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**RAW REALITIES OF OUR TIME AND THE AGENDA OF NEO-LIBERAL PARADIGM**

[By Shiva Kant Jha]<sup>1</sup> (August 2013)

**(b). Azadi Bachao has the effect of promoting the Neo-liberal paradigm**

. There is a strange syndrome of a simultaneous rollback of the State's functions and an incessant aggrandizement of the executive power.

	<b>The Points in the Neo-constitutionalism promotive of Neo-liberal paradigm</b>	<b>The emerging effects of the judicial position in <i>Azadi</i></b>
1	<b>A paradigmatic change</b> in constitutional philosophy <sup>2</sup> now erecting altered institutional and legal structures to promote the market order aiming to establish <i>Pax Mercatus</i> , or <i>Pax Corporatus</i> run by rabid <i>Homo Economicus</i> illustrating <u>Friedrich A. Hayek's</u> <i>The Constitution of Liberty</i> , published in 1960, about which <u>Margaret Thatcher</u> is reported have said "This is what we believe"	<b><i>Bachao</i></b> <i>Azadi Bachao</i> (i) promotes the interest of the MNCs both those entitled to avail of the benefits of a bilateral tax treaty, and also those who wrongfully turned masqueraders from the third States to avail of such benefits beyond the Personal Scope of Tax Treaties through <b>the entente cordiale</b> of fraud and collusion. <i>Azadi Bachao</i> considered corporations' 'personality' so impregnable by holding that in the realm of Tax Treaties the Doctrine of the Lifting of the Corporate veil was not applicable because it applied in the domestic law. This illustrates 'the continuing pressure by corporate

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<sup>2</sup> Our Constitution rejects the idea of the "trickle-down theory," as its usefulness is not proved despite the claim by John F. Kennedy's that "[a rising tide floats all boats](#)". This plea, (so dear to the disciples of the IMF, the World Bank, the WTO, and the believers in [Reaganomics](#) or [supply-side economics](#)), deserves to be rejected (as it is, to borrow the expression of [John Kenneth Galbraith](#), just a "horse and sparrow theory": if you feed enough oats to the horse, some will pass through to feed the sparrows. The State, which we have organized under our Constitution to promote our 'Constitutional Socialism', is not a corporation. It is distressing to see that these days it is getting adroitly turned into a Corporation with all the ills of modern corporations

		<p>interests to expand corporate rights and limit the corporate obligations'. <i>Azadi Bachao</i> sustains of the Circular 789 of 2000, ignoring Justice Reddy's legal perspective provided in the Constitution Bench decision of <i>McDowell</i>. This led <i>Azadi Bachao</i> to recognize the paper companies of Mauritius thousand of which hibernated in the tax haven's chartered accounts' hip-pocket,.....</p>
2.	<p>The abandonment/modification of the traditional constitutional assumptions evolved through national institutional structures to promote primarily national agenda.</p>	<p><i>Azadi Bachao</i> amply illustrate the assumptions evolved under the neo-liberal paradigm.<sup>3</sup> The <i>Encyclopaedia Britannica</i> notes: "In the middle years of the century (the 19th century) it had been widely held that colonies were burdens and that materials and markets were most effectively acquired through trade."<sup>4</sup> But after the emergence of this global architecture, a ruthless regime of Market got established. The corporations which emerged triumphant after World War II, succeeded in establishing their hegemonial impact through the Bretton Woods institution</p>

<sup>3</sup> *Azadi Bachao* could delight only the proponents of the Neo-liberal Economic Paradigm. This outcome of *Azadi Bachao* seems most unfortunate as we are at the turning point of our history in which 'sound and balanced idea of evolving a welfare economy in an open democratic society' is getting befogged and obfuscated under the corporate-driven conspiracy made to pass for a mission for the weal of common men by a band of economists like Friedrich von Hayek [*The Road to Serfdom* (1944); *The Constitution of Liberty* (1960)], Milton Friedman [*Capitalism and Freedom* (1962); *Free to Choose* (with Rose Friedman)]. For Hayek the concept of 'social justice' was itself a threat to law; Friedman felt that true freedom can be brought about only by a market economy which means the Rule of Corporations. In effect *Azadi Bachao* has benedicted and facilitated the evident triumph of the neo-liberal paradigm.

<sup>4</sup> Asa Briggs in the *Encyclopaedia Britannica* Vol. 29 p. 85 in the article on the United Kingdom.

		<p>culminating in the WTO. Their toughest problem was how to supersede the national constitutions and laws, as they threatened their corporate regime with their constitutional mission and agenda. It was decided to erect a system through the Treaties which can validly derogate from them for pursuing the corporate objectives. The WTO Treaty and the Agreements under its umbrella, and the Tax Treaties ( and many others not needed to be catalogued) illustrate this strategy. Whilst the USA and many other States did such things with various riders legislatively imposed, the Government of India executed such treaties wholly under the opaque system wholly by the Executive under the notion that its Treaty-making power was not subject to constitutional restraints. <i>Azadi Bachao</i> erroneously holds that the Government's sovereign power to make treaties for political ends under the conviction that the Treaties prevail over the statute or law.</p>
3.	<p>Commitment to the neo-liberal economic paradigm for promoting and establishing capitalism as a hegemonic over-weening system: thus emergence of new Market Leviathan to tame which the national constitutions are yet to evolve mechanism of control and accountability.</p>	<p><i>Azadi Bachao</i> has the effect of promoting the neo-liberal economic paradigm for promoting and establishing capitalism. <i>Azadi Bachao</i> permits the creation of 'residents' out of airy nothing so that taxes can be evaded, dirty wealth can be layered through stratagem, so that the triumph of capitalism creates situation when</p>

		some are born to all delight but many to eternal night.
4.	<p>Norms of private property and individual liberty:</p> <p>As perceived by ‘the Invisible Hand’ of the Market which considers ‘Equality’ and ‘Social Justice’ detrimental to socio-economic growth<sup>5</sup>: hence the Objective of the Rule of Law is the preservation of private property and individual liberty in the specific neo-liberal sense.</p>	<p>A little reflection on what emerged from the decision of <i>Azadi Bachao</i> would show how it goes against ‘Equality’ and ‘Social Justice’ without which our Constitution goes with the wind.</p>
5.	<p><b>The Executive</b></p> <p>To promote the neo-liberal Market Order there must be almost wholesale delegation of the legislative power : hence Parliament should pass open-ended legislation leaving law-making power to the executive not subject to public scrutiny or accountability. Where there no specific limitation imposed by a statute, the executive’s perception is itself binding law. The executive is beyond constitutional limitations in promoting the new agenda.</p> <p>To roll back the welfare state. In the constitutional state conceived under the neo-liberal paradigm the welfare state<sup>6</sup> deserves to</p>	<p><i>Azadi Bachao</i> has the effect of granting powers wide enough to override the law of the land and its Constitution. As the tax treaties are wholly executive acts, the executive becomes unaccountable to Parliament, and the procedure suffers from ‘democratic deficit’.</p> <p>The judicial view that tax treaties can override the law is, if investigated, based only on the self-serving circulars issued by the CBDT to establish strange executive <i>imperium</i> to serve the interests of those who can manipulate the governmental</p>

<sup>5</sup> . The commitments of our government (under the Uruguay Round of GATT, of which the apex institution is the WTO, with a close nexus with the IMF and the World Bank) have the direct and inevitable effect of subverting our Fundamental Rights. The Market Economy, it is well known, is founded on the ideas of Frederich von Hayek who in *The Road to Serfdom* considers freedom as the function of the market, and those of Milton Friedman in his *Capitalism and Freedom* and *Free to Choose*. It is obvious that the idea of **Social Justice** seethes through the Preamble to Arts 14, 19, 21 and 29 (only to illustrate), and this idea is given a go bye the Fundamental Rights stand subverted. And this is the mandate of the Market Economy which the WTO has imposed on us through the deeds of our Executive. **Hayek considers the concept of ‘social justice’ the most powerful threat to law conceived in recent years. Social justice**, said Hayek, ‘attributes the character of justice or injustice to the whole pattern of social life, with all its component rewards and losses, rather than to the conduct of its component individuals, and in doing this it inverts the original and authentic sense of liberty, in which it is properly attributed only to individual actions’. [Hayek , *The Constitution of Liberty* quoted by Peter Watson, *A Terrible Beauty* p. 518]

<sup>6</sup> The decisions of the Warren Court emerged to constitute the jurisprudential foundation of the Welfare State. ‘Besides considering the great social/legal problems of the day, Dworkin grounded his work in the all important question of how, in a democracy, the rights of the majority, the minorities, and the state can be maintained.’<sup>6</sup> [Peter Watson, *A Terrible Beauty* p. 644]

	be rolled back, and a limited government must operate for the exclusive welfare of the Market Order. <sup>7</sup>	system for their benefit.
6.	<p><b>Legislature</b></p> <p>As the electoral politics has failed in creating a democratic order promotive of the Market Order, the wings of the Legislature must be clipped leaving the power and discretion to rule to the executive and judiciary bidden to act to promote the neo-liberal agenda. Parliament must allow the subjugation of the political realm to the economic realm as per the architecture of the neo-liberal paradigm.</p>	<p>In the realm of treaty-making our Parliament is said to have no function. There was a time before the onset of the neo-liberal waves when this ‘democratic deficit’ did not matter as the governmental acts at international plane did not matter in the domestic realm. But through the Treaty terms the domestic space of policy and sovereignty are now invaded. <i>Azadi Bachao</i> failed to see how certain dicta to that effect in <i>Maganbhai</i> and <i>Berubari</i> had lost their constitutional relevance, and are ex facie erroneous</p> <p><i>Azadi Bachao</i> .permits most unfortunate trespass by the Executive on the legislative sphere, illustrating the growing irrelevance of our Parliament. Nothing illustrates it better than than the reasons for which the CBDT Circular 789 of 200 was sustained in <i>Azadi Bachao</i>: viz. its approval of the conclusive presumptions as to ownership and residency in the said Circular forgetting that presumptions, or conclusive presumptions, are only legislatively enacted.</p>
7.	<p><b>The Role of Judiciary</b></p>	<p><i>Azadi Bachao</i> has the effect of patronizing the new despotism of the executive by approving, for judiciary, a costitutional role</p>

<sup>7</sup> Articles 14 or 21 are designed to survive only in a Welfare State. But the realities being shaped under the neo-liberal reforms protocol, being prescribed by the WTO, go counter to our constitutional policies and mandatory constitutional norms

<p>The Judiciary to give a new pro-market and pro-corporation view of the Rule of Law and the Doctrine of the Separation of Powers. The judiciary's policy making role must be in synergy with the executive's. Judiciary's constitutional role must undergo a functional change. through the technique of MBO (management by objective) to help the globalised economy of our day.</p> <p style="text-align: center;">*</p> <p>To take steps roll back the welfare state thus complementing the task of the executive. .</p>	<p>under which groundswell of neo-liberal ideas will allow judges to roll back the welfare state, and narrow the domain of the judicial control on the specious plea invoking the doctrine of "<i>Juices est. jus dicer, non dare</i>" (now not approved in <i>Standard Chartered Bank<sup>8</sup> Case</i> }. This led the Hon'ble Court to severely criticize <i>McDowell</i> which reflected the ideas in <i>Furniss v. Dawson</i> [1984] 1 All ER 530, [1984] AC 474 and <i>National Federation of Self-Employed and Small Businesses Ltd<sup>9</sup></i> which our Court had accepted before and approved later [as in <i>S.P. Gupta &amp; Ors v President of India &amp; Ors</i> (AIR 1982 SC 149) . The net effect of <i>Azadi Bachao</i> is a futile <i>cri de Coeur</i> to Parliament and the executive defeating Lord Denning's dictum that 'Fraud unravels everything'<sup>10</sup> and benedicting the neo-liberal stratagem by considering certain evils 'tolerable'. <b>This approach led <i>Azadi Bachao</i> to ridicule its own Constitution Bench decision, and to bank on a book by the interested party illustrating a gruesome departure from judicial norms.</b> This also led it wrongfully to assume that the doctrine of the Lifting of the corporate veil belonged to the sphere of domestic law. Our law and</p>
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<sup>8</sup>. [2005] 275 ITR 81 (SC).

<sup>9</sup> [1981] 2 All ER 93 HL

<sup>10</sup> *Lazarus Estate Ltd. v. Beasley*[1956] 1 QB 702 and 712

		Constitution were ignored, and copious borrowings of ideas were made from the OECD, and other countries.
8.	<p><b>Even Satan be the Guide</b></p> <p>Market Forces are amoral, if it helps even Satan become its Guide as he us always a better logician than God. In effect. Means matters not end.</p>	<p><i>Azadi Bachao</i> is gnawingly unfortunate. If the doctrine of toleration of Evil “in the interest of long term development”, is allowed to have a grip over our thinking, even God would leave us to groan under the Slough of Despond. Hitler destroyed the Weimer Constitution justifying his act as a necessary evil to wipe out the disgrace that the Peace Treaty of Versailles. Mrs. Gandhi justified the ignominious Emergency pleading this as a justification.</p>
9.	<p><b>Democracy</b></p> <p>But our constitutional socialism cannot allow the neo-liberals to promote GREED as socially accepted good.</p>	<p><i>Azadi Bachao</i> rejects the constitutional socialist mission of Constitution even by ridiculing said the Constitution Bench decision in <i>McDowell</i> ‘a hiccup’ and ‘temporary turbulence’.<sup>11</sup></p>

<sup>11</sup> The Court’s revolutionary departure from ‘the Welfare mission’ was asrsted in an article written by B. N. Srikrishna J., who had written the *Azadi Bachao* judgment. The article, ‘Skinning a Cat’[(2005) 8 SCC (J) 3] was written before he retired from the Bench. He wrote:

“9. References and discussions of political ideologies in judgments often lead to inconsistent and gratuitous philosophical debate by Judges. For e.g. in *D.S. Nakara v. Union of India*, (1983) 1 SCC 305 at SCC pp. 325-26, para 33, Desai, J. observes: "33. Recall at this stage the preamble, the floodlight illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic... What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. ... This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism." Compare this with the recent *dictum* of Sinha, J. (dissenting) in *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26 at SCC p. 148, para 307 who takes the diametrically opposite view: "307. Socialism might have been a catchword from our history. It may be present in the preamble of our Constitution. However, due to the liberalisation

10.	Fundamental Rights and the Doctrine of Basic Structure must be wrecked where to do so is good for the Market Order.	<i>Azadi Bachao</i> has the effect of approving such strides. <i>Azadi Bachao</i> approves the <i>per incuriam</i> ideas as to Treaty-Making Power casually stated in <i>Maganbhai</i> where none bothered about the Fundamental Rights, the Basic Structure of our Constitution, or the Preamble to the Constitution.
11.	<b>The Holistic approach</b> <sup>12</sup> To acquire a holistic control over matters cultural, political, social and social to charter ways following the loadstone of the Neo-	<i>Azadi Bachao</i> , in effect, reiterates what Roy Rohatgi said: ‘Overall countries need to take, and do take, <u>the holistic view</u> ’ <sup>13</sup> Under

policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away." [http://www.ebc-india.com/lawyer/articles/2005\\_8\\_3.htm](http://www.ebc-india.com/lawyer/articles/2005_8_3.htm) Justice B.N. Srikrishna Cite as : (2005) 8 SCC (J) 3

The title of his article is ‘Skinning a Cat’ and its ideas ideas are clear pointer to the abandonment of our Constitution’s ‘socialist’ mission, and its commitments of the Welfare State agenda. One can fear on good grounds that under such neoliberal ethos our Democracy and Constitution both might get skinned out!

<sup>12</sup> A constitution is sacred to a Nation because of its three fundamental purposes; it establishes government, establishes how government will function, and protects the rights of citizens. The commitments of our government (under the Uruguay Round of GATT, of which the apex institution is the WTO, with a close nexus with the IMF and the World Bank) have the direct and inevitable effect of subverting our Fundamental Rights.

<sup>13</sup> For upholding Treaty Shopping, this Hon’ble Court relied upon the views of in a book by a tax consultant called Roy Rohatgi quoting three paragraphs from Rohatgi’s *Basic International Taxation* in *Azadi Bachao*. Roy Rohatgi, who is a Chartered Accountant who described himself as a “strategy and International Tax consultant to several Indian and Overseas companies”, and was figuring as an expert on the website of Nishithdesai & Co which conducted the case before this Hon’ble Court of the Mauritian company which popped up for the first time getting leave to become a co-Appellant in *Azadi Bachao* before the high persuasion by Shri Arun Jaitley, Sr. Advocate. The Court quoted three paragraphs from the book: these are---

“Many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper or unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues. Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities. Some of them favour treaty shopping for outbound investment to reduce the foreign taxes of their tax residents but dislike their own loss of tax revenues on inbound investment or trade of non-residents. In developing countries, treaty shopping is often regarded as a tax incentive to attract scarce foreign capital or technology.

They are able to grant tax concessions exclusively to foreign investors over and above the domestic tax law provisions. In this respect, it does not differ much from other similar tax incentives given by them, such as tax holidays, grants, etc.

Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The use of Cyprus as a treaty haven has helped capital inflows into eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. In recent years, India has been the beneficiary of significant foreign funds through the “Mauritius conduit”. Although the



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Indian economic reforms since 1991 permitted such capital transfers, the amount would have been much lower without the India-Mauritius tax treaty.

Overall, countries need to take, and do take, a holistic view. The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy. Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses.”

144. The three paragraphs quoted above contains ideas most nauseating and baffling and deserve rejection for reasons laconically stated thus:

(i). One cannot ‘tolerate’ or ‘encourage’ such a practice. A nation ‘tolerates’ what is unworthy only when turned a slave [as Germany had to do for some time after the Treaty of Versailles]. Treaty-shopping cannot be ‘encouraged’ as it is a fraud on principles, wholly deficient in morality and propriety.

(ii). How can something which is ‘unintended, improper or unjustified’, be tolerated by our Republic so long our values do not get destroyed, and our Constitution does not become a mere scarecrow.

(iii). Under whose authority what is ‘unintended or unjustified’ can be tolerated? Are we being ruled by some sinister Shadow from some opaque and foggy world? The tsunami of economic globalization has subordinated the political realm (to which our political institutions including this Hon’ble Court belong) to the economic realm (ruled by the economists, corporators and ‘the the protagonists of the Rogue Finance’) established under the overweening majesty of Pax Mercatus. Geza Feketeluty has brought out this reality thus:

“Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international institutions has outstripped the development of appropriate global political structures.”[ 2001 *Britannica Book of the Year*. 191.]

(iv). Roy Rohatgi justifies his greed stuffed thesis that Treaty-shopping is considered justified for “other non-tax reasons”. Rohatgi allows Treaty-Shopping ‘unless it leads to a significant loss of tax revenues..

Who has the legitimate authority to say that it can go on ‘ unless it leads to a significant loss of tax revenues? ‘Significant’ by whose assessment? Why were the Delhi High Court, CAG and the JPC not trusted when they had reasons to hold massive loss of resources. Why were the facts\* of heavy concealment of income and evasion of tax ,evidenced through about 30 Assessment Orders distrusted? Why were the propriety of those Assessment Orders, not allowed to be tested in our tribunals and courts but buried under the opaque administrative system allowing Fraud to have the last laugh? It is amazing that the following totally false statement was appreciated:

“Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities.”

But whose voice is this? From which sphere, the high net worth looters of India with chest outside, or the creeping, crowing and cringing millions amongst ‘We, the People’ segmented with growing gravity between: to quote Blake:

Some are born to Sweet delight,

Some are Born to Endless Night.

(vi). No great country in its right senses allowed Fraud has allowed Treaty Shopping a few derelict tiny tots on our planets where the crooks and fraudsters are building their *Sone-ki-Lanka* away from the gaze of the civilized humanity. It was unfortunate that our Supreme Court trusted such *ex cathedra* statements without examining their veracity, and noticing moral vacuity.

(vii). To consider Treaty Shopping a sort of ‘tax incentive’ at par with the incentives granted to the domestic tax-payers is shocking. **Tax incentives are always legislatively granted.** And grant of such benefits to the domestic tax payers cannot be equated with the masqueraders of other lands as they are fair weather friends interested in India only to feather their nests: whilst our people have our destiny tied up with our nation, and egalitarianism is our constitutional commitment to our citizenry.

(viii). The attempt to rationalize it on the ground that ‘developing countries need foreign investments....’ is frivolous. The tax treaties are framed under Section 90 of the Income-tax Act, 1961. These treaties are not in exercise of power under Art 73, but of Art 265 of our Constitution. How can statutory power can be exercised for extraneous purpose?

(ix).The analogical reasoning with reference to Madeira, Cyprus, and Mauritius is shocking. It would be end of our tradition if we degrade our nation going down to such dunghill as Madeira

	liberal Paradigm. No idealism is higher than the Market	the Rogue Financial system the lobbyists paint rainbow. It is not clear how the calculus of revenue losses and non-tax benefits works when the tax authorities are prohibited from examining operative facts, and when <i>Azadi Bachao</i> approves this opaque system.
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famous for nothing else but wine [Sanskrit *madira*] to deprive us of our senses. And none can discover an analogy to persuade us to this or that without even have lost the lucid moments.

(x). It is true that ‘ in recent years, India has been the beneficiary of significant foreign funds through the “Mauritius conduit. ...’ but at what cost? Why had our Government prevented its own statutory authorities through a Circular which *Azadi Bachao* upheld? What is all this? When those whose duty is to see are prevented from seeing then, then justice and Constitution both get trashed.

(xi). The third paragraph is the rehash of the grossly flawed ideas in the first two paragraphs. The expression *holistic* is meaningless unless we know whether the common suffering souls of this country are within this *holos* (the whole), or they are out of it!

(xii) The neo-liberal economists are accustomed to paint a rainbow, and persuade us to hold tongue with tongue-tied patience as the trickle down effect was sure to herald a new El Dorado. The great Weimer Constitution was lost as people believed their nefarious persuaders. Such pretentious logic of Mephistopheles led Dr. Faustus sell his soul in Marlowe’s Dr. Faustus. Dr. Rohatgi tried to tread on the same track with an analogous mission but with a better armoury.

