INTRODUCTION

SYNOPSIS

"*Yatoh Dharmahstatoh Jayah (Where dharma is, victory is surely there).*"

—Gandhari in the *Mahabharat*

"We shall exult if they who rule the land
Be men who hold its many blessings dear,
Wise, upright, valiant; not a servile band,
Who are to judge of danger which they fear,
And honour which they do not understand."

—*Wordsworth*

I
ON THE NAME OF THE BOOK

Prelude

The Main title of the book is plain and simple, but its sub-title needs some clarification. This clarification at the threshold would give an idea of the content of the book, and would also reveal this author's observation-post which conditions and controls his perception of the issues presented in this book.

Shakespeare in his *Romeo and Juliet* says:

What's in name? that which we call a rose
By any other name would smell as sweet.

But often proper names are connotative. The sub-title of the book, *Pax Mercatus*, is suggestive; it is an objective correlative of the book's content itself. In plain English I would render Pax Mercatus as 'the kiss of the Market'. When Augustus with his ruthless might established in his Roman Empire political calm, he thought Pax (Peace) had kissed his land of plenty. He deified it; and the glories of his day came to be known as Pax Romana (Latin"Roman Peace") which lasted from the reign of Augustus (27 BC–AD 14) to that of Marcus Aurelius (AD 161–180). Mercatus is a Latin term which describes the activities of markets and commerce. The author would show in this book how circumstances of our times have subjugated the political realm to the economic realm. Whilst the lust of the economic realm to acquire primacy vis-à-vis the political realm was never non-existent, it succeeded in riding roughshod over the political realm in the roaring nineties of the last century, and the years which followed them. The economic realm gave birth to its own Leviathan which under the free enterprise system is christened as Market which has been exalted into a principle of civilization by the doctrine of laissez-faire which in turn has fathered the present neo-capitalism. There is one thing common between Augustus Caesar and the Market. As the great Roman Emperor strove and succeeded in establishing his Pax Romana, the Market in our times is out to establish Pax Mercatus. Augustus drew inspiration from Pax in whose honour a great temple of Pax was built by the emperor Vespasian in AD 75. Many imperious institutions have been built in our days to mark the triumph of the market

Adam Smith thought that the 'invisible hand' of Reason conditioned the realm of humans by an enlightened self-interest. He shibboleth turned over years into a virtual divine commandment. The metaphor of 'invisible hand' caught on the mind of people so much that it itself turned into a deity said to have an immanent presence. But the reality of life is that the 'invisible hand' has all along been conspicuous by its absence. It is clear from the trends and tendencies of our day that Market is planting its kiss on all the institutions spawned by the political realm. It has enchanted the executive to become market-friendly. Its persuaders have not left outside their spell even Judiciary. Richard Posner speaks of the Constitution as an Economic document, and proposals have been made to refashion constitutional law to make it a comprehensive protection of free markets, whether through new interpretation or new amendment, such as a balanced-budget amendment.[1] We are bidden to take into account the impact of legal institutions and rules on markets, and to undertake an economic analysis of law. Even the role of the State is defined in terms of our deference to the market. The Chicago University and the Yale Law School are the centres for the study of law and economics wherein economics dominates legal discourse. *Homo juridicus* is becoming *homo economicus*. Public policy of the State is manipulated to come to terms with the ideas of the mainstream neoclassical economics. The triumphal march of the Market, taking all institutions for granted as its minions, has generated forces which are taking us fast towards the Sponsored State.

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1. See Chapter 7.

The author has likened Market with Leviathan, but he must focus on the similitude a little more so that we get these artificial creations in the round. Leviathan was an artificial animal, an excellent imitation of "that rational and most excellent work of Nature, man." It was a human art which created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS)," which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defense it was intended". It had its soul (sovereignty); it had its joints (magistrates and other officers of judicature and execution); it possessed wealth (the members composing it); its business was *(salus populi*). It worked with artificial reasons (equity and law). It prospered in concord. '[T]he pacts and covenants, by which the parts of this body politic were at first made, set together, and united, resemble that fiat, or the Let us make man, pronounced by God in the Creation.', Hobbes said. Pax Mercatus is an artifact of the Economic Realm under the leadership of acquisitive people. This artificial creation has turned so powerful that it rules the Political Realm. The Political Realm is now under the governance of constitutional democracy. Leviathan is a thing of the past though it keeps on encroaching on our present whenever democratic verve and vigilance of a nation sag. Democracy now holds the mantle for ensuring *salus populi(* public good). Pax Mercatus, is a creature of a different realm. Its artificial intelligence defies our comprehension, though the economists pretend to know it well as its special confidants. The pacts and covenants, which structure Pax Mercatus, are dictated for obedience by the mighty institutions of the Economic Realm, which bids us to suspend our judgment till the new El Dorado is born in some American maternity ward. As it works for wealth creation for an acquisitive society, it is hardly concerned with those excommunicated from its realm. It holds the press and the media under captivity so that its paeans alone are sung day in and day out by them. It has bidden its compradors to work for making even the Judiciary market-friendly till it itself assumes servitude as a matter of delight. But as its ways are baffling and mysterious, as its spokesman speaks through thousand voices, the comprehension of the silhouette, more horrendous than anything yet known, is not easy. Leviathan belongs to the age of mercantilism, Mercatus flourishes in this era of neo-capitalism. Leviathan was supreme in the command structure; now the market forces rule the roost. Leviathan led to imperialism that engendered colonialism. Pax Mercatus fathers neo-imperialism that engenders neo-colonialism. Levithan was tamed by Democracy, but there is nothing in sight which can tame the shrew of our day. This author has dwelt on similitudes and deviations *inter se* the two artifacts, so that the readers can keep their profile in their mind's deep well to serve them in good stead trying to come to terms with the world ruled by the market forces.

It is often argued these days that the best solution of the problem is to evolve an equilibrium at high point of creativity between the market forces and the forces and institutions of the political realm. Joseph Stiglitz expresses this idea with conviction and felicity:

"In my own work---both in my writings and in my role as the president's economic adviser and chief economist of the World Bank—I have advocated a balance view of the role of government, one which recognizes both the limitations and failures of markets *and* government, but which sees the two together, in partnership, with the precise nature of that partnership differing among countries, depending on their stages of both political and economic development."

If dreams were to sell, there is no harm in being the largest buyer. The ways of the economic realm subvert the institutions of the political realm, through craft and corruption. Besides, the market forces have made humans the commodities on counter. Stiglitz's ideas are designed to assuage, but cannot provide much hope. Freud stated a stark truth which should jolt us to wisdom. He said:

> "In reality our fellow-citizens have not sunk so low as we feared, because they had never risen so high as we believed".

Whilst this author is indifferent to the phenomenon of kissing, he is worried as he is listening, in undertone, the hissing of a snake. Whilst he agrees that now there is no escape from the phenomenon, we must be vigilant to protect ourselves if it turns out a vampire. How easily Lycius was trapped in the seductive beauty of Lamia, a snake which had turned into a woman of extreme charm. Lycius saw no bounds to his joys in her company, and wanted to be one with her. But he was under the brooding omnipresence of his philosopher, Appollinus, whose timely intervention saved him from ruin as the philosopher's critical gaze brought her reality out. Right now this author is not in a position to decide whether the kiss of the Market would be fatal, or wholesome, or both in varying measures depending on our wisdom and alacrity.

A great philosopher once said that if he could know a petal he could know the Universe. In this book I have tried to study a petal of the lotus of our governance to see how it is faring under the tsunami of the market forces generated by the present-day economic globalization. The impetus for writing this book was my probe into a pathological focus under our system of governance. I focus on certain issues of greatest importance for lawyers, politicians, economists, and social scientists. Being a lawyer myself, I have given them a local habitation and name from the observation-post of law and jurisprudence. This book examines a number of legal and political issues of greatest importance in this phase of economic globalization. It is a product of wide and deep research over a good number of years. It draws on the rich repertoire of the author's experience in conducting a PIL of greatest importance before the Delhi High Court and the Supreme Court. The issues have been examined with sensitiveness, which a national cause demands. Much of this author's insight and verve is derived from the sacrifice his family had done for this nation's independence, and his own sufferings during the years we were engrossed in our Struggle for Freedom.

This author thinks it more appropriate to take his reader straight to the thematic structure of the book organized into five clusters of the chapters. On

these five inches of ivory the author etches outlines of the topics to be explored later at some length.

If my writing this book makes my reader ponder over the ways of Pax Mercatus, this author's purpose in writing this book will be served.

II

THE THEMATIC STRUCTURE CHAPTER-WISE

The First Cluster

The first cluster comprises of the first two Chapters, 'Towards the Sponsored State' and 'An Opaque System'. These two Chapters portray the world we live in. The author believes that whilst we are conditioned by circumstances, we are not mere parts of the landscape: we are its shapers too.

The First Chapter, *'Towards the Sponsored State',* deals with the phenomenon of the Sponsored State. In the early history of British India two models of imperialism were minted: in one the imperialist power controlled the administration and the markets leaving the façade of the Nawab's government intact to receive all the brickbats from his people for things getting wrong; in the other no such pretence was maintained, and power was directly assumed over the people who could see the targets of their wrath, or objects of their veneration straight within their sight. The Sepoy Mutiny was a great revolution terribly underplayed by the British historians. But the imperialists learnt a lesson that the best strategy was to capture market for trade leaving political power with the native factotum. This preference for vampirism won approval of the think-tanks of the distraught imperialists who swung to the second model. This model is the delight of the neo-imperialists of our days where there is a scramble of power to capture the markets and the economic resources of others under deceptive strategy. The First Chapter studies the script of the new strategy focusing on its implications for us. The IMF-World Bank strategy illustrates what the early imperialists had thought and devised. This Chapter aims to provide an insight into the past so that the present is comprehended better.

The Second Chapter, *'An Opaque System'*, studies the raw realities of our times, and exposes its opaque system of massive corruption and economic crimes. As "sunshine is the strongest antiseptic", nothing is disliked more by the money-launderers, crooks, fraudsters and scamsters than transparency. The low level of political morality and civic culture compound the hazards to which we are exposed. Great issues of law, economics, or politics cannot be dealt with without knowing these. The author studies in this Chapters the operations of the instruments of darkness, and wholeheartedly supports the magisterial statement of the Delhi High Court in a simple sentence of greatest insight: " No law encourages opaque system to prevail." This laconic statement was made while

quashing the Circular 789 dated April 13, 2000[2], issued by the Central Board of Direct Taxes. The said Circular is an edict for opaqueness, and amounts to national disgrace. It is tolerated as it promotes the interests of those who call shots with motives unworthy to the core.

The Second Cluster

It is a strange irony of history that a political society which adopted the mantra of *satyameva jayate* (Truth alone triumphs), has succumbed to a belief that whatever succeeds is itself the triumphant truth. With high hopes we had made our tryst with our destiny, and given to ourselves a constitution, the most marvelous that human intellect yet conceived. But over the decades degradation set in to rob its institution of their virtue and verve. The only institution which appears not yet to have lost its soul is our superior judiciary, the last resort for the flickering hope under our constitutional system. In the six Chapters of the Second Cluster, the author has dealt with certain issues relating to the administration of justice in our locust-eaten years.

The Third Chapter, '*Not on the Trident of Lord Shiva*', examines the jurisdiction of the Supreme Court and the reach of Art 12 of the Constitution in order to answer: whether an aggrieved person is entitled to any relief against a final judgment/order of this Court, after dismissal of review petition, either under Article 32 of the Constitution or otherwise. By subjecting even the apex Court to an effective constitutional accountability, there would be a real and most comprehensive Rule of Law. People would get rights to question the Olympus if their fundamental rights are breached by none less than Zeus Himself. Even if we assume that the economic globalization, illuminated by the Washington Consensus and its kindred conclaves, leads to economic growth and development, it surely does not create by itself conditions for enjoyment of personal freedom and civil rights without which democracy is inconceivable. We live in a phase wherein our judiciary shall have to expand its legitimate jurisdiction to the uttermost confines of possibilities; by getting rid of the fossils and cobwebs carried forward from our imperial past.

The Fourth Chapter, 'The Frontiers of the Doctrine of *Ex Debito Justitiae*' deals with the debt go the court to provide remedy against the miscarriage of Justice. This Chapter examines the reach and the ambit of the doctrine of *Ex Debito Justitiae* by showing how our Supreme Court drew its confines very narrow in its curative jurisdiction. In this period of economic globalization we need a high measure of judicial creativity and activism. Lord Bridge aptly said: "If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better". This Chapter examines the jural frontiers of certain concepts so that justice in a given case is not jeopardized under any procedural rigmarole.

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2. [2000] 243 ITR (St.) 57.

The Fifth Chapter, *'Judicial Hierarchy and the Resultant Norms'*, deals with the rule of hierarchic discipline in the Supreme Court. An attempt has been made to understand the possible reasons for this.

The Sixth Chapter, *'Mcdowell*: *The Decision And The Ratio'* shows the evidence of some stock response and preconceived notions on the part of the judicial decision maker. The Section dealing with *McDowell's* Case is to tell how this Judgment was misread. It deals with the art of reading in light of the *Mimansa* principles as no better technique than this was ever found. Besides, this Chapter brings out the importance of taxation, and highlights the response of the government to taxation.

The Seventh Chapter, *'The Pragmatics of the Right Judicial Role'* studies the role of Judiciary as there is an evident narrowing in the judicial perception of its role, strangely enough synchronizing with the roll-back in the governmental functions. This feature may delight the proponents of the economic globalization and the other denizens of the Economic Realm, but it causes worry to common people who want democracy wherein freedom and individual liberties are not hampered. Our Constitution is not made to promote the solipsistic nature of life. This Chapter shows how this narrowing of the role made the judiciary, perish the thought, virtually a suppliant before the executive and parliament by registering a *cri de Coeur* for providing a remedy against a fraud.

The Eighth Chapter, *'Reading With Discrimination'* examines an extremely important question: what sort of book can be relied by a court in its judicial decision making. It reviews the judicially evolved norms governing the selection of a book for reliance in a judicial proceeding by reference to the views of Hood Phillips, Oppenheim, and of Megarry J. in *Cordell v. Second Clanfield Properties*[3]. It criticizes a judgment of our Supreme Court for going wrong by relying on a book written by an interested person who by all standards is an aggressive pleader of the ideas dear to the market forces.

The Third Cluster

Chapters 9 to 13 deal with corporations and their ways which must remain under our lens for public benefit.

The Ninth Chapter *'A Corporation cannot be an Impervious Coverlet of Gross Abuse'* is designed to stress that no civilized jurisprudence can allow a corporation to be used as a coverlet for gross abuse by the predatory international financiers. One way of minimizing the hazards from the corporate *imperium* is to subject a corporation to complete transparency. This Chapter deals with the implications of 'incorporation', and explores the circumstances when it is fair and just to explore the inner operative realities of a corporation. It deals with the doctrine of the Lifting of the Corporate Veil to prevent the abuse of legal forms. It adopts a

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[3]. (1969) 2 Ch. 10 at pp. 16-17.

functional approach to the issue of corporate residence, and points out how approaches under the Companies Act and the Income-tax Act are substantially different.

The Tenth Chapter, ***'Fraud Unravels Everything'***, the author explains Lord Denning's famous dictum in *Lazarus Estates Limited v. Beasley* [4]: "No judgment of court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." It deals with the fraud against revenue, and shows how the courts have recognized that fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. And it explains that all frauds affecting the State and public at large are indictable as cheats at common law.

Chapter Eleven, *'Treaty Shopping'* explores the great constant in economic life: as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently much preferred. It explains the concept of Treaty Shopping illustrating that dark face of markets where even good faith is no more than a commercial ware for sale under an opaque system. It tells about the device adopted to launder ill-gotten wealth parked outside for being purified with the Ganges water in India. No court of law in any civilized country sustained the evil of Treaty Shopping before the decision by a Division Bench of our Supreme Court in *Azadi Bachao Andolan &Anr. Union of India & Anr* [5]. But even our Court has not approved this evil as it has asked the Executive and Parliament to provide a remedy.

Chapter Twelve, *'Supreme Court on Treaty Shopping'*, shows that our Supreme Court could not remove the shadow that fell between the idea and the reality. This Chapter examines critically the judicial conception which had led the Court to sustain the fraud of Treaty Shopping in *Azadi Bachao*. It explores why a dissociation set in the judicial sensibility between moral vision and practical insight. It examines the flawed ideas of Rohtagi's book *Basic International Taxation* which become the reason of the judgment. It also states that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking steps to protect its own revenue laws from gross abuse or save its own citizens from unjust discrimination in favour of foreigners.

Chapter Thirteen, *'CAG on the Treaty Shopping: An Alarming Expoe'* examines the role of the Comptroller General of India whom Dr Ambedkar considered the

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4. [1956] 1 QB 702 at 712.

5. (2003) 263 ITR 706.

The Delhi High Court decided the Civil Writ Petition (PIL) No. 5646/2000 and Civil Writ Petition No. 2802/2000 under the cause-title *Shri Shiva Kant Jha & Anr. v. Union of India* reported in *(2002) 256 ITR 536;* but the SLP was filed by the Union of India before the Sup. Court under the cause-title *Union of India & Anr. v. Azadi Bachao Andolan & Anr*. (2003) 263 ITR 706 . The Supreme Court reversed the decision of the High Court . In the Judgment of the High Court the cause-title was judicially determined. The cause-title was modified by the appellant contrary to procedure while preferring the SLP for reasons not deserving a mention here.

most important officer under the Constitution. The Chapter refers to the Report of the CAG (No 13 of 2005) relating to System Appraisals in the segment of Direct Taxes. The CAG has drawn attention to the misuse of the Double Taxation Avoidance Agreements. The CAG, as the parliamentary watchdog, has reported to Parliament so that our Parliament takes up proper remedial steps. The ball is now in the Court of Parliament.

The Fourth Cluster

Chapter Fourteen, *'International Law And The Foreign Administrative Acts'*, deals with the danger posed by the recent phenomenon of aggressive formulations of the norms of international law in the most undemocratic club of the States represented by their executive and bureaucrats working under the pressure and persuasion of the corporate imperium, and other undemocratic and opaque institutions of the economic globalization. It always suits these players to accord only a subsidiary status to the law and the constitutions of the States. This suits them most as these mighty players in the economic globalization can wring all sorts of advantages to build their imperious clout. They are strongly supported by a vast breed of international lawyers who want their discipline to subjugate the law and the constitutions of the political realm of the States. Now a time has come to recognize that no executive can, through its acts, transgress the mandatory limitations under the domestic constitution. The argument, that the executive government of a constitutional democracy represents the wish of the people while accepting obligations at international plane even if the terms go counter to the mandatory constitutional provisions, deserves to be rejected outright. The Chapters dealing with the making of the tax treaty and the Uruguay Round Final Act would amply show how unrealistic and absurd these ideas are. Besides, this Chapter deals with the legal effect of the foreign administrative acts, like the issue of the Certificate of Residence from a tax haven, to make it clear that they cannot be given legal effect unless the terms of a treaty permit that grant.

Chapter Fifteen, *'Treaty Making Power'*, examines the treaty making power under constitutional limitations of a written constitution with entrenched fundamental rights. It explores constitutional restrictions. It makes a critical and comparative study of the treaty making powers with references to the positions in a number of important countries. The Government's Treaty Making Power under our constitutional limitations is still to be declared by our Supreme Court after taking into account the constitutional limitations. This is a matter with which everyone of us is concerned as in this period of economic globalization, the corporate *imperium* and the global powers find treaties good weapons to subject us to obligations or embarrassment. We are sure to be in trouble in this phase of economic globalization, if our watchers behave the way they have done while handling the negotiations relating to the Uruguay Round Final Act. It is high time to consider the implementation of the recommendations on our Governments' Treaty Making Power as discussed in the Chapter 18. The author has referred to the recommendations of the Peoples' Commission vide Section IV

of the Chapter. This author's suggestion for changes in India' treaty making power are set forth in Section V of the said Chapter.

Chapter Sixteen, *'Quis Custodiet Ipsos Custodes (Who will watch the watchmen?)'* has been written with reference to the Indo-Mauritius Double Taxation Avoidance Agreement merely to show how untrustworthy the wielders of political power have been during the years of the Reforms. The bureaucrats and our diplomats have not behaved better. The effect of the evil nexus between the politicians in power and the bureaucrats, which the Shah Commission rightly considered the root of all evil, is writ large over the whole story.

Chapters 17 and 18 ,'*A Morbid Story of the Mauritian DTAC*' and '*The Uruguay Round Final Act: A Betrayal of the Nation'* deal with certain aspects of the two types of treaty: a tax treaty and a general treaty to show how our executive handles important treaty negotiations. The story is so saddening that the author thinks immediate changes in the procedure must be brought about. Whittier said—

> *For all sad words of tongue or pen*
> *The saddest are these: It might have been.*

Chapter 19, *'Status of a Tax Treaty vis-a-vis the Statute'* goes to state that an act of the executive can never override a statutory provision or the law declared by Parliament. It is a high constitutional principle that the supremacy of Parliament is so fundamental that even Parliament cannot modify or override it. This view is amply attested by the fact that to make the Indo-Mauritius DTAC conform to the terms of Section 90 of the Income-tax Act, the Parliament had to amend the law itself. It provided a statutory foundation for the terms in the tax treaty through the substitution in Section 90 of the Income-tax Act 1961 brought about by the Finance Act 2003. The same view prevails in the U.K. where the Mutual Agreement Procedure was made operative only after insertion of Section 815AA by amending the British Income-tax Act.

The Fifth Cluster

Chapter Twenty, *'A Paradigm Shift In Tax Jurisprudence'* presents the tax philosophy illustrating the ethos of the Welfare State. But it is difficult to assess at present in what direction we are moving. A roll-back government may make itself irrelevant for common people by withdrawing from the welfare activities to become the police for the high net worth creatures. It is too early to cast a verdict, but we should keep our fingers crossed.

The Chapter Twenty-one, *'CBDT's Circular Making Power: Frontiers Still To Be Settled'* charters the ambit of the executive power of a statutory body, the CBDT. The dicta in different decisions take us nowhere. Besides, in adversary litigation, the question crops up generally under circumstances where neither party to the litigation is interested in questioning the legality of the Board's circulars. The taxpayer is most often its beneficiary, and for the Board enjoys vast powers. We all know that power is most delicious when abused. Only a PIL can provide a

right scope for examining the legality of the Board' circulars. So far our courts are concerned, we are often reminded of what Allen said: '*there is, apparently, something in the tranquil atmosphere of the House of Lords which stimulates faith in human nature'.*

Chapter Twenty-two, *'Public Interest Litigation In Revenue Matters'* deals with questions of administrative lawlessness in the tax administration. It was really a revolutionary step for the British courts to grant a *locus standi* to a public spirited person even in matters of revenue traditionally considered a sovereign function. This author has stated in brief his ideas relating to PIL in revenue matters in this short Chapter.

III
A PERSONAL EXPLANATION

Never in my life I ever had moments more pregnant with ethereal thoughts than at the threshold of retirement after more than three decades of active public service as a member of the Indian Revenue Service. First, I felt I should spend my years like Shakespeare's fool , Touchstone:, counting hours till my chapter closes.

> *"It is ten o'clock:*
> *Thus may we see,' quoth he, 'how the world wags:*
> *'Tis but an hour ago since it was nine,*
> *And after one hour more' twill be eleven;*
> *And so, from hour to hour, we ripe and ripe,*
> *And then, from hour to hour, we rot and rot;*
> *And thereby hangs a tale."*

But I found counting hours more difficult than wasting them on the kings and cabbages. So I was in quest for some peg to hang my hours on. A boating on the Ganges brought home to me that a boat trembles when it is still, but keeps its steadiness when it is moving cleaving through the waves. My mind turned a chrysalis. On some dunghill of moment I read *Seneca's* celebrated essay "On Tranquillity of Mind":

> "If Fortune has removed you from the foremost position in the state, you should, nevertheless, stand your ground and help with the shouting, and if someone stops your throat, you should nevertheless stand your ground and help in silence. The service of a good citizen is never useless; by being heard and seen, by his expression, by his gesture, by his silent stubbornness, and his very walk he keeps… Why, then, do you think that the example of one who lives in honourable retirement is of little value? Accordingly, the best course by far is to combine leisure with business, …….for a man is never so completely shut off all pursuits that no opportunity is left for any honourable activity".

I have been inspired by what Lord Meghnad Desai said after his economic analysis[6] of this country: "The hope of India lies not in its politicians but in its citizens. They have to take their own future in hand and order its shape".

Genesis & Context

For some personal reasons I visited Mumbai sometime in 2000. I, along with my wife, went to a Shiva temple on the Marine Drive. It was just a chance that there I met some senior officers of the Income-tax Department whom I had known for years. They were apparently distraught, something was wrenching their mind. I had no wish to play God's spy, yet I asked them the reasons which had led them to that pass. They told me the whole story pertaining to the abuse of the Indo-Mauritius Double Taxation Avoidance Agreement. They discharged their duty under the Income-tax Act 1961, and were quasi-judicial officers. Their orders displeased the corporate *imperium* who procured support of some powerful politician. Instead of getting a reward for good work they were threatened with punitive actions. I assuaged them that in our country they were not the first to receive displeasure as the wages for good work. But, I felt, I sounded a counterfeit coin in advising them to take things in their stride. But the burden lingered in my mind. It was just a chance that a rickshaw puller told me the story of his sufferings wrought by the fraud and collusion of his friend. I found in it something which 'brought out a noble knight' in me.

I seek the reader's indulgence to read the story of the two rickshaw pullers as the story inspired me to launch a PIL before the Delhi High Court. And without the experience of this PIL I might not have reasons to write this book. I quote what I had written in Personal Journal:

> "Two rickshaw pullers came from Bihar and settled down in the J.J Colony (Jhuggi Jhopari Colony) in the outskirts of New Delhi. By greasing the palms of those who mattered they got two small pieces of plots of lands. As they were under obligations to maintain their families they had brought them also. To economize on their resources and to reduce the drudgery of the domestic chores they entered into a gentleman's agreement that whilst lunch is prepared in the house of one, the dinner be in the house of the other. They were good friends and had no reason to doubt good faith of each other. The arrangement worked for sometime. It could not work for all times as one of the two contracting parties developed greed and wanted to take advantage of what was not due under the agreement. He racked his brains for some scheme. He got one, which with Lucifer's logic he pursued for his gains. He not only sent his wife and two children to eat in the house of the other but also sent children of some other persons (for consideration, of course) to eat food as the beneficiaries of the agreement. When questioned, he argued that he was competent to adopt as many children he wished. To make his point solid he would invoke custom of his community. As if it was not itself too much, he sent several ladies whom he described as his wives. They all had, in a sense, certificates evidencing relationship, which entitled them to the benefits under the pact. But this

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6. Published in *India Book of The Year 2002.* (Encyclopaedia Britannica: The Hindu).

> state of affairs could not last long .His friend rightly felt enough was enough. His domestic economy had already crashed. The wreck could have been avoided if he would have listened to his wife's advice to end the gentleman's agreement at the earliest. The original meeting of minds had lost significance. Fraud was evidently at work. After narrating this story I asked my wife: " Well dear, was it fair and just for the first rickshaw puller to do what he did?" My wife instantly replied: "It was unfair."

I narrated this story to my wife who always obeyed law as she never knew anything about it. I asked her opinion on the propriety of the conduct of the rickshaw puller who swindled his friend. Her verdict appeared to me impeccably right. My wife was not proficient at law otherwise she would have dismissed my story with words: " I don't believe there's an atom of meaning in it". I do not want to be apologetic for testing my legal conclusion in the light of the verdict by a housewife. The most celebrated judgment for all times known to me had been pronounced by Gandhari on her son's prayer made by her son while conducting the Mahabharat War. Gandhari said: "*Yato Dharmahstato Jayah (Where dharma is victory is surely there only).* This verdict is inscribed on the emblem of the Supreme Court of India. I call the rickshaw puller's Case under a cause-title *A Rickshaw Puller v. A Rickshaw puller.* It can constitute a trilogy with the two other widely known cases (*Shylock v. Antonio* in Shakespeare's *The Merchant of Venice*, and *Jarndyce v Jarndyce in* Charles Dickens' novel *Bleak House)* which do not figure in the law reports. They are often referred but never cited.

The factual details of the PIL would be set forth in this book as required by the context. The issues involved in it provided me some insight into the topics of great relevance in these days of economic globalization. A short account of the facts which led to the filing of the PIL is provided here so that the reader sees issues in right perspective.

In course of investigation the Assessing Officers under the Income tax Act found that a good number of the residents of the third States attempted to avail of the bilateral tax treaty between India and Mauritius (the Contracting States). At one go 24 Assessment Orders were passed towards the end of March 2000 holding that the Indo-Mauritius Double Taxation Avoidance Convention was abused. The tax authorities found that the third country residents set up conduit companies in Mauritius. These companies were incorporated under the Mauritian Companies Act. They obtained Certificate of Incorporation. They were even granted Certificates of Residence for the purposes of obtaining benefits under the Indo-Mauritius DTAC. They had no economic presence or impact in Mauritius. Their control and management were in countries other than Mauritius. Their theatre of operation was in India, mainly in the Indian Stock Market to earn capital gains neither taxable in India nor in Mauritius. Besides, the tax treaty had some other beneficial provisions. The Assessing Officers lifted the corporate veil of these companies to see the operative realities in order to determine liability under the Income tax Act. They held that for the tax purposes these companies incorporated in Mauritius were to be ignored for the purpose of

the tax treaty: and they held further that they were chargeable to tax as non-residents *simpliciter*. Pressure was built on the Central Government by the vested interests and their lobbyists. The Central Board of Direct Taxes issued a circular directing the tax authorities to abandon what they were doing in the matter of investigation of such cases. They were directed to accept the Certificates of Residence granted by the Mauritian authorities as conclusive evidence not only for the determination of the status as residents in Mauritius but also for determination of the beneficial ownership of income earned.

After a lot of reflection I felt that there was a misuse of the tax treaty. Deeper I went deep into the facts, more I felt that it was my national duty to take up the matter. On return from the summer vacation in 2000, I filed a broad-spectrum PIL Writ Petition[7]. The Writ Petition sought from the Delhi High Court writs of *certiorari* for quashing an act of administrative lawlessness through the issuance of Circular 789 of April 13, 2000 by the Central Board of Direct Taxes; *mandamus* directing the Central Government to do certain public duties; and *declaration* law relating to many matters of public law, including the Government's treaty making power. So it all began. The High Court quashed the impugned Circular[8], and declared the law. The High Court allowed the Petition on all points. The Union of India appealed to the Supreme Court under Article 136 of the Constitution of India. The Division Bench of the Supreme Court (coram: Hon'ble Justice Ruma Pal and Hon'ble Justice B. N. Srikrishna) delivered Judgment[9] in Civil Appeal Nos 8163-8164 of 2003 reversing the decision by the High Court. The judgment was now under the cause-title *Union of India & Anr. v. Azadi Bachao Andolan & Anr.* (2003) 263 ITR 706. The core issue was the misuse of the bilateral tax treaty by the residents of the third countries. Our Supreme Court desired that this misuse be remedied by a legislative or executive act.

In course of the conduct of the aforementioned PIL, I studied in broad spectrum different aspects of problems of immense contemporary relevance. I was advised by Dr M.L. Upadhyaya to turn the outcome of my research into a string of chapters for the benefit of the general readers. I picked up his suggestion, and have written this book from the observation post of an ordinary citizen with absolutely no axe to grind.

Let nobody carry an impression that this author's criticism of the abuse of a tax treaty is directed exclusively against the Indo-Mauritius DTAC. Other tax treaties are also being misused in varying measures. It matters little whether ravishers come from Mauritius, or Cyprus, or Singapore, or Nauru, or any other dark spots on this terra firma. If we do not take effective steps, many more arrangements and agreements would be subject to horrendous misuse. In the end, it all boils down to what sort of ethos we are evolving, what sort of national

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7. Civil Writ Petition (PIL) 5646/2000.
8. *Shiva Kant Jha & Anr v. Union of India* [(2002) 256 ITR 563] see fn. 7 *supra.*
9. *Union of India and Another v. Azadi Bachao Andolan and Another*, (2003) 263 ITR 706.

character we are building up. Evil flourishes most when courage and imagination go down the gutter.

IV
AN APOLOGIA AT THE THRESHOLD

Some may knit their brows at my criticism of the judgment of our Supreme Court to which I was myself a party as a PIL petitioner-in-person. My criticism is made with greatest respect, but with complete candour. I am under duty to let our fellow citizens know what I did on their behalf, and how things turned out. I always felt that I was free to take up, or not to take up, a national cause. But once I took up, I discharged my duty to the utmost that my faculties enabled me. I think I am duty bound to render an account of what happened in the PIL so that I can be judged by my countrymen, and someone abler than me can do better someday somewhere. The author believes that nothing is finally settled till it is settled right. Besides, there is a special reason which requires me to write the book. Our Supreme Court wants the executive or the Parliament to provide remedy against Treaty Shopping which is a fraud on national interest. The matter is now in the court of the executive-government and the Parliament. The CAG too in its Report 13 of 2005 has reported to the Parliament that things be done to remedy the misuse of the tax treaties. Hence, it becomes my duty to inform all the position I had maintained so that we can evolve public opinion. Right of respectful criticism of judicial act is judicially recognized. But I had a special reason for my happiness when I found that Hon'ble Chief Justice S.B. Sinha (as his Lordship then was), whilst the matter was before the Delhi High Court, and Hon'ble Justice B N Srikrishna, whilst the matter was before the Supreme Court, recognized, through the words which had fallen from the Lordships, my right to judge the judgment *pro bono publico.* I am grateful to them for such words of inspiration; perhaps without them I would have forgotten to write this book amidst the inane trivialities in this December of my life. The PIL, which I had conducted, was wholly my labour of love. As duty-bound, I have at times severely criticized many of my friends and the high personages for whom I have highest regards. I would end this apologia with a prayer to God set in the words which come at the end of Lord Hailsham of St Marylebone's autobiography, *A Sparrow's Flight expressing the Sparrow's prayer to the Lord :*

> *Mercy, not justice, is his contrite prayer,*
> *Cancel his guilt, and drive away despair.*