International Environmental
Law Research Centre

COMMUNITIES AT RISK

INDUSTRIAL RISK IN INDIAN LAW

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Published in: 39/41 *Economic and Political Weekly* (9 October 2004), p. 4521.

This paper can be downloaded in PDF format from IELRC's website at
http://www.ielrc.org/content/a0405.pdf

Communities at Risk

Industrial Risk in Indian Law

Industrial risk was a dormant concern till it precipitated into the Bhopal Gas Disaster in December 1984. The siting of industrial risk, and its exiling, have been part of law, policy and practice over the 20 years since Bhopal. There is, however, an incoherence in the development of law and policy. The anxiety about risk and hazard exists, but legal imagination has not been able to cope with the consequences of either leaving risk where it is, or exiling it. The courts do not possess the equipment needed to work out the reorganisation of spaces to minimise, or outlaw, risk. Yet, when the question of risk and hazard is taken to the court, the judiciary cannot turn away. It has sometimes refused to be definitive, and sometimes shown a tolerance of risk, asking of persons resident around risk to become superior risk bearers.

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Industrial risk is embedded in the prosaic contours of the law. Its early appearance in the Workmen's Compensation Act 1923 recognised the risk immanent in industry and identified workmen as constituting the community at risk. The location of the risk was confined to the premises of the industrial establishment. The 1923 Act acknowledged a regularity with which occupational injury and occupational disease were episodes in the lives of workmen, and introduced this acknowledgment in the statute.[1] There was a tacit assumption of risk by the workman who entered the premises where the risk resided; and there was an assumption of liability by the employer to compensate a workman who was injured or rendered ill because of a workplace 'accident'. Traumatic episodes resulting in injury, and non-traumatic illnesses[2] caused by the process or substance involved in the work, were both classed as 'accidents'.

The regulation of conditions of work in factories, which began in the 19th century with the Factories Act 1881, was reworked into law in 1934, and again as the Factories' Act 1948, confined itself to matters of health, safety and welfare of the workforce in the workplace.

In 1976, when chemical industries had settled into the landscape, the heightened perceptions of risk imprinted their anxieties on the law. So, in 1976, the Factories Act 1948 was amended to introduce the notion of 'certain dangerous occurrences': and the manager of a factory where 'any dangerous occurrence of such nature as may be prescribed occurs' was required to notify the authorities who were designated to receive, and act upon, such information.[3] Again, 'safety and occupational health surveys' were authorised to be undertaken by the designated authorities, and the "occupier or manager… shall afford all facilities for such survey, including facilities for the examination and testing of plant and machinery and collection of sample and other data relevant to the survey."[4] The constituency of the law continued to be the workforce, and there was a containment of concern to the premises of the factory.

Evidence of emerging concerns regarding safety and harm is discerned in the enactment of laws including the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 which grew out of an increasing awareness about the need to control pollution occasioned by industrialisation and urbanisation. These hold the first glimmerings of understanding that what happens on the premises of a factory could affect persons and communities well beyond its boundaries. Yet it was not till the Bhopal Gas Disaster that the designation of a community at risk was dramatically altered.

In the intervening night of December 2-3, 1984, methyl isocyanate (MIC) leaked out of the Union Carbide plant in Bhopal. It left over 3,000 dead in its wake, and over 5,00,000 people affected by the gas in varying shades of severity. More than 15,000 people have died since that day of gas related illnesses. It has been variously called 'a grim tragedy',[5] "one of the most tragic individual disasters in the recorded history of mankind"[6] and "second in magnitude and disastrous effects only to the havoc brought by atomic explosions in Hiroshima and Nagasaki"[7] by judges deciding the Bhopal matters in the Supreme Court. The Bhopal Gas Disaster, demonstrating the potency of industry to cause mass death, injury, illness and loss well beyond the perimeters within which its activities are located, altered industrial risk irremediably, and expanded it into industrial hazard. The constituency of realised risk stood definitively changed. The induction of the 'general public in the vicinity' of the factory into the law, as potential victims of industrial hazard, is a manifestation of this change.

The Emergence of a Community at Risk

Till the Bhopal Gas Disaster happened, industrial risk was linked with occupational health and safety. The constituency of industrial safety law was the workforce, and the site of industrial risk was the premises where industrial activity was carried on.

Immediately, and directly, the victims of the disaster emerged as an identifiable constituency that the law had to acknowledge.[8] The victims bore these characteristics:

– That their residence was around the factory. Of the 56 wards into which the city of Bhopal is divided, the residents of 36 wards were affected by the disaster in different measures of severity.

– Their habitation was in the nature of an industrial shantytown. The houses were packed close together, and the residents belonged to the working classes.

– While there were those among the victims who lived in the area and worked in the Union Carbide Plant, they largely comprised persons who had no connection with the industry beyond being residents in the vicinity.

The litigation around compensation, criminal prosecution of the company officials, medical relief and treatment, and residual and spreading contamination in and around the factory, followed a tortuous course over the succeeding years; in fact, much of it remains to be concluded in 2004.

In February 1989, the union of India, representing all the victims of the disaster[9] settled the claims for compensation for US $ 475 million. The categorisation of claims arising out of the disaster began after challenges to the settlement by victims' groups and public interest petitioners had been decided by the Supreme Court in 1991.[10] The exercise continues with over 16,000 claims still to be decided. On July 19, 2004, the Supreme Court ordered that the monies which remained under control of the union of India belonged with the victims, and that it be disbursed pro rata among them;[11] this process is yet to begin. The criminal trial of the offending company and its officials and of the officers of its Indian subsidiary is still under prosecution in the court of first instance, with the Union Carbide Corporation (UCC) and Warren Anderson, the CEO at the time of the disaster, being declared absconders.[12] After years of agitating for treatment and monitoring of the health of the victims, the court has conceded a demand for setting up an independent medical commission.[13] The soil and ground water contamination in and around the factory, not all of it caused by the disaster but aggravated by the neglect and abandonment of the site following the disaster, was detected and reported upon by Greenpeace in 1999,[14] and a court in the US, in March 2004 declared its willingness to order a clean-up, and the government of India agreed to let Union Carbide and Dow Chemicals (who have taken over UCC) comply with the US court's direction.[15] This process is yet to begin.

In the meantime, a day and a year after the Bhopal Gas Disaster, an industrial accident in Delhi provided the impetus for reconsidering the context of industrial risk and disaster. On December 4 , 1985, oleum gas leaked into the atmosphere in Delhi, spreading from its source in the factory of Shriram Foods and Fertilisers, moving through populous zones, affecting large numbers of the public that it encountered on its way, reportedly resulting in a death of an advocate in the Tis Hazari courts caused by inhalation of the gas. Even as the enormity of the Bhopal Gas Disaster paralysed parts of the apparatus – and even as disinformation, lack of information and unpreparedness aggravated the direct damage to those affected by that disaster – the oleum gas leak, with the relatively limited extent of injury and loss, allowed an immediacy to enter the discourse. Where Bhopal showed up the vulnerability of the industrial shantytown, the oleum gas leak raised the spectre of the denizens of Delhi living under perpetual threat posed by hazardous industry. The populations at risk were identified by the experience of realised risk in one instance, and the demonstration of potential risk in the other.

The oleum gas leak provoked a range of responses including
– legislative changes, particularly to the Factories Act 1948 in 1987,
– essaying a policy of deterrence through an enunciation of enterprise liabil*ity*,[16] and
– the induction, into policy, of relocation of hazardous industry away from concentration of populations

Amending the Factories Act 1948 in 1987

There are three aspects of the amendment made to the Factories Act 1948 in 1987, incorporating the experience of the Bhopal Gas Disaster and the oleum gas leak, which are directly related to a recognition, and anticipation, of a community at risk. Abandoning the presumption that industrial risk is related only to the workforce and is restricted to the premises of a factory, parliament acknowledged the risk posed to "the general public in the vicinity" by a factory "involving a hazardous process".[17] The distancing of the population at risk from the factory, especially of those factories already established, being an improbable solution to the question of risk, the amended law instead requires "compulsory disclosure of information" "regarding dangers, including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes".[18] With the introduction of this provision into the law, *the recognition of a community at risk was expanded beyond the workforce to include persons in the vicinity of the risk.* The factory is still the site from where the risk emanates, but the effect of realised risk was acknowledged as reaching beyond the premises of the factory.

The second aspect was concerned with prospective location of industrial risk. There is an inevitable constriction of choice where a factory has already been established and is in operation, and where a population has settled around it. Against the background of the Bhopal Gas Disaster and the oleum gas leak, the realisation of risk, even disaster, has necessarily become a part of law and policy. A Site Appraisal Committee has, therefore, been introduced by the law "for purposes of advising (the government) to consider applications for grant of permission for the *initial location* of a factory involving a hazardous process or for the *expansion* of any such factory".[19] Among its members are to be an expert in the field of occupational health, a representative of the Town Planning Department of the state government, water and air pollution control authorities, a representative of the meteorological department of the government of India, a representative of the local authority and the chief inspector of factories.

Factories in operation, and those being established, are required to draw up "on-site emergency plan and detailed disaster control measures". And "workers employed (in the factory) and the general public living in the vicinity of the factories" are to be informed of "the safety measures required to be taken in the event of an accident taking place."[20] This is the third aspect of risk recognition that has been enacted into law.

Compensation, Liability and Deterrence

There are three approaches that law could offer for reducing risk and enhancing safety. The first is *preventing risk realisation*. So, authorising workers to alert the inspector of factories, and the management, to lapses of safety;[21] and monitoring and regulating the safety features in the running of a factory, are moves towards preventing accidents and disasters.[22]

The second is the threat of *criminal prosecution*, both under the Penal Code 1860, which deals with crimes, and as 'absolute offences', where breach of a provision in the law becomes punishable even where no intention to commit an

offence need be proved before punishment is visited upon the person found to have been responsible – by neglect or by commission. Breaches of provisions in the Factories Act 1948 fall within the law's understanding of absolute offences.[23]

The third is *deterrence through a deep pocket approach to compensation*. After the oleum gas leak, for instance, a director of the offending company was called upon to undertake to pay compensation from his own resources – not to be reimbursed by the company – in the event of a further leak, before the factory was permitted to re-start its operations.[24] The Supreme Court also brought on board a notion of 'absolute liability' and 'enterprise liability', which would strengthen the enterprise's interest in ensuring safety.[25]

Industry Relocation

The most dramatic response to industrial risk has been relocation. The ascension of risk to a hazard, and the experience of that hazard in Bhopal, has altered the perception of acceptable risk. The growth of settlements around factories has been both inevitable, and by policy[26] illustrates the emergence of a community of those officially housed by the company in the vicinity of the factory, and employees in jhuggies and 'outsiders' allowed to settle around the factory premises. Bhopal had demonstrated the vulnerability of the population around the factory to realised risk; and the oleum gas leak had reinforced fears that whole populations of cities could be at enormous risk. The exiling of risk and hazard was one possible response; the minimising of risk was another.

In February 1986, the Supreme Court considered the implications of the continuance of hazardous industry in the city of Delhi. They relied on the opinion of expert committees which had been set up to investigate safety and risk in the offending factory. "All the expert committees are unanimous in their view that by adopting proper and adequate safety measures the element of risk to the workmen and the public can only be minimised but it cannot be totally eliminated," the court said. An expert was quoted as saying that the caustic chlorine plant from which the oleum gas had leaked revealed 'a worrying state of affairs', and that the plant was liable to be "classed as a major hazard facility by applying most of the currently accepted definitions".[27] 'Relocation', he said, "is the only practicable long-term option which would guarantee the complete removal of the community risk".[28] A second expert committee's opinion read: "The risk due to major release of chlorine could only be reduced but not completely eliminated. Complete elimination of the risk to the population at large obviously lies in relocation of the plant in an area without human habitation".[29] It was then observed that, beyond the immediate question of what was to be done with the offending industry, "a National Policy will have to be evolved by the government for location of toxic or hazardous industries and a decision will have to be taken in regard to relocation of such industries with a view to eliminating risk to the community likely to arise from the operation of such industries."

Over 10 years later, on July 8, 1996, the Supreme Court passed an order directing 168 hazardous industries to "stop functioning and operating in the city of Delhi with effect from November 30, 1996".[30] "These industries may relocate/shift themselves to any other industrial estate in the National Capital Region," the court said while asking the National Capital Region Planning Board to "render all assistance to the industries in the process of relocation".[31] The "closure order with effect from November 30, 1996" was made 'unconditional', and 'even if the relocation of industries is not complete they shall stop functioning in Delhi with effect from November 30, 1996'.[32]

There is a significant shift in emphasis that occurred between 1985 and 1996. The 1985 court was still under the Bhopal cloud, darkened further by the oleum gas leak. In the years since 1985, pollution and the environment had gained an ascendancy in the agenda of the court; the 1996 court was therefore inclined to consider relocation of industries in the context of pollution, as a non-traumatic condition, rather than as a matter of potential hazard or a traumatic occurrence. The cleaning up and beautification of the city was given a priority. So the 1996 court remarked:[33]

> Delhi is one of the most polluted cities in the world. The quality of ambient air is so hazardous that lung and respiratory diseases are on the increase...Once a beautiful city, Delhi now presents a chaotic picture. The only way to revive the capital city from the huge additional cost burden and pressures, is to deconcentrate the population, industries and economic activities in the city and relocate the same in various priority towns in the National Capital Region.

The revision of the 1962 Master Plan for Delhi was also undertaken in this period, in 1990, and there it was asserted that 'hazardous and noxious industrial units' were 'not permitted in Delhi', and existing hazardous industries "shall be shifted on priority within a maximum time period of three years".[34]

The prescription of relocation was retained, through shifting judicial priorities and the constructing of executive policy. The demolition of jhuggi settlements and the policy of resettlement of slum dwellers to the outskirts of Delhi, with relocated chemical industry in their neighbourhood, illustrates the constructing of communities at risk, and is set out further in this narrative. The offer to workers to move with the polluting, hazardous industry to its new site and the absence of reduction, or minimising, of risk in the prose of state policy and judicial dicta will also find its statement later. The Delhi industries' relocation formula has proved to be the exception, as is witnessed in judicial engagement with the issue of hazardous industry, first in Thane, near Mumbai and more recently in Cochin in Kerala.

Public Interest Litigation (PIL)

The court-devised jurisdiction in PIL (public interest litigation) rendered possible judicial engagement with decisions about locating, and re-locating, risk. PIL is a product of the late 1970s and 1980s, and was constructed through exercises in juristic activism, that is, judges re-framed the rules of practice of law, starting with diluting the rule of locus standi. Traditional approaches to the court only permitted affected persons to agitate their claims and complaints in the court. PIL allowed, even encouraged, well-intentioned persons including professors, journalists, social activists working at the grass roots, to take matters to the court where a class of people were seen to be deprived of their fundamental rights.[35] This was intended to bring the cause of those deprived of access to the court due to indigence, illiteracy or ignorance of their rights, or due to systems of exploitation, to have their issues brought to the court, on their behalf, even if in their absence. The procedure that made the services of a professional lawyer necessary to reach the court was simplified, and even a letter addressed to the court was treated as a petition, earning the appellation 'epistolary jurisdiction'.

PIL gave the court a renewed relevance, and extended its reach to all matters of 'public interest'.[36] In its nascence, PIL's constituency was bonded labour, prisoners, child labour, the mentally ill, women in custodial institutions. In the later half of the 1980s, environment began to occupy a place of prominence. And, in the 1990s, environment dominated judicial discourse as matters of public interest.[37] PIL invested the court with a power that was greater than that given to the court in traditional litigation, which would go a good distance in explaining the broad sweep of the orders passed by the court. [38]

The oleum gas leak was heard and decided by the court as PIL. Judicial entrenching into the policy arena, which is generally considered the exclusive territory of the executive, and the considered options of relocation, and shop floor routes to safety[39] were facilitated by the expansive understanding of the court's power in matters of 'public interest' – a general term of broad definition. The 1996 order peremptorily outlawing hazardous industry from Delhi came through this exercise of judicial power.

Yet, when F B Taraporewala vs Bayer India[40] and Fertilisers and Chemicals Travancore Employees Association vs Law Society of India[41] were brought to court, the threat posed by hazardous industry to concentrations of population did not provoke the court to exercise judicial power it had cultivated in its PIL jurisdiction.

In Bayer India vs State of Maharashtra,[42] the industry manufactured chemicals and drugs. Their factories were located in Thane, near Mumbai. When the factories were set up, the Supreme Court observed, "there were no residential buildings anywhere near the factories."[43] Over time, builders and private persons raised constructions 'in the vicinity' of these factories. The factory went to court saying "that hazardous substance and gases are stored and utilised in the said factories and that the danger of an explosion or a leak like the one that took place in Bhopal, in 1984, cannot be ruled out. If any such accident happens it may lead to greater damage to human life than at Bhopal. To guard against any such eventuality, they say that within a radius of one kilometre, no residential buildings should be allowed to be constructed."[44] The context in the court arose out of proposed construction activity in the vicinity of the factories and the resistance of the factories to construction being permitted in an area that they said had been marked for industrial use. It was taken to the court as PIL; in February 1993, the Supreme Court redirected the dispute to the Bombay High Court.

The conflicting interests of industry and the builders remaining unresolved, the issue was taken, in a second round, to the Supreme Court. The complexity in exiling risk, as also in authorising risk to continue where it was located, pervades the judgment of the Supreme Court, which was delivered in September 1996.

"Industrial growth, yes, but by exposing a large segment of society to the risk of losing lives, no. This apprehension is not imaginary", the Supreme Court exclaimed.[45] The Supreme Court saw itself poised on the horns of a dilemma. If they endorsed the prohibition of further construction within proximity of the factories, it would adversely affect the right to reside in the locality, which would amount to 'immunity to the industrialists' and 'injustice' to the aspiring residents, "leaving at the same time large number of inhabitants already residing exposed to the risk."[46] So, the court thought "that if the industrialists wanted to safeguard their interest in the event of some accident happening in their factories, it was for them either to obtain the ownership of the area in question or to shift their factories to such places where the residential area could be kept wide apart from the factory premises."[47] But, the industries had averred, "relocation is not possible logistically, financially or otherwise."[48] '[W]e,' said the court, "have neither the expertise nor are we in possession of various information, which shall be required, to decide one way or the other…the question of relocation."[49] And with that, the court directed that a committee be constituted under the Environment Protection Act 1986 to consider the possibility of relocation, but would make no direction itself.

The unease of the court pervades the judgment. '[T]he very lives of the inhabitants living around the factories in question are in great jeopardy so much so that any probable accident in the factories may see annihilation of a large number of inhabitants," the court agonised. "But then relocation does need a deeper probe..."

In Taraporawala, the community at risk was identified as the population within a radius of one kilometre around the factories. In Fertilisers and Chemicals Travancore Employees Association vs Law Society of India,[50] the community at risk was the population of Willingdon Island and Cochin. Manufacturing chemicals and fertilisers, the company imported ammonia in special refrigerated ships and stored it in a storage tank located on Willingdon Island. This was then moved by rail to Cochin where it was stored in a bigger ammonia storage tank before it was pumped into its consuming plant. The PIL petitioner who went to court anticipated "devastating catastrophe...in the event of a major leak in the…ammonia tank."[51] An air crash, an act of sabotage, or an earthquake could lead to loss of life on a tragic scale. And "effective environmental protection and improvement being a matter of legal rights and duties", the high court agreed with the petitioner and ordered the closing down of the tank.

The Supreme Court held a different position. Pragmatism, and a perception of risk and hazard as inherent in the ways of the modern world, led the court to draw up a calculus between "utilities which exist in public interest… and human safety".[52] "In modern times", the court said, "we have nuclear plants which generate electricity. Their structural integrity and their operations are vulnerable to certain risks. However, generation of electricity is equally important and within the prescribed limits society will have to tolerate existence of such plants...If the arguments of the... petitioner are accepted then no such utility can exist, no power plant can exist, no reservoir can exist, no nuclear reactor can exist."[53] And added: "we do not discount such risks but are counterbalanced by services and amenities provided by these utilities."[54]

Judicial tolerance of risk and hazard appears to have grown with increasing temporal distance from the Bhopal Gas Disaster. There is a re-prioritisation that has occurred which can in part be traced to fading institutional memory,[55] where the reality of disaster has given place to the reconstruction of a disaster as hypothesis. In further part, this represents an endorsement of the developmental, and pragmatic, choices made by the state, and endorsed by the court as a concomitant of modernity. That communities at risk are often inchoate communities till the risk precipitates and becomes a hazard has contributed to the takeover by re-ordered priorities. In the context of atomic energy which is state controlled, governed by a statute,[56] and where secrecy is the prevailing norm – the court has refused to enforce disclosure on matters of safety and hazard, with state privilege to hold back

information being endorsed, and the community at risk relegated to the sidelines.[57]

The impossibility of closing, shifting and relocating industries, as a way of protecting communities from risk has entered judicial discourse. The perceived necessity for industry has led the court to demand a generally heightened tolerance of risk. Where efforts to exile risk are made, however, there are processes underway to pre-determine the communities that shall be placed at risk.

Constructing Communities at Risk

Relocation, resettlement, rehabilitation and relief have been processes which have involved decisions in policy and law about proximity to risk. After the Bhopal Gas Disaster, the precipitation of industrial risk into a hazardous episode is no longer a hypothesis. Union Carbide attempted to pass off the disaster as an act of sabotage, although this stands discredited both by the changing versions that the company put out over time, and by its inaction in pursuing its claim.[58] The petition to the district court in Bhopal avers that design defect, and declining investment in maintenance of safety in the plant (where operations had ceased while a decision was being made about dismantling and shipping the plant to a yet undecided location), were responsible for the disaster.[59] This still holds true as the most probable theory. The criminal trial of the India accused is unconcluded and continuing, while Warren Anderson, the then CEO of UCC, and the company itself, are accused but absconding. Whether a conclusive explanation for the disaster will emerge is yet uncertain. What stands demonstrated is the dangers inherent in hazardous processes in industry, including the storage, transportation, disposal and manufacture, using hazardous substances.

The Bhopal Gas Disaster created a community of victims. It is recognising this community that the union of India took over the litigation, and acted on their behalf, against the Union Carbide. It was also an acknowledgment of the time that it could take for the litigation to conclude, and for the victims to be compensated which would pit the staying power of the victim community against that of a multinational corporate giant. In February 1989, the Union of India settled the matter of compensation in the Supreme Court.[60] The settlement was challenged by victims' groups and by public interest petitioners, and, in 1991, the Supreme Court endorsed the 1989 settlement with significant modifications.[61]

In 1985, marginal relief was reached to the victims, and milk, bread, sugar and edible oil were distributed; but this was soon discontinued. It was only on March 3, 1989, that an order of the Supreme Court directed the state to provide for interim relief to the victims.[62] On April 28, 1989, the amounts paid as interim relief were directed to be paid into "the State Bank of India nearest to the residence of the victims'.[63] On March 12, 1989, the state said on affidavit before the Supreme Court that "the government of India has decided to give interim relief to all the residents of the 36 severely affected wards of Bhopal who were there on the night of the disaster. This decision to cover all the residents has been taken because there is a likelihood of long-term health damage to all persons who were exposed to the MIC and other toxic gases."[64]

The categorisation of the claims of the victims, and the determination of compensation amounts to be paid to them, was begun only in 1991, after the Supreme Court had reviewed the settlement and upheld the composite amount of US$ 475 million. In 2004, nearly 20 years have passed since the disaster, and the process is not yet concluded.[65]

The recognition as victim, the access to interim relief (including medical relief) and the capacity to pursue a compensation claim to finality have been integrally connected with the continuance of the victims in the residences they occupied at the time of the accident. The onus was on the victims to stay, and pursue their claim, as witness the Welfare Commissioner's statement in Bhopal:[66] "The allegation... that many claimants have neither received notices nor they are able to find out the exact status of their cases, having changed their address may be potentially true, but it is the responsibility of the claimants to get their changed address recorded in the proper column of their claim application to get it filled in the record of their case so that the notices could be sent on their changed addresses."

Fifteen years after the disaster, in 1999, Greenpeace published the results of tests that it conducted to verify the levels of contamination in and around Union Carbide factory site in Bhopal. Very little attention had been paid "to the state of the Union Carbide India site and immediate surroundings with respect to contaminants other than MIC which may have been present not only as a result of the accident, but also the routine operation of the plant," the Greenpeace report said.[67] "As legal processes continue to try to establish liability and compensation following the 1984 disaster, responsibility for the contamination which remains on and around the site remains unaddressed. Given the nature of the problem of the plant, and the chemicals handled, it is possible that residents of the community surrounding the former UCIL site may still be exposed to hazardous chemicals on a daily basis," the report continued.

The factory was closed down after the accident, and has lain neglected since then. The land and groundwater in and around the factory have proven to be contaminated. The parts of the factory that continue to stand are in a state of disintegration; on January 16, 2004, when a team of researchers and activists visited the factory site, we were witness to a corroded part of the plant having collapsed as rust, and a leak leaving an unidentified chemical dribbling to the ground in a location within the plant.

The absence of choice brought on by the impoverishment visited on the victims of the disaster due to the harm endured by them is one reason why the victims may not be able to move away from the site of realised risk. The capacity to access relief, and be recognised as a victim entitled to compensation, also ties in with their continued residence around the site of the disaster. The responsibility for reducing the risk posed to a populace that has been exposed to realised risk is, however, not within the scheme of relief and compensation that has developed around the Bhopal Gas Disaster. The choice thus, for the victims, is to leave the site of precipitated risk, if they can, and reduce their capacity to pursue their rights as victims of the disaster, even as the years of unconcluded proceedings extend into decades; or, to stay on as a community at continuing risk. Neither law nor policy has provided the victims with a third option.

Industries Relocation, Workers and Demolition

The prescription of relocation of industries within Delhi was to protect the denizens of the city from the risk posed by industrial hazard. The oleum gas leak had provided the impetus for effecting relocation. Relocation involved exile. The

industries were to be exiled, away from the population perceived at risk. There were, however, two communities that were sent into exile along with the risk.

The workers were the first to be offered passage along with the exiled industry, to the relocation site. In 1996, when the Supreme Court ordered the closure of hazardous industry, the state was asked to help identify, and develop, relocation sites. While passing the closure order, the Supreme Court had only the denizens of Delhi in its vision; the workers, even as denizens, stayed beyond its ken.[68] The workers, with unemployment looming on the horizon, approached the court to reconsider its decision, as it would severely impact on the waged workforce. The court, in acknowledging the justified agitation of the workers, inducted the concern of the workers into the scheme of closure and relocation. So, it directed that the workers would have continuity of employment in the industry, if the industry was shifted and relocated. If the industry were closed down, the workers were to be paid six years wages as retrenchment compensation.[69]

Even as the industry was thus provided with a disincentive to close down, the workers were encouraged to move with the industry, and its risk, to a new locale, away from the city – which was to be protected from risk. In 1993, the Delhi High Court had begun a process of clearing Delhi of its slum settlements.[70] Slum dwellers already reside in a zone of illegality; legality of living spaces in the city is more expensive than those among the urban poor can afford. The process of delegitimation of the claim of the poor to housing and shelter in the city was effected through the depiction of the urban poor as 'encroachers' who were trenching on the city's legal residents. The most graphic manifestation of the prejudice practised against the urban poor was when the Supreme Court infamously said:[71] " Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket." Having so discredited the slum dweller, the state was pressured to fulfil the agenda of cleaning up the city.[72]

The process involved two steps: demolition and resettlement. While all slum settlements could be demolished under the authority of law as sanctified by the high court and the Supreme Court, only those who had documents to prove that they had been long in residence in the slum were entitled to a resettlement site. The demolished community was, to this purpose, divided into the eligibles and the ineligibles.[73] The resettlement sites are in the outskirts of the city. The exiling of the demolished community has been worked in conjunction with the exiling of chemical industry. Narela is a resettlement site at least 20 kms. from the demolished sites, beyond the city limits. It is in the explicit policy of relocating the chemical industry in proximity to the resettlement site in Narela that the construction of a community at risk is most obvious. The resettlement site is within four kilometres of the site that has been prepared to receive chemical industries exiled from the city. The location of the chemical industry near the resettlement site has been one way of addressing the criticism that the resettlement policy makes the resettlers lose jobs which were near their earlier settlement but was now too far to be practicable to traverse every day. On bringing the chemical industries within range of the resettlement site, the industries are provided with a captive working class population, and the re-settlers find the promise of potential employment within accessible range.[74]

It is significant that, among the conditions of licence on the basis of which the resettled person may continue in possession, is this, that such person shall be in personal occupancy of the allotted site. If anyone else is found inhabiting the site, the licence may be revoked. This was purportedly introduced as a clause in the licence to prevent the alienation of the site to third parties, while the original allottee returned to the original vicinity of residence, prompted by nearness to the workplace or any other such reason of convenience and capacity. This condition, then, compels the resettled person to either stay in the resettlement site, or stand to lose possession of the site, along with any amounts that may have been paid to the administration before being given possession of the site, and any investment made thereafter.

The Hobson's choice offered to workers – to travel with the risk or face unemployment – and the choicelessness that the slum dwellers at the resettlement site face, illustrates the choices made in state policy about communities that may be placed at risk, and around potential hazard. And, even as industrial risk is exiled along with those who are to be its neighbours, there is a stark silence on reduction of risk. In the reconstruction of communities displaced by closing down livelihoods, demolition of settlements or large scale project displacement,[75] the construction of communities at risk is in evidence.

Conclusion

Industrial risk was a dormant concern till it precipitated into the Bhopal Gas Disaster in December 1984. The siting of industrial risk, and its exiling, have been part of law, policy and practice over the 20 years since the Bhopal Gas Disaster. The recognition of communities at industrial risk expanded then from the workforce into the general public in the vicinity, and the site of realised risk shifted beyond the premises where industrial risk was located, to the larger community. The oleum gas leak, within temporal sight of the Bhopal Gas Disaster, spurred the response of relocation into the public domain. But the growth of habitation around industry, the difficulties in creating buffer zones for industry in city spaces, and the costs and impracticability of shifting industry and of finding risk-free zones (if such exist) has made relocation an option that the court has not uniformly been willing to push, especially retrospectively, where industry is already established.

There is no uniform definition of a community at industrial risk. The 36 wards of the severely affected in Bhopal emerged as a community who had been at risk; but were recognised as such only after the risk had precipitated. The long years to compensation and relief, and the neglect of risk reduction in a location that had proved its potency, made them an identifiable community left at risk. After the oleum gas

leak, the denizens of Delhi were all identified as at risk. The created proximity between the exiled industrial risk and the reconstructed population has constructed a community at risk. And the workers have been given the choice that choicelessness offers – of travelling with the risk to hold on to their work and wages.

There is an incoherence in the development of law and policy on industrial risk. The anxiety about risk and hazard exists, but legal imagination has not been able to cope with the consequences of either leaving risk where it is, or exiling it. The courts do not possess the equipment needed to work out the reorganisation of spaces to minimise, or outlaw, risk. Yet, when the question of risk and hazard is taken to the court, the court cannot turn away. It has sometimes refused to be definitive, and sometimes shown a tolerance of risk, asking of persons resident around risk to become superior risk bearers. The unease of the law persists.

The ways of the law, and of policy, do inexorably move reconstructed communities and exiled risk into proximity with one and another. The deliberated construction of communities at risk is found in these experiences. EPW

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Notes

1 Schedules II and III of the Workmen's Compensation Act 1923.
2 Jane Stapleton, Disease and Compensation Debate (1986).
3 S 88A, Factories Act 1948 as amended in 1976.
4 S 91 A (1) of the Factories Act 1948 as amended in 1976.
5 Justice S Mukharji in *Charan Lal Sahu vs Union of India* (1990) 1 SCC 613 at 632.
6 Justice K N Singh, ibid at p 709.
7 Justice S Ranganathan, ibid at p 714.
8 Those who survived the disaster and those who were affected by the disaster.
9 By authority invested in the government by the Bhopal Gas Disaster (Processing of Claims) Act 1985 which was enacted to enable the government to take over the litigation from the victims and to conduct it to a close on behalf of the victims.
10 *Union Carbide Corporation vs Union of India* (1991) 4 SCC 584.
11 Order dated July 19, 2004 of the Supreme Court in IA No 46-47 in CA Nos 3187-88 of 1988.
12 Order dated February 1, 1992 of the Chief Judicial Magistrate, Bhopal in MJC No 91 of 1992.
13 Proceedings in the Supreme Court in WP(C) No 50 of 1998 (*Bhopal Gas Peedith Mahila Udyog Sangathan and others vs Union of India and others).*
14 Greenpeace, *The Bhopal Legacy*, 1999, Greenpeace Research Laboratories, Department of Biological Sciences, University of Exeter, Exeter, UK.
15 Letter dated June 28, 2004 delivered by hand to the Court of US District Judge John F Keenan in the matter of *Re Bano et al vs Union Carbide* 99 (iv 11329 JFK)
16 *M C Mehta vs Union of India* (1987) 1 SCC 395.
17 S 41 B, Factories Act 1948 as amended in 1987.
18 Ibid.
19 S 41 A, Factories Act 1948 as amended in 1987. emphasis added.
20 S 41 B, Factories Act 1948 as amended in 1987. The Factories Inspector and the local authority too are to be informed.
21 S 41 H, Factories Act 1948 as amended in 1987.
22 The identity of a person who draws attention to lapses of safety is part of this scheme for enhancing safety: S 118 A, Factories Act 1948 as amended in 1987.
23 *J K Industries vs Chief Inspector of Factories* (1996) 6 SCC 665.
24 *M C Mehta vs Union of India* (1986) 2 SCC 325 at 329.
25 *M C Mehta vs Union of India* (1987) 2 SCC 395.
26 See, for e g, *Lalla Ram vs DCM Chemical Works Ltd* (1978) 3 SCC 1.
27 *M C Mehta vs Union of India* (1986) 2 SCC 176 at 184.
28 Ibid at p 185.
29 Ibid.
30 (1996) 4 SCC 750 at 769.
31 Id at p 769.
32 Ibid.
33 Id at p 752.
34 Cited at id at p 752.
35 These are detailed in Part III of the Constitution of India. The right to approach the Supreme Court for a remedy where fundamental right are violated is itself a FR in Article 32 of the Constitution.
36 Ashok Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems' in B N Kirpal (ed), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* Oxford, 2000, 159.
37 Issues of corruption and public accountability too gave PIL, and 'judicial activism', a high profile, but it is environment that has re-prioritised other concerns. See, for instance, the replacing of hazard and safety with pollution and cleaning up referred to earlier in this essay. See S Muralidhar, 'Public Interest Litigation' XXXII Annual Survey of Indian Law, 369, 385.
38 *T N Godavarman Tirumulkpad* (1997) 2 SCC 267; *Almitra H Patel vs Union of India* (1999) 5 SCALE 154; (1999) 7 SCALE 376.
39 *M C Mehta vs Union of India* (1986) 2 SCC 176 and 325
40 (1996) 6 SCC 58.
41 (2004) 4 SCC 420.
42 (1993) 3 SCC 29.
43 Id at p 31.
44 Id at pp 30-31.
45 *F B Taraporawala vs Bayer India Ltd* (1996) 6 SCC 58 at 59.
46 Id at p 60.
47 Ibid.
48 Ibid.
49 Id at p 61.
50 (2004) 4 SCC 420.
51 Id at p 422.
52 Id at p 426.
53 Id at p 424.
54 Ibid. While so deciding, the court took the assistance of an expert body to assess, and pronounce upon, the risk.
55 The Fertilizers case does not even mention the Bhopal Gas Disaster, unlike *Bayer* and *Taraporawala*.
56 The Atomic Energy Act 1962.
57 *PUCL vs Union of India* (2004) 2 SCC 476.
58 Set out in the 'Reply of Union of India' before the court of the District Judge, Bhopal, dated January 6, 1987, reproduced in Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation: The Bhopal Case*, N M Tripathi, Bombay, 1990, pp 122, 124.
59 Ibid.
60 *Union Carbide Corporation vs Union of India* (1989) 1 SCC 674.
61 *Union Carbide Corporation vs Union of India* (1991) 4 SCC 584.
62 Order of a Constitution Bench of the Supreme Court in the matter of *Bhopal Gas Peedit Mahila Udyog Sangathan vs Union of India* Writ Petition (Civil) No 843 of 1988, dated March 3, 1989, reproduced in *Valiant Victims* at pp 667-69.
63 *Valiant Victims* at p 672.
64 *Valiant Victims* at p 676.
65 Affidavit dated July 1, 2003 of Veena Gupta, director, Government of India, Industry of Chemicals and Petro Chemicals in IA No 46-47 in CA Nos 3187-88/1988.
66 *Bhopal Gas Peedith Mahila Udyog Sangathan vs Union of India* Writ Petition (Civil) No 415 of 2000 in the Supreme Court, p 66 of the paper book.
67 Greenpeace, *The Bhopal Legacy*, 1999, Greenpeace Research Laboratories, Department of Biological Sciences, University of Exeter, Exeter, UK, p 2.
68 See *MCMehta v Union of India* (1996) 4 SCC 750.
69 (1997) 11 SCC 327.
70 http://www.ielrc.org/content/w0402.pdf
71 *Almitra H.Patel v Union of India* (2000) 2 SCC 679 at 685.
72 http://www.ielrc.org/content/w0402.pdf
73 Ibid.
74 Ibid.
75 For e g, see 'National Thermal Power Corporation Limited: Rehabilitation and Resettlement Policy' reproduced in Walter Fernandes and Vijay Paranjpye, *Rehabilitation Policy and Law in India: Right to Livelihood*, Econet, Pune, Indian Social Institute, Delhi, 1997 at pp 331-44. Four options are held out for rehabilitation: land for land, cash compensation, jobs in the industry to the extent available and support for self-employment in support services around the displaced industry.