

India: Bhopal and the continuing threat to human rights

Sunday 14 December 2014, by [NAGARAJ Vijay K.](#) (Date first published: 10 December 2014).

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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.

Vijay K. Nagaraj

P.S.

*<http://www.thestatesman.net/news/92828-continuing-threats-to-human-rights.html>

The writer is an independent researcher and can be reached at vijayknagaraj gmail.com