CHAPTER 15
TREATY-MAKING POWER

SYNOPSIS

Now as through this world I ramble,
I have seen lots of funny men,
Some will rob you with a six-gun,
And some with a fountain pen.

—Woodie Gutterie, USA[1].

"…The right of freely examining public characters and measures and the free communication thereon is the only effective guardian of every other right."

—James Madison

I

1. Treaty-Making Power

In this phase of economic globalization treaties have acquired great importance. In the past treaties were mostly on international plane having minimal direct impact on the common people of a country. Treaties like the treaties of Utrecht and Nystad (1713–14, 1721) did not disturb the rhythm of the common people's life. Even the Triple Alliance and the Triple Entente, which led to the First World War, operated largely on international plane. But the treaty like the Treaty of Versailles had tremendous impact both in domestic sphere and international plane. The treaties that are being made in this phase of economic

[1]. Quoted in the *Report of Peoples Commission on GATT* p. 178.

globalization have a direct impact on almost every aspect of national life. Hence the time has come when common man should think about the ambit and reach of the treaty-making power. This is more important in a country with a written constitution, which creates the organs of the State, and subjects them to a discipline of law and the Constitution. We are now faced with treaties like the Uruguay Round Final Act, which mandates a continuing obligation to negotiate to reach agreements involving " fundamental questions about Indian federalism, the welfare State, fundamental rights and the functioning of Indian democracy."[2] . Tax treaties operate in the intra-domestic spheres of the countries, and affect their resources, besides raising the issues of equity and equality *inter se* the citizens and the foreigners.

In the PIL, which this author had filed before the Delhi High Court, he had sought judicial declaration on the treaty-making power. Though the PIL related to income tax, yet broad-spectrum arguments were made so that the Court could declare the law comprehensively on the point for the first time in the post-Constitution era. The High Court in *Shiva Kant Jha & Anr v. Union of India*[3] (which, after the appellate judgment by the Supreme Court is referred only as *Azadi Bachao*) held:

(a) The formation of a tax treaty as a matter of political *arrangement* could not run "counter to the provisions of section 90 of the Income Tax Act."[4]

(b) "The validity of the impugned circular is to be judged having regard to the limitations contained in section 90 of the Income-tax Act and not other wise."

(c) Section 90 of the Income Tax Act does not confer an unguided or unbridled power. As the purpose of entering into a tax treaty is ***avoidance of double taxation*** the power in terms of section 90 is to be considered having regard to that.

(d) In "a treaty which is entered into in terms of Article 73 of the Constitution of India the political expediency may have a role to play but not when the same is done under a statutory provision."

When the Union of India preferred an appeal before the Supreme Court the author, as the respondent in that case, felt that now there was a god-sent opportunity for obtaining from the apex court a sound decision on the Central Government's treaty making power under our constitutional parameters. But, with

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[2]. *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar. at p. 144 [hereinafter referred as *Report of the Peoples' Commission on GATT*].

[3]. 256 ITR 563.

[4]. The Hon'ble Court quoted at length from the judgment of the Supreme Court of India in *S. R. Chaudhary v State of Punjab* wherein the apex Court observed, *inter alia*, the following:
"There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental power." "Constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency. We should not allow erosion of principles of constitutionalism.".

respect it is submitted, that the Court did not catch the opportunity by its forelock. It rather made a short shrift of the matter. The decision of the Court in *Azadi Bachao*, to the extent it goes, does not improve upon the dicta in some old judicial decisions given under the influence of the British constitutional history.

The author intends to examine in this chapter the treaty-making power of the Central Government. It would be followed in the next two chapters by a short illustrative exposition on a treaty in its generic sense (on the Uruguay Round Final Act), and a treaty of special character (Indo-Mauritius Double Taxation Convention.).

II

In *Azadi Bachao* the Division Bench of the Supreme Court stated the conditions for the exercise of treaty-making power in these words[5]:

> "The power of entering into a treaty is an inherent part of the sovereign power of the State. By Art. 73, subject to the provisions of the Constitution of India, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for entry into an international treaty in time either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention, or treaty incur obligations, which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected. No legislative measure is needed to give effect to the agreement or treaty.[6]"

2. Inherent Part of Sovereign Power

The Court has held that the power of entering into a treaty is an inherent part of the Sovereign power. The view of the Court, it is submitted, is not correct. The Executive under the Constitution of India is a creature of the Constitution, and, by way of constitutional logic, possesses no "inherent" sovereign power. David M. Levitan in his article on "The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory"[7] examines whether under the U.S Constitution there is any *inherent power*. The first and the concluding paragraphs of the article deserve attention as we share the parameters of a written constitution with the United States:

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5. (2003) 263 I T R 706, 721.
6. *Maganbhai Ishwarbhai Patel &Ors v. UoI*, (1970) 3 SCC 400.
7. *The Yale Law Journal* Vol. 55 April, 1946, No. 3.

"The United States has now joined the other nations of the world in a broad program of international co-operation. Since this country is governed under a written constitution, as interpreted by the courts, examination of the scope of authority of the national government in the field of foreign affairs is appropriate. Questions of constitutional competence have already been raised. The most recent authoritative and complete exposition of the legal scope of the foreign relations power is to be found in Mr. Justice Sutherland's opinion in the case of *United States v. Curtiss-Wright Export Corporation*. Mr.Justice Sutherland wholly relied on the Curtiss-Wright decision in his opinion in *United States v. Pink*. It constitutes for the present the official legal view on the external powers of the federal government, and is, therefore, worthy of careful analysis. The analysis of the legal meaning of the opinion in turn suggests an examination of the origin and validity of the theory on which Mr.Justice Sutherland rests his decision—the rationale of the opinion.

"Regarding the "inherent" powers doctrine, it is well to add, that though the existence of such powers has sometimes been referred to by the courts and by writers on public law, there is little justification for the perpetuation of such a theory. Its introduction was contrary to the spirit of a written constitution. Whether or not a written constitution is the most desirable basis for a government, as long as we live under such a document there appears little room for a theory of "inherent" powers. Instead a liberal and broad interpretation of such provisions of the Constitution as the general welfare clause is more in harmony with our philosophy that the Constitution limits governmental authority. The argument that the interpretation and reinterpretation of constitutional phrases in the light of modern conditions makes little more than a fiction out of the notion that we are living under the Constitution, will not be denied. Our government should continue to evolve to meet the ever-changing needs of the people within the framework of the general philosophy of a supreme Constitution with some specific prohibitions. The Sutherland doctrine, however, makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol."

The view of our Supreme Court in *Azadi Bachao* does not conform to our Constitution whereunder if any organ of the government transgresses constitutional limitations it acts *ultra vires.* Arbitrary power and the rule of the Constitution cannot both exist together. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought in conflict[8]. This view is based on a mandatory norm recognized by international law as would be evident from what Oppenheim states in his *International Law*:

"Constitutional restrictions: It is well established as a rule of customary international law that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it, since the state's organs and representatives must have exceeded their powers in concluding such a treaty. Such constitutional restrictions take various forms."

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8. Southerland in *Jones v. Securities and Exchange Commission*, 298 U.S, 1,24, (1936).

Lord McNair states legal position in the same way. But the first point in his "Conclusion" deserves a specific notice because of its contextual relevance: to quote—

> "A treaty which is made on behalf of a State by an organ not competent to conclude treaties or that kind of treaty, or which fails to comply with any relevant constitutional requirements, such a consequent of a legislative organ, is, subject to what follows, not binding upon that State…."[9]

"In International Law, nations are assumed to know where the treaty-making power resides, as well as the internal limitations on that power.[10] J. Mervyn Jones in his article on "Constitutional Limitations on Treaty-making Power" examines the effect of constitutional limitations.[11] Two important English writers support the view that constitutional limitations are completely effective under international law[12]. It is time to give democratic orientation to international law.[13] *The New Encyclopedia Britannica*[14] aptly observes:

> "The limits to the right of the public authority to impose taxes are set by the power that is qualified to do so under constitutional law... The historical origins of this principle are identical with those of political liberty and representative government—the right of the citizens."

It would be contrary to our Constitution to grant the Executive "extra-constitutional powers". David M. Levitan has put it felicitously when he observed: "Government just was not thought to have any "hip-pocket" unaccountable powers".[15] . Levitan observes:

> "The most significant aspect of the Curtiss-Wright decision is that it gave authoritative and respectable status to the doctrine that the national government possesses powers completely outside of those in any way assigned to it by the Constitution. Generally speaking, this means that the doctrine that the United States is a constitutionally limited federal state applies only to purely domestic matters and that general limitations arising out of the nature of the American system are not applicable in the field of foreign affairs. There is even considerable basis for interpreting the Curtiss-Wright decision to mean that there are no substantive limitations on the scope of the foreign relations power; that is, since it is an "extra-constitutional" power, extra-constitutional acts cannot be un-constitutional. Though Mr. Justice Sutherland does include a warning that the government could not exercise the power in manner specifically prohibited by the Constitution – "a power which…like every other governmental power must be exercised in subordination to the applicable provisions of the Constitution" – this limitation appears to affect only the procedural aspects of treaty making. The significance of Mr. Justice Sutherland's

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9. *McNair*, pp. 76-77.
10. Seervai's *Constitutional Law of India*, Vol- I, pp. 306-307.
11. [1941] 35 *American Journal of International Law*, p. 462.
12. Hall and Oppenheim.
13. Schuckking and Wehberg refereed by Charles Fairman in his article 30 A.JIL 131.
14. Vol. 28 p.402.
15. *The Yale Law Journal*, Vol. 55 April, 1946, No 3 p. 480.

> interpretation of the nature and scope of the external powers of the national government is found not so much in its novelty or practicable application as in its sharp departure from the accepted canons of constitutional interpretation and assumptions as to the nature of the American system of government."

The theory of inherent sovereign power is anachronistic. Examining the concept of Sovereignty *Oppenheim* observes:

> **"The problem of sovereignty in the 20th Century.** The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein."

Under our constitutional framework the question of inherent power does not arise. The right question is: whether the government possessed the legal power to do what it has done. Ours is a government under the constitutional limitations, and hence, by inevitable logic of law, under the legal discipline imposed by parliament and the courts of law. Prof. Laski observed:

> "We have to make a functional theory of society in which power is organized for ends which are clearly implied in the materials we are compelled to use. The notion that this power can be left to the unfettered discretion of any section of society has been reveled as incompatible with the good life. The sovereignty of the state in the world to which we belong is as obsolete as the sovereignty of the Roman Church three hundred years ago". [16]

All wielders of public power under our Constitution, as also under the U.S. Constitution, are the donees of power with a closely structured grammar of constitutional discipline governing its exercise [surely only for public good]. This shade of the blue in the meaning of this word, *inherent*, finds expression in the usage we find in J.A. Michener: "The little building has an inherent poetry that could not have sprung entirely from the hands of an architect." The Executive under our Constitution has no inherent power that had once upon a time been claimed, to their misfortune, by the Stuarts in England, Chancellor Bismarck in Germany before the First World War, and Hitler on the wreck of the Weimer Constitution during the interregnum between the two World Wars. The Executive's this proclivity was noted by Hidayatullah J [as he then was] when he warned that the executive 'can use the legislature as a means of securing in the laws which it desires" and cited the example of Hitler in Germany[17]. Denial of inherent power to the Executive is designed to achieve an important constitutional mission thus described in *The New Encyclopedia Britannica*[18]:

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[16]. *Ibid*, p. 102.
[17]. *Golaknath v. Punjab*, AIR 1967 SC 1643 at p.1698.
[18]. Vol.28 p.402.

> "The limits to the right of the public authority to impose taxes are set by the power that is qualified to do so under constitutional law. In a democratic system this power is the legislature, not the executive or the judiciary. The constitutions of some countries may allow the executive to impose temporary quasi-legislative measures in time of emergency, however, and under certain circumstances the executive may be given power to alter provisions within limits set by the legislature. The legality of taxation has been asserted by constitutional texts in many countries, including the United States, France, Brazil, and Sweden. In Great Britain, which has no written constitution, taxation is also a prerogative of the legislature. The historical origins of this principle are identical with those of political liberty and representative government – the right of the citizens."

The theory of inherent power emanating from Sovereignty is on account of not noticing a fundamental difference between the British Constitution and the Indian (or the U.S. Constitution). In the U.K., seen in the historical perspective, the Crown had, once upon a time, all the powers conceivable. It lost many of such powers, in course of its grand constitutional history, to Parliament and the Courts so that people could enjoy the fruits of democracy under the Rule of Law. But it still retains powers, which Parliament or the Courts have not chosen to deprive it of. We call this "prerogative power". Under our Constitution no such cobwebs of the past survive. In the U.K the Crown is still the inheritor of *inherent powers* not yet deprived of; in India the Executive would sink or swim in terms of the Constitution.

Modern International Law and International Institutions have made great strides towards making the countries of the world good neighbours[19]. Human rights have received wide recognition even at the international plane. Our world is said to have shrunk to become a global village. In this sort of a world invocation to sovereignty is meaningless.

It is respectfully submitted that the Hon'ble Court should have considered the different legal parameters of treaties cast in different protocols. Treaties like the *Treaty of Vienna*, or the *Treaty of Versailles* are made after trampling down the Constitutions of the vanquished states. Such treaties are instances of the exercise of *Sovereign power.* Our Supreme Court in *Azadi Bachao* was not concerned with an international treaty like the Convention on Diplomatic Immunities. It was concerned with a tax treaty. It is most respectfully submitted that by overlooking juristic and pragmatic differentia *inter se* the different types of treaties the Hon'ble Court committed both mistakes of law and fact. There are several types of treaties. *The New Encyclopedia Britannica* classifies them in six categories in a more practical way according to their object: (1) political treaties; (2) commercial treaties; (3) constitutional and administrative treaties; (4) treaties relating to criminal justice; (5) treaties relating to civil justice; and (6) treaties codifying international law. They have different protocols and different legal effects and incidents.

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19. Misuse of a tax treaty violates the Standard of Economic Good Neighbourliness. [G. Schwarzenberger in his *Manual of International Law* states (at p. 111)].

The perusal of the Judgment in *Azadi Bachao* would show the Court is not consistent in its expressions. The paragraph cited in Part II of this Chapter suggests that even a treaty relating to the avoidance of double taxation is done in exercise of power under Art. 73 of the Constitution. But elsewhere in the said the Judgment the Hon'ble Court observes:

> "In our view, the contention is wholly misconceived. Section 90, as we have already noticed (including its precursor under the 1922 Act), was brought on the statute book precisely to enable the executive *to negotiate* a DTAC and quickly implement it."[20] [Italics *supplied*]

Again in the said Judgment this Hon'ble Court states:

> "…… we are of the view that section 90 enables the Central Government to enter into a DTAC with the foreign Government."

"Negotiation" in the matter of treaty making is done at diplomatic level. If section 90 gives this power to negotiate then the Court should have held that in India a tax-treaty is done in exercise of power under Section 90 of the Act, not under Art 73 of the Constitution. In the second extract there is a reference to the creative and constitutive power under Section 90 of the Act. But despite contradictions in the judicial view of the exercise of Treaty-making power, it is clear:

(a) that this Hon'ble Court considers that the entire Treaty-making power is in the executive domain under Art 73 of the Constitution; and

(b) that the effect of Section 90 of the Income-tax is nothing more than implementation of the tax-treaty existing *ab extra* in the domestic jurisdiction.

III

3. British Model adjusted with our constitutional provisions

In *Gujarat v. Vora Fiddali*[21], the Supreme Court held that in India treaties occupy the same status, and adopt the same treaty practice as in the United Kingdom. The British Parliament that enacted G.I. Act, 1935 did not embody the American view of treaties in it. The G.I. Act continued the existing law, 1935 by the Indian Independence Act 1947, and by our Constitution.[22] This Hon'ble Court observed:

> "…the British practice that has prevailed in this country has not proved in actual practice to lead to injustice, but has proceeded on a just balance between the

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[20]. [(2003) 263 I T R 706, 726].
[21]. AIR 1964 SC 1043.
[22]. *Gujrat v. Vora Fiddali* (1964) AIR SC 1043 [B. P. Sinha, C.J.I., K. Subba Rao, M. Hidayatullah, J. C. Shah, Raghubar Dayal, N. Rajgopal Ayyangar and D J. R. Mudholkar, JJ].

> acquired rights of the private individual and the economic interests of the community, and therefore, there is nothing in it so out of tune with notions of propriety or justice to call for its rejection"[23]

But H.M. Seervai missed to mention that as our government works under constitutional limitations, our government cannot transgress the constitutional limits, and must promote the constitutional commitments. However, as the British practice is a general model for us, a short synopsis of the British provisions on the point deserves to be drawn up for proper comprehension of the subject.

4. The British Practice

The British practice is called a dualist approach under which "the constitution of the state accords no special status to treaties; the rights and obligations created by them have no effect in domestic law *unless legislation is in force to give effect to them.*"[24] An eminent modern authority has thus explained the rationale of this approach that is relevant under our constitutional system:

> "This approach reflects, on the one hand, the constitutional power of the executive generally to bind itself to treaty without the prior consent of the legislature and, on the other hand, the supreme power of the legislature under the constitution to make laws. In the United Kingdom, this division of powers was a product of the seventeenth-century constitutional struggle between the King of England and Parliament. This resulted in the power to legislate being almost completely vested in Parliament, yet with the Crown retaining in common law certain 'royal prerogatives' (the right to act without the consent of Parliament), which included the conduct of foreign relations and the making of treaties.[25] This division of powers was inherited by most former colonies of the United Kingdom, the United States being the principal exception."[26]

In *Maganbhai Ishwarbhai Patel v. Union of India*[27] our Supreme Court states the typical British view, as articulated by Lord McNair, in these words:

> "Lord McNair gives the settled law of modern times. According to him in the United Kingdom the concurrence of Parliament must always be obtained except in a very small number of cases. He opines that if the Courts are required to assist in the implementation, a law must obviously be found for Courts to act only in accordance with law. If a law is obligatory obviously Parliament must have a say because no law can be passed except by Parliament. However, even if a law is required, and yet the Crown enters into a treaty, the Courts take the act as final unless a law stands in the way. In other words unless there be a law conflicting with the treaty, the treaty must stand."

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[23]. at p. 1061.
[24]. Anthony Aust's *Modern Treaty Law and Practice*, p. 150.
[25]. See O'Connell, pp. 216-17; Wade and Bradley, *Constitutional and Administrative Law* (10th Edn, 1985), p. 245.
[26]. Anthony Aust's *Modern Treaty Law and Practice*, pp. 150-151.
[27]. AIR 1969 SC 783.

Most accurate and comprehensive account of the British practice is given by Starke who points out that under the British practice a distinction is maintained between (i) customary rules of international law, and (ii) rules laid down by treaties. He states law with remarkable brevity and accurateness thus:

"(i) The rule as to customary international law according to the current of modern judicial authority is that customary rules of international law are deemed to be part of the law of the land, and will be applied as such by British municipal courts, subject to two important qualifications:

(a) That such rules are not inconsistent with British statutes,[28] whether the statute is earlier or later in date than the particular customary rule concerned.

(b) That once the scope of such customary rules has been determined by British courts of final authority, all British courts are thereafter bound by that determination, even though a divergent customary rule of international law later develops.[29]

These qualification must be respected by British municipal courts, notwithstanding that the result may be to override a rule of international law; the breach of such a rule is not a matter for the courts, but concerns the executive in the domain of its relations with foreign powers.[30]…

(ii) The British practice as to treaties, as distinct from customary international law, is conditioned primarily by the constitutional principles governing the relations between the executive (that is to say, the Crown) and Parliament. The negotiation, signature, and ratification of treaties are matters belonging to the prerogative powers of the Crown. If, however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval." [31]

But the Prerogatives of the Crown are under limitations. Despite the specifics of the unwritten and evolutionary constitution of the U.K. the treaty-making power of the Crown is not without limits. The Crown's power of treaty making and limitations thereon has been thus stated in Keir & Lawson's *Cases in Constitutional Law:* [In order to make quotation from the book short only propositions

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28. See *Mortensen v. Peters*, (1906) decision of the High Court of Justiciary of Scotland, 8 F 93, and *Polities v. The Commonwealth*, (1945) decision of the High Court of Australia, 70 CLR 60.

29. See *Chung Chi Cheung v. R* [1939] AC 160 at 168, noting, however, The Berlin [1914] p 265 at 272. This principle was not however accepted by Lord Denning MR. in *Trendtex Trading Corpn v Central Bank of Nigeria*, [1977] QB 529, [1977] I All ER 881.

30. See *Polities v. The Commonwealth*, note 28 above.

31. JG Starke's *Introduction to International Law*, 10th ed. pp. 77-82

directly relevant to the points under consideration have been culled out and pieced together.]

> "There is no doubt that the Crown has full power to negotiate and conclude treaties with foreign states, and that, the making of a treaty being an act of State, treaty obligations cannot be enforced in a municipal court… Can the Crown bind the nation to perform any and every treaty, which it makes? In general it seems that the Crown makes treaties as the authorized representative of the nation. There are, however, two limits to its capacity: it cannot legislate and it cannot tax without the concurrence of parliament".

Limitations on the Prerogative of the Crown are now well recognized. Lord Denning observed in *Laker Airways Ltd v. Department of Trade*[32]*:*

> "Much of modern thinking on the prerogative power of the executive stems from John Locke's treatise, True End of Civil Government, which
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> I have read again with much profit, especially chapter 14 'of Prerogative[33]' It was the source from which Sir William Blackstone drew in his Commentaries[34], and on which Lord Radcliffe based his opinion in *Burmah Oil Co (Burma Trading) Ltd v. Lord Advocate*[35]. The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations; but it can set limits by defining the bounds of the activity; and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution. It derives from two of the most respected of our authorities. In 1611 when the King, as the executive government, sought to govern by making proclamations, Sir Edward Coke declared: 'The King hath no prerogative but that which the law of the land allows him': see the Proclamations Case[36]. In 1765 Sir William Blackstone added his authority[37].

Quite recently the House of Lords set a limit to the war prerogative when it declared that, even in time of war, the property of the British subject cannot be requisitioned or demolished without making compensation to the owner of it: see *Burmah Oil Co(Burma Trading) Ltd v. Lord Advocate*[38]. It has also circumscribed the treaty prerogative by holding that it cannot be used to violate the legal rights of a British subject, except on being liable for any damage he suffered: see *Attorney-General v. Nissan*[39].

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[32]. [1977] 2 All ER 182 at 192-193.
[33]. 1764 Edn. Pp 239-348.
[34]. Commentaries (8th Edn, 1778), vol I,p 252.
[35]. [1964] 2 All ER 348 at 365.
[36]. (1611) 12 Co Rep 74 at 76.
[37]. Commentaries (8th Edn, 1778), vol.I, p. 252.
[38]. [1964] 2 All ER 348.
[39]. [1969] 1 All ER 629 at 637.

"Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive. At several times in our history, the executive has claimed that a discretion given by the prerogative is unfettered: just as they have claimed that a discretion given by a statute or by regulation is unfettered. On some occasions the judges have upheld these claims of the executive, notably in *R. v. Hapden, Ship Money Case*[40], and in one or two cases during the Second World War, and soon after it, but the judges have not done so of late. The two outstanding case are *Padfield v. Minister of Agriculture, Fisheries and Food*[41], and *Secretary of State for Education and Science v. Metropolitan Borough of Tameside*[42], where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers, so as to see that they are used properly, and not improperly or mistakenly. By mistakenly, I mean under the influence of misdirection in fact or in law. Likewise, it seems to me that, when discretionary powers are entrusted to the executive by the prerogative—in pursuance of the treaty-making power—the courts can exa mine the exercise of them so as to see that they are not used improperly or mistakenly."

5. Deductions From The British Practice

From the British practice the following two express limitations on the Executive's Treaty-making power clearly emerge:

(a) The Executive in the U.K, over the course of its constitutional history, lost all powers over taxation except what is granted specifically within the frontiers prescribed in the statute. So a tax treaty is in the U.K under specific statutory power granted under Section 788 of the United Kingdom's Income and Corporation Taxes Act 1988. *The sub-Section (3) of this Section gives a tax treaty a specific override on the statute.*

(b) The ambit of the executive power pertaining to a subject of legislation gets eclipsed if the subject matter is already occupied by a Parliamentary enactment (as ruled in *Laker Airways Case* [1977] 2 All ER 182 CA)]. *Taxation is a legislatively occupied field*.

IV

Our Court, in *Azadi Bachao*, relied on the ideas pertaining to treaty making power as set forth in *Maganbhai's* Case without considering that in that case the observations were casual *obiter* as the issue to be decided did not require exposition of law on the point. The Petitioners did not dispute that the Union Government could enter into a covenant to be bound by the decision of an International Tribunal, and that its award would be binding on India; they merely contended

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[40]. (1637) 3 State Tr 826.
[41]. [1968] 1 All ER 694.
[42]. [1976] 3 All ER 665.

that a constitutional amendment was necessary, since the award affected the territorial limits of India. In *Azadi Bachao* this issue was at the heart of the matter.

In *Maganbhai's* Case Hidayatullah, C.J. observed, "Lord McNair gives the settled law of modern times." In his concurring judgment Shah, J also states the view as stated by McNair super-adding references to certain entries in the 7th Schedule to the Constitution of India. In *Maganbhai's* Case neither the majority nor the concurring judgment considered the aspects of constitutional limitations affecting the very *capacity* of the organ (here the Executive) to represent the State at the international level in the matter of incurring obligations on behalf of the State[43]. This Hon'ble Court should have taken into account in determining modern law on treaties the exposition in *Oppenheim* who describes "Constitutional restrictions"[44] under a written constitution providing Judicial Review. Even Lord McNair in later edition of his Treatise deals with the constitutional limitations on the Treaty-making power.

Oppenheim states: " For the United Kingdom, constitutional restrictions do not play a prominent part in the conclusion of treaties". Treaties are concluded in exercise of royal prerogative in matters of foreign affairs. The exercise of this prerogative power cannot be challenged in the English court.[45] In the U.K. all powers concerning taxation went out of the executive domain under the Bill of Rights[46]: hence it went out of the province of the prerogative power of the Crown. What went out of the province of the Crown could not be the subject of the exercise of power even at international plane. The principle of *ex nihilo* applies. Under the Constitution of India analogous situation emerges in view of Articles 265, 109, 110 of the Constitution. But what was excluded by the constitutional statutes in the U.K. and under the Constitution in India went *ipso jure* out of the province of the Executive power. Hence it affected the capacity of the representing State organ at the international plane.

Both in India and the U.K only that much power the Executive can exercise in the matter of taxation as is specifically granted to it, and on the terms of the grant strictly construed. It follows by way of inevitable corollary that if there is no legislative grant of power, the Executive, neither in India nor in the U.K., can enter into tax agreements even at the international plane as the Executive can not represent the State at international forum to incur international obligations sans powers pertaining to taxation. In deference to this constitutional position both in India and the U.K., the Parliament has granted specific power to enter into tax-agreements vide Section 90 of the Income-tax Act, 1961 and Section 788 of the United Kingdom's Income and Corporation Taxes Act, 1988. In India Section 90

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43. Lord McNair, Law of Treaties, 1961 ch iii "Constitutional Requirements" pp. 58-77.
44. *Oppenheim's International Law* 9th ed Section 636 pp. 1285-1288.
45. *Ibid* p. 1287
46. And the Bill of Rights states:
'That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

authorizes the Central Government to enter into an agreement on the prescribed conditions. In the U.K. the House of Commons, having exclusive control over taxation in view of Parliament Act 1911, maintains full legislative control in view of sub-Section (10)[47] of Section 788. If the Central Government exceeds the power granted under the terms of the statute, the violation of constitutional restrictions is manifest, and it must be taken to be case where "the state's organs and representatives must have exceeded their powers in concluding such a treaty."[48] Invalidity, and inability to perform are juridically two different things.

V

6. Treaty making power under our constitutional polity

In India, as K. Ramaswamy, J said in *S. R. Bommai v. Union of India*[49] "The State is the creature of the Constitution". In India the executive derives power to enter into treaties from Art. 73 of the Constitution. The Union List of the Seventh Schedule contains matters, which are within the legislative competence of Parliament (Art. 246). In exercising such powers the zone of the executive operation is co-terminus with the expanse of legislative power in view of the entries 13 and 14 of List I of the Seventh Schedule. The exercise of these derivative powers is themselves under constitutional limitations. This treaty making power is to be read with Art 253 of the Constitution, which allows Parliament to make laws implementing a treaty notwithstanding the fact that the subject matter of the treaty is contained in List II of the Seventh Schedule containing subjects within the legislative competence. But the executive power is, as per Art 53, vested in the President who is bidden to exercise it in accordance with the Constitution. Treaty making power must conform to the constitutional limitations Even Art 253 is under constitutional limitations. It contemplates "any treaty, agreement or convention. If the executive enters into a treaty, agreement or convention in breach of the basic features of our Constitution, or the Constitution's mandatory mandate, then such an agreement, treaty or convention is constitutionally valid: hence domestically inoperative and non est. Our courts, as the creatures of the Constitution, must uphold the Constitution by declaring such a treaty, agreement or convention bad. This will help the executive to renegotiate the terms of the treaty, agreement or convention on the plea that in India it has no option but to conform to the Constitution. Besides, this will help our citizenry to form their attitudes towards such international instruments with domestic impact. They may even declare that the people of the country reserve rights to dissociate themselves from any act done in pursuance to such instruments, including rights to disown any obligation even if incurred by the executive at international plane. Other

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47. "(10) Before any Order in Council proposed to be made under this section is submitted to Her Majesty in Council, a draft of the Order shall be laid before the House of Commons, and the Order shall not be so submitted unless an Address is presented to Her Majesty by that House praying that the Order be made."
48. *Oppenheim* p. 1265.
49. AIR 1994 SC1918.

aspects of the matter would come up for consideration in the chapter dealing with the Uruguay Round Final Act.

Ours is a written constitution under which all the organs of the polity are the creatures of written constitution: hence bound by its limitations, both express and implied. Oppenheim's view that has already been mentioned has made out this point. In the United States if a treaty, despite the fact that it is a supreme law under Article VI, cl. 2 of the Constitution[50], can be hit by the entrenched provisions of the Constitution. India, like the United States, is under Constitutional limitations, as under Article 73 of the Constitution, the executive power of the Union is to be exercised "subject to the provisions of this Constitution". In the context of the US Constitution Justice Homes in *Missouri v. Holland*[51] considered various aspects of Constitutional limitations including whether the impugned treaty was forbidden by "some invisible radiation from the general terms of the Tenth Amendment." In our country a similar note was struck in *Ajaib Singh v. State of Punjab*[52] where the Court held:

> "Neither of Articles 51 and 253 empowers the Parliament to make a law which can deprive a citizen of India of the fundamental rights conferred upon him".

From the terms of the Article 73 of the Constitution of India it expressly follows that the power of framing Double Taxation Avoidance Agreements is subject to the limitations ensuing from Article 265 of the Constitution of India. As only law can levy the income tax, *exemption from its incidence* can be granted only through some legislative provisions, and not through executive power delegated to the Central Government under section 90 of the Income tax Act. Describing these limitations H. M. Seervai states:

> "The power to make treaties or enter into binding agreements with other nations, has an international as well as an internal aspect. In International Law, nations are assumed to know where the treaty making power resides, as well as the internal limitations on that power. As regards the internal aspect of a treaty or agreement, the Constitutional limitations, if any, on the treaty making power would come into play. For example, in the United States although it is for the President to negotiate a treaty, his power is to be exercised on the advice and with the consent of the Senate. If the Senate refuses its consent, or gives it subject to conditions, then the treaty does not become a law of the United States as provided by Art.6, cl.2, and would have no operation in the United States, although it may involve a breach of the treaty with foreign nation. Again, where a treaty imposes an obligation which affects the rights of the inhabitants of a Sovereign State, say, India, the treaty would have to be implemented by a law, and the same would be the position if the treaty involved

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50. Article VI, cl. 2, states that:
"all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding. Thus, all treaties made under the authority of the United States are to be the supreme law of the land and superior to domestic tax laws".

51. 252 US 416, 64 L.Ed. 641 (1920).

52. AIR 1952 Punj. 309 at 319.

> expenditure of public funds because these can only be appropriated in the manner provided for in the Constitution. Although the power to enter into treaties and implement them is in terms absolute, having regard to the fact that we have a written federal Constitution, a Court would imply limitations on that power as they have been implied in the United States although no treaty entered into by the United States has been held constitutionally void. A treaty, for instance, cannot make provisions which would, in effect, amend the Constitution, or give up the form of Govt. set up by the Constitution, for it could not have been intended that a power conferred by the Constitution should, without an amendment of the Constitution, alter the Constitution".

Our Supreme Court in *Azadi Bachao* held: "The power of entering into a treaty is an inherent part of the sovereign power of the State." The Hon'ble Court has yoked together two heterogeneous constitutional principles, an analogue of which can be found only in Hobbes' *Leviathan:* "The Leviathan or commonwealth is 'an artificial man', sovereignty is its soul, the magistrates are its joints, 'reward and punishment, by which fastened to the seat of the sovereignty every joint and member is moved to perform his duty, are the nerves that do the same in the body natural' "[53]

Our Supreme Court has stated the following in *Azadi Bachao*, which does not seem to accord with our Constitution:

> "Our Constitution makes no provision making legislation a condition for entry into an international treaty in time either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution."

The Court's view is founded on the British view, which is no longer accepted even in the U.K. in this rigid classical form. This view is founded on the following two ideas:

(a) the Executive in our Constitution can exercise plenary power, untrammeled by the law or the Constitution of India, in matters of treaty-making at the international plane; and

(b) the Executive operates under the limitations under the municipal law alone as without legal or constitutional authorization the terms of the treaty cannot operate domestically to the prejudice of the rights and interests of the citizens, and cannot have effect de hors the law of the land.

Lord Atkin in *A.G. for Canada v. A.G. of Ontario* stated this typical British view[54] in the context of a rule applicable within the British Empire. His observations of Lord Atkin in *Attorney General for Canada v. Attorney General for Ontario*[55], which emanated from Canada, were quoted with approval both in the

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53. *The Oxford Illustrated History of English Literature* ed. Pat Rogers 195.
54. 1937 AC 326 a p. 347 = (AIR 1937 PC 82 at p. 86).
55. AIR 1937 PC 82.

majority judgment delivered by Chief Justice Hidayatullah and in his concurring judgment by Justice Shah in *Maganbhai v. Union of India*[56] but *should* be read in the context of the facts of that case. The Privy Council, per Lord Atkin, observed:

> "Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the functions of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose legislature possesses unlimited powers the problem is simple. Parliaments will either fulfill or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority: in a federal State where legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the classes of subject matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures: and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible: but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures."

The Privy Council in this case stated two things:

(a) It stated the typical British approach in this case emanating from the Canadian jurisdiction as the Preamble to the British North America Act, 1867 stated that:

> "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom;"

Art. 9 states:

> 'The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen."

(b) It held that legislation implementing an international convention was void as it contravened Sections 91 and 92 of the British North America Act, 1867.

Lord Atkin states a classical view when he drew a distinction between (1) the formation, and (2) the performance of the obligations constituted by a treaty. Under the British Constitution the Crown is not a creature of the British Constitution.

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56. AIR 1969 SC 783 (para 30 & 81).

The British constitutional history is an expanded metaphor of the struggle conducted over centuries in the name of people against the absolute power of the Crown. Even this day there is nothing wrong in saying that the Crown has all the powers conceivable except which it lost to Parliament and the Courts in course of the country's grand and majestic constitutional history. It is, hence, understandable to think of inherited and inherent power. The Crown does treaty in exercise of prerogative power as it concerned the Crown's foreign affairs not of much consequence till the beginning of the 20th century. The Crown had all the conceivable power at the international plane. Hence the formation of a treaty at international plane was wholly in the Executive's province. In India the Executive possesses no extra-constitutional power. As a creature of the Constitution it is subject both in the matter of the *formation* of a treaty or *performamce of obligation* to the limitations placed by the Constitution and the law. Whether a member of the executive functions in Delhi, or Detroit it must conform to the Rule of Law.

In *Azadi Bachao* the Court has observed:

> "The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention, or treaty incur obligations which in international law are binding upon the State".

This Court has gone wrong for the following reasons:

(1) It is recognized that the principal representative of the State is its head. He has plenary powers to commit his State, but this power operates under certain limitations: viz.

(a) Obligations *de hors* Art. 103 of the Charter of the United States establishing the supremacy of the obligations under the Charter over any other contractual agreement whether past or future, and whether between members inter se or with non-member states.

(b) "Every state possesses treaty-making capacity. However, a state possesses this capacity only so far as it is sovereign.[57] But what can be done in exercising that capacity is governed by constitutional restrictions. The rule of *ultra vires* is at work in international constitutional and international law Also. *Oppenheim* has stated this thus:

> **"Constitutional restrictions:** It is well established as a rule of customary international law that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it, since the state's organs

[57]. Oppenheim p. 1217.

and representatives must have exceeded their powers in concluding such a treaty…."[58]

(c) The States have plenary power yet the Court of Justice of the European Communities has held that in certain circumstances the member states have ceased to have any right to conclude treaties with third countries, the European Economic Communities alone having the right to do so in those circumstances.[59]

(d) International law permits no derogation from *jus cogens*. Art 53 of the Vienna Convention states that if a treaty which at the time of conclusion conflicts with peremptory norm of international law it would be void. The doctrine that unravels fraud is as would be shown, *jus cogens* as it is a peremptory norm in the civilized jurisprudence. "Because of the importance of rules of *jus cogens* in relation to the validity of treaties, Article 66(a) of the Convention provides for the compulsory jurisdiction of the International Court of Justice (unless the parties agree to arbitration) over disputes concerning the interpretation or application of Article 53."[60]

Willoughby has pointed out that the foreign states are held to have Knowledge of the location of treaty making powers. [Willoughby's The *Constitutional Law of the United States*, p. 528,] H.M. Seervai thus states the effect of the elaborate discussion by Willoughby: "In International Law, nations are assumed to know where the treaty-making power resides, as well as the internal limitations on that power". [Seervai's *Constitutional Law of India*, vol- I, pp. 306-307]. This rule puts all the contracting parties under public notice of the manifest constitutional limitations. It is a manifest limitation under our Constitution as much under the British Constitution that a treaty affecting taxation cannot be done in exercise of power under the executive domain.

7. Some new aspects of the matter that have gone unnoticed

The conventional view that the Executive represents the State in exercise of unbridled sovereign power of the state requires a re-consideration for the following reasons:

(i) In this phase of economic globalization the States through their executive organs may not only enter into treaties at the international plane, they may even evolve certain rules of customary international law,

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58. Oppenheim's *International Law* – Vol.1 Part 2 & 4 pg.1288 – para 636.
59. *Ibid* 1219.
60. *Ibid*, 1293.

which may go counter to the constitutional fundamentals. The executive under the pressure of the global gladiators, international economic institutions, or mighty power-wielders may be enticed, or made to buckle, to accept certain unconscionable terms of treaties. The corporate *imperium* and the mighty power-wielders at the global level are not likely to show respects for the constitutional limitations on the executive powers. Their spokesmen keep on bragging about the binding norms of international norms to coerce the parties to comply with the terms of the unequal and unfair treaties.

(ii) In this phase of economic globalization it is said that ours is the world of great international interdependence and solidarity in which international law must be given a primacy. This plea suits most the market forces of the economic globalization. It is not difficult for the corporate *imperium* and their mentors to make the executive governments accept their terms through pressure, persuasion and bribery. In this sort of world an uncritical acceptance of such pleas would be injurious to the interests of common people. Ultimately common people would have to bear the heat and burden of all the deeds the executive does whether in Mauritius or Marrakesh. If we do not devise effective ways to save ourselves from the dexterously forged trap, our democratic polity is surely at peril. No court, under duty to uphold the Constitution, can afford to be impervious and unmindful to the critical needs of our time.

(iii) Westlake had rightly observed: "The duties and rights of States are only the duties and rights of men who compose them."[61] The Permanent Court of International Justice in the Advisory Opinion concerning the Jurisdiction of the Courts of Danzig, posited that the States might expressly grant to individuals direct rights by treaty; such rights may validly exist and be enforceable without having been previously incorporated in municipal law.[62] Who knows someday we may wake up to find ourselves groaning under the burden of some treaties, which our executive chose to accept even without understanding them (as was done while accepting the Uruguay Round Final Act).

8. The Role of our superior courts

The power of Judicial Review and the Rule of Law are the most fundamental of all the basic features of our Constitution. Under no circumstances the executive, even through an international treaty, detract from these. Our courts are under constitutional duty to protect them. Our Supreme Court observed:

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[61]. *Collected Papers* p. 78 quoted in *Oppenheim* p. 17
[62]. *Oppenheim* p.17

> "For, as we pointed out in *Baker v. Carr* (1962 (369) US 186), *supra*, "(d)eciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whatever the action of that branch exceeds whatever authority has been committed is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[63]

This function of our superior courts is what our Supreme Court said with golden resonance:

> "that the Constitution is suprema lex, the paramount law of the land, and there is no department or branch of Government above or beyond it. Every organ of Government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."[64]

The author wishes that there is no departure from this point to the delight of *Pax Mercatus.*

9. Some Recommendations

After a theoretical study of our Government's treaty-making power in this chapter, this author intends to study certain aspects of two important treaties, one, the Indo-Mauritius DTAC; and the other Uruguay Round Final Act. In the light of this study this author intends suggesting some changes in the procedure for exercising treaty making power. In Chapter 18 (Section IV) he would set forth the recommendations by the Peoples' Commission. He would advance his suggestions too (vide Section V) for the consideration of our political society.

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63. *Mrs. Sarojini Ramaswamir v. Union of India*, AIR 1992 SC 2219 = 1992 AIR SCW 2683.
64. *Ibid.*