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Address

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...The main regret of the whole Bhopal Case episode is that it was a 'shin-kicking litigation' — an expression coined by a Professor of Law in the Virginia Law School; he used this expression when commenting on the entire toxic tort system. Litigating in mass tort actions when toxicity of chemicals explode or get into rivers and damage crops and also destroy human beings. 'It vents anger said the Professor — but it fails badly to further the best interest of claimants, defendants or society as a whole'. An incident of this dimension when it occurs is certainly traumatic and the question is how best, in case God forbid, it does occur in this part of the world, what should, could and ought to be done. I have attempted to set it all out in my paper. It is not very novel because Benches of five Judges of the Supreme Court consisting of various high ranking dignitaries have themselves gone out of their way to make pronouncements upon the subject and to try to induce Parliament to legislate to fill up the gaps that were revealed in the Bhopal Case, to fill up the gaps in this tort system of law which as you know in our country is governed still by the Common Law system; there is no express statutory provision except one passed just a few months ago. 'The public Liability Act' which provides for a compulsory insurance of industries or industrial concerns dealing with hazardous chemicals, not a very great advancement to the cause of humanity or to the cause which Bhopal actually engendered. All this is set out in the paper and I will not repeat them. At page 14 of the paper which you have, are the suggestions which the highest Court mentioned and it is a little difficult to know why neither Parliament nor Members of Parliament nor organisations of gas victims (who did yeoman work on their behalf both at Bhopal in the High Court of Madhya Pradesh and again in the Supreme Court) why they have not further pressed the Government to go through with these reforms and the reforms are set out in the paper: in one of them is the creation of a fund either through a cess imposed on these extra hazardous industries, which would help not only to compensate victims but at least help tide over their problems whilst the litigation was going on and pending an ultimate settlement of the matter. Now why Bhopal was settled or how Bhopal was settled or whether the sum was adequate or whether the sum was inadequate are, I believe, questions of the past; one cannot embark on a rehash of the entire problem that arose in the case. But one thing that struck me as a person who represented the alleged wrong-doer was, the fact that the wrong doer was a multinational added considerably to the difficulties of attempting to achieve a settlement at an earlier point of time. One of the lessons to be learned is, (I think it is the normal reaction and which I have mentioned in my paper) that in this sphere of toxic torts the phlegm, — the toxicity of anger — as it is called — gets uppermost: the phrase, is not mine but one which people who have dealt with this subject for years have coined. It was mentioned two years ago at the IBA conference in Strausbourg — if any one of you were there you will remember — that anger (justly perhaps), at the owner or the alleged

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owner of the factory, the person who produced the chemicals; and anger blinds one's vision. And how do we provide for things of this nature which may happen — do happen. Now that we are opening up our investment — which is the theme of the main Conference: Changing Investment Climate in India — I heard over All India Radio this afternoon the Minister said, that except for the Defence industries every section of the industry in this country is open for public investment either from abroad or in the private sector here, and it is no longer going to be government controlled. How then does one provide for contingencies of this nature?

There are a great deal of problems and ultimately what I found, and let me be quite frank with you, is that the Government who undertook the task of suing for the Bhopal victims, they were on the horns of a dilemma: whether to disclose the actual numbers of really hard-hit victims at an earlier point of time which might have led to the alleged wrong doer saying that well, this is so much money that we would at the outside be liable to pay; or whether to keep everybody guessing as to how many people have been genuinely affected by the disaster; it was a difficult problem for the Government, they chose the second alternative, and kept raising expectations. Then, unfortunately for them, when they actually settled the matter (knowing the real number of genuine victims) all hell broke loose. When, on the review petition the Government came out with figures which it said were correct, many organisations responded by saying they were not and could not be — but the Government had hundreds of thousands of dockets of medical examinations etc. (which were put on record) which are mentioned in the judgments of the Court. What was the reaction? The reaction was: 'Well, you made us believe that there were nearly 500 or 600 thousand genuine victims who were so badly affected and (then) this amount of compensation is really 'peanuts''. That is where the controversy, (if I may so put it), about the settlement arose. And this controversy took two and a half years to resolve partly because of the litigation and partly (unfortunately) because the review matter had to be heard again because of the sudden passing away of Chief Justice Sabyasachi Mukharjee (one of our very great Chief Justices) — who after the review petition had been argued, died suddenly in London.

Now this prompts me, — and I say this in all humility and I expect you to assume that I am not speaking as Counsel for Union Carbide — but as what I believe, I have perceived to be some lessons which we ought to confess that we have learnt from Bhopal. For two and a half years the fund of 420 million U. S. dollars remained in Court. It is still there today. It came in as 700 crore of rupees (about 420 million in Dollars) and at the end after two and a half years it is now almost 1300 crores of rupees. True that makes many more millions of dollars, but the hard core victims — and there are hard core victims — regrettably have not even begun to share in any part of that settlement fund. I am not apportioning blame, I am not saying so-and-so was at fault or this happened or the other thing happened, but this is a stark fact which has to be faced and the problem is what do you do if you get something like this again, because there are millions of [these workers which are employed in chemical and extra hazardous industries](#) in our country where chemicals are stored in an unorthodox manner, in various

fields of activity. We also have some nuclear plants for civil use. Now these things are bound to excite attention and I believe that if we could genuinely think of what ought to be done in the case of a future disaster then at least we have learnt some lesson from Bhopal. That it was traumatic, that it should never have happened, all that has to be accepted. But *it happened*, it could happen again, it could happen with an Indian company, it could happen with a multinational, it could happen with a trans-national company from any part of the world and the conundrum has been; Ought this question of multinational liability, (that is to say an Indian company with a majority shareholding of 51% held by a foreign company) have been decided? And if so, should that foreign company not have been *per se* liable for the damage that was caused, for something that happened in the factory at Bhopal though owned by the Indian company? There are various legal problems, we need not go into all of them. Can you split up a company, can you pierce the corporate veil, if so to what extent, all that has been gone into. It has been rehashed and the dismal conclusion, apparently, is that litigation is perhaps the last solution and not the first. It is so in almost every mass tort disaster. The system is just not geared up to cope with so many hundreds, or hundreds of thousands of victims, even though the right of action is vested statutorily in one body. The judicial suggestion of a National Disaster Fund — I have not yet seen it created. Natural disasters which are being discussed elsewhere in this very building.

Yes, but not man made disasters or disasters as a result of something that has happened and for which someone ought or would take responsibility. Now my conclusions are — first — that industrialised nations including India must plan for the increasing possibility of mass tort toxic disasters, particularly nuclear, and whatever the apprehended danger of toxic effects of nuclear accidents, nuclear power today appears to be the only source of plentiful supply of clean pollution-free energy of the future, and nuclear power generate nuclear waste. Second, the thorny thicket of tort litigation — what that Professor of Virginia Law School called ‘shin-kicking litigation’ — must be avoided only because it is time consuming, enervating, and cost-intensive; third, (which I think is perhaps the most important) is a prompt ascertainment (and disclosure) of the genuine victims which helps to promote an early settlement. Exaggerating the claims, as appears to have been the case in Bhopal, is totally counter productive (witness the enormous fund still lying there with the Registrar of the Supreme Court for two and half years earning interest at Rs. 1 lakh a day and not one genuine claimant being able to get any amount). The Government before the present one declared 35 districts or wards in Bhopal as gas affected (about 500,000 people) and every single person in that ward received a sum of Rs. 250 a month. They are still, I believe, receiving it — and that included our local advocate at Bhopal whom I had the opportunity to meet on several occasions and (I assure you) never found him the least gas-affected. This is really true, but when something happens and particularly when a foreign company is involved then the national feeling is directed towards that particular body and it is said ‘look this is the disaster this foreign company has caused and these are the actual victims’; the genuine essential hard core victims were say 30,000 (as Government itself mentioned on affidavit) but if you keep saying publicly that there were

600 thousand claims from genuine victims, unfortunately, regrettably. Settlement, and even distribution of the settlement amount becomes a grave problem. People who do not deserve any compensation get it, people who deserve much more do not get anything near what they should get, and this is one more lesson which I personally learnt from this particular litigation and all the ups and downs of this litigation. Fourthly, it helps promote a settlement; it is difficult of course but it does help, if words like "liability", "tort" etc. are avoided because the moment you say "you are liable", "you have to pay legally", it is your "responsibility", an immediate wall of resistance comes up. There is a whole set of legal advisers to tell the American company or the British company or whoever: 'Do not admit refuse to admit anything'. And the whole thing then drags on for months, and as noticed here, for years; I do not know if you are aware of this but it is there in the paper — for almost no reason at all for 4 years there was not even an application for discovery or inspection of documents in the Bhopal suit: the reason I now believe to be because the representative of the victims (the Government) — *bona fide* and correctly from their point of view, did not want the multinational or the Indian company to know the exact number of people involved because that might have induced them to bargain for settling for less.

This toxicity of anger has occurred in various other parts of the world. I have mentioned the Colsa Cooking Oil case where oil which was for industrial use was passed off as cooking oil in Spain killing a lot of people; ultimately the criminal court acquitted them of the charge of murder etc. but it ordered to the victims substantial compensation. (In Spain there are no two separate actions civil and criminal as in Anglo-Saxon jurisprudence.) But the victims were not pleased at all. They wanted revenge. And that is a natural reaction of people who lose members of their family, and it is only *they* who know how much it hurts. The problem is I think to be dealt with more objectively and that objective determination can only be by an institution, an authority or a body which is able to contain the emotive element and at the same time to attempt to propagate a quick and early settlement, and if there is no settlement, certainly then pursue the litigation. And if you have a cushioning of a National Disaster Fund with you out of the cess that you levy for these extra hazardous industries, well then a lot can be given by way of interim relief to those who are genuinely in need of it. Therefore, I have concluded in my paper that there are to remember (apart from what happened and what did not happen in the Bhopal Case) three lessons from Bhopal, first ascertain promptly and accurately the victims, the number of dead, those injured and the nature of their injuries. We have had a large number of cases of bogus claims in Bhopal — that is not to say that there are no genuine victims. On the contrary there are very large number of genuine victims. But the larger number are persons who liked to claim but were not genuine victims. In fact it so happened — that the judge who first tried the case happened to be a person who filed a compensation claim, which became known only some months later. There was nothing wrong with him. He passed perfectly stringent offers against Union Carbide. So there was nothing wrong with his mental processes — the gas had not affected him at all. But the poor fellow had filed some bogus claim and therefore, naturally, was disqualified from trying the case

— but only later, not until he had passed a massive injunction order against UCC. Now, these sort of things do not bring credit to anybody, and the possibility of such bogus claims occurring particularly in a country where people can be exploited by industrialists, exploited by whole groups of people, is a very very difficult problem.