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Litigation and Activism: The Bhopal Case

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LITIGATION AND ACTIVISM: THE BHOPAL CASE*

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The notion that law may be relied upon as a tool to produce rapid and comprehensive social transformation in developing areas is giving way to criticism from all sides. Experience has shown that plans for legally-induced social revolutions are often frustrated at the level of implementation, and that when social changes do comport with legally enshrined objectives, they are largely attributable to non-legal causes. New laws often have unintended effects that either neutralize desired reforms or create entirely new problems for policy makers.

Even where the efficacy of legal reforms is unproblematic, policy objectives are not. Does "development" primarily consist in expanded aggregate production, the fulfillment of basic human needs, or a measurable improvement in a basket of social indices? Despite the brave pronouncement of the United Nations Development Programme "Development Index,"[1] there is a paucity of consensus as to what kinds of economic and political changes might constitute "development." The limitations of socialist models — persistent competitive disadvantage, a tendency to authoritarianism, and individual choice strangulated by overzealous planning — were clear even before the 1989 revolution discredited the legacy of 1917. Capitalist models have fared somewhat better, but they have been plagued by the consequences of the debt crisis, while even many Americans are hesitant to recommend a model that seems wrecked on the twin shoals of a morally bankrupt consumerism and a social crisis comprising drugs, poverty, and crime. Industrialization, of either the capitalist or the socialist variety, has been subject to growing accusations of ecocide. Notions of sustainable development offer to

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1. United Nations Development Programme, *Human Development Report 1990*. Oxford: Oxford University Press, 1990, chap. 1.

curb the excesses of industrialization and ensure human dignity, but it is not clear that they are able to provide the mechanism for expanded production which will be necessary to meet basic human needs on a global scale.

In the absence of clear goals and techniques for programmatic development, recent proposals have emphasized the role of legal institutions in empowering disadvantaged groups while holding governments and corporations accountable for anti-humanitarian activities. The new law of accountability has already met with some considerable success — the innovative jurisprudence of public interest litigation in India represents a significant advance, for example — and is to be welcomed for its more realistic goals.

However, proposals and scholarship must proceed with caution if the enthusiastic excesses of previous efforts are not to be replicated. Where law presumes to "empower" the disadvantaged, a variety of questions arise.[2] Are new mechanisms of accountability actually designed to translate social demands into effective policy? Is access to a legal remedy genuinely widespread, or only available to particular groups aided by legal and political professionals? Are legal categories sufficiently sensitive to popular conceptions of justice, so that demotic voices may find expression in legal form? Finally, are the disadvantaged or injured parties active participants in the legal process, or do they remain alienated, disempowered "victims" at the mercy of an ambivalent altruism? That these questions are of urgent analytical and practical significance becomes clear in the light of the experience of litigation and activism following the Bhopal gas leak. The case is a reminder that legal procedures place serious constraints upon the possibilities for popular participation, and yet it usefully demonstrates that political activism may be used to interrogate and even breach those constraints.

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2. The very notion of 'empowerment' houses a deep and pervasive ambiguity arising from its inherent paternalism. Is power the kind of thing that can be simply bestowed, or must it be actively seized? Who is empowered to empower, and what is their interest in doing so? On whose terms? And for what ends?

Legal Marginalization

A graffito on the wall of the Union Carbide pesticide plant in Bhopal declares: "Killer Carbide must be Punished." It is emblematic of the frustration experienced by many people in Bhopal following years of litigation.[3] To local understandings, the injustice seems obvious. The leak of methyl isocyanate gas on 3 December 1984 resulted in at least 2,800 immediate deaths, an undetermined number of thousands of injuries and disabilities, and widespread loss of livelihood. The simple fact that the leak occurred suggests that the plant's safety features were inadequate, while ample evidence indicates that the leak may be directly attributed to faulty plant design and management errors. And yet, after over five years of litigation, the patent injustice of the situation has failed to produce either a determination of liability or any real compensation for the survivors.

Moreover, right from the outset, people in Bhopal have been largely excluded from the litigation process. Their distance from the putative mechanisms of accountability may be traced in four elements of the litigation. First, the survivors of the leak are predominantly Hindi-speaking, many are illiterate, and most have little previous experience with litigation in India, much less with the American lawyers who arrived to sign up claimants on contingency fee arrangements in the first week following the disaster. Until early 1987, the litigation took place in U.S. courts — beyond the participation or even observation of groups in Bhopal. The second exclusion arrived in the form of the 1985 Bhopal Gas Disaster (Processing of Claims) Act[4] by which the Central Government of

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3. For reasons of brevity and clarity, details of the litigation have been omitted from this account. For the basic documentation with commentary, see: U. Baxi & T. Paul, eds., *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: Tripathi, 1985); U. Baxi, ed., *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: Tripathi, 1986); and U. Baxi & A. Dhanda, eds., *Valiant Victims and Lethal Litigation: The Bhopal Case* (Bombay, Tripathi, 1990). See also P.T. Muchlinski, "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors" 50 MODERN LAW REVIEW 545 (1987), and M.R. Anderson, "State Obligations in a Transnational Dispute: The Bhopal Case" in W.E. Butler, ed., *Control Over Compliance with International Law* (London, Martinus Nijhoff, 1991).

4. 25 *International Legal Materials* 884 (1986).

India assumed a *parens patriae* role, arrogating to itself the exclusive right to represent and act in place of every claimant in the Bhopal litigation. Although Section 4 of the Act permits the claimant to retain a legal practitioner at his or her own expense, it has left little room for the participation of independent counsel. The formulation of the complaints, the assessment of damages, and the decision to place a higher priority on civil rather than criminal claims all originated in government offices without consultation with people in Bhopal. Third, Section 3(2)(b) of the Act also accorded to the Central Government the power to enter into a compromise with Union Carbide. Between early 1985 and February 1989, the government intermittently conducted negotiations with Carbide in the matter of an out of court settlement. Again, representatives of Bhopal groups were neither present at the negotiations nor consulted as to their content. The full effects of this policy were felt on 14 February 1989, when Chief Justice Pathak announced the results of a settlement that had clearly been reached in negotiations between Carbide and the Government: $470 million to settle all past present and future claims arising in relation to the Bhopal case.[5] Fourth, as Upendra Baxi has pointed out,[6] the judicial discourse has failed to recognize the real circumstances of people in Bhopal who have been affected by the gas leak. What has emerged in the language of both U.S. and Indian courts is the image of the average "victim": shorn of age, gender, and life circumstances. The "victim" has become a vague and polysemic symbol — imagined according to the needs of the major actors in the litigation, but never present in palpable form. Rhetorical representation has allowed the government of India to gloss over the fact that, five years after the gas leak, it has still not assembled a reliable and detailed account of how many people have suffered particular types of injuries and disabilities. It has allowed Union Carbide to blame the victims for being near the

5. *UCC v. Union of India* (1989) 1 SCC 674. The settlement was announced as a judicial order, but there is little doubt that it was arrived at in negotiations between Carbide and the central government of India. This was affirmed by the Union Carbide India Limited spokesperson, S. Mitra: "Lawyers for both sides were there, and decided on $470 million.... This amount was agreed by the lawyers and the Government of India. Then it was announced in Court. If you look at the settlement you can tell this from the wording." (Personal Interview, 27 November 1989.)

6. Baxi, *Valiant Victims*, p. lxviii.

site of the leak, and to impugn the veracity of their medical testimonials. The abstracted "victim" is a conceptual fantasy, a necessary by-product of a kind of litigation which excludes the primary claimants. Thus, largely excluded by the formal legal process, many survivors developed a sophisticated critique of legal solutions of any kind, putting their trust in political activist groupings to express their demands.

The Dialectic of Litigation and Activism

Immediately following the gas leak, a number of nongovernmental organizations and activist groups were formed in Bhopal. In the absence of adequate medical care and economic relief, the self-help organizations in Bhopal have been the most effective vehicle for coping with the medical, social, and economic effects of the gas leak. They assumed a variety of forms, with diverse purposes and approaches; moreover, as concerns and tactics changed, some groups have declined while fresh initiatives were established. Overall, five types[7] of groups have been prevalent: apolitical relief and rehabilitation groups,[8] groups that collected and disseminated technical, legal, medical, and political information,[9] trade union organizations that mobilized support around workers' issues,[10]international solidarity and support group,[11] and the explicitly political groups which have coordinated local relief, organized political demonstrations, and actively participated in the

7. This typology draws upon S. Ravi Rajan, "Rehabilitiation and Voluntarism in Bhopal" 6 LOKAYAN BULLETIN 3 (Jan.-April 1988).

8. The Self Employed Women's Association, the Mahila Chetna Manch, and the Lion's Club are examples.

9. Including the Delhi Science Forum, the Medico-Friends Circle, the Lawyers Collective, and the Bhopal Group for Information and Action.

10. The most active trade union is the Union Carbide Karamchari Sangh; non-union groups include the Bombay-based Union Research Group, and the Gas Peedith Rahat Samiti.

11. The most active is the International Coalition for Justice in Bhopal, a network of groups based in the U.S., U.K., Malaysia, Japan, Hong Kong, and the Netherlands.

litigation.[12] It is the last category which has been most important to the trajectory of litigation.

Although largely peripheral to the actual process of litigation, peoples' organizations in Bhopal have followed the litigation closely and reacted in forms of social and political action. The categories and objectives of the legal dispute have entered the vernacular in Bhopal, so that the initial demands for justice have been channelled into more legal forms. Litigation became closely involved with the timing, agenda, and idiom of activism.

In turn, political activism has had some effect upon litigation. The best example of this may be seen in the events following the settlement of February 1989. Immediately following the announcement of the settlement, groups in Bhopal exhibited several reactions. Some accepted it, others rejected it outright, and still others kept counsel in uncertainty. By April, a number of demonstrations and speeches codified the emerging consensus that the settlement was unacceptable on several counts: 1) first, that the quantum of relief was deemed to be too low, 2) that the groups in Bhopal had found no opportunity to participate in the decision-making process about the nature of the settlement or its impending distribution, and finally, 3) that Union Carbide had escaped the judicial process without ever facing the question of its liability for the gas leak. A number of groups filed both review and writ petitions seeking a reconsideration of the judicially-announced settlement. While the $465 million collected interest in a government bank account, the Supreme Court failed to act on the petitions.

Meanwhile, political action denouncing the settlement continued in Bhopal and New Delhi. The BGPMUS in particular opposed the settlement with consistent and tireless campaigning. Immediately following the announcement of the settlement, over 1,000 women from Bhopal travelled to New Delhi where they sat in protest on the steps

12. Initially, the most active of these were the Nagrik Rahat Punarvas Samiti and the Zahreeli Gas Kand Virodhi Morcha. The Morcha remains active, although has assumed a less prominent profile. The Bhopal Gas Peedit Mahila Udyog Sangathan (BGPMUS) is a women's group founded in September of 1986 which has been the most effective focus for political and legal agitation in recent years. It receives support from the Delhi-based Bhopal Gas Peedit Sangharsh Sahyog Samiti (BGPSSS).

of the Supreme Court. National and international media attention was widespread, with statements of solidarity arriving from Dublin, Amsterdam, London, and New York. As the protest gathered pace, others registered their disapproval of the Court's action, including the former Chief Justice of the Supreme Court, P.N. Bhagwati, who condemned the settlement in an article prominently featured in the influential magazine *India Today*.[13]

Meanwhile, the women's group continued to rally around their opposition to the settlement — using it as a way to voice their grievances, but also as an emblem of their more quotidian struggle to cope with the continuing effects of methyl isocyanate. Meeting every Saturday in a park, 200-600 women would discuss the practical and political matters involved in seeking medical relief, coping with accelerating illness, securing work, and supporting the legal campaign against the settlement. Their demonstrations kept the issue of the settlement in the news while statements of solidarity from groups around India (and from abroad) put pressure on both the Court and the Government to take some form of action. Following the general elections of November 1989, activists sensed a new window of opportunity. The Rajiv Gandhi government had been replaced by a coalition of parties less eager to woo foreign investment and more inclined to sympathize with a populist politics. A process of quiet lobbying began in Delhi. The effort was to persuade the new government to provide immediate relief to people in Bhopal and renounce the settlement of February 1989. In a letter sent to the new Prime Minister, V.P. Singh, two of the groups demanded: 1) an immediate hearing of the review petitions, 2) the withdrawal of the criminal immunities granted in the February settlement, 3) an announcement by the new government that the settlement was "morally wrong," 4) full public disclosure of information relating the Bhopal gas disaster and lifting the application of the Official Secrets Act, and 5) that Union Carbide be banned from all operations in India.[14] Then, on 22 December 1989, the Supreme Court handed down a decision on three consolidated writ petitions regarding the

13. *India Today* (March 15, 1989), p. 45.
14. Cited in Baxi, *Valiant Victims*, pp. lxii-lxiv.

validity of the 1985 Act granting *parens patriae* power. The court upheld the Act, but found that the government had a legal duty to provide interim relief to the affected people of Bhopal until such time as the litigation reached a conclusion. The quantity and nature of the interim relief were left to executive discretion. The Court also noted that the people of Bhopal would have an opportunity to make representations to the Court in the hearings on the three review petitions.

The lobbying efforts, supported by the Supreme Court decision, paid rich dividends on 12 January 1990. The new Government announced that 1) the quantum of settlement was insufficient to the needs of people in Bhopal, 2) the affected people in Bhopal were entitled to interim relief and that the amount and modality of relief would be decided in consultation with the representatives of the victims' groups, 3) that the claimants possessed inalienable rights to a legal remedy which brought into question the conferring of criminal immunities, and 4) that the Government supported the contentions of the activist groups in the review petitions.

Long suspicious of government actions, the activist groups in Bhopal had been able to turn the *parens patriae* power to their advantage, using political pressure to realign the arguments before the Court on the pending review petitions. In short, sustained activism operating outside of the formal mechanisms of the law had a decisive impact upon the course of litigation.[15] What the events of 1989 and 1990 demonstrate is that where the mechanisms of tort law failed to deliver effective forms of accountability for ultrahazardous activity, the activist groups were able to mobilize political support, both informally, and through parliamentary channels, to change the shape of litigation.

Conceptualizing Justice

A further issue arises out of the interaction of litigation and activism: the way in which justice is conceptualized. From the

15. At this writing, a Supreme Court decision on the review petitions was still awaited.

outset, the premises of company law, tort law, and private international law were called into question by activist groups in Bhopal. Some activist leaders operated from positions informed by Marxian or radical theory, others drew upon a populist anti-corporatism, and still others tended toward an almost anarchical anti-state and anti-industrialist position. A full description of these positions, articulated over five years, is not possible here. Nevertheless, it is possible to highlight several illustrative contrasts.

The notion of a corporation as a legal person has come under considerable attack in Bhopal. While there have been consistent demands to hold Union Carbide responsible for the gas leak, there has been a parallel movement focusing not on the corporation, but on the figure of Warren Anderson, the Chairman of Union Carbide at the time of the leak. Repeated calls to try Anderson for murder are partially rhetorical devices, but they are also partially efforts to reconceptualize the legal situation. Whereas a corporation is by definition not a natural person, and is therefore impossible to confront in a personalized manner, Anderson is emblematic of the entire corporate structure employing over 100,000 people. Also, by shifting the idiom from one of civil responsibility to one of criminal responsibility — embodied in a demotic understanding of murder — groups in Bhopal are able to articulate strong demands in ways which are more immediately accessible. The language of murder is able to provide a strong reminder that people died, and continue to die, as a result of the gas leak.

Second, many of the groups in Bhopal have questioned the notion of monetary compensation. It is frequently pointed out that monetary compensation is simply a way for Carbide to commodify human life and incorporate that value into its account books, just like any other cost of production. The BGPMUS has repeatedly emphasized that monetary compensation is relatively low on their list of demands. An influx of cash will simply raise the local price of goods, allowing merchants to pocket most of the gains. Moreover, a payment may place a full stop at the end of the litigational narrative, fostering the illusion that with the payment of compensation, the legal system has restored an equilibrium, and all future suffering has been accounted for. In fact, the women point out, the medical and social effects of

the gas are likely to continue for decades. What they demand in the place of compensation is a four-part package: 1) full legal determination of civil and especially criminal liability, 2) accessible, low-cost medical care, 3) provision of employment schemes and entrepreneurial opportunities to encourage local self-sufficiency, and 4) long-term monitoring of continuing medical effects.[16]

A question for further exploration, in Bhopal and elsewhere, is the nature of the interaction of popular and official conceptions of justice. The activist groups in Bhopal have clearly been influenced by legal understandings of liability, and yet they have retained a certain autonomy from those understandings and are able to provide a sophisticated and compelling critique of many legal concepts.

Conclusion

It was almost inevitable that the Bhopal gas leak would give rise to litigation, and that the litigation would be likely to carry on for some years. Where the parameters of litigation have left little room for the participation of people in Bhopal, it has actually marginalized and silenced the very constituency that seeks a determination of accountability. Activist groups have served to fill the accountability gap in the Bhopal case and are likely to do so in similar circumstances in the future. The biography of the Bhopal litigation reveals that people's organizations can exert considerable influence at key points in the litigation process. In their limited but significant peripheral participation, such groups have adopted the language and agenda of the legal system. The political consequences of this need to be examined more closely. To some extent, legal concepts have surely been empowering: they have provided specific objectives for protest and a reconceptualization of popular demands. But in another way, they may well be limiting. Where legal language describes the world in a particular way, it places limitations on what types of action may be imagined. If legal mechanisms are to offer authentic determinations of accountability, they will need to accommodate the

16. This summary is derived primarily from interviews conducted in November 1989.

participation of activist groups, as well as alternative conceptions of justice offered up by such groups.