THE BHOPAL VICTIMS IN THE LABYRINTH OF THE LAW:
AN INTRODUCTION

A THE GREAT EXPECTATIONS

The Bhopal catastrophe seems to have created the Bhopal litigation in its own image. The litigation has the same runaway reaction qualities as the MIC which escaped into environment on December 2-3, 1984; and if the causes of that tragic event are not as yet fully established nor have been the causes of many an extraordinary moment in litigation. The mystery of the catastrophe reproduces itself in the mystery of judicial process enveloping the Bhopal victims.

From the standpoint of victims, the Bhopal case in India, so far, represents the second Bhopal catastrophe. The first produced actual and toxic impacts on their docile bodies; the second, for full five years, aggravated and accentuated their agony and (in the February settlement) erased them out of history. In a curious sense, the MIC has entered the soul of Indian jurisprudence as well.

It is, otherwise, hard to understand, let alone explain, why the litigation failed to produce, for full five years, any entitlement in victims to financial interim relief, medical care and vocational rehabilitation in these haleys days of judicial activism which has earned the Supreme Court of India a high esteem globally. It is hard to understand, on any other approach, as to why even the Supreme Court could not achieve for itself and victims complete information relevant to the tasks of justice or hear them on the eve of the settlement which now it says it should have. The victims, with all their troubles, have to bear the burden of being pedagogues in human rights to a sovereign state, acting parent patriae, and to the Supreme Court of India, otherwise a custodian of people’s democratic rights.

Bhopal witnessed an Operation Faith from December 16-22, 1984 leading to ‘detoxification’ of the plant. The label is highly significant. Indulging the Union Carbide with the license to kill was an act of faith; rescuing the system of the management of political power from the devastating consequences of any further release of MIC also needed Operation Faith. ‘Faith’ here signifies not just detoxification of Bhopal and disposal of the MIC; rather, it stood for reinforcement of confidence of everyone in the masters and managers of the Indian destiny.

Comparably, soon upon the February 1989 settlement which toxified Indian jurisprudence, a parallel Operation Faith seems to have begun with May 4, 1989, and December 22, 1989 judicial discourse. The parallel is indeed striking. Just as the Operation Faith follows the catastrophe, judicial concern for the Bhopal victims’ entitlement begins to emerge dramatically after the settlement. Their right to interim relief is affirmed on December 22, 1989; their right of access to medical records concerning their health status fully acknowledged on February 1, 1990;

Note All pagination references in parentheses in the text refer to this work.
and their right to be heard, ignored monumentally so far, is fully restored in review petitions now scheduled to be heard in March-April 1990.

Constantly since the settlement orders, judicial discourse emphasizes the need for everyone to protect and promote the "integrity" of the judicial process from "misinformed" criticism. If the citizen faith has been, rightly or wrongly, shaken by the settlement, the post-settlement judicial discourse can be seen as inaugurating an Operation Faith.

The legal documents assembled in this volume should enable the reader to construct her own narrative of the Bhopal litigation in the Indian courts. For the moment we begin, in yet another irony, our introductory labours by resorting to Judge Keenan's great expectations of the Indian courts.

In mandating the Bhopal case to the Indian courts on May 12, 1986, Judge Keenan expressed the view that

This court is firmly convinced that the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability. Further, Indian courts have greater access to all the information needed to arrive at the amount of compensation to be awarded the victims.1

Repelling India's contention that "courts of India are not up to the task of conducting Bhopal litigation," Judge Keenan further observed:

The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its people would be to revive a history of subservience and subjugation from which India has emerged.2

This was the animating spirit mandating the Bhopal case back to India. In an extraordinary irony, the developments in the Bhopal case in India need to be judged in terms of Judge Keenan's articulate expectation that Indian courts were in a far better position than him to (a) determine the cause of the Bhopal catastrophe; (b) fix liability; (c) award damages/compensation to the victims based on all necessary information and, in this process (d) "stand tall before the world..."

The litigation did not produce any determination of the cause of the catastrophe. It did not produce a declaration of liability of the Union Carbide Corporation, Union Carbide India Limited, Government of India or Madhya Pradesh. It did not produce any compensation/damages based on access to all relevant information about the post-catastrophic past, present and future of men, women and children colonized by the MIC and related toxic substances.

Instead, the litigation produced an abstract, reified idea of a Bhopal victim. This idea of a victim became the victim; injury to this idea had to be compensated by adjudication or settlement. Simultaneously, the victim's suffering also became an abstract reified idea. Suffering was a calculable unit of injury; and that unit was denied any temporal dimension (for example, its future.) This double reification produced a notion of 'victim' which had no age (neither young nor old, neither infant nor adolescent, no gender, no community, nor a sense of self (esteem, avocation, life-projects). This accomplished, the reified victim had to be further adjusted to units of injury—simple, severe, temporary, permanent—which then had to be quantified in money terms.

Some abstraction or reification is ineluctable in a mass disaster toxic tort adjudication. But in the Bhopal case it is so acutely comprehensive as to make the real suffering of victims a fiction. In this sense, the metaphor "second Bhopal catastrophe"3 or "revictimization of the Bhopal victims"4 does not just involve a play of floating signifiers!

In the materials here assembled, you will witness an abundant display of the doubly reified victims. Not a single page or paragraph of these pages brings you even a bare glimpse of a Bhopal 'victim' in any historical, existential sense of that being. Perforce, even the discourse of this Introduction—which aims to serve the limited purpose of leading you into the MIC territory—is confined within the bounds of liturgical reification.

There is nothing inherent in judicial discourse forbidding recourse to representation of human suffering depicted in sad exuberance in the discourse of the print and electronic media and even more abidingly in the bodies and minds of hundreds of thousands of MIC afflicted human beings. But from the start the litigation discourse assumed its Kafkaesque character. Civilized discourse (we should now learn at least from the state of Bhopal) on human suffering requires even legal and juristic imagination to be enriched by modes of sensibility entailed in a humanistic construction of what happened at Bhopal and to the people. The disembodiment of victims through legal prose in itself constitutes a source of incomprehension about their rights and tasks of justice.5 And this is manifest when the Supreme Court keeps comparing the amount of compensation available to 205,000 victims from US $470 million to motor vehicle accidents or workers’ compensation ceilings of damages! The fact that these analogies are far too weak can only be grasped by encountering a real victim of MIC, and this access was systematically denied even to the Supreme Court Justices by the valorization of multiple reifications as the very best assurance of justice!

---

1 See U. Baxi, Inconvenient Forum and Convenient Catastrophe: The Bhopal Case 68 (1986) (hereafter referred to as Inconvenient Forum...)
2 Id. at 69 (emphasis added).
3 See U. Baxi, "The Second Bhopal Catastrophe..." Indian Express December 19, 1989 p. 1
4 See U. Baxi, "Reviscimitizing the Bhopal Victims" Mainstream p. 5 (March 4, 1989)
5 Judge Keenan in mandating the case to the Indian Courts considered that possibility of viewing as among the Gilbert private interest factors distorting an Indian forum (pp. 58-59.) The viewing he had in mind was of "plants and humens" not of human beings!

But the Indian Supreme Court has a different approach to the "possibility of view." For example, it itself visited Tihar Jail to verify conditions of human rights violations: Chief Justice Beg, accompanied by Justices Krishna Iyer and Kailasam visited the jail on January 23, 1978 and the Court acted upon a memorandum prepared by the Chief Justice of India (see Sudhanshu v. Delhi Administration (1978) 4 SCC 494)

The supplemental affidavits filed by review petitioner BGPUM (infra note 22) has placed before the Court narratives of two victims: Kallash Pawar (who committed suicide) and Durgabai.
B THE STRUCTURE OF INDIA'S PLAIN'T

The Union of India filed a plaint on September 5, 1986, before the District Court, Bhopal, which replicated, almost wholly, the plaint before Judge Keenan. This was necessary as the suit to be tried in India was the one before Judge Keenan and mandated by him to proceed in India. It was also appropriate for the UCC to claim in its written statement December 10, 1986, that India's suit as "framed is based on vague and general allegations" and that "natural justice and fair play" required specific pleadings on every fact and issue (p. 34). It also challenged the suit as "premature" since the: (i) "plaintiff does not know what amount of money it seeks to recover" and (ii) the processing of claims under the Bhopal Act had still to be undertaken (p. 35). It is in response to this that India filed an amended plaint (pp. 174-197) furnishing all material particulars and quantifying damages at $3 billion (p. 193).

No understanding of the Bhopal litigation is possible without a full grasp of the structure, or the inner logic, of the Union of India's (hereafter India) assertion of claims and principle of liability. One may discern at least four crucial components of this structure. First, India articulates a new conception of parens patriae role on which its capacity to sue Union Carbide Corporation (UCC) basically rests. Second, in order to pursue the UCC, and not the UCL, it has to develop the thesis that the UCC was the mind and soul of the Bhopal plant and the UCL only its docile arm; or to vary the metaphor the UCC was, as it were, the 'ghost in the machine' which animated it. Third, India needed to establish a standard, a principle, of liability appropriate to recompense victims of a toxic tort in a mass disaster situation. Fourth, India had to, more or less, precisely identify the general pattern of injury to human health and environment as well as the individual units of injuries suffered by each Bhopal victim. The suit by India marks inaugural labors in all these four areas. It requires no hindsight to say that the Bhopal case was conceived to be (and should rank as) among the most complex litigation in the late twentieth century world.

---


7 Legal/jurisprudential norms, the Bhopal case is rendered complex by: (a) the emasculation of the principles of hazardous multinational enterprise absolute liability; (b) the parens patriae stratification of sovereign India as plaintiff; (c) the forum proceedings in America; (d) the mutuality of jurisdictions at the point of enforcement of any Indian judicial decision; (e) evidentiary complexity; (f) the intertwining of appellate jurisdiction in India, culminating in the extraordinary (Article 136) jurisdiction of the Supreme Court and (g) the multinational ability to suborn India's top legal talent.

Underlying the juristic complexity is the technological complexity of Bhopal inviting a full understanding of: (a) the nature of the MIC; (b) the state of safety technology; (c) causes of catastrophe; (d) immediate therapy on exposure; (e) the present state of art concerning the manifold toxic impact of MIC exposure.

Two other orders of complexity are political and bureaucratic. On the latter, see S. Viswanath "Bhopal: The Imagination of Disaster", 11 Alternatives 147 (1986); see Inconvenient Forum pp. 29-34. The political complexity arises out of: (a) the foreign economic policy of the United States; (b) the military-industrial profile of the UCC; (c) the permeability of the Third World in general and India in particular since 1984 to multinational monopoly capital; (d) the local state politics; (e) the relation of this to activist assertions on behalf of the Bhopal victims; (f) the internal dynamic of the Bhopal-based pro-victim social action groups; (g) the politics of professionals (lawyers, doctors, scientists including the Indian Council of Medical Research). See for reflective understanding on some of these aspects Lokayan Bulletin (1988).

8 On the notion of substantive rationality of law, see Max Weber on Law and Economy in Society 224-225 (1954); (E. Shils and M. Rheinstein trs.)

9 Supra note 1 at 36-37, 52-53, 68-69.
innovativeness lies in the modification of the inherited traditional conception of *pars pro toto* and in the acquiescence of it by a US District Court and the Federal Court of Appeals. It is clear that the unfortunate settlement ratified by the Supreme Court of India in February 1989 (pp. 525-529) wholly overlooks the four components of India’s invocation of *pars pro toto* doctrine. The second component was not respected because the settlement amount was not even directed to all victims of Bhopal; the third component was wholly absent from view; and so was the fourth. As to the first component, a sovereign plaintiff’s sudden readiness to depart, in such a wholesale manner, from the pursuit of its constitutional obligations should have alerted a court as vigilant of human rights violations as the Indian Supreme Court, to the simple fact that India’s acquiescence with the UCC proposal was also a pervasive repudiation of high constitutional morality. Indeed, judged by the invocation of the *pars pro toto* doctrine India’s settlement behaviour signifies the sabotage of its own creative contribution to the world jurisprudence.

(ii) The Ghost in the Machine

Although the Union Carbide India Ltd. (UCIL) was the entity at all relevant times running the Bhopal plant, and the status of the Union Carbide Corporation (UCC) was that of a mere, though dominant shareholder (it held by a special permission 50.9% shares in UCIL reduced from its earlier holding of 60% shares) India’s contention was that the UCC was in full control of the direction of the UCIL. The UCIL was, as a multinational, in the driving seat: it navigated the UCIL in hazardous directions in ways which perilled the life-projects of hundreds of thousands of Bhopal survivors. The Indian contention was both general and specific. At a general level, the relationship between the UCIL and UCC was that of a subsidiary and a parent multinational. Also, by virtue of holding a majority stock of the UCIL, the UCC controlled its board of directors, and was a holding company under the Indian Companies Act. As such, it “either exercised control over, or, at all relevant times had the right to exercise control over all actions and conduct of the UCIL.” (p. 176.) Not content with asserting a general relationship, India provided a list “by way of example, and not limitation” of the “specific actions demonstrating the relationship between UCIL and UCC:” the seven factors are itemized in pp. 176-180 infra. Of these seventeen factors, eight (a) to (h)) relate to a period before the commissioning of the Bhopal Plant (pp. 176-178); the remainder (i) to (o)) (pp. 178-180) relate to 1980-1984—as late as October 1984—period. Both sets of considerations relate to the economic viability of the Bhopal plant which the UCC’s wholly owned subsidiary’s (Union Carbide Eastern, Hong Kong) director, Mr. Ramaswami Natarajan was to sum up strikingly as a problem of “an oversized plant with an undersized market” (p. 177.) And as of October 16-17, 1984, the UCC expert team WAPT (UCC’s World Agriculture Products Team) directed the UCIL to “assign personnel to prepare feasibility and cost reports” concerning its proposal to “dismantle and ship the plant to Brazil or Indonesia.” The UCIL undertook the study and filed an interim report suggesting the impracticality of such a move as late as November 13, 1984 (p. 180.) The entire plan, in a deadly irony, was christened as “Save Bhopal” (p. 179.)

All this evidence was discovered by India during the forum proceedings before Judge Keenan. On its basis, the amended plaint sought, essentially, to establish the point that

Union Carbide’s exercise of control in critical areas of safety and technology was only one aspect of Union Carbide’s broader exercise of control over the strategic management direction of UCIL’s agricultural products division, which included the Bhopal plant.

And this ‘strategic direction’

was in accordance with Union Carbide’s fundamental management strategy of coordinating its subsidiaries, product lines to accomplish the multinational’s worldwide plans (p. 176.)

In legal parlance, this amounted to a plea of disregarding the corporate veil. The principles on which a court might reconfigure the unity of a ‘holding’ and ‘subsidiary’ company, held apart otherwise by the devices of formal incorporation, are reasonably well-established worldwide. But these principles were hitherto unextended so fully, as India now sought to do, in case of a toxic tort entailing a mass disaster.

The thrust of this argumentative strategy was far-reaching. If it were to succeed, no multinational corporation operating hazardous industry in India would be able to deploy its local subsidiary as a shield. If the Indian court delivered a final judgment enforceable in U.S. court upholding India’s contention, its impact at least initially on America-based multinationals specializing in the export of hazard to the Third world societies would have been massive. Perhaps, in fundamentals, at least the internal economy of multinational corporation community would have had to undergo a profound perestroika.

It stood to reason that if India enacted for herself a *pars pro toto* role for the Bhopal victims, the Union Carbide had to assume a similar role for the global community of multinationals. The February settlement marked the triumph of the fiduciary role of the UCC for the world multinational community over the parental role of the Indian state for the Bhopal victims.

---

10 The innovation is notable because the doctrine of *pars pro toto* was here being invoked for the purposes of a suit in a domestic jurisdiction; moreover, it was invoked, usually, in a quasi-sovereign capacity. Chief Justice Sabyasachi Mukherji notes these limitations but rules that the “jurisdiction of state’s power cannot be circumscribed by the traditional concept of the limitation of *pars pro toto*” and that the doctrine offering the “protective umbrella of the state” articulates “the common sovereignty of the Indian people” (p. 600; see also pp. 563-564.)
11 See supra note 9, as to the Federal Court of Appeals decision see pp. 653-663 infra.
12 See for the conception of a “holding” company, Section 4 the Indian Companies Act.
(iii) The Principle of Multinational Enterprise Liability

Armed with parens patriae justification, and with the evidence of the global Carbide operations which almost rendered the UCIL existence as chimera, the logical next step for India was to urge that the UCC was liable for the Bhopal catastrophe. This urging was indispensable both as a matter of principle and as a matter of procedure.

Procedurally, the UCC itself was not liable, as a shareholder or even as the holding company, to Indian jurisdiction on the basic principle of effectiveness underlying the very notion of jurisdiction. No assertion of the parens patriae role makes any sense in the absence of any effective jurisdiction over a multinational enterprise in a mass disaster toxic sort. India’s suing the UCC in American courts was an essential precondition for the acquisition of this jurisdiction. Justice to the victims of Bhopal, whatever else it entailed, required the assurance of the UCC being amenable to the discipline of the law, either in America or India. And this was accomplished by the forum proceedings before Judge Keenan.

The formulation of a principle of liability required a high act of moral and legal imagination. The fact that India accomplished this formulation (pp. 5-6; 186-187) itself constitutes a landmark in the process of struggle for a new world order subjecting hazard makers to a standard of justice. It is necessary, all the more, to identify the key aspects of this formulation. The principle of absolute multinational enterprise liability invokes the following features of a ‘hazardous’ multinational:

(a) the "global structure, organization, technology, finances and resources" of multinationals enables them to take catastrophic decisions—that is, "decisions and actions" which lead to mass disasters;
(b) though not confined to it, (a) above is particularly true of "the multinationals which are ultra-hazardous or inherently dangerous;"
(c) the power of multinationals, especially over their "key management personnel" is neither "restricted by national boundaries" nor "effectively controlled by international law;"
(d) a prime reason for (c) above is furnished by the complex corporate structure of multinationals with "networks of subsidiaries and divisions" which make it "exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise;"
(e) the monolithic multinational operates through
   (i) a "neatly designed network of interlocking directors;"
   (ii) "common operating systems;"
   (iii) "global distribution and marketing systems;"
   (iv) "design development and technology worldwide;"
   (v) "financial and other controls;"

---

14 This elementary assertion needs to be made because even till today many lawpersons and distinguished opinionators continue to ask why was it necessary for India to go to an American Court in the first place.
on an explicit standard of safety based on one or any combination of these elements. Why could the Union of India not have insisted on a computerized safety equipment that the UCC used at its West Virginia plant?\textsuperscript{15} Can a post-catastrophe evolution of a standard of safety be fully justified? This moral logic was fully exploited by the UCC (as we will shortly see) to detract from the force of the Indian enunciation of the principle.

On the other hand, although contentiously, it was proper for India to leave this question for a due process based adjudication. No matter how adjudication resolved the issue of the "required standards of safety," the determination was logically consequential upon the acceptance of the structure of the principle of multinational enterprise liability, and the core duties thereby created or established. Once the two 'core' or 'fundamental duties' were established, the parameters of liability arising out of the violation of the ensuing consequential duties was left for further adjudication.

In this, India seems to have a two-step adjudication in mind: adjudication on principle and adjudication on the details of liability. On the former it urges that the UCC is "absolutely liable for any and all damages caused or contributed to by the explosion of lethal gas from MIC storage tank at its Bhopal plant..." (p. 188). On the latter, it urges a whole variety of acts of commission and omission which point to a failure to observe the "required standards of safety" from the standpoint of minimal rationality (pp. 188-190). Even if forensically vulnerable, this two-step formulation is conscientious and ethically sustainable.

From what sources does India find the enunciation of this principle, adumbrated first in the plaint before Judge Keenan? As we see, the UCC was to assail the Mehta principle enunciated in late 1986 in the case of Delhi Oleum leakage as one unknown to the world jurisprudence (p. 414). Clearly, this Introduction is not the place to winnow the world jurisprudence on torts in general, or toxic torts...\textsuperscript{16}

\textsuperscript{15} At the Hearing Before the Sub-Committee on Health and Environment of the Committee of Energy and Commerce, House of Representatives (Ninety-eighth Congress December 14, 1984: Serial Number 98-102) Jackson Browning, the UCC's Director of Health Environment and Safety Affairs Group, testified that the MIC (a compound composed of atoms of Carbon, Nitrogen, Hydrogen and Oxygen, usually written as CH\textsubscript{3}NCO) is "extremely hazardous chemical." It is "reactive, toxic, volatile and flammable" (p. 19.) Following Browning's statement Warren Anderson and H.J. Karwan (then Manager of UCC's West Virginia plant) stated that although no plant is ever exactly alike, the safety standards and features were exactly the same in West Virginia (p. 23). This was in contradiction to UCC's Safety Inspector C.J. Tyson's statement that the "Bhopal plant was not up to American Standards" (p. 23). But, despite this general denial, Mr. Karwan agreed that "we do have a computer in the MIC unit". But he described its role not as triggering of any "safety features" but "is there primarily for efficiency of data logging"..."[T]emperatures, pressures, flows, that type of thing." (p. 22.)

\textsuperscript{16} The discourse in Mehta as invoked by Justice Seth in Madhya Pradesh High Court at 373-375 infra and the general discussion in B.M. Gandhi, Law of Tor 456(1986).


in particular. Sufficient movement within the contemporary global tort law exists to justify the assertion of the Indian principle both as to the general regime of tort liability (strict or absolute liability) or as component of product liability, negligence, public and private nuisance\textsuperscript{18} or of specific regimes, still emergent, of toxic torts.\textsuperscript{17}

And yet, India’s enunciation does certainly push the boundaries of tort liability for mass disasters caused or catalyzed by multinationals. The splendid innovativeness of the Indian enunciation lies in its jurisprudential basis: the axiomatic, self-evident, rationality of its claim based on propositions (a) to (h) formulated above. This enunciation signified one of the most creative challenges, after Shimoda,\textsuperscript{18} to the late twentieth century jurisprudence of the world. The February settlement surrendered this great initiative, substituting judicial fatigue for judicial creativity as a response. This is not to say at all that the Indian judiciary should have on due consideration produced any resounding reaffirmation of the self-evident nature of the principle of absolute multinational enterprise liability. It might have negated or trimmed it. Either way, the decision would have contributed to the jurisprudence of multinational liability for mass disasters. Judicial escapism has deprived us of this endowment.\textsuperscript{19}

(iv) The Scale of Human Suffering and Dimensions of Damage

The UCC, rightly, insisted that India should indicate the precise nature of harm for which it was sued. But even as late as January 1988, the amended plaint of India remains relatively inarticulate on the scale of human injury/suffering and the dimension of related damage. And what it offers by way of particularization is highly ambivalent. On the one hand, out of the then 5,31,770 personal injury claims on record, it speaks of 2660 fatalities and 30,000-40,000 cases of "serious injuries." On the other hand it states:

Neither the extent nor nature of injuries or after-effects of the injuries suffered by victims of the disaster have yet been fully ascertained.\textsuperscript{19}
India craves the indulgence of the court to place results of surveys and studies on:

(a) "full facts of damage to individuals, living beings and environment..."
(b) "damage and loss in respect of personal and business property and income..."
(c) "disruption of industrial, commercial and governmental activities and of governmental revenue throughout the Union of India;"
(d) "impairment of future earning capacity of thousands of persons..." (p. 193.)

In the original plaint the following factors are also itemized:

(e) "serious and permanent injury, including but not limited to acute respiratory distress syndrome, ocular and gastrointestinal injuries and pain and suffering..."
(f) "...emotional distress of immense proportion..."
(g) (f) above being aggravated by their "witnessing the virtual destruction of their entire world..."
(h) "...further injuries... to such persons and generations yet unborn" are "reasonably certain to occur."

Further, the plaint mentions the "agonizing, lingering and excruciating" quality of death; and the quality of bereavement marked by continuing suffering of those exposed to "the loss of support, aid, comfort, society and companionship of the deceased." (p. 9.)

On the whole, the categories delineated above (save the puzzling(e)) do display a conscientious attempt to look at the compensation damage from the victims' perspective. Injury is conceived of as immediate, persistent and future impact on body and mind as well as in terms of disruption of income and ways of living; and the painful mode of death is thought of as particularly horrible, creating in the process an escalation of the agonies of bereavement. And in a mass disaster of this magnitude it is not at all improper to seek judicial indulgence for submission of results of further, and ongoing, studies.

But, clearly, this information could not be interminably delayed without fateful impact on India's principal contentions. In revision before the Madhya Pradesh High Court (p. 306) this same indeterminacy, created by the as yet ongoing studies, continued. It continued from November 1988 to mid-February 1989 when the Supreme Court suddenly announced a settlement, in the absence of full data, even if not in every respect complete, on the foregoing categories. The settlement as justified by the Supreme Court in its May 4, 1989, discourse does not proceed beyond the (slightly revised) fatality figure and 30,000 to 40,000 "seriously injured" persons plus 150,000 simple injuries (pp. 544-545) leading to an award only of $470 million (Rs. 250 crores). Not merely does the scale of human suffering thus never emerge from the Bhopal proceedings, but also remain submerged other damages to "living beings" and "environment" or future, unfolding injuries disabilities and impacts. It is this aspect of India's strategy which constituted India's Achilles Heel in the Bhopal case; the scale of suffering and dimensions of victimisation remained merely an ensemble of sensitive but abstract categories.

In this situation, the prayer for punitive damages for an amount "sufficient to deter" the UCC and all multinational "involved in similar business activities" from "wilful, malicious and wanton disregard of the rights and safety of the citizens of India" (p. 194) also remained an abstractly appealing prayer. Not wholly but in the main.

The monumental burden of rectification of this strategic error now rests on the victims in the review petitions, only partly alleviated by the present government's principled decision to support their review petitions. This strategic error exports a lesson for the Third world societies faced with Bhopal-type mass disaster scenarios: scientific understanding of exposure to dangerous substances, processes, manufactures, in ways extrapolable to a mass disaster, should be commissioned simultaneously with the import of hazardous technology.

Perhaps, no matter how these are handled, the victim review petitioners' endeavours to marshal the existing state of knowledge to demonstrate the scale of injury and dimension of damages should provide better guidance to the Third world citizens and governments faced with the potential of future Bhopals.

---

20 A cryptic remark in May 4, 1989 decision, justifying the settlement, goes so far as to suggest that the overwhelming need for immediate relief "should not be subordinated to uncertain promises of the law" and that the "assessment of the amount was based on certain factors and assumptions not disputed or even by the plaintiff" (p. 143). But from the discretion of the respective court to impose certainty to "promises of law" as also to a sovereign plaintiff acting upon a "strict proof in 1989 as to the nature and incidence of victimisation, on the pain of the sanction of a dismissal of its claim of damages. The Court instead conditioned.

21 See also an article in "The Times of India" January 13, 1990 p. 1. As the interim relief, the Union Law Minister in this historic announcement of January 12, 1990, stated that the government would formulate a one-time interim relief in consultation with victim groups. On February 3, the Union Government consulted the victim groups but withheld the announcement of the interim relief in view of the possible violation of the election code of conduct since the elections to state legislative assemblies (including Madhya Pradesh) were in the offing. Soon upon the conclusion of the elections, India has announced on 5 March 1990 interim relief of Rs. 200 p.m. for every individual in thirty-six municipal wards of Bhopal exposed to gas on December 2-3, 1984 for a period of three years. The total amount is Rs. 360 crores, close to one-third of the settlement amount adopted by the Supreme Court. For the scheme and the consequential court order see pp. 675-679.

22 See the Supplementary Affidavit in Review Petition 229/89 in Civil Appeal No. 3188/86 sworn by Ms. Radha Kumar on behalf of the Bhopal Gas Pendi Madhu Uday Singh Sanyal (BGPMS) which marshal in a Brandeis brief type formulation considerable scientific material to show acute and long term "responses by the human body" to "toxic insult." The lethal doses of MIC in the atmosphere caused "profound hypoxia" leading to choking deaths, and among the survivors chronic lung disease, corneal opacity, irreversible damage to liver, kidney, and immune system degeneration. The affidavit relies on pioneering experimental studies by Dr. Neil Anderson and Dr. Charles Mackenzie and among others, a sworn statement by the latter is also appended in the supplementary affidavit. (The team which prepared the affidavit, settled by Senior Counsel Shanti Bhushan, consisted of Advocate Prashant Bhushan, Professor Veena Das, Radha Kumar and myself.)

See also the preliminary report of a medical study on the continuing effects of toxic gases on the health status of the Bhopal survivors. See Dr. C. Sathyamala, Dr. Nishith Vohra and K. Satish, Against All Odds (December 1989; CEC, IF-20) (GF) Jangnara Extension, New Delhi 110019).
C THE UNION CARBIDE STRUCTURE OF RESPONSE

Forensically, the structure of India's argumentative strategy ordained the UCC response. Still, the opening gambit with which it chose to formulate its response is quite scandalous. It resorts to massive negation. The negation is ontological as well as functional.

(i) A Juristic Scandal

The ontological negation consists in a contorted self-denial of its very corporate being! The first negation is simple: "The defendant submits that there is no concept known to law as 'multinational corporation'!" Alternatively, this is the second negation, if such a conception is somehow known (common knowledge, indeed) surely, there is no concept of a "monolithic multinational" known to humanity (p. 61.) Alternatively, still if both these are somehow known, neither has any "relevance, significance or legal consequence in the context of the present suit" (p. 62.) This triple negation must rank, surely, as a juridical scandal of unrivalled proportion in the world legal history.

What then is the status of the UCC? It is only a domestic American corporation happening to hold "capital stock" in "separate incorporated companies in foreign countries..." As a Danbury based American corporation, the UCC never "carried on any business in India" nor, as alleged, were "one third of its sales" derived from its operations outside of the United States..." The UCC only showed under "generally accepted accounting practices" in the United States itself as 'consolidating' its own shares overseas with its "sales...for financial reporting purposes" (p. 62.)

In other words, the UCC was a domestic American corporation not doing any business abroad but merely holding capital stock which was required by book-keeping practices in the United States to be a part of its overall operations. But all this was fictional; its foreign subsidiaries were independent. The UCC, clearly, then was not a multinational entity. But if this were clearly so, what did it have to fear from any Bhopal proceedings in an American forum? Why did it at all have to accept Judge Kenan's conditional forum dismissal and agree to bind itself by a final judgment of Indian courts? Could it not have raised this elementary plea urging Judge Kenan to take jurisdiction and dismiss India's suit on this very simple ground? How may a District Court in New York ever contemplate holding a small town, domestic American corporation liable to even a preliminary hearing on damage, death and devastation in faraway city called Bhopal in a distant country called India with which UCC was in no way (excepting for book-keeping purposes) at all connected?

And why should such a local obscure corporation have any reason even to know that not too far from its registered office, there functioned an organization called the United Nations, in New York city, assiduously working over decades on a code of conduct for transnationals! (p. 619.)

The astonishing flippancy of this contention is aggravated by the UCC's further extraordinary averment in its amended written submission where it says that if a stockholder can be called a 'multinational enterprise', the Indian public financial institutions which held 25% of the share capital of the UCIL "would have to be reckoned as a part of the 'multinational enterprise' " (p. 199.)

(ii) UCIL an Autonomous Corporate Entity Ungoverned by UCC

But we must quickly lay aside these lawyerly infantile forensic antics. The vast and varied structure of the UCC response surfaces acutely only when we move from the ontological to functional negation. At this level, the UCC is not concerned to deny so much its multinational character as to maintain that it was in no way, other than being a stockholder, associated with the Bhopal plant. The latter was exclusively a UCIL concern which existed and functioned, since 1951, as "a distinct Indian corporate entity..." (p. 37.) As such it was the UCIL which negotiated and won the Government of India's many clearances for the MIC based pesticides manufacture at Bhopal (pp. 38-41.) The UCIL also negotiated with the approval of the government, the design transfer and technical agreements (pp. 41-43.) The UCIL, in terms of the government's guidelines, appointed an Indian consultancy engineering firm (p. 43); the central and state governments "issued a vast array of licences and clearances between 1968-1984 (pp. 46-47.) The UCIL kept informed the industrial safety directorate of the state concerning toxicity and hazards of MIC (pp. 47-48.) And the UCIL submitted itself to regulation by "numerous central and state agencies" (pp. 48-51.) All in all, the role of the UCC was "deliberately restricted" by the Government of India itself (pp. 51-57, 65-67.) In other words, the UCC was no 'ghost in the machine.' In all relevant matters, and at all material times, its collaboration was limited to the two—Design Transfer and Technical Services—agreements duly approved by the Indian government. The UCC had no role whatever to play at Bhopal. The plant at Bhopal did not "belong" to the UCC but to the UCIL (p. 67.) As such it was under no duty, as India contended, of absolute or any other kind (pp. 89-90.)

Not merely this: the UCC denied in every material particular all alleged connection with the UCIL; in particular, it sought to contest India's invocation of forum discovery proceedings as proving, even prima facie, such a nexus. For example, it denied that

- it controlled the Board of Directors of UCIL (p. 200);
- UCIL should be treated as an and/or "alter ego" of Union Carbide (p. 200);
- it "exercised critical control in the area of safety and technology as alleged..." (p. 200);23
- its "management committee" decided to build an MIC plant in Bhopal (pp. 202-203);

23 But see the UCC statement before the House of Representatives Sub Committee hearings (supra note 15) where Jackson Browning refers to the "detailed and extensive" procedures of the UCC for dealing with "materials which are hazardous" and the high praise for the UCC's "on going system" of Operational Safety Survey Team reports of "audit and investigation" (pp. 17-18.) and Warren Anderson's self-congratulatory observation: "Two weeks ago Union Carbide employees around the world, and there are 100,000 of us, were extremely proud of their safety record...We are a part of chemical industry that has an outstanding record of safety" (p. 24: emphasis added.)
The Bhopal Case

— its World Agriculture Planning Team (WAPT) was its forum to provide a "global strategy" for pesticides (p. 203);
— it had suggested any plans for the sale of Bhopal plant (pp. 206-207);
— its corporate policy manual suggested any overweening control over foreign subsidiaries (pp. 205-209);

This denial was buttressed by a legal contention to the effect that:

The depositions obtained during the discovery proceeding in the US court are not evidence and cannot be received in evidence in these proceedings (p. 207; emphasis added.)

(iii) MIC Not Dangerous!

Departing scrupulously from the rapporteur language (as reporting information received from UCIL) used in the entire discourse so far reviewed, the UCC directly seeks to rebut India's contention that MIC is "ultrahazardous." Quite correctly as a defendant it maintains that the plaintiff is not entitled to rely on vague characterization of "ultrahazardous" qualities of MIC. Without prejudice, it concedes that "under certain conditions, MIC is toxic, flammable and hazardous" but does not specify these conditions; and in turn attributes, vaguely, that "at all material times" this fact was known by the central and state governments (p. 67.)

Carbide categorically denies India's contention that MIC is "one of the most dangerous substances known to man." It denies as incorrect the statement that "even small concentrations of MIC pose an immediate danger to living beings and environment..." It further categorically states that "there is no evidence" (as of December 10, 1986 at least) of any "long term adverse genetic or carcinogenic effects resulting from MIC exposure." Accordingly, it denies that "it knew or should have known about such alleged long term effects." No assertions by India about the "nature, properties and effects of MIC" are admitted by the UCC (p. 68.)

The UCC thus seeks to construct a monstrous lie denying the self-evident lethal effects of the MIC. The UCC engineers were at all times aware of the "potential of entry of water into the MIC tanks at Bhopal which could result in a runaway reaction" and prepared documents on safety because "a small amount of MIC goes a long way" (p. 182; emphasis added.) In its insistence on renewal of foreign collaboration agreement with the UCIL, upon its expiration in 1982, it was (with full concurrence of the UCC) urged to submit that the UCAPC (Union Carbide Agricultural Products Inc) collaboration was essential because its "knowledge and experience in highly toxic material will be continuously available to UCIL." In particular

[H]ighly professional activities are involved in dealing with emergency situations like toxic gas release...endangering the safety of the community...

UCAPC scientists generate massive mammalian toxicology (carcinogenicity, teratogenicity, mutagenicity, sub-acute toxicity, tolerance etc.) data on various products for their registration.

Further they generate
data on toxic byproducts and gases released during the manufacturing process besides, antidotes and safety precautions that should be taken during manufacture by staff and workmen ...

The UCIL furthermore stated that the renewal of foreign collaboration will "also ensure continuous availability of data in the area of ... plant safety ..." (pp. 184-185; emphasis added.) And the UCC itself claimed on November 13, 1973 and September 30, and November 12, 1982, that it "possesses considerable knowledge, expertise and experience with respect to facilities and operation of facilities for the manufacture of carbamate pesticides by the reaction of methyl isocyanate with hydroxy compounds..." (p. 186; emphasis added.) In the hearings before the House subcommittee soon upon the Bhopal catastrophe, the UCC acknowledged the hazardous nature of its operations.24

It is astonishing but true that the only moment in Bhopal litigation where the UCC's contentions are fully contested occurs five full years after the catastrophe, and that too primarily in one victim group's review petition to be heard now in 1990.25 Neither the February settlement orders refer to the MIC effects nor May 4, 1989, discourse of the Supreme Court justifying the settlement even pause to reflect on the available scientific evidence on short, medium, and long-term effects of the MIC exposure! The operative terms of that discourse are "disaster," "injury" and "agony"—the key term of MIC effects are erased in judicial discourse!26

(iv) If MIC is Dangerous, It's Consistent with the Indian Destiny!

Not satisfied by the contention that MIC was in no sense ultrahazardous, the UCC proceeds to list forty-four examples of "potentially toxic and hazardous chemicals...stored in large quantities throughout India." And the examples painstakingly assembled are from Maharashtra and Gujarat alone (pp. 91-94.) The point of this argument is that the "quantity of MIC stored at the Bhopal plant was consistent with and in many cases far less than "such chemicals" (p. 91.) The addition of MIC stocks at Bhopal only followed, on this argument, the course of India's destiny rather than sculpt it!

Citizens of India, while acknowledging the UCC's careful research into hazards in India, must remain bewildered if the intent of this listing is to say that introduction of MIC into the toxic dump that India that is Bharat is of no consequence, even after the Bhopal catastrophe!

24 See note 15 and 23, supra.
25 See note 22, supra.
26 This despite the fact that the justificatory discourse of May 4, 1989, Supreme Court decision refers to MIC as a "lethal toxic poison, whose potentiality for destruction of life and biotic communities was, apparently, matched only by the lack of prepackage of relief procedures for management of any accident based on an adequate scientific knowledge as to ameliorative medical procedures..." (p. 539.) But after this prevarication consciousness, the rest of May 4 discourse uses primarily the language of simple injuries at odds with the description of the lethal nature of the MIC exposure!
This, apart, in terms of its own legal strategy, this presentation appears insensible. If India’s principle of multinational enterprise liability is justified, the "potentially toxic and hazardous" storage of chemicals will also be affected by the same principle by the very logic of India’s enunciation! As we notice subsequently, Mehta fastened absolute liability for hazardous state entities (and many of the UCC listing are such) and broadened the standard of tort liability for private enterprise. But the UCC in challenging the validity of Mehta subsequently seeks to restore India’s destiny as a subcontinental toxic dump!

(v) Counter-claim and Set-off

Like a careful litigant, the UCC anticipates the probability, however small, of adverse verdict and builds in its counter claim against India and Madhya Pradesh. The counterclaim is essentially based on the government’s "full knowledge of the characteristics, nature and toxicity of MIC" (p. 104.) Armed with this knowledge, the Government of India authorized and approved the UCIL hazardous plant (pp. 104-105); it approved the two agreements with warranty clause, limiting UCC liability (p. 104); the state government permitted human settlement in close proximity to the Bhopal plant, knowing all hazards. The UCC reserves, if held liable, the right to an unquantified contribution by India and Madhya Pradesh as joint tort-feasors. Both the latter were "guilty of a breach of duty and of contributory negligence" and "equally liable for all damage or injury or liability..." (p. 105.) The UCC also notes the numerous suits filed and pending before the District Court, Bhopal, by individual victims against the two governments on these very grounds and claims "set-off and counter-claim" in these proceedings (p. 106).27

(vi) An Assessment of Carbide’s Strategy

Disregarding the excess of denial by UCC of its character as a multinational, even of a monolithic kind, and of its defence of sabotage28 the UCC strategy was simple but acute. It might be summed up as follows.

First, either the UCIL is an autonomous Indian corporate entity or the UCC’s role was deliberately and scrupulously reduced by India’s sovereign functions of regulation. In neither case, is the UCC liable.

Second, either there exists, awaiting recognition, the principle of absolute multinational liability or there is no such principle. If it so exists, it does not extend to the Bhopal case. If it does not, there is no case. In neither case, is the UCC liable.

Third, either, MIC, in the present state of knowledge is not ‘ultrahazardous’ or if it is hazardous it is no more so, and even less so, than other chemicals that India stores in profound quantities as a matter of its industrial policy. In neither case, is the UCC liable.

Fourth, either the UCC is not liable at all or if it is liable, so are India and Madhya Pradesh. In neither case, the UCC is absolutely liable.

Fifth, either the forum discovery documents do not lend themselves to any interpretation of the UCC’s overarching control over the UCIL or they have to be proved in their contrary interpretation by material evidence. In neither case, is the UCC liable.

The complexity of the UCC’s defence owes as much to the complexity of India’s claim. The UCC undoubtedly sought to accentuate and augment the level of complexity. But it could do so only because the matrix of complexity, in ways conscious and not-so-conscious, was planned by Government of India, Madhya Pradesh, UCIL and the UCC, by their various acts of commission and omission over a term of years. For the Supreme Court to lament the law-fact complexity in its preambulatory recital to the February settlement and seek to justify it on that very ground was not to escape these complexities but, as subsequent developments show, to aggravate these a whole lot further! The Bhopal case illustrates tragically, if such an illustration was necessary in the first place, that even the seemingly noblest of judicial rhetoric provides no resting places in the struggle against complexities, especially those arising from the complicitous act of their creation.

D THE COURSE OF PROCEEDINGS IN DISTRICT COURT, BHOPAL

The proceedings before the District Court, Bhopal, never fully reached the core of the strategic contentions raised by India and UCC. Instead, the District Court’s entire time was blocked by a wide variety of other issues some of which find the UCC functioning full-fledgedly for its allegedly autonomous subsidiary! We provide a sample of interlocutory applications (for a list see pp. 649-650) which relate to matters such as:

— the proceedings in Bhopal District Court cannot continue till the appeal against Judge Keenan’s order in the US Federal Court was disposed of (January 12, 1987).
— IA 22 for information sought by Carbide on Judge Patel’s status as a victim under the Bhopal Act
— IA 25 (22 June 1987) recording Carbide’s request in view of India’s appeal against the Federal Court decision in the U.S. Supreme Court asking India to finally elect a forum29
— UCC civil revision application to High Court to prevent questioning of Sundara Rajan on the ground that he is their potential witness30

27 As many as 5000 Civil Suits were filed by victims against the government in the Bhopal courts. Interestingly, the UCC also claims remission of court fees on its counterclaim and set off (p. 106, paras 114, 115 infra)
28 The UCC pleaded sabotage in proceedings before Judge Keenan see supra note 6 at 101 (1985.) See also India’s response to Union Carbide’s “Creation of Sabotage” pp. 122-124 infra

29 See Judge Deo’s decision pp. 162-164 infra; see especially, the curious argument by Pali Nariman at para 5, pp. 163-164.
30 See Judge Deo’s order of April 3, 1987 on IA No. 19; and the order of Justice B.M. Lal of Madhya Pradesh High Court dated November 27, 1987 at pp. 156-158 and 295-300 infra respectively (incidentally Judge Deo spells the name as “Sunder Rajan” and Justice Lal as “Sundara Rajan”). It appears that although a Senior Instrument Engineer with the UCIL, Sundara Rajan was an “employee of the ... Union Carbide Corporation” (p. 295.)
Although the proforma party was the UCIL, it is clear that Mr. Sundar Rajan was to be protected as a witness of the UCC in the Bhopal case were it to fail in its endeavour to allow it to proceed on merits in the Indian courts. Similarly, on November 19, 1987, Justice Lal was moved to observe that the UCC is "busy filing interlocutory applications with an obvious intention to protract the trial of the case for years together, notwithstanding that prima facie such applications are not maintainable" (p. 294). Indeed, given those "glimpses of delaying tactics," His Lordship decided to have the matter placed before the Chief Justice of the High Court for transferring the entire case to it and "nominating appropriate Bench" to proceed expeditiously with trial in accordance with the law. Justice C.P. Sen for himself (and P.C. Pathak J.) decided against such transfer given the fact that it would have to be tried at Jabalpur, some distance away from Bhopal and that this would not be fair and just to victims! His Lordship also, generously, ruled that it would not be fair to label the defendant's conduct as delaying tactics (pp. 304-305).

Justice Sen says that it "does not appear that the UCC had taken any unnecessary adjournments or are obstructing the trial." Indeed, interlocutory applications in a "trial of such dimensions" are "filed to pinpoint the opponent" and have even the laudable objective "to shorten the litigation!" Justice Sen further says that if there was an unwarranted delay the "UCC cannot be singled out for the same" (p. 305).

No one could question the transparent judicial fairness of Justice Sen's observations. But by the same token, neither may we interrogate the integrity of Justice Lal's impressions. What then is one to believe? A bit of both, perhaps? That is, both the UCC and India were responsible for unwarranted delays. If so, a clear obligation to victims arose: and the High Court specifically directed (December 3, 1987) to consider the nature and scope of this obligation (p. 305.) As we will see, the interim relief orders of Judge Deo, and then of Justice Seth, were comprehensively contested by the UCC right up to the Supreme Court of India.

Whatever the characterization of the UCC's litigationary strategy — whether in terms of Justice Lal or Justice Sen — it is clear that the laudable objective of shortening the litigation was not any part of its design. Surely, even Justice Sen must have been aware that the UCC grand design was to avoid adjudication on the central issues and promote, anyhow, a settlement on its own terms. This the UCC would have achieved, or sought very hard to achieve, without words of benediction by an Indian High Court Justice commending Carbide for its conscientious defence aimed solely at expediting the litigation!

But this benediction did help the UCC to present its accentuation of the inherent complexity of the litigation as morally justified. The production of a justified impression of the inherent delay was necessary to orchestrate settlement efforts and to pursue the war of attrition, producing ultimately the jurisprudence of fatigued abdication in the February settlement. Although it suited the UCC to deny that it was ever a multinational enterprise, it used all its prowess as such to create atmosphere where it could legitimately sponsor a settlement on its own imperical terms. In this, it succeeded.

But it overlooked just one little thing: the victims. For the UCC the victims were not sentient human beings but "things," mute and powerless. The litigation
The Bhopal Case

was planned to be as lethal as the MIC. But the victims proved resilient and valiant in the face of this lethal litigation.

E. CARBIDE'S STRATEGY BEFORE THE SUPREME COURT

Even a bare reading of the special leave petition (SLP) filed by the UCC shows how deeply it is concerned to help India maintain rigorous standards of judicial craftspersonship and creative constraints of accountability in the wielding of judicial power. Carbide strikingly interrogates judicial process and power in India. It questions the power of the District Judge to order interim relief and of the High Court's "de novo" summary adjudication of liability in revision." It objects to the very notion of interim liability for compensation (or relief) in a tort suit for damages. And it questions the enunciation of the principle of absolute liability in M.C. Mehta v. Union of India. Perhaps, of the four issues the most critical is the question of absolute liability. The nine questions66 basically entail a critique of the Supreme Court's decision.

(i) The Assault on Absolute Liability

The juristic assault on the principle of absolute liability enunciated in this case is logically comprehensive. Either the principle constitutes the ratio of the case or its obiter dictum. If the latter, it clearly does not bind. If the former, also does not because it is: (a) per incuriam; (b) logically contradictory and therefore a piece of legal nonsense; (c) violative of the doctrine of basic structure because the Court here acts legislatively not judicially.71 If, however, and somehow, the ratio survives these formidable-looking multiple challenges, it must be held as not binding on Carbide because: (a) it was a mere shareholder, not directly engaged (nor permitted) to engage in hazardous manufacture; and (b) its application is debased in view of the Bhopal Act.

If somehow, again, these objections do not prevent the application of absolute liability, there is yet another set of forensic rapiers thrusts directed at the heart of Mehta. If the enunciation of the principle is a new development in Indian law, it cannot apply retroactively to Bhopal catastrophe. But even if Judges merely declare law (and not make it) and, therefore, judicial decisions remain retroactive,

36 Pp. 413-415 infra. The formulation of the questions itself indicates the sordid nature of Carbide's impertinence.
37 See the formulation in issue (7) p. 414 infra. Citing Minu Mehta, and Wadhwa the UCC alleges that the Supreme Court was here acting as a legislature. As if this was not enough, it goes on to say that the doctrine of basic structure (designed specifically to limit power of Parliament to amend the Constitution) so applies to the Supreme Court as to prevent any enunciation of binding law under Article 141 of the Constitution! This engineering of catastrophic confusion—because this can hardly be called an argument!—can have only one purpose: to waylay the Court into believing that very critical issues of Indian jurisprudence were at stake, thus predisposing it to settlement.

38 In the CMP of 1989, Zabreedi Gas Khand Sanghashee Morcha v. Union of India the petitions upon settlement maintained that it was essential for the court to speedily determine "the issue purportedly left open" in Mehta (pars 24-30). Clearly, the court had difficulties in considering the petitions against Mehta which raise the question as to whether public interest writ petitions may lie against Article 141 power of the Supreme Court to declare binding law.

the concept of punitive damages being penal in nature, Mehta may not extend to the Bhopal catastrophe. And finally, since the UCC itself did not manufacture anything at Bhopal, Mehta, even if otherwise binding, cannot simply be extended to it.

A more formidable-looking set of challenges to the supreme judicial power and process, so craftily chiselled, was not presented so acutely in the annals of the Supreme Court. The fact that the UCC after showing such fine regard for the limits of apex judicial power should have later sponsored a settlement in February 1989 which even more gravely compromised the constitutional limits of judicial power should rank (and rankle) as among the deepest ironies of the saga of Bhopal in the Indian courts.

To this major challenge, there was of course an institutional mode of consideration. The Bhopal Bench consisted of five justices; the Bench which decided the principle of absolute liability for hazardous activity, process or manufacture also comprised five justices. The Bhopal Bench had the power to distinguish on facts the two cases consistent with the doctrine of precedent, even as understood by the Supreme Court, or the precise ambit and impact of that decision. But as a co-ordinate Bench, it had no power whatsoever to hold that Mehta was per incuriam. Indeed, independently of Carbide's submission, a public interest review petition was filed against Mehta, argued at least by one of its lawyers (Anil Divan) and, therefore, within its knowledge.83 If the validity of Mehta was at issue, nothing prevented UCC from simply urging that the petition filed earlier should be first dealt with in which it must be allowed to intervene; alternatively UCC could, and should, have argued that a larger bench be entrusted with the task of adjudicating the validity of Mehta. From a reference to 1988 Antilaya decision (p. 415) it is clear that UCC was aware that the Supreme Court had convened a bench of seven justices to reconsider in the selfsame proceeding the validity of its earlier five-judge Bench decisions.90

The fact that the Union of India did not urge a similar path of action is understandable only on the view that it did not consider Carbide's challenge to the validity of Mehta as seriously meant. If so, this was a tactical blunder because the Court at a later stage, was led to think that the decision it was asked to make on this, and related issues, was far too complex and cumbersome; and this was enough to predispose it to a settlement.

But even if neither side meant the per incuriam challenge seriously, the Court, in all strictness, ought to a have taken it seriously. For here was a challenge of great magnitude to its authority and esteem. Translated into plain English, the UCC was, in effect, arguing that in 1986 the Supreme Court in Mehta did not know what it was doing, but it accomplished a fraud on the law and the Constitution. When a foreign multinational thus wantonly assails the dignity and authority of
The Supreme Court, the Court can scarcely afford to ignore it. Much less, may it allow itself to be embarrased by the mere gravity of the challenge to reward it with a settlement.

Curiously, in yet another ironic twist to Bhopal litigation, it was left to the intervening victim groups (who were, improperly, not even heard by the Court)\(^{40}\) to impugn the settlement on the ground that a five judge Bench could not ratify on its validity! Many public interest petitioners, challenging the validity of the settlement at the bar of the Rule of Law, urged the same. In yet another ironic twist, the spokespersons of the settlement blamed this group of petitioners for the victims!

Had the UCC not aborted its own forensic brilliance by a premature settlement how would the Court have dealt with the assault on Mehta? The Supreme Court should have had little difficulty in reaffirming that Mehta was a routine, not an extraordinary, instance of Article 141 power to declare the law. Both constitutional interpretation and development of the standards of tort liability remain preeminently judicial functions. Mehta, the Court would have held, properly declared the binding law on two fronts, neither of which can properly be impugned by the Carbide.

First, Mehta constitutionalizes the tort liability of the state. There is now no question that hazardous or inherently injurious activity, manufacture or process undertaken by state entities (as contemplated by Article 12) remain exposed to the standard of absolute liability for injury and damage. This liability attaches to state action by virtue of Article 21 rights to life and liberty and any law providing departures from the Mehta standard of liability must now be constitutionally suspect. The UCC has no locus to impugn this aspect of Mehta. Indeed, if the Bhopal case proceeds further, the UCC might invoke this very holding to assert liability of governments of India and Madhya Pradesh! It must be said that the challenge to the validity of Mehta as a binding decision was indeed perverse.

Second, Mehta enunciates a specific principle, standard, and measure of damages, for hazardous enterprises. In doing so, Mehta addresses the question of liability of all hazardous actors and agents, whether state or non-state. Carbide’s objections to this enunciation appear increasingly fantastic.

The proposition that judges may fashion standards of tort liability but only case by case through precedent and not by quantum jumps (p. 436) is simply impertinent. No defendant having submitted to the jurisdiction, may arrogate to itself the right

\(^{40}\) The interveners had in their written submissions specifically requested the Court that in case this Hon’ble Court deems it fit to set up a committee to negotiate an overall settlement, a representative of the interveners may be associated with the said committee in the interests of the victims. This was completely disregarded, so was the fact that it was owing to the initiative of the victim groups that Judge Deo in the first place ordered interim relief (see pp. 261-271) and it was against their successful outcome that the UCC had filed the SLP in the Supreme Court. The UCC who is otherwise so insistent on ‘due process of law’ and ‘rule of law’, of course, had no hesitation in sabotaging it in relation to victims’ just claim of being heard! By the same token, the Union of India also collaborated on this count with the UCC.

41 This impertinence becomes even more brazen when we recall that Nani Palchivala’s expert affidavit (on behalf of the UCC) had invoked Mehta as a shining example of Indian judiciary’s ability to achieve justice in toxic tort litigation. See supra note 6 at 228.


to proceed before him, the Indian, and not the American, law will control the outcome.44

Assume further that no oleum leakage in Delhi had taken place on the first anniversary of Bhopal and the Supreme Court had upheld India's assertion, after a full and fair hearing of multinational enterprise liability. Would the UCC in a suit for enforcement of Indian money judgment in a New York court been permitted to successfully raise the plea that it determine afresh the issue of liability? It is worth recalling that the U.S. Court of Appeals for the second circuit had dismissed the UCC's plea to it to monitor any due process violation by Indian courts in the following words:

UCC's proposed remedy is not only impractical but evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous. (p. 662.)

In its assault on the Mehta principle, the UCC also declared its "abysmal ignorance of basic jurisdictional principles."

In the SLP the only relevant question was one of fact: did the tort liability standard enunciated in Mehta extend to UCC which, it said, did not "engage in any manufacturing enterprise or activity in India." (p. 414.) The words "engage in" are critical. The discovery proceedings before Judge Keenan provided ample scope for construing these words the way Justice Seth, in Madhya Pradesh High Court, did.45 The overweening corporate control was of a character sufficient to suggest that the UCC actually "engaged in" the manufacture of MIC-based substances at Bhopal. The Supreme Court would have required stronger reasons than those furnished in the UCC petition to hold otherwise.

Had the Court upon full contention, so decided the surviving question whether the Mehta principle of tort liability is "a concept unknown to jurisprudence around the World" (p. 414) would not have caused any anxiety to it. The jurisprudential novelty of a legal principle is no bar to judicial power and process which is alert to rigorous due process discipline. If novelty was a bar to judicial power of interpretation, much of the world jurisprudence (which UCC invokes) would have not come into existence in the first place.46

It would, of course, have been fully open to the Bhopal Bench to have read down that part of Mehta which appeared to enunciate the alleged "new principle of punitive damages...without fault without any exceptions and without any defence," (p. 414.) The Bhopal Bench could have contextualized the Mehta enunciation to traditional defences such as vis major. On the other hand, it could have ruled that the limitation of damages according to the paying capacity of the delinquent corporation47 itself constituted a just limit on liability. In any case,

44 See U. Baxi, Inconvenient Forum 67-68 (1986.) Judge Keenan ruled that by all available conflict of laws standards "it is likely that Indian law will emerge as the operative law" more so since the thirteen American jurisdictions where the actions were brought displayed a most "minor" connection with the Bhopal catastrophe.


46 One would have thought that Judge Deo had provided a deftful response to this kind of argument at pp. 289-290 infra.

47 See the contested formulation in paras 31 and 32 of Mehta at pp. 373-374 infra.

the May 4 order does suggest that the UCC critique of Mehta was not all that cogent. The Court says

The criticism of the Mehta principle, perhaps, ignores the emerging postulates of tortious liability where principal focus is the social limits on economic adventurism (p. 547.)

All in all, any rational judicial discourse would have dispelled, rather easily, the UCC assault on the Mehta enunciation.

(ii) Interrogation on Interim Compensation

The UCC raises five questions (p. 413) concerning the law and procedure for awarding interim compensation. These questions are capable of fairly straightforward answers.

Both the District and the High Court held that they had the power to award interim relief and compensation in tort cases. The UCC arguments to the contrary were fully heard by the Madhya Pradesh High Court.48 Even in the forum hearings, the UCC had agreed to provide an interim relief of US $ 5 million through the American Red Cross to its Indian counterpart;49 the UCC was later to aver before Judge Deo that it was a "voluntary payment....without prejudice to its contentsions" (p. 229.) On this aspect, the UCC clearly had the option to similarly agree to payment of interim relief.

Instead, it contested the jurisdiction of Indian courts to order interim relief, even that order of Judge Deo (dated 17 December 87) which was described as an "interlocutory order.....without prejudice to the rights and defences of the parties to suit and counter-claim that may be finally adjudicated." (p. 289; emphasis added.)

What justification in law (prescinding the realm of morality) did the UCC have to seek a review of this interlocutory power? The basic ground animating its review of Judge Deo's order was that courts may not exceed their jurisdiction. Once again a deep irony lurks here: in the 1987-1988 period, the UCC was seeking fullest adherence to due process discipline by the Indian courts. This it was entitled fully to do in law and morality. In February 1989, it promotes a settlement which totally liberates it and the Supreme Court of India from this very discipline. What is more, it celebrates the settlement as a victory of law and justice! And it justifies the settlement on humanitarian grounds of relief to victims grounds, which did not resonate with it in 1987-1988 when called upon to pay some interim relief without any prejudice to its legal defences and rights!

Let us attend to the UCC's principal objections to the order of Judge Deo awarding Rs. 350 crores as interim relief/compensation. First, it objects to the power of the court to award such interim relief/compensation. The doctrine of "inherent powers" of court, it says, is simply not such as to sanction such orders. Second, and related to first, such power, even if it is found cannot be exercised

48 See pp. 360-380 infra: see also U. Baxi, "Union Carbide Must Honour the Verdict" Indian Express April 21, 1988 p. 8

49 See section G of this introduction, infra.
in a manner inherently prejudicial to the UCC; a pre-judgment on liability is
indefeasible in the award of interim relief/compensation. In other words, and starkly
simply cannot be exerted in the Bhopal case.
Carbide achieved a denial of section 151 Civil Procedure Code inherent powers
in Justice Seth’s overruling of Judge Deo’s assertion that:

\[ \text{inherent powers are born with the creation of the Court, like the}
\text{pulsating life coming with child born into this world. Without inherent}
\text{powers, the Court would be like a stillborn child. The powers invested}
\text{in the Court after its creation are like many other acquisitions of facili-ties}
\text{which the child acquires after birth during its life. Thus}
\text{inherent powers are of primordial nature. They are almost plenary}
\text{except for the restriction that they shall not be exercised in conflict}
\text{with any express provision to the contrary (p. 285.)} \]

Judge Deo found no restriction in sections 151 and 94 of the Civil Procedure
Code (p. 286.) Recounting the very same provisions and precedents, Justice Seth
found such limitations (pp. 360-367.) Here the matter should have ended. But
relief. (pp. 367-377.) Having won its due process argument (and the reduction
of the interim relief by Rs 100 crores) the UCC could have justifiably tendered
concern far exceed the sensibilities of Indian government’s for the Bhopal
relief provided by Justice Seth.

Justice Seth declared the judicial power to provide for interim relief on several
grounds. First, it was a power coeval with the craft of ‘judge made common law’
in section 9 of the Civil Procedure Code as “a true repository” of jurisdiction
in “justice, equity and good conscience” by which the English law was introduced,
into India (p. 370.) Third, Bhopal was a native state which merged
Civil Procedure Code 1918 with its section 16 being pari materia with section
9 of the 1908 Code. The Bhopal Court, given this history, retained the ‘justice,
equity, good conscience’ based judicial law-finding powers. Article 372(1) of
the Constitution authorizing the continuance of ‘laws in force’ reinforced the same
20 of the U.K. Administration of Justice Act 1969, (related statutes) authorizing
the principle of interim payment of damages; it rules that judicial competence (both in the legal
and literal sense) entailed compliance with this principle in the ‘justice, equity,
good conscience’ jurisdiction.

The UCC interrogation of Justice Seth’s rationale is again comprehensive. Yet,
had the further hearing of its SLP not been aborted by its settlement endeavour,
it is clear that the Supreme Court would have had to sustain as incontestable the
first three propositions stated above. It is the fourth proposition above which would
have, and probably did, cause some anxiety to the Supreme Court.

Clearly, if the High Court was justified in reading the justice, equity and good
conscience jurisdiction in section 9 of the Civil Procedure Code, the question was:
did that jurisdiction authorize the “common law” importation or also the
“statutory” importation? In other words, was what opened to the High Court was
to identify a common law principle providing for interim compensation/relief in
a suit for damages if there was no identifiable principle, the immanent jurisdiction
under section 9 cannot extend to the importation of “statutory law” of England.
Clearly, the Union of India would have had to show that, as a matter of colonial
legal history, the “justice, equity, good conscience” jurisdiction enabled adoption
not just of pure common law, but also of enacted common law principles in English
law and even statutory principles not arising from but also not opposed to the
common law. Such a showing would have been difficult, though not impossible.

In anticipation of this, the SLP witnesses UCC arguing, in fact, that a “plain
reading” of section 9 C.P.C. does not authorize the High Court to achieve the
result it wished for; nor does any judicial decision do so. Accordingly, the High
Court enunciated a “new law”...for the purposes of this case (p. 434.) The Supreme
Court of India would have had to decide whether a plain reading of section 9
excluded interim relief. The UCC argument would, perhaps, and prima facie, have
been thought to be supported by section 9-A, C.P.C., added by the State of
Maharashtra by an Act LXV of 1977, which authorizes state courts to "grant such
interim relief as it may consider necessary, pending determination by it of
the preliminary issue as to the jurisdiction." On the other hand, it is also possible
to view this Maharashtra innovation as merely codifying a judicial power inherent
under section 9. On first principles of statutory interpretation, plenary powers
(whether legislative or adjudicatory) include within them the necessary ancillary
powers; the section 9 power conferring ‘jurisdiction to try all suits of a civil nature’
can, even on a plain reading, extend to powers of interim relief.

Similarly, the charge that the High Court had enunciated a "new law" for the
Bhopal case could have been met in two distinct ways. First, very nature of the
Bhopal case involving several thousand deaths and hundreds of thousands of serious
injuries and disabilities required elaborate adjudicatory effort for a fair fixation
of the principle, standard and measure of damages. If, arguendo, there was no
precedent for the interpretation now preferred by the High Court, this was because
the Bhopal catastrophe was also unprecedented and so was a parens patriae
litigation of this magnitude. The UCC had testified, especially through the
Palkhivala affidavit, of the innate capability of the Indian adjudicatory system
to innovate law. In a deep irony, now that very ability when rationally demonstrated,
becomes ground for complaint!

The second path countering the UCC charge of innovation in law is the one
indicated by the SLP filed by the Union of India against Justice Seth’s reduction
of the amount of interim relief. That may be termed as the constitutionalization
of the law of civil procedure. Briefly, it entails the following propositions:

(a) all laws are subject to the Constitution of India;
(b) article 21 is a part of the Constitution of India;
(c) article 21 rights can be enforced not just against the state but also private
persons and entities;
(d) Example of (c) above include the right to habeas corpus, the Ganges Tanneries case;\(^{50}\)

(e) Interpretation of section 9 (and section 151) of the C.P.C. must stand informed by constitutional interpretation, disregarding the contingent form of litigation;

(f) In particular, (e) above signifies that the mere fact that the concerned parties are driven to the necessity of filing a suit for the reason the case involves proof as to quantum of damages, cannot militate against the jurisdiction of the trial court to follow such procedure as it may deem fit as has been followed by (the Supreme Court) for enforcement of fundamental rights" (p. 478).

Clearly, the thrust of this argumentation is that the law declared by the Supreme Court under Article 141 binds all Indian courts; and this is so because, especially, the Constitution is the higher law which all statutory law must subserve. Accordingly, India argues, in effect, that constitutional jurisprudence must inform the exercise of powers under the Civil Procedure Code. The innovations in interpretation of the Constitution, especially Article 21, cannot be reduced, as the UCC seeks to do, to enunciations specifically created and sustained with the sole purpose to justify the award of interim relief/compensation in the Bhopal Case. Such a statement is intrinsically contumacious, besides being historically wholly inaccurate.

Even if we were to assume, for a moment, that the Supreme Court for good reasons was persuaded to accept the UCC’s interrogation of Justice Seth’s revised grounds, and to rule that section 9 did not authorize interim relief order passed by him, it would have certainly remained open to it to rule on the scope of section 151 of the C.P.C. Judge Deo had invoked that section, we recall, read with section 94 (c) of the Code to support his order. We may also recall the discourse of Justice Seth critiquing the way in which section 151 was operationalized by Judge Deo (pp. 360-367). But Justice Seth invokes primarily the leading Supreme Court decisions to hold that the inherent powers of courts are not powers “over the substantive rights which any litigant possesses” (p. 365). This observation is indubitable. But it was made in the context of ontologically radical perspective of the inherent of undefined and definable powers in the very idea of a Court enunciated by Judge Deo. Its jurisprudential viability needs to be examined in closer detail but this is not germane to our present purposes.\(^{51}\) Assuming, with Justice Seth, that section 151 does not permit “a judicial innovation” to incarnate itself as an “unbridled horse to be allowed to roam about freely in any direction it likes at its pleasure” (p. 367), the question survives as to whether this equestrian jurisprudence is possible without recognizing the existence of the entity called ‘horse.’

The jurisprudence of inherent powers must always be one of disciplined innovation. Discipline in judicial innovation is furnished by the interpretative history of adjudication under section 151 of the Code. But it is also furnished by the overall

\(^{50}\) M.C. Mehta v. Union of India, 1987(2) SCALE 611; 1988 (1) SCALE 54; 1988(1) SCALE 441.

\(^{51}\) See supra note 39, at 144-145, 150-159.

history of constitutional interpretation. If the argumentation of constitutionalization of civil procedure are to be taken seriously, it is both conceivable and likely that the Supreme Court would have been able to affirm the inherent power to order interim relief to Bhopal victims.

Justice Seth’s articulate discourse against such constitutionalization (pp. 366-367) would have come up, had the special leave petitions proceeded, for an authoritative pronouncement by the Supreme Court. It would have had to decide either way. And the central point in the authoritative decision would have been simple but momentous: do the rights of the Indian citizens under Article 21 depend on the contingency of the form and forum of litigation?

To concretize this question, we may add a series of questions. If the Supreme Court in Saurav\(^{52}\) can read section 125 of Criminal Procedure Code to provide for interim maintenance for a spouse, would it be justified in so reading section 151 of the Civil Procedure Code as to deny courts of inherent powers to provide interim relief to Bhopal victims? If the Supreme Court can direct eventual closure of private tanneries polluting the Ganges in a social action litigation,\(^{53}\) it may deny any modicum of inherent powers in the Bhopal case to award an innocuous amount of interim relief? If the Supreme Court in Antulay in 1988 could itself invoke inherent powers to quash its own orders for the trial of corruption in high public places in a forum (Bombay High Court) duly mandated by it in 1984,\(^{54}\) can section 151 powers, orientated after all to the ends of justice, not be productive of interim relief?

A longer list could be made of such questions but this is unnecessary to demonstrate the point that there may not exist, or be developed, a jurisprudence of inherent powers which depends on the form and forum of the contingency of litigation. And we must not allow ourselves to forget the fact that it was the supposedly “inherent power” of the Supreme Court which stood invoked by both the parties in the production of justification of the February 1989 settlement! If Judge Deo could not exercise any inherent powers in ordering interim relief, how is it conceivable that Chief Justice Pathak and his learned brethren could suddenly locate such power in themselves to close all, civil and criminal, “past, present and future” determinations of liability?

Undoubtedly, if the special leave petitions had not been so poignantly terminated, the Supreme Court would have produced its own reasoned elaboration on these issues. My guess is that it would have produced an affirmation of inherent power to award interim relief, but in ways which would not have precluded the issue of determination of substantive rights of the parties. It was open to the Court to have ruled that the inherent power, invoked for the ends of justice, does not determine any substantive rights and liabilities of the UCC; and accordingly the interim relief was liable to be reimbursed with interest if India did not succeed in her assertion of the principle of absolute multinational enterprise liability. It was also open to the Court to direct that both the parties equally contribute to the interim relief payment. Or, it could have simply upheld Carbide’s


\(^{53}\) See supra note 50.

\(^{54}\) See U. Baxi, supra note 39.
comprehensive objections and ruled in the Indian SLP that India should bear the burden of relief to be adjusted, if at all, depending on the outcome of the suit. All these options were logically and legally open. And the first two options would have been enforceable in the New York courts. This point needs to be emphasized because if the government sponsored justification of Bhopal settlement is to be believed, it was the anxiety (among other things) that an interim relief order, even by the Supreme Court, may not be enforceable in the New York courts which animated the settlement. But the UCC had submitted to due process based final judgments by Indian courts. An interim relief order of the Supreme Court (based on either of these first two options) would have been final. And such a decision could not have been said to violate either procedural or substantive due process—the former because UCC was fully heard, the latter because no adverse determination on the substantive rights of the UCC was patent or latent in the determination of interim relief.55

If the government sponsored justifications of the settlement on this aspect are to be regarded as credible, this can only be so on a view of Carboide strategy which regards it as an argumentation in terraeor. That it succeeded symbolizes the tragedy of Indian jurisprudence.

(ii) Elimination of the Concept of Limited Liability Company

The UCC suggests, again comprehensively, that the order for interim relief based on even a mildly prima facie judicial impression of its liability, amounts to the elimination of the statutory concept of a limited liability company under the Indian law! It reaches this extraordinary formulation through several paths. All in all, the UCC contention is twofold: either it is a mere shareholder and, therefore, not liable for "alleged torts of a company limited by shares" in view of sections 34 and 426 of the Companies Act (p. 425) or that the doctrine of "piercing the veil"56 for holding UCC liable in law is impermissible because the

55 Note the authority of Island Territory of Curaco v. Soliton Devices Inc. 489 F. 2d. 1313, 1318 (2d Cir. 1973) (cited by the Federal Court of Appeals at pp. 661-662 infra) which fully exposes the law concerning enforcement of foreign money judgments.

Judge Mansfield also clearly ruled that the conditions prescribed for non-recognition of foreign judgment by Article 53 of the Recognition of Foreign Country Money Judgment (§ 5304) "none of these conditions would apply to the present case except for the possibility of failure to provide the UCC with sufficient notice of the existence of the judgment, which do not presently exist but conceivably could occur in the future" (p. 662). The two conditions are: (a) it is "futile" for the UCC to deny that "there existed a relationship of subsidiary company and itself;" (b) the UCC held the "majority of equity share capital at all material times;" (c) the UCC controlled "more than half of the total voting power of the Indian company at all material times;" (d) the UCC "not only controlled the composition of the Board of Directors of the Indian company but also had full control over the management of the Indian company;" (e) if as "alleged" by the UCC "it chose to follow the policy of keeping itself at arms length from the Indian company in certain respects, it was entirely its choice and such policy could not absolve it from its liability;"
in fact, "from the material on record" the affairs of the Indian company and the UCC were "so mixed up (especially in the matter relating to personnel)" that the UCC "must be regarded as having full authority to act for the Indian company;"

(ii) it is "apparent" that "as far as the technical know-how regarding the establishment and running of the plant at Bhopal was concerned, the Indian company was at the receiving end all the time and was fully dependent on whatever was provided to it by the holding company..."

(iii) it is "apparent that to the extent the fiction of separate corporate entities was permitted under the law the dealing between them had to be within that fiction" (pp. 377-380.)

Justice Seth also significantly added, that under the Foreign Exchange Regulation Act, 1973, as interpreted by the Supreme Court in Escorts57 the UCC "managed to retain the controlling interest in the Indian company." He concluded that this "more than prima facie established that the defendant UCC... had real control" over the "hazardous" Bhopal plant operations.

Should you compare these propositions with the reasons and grounds in the UCC special leave petition (pp. 436-440) it should become overwhelmingly clear that it does not directly seek to rebut this gamut of propositions. Instead, it prefers to rely on the technical stance that the formal proof of discovery evidence before Judge Keenan was yet to be made in the proceedings (pp. 438-439.) This technical defence serves no purpose at all when we recall the UCC affidavit, and argumentation in the revision before the High Court, where it invited the court to examine the entire issue of liability before the interim relief order of Judge Deo was considered (pp. 306-331.) Apparently, the UCC team of lawyers have never heard of the doctrine of judicial notice embodied in section 114 of the Indian Evidence Act. The facts noticed by the Court in propositions (a) to (d) and (f) (g) clearly attract judicial notice.

The UCC could have more pointedly contended proposition (e) which may be said to be outside the realm of the doctrine of judicial notice. If, as a matter of corporate policy, and as a matter of fact and record, a multinational holding company holds itself at arms length in relation to its foreign subsidiary it certainly (in the felicitous words of Justice Seth at p. 379) is a "matter of its choice." But his conclusion that such a choice "does not absolve it from its liability" is surely contestable. The doctrine of piercing the veil may indicate evidence for multinational corporate choice-making. But it does not necessarily ground or justify the drawing of an adverse judicial inference. Even the most imaginative judges and courts may not feel equipped to make corporate choices.

In the sledgehammer forensic tactic and strategy, the UCC lawyers overlook to make this point directly. But this is scarcely inadvertent! The discovery proceedings do, put together, indicate a pattern of overweening Carbide control over the UCIL management at the Bhopal plant.

The UCC strategy, yet once again, was clearly dictated by reasons other than juristic. Surely, if it broadened consciously the canvas of adjudication in the revision

Introduction

before the Madhya Pradesh High Court to issues of its liability and conflated the issues of interim relief with those of its liability for the Bhopal catastrophe, the forensic strategy cannot but be understood as a war of attrition. The Carbide SLP before the Supreme Court merely shifts the theatre of that war. The hallmark of its strategy lies clearly in the production of subjective judicial impression that the Courts below had not fully grasped the subtleties of law and that any affirmation of their orders will be subjected to the strict oversight of a New York Court. This strategy, unfortunately for the Bhopal victims, worked rather well with the Supreme Court58 which was made to feel that the way out of the legal labyrinth created by the UCC also lay in its role as a navigator! It was essential for Carbide's SLP strategy to strengthen its role both as a "friend" of the victims and upholder of the integrity of the Indian judicial process to persuade the Bhopal Bench that the settlement was dictated equally by the considerations of humanity and of justice.

F THE FEBRUARY SETTLEMENT : THE FIRST ORDER

The foregoing assessment of the UCC strategy is clearly based on the results it accomplished in February 1989; settlement on its own terms was the controlling purpose of all UCC legal initiatives and responses, so much so that even before India filed the suit before Judge Keenan it had, generously, offered a settlement for $78 million (or Rs. 101.08 crores) and for Rs. 300 crores on the basis of Rs. 60 crores immediate payment plus Rs. 8 crores per annum for 30 years. Before Judge Keenan, the proposal of UCC suggests an amount of maximum $350 crores spread over seven to ten years. The UCC also indicated, during the American proceedings, a range of settlement amount from $240 to $400 million, also spaced over seven to ten years.59 It does not require any hindsight to appreciate the UCC orchestration of litigation strategy towards a settlement on its own terms. Right up to the Supreme Court, the UCC knowingly used litigation time as a growing space for initiatives for settlement. And it accentuated and fostered legal complexity maximally, both in the USA and in India. It so structured its SLP as to crowd the Supreme Court's agenda with a whole variety of relevant and irrelevant issues, and banked on the pressure of time on the Court as a valued resource for its


58 No reader of this volume can fail to notice the scrupulous care which the District Court, Bhopal, has bestowed on every motion made by the UCC (see, e.g. pp. 18, 29, 156-158, 162-164) Even for consideration of interim relief, Judge Deo pertinently allowed full time for rival arguments to be marshalled and fully heard. The order on the interim relief was delivered after nearly 33 weeks of detailed judicial consideration. It would be a truery of truth to maintain that Judge Deo ordered interim relief moved by sentimental considerations; indeed, the time taken and the procedure adopted by the learned District Judge testify to his abundant sensitivity to the international dimensions of the Bhopal Case.

59 See the UCC affidavit (pp. 333-334 infra) and India's affidavit (pp. 537-538 infra) for details of settlement amounts. This altogether suppresses the fact that in late 1987 an amount of $600 million was actually under consideration. The public opinion campaign against settlement (see "Bhopal: Sareep Surrender", Mainstream, November 7, 1987 pp. 28-29) did not invite any authoritative repudiation of this amount, although India mentions Senior Advocate M.C. Bhandaar's suggestion (also as a member of the Rajya Sabha) as early as February 1986 that the settlement, if any, should not go below $1 billion.
purposes. Simultaneously, the four-year time lost in litigation was a planned investment for pro-victim forces and public opinion to suggest that further litigation was inhumane, given the growing misery of the Bhopal victims.

The UCC also used the period of two years in India to continuously evoke apprehensions that an Indian judgment may be unenforceable, given the American law in the bench, bar and leaders of governmental and public opinion. And by it ensured planned consumption of judicial time in ways which would make a settlement look both inevitable and legitimate.

This was a perfectly 'rational' strategy for any multinational corporate entity whose overwhelming goal must remain power and profit, not justice and rule of law. But it takes two to arrive at a settlement and the February settlement also involved a third entity: the Supreme Court of India, in many respects among the most admired and respected judicial fora in the contemporary world. And it is the cooptation of the Union of India and the Supreme Court which makes the February settlement a deep mystery.

The mystery surrounding the Union of India's response to the settlement proposal may some day become common information, when people's right to know, and accountability of elected executive, becomes a routine aspect of Indian democracy. That day is, alas, distant and the mystery deepens when we recall that it was Rajiv Gandhi's government which fashioned a tough stance against Union Carbide by the Bhopal Act, 1985, in the United States courts, on the principle that a multinational enterprise is absolutely liable for damages caused by its hazardous activities. It thus obtained jurisdiction in India over Carbide through Judge Keenan's order of May 12, 1986; arrested UCC chairman Warren Anderson on December 7, 1984 and filed on December 17, 1987 CBI chargesheet in Bhopal court against him, the Union Carbide companies and UCIL officials (pp. 637-647).

The same government which refused settlement initiatives—both judicial and extra-judicial—from 1983 to 1988, and vigorously supported the claim of interim relief by victims groups on the principle that the UCC was absolutely liable. Somewhere in January, 1989 the legal strategy abandoned this tough stance (which had earned India high esteem from especially the third world countries) and by mid-February a conscientious sovereign plaintiff reduced itself suddenly to a poor supplicant of a multinational which had produced the world's largest peacetime industrial disaster. The scandal of settlement is perhaps unprecedented, more so because the integrity and imprimatur of the highest Court were seen to be marshalled around it.

We will perhaps never fully know (since judicial memoirs are rare) the reasons which predisposed India's eminent justices towards the settlement. But it is clear that Carbide's litigative strategy (analyzed earlier) proved decisive. The preamble to the settlement order of February 14, (pp. 525-526) clearly reinforces the way the war of attrition worked finally on the Court. The preambulatory recitals refer to the 'mass of data placed before us,' the 'offers and counter-offers made between parties at different stages during the various proceedings,' as well as "the complex issues of law and fact" raised and "in particular the enormity of human suffering occasioned by the Bhopal gas disaster...." The relationship between the italicized words indicates the direction (and magnitude) of the success of the UCC strategy. The mass of data, offers of settlement in various proceedings, the complexity of law fact issues all of a sudden redirect the Court's attention to the enormity of the suffering of Bhopal victims.

That 'enormity' does not structure itself in wholesome ways of judicial direction for the provision of interim relief; nor to an expeditious disposal of the limited issues raised by the SLP. It rather leads to the conclusion that the case is "pre-eminently fit for an overall settlement of all litigation, claims, rights and liabilities..."

The preambulatory recitals make strange reading. They represent ipse dixit of the highest court and do not signify a set of reasons, which followed as late as May 4, 1989 (these we examine a little later.) Any attempt to read reasons into it simply backfires. Neither side complained of the "mass" of materials: the UCC, in fact, continuously lamented the insufficient character of this mass! And the complexity of the law-fact issues was inherent in a litigation on mass disaster which led the Supreme Court at the start of the SLP proceedings to enquire if parties wished to settle. The UCC accentuated and diversified this complexity. And the "enormity of human suffering" was autonomous both of the "mass" of materials and the law-fact complexity as clearly the UCC not merely declined to depart from its $350 million figure spread over almost a decade, but also contested to pay interim relief during the litigation. As noted earlier, the "enormity" of human suffering neither led the Union of India to order substantial relief nor the Supreme Court to order one or both the parties to provide it as a prerequisite for hearing the matter further.

The first order of settlement makes it abundantly clear that it was the Supreme Court of India who took the sovereign initiative. Its last para thanks counsel "for the manifest reasonableness they have shown in accepting the terms of settlement suggested by this Court" (p. 526.) In what dwells this "manifest reasonableness"? Perhaps, as the three clauses of the first order make it clear, it dwells in the UCC offering a down payment in about six weeks' time of a sum of $470 million in full and final settlement and the agreement to transfer to the Supreme Court all civil proceedings to it which are, simultaneously with the transfer, deemed to have been concluded and similarly all criminal proceedings "wherever these may be pending" stand "quashed."

Perhaps, the best that could be said concerning the "manifest reasonableness" is that the UCC agreed to pay a larger amount than previously suggested by it (and this may vary from $120 million to $350 million: see p. 538) and agreeing to pay it all by itself in six weeks time. But what kind of "manifest reasonableness" was involved in Union of India's agreement to the judicial initiative? Would it be considered reasonable, was it reasonable, manifestly or otherwise, for a sovereign plaintiff acting parens patriae to agree with

--- a sum grossly disproportionate to its own quantification of the "enormity" of human suffering at $3 billion as late as 1987?
— the simultaneous transfer and fictional conclusion of all suits against the UCC?
— similar transfer of all "criminal proceedings... wherever these may be pending" and their quashing?
— preambulatory recitals which nowhere even mention the principle of absolute liability of hazardous multinationals?
— full and final settlement of all cases relating to and arising out of the Bhopal catastrophe without consulting, let alone seeking concurrence, of victims on whose behalf it was pursuing its "parens patriae" role in Bhopal litigation?
— a lump sum amount without even ensuring that it will meet the claims of personal injuries of well over six hundred thousand victims (who had filed their claims under the Bhopal Act) which on its own admission, had yet to be fully medically assessed?

A settlement, by definition, is a process of moderation of initial claims on both sides. And one may go so far as even to suggest that settlement may be an act of judicial sagacity. But it would only be so when all concerned parties are properly heard, the provisions and principles of the rule of law are fully borne in view, and the impact on the rights and lives of the directly affected persons is borne in view that the trade-off between the gains of a quick settlement and costs of adjudicatory process favours settlement. Despite judicial aversions of "manifest reasonableness" none of those considerations are manifest in the plain text of the February 14, order.

Significantly, that order itself contemplates the filing of a "memorandum of settlement" on the next day and the passing of consequential directions, if necessary (p. 526.) This sentence immediately introduces an order of uncertainty. If the first order was one sculpted by the Court, its terms were clear enough to be self-executing, and no further order was necessary. But clearly if a further order was necessary, the terms of settlement would appear negotiated by the parties, rather than the settlement being as such embodied by the judicial order of February 14, 1989. In other words, there is a germ of doubt gnawing at the heart of the certainty in February 14, 1989, order. The terms of settlement, according to the last paragraph, were "suggested by this Court." If so that order was not in the nature of settlement judicially fashioned or ordered. On the other hand, if parties were given about twenty-four hours to produce a memorandum of settlement, with scope for consequential directions, the inference is inescapable that the Supreme Court was, in effect, codifying an agreement to settle in two instalments. This view of the matter defies the characterization of "manifest reasonableness" to the very first order of the Court.

G THE FEBRUARY SETTLEMENT: THE SECOND ORDER

The second order of February 15, 1989, cognizes the memorandum of settlement (a document not accessible to ordinary mortals) to the point of saying that the first order "shall be read subject to this order." The latter expression means and includes not just the six paragraphs of the second order but also a document curiously entitled as "terms of settlement consequential to the Directions and Orders passed by this Hon'ble Court" (p. 529.) Paragraph 6 of the second order however refers to this document as comprising "terms of settlement filed by learned counsel for parties..." (p. 528.)

The difference is important, going beyond legal hair-splitting. The first order did not direct parties to file terms of settlement consequential to it. It merely recorded that a "memorandum of settlement" recording the "details of settlement" shall be filed to enable the Court to issue "consequential directions, if any..." If the memorandum filed was indeed consequential to the first order, it would have corresponded only to its three operative paragraphs. But quite obviously the appended document, as we shall shortly see, travels a lot further. Before we analyze the annexure, let us look carefully at the operative paragraphs of the second order.

(i) UCIL A NECESSARY PARTY

The first paragraph records that the UCIL "which is a party in numerous suits filed in District Court, Bhopal" is "joined as a necessary party in order to effectuate" the first order. Clearly, the UCC stipulated that the immunity from civil and criminal proceedings should be extended to its subsidiary and this can only be done if the UCIL was, at the eleventh hour, joined as a necessary party. An entirely legitimate concern, one should say, of a holding company.

But its last minute request to join the subsidiary as a necessary party is wholly contradictory to its stance all along, including the SLP before the Supreme Court of India! The UCC all along maintained that it was a mere shareholder, that UCIL was an autonomous corporate entity governed by the 'hands-off' Carbide corporate policy towards its foreign subsidiaries and that Justice Seth was wholly in error in lifting the veil to determine the character of the UCC as a holding company. Not just the "mass of materials" before the Supreme Court but weeks of oral arguments, pro and con on this issue resonated the walls of Courtroom No. 1 on the eve of the settlement. The spectacular renunciation of its fighting faith by the UCC on February 15, 1989 mystifies the ordinary mind. But the Union of India's and the Supreme Court's ready acceptance of this insistence is even more astonishing. Just as Judge Keenan indicated that if the UCC was not willing to accept the conditional forum dismissal order, the Bhopal case may have to be tried in New York, the Supreme Court had the clear option to tell the UCC on February 15, 1989, that the proposed addition of the UCIL as a "necessary party" may well lead it to reconsider its first order.

This aspect gets aggravated if we recall that it does not appear from the available record that the UCIL Board of Directors had authorized by an appropriate resolution that it sought to be impleaded as a necessary party at this late a stage. Nor did the Court, apparently, seem interested in the observance of such a procedure. Nor further (though it is conceivable) does it appear that a subsequent meeting of Board of Directors or the Annual General Meeting of the UCIL ratify this belated emergency intervention.

Even if the latter did happen (and I plead only my disinterest in UCIL as an alibi for the lack of my research on this aspect) the ground given by the Court for making the UCIL a necessary party does not compel. True, the UCIL is "already a party in numerous suits" filed in the Bhopal District Court. True also that by
The Bhopal Case

virtue of para (3) of the first order (p. 526) the suits stood transferred and concluded by the first order. But if they thus stood concluded, why does the UCIL have to be included by the second order as a necessary party by the Supreme Court? The reason for this move can only be found in paragraph 2(b) of the second order which directs the UCIL to pay "on or before 23 March to the Union of India other than the UCC’s insistence. If the UCIL was to contribute, what reasons the UCC roped in its subsidiary was simple; it would be able to maintain that absolute multinational liability which might, by hemerotic ingenuity, be otherwise maintain its international corporate image as rescuing its subsidiaries and affiliates worldwide in a moment of distress. This might have been the UCC’s rationale; was it rational for the Union of India to agree? More fundamentally, was it ‘rational’ for the Supreme Court of India to legitimate this strategy? To these questions posture. No ordinary litigant fighting a sovereign plaintiff in the apex Court could, or should, have been thus indulged.

(ii) Reduction Of The Carbide Amount

Apparently not fully satisfied with the UCIL contribution, the UCC also insisted that the sum of $5 million paid by it to the U.S. Red Cross be deducted from its liability to pay $425 million. The Supreme Court agreed, as can be seen from para 2(a) and para of the second order (pp. 527-528).

But the amount of $5 million was paid by the UCC to the American Red Cross which entered into an agreement by November 6, 1985 with its Indian counterpart. The Court is not wholly accurate when it says, that this amount was paid pursuant to the order of June 7, 1985; the UCC is on record, in its written statement filed before the District Court, Bhopal on December 10, 1986, as saying that the offer of $5 million to the U.S. Red Cross was "in humanitarian aid to Bhopal victims" (p. 73.) Apparently the agreement was approved by Judge Keenan on November 6, 1985. The agreement clearly records this 'donation' by the UCC is based on humanitarian concern and is unconditional to any extraneous consideration including litigation or matters arising therefrom.

The Indian Red Cross signified its willingness to accept the offer subject to the important caveat that it shall not be obligated legally or otherwise for the purpose of working out set-offs against compensation/claims.

On February 7, 1986 and on June 28, 1987, the American Red Cross sent an instalment each of $2 million to the Indian Red Cross. Out of this American Red

Cross contribution (with interest thereof) of Indian rupees 6,10,82,570, the Indian Red Cross has already spent upto December 31, 1988 an amount of Rs. 2,67,01,524.55 paise. There has therefore been a balance of Rs. 3,43,81,045.45 paise on January 1, 1989 and the projections of actual expenditure and liabilities as of June 30, 1989 extend to Rs. 4,60,306.95 paise. All in all the Indian Red Cross will have left with it only a sum of Rs. 87,62,845.50 paise after spending for the relief work in Bhopal in accordance with the International Red Cross Principles and Rules for Disaster Relief.

Moreover, belying the observations of the Supreme Court in its May 4, 1989, judgment, the lack of public response to the plight of gas victims (p. 541) the Indian Red Cross had raised from sundry Indian sources a sum of Rs. 42,41,074.99 in cash and order of support valuing at seven million rupees in kind. The Indian Red Cross has yet to receive the remainder $1 million from its U.S. counterpart.

In an eloquent affidavit, the Indian Red Cross sought some time in August 1989, through a special leave petition, the Supreme Court's guidance as to how it was to cope with paragraphs 2 and 5 of the second order. The latter paragraph authorized the Registrar of the Supreme Court to transfer the "amount unutilized with the Indian Red Cross Society from the International Red Cross Society." Prescinding the fact that the latter entity simply does not exist anywhere, the second order in terms decrees that the Indian Red Cross violates its agreement with the American counterpart which clearly precluded, on the UCC's own grand gesture, the use of $5 million for extraneous purposes of litigation, settlement or set-off! Not to be minimized is the important fact that the sum is only notional: $1 million have yet to arrive (the Indian Red Cross is still pursuing the question of interest on the amount with its counterpart) from the American Red Cross and a better part of the amount stands already utilized. The Court at least seems somewhat aware of this when it refers to the transfer of "unutilized" amount lying with the Indian Red Cross.

Quite clearly, the parties have perpetrated a fraud on the Court in inserting on insertion of paragraph 2 in the second order. The UCC itself sponsored the donation to the U.S. Red Cross; it itself proclaimed it as a humanitarian gesture, having no connection with litigation. It must have been at all relevant times aware of the agreement between the two Red Cross agencies. It must have been knowing that the balance of $1 million remained yet to be transferred. It must also be presumed to know that the Indian Supreme Court lacked jurisdiction to constrain the American Red Cross to order payment of the remainder as a part of the overall settlement. By the same token the Union of India should also have known all this.

The proposed, and accomplished deduction of $5 million in the second order is clearly based on suggestio falsi and suppressio veri by the UCC and the Union of India! The settlement, in this respect, is clearly based on a collusiveconcert to mislead the Supreme Court of India. This aspect of the settlement instead of showing any alleged "manifest reasonableness" must be pronounced as based on manifest fraud. And the UCC, aware of the whole prior background, has aggravated its fraudulent behaviour since the Indian Red Cross petition, by not tendering an apology and $ 5 million to the Court. Whether or not such an intervention soon after the second order or after the Indian Red Cross petition would purge the settlement of the charge of being collusively fraudulent is a matter which may
eventually need to be judiciously decided. But it is certain that the second order in this respect at the very least, renders the legality of the settlement very dubious on the first principles of civilized administration of justice.

It is astonishing but true that while the second order makes the UCIL a necessary party to facilitate its contribution to the settlement, the Court does not invite the Indian Red Cross to file an affidavit even as regards the amount held by it.

In so doing, it gravely compromised the dignity not just of the Indian Red Cross which, incidentally, is a statutory organization under the Act of 1920, but also of the International Red Cross movement as a whole. The Court did not even hear the Indian Red Cross; it simply ordered it to pay up through its Registrar.

It is also ironical that a Court so moved by the enormity of human suffering as to propose or accept a settlement acts more or less in dark as to the impact of its sudden moratorium on the Red Cross's work in Bhopal and does not take up for expedient hearing until now (if that however, happens) its pleas in the SLP filed upon the second order.

The second order is clearly intended to be "consequential" but it equally clearly must be said to produce some unconscionable consequential directions.

In strict law, a settlement whose terms are produced by fraudulent behaviour of parties, and are not severable from other terms, is void ab initio. But we learn from the immortal words of Justice Holmes that the life of law is not logic but experience. And the victims have been recently educated by the Supreme Court of India (in its December 22, 1989 discourse) that to do a great right, a little wrong is sometimes permissible (p. 613). A shortfall of $ 5 million is, perhaps, to be borne by the victims in pursuit of the "great right." But even doing of the little wrong is now producing awkward consequences for the Supreme Court of India. And the issue, of course, as shown does not merely relate to $ 5 million but concerns the legality of the settlement which if set aside the victims will perhaps be told, may even deprive them of the $ 465 million. Do they have a choice?

(iii) No Acknowledgement of Legal Liability

Lest the first order be said to rest on even a veiled acknowledgement of the principle of multinational enterprise liability, the UCC inscribed the UCIL in the second order to elucidate this point once and for all. The point was critical to its corporate image as parens patriae of all hazardous multinational corporations.

But even this liberation was not considered adequate. There was a possibility that the first order may be read as containing, in its deep inarticulate structure, a component of punitive or exemplary damages. It, therefore, proposed and the Court only too readily accepted the further formulation (in para 2(1), p. 527) that the amount was being made available to the claimant Union of India for the "benefit of all victims" of Bhopal under the Bhopal Act, 1985, and "not as fines, penalties or punitive damages." In other words, it was a humanitarian gesture from the beginning to the end by a corporation oozing at every pore with the MIC of human kindness.

Note, please, the small, little word "all" in para 2(c). How many constituted all victims compensable under the processes of the Bhopal Act, now that any suggestion of governing tort liability standards was removed from the formulation of the settlement? Everyone was well aware that the Bhopal Act prescribed no principle, standard or measure of damages or liability. Justice Seth so held in the Madhya Pradesh High Court (p. 380); and the Supreme Court also agreed in its December 22, 1989, judgment on the validity of the Act (pp. 593–594.) The reference to the amount paid under the second order for the benefit of all victims under the Bhopal Act clearly precludes for the UCC all questions of reading any aspect of liability in the Bhopal settlement.

But all victims must refer to all those at least who had filed claims for personal injury under the Bhopal Act until there was prima facie material to show that they were not victims. These claims are in the order of $20,000. The UCC and the Court think, obviously, the amount of $470 million is adequate for their "benefit." This gives to every personal injury claimant the precisely beneficent US $758! Since no rights of victims, and liability of the UCC are here entailed, the UCC makes the Court rule in paragraph 2(c) of the second order that this amount of benefit is (to evoke the phrase of the first order) "just, equitable and reasonable."

But any feeling of outrage at acceptance of such benefit in "the world's most tragic peacetime, industrial disaster" (p. 338) is subsequently sought to be assuaged by the "healing touch" discourse of May 4, 1989, order explaining the "rationale" of the settlement. The "rationale" becomes presentable as dignified judicial articulation by shrinking the dimensions of "all" Bhopal victims to some Bhopal victims. As we will see, the May 4, order justifies the generousness of the February settlement by reference to the amount being disbursed over 205,000 victims, 150,000 of which are said to be exposed only to "simple" injuries.

The expression "all" in the second order means only the chosen few. How they were chosen remains (outside the dead) a solemn mystery till today. The UCC thereby remains free to claim that the settlement order could never be read to have rendered it legally liable under any standard of tort liability known to mankind.

Is it possible to regard this liberation as a merely consequential clarification by judicial order sustained not even by a semblance of consultation with the victim groups properly before the Court in these proceedings?

(iv) Immunities

In an equally extraordinary notion of consequentiality, the second order authorizes widening civil and criminal immunities for the UCC, UCIL or persons referred to in the settlement. The second order in para 3(a) directs the Union of India and the State of Madhya Pradesh to take "all steps which may
The Bhopal Case

in future become necessary in order to implement and give effect to it. The "steps"
include, but are not limited to,

ensuring that any suits, claims or civil or criminal complaints which
may be filed in future against any corporation, company or person
referred to in this settlement are defended by them and disposed of
in terms of this order (p. 528.)

Not satisfied with para 3 of the second order it "enjoins" all such suits, claims
or civil or criminal proceedings and directs that these shall not be "proceeded with
before such court or authority except for dismissal or quashing of this order." As
if this was not comprehensive enough, para 4(b) records that any
action for contempt initiated against counsel or parties relating to this
case and arising out of proceedings in the courts below shall be treated
as dropped (p. 528.)

All this was not good enough, clearly, for the UCC. The annexure document
embodying terms of settlement, and treated as a "part" of the settlement order
makes the following propositions :

(a) the settlement "shall finally dispose of all past, present and future claims,
causes of action and civil and criminal proceedings (of any nature
whatsoever and wherever pending)
(b) this 'final' disposal relates to all "past, present and future deaths, personal
injuries, health effects, compensation, losses, damages and civil and
criminal complaints of any nature" (p. 529)
(c) this 'disposal' relates to all such proceedings "by all Indian citizens and
all public or private entities..."
(d) this 'final disposal' extends to proceedings of whatsoever nature wherever
gaining

(i) the UCC;
(ii) the UCIL;
(iii) Union Carbide Eastern, Hong Kong;
(iv) all of their subsidiaries and affiliates;
(v) each of their present and former
— directors
— officers
— employees
— agents
— representatives
— attorneys
— advocates
— solicitors
(e) all claims described in (a) and (b) are "hereby extinguished" including

"without limitations" each claim filed or to be filed under the Bhopal
Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985
(f) all such civil and criminal proceedings "are hereby transferred to this
court and are dismissed with prejudice..."
(g) all such criminal proceedings, including contempt proceedings "stand
quashed..."
(h) consequently the "accused are deemed to be acquitted"
(i) upon full payment in accordance with the settlement orders "all orders
passed in Suit No. 1113 of 1986 and or in any Revision therefrom also
stand discharged."

This document is signed by J.B. Dadachanji for the UCC and UCIL and A.
Subhashini, Advocate on Record for the Union of India.

What is the precise structure of obligations created by paragraph 3(a) of the
second order? Clearly, much depends on what we should mean by "future"
proceeding in that paragraph and the annexure of settlement. The word "future"
may refer either to any proceeding in time subsequent to the settlement orders
of February 1989 or it may signify cases of action for death, injury, compensation,
damages etc. arising later in time. If we accept the latter interpretation, the exclusion
of future cases with MIC related symptoms or morbidity, is an understandable
concern of a foreign multinational defendant in a toxic tort, even of a mass disaster
kind. What is not understandable is why the Indian Supreme Court without having
had access to any understanding of the possible long term impact of cyanate
exposure should have provided for such an inadequate amount of settlement and
why the duties of defending the UCC in future cases should have been cast on the
Union of India. The difficulties of grasping the rationale of this aspect stand
aggravated by the fact that India is obligated under the Bhopal Act to represent
bona fide the rights and interests of the Bhopal victims in its parens patriae role;
the settlement in its place creates an order of duties to defend Carbide companies
everywhere! The judicially created obligations conflict with India's
compelling statutory duties. The Court in a curious interpretative twist requires
the Union of India to be a parens patriae of the Union Carbide.

Peculiar difficulties surface even when we attach a narrow interpretation to
"future" proceedings. Would a review proceeding of the February settlement orders
be barred, in limine, by the second order? Would the act of filing such a petition
in itself be a violation of the settlement orders? Does the formulation of judicial
duties in paragraph 3(b) of the second order entail an obligation upon the Supreme
Court, acting under its constitutional review powers, requiring it to have the petition
placed before it only for "dismissal or quashing in terms of this order? If so,
is such abdication of judicial power, discipline and discretion constitutionally
authorized? If it is, is the Indian Red Cross SLP (clearly a future proceeding in
the narrow sense of that word, filed in August 1989) liable to summary dismissal,
even when such dismissal causes a shortfall in the payment of the full sum ordered
by the settlement order? Even if the UCC, realizing the implications of this petition,
were now to tender such an amount in Court, can this be accepted in face of the
characterization of any proceeding after the February orders as a "future"
proceeding? Is the Union of India obligated by paragraph 3 of the second order
to oppose the Red Cross SLP?

Let us scrutinize the set of petitions impugning the constitutionality of the Bhopal Act. Shroui, Sahu and Nasrin Bi which assailed the constitutionality of the Act were "past" or "pending" proceeding having been filed in 1985-1986; Keswani was "future" proceeding, having been filed post-settlement. Insofar as the logic of these petitions was to remove the very basis of the Union of India's power to represent the victims exclusively, these petitions had an overwhelming bearing on the February settlement. Does paragraph 3 and the annexure extinguish Shroui, Sahu, and Nasrin Bi because of their pending, and Keswani because of its "future", character? Apparently, the UCC was of the view that the settlement orders ordained this effect; its non-appearance, in petitions of this moment, can only be explained, jurisprudentially, on the basis of its interpretation of the terms of settlement.

How are we to understand the December 22, 1989, decision on the validity of the Bhopal Act in terms of the logic of the settlement orders? Was the Supreme Court merely acting out its obligation under para 3(b)? May we say that the high drama of extended hearings and elaborate judgments, reserved for well over half a year, was an innovative way of discharge of its duty imposed by para 3(b) to proceed with future proceedings only "for dismissal or quashing in terms of this order?" But if we prefer to read it as valid, autonomous discourse, creating further structures of obligations for the Union of India, can we say that the Supreme Court has itself repudiated the term of the settlement order? If it has not, what is the precise legal status of the December discourse?

Let us move with this narrow "future" and ask further: does the second order affect the consideration of the three review petitions shortly to be heard by the Supreme Court? What duties does the second order create for the Union of India and the Court? By its January 12 announcement (which we examine later) the Union has indicated its decision to support these review petitions both as to the inadequacy of the amount and the term of immunities, especially of criminal nature. Does this change in forensic strategy violate the undertaking to defend the UCC in future proceedings? And can the Court consider it otherwise than for summary "dismissal... in terms of this order?"

These are no idle questions. The UCC may be heard to argue, simply, that the review petitions must be disposed of in terms of the second order; that even if the Union of India overrides its binding obligation, the Court may not override its own. This would have to presuppose that the settlement was valid in the first place.

If the UCC argues thus, the only alternative open to the review petitioners is to argue that the settlement is not valid, inter alia, because it was arrived at by perpetration of fraud on judicial process by the connivance of both the parties, in the context of the Red Cross petition.

Alternatively, the Court will have to face the view that the UCC is bound by the final orders of the Indian courts; that no determination of the Indian courts is final in a constitutional sense unless, where relevant, the review process and power is exhausted; that paragraph 3 of the second order in referring to, inter alia, past and future "civil" proceedings does not include constitutionally mandated review proceedings and that the reference to "court or authority" in para 3(b) does not embrace the Supreme Court of India.

But for each of these propositions, reasoned elaboration will need to be provided. And whatever be the range and quality of such elaboration (features which can no more be taken for granted even for the Supreme Court discourse) one compelling result will be that the February orders do not bind the Supreme Court of India. But if they do not, the settlement is in no legal sense final. Either it is not final in this sense or it does not exist in the first place having been vitiated by fraud: these harsh logical consequences stare us in the eye even on the eve of the consideration of the review petitions.

The structure of obligations imposed by the February orders is thus logically and legally incoherent and unsound. And it is a direct result of the UCC’s settlement strategy which in its imperial ambition seeks to wipe out not just any liability arising out of the Bhopal catastrophe but is directed to genetically mutate the Indian judicial process for its own abiding corporate purposes. In this, it must be said straightway that the best of India’s legal talent did not serve Caradbe all that well beyond a Pyrrhic victory in its moment of triumph. And the heavy task of restoring the dignity of judicial process in India has, in the process, fallen on the MIC-infested Bhopal victims.

Let us now turn to the criminal immunities. The sculpting of extensive immunities also reveals Caradbe’s overkill in sponsoring the terms of the settlement order. The annexure which is made an integral part of the second order not merely records that all criminal proceedings stand transferred but stand quashed and that the accused are deemed to be acquitted. Neither J.B. Dadachanji nor Ms. A. Subhashini are duly appointed judges; their recourse to authoritative judicial language is contumacious. Further, technically, Ms. Subhashini’s signature on behalf of the Attorney General of India is highly questionable. And if letters rogatory in Bofors case recently required a District Judge, Delhi, to obtain the precise authorization of the President of India, the signing away of the Indian legal system, even if legally competent, requires an authorization going beyond a mere vakilnamama. And the mere fact that the Supreme Court, through paragraph 5 of the second order, makes it an integral part of the legal order invests it with no higher legal authority.

This must be said without any qualification whatsoever because, by all reckoning, an authoritative judicial act is one in which the application of judicial mind is self-evident. This is simply not the case with the conferment of the criminal immunities. First, the available time between the two orders rules out at the threshold any real possibility of the application of the judicial mind. Even granting, as we must, that para 3 of the first order had achieved transfer and quashing of all criminal proceedings, that order cannot be said to authorize two Indian lawyers to devise a term of settlement conferring criminal immunities in the way they did.

Second, para 3 of the first order does not find any support in the brief preambulatory recitals; neither the mass of data, nor the record, nor the complexity of the law-fact issues nor the enormity of human suffering inexorably lead to the order in para 3 as far as criminal proceedings are concerned.

Third, the question of the very power of the Supreme Court to so ordain, under Article 139A and 142 even as expanded in Antulay, remains deeply problematic as is shown clearly by the following observation in May 4 order which allowed
time for reasoned elaboration of the February orders:

There is yet another aspect of the Review pertaining to the part of settlement which terminated the criminal proceedings. The questions raised at this point in the Review petitions, *prima facie*, merit consideration and we should, therefore, abstain from saying anything which might tend to pre-judge this issue one way or the other (p. 540.)

What is, in effect, being said here is that the question of conferment of criminal immunities, even as of May 4, 1989 was a complex one, requiring detailed judicial consideration and that this question is *prima facie* one which merits consideration. But if it merits consideration on May 4, 1989, and subsequently, it also merits consideration on 14/15 February, 1989; this consideration was not, somehow, then possible.

The anguish of the judicial statement, made by the very same five Justices who decided the February settlement is welcome; but it does not demonstrate the initial non-application of the judicial mind.

Fourth, the December 22, 1989, judgment also tends the same way when it rules that the definition of "claims" under the Bhopal Act did not extend to criminal proceedings, thus prescribing tacitly the ambit of the Union of India's power to compromise the suit. The question is once again left open to further judicial determination in the review proceedings (pp 593-594.)

But it remains open to the UCC to argue in the review petitions that such belated due process judicial reflections should not be allowed the potency to cancel this vital, from its standpoint, term of settlement. Even if it so remains open, the UCC may contest the review petitioners' position that the conferment shows no application of judicial mind in February 1989; it may lead arguments to show that such immunities are a necessary aspect of "just, equitable and reasonable" overall settlement process and procedure worldwide; and further that the Supreme Court is possessed with "inherent powers" to achieve this conferment. In a deep irony, this last argument will entail a somersault by the UCC which contested the very concept of inherent jurisdiction of the Indian courts to order interim relief. But for the UCC, as any other entity recoursing to the Indian courts, opportunism, rather than ethics or aesthetics of argumentation or advocacy usually provide the zodiac of forensic strategy.

Faced with this, the review petitioners, on behalf of the Bhopal victims, will need to contend the incontrovertible lack of power in the Supreme Court to transfer and quash criminal proceedings without any application of the judicial mind. That task is not difficult, as the arguments urged in the review and writ petitions indubitably show. But that task invites attention to an ethical and constitutional question: how much burden should victims be asked to bear? They stand burdened by the exposure to the MIC. They stand burdened by an incoherent settlement which requires them, *inter alia*, to now show its inequitable character. They stand burdened to demonstrate the quantity and the quality of their suffering. And now they stand burdened by the need to articulate the nature and limits of the Court's jurisdiction.

Compared with all this, Abdul Rehman Antulay was far more fortunate. Being only a "victim" of what he thought to be unfair private prosecution on corruption charges, and by the unfairness of the 1984 Division Bench order allocating his case to Bombay High Court rather than a special court under the Prevention of Corruption Act, he received extraordinary judicial solicitude from Justices Venkataramiah and Sabhyasachi Mukharji who, more or less, *suo motu* convened a seven-judge Bench to examine the issues of the nature and scope of the Supreme Court jurisdiction, an initiative which led to the quashing of its own order in the *selfsame* proceedings. And that happened after the review and SLP filed by him were dismissed by the Supreme Court itself. In contrast, the Bhopal victims have to continue to perform the labours of a latterday Sisyphus! These they will, but not without someone having to point out that it is unethical to subject them to such continuing ordeals.

(v) The Settlement Amount

The February settlement evoked considerable national indignation and outrage not just because of the suddenness of the announcement of the settlement, the extraordinary scope of immunities, and associated features just examined but for lack of reasoned articulation of the amount. The proponents of the settlement sought to quiet all public criticism and social action on the ground that what was at stake was the integrity of the Supreme Court which should in no way be assailed. Even if no articulate reasons were given, the overriding concern to alleviate the enormity of suffering animated the settlement and to question it was simply to denigrate the Indian judiciary, especially the apex court. Even a veteran human rights leader, Mr. Tarkunde urged, on the eve of the Lok Sabha debates, in an article in the *Times of India* that primacy should be given to two cardinal values: quick relief to the victims and integrity of judicial process. Many others became the national spokespersons of victims justifying the settlement in their name. And they sought to belittle the significance of mass protests in Bhopal and Delhi, some led by victims who crowded the lawns of the Supreme Court and the Indian Law Institute as being an aspect of unfortunate "politicization" of the Supreme Court award. Some critics of the Bhopal settlement took the opportunity to remind the legal activists that the way in which they had nurtured and legitimated the spread of activism among judges now produced consequences they did not approve but had, ineluctably, to accept.

This bare overview of the animated public discourse does no justice to the variety of articulation the Bhopal settlement evoked. This needs to be archived and analysed on its own terms. My purpose in referring to it here is only to suggest that the February settlement did not, as it were, present its own credentials to the public mind. Indeed, there was no fit between the reference to the enormity of

63 V.M. Tarkunde "Bhopal critics miss two main points", *Times of India* March 15, 1989 p. 16.
human suffering and the amount; if the suffering was enormous, was not the
settlement amount mere pittance? What justified the reduction of the amount
damages from $ 3 billion to a mere $ 470 million? The Supreme Court ultimately
presented to the victims and people of India its own rationale in the May 4, order.

H UNION OF INDIA’S JUSTIFICATION

But the public discussion also prompted the Union of India in the meantime
to, through its Directorate of Advertising and Visual Publicity, to produce a small
brochure entitled Bhopal Gas Tragedy: Basis of the Supreme Court’s Award
(March, 1989). This was presumably done by the Government of India in its parents
patriae role! This was, perhaps, for the first time in history that the Government
sought to explain the basis of an inarticulate judicial order through a massive
publicity effort. It deserves a close look as a prelude to further analysis of May 4
order.

The Government claims in the document that the amount of $ 470 million (Rs.
705 crores) is neither a “pittance” nor a “sellout.” Rather, it represents a rational
figure. It is rationally arrived at, first, in relation to its total damage claim of $ 3
billion. That amount, it explains, was the estimated value of the claims, as per
its plaint, “if the case is tried to judgment through all the stages.” But if it were
so tried in the opinion of jurists... a case of this kind could not have reached
conclusion in less than 15 to 25 years from now at the earliest” and if $ 3 billion
is discounted at “10% over 20 years, it yields a present value of around $ 4 445
million.” Prescinding the consideration of the facts that a document for public
information does not give any basis for the time span for final determination,
the document does not tell us precisely how and why $ 470 million is adequate
compared with the original figure; that can only be said if the initial amount is
correlated to the magnitude of suffering of the Bhopal victims and the nature of
short and long term injuries to them. Significantly, the document nowhere mentions
the incidence and quality of injury and suffering which were sought to be
compensated in the first place, whether by the original damage or later settlement
amount.

The rationality imputed to the settlement amount is, then, further sought to be
enhanced by recourse to the fact that Justice Seth himself had by his quantification
various heads of damages, on the basis of half of which he calculated the amount
Rs. 250 crore as an interim relief, contemplated an overall damage amount
Rs. 500 crores. According to the document, “the Supreme Court using this figure
as a basis, has raised the compensation to Rs. 705 crores, building in enough margin
to take care of the other claims.” This seductive statement is wholly vacuous
because it does not inform the public as to precisely how many persons suffered
what kinds of injury; in the absence of victim profile, no justification of the
settlement amount is at all possible or tenable.

The third element of the rationality of the settlement amount ensues from the
recognition of the fact that at no time Carbide had indicated its willingness to
pay more than $ 350 million and that was a deferred plan of payment over the
years. In contrast, the settlement amount because of the “tough stand” of the
government, stands raised by $ 120 million and achieves a lumpsum payment.

In other words, now the amount just stands justified by the willingness of the
UCC to go thus far and no further; the ‘rationality’ of a multinational corporation
becomes the rationality of the judicially announced sum as well. The rationality
of victims as to what they may be entitled to has simply nothing to do with the
Bhopal litigation.

The overall "rationality" is articulated in terms of a dichotomy; the option was
either to "cut through" the litigation "in an honourable and just way" or to "try
and fight it out, faced with the prospect of an indefinite wait for redressal and
succour for the long suffering victims of Bhopal." Obviously, the statement adds,
the choice was to get a "just, equitable and reasonable" compensation now rather
than "subject the victims to an indefinite wait over a period when many of them
would very likely succumb to their ills." Not to have taken this option, says the
author anonymous, "would have been tantamount to withholding compensation
from the victims in order to establish a legal principle in a judicial laboratory."

This "logic" invites a simple response. If the choice was Hobson's choice, why
should the government have waited for five long years? And if it was a Hobson's
choice, why did the Bhopal Act take away the privilege of making that choice
from victims and invest it in the government? And if the idea was to get the highest
amount from the UCC through protracted legislation, why was February 1989
a right moment and not later? The Union of India had not even fully completed
its classification of the incidence of the victims; the long term studies of the
Indian Council of Medical Research were not even complete. After this data was
fully at hand, would not the "tough stand" of the government have produced a
higher amount? That surely would not have taken 15-20 years; even in late 1989
the Government could have produced impeccable scientific data to determine a
higher sum of liability which, by its sheer force, could have led the Court name
a higher settlement sum.

As to the crocodile tears shed around the victims, no case is at all made out
by the idea that it would be wrong to "withhold compensation" from the victims
by not agreeing to the Carbide convenience in naming a sum. Quite clearly, even
at the settled sum, compensation remains withheld from a large number of victims,
as we will shortly see in our analysis of the May 4 order. If the "judicial laboratory,
to invoke the striking phrase of the author anonymous, is not to be used to fashion
legal principles (a rather astonishing view of the judicial process at the apex level)
is it to be used as a site of abandonment of all rationality and scruple?

I JUDICIAL JUSTIFICATION OF THE SETTLEMENT AMOUNT

Let us now revisit the well chiselled judicial discourse of May 4, 1989. The
basic argumentative strategy is not wholly incompatible with the document
circulated by the government. The "basic consideration" animating the settlement
is the perceived "compelling need for urgent relief" to "thousands of innocent
citizens... in near destitute conditions... and with every coming morrow haunted
by the spectre of death and continued agony... making non-exploitation of the
"immediate sources of relief" a "heartless abstention." So pervasive was the
perception of this need in February 1989 as to overshadow the "considerations
of excellence and niceties of legal principles..." Marching with this is the proverbial
lament on the laws' delays and the rather exceptional reproach to the Indian public, public spirited citizens especially, that they did nothing to help the poor victims. The Court "considered it a compelling duty, both judicial and humane to secure immediate relief to the victims" (p. 541.)

The continuous deployment of the term "relief" is significant in more ways than one. The term may signify "interim" or "final" relief. The former signifies a process of financial assistance, medical treatment, provision of appropriate and meaningful work and recovery of self and community during the period in which litigation is pursued on an adjudicatory scale. In the most impoverished sense of that term, interim relief signifies the provision of financial assistance, with a sprinkling of medical care. In this sense, as noted earlier, the Court could have affirmed either Judge Deo or Justice Seth decision, asked the parties to share it equally or required the Union to bear the entire burden, as has now been done to sustain the validity of the Bhopal Act on December 22, 1989. Certainly, there was no reason to implement the last option at any stage in the proceedings; the Court had ample opportunity to so rule even outside the context of the crossfire of the SLPs from the Union of India and the UCC from Justice Seth's order. But this was not attempted at any stage prior to settlement; and even after it, the Supreme Court did not affirm either a right to interim relief under Article 21 of the Constitution or under the Bhopal Act. Even when it imposed a duty of interim relief, rather belatedly in December 1989, it did not do so in any specific way.66

Clearly, then, the moving rhetoric concerning the plight of the victims was not a resource for the Court in its consideration of constitutional judicial powers to order a detailed programme of interim relief. The May 4 order uses relief as a term of art; by "relief" it signifies a final relief. But what is a "final relief"? It appears that final relief is constituted by release from litigation. Logically, there is no difficulty in positing that the relief may be final in this sense for any one or more or all of the four entities: the victims, Carbide, Union of India and the Supreme Court. Clearly, the justification rhetoric only allows the use of the figure "relief" in relation to victims; it would be morally outrageous, though logically open, to use it of relief for the other entities. If we accept, as we must, this final relief is victim-oriented. Let us also, argue, assume that "considerations of excellence and niceties of legal principles" must be overshadowed by the overwhelming considerations of humanity.

But considerations of humanity direct attention at least to the following questions; none of which finds formulation in the May 4 discourse;

(a) who counts as a victim?
(b) what is one a victim of?
(c) are all victims similarly victimized?

66 See pp. 601-602, infra. The obligation to pay interim relief is regarded as a "major inarticulate premise" of the Bhopal Act which is held valid subject to it. But the Court leaves it inarticulate except to say that "the interim relief or maintenance shall be deducted from the "does of the victims...realized from the Union Carbide after adjudication or settlement" (p. 602.) The Court does not specify the floor or ceiling of the interim relief; the effective dispensation of "sustenance and maintenance"; the mode of payment of arrears.

67 This petition was filed on 30.7.1983 in order to seek medical relief and information on the toxic effects and treatment of MIC victims. The Supreme Court in an order passed on 4.11.1985 set up a seven member committee to carry out epidemiological and house to house survey of the gas victims. The petitioners have continually pleaded for providing full information to victims on their medical assessment. By its order dated 1.2.1990 the court has given to the victims, free of cost, access to their own medical records.

differential victimage before the Court? When the highest Court in the land abdicates its adjudicatory for an arbitral role, and seeks to justify its decision as being moved by the considerations of "enormous human suffering," "the tremendous suffering" "the intense and unrelieved suffering" one expects a concrete and not just a rhetorical understanding of human suffering. Of this, there is no sign in the May 4 order.

All that the May 4 discourse elaborately attends to is question (d): how many ‘victims’ constitute an abstract category in the sense that the Court’s idea of ‘victims’ has little to do with concrete human beings, with a whole variety of somatic, psychic, and related problems which they have to endure for the rest of their lives. The abstract idea of ‘victims’ is further refined by their becoming ‘categories’ and aggregations. This triple abstraction, achieved astonishingly in an ostensibly humanitarian discourse, is critical to the production of a rationale for the settlement amount.

And the presentation of the rationale moves on the axis of monetary sums, which have no manifest relation to the evocative language of human suffering. It moves on, naturally, the Nariman—Parasaran axis of the ‘right’ amount. Nariman, for the UCC, says his client is ready to top up the initial offer of US $350 million by the additional interest which raises this amount to US $426 million in February 1989; Parasaran, the then Attorney General, says, nothing less “than $500 million would be ‘reasonable.’”

Graciously, however, both Nariman and Parasaran leave the choice to the Court, its range being determined between $427 and $500 million (pp. 542-543). In this Procrustean bed not the Supreme Court nor the UCC nor the Union of India had to lie. Naturally, then, the amount to be arrived at had nothing to do with the extent and quality of human pain and suffering, injury and disability, of which in any case there was no full concrete knowledge before the Court. The moral, humanitarian, constitutional, legal and even judicial and juristic dimension dwindle to nonchalant proportions.69

Clearly, the Court had no reason to accept this framework at all. The suffering could have been, as stated before, partially mitigated by appropriate interim relief orders and other related directions to the Union of India on therapy and aftercare. Instead, the Supreme Court, too, decided to negotiate a sum. And the range of negotiation consisted of precisely $84 million! In all fairness, their Lordships felt that the Union of India should forego $30 million dollars; and Carbide increase its amount by $56 million (or rather $51 million, since $5 million Red Cross payment was later deducted; or rather $6 million less than $426 offered by it taking into account $45 million that the UCIL agreed to pay!)

J THE JUDICIAL ARITHMETIC

If $470 million somehow stood justified as the settlement sum, the task was to render it credible as a just amount. It is here that the full horrors of having to lie in the Procrustean bed emerge for the victims. Out of 6.20 lakh claimants for personal injury, only 205,000 are considered eligible for compensation; and out of the latter as many as 150,000 are considered to have received ‘minor injuries!’ This judicial arithmetic of May 4 order is set out below:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of cases</th>
<th>Amount individually payable</th>
<th>Total (in crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Death</td>
<td>3,000</td>
<td>Rs 1-3 lakhs each</td>
<td>70</td>
</tr>
<tr>
<td>(b) Permanent total or partial disability</td>
<td>30,000</td>
<td>Rs 2 lakhs to 50,000</td>
<td>250</td>
</tr>
<tr>
<td>(c) Temporary total or partial disability</td>
<td>20,000</td>
<td>Rs 1 lakh to 25,000</td>
<td>100</td>
</tr>
<tr>
<td>(d) Injuries of utmost severity</td>
<td>2,000</td>
<td>Rs 4 lakhs each</td>
<td>80</td>
</tr>
<tr>
<td>(e) Minor injuries and loss of personal livestock</td>
<td>150,000</td>
<td>Rs 20,000, Rs 15,000, Rs 10,000</td>
<td>225</td>
</tr>
<tr>
<td>(f) Creation of ‘specialised medical treatment centres requiring expert medical attention, rehabilitation and aftercare’</td>
<td>—</td>
<td>—</td>
<td>25</td>
</tr>
<tr>
<td>(g) Total</td>
<td>205,000</td>
<td>—</td>
<td>750</td>
</tr>
</tbody>
</table>

This arithmetic presents several difficulties. If we count categories (a) to (d) the total number of serious disablement injury comes to 55,000 for whom the allocable sum is Rs. 500 crores; but the Court also consistently refers to the number of victims thus affected as 45,000. We have a case of a counting error of 10,000 victims which makes impossible the payment of highest amount to all. The Court’s frequent insistence that the standard fixed is generous also stands belied; ‘if injuries of utmost severity’ [category (d)] stand assessed at Rs. 4 lakhs per victim, there is no reason why victims in categories (a) to (c) should not be eligible to receive the maximum of the range. The moral and constitutional bases of these ranges are unfortunately not made clear anywhere.

Furthermore, the Court does not know, and cannot tell us, why two-thirds of a total of 205,000 victims have been said to be affected by ‘minor injuries’ attracting trivial compensation amounts [category (e)]. Nor is it self-evident that out of 620,000 personal injury claims for damages under the Bhopal Act, only 205,000 claims alone remain thus compensable. The Court adopts a different incidence of the victimage in the interim relief order of March 3, 1989 (p. 668) (see Box below); it should have realised that 572,692 victims were rendered eligible by

69 In its May 4 decision, the court states categorically, the scope of the hegemony of the settlement amount thus determined. It says:

[No individual claimant shall be entitled to claim a particular amount of compensation even if his case is found to fall within any of the broad categories above (p. 546; emphasis added.)]
it for interim relief, including a fortnightly addition of 5000 to 6000 families which it ordered to be done:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Children and mothers</td>
<td>71,000</td>
</tr>
<tr>
<td>(b) Widows</td>
<td>547</td>
</tr>
<tr>
<td>(c) Destitutes</td>
<td>6,500</td>
</tr>
<tr>
<td>(d) Victims receiving 'respective treatment' with ICMR, Red Cross and Hamidia Hospital etc.</td>
<td>16,000</td>
</tr>
<tr>
<td>(e) Earlier list of victims prepared by the government for ex-gratia payment</td>
<td>78,645</td>
</tr>
<tr>
<td>(f) 5000 families to be added every fortnight (taking 20 fortnights from March to December 1989, for an average family size of four)</td>
<td>400,000</td>
</tr>
<tr>
<td></td>
<td>572,692</td>
</tr>
</tbody>
</table>

Clearly, the May 4 order justifying the incidence on which the settlement is based does not appreciate the logic of its March 3 order: when the estimated incidence of victims for interim relief is in the vicinity of six lakhs, how can the final settlement extend to about 205,000 victims and still claim to be 'just'?

Perhaps that is why the May 4 order concludes by saying that if "the total number of cases of death or of permanent, total or partial disabilities or of what may be called 'catastrophic' injuries is shown to be so large that the basic assumptions underlying the settlement become wholly unrelated to realities, the element of justness of the determination and of the 'truth' of its factual foundation would be seriously impaired," The Court says: "The justness of the settlement is based on the "assumptions of truth" (p. 546)."

But, as noted, the 'assumptions of truth' contradict themselves in the very moment of their articulation. Surely, if the trial or the High Court had erected such 'assumptions of truth', their Lordships, on appeal, would have had to examine the basis of assessment of victim age, the maximum amount of entitlement per individual victim, and most importantly the basis of the classification of injuries. And the Supreme Court, on such a scenario, would have even felt impelled to pass strictures on the courts below. In fact, in the May 4 order it passes veiled strictures upon its "assumptions of truth" when it says: "Like all other human institutions, this court is human and fallible" (p. 548). But even self-confessed fallibility is scarcely virtuous by definition, especially in the apex Court adjudicating the human rights of the masses pitted against a multinational.

If celestial justice stands articulated in the common adage that when God closes all doors, she often leaves a small window open, so does the Supreme Court towards the end of its May 4 discourse. Chiding social action groups for speaking in "different voices" making it difficult for the court "to distinguish truth from falsehood and half truth, and to distinguish who speaks for whom" the Court says:

[I]f, owing to the pre-settlement procedures being limited to the main contestants in the appeal, the benefit of some contrary or supplemental

Introduction

information or material, having a crucial bearing on the fundamental assumptions basic to the settlement, have been denied to the Court and that as a result, a serious miscarriage of justice, violating the constitutional and legal rights of the persons affected, has been occasioned it will be the endeavour of this Court to undo any such injustice (pp. 548-549.)

But the window thus opened offers a very constricted space: The review petitioners have to demonstrate as follows:

(i) owing to limited pre-settlement procedures some contrary supplemental material has been denied to the Court;

(ii) such material must have a crucial bearing on the fundamental assumptions basic to the settlement;

(iii) the result of such denial must be identifiable as a serious miscarriage of justice, violating constitutional and legal rights of victims.

How carefully sculpted this list of obligations is compared with the careless abundance of the settlement orders of 14/15 February 1989. How were the victims to comply with these requirements if the Court even on May 4, 1989, simply overlooks to mandate access by victims to health and related records and studies commissioned by the Union of India and presumably relied upon by it on February 1989 orders? The release of medical information ordered in the interim relief petitions even as late as October 1989 was finally comprehensively mandated on February 1, 1990;[70] had the review petitions not been delayed by the decision on the validity of the Act, the petitioners would simply have been unable to meet these carefully sculpted obligations!

Even now, with the adventitious change in regime respecting the dignity of the Bhopal victims and their right to know, they still are burdened to demonstrate that there exists contrary, supplemental material—that is material contrary and supplemental to May 4 discourse. This material has to show that

(a) the total incidence of compensable injury is more than 205,000 people;

(b) of these the total fatalities exceed 3,000;

(c) of these 205,000 victims, more than 30,00040,000 suffer from "grievous and serious injuries";

(d) the hospital records suggest a tendency contrary to (c) above;

(e) there exist median and long-term effects of MIC exposure;

(f) the ranges of amount mentioned by the court are not adequate;

(g) the criteria of "general run of damages in comparable accident claim cases and in cases under workmen's compensation laws" cannot really furnish a standard of compensation/damages for a massive MIC toxic tort situation (p. 545.)

(h) the victims are entitled to invoke punitive damages.

Not merely this. The victim review petitioners have further to show that the

[70] See supra note 67.
denial of these materials to the Court has resulted in a serious miscarriage of justice; the miscarriage has to be 'serious'. The importance of this caveat becomes clear in December 22 decision on the validity of the Bhopal Act where the Court concedes that victims were denied the basic right of pre-decisional and post-decisional hearing, but this denial was not serious enough to invalidate the settlement! The "seriousness" is to be measured in terms of violation of the basic constitutional and legal rights but the violation of constitutional right to natural justice is (if the December 22 discourse is to be considered seriously), not such a transgression!

One would hope that the Supreme Court of India in hearing the review petitions will be as demanding of itself as it is of the victims. Certainly, the latter have now sought to as fully demonstrate the nature of suffering and harm affected by MIC on the basis of available scientific studies and research.

K THE JUDICIAL DISCOURSE ON THE VALIDITY OF THE BHOPAL ACT

The December discourse of the Supreme Court adjudging the Bhopal Act valid is full of happy and unhappy surprises. The first surprise is that the Court proceeded to hear in detail challenges to the validity of the Act after announcing a full and final settlement in February 1989. This was done by constitution of a bench of five Justices to which the "sole question" of validity was referred. The Bench considered four petitions: Sahu filed in 1985, Shrivuti and Nasrin Bi filed in 1986, and Keswani filed in 1989. There is not a word of explanation in the order of referral or in the elaborate discourse of December 22 as to why either the three petitions filed in 1985-1986 were not heard before the settlement or why a 1989 petition was entertained after the settlement. If the petitioners in Sahu, Shrivuti and Nasrin Bi did not appear before the Court in November 1988 when the two SLPs on interim relief were taken for hearing, were they in order to insist on hearing after the settlement? And what was the basis for entertaining a post-settlement Keswani petition? We grope in the dark because the Supreme Court does not seem to recognize these as questions at all worthy of even bare mention, let alone consideration.

Logically, the prior question was of the validity of the Act and should have been taken up before the two SLPs in 1988 at least. In terms of a modicum of institutional discipline, the Court ought to have done so. Logically too, the petitioners should have realized the high improbability of the Court actually proceeding to invalidate the Act. Why then did the Court and the petitioners behave as they did?

The answer for the Court is easy enough. Bewildered by the nationwide and international reception71 of its settlement orders, the Court decided to perform a damage limitation exercise. The May 4 discourse was one heroic exercise in this direction; it had to be followed by patient hearing to all kinds of belated arguments which would restore public faith in the integrity of judicial process.

71 See e.g. the letter of the reputed tort law lawyer Melvin Belli, characterizing the settlement as the most "unethical" in his over fifty-year tort law experience Times of India March 7, 1989.

Chief Justice Sabyasachi Mukharji was more than candid. Concluding the December judgment. His Lordship observes:

We have reflected. We have taken some time in pronouncing our decision. We wanted time to lapse so that the heat of the moment may calm down and proper atmosphere be restored (p. 616; emphasis added.)

The "heat of the moment" was, of course, caused by the February settlement order; the pronouncement was deliberately delayed so that the agitated public opinion "may calm down." And since all hearings on review petitions and public interest writ petitions were deferred till the disposal of the validity petition, the delay in announcing the decision was to serve the purpose of restoration of "proper atmosphere." Never have the functions of delay been so smugly celebrated in judicial discourse in India or elsewhere; nor is there to my knowledge, any example of wielding of judicial power at the highest level as a functional equivalent of a "cooling off" period. The December judgment was the Supreme Court's idea of a healing touch!

This judicial celebration of delay carries a long term cost for the Indian legal system: not merely the clients or lawyers may use delaying tactics as a resource but they have now a judicial precedent to legitimate manipulation of litigation time! This celebration of delay is also deeply ironic when we recall the inspiring prose about the urgency of action which characterized the February rush to settlement!

And, most importantly, the delay is tragic for the victims insofar as the Court upholds in the way it does now the validity of the Act subject to the payment of interim relief by the Union of India (p. 614.) Surely, if their Lordships reached this conclusion in the course of their deliberations during the hearing or soon thereafter, the humanitarian concern which animated the settlement could have been also displayed during the hearings or soon thereafter by the device of an interim order holding the Act valid, with reasons to follow, but prescribing the duty of the state to afford interim relief. The humanitarian language is colourfully marashed on May 4 to justify the settlement but having accomplished its sole function, judicial amnesia concerning the plight of the victims—so glowingly described in that order—eclipses and overcomes that concern.

What did the petitioners hope to accomplish by reviving the challenge to the validity of the Act? They could not have intended to persuade the Court to invalidate the Act; such a result would have led to the legal erasure of the settlement, leaving the helpless victims to agitate their claims in American courts! Nor could they have intended, seriously, to weaken the binding force of the settlement which was explicitly reserved for another Bench. Why did they stand between the real challenge to the settlement posed by the review and related writ petitions? A powerful reason may be found in their strategy of having certain provisions of the Act read down. In this, as we will shortly see, they partly succeeded in result, if not in intention!

The second surprise is the rather bald statement by the learned Chief Justice of India: "In judging the validity of the Act, the subsequent events, namely,
the Act has worked itself out, have to be looked into "(p. 554.) Justices Ranganathan and Anand gently differ but only too gently: they would not regard settlement as a subsequent event by which the validity is to be adjudged but bear in mind this fact "as providing contextual background in which this question arises" (p. 623.) Regardless of how this is done, whether directly as the learned Chief Justice would or indirectly as his two learned brethren would, the result is the same: the fact of settlement simply cannot be ignored in judging the validity of the Act. In complete plain words: from the outset, no matter what the rhetoric, there exists an ineluctable institutional, though not constitutional, constraint operating against the invalidity of the Act. This is, perhaps, for the first time that in a case of this magnitude an agreement among parties has also created the law governing the Supreme Court of India. One may only hope against any recurrence of such an event.

The third surprise is that the Court holds that the Act in its Section 4 power to compromise entails the obligation on the Central Government to strictly adhere to the standards of natural justice; following binding decisions, it also recognizes that if for some justifiable reasons a pre-decisional hearing was not given a post-decisional hearing must be given. With this lucid exposition, the task of the Bench was well done. But it goes a lot further. It maintains first that "no useful purpose would be served by giving a post-decisional hearing having regard to the circumstances..." What are these "circumstances?"

First, these are the "circumstances" mentioned in May 4 order. But that order clearly proceeds on certain "assumptions of truth" which it also regards as fallible and ends by issuing an appeal: "Prove us wrong, please. Prove to us that the nature and number of injures is larger than what we have taken into account. If you do so, we will reconsider the matter" (see for the proper legal sense of this popular translation pp. 622-623.) This implies that a post-decisional hearing might, after all, occasion justice. Second, the Court takes judicial notice of the following "fact": it says no post-decisional hearing is necessary "having regard to the fact that there are no further additional data and facts available with victims which can be profitably and meaningfully presented to controvert the basis of the settlement..." (p. 614.)

In other words, the December Bench undermines the May Bench, which comprised the same Justices who ratified the settlement! How do the Chief Justice of India and his learned Brethren know this so-called "fact"? They simply could not have known about it since their brief was to adjudge the validity of the Act and not the February Act of Settlement! In terms of the referral, entry into this domain stood forbidden.

Perhaps, the ground of discovery of this alleged fact may be gleaned by yet another of those "having regard to" observations. The learned Chief Justice has also regard now for the fact that "the victims had their say or on their behalf their views had been agitated in these proceedings..." (p. 614.) The victims or their protagonists were entitled to have their "say" only on the validity of the Act; the fact that the distinguished Justices allowed them their "say" on everything under the sun does not empower them to say that the victims have said all they could say.

Fourth, in any case, their Lordships are pleased to say, the victims and their protagonists "will have further opportunity in the pending review petitions..." and therefore they have some post-decisional hearing. But if the Court's observations so far are to be taken seriously, as they must, what is left for the victims now to say? Furthermore, review constitutes post-decisional hearing only for judicial decisions; at issue however was pre or post decisional hearing granted for the act of settlement under the Bhopal Act.

It is simply not enough to say that these observations are at best or worst _obiter dicta._ In legal logic, _obiter_ has to have some rational relevance, though not sufficient to belong in the realm of the ratio, to issues at hand. The validity of the settlement was not such an issue. Nor was the Bench at all constituted for allowing the victims to have their say on matters outside the sole question referred to it. The notion of _obiter dicta_ structures judicial law saying: it is not a charter for judicial indiscretion. Judicial discipline is a valued resource, for rights, justice and progressive development of the law by judges. Judicial incoherence violates the minima of justice according to the law and the rule of law standards. If this is so, this aspect of the decision is _per incuriam_, especially in the light of revolutionary liberalization of that notion by the seven-Bench Bench in *Antulay.*

The same must be, unfortunately, said of the discourse on punitive damages (p. 597.) Having rightly ruled that the Act does not prescribe any principle, standard or measure of liability and damages, and having said so over and over again (see pp. 593-594) the Court had no need to go into the issue of punitive damages in the Bhopal case to say:

> The question of awarding exemplary or deterrent damages is said to have often confused civil and criminal functions of law. Though it is considered by many that it is a legitimate encroachment of punishment in the realm of civil liability, as it operates as a restraint on the transgression of law which is for the ultimate benefit of the society. Perhaps, in this case, had the action proceeded, one would have realised that the fallout of this gas disaster might have been formulation of a concept of damages, blending both civil and criminal liabilities. There are, however, serious difficulties in evolving such an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and interesting and challenging as the task might have been, it is still very uncertain how far a decision based on such a concept would have been a decision according to "due process" of law acceptable by international standards. There were difficulties in that attempt (p. 597.)

This was not, as the Court itself recognizes, the issue before the Court. The fact that Counsel in their wisdom argued it does not justify the Supreme Court to take it into consideration for pronouncement. When the entire validity question is, rightly or otherwise, considered in the light of settlement which is regarded by the Court as _futurum_; whereas the legal question was for the Court to find if the case proceeded? How do the "serious" questions of pleading, proof and

---

72 See U. Baxi, supra note 39 at 123-126.
enforcement in the United States Courts arise? Even if we leave aside the wisdom of these observations, we must ask under what basis of judicial power are these off-the-cuff judicial observations made and to what end?

The fourth surprise is the way in which the requirement of interim relief gets articulated—any matter in the domain of the Supreme Court ever since the catastrophe. Until the claims of victims are realized through "settlement" or "adjudication" interim relief has to be paid by the central government. The "relief" is described as 'compensation' which may be eventually deducted from any award of damages they receive. That's all. It is hard to believe that this is the same Supreme Court of India which was animated to settle the case in February 1989, in the light of "enormity" of suffering and justify it in May, 1989, by reference to their tremendous agony! The Court had before it a "mass of materials", too, in regard to the kind and magnitude of interim relief, including the quantification, on one-shot basis, by Justices Deo and Seth.

Even so, it leaves the entire matter to the executive! It does not even require the executive to file a statement on affidavit stating the mode and amount of relief. It does not address the question of the time from which the payment is due. It does not prescribe standards beyond which the interim relief should not fall. It does not even invoke its own prior decisions on interim relief and urge counsel to address their inadequacy. Five years after the catastrophe, victims are left to negotiate the matter with the central government. The same victims who are constantly described as "disabled" and even as "dumb, pale, meek and impoverished..." (p. 614) The fact that they were able to urge a responsive government partly to provide reasonable relief here and now is immaterial. For Justices who decide that the Act is valid on a specific condition, do no duties attach to prescribe the parameters, principles and temporal horizons for the fulfilment of the duty? What kind of "duty" is it that creates no identifiable set of rights in the victims? Why must the victims always be reduced to a position of supplicant? For a Court which is so sensitive to "misinformed public opinion" which created an atmosphere in which "attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of this Court," the most appropriate response would be a vigilant, though however belated, concern for the misery of the victims and for their rights. Even in the matter of interim relief, so vital to the victims' survival, the Court simply fails to thus respond. And for anyone to say this is to invite, yet once again, the intolerant accusation of beclouding the integrity of judicial process! This is among the many unfortunate and hopefully not abiding, fallout of the Bhopal case.

L. THE VICTIMS' STRUGGLE FOR INTERIM RELIEF AND A HISTORIC ANNOUNCEMENT

The December discourse had one pertinent judicial effect. It brought to fore the three review petitions awaiting long to be heard.73 Allied to those were a large number of public interest petitions challenging the constitutional and legal validity of the settlement.74 In the main, both sets of petitions raise similar principal arguments against the February, 1989 settlement orders.75 The Supreme Court on February 1, 1990, directed the review petitioners to file their written submissions and announced, unusually but wisely, its plan to ensure a time schedule within which the hearing will be completed.

Even pending the December judgment, the new government was requested by leading Bhopal victim groups to announce interim relief. A draft ordinance initially prepared by me seeking interim relief for the next-of-kin and seriously injured victims as per May 4 discourse was sent to the Union Finance Minister (Professor Madhu Dandavate) and other leaders on December 8, 1989. The victim groups, on further reflection, redrafted the ordinance to provide interim relief benefit to all residents of forty-six municipal wards comprising 106,000 families at a rate of Rs. 750/- p.m. for adult and Rs. 250/- per member of the family. The ordinance, as presented to the government also provided for right to information, and a participatory competent authority to administer interim relief.76 Leading victim groups also demanded

— immediate hearing on review petitions;
— withdrawal of criminal immunities;
— announcement by the new government that February settlement was "morally valid".

74 Writ petitions have been filed in the court by eminent citizens, voluntary organisations, victims groups and other petitioners in public interest. These petitions are WP Nos. 237, 297, 345, 379, 293, 399 of 89, 231, 300, 378, 382 of 89 and 281 of 89.

75 The contentions are, in essence, as follows. If the February orders were to be considered judicial orders, these are outside the Supreme Court's jurisdiction even under Article 139-A and 142 of the Constitution; they also violate Articles 14 and 21 rights of the Bhopal victims; and the structure of obligations imposed by the settlement orders compels the Union of India to violate statutory duties under the Bhopal Act. If the settlement is viewed as a contract, validated by a consent order, it is void because: (i) the power to enter into compromise was governed by order XXIII Rule 3B of the Civil Procedure Code which does not stand excluded by the Bhopal Act, (ii) the definition of 'claims' under that Act does not extend to criminal liability; (iii) non-compensable offences cannot be compounded by a private settlement contract nor may even the Supreme Court of India order it; (iv) the settlement amount bears no rational relation to suffering and damages of victims. Whether viewed as a judicial order or as settlement, the February orders comprehensively violate the rule of law, the Constitution of India, and relevant binding legislation. Judicial process grounds have also been pressed towards the same conclusion. Mehta was binding on a co-ordinate Bench; it needed to be reconsidered by a larger Bench in order to arrive at judicial settlement orders. The orders show no proper application of judicial mind and are scarred by undue haste (this now stands acknowledged by May 4 and December 22 opinions as to the issues of criminal immunities and denial of hearing to victims.) The non-application of judicial mind is further evidenced by the judicial arithmetic which fails to provide any compensation for as many 400,000 victims; by a pervasive lack of consideration of the lethal effects of MIC; by reliance on privileged medical information not accessible to victims; and by non-consideration of related issues (such as challenge to the validity of the Bhopal Act considered only after February settlement orders and in the light of it).

76 See the Submission to the Union Government in the Bhopal Gas Leak Disaster case by Bhopal Gas Peedit Mahila Udyog Sangathan (BGUMS) 51 Rajendra Nagar, Bhopal 462010 and Bhopal Gas Peedit Sangharsh Sahyog Samiti (BGSSS) 4 Bhagwandas Road, New Delhi-110001.
— full public disclosure of all information relating to the Bhopal gas disaster and lifting of the operation of orders under the Official Secrets Act;
— banning of all Carbide operations in India and of "any direct or indirect relations" of Carbide in India.\(^77\)

These demands were also articulated on the fifth mournful anniversary of Bhopal. The December 22, 1989, decision, however, reinforced the victims' insistence on interim relief. The demand for an ordinance reflected a reluctance on the part of victims to rely on any further executive assertions of goodwill. The Union of India considering the strength of the standpoint of victims made a public statement on January 12, 1990. This announcement declared, first, that life in India is not so cheap that the world's worst industrial disaster which affected the lives of lakhs could be compensated by $470 million.

In other words, India now considered the settlement amount as inadequate. Second, the announcement recognized the right of victims to interim relief. Although interim relief will be one-shot, the amount and modality of relief will not just be bureaucratically announced but decided in full consultation with the representatives of victims groups. (Such a consultation took place with four senior Cabinet Ministers, Cabinet Secretary, and a host of key officials on February 3, 1990.) Third, interim relief was to be given to residents of thirty-six wards directly gas-hit in December 1984. Fourth, the announcement declares that the victims have "certain inalienable rights" to remedies; as such the conferment of criminal immunities in February settlement orders needed reconsideration; the government's view was now that immunities of this type raise an "important matter of principle" under which the constitutional and legal rights of victims to seek judicial remedies as are available to them under the law of the land in respect of compoundable and non-compoundable offences cannot be bartered away.

Fifth, in view of all this, the announcement indicates that the government will now support the contentions of victims in the review petitions now pending.

The initial press response of the UCC to the January 12 announcement was simply that it does not affect the "finality" of the settlement. But the UCC, of course, remains aware that the "finality" can under Indian jurisdictional rules only be accomplished through the negation of review petition contentions. In review, therefore, it will need to take some definite position on the announcement. At this stage it is difficult to assess its shape or size. But the following logical possibilities do exist:

- (a) the UCC may completely ignore this statement for the time being for the purposes of the review hearings;

- (b) it may allege that the announcement violates the February 1989 settlement and is in terms prohibited by it;
- (c) it may accept without much protest certain aspects of the announcement but fully oppose some other aspects of it.

Alternative (a) may be superficially attractive because the UCC has submitted itself not to the power of the Indian government but the jurisdiction of courts with powers of finality. Whatever the Union of India wishes to say in public is its business not Carbide's which is only obligated to respond to contentions in review. But (a) is vacuous as an alternative because, regardless of the announcement, the central thrust of the review petitions is precisely that the amount is arbitrary and inadequate and the immunities all wrong. And the announcement indicates that India will now support these contentions. Still, the UCC may make its averments on these without a single reference to the announcement, thus reserving to itself the litigational opportunity at the state of enforcement (should the need ever arise) in the U.S. courts where it may hope to argue that subsequent review was biased.

Alternative (b) does provide, as examined earlier, a good offensive for the UCC. The settlement, in terms, bars future proceedings; what is more it obligates India to defend the UCC in such proceedings and in the spirit of the settlement to argue (and even sustain) their quashing or dismissal. If the UCC raises this argument, the Court will need to pronounce on the real nature of the February orders: did they ordain or ratify a settlement? Were the February orders products of a settlement or was the settlement a product of the judicial orders? The orders permit either way of reading.

If the preferred reading was that the settlement was judicially ordained, then the announcement (and action based on it) is violative of judicial orders; if the February orders were, on the other hand, products of a settlement, then the announcement violates a judically ratified contract between parties.

If indeed the UCC were to raise this as an argumentative tactic, India should have no difficulty on the first limb of it. The February orders were not the only orders concerning the settlement; the discourse in May 4, 1989 gave reasons for the settlement in ways which raised possibilities of impugning the settlement amount as well as conferment of criminal immunities. In both these respects, the announcement constituted no departure from the settlement orders; the May 4 discourse clearly deferred these two aspects to future consideration. Rather, India was through the announcement only discharging its duties to the Court. The announcement then, could not be said to fall within the ambit of "future proceedings" imposing a determinate structure of duties on India otherwise imposed by the settlement.

The second limb would be somewhat more difficult to tackle. If the settlement is a contract only ratified by the Court may India by a unilateral announcement wriggle out of it? The UCC may conclude that it is final as soon as the payment is tendered in good faith by it. It may further maintain that the review proceedings have no pertinent relation to the structure of settlement contract except that both parties have to defend the settlement against the review petitioners, and should the latter succeed accept the liability to have it set aside. The announcement violates the contractual nature of settlement in three critical ways: by attacking conferment
criminal immunities, by alleging inadequacy of the sum and indicating willingness to support the victim petitioners (and actually doing so). Carbide could also address the issue that a change of governmental regimes neither affects the legal identity (and obligations) of Union of India nor is the announcement in good faith.

India could perhaps, posit in rebuttal that the contractual obligations undertaken by the UCC are not fully complete (given the shortfall of US $5 million discussed earlier). But nothing much of significance follows from this strainning of a gnarl line of argument! Perhaps, the more compelling way out is furnished by the statutory and fiduciary charter of India as plaintiff. India may plead as to confer all criminal immunities that it had powers to do so under the Bhopal Act as understood by all in February 1989; but the December 22, 1989, discourse indicates that this action is outside the scope of its powers of compromise under the Act (pp. 593-594). The same Act imposes on India, the duty to bona fide act the parens patriae role (pp. 564-567); this now means that it cannot act but in support of victims in its parental role.

But how does this affect the mutually agreed settlement amount? On this, perhaps, India can only plead its post-settlement awareness of the scale of human suffering and order of damage in Bhopal. On a purely contrarian view of the matter, India's second thoughts—however morally sound—on the settlement amount must remain problematic indeed.74 The only option India is left to commend is that the duties of bona fide representation encumbered under the December 22, judgment necessitates a close look at the judicial "assumptions of truth" which were invoked by the Court itself to justify the sum but in an open-ended manner.

M CONCLUSION: TOWARDS A JURISPRUDENCE OF HUMAN SOLIDARITY?

If the Bhopal case marks the reversion of the apex constitutional court to an "arena of legal quibbling for men with long purses",79 the review petitions offer it a resplendent opportunity to recover its lost role as the "last resort of the oppressed and the bewildered."80 Towards this recovery the Court has amply moved by its diligence on criminal immunities and the luminous awareness of denial of due process to the victims.

From this vantage point, the Court has an option to proceed to further adjudication or settlement. Any endeavour at a fresh settlement will have to be based on participation and concurrence of three parties: the UCC, India and leading victim groups. And the Court will have to issue a firm indication on what it thinks is the dimension of damage and magnitude of suffering on the basis of which a tripartite settlement may proceed. Further, the Court will have a duty to specify, in the light of its understanding of suffering and damage, a reasonable range of amount within which the settlement may move. It will also have the further obligation to clarify that, even if not adjudicatively, any settlement now to be approved by it must proceed from an acknowledgement of a standard and principle of liability for a mass disaster toxic tort.

But if no worthwhile initiatives on this score prove possible, the Court has a duty to proceed with adjudication by admitting the review petitions and allowing the resumption of the hearings of the two SLPs—by the UCC and India—in a time bound manner. Since the question of interim relief has been for the time being taken care of under the new interpretation of the Bhopal Act, it will be for the UCC to decide whether to pursue its SLP on other issues—especially the question of its liability. Should it wish to do so, the Court has a clear duty to prescribe a schedule for hearing and to proceed to an expeditious judgment.

On the issue of liability, the Supreme Court has clearly two alternatives. First, it may hold, on reasoned elaboration, that the UCC is not liable at all for any aspect of Bhopal catastrophe; second it may hold that it is, on the basis of the principle enunciated by India or on more moderate grounds of tort liability such as negligence, nuisance etc.

If the Court were to adopt the first option, the case will terminate as far as the UCC is concerned but will stand inaugurated as far as victims claims against the Union of India and Madhya Pradesh Government are concerned. An intervener victims group in the Bhopal case have already filed a civil miscellaneous application urging (in case of the UCC being exonerated by the affirmation of the settlement orders) that the Court direct the concerned governments (but principally the Union of India) to make up the difference between US $3 billion and $470 million—the difference between the quantified damages claimed by India acting parens patriae and the settlement amount. In addition the 5000 odd pending civil suits (as well as the fresh ones which may later be initiated) will have to be adjudicated. Since interim relief is ordered by December 22, 1989 decision till "adjudication or settlement" it will have to be paid to all victims unless the Bhopal Act is repealed; but the obligation may persist under tort law jurisdiction which may be activated by courts or under Article 21 rights to life and liberty.

If the Court prefers the second alternative and upholds India's enunciation of the principle of absolute multinational enterprise liability, it would either itself in the SLP judgment, or later in appeal, have to quantify the categories of damages for personal (and related) injury claims. If, on the other hand, it fastens the more traditional liability standards and principles, the Court will have to consider the problem of counter claim and set off on the ground that India and Madhya Pradesh are, perhaps, joint tortfeasors. In either case, the Court will have to ensure expeditious adjudication of amount of damages at the level of District Court, Bhopal, and by authorities under the Bhopal Act.

A logical third alternative must be altogether ruled out: that is the judicial option to uphold the February settlement orders. Given due process denials to victims, the impermissibility of criminal immunity, jurisdictional bars to termination of all civil proceedings past, present and future, the only aspect of settlement orders which could be conceivably upheld is the settlement amount. But though conceivable, this should be regarded as unlikely since at the most elementary level the judicial arithmetic of May 4 discourse is wholly wrong, leaving totally out (as it does) about 400,000 claimants for personal injury. In addition, there are

78 But see on this aspect Rob Hagar's intervenor application as amicus curiae where he maintains that under American Law a settlement qua contract is revokable and has been held so judicially.
80 State of Rajasthan v. Union of India (1979) 3 SCC 634 at 670 (per Justice Goswami).
weighty scientific reasons to think that the MIC injuries can never be 'simple' or 'minor' ones and available expert evidence suggests not merely the misleading nature of health status categories but also possibilities of unfolding median and long term injuries. Only a false consciousness of justice to Bhopal victims can sustain any endeavour to reafirn the February settlement orders. But, as so far seen, the Court has given enough indications that it has a justly open mind on these issues. And the Union of India in its resumed role as parens patriae (rudely interrupted by the February settlement behaviour) now appears as an ally, rather than adversary, of the victims.

Furthermore, the UCC cannot object, in principle, to a reversal of the settlement on the ground that it denied due process to victims, the UCC itself being, all along, a strong votary of due process principles and standards. Nor can it assail the reconsideration of criminal immunities which are ultra vires the Bhopal Act. It can, and will, vigorously contest the scientific evidence on MIC's lethal effects indeed even to a point of reinforcing the original settlement amount. One does not have to wish it luck in order to acknowledge that the UCC would be well within its rights to achieve the full meaning of its consistent thesis that the MIC is not ultra-hazardous. Naturally, the Supreme Court of India will have to follow the principle of best evidence by marshaling a global consortium of experts to guide its understanding to a safe and sound (just) conclusion, fair both to the UCC and its victims.

The stage is thus set for even a more conscientious judicial endeavour to respond justly to the present and potential suffering of the Bhopal victims. It is only if their suffering is taken seriously that their rights may be taken seriously.

So far, the Bhopal jurisprudence invoked the abstract figure of a Bhopal victim. Now, at last, the formless has to acquire a form. Moving from the jurisprudence

---

81 See Against All Odds, supra note 22.
82 See supra note 22; see also Union of India recent affidavit imputing serious long term carcinogenic and mutagenic impact.

On this road, sooner or later, the Supreme Court will have to decide authoritatively the following issues: First, the issue of causation; second, the question of burden of proof; and third, the methods of scientific proof in mass disaster toxic torts. This is a new and rapidly developing field of judicial innovation. The Supreme Court has already in its May 4 discourse, rightly, grasped the need for innovation when it said that the UCC critique of Medusa principle "perhaps, ignores the emerging postulates of individual liability whose principal focus is the social limits on economic adventurism" (p. 547). From this base, the public law tort approach emphasizing "centralized corporate sources, statistical predictability, massive scale and relative uniformity of disease risks" and an identical relationship of all victims is injured to (i) injuries and (ii) the toxic agent should encourage just judicial innovation. See D. Rosenberg, supra note 17; G. Calabresi, Costs of Accidents: A Legal and Economic Analysis (1970); P.H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 252-276 (1986.) On epidemiological analysis and other innovative methods of proof, see M. Dore, The Law of Toxic Torts Chapter 24 (1987); See also R. Molkber, Corporate Crime and Violence: Big Business Power and the Abuse of Public Trust (1988.)


84 R. Rorty, Contingency, Irony and Solidarity, xvi (1989.) Emphasis added to the first sentence of the quote.
85 R. Rorty, supra note 84, at 97.