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# THIRTY YEARS AFTER BHOPAL

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## Valiant victims, lethal litigation

The Statesman

01 Dec 2014

**In a series of articles by a distinguished panel of writers, The Statesman, beginning today, revisits the Bhopal gas tragedy of December 1984, to determine how India and her institutions failed - and continue to fail - its citizens.**

### Upendra Baxi

Suffering knows no anniversary but since Indian public memory is both short and shortened, and political power is increasingly synonymous with reorganising public memory, the thirtieth anniversary of the Bhopal catastrophe assumes a poignant significance. On that late night/morning of 2/3 December 1984, 40 tonnes of deadly methyl isocyanate (MIC) gas was released into the air where India's poorest of the poor lived. The gas plant was owned by an American corporation ~ Union Carbide Corporation (UCC) ~ which failed to exercise due diligence owed to the people.

What happened at Bhopal was no gas leak or disaster; it was truly a catastrophe. What happened at Bhopal was no passive victimage; valiant victims have heroically waged a lethal litigation in resistance to injustice. Writing about Bhopal begins, not ends, when it tells stories about impunity of multinational corporate conduct; for it must also have serious regard for the active agency of the survivors and enscript a complex movement toward emancipatory politics. From the effigy-burning of Warren Anderson at the first anniversary till today, the victims have haunted both American and Indian courts in search of the 'uncertain promise of justice'.

They have engaged with lawmaking by Parliament: the Bhopal Claims Act in 1985 (in which the government and the state of India assumed 'parental' powers in the compensation courts, and which invited the ire of the victims); the law of 'public liability insurance' in 1991/1992 (that allows catastrophic victims interim compensation); and revisiting the Factories Act in 1987 to include an understanding that hazardous processes may cause disasters in, as well as way beyond, the premises of factories, are some examples.

Despite their re-victimisation by the state and the multinationals, the survivors have continued their struggle. This movement began early and had worldwide support of the Fourth World of the dispossessed, disadvantaged, and disenfranchised peoples everywhere, who saw a noxious continuity between chemicalisation of soil and agriculture brought about by the first Green Revolution. After all, UCC came to India for MIC based SEVIN, a pesticide that was to overcome resistance to high breed plant varieties. Even if such nobility of intent was presumed to exist, why did UCC need to store 40 tonnes of MIC as against the wisdom practised in UCC's plant in West Virginia that storing more than 10 tonnes was a prescription for potential disaster? Why would it abstain from state-of-art safety systems which it provided there? Did it need to close off the refrigeration systems at the plant which allowed the MIC to escape undetected till too late?

When ordered to pay an interim compensation of \$250 million by the Madhya Pradesh High Court in 1987, UCC contested it before the Supreme Court, finally obtaining a judicial settlement of \$470 million and complete immunity for itself. Why the court passed this settlement-order instead of giving a proper judgement will forever remain a mystery; perhaps, the judges yielded to surmises about how eventually a New York garnishee court would set aside its ultimate award on some grounds of failure of due process,

The settlement orders were also wrong as they were made behind the backs of the victims who were a legitimate party before the court - the error denying natural justice went to the root of jurisdiction. As natural justice was gainsaid later in a review, when the court quoted Merchant of Venice to the victims: 'To do a great right, do a little wrong'. A little Shakespeare is a dangerous thing for justice! Not merely did the court undercompensate fatalities, it also adjusted the settlement amount within judicially invented categories of 'serious' and 'minor' ones.

This has haunted two generations of victims. The claims settlement process has also been haunted by the spectre of 'bogus claims'; the violated were ultimately dispensed small amounts, when the needs of health care and rehabilitation were vast. Although the settlement was supposedly dictated by the 'urgency' of justice to the Bhopal-violated, the court displayed no expedition in the decades that followed in dispensing proper relief and rehabilitation to victims.

The setbacks have continued in American courts which unconscionably treated the 'settlement' as a full and final response to all claims. They refused to treat UCC as a 'fugitive felon', debarred from availing any judicial process - a doctrine developed by the American Supreme Court itself!

Astonishingly, the court of Judge Keenan has found that there may not exist any claims against the UCC outside the settlement, even such claims as those regarding contaminated water, soil, or air contamination, which were not specifically urged before the court in its settlement-order, and which is beyond the disaster. It seems the settlement orders covered even claims which arose subsequently!

The violated peoples suffered a further re-victimization when their efforts to extradite the CEO of Union Carbide fell on American and Indian Presidential deaf ears; and, again, when the Supreme Court affirmed the lesser charge of two years for 'rashness' and 'negligence' instead of considering a sentence of life imprisonment or capital punishment for the criminally negligent actors of UCIL.

All this has happened in the face of a 2010 curative petition (which is yet to be heard) where the Union of India claims against UCC that the settlement was based on certain 'assumptions of truth' which no longer prevail; the Union now places the highest level of compensation at US\$ 1241.38 million.

What matters for the future is the continuous struggle against injustice. The Bhopal-violated have been asking UCC to release information concerning toxic and epidemiological properties of MIC; that information, only possessed by UCC, will go a long way still in treating generations of victims. The successor company, Dow Chemicals, is asked to own legal and moral liability for the acts of UCC whose assets alone Dow Chemicals claims it has acquired, to the exclusion of its liabilities, and which it contends vigorously, even to the point of evicting peaceful campaigners.

Most recently, Abdul Jabbar, convenor of Bhopal Gas Peedit Mahila Udyog Sangathan drew attention to the missing samples of dead childbirth victims which affects the quality of forensic evidence. The director of the Bhopal Medico-Legal Institute has said that there was 'not a single sample in our institute which we can say for sure belongs to the gas victims'. He also says that though there is 'enough medical data which shows genetic mutation in MIC victims, the state government did not maintain any data of the MIC affected peoples beyond 1992!' What did the Supreme Court know about genetic and long term effects of MIC when it settled the matter? Was it even an informed guesstimate?

On 16 November 2014, a five day 'nil-by-mouth' hunger strike by five women victims, supported by about over 300 activists and survivors, ended with an assurance from the Union Minister of Chemicals and Fertilizers that the figures the government was using in the compensation claim would be revised on the basis of scientific data that exists but has been ignored thus far. He also agreed to ensure that the data would be re-presented to the Supreme Court in the case that was being made for acknowledgment, and remedying, the extent of damage that the disaster has continued to cause to victims and survivors.

The Bhopal saga is not unique because of the impunity that multinationals claim for acts even of radical evil, but for their struggle for (in philosopher Hannah Arendt's terms) the 'right to have rights'.

Even when we mourn the tragedy of Bhopal, we must celebrate the determination for justice shown by the heroic violated.

**(The writer is an internationally-acclaimed legal scholar and former Vice-Chancellor of Delhi University.)**

## Lessons we refuse to learn

The Statesman

02 Dec 2014

**The second in this series of articles looks at the stubborn refusal of our rulers to learn lessons from Bhopal and to enforce laws that could prevent such tragedies**

**Nityanand Jayaraman**

Those who do not learn from history are fated to repeat its mistakes. Tomorrow (3 December) is the 30th anniversary of the Bhopal gas disaster. 24 December is the 10th anniversary of the Indian Ocean tsunami. Any disaster is an opportunity to learn about things that could have been done to avert or minimise the damage. Each disaster would have its own lessons to offer. Identifying these lessons is a matter of picking out the causes that led to the disaster.

The 1984 poisonous gas leak from Union Carbide's pesticide factory in Bhopal was a disaster by any definition. About 8,000 died in the immediate aftermath. Till date, more than 25,000 have died due to the long-term effect of the poisons. Nearly six lakh people have been compensated for health damage. Bhopal symbolises a worst-case result of decisions where investments and corporate welfare are prioritised over environment, safety and public good.

Of the many lessons Bhopal has to offer, three are particularly important - siting; safety as a function of technology screening and emergency response; and rehabilitation in the event of disaster.

A highly hazardous factory was allowed in a densely populated locality in working class Bhopal. Keen to accommodate corporate investment, the government allowed Carbide to deploy untested technology without proper screening by independent regulators.

In the absence of robust emergency preparedness, everyone - the district administration, public health officials and the people - was caught off-guard when the disaster happened. And finally, the tasks of compensation, medical and social rehabilitation and environmental remediation that ought to have happened without delay still remain to be completed today, 30 years later.

On these three counts, it can be safely said that our decision-makers may have passed laws that reflect the lessons, but they have stoutly refused to enforce these laws.

### Siting

Elaborate site selection guidelines are available for various kinds of polluting industries. These guidelines are routinely set aside for political and financial considerations. This is evident from the number of cases clogging our courts where inappropriate siting is the key argument.

Take the case of the 4000 MW coal-fired ultra mega power plant that is set to come up in Cheyyur, Tamil Nadu. Coal-fired power plants pollute the water and land with heavy metals such as mercury, arsenic, cadmium, chromium and lead. Coal plants also emit tons of acidic pollutants like sulphur dioxide that return to the ground as vegetation-destroying acid rain.

There is no good place to locate a coal plant. But if one had to make a choice, then one would avoid areas rich in water bodies, agriculture, fisheries and other ecologically sensitive areas.

In choosing Cheyyur, the proponent - government-owned Coastal Tamil Nadu Power Ltd - has stated that the site was chosen as it had minimum agricultural land, and no water bodies, ecologically sensitive areas or places used by migratory species in the vicinity.

## Three decades of dissatisfaction

The Statesman

03 Dec 2014

**R. Srinivasa Murthy**

A psychiatrist who has worked with victims of Bhopal recounts how little has changed in the area of health care over three decades.

As we come to the 30th anniversary of the Bhopal gas disaster, there will be review and examination of what happened that night, how it changed the lives of the people of Bhopal, what efforts have been made to care for the survivors and what remains to be done.

I have been working with the people of Bhopal since 1984, to understand the mental health impact of the disaster and develop mental health care. This has given me an understanding of both their sufferings and of our failures in providing relief to the survivors.

In the years since the disaster, the most striking aspect of the health situation generally, and mental health care in particular, can be reflected in one word: 'dissatisfaction' - a euphemism for much that is experienced in Bhopal. Dissatisfaction among the affected people, the staff of voluntary organisations, the medical care providers as also the administrators. This dissatisfaction arises from the lack of information about the health impact of the disaster, the continuing medical needs of the population, the clinic-oriented medical care, the poor coordination of medical care, inadequacy of medical interventions and lack of rehabilitative services.

An important reference point in articulating the health needs, health rights and the approaches to achieve optimum health care of the survivors is the 9 August 2012 Supreme Court judgment, which was itself a result of over 14 years of legal battles. In the words of the judges: "All the gas victims are entitled to greater extent of multi-dimensional health care, as their sufferings are in no way, directly or indirectly, attributable to them." Further the court ordered corrective solutions through "strengthening of the empowered monitoring committee, adequate research by the ICMR, computerisation of medical information, publication of 'health booklets' etc and complete computerisation of the medical information in the government as well as non-government hospital/clinics, which should be completed within a period of three months from today."

However, most of these directives remain unfulfilled and the population continues to suffer in silence.

For example, many people in the community are experiencing symptoms described in a recent book on the women of Bhopal, 'The Let Down' by Ms Swati Tiwari (in translation from Hindi) which records the years since the disaster as the woman survivors experienced it.

As one survivor put it, "My body has become home to a number of unknown diseases".

**The book records:** "Laxmi had many questions which are still open. She does not cry but she becomes aggressive to express her feeling, however, (and) loses temper. Her fists tighten. Her eyes become bloodshot. She earnestly wants to know what her fault was to deserve the ordeal of being witness to her own family perishing".

"The pain of Pramila is that her in-laws have severed relations with her due to her illness. She was hardly ten at the time of the tragedy. She has lost her kith and kin. In course of time diseases caught hold of her".

“From that day (of disaster), we never knew peace and happiness. His death wiped all the colours from our life. All our dreams and hopes lay shattered. Even today I shudder to think of it”.

The dissatisfaction with medical care is universal among the survivors. “Perhaps the doctors have also got fed up with checking up the gas-affected patients for so many years.” The women doing the rounds of the hospital said, “The doctors don't bother to properly examine us. They try to put us off”.

I was part of the research efforts between 1985 and 1994 and have kept track of the health impact on the affected people. In 2003, two of us (Dr Amit Basu and I) wrote in the Economic and Political Weekly on the continuing mental health effect on the population.

We concluded that “no systematic effort has been made to tackle the mental health problems that were generated as an impact of the gas leak”. Sadly, this situation has not changed even in 2014!

Since 2010, I have been more actively studying the need of medical officers trained in the essentials of mental health care. When I restarted my engagement with the Bhopal population, what struck me was the utter lack of movement in providing the needed mental health care. What I saw in February 1985 was nearly exactly what I saw in October 2010 ~ a lot of suffering, a lack of awareness of the needs among care providers and unrelenting apathy of the administration.

Studies undertaken during this period showed that an inordinate majority of the persons studied had been ill through the 28 years, but had received very little in the nature of health care. At BMHRC, Bhopal, the tertiary care hospital specially built and exclusively for the survivors of the disaster, the care records revealed that there had been discontinuous and irregular treatment of a high percentage of psychiatric patients. There was no system to ensure longitudinal care and continuous follow-up.

In a community survey of the population conducted in July 2012, 20 per cent of the 500 families surveyed had identifiable mental disorders and there was higher mental morbidity among the poor, unemployed and those with physical diseases.

The current mental morbidity can be related to (i) people with post-disaster anxiety-depression, post-traumatic stress disorder, adjustment disorder conditions, directly related to the disaster of 1984; (ii) people with psychiatric disorders, attributable to the various life changes, family and occupational status, resulting directly (e.g., unemployment due to poor health conditions) and indirectly (e.g., loss of head of the family in the disaster) from the disaster experiences; (iii) people with chronic physical conditions like lung problems, diabetes, hypertension and cancer, with associated psychiatric disorders like depression, adjustment disorders; (iv) people with psychiatric disorders, that may not be directly related to the disaster .

A positive development in the mental health care situation in the city in the last three decades has been an increase in the number of mental health professionals in both the government and private sectors, along with in-patient care facilities at Gandhi Medical College, BMHRC, BEML and in the private sector. However, this is confined to the clinics with no care at the community level. In the last three decades, there have been many lapses in the assessment of disability, compensation provided (for instance, coverage, categorisation, amount), and rehabilitation, leaving the affected community “dissatisfied”. There has been no continuing research to understand the changing morbidity, adequacy of the care provided and efficacy of

the different interventions. In the area of services, there is inadequacy in providing longitudinal mental health care to all persons with mental disorders, not linking primary health care with mental health care, lack of rehabilitation, no public mental health education, leaving it to self-care, and use of psychosocial interventions. Poor coordination with voluntary organisations has resulted in significant mistrust.

The experience in Bhopal speaks of collective amnesia about the sufferings of the survivors. There has been an inexcusable abandonment of survivors at all levels. Thirty years after the disaster, neglect has not been cast aside. Recognition of health needs, including mental health needs, is yet to happen, and care is still to become organised, comprehensive, continuous, coordinated and compassionate. This situation demands to be remedied.

(The writer, a professor of psychiatry, has been associated with the people of Bhopal since the disaster. He has been a member of various government initiatives and is co-editor of a manual of mental health care for Bhopal victims. In 2011-13, he spent half his time in Bhopal making sense of what has happened in the arena of mental health after the disaster.)

## Environmental injustice continues

The Statesman

04 Dec 2014

**Bhopal isn't just about those who died in 1984, but the millions affected by contamination from the site before the disaster, and the continuing threat from 350 tonnes of chemical waste that has still not been removed**

**Geetanjoy Sahu**

Much has been said and written about the Bhopal gas tragedy, and rightly so as it was the worst-ever industrial disaster that the world has witnessed so far. On 2-3 December 1984, methyl isocyanate escaped from the pesticide plant of the Union Carbide in Bhopal. Half a million people came in contact with the toxic gas and other chemicals, and thousands died within days. In the last three decades, estimates take the numbers much higher. Edward Broughton in his 2005 article, 'The Bhopal disaster and its aftermath: a review', cites a figure of three million people who are thought to have eventually suffered after exposure to the gas. A UNICEF report estimates two million people were affected.

On 29 March 1985, Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act and this act purportedly gave the Indian government the exclusive authority to represent victims of the Bhopal disaster in courts around the world. It was under this law that the government entered into the settlement with UCC in 1989 for US\$ 470 million, although the victims had already challenged the constitutional validity of the Act. The court was to later uphold the Act, in 1990, having already allowed the government to act under it.

The Claims Act was confined to the disaster. It had nothing to say about the toxic wastes from the Union Carbide factory site. The contamination of the ground water had begun much before the disaster, and it was to manifest years after the disaster. It was in the late 1990s that Greenpeace, upon testing the site of the Union Carbide plant in Bhopal, found that toxicity had seeped into the soil and contaminated ground water over the years the plant had been in Bhopal, affecting the lives and health of the people in the vicinity of the plant. Regulators failed to make the company liable to restore the environment by applying the "polluter pays" principle. The Bhopal gas disaster further exacerbated the environmental problems, but this has remained unrecognised in law, and in decisions of the Supreme Court.

Mr Fali S. Nariman, representing Union Carbide in court in the case concerning the disaster, had fiercely opposed the idea of responsibility of the company to restore the environment, and argued vociferously that UCC could not be held liable on the polluter pays principle. Yet, years after the disaster and the settlement, he was to acknowledge the application of the polluter pays principle in relation to the Bhopal gas disaster when he wrote in February 2005 in Seminar, refuting the suggestion that his argument was that the polluter pays principle did not apply to the Bhopal settlement: "Far from it: it is on this very principle that the settlement of 470 million US dollars was fashioned, agreed to by the Union of India through its Attorney General, and accepted as reasonable, fair and valid by the Supreme Court: not once (in 1989), not twice (in 1990), but again a third time after contest (in 1991)." In 1987, the Supreme Court had enunciated the principle of absolute liability and of enterprise liability in the context of the 1985 oleum gas leak from the Shriram plant in Delhi; but, in deciding how to deal with the situation created by the Bhopal gas disaster, the court declined to apply these principles. Still, the principles evolved in the oleum gas leak case are a guide for imposing liability on the polluter so that the polluter restores the environment and pays for the damage done.

In 1992, the judgement that reviewed the settlement pointed towards the liability of a welfare state to make up for any deficiency in compensation, but no attempt was made to address the environmental burdens on local people due to the disaster; as for contamination of the ground water, it was not even in the reckoning.

After extensive protest and movement from the local to the global level, the plant was eventually closed, but the industrial site was never cleaned up. Around 350 tonnes of chemical wastes remain to be removed from the site of the Union Carbide plant. An efficient clean-up process is yet to be formulated. There can be little reason to doubt that Dow Chemicals, which acquired UCC subsequently, is 'absolutely liable' to carry out the clean-up operation, and restore the plant site to its original position. But, Dow Chemicals has avoided responsibility for its subsidiary's troubled past, maintaining that the legal case was resolved with the 1989 settlement, and that they had only taken over the assets of UCC and not its liabilities, and that, anyway, cleanup now falls to the Indian government.

Fearing the displeasure of investors, the government seems to have decided not to insist on the application of the polluter pays principle, and has gone soft in the matter of clean-up of the contamination of ground water. In June 2012, following the Supreme Court's intervention, a Group of Ministers of the government of India approved removal of the toxic waste, at the cost of Rs. 25 crore, by the German agency, GIZ.

However, after three months of contract negotiations between the government and GIZ, GIZ withdrew its waste disposal offer following uproar from civil society in Germany, and also due to a disagreement with the Madhya Pradesh government, mostly over the sharing of liability, arbitration and jurisdiction in case of dispute. GIZ's refusal was a big blow to the possibility of cleaning the toxic waste.

Attempts to dispose of the 350 tonnes of waste in several Indian incinerators - with the last effort at Pithampur in Madhya Pradesh - were vociferously opposed by people living nearby.

The Bhopal disaster and its aftermath demonstrate the inability of both the executive and judicial system to provide justice, and to act to deter in cases of industrial and environmental crimes.

The tragedy of Bhopal is a warning that industrialisation in India requires strict environmental guidelines and that companies must adhere to these regulations to ensure that their operations are safe for employees and local residents.

It is also a reminder that economic challenges cannot be an excuse for non-compliance with standards, especially when so many lives are at stake.

India's economic growth has come at the cost of environmental health and public safety of its population, and both small and large companies continue to cause lasting damage throughout the country.

The environmental regulatory system has failed to implement safety regulations, in part because of the apprehension that industries may move out of India.

The increasing number of workers' death in hazardous industries, and pollution of water bodies across the country due to the discharge of untreated effluents from chemical and hazardous industries, offers illustrations of the inept environmental regulatory mechanism in India.

The court cannot remain a silent spectator when thousands of people in Bhopal continue to bear the burden of human suffering as also of environmental pollution.

The principles of absolute liability, enterprise liability, polluter pays and the precautionary principle have to be invoked, and developed, to compensate the victims of disasters and of the pollution, and to pay remedial costs to restore the damaged ecology.

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## Six historical mistakes

**The Statesman**

*05 Dec 2014*

**Satinath Sarangi**

It is 30 years since that horrific night of toxic terror in Bhopal whose effects linger on till this day. The facts are chilling: 23,000 dead and counting, 150,000 battling chronic illnesses; tuberculosis and cancers rampant amongst the affected people; tens of thousands of children born after the disaster carrying marks of the poisons of the US multinational Union Carbide, the principal author of the gas disaster on the night of 2-3 December 1984. ICMR reports, hospital records and scientific papers by individual researchers are replete with evidence of what the disaster has left in its wake. The tragedy has continued to unfold. In 1996, there was more poison detected as emanating from the Union Carbide plant, the pesticide factory abandoned after the disaster was detected to be contaminating the ground water with toxic chemicals. It reached 3.5 km from the site and depths greater than 30 metres in October 2012, and continues to spread and find new victims even as this is being written. There was a severe underestimation of the effects of the disaster when the Welfare Commissioner construed 93 per cent of those exposed to Union Carbide's gases in Bhopal as having suffered only 'temporary injury', in denial of the chronicity of effects experienced by the victims. In the scheme of medical categorization followed in Bhopal, close to 70 per cent of the exposed people were not acknowledged as having suffered a disability because, according to bureaucratic understanding, they were not gainfully employed and so suffered no income loss due to injury! Three important tests for assessment of exposure related injury - pulmonary function test, exercise tolerance test and urinary thiocyanate - were administered on less than 20 per cent of those examined. While Indian Council of Medical Research's (ICMR) study reported 30 per cent of survivors with mental illnesses attributable to the disaster, not a single affected person was examined for mental illness. Gynaecological examinations were simply not done. ICMR reported more than 10,000 cases of burnt out lungs, but the process of medical categorization yielded only 42 persons in the severest category of injury among the over half million exposed persons. Meanwhile, in 2001, Union Carbide Corporation became a wholly owned subsidiary of the Dow Chemical Company. And Dow Chemicals claims it only took over the assets of UCC and has nothing to do with the liabilities, and so will have nothing to do with the toxicity created by UCC in Bhopal. Successive governments have had a significant role in the creation of the situation as it is in Bhopal today. There is abundant evidence in the story of the Bhopal disaster that illustrates how bureaucratic mistakes, to use a euphemism, stemming from individual and collective lack of will, understanding, integrity, courage and most of all empathy have caused massive injustice and denial of basic rights in Bhopal.

Consider these six mistakes: One, in February 1989, the settlement that the Supreme Court endorsed was for a compensation of US \$470 million. The scale of the disaster as it has unfolded has finally forced an admission that the US \$470 million that UCC and its subsidiary paid was unconscionably meagre. On 3 December 2010, a full 26 years after the disaster, the central government filed a curative petition in the Supreme Court seeking additional compensation from Union Carbide and Dow Chemical for the gas disaster of 1984. This petition includes a claim for environmental remediation, alongside the enhancement of compensation, thus carelessly conflating the disaster with the contamination of the soil and water. These were two wrongs, deserving two distinct consequences; yet, in the curative petition, the government distorts its case by ignoring the distinction.

Second, it was a big mistake not to have sought extradition of Union Carbide's authorised representative, which was for the Central Bureau of Investigation to do in its role as the

prosecutor. Even such halfhearted attempts as were made between 2003 and 2009 to extradite the former chairman, Warren Anderson, were not made towards bringing John McDonald, the secretary and authorized representative of Union Carbide, to trial. As for the Indian subsidiary, UCIL, and its officials, convicted of reduced charges that treated the incident as akin to a traffic accident, they are free, on bail, while their appeals against conviction lie unattended in court.

Three, National Institute for Research on Environmental Health (NIREH) was set up in Bhopal as the 31st centre of the ICMR, a welcome step. But employing the entire staff of the state government agency, Centre for Rehabilitation Studies, en masse, undermined the worth of NIREH. This staff had failed to follow up on 80 per cent of the cohort of exposed that the ICMR had initiated: an inexcusable lapse which an article in the Lancet last year termed “a missed scientific opportunity in Bhopal”. The poor quality of staff has ensured that not a single project has been completed by NIREH in the last four years despite expenditure of over Rs. 15 crores.

Four, it was a terrible mistake on the part of the state government not to finalise last year’s offer of the German technical assistance agency, GIZ, of transporting 350 tonnes of Union Carbide’s hazardous waste from the Bhopal factory to Hamburg for safe disposal. The state government rejected this option for reasons that remain to be known. And the waste continues to lie in the abandoned factory site.

Five, it has proved to be a mistake to assign NEERI (National Environmental Engineering Research Institute) and NGRI (National Geophysical Research Institute) the work of scientific assessment of the depth and spread of toxic contamination of the soil and groundwater in and around the Bhopal factory site. The report prepared at a cost of Rs. 3 crores by these two government agencies, with its unreliable estimations and ridiculous recommendations, was thankfully rejected by the Peer Review Committee set up by the Ministry of Environment & Forests in 2011.

Six, entrusting the Madhya Pradesh government with the work of providing medical care, economic rehabilitation and social support to the victims of the disaster is a mistake as old as the disaster. Reports submitted by the Supreme Court appointed Monitoring Committee from 2005 onwards have highlighted the paucity of doctors, poor quality of medicines and the absence of treatment protocols at government-run hospitals. The situation is worse insofar as economic rehabilitation goes where the latest scandal reported in the press points to embezzlement of Rs. 18 crore and false claims of providing gainful employment to thousands of victims.

The six “mistakes” listed above are not all that is wrong with the government's response to the disaster in Bhopal; they are indicative of how much has gone wrong, and how much has to be set right 30 years after the disaster.

On 14 November 2014, the Minister for Chemicals and Fertilisers agreed that the assessment of injuries, and of death, would be revisited on the basis of scientific evidence, including ICMR research data and hospital records.

This could be the beginning of a fair assessment of injuries caused by the disaster in place of the severely flawed ‘medical categorisation’ that was put in place 27 years ago. Thirty years after the disaster, this could be the start of correcting the multiple historical mistakes and would go a long way in minimising the injustice done to a people over three decades.

**The writer is an activist based in Bhopal for the past 30 years.**

## Of crime and consequence

The Statesman

06 Dec 2014

**Mid-December 1984 was the last time any official of Union Carbide was in jail for a crime that killed thousands of people. Thereafter, UCC and its parent have used legal processes to ensure that crime is not followed by punishment.**

**Tim Edwards**

From the fog of time and memory have emerged two largely unseen, thirty-year old film sequences capturing the first hours of a prodigious and shattering horror. We watch as a doctor tends to a line of prostrate infants and feel his helplessness as he struggles, and fails, to resuscitate a lifeless child. We share in the grim, thankless work of those manning the burial and cremation grounds, faced with an interminable procession of roughly handled corpses. There was not enough time or strength to respect the dead, estimated - there are no definitive figures - to have numbered 8-10,000 souls in the immediate aftermath.

These two films capture Bhopal in the throes of an immense tragedy. But both films also bear witness to the long-forgotten professionalism, compassion and courage of those who struggled to bring healing and order, even as calamity unfolded all around them.

What we do not see, however, amongst the carnage and chaos of the Bhopal of 3 December 1984, just a few hours after Union Carbide's pesticides factory had disgorged 27 tons of lethal gases into the lungs of over half a million people, is Hanumanganj Police Station House Officer Surinder Singh Thakur going about the quiet and no less responsible business of writing up, and registering, crime No.1104/84.

Thakur's act of admirable self-possession ensured that the dying underway in Bhopal would be subject to an investigation of criminal responsibility.

What happened to the criminal charges against the corporation and its errant officials? On 12 November 2014, trial proceedings were supposed to have brought the US \$60 billion multinational, The Dow Chemical Company, to the Chief Judicial Magistrate's (CJM's) court in Bhopal. Dow Chemical is summoned to answer - or at least begin the process of answering - for the agonised, preventable deaths of 25,000 or more human beings, and counting. However, just like its subsidiary of 14 years, accused no. 10 Union Carbide, Dow Chemical did not deign to appear.

It requires a little context to understand exactly where Dow's no-show fits within the thirty-year failure to achieve any measure of criminal justice for the maimed and dead of Bhopal.

On that end of all days - the day crime No.1104/84 entered the register - five junior officers of Union Carbide India Ltd (UCIL) were the first company officials to see the inside of a jail. They were also the last.

It's a fact that deserves repeating: the release of five UCIL officers on bail twelve days after the mass killing marked the final day in custody for any Union Carbide representative before, or since. The eventual conviction of seven UCIL officials on 7 June 2010 has had little consequence: the convicted are at liberty while pursuing their appeals.

The three foreign accused have fared better still - not one of them has faced a single day in court.

We now know that on 29 September 2014, former Union Carbide CEO and fugitive prime accused no. 1, Warren M. Anderson, finally completed his own escape from the Rule of Law. India's last request for his extradition had been mouldering within the U.S. Justice Department for over three years. Looking back at the events of 6 December 1984, when Anderson was unlawfully granted bail from a strictly non-bailable charge of culpable homicide and scuttled out of Bhopal, former Foreign Secretary M K Rasgotra insisted, in June 2010, that it had been in India's economic interests to release him: "If let us say this gentleman Anderson had been arrested and tried in India unilaterally, would the corporates anywhere in the world or the countries who are interested in India's well-being and progress, would they look at India in those circumstances?"

With no little irony, on the very day Anderson died, Prime Minister Modi was at breakfast in New York with eleven U.S. CEOs and promised to further liberalise India's economy.

While most eyes have followed Anderson's comfortable dotage, the other two foreign accused, Union Carbide Eastern (UCE - accused no.11) and Union Carbide Corporation (UCC), continued business as usual, untroubled by law or conscience. UCE (Hong Kong) de-registered in 1991, its officials immediately resurfacing as directors of U.S.-registered Singapore company, Union Carbide Asia Pacific (UCAP). In 2001, UCAP dissolved into Dow Singapore.

UCC itself has been an absconder, evading the processes of the law and judicial process, for almost 23 years - and since their February 2001 merger, as a Dow Chemical subsidiary. Given that it has been an absconder from trial, doing business in India ought to have been a perilous enterprise for UCC. Yet, days before the ink had dried on the merger, Dow Chemical India managers met with directors of a Mumbai-based trading company that had spent a dozen years supplying Union Carbide products to the Indian marketplace. This trading arrangement enabled manufacturer Union Carbide to continue business whilst remaining invisible to the eye of Indian law, and staying out-of-reach of court-ordered asset attachment measures issued to force its appearance for trial in Bhopal.

Within a year of that first meeting, Dow Chemical extinguished the trading company's contract, having carefully established itself as the sole supplier of contraband Union Carbide goods in India - though only once its lawyers were satisfied that proceedings inside the CJM's court in Bhopal posed insufficient threat.

At least four of the regular buyers of Union Carbide goods across this period, during which the company was a declared fugitive of Indian law, were state-owned Indian enterprises.

Two years later the same Dow Chemical India Private Ltd now engaged in surreptitiously supplying Union Carbide goods within India was summoned to the Bhopal court to explain Union Carbide's long absence. Dow India informed the court that it had "no nexus" with either Union Carbide or Dow Chemical, Michigan, but was in fact a subsidiary of Dow Singapore. In the following hearing the CJM therefore issued summons to Dow Chemical, Michigan. Dow India promptly lodged an objection in the High Court of Madhya Pradesh, arguing that the company with which it had "no nexus", also had "no nexus" with Union Carbide. At no point was Dow India asked why it spoke on behalf of a company with which it claimed to have no nexus. The High Court granted a stay order, immediately challenged by Bhopal survivor organisations. Between 2005 and 2010 the matter was listed for final hearing before ten different judges; yet in all those years it avoided being heard even once.

In September 2011, five survivor organisations wrote in frustration to the CBI and the Prime Minister's office urging immediate intervention. The CBI finally acted in early 2012, but Dow India successfully gained five consecutive adjournments.

It was October 2012 before the resident judge determined that Dow India's petition was "devoid of merits", lifting the stay order almost eight years after it was imposed.

Dow Chemical's latest evasion is predicated upon the laxity of the CBI and Home Ministry's processing of summons, and the tardiness of the U.S. response. Is it cynical to expect that a company whose CEO, Andrew Liveris, is among the most regular visitors to the White House will continue to be shielded by the complicity and assistance of U.S. and Indian elected officials, courts and institutions?

How shameful that the last significant acts of professionalism, compassion and courage by those with a duty of care towards the blighted of Bhopal happened within the first chaotic hours of Union Carbide's massacre of the innocents.

**The writer is Executive Trustee of the Bhopal Medical Appeal, a UK charity supporting rehabilitation for gas and water pollution affected people in Bhopal.**

## Toxicity of our souls

**The Statesman**

*07 Dec 2014*

**Usha Ramanathan**

The contours of risk, and harm, were altered dramatically on the night of 2/3 December 1984, when MIC escaped from the Union Carbide factory in Bhopal killing thousands and causing injury to hundreds of thousands living in the vicinity. The extent of the harm has been unfolding since then, with deaths due to exposure to the gas continuing to rise, and chronicity manifest in the 5,00,000 people seeking relief in the hospitals run by the Gas Relief Department. The disaster has produced a 'Vidhwa Colony' and the 'Bhopal Orphan'- there isn't even a kindness in construction of the identity of the survivor. In 2000, sixteen years after the disaster, the Centre for Rehabilitation Studies set up by the Madhya Pradesh government was reporting that exposure to the gas was claiming one victim a day each day of the year. The numbers have continued to escalate.

In December 1985, a day and a year after the Bhopal gas disaster, there was a leak of oleum gas from the chlorine plant of Shriram Foods and Fertilisers in Delhi causing panic that was exacerbated by the then unforgotten memory of what had happened in Bhopal. There was a PIL pending in the Supreme Court raising concerns about negligence and heightened risk in the factory - fears that the gas leak confirmed were justified. The court, with Bhopal expressly in view, set out principles that could form the basis of mass disaster law. There were the principles of absolute liability and enterprise liability providing potential for making enterprises internalise the costs of accidents and disasters, but which, inexplicably, has only found staggered acceptance over the years. Then there has been the supervisor's responsibility for lapses in safety, and the workers' right to know about safety issues in a factory - till this judgment and the subsequent amendment to the Factories Act in 1987, workers actually had no such right despite being most proximate to the risk!

Two directions of the court carried particular significance. One arose in the context of Shriram appealing to the court that they be allowed to restart the factory once they had done what was considered necessary to repair and restore the plant to safety. The court was willing to give the go-ahead only if the Chairman and Managing Director of the DCM Ltd., which was the owner of the various units of Shriram, would give an undertaking that he would be "personally responsible for the payment of compensation for.....death or injury" in case "there is any escape of chlorine gas resulting in death or injury to the workmen or to the people living in the vicinity." The court's position was plain: if the Chairman was unwilling to guarantee that there would be no further leak, how could the whole population be put at risk? The factory subsequently restarted on the strength of the undertaking. The second direction related to the relocation of industries. Chemical and other hazardous industries, the court said, have an element of risk. "It is not possible to totally eliminate such hazard or risk altogether.....we can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk of danger to the community and maximising safety requirements in such industries." So, it was suggested, a national policy was to be evolved "for location of chemical and other hazardous industries in areas where population is scarce and there is little hazard or risk to the community, and when hazardous industries are located in such areas, every care shall be taken that human habitations shall not grow around them. There should preferably be a green belt of 1 to 5 km width around such hazardous industries."

That was in 1985. In 1996, a successor court ordered the shutting down and relocation of all industries in Delhi to other sites in the neighbouring states. An assessment still needs to be done if this was a relocation of industry along with a reduction of risk, or, if this was merely the relocation of risk. The question that remains is if pollution, potential disaster and workers' safety had been contained, or whether risk had only shifted its location. Since then, the vocabulary of risk and hazard has discovered many expressions.

Take NIMBY. Not In My Backyard. Why would any community of persons be more willing to bear recognised risk than any other? The difficulties encountered in disposing of the toxic waste that is in the Union Carbide plant site in Bhopal is an illustration. It was in the late 1990s that the contamination of the soil in and around the site, and of the water in the neighbourhood, was spotted. The effect it has had of re-victimising the victims of the disaster, and adding to their numbers, is now undisputed. A case was filed in the High Court at Jabalpur asking Union Carbide and Dow Chemical which had acquired Union Carbide, to clean up the site.

Along the way, a German company offered to do clean-up of the toxic waste. Among the reasons this fell through, apart from the intractability of the state government, was the resistance from civil society in Germany. Further efforts have failed to take off, the logic of NIMBY standing as an obstacle.

After all, why should people of Pitampura not refuse to host the toxic waste?

Then there is 'fingerprinting'. This is a process which helps establish a link between an industry and the toxin emitted. The setting up of industrial areas in which multiple factories are located lends this added importance.

If workers and residents suffer the effect of emissions, identifying the offending factory could be a hurdle in fixing liability, and 'fingerprinting' could come in handy. Except, of course, there is little evidence that this science is being developed around us.

There is 'body burden'. Simply stated, this phrase represents the burden of chemicals that is present in the human body at a given point in time. If we were to walk into a lab today and test our bodies to establish the chemical burden, the result is most certain to be frightening.

There are manifestations that we see around us but, in willed ignorance, refuse to confront. Think of the 'Cancer Train' from 'Bhatinda to Bikaner'.

Where the disaster constituted a traumatic episode, the soil and water contamination at the plant site has crept into the system, leaving discovery for a date far from when the damage began.

There is the fiction of 'permissible limits' about which little is known to us, which is hardly re-calibrated based on science and experience, and which serves to produce a sense of safety where none should exist. In effect, the human body has become a global commons.

It is the tragedy of Bhopal that a disaster of such dimensions has not alerted us to the dangers of toxicity.

If it were not for the survivors and their supporters, who have kept alive to matters of justice, wrong-doing, responsibility and liability, the lessons from the disaster may well have vanished into the mists of irresponsible forgetfulness. Confronting toxicity is, however, yet to happen.

*The writer is a lawyer and an academic activist*

## Reform in tort litigation needed

**The Statesman**

*08 Dec 2014*

**Marc Galanter**

The 30th anniversary of Bhopal is a fitting time to take up a conversation that is long overdue. It is a conversation about what happens when people get hurt - by accidents, by negligence, by poorly designed facilities, and by indifference. How can legal institutions better help to comfort the victims and to minimise such occurrences?

The terrible gas leak at the Union Carbide plant in Bhopal, which ranks as the world's greatest industrial disaster, posed a challenge to the Indian legal system which, most observers agree, did not acquit itself well. (Nor, I should add, did the American.) Bhopal was the biggest and worst of many injurious episodes, but little Bhopals ~ building collapses, mass poisonings, fires in hospitals and schools ~ occur with dismaying frequency. To respond to disaster in a way that both assuages the harm and reduces the risk of similar events in the future is a goal that grows more challenging, as changing technology both increases the scale of potential harm but also provides tools for prevention and remedy.

In February 1989, the government of India concluded a settlement with Union Carbide for 470 million dollars, which was immediately endorsed by the Supreme Court. The government and many observers, including some in the judiciary, justified the settlement as beneficial to the victims by comparing it with the results of further litigation that would have lasted "anywhere from 15 to 25 more years." This was not a claim that the settlement represented the victim's true entitlements; rather it was an assertion that the unalterable character of the Indian legal system foreclosed the possibility of obtaining them a just resolution; and that the protracted delay that was a feature of the system was a given, and unchangeable.

The government of India's distribution of the settlement funds was both stingy and inefficient. An authoritative report observed that "No claim was settled earlier than a waiting period of seven years. The adjudicatory process involved over five visits of two hours each for the claimant. Ultimately the judge was able to spend no more than 10 minutes on a case." Twenty years after the explosion, the government retained an amount roughly equivalent to the amount it had distributed to the victims. (This was because the exchange value of the rupee had declined from 12 to the dollar in 1985 to 43 in 2004.) In 2004, the Supreme Court ordered the government to distribute the remaining funds pro rata to the prior recipients. A decade later, victim organizations, dissatisfied with both the compensation and the cleanup, were holding a "waterless" strike in Delhi.

Bhopal provides a vivid reminder of the Indian legal community's lack of interest in tort litigation. To an outsider, the virtual absence of any continuing investment of reform energy in using the civil law to reduce the toll of accidents is striking. And not just to outsiders. Two months ago, a bench of the Supreme Court, upholding a liability of the National Consumer Disputes Redressal Commission, requested that the Law Commission propose a comprehensive law of tort liability for government agencies. Tellingly, the court was adjudicating an incident of negligence that took place some 22 years earlier.

Why is there so little resort to tort remedies in India? Tort claims in the courts are inhibited by up-front ad valorem filing fees, by long delays and by modest (frequently difficult-to-collect) awards. Cases arising from car, bus and truck accidents are in the Motor Accident Tribunals; medical malpractice claims are in the consumer tribunals. However, for the great bulk of non-auto injuries, the most prevalent form of relief, if any, is through ex gratia

payment ~ that is, a payment which the giver, either the tortfeasor or, more frequently, a government body, characterizes as given without legal obligation.

A report of a building collapse, a railway accident, a chemical spill, is typically accompanied by an announcement that some government body is giving an ex gratia payment of Rs 2 lakh or 5 lakh to families of the deceased and a lesser sum to the injured. Some of these are one-off; other ex gratia are regularized, with terms specified in advance and announced on government websites.

There is sometimes ~ we don't know how frequently ~ slippage between the announcement and the actual delivery of aid. Such payments are welcome indications of concern and willingness to help. But concern can take many forms. These ex gratia payments, in many cases at least, are paternalistic or unpredictable, not closely related to need, involve no ascertainment or admission of fault, and have no discernible connection with prevention. Indeed they may protect potential tortfeasors by reducing the chances for demands on them. Recovery from injurers is so infrequent that legal liability rarely emerges as a force for prevention. If the response to Bhopal did anything to enhance deterrence, it is difficult to discern.

How can we move to a pattern in which significant awards provide incentives for more claims and this enhanced litigation risk inspires preventive measures? The challenge is to develop patterns of more timely, more generous, and more effective awards. Is there a way to get the reform here? What sort of reform am I thinking of? Comprehensive reform is not only difficult to administer, but frankly it is not clear what will work.

We shouldn't be afraid to admit that we don't have a ready-made solution waiting to be implemented. My guess would be that good substantive tort law is important, but it is only half the battle. If cases take 15 years and produce paltry recoveries, any reforms are unlikely to have substantial effect on safety practices. What is needed is reform, not just by way of new procedural rules, but new practices. But how do we know what will work in bringing them about?

I would propose an experimental approach that is both more modest and more adventurous. Imagine that there was a designated demonstration district - like an agricultural programme with new seeds and techniques - with investment in more and better trained personnel, and monitoring of the new policies. New policies might include continuous trials, limited appeals, attention to enforcement of judgments, contingency fees or conditional fees with supervised ceilings, and monitoring of lawyers and with no toleration for delay. One could imagine different experiments in different localities, perhaps one in each state or region. One aspect of this open experimentation would be to enlist the legal knowhow, energy and imagination of lower court judges, lawyers and legal academics, untapped resources in most reform schemes. This terrain has lain unattended for far too long.

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## Many buses that medical care missed

The Statesman

09 Dec 2014

**N.D. Jayaprakash &  
Dr. C. Sathyamala**

According to a preliminary estimate made by the Indian Council of Medical Research (ICMR), approximately two-thirds of Bhopal's population of about 900,000 people in 1984 was exposed to the toxic gases that had escaped from the premises of Union Carbide India Limited (UCIL) in which Union Carbide Corporation (UCC), USA, held controlling interests. The toxic gases consisted of methyl isocyanate (MIC) and its several reactant products including hydrogen cyanide (HCN). Initially, local Carbide officials kept insisting, "MIC was only an irritant and not lethal". They were also desperate to hide the presence of HCN, which was well known as a highly poisonous chemical. To their discomfiture, Dr. Heeresh Chandra, head of Forensic Medicine and Toxicology at Bhopal's Gandhi Medical College, who was conducting autopsies, suspected that death in many cases might have been caused due to cyanide poisoning. Dr. Max Daunderer, a toxicologist who was sent to India on 4 December 1984 by the German Foreign Office to assist with the relief work, confirmed Dr. Chandra's suspicion. Dr. Daunderer prescribed sodium thiosulphate (NaTS) as an antidote to cyanide poisoning. However, the pro-UCC lobby in Bhopal was so powerful that Dr. Daunderer was deported from India on 7 December 1984. Later, Dr. Sriramachari of ICMR and his team carried out necessary studies to confirm that NaTS was a safe antidote against cyanide poisoning. However, even the ICMR could not prevent the State Government from formally banning the use of NaTS to treat gas victims although timely administration of NaTS would have saved lives and reduced adverse effects on the survivors.

Estimating the actual number of the affected was another challenge. The Tata Institute of Social Sciences (TISS) took the initiative in this regard during January-February 1985. However, TISS's attempt to mobilise nearly 500 students and teachers from various schools of social work across India to carry out a house-to-house survey in collaboration with the state government was not only stopped abruptly after the teams had covered nearly one-fourth of the affected population, but, also, the administration confiscated all the data that had been laboriously collated. A vital opportunity to collect comprehensive data about the impact of the disaster was thus lost. Instead, victims were asked to file individual claims.

In the absence of proper treatment even several months after the disaster, Dr. Nishit Vohra and two gas victims filed a PIL before the Supreme Court in August 1985 through Ms. Indira Jaising of the Lawyer's Collective.

As a result, the Supreme Court not only directed the State Government on 4 November 1985 to augment health services but also set up a seven-member committee of experts comprising representatives of the State Government, the ICMR and two representatives of gas victims, namely Dr. Anil Sadgopal and Dr. Sujit Das, to make recommendations regarding medical relief to gas victims and other related matters.

However, due to non-cooperation of a majority of the members, Dr. Sadgopal and Dr. Das submitted a Minority Report to the court on 30 August 1988, on which unfortunately no action was taken at that time.

**The Unjust Settlement:** While a matter pertaining to payment of interim relief was pending before the Supreme Court, suddenly on 14/15 February 1989, a court-assisted settlement took place between the Union of India and UCC for a paltry sum of 470 million dollars; and one condition was that criminal cases against UCC and its accused officials would stand

terminated for all time to come. It was only after review petitions protesting the unjust settlement that the court revived the criminal cases against UCC and its officials, on 3 October 1991. (Later, it became evident that the settlement would effectively prevent the CBI from inspecting the safety systems at UCC's Institute plant in West Virginia, USA, for purposes of comparing the standards with the safety systems installed at the Bhopal plant, which the U.S. Justice Department had permitted on 14 February 1989, the day that the settlement was first announced in the Supreme Court.)

At the time of the settlement, only a small portion of the nearly 600,000 claims that had been filed until February 1989 had been processed and categorized. Therefore, there was absolutely no basis for concluding that the total number of gas victims, including the dead, would only be around 105,000. That the settlement was based on fictitious figures was more than proved after the 40-odd Claim Courts in Bhopal had processed all the claims from 1992 to 2004 (including another 400,000 claims filed between 1989 and 1997) and had determined that the total number of gas victims was about 573,000. However, even the Claim Courts had underestimated the number of dead and seriously injured gas victims in the absence of proper medical records and lack of access to research studies conducted by the ICMR until 1994. (The ICMR, which closed down all the Bhopal disaster-related medical research in 1994, was forced to restart such research in 2010.) Shockingly, neither the ICMR nor the state government has taken the trouble of maintaining proper medical records of gas victims during the last thirty years! The gas victims are mostly suffering from ailments afflicting eyes, lungs, the nervous system, and the gastro-intestinal system. The state of mental health of many gas victims is also a cause for concern. There are enough grounds to suspect increasing cases of cancer among gas victims as well as genetic effects among their progeny.

Meanwhile, through Writ Petition (Civil) No.50 of 1998 that was filed before the Supreme Court on 14 January 1998, BGPMUS, BGIA and BGPSSS have been seeking issuance of a hard copy of the complete medical record to each gas victim and to ensure that there is a standardized protocol for treating each disaster-related ailment. Computerization and networking of the medical records of the various hospitals and clinics treating gas victims was essential for this purpose - accordingly, the Supreme Court has been issuing directions to the ICMR and the state government in this regard since 25 July 2001. The Supreme Court also set up an Advisory Committee and a Monitoring Committee on 17 August 2004 for making appropriate recommendations. Although the Supreme Court has issued several such orders including a detailed one on 9 August 2012 (effectively accepting almost all the recommendations that Dr.Sadgopal and Dr.Das had made 24 years earlier), the ICMR and the State Government are yet to comply with them.

The failure to computerize, network and issue health booklets with their complete medical record to gas victims is not due to inertia or inefficiency; it is a deliberate ploy to underplay the magnitude and gravity of the disaster.

Maintaining proper health records is not only essential for evolving a standardized protocol for treatment but it is also necessary for augmenting compensation in accordance with the degree of injury. By depriving gas victims access to a hard copy of their complete medical record, there is a concerted attempt to deny the gas victims higher compensation.

Although, even thirty years after the disaster, more than 6000 gas victims on average seek treatment for various disaster related ailments, most of them continue to be classed as suffering from temporary injuries!

*The writers are respectively convener, Bhopal Gas Peedith Sangharsh Sahyog Samiti and a member of the Supreme Court's Advisory Committee on Bhopal They can be reached at jaypdsf@gmail.com and csathyamala@gmail.com*

## Continuing threats to human rights

**The Statesman**

*10 Dec 2014*

**Vijay K. Nagaraj**

For the survivors of the Bhopal gas leak, today, Human Rights Day, is yet another day to confront the myriad wrongs of thirty years of corporate criminality and apathetic governance.

On 3 December 1984, tonnes of lethal methyl isocyanate (MIC) and other chemicals leaked from the factory of the US multinational Union Carbide - later acquired by Dow Chemicals. So far it has claimed over 20,000 lives and continues to poison hundreds of thousands of others.

The only form of accountability has been a two-year prison term along with a paltry fine for seven former Union Carbide India Limited officials after a 25-year criminal process.

Survivors continue to suffer the combined effects of chronic illnesses and disabilities, birth defects, poor health care, social stigma, impoverishment, and meagre and delayed compensation. Many still live close to the contaminated site that continues to poison the soil and their drinking water.

Three decades after Bhopal progress towards holding multinational corporations (MNCs) to account for the adverse human rights consequences of their actions has been modest.

**Escaping Liability**

MNCs constantly seek to pass on the burden of risk and underwrite liability for hazardous businesses. Intricate forms of subsidiarity, ownership, and channels of control developed by MNCs enable the accumulation and transfer of profits and the distribution and relocation of risks, helping circumscribe their liability.

Consequently, the effectiveness of corporate liability regimes though episodic, fragmented, and inconsistent remains important. Just last month, on 5 November, a federal appeals court in the USA affirmed an earlier ruling that British Petroleum is liable for damages in relation to the federal Clean Water Act as result of the 2010 Gulf of Mexico oil spill. The company had argued it was not liable because equipment failure on a leased rig caused the spill. In January 2013, the Hague District Court upheld liability claims brought by Nigeria's Ogoni community against Royal Dutch Shell and its Nigerian subsidiary in relation to two oil spills. It ordered payment of compensation for environmental damage and related losses. Even though the court dismissed a number of the other Ogoni claims, the fact the claims were admitted and considered on merits is significant.

But 'successes' such as these are rare, costly, and often time-consuming. Despite the increased global attention regarding the human rights risks of irresponsible corporate behaviour, remedies have not been easy.

For instance, the town of Institute in West Virginia, USA, waged a 25-year battle to stop production and storage of MIC at what was the parent plant of Carbide's Bhopal facility. Accidents continued despite it changing hands from Carbide to Rhone-Poulenc to Bayer. It was only shut in 2011, following an explosion in August 2008 that killed two workers and occurred within 80 feet of a tank containing more than 13,000 pounds of MIC.

**UN Guiding Principles: Diluting Accountability**

In June 2011, United Nations Human Rights Council (HRC) endorsed a set of Guiding Principles on Business and Human Rights. The Principles outline how States and businesses should implement the UN "protect, respect and remedy" framework to better manage business and human rights challenges.

As part of the "state duty to protect", the Principles stress the duties of governments to clarify expectations and provide a consistent framework of norms for businesses in relation to human rights. The 'corporate responsibility to respect' section provides a roadmap for businesses "on how to know and show that they are respecting human rights." The focus of 'access to remedy' is on defining the nature of adequate accountability and grievance redressal mechanisms. The HRC has also set up a body to promote the use of the Principles and draw lessons from their implementation.

But the Guiding Principles are just guidance and encouragement, not binding obligations. They do not account for the complex nature of MNCs and are largely silent about the human rights obligations of states in relation to the overseas actions of companies registered in their jurisdiction.

In fact, by emphasising that states have 'duties' - obligatory actions - but corporations only have 'responsibilities' - desirable actions - the Principles dilute the onus of the latter and human rights standards themselves. The minimalist approach of the Guiding Principles means shying away from corporate accountability in favour of a fuzzy language of corporate social responsibility.

Indeed, as John Ruggie, the expert who drafted the Principles said, "This is really about the social sustainability of enterprises. By better managing their conflicts with workers and communities, corporations will be more sustainable in the long run."

That even after thirty years of accountability failure in Bhopal, the human rights system is putting corporate social sustainability rather than accountability, people and the environment at the centre is a threat to its own credibility.

#### A debt we owe Bhopal

The need of the hour is to move towards strict multinational enterprise liability, an idea advanced by the government of India in the Bhopal case over two decades ago.

Briefly put, such liability would ensure that a) a company takes steps to anticipate all risks, plan for prevention and response, including full disclosure, especially to communities at risk b) the cost of the harm to persons or the environment is internalized, in line with the 'polluter pays' and 'precautionary' principles and c) the victims are not burdened with the responsibility of proving fault.

In the Delhi oleum gas leak case judgment in 1986, the Supreme Court was categorical that enterprises "must be held strictly liable for causing ... harm as part of the social cost for carrying on the hazardous or inherently dangerous activity." The court was unequivocal that such activity "for private profit can be tolerated only on the condition that the enterprise ... 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."

But law and policy have not necessarily followed this line. For instance, amendments to the Factories Act in 1987 actually strengthened provisions against public disclosure and failed to penalize non-disclosure of risk and safety related information. It even introduced a provision indemnifying designers, manufacturers, importers, and suppliers if the user gave an

undertaking that their products were safe "when properly used." Amendments proposed in 2014 attempt to change this but only by imposing a duty to ensure safety "so far as practicable". The soft touch in dealing with corporate liability continues.

In June 2010, widespread outrage against the paltry sentences in the Bhopal criminal cases stultified attempts to provide a highly limited liability regime for US nuclear suppliers. As a consequence, and despite its limitations, India's Civil Liability for Nuclear Damage Act 2010 does alter standards on nuclear liability by giving operators greater right of recourse with respect to the suppliers, and in protecting the rights of victims to seek remedies under other civil or criminal law.

To rely solely on corporate voluntarism to protect human rights in a world which they already dominate is misguided and dangerous. A binding international treaty coupled with strong national accountability frameworks is an imperative. Achieving that is not easy but we owe the victims and survivors of Bhopal nothing less.

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## Scripting a tragedy of errors

**The Statesman**

*11 Dec 2014*

**Armin Rosencranz**

Union Carbide, both the former American company, and its 49 per cent stake-owned Indian subsidiary, bear prime responsibility for the worst industrial accident in history. They hired entry-level people and failed to train and supervise them. In the middle of the night 30 years ago, one of these unskilled maintenance people poured water on a smoking chemical vat, catalyzing a gas leak, which in turn, borne by the winds, harmed and killed thousands in Bhopal, Madhya Pradesh. The plant site is still toxic and genetic damage will very likely be seen in future generations. Dow Chemical Company, which now owns Carbide, has consistently refused to assume any responsibility, and has refused to clean up the abandoned but still highly toxic plant site. The United States has not interfered with the activities of American-based multinational corporations for at least 60 years, and probably much longer. When President Jimmy Carter, in the final weeks of his presidency in January 1981, sought by executive order (EO) to prohibit the export of the hazardous pesticide DDT, whose use in the US had been prohibited since 1974, the first EO of his successor, Ronald Reagan, was to repudiate the Carter EO.

Elsewhere I have pointed out that many Indian officials share the tragedy's responsibility with Carbide. The Supreme Court of India is responsible for brokering a very modest settlement for Bhopal's victims, and for never raising the issue of possible genetic damage. The Indian Parliament was responsible for enacting the Bhopal Act in 1985, ostensibly to (unsuccessfully) pressure American courts to take up the victims' cases, since the Indian government itself became the plaintiff acting in its citizens' behalf. The victims' advocates were responsible for keeping the forlorn hopes of the victims futilely alive for 30 years. The State of Madhya Pradesh is responsible for allowing an ultra-hazardous methyl-isocyanate - a cyanide derivative - fertilizer plant to be sited near a populous city. The Bhopal and Madhya Pradesh authorities were egregiously responsible for failing to inspect the plant regularly and for failing to ensure that adequate safety and training standards were observed in operating and maintaining the plant. As if this were not enough, Bhopal hospital administrators, a day after the gas leak, found themselves confronted by a German doctor holding 50,000 sodium thiosulfate antidotes to cyanide poisoning. They immediately sent him back to Germany, fearing that panic would ensue if it became known that the plant's main product was a cyanide derivative. When the \$470 million in settlement money finally came to be distributed in 1994, Bhopal district judge Quereshi proudly announced to me that he spent no more than 60 seconds distributing the settlement funds to each victim, not even thinking to set aside any amount for institutional facilities or genetic damage. Sir Ian Percival, a former U.K. Solicitor General, was sole trustee of a London charitable trust to provide medical relief in Bhopal. Before Sir Ian died in 1998, he spent Rs.10 crore of trust funds to refurbish his London office, pay himself large trustee fees and support his travel and office expenses.

In my view, the people mainly responsible for the victims' relief, and who failed them grievously, were the members of the Indian Supreme Court who brokered the \$470 million settlement in 1989. Except for a small fraction of victims who have been promised modest monetary relief by the Madhya Pradesh state government, the Supreme Court's 1989 settlement of \$470 million is all the relief that the victims or their progeny will ever get.

Because of this limited and woefully insufficient court-brokered relief, it may be worth a moment to look at the pressures that the Supreme Court was under. Carbide had hired India's

ablest lawyers, who seemed able to run rings around the government's lawyers and to prolong the trials of Bhopal damage claims indefinitely. More than a year had been lost when Bhopal District Judge M.W. Deo came up with the theory of awarding interim damages to the victims. Carbide immediately appealed. Justice S. K. Sheth of the appellate court upheld the interim damages theory, though he lowered the amount of the award so that Carbide's insurance policy could cover it. Interim damages had no basis in law. Carbide's lawyers argued that it amounted to holding Carbide guilty before a trial had taken place. Moreover, if any Indian damage award were submitted for vindication against Carbide's assets in the US, it would have to pass a due process test. Interim damages had no hope of surviving such a test.

The Supreme Court judges, observing the skill and tenacity of Carbide's Indian lawyers, and the inadequacy of government relief efforts, must have concluded that this case could wind its way through Indian courts indefinitely, depriving the victims of any relief. Most victims could not meet their medical bills, could not work, and in many cases were unable to get enough to eat. The desire for speedy compensation caused all other issues to pale in comparison.

The Union government, through its Attorney General, had said it regarded \$500 million as an acceptable figure. Fali Nariman, representing Carbide and its lawyers, said Carbide was prepared to offer \$426 million. The Supreme Court offered \$470 million as a midway figure. Supreme Court employees worked out that each victim would get \$14, 600, which contrasted nicely with India's then average per capita annual income of \$311. The number of victims was grossly underreported, and no one thought ahead to the need for all sorts of institutional facilities and support. Not a word was ever mentioned about damage to future generations. Of course \$470 million was inadequate. But even this modest figure did not begin to be distributed until 1994, nearly ten years after the tragedy. And notwithstanding the continued urgings and complaints of victims' advocacy groups to this day, it seems likely that a tiny fraction of \$470 million is all that most Bhopal victims will ever see - thanks to the Supreme Court of India's brokered settlement.

The writer is a professor of law and public policy at Jindal Global University and co-author of Environmental Law and Policy in India.

## Legislation of a complicit state

**The Statesman**

*12 Dec 2014*

**Usha Ramanathan**

There was no law Parliament had made that anticipated the Bhopal gas disaster. Since the disaster, there have been laws enacted that derive their provenance from the disaster; and there is a strangeness, even absurdity, about these laws.

First, there was the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985. Three months after the disaster, the government decided to give to itself the "exclusive right to represent, and act in place of ... every person who has made, or is entitled to make, a claim ...". The problem was that this kindly assumption of the 'right to represent' was edging out the right of the affected people to be heard. And, it was being taken over by a government that was itself being pilloried for being a wrongdoer, alongside the corporation. Why? Because it was the government that had given the Union Carbide Corporation the license to operate, and had, even on the face of it, failed to ensure safety during the licensing process. It had failed as a regulator: when there had been episodes of escape of gas and death and injury of workers preceding the mass disaster, they had gone unattended. The Factories Act requires regular inspection to ensure safety in the factory, and there was much to demonstrate abdication of this role. And, again, the government had allowed UCC to locate the plant in a populous area, disregarding the risk it posed to the population.

The government was, in the eyes of the law, answerable to the victims as a joint tortfeasor. And there it was, taking away the right of the victims and converting it into their battle, with the authority to take the case to a conclusion or to settle.

The reason offered for taking over the litigation was that the victims would not be able to stay the course in a long drawn out litigation against a well endowed corporation, and so would stand to lose if the state did not intervene. Except: the government too did not seem to have the staying power. In 1989, it entered into a settlement with UCC - even before it had identified the extent of harm and injury and death; at one-seventh the claim awaiting resolution in the district court; and even while the victims' challenge to the Claims Act 1985 was pending in the Supreme Court.

All these years later, the government is now before the Supreme Court in a curative petition, claiming that it had grossly underestimated the extent of damage, and the compensation should, in fact, have been much higher.

In the meantime, UCC has fled, hiding in the shade of Dow Chemical's acquisition; and Dow Chemical is proclaiming that it has an interest in UCC's assets, but none in its liabilities!

Then, in 1987, when the Factories Act was amended, there were two bizarre provisions tucked away in the law. In 1987, it is significant to recall, the government was in court demanding that UCC be made to pay US \$ 3.3 billion. The plant and machinery that UCC had had installed in its UCIL factory in Bhopal, the government was saying in court, was defective in its design, and this had led to the disaster. UCC was asserting that the fault was not in the design but in the way it was handled. The fact that UCC's plant in Institute, West Virginia did not pose a similar threat because they had improved on its safety features had been brought on record by the government, and there were proposals that the Institute plant be subjected to 'discovery' proceedings.

Even as this contest was on in court, the executive government, in its guise as the initiator of legislation, included a provision in the 1987 amendment which "reliev(ed)" the designer of plant and machinery of the "duty imposed" by the law once the 'user' gave a written undertaking that "if properly used" it would be safe and cause no harm. UCC's defence became the law, even as the government claimed in court that UCC's defence was unsustainable.

Then there was the second change made in the law which is difficult to explain. The Factories Act invests the Inspector of Factories with the authority to enter the premises of the factory to take samples of any substance that he thinks may "cause bodily injury to, or injury to the health of, workers in the factory". It is possible that the sample, when tested, is suggestive that it may cause harm or injury. It would be natural to expect that such result should be communicated to all persons who may be at risk. Parliamentary wisdom veered off in another direction. Before 1987, anyone who disclosed the result of the analysis of the sample could be punished with imprisonment up to 3 months or a fine or both. In 1987, after the disaster had demonstrated how much damage could be caused to an unwary people in, and in the vicinity of, the factory, the penalty for disclosing this information was increased - to six months imprisonment or Rs 10,000 fine, or both!

In 1991, the Public Liability Insurance Act was enacted. This was meant to make provision for immediate relief to victims of disasters - re-named in the law as "accidents". Industries dealing with hazardous substances were required to get themselves insured. Where death or injury resulted from an 'accident', victims were to be paid a sum specified in the law (a small sum, but still serving to recognise the victim) without waiting to establish fault, the harm and injury being the point. The Collector was required to publicise these provisions when such 'accidents' occur and 'invit(e) applications' for compensation.

Between 1992 and 2000, Rs 56,56 crore had been collected as premia. The relief paid out was Rs 46.45 lakhs, pertaining in the main to one 'accident'. This would make it seem that hardly any 'accidents' have happened. How frequent, really, are these accidents?

An explosion at the HPCL plant in Vizag in 1997 killed 60, a 2008 chlorine gas leak in Tata Motors in Jamshedpur affected 150, a 2012 Vishakapatnam Steel Plant blast killed 19, a 2002 chlorine gas leak from IPCL in Vadodara affected 250 - the list goes on, and on.

On 1 December 2014, when The Statesman published the first in this series of articles on the Bhopal gas disaster, alongside was a report: '48 ill after gas leak in township near Bhopal, three critical'. Anecdotal evidence indicates that there is very little to no awareness of the PLIA, and that it is seldom applied. It would be instructive to know if the PLIA has been invoked in this episode; there is reason to wonder. Unless rudely awakened, this law threatens to drown in deep slumber.

The National Environmental Tribunal Act 1995 (NETA) presents an extraordinary tale. NETA was enacted to establish a tribunal to pronounce on cases "arising out of any accident occurring while handling any hazardous substances".

Years passed, but this law enacted by Parliament was not notified; that is, it never came into being.

Truth is, it was never notified. In 2010, when the National Green Tribunal Act was passed, "relief and compensation" for death, injury or damage caused by 'accident' was brought into this law, and NETA was quietly repealed, and slipped away, unnoticed, unsung. No explanations sought in Parliament; none given.

As for corporate manslaughter, which has entered the realm of the probable with the Bhopal gas disaster, the law, and the law maker, continue to maintain an unbroken silence.

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*The writer is a lawyer and an academic activist.*

### 3 injustices added to injury

**The Statesman**

*13 Dec 2014*

**Abdul Jabbar**

It seems the tribulations of Bhopal's victims will never cease. The gas disaster was only the beginning. The settlement, with the meagreness of compensation, arrived at without hearing any victim, is among the many injustices that the victims have had to battle. Three situations show the growing distance between the victims and justice.

Drug trials on victims

In January 2010, I chanced upon a circular from the Director, Bhopal Memorial Hospital and Research Centre (BHMRC), dated 25 August 2008 directing the Departmental Heads of Cardiology, G.I. Surgery, Anesthesia, and Pulmonary Medicine "to suspend all the ongoing and proposed drug trials in your department with immediate effect". The circular referred to a telephonic communication that the Director, BMHRC, had had earlier that day with the Secretary of the BMHT or Bhopal Memorial Hospital Trust. (The BMHT was set up after the order of the Supreme Court in 1998 and stands dissolved by the order of the court dated 9 August 2012. BMHRC was established by the BMHT in 2000.) The subject heading was 'Re: conduct of drug trials at BMHRC'.

This came as a shocker, and we tried to get information from the BMHRC about these drug trials. BMHRC however stonewalled us. By letter dated 11 February 2010, BMHRC turned down our request for information saying: "This is to inform you that the Hospital Trust does not fall under the purview of this Act. The Trust was constituted by the Hon'ble Supreme Court of India."

Since then, some information regarding the clinical trials that were conducted at BMHRC during 2004-2008 has come into the public domain. It appears that at least 215 gas victims had been subjected to clinical trials. It seems that these were conducted at the behest of several pharmaceutical companies. As reported in the print and electronic media, the pharmaceutical companies included Theravance Inc., Wyeth Research (now part of Pfizer), Sanofi-Synthelabo (now Sanofi-Aventis), AstraZeneca, Schering and GlaxoSmithKline. BMHRC allegedly earned over Rs. 100 lakh for facilitating the process.

These clinical trials were to test "a new chemical entity" identified by a code number. As far as we have been able to ascertain, it was not an approved drug. Prior informed consent was not taken from the patients; some patients had their signatures taken on the consent form, but the forms were in English. The impact of the clinical trials of the new chemical entity has not been made public.

In fact, even family members have not been informed of those who suffered adverse impact or died.

This compelled us to move the Supreme Court asking that BMHRC provide complete documents about the clinical trials, patients enrolled, the result of clinical trials, deaths and who has been behind these trials. BMHRC cannot refuse to answer the court.

A dysfunctional criminal justice system

The lackadaisical manner in which the trial against the accused in the Bhopal disaster criminal case has proceeded for the last thirty years has made a mockery of the criminal justice system. Warren Anderson and Union Carbide Corporation were accused 1 and 11 in the charge-sheet. The case has been on the court's docket since 1992, after the Supreme

Court, in 1991, set aside the part of the settlement-orders that quashed the criminal cases against the company and its officials. Anderson and UCC did not appear at the trial. Anderson had been declared a 'proclaimed absconder' on 1 February 1992, as were UCC and Union Carbide (E) Ltd (accused 10). When UCC was acquired by Dow Chemical and became its wholly owned subsidiary, the Chief Judicial Magistrate issued notice on 6 January 2005 to Dow Chemical Co. to appear in the criminal case in UCC's stead. This was in response to an application made by three organisations working among the victims, BGPSSS, BGIA and BGPMUS, on September 7, 2001. This order of the CJM was stayed by the Madhya Pradesh High Court at Jabalpur on 17 March 2005 at the urging of a purported non-party, and it was to be seven years before this stay was vacated, on 19 October 2012.

The CJM thereafter re-issued notice to Dow on 24 July 2013. Dow failed to reply to the notice, and fresh notice was issued to Dow to appear on 12 November 2014. One more deferral, and the date is now 14 March 2015.

As for Anderson, he was declared a proclaimed absconder on 1 February 1992, and non-bailable warrants have remained pending from 27 March 1992. It was May 2003 before the Indian government caved in to pressure and conveyed its request for extradition to the US government, which the US government rejected on 13 July 2004, citing technical reasons. In April 2011, the request for extradition was revived, after another non-bailable warrant had been issued in July 2009 and the CJM had re-issued a Letter Rogatory on 23 March 2011. The Indian government made no attempt to expedite the proceedings, although the matter was reportedly pending before the U.S. Administration since April 2011. That Letter Rogatory of March 2011 became infructuous with the death of Anderson on 29 September 2014.

#### Ground water contamination

In 1996, when the Madhya Pradesh Health Engineering Department's State Research Laboratory tested water from 11 community tubewells, it found large amounts of chemicals dissolved in the water. The report concluded that "it is established that this pollution is due to chemicals used in the Union Carbide factory that have proven to be extremely harmful for health. Therefore the use of this water for drinking must be stopped immediately." This did not prompt any action from the state government. On 7 May 2004, the Supreme Court had to direct the state government to immediately supply piped drinking water to those residing in the area around the Union Carbide factory site.

No one doubts the toxic waste that has seeped into the soil and contaminated the water, and which has been causing sickness among the affected population, is a legacy of the operation of the factory from 1969. Based on the polluter pays principle, it should be UCC, and now Dow Chemical, that should bear the responsibility, and liability, for cleaning up the site and compensating the affected people. Dow Chemical has, however, refused to own up to the responsibility, and that matter too is now in court.

There has been a gross underestimation of the toxic waste that needs to be cleaned up. What is being debated is the disposal of 345 tonnes of toxic waste that has been stored at the plant site. But a preliminary study that was jointly carried out by the National Environmental Engineering Research Institute (NEERI), Nagpur, and the National Geophysical Research Institute (NGRI), Hyderabad, in 2009-2010 estimated that "the total quantum of contaminated soil requiring remediation amounts to 11,00,000 MT". The stoic indifference of the State Government to this daunting task is alarming.

*(The writer is a survivor of the Bhopal gas disaster and Convener of the Bhopal Gas Peedit Mahila Udyog Sanghatan)*