INTRODUCTION: TOWARDS THE REVICTIMIZATION OF THE BHOPAL VICTIMS

I. AN ABODE OF IRONIES

The Bhopal litigation, with all its labyrinthine developments, bristles with extraordinary inversions.

A sovereign state, proud of its juristic and political traditions, appears as a litigant before an American forum seeking justice against an American multinational for a mass disaster. India auto-critiques her own legal system in a misguided exuberance of a litigative strategy; an American multinational is thus accorded the historic privilege to celebrate the Indian legal system. India biopsies her own legal system with the help of an American law professor; Union Carbide gives healing touch to the system by retaining two eminent Indian lawyers.

An American judge confesses anguished reluctance to impose and inflict the standards of American justice on Bhopal victims, lest this might constitute “yet another example of imperialism”; and yet he has no difficulties in subjecting enforcement of any Indian decision on the Union Carbide to some inchoate ‘minimal’ due process standards, the full import of which will only be felt at the time of enforcement of Indian judgments against Union Carbide in the United States. And the Judge who does not want to deprive the Indian judiciary of an “opportunity to stand tall before the world and pass judgment on behalf of its own people”, finds nothing incongruous in directing the importation of the American discovery processes in Indian courts. In order to “stand tall” in the Third World, one does need the first world high heels, after all!

We also learn, in the process, that the much vaunted liberal legal ideology of justice—a prized American cultural export, assiduously marketed in the Third World societies—does not include in its benign range the hapless victims of mass disasters, directly or indirectly, caused by American multinationals. Indeed, they are rather facilitated further in their immunity from the discipline of the law and the command of justice.

Nor is the potential for creativity of American judge and jurisprudence to be harnessed readily for the luckless denizens of Bhopal. Judge Keenan rules that the “purported public interest of seizing this chance to create a new law is no real interest at all” (p. 66, emphasis added). In complete plain words, death and disability of hundreds of thousands of Indians by acts of commission and omission of an American multinational is of no real interest at all to the judicial decision-makers (let alone others) in America. The Keenan Court would not “exceed its authority . . . when restraint was in order” (pp. 66-67.) And restraint, not creativity, is most in order when American courts are confronted with an unparalleled industrial catastrophe.
To cap it all, all the majestic judicial prose scrupulously identifying private and public interests of the United States in disowning its courts as a convenient forum can be set at naught by Union Carbide's intransigence. If Union Carbide were to decline the three conditions to which the forum denial is subjected (p. 69), the American courts will have to suffer all the unconscionable administrative inconveniences, the American taxpayers will have to bear the multiple costs, and American people bear all the necessary injuries and all the evils articulated by Judge Keenan as forbidding an American forum. In that case, the doing of justice in the Bhopal Case by an American forum would be an act of necessary evil! Of course, expectations of the good sense of Union Carbide furnish the inarticulate major premise of the Keenan endeavour in mandating the case to India.

There are lesser ironies, too. A Judge so highly conscious of India's sovereignty and its ability to deter an American multinational through its own courts (p. 66, footnote 24) has no hesitation in following almost as a revealed truth Nani Palkhivala's sagacious affidavit; an affidavit, which in its concluding paragraph, alleges, of course in the service of Truth, that the state and the people of India are pursuing ulterior ends in seeking "American aid thinly disguised as 'damages'!"1

And, whatever may be said on merits of Professor Marc Galanter's unfortunately Janus-faced affidavit, we now know that the American courts have as scant a regard for the academic lawyers as their Indian counterparts. Dadachanji's and Palkhivala's affidavits are more "persuasive" because they have practised law in India for forty years. The "impressive credentials" of Marc Galanter are, more or less, cancelled by the fact that he is "not . . . admitted to practice in India" (p. 40). The extraordinary implication of all this is that reliable legal knowledge is only available through the practice of the law. A new epistemology of the law, indeed!

The Bhopal litigation is unparalleled in the abundance of its ironies. And the cruellest and the most saddening of all this is provided by the fact that all these Herculean endeavours are for the 200,000 odd Bhopal victims who are being further revictimised in the process.

II. THE DEEP STRUCTURE OF JUDGE KEENAN'S OPINION

It is now a tolerated truth, what was formerly a heresy in relation to the judicial process, that underlying the surface structure of a judicial decision there exists the deep structure. It is this deep structure which determines the formal structure of judicial discourse. At the latter level, Judge Keenan's decision is all about how to apply the concept and criteria of forum non conveniens to the Bhopal case. But it is the deep structure which decides the way in which this question shall be answered. It is the deep structure which encodes the policy decision which the surface structure merely develops by way of legal reasoning and persuasion. To decode the deep structure is, to my mind, the first (though rather formidable), task to the understanding of any judicial decision, especially a decision of historic significance.

If we ask what had Judge Keenan decided before he wrote the decision, we find some clues to deep structure. At this distance of time and space, and with the disadvantage of any familiarity with his judicial work, my attempt to decode the deep structure has, faute de mieux, to depend on a close reconstruction of the text of his decision.

It is clear that Judge Keenan simply did not wish to proceed to a decision at all. He clearly favoured a settlement. He allowed a good deal of time for it; he also formally and informally, indicated to the parties his preference and deferred his judgment for a year. And Judge Keenan himself testifies to the process "... this Court has labored hard and long to promote settlement between parties for over a year, but to no avail." (p. 46).

Judge Keenan acknowledges that settlement was desirable "for many reasons, including conservation of lawyers' fees, preservation of judicial resources, and speed of resolution." (p. 46). Taking advantage of the assertion of Professor Galanter that the Indian judges do not promote settlement (a position unnecessary to his brief and unsupported by data, which Judge Keenan need not even have paused to note), Judge Keenan says, early in his judgment, that settlement is "unlikely" in this case, "regardless of the level of the presiding judge" (p. 46).

It is significant that Judge Keenan, who so often repudiates Galanter with the help of Dadachanji affidavit does not, at this point refer to the fact highlighted by latter that Indian judges do engage in settlement process (p. 77). Judge Keenan simply did not think that Indian judges would succeed when he failed; he chooses merely to express the weariness that even his own high "level of activism" was notably unproductive.

Clearly, any settlement, especially in American tort law adjudication culture, involves creative intervention and facilitation by the presiding judge. Judge Keenan chooses not to disclose the "level of activism" invested him. Nor does he mention that Union Carbide was not prepared to go beyond US $ 350 million, a sum which would have been reimbursed by insurance. Still less, does Judge Keenan reflect publicly on whether the Indian position that adjudication on liability was a requisite precondition to just settlement. In other words, while we know that Judge Keenan did his conscientious best to provide for settlement, we have no bases for any assessment of his efforts to determine either the stage at which a just and honourable settlement was truly possible in the Bhopal case or the quantum of amount he, at any rate, considered just. Judge Keenan's ipsa dixit direct attention not so much to the level of his efforts as to his weariness at

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1. See Mass Disasters and Multinational Liability at 229 (1986; Ind. Law Inst; U. Blaxi, T. Paul eds ). This work will be hereafter cited as Mass Disasters.
his failure.

And although he categorically says that the issue of the promotion of settlement is "wholly irrelevant" to the determination of forum non conveniens, the manner in which he proceeds to discuss it is highly relevant for the grasp of the deep structure of the decision. Both parties receive an even handed justice from Judge Keenan. For its non-cooperation, in the settlement process, Union Carbide stands afflicted by a conditional grant of its motion to dismiss; for her lack of cooperation, India stands deprived of a reasonable decision on why the liability issue may not be tried in the United States.

Thus, the irrelevance of the settlement issue to forum determination is a fact with regard to the formal structure of Judge Keenan's holding. But its almost 'punitive' relevance is present at the deep structure of his opinion. Factors other than a settlement also influence the deep structure. A glimpse of some of these factors is, fortunately, available in Judge Keenan's opinion. The first, and a rather startling, factor is that the learned Judge does not see, on balancing costs and gains, any real gain to the United States in accepting jurisdiction. He feels (as we will examine in some detail later) that no real interests of the United States will be served by proceeding with the case. Justice to Bhppal victims, deterring foreign corporations from causing mass disasters, and related concerns, belong to Indian courts and governments, (pp. 66-67). Judge Keenan perceives them, essentially, as local concerns (p. 66). Judge Keenan simply fails to perceive the significance of the Bhppal catastrophe as raising humanity wide issues of global concern, raised so acutely by the sovereign state of India appearing as a complainant before a District Court in the United States. The lack of a sense of history is not overcome by his rhetorical acknowledgement that no "greater tragedy could occur to a peace time population than the deadly gas leak in Bhppal on the night of December 2-3, 1984" (p. 68).

The failure to perceive a community of concern in the adjudication of the Bhppal case,° marches with a rather easy-minded readiness to compare it with any and every tort case raising issues of compensation for torts. Thus, alongside with Piper® (involving defective aircraft design), we have Dowling® including adverse impact of Debenodox on pregnant English mothers where the drug was made in the United Kingdom) and Domingo° (involving a maritime accident) — and other such matters and cases, decisions which are made to govern mass disaster.°

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Hereafter cited as Piper.
6. See Mass Disasters at 81-82, 94, 112-123 for a persuasive attempt to distinguish prior rulings from the Bhppal case. But see infra note 36.

All in all, the greatest tragedy visiting a peace time population becomes assimilated to recurring hazards of everyday living in a world dense with high technology. Neither the nature, scale or magnitude of the catastrophe nor the intensity of suffering hundreds of thousands of people nor further the need to play as "activist" a role in mitigating this suffering through adjudication (as through settlement) impress or move Judge Keenan. High level of activism in promoting settlement is accepted as a part of the judicial role by Judge Keenan; but this activism cannot spill over to the core of adjudicatory role, even when, historically, the Bhppal case summons it.

Marching with the trivialisation of the Bhppal tragedy into just any other tort case coming before the most 'congested' centre of adjudication in the United States of America (pp. 60-61) is the general feeling of Judge Keenan that Union Carbide may not after all be really all that culpable. No one reading Judge Keenan's discussion on sources of proof in the opinion can possibly come to a different conclusion. Although the learned Judge is careful not to determine any issues of fact save one (that the manual regarding startup for the Bhppal plant was prepared by the Indian nationals employed by the UCIL: p. 56), the Court clearly feels that the principal Indian contention is weak. That contention was, in effect, that Union Carbide must be held liable because it played a predominant role in designing the plant, its operational, safety and related monitoring systems and that the UCIL's role was secondary and marginal. The Court finds on this score that the defendant has sought to "refute this contention, with notable success." Indeed, the Court holds that the "Design Transfer Agreement indicates that Union Carbide's duty under the Agreement was to provide process design packages, and that UCIL, not Union Carbide, would be responsible to 'detail design, erect and commission the plant'" (p. 53). Indeed, the Court is struck by the assertion that the Design Transfer Agreement and the Technical Services Agreement "were negotiated at 'arms length' pursuant to Union Carbide corporate policy" (p. 52). What is more, the Court is equally "struck" by the fact that the Indian Government "mandated" that it "retain specific control' over the terms of any agreement UCIL made with foreign companies such as the Union Carbide Corporation" (p. 52).

The import of such observations indicating substantive findings (or which can be argued to be such) when the case is tried in India, and the impact of a possibly different view taken by Indian courts on a later proceeding in the United States for enforcement of Indian decisions are issues which require close examination. But for the present purposes we should note that Judge Keenan's own view on the issue of liability seems to be that the issue of liability would be ultimately, on balance, decided against India. If so, what was the point of taking jurisdiction? Surely such a decision by any American court would make it even more of an international cause celebre. Unfavourable criticism of such a determination in the United States, India and elsewhere may have the consequence on the credibility of
American capacity to do justice. Given this scenario, Judge Keenan might have felt that it is best from the standpoint of American national interest, and the image of the American judiciary and its liberal due process ideology, to proceed to forum denial. This too may be criticized; but in less image costly ways. And care should be taken in writing a forum denial decision to disarm trenchant criticism. Judge Keenan casts his decision in terms of doing a service to India, her people, her judiciary and her Bar by mandating the cases for an Indian forum. A decision which drips with concern for the dignity and image of India could scarcely be condemned as ‘parochial’. In contrast a decision on merits denying Union Carbide liability altogether in the most agonisingly spectacular devastation in known industrial history, would invite irrefutable criticism on grounds of justice.

Thus, even as he approached the task of judgment-formulation, Judge Keenan had decided that in the settlement attempts failed, he should deny forum. Indeed, the judgment came to be scheduled for delivery only after it was fairly clear, around, that there would not be any settlement. At that stage, the learned Judge seems to have also realised that as a matter of law and its application, the prospects of establishing culpability of Union Carbide, on facts, would probably be decided in its favour. And, clearly, there was no question of an American Court agreeing to create a new category of tort, namely, multinational enterprise strict liability as vigorously urged by India. Given these trends, the only question which remained before Judge Keenan was not whether to grant forum. Rather, it was: what was the best way to deny the forum? It clearly, the best way was to write a decision which would withstand judicial review. And even superior way was to write a judgment which would inhibit any appeals, to make it virtually non-appealable! Judge Keenan addressed himself wisely, but as we will see, not so well to these tasks.

III. THE STRATEGY OF FORMULATING AN UN-APPEALABLE JUDGMENT

In deciding the issue of forum non conveniens, Judge Keenan had two perfectly logical and legal alternatives; he could have retained jurisdiction or declined it. Had he opted for the first alternative, he could have ordered trial only to determine issues of liability (as argued by India and suggested by the plaintiffs’ Executive Committee set up by him) or ordered a normal trial on issues of liability and damages. He broadly opted for the second alternative by ruling that American courts were forum non conveniens. But, at the same time, the Court, astutely, made the forum dismissal subject to the specific conditions which, if not accepted by Union Carbide, will entail a reversal of the forum non conveniens holding. The three specific conditions are as follows. First, Union Carbide shall consent to submit to the jurisdiction of the Indian courts and waive all defences on the ground that any damage and liability action in India may be time-barred. Second, Union Carbide shall consent to abide by any final decision of the Indian courts which satisfies "the minimal requirements of due process." Third, Union Carbide shall be subject to 'discovery' procedure mandated under the Federal Rules of Civil Procedure after an appropriate demand by the plaintiffs.

Union Carbide has accepted the conditions, with the clarification that the second condition of compliance with any judgment refers only to a judgment against Union Carbide. (The reference to a final decision may be held to rule out any interim compensation). Its motion to extend the discovery procedure to itself has been denied by Judge Keenan. Union Carbide has clearly the option to agree to appeal against these conditions as an abuse of discretion by the District Court.

These conditions themselves demonstrate that Judge Keenan is not altogether confident that Indian courts provide an alternative forum. They clearly do not if the Union Carbide does not submit to jurisdiction; hence, the first condition. The second condition is predicated on “minimal” due process conditions obtaining in India. This condition was wholly unnecessary since a prime reason why the learned Judge deems to Indian courts is that not to do so would be "yet another example of imperialism, another situation in which an established sovereign inflicted its rules, standards and values on a developing nation." (p. 69). Indeed. But if so, where is the justification for the insistence on "minimal" due process? An insistence that would be used by Union Carbide to challenge anything done by any Indian court, decades later, on the ground that some unspecified standard of 'minimal' due process was not followed in India! And what else does this requirement connote if not "yet another example of imperialism" which the learned Judge is so anxious to avoid?

And the third condition of the importation of the American discovery processes by the Indian courts, while speaking volumes for the good intentions of the learned Judge, also carries an acknowledgement that the Indian legal system is, after all, deficient—a contention whose rejection forms the very bases of the rejection of Indian forum application! Indeed, an Indian trial court stands directed, if the Union of India so requires to apply a complex body of American procedural law in order to serve the best interests of Bhopal victims! An American Court, best suited to apply its own

7. See MATS Disasters at 97-98. An "efficient and expeditious format" for the resolution of the dispute was proposed on July 10 by the Plaintiffs' Executive Committee, appointed by Judge Keenan. The plan "envisioned an expedited schedule of discovery leading to a September 1, 1986 trial of liability, including punitive damages, and to representative damages cases".

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Judge Keenan had a choice to dismiss outright the Indian plaint on the ground of forum non conveniens. But that was too agonising a choice. So, he uses his inherent powers to write a virtually non-appealable judgment.

Union Carbide can protest the conditions but cannot say that the forum dismissal constitutes an appealable abuse of discretion, since it has all along maintained that the litigation should be tried in India. It cannot contest the 'minimal' due process condition since apart from being eminently just in the long run, it offers to Union Carbide several strategies of contesting any decision ultimately awarded by the Indian courts on the ground that the 'minimal' due process was not observed. Still less could it contest the requirement that it submit itself to the jurisdiction of the Indian courts. The waiver of the bar imposed by the Indian statute of limitations can hardly be alleged as a ground for the District Court abuse of discretion. Union Carbide can only appeal against the unilateral liability to the subject of American discovery procedures in Indian forum. To this possibility, Judge Keenan has been quite alert as footnote seven of his judgment shows: it ends with the statement that while "the Court feels it would be fair to bind the plaintiffs to American discovery rules, too, it has no authority to do so." (p. 45). The strategy that Union Carbide can be reasonably expected to follow, under the circumstances, is to contest damage judgment enforcement in American courts by maintaining that 'minimal' due process was not satisfied simply because Judge Keenan rules on discovery as he did and the Indian courts did disallow discovery under the American procedure when it was asked for.

Of course, this latter argument may not hold valid if Indian courts grant to Union Carbide the same discovery procedure. But cognoscendi would how Union Carbide will use access to discovery. It may use it to show sabotage, calling for all sorts of documents to which the doctrine of state privilege may apply or to involve the Madhya Pradesh Government or the Union of India in politically and internationally embarrassing situations; it may use it further in diverse ways to put the Indian political system on judicial trial. These are perfectly legitimate defence lawyer's tactics. If these are not allowed, Union Carbide may still say that the Indian courts, in awarding judgment and damages, faulted the 'minimal' due process. They would recall with gratitude Judge Keenan's observation that it would be fair to extend the same discovery procedures to Union Carbide; and the Indian courts (if they do so) in denying it obviously did an unfair thing, violative of the 'minimal' due process.

Hence, Union Carbide need not appeal. It can bide its time and simply contest Indian decision at the stage of enforcement.

The Keenan court has passed the buck not so much to a home multinational but to the Indian judiciary, which no matter how it decides the discovery issue will be seen, in the eye of history, as having ill-served the victims of Bhopal. Even when unintended, the irony of footnote seven is writ large.

Indeed, by his grand rhetoric Judge Keenan has made it insuperably difficult for the Indian government to justify any appeal. How can the sovereign state of India further contest a high encomium paid to the maturity of its legal and judicial system, and escape wounding the national pride (not of Palkhivala variety!) and international standing? How can it say that it wants the imposition of imperialistic jurisprudence? How can it say that it does not want its judiciary to stand tall? Judge Keenan's rhetoric has a purpose. The purpose is to avoid at all costs the trial of the case in the United States.

As the later sections explain, the Union of India has ample grounds to appeal the decision on the ground of abuse of discretion. But it is unlikely that it will appeal. Judge Keenan has, consciously or not, ensured an outcome which would localize a catastrophe brought about by global actors.

Not merely that, Judge Keenan, again through the device of a footnote, has castigated American attorneys who filed 145 actions in more than thirteen American jurisdictions. Acknowledging that the conduct of the American lawyers who "travelled 8,200 miles to Bhopal in these months" (December 1984; January 1985) "is not before the Court in this motion," Judge Keenan adds: "Suffice it to say that those members of the American Bar... did little to beter the American image in the Third World..." (p. 37 footnote 1). What is being said here? A contingency fee based American Bar is being singled out for special critical observation. Why? Perhaps a subtle message is being conveyed to the American private attorneys; their initiative had entailed image costs for the United States system; they must bow out from the litigation, they can pursue it only by tarnishing their image even further.

Why is the contingency-fee based American Bar being singled out for special adverse mention? No doubt, Judge Keenan is obviously embarrassed by the adverse publicity accorded to some amongst the private attorneys who regardless of sense and sensibility persuaded a large number of victims even before their dead were located or buried to sign powers of attorney. This was reprehensible conduct, indeed.

At the same time, it should involve no defence of ambulance-chasers

9. Sabotage has been pleaded by Union Carbide: See Mass Disaster at 101. The basis for this allegation is an article from the News Times that a group called "Black June" claimed responsibility for the disaster in a large number of posters in Bhopal.

10. See Sections IV, V, VII, VIII infra.
American capacity to do justice. Given this scenario, Judge Keenan might have felt that it is best from the standpoint of American national interest, and the image of the American judiciary and its liberal due process ideology, to proceed to forum denial. This too may be criticized; but in less image costly ways. And care should be taken in writing a forum denial decision to disarm trenchant criticism. Judge Keenan casts his decision in terms of doing a service to India, her people, her judiciary and her Bar by mandating the cases for an Indian forum. A decision which drips with concern for the dignity and image of India could scarcely be condemned as "parochial". In contrast a decision on merits denying Union Carbide liability altogether in the most agonisingly spectacular devastation in known industrial history, would invite irrefutable criticism on grounds of justice.

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basis for this allegation is an article from the News Times that a group called “Black
June” claimed responsibility for the disaster in a large number of posters in Bhopal.

10. See Sections IV, V, VII, VIII infra.
American capacity to do justice. Given this scenario, Judge Keenan might have felt that it is best from the standpoint of American national interest, and the image of the American judiciary and its liberal due process ideology, to proceed to forum denial. This too may be criticized; but in less image costly ways. And care should be taken in writing a forum denial decision to disarm trenchant criticism. Judge Keenan casts his decision in terms of doing a service to India, her people, her judiciary and her Bar by mandating the cases for an Indian forum. A decision which drips with concern for the dignity and image of India could scarcely be condemned as ‘parochial’. In contrast a decision on merits denying Union Carbide liability altogether in the most agonisingly spectacular devastation in known industrial history, would invite irrefutable criticism on grounds of justice.

Thus, even as he approached the task of judgment-formulation, Judge Keenan had decided that if the settlement attempts failed, he should deny forum. Indeed, the judgment came to be scheduled for delivery only after it was fairly clear, alround, that there would not be any settlement. At that stage, the learned Judge seems to have also realised that as a matter of law and its application, the prospects of establishing culpability of Union Carbide, on facts, would probably be decided in its favour. And, clearly, there was no question of an American Court agreeing to create a new category of tort, namely, multinational enterprise strict liability as vigorously urged by India. Given these trends, the only question which remained before Judge Keenan was not whether to grant forum. Rather, it was: what was the best way to deny the forum? It clearly, the best way was to write a decision which would well withstand judicial review. And even superior way was to write a judgment which will inhibit any appeals, to make it virtually non-appealable! Judge Keenan addressed himself wisely, but as we will see, not so well to these tasks.

III. THE STRATEGY OF FORMULATING AN UN-APPEALABLE JUDGMENT

In deciding the issue of forum non conveniens, Judge Keenan had two perfectly logical and legal alternatives; he could have retained jurisdiction or declined it. Had he opted for the first alternative, he had two further options: he could have ordered trial only to determine issues of liability (as argued by India and suggested by the plaintiffs’ Executive Committee set up by him) or ordered a normal trial on issues of liability and damages. He broadly opted for the second alternative by ruling that American courts were forum non conveniens. But, at the same time, the Court, astutely, made the forum dismissal subject to the specific conditions which, if not accepted by Union Carbide, will entail a reversal of the forum non conveniens holding. The three specific conditions are as follows. First, Union Carbide shall consent to submit to the jurisdiction of the Indian courts and waive all defences on the ground that any damage and liability action in India may be time-barred. Second, Union Carbide shall consent to abide by any final decision of the Indian courts which satisfies “the minimal requirements of due process.” Third, Union Carbide shall be subject to ‘discovery’ procedure mandated under the Federal Rules of Civil Procedure after an appropriate demand by the plaintiffs.

Union Carbide has accepted the conditions, with the clarification that the second condition of compliance with any judgment refers only to a judgment against Union Carbide. (The reference to a final decision may be held to rule out any interim compensation). Its motion to extend the discovery procedure to itself has been firmly denied by Judge Keenan. Union Carbide has clearly the option to appeal against these conditions as an abuse of discretion by the District Court.

These conditions themselves demonstrate that Judge Keenan is not altogether confident that Indian courts provide an alternative forum. They clearly do not if the Union Carbide does not submit to jurisdiction; hence, the first condition. The second condition is predicated on “minimal” due process conditions obtaining in India. This condition was wholly unnecessary since a prime reason why the learned Judge defers to Indian courts is that not to do so would be “yet another example of imperialism, another situation in which an established sovereign inflicted its rules, standards and values on a developing nation.” (p. 69). Indeed. But if so, where is the justification for the insistence on “minimal” due process? An insistence that would be used by Union Carbide to challenge any decision given by any Indian court, decades later, on the ground that some unspecified standard of ‘minimal’ due process was not followed in India! And what else does this requirement connote if not “yet another example of imperialism” which the learned Judge is so anxious to avoid?

And the third condition of the importation of the American discovery processes by the Indian courts, while speaking volumes for the good intentions of the learned Judge, also carries an acknowledgement that the Indian legal system is, after all, deficient—a contention whose rejection forms the very bases of the rejection of Indian forum application! Indeed, an Indian trial court stands directed, if the Union of India so requires it to apply a complex body of American procedural law in order to serve the best interests of Bhopal victims! An American Court, best suited to apply its own

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7. See May Disaster at 97-98. An "efficient and expeditious format" for the resolution of the dispute was proposed on July 30 by the plaintiffs’ Executive Committee, appointed by Judge Keenan. The plan "envisioned an expedied schedule of discovery leading to a September 1, 1986 trial of liability, including punitive damages, and to representative damages cases".

8. On the clear implications of this choice, and difficulties passed by any choice, see Section IX infra.
procedural laws of discovery, to acts of commission and omission of an American multinational, now directs that an Indian court in Bhopal is much better suited to do so.

Judge Keenan had a choice to dismiss outright the Indian plaint on the ground of forum non conveniens. But that was too agonising a choice. So, he uses his inherent powers to write a virtually non-appealable judgment.

Union Carbide can protest the conditions but cannot say that the forum dismissal constitutes an appealable abuse of discretion, since it has all along maintained that the litigation should be tried in India. It cannot contest the 'minimal' due process condition since apart from being eminently just in the long run, it offers to Union Carbide several strategies of contesting any decision ultimately awarded by the Indian courts on the ground that the 'minimal' due process was not observed. Still less could it contest the requirement that it submit itself to the jurisdiction of the Indian courts. The waiver of the bar imposed by the Indian statute of limitations can hardly be alleged as a ground for the District Court abuse of discretion. Union Carbide can only appeal against the unilateral liability to the subjection of American discovery procedures in Indian forum. To this possibility, Judge Keenan has been quite alert as footnote seven of his judgment shows; it ends with the statement that while 'the Court feels it would be fair to bend the plaintiff to American discovery rules, too, it has no authority to do so.' (p. 45). The strategy that Union Carbide can be reasonably expected to follow, under the circumstances, is to contest the damage judgment enforcement in American courts by maintaining that 'minimal' due process was not satisfied simply because Judge Keenan rules on discovery as he did and the Indian courts did disallow discovery under the American procedure when it was asked for.

Of course, this latter argument may not hold valid if Indian courts grant to Union Carbide the same discovery procedure. But cognoscere would how Union Carbide will use access to discovery. It may use it to show sabotage, calling for all sorts of documents to which the doctrine of state privilege may apply or to involve the Madhya Pradesh Government or the Union of India in politically and internationally embarrassing situations; it may use it further in diverse ways to put the Indian political system on judicial trial. These are perfectly legitimate defence lawyer's tactics. If these are not allowed, Union Carbide may still say that the Indian courts, in awarding judgment and damages, faulted the 'minimal' due process. They would recall with gratitude Judge Keenan's observation that it would be fair to extend the same discovery procedures to Union Carbide; and

the Indian courts (if they do so) in denying it obviously did an unfair thing, violative of the 'minimal' due process.

Hence, Union Carbide need not appeal. It can bide its time and simply contest Indian decision at the stage of enforcement.

The Keenan court has passed the buck not so much to a home multinational but to the Indian judiciary, which no matter how it decides the discovery issue will be seen, in the eye of history, as having ill-served the victims of Bhopal. Even when unintended, the irony of footnote seven is writ large.

Indeed, by his grand rhetoric Judge Keenan has made it insuperably difficult for the Indian government to justify any appeal. How can the sovereign state of India further contest a high encomium paid to the maturity of its legal and judicial system, and escape wounding the national pride (not of Palkhivala variety!) and international standing? How can it say that it wants the imposition of imperialistic jurisprudence? How can it say that it does not want its judiciary to stand tall? Judge Keenan's rhetoric has a purpose. The purpose is to avoid all costs the trial of the case in the United States.

As the later sections explain, the Union of India has ample grounds to appeal the decision on the ground of abuse of discretion. But it is unlikely that it will appeal. Judge Keenan has, consciously or not, ensured an outcome which would localize a catastrophe brought about by global actors.

Not merely that, Judge Keenan, again through the device of a footnote, has castigated American attorneys who filed 145 actions in more than thirteen American jurisdictions. Acknowledging that the conduct of the American lawyers who "travelled 8,200 miles to Bhopal in these months" (December 1984: January 1985) "is not before the Court in this motion," Judge Keenan adds: "Suffice it to say that those members of the American Bar... did little to better the American image in the Third World..." (p. 37 footnote 1). What is being said here? A contingency-fee based American Bar is being singled out for special critical observation. Why? Perhaps a subtle message is being conveyed to the American private attorneys: their initiative had entailed image costs for the United States system; they must bow out from the litigation, they can pursue it only by tarnishing their image even further.

Why is the contingency-fee based American Bar is being singled out for special adverse mention? No doubt, Judge Keenan is obviously embarrassed by the adverse publicity accorded to some amongst the private attorneys who regardless of sense and sensibility persuaded a large number of victims even before their dead were located or buried to sign powers of attorney. This was reprehensible conduct, indeed.

At the same time, it should involve no defence of ambulance-chasers

9. Sabotage has been pleaded by Union Carbide: See Mass Disaster at 101. The basis for this allegation is an article from the News Times that a group called "Black June" claimed responsibility for the disaster in a large number of posters in Bhopal.

10. See Sections IV, V, VII, VIII infra.
to recognize that their early initiative led to as many as 146 actions across as many as, and perhaps more than, thirteen different American jurisdictions which were consolidated before Judge Keenan. Perhaps, the real meaning of footnote one is the recognition that the private attorneys can, and perhaps will, disrupt the fine balance for America that Judge Keenan had so painstakingly evolved. A mild castigation of their behavior at this stage might serve to flush the signal that more judicial disapproval may lie in store for them should they appeal. Footnote one appears to have serious tactical functions should the decision be appealed.

Of course, the private attorneys have much to lose by not attempting an appeal. They will also have the support of Union Carbide in their appeal, as it would only delay and aggravate further the potential for normative complexity. It has stated its intention to file an appeal on discovery issue and there is likelihood that in private attorneys appeal, Union Carbide will file a cross appeal. How seriously will the private attorney's take the tactical message of Judge Keenan's footnote one is thus open to doubt.

Barring this possibility, it is clear that very few Judges would have endeavoured so notably, and with such remarkable finesse, the task of writing consciously a virtually non-appealable decision. That the decision is characterised by a morality of avoidance, rather than concern for justice for Bhopal victims, is of no real concern to Judge Keenan. It may be a harsh thing to say but it remains unfortunately sayable that no single decision in American history since the Dred Scott decision has so acutely exposed the hollowness of American liberal jurisprudence.

In what follows, we analyse the justificatory strategies in Judge Keenan's opinion. It is important to note, in so doing, the structure of reasoning made so elegantly and lucidly clear by the main literary divisions of the opinion. It is classified into: (a) Factual Background (pp. 36-37); (b) Discussion (pp. 37-68) and (c) Conclusion (pp. 68-69). The Discussion is in turn divided into: (a) Preliminary Considerations (pp. 38-48); (b) Private Interest Concerns (pp. 48-59) and (c) Public Interest Concerns (pp. 59-68). The overall logic of the conclusion can best be appreciated by a comprehensive discussion of the Discussion.

An unwary reader of the chiselled American judicial prose may be persuaded to believe that Judge Keenan has tried his conscientious best to follow binding decisions of the American Supreme Court. The judgment gives an impression that there was no scope for ruling otherwise, that the discretion on forum did not involve any choice of policy or justice. One gets the impression that even in such an adverse decisional context, Judge Keenan has struggled to keep the victims of Bhopal foremost in his view and tried to ensure that his dismissal of forum does not wreck prospects of just compensation. In this context, the three conditions (p. 69) to which the forum dismissal is subjected are particularly seductive, so much so that many right thinking persons feel that the Court did the best it could under the given constraints. To think even for a moment that one may appeal against this decent decision on the ground that the court possibly abused its discretion in denying the forum almost seems an unfriendly and uncharitable thought! This is a tribute to the craftsmanship of Judge Keenan, which should not be mistaken for a sense of justice.

A closer reading of the opinion reveals that not merely the Court has misread Piper as the controlling decision. It has also proceeded in ways (both through observations and holding) which generate a strong prima facie case of abuse of discretion on the forum issue.

IV. THE KEENAN RECONSTRUCTION OF PIPER: THE PIED PIPER?

The Discussion part of the judgment starts off with the most crucial statement that “Piper teaches a straightforward formulation of the law of forum non conveniens” (p. 37). Concealed from the common view in this straightforward observation is the glaring fact that in Piper is an evenly divided decision. Only six Justices participated in the decision: Justices Powell and O'Connor did not participate in the decision. Justices White, Stevens and Brennan partly disagreed with the opinion written by Justice Marshall (for himself, Chief Justice Burger, and Justice Blackmun). The difference among the Justices centred upon the question whether the Federal Court of Appeals was justified in holding that the District Court had indeed abused its jurisdiction in handling the forum non conveniens enquiry. Justice Marshall and his two Brethren thought that the Federal Court of Appeals was not justified in so doing: the other three Justices held that it was neither necessary nor proper for the Supreme Court to proceed to any ruling on this issue. This crystal-clear 5:3 disagreement is relevant to demonstrate where the Court as a whole agreed in Piper. It can be said, without doubt, that all the six participating Justices agreed that plaintiff may not resist a motion to dismiss a suit on the ground of forum non conveniens merely by showing that the law which might be invoked in the alternate forum is less favourable than the one which might be invoked in the chosen forum. The Court ruled, with one voice, that there are theoretical as well as practical problems in assigning even substantive, let alone decisive, weight to the factor of the possibility of change in law applicable in different fora.

12. See Appendix B for leading forum decisions.
13. Piper at 261-262.
14. Id. at 250-52. All the Justices held that the doctrine of forum non conveniens "is . . . designed, in part, to help courts avoid conducting complex exercises in comparative law" (at 251).
In other words, only this is the “straightforward lesson” of Piper, and no other. Piper is an authoritative decision on the issue that the mere the possibility of “an unfavourable change in law” (barring extreme situations of absence of any effective remedies), cannot be urged by plaintiffs as decisive argument for their chosen forum. Piper is certainly not an authority on the wider issue as to whether the Court of Appeals was justified and correct in actually reviewing under Gilbert the application of public and private interest criteria by the District Court in denying American forum. On this aspect it is a 3:3 decision, with no compelling majority holding. Piper, in other words, does not bind any District Court on how in a given fact-situation the general criteria of public and private Gilbert interest should concretely be applied by the Court. It reiterates the principle that the forum non conveniens determination is “committed to the sound discretion of the trial court.” (p. 38).

The “straightforward lesson” of Piper, then, is simply that the trial Court will keep in view the broad range of factors indicated in Gilbert and reaffirmed in Piper. No more, no less.

But Judge Keenan is determined to extend Piper. The second major proposition of the Discussion is that Judge Keenan modifies Koster in a major way. Koster, a unanimous nine-judge opinion, on the relevant aspects had ruled that plaintiff’s choice of forum is to be disturbed only on rare occasions. Piper, conversely, holds that:

When the Plaintiff is foreign, however this assumption is much less reasonable. Because the central purpose of any forum non conveniens enquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.\(^{16}\)

There are two major problems with Judge Keenan’s handling of these observations. First, he takes them to be the observations for the whole Court. This is simply not so. These observations occur in Part III of Piper with which three Justices express disagreement. At the most, then the observations articulate the views of Justice Marshall, Chief Justice Burger and Justice Blackmun. The observations are entitled to respect but only as representing the views of these three distinguished Justices. At best, they are considered dicta. Can these replace the unanimous observation of all the Justices in Koster?

Second, even if we assume arguendo that they do, what is the scope of these observations? The three Piper Justices simply say that the plaintiff’s choice deserves less deference when she is ‘foreign’. Less deference compared to an American plaintiff seeking to use in her home forum. But less deference does not mean no deference or minimal or miniscule deference. Judge Keenan has, as we shall see in detail later, actually construed less deference to mean little or none. This is certainly not authorized by Piper (assuming again that Piper is authoritative on this score in the first place).

Straightforward lessons from Piper emerge for Judge Keenan as they do because he has reconstructed its holdings. This has been done by recourse to the specific impermissible device of taking the opinion of three Justices as the opinion of the whole Court, despite categorical partial dissents by three other Justices in an evenly divided Court.

Third, this reconstruction of Piper is extended in the Bhopal litigation to the question of the capacity of the Indian legal system to handle tort litigation in a situation of mass disaster ‘caused’ by multinationals. The question in Piper was much more acutely focussed. It is simply the question whether an unfavourable law relative to liability and damages can be urged by for denying chosen forum. Piper answered this question in the negative. The Indian position in Bhopal case was not based on this narrow question at all. Rather, it was focussed on the institutional capacity of the Indian legal system to cope with a situation of mass disaster. To this kind of question, Piper does not advert at all, and rightly so. And despite Judge Keenan’s analysis concluding that there are no obstacles of this nature in Indian legal system, in his actual holding he is constrained to require that Indian courts follow ‘minimal’ due process and the American ‘discovery’ rules! The precise point to be made here, however, is that insofar as the Indian position is considered in the shadow of the reconstructed Piper it is an unfair consideration. The kind of comprehensive claims made by India concerning the inadequacy of its own legal system was never before urged in any American Court; its status had to be determined of necessity on its own terms. Judge Keenan erred grievously in approaching the Indian position on institutional inadequacies through the normative (change of laws) lenses of Piper. Piper does not diminish in any way the discretion of the trial court. If anything, it reinforces it.

V. THE PROBLEM OF LESS DEERENCE

What shall we say is the exact scope of the enunciation that the foreign plaintiff’s choice of an American forum is entitled to a lesser deference? In what ways does this enunciation qualify the burden that the defendant has to sustain in her motion to dismiss the suit on the ground of forum non conveniens? How is the trial court in its concrete application of the Gilbert factors to operate this enunciation? In other words, how is the court to exercise its discretion to rule on forum non conveniens?
conveniens when foreign plaintiff insists on an American forum?

Unless these operational questions are raised for consideration and answered, the "deference" enunciation may well result in no deference outcome.

One can logically operationalize the notion of "less deference" to a foreign plaintiff by deciding that when an alternative forum is available in which the defendant is amenable to jurisdiction, this possibility would be, in itself, without more, be determinative of the forum ruling. This may be subjected to the Piper caveat that such alternative forum should at least be capable of providing relief to the plaintiff. On this view of "less deference", no American Court need do the further complex exercise of categorizing the application of private and public interest factors catalogued in Gilbert. This course of action was open to Judge Keenan not only logically, but, we may add, legally. He, of course, did not adopt it directly.

Another logical possibility is that an American court may operate the principle of "less deference" in the actual application of Gilbert catalogue of private and public interest factors. In considering each set of factors, the court may finally ask: "Well, all said and done, does the application of this or that factor amount to giving more than 'less' deference to a foreign plaintiff?" It does not seem clear that Judge Keenan has followed this logical, and legally open, possibility directly, either. There is no explicit finding anywhere in the decision to suggest that when any set of public or private interest factors weighed against the plaintiff, the Court explicitly asked the question what "less deference" requires.17

In what sense, then, does the Court invoke and employ the "less deference" notion in the Bhopal case? An obvious answer is that having recorded this notion, the Court implicitly allows it to rule the final outcome and lets the "less deference" notion operate silently in the application of the Gilbert catalogue. To a detailed consideration of the ways in which these factors were applied, we now turn.

VI. INDIA IS AN ADEQUATE FORUM

Judge Keenan rules: "the Indian legal system provides an adequate alternative forum for the Bhopal litigation" (p. 47). This determination precedes, by way of Preliminary Consideration, the concretization of Gilbert factors.

17. The mere statement at the tend of consideration of the private interest factors, on p. 59 of Judge Keenan's opinion, that "less than maximum deference" has been given to the foreign plaintiff does not resolve the question of how and how fairly, this has been actually done.

The Court recognizes that forum non conveniens determination is open only when there is an adequate alternative forum to whose jurisdiction the defendant is amenable. On the one hand, the Court says, on this issue, that:

Plaintiff's preliminary concern, regarding defendant's amenability to process in the alternative forum, is more than sufficiently met in the instant case. Union Carbide has unequivocally acknowledged that it is subject to jurisdiction of courts of India...Union Carbide is definitely amenable to process in India (p. 40).

On the other hand, in concluding the Preliminary Consideration, Judge Keenan "conditions the grant of a dismissal on forum non conveniens agreement to be bound by the judgment of its preferred tribunal, located in India" and to "satisfy any judgment rendered by the Indian court, and affirmed on appeal in India" (p. 47).

The logic of this condition is not self-evident. If the Union Carbide had indeed agreed to the jurisdiction of Indian courts, there was nothing more to be done than to acknowledge this main premise for forum dismissal. Only if it had not agreed, a stipulation by way of condition would be justified. A conditional dismissal shows that the Court is not confident concerning Union Carbide's stated intentions.

But if it is not confident, how can India be considered an adequate alternative forum at all? An alternative forum is one, to repeat, to which the defendant is in the first place amenable. If she is not, there is no alternate forum. Therefore, there is no question of invocation of the doctrine of forum non conveniens. It follows, then as the night follows the day, that the Gilbert catalogue is irrelevant in timing; that catalogue needs to be consulted only if there are two fora from which the choice is to be made.

The Gilbert18 labours have been performed by the Court, and can be so performed, only on the acceptance of jurisdiction of alternate forum by the defendant. But if there is categorical assurance of amenability, why a conditional dismissal? Clearly, the Court could have ruled that there is no alternate forum. It is unlikely that the Union Carbide had consented to submission to Indian Courts. If it had there was no need to give it thirty days to confirm compliance with Indian jurisdiction. This inconsistency—acknowledging at the beginning of the judgment a categorical and unequivocal submission by Union Carbide, and imposing submission condition at the end of the decision—demonstrates the infirmities of Justice Keenan's whole approach to forum determination.

VII. CAVALIER HANDLING OF THE LEGAL SYSTEM ARGUMENT

The Keenan Court errs in extending the *Piper* holding to the extraordinary claims urged by the sovereign state of India appearing as a plaintiff before the District Judge of Southern District of New York. The claim concerned the normative and institutional inadequacy of the Indian legal system in dealing with issues of multinational liability and mass disasters; to repeat, it was not a mere claim favouring plaintiff with the choice of American law as in *Piper*.

We first look at the general approach adopted by Judge Keenan to the problem of the institutional and normative inadequacies of the Indian legal system. Obviously, all that the learned Judge had before him were diametrically opposed views on this question, supported by capable affidavits on both sides. Obviously, a reasoned choice had to be made on the question by a careful evaluation of the deficiencies, alleged and real, of the Indian legal system. Did Judge Keenan make such a carefully reasoned evaluation?

The answer to this depends on two unusual features. The first is offered by an extremely significant observation at the conclusion of the Preliminary Observations where Judge Keenan says as follows:

Although the outcome of this analysis, given the rule of *Piper*, regarding change in law, seems *self-evident*, the Court will review plaintiffs’ argument on the inadequacy of the Indian forum out of deference to the Plaintiffs (p. 40, emphasis added).

The seven-page analysis consideration (pp. 41-48) which follows is thus not necessary at all in Judge Keenan’s view; it is undertaken out of a spirit of courtesy to the plaintiffs! If the Indian position was that the applicable law would be favourable in the United States as compared with India, and no more, the rule of *Piper* would indeed be dispositive. As already noted, the Indian position went far beyond considerations of applicable law; it embraced the totality of inadequacies of the Indian legal system to expeditiously and equitably cope with the situation of mass disaster. The above quoted observation of Judge Keenan shows that he has extended *Piper* far beyond permissible techniques of precedents and he has constructed the sweep of the Indian position far below the standards of judgcraft expected from the home of due process jurisprudence.

The other notable feature is the way the affidavits on both sides have been handled. At the threshold, the fact that Professor Marc Galanter is not admitted to the Indian Bar (no foreign national can be so enrolled) is assigned the function of lowering the persuasive value of the Indian position. The fact that Nani Palkhivala was an Ambassador of India in the United States is mentioned quite frequently (see e.g. p. 40). All this would not have really mattered much by itself, had the detailed consideration of the rival positions been carefully balanced. Where it is, it is not without significance that the force of the Indian submissions have indeed been realized and has matured into specific conditions on the Union Carbide (e.g. the condition as regards Union Carbide’s waiver of defence of limitation or the condition regarding the applicability of the American law of discovery process).

In all major respects, Judge Keenan’s analysis of India’s submission on the issue of inadequacy of Indian forum appears rather cavalier. It may be said that the same result may have been reached if the consideration had been more detailed and balanced. Certainly, this is notionally possible. But it is also true that such a consideration may have yielded a different result as well. Since Judge Keenan has not attempted the kind of due consideration that the Indian case merited, what would have been achieved on this issue by such consideration must remain an open question.

We discuss below in some detail the treatment accorded to the Indian position. This is necessary to substantiate the rather serious criticism made here of Judge Keenan’s effort. We discuss this in terms of the various heads under which he analyses the Indian position to facilitate analysis, although it is our view that the breakdown of the Indian submissions, necessary for the purposes of analysis, is not an adequate way at all of analysing the total effect of what India was trying to say.

A. Innovation in the Indian Judicial System

All the three affidavits testify to the innovativeness of the judicial system, especially in the sphere of constitutional and administrative law. The Court also recognises the innovativeness of the Indian courts (p. 41, footnote 5).

The issue clearly was not innovativeness of appellate courts in India *per se* but of the state of the legal system, to be discussed later.

The innovativeness *per se* of the Indian judiciary is not an issue in conflict. Insofar as the Indian position was that the system still suffers from its colonial past which impedes the potential—pace, rate and direction—of the Indian innovativeness, Judge Keenan has only a terse sentence: “Their claim in this regard is not compelling” (p. 41). Why? Because “plaintiffs present no evidence to bolster their contention.” Judge Keenan is entitled to his judgment but readers of his decision are also entitled to careful reasoning in support.

The fetters of colonial heritage on innovative potential have been a subject matter of live discussion and analysis in official and non-official
literature which the affidavit studiously cites and quotes and which is in no way, on this precise issue, rebutted by either Dadachanji or Palkhivala affidavits. To say the least, this terse dismissal of an important fact concerning the Indian legal system was the least expected. It was open to the learned Judge to have declined to undertake an examination of such a large historic claim; it was also open to him to have said that the nature of relationship between the innovative potential of the Indian judiciary and the colonial heritage of legal system of India was not pertinent to ascertaining whether the Indian courts were or were not adequate as alternative fora. But an unreasoned rejection of a very important aspect of the Indian position is clearly injudicious. We must say, with equal respect, that on this issue Judge Keenan has also not presented any evidence to "bolster" his definitive ruling on this issue.

B. Endemic Delays in the Indian Legal System

This issue, too, is dealt with in a highly disingenuous way, to say the least. The Court acknowledges that "delays and backlogs exist in Indian courts". It then cancels this acknowledgement by saying that the "United States courts are (also) subject to delays and backlog" (p. 42). Certainly, it was no one's case that American courts are free from delays and backlogs. Almost all judicial systems in the world do thus suffer, for good or for bad reasons. The Indian claim was not that delays and backlogs occur in India; it was that the system is so clogged as to make impossible a speedy resolution of the Bhopal case. And this fact was conspicuously acknowledged by Judge Fitzgerald in In re Air Crash Disaster Near Bombay in 198220 to accept jurisdiction even in a case where all the Gilbert factors relentlessly pressed for a forum dismissal. This decision, although cited extensively in the Indian and amici curiae does not even get a mention by Judge Keenan. In glaring contrast is a far-fetched and unwarranted Harrison21 scenario of how improper would be for an American court to impose American standards of drug product safety and care on India! (p. 65). In Harrison India was not even a remote party. Yet Judge Keenan invokes the hypothetical scenario to "bolster" his decision. But the Air India decision involved the problematic of endemic delays in India; the delays were made the basis for granting forum in a most unusual overrunning of the legal consequences of the invocation of Gilbert. Judge Keenan, however, does not cite the Air India decision anywhere! To say the least, this is a very cursory way of disposing of a vital argument, which stood as the very basis of a rather unusual forum decision. If such a decision was pronounced by an Indian court, given the Indian standards of evaluation of judicial decisions, it would have been labelled as arbitrary and unbecoming in the extreme.

The second phase of analysis (if it can be called such) of the delay problem consists of a two paragraph reference to the Bhopal Act and ways of expediting hearing of cases in India. On the Bhopal Act, Judge Keenan accepts the Gospel according to Nani Palkhivala for whom the Act is a talismanic cure for all theills of the Indian legal order! The learned Judge accepts his characterisation as one that will allow the cases to be treated "speedily, effectively and equitably and to the best advantage of the claimants," Nani Palkhivala did not know or suppress the fact that a writ petition challenging the validity of the Act is pending before the Supreme Court; it has still to reach the stage of hearing after a year. Should the Act be found violative of the fundamental rights, it will be invalidated by the Court. Should its validity be sustained, after a period of years, it is not to be assumed that the Government of India will necessarily act expeditiously in regard to its obligations under the Act; a fact that Judge Keenan may not be aware of but which Nani Palkhivala may not in all integrity feign ignorance. If the Government has to create commissioners for processing claims and forming schemes, a fairly long process of bureaucratic decision-making, subject to approval by the Finance Ministry, will have to be undergone. So much for Palkhivala’s expedition. As to “equity” and “best advantage of the claimant” if Judge Keenan had looked as closely to the Act as he has at Palkhivala—the former Ambassador’s affidavit—he would have been unable to agree, for example, that the Act constitutes “equitable handling.”22 In any case, the Bhopal Act cannot be said, without much closer analysis, to be a bold step towards the redressal of the endemic delays in the Indian legal system.

As to other instances of expeditious hearing like the Supreme Court directing day to day hearing of the case, assignment of cases to special judges and special courts and tribunals (Judge Keenan’s phrase is “special judicial accommodation” p. 42) what seems to have been wholly overlooked, despite Nani Palkhivala’s generous release of the text of Article 136 (special leave to the Supreme Court) to Judge Keenan,23 is that the Indian system provides multiple pathways to appeal to High Courts and Supreme Court on a wide range of matters. These pathways may not be blocked by appointing a special judge, even of a High Court as the recent decision of the Supreme Court in the case of a former Chief Minister of Maharashtra amply demonstrates.24 Certainly, special courts and tribunals

19. See the materials adverted to by Marc Galanter in his affidavit reproduced in Mass Disasters at 169-70, 175, 185-86.
20. 531 F. Supp. 1075 (1982); hereafter cited as Air India.
22. See, e.g. Section 4 of the Act which provides that the Central Government may permit at the expense of the claimant (a Bhopal victim) the right of legal representation. So much for “equitable handling.”
24. R.S. Nayak v. A.R. Antulay, Cr. Appl. No. 658 of 1986. Although this was a criminal case, it is noteworthy that the Supreme Court had to invest a year-long effort.
of monitoring these, we would have been spared of this juvenile statement by India's most acclaimed lawyer. 30

Be that as it may, Judge Keenan's handling of the issue insofar as it relies on Palkhivala's affidavit is afflicted by all its naiveté. It would have been adequate for Judge Keenan to simply maintain that this issue is not germane to the decision; in view of the rule of Piper: a mere change of law in the alternate forum is no ground for vetoing a motion to dismiss the suit on the ground of forum non conveniens. There are recognizable and extensive differences between the embryonic Indian tort law doctrines and the developed American tort law on issues of liability. But under Piper these differences simply do not furnish a ground against alternate forum, if it is in other respects adequate. This course of holding would have in addition to the virtue of fairness also the note of humility. In deciding as he has, Judge Keenan has unnecessarily surrendered both.

VIII. THE APPLICATION OF PRIVATE INTEREST FACTORS UNDER GILBERT

Judge Keenan makes a detailed analysis of the Gilbert private interest factors under three rubrics: sources of proof (pp. 48-57); access to witnesses (pp. 57-58) and possibility of view (pp. 58-59). Consideration of each of these three factors inclines him to determine that the private interest factors, as a whole favour dismissal. Compared with the treatment given to the major ground of the inadequacy of the Indian legal system, Judge Keenan gives most solicitous consideration to Union Carbide's claims and contentions on this ground; all this fully accords with what we have called the deep structure of his opinion. We examine below the Court's reasoning under each rubric.

A. Sources of Proof

The Court discusses this question in the light of the “limited discovery” since under Gilbert the factor of “relative ease of access to sources of proof” requires analysis which “must hinge on facts” (p. 48). But the Court makes it categorically clear that its findings of facts “concern location of proof only, and bear solely upon the forum non conveniens motion”, it, rightly, declines to make findings as to actual liability at this stage of the litigation” (p. 52). Indian fakirs must remember that they are not the only ones to walk on a tightrope in order to make a living; adjudicators everywhere have to acquire this competence. The difference, of course, is the latter have to put their reasons for successful tightrope walking in cold print and remain more liable to a scrutiny of their success or failure. The essence of India’s claim was that Union Carbide “was the creator of the design used in the Bhopal plant, and directed UCIL’s relatively minor detailing program” (p. 52); consequently, only an American forum had the best access to the sources of proof. The Court decides, in response, that “most of documentary evidence concerning design, safety, training, safety and start-up, is to be found in India.” In doing so, Judge Keenan relies on the affidavits of Messers Brown, Woomer and Dutta, all Union Carbide employees. In particular the following points seem to have decisively influenced the judicial mind.

First, the Court is “struck by the fact” that the two agreements between the UCIL and the Union Carbide (“Design Transfer Agreement” and “Technical Service Agreements”) were based on an arms-length corporate practice (p. 52). In other words, although it was an inter-company transfer of technology, the Union Carbide “related with the UCIL much as it would have with an unaffiliating or even a competing company.” (p. 53, footnote 16). In thus being struck by this alleged arms length principle Judge Keenan altogether annihilates the prima facie materials and evidence at the limited forum discovery showing the complex, interlocking control by Union Carbide over all its subsidiaries. 31 The learned Judge does not even as much as specifically mention the evidence collected by India at the forum discovery, let alone analyse it.

Second, the claim of Mr. Brown, based on personal information that the UCIL thought that the Union Carbide will not be allowed by the Government of India to be involved beyond the provision of design packages, in terms of the Letter of Intent dated March 12, 1972 issued by the Government. But the Design Transfer Agreement provided for seven crucial areas of plant design in addition to safety relief systems and specification of bulk storage for MIC. The entire deposition of Mr. Rutzen, a Union Carbide employee at the West Virginia Institute, showed the extent of preeminence of the Union Carbide in designing the plant. There is not a shred of evidence to show that the Government of India interfered in terms of the Letter of Intent with the design of the plant. The fact that the UCIL built the plant at Bhopal from 1972 to 1980, and that it was responsible for detailing the design, “erect and commission the plant” are noted by Judge Keenan (p. 53). What is not even acknowledged is the cruciably of the design agreement on all vital areas, including safety relief system and the bulk storage of the MIC unearthed so persuasively at the limited

The significance of the two agreements clearly lies in the level of global integration they accomplish for Union Carbide operations across the world, especially in the production of hazardous chemicals. India had built a strong prima facie case of the Union Carbide's policy of preeminence, on the basis of the limited forum discovery, from the inception of the plant to those dark days at Bhopal in early December 1984.

The sources of proof factor obviously depends on what legal contention is being sought to be proved. If what is sought to be proved is the global corporate policy of the Union Carbide as regards the production, storage, transportation, use, design and safety of plants, all relative to hazardous substances (as India clearly sought to demonstrate), then the source of proof indubitably lies in the United States. And the onus is clearly on the defendant, even when the foreign plaintiff may be held to desire less deference, to demonstrate that the relative ease of access to these sources of proof lies in alternate forum. Strong arguments can be made at the appellate stage that the Keenan Court has misconstrued the precise legal questions in the light of which sources of proof factor has to be determined.

It is clear, further, that having extended discovery procedures to Indian court, Judge Keenan is less inclined to undertake a close and sustained investigation of the sources of proof factor. But it is arguable that the application of a highly complex American legal procedural device is best done by the American forum: the transfer of American discovery norms to alternate forum is no way for disposing a motion to dismiss the forum non conveniens plea, simply because the weighing of an important cluster of Gilbert factors then becomes a merely ceremonial exercise. The Gilbert method becomes attenuated to the simple message: “Forum denied; apply local liability and damages law; apply American discovery.” The inherent equitable jurisdiction of a District Court simply does not thus extend to overcome a vastly complex body of decisional norms appropriate to the forum determination. The task of a District Court is to meticulously apply and weigh the Gilbert factors, not to distort or altogether displace them.

B. Access to Witnesses

Judge Keenan accepts wholly the type of witness Union Carbide must have indicated, rather forcefully in the oral hearings, for the determination of liability. Judge Keenan’s list (although not so presented) is of the following order:

- heads or managers of seven operating units of the UCIL plant at Bhopal
- general Works Manager and three assistant general works managers of the UCIL
- 36 employees of the carbon monoxide and MIC phosgene units (all Indian nationals)
- 99 Indian nationals of the carbomoylation unit
- 193 Indian employees on duty at Bhopal “immediately prior or after the incident”
- 171 employees of the Agricultural Chemical Maintenance Unit
- 46 employees of plant Engineering and Formulation Maintenance unit
- 195 employees of the Utilities and Electrical Departments
- 34 employees of Quality Control, 35 of Purchasing and unquantified number of Stores units
- 31 employees of Safety/Medical Departments
- all employees of the UCIL departments responsible for records and reports of various maintenance units, including those who kept records of the daily, weekly, and monthly plant operations
- 35 to 63 UCIL engineering officials who supervised the work of plant construction undertaken by the Bombay firm Humphreys and Glasgow
- hundreds of sub-contractors located in India
- officials of Madhya Pradesh Government, of the Municipal Corporation of Bhopal and Union of India’s officials.

Given this approach to the factor of access to witnesses, Judge Keenan has no difficulty in persuading himself and readers of the opinion that clearly access to witnesses is overwhelmingly available in India. It is also clear that a United States Court will not have the power to subpoena all these witnesses. The Indian Court would have probably the power to subpoena the Union Carbide officials in America (p. 57).

There cannot be a greater misdirection of the Gilbert access to witness factor. The Indian case in the United States was not against UCIL but against Union Carbide. And the major proposition of the case is that Union Carbide is liable absolutely and strictly for all acts of commission and omission, which lead to an unsafe design of a plant manufacturing hazardous chemicals. If found liable, Union Carbide, of course, has distinct and separate right against its Indian subsidiary, since (as the judge holds) its business was conducted at arms-length, as if it were an independent or even a competitive concern. Union Carbide could sue the Government of India and Madhya Pradesh if there was any ground of liability. UCIL in turn could sue its hundreds of contractors and others for breach of duty at contract or tort. If on the other hand, upon taking jurisdiction, it had been decided that there was no such strict and absolute liability
according to the applicable law, no legally contentious issue would have survived in the Bhopal case.

Judge Keenan is, of course, right that if the causation of the Bhopal tragedy as such and in itself had to be determined all these, and many more witnesses were necessary. Causation was certainly relevant but only in relation to the defective design of the plant arising out of overweening control and dominance of Union Carbide.

As to the showing of this limited causation, the Union of India’s undertaking to produce all necessary officials and employees of the Central Government was adequate. The Court expresses doubt whether it had jurisdiction over the officers of Madhya Pradesh Government and the Municipal Corporation of Bhopal. Certainly, the acceptance of forum could have been conditioned to India’s agreement to make relevant witnesses available.

It appears that the Indian complaint on six specific counts25 has not guided Judge Keenan’s determinations on the private interest factors at all.36 The Court seems to have generalized the entire matter into causation of the Bhopal catastrophe as a whole. Both the Gilbert factors concerning access to the sources of proof and to witnesses must surely relate to the cause of action asserted by the plaintiffs. Certainly, even while considering the forum non conveniens motion, American courts are entitled to rule, and have ruled, that mere defective design of product which allegedly causes accident and damages several years later may warrant dismissal of forum sought by the plaintiff, absent other compelling factors of justice.

Judge Keenan had this way of holding open to him. Alternatively, he could have held that the Bhopal case was sui generis in the sense that it entailed specially claimed worldwide expertise by Union Carbide for the manufacture of hazardous and ultra-toxic chemicals and therefore claims of justice warranted taking jurisdiction on the liability issues. He does neither. Instead, he applies the Gilbert factors in a wholly novel way, bypassing the central legal contents of the plaintiffs! This is clear case of abuse of discretion in the determination of the forum non conveniens.

It is worth noting that Judge Keenan wholly ignores the notable reasoning of Justice Reed in Koster (with whom Justices Black, Rutledge and Burton agreed in their dissent) on the issue of the hardship involved in transporting mass of documents and witnesses not easily accessible to the forum.” Justice Reed observed that to “dismiss a cause on such bare allegation without a particular showing of the hardship...involved puts a powerful weapon into the hands of corporations alleged to have improperly conducted their affairs (p. 119, infra). Indeed, Justice Reed further observed that: “It has been the whole course of our law to break down barriers against calling corporations to account in all states where they may do wrong in doing business” (p. 119, infra). Undoubtedly, these observations were made in the context of forum denial by the majority in a derivative shareholder suit for a corporation doing business in forty eight American states. But should the “whole course of our law” designed to ensure accountability be less important in the Bhopal case?

IX. THE WEIGHING OF THE PUBLIC INTEREST FACTORS

The first public interest concern, as per Gilbert, is one which relates to “administrative difficulties (which) follow for courts when litigation is piled up in congested centres instead of being handled at its origin” (p. 59). Clearly, the contrast between “congested centres” and “places of origin” relates to cases where American plaintiffs sue American defendants in their chosen forum. Of course, it has been extended to foreign plaintiffs as well. But when thus extended, it may happen, as in the Bhopal case, preference for the Union Carbide affidavit evidence. Judge Keenan also overlooks, impermissibly, that sources of proof factor pointed to what was alleged and not what the Indian CBI seized in its routine investigatory exercise.

35. See supra note 31.
36. We do not here discuss factor C, the possibility of view (see Keenan decision at 58-59) where at least the Judge takes the view that the “implant case is not identical to the product design defect case.”

The excessive reliance on Bad Holman’s affidavit containing an analysis of the documents seized by the CBI is indeed puzzling. Judge Keenan is correct to emphasise Mr. Holman’s statement that “of the almost 78,000 pages of UCIL documents seized... only eleven documents (336 pages) were produced which show any contact between the plant and the Union Carbide Corporation or Union Carbide Eastern Inc...” (p. 93). But this reliance is unjustified as a perusal of the complete statement shows; the sentence goes on to say that the documents do not show any contact “in the almost five years between February, 1980 start-up of the MIC unit and the Bhopal tragedy.” A similar acknowledgement occurs in the footnote on page 86 of Mr. Holman’s affidavit.

Clearly, it was not India’s case that the day-to-day operation of the plant at Bhopal was undertaken by Union Carbide; if this was India’s claim, it would stand rebutted by Judge Keenan’s reliance on the Woerner and Holman affidavits. But India’s claim was qualitatively different, as noted earlier. It related to Union Carbide’s pervasive control and presence in design of the plant and manufacture and storage of hazardous toxic substances. Mr. Holman builds his affidavit on the basis, accepted by Judge Keenan quite unacceptably, that India’s claim is based on these eleven documents seized by the CBI and this is a too slender basis for strict multinational enterprise liability urged by India. As Mr. Holman puts it, placing such weight on these eleven documents “widely exaggerate(s) their significance.” Mr. Holman could not argue otherwise. But it is sad commentary on American justice that Judge Keenan is entirely disposed to accept this as gospel truth. He ignores Mr. Holman’s own admission that “virtually all the eleven documents deal with the subjects of 1981 fatality and 1982 operational safety survey...” (p. 93). This clearly shows at the very least that safety systems were monitored by Union Carbide. Overall, it is fanciful to suggest that the documents seized by the Indian CBI will in any case include Union Carbide dossiers on the Bhopal plant that even a limited forum discovery brought unimpeachably before Judge Keenan. The learned Judge, of course, turns a Nelson’s eye to this evidence in his obvious
that the point of origin (taking the very wide view of causation adopted by Judge Keenan) is also an equally, and in fact far more, “congested centre”. I believe this should have been an important factor in applying forum non conveniens criterion to the Bhopal case; it was so in the Air India case, for example. This should be the more so if the forum non conveniens criteria have to be so applied, overall, to serve “the ends of justice” and by advertent to the realities that make the doing of justice possible.38

But this perspective is altogether missing in the Keenan Court; hence, one would expect him to conceive of the administrative difficulties quite parochially. This expectation is amply fulfilled (pp. 60-61).

It must be said parenthetically that it adds insult to injury when Judge Keenan waxes eloquent concerning the use of American taxpayers’ “heavy financial burden” occasioned by the “administrative costs of this litigation”. He describes them as “astounding”; indeed, so they will be, since Judge Keenan takes the Bhopal case to an enquiry into the complex and multiple causation of the Bhopal tragedy, traversing way beyond the limited legal contentions of India. And Judge Keenan tends, irritatingly, to overlook the fact that the Union Carbide is a profit making American corporation adding to the American taxpayer’s affluence as well.

The second major public interest concern entails a weighing of American and Indian interests in deciding the forum issue. On this, Judge Keenan has to say is as follows:

Union Carbide, not surprisingly, argues that the public interest of the United States in this case is very slight, and that India’s interest is great. In the main, the Court agrees with the defendant. (p. 63, emphasis added).

The Indian interest is “great” because of the following. First, India “no doubt valued its need for a pesticide plant against the risks inherent in its development” (p. 65). Second, the Indian interest in regulation “were possibly drastically different from the concerns of American regulators” (p. 66). Third, this is so because the “Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology” (p. 66). Fourth, there is evidence of immense interest of various Indian governmental agencies in the creation, operation, licensing, regulation and investigation of the plant.” (pp. 63-64).39

38. Koster, supra note 26 (emphasis added).
39. Judge Keenan refers to India’s interest in minimization of foreign exchange losses, and the device of capital goods licence at p. 63. He does not note that the UCIL authorised to import a total of $ 2.77 million for the Bhopal plant imported goods of the value of $ 2.2 million! See Mass Disasters at 102. How is this control relevant?

In contrast, the American public interest is “very slight”. The dismissal of forum will not, Judge Keenan blithely asserts, cause any “relaxing of regulatory standards by the responsible legislators of the United States as a response to the lower standard abroad” (p. 66). Further, the purported public interest of seizing this chance to create new law is no real interest at all” (p. 66). Judicial self-restraint serves best the public interest concern of the United States.

It appears that Judge Keenan goes even further than the contention of Union Carbide that the American public interest is very slight. He, indeed finds that there is no public interest concern of the United States that this case possibly can raise, outside the realm of “administrative difficulties”. Judge Keenan is terribly disinclined to examine the wider public interest concerns, carefully urged by India and the anicut.41 These concerns on such a vast canvas were urged probably for the first time to any United States Court in a forum determination proceeding. Judge Keenan could have stayed close to the Gilbert conception of administrative difficulties as providing adequate manifestation of public interest concerns, and made, if at all felt necessary, a footnote reference to these wider concerns which, given judicial self-restraint, could not be examined. He rejects their perfectly sensible option.

Having taken on board the gamut of wider public interest concerns, his articulation of these is truly extraordinary. It comes close to Dow Jones (or the stock exchange) jurisprudence. As long as no harm occurs to Americans, the American legislators remaining vigilant to ensure that their regulatory effort at home is not contaminated by lower standards abroad, how can the public interest of the United States be ever adversely affected? Indeed, it is best served by dumping dangerous technology on poor countries, which are periodically also rescued by American arms in order to make the world safe for democracy!

After the Keenan decision, it should be even harder to understand and explain that a Ralph Nader once lived and worked in the United States! Or that the United Nations, with its growing emphasis on a global community of concerns, exists in New York! A more rigorously conservative view of the public interest concerns of the United States, and a more joyous surrender of power to discretion to do justice, than Justice Keenan’s would be difficult to locate in the recent annals of American jurisprudence.

As to the public interest concerns of India, it is clear that Judge
Keenan is saying in effect that if Indians desire development through importation of dangerous technology, it is their business. Of course, it is. And he is right to say that it would be "sadly paternalistic" (p. 65) of an American Judge to evaluate such policy or regulation. It does not even occur to Judge Keenan, may be because it was not properly put to him, that the Bhopal case does not call for such paternalistic interventions at all.

The Bhopal case was initiated by the sovereign State of India appearing, in an unprecedented event, as a plaintiff before Judge Keenan to obtain a determination of the liability of an American multinational. The decision to bring these legal proceedings was by itself the highest affirmation of the Indian public interest. And that determination signified that while the Indian vision of development is tolerant of importation of hazardous technology, it does not and will not tolerate a "lower standard abroad" in designing of plant and safety relief systems by an American multinational. In altogether ignoring this affirmation of the public interest by the sovereign state of India, Judge Keenan has in fact been grossly paternalistic.

Neither Gilbert nor other forum decisions permit or accommodate or even tolerate such an identification and evaluation of competing public interest concerns. It would indeed be (more than Judge Keenan) sadly paternalistic for me to advise the community of American lawpersons of the community of concern which link people of Bhopal and West Virginia, to take but just one relevant example. If forums remain inconvenient, this does not assure that catastrophes will always remain convenient!

X. THE TASKS AHEAD

I believe that India should appeal Judge Keenan's decision on the grounds of abuse of discretion in forum denial, for an improper application of the Gilbert factors, insufficient appreciation of India's principal legal contentions concerning trial of liability issues and inadequate application of the judicial mind to the problem of Indian legal system's normative and institutional inadequacies.

Since, in the conduct of the litigation, the Union of India has chosen to bypass the Indian academic talent in service of national development, it would be vain to suppose that this opinion would receive even a nodding consideration. One would be happy to be proved wrong in this prognosis; but then a citizen of India conscientiously discharging her fundamental duties under the Constitution is not assured any happiness.

Be that as it may, should the private attorney's appeal (with Union Carbide cross-appealing on the discovery issue), the Union of India would find itself in a curious position of having to defend the indefensible decision of Judge Keenan! Before accepting such a position, on some version of the law of Karma, India would do well to take a close stock of its position were the Bhopal case to be tried in India.

The first task would be to move the Supreme Court to expedite the decision on the constitutionality of the Bhopal Act. Should for justified reasons the Act be struck down, a most piquant situation will arise. Second, the Central Government should in pursuance of Section 3 of the Act create a special Bhopal litigation department to process questions relating to the trial of the Bhopal case in India. The legal resources which need to be marshalled must include a wide range of concern and competence. Third, there must also be established an expert statutory Medical Commission on Bhopal victims which would prepare the estimate of damages suffered by the victims in terms of physical and psychic health, genetic mutation and costs of past, present and future treatment, including rehabilitation. Fourth, the Indian National Trust for Cultural Heritage (INTACH) should be asked to assess the total environmental costs of the Bhopal catastrophe. Only when all this is done India will find it possible to provide an authentic claim of the level of damages.

In terms of litigative strategy, India still has the option, in complete accordance with the Keenan decision, to obtain a judicial determination of the liability of Union Carbide. For this, it is unnecessary for India to make UCIL a party to the legal proceedings. We should recall that the mandated Indian forum can determine the very same questions which were raised before the United States District Court. In fact it should do just this and no more. The Indian case in the United States was against Union Carbide because, among other things, India had no jurisdiction over it; now that it has, it should proceed against Union Carbide exclusively in Indian courts.

Union Carbide would, of course, want to impede UCIL and other parties to limit liability or to acquire only the status of a joint tortfeasor. If the litigation in India is only confined to the strictly framed issues on Union Carbide liability, the Indian courts may be justified in taking a negative view of this request. In fact, the clarification sought by Union Carbide on the second condition has resulted in the ruling by Judge Keenan that the final judgments to which Union Carbide must submit are only those specifically directed against it. Prior to this clarification, the second condition only referred to satisfaction by Union Carbide of any final judgment of the Indian court. A judgment against Union Carbide can only be a judgment based on the issue of Union Carbide's own liability in terms of defective design and dominant, even overhearing, corporate control over the subsidiary.

As regards the "special judicial accommodation suggested by Judge Keenan (p. 48), it would be, a mistake in the present opinion, to establish

42. Agent Orange litigation provides another apt example. See Mass Disasters, at 120-21.

and routinised and also to some extent politicized, to the overall detriment of the victims' sad plight. The winding up of the Bhopal Commission of Enquiry, which was doing its conscientious best as a forum for vigilance on relief and rehabilitation, suggests that Bhopal tragedy has ceased to be a matter of "definite public importance"; a commission of enquiry may set up under the Commission of Enquiry Act when such a matter of public importance exists. Surely, the plight of the Bhopal victims suggests a continuing definite matter of public importance. The Commission should now be revived, with slightly modified terms of reference, especially if Union of India decides to proceed against Union Carbide exclusively on the grounds of strict multinational enterprise liability.

Well over one year after the Bhopal catastrophe, and one year after the filing of the Bhopal case before Judge Keenan, there persists a need for a high-powered Commission with full authority, to analyse the complete needs for relief and rehabilitation of the Bhopal victims as also actually provide relief and rehabilitation. Surely in a country approaching 800 million human beings, the Government of India can find twelve non-party political persons with high social legitimacy and concern and competence to whom it can exclusively entrust these tasks.

The question of relief and rehabilitation to Bhopal victims should be a matter of high priority on the national agenda; and state funds must be committed to these operations, regardless of the nature, type and timing of damage outcome in the Bhopal case. Even as we assert the high moral principle of absolute liability of multinational enterprise, we should notourselves present a sad spectacle of callous, inapt and inhumane handling of the victims of the world's greatest industrial disaster. And in no way should we allow anyone to even legitimately whisper that from the standpoint of the victims there is not much to choose from between the Government of Madhya Pradesh and the Union Carbide or that the Union of India has been only as much conscientiously concerned with their plight as Judge Keenan!

DELHI
17 June 1986

Upendra Baxi

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