spite positive starts made by many companies, much still needs to be done. On the whole, multinationals remain too ambivalent about the misuse of tax revenues and foreign aid by corrupt or incompetent African governments. Multinationals now wield vast economic and social power, which gives them the opportunity to ensure that tax revenues and foreign aid are used to build infrastructures that have a positive impact on the environment, on sanitation, on health, and on economic development.


Notes

2. SGS ICS s.r.l., International Certification Services, Audit Report, Del Monte Kenya Limited, SA/003/99 (Thika, Kenya).
5. Mutunga, Gesualdi and Ouma, Exposing the soft belly of the multinational beast.
6. Ongango, “Dark days at Del Monte”.
7. Mutunga, Gesualdi and Ouma, Exposing the soft belly of the multinational beast.
8. Ibid.

Analytical concerns: Privileging a version

All endeavours to relate ethics, morality, human rights, or justice seem necessarily to founder when “efficiency” or wealth maximization provides the “theoretical foundation of contemporary corporate and commercial law scholarship” and of corporate conduct. But, even in this milieu, the UNU/PRIO project to recraft the principle of double effect (PDE) provides a ray of hope. A viable framework for evaluating the “negative side-effects” of business and corporate cultures, practices, and decisions holds promise of some rapprochement between “efficiency” and “justice” and “wealth maximization” and “human rights”.

However, because of its focus on the engagement of multinational corporations in ultra-hazardous processes, manufacture, and industry, this chapter overtaxes somewhat even this worthwhile enterprise. The already complex issues concerning the authorship, agency, incidence, aftermath, and amelioration of “negative side-effects” become even more complicated. The expression “negative side-effects” strains belief when extended to situations of archetypal industrial mass disaster such as the Bhopal catastrophe, even if we accept the notion that we all live in an “age of side effects”. What I am suggesting, however, is not that the re-crafted PDE project is for these reasons unproductive in such contexts but that its inadequacies need to be further rigorously addressed.
The relationship between the recrafted PDE regime and its long enunciative habitats and history invites a side-glance even within the scope of this chapter. Originating in the context of the just war doctrine and developed in the distinctive theological and secular discursive frameworks of *ius naturalis* (for situations such as abortion and euthanasia), the PDE regime seems now to provide a general ethical theory concerning human conduct as a whole. To enhance the potential of the present project’s pragmatic (in the best sense) constructions of “legitimate” business practices, some genealogical regrounding may be both necessary and desirable. Undoubtedly, the new PDE must, if it is to engage the attention of captains of business and industry, almost wholly disinherit, as it were, the metaphysical overload of the multifarious PDE discourse. The question still poses itself: will such an attempt at normative cleansing altogether escape its recalcitrant residues? The recrafted PDE regime avoids daunting questions that would otherwise arise—for example, the construction of the “good”, by its admirable recourse to “human rights”, as providing a tolerable, consensually based intersubjective PDE ethic for corporate/business decision-making, governance, and culture. In turn, though, this raises some very distinctive questions. In any event, talking human rights language to business remains a notoriously difficult enterprise, given the latter’s overwhelming concern with efficiency and profit. At the same time, the recrafted PDE enables new configurations of what commonly passes as “business ethics”.

This chapter also raises a wider concern. Any retooling of the PDE regime summons some grasp of the problem of shifting bases of forms of social trust, a heavily contested terrain. The vertiginously complex globalizing world is rendered possible and sensible by everyday reliance on expert, and esoteric, knowledge systems. These systems are inevitably based on, and justified by, the webs of belief in their cumulative corrigibility and reflexivity.

Outside this frame, trust in expertise becomes ethically unsustainable; and this is the crux of the problem that poignantly arises in the context of the Bhopal catastrophe. Any extension of the PDE regime needs to encompass features of expertise on which contemporary forms of production rely:

First, expertise is disembedding; it is ... in a fundamental sense non-local and decentered. Second, expertise is tied not to a formulaic truth but to a belief in the corrigibility of knowledge, a belief that depends on methodological scepticism. Third, the accumulation of expert knowledge involves intrinsic processes of specialization. Fourth, trust in abstract systems, or in experts, cannot readily be generated by means of esoteric wisdom. Fifth, expertise interacts with growing institutional reflexivity, such that there are regular processes of loss and reapprropriation of everyday skills and knowledge.

Clearly, the recrafted PDE regime is based on an implicit but nevertheless pervasive belief in “institutional reflexivity”. Minimization of negative side-effects, under the fourth criterion of the revised PDE, is a notion that speaks more clearly to managers of business than do the powers of “esoteric wisdom” of theistic and secular PDE discourse. Belief in the “corrigibility of knowledge” and the expertise of technoscientific “communities” of risk producers clearly helps processes of risk pre-assessment and enables prevention in the first place, and amelioration in the second, of negative side-effects. I do not (for reasons of space) here directly address the debate about whether “non-knowledge” rather than “knowledge” is the more crucial in dealing with the global risk society; in other words, whether popular reflexivity is more liberating than expert knowledge’s systemic propensity to reflexive learning. However, I note in passing here that the recrafted PDE seems to lean more towards the gestalt of Anthony Giddens than that of Ulrich Beck.

Leaving these larger issues out of consideration, this chapter invokes an understanding of the present project as postulating a distinctive kind of business ethics, specifically entailing the following:

- business associations and corporations may not be regarded as *amoral* agents;
- their conduct and operations can be and ought to be judged by ethical standards that define moral intentions and corresponding conduct that produces ethically the right result;
- even such right results may in real life be accompanied by positive as well as negative side-effects;
- a study of negative side-effects remains necessary to plan future business/corporate social learning/reflexivity for corporations already inclined to a culture of business ethics and corporate governance that is oriented to human rights.

Given this, a number of pertinent consequences ensue:

- the problem of group identity and legal responsibility (liability) is relevant not in itself but only to the extent that it enables the study of negative side-effects;
- the state and the law, as it were, do not end where corporations begin;
- in stipulating liability, the state/law has itself to be ethical; it should remain concerned with issues of the relationship between moral responsibility and legal liability. The state/law ought then to provide strong justification for the view that economic enterprises may be said
to be morally responsible without being legally liable or to be legally liable without being morally responsible.

The PDE in catastrophic contexts

Transnational corporate governance engaged in the production and management of ultra-hazardous processes, substances, manufacture, and industry raises a number of issues of concern. By definition, decision-making here entails the creation of huge risks, which proliferate and intensify in a situation where a number of dispersed corporate decision makers remain globally networked (through corporate interconnectivities between subsidiary companies and affiliates). These risks (in chemical, biotech, nuclear, and conventional defence production, for example) affect both living and future generations (in terms of their impact on existential life cycles and choices and of overall ecological consequence), and at times (as in Bhopal) they approach the dimensions of large-scale catastrophes and social disasters.\[13\] This raises a threshold question concerning the extension of the PDE regime: should it focus on the ethics in the production of risk, or on the ethics of its distribution, or both. The easy answer – that it must address both – is indeed superficially attractive, until we attend to understanding notions of risk in the circumstance of globality called provocatively “reflexive modernization”,\[14\] which characterizes both the politics of production and the production of politics.\[15\]

Risks, as is well known, emerge where decisions have to be made under conditions of uncertainty. Thus arise constructions of risk-causing communities and risk-bearing communities in collective human conduct and experience. Because risk-causing communities do not usually directly suffer the risks caused by ultra-hazardous manufacture, processes, and industry, especially under multinational modes of risk production, the two communities remain both spatially and temporally distinct. This distinction causes a dilemma for the recrafted PDE regime.

Given the ubiquity of risk, the politics of describing the production and distribution of risk as production and distribution matters considerably in any extension of the PDE regime. There is a choice to make between using the language of “accident” and that of “catastrophe”. Each and every sector of hazardous production remains viewed in terms of “normal accidents”.\[16\] The PDE regime, however it is constructed, mandates an ethic of production that requires such production to be planned and carried out so as to minimize, and even avoid, accidental harm. “Accidents” are events that specifically injure and harm a determinate number of human beings; “catastrophes” are events that cause multiple, even generational, injury and harm to indeterminate human populations and environment. “Accidents” may occur in spite of the best collective efforts in the management of hazardous/ultra-hazardous industry or manufacture, and therefore invite description in terms of “negative side-effects”. Because “accidents” constitute misfortunes, it would be rather odd to describe them in the language of injustice. Mass disasters (catastrophes), in contrast, certainly for those affected, are experienced as injustice.\[17\] If the language of “negative side-effects” remains apposite to doing business, this is indeed strained to breaking point in catastrophic situations, which in turn retrospectively raise large questions concerning the very ethics of ultra-hazardous production.

At least two threshold questions, in terms of the PDE-informed ethics of production, arise. First, do business/corporate decision makers have a human rights responsibility to avoid decisions that entail catastrophic consequences? Second, what concrete duties do they owe to the bearers of human and social suffering caused by actual catastrophes? This last question also points to the multitudinous issues concerning the ethics of the distribution of risks.

In these terms, the principal question concerns risk, responsibility, and redress. This question is posed and mediated in various ways in catastrophic situations. In order that responsibility and redress become pertinent to business conduct or ethical judgement, issues of the authorship (conventionally put, the causation), the agent (means), and the extent (incidence) of harm need to be clearly addressed. Assuming an agreed response to this, the issue of responsibility has at least two dimensions; first, the language in which the discourse about responsibility is conducted makes all the difference; second, the extent of the responsibility for catastrophic harm ensuing from the PDE.

The first dimension once again raises the distinction between legal and ethical languages (however contingent their relationships); legal liability and moral responsibility do not often comfortably merge. The second dimension translates these issues into the corporate language of damage limitation, suggesting at least some minimal thresholds for responsibility/liability. In terms of redress, then, even the most minimalist version of the recrafted PDE regime rejects the notion of impunity that ordains that the costs should lie where they fall, on the submissive bodies and voiceless souls of those direly affected.

However, the culture and practice of corporate damage limitation raise further obdurate questions. What may be said to constitute the “floor” and “ceiling” obligations of redress for catastrophic impacts? How may the scope or limits of redress be conceptualized? Is compensation in the form of a one-off “negotiated” monetary quantum of “damages” suitable for mass disaster situations? If not, what medium- and long-term concrete
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In these terms, the principal question concerns risk, responsibility, and redress. This question is posed and mediated in various ways in catastrophic situations. In order that responsibility and redress become pertinent to business conduct or ethical judgement, issues of the authority (conventionally put, the causation), the agent (in means), and the extent (incidence) of harm need to be clearly addressed. Assuming an agreed response to this, the issue of responsibility has at least two dimensions; first, the language in which the discourse about responsibility is conducted makes all the difference; second, the extent of the responsibility for catastrophic harm ensuing from the PDE.

The first dimension once again raises the distinction between legal and ethical languages (however contingent their relationships); legal liability and moral responsibility do not often comfortably merge. The second dimension translates these issues into the corporate language of damage limitation, suggesting at least some minimal thresholds for responsibility/liability. In terms of redress, then, even the most minimalistic version of the recrafted PDE regime rejects the notion of impunity that orients that the costs should lie where they fall, on the submissive bodies and voiceless souls of those directly affected.

However, the culture and practice of corporate damage limitation raise further obdurate questions. What may be said to constitute the “floor” and “ceiling” obligations of redress for catastrophic impacts? How may the scope or limits of redress be conceptualized? Is compensation in the form of a one-off “negotiated” monetary quantum of “damages” suitable for mass disaster situations? If not, what medium- and long-term concrete
obligations, in terms of human rights, to ameliorate massive human suffering may attach to corporations? How may we justify the corporation's capacity to pay as furnishing an ethical cap or ceiling that defines the limits of redressability? Does the invocation of penal law and sanctions relate to redress, and if so in what ways?

The Bhopal catastrophe, and its negotiated passage of risk, responsibility, and redress, brings alive, with some poignancy, these and related questions. I start by noting a bare fact: the Bhopal catastrophe involved the release of nearly 45 tons of methyl isocyanate gas (MIC) on 2/3 December 1984 at the Bhopal plant of the Union Carbide Corporation's (UCC) Indian subsidiary, Union Carbide India Ltd (UCIL), which killed at least 2,500 people. In the face of the scale of the disaster, the UCC, and the UCIL under its auspices, assiduously engaged in the logic of double denial concerning the agent (means) of harm and the author of harm.

As to the agent of harm, the UCC insisted the gas emissions were not of MIC; and that, in any event, the emissions were in no way harmful. On this scenario, the question simply did not arise for the UCC of corporate moral responsibility for the timely identification of the agent of harm and sharing any relevant toxicological, epidemiological, and therapeutic information. Instead, the UCIL's propagandists advised people to stay indoors and hold a wet towel over their faces. Given the UCC's global monopoly of technoscientific information concerning the toxicity of MIC, these evasive moves successfully impeded appropriate therapeutic regimes that could have minimized the overall harm and mayhem. The re-crafted PDE regime is sensible if and only if it casts corporate duties to minimize colossal suffering in the wake of a mass social disaster.

The issue gets further complicated in terms of the authorship of harm. When assumption of any such humanitarian obligations is seen to entail acceptance of some degree of moral responsibility that may in turn attract a measure of legal liability, corporate decision makers become simply morally incoherent. This happens because modern corporate management styles and cultures of corporate "legality" encourage individual decision makers within networked corporate contexts to avoid confessional gestures of any sort. The "ethics" of risk analysis and risk management "taught" in the top business schools engraves the logics and rhetoric of denial. So does the "ethic" of the global insurance industry, which precludes any confessional gestures, save when consistent with losses duly insured.

Further, the postmodern (as well as a post-Fordist) transnational corporate governance form complicates acknowledgement of the authorship of harm. This form is flexible enough to make imputation of authorship vexatiously indeterminate. Although the UCIL was a subsidiary of the UCC, and although the UCC held 51 per cent of the shares, it was also, under law, an autonomous corporate self. In the complex mass tort litigation that ensued, the UCC maintained that it could be held neither responsible nor liable for the acts of its subsidiary. It also argued before Judge Keenan that, as an American corporation with its headquarters in Danbury, Connecticut, it was not subject to the jurisdiction of the Indian courts, a position that the learned Judge did not accept in mandating UCC to appear before the Indian courts. At the level of strict law, the UCC contended before the Indian courts that it was not liable for damages under the principle of multinational enterprises' absolute liability for mass disasters. How may one construe this denial of any legal liability under a PDE-oriented regime?

As we shall see in some detail in what follows, the UCC further maintained that the ultimate moral responsibility lay with the Union of India (UOI) and the State of Madhya Pradesh (MP): the UOI initiated the technology transfer agreement with the UCC; it allowed the location of the plant at Bhopal; its laws and regulation governed the UCIL; and, in particular, factory or onsite technical safety inspections were the responsibility of the MP government. The responsibility to minimize negative side-effects (if one may use this term without a moral shudder in the context of the Bhopal catastrophe) befalling hapless Indian citizens was thus said to be pre-eminently governmental. And the settlement amounts the UCC initially and then finally proposed did not betoken any singular notion of moral corporate responsibility; rather, these remained animated by the need to negotiate transaction costs between a "host" state and a multinational corporation. As we shall see later, the responsibility issues here are ineluctably constituted and related to a multiple-nested collective moral "self".

Narratologies and PDE: A preliminary excursus

I have already begun the Bhopal narrative. But some threshold issues arise concerning narrative integrity: how "best", and from whose standpoint, may we construct and narrate stories concerning risk production and distribution in terms of the objectives of the action, the means employed to achieve this, and the results (including both positive and negative side-effects). As already hinted, the Bhopal case is laden with multiple stories concerning extremely diverse actors and comprising multifariously constituted intersections between governmental, corporate, and violated selves.

The UCC narrative path privileges the fact that the national government of the world's most populous democracy was the actual author of
the key decisions to import an ultra-hazardous process, manufacture, and industry and its eventual location at Bhopal. The UOI, representing India's free, equal, and sovereign state, was the custodian of the rights and interests of Indian citizens. The UCC was then no more than a supplicant for state largess, with no real power to bend its sovereign will towards its own commercial ends. In this narrative, then, primary ethical responsibility lies at the door of the UOI and its constituent state, the MP. In a way, this responsibility narrative was also implicitly subscribed to by the UOI from the 1960s to the early 1980s, when the catastrophe occurred.

When this privileged narrative was disrupted by the massive release of 45 tons of MIC in the early hours of 2/3 December 1984, the UOI and MP constructed the narrative in terms of a model of action that vested pre-eminent, even sole, responsibility in the UCC, which it naturally then chose to contest all the way through diverse instrumentalities and forums of a unique global mass tort litigation. The UOI, as a sovereign plaintiff, sued the UCC, first in New York and subsequently in India, creating the epoch-making principle of absolute enterprise liability, which insists that ultra-hazardous processes, manufacture, and industry (national or multinational) remain absolutely liable, to the point where the enterprise is fully liable for the harm caused and does not even have the capability of invoking the standard defence that a mass/social disaster might have been caused by sabotage or (as lawyers call this) an Act of God. In this narrative genre, the Bhopal catastrophe becomes intensely juridicalized.

The Bhopal-violated Indian humanity offers a third and complex narrative path. The anguished survivors constructed scripts of responsibility that indicted the UCC and UCIL as well as the UOI and MP, co-equally but variously. They posed the issue of responsibility not merely in terms of causation and damages but also in the language of duties of care as justice entailing amelioration of here-and-now and long-term suffering via specific obligations of relief, redress, and rehabilitation. In this perspective, the “negative side-effects” become embodied selves. These are best measured not in terms of juristic principles of liability and quantum of compensation (assessed by the UOI at US$3 billion and finally settled at US$470 million) but rather in terms of collective human bereavement and grief, and whole encyclopaedias of the immediate as well as the indeterminate future physical and psychological hurt and harm, lived now for nearly two decades. The so-called side-effects signify for them the wholesale and continuing destruction of their life projects.

Any morally sensitive PDE-oriented articulation of “intended” harms and unintentional negative “side-effects” needs then to confront the stark issue: from whose and from which perspective may we choose to tell epic stories of human, and human rights, violation? The issue here concerns the very formation of a narrative self. How and where may we locate its origins and itineraries? Which narrative self, in its multiple unfolding, may we privilege? How may we periodize the various births and rebirths of this narrative self in the archetypal situations of mass/social disasters from Bhopal to Ogoniland and beyond?

Clearly, different narrative modes result in different emplotment of the ways in which we privilege both the narrative self and the narrated ones. After all, each and every narrative performance tends to distribute/redistribute constitutive narrative functions. Different narrative selves emerge; as does the great chain of events that constitute the being of the catastrophe and the variety of its aftermaths. The “narratives” (those who stand narrated) also vary, depending on the intentionalities of the narrative selves. Different narrative structures emerge in ways that privilege certain accounts of causation and of the moral responsibility and legal liability of the various actors (that is, those that singly and together produce a range of critical events). Different narrative ethics too emerge. Diffused distribution of responsibility and liability for unfortunate impacts thus characterizes critical events.

Furthermore, there is the problem (already noted) of the language of the chosen narrative style. For example, was what happened on 2/3 December 1984 at Bhopal merely a “gas leak”, a “disaster”, or a “catastrophe” equivalent to Hiroshima, earning it the name of “Bhoposhima” or the “largest peacetime industrial disaster in the world” (as Judge Keenan was to describe it)? What, if any, PDE-related consequences may then be said to ensue?

The problematic of adequate narratology continues to haunt us all the way. What narrative forms may be pertinent in terms of risk pre-assessment and prevention and of amelioration of negative side-effects? Were the diverse choreographies of corporate/business conduct, governance, and culture sufficiently PDE responsive? How are we to understand differential PDE ethics thresholds that led the UCC to acknowledge responsibility while altogether denying any legal liability? Does any preferred version of PDE help us to discover Archimedean points of narrative? If none may be established, how then may we tell, even as “chain novelists”, the “best” stories concerning what actually happened? How then also might we adjudicate the inner narrative moralities thus conflicted? All one may say perhaps is that narrativist reductionism remains unethical in its irredeemably simplified (and reified) descriptions of complex and contradictory realities. Narrative integrity is indeed a virtue. The question, then, is what in the PDE regime may help us privilege any narrative form for the presentation of the critical events of a mass disaster.
Periodization remains central to fashioning “core” narratives of critical events because these occur and are experienced in differential space-time. The space-time of the UCC decision makers was intensely global; the space-time of those violated at Bhopal was irredeemably local. Feats of periodization hover ambivalently across these catastrophic horizons; for reasons of space, I rather clumsily cluster the periods into three categories relevant to any PDE application: the pre-catastrophe period; the catastrophe period (the minor 1982 gas leak and its managerial aftermath; the “management” of the immediate events on 2/3 December 1984); and the period of juridicalization of the catastrophe (from 1985 to the 1998 “settlement” and its aftermath).

The pre-history of a catastrophe

The background

The UOI, in the circumspect of post-colonialism, espoused a state-driven conception of development. In this form, it emerges as an ethical actor, a singularly burdened multiplex network of public decision-making, confronted by the perceived need to make India self-sufficient and self-reliant in food production. In the 1960s it decided it no longer wanted to be dependent on the National Food Aid programme for the supply of carbasrate (pesticide and insecticide chemicals entailing indeterminate actual and future impacts on human life and the environment) and to commence a programme of chemicalized agricultural production under its own auspices (the first Green Revolution). It thus embarked on technology imports. The UOI floated global tenders for the manufacture of MIC-based pesticides, thus exercising toxic sovereignty. The wider aspects of the pre-UCC governmentality, which were important in the struggle for justice for the Bhopal victims, will not be pursued here.22

The UOI considered two offers/tenders, from Bayer and UCC, and, following the standard procedure, invited public comments on these. Both tenders were based on methyl isocyanate (MIC). Bayer followed the “best industry standard” in that its offer entailed merely production on demand, with no large-scale storage of MIC, even then known to be lethal in as yet unforeseen ways. The UCC, in contrast, saw no harm in large-scale storage of MIC as and when needed. Only one Indian company (Atul at Valsad, Gujarat) lodged an objection, based on the grounds of future endangerment – to no avail. The contract was awarded to the UCC.

Any appeal to the recrafted PDE version then raises the following issues:

- Did other concerned Indian corporations have the same PDE “duty” as Atul to raise objections? This involves the issue of the collective corporate pursuit of what is commonly known in business as the “best industry standard”, an ensemble of business practices and trade customs that anticipate and limit the overall harm of negative side-effects. Two questions here arise: first, how may we glean the uncontested existence and provenance of the best industry standards; and, second, how may various human rights norms, standards, and values relate to the birth and growth of such standards?
- Was the UOI justified, under any PDE regime, in treating the Atul objections less deferentially? This question, lying perhaps outside the threshold of the recrafted PDE regime, remains crucial in any narratives concerning the Bhopal catastrophe.
- Was the UCC preferred because of objectives driven by American foreign or economic policy? If thus narrated, which set of moral actors may be identified, singly or jointly, as morally blameworthy (and legally consequential) for any catastrophic production and distribution of mass disaster risks?
- Did the UOI fully consider the hazards, given the state of contemporary knowledge, of large storage-based production of the two UCC products?23
- What fiduciary duties, under any PDE regime, were owed by the UCC in terms of obligations of full disclosure of the levels of toxicity and ranges of epidemiology involved in its modes of production? To whom were these owed?24 And what was required by the PDE regime by way of coherent obligations of corporate policy/governance fulfillment?
- What, if any, PDE regime duties ought to have informed the insurance industry as regards known and foreseeable hazards in their underwriting of the UCC project? Because hazardous industry and manufacture are increasingly insured for catastrophic risks as well as for accidental harm, the PDE regime ought to address the ethic of the global insurance industry; all too often, the insured risks determine the modes of acknowledgement of responsibility/liability and the quantum of compensation in mass disaster and mass tort litigation and settlement.
- What human rights obligations, constitutive of a new incarnation of the PDE regime, ought to have informed decision-making by the UCC and its network affiliates? Because existing human rights regimes tend to exclude the application of human rights norms and standards to multinational corporate conduct, specification of applicable customary and treaty-based human rights remains vital to the recrafted PDE regime.25
The politics of location decisions

Location decisions in relation to ultra-hazardous industry, processes, and manufacture structure the nature of “negative” side-effects (they condition as well as determine). From a business standpoint, industry location invariably entails considerations of access to factors of production (land, labour, tax incentives, and access to infrastructure, especially transport and communication, the manipulability of executive discretion). Human rights considerations scarcely impinge on location decisions; “safety” considerations do matter but not decisively, at least when a multinational corporation operates in a populous developing country setting. In any event, in such settings the “technical” aspects often get associated with, even overlaid by, the “political” dimension within which the host governments necessarily function. The question then arises: in what ways may PDE normativeness speak to location decisions?

Bombay (now Mumbai) was thus obviously the first choice for the UCC plant, but the most available site also proved to be the worst: the proposed location at Chembur in Bombay was too close to an already ageing civilian nuclear power plant. The narratives of mass disaster and its historical impacts would have been spectacularly different had the plant been located on this site. Indian governance and politics, as well as multinational corporate conduct, would have been affected in far-reaching ways. Did any sense of business ethics (to put the best ethical face on corporate decision-making) guide the UCC acquiescence in the abandonment of this site? May it be credited with some scruples in not deploying its corporate power to persist in the original and more industrially favourable location?

It is doubtful whether any PDE logics/paralogics informed the choice of Bhopal, the capital city of the state of Madhya Pradesh. Was this choice (as compared with Bombay) justified on the basis of any pursuit of the “less harm” principle? What corporate deference, if any, was owed to the vociferous and principled opposition by no less than the then Chief Secretary of the MP (M. N. Buch)? He opposed the location of the hazardous plant in the heart of the old city, where millions of impoverished citizens etched their ways of survival and livelihood. But this location was eminently convenient for the UCC and it prevailed; the Chief Secretary resigned in protest, but to no avail. What negative side-effects were thus considered ethically unproblematic?

Further, it goes without saying that the people affected had no say in the final locational decision, at least in terms of involvement in risk pre-assessment. Had a measure of due PDE-oriented diligence informed the UCC management, a less populous site at Bhopal would have been preferred, avoiding future catastrophic results. Ethically informed options concerning the avoidance of negative side-effects would have emerged for consideration had stakeholder consultancy been in place before, and during, the operations. However, any such meaningful participation would have required a symmetrical flow of information about the nature of the hazard, its foreseeability, and its short- and long-term impacts on life, health, and the environment. What ethical obligations did the UCC and its affiliates have, even within the mixed jurisdiction of public/private (governmental/corporate) decision-making, concerning public education about the potential hazard?

Informational asymmetries and monopolies

More to the point, how may this task be addressed where the flow of information is asymmetric? As already noted, the UCC had a near monopoly on technoscientific global knowledge concerning the toxicity and epidemiology of MIC-based pesticide production. Was its deliberate non-disclosure to the UOI, MP, and potentially concerned communities justified or justifiable under the PDE regime? Positive law regimes of trade secrecy and intellectual property provide almost full protection of rights of corporate non-disclosure. The UOI’s tolerance of this monopolistic advantage is equally understandable, because ultra-hazardous technologies constitute a seller’s market. But does full acceptance of these rights legitimate business practices that overtly or covertly amount to genocidal decisions? Denial of even prima facie PDE-related obligations adequately to conceptualize potential negative side-effects and to provide a state-of-the-art safety regime for the Bhopal plant, given the unprecedented storage of MIC, remains PDE impertinent.

How can we explain the fact that the same UCC management did not allow similarly large MIC storage at its West Virginia plant? No PDE-oriented regime may, in the abstract, sanction a racist corporate culture that differentiates between duties of care owed to co-nationals and non-nationals. At the very least, PDE norms entail equally scrupulous solicitude for the human right to life and livelihood; locational as well as technical operational decisions in particular require the duty to avoid hostile indifference and ethnic discrimination in ultra-hazardous processes and manufacture. In addition, application of the PDE proscribes “economy” measures that might increase the risk – the UCIL management shut down the Bhopal refrigeration plant to minimize operating costs, a decision that greatly contributed to the catastrophe. A similar range of issues arises in terms of the prevention of negative side-effects occurring through accident and even industrial sabotage. A PDE regime manifestly imposes a higher threshold for eliminating or at least minimizing such side-effects.
Likewise, in designing and maintaining efficient safety systems, the UCC management was clearly obliged by a PDE regime to maintain the same level of state-of-the-art safety systems across its worldwide MIC-based production. I say this for the simple reason that the PDE regime derives its cogency from the premise that business practices must be based on equal treatment and equal respect for all. The UCC’s West Virginia plant had computerized safety systems providing for early warning, automatic fault rectification, and similar coping abilities for the avoidance or minimization of negative side-effects. The Bhopal plant, in appalling contrast, began operations with an already outmoded manual safety system, which was not redressed (as I note in the next section) in the wake of the 1982 gas leak by any attempt at conscientious implementation of its own safety audit report.

Routine managerial decisions at the local plant level, which were not subject to concerned scrutiny by the controlling multinational management, as well as policy decisions taken when setting up the plant, may be criticized on PDE grounds. Hazardous production should not be further aggravated by differential management of safety technology that devalues life, livelihoods, and minimal dignity in developing countries. Put another way, hostile ethnic discrimination, even when "justified" in terms of efficiency and profits, remains unexcusable under any PDE regime.

The catastrophe period

Decision moments

When investment and operational management decisions remain wholly "instrumental", the underlying rationality of business/corporate conduct invites the description "fly now, pay later". The "fly now" aspect concentrates mostly, even exclusively, on the needs of production and profit. The "pay later" mode, in turn, is encased by the risks that the global insurance market may "reasonably" and "rationally" be said to bear. It is also manifest in recourse to legal strategems to avoid "paying" even later. "Rational" business/corporate decision-making is thus at each stage carefully informed by profit maximization and avoidance of uninsurable liability. In real-time corporate/business decision moments, reflexive corporate governance translates human rights solicitude and imperatives, if at all, in terms of what the market will bear.

The catastrophic leakage of MIC in 1984 was preceded by a small leak in 1982 that killed two workers. This incident occurred despite periodic safety inspections by the state of Madhya Pradesh. The active pursuit of plant safety by the local trade union leadership was swiftly disciplined and punished by the UCIL; the union unavailing pursued the wrongfulness of the management action in a local labour court. However, the UCC management was so concerned that it ordered a "safety audit", which uncovered the alarming condition of safety systems and procedures at the Bhopal plant. The discovery proceedings before Judge Keenan revealed that this safety audit report was not shared with the UCIL management or the UOI or MP governments. Worse still, far from carrying out any participative exploration prior to and during the business operation with a view to avoiding "negative side-effects" (in terms of the revised PDE), the UCC suppressed the safety audit report. Its irredeemably unilateralist business/governance conduct merits thoroughgoing PDE indictment.

The post-catastrophe managerial aftermath

What PDE-related considerations may inform cultures of corporate governance and conduct in the event of a catastrophe? I have already noted the problematic logic and rhetoric of denial of the agents (means) of harm. But the long aftermath of the catastrophe deserves brief analysis here.

First, was the UCC justified in contesting that whatever emissions ensued were not MIC laden?

Second, was it justified in not sharing all available epidemiological and toxicological information with the UOI and MP governments and Indian health care professionals? Were there no available means and methods (even within management limitations on confessional gestures of moral responsibility, which are perceived as liable to be translated into legal liability) by which the UCC might have helped to ameliorate the enormous human suffering?

Third, was the UCC justified in arguing (in the mass media, in boardrooms, as well as in courtrooms) that the negative side-effects would have been less lethal had the levels of nutrition and community health been higher, even if not comparable to those in the developed world? It maintained, for example, that the adverse respiratory impacts of exposure would have been noticeably different had the smoking habits of the affected populace been different or their nutritional floor richer! Such archetypal damage limitation exercises, if taken at face value, seem to rule that corporate investment and location decisions may be constrained by the PDE only where communities are well fed and nourished and do not indulge in health-damaging addictions. Investment decisions around the globe would then indeed punish relatively less "worthy" communities. Such excesses in damage limitation exercises go against not just the PDE regime but plain common-sense.31
Fourth, the PDE entails that, where suffering is a side-effect, the company is obligated not just to minimize it but to “take on the suffering as well.” This then answers the affirmative the question: Did the UCC have any obligations, consensually crafted together with the UOI and MP, to provide any interim financial relief and assistance to the Bhopal victims? The UCC complained vociferously (in terms of a public relations exercise) that the concerned governments had closed down UCC/UCIL-maintained “facilities” (such as provision of sewing machines for female “victims”), but so far as is known made no effective attempt to provide a non-adversarial consensual platform for such cooperative endeavour. Instead, it contested all the way up to the Supreme Court the award of interim compensation by the MP High Court (of US$270 million) aimed at immediate amelioration of the victims’ plight. The UCC may have been well advised to deny any legal obligation to pay compensation, but there was nothing to prevent a humanitarian gesture, consistent overall with its eventual non-liability position, to offer an equivalent sum for immediate relief and rehabilitation.

This raises an important question that PDE-oriented business management ought to consider. When judicial orders direct interim compensation in damage suits for mass torts, corporate management needs to have ethically sound reasons for opposing compliance. Such compliance may properly be accompanied by two conditions: first, that such aid and assistance do not preclude or prejudice the company’s legal position or defence in ongoing legal proceedings; and, second, that the company may seek to deduct from a final settlement amount any interim compensation already paid. These conditions were in any event integral to the MP High Court’s award of interim compensation.

Of course, a hard-nosed management may want to maintain that, were it to succeed on appeal and thus be found not liable for any compensation at all, it might be difficult to recover interim compensation already disbursed. Given, however, that most mass torts litigation is ultimately settled, rather than fully adjudicated, there is no legal or juridical reason for the interim payments not to be set off against the finally settled amount. Even if a settlement is not made, it is not clear why, as part of the principle of minimizing intense human/social suffering, ultra-hazardous manufacture and industry should not add suitable provision for interim relief to its overall insurance portfolio. For example, insurance portfolios already extend to “political risk”, which covers losses arising from political circumstances and situations such as regime change or civic unrest and violence that adversely affect pre-existing contracts. There is no reason for business not to insure against measures of interim relief or compensation being judicially ordered. Likewise, toxic industries (for example, in the United States) have agreed to the legislative imposition of subscription to industry-wide environmental clean-up public funds (the Toxic Superfund); is there any reason for the principle informing such legislative arrangements not to extend to interim relief payments in the event of a major industrial disaster? In any event, any PDE-friendly business ethic requires, at the level of both individual firms and business/industry associations, morally imaginative innovations to address the amelioration of human/social suffering that may emerge on any reasonable scenario of the probability of a catastrophe occurring.

Fifth, what justifies the extraordinary self-presentation by the UCC of itself as a victim of Bhopal litigation? I have explored the multiple ironies this raises. Here it should suffice to mention that the UCC presents itself as the ultimate victim, denied fair play by social action and human rights groups, the Indian media, and even Justices of the Supreme Court. On this presentation, actions for legal redress by the UOI and victim groups constitute a second Bhopal catastrophe. The UCC thus clouds, multifariously and mischievously, the issues concerning the authorship of mass disaster, the moral obligation to ameliorate human suffering thus caused, and allegiance to moral causes.

Sixth, although the criterion of immediacy of harm is not integral to the recrafted PDE, the recalcitrant residues of the original PDE raise the issue of how we may extend or apply the PDE criterion that beneficial effects must follow from the action at least as swiftly as harmful effects. This criterion of immediacy, which is well suited to just war or medical/bioethics contexts, requires wholesale reconsideration in the context of corporate governance contributing to or causing mass disasters. Although I applaud the recrafted PDE regime, which dispenses with the criterion of the immediacy of harm because the harmful effects of mass disasters unfold over time and across generations (especially mutagenic impacts), the issue of translation persists. By this I mean the ways in which business ethic formations may actually assume long-term responsibility for rehabilitation and redress. During prolonged litigation, as in Bhopal, corporations remain overwhelmingly concerned with denying any serious long-term effects and even immediate effects; upon settlement, they tend to maintain that the manifestly inadequate sums thus made available must be held to absolve them from any further responsibility and liability. The logic of dispensing with the criterion of immediacy in mass disaster situations needs to be put to work; as such it constitutes a problem that warrants future attention.

The juridicalization of the Bhopal catastrophe

The issues so far raised acquire further complexity and contradiction with the juridicalization of the Bhopal catastrophe. Juridicalization entails unequal and deadly combat between formidable networks of global techno-
scientific capital and numerous, usually impoverished, dispersed and powerless victims. The victims of the mass disaster have to bear the burden of proving the harm; they have not merely to show the authorship of harm (causation) but also to demonstrate that they have suffered compensatable injuries. What constitutes compensatable injury is further determined by the civil law of torts, which is not always and inherently inclined towards the justice of their cause. Its principles and standards of liability are not historically designed to empower the victims of mass disaster. Juridicalization commingles issues of legal liability and moral responsibility and the adjudicatory auspices follow their autonomous path and career. Most catastrophic mass disasters do not involve hot pursuit of the offending corporation by a sovereign plaintiff state. Bhopal was probably the only major mass disaster in which the state claimed to act as *pares patriae* for those harmed by the catastrophe.

The immediate trigger was provided by the swarm of contingency fee American lawyers that descended upon the Bhopal victims in the wake of the catastrophe. Within less than a fortnight, they had assembled powers of attorney and begun to institute as many as 118 civil mass torts suits in various United States jurisdictions. Incidentally, were we to conceive of the American Bar as a business, might PDE logic also extend to legal professionals?

Considered in necessary detail, juridicalization entails contestation by the defendant corporation of the facts, causes, and effects of a mass disaster. Further, corporate/business handling of mass disaster litigation systematically reveals juridicalization to be a war of attrition. Because legal services constitute a paradigm of a seller's market, corporations tend to suborn the best and brightest legal competence, which is thus never in full measure available to the “victims” of mass/social disasters and their next of kin, to the human rights and social activists, and in the Bhopal case even to a sovereign state plaintiff. The commanding heights are captured in juridicalization strategies by aggregations of techno-scientific capital. From these heights, immensely complex legal maneuvering constantly takes place; every form of procedural and substantive complexity in the legal orderings is relentlessly marshalled (as the corporate conduct in the Bhopal case documented in my trilogy abundantly testifies). This invaluable strategic advantage is pursued in the undeniable values, languages, and rhetorics of the rule of law and due process.

The overall result is a huge “docket explosion”, in which litigation moves through the judicial hierarchy in a constant game of “snakes and ladders”. The Bhopal case furnishes a paradigm of the movement of issues and contentions through the appellate judicial labyrinth. Both the UCC and UOI remain engaged with the production of the docket explosion. The UCC corporate governance and culture are favourably disposed to delaying consideration of the real issues because delays favour relatively low settlements that fall within the range of insured amounts. The UOI, through the unique device of the Bhopal Act, which personified itself as a collectively injured self, subrogating litigational rights and privileges, constituted itself as a sovereign plaintiff, which cannot afford to appear complicit or weak in the public political eye. It sued a multinational corporation for mass disaster, both in the New York court and in various Indian judicial forums, under an innovative mode of absolute liability of multinational enterprises. Thus began an extraordinary forensic saga that infinitely complicates the PDE-related narratives. Because global capital remains loath to accept a final judgment on legal liability or to accept operationally meaningful moral responsibility, institutional PDE reflexivity is hard to decipher and demonstrate.

How may corporate governance and business ethics address their PDE-constructed roles aimed at minimizing the repertoire of negative side-effects in the context of complex litigational strategies, each of which aggravates the plight of those victimized by the occurrence of the catastrophe? First, the UCC’s denial of the jurisdiction of, or non-submission to, Indian courts led to the UOI suing the UCC before Judge Keenan; second, the UCC chose to appeal even the conditional submission to Indian jurisdiction; third, it used the litigation period to promote settlement within the parameters of the sum insured (around US$250 million); fourth, as already noted, it resisted all claims for an interim award of compensation. These strategies are not consistent with PDE-related obligations to minimize suffering.

Nor are such obligations ever fully borne in mind when proposing and negotiating settlement amounts. The final settlement of US$470 million (as against the UOI’s claim for US$3 billion) is by no means adequate for the immediate and long-term relief, rehabilitation, and redress of over 200,000 human beings. UCC also inscribed in the settlement absolute immunity from all future civil litigation and criminal prosecution. The latter immunity was subsequently cancelled by a post-settlement judicial review, but the UCC does not recognize Indian criminal court proceedings, even acquiring in the process the status of an abscinder (fugitive from justice). It further aborts all extradition proceedings.

To be sure, a PDE regime may not address all the foregoing aspects of a complex litigation process. However, the overall narrative thus far is unflattering in the extreme to notions of PDE-oriented institutional reflexivity. My task would have been amply done had all the foregoing addressed the principal issue, namely the relation between the ethical duty to minimize unintended harm (and negative side-effects) and the “effective” cancellation of this moral order with the preferred forensic and
litigational strategies. The juridicalization of the Bhopal catastrophe further raises anxious questions about the institutional role and integrity in the adjudication of mass disasters; the Indian Supreme Court, despite a long and proud history of judicial activism, did not cover itself with glory in ordering an excessive and premature settlement, in its lackadaisical invigilation of the disbursement of compensation, and in its inability to prevent the revictimization of the Bhopal victims.55

Needless to say, juridicalization creates constitutive ambiguities for any extension or application of PDE criteria. These will simply be redundant in a business/corporate world where PDE norms have become a part of institutionally reflexive learning. Till then, legal defence positions in cases of mass disaster (these versatile corporate ways of instant damage limitation that present a catastrophe as mere accident) possess no ethical or juridical pertinence for future conduct.

Conclusion

This chapter has attempted to demonstrate both the importance of the recrafted PDE regime as well as the difficulties of extending it to human rights and social catastrophe caused by mass disaster. The importance of this regime, of course, lies in the animating impulse to subject business and corporate governance to critical morality, whose standards derive from existing human rights norms and standards. Its difficulties lie in the extension of the notion of “negative side-effects” to catastrophic situations and in the articulation of precise entailments of duties to minimize human suffering in mass disasters. I have tried to show that these difficulties are not insurmountable, but they do need to be more clearly addressed if we are to develop PDE normativity as a critical platform from which to assess business conduct and corporate governance. The task becomes infinitely harder because it deploys PDE standards not just as tools for moral judgement after the event but directly to address foundational and routine business and corporate decision-making before the event. Put another way, if the development of standards of critical morality is already a heavy task, the creation of standards of positive morality is even more formidable.

For such standards to emerge and to be internalized in business and corporate cultures, we need to develop overall acceptable ethical conceptions of the constitution of expertise itself. PDE normativity then needs to address the circuits of decision-making in the global risk economy that “regulate” forms of production, distribution, exchange, and consumption of risks (or “negative side-effects”). It needs to address (as partly shown so far) the networked nature of the expertise thus involved; this directs attention not just to a named corporation and its affiliates but to entire submerged structures. The Bhopal case reveals interconnections among the insurance industry (which defines insurable and therefore compensatable injury); medical, health, and science professionals (epistemic classes necessarily involved in disaster management and damage limitation); the learned professions (including legal professions and the mass media); and the political classes (political actors, legislators, and justices). Are all these myriad agents and structures to be the addressees of the recrafted, or any other, PDE regime? Further, are there any areas of corporate/business decision-making free from the PDE regime? If so, how may these be identified and justified?

A more general question can now be bluntly put. How may we prevent the PDE discourse from being swallowed up by amoral or agnostic multinational corporate culture and conduct in ways that further legitimate its insatiable hunger for power and profit? And how, in a post-9/11 world, do we invent a new discourse concerning the moral responsibility and legal liability of the group or collective? How may all this speak to the postulation of the ethical obligation to minimize and ameliorate human suffering?

I need also to conclude with a question about the fiduciary responsibility of our own project. Does our project, which is admirably addressed to the ethical corrigibility of business conduct and corporate governance, pose or harbour any potential for negative side-effects? Put another way, in this era of the struggle of the new multitudes against the despotism of the new minuscule, how may we escape the future indictment of our laudable project as contributing to forms of conversion of the PDE towards ever new pastures for plunder, profit, and power at the behest and on behalf of global multinational capital? Put yet another way, how may we seek altogether to avoid cannibalization of our precious project by corporate governance while crucially protecting the human rights of the wretched of the earth? In sum, how may we build on our initial work in ways that take both human suffering and human rights even more seriously?

Notes


3. For example, the discursive traditions of just war (scarcely a unique Euro-American ethical heritage), killing in self-defence, abortion, euthanasia, human and animal cloning.

5. Extending to, inter alia, suicide bombers, terrorists, dentists, and professors who grade students; see Allison Maclntyre, “Doing away with double effect”, Ethics 111, 2001, p. 219, and materials cited there.

6. These “residues” involve moral languages of “good” and “evil” acts and intentions, “intended” and “incidental” effects, “benefits” and “harmas”, foreseeability and responsibility, deontic and instrumental ethics. Thus, we clearly a significant amount of normative debris when we maintain that the PDE is unconscious “with what the agents intend to bring about as ends or with their motives or ultimate aims”. Rather, it is “limited to a contrast between harms intended as a means to a good end and the incidental effects of promoting a good end” (Maclntyre, “Doing away with double effect”, p. 226). Quite simply, PDE “does not provide the grounds for condemning someone who acts with malicious aims” (ibid., p. 228). Indeed, as Maclntyre observes, the PDE, although addressed to well-intentioned agents who seek to realize good ends, “expresses something more specific: it singles out instrumental harming in particular and contrasts it only with incidental harming” (ibid., p. 228).

7. Is the “good” to be judged by outcomes, results, effects, and consequences or by the intention of act, behaviour, and conduct? Or is it the case that there is the good in itself, independent of the consequences thereof (not intrinsically evil)? If “good” is to be approached in consequentialist terms, this raises at least the following issues:

   • How may we conceptualize the key notions of “benefit” and “harm”? When may we say that certain “benefits” may indeed be harmful and certain “harmas” may be beneficial?

   • How may our ways of evaluating “benefits” and “harm” differ from routine cost-benefit analysis, which is not necessarily tethered to any ethical theory?

   • Where may we reckon with the time dimension in operationalizing the key notions?

   • Is it possible to say that the short-term “harmas” may be “beneficial” in the long-term? Indeed, what are “short” and “long” horizons and what ethical construction of temporality may here be privileged? When is “harming” a present generation good grounds for securing “benefits” for a future one?

   • If the PDE signifies an ethical theory concerning decision-making, how does it guide decision makers acting under conditions of uncertainty? These include risk-taking, the etymological sense of the term “entrepreneur” – “risk” notions make sense only in contexts where it may be said with sincerity that no degree of foresight is able to offer a clue to all the potential “harmful” effects. Does the PDE seriously address

   notions of risk in a global risk society, as Ulrich Beck, The risk society (London: Sage, 1992), calls this thing? Is “foreseeability” quite the same as “foresight”? Is the distinction worth making? Does the former signify a pragmatic moral calculus, whereas the latter suggests powers of divination of a future state of affairs not quite open to rational ethical calculus? Or is “foresight” merely an accumulation of common wisdom arising from a large number of hunches? In any event, sociologists (most notably Robert K. Merton) educate us in the distinction between manifest (foreseeable) and latent (unforeseeable) in the present state of knowledge. If the “latent” is by definition unforeseeable, does the PDE then offer abatement from moral responsibility? And, if so, in what measure? And at whose cost? Incidentally, it would be rewarding to explore the discourse on the precautionary principle, now ambivalently incorporated in the Cartegena Protocol on Biosafety; see, e.g., K. Buechle, “The great, global promise of genetically modified organisms: Overcoming fear, misconceptions, and the Cartegena Biosafety Protocol”; Indiana Journal of Global Studies 9, 2001, p. 263.

   • Do these twin notions – benefit/harm – exhaust the ethic of the good or for that matter of evil? How may the PDE address what has been called “radical evil” (which Hannah Arendt describes as a state of affairs that we may never fully be able to punish or to forgive)?

8. Because of this threshold ethical perspective, the project assumes that human rights rules, norms, standards, principles, values, and ideals constitute an unqualified good; it privileges the notion of a “community of rights” superbly theorized by Allan Grewirth, The community of rights (Chicago: Chicago University Press, 1996). This creatively reformist PDE suggests that “legitimate” business operations are those that are consistent with human rights norms, standards, and values; the duty to avoid or minimize “negative” side-effects (i.e. those that violate human rights) ought to inform corporate conduct, governance, and culture, and these side-effects may be justified only insofar as they are “proportionate to the legitimate (business) ‘objectives’”. Further, human rights regimes do not address all agents of violation; by and large, human rights discourse does not readily extend to civil society conduct, which at times is more abusive of human rights values and ideals. Notably, global and national corporations (aggregations of technoscience capital) are not the primary addressees of internationally fashionable human rights obligations (see Upendra Baxi, The future of human rights, Delhi: Oxford University Press, 2003), as their exclusion from the Statute for the International Criminal Court and the extreme voluntarism of the United Nations Global Compact suggest. The basic grounds for anxiety remain: How may we best relate the PDE to “human rights”? For notable attempts to relate human rights to multinational corporations, see James Sterba, “Introduction”, The ethics of war and nuclear deterrence (Belmont, Calif.: Wadsworth, 1981/1985), pp. 2–3; Henry Shue, Basic rights (Princeton, N.J.: Princeton University Press, 1980); Henry Shue, “Exporting Hazards”, Ethics 91, 1981, pp. 579–606; James W. Nickel, Making sense of human rights: Philosophical reflections on the Universal Declaration of Human Rights (Berkeley: University of California Press, 1987); Thomas Donaldson, The ethics of international business (Oxford: Oxford University Press, 1989), pp. 65–94.


11. Before the important discovery by Greimas that corporations remain juridical semiotic productions (see Bernard S. Jackson, Semiotics and legal theory, London: Routledge, 1987), the issue of the personality of corporations was framed and formed
primarily by the rights discourse. Given the pre-socialist, laissez-faire insistence on near-
absolute individual rights to property and contract as defining the concept of freedom
(though autonomy from state incursion), the eighteenth/nineteenth-century discourse
concerned itself with the issues arising from the "artificial" nature of the juristic per-
sonality. On the one hand, the foundational concepts of early capitalism (property and
contract) authorized the collective/associational form of economic agency itself as a
natural right; on the other hand, the law (both legislative and adjudicative) was ex-
pected to define various associational forms (such as partnerships, firms, joint stock
companies) and regulate these (mostly by way of facilitating economic enterprise) in the
long-term interests of "disorganized capitalism".

12. I present this below schematically, and in language that is not contemporaneous
with the origins of this discourse:

1. If we were to regard the legal personality of corporations to be a mere fiction, as a
legal semiotic production, as some jurists do, we would be constrained to conclude
that corporations do not exist in nature or society; they are brought into being by law
as a fictive entity, both to facilitate and to regulate a certain type of economic enter-
prise. Accordingly, there is no law beyond the "positive" law that may address their
constitutive ethic.

2. As such, rights and responsibilities attach to these juridical beings only through the
performance of a legislative (and, we may add, adjudicative) will to power. Accord-
ingly, ethical discourse extrinsic to the logics of power that shape positive law may
not have much purchase.

3. If corporations are creatures of law, how can they be said to possess unlawful or
criminal will? If they do, can mere legality restrain their Frankenstein powers? In
more difficult terms, how may we speak about the ontology of corporations, espe-
cially the multinational?

4. The "bracket" theory of corporations sought a way out by denying the full force of
"fiction" theory; it addressed the power of corporations within and against the law by
insisting that the corporate form is just the functional equivalent of a bracket, which
is a shorthand way of describing the additive and cumulative activity/conduct/enterprise
of so many diverse and varied individual economic actors. In order to under-
stand and regulate corporate activity (as well as challenge it from an external ethic),
we need to address the moral logic or economy of group formation. Here, the ques-
tion of course is: how may we understand a group? As solidarity (to evoke Sartre) or
as excess (to invoke Bataille), is a group merely additive, the sum of its various parts?
Or is it cumulative— that is, some ineffable surplus is not thus exhausted? If the lat-
ter, how may law and human rights languages describe and locate this excess as the
very site of PDE-type responsibility?

13. In an insightful analysis of the Bhopal catastrophe from a rights perspective, Thomas
Donaldson distinguishes four types of risk: first-party risks (to members of the corporate
organization such as officials and employees), second-party risks (to the citizens of a
government), third-party risks (to persons and communities not members of risk-causing
organizations), and fourth-party risks (to "entirely innocent" victims of future genera-
tions). The last two communities of risk await the invention of a language of moral res-
ponsibility (see Donaldson, The ethics of international business, pp. 110–125).


15. Michel Bury, *The politics of production: Factory regimes under capitalism and

16. "Accident" waiting to happen; see Charles Perrow, *Normal accidents* (Princeton, N.J.:

17. I here rely on the seminal distinction suggested by Judith Sklar, *Faces of injustice* (New
Haven, Conn.: Yale University Press, 1990).

18. See Upendra Baxi (ed.), *Inconvenient forum and convenient catastrophe: The Bhopal
case* (New Delhi: Indian Law Institute, 1986); Upendra Baxi and Paul Thomas (eds.),
*Mass disasters and multinational liability: The Bhopal case* (New Delhi: Indian Law
Institute, 1985); Upendra Baxi and Amita Dhand (eds.), *Valiant victims and lethal lit-
tigation: The Bhopal case* (New Delhi: Indian Law Institute, 1990); Upendra Baxi, "Mass
torts: Multinational enterprise liability and private international law", *Revue des cours
multinationales* 2 (1990): 49–58; the literature cited therein. Additionally, for a signifiant
and existential narrative, see Dominique Lapierre and Javier Moro, *It was five minutes past
midnight in Bhopal* (Delhi: Full Circle, 2001); Don Kurzman, *A killing wind: Inside
Pesticide, environment, and health* (San Francisco, Calif.: Sierra Club Books, 1984); Paul
periodic contemporary analysis by Wil Lepowsky appears in several issues of *Chemical and
Engineering News.*

19. Though the official figure is about 2,500, contemporary eyewitness accounts suggest
10,000 fatalities. I myself saw hundreds of bodies piled up in a large number of municipal
trucks for expeditious disposal (with no identification or regard for religious preferences
for cremation or burial). This raises the basic issue of the nationalization/corporatiza-
tion of truth relevant for measuring "negative" side-effects.


21. Obviously, on a "network" conception of multinational enterprises, ethical agency is
widely dispersed, even to the point of the right hand not knowing what the left does; or,
more accurately, to the point where the five fingers of either hand do not quite know
what each intends to do or in actual effect does or accomplishes. The attractions of a
reductionist view remain seductively fatal. Indeed, a view assigns to the HQ (or
siege sociale) a heavily concentrated collective moral and ethical agency/persona. It
insists that every single act of commission and omission remains ruthlessly attributed
to an imaginary "brains trust" of global capitalism. On this view, "good" and "evil"
incentives and impact scarcely pierce what lawyers call the "corporate veil." The dis-
tribution of the juridical personality of global and multinational corporations emerges
as a series of ethical guises; all collateral damage continues to be traced to forms of
ultimate authorship that are completely uninhibited by legal forms (the "parent"/
"holding" company, its national and regional subsidiaries, and related assorted affiliates
that "outsource" their proportional labour and capital). I have myself rather relentlessly
pursued this imagery over nearly two decades of the struggle of Bhopal victims against
Union Carbide and its successors. And I have to say I found it vigorously empowering
in all manner of ways. Yet the issue remains: are juridical forms merely signifiers of the
divestment of moral agency or are they something more that escapes activist meaning,
at least in terms of the DFE discourse?

Second, we need urgently to confront the issue of in what sense we may assert that
"corporations" are moral agents. This is an extremely difficult problem, especially in
the light of the formidably well-worked out thesis by David Gauthier (Moral by agreement,
132–166*), which argues, in effect, that corporate/business conduct constitutes a "moral
free zone". This, indeed, is self-evident in the very constitutive grammar of "free"
market and enterprise that valorizes market competition. How may we extend the DFE
language to business competition? Am I, as an economic agent in a free market, obli-
gated to take into account any harm that my competitive success causes, even harm to
the human rights of my rivals? Free market competition under capitalism necessarily
entails a notion of the legitimacy of such harm to co-equally placed rival market agents.
Indeed, property and contract rights postulate a human right to cause legitimate and
lawful harm to business rivals (see Upendra Baxi, "From human rights to right to be
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human", in *The right to be human*, Delhi: India International Centre, 1987, and the reference therein to Guya Ensari in particular). Restating the PDE remains then at odds with market competition and problematizes state-law justifications for coercive state market activities. Capitalist regulation of immoral/illegal business practices that overall adversely affect the operations of free market, predatory, and perverse forms of corporate/business conduct, governance, and culture (e.g., "insider trading", business fraud, "creative accounting", corrupt practices), extreme corporate/business practices that degrade and destroy the environment, recklessly exploit labour markets, and impermissibly forms of gender hostility via a free-for-all production/reproduction of the global sexual division of labour and business practices producing/reproducing slave-like labour exploitation.

Third, this raises the all-important question of corporate moral autonomy in the self-legislation of standards of moral conduct. From whence may they derive notions of "good", "evil", "intentions", collaterality, and "side-effects"? To whom, as economic entities/agents, may they be said to owe any moral or ethical obligations? How may the PDE regimes justify the movement from forms of shareholder responsibility to stakeholder responsibility? How may they construct, in frankly human rights terms, the varieties of the logics of fiduciary obligations to concerned communities and incorporate profit and power considerations? Put another way, what levels of moral altruism may the PDE prescribe for corporate governance? When may state coercion to reinforce such normative obligations be justified, and on what possible or arguable grounds? What varieties of PDE may guide principled choice between self-regulation and justified state coercion?

22. Was the Green Revolution planning (which aimed to increase food grain production and economic self-reliance) conceived within the moral framework of the Indian Constitution? Was it conceived with due for the constitutionally enshrined rights of all Indian citizens? What might justify governmental monopoly over the definition of the "public" interest? What PDE-related ethic ought to have guided state policy-making?

23. Namely, its brand-name products Temidk and Sevin.

24. Many of us appeared before the UCC, Danbury, Annual Meetings as stakeholders. As a stakeholder representing the American Union of Baptist Churches, and on the fifteenth anniversary of the Bhopal catastrophe, I raised the issue of whether, having settled all liability issues, the UCC might consider releasing information concerning the toxicity of MIC. Information that would then facilitate governmental and non-governmental business community efforts at ameliorating the adverse impacts on physical and psychic health. The chairperson of the UCC simply ignored this request in his response.


26. The invocation of the "less harm" principle is not free from difficulties. True, the magnitude of death, injury, and harm would have been demographically much higher if the disaster had not been contained at Bombay. Further, one may only speculate on the overall impact of a massive MIC release on the nuclear power plant. And it remains arguable that in this location scenario the UCC would have been far stricter concerning safety design and operations. Would it have ensured greater vigilance had the 1982 incident occurred at the Bombay location? Apart from all this, any suggestion that the Bhopal location in itself remains PDE compromised means that the less harm principle must rest on the unsustainable notion that human lives are worth more in Bombay than in Bhopal. The equal worth and value of all Indian citizens and other likely to be affected by a catastrophe prohibit comparisons between populations exposed to catastrophic events.


28. The UCC argued the theory of terrorist sabotage before Judge Keenan; even he was constrained to dismiss this as a flight of fancy. Subsequently, the UCC floated the theory of a disgruntled employee who intentionally allowed the contamination of MIC that produced the catastrophe; the UCC has not been able to substantiate this, although its media campaign made it plausible for financial newspapers and cohorts of the global chemical industry. Dr. Ward Morehouse, the president of the International Council of Public Affairs, New York, has rendered inestimable service to the Bhopal victims by archiving a wholly different narrative of a UCIL worker.

29. Through legally permissible, though ethically impugnable, bankruptcy proceedings, as illustrated most pointedly in the aftermath of the Enron scandal and of various asbestos litigations.


31. Thomas Donaldson expresses all this in terms of contrasting "cultural variables" and "extracultural vision". The latter allows us to "understand a trade-off between risk and productivity, between the dollar value of an increased gross national product on the one hand and higher dollar cost of medical care necessary to accommodate higher levels of risk". But this vision is "blurred for more ethnocentric trade-offs. In many less developed countries a higher gross national product is only one of the handful of crucial goals informed by cultural tradition and experience" (*The ethics of international business*, p. 112).

32. I owe this striking formulation to Lene Bomann-Larsen.

33. Upendra Baxi, "Introduction", in Baxi and Dhandha (eds.), *Valiant victims and lethal litigation*.

34. There is simply no way in which we may apply this principle to the people in Bhopal affected by MIC, or the people affected by Agent Orange, or subjects identified by great realist fictional narratives such as Jonathan Harr's *A civil action* (New York: Vintage, 1997) or John Grisham's *The king of torts* (London: Arrow, 2003).

35. How may approaches/reconstruction of the PDE regime that favour human rights address conceptions of judicial autonomy, judicial integrity, and the human rights obligations of the judicial role and function? In the concrete context of the Bhopal litigation, this raises at least the following PDE-relevant issues (and not just for the Indian courts):

- What PDE/human rights friendly fiduciary obligations may justices and courts be said to have?
- How may we assess Judge Keenan's "technical" performance on this measure? See Baxi (ed.), *Inconvenient forum and convenient catastrophe*; Baxi and Thomas (eds.), *Mass disasters and multinational liability*; Baxi and Dhandha, *Valiant victims and lethal litigation*; Baxi, "Mass torts"; Baxi, "Geographies of injustice".
- Did the UCC have any PDE-relevant obligations to submit to Indian jurisdiction?
- If so, what PDE-informed perspectives may be said to furnish legal or forensic bases for its logos of argumentation concerning non-liability/responsibility?
- Does the PDE criterion of "participation" by affected peoples inform the province of adjudicative decision-making? If so, in what ways did the Indian Supreme Court violate the application of a PDE regime in ordering settlement of the case?
- How may the project to rework the application of the PDE address the outcome problem; that is, help us in judging the justice and efficacy of the eventual settlement amount and its careful disbursement?