Are we prepared for another Bhopal?

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THE Bhopal gas leak and the disaster that ensued raises a series of questions regarding industrial safety, risk, compensation and relief for victims of industrial disasters, multinational enterprises and liability, regulation of the transfer and use of hazardous technology and so on. The leak prompted a range of responses – statutory, policy and the judicial – both in India and the USA which have now played out over two decades. The 20th anniversary is an appropriate occasion to consider some of these responses and assess whether we are prepared for another Bhopal.

Internal documents that have come to light during the discovery process in the US courts in the contamination case over the last few years clearly indicate that UCC (a) transferred unproven technology to UCIL; (b) did everything it could to ensure that it maintained a majority stake of over 50% in UCIL; (c) was aware of the possibility of a potential runaway reaction that triggered the MIC leak in Bhopal; (d) had far lower safety standards in place in Bhopal than it did in the USA; and (e) was aware right from 1982 that the Bhopal plant suffered from serious safety problems.

Even as UCC's responsibility for the accident is well established, there is no doubt that the Governments of India and Madhya Pradesh too have to accept their share of responsibility for not regulating the safety of the plant. Between the late 1970s and 1984 there were several accidents at the Bhopal plant, including one which resulted in the death of a worker due to a phosgene gas leak. The inspectors of the Industrial Safety and Health Department, Government of Madhya Pradesh recorded at least six accidents at the plant before 1984, but although they made recommendations and instructions the inspections did not lead to a 'deeper probe or stricter follow-up of the action Carbide was required to take.'

It is also impossible for the Government of India to plead innocence regarding the potential threat from the Bhopal plant. For instance, the 1982 application for approval of foreign collaboration submitted by UCIL clearly states that the manufacture and storage of MIC involved extremely hazardous substances and technology. Prior to the 1984 leak several media report and protests by the UCIL workers' union at the plant also drew attention to the serious safety hazards, but both the state and central governments overlooked the issue.

It is also significant to note that while the GOI was allowing industries employing hazardous substances, technology and processes to operate, no attempt was made to develop an appropriate regulatory framework to govern safety and risk of such industries. Further, little or no attention was paid to enhancing capacities of bodies responsible for industrial safety to actually monitor hazardous industries. The lack of legislative frameworks and corresponding institutional preparedness notwithstanding, it seems that what the state really lacked 'was the will and the intent to come down strongly on Union Carbide.'

The state made no attempt to ensure that the community was informed regarding the potential threat from the Carbide plant. In fact attempts made by some in the local administration to

shift the plant to a safer site were overruled in 1975 and just months before the fatal leak a large number of settlers living illegally around the plant were given legal titles to the land.

Following the Bhopal gas leak the Factories Act of 1948 was amended and a new chapter on Hazardous Industries added in 1987. This amendment also incorporated some of the Supreme Court pronouncements on industrial safety made in the context of an oleum gas leak in New Delhi in 1986.

The amendments essentially focused on ensuring that information regarding potential risks and hazards are made available to local authority and to communities in the vicinity of the plant, and that workers have a right to participate in safety management and regulation of the location and expansion of hazardous industries. The 1987 amendments also redefined the 'occupier' (the person designated to be responsible for the affairs of the factory – specifically safety in the present context) to be one of the Directors and explicitly laid down that the occupier has an obligation to show, in the event of an accident, that due diligence had been exercised to enforce the safety obligations laid down in the Act.

One of the most critical lessons from Bhopal is the importance of transparency and public participation in decisions relating to the location and operation of hazardous industries. It needs no emphasis that secrecy breeds a lack of accountability. Recognizing the right to know and enforcing transparency, i.e. the obligation to inform, is critical also because knowledge brings with it a greater sense of responsibility on all sides – the public, the regulatory authorities and of course the corporation itself.

The law has, for some time now, been protective of the right against disclosure about matters connected with industry. Unfortunately, the 1987 amendments to the Factories Act rather than change this only reinforced non-transparency and secrecy. While Chapter IV A of the Act emphasized transparency the punishment for any 'unauthorised' disclosure was actually enhanced substantially. Similarly, S.118 which places further restrictions on disclosure was also allowed to remain unchanged.

What is, however, most startling is that there were no amendments to the Factories Act or any other statute that made it mandatory for industry to disclose all information that may help mitigate the effects of the disaster. 'The emphasis on industrial secrecy, and the enforced silences, rest uneasily with the dire need for disclosure and of information sharing witnessed in the days, months, and years following the Bhopal gas disaster.'

For the victims of the leak the real disaster began after the leak. In 1985 the Government of India enacted the Bhopal Gas Claims Act and appropriated to itself the sole privilege of representing the victims of the disaster. The Act also laid down an elaborate mechanism of processing victims' claims for compensation including medical categorisation. Apart from an initial ex-gratia, the state made no attempt to grant any interim compensation to victims until the Supreme Court so directed years after the leak. In 1989 the Government of India agreed to a full and final settlement with UCC (without consulting the victims) and signed off all of UCC's civil and criminal liabilities in exchange for a paltry sum of US $ 450 million even though it had begun by claiming damages to the tune of over US $ 3 billion. And it was only three years later that the Claims Courts began adjudication of compensation claims.

For the victims of the leak the compensation mechanism proved to be another nail in the coffin. It pitted thousands of poor, illiterate and powerless gas victims against a ruthless bureaucracy that reduced victims to claimants. The compensation mechanism became an unholy nexus between

petty bureaucrats, doctors, lawyers and, in some cases, even judges. Characterised by heavy bureaucratic procedure, arbitrariness and corruption, the victims of Bhopal ended up receiving too little compensation too late and that too at a high cost. Of course these were in fact the fortunate; thousands had their claims rejected altogether or were even refused registration.

One of the most pertinent lessons of Bhopal was the need to ensure prompt relief to victims without them having to establish individualized fault and causation. The plight of the Bhopal gas victims has prompted a consideration of public no-fault compensation models that separate the issue of victim compensation from the question of liability and deterrence, allowing victims to be compensated quickly without removing the deterrent effects of traditional tort law from the system.

In 1991, India enacted the Public Liability Insurance Act (PLIA) to provide for interim compensation on a no-fault basis. In 1992 this was amended because insurance companies were unwilling to insure hazardous companies for a sum without an overall ceiling. This, although the PLIA already prescribed limits on the amounts to be paid to each affected person where death, serious injury, loss of work, or damage to property occurs. The PLIA was an attempt to use insurance as a risk spreading exercise which would enable the immediate payment of minimal amounts as an interim measure. This would cover not only Bhopal-like incidents but the multitude of mini-Bhopals that are a regular occurrence. There is little evidence, however, that this account under the PLIA is being drawn upon – not very good news for present or future victims of industrial disasters.

In 1995 the National Environment Tribunal Act was enacted to set up tribunals to deal exclusively with the determination and disbursement of compensation. The law, however, is yet to come into force. There is also a proposal under discussion to merge these tribunals with the Environment Appellate Authority (EAA) which was set up by a 1997 law to 'hear appeals with respect to restriction of areas in which any industry's operations or processes… shall not be carried out…' The merger apparently is being mooted because both these forums are being underutilized – a paradox given the ever-increasing multitude of conflicts around location of industrial projects and increasing number of accidents involving hazardous substances.

Victims of the Bhopal gas leak attempted and failed to access justice through the tort system in both the USA and in India. In theory, the tort system is a powerful tool to obtain justice, compensation and remediation and to act as a deterrent in cases of environmental damage.8 The Bhopal case revealed some of the weaknesses of using tort law.

In Judge Keenan's decision to send the Bhopal case to the Indian courts, he noted that he was 'firmly convinced that the Indian legal system is in a far better position… to determine the cause of the tragic event and thereby fix liability' and, because of access to greater information than the American courts, to fix the appropriate amount of compensation.9 Yet, tort litigation in India did none of this.

A number of cases have recently been filed by affected communities which have sought to use national law to tackle cases of personal injury or environmental damage claims against MNCs.

However, tort cases hold many obstacles for plaintiffs. Cases are generally slow and expensive. Toxic tort cases often have very high standards for proving certain legal elements such as causation and liability, which make it difficult for plaintiffs to meet evidentiary burdens.10 While tort cases are reasonably good at assessing personal injury and property damage, tort cases are 'clumsy and inflexible' in assessing, evaluating, and quantifying environmental goods and processes outside the market.11 For cross-border torts, questions arise about the appropriate forum for the case and

the applicable law. The application of the doctrine of forum non conveniens, like in the Bhopal case, can often determine whether a case will succeed or fail.12

Even if cases are allowed, awards can be small if a court decides it is proper to use the more limited law of the state in which the tort occurred.13 Courts may also choose to apply the doctrine of limited liability which allows corporations to hide behind the corporate veil, effectively prohibiting the enforcement of any damages awarded. MNCs are also problematic for torts because they defy assumptions about 'the mapping of legal persons to territorial jurisdiction', the basis of traditional tort law.14

The increasing proliferation of tort cases against MNCs is a symptom of the failure of other regulatory systems or, in fact, the lack of them – despite Bhopal – which have left victims/plaintiffs with no option but to turn to tort law for redress. Affected workers and communities have formed alliances with NGOs and public interest lawyers to attack a perceived 'governance deficit' in the regulation of MNCs.15 The big question, however, is whether the judiciary should and can make up this deficit, especially within the framework of tort?

In a December 1986 written statement filed in the Bhopal district court UCC claimed in its written statement that 'there is no concept known to law as "multinational corporation".'16 UCC further argued that 'the phrase "multinational corporation" or "monolithic multinational" has no relevance, significance, or legal consequence in the context of the present suit.'17 UCC therefore reduced its own corporate identity to a 'phrase'.

In a written statement submitted at a combined hearing of two Congressional Sub Committees in March 1985, the CEO of UCC, Warren Anderson, noted that among the important public policy issues raised by the Bhopal tragedy include 'Third World questions, such as the whole relationship between multinationals and developing countries.'18 In fact he went on to say that 'without the technologies and capital that multi-nationals help to introduce, developing countries would have little hope of eradicating hunger and poverty.'19

Multinational corporations today are more powerful, organised, complex and certainly as elusive to the law as they were in 1984. Jamie Cassels observed: 'Indeed the multinational company, though the most important nongovernmental entity in the daily life of citizens around the world, is not even recognized to exist by most legal systems.' Warren Anderson can look back over the past 20 years with some satisfaction – the relationship between multinational corporations and developing countries is just where he left it.

In recent years, there has been a shift of hazardous or polluting industries, so-called 'dirty' industries, to low-income nations. This shift is prompted by what Lawrence Summers while at the World Bank, called the 'impeccable economic logic of dumping a load of pollution on the lowest wage country.' Potentially hazardous industries from the developed world will move to host states in the developing world that offer the lowest levels of environmental regulation and compliance costs, and the least liability for international investment. Governments in developing nations face a contradictory situation: they are responsible for the health and safety of their citizens, but over-regulation of multinational corporations can drive away investment, reducing the wealth of the nation and the number of available jobs. States, particularly low-income ones, are unable to adequately regulate hazardous industries that move into their nations for fear of driving investment elsewhere.

Such 'impeccable' economic logic ignores the fact that market pricing theories have yet to find a quantifiable economic cost for environmental harm. This ignorance is compounded by the fact

that long term costs of environmental damage are uncalculated and largely borne by the host state whereas benefits of the movement of hazardous technology to developing nations are discrete and quantifiable, in the form of increased money for investors, and higher rates of economic growth, GDP, income or productivity for the home state.

While international law has addressed the problem of transboundary pollution, it has not directly addressed the responsibilities of corporate actors within this context. Since 1963, the International Law Commission has debated the question of transboundary environmental harm. In 2001, the Commission adopted a draft preamble and 10 draft articles on the Prevention of Transboundary Harm from Hazardous Activities.

The question of liability for transboundary environmental harm is still only a matter for debate. There was an order to the International Law Commission from the General Assembly in General Comment operative paragraph 3 of resolution 56/82 to continue its consideration of international liability for injurious consequences arising out of acts not prohibited by international law. Despite a great deal of work from the Special Rapporteur on this question, there were some in the Commission who still expressed a great deal of dissent on the appropriateness of the topic. The topic of liability, according to this view, did not easily lend itself to codification or progressive development, and there existed no agreement on the matter in doctrine, jurisprudence, or practice. However, there was general support for the statement that the innocent victim should not be 'as far as possible, left to bear the loss resulting from transboundary harm arising from hazardous activity.'

This limited progress on the question of international liability has had almost no impact on the question of multinational corporation liability. The Commission stated in its Annual Report for 2003 that '[w]hile issues concerning damage by transnational corporations in the territory of a host country and their liability were critical, some members viewed any consideration of such issues within the context of the topic, or at any rate by the Commission, with reticence. Moreover, it was noted that questions concerning civil liability such as those on proper jurisdiction, in particular the consideration of cases such as… the 1984 Bhopal disaster litigation went beyond the general scope of the topic.'

So who is going to bell the cat? In 2001 the OECD adopted its Guidelines for Multinational Corporations, which are essentially agreements and guidelines for member home governments of multinational corporations. And in 2003 the UN Sub-Commission adopted the UN Norms on the Responsibilities of Transnational Corporations And Other Business Enterprises With Regard To Human Rights. Both are often claimed by human rights groups in particular as significant achievements but neither deal with the issue of corporate liability – at the heart of tragedies like Bhopal.

The issue of transnational liability is obviously not as widely accepted as transnational profit. The Damocles sword of forum still hangs above every move to bring multinationals to the courts of home countries. As Judge Doggett of the Supreme Court of Texas observed in Dow Chemical v. Castro Alfaro, in reality *forum non conveniens* is nothing 'but connivance to avoid corporate accountability'. Judge Doggett went on to observe that comity to ensure corporate accountability cannot be achieved 'when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for these actions.'

Indeed even the deaths of thousands of people did not prompt any steps by the US government to ensure that the multinationals that brought in millions by way of profits from their overseas operations actually adhered to the same safety standards abroad as they did at home. It is

significant that while no attempt was made by the US Government to get their multinationals to improve safety standards abroad, many steps were taken within the US to enhance safety and protect potential victims of industrial hazards.

In the US the Bhopal disaster also resulted in the passing of the Emergency Planning and Community Right to Know Act, 1986. This act made it mandatory for industries to disclose the names of hazardous chemicals they were dealing with, quantities of such chemicals they were releasing into the atmosphere, and the possible dangers. In 1990 the Clean Air Act was amended and required a range of industries to disclose worst case scenarios and the preventive measures in place. The US Environment Protection Agency (EPA) moved to post all the information on the internet in order to make it more widely accessible.

In 1986, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), more commonly known as Super-fund was amended by the Superfund Amendments and Reauthorization Act (SARA) to improve on standards of remedies as well as enhance enforcement and expand the size of the trust fund. The amendments also stressed the importance of permanent remedies and innovative treatment technologies in cleaning up hazardous waste sites and also provided new enforcement authorities and settlement tools. Further, it increased the focus on human health problems posed by hazardous waste sites and required EPA to revise the Hazard Ranking System (HRS) to ensure that it accurately assessed the relative degree of risk to human health and the environment posed by uncontrolled hazardous waste sites that may be placed on the National Priorities List (NPL).

Thus while the US sought to tighten its own regulatory capacities and control over 'dirty' industries it has steadfastly refused to take any action to get its multinational corporations to adopt higher safety standards abroad. Indeed, by continually enhancing corporate regulation at home and turning a blind eye to the actions of its multinationals abroad the US government (like many other northern governments) is encouraging corporate double standards in safety but acting very much in keeping with the 'impeccable' economic logic of dumping pollution and hazardous technology on poorer countries – a logic that believes in simply relocating risk rather than enhancing safety.

The Government of India argued before the American court in the Bhopal case, the concept of multinational enterprise liability. Essentially this involved marrying strict liability for hazardous technology and enterprise liability for MNCs. The Indian lawyers argued that MNCs, 'by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals which are ultra-hazardous or inherently dangerous.' The 'complex corporate structure' of MNCs is characterized by close intertwining coupled with fine distinctions within a network of subsidiaries, affiliates and divisions operating in a maze of 'interlocking directors, common operating systems, global distribution and marketing systems, design development and technology worldwide, and financial and other controls.' This 'complex corporate structure' of the MNC makes it extremely difficult for victims to 'pinpoint responsibility for the damage' or precisely 'isolate which unit of the enterprise caused the harm.' Only the MNC in question has 'the means to know and guard against the hazards likely to be caused by the operation of the said plant.' As a result, 'the multinational enterprise which caused the harm is liable for such harm.'

A year after the Bhopal gas leak, a major leakage of oleum gas from a plant owned by Shriram Industries in New Delhi resulted in a large number of persons being affected and at least

one death. In this case (Shriram) the Supreme Court made a pronouncement of absolute liability and enterprise liability that changed the way in which Indian companies were held liable.

The Supreme Court said: 'We are of the view that an enterprise which is engaged in an hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of the activity which it has undertaken.'

The Supreme Court reasoned that,

> 'Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other element that caused the harm the enterprise must be held strictly liable for causing such harm as part of the social cost for carrying on the hazardous or inherently dangerous activity. […] Such hazardous or inherently dangerous activity for private profit can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not.'

The court concluded by pronouncing that,

> 'Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in Rylands v. Fletcher.'

The case, though limited to Indian companies, sets out a model of liability that can be extremely useful as the international community moves forward in its consideration of how MNCs, especially those engaged with hazardous technology, can be held more accountable.

Underlying both absolute liability and enterprise responsibility is that:

1. The enterprise is obliged to take steps to anticipate all risks, and plan and prevent them from materializing. This corresponds on the one hand to the principle of due diligence in human rights law and on other also echoes the now well established principle of strict liability in environmental law.

2. The enterprise internalizes the cost of the personal or environmental harm due to its activities. This is very much in line with the 'polluter pays' and 'precautionary principles', now well established in international and domestic law in almost all jurisdictions.

3. In the context of 1 and 2 above, the victims are not burdened with the responsibility of pinpointing fault. In a departure from traditional tort law but responding to the realities of the increasingly sophisticated nature of technology and multinational business, it is considered fair to shift the onus of proof on the tortfeasor, i.e. the enterprise/multinational corporation.

Despite judicial pronouncements on the question, the statutory law in India clearly reveals the state's ambivalence on the issue of multinational corporate liability. Amongst the amendments to the Factories Act, 1948 was one in 1987 which absolves the designer, manufacturer, importer or

seller of plant and machinery once the user to whom the plant and machinery were handed over, gave an undertaking that, 'if properly used', no harm would ensue. It seems this provision was in the nature of an assurance to the high priests of capital and technology – from absolute liability to absolute prejudgement of liability.

In sum, 20 years after the world's worst industrial disaster hundreds of thousands of people are still at grave risk. Whatever little gains the victims of Bhopal have made is primarily due to their own tireless struggle for justice and redress. Unfortunately, it seems the disaster that is Bhopal and the struggle of the victims has not been enough to prompt the executive, legislature and judiciary to act together to meet the challenge posed by a combination of political economy of neoliberal globalization, hazardous technology and the power of transnational capital.