BUSINESS AND HUMAN RIGHTS

THE INDIA PAPER

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I. INTRODUCTION*

Indian laws' encounter with corporate accountability, and immunity, is witnessed in at least three contexts. The Bhopal Gas Disaster in 1984, where methyl isocynate (MIC), a deadly gas, escaped from the Union Carbide plant into the neighbourhood and beyond, provides one context. The two species of litigation - one in the ***Bhopal*** case itself, and the other in the case of the ***Oleum Gas Leak***, which occurred after Bhopal - altered the contours of the law of safety, compensation and liability. Legislation followed, assimilating some of the institutional and processual arrangements suggested in the judgments of the court.

Court control over polluting industry is the second context. While the Air and Water Pollution Control laws have been on the statute book since 1970s, and the Environment (Protection) Act (EPA) was enacted in 1986, it is in the cases brought to the courts, particularly the Supreme Court, as Public Interest Litigation (PIL), that remedies have been essayed. The court has banked heavily on clean-up technology, and used closure as an interim, and increasingly as a terminal, measure. Directing the relocation of industries, adopting the polluter pays principle, levying a pollution fine, the court has sought to control the chaos caused by industrial pollution. A differential impact on large and small industries, on workers and industry owners and managers, and affected populations has been part of this experience.

The third context is provided by the imperatives of liberalisation, and the priority accorded to the market. Signing of the Multilateral Investment Guarantee Agency (MIGA) Protocol, and the push to encourage Foreign Direct Investment (FDI), are indicators of the eagerness with which multinational corporations are being invited to establish bases in India, even as it is indicative of international pressure to open up the economy. The charges of corruption shading the deals with the government have deepened the shadows that civil society organisations have projected as the unacceptable reality of multinational, and mega-buck, entry into India. The deep suspicion, and unyielding resistance, to multinational entry into salt manufacture, for instance, which has overtones of the colonial era, and of gene modification and manipulation which may alter irremediably the autonomy and long-term sustainability of the Indian farmer, have been located in this domain.

From a different starting point, the agenda of competitiveness in the market has been advanced by Indian industry as an explanation for why it is working at undoing the protection to vulnerable segments of the labour force including contract labour and women workers. The creation of Export Promotion Zones (EPZ) and Free Trade Zones (FTZ) where labour laws, for instance, stand excluded has spurred on the emergence of an officially accepted 'lesser' workforce.

There is, too, a fourth dimension. It emerges in an arena which has direct impact on democratic functioning.

In a definite alteration of course, the Constitution was amended in 1993 and a third tier of representative democracy was institutionalised. The Panchayati Raj Institutions (PRIs), and comparable elected bodies in the municipalities were woven into the constitutional scheme. Apart from devolution of political power, the decisions around use and sharing of natural resources and common property in the local area are to shift from more centralised bureaucracies of power to these institutions. This is of special significance to PRIs, which are located in the rural sphere. Besides, there is a one-third quota for women in the elected bodies of the PRIs, and in their leadership. Resistance to the shifting power equation has surfaced in a case concerning the location of an industry in a panchayat area. This is a recent entrant into law's domain, and is an instance of the conflicts that are likely to emerge between the established interests of industry and industrial development and autonomy and decision-making in decentralised zones.

While the law has been somewhat slow to gather pace, challenge from people's organisations has been the most potent check to corporate adventurism, invasive expansionism, and even criminal conduct. PIL has provided one avenue in the court for posing the challenge, even as people have taken to the streets and to direct action in protest. The quelling of protest, too, has generated a range of violations.

* *Acknowledgments*: Muralidhar, for hours of discussion, sharing documents and insights, and containing runaway reactions. Nita of National Labour Institute, Swapna Mukhopadhyay and Reena of ISST, Tarun Das and K.P.Nyati of Confederation of Indian Industry, K.S.Ramachandran, Consultant, Sindhu Menon of Centre for Education and Communication, Badal Mukherjee of the Delhi School of Economics, Nataraj and Jaishree, lawyer friends, Suryanarayanan, company secretary, Biraj Patnaik of Action Aid, Nimmi and Michelle of Greenpeace, Leo Saldanha of Environment Support Group, Kavaljit Singh of PIRG, Vallinayagam and Arvind.

The developments in the law have been influenced by the perceived synonymity between MNCs, technology transfer and survival in the market. Multilateral pressure - commonly perceived as emanating from banks, more particularly the Bretton Woods institutions, and in the more recent legal regimes which set out the possibles and the punishables as in the WTO instruments - has lent its weight. While the law has changed as experience has accumulated, immunities too can be seen to be inhabiting the law. In its absences, the criminal law has tended to keep the errant corporation out of its reach. Risk- spreading through statutorily mandated insurance; the spreading tentacles of the 'no-fault' doctrine and the language of 'accidents' have contributed to the immunity of corporations, often in the guise of providing support to the victim. Provisions in the law which give escape routes to corporations, as has been brought into the Factories Act, 1948, are definite moves towards immunity. The Bhopal Gas Disaster exposed aspects of immunity including the inaccessibility of the corporation within the jurisdiction of Indian courts, the case of the disappearing corporation and the coopting of the representative of the victim-adversary (in *Bhopal*, this was the government of India) as a friend of the accused corporation.

These are some skeins of the narratives that will unfold in the sections that follow.

II. THE BHOPAL GAS DISASTER AND THE OLEUM GAS LEAK CASE

In the intervening night of December 2/3, 1984, an escape of deadly MIC gas from the Union Carbide plant in Bhopal, the capital of the State of Madhya Pradesh in Central India, 'took an immediate toll of 2660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired or affected in various degrees.'[1] Over 5,00,000 people are estimated to be affected by the gas.[2] In the sixteen years since the disaster, over 15,000 people have died due to gas related causes.[3] The disaster killed over 3000 animals and injured many more, and polluted the water sources in the affected area. Even now, years after the disaster, residents and groups representing the victims complain of the danger posed by the continued storage of the offending chemicals in vats, hardly guarded, in the premises of the factory; neither Union Carbide nor the state has responded to their concerns in all this time. The premises remain cordoned off, as 'case property', keeping the local population beyond the perimeter of the factory.

Even as the criminal case against the corporation, its directors and managers trudges along seeking preponderance of guilt, there is little reason to doubt the callous, criminal neglect that resulted in the disaster. An investigation conducted by a scientific team after the disaster found:[4]

- There were basic defects in the design supplied by the UCC, which could have triggered off a disaster. For instance, '[d]ue to (a) design defect, there was back flow of alkali solution from the Vent Gas Scrubber to the tanks which had been drained in the past by the staff of Union Carbide India Ltd. (UCIL)…'[5] and: 'Whereas the MIC tanks had to be constantly kept under pressure using nitrogen, the design permitted the MIC tanks not being under pressure in certain contingencies'[6] and that the storage tanks were designed to store huge quantities of MIC which was both beyond the needs of the process as well as dangerous.

- Neither the UCC nor the UCIL took any steps to apprise the local administration authorities or the local public about the consequences of exposure to MIC or the gases produced by the reaction. Nor was any information given on the medical steps to be taken in the aftermath of the disaster.

Lapses of the corporation were identified as including:[7]

1 *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38 at 40 (hereafter 'May 4 order')
2 *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129 at 149 (hereafter '*Keshub Mahindra*')
3 S.Muralidhar, 'Human Rights Issues' in Parasuraman S and Unnikrishnan P.V. (eds.), *India Disasters Report: Towards a Policy Initiative*, 31 at 32, Oxford Uiversity Press, New Delhi (2000).
4 *Keshub Mahindra* at 148.
5 Ibid.
6 Ibid.
7 Id at 148-49.

- Invariably storing MIC in the tanks in greater quantity than the 50% of the capacity of the tank as had been prescribed.
- Not maintaining the temperature in the MIC tanks at the preferred temperature of 0-degree Celsius (the refrigeration system being inadequate and inefficient, with no stand-by) but at ambient temperatures, which were much higher.
- Not taking emergent remedial measures when the runaway Tank No.E610 did not maintain pressure from October 22, 1984 onwards (the disaster occurred 1 1/2 months later)
- Not sending out an immediate alarm when the gas escaped, and not working at limiting the damage.

It is not without significance that, the UCIL factory having sustained losses in the first ten months of 1984 - a loss of Rs. 5 crores - Union Carbide Eastern had directed UCIL, by letter dated October 26, 1984 'that the factory at Bhopal should be closed down and sold to any available buyer. As no buyer became available in India, UCE, Hong Kong directed UCIL to prepare an estimate for dismantling the factory and shifting it to Indonesia or Brazil…. These estimates were completed towards the end of November, 1984.'[8] The waning of interest in matters concerning safety is explained, at least in part, by this re-prioritising of concerns.

But only in part. In April 1982, a wall poster distributed by a union had warned of 'fatal accidents. Lives of thousands of workers and lakhs of citizens in danger because of poisonous gases. Citizens in danger because of poisonous gas. Spurt of accidents in the plant. Safety measures deficient.…'[9] The *Dainik Alok*, a regional paper, in its edition dated April 24, 1982 had reported on some of the cases of accidents in the plant, including an incident where 18 workers had to be hospitalised after a phosgene gas leak. On October 7, 1982, the *Nav Bharat*, a local newspaper, reported that seven workers had been affected by a leakage of MIC twice during the night, and the supervisor was in a critical condition. 'The effect of the poisonous gas in the atmosphere was so severe,' it was reported, 'that even the residents of Chhola Road, Kazi Camp and JP Nagar complained of headache and watering of eyes.'[10] There is further testimony to the issue of safety of the workers and the population resident in the vicinity of the factory having been raised and denied.[11]

The Bhopal Gas Disaster was the first major hazard in the realm of 'mass torts' that the country witnessed. A host of issues stood out even as the victims and the administration struggled to cope with the effects of the disaster. They included:

- The lack of information, even disinformation, concerning the nature and effects of MIC
- The health and civic administration was not in any state of preparedness to deal with such a massive disaster. They were not helped by the lack of information about the gas, about the antidotes and about long-term treatment, which may mitigate or reverse the damage caused.
- Death and devastation was most acute in settlements around the industry. They were largely working-class residents whose subsistence and survival depended on their capacity for continued labour. The disaster threatened their ability to resurrect their livelihoods.
- The pursuit of claims against the offending enterprise posed a particular problem. The presence of 'ambulance chasers' was one cause for anxiety. The contingency fee arrangements are opposed to Indian legal practice. Questions about the capacity of civil courts with jurisdiction over the disaster area to handle the over 5,00,000 claims that would be filed; the victims' ability to withstand the staying and

8 From the chargesheet filed by the CBI in the court of the 9th Additional Sessions Judge, Bhopal in Sessions Trial No. 257 of 1992, reproduced in *Keshub Mahindra* at 145.

9 Annexure I to Review Petition (Crl.) No. D 20073/97 in Crl.A.No. 1672-75/96 in the Supreme Court of India [hereafter 'Review Petition (Crl.)'].

10 Annexure II to Review Petition (Crl.).

11 See notice sent by Shahnawaz Khan, an advocate in Bhopal, dated April 29, 1983, Annexure V to Review Petition (Crl.) and the reply from J.Mukund dated April 24, 1984, Annexure VI to review Petition (Crl.). See also accidents cited in Judge Keenan's decision in U.Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case*, at 51, N.M.Tripathi Pvt.Ltd., Bombay (1986) (hereafter '*Inconvenient Forum')*; Justice Seth's judgment in U.Baxi and A.Dhanda (eds.) *Valiant Victims and Lethal Litigation: The Bhopal Case*, at 346, N.M.Tripathi Pvt.Ltd., Bombay (1990) (hereafter *'Valiant Victims')*.

fighting power of the corporation; the undeveloped state of tort law which had thus far not been challenged to handle mass torts; the process of discovery which would require access to premises and processes beyond the boundaries of the Indian state; taking an MNC to court and to make it submit to the jurisdiction of an Indian court; the enforcement of the court's order against an MNC - these issues demanded attention and answers.

In March 1985, a parliamentary legislation - the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 - was enacted. This Act enabled the Union of India to take over the litigation from the victims and to act on their behalf. Identifying the UCC as the chief adversary, the Indian state approached US courts for adjudication.[12] Judge Keenan of the US District Court in the Southern District of New York accepted the UCC defence of *forum non-conveniens* and sent the Indian government back to the Indian courts. While dismissing the Indian case, the court appended three 'conditions':

- That UCC shall submit to the jurisdiction of the Indian courts and shall waive the defences based on the statute of limitations.
- That UCC 'shall agree to satisfy any judgment rendered by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process.'[13]
- UCC was to be subject to discovery rules.[14]

A suit was filed in the District Court, Bhopal in September 1986. Even as the contest snailed its way through the legal process, on December 17, 1987, the District Judge hearing the case suo motu raised the issue of interim compensation, heard the parties as it ought in an adversarial litigation, drew statutory support from the Code of Civil Procedure 1908, and directed the UCC to deposit Rs.350 crores 'for payment of `substantial interim compensation and welfare measures' for the gas victims.'[15] UCC took this order in appeal to the High Court where Justice S.K. Seth, in an elaborate and reasoned order restated the law's position which permitted the court to award a reasonable sum in interim compensation, while he reduced the amount to be deposited by UCC from Rs. 350 crores awarded by the District Judge M.W. Deo to Rs.250 crores.[16]

The law required that the defendant, while appealing such an order, deposit the sum in court before the appeal will be entertained. Justice Seth of the Madhya Pradesh High Court had declared that the liability of the defendant UCC 'shall be final and conclusive as such damages and in case of failure on its part to deposit the same it shall be open to the plaintiff Union of India to execute this order as if it were a decree passed in its favour by the trial court.'[17] UCC, however, did not make any payments. It appealed to the Supreme Court protesting the orders requiring it to pay for interim relief to the victims. The Union of India does not appear to have protested at this breach, nor did the Supreme Court require the UCC to conform to this requirement of the law.

Even as arguments proceeded apace in the Supreme Court on the ordering of interim compensation, a court-endorsed settlement order was pronounced in the court on February 14, 1989. On February 15, 1989, a further order was passed and 'consequential terms of settlement' were filed by the parties to the settlement, viz. counsel representing UCC and UCIL, and counsel for the Union of India. The February 14 order set out the terms of settlement:

- UCC was to pay to the Union of India, before March 31, 1989, US $ 470 million in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas Disaster.'[18]

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12 The principal arguments advanced for and against the US courts assuming jurisdiction are found in U.Baxi and T.Paul (eds.), *Mass Disasters and Multinational Liability: The Bhopal Case,* N.M.Tripathi Pvt.Ltd., Bombay (1986) (hereafter '*Mass Disasters*').

13 Much was to be made of this due process requirement when the case was settled in the Supreme Court of India.

14 The judgment is reproduced in the second book of the Bhopal Trilogy, *Inconvenient Forum*. These conditions were modified by the US Court of Appeals for the 2nd Circuit by order dated January 4, 1987. It was explained that the second condition was superfluous, while the third condition would be subject to Indian law of discovery and reciprocity and equal treatment of both parties to the litigation. The third book in the Trilogy is *Valiant Victims.*

15 Reproduced in *Valiant Victims* at 338-83.

16 Id at 338-83.

17 Id. at 382.

18 *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674 (hereafter 'Settlement-Order').

- All civil proceedings related to and arising out of the Bhopal gas disaster were to stand transferred to the Supreme Court and 'shall stand concluded in terms of the settlement, **and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever they may be pending.**'[19]

On February 15, 1989, the Supreme Court directed:

- UCIL be joined as a 'necessary party'; the settlement order would include them in its ambit
- The $470 million would be paid before March 23, 1989 by UCC (US $ 425 million, less US $ 5 million which had been earlier paid to the International Committee of the Red Cross pursuant to judge Keenan's order dated June 7, 1985) and UCIL (US $45 million) at the prevailing rate of exchange.
- These payments would be made to the Union of India for the benefit of the victims of the disaster 'and not as fines, penalties, or punitive damages.'[20]
- Upon full payment, the Union of India and the State of Madhya Pradesh would take all steps to 'implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any corporation, company or person referred to in this settlement are defended by them (i.e, the Union of India and the State of M.P.) and disposed of in terms of this order.'[21] Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority were not to be proceeded with 'except for dismissal or quashing in terms of this order.'[22]
- By order of the District Court dated November 30, 1986 UCC had been required to give, and had given, an undertaking that they would keep unencumbered assets to the extent of US $ 3 billion - the claim in the suit. This undertaking now stood discharged.

The 'consequential terms of settlement' comprehensively 'extinguished' all claims and cases, future, past and present, against all persons and entities having to do with UCC, UCIL and UCE, within and outside India.

Judicial responses to the Bhopal Gas Disaster have thereafter been prefaced by the existence of this settlement-order. The order effectively forestalled challenges to the corporation's acts of negligence, commission and criminality. The adversaries in the ring were the victims pitted against the state (both Union of India and the State of M.P.). In the ensuing litigation, the court was constrained by the existence of the settlement order; law by judicial dicta has, in consequence, developed with the settlement-order implacably present as a fact to be taken into the reckoning. Matters of liability and safety have, therefore, not been developed in the three main streams of compensation-related litigation that followed (in the *Claims Act* case, the *Review Order* and the criminal proceedings).

On May 4, 1989, the Supreme Court, reacting to widespread criticism, attempted to explain its reasons for endorsing the settlement, and the basis on which the settlement amount was found to be reasonable. Citing the competing need for urgent relief to the victims of the disaster, the Court said:

'Even after four years of litigation, basic questions of the fundamentals of the law as to liability of the UCC and the quantum of damages are yet being debated. These, of course, are important issues which need to be decided. But, when thousands of innocent citizens were in near destitute conditions,…it would be heartless abstention if the possibilities of immediate sources of relief were not explored. Considerations of excellence and niceties of legal principles were greatly overshadowed by the pressing problems of the very survival for a large number of victims.'[23]

Where, even with the Indian state taking over the litigation to bolster the staying power of the victims, the Supreme Court found itself impelled to peremptorily conclude the proceedings in the interest of the victims, the possibility of principles to cover situations of mass tort committed by multinational enterprises emerging in the judicial arena begin to seem remote. The court, in explanation, alluded to:

19 Id at 675.
20 Id at 676.
21 Ibid Clause (3).
22 Id at 677.
23 *May 4 Order* at 42.

- the laws' proverbial delays
- the absence of a 'public supported relief fund so that victims were not left in distress'
- its 'judicial and humane' duty to secure immediate relief to the victims
- the negotiations in which UCC had pegged its willingness to pay a maximum settlement amount of US $ 426 million and the Union of India was unwilling to settle for less than US $ 500 million.[24]
- Its adoption of a higher standard than the income replacement principle which has been statutorily endorsed for motor vehicles accidents and workmen's injuries.

It would seem that the apprehensions articulated by the Indian state before the Keenan court were proved to have been real.[25] The court placed the onus on efforts to be 'to evolve a national policy to protect national interests from such ultra-hazardous pursuits of economic gains. Jurists, technologists and other experts in economics, environmentology, futurology, sociology and public health etc. should identify areas of common concern and help in evolving proper criteria which may receive judicial recognition and legal sanction.'[26]

In two other decisions in the Bhopal Gas disaster case, the anxieties, and aspirations, in law stand revealed. The first pertains to the litigation concerning the constitutional validity of the Claims Act, 1985. Victims' groups had challenged the Claims Act even in 1986, particularly since it in effect vested the power to litigate in the Union of India, leaving only a vestigial right with victims and victims' groups. The constitutional right of access to justice, linked up with the right to life which is compromised, or destroyed, in a situation of mass tort as in the Bhopal gas disaster was in issue. The February 14/15 orders brought into sharp focus the powers appropriated by the state to arrive at a settlement or compromise. That there were no requirements spelt out on consultation with the victims, and getting their consent, was bitterly contested in the Claims Act petition, when it was heard. The Union of India and the State government were perceived by victims' groups to be joint tort-feasors, and, burdened with the guilt, disabled from representing the victims.[27]

The judges appear to have been exercised by the tenuousness of the jurisdictional hold over the UCC and the enforceability of any altered decision. In the Claims Act 1985 judgment,[28] as also in the review petitions challenging the settlement-order,[29] the judges echoed and re-echoed this anxiety. The vaguely constructed fear that principles of liability - e.g., enterprise liability, or punitive damages - would not meet international standards, or the requirements of due process, dot the judgments. For instance, when it was suggested on behalf of the victims that, based on a 1986 decision of the Supreme Court in *M.C. Mehta v. Union of India*[30] (more of which later) that, to make damages deterrent, the capacity to pay of the delinquent enterprise be made the basis, a judge demurred, saying: '[E]ven if (this principle) is accepted, there are numerous difficulties in getting that view accepted internationally as a just basis in accordance with law.'[31]

Again, on punitive damages:

> 'Whether the settlement should have taken into account this factor is, in the first place, a moot question…[I]t is premature to say whether this yardstick has been, or will be, accepted in this country, not to speak of its international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick on another country.'[32]

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24 The court's order ultimately required the UCC to pay only US $ 425 million.

25 It must be said in fairness to the Indian judiciary, that the judgment of the District Court, and the High Court of Madhya Pradesh, do not reflect this despondency.

26 *May 4 Order* at 51 para 34.

27 More recently, in a decongestion of the city of Delhi, residents of slums whose homes had been demolished and who had been relocated in a distant site will find a host of chemical industries also being banished from within city limits to their new neighbourhood. See Sanjay Mehdudia, 'Plan to shift chemical units to Narela', *The Hindu*, Chennai, April 29, 2000 reproduced in *Corporate Environment Inc.*, April, 2000, 24. The relationship between state policies and victim vulnerability lends strength to this perception of the state as a tort-feasor.

28 *Charan Lal Sahu v. Union of India* (1990) 1 SCC 109 (hereafter '*Claims Act Judgment*').

29 *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584 (hereafter '*Review Order*').

30 (1987) 1 SCC 395 (hereafter '*Shriram Case*')

31 S.Mukharji,J. in the *Claims Act Judgment* at 704 para 122.

32 Ranganathan, J. in the *Claims Act Judgment* at 722, para 156

There was reticence about developing principles of liability to meet the *Bhopal* situation:

> 'There have been several instances where this court has gone out of its way to evolve principles and make directions which would meet the demands of justice in a given situation. This, however, is not an occasion when such an experiment could have been undertaken to formulate the *Mehta* principle of strict liability[33] at the eventual risk of ultimately losing the legal battle.'[34]

Reference to 'practical complications that may arise' as a result of setting aside the settlement[35] is implicit in most of the opinions rendered by the court. The court did find that not hearing the victims before arriving at a settlement had been a procedural irregularity. The settlement was, however, substantively found not wanting in the elements of justice. On the questionable proposition that 'To do a great right', after all, it is permissible 'to do a little wrong',[36] the court upheld the Claims Act 1985, while suggesting to the victims that they speak and be heard in the review petition.

The doubts that the Supreme Court, in particular, experienced about how proceedings in the Indian jurisdiction would fare when tested on the touchstone of due process, the conservatism of what was a generally activist judiciary (and that was one of the bases for returning the case to the Indian courts);[37] and the invisibility of the victim and the dominant pressure of the corporation meant that there was very little that emerged from the Bhopal litigation that could deter a potentially delinquent corporation.

The majority opinion in the *Review Order*, predictably, upheld the settlement-order, but with significant amendments. The immunity from criminal prosecution had caused an uproar, and that part of the settlement-order was assailed with particular vigour. The Supreme Court traced its power to quash criminal proceedings to a constitutional provision which allows it to do 'complete justice':[38] but it resiled from that part of the settlement-order anyway. All immunity from future prosecutions, which was part of the memorandum of settlement, too was deleted.[39] That there was no `re-opener' clause was held not to vitiate the settlement. Lump sum payments - 'a once and for all determination of compensation for all the plaintiffs' losses, past, present and future'- as opposed to split awards were declared to be the only form of compensation known to law, unless a statute provided otherwise.

Despite the court's stated concern for providing relief to the victims occasioning it to settle the matter in February 1989, the victims had not been identified and acknowledged nor their claims categorised. The question was who would bear the costs if the amounts exceeded the sum recovered from the UCC and UCIL. The majority judgment was that the Union of India, as a welfare state, should make good any deficit.[40] The minority opinion of A.M. Ahmadi, J., however, held: '[I]t is impermissible in law to impose the burden of making good the shortfall on the Union of India and thereby saddle the Indian taxpayer with the tortfeasor's liability, if at all. If I had come to the conclusion that the settlement fund was inadequate I would have done the only logical thing by reviewing the settlement…'[41] In the meantime the medical categorisation done by the Directorate of Claims showed an unrealistic figure of forty cases of total permanent disablement.[42]

Settlement has meant that questions of liability, of the accountability of economic centres of power and of hazardous enterprises have been left unattended. Matters of safety have not quite engaged the attention of the Bhopal courts. The suggestions that have been made at the various points in the proceedings have been therefore on matters concerning compensation and its disbursal. These include:

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33 A reference to the *Shriram* case, see infra.
34 Ranganath Misra, J.in the *Review Order* at 609, para 19.
35 Ranganathan, J. in the *Claims Act Judgment* at 728 para 164.
36 *Claims Act Judgment* at 705.
37 Keenan's decision e.g. *Inconvenient Forum* at 41: 'Plaintiffs present no evidence to bolster their contention that the Indian legal system has not sufficiently emerged from its colonial heritage to display the innovativeness which the Bhopal litigation would demand.'
38 Article 142 of the Constitution of India: *Review Order* at 635-38.
39 *Review Order* at 641.
40 Id at 682. So too Ranganath Misra, J. in the *Review Order* at 605.
41 Id at 694. Significantly, the victims groups maintain that as on April 2000, an amount of Rs.1,100 crores of the compensation money is still lying undisbursed with the Union of India even while the amounts actually awarded as compensation, without interest, is far less than the tariffs that formed the basis of the settlement figure: See Sudhir K.Singh, 'Union Carbide cash goes abegging', *Times of India*, Mumbai, April 21, 2000, reproduced in *Corporate Environment Inc.*, April, 2000, 23.
42 *Review Order* 681.

- Many domestic industries and transnational corporations (TNCs) are engaged in hazardous enterprises. There is no provision in law for compensation to be paid to 'outsiders'. This lack needs to be remedied.
- India has accepted the Code of Conduct for TNCs; this should be translated into law.
- Special procedures and a special tribunal should be established to avoid delay in compensating the victims.[43]
- An Industrial Disaster Fund should be established.[44]
- A fixed minimum compensation based on 'no-fault' liability should be provided in law to victims awaiting final adjudication of their claims.
- A special forum should be created to grant interim relief.
- Compulsory insurance against third-party risk be prescribed for industries and concerns engaged in hazardous activities.
- The law must provide for TNCs to be subject to the jurisdiction of Indian courts; their assets around the world should be reachable; and the decree enforceable.

Specifically relating to *Bhopal,* the Court ordered medical surveillance of the population to identify victims in whom the symptoms may manifest late, up to 15 years from the date of the accident.[45] UCC was asked to construct a hospital within two years from the treatment of the victims of the disaster.[46] A medical group insurance cover to take care of the contingency of prospective victims of the disaster was directed by the court.[47]

Even as the Union of India was battling in the courtroom to establish UCC's liability, and even before the courts pronounced on the need to make TNCs liable when engaged either directly, or through their subsidiaries, in hazardous activities in India, there was a significant, and quite contrary, amendment made to the Factories Act, 1948. In 1987, while effecting substantial changes to the Factories Act which were expected to improve the factor of safety in hazardous processes, a provision was introduced which appears to introduce immunity in a *Bhopal*-like situation. S.7B, while setting out the 'general duties of manufacturers etc. as regards articles and substances for use in factories', in sub-section (5) reads:

> 'Where a person designs, manufactures, imports or supplies an article on the basis of a written undertaking by the user of such article to take the steps specified in such undertaking to ensure, so far as is reasonably practicable, that the article will be safe and without risks to the health of the workers *when properly used*, the undertaking shall have the effect of relieving the person designing, manufacturing, importing or supplying the article from the duty imposed by clause (a) of sub-section (1) to such extent as is reasonable having regard to the terms of the undertaking.
>
> Explanation: For the purposes of this section, 'article' shall include plant and machinery.'

The provision follows closely the defence of the UCC in the suit proceedings[48] leaving little room for doubt the interests that engineered this change in the law. This provision provides a relatively simple means of distancing a corporation from liability. So it is reported for instance, that 'Du Pont having witnessed Union Carbide's litigation from the Bhopal disaster, had inserted clauses into the joint venture contract which exempted Du Pont from any liability for damages to people or property arising form a chemical accident or contamination.'[49]

Public Liability Insurance Act, 1991

Changes were brought into the law pursuant to the court's order too. In 1991, Parliament enacted the Public Liability Insurance Act (PLIA). This Act mandated every 'owner' of hazardous substance to take out a policy of

43 See also S.Ranganathan,J. in the *Claims Act Judgment* at 729.
44 *Claims Act Judgment* at 714. See also Mukharji, J. in the *Claims Act Judgment* at 708.
45 *Review Order* at 683.
46 The hospital is still under construction 16 years after the disaster.
47 M.N.Venkatachaliah, J., in the *Review Order* at 684-686.
48 See the written statement of Union Carbide in *Valiant Victims* at 33- 107.
49 Jed Greer and Kavaljit Singh, *TNCs and India*,PIRG (1996) at 34.

insurance. In the event of an 'accident', the victim (not including a workman) would be provided 'immediate relief' which would be payable on a no-fault determination; that is, the victim would 'not be required to plead or establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.'[50] The Collector, an administrative functionary, is authorised by the Act to entertain applications for relief. A schedule spells out the heads of compensation and the amounts that may become payable.[51]

The definition of 'accident' is striking. It is defined to mean 'an accident involving a fortuitous, or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to, any person or damage to any property but does not include an accident by reason of only war or radio-activity'.[52] The language of accidents, when it exists in such proximity to no-fault liability, is worrying from the aspect of safety, discovery and deterrence. The risk-spreading effect of insurance may also be seen as adding to the moral hazard inherent in insurance.

The PLIA has an interesting sequel. The PLIA in 1991 required all owners dealing with hazardous substances to get insured within a year of the commencement of the Act. This however did not happen. The insurance companies[53] would not agree to give insurance cover for unlimited liability of the owners. The Act had, therefore to be amended to limit the amount of the insurance policy; the owners' liability would continue to be unlimited.[54] In addition, an Environment Relief Fund (ERF) was set up. A sum not exceeding the premium payable would be paid by the owner into the ERF which could then be used, again, to provide immediate relief to the victims. If it still fell short, the owner would be required to make up the deficit.

The PLIA also empowers the central government or any person authorised by the central government to restrain an owner from handling a hazardous substance in contravention of any of the provisions of this Act.

National Environment Tribunal Act, 1995

In 1995, the National Environment Tribunal Act was enacted. This is to be a special tribunal expressly established to determine compensation under the PLIA, and to determine final compensation to victims of disasters caused by hazardous substances. The definitions, including that of 'accidents' reiterates those found in the PLIA. Here, too, a schedule sets out the heads of damages, though it does not set out any amounts that may be paid in compensation.[55]

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50 s.3(2).

51 PLIA, Schedule:
(i) Reimbursement of medical expenses incurred to a maximum of Rs. 12,500 in each case.
(ii) For fatal accidents the relief will be Rs.25,000 per person in addition to reimbursement of medical expenses, if any, incurred on the victim up to a maximum of Rs. 12,500.
(iii) For permanent total or permanent partial disability or other injury or sickness, the relief will be
(a) reimbursement of medical expenses incurred, if any, up to a maximum of Rs. 12,500 in each case and
(b) cash relief on the basis of percentage of disablement as certified by an authorised physician. The relief for total permanent disability will be Rs. 25,000.
(iv) For loss of wages due to temporary partial disability which reduces the earning capacity of the victim, there will be a fixed monthly relief not exceeding Rs.1,000 per month up to a maximum of three months; provided the victim has been hospitalised for a period exceeding three days and is above sixteen years of age.
(v) Up to Rs. 6,000, depending on the actual damage, for any damage to private property.

52 S.2(a). The exclusion of radioactivity is because it would be governed by the Atomic Energy Act which incidentally does not account for compensation to victims, nor for an enquiry in which the victims might hear or be heard.

53 Insurance was a nationalised industry in 1991. More recently, it is being gradually unbundled.

54 Statement of Objects and Reasons of PLI(Amendment) Act 1992.

55 National Environment Tribunal Act, 1995 : Schedule:
Heads under which compensation for damages may be claimed: a) Death; b)Permanent, temporary, total or partial disability or other injury or sickness; c) Loss of wages due to total or partial disability or permanent or temporary disability; d) Medical expenses incurred for treatment of injuries or sickness; e) Damages to private property; f) Expenses incurred by the government or any local authority in providing relief, aid and rehabilitation to the affected persons; g) Expenses incurred by government for any administrative or legal action or to cope with any harm or damage, including compensation for environmental degradation and restoration of the quality of environment; h) Loss to government or local authority arising out of, or connected with, the activity causing any damage; i) Claims on account of any harm, damage or destruction to the fauna including milch and draught animals and aquatic fauna; j) Claims on account of any harm damage or destruction to flora including aquatic flora, crops, vegetables, trees and orchards; k) Claims including cost of restoration on account of any harm or damage to the environment including pollution of soil, air, water, land and eco-systems; l) Loss and destruction of any property other than private property; m) Loss of business or employment or both; n) Any other claim arising out of, or connected with, any activity of handling hazardous substance.

A scrutiny of the schedule shows that many of the costs of accidents which had got excluded from consideration while settling the Bhopal case, and which therefore fell on either the victim or the state, were now taken into the reckoning. For instance, the expenses incurred by government to cope with the harm or damage caused by delinquent action is now an express head of compensation. When the Union of India gave an assurance in court that all the compensation recovered through the settlement would be deployed in compensating the victims, and that no part of it would be used to reimburse the government[56] it was without doubt an admission that the cost of the accident was not being passed on to the errant corporation.

There is little evidence of the further agenda of the court - of making the MNC take responsibility for its deeds, and pay without demurring when it is delinquent - having been pursued. The contrary is indicated in s. 7 B (5) of the Factories Act which has been adverted to earlier. The problems of jurisdiction, liability and enforcement of orders, which were encountered in considering the *Bhopal* case continue unmitigated. The court's suggestion that the Law Commission of India be set the task of finding the basis for damages, which should be statutorily fixed 'taking into consideration the nature of the damage inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such should also provide for deterrent or punitive damages, the basis for which should be formulated by a proper expert committee or by the government', continues unattended. The impetus given by the disaster, and later by the court, appears to have been inadequate.

The *Shriram* Principles

The *Shriram* case, differently from the *Bhopal* proceedings, did deal with matters of safety, liability, responsibility and principles of compensation.

On December 4, 1985 a day and a year after *Bhopal*, a major leakage of oleum gas resulted from the bursting of a tank containing the gas in the caustic chlorine plant, when the structure on which the tank was mounted collapsed. A large number of persons, including workmen and the public, were affected, and an advocate practising in the district courts which was in the line that the gas travelled died on account of inhalation of the gas. Within two days, on December 6, 1985, there was a further, even if more minor, escape of gas from the plant. It was then that the plant was ordered to be closed down.

There was a PIL pending in the Supreme Court since about June 1985 asking the court to order closure of the various units of Shriram since they were hazardous to the community. The question of relocation of hazardous industry was already being considered. The court ordered the closure of the plant appointed technical committees to report on its safety, and worked out the conditions before allowing the company to reopen its plant. Acknowledging the importance of any decisions made on matters of liability, responsibility and compensation to the *Bhopal* case, the court moulded the law to meet the needs of the *Bhopal* litigation too.

The court's directions have largely been incorporated into statute law, except, strikingly, for the principles of absolute liability and enterprise liability which the *Shriram* court set out.

Having found negligence in the management of the plant, which had resulted in the leakage of the gas, the court made the reopening of the plant conditional on:[57]

- An expert committee's report after its examination of the safety features of the plant
- A designated officer being personally responsible for a group of safety devices or measures, and the head of the caustic chlorine division being individually responsible for the efficient operation of the device/measure.
- The identification of critical and non-critical devices by the expert committee, and the shutting down of the plant if any device identified as critical is non- or mal-functioning.
- Weekly inspection by a Chief Inspector of Factories with the necessary expertise to inspect chemical factories, as also a senior Inspector of the Central Pollution Control Board (CPCB).
- Before the plant could be reopened, the court insisted, the management of *Shriram* would have to obtain an undertaking from the Chairman and Managing Director of DCM Ltd., which is a prominent industrial

56 *Claims Act Judgment* at 678.
57 *M.C.Mehta v. Union of India* (1986) 2 SCC 176 as amended by (1986) 2 SCC 325.

enterprise and the owner of various units of Shriram that, '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' he would be 'personally responsible for payment of compensation for such death or injury.'[58]

In its original rendering, the court extended this condition of personal liability to all officers in actual management of the caustic chlorine plant. Upon appeal by the company that that this condition of absolute unlimited liability would turn competent people away from employment in these positions, the court, albeit reluctantly, backed down somewhat. The condition was modified requiring the undertaking to be given by the officer designated as 'occupier' under the Factories Act 1948 and/or the officer responsible to the management for the actual operation of the caustic chlorine plant as its head. The liability was also limited to the extent of annual salary with allowances, unless the escape of gas occurred as a result of an act of god or sabotage or if he was able to show that he had exercised all due diligence to prevent such escape of gas, in which event he may be indemnified by Shriram.

- The court's condition that six representatives of the two trade unions be trained to keep a watch on the safety arrangements in the plant, was stoutly resisted by the management of the company. They contended that the Committee of Workmen could not possibly be trained to acquire sufficient knowledge to deal with the sophisticated safety devices, nor could they be permitted to leave their duties and go off on inspection without prior authorisation. But, as the court remarked,'(w)e do not subscribe to the view that workmen who have been working for years in a plant cannot acquire some elementary knowledge about the various safety devices in the plant. We have known of various instances where ordinary workmen, though not highly educated, have been able to acquire sufficient expertise, through long experience, in the operation of the machinery and equipment which they are working.'[59] The court's concession to the management's position was in requiring that four of the six workmen (two from each union) appointed on the Committee of Workmen should have experience of working in the caustic chlorine plant; and that they would go on inspection after a half-hour notice to the officer-in-charge so as not to disrupt the functioning of the plant by leaving their tasks untended.

- Every worker was to be trained and instructed on matters of safety in the plant. Given that it is likely that workers may forget the sequence of the steps to be taken to monitor, warn, avoid, control and handle any chlorine leakage emergency, refresher courses were to be conducted every six weeks. Management was also to ensure that safety devices were in fact used by workers, and regular medical check up of the workers carried out.

- A detailed chart was required to be placed in each department or section, as also at the gate of the premises, in English and Hindi, stating the effects of chlorine gas on the human body and informing workmen and the public as to the immediate treatment that should be taken in case they were affected by a leakage of chlorine gas.

In 1987 the Factories Act was amended incorporating a number of these conditions in the law.

Factories Act, 1948/1987

Even as the defence of distance from day-to-day functioning of the plant was taken on behalf of the directors of UCIL who had been implicated in the criminal proceedings arising out of *Bhopal*, the amendment to the Factories Act provided that 'in the case of a company, any one of the directors shall be deemed to be the occupier'.[60] Prior to this amendment, occupier was defined as 'the person who has ultimate control over the affairs of the factory.' And this could be an employee, designated by the management to be the occupier. With this deeming provision, the buck now stops with a director. It now appears that a Task Force on Administrative and Legal Simplification, constituted with leaders of industry[61] is asking that this onus on the director be dispensed with.[62]

A new chapter IV A has been introduced into the Factories Act on 'provisions relating to hazardous processes.' It provides for the constitution of Site Appraisal Committees, with representatives from the departments of labour,

58 Id at 198,199.
59 Id at 332.
60 s.2 (n).
61 Kumaramangalam Birla, Convenor and Nusli Wadia, P K Mittal and Ratan Tata, members.
62 'Editorial', Labour File, May, 1999, p.2. See also *J.K.Industries Ltd. v. Chief Inspector of Factories and Boilers* (1996) 6 SCC 665 where the court upheld the validity of the definition of occupier in s. 2 (n) of the Factories Act, 1948.

environment, meteorology, town planning, the State and Central Pollution Control boards, an expert in occupational health, and five other persons that the state government may co-opt on to the committee. The occupier of every factory involving a hazardous process is to disclose all information regarding dangers, including health hazards and the measures to overcome such hazards to the Chief Inspector under the Act, as well as to the local authority as well as 'the general public in the vicinity'. A detailed health and safety policy for the workers is to be communicated to the Chief Inspector of Factories and to the local authority even at the time of registering the factory; and they are to be informed of any changes made to the policy. An on-site emergency plan and detailed disaster control measures are to be drawn up and made known to the workers and to the people living in the vicinity of the factory, including in it the safety measures to be taken if an accident were to occur. Contravention of this mandate may entail cancellation of the licence to work the factory.

Measures for handling, usage, transportation and storage of hazardous substances within the factory premises, and their disposal within and without, have to be laid down and publicised among 'the workers and the general public living in the vicinity'.[63]

The occupier is charged with the specific responsibility of maintaining the health records of the workers, providing periodic checking for each worker both while in employment and after ceasing to work, to appoint persons conversant with the handling of hazardous substances, and to make all necessary facilities available to protect the worker in the workplace.

The central government is authorised to appoint an Inquiry Committee on the occurrence of 'an extraordinary situation'. Where standards of safety are not in place, the central government may have emergency standards laid down. A schedule appended to the Factories Act would indicate the threshold limits of exposure of chemical and toxic substances.

Adapting the *Shriram* dicta, the amendment now provides for workers' participation in safety management. Apart from providing for the setting up of a Safety Committee consisting of an equal number of representatives of workers and management 'to promote cooperation between the workers and the management in maintaining proper safety and health at work….'[64], the Act now also recognises a right in workers to 'warn about imminent danger'.[65] Where workers entertain a 'reasonable apprehension' that there is a likelihood of imminent danger to their lives or health due to any accident, they may bring it to the notice of the occupier, agent, manager or person in charge, and simultaneously bring it to the attention of the Inspector of Factories. Such person is to take immediate remedial action if satisfied of the existence of the danger and is to send a report on the action taken to the nearest Inspector of factories. If such person in authority is not satisfied about the existence of any imminent danger as apprehended by the workers, the matter shall nevertheless be referred to the nearest Inspector whose decision on the question of the existence of the danger shall be final.

Along with these amendments, the penalties prescribed for breach of the provisions of this law were also scaled steeply upward,[66] intending perhaps to develop the deterrence potential of the law. A shifting of the onus of proof was also effected when it was enacted that:

> 's.104 A: ***Onus of proving limits of what is practicable, etc.***-In any proceeding for an offence for the contravention of any provision of this Act or rules made thereunder consisting of a failure to comply with the duty or requirement to do something, it shall be for the person who is alleged to have failed to comply with such duty or requirement, to prove that it was not reasonably practicable or, as the case may be, all practicable measures were taken to satisfy the duty or requirement.'

The Factories Act relies rather heavily on regulation by the Factories Inspectorate. This has not proved to be particularly effective. The 1987 amendments do make some departure from this dependence when it provides a procedure for disclosure, or when it prescribes standards as in schedule of permissible levels of emission and in strengthening the potential for workers in participating in matters of safety.

The amendment is also the first acknowledgment of the extra-mural effects that may arise when a disaster happens. The Bhopal experience has been incorporated in seeing the relevance of the local authority, and the need to take persons living in the vicinity into the reckoning. In the thirteen years that the law has been on the statute book,

63 s.41B
64 s.41 G.
65 s.41H
66 s.92 and s. 96A.

however, *there is little evidence that it has made any significant change to the life of the worker or that it has decreased the potential for disaster.*

Liability and compensation in *Shriram*

The *Shriram* court, delivering its judgment on issues of liability and compensation, encountered a catch in the nature of a constitutional conundrum: would a writ under Article 32 lie for a violation of the right to life under Article 21 against the Delhi Cloth Mills Ltd., to which larger corporate entity Shriram belonged, a public company limited by shares? Would a private corporation like Shriram share the character of the state to be brought to bar in a petition made to the Supreme Court for violation of the right to life? The answers would have determined whether the court's dictum would have binding effect or not. While the court inclined to view that the disciplining force of Article 21 should extend to the corporation, it left the issue unresolved. This has created an obstacle course in the absorption into law of the principle expounded in *Shriram*. Both because no other, rational principles of liability and compensation have emerged, and because these principles find a place in the dictum of the Supreme Court, these principles do continue to exercise a persuasive influence.

On **liability**, the court held:

> 'We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity.'[67]

When hazardous or inherently dangerous activity is permitted to be carried on for profit, the law must presume that the permission is conditional on the enterprise absorbing the cost of accident. Such activity for private profit can be tolerated only on condition that the enterprise indemnifies all those who suffer on account of its activity 'regardless of whether it is carried on carefully or not.' This principle was also explained as being sustainable since it is the enterprise alone which has the resources to discover and guard against hazards or dangers to warn against potential hazards. 'We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for e.g., in escape of toxic gas the enterprise is ***strictly and absolutely liable*** to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher.*[68] '[69]

In an exposition of enterprise liability, the *Shriram* court asserted that the measure of compensation in such cases must be correlated to the magnitude and capacity of the enterprise 'because such compensation must have a deterrent effect.' Further, '[t]he larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity under the enterprise.'[70]

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67 *Shriram* case at 620-21.

68 1868 L.R. 3 HL 330.

69 *Shriram Case* at 421, emphasis added. *Rylands v. Fletcher* excludes from strict liability act of god, acts of a stranger, where the fault is of the person injured, where the thing which escapes is present with the consent of the person injured or certain cases where there is statutory authority.

70 *Shriram Case* at 421. In an earlier order, the court had ordered the management of Shriram to deposit Rs. 20 lakhs as security for payment of compensation, and to furnish a bank guarantee for Rs.15 lakhs in case there was any further escape of chlorine gas within the next three years from the date of the order resulting in deaths or injuries to any workman or to the persons living in the vicinity. The claims were settled in proceedings before a magistrate at the behest of the *Shriram* court.

The *Bhopal* courts, confronted with these principles after the settlement-order, exhibited a certain uneasiness. The *Bhopal* court which considered the Claims Act called it 'an uncertain promise of law' which, on the basis of the available evidence 'and on the basis of the principles so far established' it was difficult to see 'any reasonable possibility of acceptance of this yardstick.'[71] Elsewhere, the *Shriram* principle which might have arisen for consideration in a 'strict adjudication' was held to be rendered redundant by the settlement which notionally substituted the tortfeasor by the settlement fund 'which now represents and exhausts the liability of the alleged hazardous entrepreneurs, viz., UCC and UCIL.'[72] A judge even shrugged it off as being 'essentially obiter'.[73] This observation has, however, since been overruled and the *Shriram* principle affirmed and applied in a decision pinning liability on polluting private industrial units.[74]

Criminal liability

The proceedings in the Bhopal Gas Disaster cases threw up aspects of immunity from prosecution and criminal liability which yet await remedies. On December 3, 1984, the Station House Officer of the local police station suo motu registered a first information report. On the basis of the information available soon after the disaster, the case was registered under s. 304 A, Penal Code 1860, for causing death by negligence and not amounting to culpable homicide. There were 12 accused:

1. Warren Anderson, Chairman, UCC.
2. Keshub Mahindra, Chairman, UCIL.
3. V.P.Gokhale, Managing Director, UCIL.
4. Kishore Kamdar, Vice-President and in-charge of AP Division of UCIL.
5. J.Mukund, Works Manager of the Bhopal Plant.
6. R.B. Roy Choudhary, Asst. Works Manager, AP Division, UCIL at Bhopal.
7. S.P.Choudhary, Production Manager of the Bhopal Plant.
8. K.V.Shetty, Plant Superintendent of the Bhopal Plant.
9. S.I.Qureshi, Production Asst. at the Bhopal Plant.
10. Union Carbide Corporation (UCC).
11. Union Carbide (Eastern) Inc., Hong Kong (UCE).
12. Union Carbide India Ltd. (UCIL)

On registration of the crime Accused 5 - 9, stationed at Bhopal, were arrested. Warren Anderson, arrested on December 7, 1984, when he visited Bhopal was released on bail the same day, and had to be escorted out of the city by the Chief Minister of the day to protect him from the wrath of the citizenry of Bhopal. Keshub Mahindra and Gokhale too were arrested on the 7th. On December 6, 1984, the case was handed over to the Central Bureau of Investigation (CBI). It was three years later - on December 1, 1987 - that the CBI filed a charge-sheet in the Court of the Chief Judicial Magistrate (CJM), Bhopal. In 1989, the settlement-order quashed all criminal proceedings, and it was only after October 3, 1991, when the *Review Order* was passed, that the criminal proceedings were restored. The case was now split, and the cases of all other than Warren Anderson, UCC and UCE, all of whom had failed to appear or to be represented in the criminal proceedings, committed to the court of sessions. The charges laid against the accused were under Ss. 304 Part II,[75] 326,[76] 324[77] and 429[78] read with 35.[79] On

71 Mukharji, J. in the *Claims Act Judgment* at 704. There was anxiety too about acceptance internationally which has already been referred to.
72 M.N.Venkatachaliah, J., in the *Review Order* at 683.
73 Ranganath Misra, J., in the *Review Order* at 608.
74 *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212 at 242-243 (hereafter '*Bichhri Case*')
75 Of culpable homicide not amounting to murder, 'if the act was done with the knowledge that it is likely to cause death, but, without any intention to cause death, or to cause such bodily injury as is likely to cause death' the punishment may extend to 10 years, or fine, or both.
76 Of voluntarily causing grievous hurt by dangerous weapons or means.
77 Of voluntarily causing hurt by dangerous weapons or means.
78 Of mischief by killing or maiming cattle..
79 Common knowledge or intention.

April 8, 1993, the Sessions Judge, Bhopal framed charges against the Indian accused. They then moved the High Court of Madhya Pradesh for quashing the prosecution contending that the case for the prosecution did not even prima facie support the charges laid at their door. The Madhya Pradesh High Court declined the invitation to intervene, and the accused moved the Supreme Court.

The prosecution case is set out in the text of the Supreme Court's judgment. The relationship between the UCC, UCE and UCIL, the nature of MIC, the defects in design, the acts of omission and commission and before, during and after the disaster and the estimated damage caused by the disaster are in the prosecution's recital. The evidence collected during investigation, the prosecution said, 'proves that the accused persons had knowledge that by the various acts of commission and omission in the design and running of the MIC-based plant, death and injury of various degrees could be caused to a large number of human beings and animals.'[80]

Documentary evidence supporting the prosecution case was also filed in the court. The court sets it out. For instance: '…it was recited that in that Plant there were no facilities for collecting MIC produced separately in each shift and the material is directly laid into the storage tanks without batch wise analysis. It was also found that there are no on-line analyses. Similarly, nitrogen from a neighbouring factory is fed directly into the storage tanks, without full intermediate storage and quality determination…. The system of instruments for alarm to indicate sudden increase in temperature are not suited to the conditions of operation. Only a single refrigeration system for cooling the MIC in two tanks was installed and it had not been operated for some considerable time.'[81] And it goes on.

The only contention, as the court saw it, was that there was no prima facie evidence to show that appellants, or any of them, were in any way responsible for this unfortunate accident, 'which in their view was an act of god for which no human being was responsible.'[82]

The court took a strange view of things.

- Mere running of a plant as per permission granted by the authorities could not be a criminal act.
- Even if the plant was defective, and it was dealing with a very toxic and hazardous substance, the mere act of storing such material could not suggest that they had knowledge that they could cause death.
- There was nothing to indicate that the accused had knowledge that by operating the plant 'on that fateful night whereat such dangerous and highly volatile substance like MIC was stored' they were likely to cause death of any human being.

The court concluded that there was not even prima facie material to frame a charge of culpable homicide 'on the specious plea that the said act of the accused amounted to culpable homicide only because the operation of the plant on that night ultimately resulted in the deaths of a number of human beings and cattle.'[83]

It is difficult to see what would constitute 'knowledge' in the opinion of the court. Design defects, lapses in the operation of the plant, prior incidents of gas leaks and injured workmen, warning by the workmen to the management… Yet, the court was willing to attribute an absolving innocence to the Indian corporation (the non-Indian parties were still absconding) and its agents.

The charges were reframed, and s.304 A was held to apply to the facts of the case. s. 304 A defines the offence of 'causing death by negligence', and the prescribed punishment is 'imprisonment of either description for a term which may extend to two years, **or** with fine, or with both'. It charges the accused with, at the highest, having committed a 'rash or negligent act not amounting to culpable homicide'. This drastic dilution of charge has, it hardly needs to be said, reconstituted perceptions of responsibility of corporations and their agents. The relationship between foreseeability and 'knowledge' was, for instance, not even considered.

80 *Keshub Mahindra* at 149.
81 Id at 149-150.
82 Id at 151. This is an interesting defence, not only because of the various unattended defects the consequences of which could hardly have been unapprehended by the company, but because the UCC has been putting out a theory of sabotage, in its legal defence [see *Mass Disasters* at 27] as well as a web site it has created for its propaganda purposes.
83 Id at 157.

Since the material on record showed structural, and operational defects, a prima facie case under s. 304 A was made out, it was said. Accused 2, 3, 4 and 12 were lassoed under s.35 read with s.304 A.[84]

The prolonged gestation in the criminal trial is one manner of adorning the accused with immunity. As the years pass by, the evidence disappears. In an application made before the CJM, representatives of victims' groups have been alleging that the plant and machinery have been removed from the premises and sold. Injunction orders have been thwarted, even with the assistance of the apex judiciary. For instance, the shares of UCC in UCIL were injuncted from being sold or transacted by the CJM, Bhopal to ensure the presence of UCC at the criminal trial. (UCC, along with Warren Anderson and UCE, are proclaimed offenders.) On December 14, 1994, a bench of the Supreme Court acceded to the joint plea of Union of India and Sir Ian Percival, the sole trustee of the Bhopal Hospital Trust (BHT) which was established by UCC in London avowedly to set up the hospital that the Supreme Court had directed it to finance for the victims,[85] that the shares would be better utilised in aiding the financing of the hospital. The court does not appear to have asked why the UCC could find no resources otherwise. The shares fetched Rs. 290.2 crores, a large part of which have been diverted to the BHT. The purpose of the attachment by the CJM - of bringing UCC to court - has been virtually invalidated. The UCC, in the meantime, has managed to get away without making any contribution to the construction of the hospital.

Warren Anderson, UCC and UCE continue to be proclaimed absconders. Extradition proceedings have not even been initiated to bring them to trial, despite victims groups having persisted in their demand before the CJM that he require the Union of India to make an extradition request. The complicity of the state has shown through. The victims, having once been left out of the settlement process, continue to inhabit the sidelines in the criminal trial, since criminal trial is only prosecuted by the state; the victims are at best only witnesses - in this case, most victims perhaps would not be called upon even to testify. Criminal law continues to be deficient on how a corporation is to be punished,[86] and recent reports of the Law Commission of India on criminal law have done nothing to address this gap in law.

The device of the disappearing corporation was periodically used to pervert the course of the legal proceedings. UCIL one day became Eveready Industries India Ltd. after the sale of the shares to the Khaitan Group of companies. UCC then merged with Dow Chemicals to vanish into the mist. UCC created the BHT apparently to enable it to carry out the court's orders, only to hide behind BHT's coat tails while siphoning away the monies held as shares in attachment by order of the criminal court. UCE filed for Members' Voluntary Liquidation and vaporised into non-existence.

A case filed by the victims in the District Court of the Southern District, New York in 2000 based on

- the accused, including Warren Anderson and the UCC not submitting to trial in the criminal proceedings
- the Alien Torts Act and
- international human rights principles

was dismissed. Judge Keenan dismissed it as barred by the settlement, effectively sealing one more avenue that the victims might have hoped would lead somewhere.

The victims have had to bear a large share of the cost generated by the disaster. For instance, it is estimated that 92% of claimants for personal injury have received as low as Rs.15,000 as compensation. 30% of the injury claims have been rejected and over 200,000 claims remain to be decided.[87]

The state now talks of closing files and giving a finiteness to claims of victims who, according to the state's records, have not responded to summons. Lost files, unsent correspondence and the lack of access that victims have to their files has compounded the possibility of undetermined claims.

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84 The court also suggested that the trial court might consider framing charges under Ss. 336, 337 and 338, IPC with or without s.35. S. 336 - act endangering life or personal safety of others - punishable with imprisonment up to three months or fine up to Rs. 250 or both. S.337 - causing hurt by act endangering life or personal safety of others - punishable with imprisonment up to six months or with fine up to Rs.500 or with both; s.338 - causing grievous hurt by act endangering life or personal safety of others - punishable with imprisonment up to two years or with fine up to Rs.1000 or with both.

85 *Review Order* at 683-84.

86 s.305, Cr.P.C, while it indicates that a corporation may be an accused, explains little else of any significance in terms of conviction and sentencing of a corporation.

87 S.Muralidhar, n.3 supra at 32.

A hospital constructed for victims is not yet operational; and the construction of the BHT hospital is still underway. Research that had been undertaken by the Indian Council of Medical Research, and otherwise by the state, have ceased and there is no information reaching the victim on medical issues.

The hurdles to pursuing claims - the long wait, non-availability of expert evidence, the difficulties encountered in getting information on the status of a claim, the veritable absence of legal aid, corruption - have dogged the victims.

Straggling strands in the Bhopal litigation have remained untended. The Union of India's formulation of 'absolute multinational enterprise liability' has hardly been explored. It was articulated thus: 'A multinational corporation has a **primary, absolute and non-delegable** duty to the persons and country in which it has in any manner caused to be undertaken any ultra-hazardous or inherently dangerous activity. This includes a duty to provide that all ultra-hazardous and inherently dangerous activities be conducted with the highest standards of safety and to provide all necessary information and warnings regarding the activity involved.'[88]

Forum non-conveniens, the enforceability of foreign decrees, the standard of damages, the particularity of mass disasters and of toxic tort demand to be (re-) visited. Professor Baxi's attempt to introduce the notion of 'victimage'[89] demands attention. Lawyers have been debating the possibilities of the arrest of a corporation, and of `tacit hypothecation' which would enchain the offending plant and machinery to victims' claims and entitlements.

The questions that remain

The course of the Bhopal litigation was determined by factors beyond deterrence of potential offending enterprises, compensation and restoring to victims their lives and livelihoods, and punishment of the criminal and callous. Throughout the proceedings, a thinly veiled threat was held out that severe treatment meted out to UCC would deter other corporations from conducting business in India. The Indian state's policy drive — driven partly by ambition, and greatly by pressure from multilateral agencies — in the direction of inviting, even enticing, foreign corporations to establish bases in India was worked on to whittle down the negotiating power of the bureaucracy of the state.

The justification for laying aside concerns of deterrence, determination of liability, punishment and establishing norms of responsible conduct was found in the plight of the victims. The experience in Bhopal gives it a hollow ring:

- The victims had their right to be heard and to participate in the proceedings taken away by the state; the court heard them only as an afterthought, and after the settlement had brought the court's role into question.

- The battle over interim compensation was waged all the way to the Supreme Court; the court passed the onus of finding resources to pay interim compensation from the UCC to the state.

- The effect that: The takeover of the litigation; The substitution of the UCC by the settlement fund which was under the control of the state; The dilution of the criminal charges; The categorisation of claims and their quasi-administrative determination; The Rs.1100 crores of the compensation monies still lying undisbursed with the state; The arbitrary recategorisation of claims which reduces the compensation due to the victim; The disposal of claims through Lok Adalats (informal non-court procedures whose decisions are recognised by courts as binding between the parties) and the small amounts they have been awarded, without the component of interest - interest which the state has been earning on victims' monies!; have, for instance, had on victim identity, and victim compensation is yet to be studied.

These speak volumes about the position of the victim in mass disaster law. The right to be heard, the right to information, the right to medical care and treatment, the right to interim compensation, the right to a fair compensation through fair procedure, the justice in having an offender brought to trial - these have to be accounted for in any situation of mass disaster.

88 *Mass Disasters* at 5.

89 *Valiant Victims* at *liii*: 'who counts as a victim? In a body bearing multiple injuries, is each injury a unit for measuring relief or the totality of all injuries of which one body is the site? In assessing victimage, does one look at the one or the many? The way one conceptualises the notion of the victim will determine the measurement of victimage.'

'[T]he knowledge of ……what a tragedy can be caused by chemical industries' has entered judicial lore since Bhopal.[90] In at least one instance where the court was called upon to intervene, the contest was between residents of a locality in the outskirts of Mumbai and chemical industries located in their midst. The right to reside was pitted against industry seeking a buffer zone. Demonstrating unease at the risk posed by these industries, the court ordered: '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.'[91]

There is clearly a state of unpreparedness for another Bhopal.

III. CHEMICAL INDUSTRIES IN NON-ACCIDENT SITUATIONS

The law of 'accidents' emerged from the experience in *Bhopal* and *Shriram*. Parliamentary, and judicial, response delinked issues of safety and compensation. Safety was placed within the zone of regulation.[92] The principle of 'no fault', and its inevitable companion of insurance and risk spreading was located in the law, and the anxieties, particularly of the multinational, were allayed by providing an escape clause in the law which could act as a manner of immunity.[93] And criminal culpability has been reduced to an extent which renders it neither a serious deterrent nor provides an adequate punishment.

The treatment of chemical industries in non-accident situations has been significantly different. The law has developed partially through legislation, particularly the Environment Protection Act 1986 (EPA) and the rules that have been made to carry out the purposes of this Act.[94] More elaborate, and strident, have been the court's interventions, especially in matters of pollution; the preoccupation has largely been with riverine and groundwater pollution, and soil contamination. While clean-up technology[95] and pollution fine have been the court's preventive and punitive responses, the polluter pays principle has been introduced into the law by the court as a compensatory, and perhaps restitutive, remedy. Also, intended to be 'deep pocket', the `polluter pays' formula is expected to deter potential polluters from harbouring the hope that the costs of pollution can be externalised.

The tentativeness that characterised the court taking on the multinational has been absent in proceedings concerning polluting industries. The confidence of jurisdiction, and of judicial power as derived from Article 142[96] are evident in the orders of court. Most pollution-related cases were brought to the court as Public Interest Litigation (PIL).[97] A trait of PIL is the wide-ranging powers that the court may assume unfettered by private interest being in direct contention. The issue is brought to court by a public interest petitioner whose bonafides are tested on their not having a personal interest in the matter. The central and state governments are generally arrayed as parties, and they are expected to adopt a non-adversarial stance. While most pollution cases affect the interest of private persons and industry, it is on the state that the onus is cast to implement the orders of the court. The court has used

- closure as an interim measure generally till clean-up technology is put in place
- terminal closure and
- relocation

while dealing with polluting industry.

It is not uncommon to find the court dealing with a category of industries in an area rather than with a single polluting unit. For instance, in the *Vellore Tanneries* case,[98] the court orders encompassed all the tanneries in an

90 *F.B. Taraporawala v. BayerIndia Ltd.* (1996) 6 SCC 58 at 59.
91 Id at 60.
92 Essentially in the Factories Act, 1948.
93 S.7 B(5), Factories Act, 1948.
94 E.g., Hazardous Waste (Management and Handling) Rules, 1989 and Manufacture, Storage and Import of Hazardous Chemical Rules, 1989.
95 Particularly the setting up of the Effluent Treatment Plants (ETPs) and Common Effluent Treatment Plants (CETPs)
96 'Article 142: (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it…'
97 See infra for further discussion on PIL.
98 (1996) 5 SCC 647.

area in South India, including 59 villages affected by the tanneries.[99] The onus then shifts to individual industries to demonstrate that they were not offending enterprises and to engage with the government in determining their share of the costs generated by the pollution.[100]

A range of aspects of 'mass torts' is demonstrated in these cases. For instance:

- The large number of farmers, residents of the locality, resources including wells, rivers and soil which are affected
- The multiplicity of costs that the tort generates
- The offending activity being beyond the control, and often the knowledge, of the affected person
- The nature of continuing tort
- The difficulties inherent in establishing the line of causation as leading from the offending enterprise to the effect(s) it has had on the affected person or resource.

This is merely illustrative.

The concentration of hazardous industry in industrial belts and estates, or their mushrooming along certain resources - as it is in the cases of tanneries along rivers - is a feature that may acquire increasing importance; specially so, since the criteria now being adopted for hazardous industry (where, for instance, some industries will need to have a buffer of 1-5 kilometres with no human habitation) will inevitably lead to clustering of hazardous industry. An amendment that is being proposed to the Land Acquisition Act, 1894 (LAA)[101] now proposes acquisition of land for industrial estates reinforcing their strategy of creating industrial areas. There is an aspect of this manner of industrial development which may have an impact on the prevention of victim-creation and the laws of liability and compensation. In planning for industrial areas, it is hardly at all that the planning process reckons with the needs of industrial labour. There is little or no provision made for workers' houses. Industry too maintains a stodgy silence. Industrial shanty towns and slums are the inevitable result. Apart from everyday exposure to pollution, a hazardous episode can be expected to devastate the immediate community. The slums and shanty towns suffer under the vice (grip) of illegality and that makes the task of establishing their claims harder. Also, epidemiological basis of victim-identification not having been adopted into the law, each victim has to prove the legitimacy of their position as a victim. The cost of the accident is also calculated to be unreasonably low as the basic norm in law continues to be 'income replacement' which, in the case of the worker and of the workers' families who are likely as not to be in informal, even marginalised sectors, often adds up to insubstantial amounts. This has already been seen to have happened in Bhopal; yet no alternative formulae have emerged.

There is reason to worry that it may add to the irresponsibility of the corporation - both in its encouragement of the myth that industrial slums are unconnected with corporate enterprise, and in low costs that will be computed as payable by the corporation to victims of hazards.

Bichhri

The *Bichhri* case[102] is one instance of the 'woes of people living in the vicinity of the chemical industrial plants in India. It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialisation and export earnings.'[103]

Bichhri is a small village in the state of Rajasthan. Some time in 1987, Hindustan Agro Chemicals Ltd. started producing chemicals such as oleum and single super phosphate. Its sister concern, Silver Chemicals, and one

99 The order also covered six distilleries which were contributing to pollution of the river and ground water.

100 For e.g., in *Indian Council for Enviro-Legal Action v. Union of India* 1997 (1) SCALE (SP) 21 (hereafter the *Nakkavagu Case*).

101 This is a law under fire from NGOs empowering the state to coercively separate people from their land. Eminent domain, and 'public purpose' where the courts accept the declaration of the purpose of acquisition as being a `public purpose' and which then is treated as non-justiciable, are its prominent features. The purchase of land by the state on behalf of corporations has tilted the power equation further away from the people; protests have mounted on this effect of the law.

102 *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212.

103 Id at 217.

other concern, hastened the crisis when they went into production of 'H' acid.[104] Two other units manufacturing fertilisers and allied products were also located within the limits of Bichhri.

Untreated toxic waste waters, and untreated toxic sludge thrown about in and around the industrial complex polluted the aquifer and the subterranean supply of water. The wells and streams in the area had become unfit for human and cattle consumption and use. It was unfit, too, for the purpose of irrigation. The contaminated soil rendered it unfit for cultivation. The units had ceased to function since 1989, yet when the court passed its main order in 1996, the consequences of the pollution had not abated.

Early in the proceedings, the reverberations reached Parliament where a minister promised action; but little of note happened. 'The villagers then rose in virtual revolt leading to imposition of s.144 Cr. P.C[105] by the District Magistrate.' It was then that the unit manufacturing `H' acid was closed.

The case is a telling statement of causes that occasion virtual immunity to industry, and to the problem of damage beyond repair.

The weakness of the environment regime is patent. For instance, the culpable enterprises had been operating without clearances from the Pollution Control Board (PCB). They had, in fact, been functioning against directions to close down operations.

Swift and decisive action has not been the mark of PCBs in India. Governed by procedure, PCBs have been found, time and again, to be ineffective in the face of industrial pollution. This was witnessed in *Shriram*, where the court had to step in after two gas leaks had occurred - the PCB had merely issued show cause notices, and were awaiting Shriram's response. This has been witnessed too in the series of environmental cases that have since been brought to the court.[106]

The ineffectiveness of the PCBs provoked the *Bichhri* court to mood the idea that the heads of the units of industry and **of officers of agencies established as environment protection machinery** be held **personally accountable** for lapses or negligence in their units or agencies. Implicit in this suggestion are the doubts about the **willingness** of agencies, including the PCBs, to act to check polluting industry; a willingness that could be swayed by 'pressure from above', corruption or just callousness. It may however also be necessary to consider factors which determine the **possibility of performance of the role of a monitoring and regulatory authority.** Questions about the training imparted to regulatory personnel, the multiplicity of agencies concerned with industrial development and functioning and the relatively low priority often accorded to environment till devastation becomes impossible to ignore; the difficulties encountered in tracking down the specific source of pollution, and the extent of each unit's offending activity[107] before action can be initiated - these, for instance, may have to be answered to draw the divide between willingness and possibility. It may be hypothesised that it is a merger of the absence of will and of possibility of performance that has kept the environmental regime inert and ineffective.

Weak environmental regime in the developing world is commonly considered to be one of the reasons for locating hazardous industries in these countries. The cases that have reached the courts testify to this. The extent of devastation that occurs before action is initiated - and that has been often at the behest of courts - is significant. In *Indian Council for Enviro-Legal Action v. Union of India*[108] the pollution had caused losses estimated at, at least Rs. 1,39, 09, 737. By the time damage limitation was attempted, at least fifteen villages affected by the pollution had to have pipelines laid to get drinking water to them.[109] In *Bichhri* too, by the time the court swung into action, remedial measures called for

104 The manufacture of 'H' acid generates pernicious waste and, as the court acknowledged, its production is banned in the western world. The need, however, continues, and it is supplied by production in the developing world. 'H' acid, in this enterprise, was exclusively for export.

105 Under which a gathering of five or more persons is prohibited, ostensibly to maintain law and order.

106 See PIL - SCALE- Environmental Section.

107 A feature displayed in *Nakkavagu* where, responding to industries' plaint, the court ordered that there be apportioning of costs based on the proportion of damage caused.

108 1996 (5) SCALE 412. The court issued a series of directions in this 1990 petition which concerned large-scale damage to water sources and agricultural land due to untreated, or improperly treated effluents. It is hereafter referred to as the *Nakkavagu* case, as it revolved around the pollution caused to the Nakkavagu stream in the state of Andhra Pradesh.

109 *Nakkavagu*, 1998 (3) SCALE 664.

- dewatering of over sixty affected wells
- revamping the soil which had been contaminated by the abandoned sites.

Again, in *Vellore Tanneries* case[110] before the despoliation could be contained, 350 wells of the 467 used in the area for drinking water and irrigation were found to be polluted. Government had to provide 59 villages affected by the tanneries with alternative arrangements for drinking water.

Deterrence, therefore, has to be linked up with something other than regulation.[111] The punitive, restitutive and compensatory devices may have to be expanded to build in the component of deterrence. Industry that the environment cannot support may have to be outlawed. As seen in *Bichhri*, where production of 'H' acid was shifted to less rigorous environmental regimes, the notion of the 'banned' substance or process needs to be revisited.[112]

The irremediable nature of damage caused by waste haunted *Bichhri*. In an effort to limit the damage done, the court had ordered, besides dewatering the wells,

- Transport of the sludge to safer confines, and
- entombing the toxic waste that had been stored in and around the premises.

It was however recorded that 'the respondents did not comply with the direction to store the sludge in safe places. The dewatering of wells did not prove possible.'

In contrast with the timid *Bhopal* court, in *Bichhri*, the court established the 'polluter pays' principle in Indian law. The confidence of jurisdiction aided the court in asserting this principle in an *ex post facto* situation. As is the practice in matters requiring investigation, the court had appointed a specialist agency to report on the restoration of environmental quality to the affected area surrounding Bichhri due to 'past waste disposal activities.' After stating the conditions on the ground, the report had referred to the damage to the crops and the land and to the 'psychological and mental torture inflicted upon the villagers.' It had thereafter suggested that the polluter pays principle be applied, as 'the incident involved deliberate release of untreated acidic process waste water and negligent handling of waste sludge knowing fully well the implication of such acts.'[113] The report then suggested that compensation be paid

a) for losses due to damage and

b) towards the cost of restoration of environmental quality.

The total cost of restoration of environmental quality was worked out at Rs.3738.5 lakhs. The *Shriram* principle of liability was recommended in the report, and adopted by the court.

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110 *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647

111 See also *Andhra Pradesh Pollution Control Board v. Prof. M.V.Nayudu* (1999) 2 SCC 718 where the court concedes that most statutes relating to the environment and providing for appellate authorities fall short of a combination of judicial and scientific needs, and proceeds to illustrate this comment.

112 In *Drug Action Forum v. Union of India* (1997) 11 SCC 265 pharmaceutical industries dominated by MNCs, were found to be manufacturing and marketing drugs which are banned in the west. The Drug Controller appointed under the Drugs and Cosmetics Act 1940 is the sole functionary between permission and prohibition. Action was initiated by an NGO in the Supreme Court to introduce a leash of sorts into this situation. Apart from a ban on fixed dose combinations of Analgin known by any brand name, this 1993 petition continues undecided in the court. In *Stree Shakti Sanghatana v. Union of India* [W.P.(C) No. 680 of 1996 decided on August 24, 2000], women's activists battled in court and took to the streets protesting the introduction into the population control programme of Net En, manufactured by Schering AG, Germany marketed by German Remedies, and Depo Provera manufactured by Upjohn Co. USA and marketed by Max Pharma, India. After 14 years of a prolonged legal confrontation, the activists wrested from the government an undertaking that these injectibles would not be allowed for 'mass use' in the family planning programme, in the case of Depo Provera, and that Net En would be introduced 'only where adequate facilities for follow up and counselling are available.' This is a quote from the last affidavit filed by the Union of India on which basis the case was closed. It is significant that the pharmaceutical industry was not called upon to state their position. In *All India Democratic Women's Association v. Union of India* (1998) 5 SCC 214, challenged by activists in the Supreme Court, the central government undertook to take steps to ban the import, manufacture, sale and distribution of 'quinacrine' for use as a method of non-surgical sterilisation on women.

113 Quoted in *Bichhri* at 231.

The illegality of the entire operation made the case easy of resolution. It must therefore be said that, in *Nakkavagu* too, where between 22 and 37 industries were possible violators of effluent standards but were generally legally established, the polluter pays principle was advanced, the government made to deposit monies in the first instance, and the industries required to indemnify the government.

While principles of liability have been strengthened in these court calisthenics, the victims' position is still nebulous. In *Bichhri*, for instance, the affected villagers were advised to file civil suits to recover the compensation due to them.[114] They were permitted, by the Supreme Court, to file in forma pauperis, but presumably questions of causation and extent of liability would have to follow traditional expectations in civil suits. Delay, and expenses for legal assistance, it may be assumed, will be inevitable.

The polluter pays principle has developed as a means of reparation and compensation in *Bichhri* and *Nakkavagu*. In *In Re Bhavani River - Sakthi Sugars Ltd.*[115] the costs of restitution were sought to be extracted from the offending industry. *Sakthi Sugars* also saw a recognition of the costs of the process when, for instance, while sending the case to be monitored by the High Court, the Supreme Court directed that the cost of engaging lawyers to assist the court be burdened on the industry.

The *Vellore Tanneries* case[116] also had to do with untreated effluents, pollution of the river Palar, surface and subsoil water pollution and contamination of the soil. The device of interim closure till the setting up of ETPs and CETPs was used. In addition to reasserting the polluter pays principle, the court levied a pollution fine of Rs.10,000 from each unit. It is in setting out the precautionary principle including this, that

> 'where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent the environmental degradation,' and 'The onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign'[117]

that *Vellore Tanneries* builds beyond *Bichhri*. This has since been reasserted in *Andhra Pradesh Pollution Control Board v. Prof. M.V. Nayudu.*[118] Its translation into state industrial policy, or its empowerment of protesters, is not spotted with any ease. Quite the contrary, in fact. For, in December 1998, a bench of the Supreme Court cautioned lower courts not to entertain petitions seeking injunctions against 'projects', and warned that the escalation in costs would be foisted on the person or organisation stalling the project. Setting this lexical priority, the court's admonition was directed particularly against the public interest petitioner.[119]

Pollution-related law has developed, almost in its entirety, through PIL. Acting in its writ jurisdiction, the Supreme Court has exercised its extensive powers to mould principles and reliefs. It is difficult to foresee whether these products of an activist court will be applied to situations involving internationalised litigation, or whether the apprehensions evidenced in *Bhopal* will persist. In the rare case, an environment court has sentenced the manager of a hotel to five years imprisonment and a fine of Rs.5000 for discharging effluents into the Dhobi Sahi nala which flows into the Bay of Bengal.[120] Yet it must be said, the understanding of criminal liability is still in its nascence.

Relocation or closure of industry and the worker

Bichhri and *Nakkavagu* were concerned with the quality of life of the residents in the affected area, and with the livelihood losses of the farmer. The Delhi industries relocation matter[121] impacted upon the employment of workmen in industries.

A conflict of interest between livelihood and environment issues has emerged through the phases of the *Relocation* case. The large number of industries - estimated at 93,000 - in Delhi, many of them dealing with hazardous substances or/and processes, many operating illegally, was nudged into the court's presence. The Master Plan for

114 Order reported in 1997 (6) SCALE SP 17.
115 (1998) 6 SCC 335.
116 (1996) 5 SCC 647.
117 Id at 658.
118 Supra n.110.
119 *Raunaq International v. IVR Construction Ltd.* 1998 (6) SCALE 456.
120 Siraj Mohammed, 'Jail for polluting railway hotel's chief', *Hindustan Times*, New Delhi, January 19, 2000.
121 *M.C.Mehta v. Union of India* (1996) 4 SCC 351 at 370 (hereafter referred to as *Relocation*).

the city did not provide for the siting of these industries. The high levels of pollution, and the frequency of hazardous episodes, made drastic remedies inevitable. Relocation had already been mooted in *Shriram*. In a petition filed in 1985, the Supreme Court ordered the closure of all hazardous industry with effect from November 30, 1996. Negotiations then began, with and through the court, where industry worked at wringing the most they could as concessions from the state. For instance

- Industry converted the land on which it was situated into real estate, and the court endorsed the position that none should grudge the high profits they will make since they have contributed to industrialisation when that was the need.
- Industry was offered all assistance in the process of relocation. Initially there was no response from the industry, but the state was anyway asked to locate and make available land at reasonable rates to assist in relocation
- 'All assistance, help and necessary facilities' were directed to be provided to relocating industries. A single agency was to be set up by the four states where relocation was to happen, and a single window facility was to be set up.
- Incentives were directed to be offered to relocating industry.

And so on.

The workers had a different deal:

- The protection in the law against closure and retrenchment were overtaken by the order of the court.
- Their work was protected if they shifted to the relocation site. If they did not, they would be entitled to one years' wages beyond retrenchment compensation. Where the industries decided against relocation, the workmen would be entitled to six years' wages.
- Since many of the workmen, even those employed for years, had not been regularised, they were denied these protections too.

It is ironic that, while illegally operating industry had its interests carefully protected by the court, workmen were given short shrift. With environmental discourse acquiring dominance, the position of the worker has dropped many rungs in the lexical order. The *Relocation* case is an indication of the regressing status of the workman, particularly when pitted against industry, and the increasingly dominating concern of the environment.

Shrimp farmer and environment v. corporate interest

The ecological argument, however, helped the traditional shrimp farmer to save his livelihood from corporate interests.[122] Corporate inroads, as represented in the Alagarswami Report on which the court relied, included factors of drinking water problems and salination, the denudation of mangrove areas, loss of agricultural land, the rise of social conflicts… The non-traditional methods of shrimp farming were arguably ecologically destructive and highly polluting. The effects of commercial aquaculture were set out as causing social and ecological harm, and as economically not justifiable. The privatising of resources by corporate shrimp farms affected contiguous populations and, among other things, prevented access for fishermen to the sea. At one point in the proceedings, for instance, the court records from the report:

'The (commercial) shrimp farming (in Chilka lagoon) has resulted in several social problems viz.,

- denial of free access to fishermen
- denial of job opportunities
- conversion of agricultural land to shrimp farming
- social displacement

122 *S.Jagannath v. Union of India* (1997) 2 SCC 87.

- salination of groundwater
- reduction in grazing ground of cattle, and free access to creek/estuarine water.'' [123]
  And so it goes on.

The clash between the traditional shrimp farmer and the corporate farmer, including several MNCs, have raised questions of equity, and of sustainability. The traditional method has scored on each count. Equity alone has, however, not managed to win any battle yet. The reordering of priorities which environmental concerns have effected accounts quite considerably for the court's empathy with the small farmer. In this case too, the precautionary principle and the polluter pays principle have found utterance. The record of enforcement against the large corporates and the MNCs remain inaccessible; its efficacy in taming adventurers for profit is therefore yet undefined.

The EPA has been in place for 14 years now. The development of law has, however, been in the arena of the court, in PIL.

Hazardous industry, particularly chemical industry, has been most frequently brought to court as 'rogue industry' and delinquents. Untreated effluents, and toxic waste disposal have dominated the discourse, but the ecological, and social disruption that accompanies corporate entry into partaking of other resources - as seen in the instance of shrimp farms - has also been addressed. The polluter pays principle, the precautionary principle and levying of pollution fine now stand insinuated into Indian law. The *Shriram* principle of strict and absolute liability has been affirmed, though enterprise liability, where the extent of damages will be determined by the capacity of the industry to pay (thereby making larger enterprises liable to greater order of damages), has not been applied. Significantly, whether a private corporate entity can be subject to the compensatory writ jurisdiction of the court an issue that was raised and explored but left unresolved - in *Shriram* - has been raised again in *Bichhri*, but left unanswered. The court has instead taken the government agencies to task, calling upon them to take remedial action, and deposit monies due in damages, and requiring that they thereafter recover the monies from errant industries. While Indian industry may be pursued to effect recovery, this formula developed by the court clearly does not account for multinational account rendition.

The manufacture of substances banned where environmental controls are more rigorous has been surfacing. It has also been challenged by activists where drugs banned in other jurisdictions have been introduced into the Indian market, even into programmes of 'social marketing'. At its most severe, courts have banned certain formulations; and have in the same breath acceded to the pharmaceutical companies' request for permission to export it to other countries where the ban does not yet exist. The opportunism of industry is not likely to be curbed by this soft approach. The impunity with which the transnational enterprise is allowed to go market shopping is breathtaking.

It is evident that the threat of imposition of damages is an unlikely deterrent. Insurance, and the promise (and realisation) of profits, have made damages unthreatening. Responsibility for actions, especially where there is foreseeability of possible consequences, and culpability, have to be factored into law; but this is yet to happen. The possibility of preying on weak environmental regimes, and invading markets which lack in stringent regulatory and deterrent mechanisms, exists. The capacity to escape beyond the boundaries of jurisdictions of courts and enforcement agencies aggravates the problem when the offender is an MNC - a spectre that acquired substance with *Bhopal*.

IV. CORRUPTION, THE STATE AND THE CORPORATION

The opening up of the economy by lifting investment restrictions has marked the years since the mid-1980s. The entry into the World Trade Organisation (WTO) and GATT world - a decision by the executive arm of the state which did not require parliamentary approval or popular endorsement since the constitution treats this as a matter of policy which is in the exclusive field of the executive[124] - has added multilateral pressure to the race to liberalise. The 1990s was witness to the hard sell that state governments embarked on, with ministers and their chiefs visiting countries in the developed world enticing multinational industry to export technology and capital to their home soil. The rules, settled over the years and constructed on suspicion of potential corruption and 'extraneous

123 Id at 119.
124 See *P.B.Samant v. Union of India* AIR 1994 Bom 323.

considerations', have been abandoned to let in a culture of behind-the-scene negotiation. As part of the invitation to invest, guarantees and counter-guarantees have begun to be given by state governments and the centre to multinational capital, even as rules concerning the repatriation of profits have, for instance, been re-worked. It is not only the potential for market expansion that is expected to draw MNCs to the developing world: it is cheap labour and fewer health and environmental regulations than in their parent countries.[125] The labour standards and protection carefully garnered over the years have begun to be dismantled, competitiveness being the new *mantra*. Further, liberalisation has meant that the movement of technology into the country is conditional on the entry of the multinational which holds the technology, altering the parameters of the `transfer of technology'.

The dismantling of the licensing laws, and governmental involvement in inviting, and guaranteeing, of multinational investment and industry has taken away the relative neutrality of government and aligned it with industry. The internationalising that results from the contracts entered into between the state or its instrumentalities and the MNC takes the effects of the contract beyond the control of local populations; there is in fact a definite exclusion, which is aggravated by the lack of transparency in negotiating with the multinational.

This opacity and the flexing of rules of transaction of business give rise to a piquant situation. The central issue in *Center of Indian Trade Unions v. Union of India*[126] was corruption. In the years of the last decade, the omnipresence (and omnipotence) of corruption has been acknowledged as fact, and a few battles have commenced to render corruption, more particularly political corruption, impolitic and unprofitable. Indian law, with its web of sanction to launch prosecution and the 'good faith' presumed when a public servant acts, has been partial to the corrupt. PIL has however made corruption justiciable, and, in spurts, courts have waded into the issue with enthusiasm to curb the corrupt. There has, of course, been little tangible that has resulted from these judicial forays; it merely served to raise the ire of the politician about judicial activism!

Liberalisation in the power sector has been aggressive state policy for some years in the recent past. In 1993, the Maharashtra State Electricity Board (MSEB) and the Dabhol Power Co. in which Enron, a US multinational, held majority shares, entered into a power purchase agreement (PPA). The avenues for challenge are few, since these are matters within the executive domain; popular protest is one means of opposing projects, PIL is another. Public interest petitioners, some of them members of an opposition political party, approached the Bombay High Court, and the Delhi High Court, inter alia challenging the award of the contract to Dabhol without competitive bidding through global tenders, and that the whole process was shrouded in secrecy. The courts reiterated the power of the executive to determine policy, and to act in furtherance of it; such decision or action of the executive would not be justiciable.

This deference to executive power in policy-making has, it must be recognised, privileged the contracting corporation since it now contracts with the state, and it is the state which is also the policy-maker. It also curtails the democratic spaces for challenge and protest, and for demanding information and accountability. The era of liberalisation has been punctuated by such abdication of jurisdiction. Presumably this represents inversion of the New Deal experience, with courts adopting 'pragmatic' standards in judging conflicting interests.

The turn the Dabhol case took hurtled into prominence this issue of unquestioned state power, as represented in executive decision-making.

In February 1995, the PPA was made an election issue by the opposition combine of Shiv Sena - BJP which had been carrying on a tirade against the ruling party on economic and chauvinistic grounds, and imputing foul play. In March 1995, this opposition combine won at the hustings and assumed office. In May 1995, a cabinet sub-committee headed by the Deputy Chief Minister was constituted to investigate the PPA. The committee reported in July 1995. The report contained statements such as these:

'The conduct of the negotiation shows the sole object was to see that Enron was not displeased - it is as if Enron was doing a favour by this deal to India and to Maharashtra.'

' It is this one to one dealing with Enron and absence of competition that led to secrecy and lack of transparency in the negotiations and handling of Rs. 10,000 crore contract. As a result…., the state government could not resist successfully the insistence of Enron on confidentiality of negotiations for commercial or other reasons and ultimately this resulted in an uneven agreement.'

125 See *TNCs in India*, 1996, PIRG, New Delhi
126 AIR 1997 Bom 79

Opposition to the project and suspicion about the process was precipitated, and bolstered, by a statement made by Ms. Linda Powers, Vice President, Global Finance, Enron Development Corporation before a committee of the US House of Representatives. She said that Enron had spent an enormous sum, approximately US $ 20 million, on 'education' and 'project development' - terms which are acknowledged euphemisms for grease money.[127]

The Chief Minister of Maharashtra thereafter lambasted the PPA on the floor of the House, repeatedly insinuated that bribes and corruption had been its advocates, and announced the government's decision to cancel the second stage of the project.

In September 1995, the government filed a suit in the Bombay High Court seeking a declaration that the PPA, the state government guarantee and the state support agreement were invalid and void on the grounds of fraud and misrepresentation on the part of Dabhol and being in violation of public policy. Allegations of corruption, bribery and fraud were levelled against Dabhol, Enron and a variety of authorities.

In the meantime, the proposed cancellation of the contract led Dabhol to initiate arbitration proceedings in London under the arbitration agreement which was part of the contract. The state government vigorously reasserted the allegations of payments made as 'illegal bribes', and argued that

'A contract procured by a bribe is illegal and void both under English and under Indian law. The effect of that is to render the PPA illegal and void.'

Even while the suit and the arbitration proceedings were pending, the state government did a volte face. They constituted a 'negotiating group' on November 8, 1995 with the express intention of reviving the Dabhol project. By November 15, 1995, they had renegotiated the contract with Dabhol - with some concessions on tariff and absolving the government of the cost of the suspension of the project and something on environmental protection - and by November 19, 1995 the negotiating committee was recommending the revival of the project.

This turnabout, so thoroughly inconsistent with the government's position so far, raised a lot of dust. A second set of PILs were, inevitably, filed on the basis of the government's own stances in the sub-committee report, on the floor of the House, in the suit in the High Court and in the arbitration proceedings in London.

Confronted with the blatant contradictions, counsel for the state of Maharashtra took an astonishing stand. The allegations of bribery, corruption, fraud and misrepresentation, he said, were, really, wholly unfounded and baseless. They were made only to aid the scrapping of the project, which was an electoral promise.[128] There was not an iota of evidence to back these charges, he said. The whole exercise, he asserted, was motivated by the desire to wrest some concessions from Enron by way of reduction in the capital cost of the project and the tariff, and to get out of the stringent clauses of the agreement.[129] The suit in the High Court, he explained, was filed to get out of the serious legal implications of its decision to scrap the project - which, of course, he had said in another breath had really not been intended to be scrapped - and the huge damages which might have been saddled in the arbitration. In his ascent to new heights of absurdity, the counsel described the scrapping of the project as actuated by 'political compulsion', and the resurrection of the project as 'an act of sober statesmanship'.[130]

The court was scathing of the government, but yet declined to exercise its jurisdiction. '[I]t is not within the domain of this court in exercise of its power of judicial review to examine the merits of the decision of the government ', the court said. 'That will amount to sitting in appeal over governmental decision which is not permissible.'

Counsel for Enron invited a sermon from the bench when he asked the court to consider the wrong visited on Enron. '[M]ultinationals who want to invest in developing countries should not indulge in tall talk about educating the people of those countries', the court lectured.

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127 This was later reinterpreted by a representative of Dabhol/Enron while tendering an apology: 'We have publicly said that the words used (by Ms.Linda Powers) were inappropriate and could be misconstrued…The full sentence that was used in the testimony was that this was a learning process for all the parties involved.' quoted at id. 108.

128 The fact was that the project was never scrapped; it was only suspended.

129 The petitioners contended the contrary. They claimed that the modified PPA gave more to Dabhol and Enron than the original PPA. For instance, they averred that Dabhol was being allowed to set up a project larger in size than both phases of the original project taken together. And that the tariff figures were exercises in jugglery, and a mere eyewash.

130 Id at 105.

The story on the surface is bizarre. That does not help to obscure the helplessness of a bewildered public, rendered passive by the silences in the law. There is no right to information given by law, and courts too have often exhibited a reticence in calling forth information. In the Dabhol- Enron case, for instance, the court dismissed the petitions because they had been unable to bring any material on record to justify their allegations of bribery et al. They had ridden in on the statements of the Chief Minister, the deputy Chief Minister and the state's affidavit filed in proceedings in court and before the arbitrators. This was insufficient substantiation; and the court did not ferret any further. The suggestion that the state and its agents be hauled up for perjury was gently brushed away. The Supreme Court too has refused to enter into the question of the validity of the project 'since it is not in public interest now to reopen the question which has been considered by the courts earlier on several occasions.'[131]

The matter is however pending in the Supreme Court, but limited to questioning the accountability of the state of Maharashtra for its conduct through the proceedings.[132]

Dabhol-Enron has not been the only instance where corruption was apprehended. Cogentrix, another US multinational, which contracted with the government of Karnataka to set up a thermal power plant in what is arguably an ecologically fragile area, was suspected to have employed 71.8 million Hong Kong dollars in 1995-96 in avenues of corruption in connection with the project. The Supreme Court, however, was unimpressed by the leads provided by the public interest petitioners, and they were brushed aside.[133] Peoples' protests, and comprehensive petitions documenting the environmental damage that the project would cause were stood down by Cogentrix, which also brought in the China Light and Power (International) Ltd. as an equity holder. After government and the courts had endorsed the project on the basis, inter alia, of the competencies of Cogentrix which it had claimed in protecting environmental pollution and damage, Cogentrix abruptly withdrew from the project.[134] The last straw appears to have been another in a series of PILs filed in the Supreme Court challenging the project, and alleging that Cogentrix had given bribes to get the project.

In PIL, the state inevitably acts as a buffer between the industry or enterprise and the court, since the constitutional scheme is clear in the matter of calling the state to account when constitutionally protected fundamental rights are violated. The corporation is still in a hazy zone when it is a matter of being challenged in a writ - which is the jurisdiction in which PILs are brought to court. With the state becoming a contracting party in the liberalised era, which it invariably is in projects where large-scale investments are proposed, the corporation is rendered more distant still. The wooing of the multinational is also inconsistent with the organs of state demanding that they answer the charges against them.[135]

Corruption, it is feared, is not only a convenient means of entering the economy. It could also be the price of concessions, terms and immunities which will protect the corporations. There is too the probability that a project tainted by corruption may heighten the states' resistance to heeding people's voices; a resistance that has already been raised by the priority accorded to multinational investment as an essential aspect of liberalisation.

V. OF SEEDS AND SALT

The GATT negotiations left deep furrows of doubt about the capacity of the state to resist the pressures of multilateral agencies, including the formidable Bretton Woods institutions. There are also doubts about the states' desire to contest the illusions of the level playing field and breaking down of trade barriers which have been generated through the period of establishing the new economic world order. The choicelessness, either real or assumed, that the Indian state exhibited in the lead up to signing the GATT instrument, and interpretations that have emerged of the altered nature of sovereignty of the state, have significantly changed the manner and target of resistance. The MNC is perceived as having engineered, and acquired, a licence to legally invade and control economies. Having signed the GATT treaty, and the supranational WTO exercising the power of judgment and punishment, the Indian state, it is apprehended, has allowed for a re-defining of its role. It is now to ensure that the Indian market permits

131 *Centre for Indian Trade Unions v. Union of India* 1997 (4) SCALE SP-16.
132 Ibid.
133 *State of Karnataka v. Arun Kumar Agarwal* (2000) 1 SCC 210.
134 Sunil Jain, 'Cogentrix says enough is enough; walks out', *Indian Express*, December 10, 1999.
135 In the case of Enron - Dabhol, for instance, the alleged bribe-giver was, at the most, subjected to a rebuke at the tail end of the proceedings. And the complaint was not even investigated.

free ingress and egress of the multinational and to aid in protection of multinational enterprise and capital. Visions of economic imperialism acquire form in the protests against this role for the state.

The state, necessarily allied with multinational interest in this new dispensation, is not seen as having either undiluted will or the capacity to protect the ordinary citizen, the small-scale industrialist or the farmer, for instance, from the might of the multinational. MNCs, in their turn, are identified with profit seeking, capturing markets, not losing sleep over the small person's interest, and using the state to serve their ends. *Bhopal* has augmented the reputation of the multinational as an evader of the law when things go wrong. There is an inequality, as well as an inequity, that movements against MNC entry are clear exist. Direct action, in the form of protests, demonstrations, picketing, ransacking and browbeating of multinational corporations have become more common in the past decade.

Since MNCs have a proven record - at least once, rather patently in *Bhopal* - of acquiring a status above the law, the protests are directed at keeping them at bay. MNCs are also believed to increase inequity; and when the issue is of seeds for the Indian farmer, and salt, the issue is inevitably volatile.

Even as the debate rages in Europe about the genetically modified organisms taking over farmers' fields, Monsanto has made a bid for introducing its GM cottonseed to the Indian farmer. In 1998, the company began small-scale field trials of Bt cotton in Andhra Pradesh. Bt cotton is said to fight the bollweevil, a common cotton pest which inflicts heavy damage on cotton crops.

The trials met with stiff resistance from some farmers' unions and environmentalists. Among other apprehensions about the introduction of this genetically engineered seed, was the fear that it held the terminator gene, which terminates the germination of the seed after one time usage.[136] The debate is set to be restarted with the Genetic Engineering Approval Committee of the Ministry of Environment and Forests clearing the decks for large-scale field trials of the cotton. The Maharashtra Hybrid Seed Co. (MAHYCO) - Monsanto joint venture has been given permission for trials on 85 hectares of land and seed production, on 150 hectares of land.[137]

The 1998 trials were challenged in the Supreme Court by the Research Foundation for Science, Technology and Ecology (RFSTE), where they remain pending even as the fresh trials have been authorised. The Ministry of Environment and Forests is a party to the proceeding in the court, but it has neither asked for early resolution of the case, nor has it allowed itself to be inhibited by it. Vandana Shiva, the environmental activist who leads RFSTE, has questioned the legality of the MAHYCO trials, describing these as 'illegal' and 'unscientific'. She asserts that her organisation's survey contradicted claims of efficacy of the transgenic Bt cotton.[138]

Seven academies of science around the world - from Brazil, China, India, Mexico, UK, the US and the Third World Academy of Sciences - have cautioned about the need to put health regulatory systems in place in every country to monitor adverse health effects of transgenic plants. In a White Paper released at the Indian National Science Academy in Delhi, the group said that no human health problems had so far been identified after over 30 million hectares of transgenic crops had been grown; but fears exist that food products from transgenic crops could cause allergic reactions. So also fears about antibiotic resistance.

In India, the resistance to genetically modified organisms (GMO) is based primarily on:

- considerations of equity, and
- dependence on a multinational for a farmer's basic seed needs.

The growth of the population beyond the one billion mark causes the proponents of GMO to find in it an answer to increased food requirements. Critics are however quick to point out that it is not empty granaries which makes 1/3rd of the Indian people sleep hungry;[139] it is a deficient distribution system, and the low purchasing capacity of the impoverished Indian which results in hunger. The question also is not whether modern agricultural biotechnology has the ability 'to produce more food, more economically or even ecologically, but its threat to displace the already marginalised and poorer sections of society.'[140]

136 Vidya Deshpande, 'Transgenic cotton grabs headlines again' in *Financial Express*, Mumbai dated July 30, 2000.
137 Radhakrishna Rao, 'End of a controversial Research Project' in *Business & Political Observer*, New Delhi dated June 28, 2000.
138 'NGOs Flay Government clearances for transgenic cotton trials' in *Daily Excelsior*, Jammu dated July 21, 2000.
139 Hindustan Times article on giving it for free
140 Joseph Vackayil, 'Stopping the biotech colonisation' in *Financial Express*, Mumbai dated August 13, 2000.

While some warn that '[a]n insistence on extreme precautionary principle by societies can deny the benefit of these products,'[141] others would say that 'GMOs are being pushed by large corporations. As the power of these corporations have grown so have the inequalities in this world'[142] adding: 'This is an era of market fundamentalism.'[143]

Part of the problem is that there is very little information available on which to base decisions. There are no regimes of accountability which have been developed in the event that information that is available and relevant is not shared or disinformation spread. There are few who doubt that the bottom line of the MNCs is profit, and that seems an unlikely motivation to lay facts bare where they do not suit a corporation.[144] The privileging of trade and industrial secrecy, which has been heightened in the recent prioritising of intellectual property rights, bolsters the right of a corporation to maintain silence when they should speak.

The protestors who stormed into the Bangalore office of Cargill Seeds India Pvt. Ltd. and ransacked it were however clear that the GATT negotiations with its new patent regime would enable MNCs to strengthen their control over the world's seeds business.[145]

The Monsanto and Cargill experiences also bespeak of the reducing spaces for people who make decisions which vitally affect their lives and livelihoods. A farmers' jury held at BG Kere in Chitradurga district of Karnataka between 6 - 10 March 2000, for instance, concluded that extensive field trials of 5-10 years should precede the release of seeds into the market; that the focus of all programmes of development should be self-reliance; that innovations in agriculture should ensure the farmers' right to save, breed from and exchange all seeds; if the seeds were to fail for any reason which had to do with the technology itself or weather conditions, the MNCs should not only compensate for the losses, but also buy up the crop at double the price.[146] The response from Monsanto is interesting. A proportion of the farmers had said they were afraid of any contact with the MNCs, having heard about them in the context of WTO and patents. They feared that powerful MNCs which develop seeds in laboratory conditions would gain control over seeds and farmers' sovereignty: 'Farmers should be more concerned about the technology rather than who is providing it. MNCs may provide technologies that may enable local companies to produce new seeds and help local farmers.'[147] On the question of compensation, there was a limited response: 'It is unreasonable to hold companies responsible for crop failures due to weather conditions.'[148]

This potential to participate in decision-making that was explored in the farmers' jury, and getting informed through open processes, is however not a part of state policy. The recent permission to hold trials of GM cotton has, for instance, been bureaucratically determined, with no farmer involvement.

Salt manufacture

In 1992, Cargill's proposal to produce salt on 15,000 acres of land belonging to the Kandla Port Trust in Kutch region of the State of Gujarat, rang alarm bells.[149] It was the Kutch Small Scale Salt Manufacturers Association (KSSSMA) which alerted its members and obtained a stay from the Gandhidham Civil Court in February 1993. The Kandla Port Trust was injuncted from handing over the 15,000 acres of land. Among the chief concerns of the KSSSMA was the fear that Cargill would swamp domestic producers' business out of existence. Salt manufacture has symbolic significance in India, with Gandhiji having undertaken the Dandi March in 1931 to defy the British tax on salt. The protest against Cargill expanded into a movement with social activists, politicians and trade unions, students, freedom fighters and NGOs getting into the act. Satyagraha was embarked upon in which about 8000 protesters participated over a period of a few months. An Ulta Dandi march (reverse Dandi march) was

141 Dr.C.S.Prakash, Director of the Center for Plant Biotechnology Research, Tuskegee University quoted in 'GM foods put French agro into `nostalgia' ' in *The Hindu Businessline*, New Delhi dated August 9, 2000.
142 P.Sainath, development journalist cited in ibid.
143 Ibid.
144 Disinformation without liability is not new to Indian law. The case documents filed in the case of *In re Bhavani River - Shakti Sugars Ltd.* (supra) reveals that the polluting mini-giant, Shakti Sugars, had used an Australian report to claim that the effluents from their plant would enhance the yield of the farms around. The proven pollution resulted in severe damage to the land and water (see supra), yet they were not held to account for the damaging disinformation. Union Carbide is still to acknowledge the lethal effects of MIC.
145 Greer and Singh, *TNCs and India*, (1996), 31.
146 *Action Aid Citizens' Jury Initiative: Indian Farmers judge GM Crops*, Action Aid, London, July 2000 (mimeo).
147 Id at 11.
148 Ibid.
149 This account is derived from 'Cargill quits India' in Greer and Singh, *TNCs in India* at 30-33.

launched on August 31, 1993, reversing the route that Gandhiji had taken. In the meantime, the people of Vypeen, an island in the backwaters of Ernakulam in Kerala resolved to resume salt manufacture; this was intended to be a move towards self-reliance which would provide sustenance to the farmers engaged in it.

The protest was to culminate in a 'do or die' action on October 2, 1993, Gandhiji's birthday. The Kandla Port Trust was also displaying doubts about Cargill's project, presumably because it saw the venture as a threat to the Port's earnings. The surcharged atmosphere and the vociferous growing opposition decided the issue for Cargill; it decided to abandon its salt project.

The entry of MNCs into seeds and salt has been stoutly resisted in large measure because MNCs are not seen as capable of having the Indian's interests at heart. The surrendering into dependence, and the absence of accountability in law for misuser of the control or the damage that it may cause aggravates the imbalances that are inherent in the system. Recent legislation such as the Biological Diversity Bill 2000 and Protection of Plant Varieties and Farmers' Rights Bill 1999 do all too little to protect the intellectual property of the farmer, and even less to hold accountable a corporation which draws on farmers' knowledge systems without acknowledging it.[150]

The inequality, potential inequity, depletion of autonomy and absence of liability parameters, it is apprehended, characterise the presence of MNCs in these sectors of activity.

VI. LABOUR, WOMEN WORKERS AND EPZS

Structural adjustment which was a catchphrase in the early 1990s has signified for many the loss of jobs, increasing unemployment, casualisation of labour and tentative talk of safety nets which never materialised. The later part of the 1990s has seen a concerted attempt at dismantling labour laws and social security to the workforce. The opening up of the economy has provided an opportunity to employers to demand the denudation of labour rights. The reason is, almost unvaryingly, competitiveness. If Indian industry is to be competitive, it is asserted, the protection that labour has acquired over the years must be loosened up. To this end, there are moves afoot to

- remove the government's power of abolition of the contract labour system, which is now ensconced in the Contract Labour (Abolition & Regulation) Act 1970.[151]
- remove the restrictions on night work for women. Employers' associations and apex bodies of industries have been asking for relaxation of this law, especially where it concerns the women working in export oriented units. The Secretary of Labour to the Government of India also asserts that in the competitive environment of a globalised economy, if productivity is to be increased, women should be engaged in night work.[152]
- restructure the Trade Unions Act, 1926 so that smaller unions may be weeded out.
- remove the component of 'dearness allowance' from the Minimum Wages Act 1948 and Payment of Wages Act 1936, and
- revamp the Industrial Disputes Act 1947 so that all that is left is collective bargaining. Adjudication, restrictions on closure, lay-off, retrenchment and protection of the employment of a workman while proceedings are underway before a Tribunal would for instance be discarded.[153]

150 See Ashish Kothari, 'For farmers or for corporations?', in *Frontline* date March 3, 2000.

151 This was a law enacted to prevent the exploitation of a segment of labour, who were made vulnerable by their status as contract labour. Where the work was perennial, of sufficient duration to constitute a day's work, regular workers were employed for the same work in similar industries, and the process was an integral part of the working of the industry, for instance, the government could decide to abolish contract labour. This is now being opposed. See Backgrounder to a Bipartite Discussion on Restructuring Contract Labour (Regulation & Abolition) Act 1970 on July 22, 1990 organised by the All India Organisation of Employers, New Delhi. The backgrounder presents the employers' viewpoint.

152 Sindhu Menon, 'Work at Night…in the Day: Intensification of Women's Labour' in 1999 Vol. 5, No.5. *Labour File* 9-16. Reactions range from vehement opposition voiced by trade unions, some of whom point to the ILO convention on night shift in support of their position; to insecurity and fear of violence; to some who consider it a matter of gender sensitivity and freedom of choice and equal opportunity. Ibid.

153 See *Labour File*, ibid.

The climate of multinational entry into the Indian market is being used to jettison the protection for labour that has been developed over years.

There is already one segment of the workplace which has, for some years past, been beyond the pale for implementation of labour laws. The Export Processing Zones (EPZs), located at seven places in different parts of the country,[154] offer investors a range of incentives. There are exemptions from local taxes, long tax holidays, subsidized utilities, no foreign exchange control, and no import restriction. Industries set up in the EPZ may be wholly owned by foreign corporations and repatriation of investment and profits and dividend are permitted.[155]

In addition, as two studies on EPZs show, there is an unofficial ban on unions. While there is no legal suspension of labour laws in the EPZs, there is a policy of non-implementation of the laws which have been recorded by the researchers in both the studies.[156] A brochure inviting investments in the EPZs, promises: 'Labour relations: Public utility status had been granted to the units in EPZs under the Industrial Disputes Act which acts as a psychological deterrent against wildcat strikes. In some states EOUs (export oriented units) have also been covered under these provisions.' This status as public utility units severely curtails the legal means of protest which are given to other workers by the Industrial Disputes Act 1947.

Both studies record that workers in the EPZs are predominantly women - between 65% to 85% of the workforce. The TISS study appears to have embarrassed both industry and administration, and the 1995 report describes the hostility to research.[157]Minakshi Thorat's encounter with dissuasion included statements such as: 'Madam, you do not know what kind of treatment would be given to you….The labour officer who accompanies you would be in a fix in case anything happened to you on the way. Anyway, in the first place, they won't let you in.' Persistence did not pay, and but for an isolated visit within the Santa Cruz EPZ, she was unable to gain ingress.[158]

The three researches speak to

- the 'protection' against labour extended by the state to employers in the EPZs.
- the reluctance of the women to speak of conditions in the EPZs for fear of losing their jobs
- the impediments to unionisation in the EPZs
- a disproportionate casualisation of labour. The contract labour system prevails which deters unionisation, denies the guarantee of employment and deprives the workers of social security that the law provides for the 'workman.'
- the minimum wages law was being flouted with immunity.

When the women did speak, they spoke of

- long hours of work with low pay
- being discouraged from mixing with other workers
- the shuffling of contract workers among the units, which makes the sustaining of a dialogue between them difficult
- the harassment in the units to make pregnant women quit, or of women who showed leadership traits or who gathered co-workers together

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154 Kandla, Gujarat is the oldest, since 1965, Santa Cruz Electronics EPZ in Mumbai since 1974; Cochin EPZ since 1983; Madras EPZ; Falta EPZ at Calcutta; NOIDA EPZ in U.P. near Delhi; and Vishakapatnam EPZ in Andhra Pradesh.

155 Minakshi Thorat, 'Labour Administration, Enforcement and Gender' in Cherian Joseph and K.V.Eswara Prasad (eds.), *Reality of Gender*, National Labour Institute, 1995 at 205.

156 R.N.Sharma and Chandan Sengupta, *Women Employment at SEEPZ*, TISS, Bombay, 1984 (mimeo); Chanda P. Korgaokar, Workers and working conditions in Export Processing Zones in India - A Case study of SEEPZ, 1995 (mimeo): prepared for the INTUC, New Delhi and sponsored by the NCFTU, Brussels/Singapore; Sujata Gothoskar, Struggling for Space, for Asian Women, Hongkong, 1992, cited in Minakshi Thorat, supra at 208 writes about how unionisation is effectively prohibited in the Santa Cruz EPZ.

157 From Kargaokar (supra) at 4.

158 Minakshi Thorat at 209.

- the threat of withdrawing a pass.[159]

The rationale for EPZs is located in the transnationalisation of production.[160] It is part of the strategy of global production and competition. This is borne out by the number of MNCs who work out of the EPZs. The availability of labour, and the problem of unemployment together has resulted in increased vulnerability of the worker, and laws[161] have been enacted to protect exploitation of the workforce. The dismantling of labour laws in the EPZs, and as is being demanded by Indian industry, is symptomatic of the declining respect for workers' rights.

VII. PUBLIC INTEREST LITIGATION (PIL) AND PROTESTS

In the search for democratic spaces where the voices of the affected people may be represented, or heard, PIL and protests have come to be relevant.

PIL emerged as a court strategy in the late 1970s, and early 1980s. It is a widely held view that PIL was a sign of penitence of judges of the Supreme Court for the weakness displayed in the dark days of the 1975-77 Emergency when the fundamental rights in the Indian Constitution were suspended by the state as a political expedient.[162] The court had touched a low when, in *A.D.M. Jabalpur v. Shiv Kant Shukla*,[163] the plea of incarcerated opposition leaders for habeas corpus was turned down with the Supreme Court holding that the Presidential Ordinance declaring the Emergency resulted in suspension of the constitutional rights, including the right under Article 21 - the right to life and personal liberty. PIL was intended to expand access to the court, allowing the court to reach, and become relevant to, many constituents who had so far remained inaccessible.

In the re-moulding of the constitutional litigation that occurred, constitutional violations were given a position of greater relative importance than procedure. The two most significant departures from the traditional practice in law which characterises PIL are

- the relaxed rule of locus standi - where, earlier, only an affected person could approach a court for relief, now a public interest petitioner could be anyone who was bona fide and not a mere 'busybody' or a 'meddlesome interloper.'[164]

- the relaxed procedure for taking an issue to court - even a letter to the court could be treated as a petition: what has been termed the epistolary jurisdiction of the court.

A third aspect essayed by the court was the treatment of PIL as non-adversarial, where the state would work with the court and other concerned persons in dealing with the matter that had been brought to the court in public interest.

In the early cases which dealt with issues of undertrials in jails, juvenile homes, bonded labour, women in 'protective' homes, the condition of mental health institutions, the exploitation of migrant labour - PIL was projected as intended to facilitate the access to court of constitutional issues concerning classes of persons who were incapacitated by indigence, ignorance, illiteracy. In the court's assumption of responsibility, it used the assistance of the commissions and commissioners to ascertain fact-situations and to fashion responses. A dynamic relationship has developed between investigative journalism and PIL, where both PIL petitioners and the court have drawn on newspaper reports in their identification of issues. Journalists, law teachers, civil rights activists and lawyers were early petitioners.

In the nearly twenty years since it has become a part of constitutional adjudication, the use and effect of PIL has expanded. Particularly significant has been the role the court has assumed in engineering environmental policy.[165] The court's intervention in matters of political corruption has been significant too, especially in the resistance to

159 See, especially, Thorat at 215-218; Korgaokar at 122.
160 Korgaokar at 9.
161 Including the Contract Labour (Regulation and Abolition) Act 1970, Inter-State Migrant Workmen Act 1979, the Maternity Benefit Act 1961.
162 See Ashok Desai and S.Muralidhar, 'Public Interest Litigation: Potential and Problems' in B.N.Kirpal et al (eds.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, 159 at 160-161.
163 (1976) 2 SCC 521
164 *S.P.Gupta v. Union of India* 1981 Supp SCC 87.
165 A part of which has been set out in Part II supra.

PIL that it generated among parliamentarians and legislators. An acrimonious, and yet inconclusive, debate was set off about judicial activism, and the alleged encroachment of the judiciary into executive and legislative preserves.[166]

In the context of the present enquiry, it bears iteration that -

- the space for human rights concerns has expanded in the court with PIL
- in contrast with its earlier reticence, the court has ventured into matters of policy, even making policy choices (as they did when they mandated lead free petrol for motor cars, or directed closure or relocation of industries in Delhi)
- the assumption of the power to do 'complete justice'[167] has allowed the court to set a lexical order of interests and priorities[168]
- PIL, from starting out essentially as social action litigation[169] has been influenced by judicial perception of the public interest

While the court in its PIL jurisdiction has challenged and chastised polluting industry, the court has played a supporting role to interests of emerging industry in a liberalised era. It has, on occasion, threatened the public interest petitioners with having to pay the costs that delay generates, especially where power, irrigation and highway projects are stalled by litigation.[170] Since it is these projects that result in large-scale displacement, and where environmental damage is apprehended causing environmentalists and representatives of local communities to approach the court, this decision may be viewed as an attempt at deterring the use of PIL.

The usefulness of PIL where the liability of an MNC is in issue is doubtful. Against the background of *Bhopal*, where due process, and the uncertainties of enforcement of a decree in a foreign court were deterrents to taking the case to a determination, PIL is unlikely to be an effective processual device.

PIL has however been used

- to try and lend transparency to the policy and functioning of the state, as is being attempted in the Research Foundation for Science and Technology's petition against the Monsanto Bt cotton trials
- to establish a record of the anticipated effects of projects, even while the immediate attempt is to bring the project to a halt - Cogentrix is an instance
- to bring a degree of accountability regarding actions of the state - Enron constitutes a classic case in point
- to supplement direct action undertaken by local communities and civil society organisations. This is vividly illustrated in Narmada Bachao Andolan's involvement in people's resistance against dam construction and its case in the court against raising the height of the dam further than 80 m it had already reached.

Protest

Dharnas, satyagraha, demonstrations, protest marches, rallies, street plays….these are phenomena in the functioning of Indian democracy which are adopted by peoples and communities in making their voices heard and in registering

166 The use of PIL in the redistribution of judicial power, and in negotiating with the executive for necessities and privileges of judicial office are of importance in understanding PIL, but does not require investigation for the purposes of this paper.

167 Article 142 of the Constitution, see supra n.96.

168 For e.g., workers' livelihood interests and pollution and safety of industry in Delhi; these were treated as conflicting claims when the priorities were determined (supra).

169 A nomenclature Prof. Baxi had said would make a difference in how the process would be perceived - See U.Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India'in Dhavan, Sudarshan ans Salman Khurshid (ed.) *Judges and the Judicial Power*, p.289, Sweet & Maxwell - Tripathi, 1985 and in which he has been proved right - See S.P.Sathe, 'Preface'in Sangeeta Ahuja, *People, Law and Justice: Casebook on Public Interest Litigation*, Vol.I, Orient Longman,1997 xxxv.

170 See *Raunaq International* supra note 119.

protest. The battle for stopping construction of the Sardar Sarovar dam across the Narmada river, which is expected to submerge over 249 villages spread across three states, has enriched the glossary of protest actions: for instance, *jal samarpan*, where the inhabitants of a submerging village stay on letting the water rise above them, with a preparedness to drown. The Karnataka Rajya Raitha Sangha's direct action saw farmers destroying the office records at Cargill's office. A 'tractor morcha' - where 35 tractors and 4 matadors of people, mostly women, marched to the pollution board shouting slogans demanding that effluents from a distillery and the city sewage be not discharged into the river - was held to bring relief to 10 villages on the river Sukhna in Gujarat.[171] The villagers' request to a local voluntary organisation, Lokmandal, to lead their agitation against the Oswal Chemicals and Fertilisers Ltd. for flouting pollution control laws which was depriving them of their daily catch of fish besides engulfing them with pungent acidic clouds is an aspect of collaboration in protest.[172]

State crackdown on protestors takes the form of preventive arrests, lathi charges, use of tear gas, shooting into crowds, obstructing their movement, imposing ban orders on movement and the meeting of five or more persons. There are laws which give the police the power to take action for maintaining law and order[173] - a phrase that encompasses much, and works on the interpretation given to it by the person wielding the baton. There are extraordinary laws such as the National Security Act 1980 which are avowedly intended to 'protect the citizens against terrorism'[174] which get invoked against the protesters. The Official Secrets Act 1926 has, on occasion, been called into aid to suppress protest.

The drastic changes brought about by liberalisation has inevitably led to a schism between state interest as dictated by policy and a range of other interest groups. The right to assemble, to move around, to peaceful protest, to speech are threatened, and violated, when the state sees the protest as a threat to law and order or, as has happened between the Government of Gujarat and the NBA, where the state views the protester as anti-national and a trouble maker. The fight is then recast as being between those who favour development and those opposing it.

Protest is one area where the contest between legitimacy and legality is being played out.

VIII. CONCLUSION

The Indian experience of culpable conduct of corporations is dominated by *Bhopal*. The threat of prolonged and expensive litigation daunted the Supreme Court, the state and, by reflection, the victim; the corporation was the one entity that could turn the threat of delay and escalating costs to good account. The possibility of non-enforceability of awards haunted the court, the state, and by imputation, the victim; the corporation gained ground to negotiate on the uncertainties of the outcome of the litigation. The internationalising of business interests jeopardized jurisdiction for the victims; it left the corporation with a plenitude of escape routes. The unpreparedness, in infrastructure as well as in law, to deal with 'mass' torts persists, adding an unwelcome dimension to victim-creation, accountability of corporations and redress. The absconding accused and the disappearing corporation provide a cover of immunity.

The attention that has been drawn to polluting industry, the import, and impact of environmental standards or of their enforcement has sprung into relief. The induction of the precautionary principle, and of making the polluter pay as a move towards deterrence and reparation, has widened the scope for corporate accountability. Yet, these are doctrines in Indian constitutional law and have spun into existence from the courts' extraordinary power to do 'complete justice', spurred on by the confidence given it by PIL. Indian industry may find itself reined in, reprimanded and made to go deep pocket in the jurisprudence that has emerged. But the potential of these dicta to tame an errant and recalcitrant transnational is in doubt. The due process and international acceptability concerns of the court - aggravated by the uncertainty of enforcement doctrine - has cast a shadow over the efficacy of the court's activism in propounding principles in Indian law.

171 'Tractor morcha forces MPCB to stop Sukhana Pollution', *Times of India*, Mumbai dated June 25, 1999.
172 Ibid.
173 s.37 Bombay Police Act 1951; s. 107 Cr.P.C. which gives the Executive Magistrate the power to require a person to execute a bond for good behaviour for up to one year; s.151 Cr.P.C. See for further details, Amnesty International, 'India: Persecuted for challenging injustice: Human Rights Defenders in India', April 2000.
174 Government of India statement to the Working Group on Enforced or Involuntary Disappearances in 1997 quoted in id at 20.

The pollution litigation has also given substance to anxieties about differing environmental standards and the damage and destruction that it may entail among communities in the developing world. A leaf from their lesson needs to be applied to labour standards too.

The corrupting corporation has not been nailed yet; but the lure of entry, and the lack of liability if caught, is real.

The undeveloped right to information, bolstered by the right of a corporation to hold back information - as intellectual property, as trade or industrial secrets, as unnecessary to disclose, in its reckoning - has hardly been addressed, giving impunity yet another visage.

There is a lexical order that is set - sometimes overt, at others unstated - which dictates the priorities of the day. In recent years, perceptibly, victims, the workforce and local communities have been relegated to tertiary positions.

The international economic order, and the goals set by and for the Indian state, have given a primacy to foreign direct investment, transfer of technology and competitiveness in a market system. The probability is that the bargains that will be struck in this climate will deal in impunity. In a world where an International Criminal Court has taken root, and impunity is under attack, the continued absence of standards binding businesses across boundaries is an unsustainable gap.