICS 27/1,2: 205-214, 208 (2000).

[8] United Nations Human Rights Council, *Protect Respect and Remedy: A Framework for Business and Human Rights*. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, 8th Session, A/HRC/8/5 (Oct. 10, 2012) *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861-.pdf? OpenElement. *See also,* the United Nations, *Clarifying the Concepts of "Sphere of Influence" and "Complicity."* Report of the Special Representative of the Secretary-General on the issue of Human rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Human Rights Council, 8th session, A/HRC/8/16 (Oct. 10, 2012) *available at* http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf.

[9] Chandler, *Oil Companies and Human Rights*, BUSINESS ETHICS: A EUROPEAN REVIEW 7/2, 69-72 (2008). *See also*, J.G. Ruggie, *Business and Human Rights: The Evolving International Agenda,* AM. J. INT'L L. 101: 819-840, 839 (2007).

[10] Florian Wettstein, *CSR and the Debate on Business and Human rights: Bridging the Great Divide*, BUSINESS ETHICS QUARTERLY at 2, Institute for Business Ethics, University of St. Gallen, Society for Business Ethics (Oct. 12, 2012) *available at* http://www.pdcnet.org /pdfs/forthcoming/BEQ22-4_1.pdf.

[11] *Id.* at 5.

EFFORTS AT ENSURING BUSINESS AND HUMAN RIGHTS PROTECTION BEFORE JOHN RUGGIE'S UN FRAMEWORK

The human rights impact of companies has slowly emerged as a business concern over the past 30 years. During the course of the 1990s and in early 2000, coinciding with a few major incidents involving large companies and human rights abuses, there were increasing demands for companies to operate within human rights standards, drawn from international human rights law. Several companies began to study the framework when aiming to understand human rights and their responsibilities. A small number of companies started to incorporate human rights into their codes of conduct and operational policies.[12]

Though from history, international law, has always focused on relations between states, and is also adapting to the new climate. Human rights groups and others have long argued that states have an obligation not only to respect human rights themselves but also to enforce human rights law against private actors, including companies. Historically too, international law remedies in relation to unlawful businesses are considered weak. This weakness is exacerbated when domestic laws are incapable of holding businesses accountable for inappropriate conduct in other jurisdictions. This issue is further complicated when the national law in the country where the inappropriate conduct occurred is either inadequate or the judicial system or government is not motivated to commence action against the offending corporation. These issues have led to a common criticism that businesses mostly transnational corporations operate "outside the law" and therefore no forum capable of holding them accountable for inappropriate conduct exists.[13]

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[12] John Morrison & David Vermijs, *The "State of Play" of Human Rights Due Diligence Anticipating the Next Five Years*, Institute for Human Rights and Business (IHRB), London 2011, 5 (Oct. 14, 2012) *available at* www.institutehrb.org.

[13] Kim Kercher, *supra* note 6, at 9.

The increasing power of transnational corporations within the global economy has brought with it a corresponding awareness of the need for an international regime that places direct responsibilities on these companies.[14] When the global resources of a transnational corporation are substantially larger than those of the country where it is operating, the government of that country may not be in a position to enforce international, or even domestic, laws against the company at all; especially when the company often receives the diplomatic support of the first world state where it has its corporate headquarters.[15]

As far back as 1948, the Universal Declaration of Human Rights, the founding document of international human rights law, called on "every individual and every organ of society" to promote respect for human rights.[16] In the 1970s, at the height of discussion about the establishment of a "new international economic order,"[17] two other documents adopted by international bodies explicitly referred to companies these are: the ILO's Tripartite Declaration[18] and the Organization for Economic Cooperation and

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[14] Due to their immense economic power and influence, transnational corporations would be able to contribute to a better social and political environment, but in reality not a small number of them are actually involved in human rights violations or even themselves commit human rights abuses. (*See* UN Millennium Project, Report 2005 "Investing in Development – A Practical Plan to achieve the Millennium Development Goals", London / Sterling 2005, at. 110. (118)). *See also,* Nils Rosemann, "The UN Norms on Corporate Human Rights Responsibilities An Innovating Instrument to Strengthen Business Human Rights Performance", Occasional Papers, Dialogue on Globalisation, Geneva, N° 20/August 2005.

[15] Bronwen Manby, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis*, A case study published by the

Carnegie Council on Ethics and International Affairs, Case Study #20, New York 10-11 (Oct. 12, 2012) *available at* www.cceia.org.

[16] Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III) of December 10, 1948; U.N. Doc A/810 at 71 (1948), art. 29; *See also*, L. Henkin, *The Universal Declarations at 50 and the Challenge of Global Markets,* 1 BROOK. J. INT'L L. 25 (1999).

[17] "The New Economic order should be founded on full respect for the following principles: ... regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such corporations operate on the basis of the full sovereignty of those countries." (*See* Paragraph 4 (lit g) General Assembly Resolution 3201 (S-VI) *Declaration for the establishment of a New International Economic Order* of May 1, 1974, U.N. Doc. A/RES/3201 (S-VI)).

[18] International Labour Organisation: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted November 16, 1997, 17 ILM 422 (1978) and revised by 17 November, 2000, 41 ILM 186 (2002)

Development (OECD) Declaration and Guidelines[19] after which other documents emerged.

In 1977 the International Labour Organization (ILO), a tripartite organization with representatives of governments, business, and labour having access to its decision-making organs as members of national delegations, adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises (MNE's) and Social Policy, which committed all parties concerned by the declaration to "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations[20] as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress." The ILO's declaration, dating from 1977/2000, is reference framework for companies with international activities. It is an instrument negotiated and adopted by governments, worker and employer organisations, and is therefore based on broad consensus.[21] The declaration also seeks to encourage the positive contribution of business corporations to economic and social progress and states, inter alia, that: business enterprises should obey national laws, respect international standards, honour voluntary

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[19] Organisation for Economic Co-operation and Development: Guidelines for Multinational Enterprises, adopted June 21, 1976, 15 ILM 967 (1976), and revised on 27 June, 2000, 40 ILM 237 (2001). The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, proclaims that all parties, including multinational enterprises, "should respect the Universal Declaration of Human Rights and the corresponding international Covenants." ILO., Tripartite Declaration of Principles Concerning Multinational Enterprises & Social Policy 3, 8 (Oct. 11, 2012) *available at* http://www.ilo.org/public/english/employment/multi/download/english.pdf. The OECD Guidelines for Multinational Enterprises recommends that firms "respect the human rights of those affected by their activities consistent with the host government's obligations and commitments." OECD Guidelines for Multinational Enterprises 19 (2000).

[20] UN International Covenant on Civil and Political Rights G.A.R 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23rd March, 1976 and the UN International Covenant on Economic, Social and Cultural Rights. G.A.R. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3rd January, 1976.

[21] Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA), *supra* note 6, at 8.

commitments and harmonise their operations with the social aims of countries in which they operate;[22] governments should implement suitable measures to deal with the employment impact of Multinational Enterprises; and in developing countries, business should provide the best possible wages, conditions of work (including health and safety) and benefits to adequately satisfy basic needs within the framework of government policies. But this declaration could not suffice the need of the period.

In 1976, the Organization for Economic Cooperation and Development (OECD) adopted a Declaration and Guidelines on International Investment for Multinational Enterprises, though this document, is applicable only among the rich states of the OECD. In the OECD Guidelines for Multinational Enterprises, the governments of OECD countries set out general recommendations for corporate social responsibility. They relate exclusively to foreign investments and not as often claimed by trade unions and NGOs to trade relations. The OECD guidelines are directed to all companies active abroad, and their subsidiaries. The guidelines explicitly do not set out to take the place of national law. Rather, they encourage companies to contribute on a voluntary basis to the economic, social and ecological development of the host countries where they are active.[23] The OECD Guidelines for Multinational Enterprises are the longest standing initiative for the promotion of high corporate standards. The Guidelines contain voluntary principles and standards for responsible business conduct in areas such as human rights, supply chain management, disclosure of information, anti corruption, taxation, labour relations, environment, competition, and consumer welfare. The Guidelines aim to promote the positive contributions of MNEs to economic, environmental and social

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[22] Caux Round Table, International Labour Organisation (Oct. 10, 2012) *available at* http://www.cauxroundtable.org/ILOTripartiteDeclarationofPrinciplesconcerningMultinationalEnterprisesandSocialPolicy.html.

[23] Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA), *supra* note 6, at 7 (Oct. 12, 2012) *available at* http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html.

progress.[24] The Guidelines express the shared values of 39 countries consisting of the 30 OECD members[25] and nine non-member countries.[26] The adhering countries are the source of almost 90 percent of the world's foreign direct investment and are home to most major MNEs.[27]

The U.N. Commission on Transnational Corporations, established in 1974, also developed over many years a draft U.N. Code of Conduct on Transnational Corporations, finally submitted in 1990, which provides that "transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate." The code was never formally adopted by the United Nations, because of opposition from rich countries to some of its provisions, especially those relating to treatment of transnationals by host countries. Efforts to place direct responsibilities on transnational corporations at the international level picked up in the late 1990s. The U.N. Commission on Human Rights Subcommission on Prevention of Discrimination and Protection of Minorities decided in 1998 to establish a working group on the relationship between human rights and the activities of transnational corporations. The World Bank, often involved in financing large infrastructure projects in which transnational corporations are involved, set up a working group to develop guidelines on best international practice for investment in the oil sector.[28]

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[24] Kim Kercher, *supra* note 6, at 8-9.

[25] OECD countries are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, UK, US. The governments of 36 industrialised countries have put in place "national contact points" which answer questions about the guidelines and help to solve problems. They also look into complaints about failure to comply with the guidelines and bring together the relevant partners to try and find an amicable solution. In Germany the "national contact point" is part of the Federal German Ministry for Economy and Technology, in the Foreign Investment Department. (*See* Nils Rosemann, *supra* note 14, at 18-20).

[26] The non OECD countries are Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia has also declared their adherence to the Guidelines.

[27] Kim Kercher, *supra* note 6. The OECD created complaint mechanisms called "National Contact Points" to which individuals may bring complaints against businesses subscribing to the OECD Guidelines, and tasked its Investment Committee with overseeing NCP performance.

[28] *Id.*

Various branches of the U.S. government have taken steps to impose obligations on U.S. businesses operating abroad with respect to human rights, as well as, more commonly, economic objectives. The most significant legislative initiative in this regard was the Comprehensive Anti-Apartheid Act (CAAA) of 1986, since repealed; it was designed to limit investment in South Africa under the apartheid regime. In 1996, the United States passed legislation, partially modelled on the CAAA, giving the president authority to prohibit new investment by U.S. citizens or companies in Burma (Myanmar) if the Burmese military government physically harmed, rearrested, or exiled opposition leader Aung San Suu Kyi, or committed large-scale oppression against the political opposition. In May 1995, President Clinton announced a set of "model business principles," a voluntary code of ethics to be used by U.S. based multinational companies, which supports respect for fundamental human and labour rights, though without sufficient detail to give clear guidance. [29]

The Global Reporting Initiative (GRI), convened in 1997, was established to improve sustainability reporting practices, while achieving comparability, credibility, timeliness, and verifiability of reported information.[30] The Guidelines, first released in June 2000, revised in 2002 with a revision due during 2006, seek to develop globally accepted sustainability reporting guidelines. These guidelines are also voluntary and are used by organisations in reporting on the economic, environmental, and social dimensions of their

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[29] Bronwen Manby, *supra* note 15. The issue of CSR and human rights is now also being discussed more intensively with Brazil, India, China, Mexico and South Africa, via the G8 Heiligendamm process. The aim must be to win over these countries to the two most important instruments, the OECD guidelines for multinational enterprises and the ILO Tripartite Declaration. Bearing in mind the increasing significance of China and India in the area of direct investments in Africa, this will underpin sustainable development on the African continent and implementation of human rights. See, Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA), *supra* note 6, at 24 (Oct. 11, 2012) *available at* at www.bda-online.de or www.csrgermany.de. *See also,* ILO Tripartite Declaration (Oct. 11, 2012) a*vailable at* http://www.ilo.org/public/english/employment/multi/download/english.pdf and OED guidelines for multinational enterprises: http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[30] Global Reporting Initiative, Guidelines (Oct. 13, 2012) a*vailable at*http://www.globalreporting.org/guidelines/2002/dannex1.asp.

activities. The Guidelines are increasingly becoming a universally accepted method of harmonising CSR reporting in various jurisdictions. Approximately 1000 organisations worldwide incorporate the GRI¹s Guidelines into their reporting.[31]

The Global Sullivan Principles (GSP) released in 1999 consists of eight principles. It is a voluntary code of conduct seeking to enhance human rights, social justice, and protection of the environment and economic opportunity for all workers in all nations. The GSP originated with suggestions made by Reverend Dr. Leon Sullivan that a global code be derived from the original Sullivan Principles (which were instrumental in the fight to dismantle apartheid in South Africa). The GSP were developed in consultation with leaders of business, government and human rights organisations in various nations.[32] The Reverend Leon Sullivan, author of the "Sullivan Principles" on U.S. investment in South Africa..., put forward a new set of "Global Sullivan Principles" in February 1999; this voluntary code commits those companies that signed it to a set of... principles, including "support for universal human rights."[33]

The UN Global Compact was put in place in 2000 by UN Secretary General Kofi Annan with the objective of strengthening cooperation between the United Nations, business and other groupings in society and thus making a worldwide contribution to more sustainable growth. The companies involved in the UN Global Compact set out to give closer consideration to core values in the fields of human rights, labour rights and environmental standards by implementing its ten fundamental principles in their worldwide activities.

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[31] Kim Kercher, *supra* note 6, at 11.

[32] *Id.*; *See also*, FAQs about the GSP (Oct. 15, 2012) *available at* http://www.unpri.org/files/pri.pdf>.

[33] *Id.* Within the European Union, the European Parliament Committee on Development and Cooperation adopted a report in December 1998 proposing the establishment of an independently monitored E.U. Code of Conduct for Multinationals. Although these initiatives have yet to place legally binding responsibilities on transnational corporations in relation to issues of social responsibility, it seems that it will be only a matter of time before they do so though resistance can be expected from the business sector.

The Global Compact, which involves business, labour, NGOs and governments, its original nine principles were derived from the Universal Declaration of Human Rights, the ILO's Fundamental Principles on Rights at Work and the Rio Declaration on Environment and Development. Critics have pointed to a tendency for the Global Compact Office to see the promotion of Foreign Direct Investment (FDI) in developing countries as an important objective and even to regard it as a manifestation of corporate responsibility.[34]

In August 2003 a sub-commission of the UN Commission on Human Rights presented the so-called "draft norms" on the responsibilities of corporations with regard to human rights. These "draft norms" took the approach that the duty of governments to enforce human rights could be transferred to companies, sometimes in a binding manner. At the 60th meeting of the UN Commission on Human Rights in April 2004, the "draft norms" were rightly thrown out.[35] The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (UN Norms) ordinarily was an attempt to establish a comprehensive legal framework for the human rights responsibilities of companies. The Norms which endeavour to standardise existing standards are based solely on existing international law regarding human rights and labour standards and deal with issues such as workers rights, corruption, security and environmental sustainability. The UN Norms state that MNEs have an obligation to 'promote, secure the fulfilment of, respect and protect human

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[34] Rhys Jenkins*, Globalization, Corporate Social Responsibility and Poverty*, Internal Affairs, 81, 3 (2005) 530-531; *See also,* A. Zammit, *Development at Risk: Rethinking UN–Business Partnerships* 74 (Geneva: South Centre and UNRISD, 2003).

[35] Confederation of German Employers' Associations or Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA)., "Human Rights and Multinational Enterprises Possibilities and Limits of What Business Can Do", BDA: Berlin, May 2008 (Oct. 12, 2012), a*vailable at* http://www.arbeitgeber.de/www/arbeitgeber.nsf/res/7F023D2C865B93F7C12574EF00544F88/$file/Menschenrechte_engl_WEB.pdf.

rights recognised in international and national law'. The UN norms are not a formal treaty under international law and therefore are not legally binding.[36]

IMPEDIMENTS AGAINST FULFILLING BUSINESS OBLIGATIONS OF HUMAN RIGHTS PROTECTION BEFORE THE DEVELOPMENT OF JOHN RUGGIE'S FRAMEWORK

Over the course of the past decades, and with increasing frequency, nongovernmental organizations (NGOs) and activists have publicized instances of business conduct that have hindered the ability of individuals to enjoy universally agreed upon human rights. In response to the ensuing outrage on the part of the human rights community, investors, consumers, international entities, and businesses themselves have developed a variety of initiatives to respond to the calls of the Business and Human Rights movement for better business conduct worldwide.[37]

As originally conceived, the human rights obligations codified in the Universal Declaration of Human Rights and core human rights treaties were intended to serve as limitations on state power alone; non-state actors such as business entities were not considered as direct subjects of international human rights law. However, the increasing power and flexibility of businesses, particularly transnational corporations, has led many scholars to seek the progressive development of human rights law so that it can effectively address businesses as well.[38]

According to David Kinley and Sarah Joseph, the legal duties of business within the various domestic laws of states can be readily clarified in most

[36] *See* generally. The UN Commission on Human and Peoples Rights. ECOSOC. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

[37] Christen Broecker., *Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability*, N.Y.U. J. INT'L L. & POL. (Vol. 41:159) 165-167 (2008) at 160 (Oct. 14, 2012) *available at* http://www.law.nyu.edu/ ecm_dlv4/groups/public/@nyu_law_ website__journals__journal_of_international_law_and_politics/documents/ documents/ecm_pro_062464.pdf.

[38] *Id*. at 167-168.

instances. Such duties may arise for example in the context of criminal laws, civil rights laws, and consumer protection laws. However, the legislative sources of human rights pressure may be on occasion surprising. For example, trade practices laws prohibiting misleading and deceptive conduct can perhaps be used to restrain a company from portraying itself as an ethical entity when the contrary is true.[39] Unfortunately, domestic laws have proven an inadequate means for controlling the human rights excesses of certain business. In some instances, business corporations are more powerful, economically and *de facto* politically, than a state in which it is operating in, particularly when that state is a developing nation which perceives that it needs foreign direct investment in order to achieve satisfactory levels of economic development.[40] Business corporations may threaten disengagement if a state tries to increase its regulation of their activities, particularly if other states offer greater deregulation. For example, in the context of labour rights, this phenomenon has led to what is often called a race to the bottom, whereby states compete for foreign direct investment by offering the cheapest labour forces. Business corporations are therefore in a uniquely powerful position to resist attempts by states, especially the developing nations, to control their domestic operations. Hence, there is a need for other sources of business human rights obligations.... The direct legal human rights duties of business corporations in international law are particularly opaque, despite the existence of numerous relevant international documents. Most international law documents regarding corporate human rights duties are not strictly legally binding, though it is possible that some soft law provisions have hardened into legal obligation. Furthermore, the indirect duties imposed via the doctrine of horizontality have rarely been clarified in international human

[39] David Kinley & Sarah Joseph, *Multinational Corporations and Human Rights: Questions About their Relationship*, ALT. L.J., Vol. 27, No. 1, 8-9 (February 2002).

[40] *Id.*; *See*, for example, *The Ok Tedi Mine Continuation Act 2001* passed by the Papua New Guinea Parliament on 12 December, 2001, which indemnifies BHP Billiton from damages for environmental pollution at its Ok Tedi coppermine; AAP, Press Notice (Dec. 12, 2001).

rights case law, with only a few cases, mainly before the European Court of Human Rights, addressing the issue of a states alleged failure to control private sector human rights abuse.[41]

THE RUGGIE'S MANDATE AS UN SECRETARY GENERAL'S SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS

In the wake of the controversy surrounding the Draft Norms, the Commission on Human Rights decided to pursue an alternative approach to addressing the intersection between business and human rights.[42] In 2005, the Commission requested that the UN Secretary General appoint a Special Representative (SRSG) on the issue of "human rights and transnational corporations and other business enterprises."[43] He did so later that year, selecting John Ruggie, a former Assistant Secretary General of the UN and the primary architect of the Global Compact.[44] Ruggie's mandate, which began in July 2005, obliged him in part "to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights" and "to elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.[45]

....This special representative, a Harvard Professor John Ruggie, firmly rejected the UN "draft norms" since they would not only transfer human rights, which are addressed to states, to companies in a binding manner and without justification, but they would also under some circumstances

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[41] *Id.*

[42] Christen Broecker, *supra* note 37, at 176.

[43] H.R. Res. 2005/69, 1, U.N. Doc. E/CN.4/RES/2005/69 (April 20, 2005).

[44] Ruggie's mandate originally extended from July 2005 through July 2007.

[45] ECOSOC, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. E/CN.4/2006/97, 2 (Feb. 22, 2006).

undermine efforts to reinforce states' responsibility for human rights. John Ruggie's exact words are: "The rejected UN Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers. ... What the Norms have done, in fact, is to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law hard, soft, or otherwise.... Indeed in several instances, and with no justification, the Norms end up imposing higher obligations on corporations than on States by including as standards binding on corporations instruments that not all States have ratified or have ratified conditionally and even some for which States have adopted no international instrument at all. ... Far more profound is the fact that corporations are not democratic public interest institutions and that making them, in effect, co-equal duty bearers for the broad spectrum of human rights and for "the obligation to promote, secure the fulfilment of, respect, ensure respect and protect" those rights, as the General Obligations of the Norms put it may undermine efforts to build indigenous social capacity and to make Governments more responsible to their own citizenry".[46]

EMERGENCE OF THE UN FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS

In June 2008, after three years of extensive research and consultations with governments, business and civil society on five continents, the Special Representative concluded that one reason cumulative progress in the business and human rights area had been difficult to achieve was the lack of

[46] Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA), *supra* note 6, at 11.

an authoritative focal point around which actors' expectations could converge on a framework that clarified the relevant actors' responsibilities, and provided the foundation on which thinking and action could build over time.[47]

The Special Representative presented such a framework to the Human Rights Council in June 2008. The "Protect, Respect and Remedy" Framework rests on three pillars: the state's duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial. The Human Rights Council unanimously welcomed what is now referred to as the UN Framework, marking the first time that a UN intergovernmental body had taken a substantive policy position on the issue of business and human rights. The Council also extended the Special Representative's mandate until 2011 with the task of "operationalizing" and promoting" the framework. The main sponsor of the resolution authorizing the Special Representative's mandate is Norway, with Argentina, India, Nigeria and Russia as co-sponsors one country from each UN regional groups.

In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented to it by Professor John Ruggie. This move established the Guiding Principles as the global standard of practice that is now expected of all States and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and

[47] The UN "Protect, Respect and Remedy Framework for Business and Human Rights" (Oct. 19, 2012) *available at* http://www.business-humanrights.org/SpecialRepPortal/ Home.

businesses, and include points covered variously in international and domestic law.[48]

The UN Framework has been well received by key stakeholder groups: a number of individual governments have utilized it in conducting their own policy assessments; several major global corporations are realigning their due diligence processes based on it; civil society actors have employed it in their analytical and advocacy work; and major international organizations have drawn on it in adapting their own business and human rights policies and standards.[49] The next sub-section will address the potency or functionality of the UN mandates on business and human rights.

THE STATE DUTY TO PROTECT AS THE FIRST PILLAR OF JOHN RUGGIE'S UN FRAMEWORK

The first pillar of John Ruggie's UN Framework is the state's "duty to protect" against human rights abuses committed by third parties, including business, through appropriate policies, regulation and adjudication. It highlights that states have the primary role in preventing and addressing corporate-related human rights abuses. The Special Representative documented the duty's legal foundations, policy rationales and scope in his 2008 and 2009 reports to the Council. Although states interact with business in numerous ways, many currently lack adequate policies and regulatory

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[48] United Nations Human Rights, Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, HR/PUB/12/02, (2012).

[49] In June 2011, John Ruggie, United Nations Special Representative on Business and Human Rights, presented to the UN Human Rights Council his *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, the result of his six-years study on business and human rights. Building on his "Protect, Respect and Remedy" Framework, released in 2008, the Principles outline the state's duty to protect human rights, the corporation's responsibility to respect human rights, and the need for access to remedy. On June 16, in an unprecedented step, the UN Human Rights Council unanimously endorsed the Principles. (*available at* http://www.business-humanrights.org/media /documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.); *See also*, Daan Schoemaker, *Raising the Baron Human Rights: What the Ruggie Principles Mean for Responsible Investors*, *available at* http://www.sustainalytics.com/sites/default/files/ruggie_principles_ and_human_rights.pdf.

arrangements for effectively managing the complex business and human rights agenda. While some states are moving in the right direction, overall state practice exhibits substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and states too. The most common gap is the failure to enforce existing laws. Legal and policy incoherence arises because the departments and agencies which directly shape business practices including corporate law and securities regulation, investment, export credit and insurance, and trade typically work in isolation from, and uninformed by, their government's own human rights obligations and agencies. In his reports to the Council, the Special Representative has proposed five priority areas through which states can work to promote corporate respect for human rights and prevent corporate related abuse. They include: (a) striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state's own ability to protect rights when entering into economic agreements; (b) promoting respect for human rights when states do business with business, whether as owners, investors, insurers, procurers or simply promoters; (c) fostering corporate cultures respectful of human rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritoriality.[50]

CORPORATE RESPONSIBILITY TO RESPECT AS THE SECOND PILLAR OF RUGGIE'S UN FRAMEWORK

The corporate responsibility to respect human rights according to John Ruggie's report means acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur. The term "responsibility" rather than "duty" is meant to indicate that respecting rights is not currently an obligation that international human rights law generally

[50] The UN "Protect, Respect and Remedy Framework for Business and Human Rights", *supra* note 47.

imposes directly on companies, although elements of it may be reflected in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself. A company's responsibility to respect applies across its business activities and through its relationships with third parties connected with those activities such as business partners, entities in its value chain, and other non-State actors and State agents. In addition, companies need to consider the country and local contexts for any particular challenges they may pose and how those might shape the human rights impacts of company activities and relationships.[51]

Companies can affect virtually the entire spectrum of internationally recognized rights. Therefore, the corporate responsibility to respect applies to all such rights (although some rights typically will be more at risk than others in particular contexts).[52] Many companies say that they respect human rights. In order to "know and show" that they are meeting this responsibility, companies need a human rights due diligence process, whereby they become aware of, prevent, and address their adverse human rights impacts. Drawing on well-established due diligence practices and combining them with what is unique to human rights, the UN framework describes the core elements of human rights due diligence: based on a statement of commitment to respecting rights and supporting policies, human rights due diligence should include assessing human rights impacts, integrating respect for human rights across relevant internal functions and processes, and tracking as well as communicating performance.[53]

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[51] *Id.*

[52] *Id.* For an authoritative list of internationally recognized rights, companies should look to the Universal Declaration of Human Rights, 1948 the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, 1976 and the core conventions of the International Labour Organization 1919. The principles those instruments embody are the most universally agreed upon by the international community, and they comprise the human rights benchmarks by which other social actors judge companies.

[53] *Id.*

ACCESS TO EFFECTIVE REMEDY AS THE THIRD PILLAR OF UN FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS

Access to effective remedy forms the third pillar of John Ruggie's framework on Business and Human Rights this is because even where institutions operate optimally, adverse human rights impacts may still result from a company's activities and victims must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. As part of their duty to protect against business-related human rights abuse, states must take appropriate steps within their territory and/or jurisdiction to ensure that when such abuses occur, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means. Currently, access to judicial mechanisms for business-related human rights claims is often most difficult where the need is greatest as a result of both legal and practical obstacles. And there is currently an uneven patchwork of non-judicial mechanisms, including mechanisms at the company level, national level such as national human rights institutions, or National Contact Points in states that have signed the OECD Guidelines on Multinational Enterprises and at the international level such as the Compliance Advisor Ombudsman for the International Finance Corporation. Non-judicial mechanisms, whether state-based or independent, should conform to principles of legitimacy, accessibility, predictability, rights-compatibility, equitability and transparency. Company level mechanisms should also operate through dialogue and engagement rather than the company itself acting as adjudicator of its own actions.[54]

CONCLUSION

The potency of the UN tripartite framework for protect, respect and remedy as proclaimed by John Ruggie, if complied with by states, corporations and

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[54] *Id.*

other stakeholders, will serve as a remarkable tool and the benchmark in ensuring that human rights obligations of States and business are fulfilled and its guiding principles [55]no doubt will help in advancing the course of human rights as a veritable component of corporate social responsibility in the business world, curb corporate greed and will put states and corporations on guard towards issues of human rights promotion and protection as it relates to their business activities. The framework will further fill the gap that existed in other mechanisms developed by governmental, inter-governmental organisations, NGOs and other stakeholders in the corporate world to advance human rights in business but could not succeed because of lack of commitments or impending gaps in their enforcement procedures. Furthermore, framing of policy challenges can have profound consequences for assigning responsibilities to relevant actors and determining whether the combination is capable of meeting the overall policy objectives. The business and human rights agenda remains hampered because it has not yet been framed in a way that fully reflects the complexities and dynamics of globalization and provides governments and other social actors with effective guidance and this, the Ruggie framework has achieve presently.[56] Insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by States or firms, may be too constrained by the competitive dynamics as explained earlier in this article. Therefore, more

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[55] The Guiding Principles are the product of six years of research led by Professor Ruggie, involving governments, companies, business associations, civil society, affected individuals and groups, investors and others around the world. They are based on 47 consultations and site visits in more than 20 countries; an online consultation that attracted thousands of visitors from 120 countries; and voluminous research and submissions from experts from all over the world. (UN OHCHR: News Release: New Guiding Principles on Business and human rights endorsed by the UN Human Rights Council, Geneva (Oct. 21, 2012) a*vailable at* http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf.

[56] UN Human Rights Council, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Rights to Developments, Protect, Respect and Remedy: A Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie", 8th Session, Agenda Item 3. A/HRC/8/5, 5-6 (April 7, 2008).

[57] *Id.*

coherent and concerted approaches are required. The tripartite framework of "protect, respect, and remedy" can assist all social actors, governments, companies, and civil society to reduce the adverse human rights consequences of these misalignments, now and may be in future.[57]

TORTIOUS LIBILITY FOR ENVIRIONMENTAL HARM: A TALE OF JUDICIAL CRAFTMANSHIP

Dr. Madhuri Parikh*

Tort is a civil wrong. It is concerned with the liability of persons for torts or breach of their own duties towards others... it relates to the recognition of interests that the civil law recognizes in the absence of contractual relations between the wrongdoer and the injured person[1]. *While today the Indian courts still follow the English law of torts, this ideological foundation has permitted to some extent innovation and development that are necessary to meet new challenges particularly in the field of environment protection.*

The present paper tries to analyze the application of torts' principles in India in the matters related to environmental harms. The principles of torts have been applied by Indian judiciary in various cases of environmental damage violating people's right to clean and healthy environment. It also makes critical study of the judicial response in the development of the principle of absolute liability and wide interpretation of tortious remedy by checking the potential of tort in controlling environmental pollution in India.

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INTRODUCTION

The present legal system in India is formed, for all practical purposes on the basis of the English common law brought into India by the British. From the eighteenth century, the British colonial rulers, who were eager to have a legal system that would maintain law and order and secure property rights, gradually imposed on India a general system of law. The foundation of this Anglo-Indian judicial system was laid by the Judicial Plan of 1772 adopted by Warren Hastings on which later administrations built a superstructure.[2] In the second half of the nineteenth century the Indian legal system was virtually revolutionized with a spate of over-legislation, which was influenced by a desire to introduce English law and to shape that system from an English lawyer's viewpoint. [3] The structure and powers of the court, the roles of judges and lawyers, the adversarial system of trial, the reliance on judicial precedent and the shared funds of concepts and techniques, brought the Indian legal system into the mainstream of the common law systems. It is said that the common law in India, in the widest meaning of the expression, would include not only what in England is known strictly as the common law but also its traditions and some of the principles underlying English statute law. The equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the English system of administration of justice[4].

The early charters, which established the courts in India under the British rule, required the judges to act according to "Justice, Equity and Good Conscience in deciding civil disputes if no source of law was identifiable".[5] In

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[1] A LAKSHMIPATH, M SRIDHAR, THE LAW OF TORTS 7 (ed. Iyer Ramaswamy, Nagpur: Lexis Nexis Butterworths, 2007).

[2] M. P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY 77 (Nagpur: Lexis Nexis Butterworths 1972).

[3] A.C. BANERJEE, ENGLISH LAW IN INDIA 189 (New Delhi: Abhinav Publications 1984).

[4] M. C. SETALVAD, COMMON LAW IN INDIA 3 (London: Stevens and Sons Ltd. 1960)

[5] J. D. M. DERRETT, 3 ESSAYS IN CLASSICAL AND MODERN HINDU LAW 129-138 (Leiden: Brill 1976)

the historical development of civil laws in India by English judges and lawyers, the notion of justice, equity and good conscience, as understood and applied by the then Indian courts, was basically in line with the development of English common law. The English-made law used to dominate all major areas of civil laws in India, which mostly took the form of a codified legal order. The law of torts in India, which remained uncodified, followed the English law in almost all aspects in its field. It is notable that common law, originally introduced into India by the British, continues to apply here by virtue of Art. 372 (1)[6] of the Indian Constitution unless it has been modified or changed by legislation in India. The law was modified and departed from the English law only when the peculiar conditions that prevailed in India required this.

The remedies of modern environmental torts have their roots in these common law principles of nuisance, negligence, strict liability and trespass and other remedies for tort.

POTENCIAL OF TORT IN CONTROLING ENVIRIONEMENT POLLUTION

Majority of environment pollution cases of tort in India fall under four major categories –Nuisance, Negligence, Strict liability and trespass.

Tort law deals with remedy for invasion of private rights. It talks about compensating a person for violation of his private right. A question arises about potential of tort law in controlling pollution as it focuses on remedy for violation of private right. According to Stephan Shavell "tort law should be assessed in terms of the contribution it can make to the control of environmental and other risks. The reason is that compensation can be

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[6] Art.372 (1) of the Constitution of India states: "Notwithstanding the repeal of this Constitution of the enactments referred to in Article 395 but subject to the other pro-visions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

achieved independently of tort law by other (and he implies, equally good and better) means.[7] Compensation goals can be pursued independently of tort law, as can risk control goals, but in tort law these two goals are harnessed together. Tort liability for harm rests on risk-creators. It is in the link between compensation and risk-control that the distinctiveness of tort law resides. Tort law is two sided, "looking both to harm and to the compensation of harm."[8] Because of its bilateral structure the tort law is best suited in the environmental law context. It is responsibility based mechanism for repairing harm. It's potential as a risk control is limited by its focus on harm. Actually the close study of the characteristics of tort law reveals its true potential in protecting the environment.

a) Tort law comes onto the scene when something has gone wrong. So in cases of environment, the tort law will play role when there is environmental damage.

b) It is much more concerned with cure rather than prevention.

c) It is concerned primarily with reparation and not punishment.

d) Tort law focuses on bad outcomes affecting persons (both human beings and corporations) and property. The term 'property' does not refer to the things, but to things that are subject to legal regime. The earth's atmosphere for instance, is not subject to any legal property regime and so is not within the scope of tort law. In this way, tort law can be seen exclusively concerned with persons because only persons can have property.

e) The rights protected from interference by tort law are property rights[9] and dignitary rights such as reputation and personal

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[7] STEPHAN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENTAL LAW 279 (Harvard University Press, 1987); *See also,* Richard B. Steward, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual Track System*, GEO L.J. 88 (2000) 2183-83.

[8] PETER CANE, THE ANATOMY OF TORT LAW 427-467 (Oxford: Hart Publishing 1997).

[9] Rights in land, chattels, intellectual property, such as trade mark, patent etc.

freedoms. The archetypal harms recognized by tort law are injury to the human body and mind, damage to tangible property and financial loss. More marginal are tangible harms to the person such as grief, fear and insult. Significantly for present purposes aesthetic harms resulting from bio-diversity damage, for instance, are not as such recognized by tort law.

f) It is said that tort law focuses on harms not risks. It is not absolutely true. For instance, an important component of negligence calculus is the probability of the harm. The core-idea of foreseeability is also related to risk.

g) In cases where an injunction may be awarded to prevent harm occurring in future, an injunction will be issued only if the court is satisfied that harm is imminent or very likely and not merely on the basis that the defendant is involved in a risky activity. Here it differs from precautionary principle, which considers risk involved in the activity and proposes prevention rather than cure. So the precautionary principle is increasingly finding favour as an approach to environment protection.

h) Tort liability is predominantly fault based liability and in tort fault typically means negligence. The pre-condition of foreseeability of harm is pre-condition of liability under the principle of *Rylands v. Fletcher*[10]. The polluter pays principle is usually assumed to dictate strict liability.

i) Private law remedies in tort may require payment to individuals for environmental damage if that environmental harm constitutes harm to certain individual interests. There is absence of any liability to the environment, and absence of any doctrine

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[10] Raylands v. Fletcher, LR3HC 330 (1968).

compensating the environment for the harm caused to it. It is yet to be developed.

j) In some of the cases it is difficult to prove any causal links between the emission of a pollutants and increased incidence of disease. In some of the cases the victims are passive victims in such cases it is difficult to prove the causes of harm. It is simply impossible in many cases to distinguish the pollution effects and the general background of disease, that is between the individually tortiously injured as distinct from individuals with same disease brought about by background factors. In addition multiple sources of pollution together with non environmental factors can combine to create complex links to the extent that it may not even be meaningful to ask what causes an ailment. As well as creating difficulties for individual claimants, any deterrent effects of tort will be lessened by the reduced likelihood of a successful claim.

In evaluating the potential of tort law in matters related to environment protection as a compensation and risk control mechanism, we need to attend not only to the rules and principles according to which tort liability is imposed, but also to the institutional structure through which these rules and regulations are given practical effects. In other words, we need to assess tort law in action i.e. the interpretation of the tortious liability rules by the judiciary in cases related to environment protection.

JUDICIAL SKILL IN SHAPING TORTIOUS LIBILITY IN ENVIRIONMENT PROTECTION

The Indian judiciary has played a remarkable role in implementing principles of tort law in environmental issues. The credit goes to the Supreme Court in interpreting the same old principles of tort with wider meaning to encompass the new challenges of the environmental damage.

Wherever and whenever necessary, the Supreme Court has evolved new principles of tort and given a new shape to tortious liability in environment protection.

Evolving New Principles of Tortious Liability

The Bhopal Catastrophe has been proved eye-opening for the environmentalist, social workers and government institutions as well as general public. It brought new awareness in India. The government and the judiciary started thinking about new ways and means of preventing similar tragedies in future. Compensation to the victims of Bhopal disaster raised an enigma in Indian torts law. There was paucity of litigation in the field of torts. The proverbial delay, exorbitant court fee, complicated procedure and recording evidence, lack of public awareness, the technical approach of the bench and the bar and absence of specialization among lawyers are stated to be reasons for such a condition.[11] It is also argued that the alleged paucity is myth and not reality, as thousands of cases are settled out of court through negotiations and compromises and unreported decisions of subordinate courts.[12] It is not disputed that Indian courts do not award punitive damages in civil cases to deter the wrongful conduct.[13] But it does not mean that tort law has not played any effective role in the environment protection. The judicial pronouncements clearly show the recent trends in the Indian torts law as an instrument of protection against environmental hazards.

The judicial vigil is seen in the interpretation of principles of tort law in the age of science and technology. Absolute liability for harm caused by industry engaged in hazardous and inherently dangerous activities is a newly formulated doctrine free from exceptions to the strict liability in England.[14]

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[11] B. M. GANDHI, LAW OF TORTS 63-69 (Eastern Book Company 1987).

[12] J. B. Dadachandji, J.B.'s affidavit before US District Court in the Bhopal litigation: *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case,* Indian Law Institute, 81-82 (1986).

[13] Stephan L. Cummings, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Affirmative Forum in Light of the Bhopal Disaster*, 109 (16) GA. J. OF INT'L & COMP. L., 136-142.

[14] P.LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 126 (Butterworths 1999).

The judicial activism and craftsmanship is clearly seen in its new-fangled approach in providing tort remedies in public interest litigation. In M.C.Mehta v. Union of India[15] the court entertained the public interest litigation where the damage was caused by an industry dealing with hazardous substance like oleum gas. The Supreme Court could have avoided a decision on the the affected parties' application by asking parties to approach the subordinate court by filing suits for compensation. Instead, the Court proceeded to formulate the general principle of liability of industries engaged in hazardous and inherently dangerous activity. Not only this, Chief Justice Bhagawati declared that the court has to evolve a new principle and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialized economy.[16] The Court evolved the principle of absolute liability and did not accept the exceptions of the doctrine of strict liability for hazardous industries. The Court did not stop here; it proceeded a step further and held that the measure of compensation must be co-related to the magnitude and capacity of the enterprise.

The Chief, Justice Bhagawati said: "The large 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 the hazardous or inherently dangerous activity by enterprise."[17] This is found necessary because of its deterrent effect on the behaviour of the industry. The Indian Supreme Court was developing indigenous jurisprudence free from the influence of English law. Here the scope of the owner conferred on the Court under Article 32 was so widely interpreted as to include formulation of new remedies and new strategies for enforcing the right to life and awarding compensation in an appropriate case.[18] The court gives clear message in the case that one who pollutes ought to pay just and legitimate

[15] AIR 1987 SC 1086.
[16] *Id.*
[17] *Id.* at 1089.
[18] *Id.* at 1091.

damages for the harm one causes the society. It opened a new path for later growth of the law and accepted the polluter pays principle as part of environmental regime. The principle requires an industry to internalize environmental cost within the project cost and annual budget and warrants fixing absolute liability on harming industry. The judiciary woke up with a new awareness and laid down legal norms in clear terms. This was accompanied by invoking the technique of issuing directions under Art.32 of the constitution of India.

In Consumer Education and Research Center (CERC) v. Union of India[19] the court designed the remedies following the Mehta dictum.[20] The Court's attitude shows certainty of the court that direction can be issued under Article 32 not only to the State but also to a company or a person acting in purported exercise of powers under a stature of license issued under a statute for compensation to be given for violation of fundamental rights.

In this case, the doctrine of absolute liability has not been referred but a different species of liability was formulated in respect of hazardous industries, like those producing asbestos. The compensation payable for occupational diseases during employment extends not only to those workers who had visible symptoms of the diseases while in employment, but also to those who developed the symptoms after retirement.

In Indian Council for Enviro-Legal Action v. Union of India [21] the Supreme Court supported Mehta case and pointed out the rationale for fixing the absolute liability on the hazardous industry. In this case the polluter pays principle was applied. The Court directed the government to take all steps and to levy the costs on the respondents if they fail to carry out remedial actions.

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[19] AIR 1995 SC 922.
[20] Not mentioned the case but followed.
[21] AIR 1996 SC 1466.

Socio-economic transformation is a challenge to a developing country. As Chief Justice Bhagwati has rightly observed, law has to grow in order to satisfy the needs of fast changing society and keep abreast with the developments taking place in the country.[22] It is absolutely true. The Indian judiciary has evolved the new doctrines of tortious liability through the effective tool of public interest litigation.

Some of the Public Interest Litigation cases involved flagrant human rights violations that rendered immensely inadequate traditional remedies, such as the issuance of prerogative writs by the Courts. Without any hesitation the Indian Judiciary has forged unorthodox remedies. Where the peculiarities of case prompted urgent action, the Court gave immediate and significant interim relief with a long deferral of final decision as to factual issues and legal liability.

In cases of personal injuries[23] and unlawful confinement[24], the court has refused to limit the victim to the usual civil process. Petitions are allowed directly to the Supreme Court under Article 32 and damages are awarded to compensate the victim and deter the wrongdoer. In cases of gross violations of fundamental rights, the damages are awarded by the court. It is a new approach. The court has not dealt with only violation of individual's right but has taken serious note of the environmental harm along with violation of human rights. In such cases the court has also imposed the cost of repairing the environmental damage on the polluters.[25] Perhaps more importantly, the courts have shown a willingness to experiment with remedial strategies that require continuous supervision and that appear significantly to shift the line between adjudication and administration. Just as the court will appoint socio-legal commissions to gather facts, so will it create agencies to suggest

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[22] *Supra* note 544, 546.

[23] M.C.Mehta v. Union of India, AIR 1987 SC 1086.

[24] Rudal Shah v. State of Bihar, AIR 1983 SC 1086.

[25] Vellore Citizen Welfare Forum v. Union of India, AIR 1996 SC 2715; Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1466.

appropriate remedies and to monitor compliance. The final orders in PIL matters are often detailed, specific and intrusive.[26]

In *Bandhua Mukti Morcha v. Union of India*[27] the Court had endorsed the true scope and ambit of Article 32 of the Constitution and has held: "it may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for the enforcement of the fundamental rights but it also lays a constitutional obligation on the Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights"[28].

In *M.C Mehta v. Kamal Nath and Ors.,*[29] the Supreme Court held, "Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner...The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded."[30]

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[26] Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, AM. J. of COMP. L., 37, 506 (1989).

[27] (1984) 3 SCC 161.

[28] *Id.*

[29] AIR 2002 SC 1515.

[30] *Id.*

CONCLUSION

Thus the judiciary has resorted to fundamental rights, directive principle of state policy and the fundamental duties of citizens in the constitution for the development of environmental jurisprudence. The new interpretation of these provisions has developed a judge made law in the field of environmental law in India. The expansive interpretation of Article 21 is the remarkable development in the human rights to clean and wholesome environment in India. The Article 21 has been used by judiciary to implement the principles of sustainable development, protecting the right to clean air, water and environment; right to livelihood etc. the analysis of the case laws shows that the judiciary has widened the scope of article 21 and implemented an international law in a domestic law. Article 48 A and 51 A (g) have been interpreted to substantiate this development .

The liberal interpretation of Article 32 and 226 have further added to the development of remedies for environmental tort in India. A new method of awarding compensation for constitutional tort has been developed by Indian Judiciary in environmental cases. The dynamic interpretation of Article 21 by the judiciary has served twin purpose of protecting the rights of the citizens to clean and wholesome environment and awarding damages for the violation of their private rights.

The judicial craftsmanship is clearly seen in the use of private law remedies for the public wrong in environmental cases. The High Courts have also shown dynamic approach in interpreting the principles of tortious liability to protect the environment. The judgments in *Ram Raj Singh v. Babulal*[31], *Ramlal v. Mustafabad Oil and Cotton Ginning Factory*[32], *Krishna Gopal v. State of M.P.*[33], *Dhanna Lal v. Chittar Singh*[34], *Lakshmipathy v. State*[35], *Ved*

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[31] AIR 1982 ALL 285.

[32] AIR 1968 P& H 399.

[33] 1986 Cr. C.J. 396 (M.P.).

[34] AIR 1959 MP 240.

[35] AIR 1992 Kant 57.

Kaur Chandel(Smt) v. State of H.P.[36], *Bijayanand Patra v. Distt. Magistrate, Cuttack*[37],clearly establishes that the conduct of a person (on his Property) becomes a private nuisance when the consequences of his acts no longer remained confined to his own property, but spill over in a substantial manner to the property belonging to another person.

Thus the judiciary has innovated new methods to enforce tortious liability to protect the environment. The Supreme Court and the High Courts have laid down and are in the process of broadly laying down the legal framework for environmental protection. A public law realm, based on the Constitution of India, has brought about great inroads into the civil and criminal laws of the country within the last three decade or so. These new developments in India by the extraordinary exercise of judicial power have to be perceived as just one of the many ways to meet the social and political needs of the country. The new approach of the Judiciary in developing the concept of constitutional tort has proved really helpful in protecting the environment and the rights of people to clean and healthy environment.

The Supreme Court's role is noteworthy in developing tortious liability in environmental cases in India, still we feel that there is a great paucity of tort litigation in India, which makes the ideological credibility of Indian tort law a debatable issue. Several reasons could be given for the scanty litigation in India in this field:

(1) The institutional character of the legal system fails to encourage the pursuit of remedies of a civil nature for reducing inter-personal tensions in the community;

(2) The very technical approach adopted by judges and lawyers without taking into account the growing needs of Indian society;

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[36] AIR 1999 HP 59.
[37] AIR1999 Ori 70.

(3) The tendency, noticed in most eastern societies in general, to prefer the process of mediation to that of the judicial process;

(4) The prohibitive cost of a lawsuit, the time, labour and money expended at every stage of litigation;

(5) The delays attendant on litigation;

(6) The unsatisfactory condition of the substantive law on certain topics, for example the liability of the State for torts of its servants;

(7) The anomalies created in the minds of litigants by the coexistence of several statutory provisions;

(8) The low level of legal awareness among the general public;

(9) The difficulty of gaining access to law, since a large portion of the tort law remains uncodified;

(10) The bureaucratic attitude of government officers dissuading legitimate claims of citizens even though they are legally enforceable.

In the light of such hurdles, which obstruct the natural growth of tort law in India, the recent development in combining tort law with the constitutional right to personal liberty and its remedy through compensation is a good step.The present state of the law of torts in India is characterized by rapid recent developments within the public law domain that have also perceptibly created a new legal framework for environmental protection in India.

GERMANY V. ITALY – ONE-UP FOR JURISDICTIONAL IMMUNITIES OVER JUS COGENS NORMS

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On February 3, 2012 the International Court of Justice (ICJ) pronounced its judgment in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy) thereby propounding upon the scope and ambit of State immunity vis-à-vis violation of jus cogensnorms. The Court pronounced that violation of jus cogensnorms does not constitute an exception to the exercise of jurisdictional immunities by a State and that the law of State immunity is in the nature of a procedural rule and not a comment on the substantive question of lawfulness of any other settled means of redressing human rights' violations. The decision has been criticized for having sacrificed human rights at the altar of procedural formalism. The author attempts to view the law of State immunity through the prism of violation of jus cogens norms and human rights. Various domestic courts have upheld the law of State immunity on the premise that prosecution of a State at the hands of another would unsettle the sovereignty and integrity of nations and would open up domestic courts to litigation against alleged human rights' violations by other States. Human rights' advocates argue that a State impliedly waives its right to State immunity when its officials indulge in acts which constitute a breach of jus cogensnorms. Jus

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cogensnorms stand on a higher pedestal and thus, in case of a conflict between jus cogensnorms and State immunity, the former shall prevail. This article shall provide a profound view of State practice on the aforementioned subject, a critique of the decision of the ICJ and the response that the decision has elicited across the globe.

INTRODUCTION

The portals of the International Court of Justice (hereinafter the "ICJ") bustled with activity a few months ago when the much-awaited verdict in *Germany* v. *Italy*[1] was delivered on February 3, 2012.Several hundred thousand Italian soldiers were detained by the German army after Italy declared war on Germany, deported to Germany and German occupied territories and forced to work without remuneration (between September 1943 to May 1945). These internees did not qualify for German schemes that aimed to compensate victims for different reasons. The cause of these soldiers was the issue forming the cynosure of the instant case.While on the one hand intricate principles of the doctrine of State immunity were deliberated upon, on the other hand the verdict has given jurists around the world an opportunity to view the said principle through the prism of internationally recognized human rights.

It is an established principle of international law that no State has jurisdiction over another State[2]. No State is allowed to exercise through its own courts' jurisdiction over another State unless the other State expressly consents. The principle, that basically stems from the fundamental right of equality and formulated as *par in parem non habet imperium* ("equals do not have jurisdiction over each other"), implies also that no court of a State is allowed to exercise jurisdiction by directing coercive measures against the

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[1] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) – Judgment of 3 February 2012.

[2] HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 357 (2d. ed, 1967).

property of another State as a consequence of or in connection with a delict committed by an individual in his capacity as an organ of another State[3]. In this article, I take the liberty of analyzing the concept of State immunity in light of the aforementioned judgment while attempting to appreciate the extent to, and if at all internationally recognized human rights constitute an exception to the principle of sovereign immunity.

SOVEREIGN IMMUNITY – THE CONCEPTIN ITS ENTIRETY

While invoking the jurisdiction of the ICJ in the present matter, the Federal Republic of Germany contended that "by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, the Italian Republic committed violations of obligations under international law in that it has failed to respect the jurisdictionalimmunity which the Federal Republic of Germany enjoys under international law.[4]" By an overwhelming majority, the ICJ pronounced that the Italian Republic violated its obligation to respect the immunity enjoyed by Germany by taking measures of constraint against German State property.

The doctrine of immunity of foreign States is grounded on the rationale that States must not interfere with public acts of foreign sovereign States out of respect for their independence[5]. Visiting forces of a sending State are considered partial recipients of the benefits of sovereign immunity[6]. This emanates from the fact that military presence of a foreign State is no longer uncommon. Visiting forces of a foreign State constitute a separate category

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[3] *Id*. at 359.

[4] Germany v. Italy, *supra* note 1, at ¶ 16.

[5] ANTONIO CASSESE, INTERNATIONAL LAW 99 (2d. ed. 2005).

[6] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 324 (7th ed. 2008). *See also,* SompongSucharitkul, *Immunities of Foreign States,* 1 RECUEIL DES COURS 93, 108 (1976).

of persons entitled to partial or limited sovereign immunity, being part and parcel of the sending State[7].

The claim for immunity to a foreign sovereign has found recognition in numerous domestic courts[8] as well as in the European Court of Human Rights[9]. In *Jones* v. *Ministry of Interior of the Kingdom of Saudi Arabia*[10], the House of Lords categorically stated that where State immunity is applicable, the national Court has no jurisdiction. The Court chose to rely on the ICJ which held in *Democratic Republic of Congo* v. *Rwanda*[11]that "*breach of a jus cogens norm of international law does not suffice to confer jurisdiction on national Courts*." In *Jones,* the House of Lords also adopted a very critical approach towards the position taken by the Italian Supreme Court in the *Ferrini*[12]case, whose line it considered not in conformity with international law[13].

UNIVERSAL JURISDICTION AND STATE IMMUNITY

The concept of sovereign immunity is often at loggerheads with the precincts of universal jurisdiction. Under international law, there are certain crimes which are so destructive of the international order that they are treated as international crimes (*delicta jure gentium*). Generally, it is accepted that

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[7] *Id. See also,* G.P. Barton, *Foreign Armed Forces: Immunity from Supervisory Jurisdiction,* 26 BRIT. Y.B. INT'L. L. 380, 413 (1949)

[8] *See* Jones v. Ministry of Interior of the Kingdom of Saudi Arabia [2006] UKHL 26 (appeal taken from Eng.)

[9] Case of Al-Adsani v. The United Kingdom, App. No. 35763/97, 2001-XI Eur. Ct. H. R. 79. *See also,* McElhinneyv. Ireland, App. No. 31253/96, 2001-XI Eur. Ct. H. R. 37.

[10] JONES V. MINISTRY OF INTERIOR OF THE KINGDOM OF SAUDI ARABIA *, supra* note 8.

[11] Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)(Democratic Republic of the Congo v. Rwanda), Judgment of 3 February 2006, ¶ 64.

[12] Corte di Cassazione (Sez. unite civili), Ferriniv. Federal Republic of Germany, 11 May 2004, No. 5044, RDI, 2004, p. 539 wherein the Italian SC abandoned the traditional distinction between *acta jure imperii*and *acta jure gestionis*and denied immunity to Germany, since the unlawful acts under consideration consisted of the violation of peremptory norms of international law.

[13] Andrea Atteritano, *Immunity of States and their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years,* 19 IT. Y.B. INT'L. L. 33, 35 (2009).

since there exists a universal interest in repressing international crimes, States can exercise 'universal jurisdiction' over perpetrators of such crimes[14].

For a very long period of time, there was no universally-accepted or authoritative definition of "universal jurisdiction" or the "universality" principle. The term has been used with confusingly different connotations. In the *Case concerning the Arrest Warrant of 11 April 2000 (Congo* v. *Belgium)*[15] (commonly known as the *Arrest Warrant* case), President Gilbert Guillaume distinguished between "universal jurisdiction", denoting universal jurisdiction over extraterritorial crimes by foreigners, based on the presence of the accused in the forum State, and "universal jurisdiction by default", that is, jurisdiction asserted by a State without any link with the crime or the defendant, not even his presence on the territory[16]. The former category of universal jurisdiction is known as *universal jurisdiction proper* while the latter as *universal jurisdiction in absentia.* A laudable effort was made in this regard by the Amnesty International when it compiled the *Legal Memorandum on Universal Jurisdiction*[17]in 2001 with the aim of assisting ministries, legislatures, prosecutors, judges and ministries of justice and foreign affairs in affectively exercising universal jurisdiction and formulating appropriate legislation in this regard[18].

The Legal Memorandum in its introductory chapter describes universal jurisdiction as:

> *"the ability of the prosecutor or investigating judge of any state to investigate or prosecute persons for crimes committed outside the state's territory which are not linked to that state by the*

[14] ANTONIO CASSESE, s*upra* note 5, at 102.
[15] (2002) ICJ Rep. 121.
[16] *Id.* Separate opinion of President Guillaume, ¶¶ 5 and 9.
[17] Amnesty Int'l, *Legal Memorandum on Universal Jurisdiction*, AI Index: IOR 53/002/2001, (Sept. 1, 2001).
[18] *Id.* at 3.

nationality of the suspect or of the victim or by harm to the state's own national interests".

Prior to the Legal Memorandum, the Amnesty International also developed the *14 Principles on the Effective Exercise of Universal Jurisdiction*[19] in 1999. The 14 Principles as well as the Legal Memorandum were prepared by the Secretariat of the Amnesty International pursuant to the organization's third-party intervention in the *Pinochet's*[20]case in the House of Lords. The Amnesty International felt the pressing need for a comprehensive survey and evaluation of the state of existing national legislation relevant to universal jurisdiction prosecutions. The consequence of the organization's strenuous efforts in this regard gave birth to the aforementioned documents.

Basically, State immunity tends to conflict with the convergence of *jus cogens*norms, *ergaomnes*obligations, and universal jurisdiction. The term *ergaomnes*means "flowing to all," and so obligations deriving from *jus cogens*are presumably *ergaomnes*.[21] It has been argued that the aforementioned concepts are mutually reinforcing because firstly, some norms are fundamental because the conduct they proscribe is so heinous that they bind every state and every individual, without exception and secondly, international law must increase the prospect of enforcing these norms by expanding the scope of concepts such as standing and jurisdiction that might otherwise circumscribe the possibility of adjudication.[22] In reality, however, even with the changing tenets of the doctrine of foreign sovereign immunity and with the adoption of the Princeton Principles, there are still various international crimes that go unpunished. It has been argued that universal jurisdiction often fails in its attempts to bring persons accused of

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[19] Amnesty International, *14 Principles on the Effective Exercise of Universal Jurisdiction*, AI Index: IOR 53/01/99 (May 1, 1999).

[20] PINOCHET'S CASE, *infra* note 43.

[21] M. CherifBassiouni, *International Crimes: Jus Cogens and ObligatioErgaOmnes,* 59 LAW & CONTEMP. PROBS. 64, 77 (1996).

[22] Donald Francis Donovan &Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L. L. 142, 155 (2006).

crimes to justice. Despite the formidable extension of competent fora such as the International Criminal Court, the system has not been very successful in punishing the perpetrators of such crimes[23]. Also, principles of universal jurisdiction, some scholars say, succeed in bringing to book perpetrators when the prosecuting countries are developed, powerful nations of the world. For instance, the prosecution in *Pinochet's* case reached as far as it did because of the substantial role played by the authorities of the United Kingdom involved therein[24] by virtue of the presence of Senator Pinochet in London at that point in time. However, that does not dispute the fact that at the fulcrum of universal jurisdiction are the rights of the victims of international crimes, as is evident from the statutes of ad hoc international tribunals constituted for the purpose of prosecuting the accused in such crimes.

JUS COGENSNORMS AND SOVEREIGN IMMUNITY – AN UNSETTLING PROPOSITION

By and large, it has been observed that violation of *jus cogens*norms does not constitute an exception to the doctrine of foreign sovereign immunity. Though there have been deviations from the settled rule time and again, re-affirmations have also surfaced from numerous quarters of the world. As far as the legal framework is concerned, State immunity has been the subject of two conventions: the European Convention on State Immunity, 1972[25] and the United Nations Convention on the Jurisdictional Immunities and Their Property, 2004[26]. However, none of these documents incorporate the *jus cogens*exception. This can be read into the assertion that State immunity is a procedural rule that does not contradict a prohibition contained in a *jus cogens*norm but merely diverts any breach of it to a different method of

[23] Gabriel Bottini, *Universal Jurisdiction after the creation of the International Criminal Court,* 36 INT'L. L. & POL. 503, 511 (2004).
[24] *Id*. at 510.
[25] 11 I.L.M. 470 (1972).
[26] G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

settlement[27]. State practice in this regard strays away from granting an exception to *jus cogens*violations to the doctrine of foreign sovereign immunity. The United States Supreme Court in *The Schooner Exchange* v. *McFaddon*,[28] which happens to be its foremost decision on sovereign immunity,held that sovereign immunity is a matter of grace and treated comity as the basis for finding an implied waiver of jurisdiction over foreign officials and princes or public armed ships entering the territory with the consent of the territorial sovereign. The Court found in *Siderman De Blake* v. *The Republic of Argentina*[29]that though torture is a *jus cogens*violation, it granted immunity for acts of torture pursuant to the Foreign Sovereign Immunities Act, 1976[30] (of the United States). The Court observed that since the Act does not explicitly state an exception to immunity for *jus cogens*violation the Congress did not confer jurisdictions over sovereigns for such offences[31]. The rationale behind such an exposition follows from the apprehension that any limitation whatsoever on the sovereign immunity by a State would entail the clear risk that other countries would follow the example and modify their laws to create *jus cogens*exceptions[32]. They might even go further and not limit these exceptions to violations of *jus cogens* but to any kind of human rights violation, the broadness of the exception being dangerous since the very notion of *jus cogens* is both ambiguous and ever more far-reaching[33].The notion that sovereign immunity should yield to

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[27] HAZEL FOX QC, THE LAW OF STATE IMMUNITY 525 (2d. ed. 2004) – 'Arguably, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens*mandate can bite.'

[28] 11 U.S. (7 Cranch) 116 (1812).

[29] 965 F. 2d.699, 714-719 (1992).

[30] 28 U.S.C. §§ 1330, 1602-1611 (1988).

[31] The Ninth Circuit followed the US Supreme Court's interpretation in *Argentine Republic* v. *Amerada Hess Shipping Corporation* [488 U.S. 428 (1989)] wherein the Court held that immunity is only denied where Congress has specifically stated an exception.

[32] Andreas Zimmerman, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks,* 16 MICH. J. INT'L. L. 433, 435 (1995).

[33] *Id. See also,* Jodi Horowitz, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations,* 23 FORDHAM INT'L. L. J. 489, 512 (1999).

fundamental human rights was advocated in the US District Court in the *Princz*[34] case. However, the argument could barely stand the test of time as the US Court of Appeals for the District Court overruled the judgment[35]. The Court said that it would require them to engage in the difficult and politically sensitive task of determining what rules of conduct constitute *jus cogens*, "*a determination that is better left to the branches of government assigned responsibility for conducting the nation's foreign affairs*"[36]. A highly notable inference that has been drawn from the *Princz*case is that even if all States are bound to respect *jus cogens* principles, they are not required to open their domestic courts to private litigation to resolve alleged *jus cogens*violations by other States[37]. The ECHR responded pragmatically to the question of reconciling the doctrine of sovereign immunity and the protection of human rights[38]. The Court noted that the right to access court is not an absolute right, but subject to certain limitations imposed by national authorities who enjoy a certain margin of appreciation in applying these limitations[39]. The restrictions must pursue a legitimate aim under the European Convention of Human Rights and its jurisprudence, and comply with a standard of proportionality between means and ends[40]. The application of State immunity did not violate the Convention as it involves the municipal courts' compliance with international law to promote comity and good relations between States which constitutes a legitimate aim. With respect to the proportionality assessment, the ECHR held that the Convention should be interpreted in harmony with other rules of international law, including the doctrine of State immunity.

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[34] Hugo Princz v. Federal Republic of Germany,813 F. Supp 2 (DDC 1992).

[35] Hugo Princz v. Federal Republic of Germany,26 F. 3d 1166 (DC Cir. 1994).

[36] *Id*. at 1179.

[37] Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany,* 16 MICH. J. INT'L. L. 403, 418 (1995).

[38] Marius Emberland, *Case Report: McElhinney v. Ireland,* 96 AM. J. INT'L. L. 699, 701 (2002)

[39] *Id*. at 702.

[40] Craig Forcese, *De-Immunizing Torture: Reconciling Human Rights and State Immunity,* 52 MCGILL L. J. 127, 155 (2007).

In *Al Adsani*v. *The United Kingdom*[41]*,* the Court while considering the legitimate aim of granting sovereign immunity to a State held that Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a Court. Furthermore, the adjudication of the Italian Supreme Court in the *Ferrini*[42]case as well as in numerous other cases, which attempts to widen the scope for *jus cogens*exception to the exercise of immunity does not authoritatively create such an exception. Certain international rules may be peremptory, but it does not follow that their alleged violation by one State allows courts of another State to deny immunity to the former, especially when practice supporting the non-immunity rule is lacking or uncertain[43].

SCOPE OF STATE IMMUNITY VIS-À-VIS FORMER AND INCUMBENT HEADS OF STATE

An oft-repeated query with regard to the scope of jurisdictional immunity is whether it applies to former Heads of State and officials with regard to international crimes committed by them during their tenure in an official capacity. This aspect was discussed in great detail by the House of Lords in *R* v. *Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte (Amnesty International and Others Intervening) (No. 3)*[44] wherein the atrocities and killings of nationals as a consequence of the military coup led by Chilean dictator General Augusto Pinochet were brought under the scanner. An arrest warrant was issued against Senator Pinochet who was then in the United Kingdom for medical treatment on October 16, 1998 by a magistrate in London. The appeal to the House of Lords in

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[41] App. No. 35763/97, 2001-XI Eur. Ct. H. R. 79.

[42] FERRINI, *supra* note 12.

[43] Carlo Forcarelli, *Case Report: Federal Republic of Germany v. Giovanni Mantelli and Others, Order No. 14201, ITALIAN COURT OF CASSATION, MAY 29, 2008 (PLENARY SESSION),* 103 AM. J. INT'L. L. 122, 125 (2009). *See also,* Lord Bingham's view in the *Jones* decision, [2006] UKHL 26, ¶ 27 (June 14, 2006), whereby "since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails."

[44] [1999] UKHL 17.

Pinochet's case was heard by a panel of seven law Lords who ruled, by a majority of six to one, that the offences of torture and conspiracy to torture were extraditable crimes and, consequently, Senator Pinochet had no immunity from prosecution for them.Despite strong arguments by the dissenting law Lords the House of Lords unambiguously ruled in *Pinochet's* case that a former Head of State cannot claim immunity from jurisdiction for international crimes, which he committed during his office as Head of State[45]. The rationale given by the law Lords for such an exposition was that *"since state immunity rationemateriae can only be claimed in respect of acts done by an official in the exercise of his functions as such, it would follow, for example, that the effect is that a former head of state does not enjoy the benefit of immunity rationemateriae in respect of such torture after he has ceased to hold office."*

The scope of the sovereign immunity was further adjudicated upon by the ICJ in the *Arrest Warrant* case. The case concerned the issue of an arrest warrant by a Belgian judge *in absentia* against Abdulaye Yerodia Ndombasi, Congo's Minister for Foreign Affairs thereby accusing him of crimes against humanity and breaches of the 1949 Geneva Conventions and their Additional Protocols. The Minister was accused of delivering speeches addressing racial hatred allegedly inciting the massacre of the Tutsi tribe in Congo 1998. The issue of the arrest warrant was vehemently opposed by Congo primarily on the ground that the warrant was issued against an individual who is an incumbent Minister for Foreign Affairs and non-recognition of his immunity constitutes a violation of the established principles of customary international law regarding sovereign immunity.

The ICJ should be credited for having given a detailed and a well-reasoned judgment in this case. The ICJ duly recognized that the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but

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[45] Abdul Ghafur Hamida & Hunud Abia Kadouf, *Immunity Versus International Crimes: The Impact of Pinochet and Arrest Warrant Cases*, 46 IND. J. INT'L. L. 495, 501 (2006).

to ensure the effective performance of their functions on behalf of their respective States by virtue of which the Minister, when abroad, enjoyed full immunity from criminal jurisdiction[46]. While addressing Belgium's assertion that immunities accorded to incumbent Minister for Foreign Affairs could not protect them where they were suspected of having committed war crimes or crimes against humanity, the ICJ stated that customary international law does not carve any exception to the rule according immunity from criminal jurisdiction and inviolability to such Ministers. However, the ICJ emphasized that immunity from jurisdiction did not mean impunity[47] and subsequently observed that there were four exceptional circumstances in which criminal proceedings could be brought against an incumbent or former Minister for Foreign Affairs which have been enlisted hereunder:

i. where such persons are tried in their countries;

ii. where the State which they represent or have represented decides to waive that immunity;

iii. where the State invoking jurisdiction arrests a former Minister for Foreign Affairs for acts committed prior or subsequent to his or her period of office, or acts committed during that period of office in a private capacity;

iv. where such persons are subject to criminal proceedings before certain international criminal tribunals where they have jurisdiction.

The fourth exception mentioned above was given due recognition also by Lord Goff in his dissenting opinion in *Pinochet's* case. The learned Judge argued that instruments like the Nuremberg and Tokyo Charters, the statutes[48] establishing the International Criminal Tribunals for Yugoslavia

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[46] ARREST WARRANT CASE, *supra* note 15, ¶¶ 53 and 54.
[47] *Id.* at ¶ 60.
[48] Statute of the ICTY, 32 I.L.M. 159 (1993); Statute of the ICTR, 33 I.L.M. 1602 (1994).

and Rwanda (the ICTY and ICTR)[49], and the International Criminal Court (ICC) established by the Rome Statute[50], all concerned with international responsibility before international tribunals, and not with the exclusion of State immunity in criminal proceedings before national courts and that these statutes give effect to the principles of universal jurisdiction. As a matter of fact, Article 27, paragraph 2 of the Rome Statute expressly mentions that *"immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person"*. As a matter of fact, both the ICTY and the ICTR Statutes expressly do not recognize the traditional immunity provided to Heads of States and government officials[51]. These two statutes have expressly chosen to contract out of non-*jus cogens*norms of international law by virtue of being creatures of the United Nations Security Council. It is worth mentioning that in the case of *Prosecutor* v. *AntoFurundzija*[52], the ICTY suggested *obiter dictum* that the violation of a *jus cogens*norm, such as the prohibition of torture had direct legal consequences for the legal character of all domestic actions relating to the violation and can delegitimize any legislative, administrative or judicial act authorizing torture. However, this is purely an offshoot of the legal regime that lay at the establishment of these tribunals and has not been accepted as a norm in international law that can creep into the deeply grounded tenets of sovereign immunity.

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[49] The ICTY and ICTR were constituted pursuant to Security Council resolutions under Chapter VII of the United Nations Chapter. The ICTY was established by Security Council Resolution 827 S/RES/827 (May 25, 1993); the ICTR by Security Council Resolution 955 S/RES/955 (Nov. 8, 1994).

[50] U.N. Doc. A/CONF.183/9 (July 17, 1988).

[51] Article 7, Statute of the ICTY and Article 6, Statute of the ICTR.

[52] Case No. IT-95-17/1-T10, Trial Chamber, Judgment, Dec. 10, 1998, ¶¶ 155, 157.

JUS COGENS OVER SOVEREIGN IMMUNITY – THE OTHER SIDE OF THE COIN

Any discussion with regard to the conflict between violation of *jus cogens*norms and the principle of sovereign immunity remains incomplete without appraising what the advocates of *jus cogens*over sovereign immunity have to say. The established norms of foreign sovereign immunity have, in contemporary times, been subjected to the pressing need to uphold *jus cogens* norms and prevent violation thereof. National courts in shaping the doctrine of State immunity have attempted to adapt, by way of interpretation, its content to the changing demands of the international system and consequently, State immunity has been largely affected by case law of domestic courts[53]. That the violation of *jus cogens*norms forms an exception to the doctrine of foreign sovereign immunity was observed by the Court of First Instance of Leivadia, Greece in *Prefecture of Voitia*v. *Federal Republic of Germany*[54]. The Court concluded that where a State acts in breach of a rule of *jus cogens*,it is assumed that it tacitly waives its right to invoke sovereign immunity thereby giving recognition to what is called the "implied waiver argument"[55]. Acts contrary to *jus cogens*norms are null and void, and cannot constitute a source of legal rights or privileges, such as the claim to immunity, according to the general principle of law *ex injuria jus nonoritur*.The Hellenic Supreme Court (AreiosPagos) while reviewing the afore-cited judgment refused to grant immunity for the acts of the German soldiers[56] and concluded that the acts involved a breach of *jus cogens*norms

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[53] Andrea Bianchi, *Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights, in* 49 ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 405, 412 (Benedetto Conforti& Francesco Francioni eds., 1997)

[54] Case No. 137/1997, Court of First Instance of Leivadia, Greece, Oct. 30, 1997.

[55] IliasBantekas, *Case Report: Prefecture of Voitia v. Federal Republic of Germany. Case No. 137/1997. Court of First Instance of Leivadia, Greece, October 30, 1997,* 92 AM. J. INT'L. L. 765, 766 (1998)

[56] Prefecture of Voitiav. Federal Republic of Germany,AreiosPagos [A.P.] [Supreme Court] 11/2000 (Greece).

and therefore resulted in a tacit waiver of immunity on the part of the perpetrator State[57].

The *Viotia*case served as a pioneer for various other Courts to pronounce similar judgments regarding the scope of sovereign immunity in cases of violation of *jus cogens*norms by persons acting in official capacity. The most notable of these is thejudgment in the *Ferrini*[58]case (against which Germany filed a case before the ICJ) wherein while ascertaining its jurisdiction over the case, the Italian Supreme Court abandoned the traditional distinction between *acta jure imperii*and *acta jure gestionis*and denied immunity to Germany, since the unlawful acts under consideration consisted of the violation of peremptory norms of international law[59]. The fact that Italian jurisprudence has played a significant role in enlarging the scope of this exception is affirmed by the decision of the Italian Supreme Court in *Borri*[60](albeit in an *obiter dictum*), and then directly applied in the case of *Milde*[61]. Prior to its decision in *Milde,* the Italian Supreme Court delivered fourteen rulings on May 29, 2008 denying jurisdictional immunity to the Federal Republic of Germany (FRG) for having allegedly indulged in acts of deportation and forced labor during World War II against Italian citizens[62].

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[57] Maria Gavouneli & IliasBantekas, *Case Report: Prefecture of Voitia v. Federal Republic of Germany. Case No. 11/2000. AreiosPagos (Hellenic Supreme Court), May 4, 2000,* 95 AM. J. INT'L. L. 198, 201 (2001).

[58] FERRINI, *supra* note 12.

[59] Andrea Atteritano, *Immunity of States and Their Organs: The Contribution of Italian Jurisprudence Over The Past Ten Years,* 19 IT. Y.B. INT'L. L. 33, 34 (2009). *Also see,* Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?* 21 EUR. J. INT'L. L. 853, 856 (2011).

[60] *Borri* v. *Argentina,* 27 May 2005, No. 11225, RDIPP, 2005, p. 1091 wherein the Supreme Court, held that a further exception to the (sovereign) immunity rule has recently emerged when it comes to affecting 'universal values of respect for human dignity that transcend the interests of individual State communities.'

[61] *Criminal Proceedings against Joseph Max Milde,* 13 January 2009, No. 1072, IYIL. The Court pointed in the direction of showing that the customary principle of State immunity does not apply in cases where it conflicts with the principle of customary international law that allows the exercise of judicial remedies available for the compensation of damages arising out of serious breaches of the fundamental rights of the human being. *See* Annalisa Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War, The Civitella Case,* 7 J. INT'L. CRIM. JUST. 597 (2009)

[62] Federal Republic of Germany v. Giovanni Mantelli and Others, Order No. 14201, ITALIAN COURT OF CASSATION (MAY 29, 2008).

The Court observed that in principle, deportation and forced labor have always been regarded as crimes against humanity, as it unequivocally emerged from a variety of international instruments (including the Statutes of the International Criminal Tribunal forYugoslavia and the International Criminal Tribunal for Rwanda) and that the customary principle of foreign State civil jurisdictional immunity coexists with this principle[63].

Notwithstanding the majority view adopted by the European Court of Human Rights in *Al Adsani*[64]*,* some new trends in the direction of creating a *jus cogens*exception to the doctrine of foreign sovereign immunity are emerging. In any event, it has been argued that it is not always necessary to have a wealth of authorities available before asserting that *jus cogens*norms override contrary customary rules[65]. The basic premise for refusal to grant immunity stands on the implied waiver argument. The bar of State immunity stands defeated by reference to human rights treaties to which the forum State is a party[66]. The essence of the implied waiver argument is that immunity should not apply if its application expressly conflicts with provisions of a treaty to which the forum State is a party[67]. The House of Lords in *Pinochet*'s case scrutinized the concept of State immunity *rationaemateriae*. Even though the majority of the Lords denied that that was a case of implied waiverLord Saville of Newdigate remarked that Chile's acceptance of the express and unequivocal terms of the Torture Convention[68] fulfill any requirement of a waiver of the immunity enjoyed by any State.

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[63] Carlo Forcarelli, *Case Report: Federal Republic of Germany v. Giovanni Mantelli and Others, Order No. 14201, ITALIAN COURT OF CASSATION, MAY 29, 2008 (PLENARY SESSION),* 103 AM. J. INT'L. L. 122, 124 (2009).

[64] Application No. 35763/97, 2001-XI Eur. Ct. H. R. 79.

[65] ANTONIO CASSESE, INTERNATIONAL LAW 107 (2d. ed. 2005).

[66] ANDREA BIANCHI, *supra* note 53, at 407.

[67] *Id.; See also,* Joseph G. Bergen, *Note: Princz v. The Federal Republic of Germany: Why the Courts Should Find That Violating Jus Cogens Norms Constitutes an Implied Waiver of Immunity,* 14 CONN. J. INT'L. L. 169 (1999).

[68] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

In addition to the implied waiver argument, the aspect of *jus cogens* limits the scope and ambit of the doctrine of sovereign immunity by means of what is called the "normative hierarchy" theory. The prohibition of slavery has been suggested to be a *jus cogens* norm[69]. The International Labor Organization (ILO) defines forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily[70]." Consequently, if the prohibition against slavery is a *jus cogens* norm, then the prohibition against forced labor is also a *jus cogens* norm[71]. Furthermore, the right to bring a claim for violation of internationally-recognized human rights is well-established under international law[72]. Article 8 of the Universal Declaration of Human Rights (UDHR)[73] says that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law." Article 2(3)(a) of the International Covenant On Civil and Political Rights[74] says that "each State party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity…." This position was reiterated by the Supreme Court of the US in *Marbury* v. *Madison*[75] when Chief Justice John Marshall stated that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever

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[69] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 n. 6 (1987); *See also,* Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights,* 12 HASTINGS INT'L. & COMP. L. REV. 411, 429 (1989).

[70] ILO Convention (No. 29), Convention Concerning Forced Labor or Compulsory Labor, art. 2, June 28, 1930, 39 U.N.T.S. 55.

[71] Karolyn A. Eilers, *Article 14(B) of the Treaty of Peace with Japan: Interpretation and Effect on POWs Claims Against Japanese Corporations,* 11 TRANSNAT'L. L. & CONTEMP. PROBS. 469, 485 (2001); *See also,* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 424 (D. N.J. 1999).

[72] Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation,* 29 DENV. J. INT'L. L. &POL'Y 77 (2001).

[73] G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) A (Dec. 10, 1948).

[74] Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[75] 5 U.S. (1 Cranch) 137 (1803).

he receives an injury....and when there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.[76]"

It is well-established under international law that *jus cogens*is a set of peremptory norms which does not depend on the consent of any individual State for its validity. The very existence of *jus cogens*limits State sovereignty in the sense that the 'general will' of the international community of States takes precedence of the individual will of States to order their relation[77]. The emergence of *jus cogens*as peremptory norms of international law implicitly suggests that the traditional concept of sovereignty has become particularly inconsistent and outmoded in the present-day world[78].

IS THE STAND ADOPTED BY THE ICJ A BLOW TO THE CAUSE OF INTERNATIONAL HUMAN RIGHTS?

Expectedly, the afore-discussed judgment of the ICJ has opened a Pandora's Box as far as the concept of state immunity vis-à-vis violation of peremptory norms of international law is concerned.The view taken by the ICJ reaffirms that it regards the law of State immunity more in the nature of a procedural rule and not as a substantive question of lawfulness. However, in what seems like a clarion call for giving due recognition to internationally recognized human rights, Judge CançadoTrindade and Judge Yusuf dissented from the majority insofar as the conflict between sovereign immunity and *jus cogens*norms is concerned. In their respective dissenting opinions, the Judges held that State immunity does not stand in the domain of redress for graveviolations of the fundamental rights of the human person. The majority of Judges chose to rely on enduring State practice in this regard and confines its observations to the same.

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[76] *Id*. at 163.

[77] Mary Ellen Turpel & Phillippe Sands, *Peremptory International Law and Sovereignty: Some Questions,* 3 CONN. J. INT'L. L. 364, 375 (1988).

[78] R.P. Anand, *Sovereign Equality of States in International Law,* 197 RECUEIL DES COURS 17, 31 (1986); *See also,* Adam C. Belsky, Mark Merva and Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law,* 77 CALIF. L. REV. 365, 390-391 (1989).

Noticeably, the judgment is not much of a pacifier for human rights advocates who were looking forwards to human rights being recognizedover customary international law.As a matter of fact, the Senior Director of International Law and Policy at Amnesty International, Ms. WidneyBrown expressed her disappointment at the ICJ's ruling terming it as "a big step backwards on human rights."[79] Though the dissenting opinion of the two afore-cited judges may be a positive sign, it seems unlikely that the deeply-entrenched concept of State immunity would pave way for *jus cogens*norms any time soon. International lawyers still stand by State immunity and a major overhaul of the conflict between the two concepts shall ensure that the balance shall tilt in favor of human rights.

Though not directly related to the issue discussed in this article, the recent ruling of the ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*[80] has important implications on the exercise of State immunity in light of the principles of universal jurisdiction. The ICJ found that Senegal had failed to meet its obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Consequently, Senegal has been ordered by the ICJ to prosecute HissèneHabré "without further delay" if it does not extradite him. Habré was president of the former French colony of Chad from 1982 and his one party rule was marked by widespread atrocities. He periodically targeted various ethnic groups such as the Sara (1984), Hadjerai (1987), Chadian Arabs and the Zaghawa (1989-90), killing and arresting group members en masse when he believed that their leaders posed a threat to his rule. Habré fled to Senegal in 1990 and has since been living there in exile.[81]

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[79] Amnesty Int'l., U Court Ruling on Nazi War Crime Victims 'a setback for rights' (Feb. 3, 2012) *available at* http://www.amnesty.org/en/news/un-court-ruling-nazi-war-crime-victims-deplorable-2012-02-03.

[80] Judgment of July 20, 2012.

[81] Human Rights Watch, Q&A: The case of HissèneHabré before the Extraordinary African Chambers in Senegal (Sept. 12, 2012) *available at* http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal.

The decision, which under the United Nations Charter[82] is binding on Senegal, brought an end to the suit Belgium filed in February 2009, following Senegal's refusal to extradite Habré and continued stalling on his trial before domestic courts. The proceedings against Habré date back between November 2000 and April 2001 when several complaints were filed by victims in Belgium against him for war crimes, crimes against humanity and crimes of genocide. The decision of the ICJ was based on the premise that Habré could not exercise immunity from application of the provisions of the Torture Convention because he was a former Head of State and the acts of atrocities committed were not in exercise of his official functions (which is similar to the rationale given by the House of Lords in *Pinochet's* case). The ICJ also duly noted that Senegal cannot invoke financial difficulties to justify its failure to institute proceedings against Habré and also opined that prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).[83] Thus, in essence, the ICJ did not allow procedural formalism to form a roadblock for substantial justice.

Meanwhile, coming back to the case of *Germany* v. *Italy,* perhaps the most thoughtful insight that any reader can chance upon is that by Professor Andrea Bianchi who is a Professor of International Law at the Graduate Institute, Geneva and who has been relentlessly writing on the subject of the apparent conflict of *jus cogens*norms with State immunity. Professor Bianchi discreetly states that the ICJ in its verdict did not do anything novel and repeated the crux of its previous judgments that dealt with the practice of State immunity. The disturbing factor in the judgment is the manner in which the ICJ sternly emphasizes the sweep and extent of the principle of State immunity, to the extent that national Courts seem almost inapproachable for individuals who seek to redress against States human rights' violations. However, what is notable in Professor Bianchi's comment

[82] Oct. 24, 1945, 1 U.N.T.S. XVI.
[83] Belgium v. Senegal, *supra* note 80, ¶ 112.

upon the verdict is his appreciation for Judge Cançado Trindade's dissent (which has been mentioned above) which he calls "a redeeming force of human rights and universal justice for a better world."[84]

Presently, victims of human rights' violations as well as advocates propounding their cause have only the dissenting opinions of two Judges of the ICJ to hold on to who presided over in the case that has formed the nucleus of this discussion. Though the fact of the long standing principle of sovereign immunity is completely in sync with the rationale and the purpose for which it was devised, contemporary times demand that human rights' violations should be dealt with and means of redress should be made available to the victims. In such a situation, when a forum (particularly if that forum happens to be the world's highest judicial body) denies the claims of military internees and civilians decades after the culmination of the second World War and several years after the institution of proceedings against the alleged perpetrators, the faith and belief in the intent and capacity of the ICJ to dispense justice is shaken. With the principles of universal jurisdiction firmly in place (if not in practice then at least in theory), the ICJ was expected to adopt an approach that might have served as a pioneer for applying those principles to the facts in this case. Instead, the ICJ prepared a mere reiteration of its previous verdicts on the principle of sovereign immunity. Though legally (and, theoretically) the ICJ could not have been more correct, a person who has been deprived of his human rights during a war (and, even during peacetime) expects the adjudicating authority to adopt a more humane approach and not a mechanical application of the law. This view is further substantiated by the fact that not all State practice inclines in the direction of State immunity and has been mentioned above, domestic courts in some States have carved out the *jus cogens*exception to State immunity with abundant caution. Procedural rules deserve the highest

[84] Andrea Bianchi, On Certainty (Feb. 16, 2012) *available at* http://www.ejiltalk.org/on-certainty/#more-4504.

level of compliance. However, the same argument can be echoed for violation of human rights that nothing should pave for such instances to occur.

The decision is obviously brimming with procedural correctness and cannot be criticized on those grounds. However, the ICJ should not have only dealt with the aspect of sovereign immunity and that there is not *jus cogens*exception to the same. In the event that the ICJ did not admit Italy's claims, the presiding Judges should have spoken about an alternative means of redressal for the victims of atrocities at the hands of German soldiers. What occurred to the military internees in Italy was in grave violation of human rights treaties which stood (and still stand) irrespective of any principle of universal jurisdiction. Thus, the ICJ could have directed the victims to these treaties. The attitude of the ICJ, in hushed undertones, is a little too mechanical and insensitive. Upholding human rights has never hurt any procedural rule and the ICJ could have lived with some amount of criticism if it had upheld the cause of the military internees because such deviation from the established norm would have been worth the effort. However, the ray of hope after this verdict is that the principles of universal jurisdiction are being given a more clear understanding and thus, it can be certainly hoped that with the able support of the international human rights treaties, no more victims of human rights' violations shall be disappointed by adjudicating authorities.