

## Corporate human rights accountability in India: What have we learned from Bhopal?

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Twenty-seven years on, Bhopal continues to be a living example of corporate impunity for human rights violations.<sup>1</sup> Union Carbide never admitted legal liability for Bhopal; it rather tried to avoid facing legal proceedings before Indian courts. Despite continuous civil society pressure, Dow Chemical, which took over Union Carbide in 2001, continues to deny any responsibility for the loss of lives and subsequent environmental contamination. What lessons, if any, should India (and the global community) have learned from Bhopal? Several efforts should have been made to overcome the challenges posed by Bhopal: lack of clear human rights obligations of companies, liability of a parent company for the conduct of its subsidiaries, the misuse of the doctrine of *forum non conveniens*, and the unwillingness or incapacity of states to vigorously pursue multinational corporations (MNCs).<sup>2</sup> One important lesson that a developing country like India should have learned is to ensure that the pursuit of economic development does not create undue risk to the realisation of human rights. However, the Indian Government still seems to pursue policies of economic development at the cost of human rights.

### ***New Power Dynamics***

It is often posited that a cocktail of democracy, the rule of law, an independent judiciary, a vibrant civil society and free media can safeguard human rights of people. While this contention may not be entirely unfounded, there is no automatic guarantee that this recipe will ensure the protection of human rights in all cases. It might not work equally well, for instance, in cases where violators are non-state actors like companies. India is a case in point, because in several instances, the government was keener to protect corporate interests rather than the human rights of its populace.

The success of the above cocktail is arguably premised on the presence of a visible and clearly identifiable power centre: the state. In such a situation, one can control the powers and regulate the behaviour of a potential violator. However, the erstwhile tools are not equally effective against corporate actors that can operate without much regard for state boundaries. Despite the façade of shareholder democracy, companies are inherently undemocratic institutions. They not only control the media but also know how to exploit loopholes to ensure that they stay above or ahead of rules. They also have the capacity to employ a battery of lawyers to keep independent courts at bay.

There may be a complex concert between states and companies. While the state-business nexus has existed at least since the days of the British East India Company, the chemistry of this union is very different now. MNCs exert – in both direct and subtle ways – tremendous clout on decision-making by states at both national and international levels to ensure that corporate interests take priority over the interests of common people in cases of conflict between the two. For example, a recent parliamentary report found that the government approved certain drugs to be sold in India that were not approved for sale in developed countries, did not ensure that mandated clinical trials are conducted, and ignored conflicts of interest between pharmaceutical firms and medical experts giving evidence for approval of drugs.<sup>3</sup>

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<sup>1</sup> Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business*, 2012, xix, 26.

<sup>2</sup> *Ibid*, 25.

<sup>3</sup> Department-Related Parliamentary Standing Committee on Health and Family Welfare, 'Fifty-Ninth Report on the Functioning of the Central Drugs Standard Control Organisation (CDSCO)' (May 2012), paras 7.12-14, 7.31-

Any regulatory framework, in order to be effective, should be able to unpack nuances of this power dynamic and move beyond relying solely on states to hold non-state actors accountable. States undoubtedly have a crucial role in regulating companies. But non-state-centric and informal regulatory tools are required too. The UN Guiding Principles on Business and Human Rights (the “GPs”) unfortunately do not respond to this regulatory gap.<sup>4</sup> Considering that not all companies will respect human rights and some states are likely to falter in their duty to protect human rights, what recourse will be available to victims of corporate human abuses in such situations? In short, the GPs are likely to fail to deliver in ‘hard cases’, where the relief is needed the most.

### ***Disjunctive Economic Development***

The genesis of the Bhopal gas leakage lies in the “political economy of development in the Third World”.<sup>5</sup> The Indian government relaxed or bypassed its rules and regulations to approve the Bhopal plant,<sup>6</sup> apparently with a view to sustain the “green revolution”. It also did not vigorously pursue the extradition of Warren Anderson, the CEO of Union Carbide, in order not to scare foreign investors. In other words, in Bhopal, lack of a holistic decision-making matrix resulted in development considerations prevailing over risks to human rights and/or the environment.

What is more worrying is that India has not seemingly learnt lessons from Bhopal. Let me offer a few examples here to illustrate how policies and laws, with some exceptions, continue to remain oblivious to the need to integrate human rights with the development process.

In 2005, the Indian state of Orissa signed a memorandum of understanding (MoU) with POSCO, a Korean company.<sup>7</sup> Under the MoU, the government of Orissa undertook to do almost everything necessary to help POSCO establish a steel plant and related projects – from acquiring land to ensuring availability of water and securing environmental clearances.<sup>8</sup> The MoU hardly gave any attention to the human rights and/or environmental implications of the project. In March 2012, the National Green Tribunal suspended the environmental clearance granted to the project.<sup>9</sup>

The mining sector in India, an important facet of its economic development, provides another example. A recent report by Human Rights Watch maps how mining regulation is failing, posing a threat to human rights and causing irreparable damage to the environment.<sup>10</sup> Government officials and politicians are either indifferent to adverse impacts of mining on local communities (sometimes in breach of relevant rules and regulations) or they are beneficiaries of the state-business nexus in this sector.

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36, 7.45-46, 7.51-52, and 8.4,

<http://164.100.47.5/newcommittee/reports/englishcommittees/committee%20on%20health%20and%20family%20welfare/59.pdf>.

<sup>4</sup> Surya Deva, “‘Protect, Respect and Remedy’: A Critique of the SRSG’s Framework for Business and Human Rights”, in *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives*, Karin Buhmann et al (eds.), 2011; Deva, *Humanizing Business*, above n 1, 109-115.

<sup>5</sup> William Bogard, *The Bhopal Tragedy: Language, Logic, and Politics in the Production of a Hazard*, 1989, xi.

<sup>6</sup> Dominique Lapierre & Javier Moro, *It Was Five Past Midnight in Bhopal*, 2001, 54-65, 72, 77; Kim Fortun, *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders*, 2001, 115; Tara Jones, *Corporate Killing: Bhopals will Happen* 1988, 38-39.

<sup>7</sup> “Memorandum of Understanding between the Government of Orissa and M/S POSCO for Establishment of An Integrated Steel Plant at Paradeep” (MoU), 22 Jun 2005, <http://www.orissa.gov.in/posco/POSCO-MoU.htm>

<sup>8</sup> See International Commission of Jurists (ICJ), *Access to Justice: Human Rights Abuses Involving Corporations – India*, 2011, 70-72.

<sup>9</sup> “Tribunal scraps green clearance to India’s largest FDI, Posco”, *Indian Express*, 30 Mar 2012, <http://www.indianexpress.com/news/tribunal-scraps-green-clearance-to-indias-largest-fdi-posco/930477/0>.

<sup>10</sup> Human Rights Watch, *Out of Control: Mining, Regulatory Failure and Human Rights in India*, June 2012.

Land acquisition by the state for specific corporate projects or special economic zones (SEZs) illustrates how the government does not give adequate attention to the property rights of farmers or the adverse impact of their displacement.<sup>11</sup> It is hoped that the pending Land Acquisition, Rehabilitation and Resettlement Bill 2011<sup>12</sup> will strike a balance between the need for land acquisition for development projects on the one hand, and the interests of land owners and the impact of acquisition on the community on the other.<sup>13</sup>

Last but not least, the Draft National Public Private Partnership Policy 2011 (Policy)<sup>14</sup> also exemplifies the absence of human rights from the current public-private partnership (PPP) discourse in India, the entire focus being on employing PPPs for achieving economic development and/or improving infrastructure. Neither the objectives of the Policy nor the principles governing PPPs make any reference to human rights.<sup>15</sup> The Policy lacks a provision for the human rights impact assessment alongside economic assessments. In other words, rather than embedding human rights into the plans for harnessing the potential of PPPs, the Policy ignores and externalises the human rights impacts of PPP-driven development.

Having ratified several international human rights conventions, the Indian Government is under a duty to respect, protect and fulfil human rights. This obligation remains undiluted even when the government joins hands with a private entity to achieve certain economic goals. The GPs rightly remind states to take multiple measures to protect against human rights abuses by business entities within their territory or jurisdiction. But the key issue is: what if a given state fails in its duty?

### ***The Role of Corporate Law***

Corporate laws have a crucial role in encouraging companies to comply with their human rights obligations.<sup>16</sup> The Indian Companies Bill 2011 (Bill) contains several provisions aimed at promoting socially responsible business<sup>17</sup> – something for which the Indian Government deserves qualified praise. First, while trying to codify the duties of directors for the first time, the Bill imposes a specific duty on directors to consider the interests of the community.<sup>18</sup>

Second, the Bill requires that the board's annual report include "details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year".<sup>19</sup> Requiring directors to report at the annual general meeting on

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<sup>11</sup> See, for instance, the controversy surrounding the land acquisition in Singur for Tata's car manufacturing unit. Suchita Mazumdar, "Development through Displacement: A Study of Singur, West Bengal", in *Special Economic Zones: Issues, Laws and Procedures*, K R Gupta (ed.), 2008, 88.

<sup>12</sup> Land Acquisition, Rehabilitation and Resettlement Bill 2011 (Bill No. 77 of 2011), <http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf>.

<sup>13</sup> The Standing Committee on Rural Development in its report has made several recommendations to severely limit the power of the government to acquire land. "Land Acquisition, Rehabilitation and Resettlement Bill 2011: 31<sup>st</sup> Report", Standing Committee on Rural Development of Parliament of India, May 2012. <http://www.prsindia.org/uploads/media/Land%20Acquisition/SCR%20%20Land%20Acquisition,%20Rehabilitation%20and%20Resettlement%20Bill%202011.pdf>.

<sup>14</sup> Draft National Public Private Partnership Policy 2011, Preamble (para 1), <http://www.pppinindia.com/pdf/draftnationalppppolicy.pdf>.

<sup>15</sup> Ibid, paras 2.1 and 2.2. Protecting the interests of "project affected persons" and "other stakeholders" is though listed as one of the principles to be kept in mind. Ibid, para 2.2.4.

<sup>16</sup> Surya Deva, "Sustainable Development: What Role for the Company Law?" 8 *International & Comparative Corporate Law Journal* 76, 2011.

<sup>17</sup> Companies Bill 2011 (Bill 121 of 2011) (Bill) cls. 134 and 135 and Schedule VII [http://www.mca.gov.in/Ministry/pdf/The\\_Companies\\_Bill\\_2011.pdf](http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2011.pdf). For a detailed analysis, see Surya Deva, "Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?" 41 *Common Law World Review*, 2012 (forthcoming).

<sup>18</sup> Companies Bill 2011, cl. 166(2).

<sup>19</sup> Ibid, cl. 134(3)(o).

implementation of CSR policy should allow not only shareholders but potentially also other stakeholders to assess companies' CSR performance.

Third, Clause 135(1) of the Bill proposes to require companies over a certain size to establish a Corporate Social Responsibility Committee. The CSR Committee shall formulate and recommend to the board a CSR policy, recommend the amount to be spent on CSR activities, and periodically monitor the CSR policy of the company.<sup>20</sup> The board of directors of every company covered by Clause 135(1) is given the responsibility to approve the CSR policy, disclose the policy on company's website and ensure that activities included in the CSR policy are undertaken by the company.<sup>21</sup>

A more radical proposal, however, would require the board to "make every endeavour to ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy."<sup>22</sup> This requirement is backed by the "comply or explain" approach: if the company fails to spend this amount on CSR activities, the board must specify the reasons for not doing so in its annual report.<sup>23</sup>

Although the minimum CSR spending provision seems a positive one, this approach also has certain drawbacks. By merely targeting big companies, the proposal ignores many small companies and other businesses such as partnerships, which contribute significantly to the economy and can adversely affect human rights. This approach is also normatively unsound because every business entity – irrespective of its size – should conduct business in a socially responsible manner. Nor does the proposal really encourage companies to internalise and integrate CSR into their day-to-day business decision-making. As long as a company spends 2% of its average net profits on CSR activities, it will satisfy the proposed requirement, even if it otherwise engaged in the worst kinds of socially irresponsible behaviour.

### ***The Way Forward***

Human rights violations by companies not only present new regulatory challenges but also raise fundamental questions about the contours of certain existing notions such as "human rights", the "state", the "company" and the "free market" ideology. Unfortunately, states and the international community are trying to deal with new challenges with old, conventional regulatory tools.

As I have argued elsewhere, in order to achieve the goal of humanising business, we should overcome three broad challenges: *why* companies should have human rights obligations, *what* these obligations are, and *how* to ensure that companies comply with their obligations.<sup>24</sup> Although Bhopal threw these three challenges to us more than twenty-seven years ago, we have not yet taken many robust steps to meet them. A brief review of selected developments in India since Bhopal indicates that companies and their business interests continue to prevail over common interests reflected in the language of human rights. While it is not impossible to reverse this order, something more than the current soft, the so-called consensual and state-centric approaches might be needed.

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<sup>20</sup> Ibid, cl. 135(3).

<sup>21</sup> Ibid, cl. 135(4).

<sup>22</sup> Ibid, cl. 135(5).

<sup>23</sup> Ibid.

<sup>24</sup> Deva, *Humanizing Business*, above n 1, xix, 1-2.