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## Address

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## Prof. Upendra Baxi\*

...I should perhaps make a concession to myself and say that I am one with you that foreign investment must be protected and promoted. But should not it be done also so as to protect and promote the basic rights of Indian humanity to which the Constitution of India is committed and to which the Indian legal profession and legal professions everywhere ought to be committed. I am somewhat disappointed since I have no sense of occasion, you permit me to say so, I am somewhat disappointed that the legal professions of the world assembled here would ever so thoroughly in their public articulation delink protection of foreign investors from the protection and promotion of human rights.

It seems to me that if you are going to envision a human future we ought to remember the great sage Karl Marx. Karl Marx did say that human futures are built up by a sense of fellowship, fraternity and solidarity among whom he said human futures are built by a sense of solidarity between suffering human beings who think and thinking human beings who suffer. Unfortunately the Indian legal profession represents Indians who think but who do not know how to suffer. Whereas Indian masses contains large number of people who suffer and think as well. It seems to me that most leaders of the Bar, business and industry and politics are kissed by gods. They forever remain immune from the catastrophic potential of modern industry, science and technology. And therefore when we come to think of fashioning principles of liability for victims of mass disasters we are not able to look at the problems from the stand-point of the victims. We are only able to look at the problem in terms of managers of the people. I beg you to think that if the Bhopal plant was located, as proposed earlier, near the Atomic Research establishment of India in Trombay near Bombay or if the Bhopal plant, when located there, on that fateful morning of 2-3 December 1984, if the wind direction on that fateful morning was different and travelled to the elite areas of Bhopal, our entire discussion on multi-national liability would have been wholly different. The Indian legal profession in that case would have been a far more cogent articulator of the standards of multi-national liability than it has been. We must not forget that even an innocuous leakage of the Oleium gas on the first anniversary of Bhopal disaster produced such panic among the Bench and the Bar as to deliver to us a stunningly innovative judgment of far-reaching significance in *M. C. Mehta versus Shriram Fertilizers*. I would be seized to think on this occasion and to articulate that we are all potential victims. We may not have been Bhopal victims but we are all potential victims of environmental degradation and industrial irresponsibility. Such a warning or such a request should not be necessary in a world full with the threats emanating from the heavily perforated ozone layer.

May I remind you also of the trinity of disasters which occurred within the time and space of 18 months beginning with Bhopal, where Bhopal followed

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by Chernobyl and Chernobyl followed by the Sandoz Chemical warehouse catching fire in Basil. In 18 months time these three disasters carry several profound messages. One that technology has a distechnology and wanton mismanagement have unlimited capacity to create human suffering everywhere. Second, that such capacity knows no national frontiers or ideological borders. Third, that the greatest threat to human future is posed by run-away technology. Four, law in each of the three cases instead of being used as a resource for alleviation of human suffering has been used more or less as a weapon or an instrumentality of disarticulating, depreviling and disadvantaging whole mass of suffering humanity. In other words, the law has developed a remarkable capacity to revictimise the victims. And that is the dilemma out of which some of us have to struggle to find a way out.

Bhopal raised several distinctive issues. But I don't believe that any lessons for the future can be drawn without revisiting the agonising and agonising complexity of Bhopal. It raised the issue of how any legal system, particularly third world legal system, can establish jurisdiction over a foreign corporation. And we have to go to extraordinary lengths to legislate a special Act of Parliament, and to file proceedings before Judge Keenan in the USA. The forum proved inconvenient for Judge Keenan, the catastrophe was of course very convenient. And Judge Keenan remanded the case of course after securing at least jurisdiction of Indian courts over Union Carbide. Judge Keenan in a superb irony said that while no interest of America was affected in trying the case in New York, he forgot that the United Nations existed next door. Worried about human rights and environmental standards, he remanded the case to India by saying that he had a duty as a fellow judge to allow the Indian courts an opportunity and I quote "to stand for before the world jurisprudence. Of course the Indian judiciary could only stand for as it turned out with the first world heels."

The second issue that the Bhopal litigation raised was the complexity and delay of legal process which was used by Government of India itself to establish convenient forum before Judge Keenan and which was used in a variety of ways by the ever ambi-dexterous Fali Nariman and his colleagues during the Bhopal proceedings. The third major point that Bhopal litigation brought to us was the sheer arrogance of judicial power. The arrogance of judicial power manifested itself in the 1989 settlement which I had to describe as a Second Bhopal Catastrophe. The Second Bhopal Catastrophe embodied in the judicial settlement should unfortunately give a lot of peace of mind to foreign investors in India. Because I do not think even Mr. Nariman would want to change that. In what did the traditional catastrophe multiply in the actual Bhopal catastrophe consist. It consisted in one single sentence in the total annihilation of the Indian legal system. Nor merely was a sum suddenly produced towards late proceedings of the hearing of the case of \$ 470 millions but the victims were not heard, were given no opportunity to canvas their point of view. Not merely that, their Lordships such as they were went on to say to give complete civil and criminal immunity to the Union Carbide Corporation, not merely that although the Bhopal Act under which they were adjudicating the particular contentions which were designed to empower the Union of India to represent

the victims, their Lordships in their wisdom unlike of it ordered that the Union of India shall be duty bound to defend the Union Carbide world-wide in regard to any proceedings arising out of the settlement, whether civil or criminal.

That settlement was a bench mark, by some compassion for speedy relief to victims. Whether the judicial overcrowd belie any such benign reading of that purpose. Therefore we did seek a review on behalf of the victims. The Bhopal case brings out the problematic of enforcement of money judgments in the first world. It also brings out finally without being exhaustive the most important area to which Fali Nariman drew our attention in his own inimitable way of the medico-legal aspects of mass disasters. The questions here are many in complex and I will not detain you. But it certainly needs to be stated that the victimage caused by the 47 tonnes of MIC released in the air was massive, one may cribble about figures here and there but in fact during the course of the hearings in the Supreme Court when Union Carbide in fact pleaded and it is in their affidavit that MIC was not lethal I suggested to my friend Shanti Bhushan that he bring 6 or 7 small vials of MIC and ask their Lordships to sniff as it in which case the victims would have no case. The toxicity level of MIC have been extremely well documented and were presented in our affidavit. The question of cohesion is a very important question particularly with mass technological disasters. The question of availability of legal services to the victims of mass disasters is another important question raised by Bhopal. All the grey eminences of the bar were on one side, whereas the much maligned social activists and human rights people like me and others were on the other. We are going to poke about justice to victims of mass disaster. It is imperative that the legal professions everywhere recover a degree of public spirit and compassion and fellowship for human rights of mass victims. They bear the lessons all that we can learn from Bhopal, go beyond the name prescriptions discovered by brother K. N. Singh in a sudden vertiginous fit of discovery of new ideas like setting up of disaster fund this that and the other with the perfect confidence that they will not be acted upon.

I think we need to shift our horizons and to look at the critical issue as to who is a victim, how do we conceptualise victims in mass industrial disasters. Unless we understand what is the victim and what is the victimage, there is no way, I believe, of renovating our age-old outlooks on how to do justice to tort or any other litigation. In Bhopal litigation the difficulty in conceptualising the victims persisted right through. Victims became statistical units, highly contested discussive entity. Victims had no age, they were neither young infants, young people, adolescents or old people. They were just victims. Victims had no gender, victims had no past and victims had no future. And in a very interesting manner and the manner that is absolutely remarkable and should be a great solace to foreign investors for the next 20 or 25 years in India because the velocity of economic change does not mean velocity of judicial or legal profession in this respect, an extraordinary thing happened to the notion of victim in the Bhopal case. In fact, instead of the suffering humanity of Bhopal being considered the victim, I must congratulate Mr. Fali Nariman and the comrades of the bar, it was the Union Carbide Corporation which emerged as

of itself as the real victim of Bhopal, a victim persecuted and prosecuted from a number of quarters, from the Indian Parliament it was persecuted through the Bhopal act, by the judges it was persecuted by the fastening of *M. C. Mehta*, by the activists it was persecuted and maligned by the public criticism.

In a fantastic conversion a multi-national emerges as the real hero victim of the Carbide saga. And to conclude briefly, a new notion or not very new notion of rule of law emerges through the Carbide litigation. It was a chap Prof. Dicey, a very dicey chap indeed, whose writings we all read and venerate in England there is no publisher for Dicey's works, in Commonwealth he published only here. Prof. Dicey because he is Professor Dicey of Oxford, we have a great veneration and sister worship. Prof. Dicey in one of his works particularly 'Law and Public Opinion in England' he is also the founder of the rule of law in industrial jurisprudence said a maxim that lawyers, judges and legislators must always follow to their own advantage and to the advantage of the society is this. Do not make the mistake of weighing the butcher's meat in diamonds' scales. And I think the Bhopal litigation follows to perfection this particular maxim because the suffering humanity of Bhopal becomes the butcher's meat which cannot be weighed on the diamonds' scale of international justice. You might have found me too emotional in my presentation. I cannot offer you a bloodless account of the Bhopal litigation.

But in the end let me turn to the future and it is very significant that we have not talked of horrendous possibilities, not coming from chemical industry alone, of future Bhopals. I wish to refer very quickly and briefly to what I would like to call genetic Bhopals. The Rajiv-Reagan agreement in 1985 allows a lot of bio-technology combines to come to India. Genetic engineering research, field testing of genetically engineered products is itself a very high hazardous form of activity. In the USA we can count, but I have counted, there are 32 laws regulating bio-technology research, its field testing and its industrial application. In the European Economic Community there are an equal number of legislations and directions regulating biotech-industry. With the Rajiv-Reagan accord of 1985, already in India, a large number of genetic Bhopals are in the making. We have a National Biotechnology Board. And much before the talk of liberalisation which has now begun in such torrential manner, way back in 1985 the National Biotechnology Board of India produced a series of guidelines which were a replica of the National Institute of Health guidelines on Recombined DNA research but with a caveat that you would not find in any society or country concerned with the rights of its citizens and people and the caveat was that if the Biotechnology Board, Inspection Committee report—if there is no response from the decision makers within 30 days then the application of the producer of genetic material is considered to be accepted. This is the amount of attention in the pre-liberalisation days that we have given to this frontier technology with immense potential for accident and catastrophe. I therefore hope that the International Association of Advocates will do the cause of human future and human rights a very great service by proposing a series of standards, human rights standards dealing with hazardous industries and hazardous technologies. Only that investment is entitled to progress which is an investment in human future, human solidarity and human fraternity.