

An Extract from Shiva Kant Jha's *Final Act of WTO: Abuse of Treaty-Making Power*:

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DEMOCRATIC DEFICIT IN TREATY-MAKING

In February, 1992, Shri M.A. Baby, Member of Parliament, Rajya Sabha gave a notice of his intention to introduce the Constitution (Amendment) Bill, 1992 to amend Article 77 of the Constitution of India providing that “every agreement, treaty, memorandum of understanding contract or deal entered into by the Government of India including borrowing under article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament prior to the implementation of such agreement, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament”. Shri Baby spoke passionately in support of the said Bill pointing out in particular the adverse consequences flowing from the several WTO Agreements signed and ratified by the Government in 1994 without reference to the Parliament. Shri Pranab Mukherjee, M.P. argued, and stressed the following points:

- (a) Parliamentary approval leads to complications. He referred to the Treaty of Versailles, negotiated by President Wilson, which was rejected by the U.S. Senate.
- (b) If two treaties signed between India and Nepal on harnessing water resources of Mahakali and other rivers and the other with Bangladesh on sharing of the Ganga waters would have been referred to Parliament, it would have been extremely difficult to obtain such approval or ratification in the prevailing circumstances.
- (c) GATT/WTO Agreements, signed and ratified by the Government of India, can be implemented only by Parliament by making a law in terms of the agreement as provided by Entry 14 of List I of the Seventh Schedule to the Constitution read with article 253.
- (d) The Parliament is not so constituted as to discuss the international treaties and agreements in an effective manner.
- (e) One of the reasons for the success of European Union and ASEAN as ‘economic blocs’ is that the decision makers of the constituent countries, i.e. their executives, are by and large free to take decisions in matters of common interest.
- (f) Under our present system of Parliamentary Government, executive has to render continuous accountability to Parliament; and that the Parliament can always question the acts and steps taken by the Government.

Each one of the aforesaid points are absurd amounting not only to the contempt of Parliament but an insult to India’s citizenry who are present in Parliament through their Representatives¹. Though such comments deserve to be dismissed from any serious consideration, yet as an act of deference to the speaker, and also to show how with what little awareness great issues are handled, it is worthwhile to advert to them economizing with words, but not with truth:

- (i) Under the Treaty of Versailles, which concluded the World War I, Germany was put on the mat under the spiky boots of the rapacious victors. After vivisectioning Germany, the victors stripped the great country of its honour. ‘Article 227 through 230 gave the Allies the right to try individual Germans, including the former emperor, as war criminals.’ And Japan signed the Treaty of Surrender, after being trounced and pulverized after atomic bombardment, on September 2 in Tokyo Bay aboard the battleship USS Missouri concluding the World War II.

¹ vide para 31 of the Writ Petition p. 25 citing *De Republica Anglorum* 48-9 in G. R. Elton, *The Tudor Constitution* (Cambridge) p. 235

Humiliation of the nation was accepted in the mood of utter frustration, and sheer helplessness. Such treaties as these are done on the wreck of constitutions. The vanquished nations owe their existence of Statehood to the mercy of the rapacious victors. It is, hence understandable, why the western jurists (including Oppenheim) ignore the Treaty of Versailles from their work on treaties. Such treaties are not treaties; they are the ruthless impositions of cruel terms on hapless nations.

- (ii) The U.S Congress showed great sagacity and political insight in rejecting the Treaty of Versailles from which cauldron emerged the evil forces which pushed Europe to a delirious destruction of the Second World. It was this decision of the Congress which saved America from President Wilson, “the blind and deaf Don Quixote”². It was this refusal which saved Wilson from the culpable idiocies of Gorges Clemenceau of France, who had “one illusion –France; and one disillusion --mankind”³, and David Lloyd George of Britain, “this half human visitor of our age”⁴, who wove the web for the destruction of Europe through the Treaty of Versailles. Whilst Europe was busy making noose to hang itself, America was relaxing and equipping itself to become the master of the whole world as it has become. John Maynard Keynes, who was himself associated with what was happening in the Hall of Mirrors, at the Palace of Versailles, wrote his *Economic Consequences of Peace*. He made out a point that this Treaty gave rise to Hitler, who couldn’t have taken control of Germany without the wide resentment against this Treaty. Shri Pranab Mukherjee should have appreciated the U.S Senate which saved its country from the foolish errand of Wilson. This Petitioner would have been infinitely grateful to our Parliament if it could have told the Executive, while the Uruguay Round Final Act was in the air, THIS FAR, AND NO FURTHER.
- (iii) That, often our Government feels that hurling a few ideas in the public domain is enough. The right course should be place the draft of a treaty for popular consideration, and deliberation by Parliament. Besides, there are special reasons why treaties with great socio-political impact be done with popular consent. How could a governmental functionary saddle this country with a treaty so noxious as the Uruguay Round Final Act? Why should we allow the Executive Government to enter into deals which may become the counterparts of the Entente and the Alliance which endeared themselves to the executive governments working for self-destruction on way to the second World War. Our world is more fragile. The clouds of the Third World War are gathering fast. If in this era of critical development, we fail to shape the laws to respond to the challenge, (perish the thought,) our political institutions would perish in a surrealistic delirium when persons right, and persons wrong, would face the same Fate. We apprehend that the years ahead may not be much different from what Galbraith has said:
- “Here another great constant in economic life: as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently preferred”⁵.
- How can this great nation be allowed to become, through an executive act, a foreign country’s, or institution’s bleating little lamb tagged behind on a lead, pathetic and supine, consoling herself with an idea, minted in a much different context, that the executive is absolute at an international plane?
- (iv) That it was wrong to say that the other treaties to which he referred could not have been considered by Parliament. The real problem with the Executive Government, like the passionate misdirection of Wilson, was that it wanted them to be done somehow for

² Keynes, *The Economic Consequences of Peace*. P. 41

³ *ibid*, p. 32

⁴ Keynes wrote about Lloyd George, in a passage that was deleted in the last moment, “this goat-footed bard, this half-human visitor to our age from the hag-ridden magic and enchanted woods of Celtic antiquity” Quoted in Harrod, cited by John Kenneth Galbraith, *A History of Economics, The Past as the Present*. P. 230

⁵ John Kenneth Galbraith, *A History of Economics, The Past as the Present*. P. 236

purposes not all worth appreciation. History proves that Parliament and people are right more often than the Executive with its hubris for power. The criticism, hence, is totally misconceived.

- (v) No comments is worthwhile. The Executive government can implement treaty obligations within its executive field which is much wider than the legislative field. Besides, through treaty commitments the Executive can coerce Parliament to fall in line with it. Such things, in the context of the Uruguay Round Final Act, have already taken place. The haplessness with which our Parliament enacted Amendments to the Patent Act is a case of point. We lost our case before the WTO's DSB, and its Appellate Forum. Our Parliament had to bend. Virtually it ceased to be sovereign. Again, we removed the Quantitative Restrictions on agricultural products after having lost Case before the DSB and its Appellate Forum. These are the well-known instances. Many things much worse might be happening under the opaque administrative system.
- (vi) Whenever the WTO is criticized for being an undemocratic institution, its proponents stress eloquently that the Uruguay Round Final Act was accepted by the nations with the approval of their democratic legislative agencies. This is a dressed-up argument. There are good reasons to believe that our Executive imposed on the nation a treaty about which itself did not know much.
- (vii) The idea that Parliament is not so constituted as to discuss the international treaties and agreements it is not correct. If Britain could deliberate in its Parliament whether it was right to declare a war, there was no reason why the text of the Uruguay Round Final Act couldn't have been placed before Parliament for an in-depth scrutiny, or why the text of the Indo-US Nuclear deal cannot be examined threadbare by our Parliament. It has already been pointed out how decision to go the Second World War was taken by Parliament, and not by the Crown. A.J.P. Taylor describes the difference between the ways the First and the Second World Wars were declared by the U.K. Besides Shri Pranab Mukherjee's argument brings to mind what the destroyers of the Weimer Constitution had said about Parliament, or what Bismarck said about the German Diet before it was all gloom.
- (viii) What would facilitate the formation of an economic bloc is a pet idea of the corporate conspirators ruling the Economic Realm, which in this era of the Bretton Woods institution and the Washington Consciousness, has subjugated the Political Realm. The argument smacks of the smugness of the compradors who work for the neo-colonialists, and neo-capitalism.
- (ix) If our Constitution would have trusted the Executive wholly it would not have made it an institution with granted powers, and it would not have prescribed the Fundamental Rights. In this era of Economic Globalization, the executive leadership in Parliament may mean nothing but the triumph of corporate oligarchy. True there was a phase when the executive led Parliament. Now the executive is itself led by the corporate imperium.

Such criticism should not have been inflicted on Parliament by one who evaluated the Treaty-Making Procedure under our constitutional frame-work with reference to the Treaty of Versailles. The nation knows what is wrong with our Parliament, and surely some day, ways would be found/forged to set the institution right. But this does not prove the point Pranab Babu was making. It is true that things are moving from bad to worse. This is inevitable, says Erich Fromm in his *The Sane Society*, in the mass society which turns man into a commodity; 'his value as a person lies in his saleability..'. This is also inevitable in capitalism as, says Tawney in his *Acquisitive Society*, capitalism is, at bottom, incompatible with democracy. This is also because of the compradors and the lobbyists, about whom Vance Packard wrote his trilogy: *The Hidden Persuaders*, *The Status Seekers*, *The Waste Makers*, rule the roost. This is also because the Rise of the Meritocracy, about which Michael Young has written setting his account in 2034, has led to trends towards eugenic nonsense and monstrosities, which would create the new lower classes –by definition stupid --- without leadership worth the name, and that the new IQ-rich upper classes would soon devise ways to

keep themselves in power. The waxing corporate imperialism has already made our best talents exportable merchandise, and our nation would have to manage with left-overs. Even if all these happen our hope is only through Parliament. In 1915 Einstein wrote to Lorentz in Holland “that men always need some idiotic fiction in the name of which they can face one another. Once it was religion, now it is the State”. On scanning the present realities, shouldn't we say: “Once it was religion, then it was the State, now it is the Market, Pax Mercatus”. Market is ruled by corporate oligarchy with which, as indicated by the treaties being done, our government has a clear symbiotic relationship.

That sidetracking Parliament and people in a democratic country, with a structured constitutional polity, is not only a betrayal of the people's trust reposed through the Constitution, but is also a tale of evasions of reality. Our Constitution has not enacted the ideas of a Friedeich von Hayek, or a Milton Friedman in the solemn and sonorous words of the Preamble, the Fundamental Rights and the Directive Principles of State Policy.

Our nation tolerated with almost tongue-tied patience the Uruguay Round Final Act, for which even our Executive expressed some insincere remorse. But the fortitude of our people, and the melodrama of the Executive have facilitated the conclusion of a Treaty no less momentous, for good or bad, for our country: the Singapore Comprehensive Economic Cooperation Agreement (CECA) which deals with subjects as comprehensive and as important, as those dealt with in the Uruguay Round Final Act:

Trade in Goods, Rules of Origin, Customs, Mutual Recognition Agreement on Conformity Assessment, Investments, Trade in Services, Air Services, Movement of Natural Persons, E-Commerce, Intellectual Property Cooperation, Science & Technology Cooperation, Education, Media Cooperation, Dispute Settlement, any many others.

The strategy is to establish the government of the rich, by the rich, and for the rich by destroying the stature of this Republic, by diluting its constitutional commitments. China created Two Systems in one country through steps like SEZ, our Government is creating Two Indias in one country by resorting to steps which include grant of corporate zamindari exempt from the operation of various laws. Besides, the CECA establishes a clear subservience to the WTO institutions, and it goes to adopt analogous Dispute Settlement mechanism, Disputes pertaining to the DTAA can also agitated before the Council of Trade in Services by either country as per the footnote to Para 3 of Article XXII of GATS.

But our citizenry has hope from people and its highest Court of Justice. Concluding his *Modern Democracies* (Vol II p. 670) Lord Bryce perceptively observed:

“Hope, often disappointed but always renewed, is the anchor by which the ship that carries democracy and its fortunes will have to ride out this latest storm as it has ridden out many storms before.”