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## **Bhopal and the U.S. Courts**

### **Catastrophe and the Dilemma of Law (2004), by H. Rajan Sharma**

*H. Rajan Sharma, a lawyer who is presently representing residents of Bhopal in a Federal class action against Union Carbide in US courts, brings the legal story up to date, outlines his case, and looks at what Bhopal means for the future of Human Rights.*

The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to *interpret* a corpus of texts sanctifying a correct or legitimized vision of the social world. Such a process is ideal for constantly increasing the separation between judgments based on the law and naive intuitions of fairness.

-Pierre Bourdieu<sup>1</sup>

Around midnight on December 2-3, 1984, a pesticide plant leaked some twenty seven tons of a methyl isocyanate, a highly toxic chemical gas, leaked out into the air over the sleeping city of Bhopal. The results took the form of an enormous tide of death that welled up in the city's hospitals and morgues. Official estimates, probably understated, put the toll at a staggering 2,000 dead but reliable unofficial estimates suggest a soul-numbing figure of nearly 6,000 or more dead in the 48-hour aftermath of the disaster. The cause of death was described in most cases as pulmonary edema, a polite medical euphemism for an excruciating manner of death by slow drowning in one's own bodily fluids. According to the Indian Council for Medical Research, more than 250,000 people continue to suffer from permanent disabilities and chronic ailments as the result of exposure to the poisonous gases on that night. This December marks the twentieth anniversary of this unparalleled disaster, perhaps the single worst industrial catastrophe ever to befall a civilian population. By some accounts, at least 20,000 persons have died over the past two decades. The International Commission for Medical Research on Bhopal has concluded that, due to chromosomal and genetic damage among the victims, the wake of this unprecedented catastrophe will continue to ripple through the next three to four generations in Bhopal in the form of birth defects.

The word 'tragedy' has shown a talismanic insistence in appearing and reappearing in the context of this incident. Perhaps it helps us soothe the conscience by lending an air of the inevitable or unavoidable to these events or maybe it helps us invoke that Faustian mythology so typical of modern society in which nameless others are sacrificed at the hallowed altar of progress for our technological hubris. But this anniversary should not just memorialize the tragedy of Bhopal. It should be an occasion to recall the travesty of what the victims have been made to endure over the past twenty years. Despite all the fine sentiments and noble ambitions expressed in what the Indian Supreme Court, in this case, referred to as the "uncertain promise of law," the fact of the matter is that the law, in all its abstract majesty, has utterly failed to provide the victims of the world's worst industrial disaster with so much as a semblance of justice over the past two decades. Instead, the law has been the principal author of a kind of Kafkaesque parody of justice that has played itself out in the courts of the United States and India. The so-called wheels of justice have, in this case, turned only to crush the hopes of the survivors

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<sup>1</sup> Pierre Bourdieu, "The Force of Law: Towards A Sociology of the Juridical Field," *Hastings Law Journal* 38 (5): 814-53 (1987).

beneath them. The seemingly endless processes of the law have, in fact, perpetuated and compounded an injustice too fearful to contemplate, which has been allowed to stand without redress or remedy for twenty years, seven thousand three hundred days (to be precise), each day a shameful vindication of the maxim that holds that laws are like cobwebs, strong enough to only detain the weak and too weak to constrain the strong. The epitaph has yet to be written on the sordid record of what may justifiably be called the Bhopal travesty.

The plant belonged to Union Carbide India Limited, an affiliate of Union Carbide Corporation, a multinational corporation headquartered in the United States. Union Carbide owned 50.9% of its Indian affiliate at the time of the disaster and was responsible for transferring proprietary technology to the Bhopal plant for manufacturing Sevin, a patented product in which methyl isocyanate was one of the key ingredients. It was determined shortly after the disaster that a "runaway reaction" of a highly volatile chemical, methyl isocyanate or MIC, had taken place in one of the plant's storage tanks. The most likely cause was the introduction of water into the tank. It is undisputed that a routine "water-washing" operation prescribed by the American company's operating manuals were being conducted on the night of the disaster. Numerous independent investigations have concluded that, while the entry of water into the storage tank may have triggered the runaway reaction, the real causes of the catastrophe can be traced to the decision to store methyl isocyanate in large quantities for long periods of time, the badly flawed design of the plant as well as the near-total absence of safety provisions and emergency-preparedness measures. Needless to say, Union Carbide has strenuously contested this version of events, disclaiming any managerial responsibility for the design, day-to-day operation of the UCIL facility or its safety features and asserting that its relationship with its Indian subsidiary was a hands-off or arm's length relationship. The survivors and their representatives, meanwhile, have maintained that the U.S. company deliberately chose to bequeath to Bhopal an obsolete, dangerous and ill-equipped plant, with grossly inadequate technology, pointing to Carbide's methyl isocyanate facility in Institute, West Virginia as an example of the company's discriminatory imposition of double standards of risk, safety and emergency-preparedness. The Institute plant, they argue, was designed with significantly higher parameters for safety and emergency-preparedness: e.g., computerized warning systems, larger capacity safety devices, and safer processes for storage and containment of methyl isocyanate. For the past two decades, Carbide has insisted that standards of design, technology, safety and emergency-preparedness were either uniform or at least comparable at all of its worldwide operations, including at Bhopal. To date, Union Carbide continues to withhold scientific and medical research on the toxicology of the leaked gases which could assist in the treatment of innumerable victims on the specious grounds that this information constitutes a "trade secret."

In the disaster's aftermath, hundreds of lawsuits were filed in jurisdictions across the U.S. against Union Carbide by American contingency-fee lawyers. These were ultimately consolidated into a single proceeding before Judge John Keenan in the Southern District of New York. Fearing that the victims claims might be exploited by an army of private lawyers, the Indian Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, on March 25, 1985. The legislation was based on a doctrine under international law known as "parens patriae" (literally, "parent of the country"), which held that the State was empowered to act the legitimate protector of its citizens and their environment. The Act conferred upon the Indian government the full power and authority to act as the exclusive legal representative of the survivors in all claims for compensation before foreign or domestic courts, subject to its obligation to consult and cooperate with the victims and their representatives in the prosecution of such claims. Framers of the legislation argued that it would enable the Indian government to provide centralized, integrated decision-making and control to prosecute claims on behalf of the mostly destitute victims, bringing all the nation's resources to bear against the multinational

might of the corporation.

Based on this legislation, the Indian government filed suit against Union Carbide on April 8, 1985, in the courts of the United States, where, in what can only be described as a profoundly ironic exercise, India argued that the interests of justice required the case to be tried in the United States on the grounds that its own legal system was backward and procedurally outmoded, lacking any class action device or other provision for representative suits, burdened with the legacy of colonialism, and subject to massive delays caused by endemic docket backlogs. The company countered that the case ought to be tried in the courts of India, without burdening American taxpayers, and showered praise upon the legal system of the "world's largest democracy", particularly to the extent it was "based on sound and established principles of Anglo-Saxon law." On May 12, 1986, Judge Keenan conditionally dismissed the consolidated action on the grounds that India was the more appropriate forum for the resolution of this litigation. The decision rested, in part, on the notion that trying the case in the US courts would amount to "yet another instance of imperialism" imposing foreign legal standards upon a developing country with "vastly different values", different levels of "population" and "standards of living." The dismissal was conditioned upon Union Carbide's "consent to submit to the jurisdiction of the courts of India." Meanwhile, criminal proceedings and investigation had already been initiated against Union Carbide and its former director, Warren Anderson, in the Bhopal District Court in 1984 and formal charges of "culpable homicide" and "causing death by use of a dangerous instrumentality" were framed by India's prosecuting agencies on November 30, 1987. The charge of culpable homicide under the Indian Penal Code is equivalent to manslaughter, causing death by reckless indifference.

By the time the case first reached the Supreme Court of India on the issue of whether interim relief assessed against Union Carbide on behalf of the victims was appropriate, litigation had continued in India for more than five years without even reaching the commencement of pretrial discovery. The mostly destitute victims had received nothing in the way of compensation from their erstwhile 'parent,' the Union of India. On February 14, 1989, Chief Justice Rajinder S. Pathak interrupted the proceedings to announce that he felt, in light of "the enormity of suffering occasioned by the Bhopal gas disaster and the pressing urgency to provide immediate and substantial relief to the victims," that the case was "preeminently fit for overall settlement."<sup>2</sup> The Chief Justice then entered a judicial decree preliminarily recording the terms of this settlement which required Union Carbide to pay \$470 million in damages in order to extinguish all civil and criminal liability.

The Indian Supreme Court, however, gave the victims and their able counsel a last opportunity to challenge the terms of the proposed settlement. In its final decision of October 1991, the Indian Supreme Court justified the settlement giving it final approval on the grounds that the victims' fate could not be left to the "uncertain promise of law," but modified its terms and conditions by mandating the prosecution of criminal charges against Union Carbide and its former director, Warren Anderson, which had been pending since 1987.<sup>3</sup> Criminal charges against Union Carbide and Warren Anderson were accordingly renewed in the Bhopal District Court. In March 1992, the Judicial Magistrate issued an arrest warrant for Warren Anderson and gave lawyers for Union Carbide a month in which to appear for trial. Neither of the parties presented themselves in court and Union Carbide's official spokesperson stated that the company would flatly refuse to submit to the jurisdiction of India's criminal courts. Summons served on Union Carbide through the U.S. Department of Justice were ignored. In 1992, the Bhopal District Court proclaimed the company and Mr. Anderson to be "absconders", i.e. fugitives from justice. To date, neither Union Carbide nor Anderson have appeared to

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<sup>2</sup> Union Carbide Corp. v. Union of India, 1 S.C.C. 674, 675 (1989).

<sup>3</sup> Union Carbide Corp. v. Union of India, Review Petition Nos. 229 and 623-24 of 1989, 70 (1991).

face the criminal charges pending against them in India. As recently as 2004, the Indian government submitted an extradition request for Anderson under the Indo-US Treaty of Extradition which was, reportedly, rejected. Progress in the criminal case against Indian officials has been, if anything, equally glacial.

The compensation tribunals, established by the Union of India, the erstwhile 'parent' of the disaster victims, did not even begin functioning until 1992. Present-day estimates by non-governmental organizations indicate that over 90% of claimants have received less than \$400 from the claims process in India, an amount insufficient to pay for medications over a five year period. Meanwhile, tests of the water supply of as many as sixteen communities residing near the plant site and surrounding environs have revealed severe environmental contamination of the aquifer in Bhopal resulting from the indiscriminate disposal of toxic chemicals and by-products produced there. Recent soil and water sample tests conducted by an independent British laboratory for Greenpeace and certain victims' organizations indicate massive contamination of soil and drinking water around the facility in Bhopal. To cite one instance, the Greenpeace report states that water samples taken from the Bhopal site contained carbon tetrachloride, a carcinogenic chemical, which exceeded maximum tolerance limits established by the World Health Organization by 1,705 times. Union Carbide claims that it has no further responsibility or liability for the environmental remediation of the plant site because it has sold its shares in its Indian subsidiary and the land was returned to Madhya Pradesh in 1998.

In litigation before the Indian Supreme Court, the Union of India has sought to utilize the interest earned on the settlement fund, over the many years that it remained undistributed, to clean-up and remediate the badly polluted plant site and the groundwater aquifer which provides the drinking water of as many as 20,000 residents of affected communities. The Supreme Court has, mercifully, denied its request and ruled that the victims must receive the remainder of these sums to which they are legally and morally entitled. But lawyers for political parties have filed objections claiming, with truly democratic largesse, that these funds should be allocated to a dozen or so municipal wards in Bhopal where the effects of the disaster were felt principally in the form of a temporary inability to find good maids and kitchen help.

As an attorney who has had the privilege of representing the survivors' cause in the courts of the United States, it pains me to admit that my own efforts have achieved only modest success in turning the tide of this battle. That litigation, commenced in 1999, consisted primarily of an effort to translate the unresolved criminal liability of Union Carbide into an actionable violation of international human rights law. The complaint also included claims for damages to physical health and property as a result of the contamination of drinking water as well as for injunctive relief in the form of clean-up and remediation by Union Carbide of the severely polluted land for its factory, which still has thousands of metric tons of waste stored above-ground and buried in a landfill on site, and the aquifer in Bhopal. Those efforts were unavailing largely because the American courts gave scant weight to our argument that Union Carbide could not claim the benefit of the 1989 settlement since the company had refused to appear to face criminal charges in India. They concluded instead, ignoring the carefully framed arguments under international law, that only the Indian government had standing to complain of a breach of that settlement because it was the Indian state, not the victims on whose behalf it was supposedly acting, which was a party to that agreement.

On remand from the appellate courts, Union Carbide was obliged, for the first time, to submit to certain limited discovery for documents relating to the history of its operations at Bhopal. One of the documents was a UCC Capital Budget from 1973 for the transfer of technology which Union Carbide approved to the Bhopal plant for the manufacture of the pesticides including the technology for methyl isocyanate ("MIC"). Under a section entitled "Technology Risks," the document revealed for the first time that

the “comparative risk of poor performance and of consequent need for further investment to correct it is considerably higher in the UCIL operation than it would be had proven technology been followed throughout,” noting in particular that “even the MIC-to-Sevin process, as developed by UCC, has had only a limited trial run.” In March of 2004, the same appellate court ruled that the claims of those affected by environmental contamination may be allowed to proceed, including claims for environmental remediation of the land of the Bhopal factory and groundwater aquifer.

One of the imperatives of this anniversary should be to remedy the failure of law which made the Bhopal travesty possible and to prevent its recurrence when the law is again confronted, as it almost certainly will be in this age of globalization, with another disaster having the same international or cross-border dimensions, and the same vexing complexities of liability, corporate structure, jurisdiction, conflicts-of-law and forum. Legal reform is a cause that has seldom, if ever, managed to fire the activist imagination in India or elsewhere. If anything, however, the Bhopal travesty offers a dizzying, vertiginous glimpse of how the economic logic of globalization can become inextricably intertwined with a politics of catastrophe, in which developing countries bargain with foreign investors and multinational corporations by staking the health and lives of their citizens or their environment like gambling chips. This kind of moral abyss is made possible and underwritten by the failures and lacunae in the ‘rule of law’, domestic and international.

The forces that created Bhopal are on the march everywhere today. A recently released report by the United Nations Research Institute for Social Development, called for the implementation of such a legally binding international code of conduct, some 60,000 multinational corporations in 1998 accounted for more than one-third of world exports, with annual turnovers that dwarfed the gross domestic products of most of their host states in the developing world. “There is a danger that corporate self-regulation, as well as various partnership arrangements,” the report warned, giving the example of Bhopal, “are weakening the role of national governments, trade unions and stronger forms of civil society.”

As an Organization for Economic Cooperation and Development (“OECD”) study pointed out, as early as 1993: “Environmentally-dirty industries, particularly resource-based sectors, have migrated over the last two decades to lower income countries with weaker environmental standards; the result is a geographical shift in production capacity within sectors with a consequent acceleration of industrial pollution intensity in developing countries.”<sup>4</sup> The study adds that “liberalised trade and investment rules among countries with unequal levels of environmental protection may create incentives for companies to relocate to jurisdictions with lower levels of environmental regulation and lower compliance costs.”

The dilemma of law, as Bourdieu has pointed out, is that any rule-based system no matter how impartially administered or fairly conceived will tend inexorably towards outcomes that are not necessarily consonant with intuitive constructions of justice. By the same token, one can scarcely conceive of a political dispensation or social configuration that can be trusted, in and of itself, to deliver any ‘social justice’ worth the name without something closely resembling the normative episteme of the rule of law. Yet, the law cannot remain indifferent to the demands of justice on the specious grounds of an appeal to higher-order concepts of justice “under the law” as the sole and exclusive foundation of its claims to “universal acceptance through an inevitability which is simultaneously logical and ethical,” as Bourdieu has written. In the last analysis, the law must secure acceptance of its moral authority from those who seek its protections by aspiring to deliver some modicum of meaningful justice or else depend entirely on the

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<sup>4</sup> Candice Stevens, Synthesis Report: Environmental Policies and Industrial Competitiveness, in Environmental Policies and Industrial Competitiveness 7 (OECD ed., 1993).

armed power of the state to justify its pretensions to legitimacy.

In the context of Bhopal, that objective requires India and the international community to undertake the following measures to ensure that the law will finally remedy this perversion of justice on its twentieth anniversary.

India must commit itself to legal reform. The Bhopal case presents the spectacle of an official indictment of its own legal system by the country's government before the courts of a foreign power. This is nothing short of an acknowledgement that the sovereign, with full knowledge of its consequences, has deliberately been unwilling or unable to remedy this problem in the more than half-century since independence. Civil litigation in India remains subject to delays of 20 years or more. These kinds of delays are effectively tantamount to a denial of justice. India is a signatory to the International Covenant on Civil & Political Rights which provides, in Article 14, that: "In the determination... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Legal reforms in India must include provisions for representative suits or class actions to address mass claims of liability like those in Bhopal. Never again should victims be subjected to something like the Bhopal Act which not only enabled the government to function as their lawyer, without observing the minimal professional duties or ethical obligations of an attorney towards his client, but permitted the government to begin functioning as the client as well, stripping the victims of any legal personality and denying them any meaningful role in the decisions that affected their case. Article 16 of the International Covenant guarantees that: "Everyone shall have the right to recognition everywhere as a person before the law."

In honor of the victims of Bhopal, India should lead the effort to enact into international law by treaty or other instrument a legally binding and enforceable code of conduct for multinational corporations, including provisions of liability concerning the export of hazardous technology. Our legal strategy seems to have presaged the UN Human Rights Norms for Business and its Commentary which were recently approved by the Sub-Commission on the Protection and Promotion of Human Rights. These do not, however, have the force of law. India should work to transform these norms into an international legal framework.

The International Law Commission ("ILC"), an authoritative body charged by the United Nations with the progressive development and codification of international law, has already articulated the majority view that international liability, arising from transboundary environmental harm like Bhopal, should be imposed on states that export hazardous technologies. Even before the disaster, some members of the Commission and the Sixth Committee had suggested that the state of nationality of a multinational corporation should be liable when it "exports" dangerous industries to developing states and harm results. During the discussions on these issues, the U.S. delegation expressed their official view that "under customary international law, States are generally liable for significant transboundary harm caused by private entities acting on their territory or subject to their jurisdiction or control" adding only that "from a policy point of view, a good argument exists that the best way to minimize such harm is to place liability on the person or entity that causes such harm, rather than on the State." The Union of India agreed that liability for environmental harm originating in another state "must be imputed to the operator who was in direct physical control of the activity." But the split in the Commission on this question, ensured that the Commission's draft articles of "International Liability for Injurious Consequences Arising from Acts Not Prohibited By International Law", remain unsettled on this point.<sup>5</sup> India should work to close this

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<sup>5</sup> International Law Commission, Second Report on International Liability for Injurious Consequences

omission in the draft articles and resolve the issue of international liability for the export of hazardous or dangerous technology.

Last but not least, India must secure the appearance of UCC or its new parent, Dow Chemical, to face trial on the criminal charges pending against it in the Bhopal District Court. The criminal case against Indian officials has dragged on for a number of years and judges presiding over the case against UCC have been repeatedly transferred. A single judge should be appointed to preside over the entire matter and expedite proceedings so that the criminal case can be quickly adjudicated and disposed of under the law. India has an obligation to ensure that this crime is effectively prosecuted. Article 8 of the Universal Declaration of Human Rights stipulates that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Pursuant to Article 2 of the International Covenant on Civil & Political Rights, India has undertaken to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," and to "ensure that the competent authorities shall enforce such remedies when granted."

*Source: from Seminar 544: Elusive Justice, December 2004, New Delhi, India.*