ADDENDA TO THE 2012 WEB EDITION

p. 51 *study Section I of this Chapter before you study the Chapter 3 ('Not on the Trident of Lord Shiva') of this book*

A Writ Petition (NO.(C) 334 of 2005) was moved by Shiva Kant Jha against the decision of the Supreme Court's Division Bench of two Hon'ble Judges [*coram*: Justice Ruma Pal and B. N. Srikrishna] in *Union of India & Anr. v. Azadi Bachao Andolan & Anr* (AIR 2004 SC 1107). The Supreme Court had reversed the Delhi High Court decision (*coram:* Justice S.B. Sinha, Chief Justice; and Justice A.K. Sikri) in *Shiva Kant Jha v. Union of India* [(2002) 256 ITR 536]. The Petitioner had widened the scope of his Writ Petition before the Supreme Court by raising issues asserting that the Union of India acted illegally and without authority granted by our Constitution when it entered into certain treaties. On the threshold hearing, on 25/08/2006, before the 3-Judges Bench, the Writ Petition's three segments were identified and segregated for better presentation and consideration. The issues falling in the three segments are briefly examined in the subsequent three Sections of this Chapter.

I

Whether a remedy under Article32 of the Constitution of India can be sought against the decision of the Supreme Court itself?

(a)

The Petitioner withdrew, with the leave of the Hon'ble Court, the segments not related to *Azadi Bachao*. The Petitioner's invocation of the constitutional remedy under Article 32 of the Constitution of India against *Azadi Bachao* (AIR 2004 SC 1107 remained the only subject-matter of that Writ Petition No. © 334 of 2005).

It is worthwhile to mention that the Review Petition against *Union of India & Anr. v. Azadi Bachao Andolan & Anr* was dismissed in chamber where the impugned judgement was considered by the same judges who had decided *Azadi Bachao*. On the rejection of the Review Petition, a Curative Petition was moved before the Supreme Court. The Curative Petition was also dismissed on the *sole ground* that the case did not fall within the parameters laid down in *Rupa Ashok Hurra vs. Ashok Hurra & Anr.* (2002 (4) S.C.C.388). The Petitioner felt that the decision in *Azadi Bachao* went against the Petitioner's Fundamental Rights guaranteed by the Constitution of India. So the Petitioner sought remedy under Article 32 of the Constitution of India against the said impugned Order. He moved a PIL representing the citizenry of our great Republic.

As *Rupa* had a set of *obiter dicta* to the effect that remedy under Article 32 of the Constitution of India was not available against the decision of the Supreme Court (or, to be exact, against the decision of the superior courts) as they did not come within the concept of 'State' within the meaning of the said term as used in Art. 12 of the Constitution. So it became essential for the Petitioner to submit in his Writ Petition that *Rupa* was not correctly decided on that point; and so deserved to be overruled.. Alternatively, the Petitioner argued that *Rupa* went wrong in the narrowing of the frontiers of the doctrine of *ex debito justitiae* by going counter to the established juristic principles governing the exercise of judicial discretion to do substantial justice.

On 25/08/2006 the 3-Judges Bench of our Supreme Court passed a written order on the Petitioner's prayer seeking remedies under Article 32 of our Constitution against the

decision of the Division Bench of our Supreme Court in *Azadi Bachao*. In course of the threshold hearing, the Court made the following directions: to quote in extensor----

> "This leaves Segment No. I which seeks to challenge the judgement in Civil Appeal Nos.8163-8164 of 2003, the order dated 6th November, 2003 passed on the review petition and the order dated 14th May, 2004 passed on the curative petition. In view of the law laid down by the Constitution Bench of this Court in Rupa Ashok Hurra vs. Ashok Hurra & Anr. (2002 (4) S.C.C.388, the petition under Article 32 of the Constitution of India is not maintainable. According to the petitioner, the decision in Rupa Ashok Hurra (supra) requires re-consideration. We have requested Mr. Gopal Subramanian, learned Additional Solicitor General, to assist this Court on the point in issue from a prima facie perspective at this stage. Learned Additional Solicitor General, present in Court, has kindly consented to assist the Court as Amicus Curiae. We also request Mr. Soli J. Sorabjee, learned senior advocate, to assist the Court on this issue as Amicus Curiae. The relevant papers shall be supplied by Mr. Shiva Kant Jha, petitioner, to Mr. Gopal Subramanian and Mr. Soli J. Sorabjee within two weeks."

(b)

The matter was heard by the 3-Judges [Shri K.G. Balakrishnan**,** CJI, R.V. Raveendran, J. M. Panchal, JJ.] 27/11/ 2007. Apropos the decision by the Constitution Bench of our Supreme Court in *Rupa Ashok Hurra vs. Ashok Hurra & Anr.*, the Petitioner's submissions fell in two broad segments:

(a) that it was manifestly wrong to hold that no Remedy under Art. 32 of the Constitution could ever be obtained against a decision of the Superior Court: and

(b) that it had unreasonably narrowed the ambit and reach of the doctrine of *ex debito justitiae* leaving no scope to prevent even gross miscarriage of Justice in many situations.

The **exclusion** of one, and the **narrowing** of the other, in *Rupa Ashok Hurra vs. Ashok Hurra & Anr.*had put us, in effect, in a strange double jeopardy not conceived under the polity erected under our Constitution. The Petitioner drew the Court's attention to the following two points:

(i) the observations in *Rupa* that Article 32-remedy could not be invoked against the decision of a superior court was wholly uncalled as they were not needed to be made to answer *the question as reframed by the Constitution Bench* for its consideration ; and by

(ii) the observations in *Rupa* were mere casual *obiter dicta* made on the CONCESSION by all the counsels appearing in the matter, hence they did not declare the binding law [reliance was also placed on *Krishena v. UoI* AIR 1990 SC 1782, *CIT v. SEW* AIR 1993 SC 43,*Municipal Corporation v. Gurnam* AIR 1989 SC 38 (paras 10-11)].

Only Mr. Gopal Subramanian, learned Additional Solicitor General, appeared to assist the Court on the point in issue from a *prima facie* perspective. He pointed out only one point that it was not possible to invoke jurisdiction under Article 32 of our Constitution in the case where the Petitioner had already moved a Review Petition, and also a Curative Petition which stood dismissed, thus, making the questioned decision *final*.

. The Petitioner articulated a set of principles which supported his Case. He placed them before the Hon'ble court:

I. "Under the Constitution of India all courts are courts of limited jurisdiction.

II. Remedy under Article 32 of the Constitution of India is a matter of course whenever on account of State action a Fundamental Right granted per provisions of the Part III of the Constitution are breached, or ignored.

III. The determination, whether in a given case there is a remissness of that sort, is, in the end, for the Supreme Court to decide after a judicial consideration of grievance; and its decision thereon shall be binding and final.

IV. The judicial determination to ascertain if someone's Fundamental Right has not been protected or has been violated shall always be on judicially evolved objective criteria juristically evolved.

V. The judicial organ of the State is as much amenable to judicial scrutiny and supervision through the remedy prescribed under Art. 32 of the Constitution as are other organs of the State, or its instrumentalities.

VI. As all the organs of our polity are the creatures of our Constitution with granted powers, they all are subject to Judicial Review whether they act in the domestic sphere, or at the international plane.

VII. The Supreme Court of India is the final court of construction of the law and the Constitution: hence its analysis of factors, appreciation of facts, and evaluation of all variables in a judicial-making, are beyond any question.

VIII. But if an aggrieved person feels that a determination made in matters *inter partes,* or in a PIL, is grossly and manifestly in disregard of the Fundamental Rights, he may bring his case before the Supreme Court to be considered in the open court by a Bench lager than that which had passed the impugned order.

IX. The reach and the ambit of the Art. 14 of the Constitution is to be treated, as our Supreme Court has already held, so wide that the maintenance of the Rule of Law, and the operation of the Rules of Natural Justice are given effect through an effective implementation of the doctrine of *ultra vires*.

X. It is possible, of course in the rarest of rare cases, even for the Superior Courts to lose its rightfully acquired jurisdiction over a matter if in course of a proceeding they violate (or through omission or commission has that effect) someone's Fundamental Rights..

XI. The Supreme Court, under our Constitution, is sovereign in respect of determination of what law is on a given point, but would grant a remedy under Article 32 of our Constitution when a petitioner makes out a good case that his fundamental rights, directly or indirectly, have not received protection (or stand, in effect, breached) in an impugned decision.

XII. In order to ensure that frivolous petitions are not moved before the court, the court could set up a process of the pre-decisional scrutiny of such Petitions filed seeking Art. 32 remedy against decisions which had become final. It is to say the obvious that the court can impose heavy cost on the petitioner if his petition is wholly misconceived, and clearly non-maintainable.

The Petitioner took the Hon'ble Court to the detailed exposition made by such eminent authorities as H.M. Seervai, Dr D.D. Basu, Ramchandran and others; and also through various decisions of the Courts in the UK. and the U.S.A. Attention of the Court was drawn to the following comments of experts:

(i) "The Author is definitely of opinion that reason of the word 'includes' the definition in Art. 12 enables the Indian Supreme Court to include within the definition all the three organs of the State (executive, legislative, and judicial) as well as other authorities which have been included within the concept of State action in the U S A, and that any narrowing down of the ambit of the definition would be defeating the object of inserting the definition in Art. 12." Basu, *Commentary on the Const. of India* A/1 (1996) p. 243

(ii) "..the judiciary wields the judicial power of the State, and Art 144 emphasises the fact that judgments would be worth little if the full authority of State were not exerted to give effect to them. …in the United States it is settled that the judiciary is within the prohibition of the 14TH Amendment…….This is all the more so, in view of the fact that

the inclusion of the writ of *certiorari* in Art 32 clearly shows that some fundamental rights can be violated by Courts *stricto sensu*." Seervai, *Const.Law* 4th ed. p.394 para 7.107

(iii) "There is no justifiable reason why the Judiciary should not be included in the inclusive definition of the 'State' under Article 12 of the Constitution." V.G Ramchandran in his *Law of Writs* 5th ed pp.47- 56

(iv)H. M. Serervai for a forceful argument that judiciary is 'the State' even in the exercise of its judicial functions. This would also seem the view taken by Mukharji J. in *A R Antulay v. R S Nayak* (1988) 2 SCC602" Prof. V.N.Shukla, *Constitution of India*, (10th ed. at p. 26.)"

(c)

On 28/11/2007 the Bench of the Supreme Court decided to dismiss the Writ Petition on this threshold issue. The Petitioner strongly pleaded and persuaded the Hon'ble Court to pass a speaking order so that our country could know the reasons on account of which remedy under Article 32 of our Constitution was denied even without considering what tainted the decision of the Hon'ble Court in *Azadi Bachao*. The Hon'ble Court passed its Order on 28/11/2007: I quote from the Order passed by the Hon'ble Court on 28/11/2007::

"Petitioner who appeared in person, has filed this petition. Though several reliefs are sought in the petition as recorded in the Order dated 25, 8. 2006, restricted the prayer in this petition to a re-look into the decision of this Court in *Rupa Ashok Hurra vs. Ashok Hurra & Anr.* (2002 (4) S.C.C.388.

We heard petitioner-in-person at length and learned Additional Solicitor General of India. Petitioner argued that all final decisions of this Court are subject to the remedy available under Article 32 of the Constitution. Petitioner contended that there may be occasions where the decisions of this Court may violate the fundamental rights of citizens and under those circumstances, the aggrieved should have remedy under Article 32 of the Constitution against such decisions. In support of his contentions, he referred to the views of several learned authors and the decisions of English Courts. It is not necessary to refer to them, as the question has been exhaustively considered by the Constitution Bench of this Court in Rupa Ashok Hurra (supra).

Of course, the decision of this Court could be reviewed and if necessary varied in appropriate cases, as pointed out in *Rupa Ashok Hurra*. The decision of an earlier Bench could also be overruled by a larger Bench. But we do not accept the submission of the petitioner, that the decision of this Court which has attained finality could be subjected to judicial review under Article 32 of the Constitution, at the instance of one of the parties to the decision. We find no merit in the writ petition. The writ petition is accordingly dismissed."

(d)

I preferred a Review Petition against this decision of 28/11/2007, but it was dismissed by the same Hon'ble Judges. . This is how matter stands now. But I think it appropriate to a quote an extract from the Review Petition where I had evaluated the Hon'ble Court's Order to help the readers to reflect on what was judicially done:

S.No	**Core Observations in the Judgment against which is this Petition**	**Petitioner's comments**	*Vide para/paras in this Petition*
1.	Petitioner restricted the prayer to a re-look into *Rupa*	The Petition sought remedy against the impugned Judgment.	Para 5 supra

		Rupa came in for criticism on account of its *per incuriam* dicta to the effect that the remedy under Article 32 could not be provided against the decision of the Superior Courts. Assuming *arguendo* that this proposition is not revised, an alternative plea was advanced that *Rupa* was wrong on the further count that it drew the frontiers of the doctrine of *ex debito justitae* very unreasonably narrow by going against the established jurisprudence the Anglo-Indian Jurisprudence. The Court had per its order segregated the first point for deliberation with the assistance of the *amici curiae.* Nov 27, 2007 was a day for hearing one of the two assertions against *Rupa.* In disposing of the whole case even without considering the alternative plea by treating the Writ Petition as a Petition simplicitor invoking the inherent power of the Court to restore the doctrine of *ex debito justiae* to its rightful juristic status so that the breach of the Fundamental Rights can be corrected even under this doctrine.	
2.	The question has been exhaustively considered by the C.B. in *Rupa*	The statement is *per incuriam* as did not **decide** this issue even indirectly. The unconsidered obiter dicta were on the **concession** of the counsels of both sides.	Annex 'A' And para 31 supra
3.	The decision of the S.C can be re-viewed as pointed out in *Rupa*	It is a trite legal proposition. When a Judgment is overruled, its precedent value alone is destroyed, without affecting the binding force of the decision *inter partes*. This Petitioner contended that the Judgment *inter partes* itself must go if it goes against the Fundamental Rights. Whether this Petitioner has made out such a case, on facts, is a different issue turning on the merits of his case.	
4.	The decision can also be re-viewed by a larger Bench.	This is the normal judicial decorum, and is a rule of law. But in *Azadi Bachao,* gross indiscretion was committed by	

		departing from the Constitution Bench decision inflicting on it vituperative. Thus the impugned decision was made without Jurisdiction. What makes the decision of the larger Bench binding is clearly a rule of law, not a rule practice.[*A. R. Antulay* AIR 1988 SC 1531 & *Triveniben v. State of Gujarat* AIR 1989 SC 465]	
5.	Decision of the S.C "which has attained finality" cannot "be subjected to Judicial Review under Art. 32 of the Const., at the instance of one of the parties to the decision."	This proposition is right so long a decision does not go against the Fundamental Rights. To hold otherwise is to turn indifferent to what is the very 'conscience of the Constitution'. The view of Lord Denman in *Rex.v. Boltan* (1841) 1 Q B 66 at 74, which is the conventional justification for this proposition, does not survive to the extent it goes counter to our constitutional provisions and values. In fact it has been rejected in the U.K itself.[1]	Para 33-infra
6.	Writ Petition *dismissed*.	The Writ Petition couldn't have been dismissed by a Bench of 3 Hon'ble Judges. They could have heard the matter, and could have referred to the Bench of 5 Judges for answer [as they have done I so in many other cases]. If they felt that the case was to be dismissed, the only course open to them was to refer the matter to the Bench of 5 Hon'ble Judges.	
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(e)

[1] H W R Wade, after examining the dicta by Lord Denman in *Bolton*, and by Lord Sumner in *Nat Bell* comments in his *Administrative Law* 7th ED p. 299::

> "In their own time and context these statements were unexceptionable; they expressed the traditional doctrine that so long as jurisdiction existed, mere error as such would not destroy it. But it does not in the least follow that no sort of error made in the course of the proceedings can affect jurisdiction. Some questions may arise which the tribunal is incompetent to determine; or some point may be decided in bad faith or in breach of natural justice or on irrelevant grounds, or unreasonably, all of which faults go to jurisdiction and render the proceeding a nullity."

This comment was endorsed by Lord Mustill in *Neill v. North Antrim Magistrates' Court.* [1992] 1 WLR 1220 (HL).

The position that emerges

I have written in detail about the Writ Petition against *Azadi Bachao* just to underscore the following points:

(i). Our Supreme Court is yet to decide the great Constitutional Question: whether it is possible in appropriate cases to invoke the jurisdiction of the Supreme Court under Article 32 of the Constitution to obtain an effective remedy against the Supreme Court's transgression of law and the Constitution to which it is as much subject as the other organs of the state: the executive and legislature.

(ii) In the judgement aforementioned the Court pointed that no Writ Petition against the Court could be moved when the judgement had become final after the disposal of the Review Petition, and the Curative Petition. This proposition deserves reconsideration. Why should someone suffer what is constitutionally wrong only because the Review Petition, and the Curative Petition are dismissed in his case.

The ambit of the judicial control and correction through the Review and the Curative proceedings are very narrow, and much hedged in by the rules framed by the Court, and the judicially formulated norms. Why should a judicial order be not subject to constitutional remedy under Art. 32? There is no valid reason. The remedy under Article 32 of our Constitution is more comprehensive, and more effective. The Review and the Curative proceedings are rarely disposed of in the open court. Such proceedings cam scope for the operation of s stock-responses and inhibitions, and this can lead to which Justice Frankfurter referred when he said in *Craig v Harne* (331 US 367,392 (1947): "It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation"; and

As the Supreme Court has not decided the aforementioned issues, I have kept the Chapters 3 and 4 of the book as they were in the first edition. These two Chapters will help our citizens to make out a case for moving the Supreme Court once again. Our Constitution does not prevent us from doing so because there is no good reason to exempt any organ from constitutional accountability. We have reasons to believe that during this phase of the market-ruled economic globalization, our courts are also being influenced by the neoliberal tenets, despite our Constitution. I have discussed such trends in the several chapters of the Part III of my Autobiographical Memoir, *On the Loom of Time* [also see the Introduction to *Judicial Role in Globalised Ec*onomy (Section I)].

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p. 389. study Section II after reading Chapter 21 ('CBDT's Circular Making Power: Frontiers still to be Settled')

II

On the legal validity of the CBDT circulars

(i)

The said Petitioner appreciated the Bench's observation that the CBDT's Circular making power to issue would have to abide by the decision of the Constitution Bench to which this question, in the context of the circular-making power of CBC&E, had already

been referred. This matter came in for consideration before the Constitution Bench in *Ratan's Case* (**2005-TIOL-41-SC-CX-LB**). I moved my Intervention Petition. On Jan. 30, 2006, the Petitioner brought the following facts before the Hon'ble Court:

> "This Petitioner has filed. ON 28 Oct. 2005, an Intervention Petition in C.A. No. 4022/1999 in the Matter of *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries,* Cal. on the point of the CBDT'S Circular making power under Section 119 of the Income-tax Act 1961. It is hoped that the decision of the Constitution Bench in *Ratan,* wherein the Board's Circular-making power is under consideration before the Constitution Bench, would govern the points in this Petitioner's Writ Petition."

The judgement in *Ratan's Case* deserves to be read with care. In my assessment, it does not approve of *Azadi Bachao'*s view on the point, rather it seems to approve the propositions which the Delhi High Court had approved in *Shiva Kant Jha v. Union of India.* . For an extensive analysis of this Judgement please go through the materials at the following links at my website www.shivakantjha.org.:

(i) 'The shadow of Ratan Melting on *Azadi Bachao*!'
http://www.shivakantjha.org/openfile.php?filename=triplets/triplet-001.htm

(ii) 'Ratan Melting - A landmark decision to the extent it goes!'
http://www.shivakantjha.org/openfile.php?filename=articles/ratan_melting.htm

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p. 293. study Section III below after reading Chapter 15 ('Treaty Making Power')

III
The Reach and the ambit of the Government of India's Treaty-making power
(a)

The third segment of that Writ Petition has questioned the constitutional validity of the terms in certain Treaties and International Agreements. this segment was made the subject-matter of a separate Writ Petition before the Supreme Court, but it was withdrawn with the Court's leave, but it was moved again before the Delhi High Court Article 226 of our Constitution

The third segment of my Writ Petition Writ Petition (NO. 334 of 2005) had questioned the constitutional validity of the terms in certain Treaties and International Agreements. this segment was made the subject-matter of a separate Writ Petition before the Supreme Court, but it was withdrawn with the Court's leave. It was moved again before the Delhi High Court under Article 226 of our Constitution. The circumstances under which the matter went before the Delhi High Court stand summarised in the very first paragraph of the Writ :to quote---

> "The issues raised in this Writ Petition had been raised in a petition under Art 32 before the Supreme Court of India on August 19, 2006. The matter came up for a preliminary hearing before a Division Bench of the Hon'ble Supreme Court on Oct. 9, 2006. The Writ Petition had to be withdrawn as the Hon'ble Judges persistently observed that this Petitioner should have invoked jurisdiction of the High Court under Art 226 of the Constitution. Per its order

> the Court granted 'liberty to seek other appropriate remedies'. ....On Nov. 17, 2006 a Division Bench of this High Court directed the petitioner to file a petition 'more focused, short and precise to the issues raised', and for that reason granted ' permission to withdraw the petition with liberty to file a fresh petition, making it short and precise and particularly, focusing on the main issues.' Hence this petition shortened by more than 50% and has been virtually re-written in compliance with this Hon'ble Court's directions. It was not possible to make it more precise as some of the greatest constitutional issues, raised for the first time before an Indian court, are to be placed per this petition before this Hon'ble Court. The issues raised have got great domestic and international consequences in this phase of Economic Globalization; and the judicial decisions thereon would be of concern to the people in most jurisdictions world over. This petition is filed wholly and exclusively *pro bono publico* in due discharge of what the petitioner considers his public duty as a citizen of the Republic of India."

A Division Bench of the High Court (Coram: Sanjay Kishan Kaul and Ajit Bharihoke JJ) declared in their judgment, given in the open court, on November 11, 2009:

> "….. insofar as the fundamental question of any act of the Government in pursuance to an international treaty resulting in violation of any provision of the Constitution or not satisfying the test of being in compliance with the doctrine of basic structure is concerned, the respondents do not even dispute the said position and have drawn our attention to their counter affidavit where while dealing with the treaty making power of the Union executive and the Parliament it has been stated in para 1 "it is humbly submitted that the Government of India can only enter into a treaty in conformity with the constitutional provisions laid down in the Constitution of India".

As I felt the High Court did not decide some of the core issues, I filed the Special Leave Petition before the Supreme Court. I argued the matter on August 16, 2010. *The Times of India* of August 17, 2010 made some insightful comments under a suggestive title: "Centre's treaty-making power must conform to Constitution: SC". The comment, I would have made on the observations of the Supreme Court, has been insightfully made by the journalist who said:

> "A petitioner, advocate Shiva Kant Jha, complained before a Bench comprising Chief Justice S H Kapadia and Justice K S Radhakrishnan that the executive was going ahead and signing a large number of multilateral treaties to fulfil its WTO obligations and was refusing to adhere to constitutional provisions. When he argued that Delhi High Court had dismissed his petition on the ground that treaty-making power of the executive was not subject to the constitutional framework, the Bench said, "Who says it is not. If you show us that a certain provision was in breach of the Constitution, certainly the apex court can examine it. Such treaties which violate the basic structure of the Constitution will be struck down. This is already stated in the HC judgment."…Though the court did not entertain the petition, it surely showed a shift in approach in scrutinizing the constitutional validity of the multilateral and bilateral agreements entered into by India."

I most humbly submit that when our government enters into any Understanding, Agreement, or Treaty, it must not forget the following mandatory norms sacrosanct under our Constitution:

1. The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.

2. The Executive does not possess any "hip-pocket" of unaccountable powers", and has no *carte blanche* even at the international plane.

3. The executive act, whether within the domestic jurisdiction, or at the international plane, must conform to the constitutional provisions governing its *competence.*

4. The direct sequel to the above propositions is that the Central Government cannot enter into a treaty which, directly or indirectly, violates the Fundamental Rights or the Basic Structure of the Constitution; and if it does so, that treaty must be held *domestically inoperative.*

But I have found on good grounds that these norms are not palatable to the neoliberals, to those effectively brainwashed by the IMF-WTO. If you wish to go into details, please the Chapter 21 ('Our Constitution at Work') of my memoir *On the Loom of Time*.

One thing more. When the Indo-Mauritius Double Taxation Convention had been signed in 1983, Mauritius 'was a constitutional monarchy with the British monarch as head of the state.' 'It was 1991 when a constitutional amendment was passed, providing for a republican form of government, with the president as head of the state.' We all know that it is the British view of the Treaty-making power that prevails in Mauritius, because it's Constitution has not gone counter to the British ideas pertaining to the Treaty-Making power by distributing the entire gamut of the state's sovereign powers through its constitution, as has been done by our Constitution. Those who carry on deliberations with Mauritius must not forget that they are bound by our Constitution whether they act in New Delhi, or Port Louis.

(b)

Let us consider how some conspirators are out to destroy our Constitution, and democracy through treaty terms.

Georg Schwarzenberger in *A Manual of International Law* (5th Ed. pp. 46-47) shows how the so-called International Lawyers have tried to subjugate the democratic constitutions by subjecting the states to international obligations said to be binding on all the state organs. He has prefaced his exposition with a remarkable observation which deserves to be borne in mind. He says:

> "The doctrine of the supremacy of international law over municipal law appeals to the *amour proper* of international lawyers and has its attractions *de lege ferenda.* In *lex lata,* it corresponds to reality on the –always consensual –level of international institutions, in particular international courts and tribunals."

'*Amour proper*' means "Respect for oneself" which easily turns into egoistically pursuit to aggrandize power and status.

It deserves to be noted that there is no 'rule of international law, [that] requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world to-day'[2]; because the "existence of a state, as the legal organization of a community, is determined by the state's internal constitutional order."[3] Let us examine the Art 368 of our Constitution that prescribes the procedure for the amendment of the Constitution. The procedure for effecting Amendments is prescribed under our Constitution. Some of its provisions can be amended by our Parliament in exercise of the constituent power, but some features are so sacrosanct that they cannot be amended at all. One of such features is the sovereign independence of our Judiciary so that the Rule of Law is maintained. Now let us see what our executive government did acting under the pressure from the MNCs and their imperial mentor. Our superior judiciary and Parliament, I say with heavy heart but with full responsibility,

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[2] the International Court of Justice in its *Advisory Opinion in the Western Sahara Case* [ICJ Report (1975) PP. 43-44; also Oppenheim in his *Public International Law* p. 122 fn. 5].

[3] *Oppenheim* p. 130 para 40

are now subjected to certain fetters of servitude. Our superior judiciary might threaten a citizen with its power of contempt, but I hope our great institutions would someday be able to liberate themselves from the fetters to which the executive government has already subjected them. The Article XVI (4) of the WTO Charter has the effect of making the WTO the highest legislative and judicial body. Neither judiciary nor or legislature can go against this direction from foreign fora at which we are not represented through a democratic process. It declares:

> "Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements."

Our Executive Government overrode our Constitution, administratively and secretly, by signing the Uruguay Round Final Act establishing the WTO. What our Parliament could not do in exercise of its constituent power, was done by the Executive through its Treaty-Making Power! In effect, it comes to this that even our Constitution exists at the pleasure of the corporate *imperium*! The corporate *imperium* is, thus, trying to subvert our democratic process through such treaty terms. Those, who work for promoting the corporate interests, can invoke the most undemocratic and obnoxious of the norms of international law which can subject our legislature and courts to subservience.[4] It seems our unworthy generation has betrayed our worthy Constitution, and has exposed even our most sacred institution, Judiciary, to the risk of being trounced in most unseemly way. To accept this state of affairs is not only illegal, immoral, it is clearly sinful

When we become critical of some treaty provisions, our attention is quickly drawn to Article 51 of our Constitution. Article 51 is one of the directive principles of our Constitution. It requires us to promote international law, and to foster respect for our treaty obligations. But we must be realistic in appraising the operative realities of this phase of the market-ruled economic globalization. On scanning the trends of times we can say: men always need some idiotic fiction in the name of which they can face one another. Once it was religion, then it was the States, and now the Market. This has led to a situation that had been very realistically appraised and analysed by Noam Chomsky in his *Hegemony or Survival* (p. 13):

> 'The whole frame-work of international law is just "hot air", legal scholar Michael Glennon writes: 'The grand attempt to subject the rule of force to the rule of law" should be deposited in the ashcan of history –a convenient stance for the one state able to adopt the new non-rules for its purposes, since it spends almost as much as the rest of the world combined on means of violence and is forging new and dangerous paths in developing means of destruction, over near-unanimous world opposition'"

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[4] The International Law Principles pertaining to the 'Responsibility of States for Internationally Wrongful Acts' visits our Parliament and our courts including the High Courts and the Supreme Court to ensure compliance with treaty commitments. . See what *Oppenheim* says in his *International Law*:
Apropos Parliament: " …parliaments… They are nevertheless organs of the state, and if their acts involve injurious international consequences for other states those acts are attributable to the state so as to make it internationally responsible for them." "The earlier view …that the activity of parliament s can never constitute an international delinquency because they do not represent the state in it's in its international relations is regarded by the ILC as obsolete."
Apropos the Courts: "…..Even where there is no irregularity or error of procedure or law a decision by a court may still engage the international responsibility of the state: this would occur, for example, where a judicial decision produces a result which is contrary to the state's treaty obligations..