REVIEWING *the views*

Legal action against mass disasters: Lesson from Bhopal case

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THE humankind has witnessed some very atrocious industrial disasters, in which thousands of defenceless people got killed, and several others injured with some suffering life-long effects including the un- born, and destructive ecological effects. Others have suffered ill health from exposure, at their work places, to poisonous industrial substances and processes where some people actually died. In most cases mass actions end up in settlements with no clear precedent that would hold authors of mass disasters to account as litigants have to overcome the hurdles embedded in various domestic laws related to: choices of law and forum, proof of liability especially in parent-subsidiary structure, mobilization of representation and funds, and assessment of damages. Considering few major catastrophes' in last one decade in Bangladesh this needs to be scrutinized and understood in depth.

In Bhopal, Union Carbide India Limited (UCIL) in whose premises at the state of Madhya Pradesh the highly toxic gas- Methyisocyanate (Mic) escaped was a 50.99% subsidiary of UCC, a United States (US) resident. UCIL produced Sevin and Temik. The gas, Mic which escaped was an ingredient in these products. The gas leaked from the plant in huge quantities and with the prevailing winds on the fateful day, the poisonous gas was blown to an overpopulated area adjacent to the plant resulting in estimated deaths of 2100 with another estimated 200,000 suffering permanent, mild, and temporary injuries. The individual victims of this gas leak filed class actions in Texas state court seeking compensation.

In actions where, for one reason or another, there are two or more jurisdictions as it were in Bhopal either jurisdiction could properly exercise legislative jurisdiction, there arise problems of choice, and conflict of laws particularly, where parties had not agreed, prior to the dispute, the applicable law or, where a relevant domestic law is silent or vague. In such cases, courts must, determine the applicable, and appropriate law.

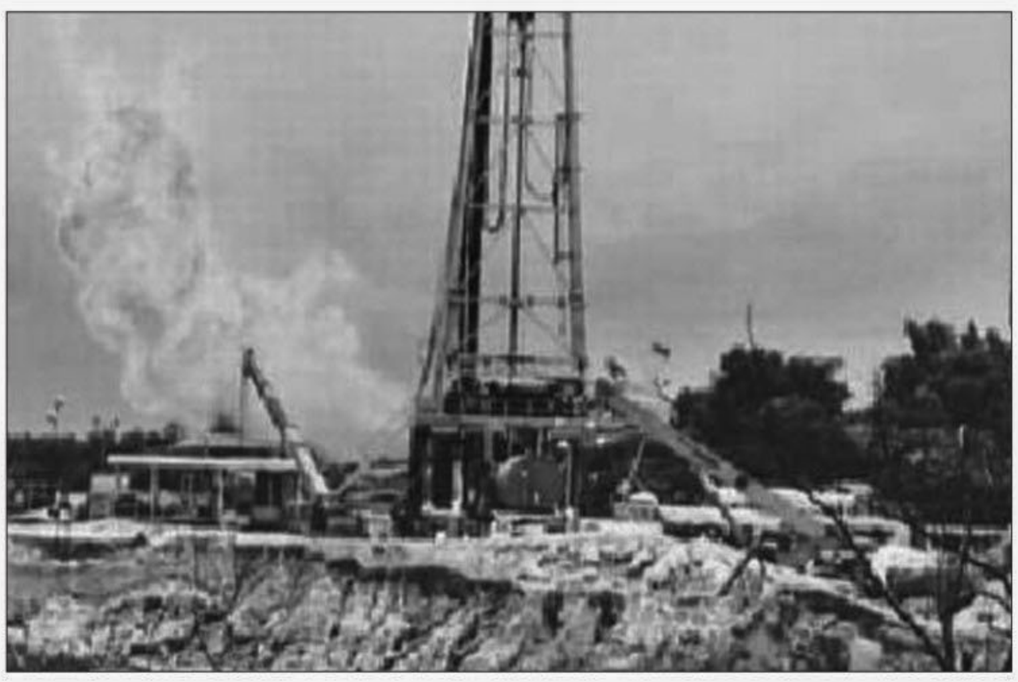
In Bhopal, had Lord Keenan ruled that, US court was the most convenient forum, it would not of itself make US law is automatically applicable. It would still require a further step, namely, to choose between Indian law, the lex loci deliciti commissi, and US law, having in minded the parties' interests and ends of justice. In determining this question, courts have tended to apply different approaches and theories. In US for example, where domestic laws conflict with international law, courts are obliged to apply domestic law.

If, questions of law are settled, courts have to go further and determine where there are two or more jurisdiction available, which of them is suitable, fair and appropriate in all interests of the parties, and the case. In Bhopal, both US and Indian jurisdictions were available but court stayed the matter on ground of forum non conveniens holding that Indian courts were the most appropriate in the circumstances.

The court in Bhopal was convinced that Indian legal system was as equally developed, and competent to try the matter. However, Indian court's competence was not in issue, rather, whether Indian courts had jurisdiction over UCC, a US domiciled company. It is this uncertainty which drove the claimants in this case including the Indian government to sue in US courts. In Bhopal, perhaps, had Lord Keenan considered other factors testing each against the other, even if ultimately the forum ended in India, the ruling would have been more plausible or even arrived at a different conclusion altogether.

Establishing liability parents for the wrongs of subsidiaries is perhaps, the biggest legal hurdle in actions of mass disaster. The parent-subsidiary structure is a relatively new corporate form where several business enterprises come together for commercial purposes but with no clear role demarcations. Parents share in the proceeds of subsidiaries in good economic times but are not directly liable for any loses or liabilities of subsidiaries.

Needless to say, in both cases, liability was not determined substantially by court as parties entered settlements before judgments. This is a tort law concept where the claimant asserts that



the defendant owed him a duty, that duty was breached, and in fact, the injury suffered was a direct consequence of the breach. So far, court decisions have shown that that duty is not automatic. Claimants have to link parents to subsidiaries' acts showing that a subsidiary is an agent or alter ego of the parent to establish this duty. It is then, that the acts of a subsidiary can be attributed to a parent, and naturally, a duty of care arises.

Discharging this obligation therefore, requires proof of the actual relationship between parents and subsidiaries of not only financial stake of parents in subsidiaries, but also parents' influence on day-to-day affairs of subsidiaries. The claimants have to show that there is no way, given the nature and extent of the existing parent-subsidiary relationship, a subsidiary can be said to ever exercise an independent decision in a single matter. Unfortunately, most information is always in the domain of the parent and accessing it can be enormously hard yet, courts are reluctant to lift the corporate veil of parents.

Assessment of Damages is another interesting head in litigation of mass disasters. Closely related with choice, and conflict of law, whose standard of living would best deliver justice in the interest of all the parties? It is obvious; contests of damages are high pitched. The claimants would want the highest assessment possible, yet, the defendant is interested in minimizing the damages as much.

The success or failure of an action of mass disaster as in Bhopal depends on how organized claimants are. The ability of victims of mass disasters to come together and assemble necessary evidence, and resources for redress is therefore vital in this regard which could mean further, capture local and international support including the civil society. This involves gathering of evidence, lining up witnesses, and securing specialist and well resourced attorneys to prosecute the case.

The recommended alternative approaches to full blast litigation for mass disasters could be the Alternative Dispute Resolution, and 'enterprise' law. Alternative Dispute Resolution (ADR) is where parties settle a dispute without recourse to court. It can be with or without a neutral third party. The parties usually determine the rules. ADR is a workable option in mass disaster dispute only, in cases where there is no substantial dispute of law. It is particularly helpful, where one party has admitted liability. The parties then go about negotiating the extent of liability, and the quantum of damages.

Enterprise law would treat all companies in a group as one economic unit disregarding corporate principles as limited liability in parent-subsidiary structures. This would be so in all respects; tax, liability etc. The distinctness of parent-subsidiary would almost die out. This would ensure that parents that open up subsidiaries have a parental role over them to ensure subsidiaries meet minimum operational standards.

In above it is evident that litigation of mass disasters has not build as much precedents that could be used subsequently to regulate ultra-hazardous corporate activity. The cases of Bhopal ended up, after such a long time, into settlement, because of largely undue regard, by the trial courts, to technicalities rather than substantive issues. The courts occupied themselves with questions of forum, and locus leaving out questions of liability, a single key issue, which would guide future corporate activity especially production of toxic products.

Aggressive expansion of global corporate activity no doubt potentially endangers both human life and the environment. The scenario in Bhopal show clearly need for these domestic variances to be looked into and courts have a lead role in this regard. As it stands, corporations enjoy liberty to set corporate activity anywhere, with little or no legal checks on maintenance of industrial standards, or good production practices thereby exposing immediate populations to great risks which otherwise could be controlled.

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LAWS FOR *everyday life*

Cyber crime detour: Facebook?

TAREK MAHMUD

A twenty-four year old male has been apprehended with the charge of faking identities of different personnel and of uploading libelous images of several political personalities.

This particular piece of news has already been the talk of the town for the current week and will have been the same for next couple of months. The bubbles of virtual Internet community have had a blast recently in Bangladesh. We have seen the entire youth generation hauling over this craze for the past few years and finally, Walla!

Yes, we are talking over the matter of the temporary Ban on "facebook". We are now bombing and being bombed by numerous scorching comments as well as sugar coated ones about the Ban of Facebook. It is, in fact possible to commit some sort of online crimes via this innocent looking virtual social communicator. The question is, we are not even safe to stay electronically, are we? Let us resume this thought and have a subtle look for a little awhile.

This particular century is blessed with the lucky cloud of Information Technology. This is the era of business where countries are trying to form entity with others with a view to promote and synergise universal cooperation. The indecisions, Bangladesh is still focused to achieve a simultaneous output from information and communication technology. As crime comes as a by product of any development activity, ICT is no exception. Several severe crimes are possible to have been committed by a person in staying this field as network hacking, faking online transaction, illegally transferring monetary amount via online, uploading destructing programs known as "virus", uploading information of all types which may cause fear, disgust, detestation or convert any people or group of peoples' ideology negatively. Carrying in mind that neighbouring countries like India, Srilanka and Singapore have adopted necessary laws to regulate and restrain the offenders from committing any crime related ICT and also to define cyber crime (Offences related Internet, computer and relevant to those) of different range and assuring that they are being punished with justified type and amount of punishment, Bangladesh adopted an act on 8th October, 2006 named as "Information and Communication Technology Act, 2006" to provide the Information and Communication Technology a Legalized and secure platform.

This act governs over a good number of areas such as creating, sending and receiving of Electronic mails or electronic records, issuance of electronic certificate and electronic license. This Act also deals with the authority which holds the power to adjudicate the offences under this act, the cyber offence, punishments, trial procedure, establishment of cyber appeal tribunal etc.

Operating law in Bangladesh

Bangladesh as a developing state and no less of an enthusiast, is striving to get the fullest advantages of this new integration. With some technical discrepancies and bureaucratic "Computer" and the "Internet" have made it possible for the people of different strata to get access into the biggest database containing every piece of information needed-text, image, sound, cinematography and many more. Though, primarily, it had only been assumed to be an eccentric complex web of unalterable information used exclusively by Techno-nerds. But later on, as many other striking inventions of Science, it became a get easy item for commoners. Now, almost every single country, having the taste of ICT, wants to be connected with the Information super highway.

What about the offences and offenders?

The significant cyber offences listed in the Act are-

Section 54: destruction of computer and computer system by-

Unauthorized access, collection, infiltration of computer virus in computer or network, destruction of storage mediums of a network, wilful intervention in a network, assisting unauthorized personnel to enter into a network, sending SPAM or unwanted E-mail to promote or sell any product without the permission of the client or the sender and depositing any person's payment for certain service in another account by illegal intervention or fraud.

Section 55: concealing, altering or destructing source code in a computer, computer program or a computer network.

Section 56: by hacking into any computer or any computer system in an unauthorized way.

Section 57: According to section 57(1), any person publishing or broadcasting any such material (text, pictorial or audiovisual) on website or any other electronic form which is falsified or vulgar, and upon reading, writing or listening to that material, any person (natural person, partnership business, company, statuary institution and cooperation society) becomes derailed or provoked or defamed or the Law and Order situation gets worsened or personal and state Image is being harmed or anyone's religious feeling is in under attack or by providing these materials, provocation is instigated against any person or group of person; this very action is a punishable offence. Section 57 (2) briefs that anyone committing an offence under 57(1) will be punished with a sentence of imprisonment not more then 10 years and a fine not more then 1 crore BDT.

As precisely, it is possible to presume from the abovementioned reference that the offences committed by the particular youngster is punishable severely yet taking into consideration whether the person is pre-aware about the fact about that action can constitute an offence or he intently commits the crime.

So, can Facebook be banned?

The issue which is complicated enough to solve that whether a social communication portal can be shut down even temporarily or not and whether BTRC has the jurisdiction over FACEBOOK? According to the definition of "Broadcasting" enumerated in Section 2, Bangladesh Telecommunication Act,2001, Transmission of anything by internet connection shall not deemed to be a broadcasting and this puts a question mark on the authority of BTRC over the Internet Broadcasting or facebooking. At the same time, if we take the examples of different countries, we may see that having very strict and working ICT Law, the countries are in smooth operation of all sorts of social communication portals. Still, some countries which preserve extreme ideologies may have different view about the operation of these sort of electronic medium. But in a country like Bangladesh, where the young generation is called to have the "power to change everything", and Facebook being the exclusive representation of this certain community, banning it for a solitary offence committed by a one-off person is not expected to be called the wisest decision. The provisions are laid down here in this very "Information and Communication Technology Act, 2006" about the Particular crime and the penalty prescribed for it can be inflicted. There is no reason to retreat by resuming or banning the operation of Facebook in Bangladesh instead of punishing the offenders.

Lastly, a synchronisation with the front-page cartoon by Sharier on 31 May 2010 on *The Daily Star*. You take medicine for your sore throat or you get a knife and cut it as if this the "*noster gora*"!

A question for all…

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RIGHTS *monitor*

Trafficking: fastest growing criminal activity

"Trafficking in persons -one of the most appalling forms of human rights' violations- remains one of the fastest growing criminal activities in the world, and the role of regional organizations fighting against it cannot be underestimated," UN Special Rapporteur Joy Ngozi Ezeilo said on Wednesday, June 2, 2010, before presenting her annual report on trafficking in persons, especially women and children, to the Human Rights Council.

"While better cooperation among countries of origin, transit and destination is key to address this scourge," the independent expert said, "the role of regional and sub-regional organizations in catalysing the action of States in combating trafficking in a specific region has not received sufficient attention and support."

"I am convinced that regional and sub-regional mechanisms play a key role in providing a response that is both multilateral and sufficiently close to countries' realities and specificities within a certain region," she added.

The Special Rapporteur's 2010 report focuses on the role and added-value of these cooperation mechanisms in the fight against trafficking. Ms Ezeilo shares a number of good practices that could positively be reproduced in other areas of the world. She also highlights the most pressing challenges that these organizations face, including the growing use of new information technologies by traffickers around the world.

Noting that the majority of regional and sub-regional organizations still tend to focus almost exclusively on the criminalisation of traffickers, the Special Rapporteur urged them to adopt a human rights and victim-centred perspective in the action: "In order to be effective, they should put the rights of the victim at the core of their strategies and actions. By doing so, they will succeed both in protecting victims and prosecuting traffickers."

"One of my key messages," Ms Ezeilo stressed, "is that it is only by properly protecting and assisting victims that you can effectively prosecute traffickers".

The Special Rapporteur plans to hold a consultation on the topic of her report, inviting representatives from regional and sub-regional organizations and other relevant partners.

Ms. Joy Ngozi Ezeilo assumed her functions as Special Rapporteur on trafficking in persons, especially in women and children on 1 August 2008. Ms. Ezeilo is a human rights lawyer and professor at the University of Nigeria. She has also served in various governmental capacities, including as Honourable Commissioner for Ministry of Women Affairs & Social Development in Enugu State and as a Delegate to the National Political Reform Conference. She has consulted for various international organizations and is also involved in several NGOs, particularly working on women's rights. She has published extensively on a variety of topics, including human rights, women's rights, and Sharia law.

Source: United Nations Press release