CHAPTER 2
AN OPAQUE SYSTEM

SYNOPSIS

"No law encourages opaque system to prevail."

—Delhi High Court in *Shiva Kant Jha & Anr v. Union of India* [1]

notpadyate vina jnanam vicarena nyasadhanaih
yatha padarthabhanam hi prakasena vina kvacit[2]

—Samkar in his *Aparoksanubhuti*

It has been established that more the effort at secrecy the greater the chances of abuse of authority by the functionaries.

Shah Commission Of Enquiry, *Third and Final Report p. 231*

1. Darkness delights where realities are to be evaded

The Delhi High Court's magisterial pronouncement that "*No law encourages opaque system to prevail"* is a fundamental statement deserving a lot of reflections taking into account the realities of the world we live in. This observation was made while quashing the Circular No. 789 of 13 April 2000 issued by the Central Board of Direct Taxes. This Circular mandated the authorities under the Income-

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1. (2002) 256 ITR 563 (Del.).
2. Without inquiry, wisdom cannot be attained by any other means, even as things of the world cannot be seen without light.

tax Act 1961 that whosoever produces Certificates of Residence from the Mauritian tax authorities, he must be treated as a Mauritian resident, and also the *beneficial* owner of income. As a matter of consequence, they lost their power to investigate the affairs of those who chose to bring hot money for investment in the Indian stock exchange. The investors could bring their money, reap tax-free capital gains, and could easily repatriate their wealth without any let or hindrance. If under their masks the treaty shoppers, money launderers, and fraudsters used the Indo-Mauritius route, the authorities were bidden to hold off. Mauritius had turned into a tax haven ensuring secrecy and the confidentiality to the investors. Besides, Mauritius had no means to know them well, or to control them, as these investors transacted through paper companies having no economic impact in Mauritus. In short, the system was made opaque.

Consequently, the income tax authorities would be in blinkers, and would not have the vital information that they could disclose to public authorities in public interest as required by the Section 138 of the Income-tax Act, 1961. Scores of Government Instructions, already issued in public interest, would become redundant under the opaque system. This author knows how the Accountant General, Bihar, and the CBI showed their displeasure at the Income-tax Department for not informing them at the earliest when some evidence of the infamous Fodder Scam had come to the Department's knowledge as a consequence of searches conducted by it. Government of India's Notification No. S.O. 927 of Nov. 19, 1981 required the disclosure of information about criminal activities, noticed in course of official function, to every officer of or above the rank of Superintendent of Police of the Department of Vigilance, Government of Bihar. If a circular like the Circular 789 survives, darkness is bound to prevail to the delight of the crooks and knaves of all lands. Various frauds and crimes, especially in the post-September 11, phase, should drum into the ears even of the banking regulators world over, to identify account holders and the beneficiaries of all kinds of funds. Besides, if the income-tax authorities put on blinkers, how can any citizen get information in public interest, which he is entitled to get under Section 138(1)(b)[3] of the Act.

2. Denial of the Right to the Freedom of Expression

The lethal consequence of this administrative remissness was a denial of transparency. Art 19(1)(a) of the Constitution of India grants to the citizenry of this

Republic a fundamental "right to freedom of speech and expression". In *R. v. Cmmr. of Police Ex. p. Blackburn* (No 2)[4] Salmon L.J. aptly said:

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[3]. "Where a person makes any application to the Chief Commissioner or Commissioner in prescribed form for any information relating to any assessee received or obtained by any income-tax authority in the performance of his functions, the Chief Commission or Commissioner may, if he is satisfied that it is in public interest so to do, furnish or cause to be furnished the information asked for and his decision in this behalf shall not be questioned in any court of law."

[4]. (1968) 2 QB 150.

> "It is the inalienable right of everyone to comment fairly upon any matter of public importance. This right is one of the pillars of individual liberty--- freedom of speech, which our courts have always unfailingly upheld… The criticism here complained of, however, rumbustious, however wide of mark, whether expressed in good taste or in bad taste, seems to me to be well within (the limits of reasonable courtesy and good faith)."[5]

And Edmund Davies L.J. highlighted, in his characteristic style, the reach and importance of this right in these suggestive words:

> "The right to fair criticism is part of the birth-right of all subjects of Her Majesty. Though it has its boundaries, that right covers a wide expanse, and its curtailment must be jealously guarded against. It applies to the judgments of the courts as well as other topics of public importance."[6]

The fundamental right to "freedom of speech and expression" cannot be exercised properly unless with it goes the 'Right to Know'. Our Supreme Court recognized the supreme importance of the Right to Know. In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd*[7], it observed:

> "We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Art. 21 of our Constitution. That right has reached new dimensions and urgency. That right, puts greater responsibility upon those, who take upon the responsibility to inform."

Our Supreme Court has rightly recognized that the right to know is an integral part of the right to life. It, in *Essar Oil Ltd v. Halar Utkarsh Samitee*[8], observed:

> "There is also a strong link between Article 21 and the right to know….."

The point to ponder is whether this opaque system can promote right to life? The CBDT Circular 789 is clearly *ultra vires* Art 21. Even the substitutions and insertions to Section 90 by the Finance Act, 2003 offend Art 21 as these provisions also contribute to the opaque system.

3. Opaque System is the best for the corrupt

Corruption is endemic in our public life. Granville Austin aptly writes about India:

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[5]. ibid p 155.
[6]. ibid p.156.
[7]. AIR 1989 SC 190 [Coram : Sabyasachi Mukharji, and S. Ranganathan , JJ.
[8]. AIR 2004 SC 1834 at 1845.

> "The rampant corruption of which elected and appointed officials are believed guilty by citizens should be understood in terms of the survival society---of the scriptural injunction to help one's own (this in a society where religious observance is common)---even while it is clear threat to the credibility of democratic governance."[9]

Anything that is done to exclude transparency is wrong. We are under obligations to implement the terms of the *U.N. Convention against Corruption* approved by the General Assembly of the United Nations by resolution 58/4 of 31st October 2003. This Convention was signed in Merida in Mexico. Besides, this Convention calls upon the States[10]:

(a) to ensure that Transparency and Accountability in matters of public finance are promoted;

(b) to make effort for prevention of corruption in public life.

We are party to the Uruguay Round Final Act, which commands transparency in the system of governance. To illustrate: The Trade Policy Review Mechanism, being the Annex 3 to the Final Act says:

> "*B. Domestic transparency*
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> *Members recognize the inherent value of domestic transparency of government decision-making* on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems."

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4. Our Raw Realities

In this phase of gbbalization there is a special reason for ensuring transparency in public matters. We are living in a phase when the government is fast withdrawing its roles from the spheres of public welfare, perhaps to play the

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[9]. Granville Astin, *Working A Democratic Constitution* p.642 (Oxford 1999).

[10]. **Article 5 Preventive anti-corruption policies and practices**: 1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. 2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption. 3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption. 4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

police for the mighty rich, and to provide services they need but cannot provide for themselves. The "invisible hand" of Adam Smith is fast turning into a vampire. The society of the common people run the risk of losing their soul, self, liberty, and property before they even realize what happened. We are inviting FDI, MNCs, and FIIs without considering the consequences of what we are doing. We have signed the Uruguay Round Final Act, and are now a member of the WTO. Under this global treaty, cast in the format of *pactum de contrahendo,*[11] we have undertaken obligations of all sorts: in the fields of trade, TRIPS, investment etc. Without transparency our World would acquire a Kafkaesque surrealist scenario.

In a tax haven, *there is absence of transparency*. The OECD in its report "Harmful Tax Competition an Emerging Global Issue" has noted this. It says in (para 114, at p. 46)

> "Information on foreign transactions and taxpayers is essential for certain domestic counteracting measures to work properly, but is notoriously difficult to obtain with respect to tax havens and certain harmful preferential tax regimes."

It is commonly shared concern that a lot of money is being generated by most unscrupulous methods: through bribery, receipt of kick-backs, drug-trafficking, insider trading, embezzlement, computer fraud, under invoicing-over invoicing, and other tainted activities spawning scams having deep lethal consequences for the welfare of common people. Billy Steel has aptly commented that it is 'the crime of the 90s'. He says:

> "Money laundering is the sleight of hand…a magic trick of wealth creation…the lifeblood of drug dealers, fraudsters, smugglers, arms dealers, terrorists, and tax-evaders. It is also the world's third largest business.."

But those who earn these ways try first to park them in places where the risk of detection, seizure, and confiscation is either non-existent or is minimal. Then they devise ways to disguise their criminal proceeds of their illegal origin. Somehow the predicate crimes must be concealed. The tax havens are considered the safe places to park such tainted wealth. Through companies floated in tax havens, ill-gotten money can be effectively laundered and brought into the normal economic channels. Many of the tax havens spread red carpet to welcome them. They ensure legal systems under which such pursuits are carried on without any risk of being subjected to scrutiny. The process is intensely shrouded in smog and darkness. First, the ill-gotten wealth, generated inside or outside a country, is

amassed and placed somewhere in the dark areas on the planet. Then the tainted wealth is layered in various ways from one country to another country, mostly tax havens with a studied strategy to cover all trails. This process, called "layering", is dexterously done through the countries, which assure secrecy. Then

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11. D.P.O'conell , *International Law* Vol 1 Chap 7.

comes the last stage in this craft of laundering: the stage of *integration* whereby the ill-gotten wealth, after rotation through an opaque system, is integrated in the channels of wealth creation of a recognized and respected economy. This whole unwholesome process does not attract serious attention because apparently, for many, it is a 'victimless crime'.

The other day we got news on the TV that a most widely known terrorist has vast wealth in Caribbean islands, Monaco and several other places apparently tax havens. He, to finance terrorism world over through his financial network, could adopt complex ways. If a dreaded terrorist decides to transfer resources to India from Monaco or the Bahamas, or Luxembourg, or some of the islands in the Caribbean Sea, or the English Channel or some dot-like country in Micronesia or Polynesia, he would adopt a simple strategy. He would instruct his investment manager to structure some device for transferring resources into the target country. By way of illustration, he might float a subsidiary company or a conduit company in Mauritius for transacting on the Indian Stock Exchange. It is worth noting that capital gains (in India by the Mauritian residents) are neither taxable in India nor in Mauritius. In fact, capital gains do not constitute even a species of income under the Mauritian law. Floating a conduit company in Mauritius is an easy affair. Such companies are so ring fenced as not to have adverse effects on the domestic transactions but enjoy all the facilities to maraud the revenue of other countries. India has become over these years an obvious and immediate target. Such companies obtain certificate of residence from the foreign tax authorities in order to pass for the real residents of the countries issuing such certificates.

There was some measure of check when the income-tax authorities used to investigate the cases of the non-residents. They examined to see the profile of the real operators and the beneficial owners to exclude the persons of the third States from taking advantage of the bilateral treaties. The courts of law have held such actions of the income-tax authorities in total conformity with law. In exercise of this jurisdiction the Income-tax Department could know the whereabouts of the *real operators* and the *real beneficiaries*. On knowing that some crime had been committed or some crime had been planned, the authorities of the Income-tax Department were duty bound to inform other agencies of the government to take appropriate actions. This would be in exercise of general duty of the type contemplated in the Government Instructions [12] issued in terms of section 138(1)(a)(ii) of the Income tax, 1961.

5. The instruments of Darkness

Not only banks, but also the members of the legal professional get involved as planners, executors; and more than these, as pressure group to influence and corrupt the persons in power. An expert has quoted Bertolt Brecht who said, "If

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[12]. There is a list of such Government Notifications in *Chaturvedi & Pithisaria's Income Tax Law* Vol. 3 pp. 3225-3228.

you want to steal, then buy a bank.' In many countries banks can be bought for very little money. Billy Steel[13] says: "Already, in Russia it is said that criminal groups control over 400 banks and 47 exchanges". Electronic transfers, cyber-payments, smart cards, e-cash and many other innovations have secured almost secrecy to transactions, and almost anonymity of the persons involved and the theaters of their craft. We are now in the World where there is the Armageddon scenario of banking on the net. The vested interest of their patrons is to ensure complete secrecy. In this World of the unscrupulous, money has ceased to behave the way it did under the sunshine. What is true of the Bahamas, a country (Area 5382 sq.mil.) having population only (2001) 298000 may not be untrue about Mauritius, or Cyprus, or Nauru, or Timore-Leste, or even Niue. It is our national duty to develop our critical sense and competence to hold institutions under vigilance. The financial institutions tend to emulate the IMF in its culture of lack of popular accountability and secrecy. The sort of model the IMF has presented is graphically described by Stiglitz who observed this institution at work from close quarters over a number of years:

> "The IMF comes by its penchant for secrecy naturally: central banks, though public institutions, have traditionally been secretive. Within the financial community, secrecy is viewed as natural- in contrast to academia, where openness is the accepted norm. Before September 11, 2001, the secretary of treasury even defended the secrecy of the offshore banking centers. The billions of dollars in the Cayman Islands and other such centers are not there because those islands provide better banking services than Wall Street, London, or Frankfurt; they are there because the secrecy allows them to engage in tax evasion, money laundering, and other nefarious activities. Only after September 11 was it recognized that among those other nefarious activities was the financing of terrorism."[14]

The present realities of the movements of money in the global economic architecture are well depicted by an expert:

> "The money screamed across the wires, its provenance fading in maze of electronic transfers, which shifted it, hid it, broke it up into manageable wads which would be withdrawn and redeposited elsewhere, obliterating the trail."

David C. Korten in his *When Corporations Rule the World* tells us that now we are dealing with 'a Rogue Financial System'. There are reasons to believe that through the tax-haven route we are getting massive 'hot money' about which *Business week*[15] aptly observed:

> "In this new market….billions can flow in or out of an economy in seconds. So powerful has this force of money become that some observers now see the hot money set becoming a sort of shadow world government---one that is irretrievably eroding the concept of the sovereign of a nation state."

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13. http://www.laundryman.u-net.com.
14. Joseph Stiglitz, *Globalization and its Discontents* p.228.
15. Hot Money' *Business Week*, March 20, 1995, 46 quoted by Korten at p.185.

"The global financial system has become a parasitic predator that lives off the flesh of its host---the productive economy."[16] In this scenario the speculators thrive on extractive investments, and transact through sophisticated financial instruments, known as derivatives and futures, making volatility a source of profits. 'The underlying patterns of the institutional transformation being wrought by economic globalization are persistently in the direction of moving power away from people and communities and concentrating it in giant global institutions that have become detached from the human interest.' Never was darkness used for profit more than under this rogue system we are up against. Transparency is the most effective remedy; but it is generally excluded on phone grounds and studied subterfuges.

The evasion of taxes, and the commission of crimes are facilitated not only by many banks, but also by experts, and persons wielding high political positions. The Paris-based *Financial Action Task Force on Money Laundering*[17] in its Report on the Laundering Typologies 2003-2004 examined the unwholesome role of many professionals and the 'politically exposed persons' (PEPs) [an euphemism for the persons holding public offices]. Its conclusions on two points of the contextual relevance are being quoted:

High technology

> "Wire transfers are a fast and efficient way of moving funds. Thus they can also be used for terrorist purposes. Complex wire transfer scheme can be used to create a deliberately confusing audit trail to disguise the source and destination of funds destined for terrorist used……."

PEPs

> "PEPs are individuals who are or have in the past entrusted prominent public functions in a particular country. New revelations of suspected PEPs' involvement in financial crime---especially as related to corruption---occur frequently in the press. PEPs, when involved in criminal activity, often conceal their illicit assets through networks of shell companies and offshore banks located outside the PEPs country of origin. PEPs were noted as frequently using middlemen or family members to move or hold assets on their behalf. The technique used by PEPs to hide assets is similar to those of money launderers. …."

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16. David C Korten, *When Corporations Rule the World* p. 193.
17. contact@fatf-gafi.org.

The Report discusses so many cases including those of the following:

(a) Payments structured to avoid detection.

(b) An associate of a PEP launders money gained from large scale corruption scandal

(c) A senior government official launders embezzled public funds via members of his family.

(d) Accountants and lawyers assist in a money-laundering scheme.

(e) Legal professionals facilitate in money laundering.

(f) An accountant provides specialist financial advice to organized crime.

(g) A lawyer uses offshore companies and trust accounts to launder money.

(h) A solicitor uses his client account to assist money laundering.

(i) A trust fund is used to receive dirty money and purchase real estate

Even in our country many persons in power have contributed to the creation and promotion of the opaque system, and have been its beneficiaries. The author has made this comment as it accords with the study by the Report of the Financial Action Task Force already mentioned. It is true that Mauritius has enacted the Economic Crime and Anti-Money Laundering Act, 2000 but this enactment does not alter the culpable situation in any substantial way. First, income-tax violations are not within the scope of the Act. Secondly, it is one thing to enact a law; it is different to enforce it effectively.

Under this opaque system, engineered by rabid and most inclement inequity, exist millions of God's children (*amritasya putrah*) marginalized and betrayed by those to whom they entrusted their destiny. It is a pleasant surprise that even our Supreme Court could perceive the grim struggle of the poor for existence. Certain lines of *Olga Tellis v. Bombay Municipal Corporation*[18] are a virtual saga of sufferings in the most parts of India. A visit to the villages in Bihar, especially during the floods, would make those, who still have their souls not sold, feel that even Heidegger's or Franz Kafka's world is brighter and better laced with a hope.

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18. per Chandrachud, CJI: "These Writ Petitions portray the plight of lakhs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first group of petitions relates to pavement dwellers while the second group relates to both pavement and Basti or slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters. come of age, bathe under the nosy gaze of passers by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Men folk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: "Who doesn't commit crimes in this city?" AIR 1986 SC 180.

A journalist, P. Sainath, expressed the woes of common people in a heart-wrenching book wherefrom blood curdling statistical information can be had[19].

The concept of Right to Life as conceived under Art. 21 has been interpreted to include:

(i) the right to live with human dignity;

(ii) the right to enjoy all aspects of life, which go to make a man's life meaningful, complete, and worth living. The concept got an activist dimension under *Maneka v. Union of India*[20];

(iii) the Right to Know as "there is also a strong link between art. 21 and the right to know…"[21];

(iv) The Right to Reputation[22]

(v) The right to health, life and livelihood[23] and education.

6. The shrinking State, and the waxing power of the commercial gladiators

Under *Pax Mercatus* the economists dominate the political realm. They are the spokespersons of the neo-capitalism. Robert L. Heilbroner rightly observed in his

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[19]. "…. every third human being in the world without safe and adequate water supply is an India. Every fourth child on the globe who dies of diarrhea is an Indian. Every third person in the world with leprosy is an Indian. Every fourth being on the planet dying of water-borne or water related diseases are an Indian. Of the over sixteen million tuberculosis cases that exist at any time world-wide, 12.7 million are in India. Tens of millions of Indians suffer from malnutrition. It lays their systems open to an array of fatal elements. Yet, official expenditure on nutrition is one per cent of GNP."
(P. Sainath, *Everybody Loves a Good Drought* pp. 24-25).
"More than 60 per cent of primary schools in India have only one teacher, or at best two, to take care of five classes (I-V). Most of these are in the rural areas. They lack even the minimal facilities it takes to run a school. The NCERT's Fifth Survey found that of 5.29 lakh primary schools ,well over half had no drinking water facilities. Close to 85 per cent had no toilets. As many as 71,000 had no buildings at all, pucca or katcha. Many others had 'buildings' of abysmal quality." "The first five year plan gave education 7.86 per cent of its total outlay. The second plan lowered it to 5.83 per cent. By the fifth plan, education was making do with 3.27 per cent of the outlay. In the seventh plan, the figure was 3.5 per cent. As the problems of her children 's education grew more, India spent less and less on them.'"
"Mass illiteracy and lack of education hurt in other ways too. They mean India's most basic capabilities will remain stunted. So economic development will---has to ---suffer. No major reforms will last that do not go with basic change in this area." "Who constitutes the nation? Only the elite? Or do the hundred millions of poor in India also make up the nation? Are their interests never identified with national interest?
Or is there more than one nation?".
(P. Sainath, *Everybody Loves a Good Drought* p. 48).

[20]. AIR 1978 SC 597.

[21]. AIR 1989 SC190, 202.

[22]. AIR 2004 KANT 169 (NOC).

[23]. *Reliance Petrochemicals Ltd v. Proprietors of Indian Express,* AIR 1989 SC 190, 202.

article in the *Encyclopedia Britannica*: "Thus did the appearance of capitalism give rise to the discipline now called economics."[24] There are evidences that there is a betrayal of the constitutional goals by the Government itself! The role of the State under this over gripping on rush of the market forces is succinctly described thus by Robert L. Heilbroner: to quote--

> "Perhaps of greater importance in perceiving Smith's world as capitalist, as well as market-oriented, is its clear division of society into an economic and a political realm. The role of government had been gradually narrowed until Smith could describe its duties as consisting of only three functions: (1) the provision of national defense, (2) the protection of each member of society from the injustice or oppression of any other, and (3) the erection and maintenance of those public works and public institutions (including education) that would not repay the expense of any private enterpriser, although they might "do much more than repay it" to society as a whole. And if the realm of government had been greatly delimited, that of commerce had been greatly expanded. The accumulation of capital had become clearly recognized as the driving engine of the system. The expansion of "capitals"—Smith's term for firms—was the motive power by which the market system was launched on its historic course."

The situation is made worse by aggressiveness of the Market. We are told that Adam Smith's "Invisible Hand", operating for every one's good, shapes our economy. The whole idea of this "Invisible Hand" is now an instrument of Grand Deception. In fact, it does not exist. Joseph Stiglitz rightly observed:

> "One of the main results of my work on asymmetric information -- which is just a fancy name for saying that different people know different things – was to show that *the reason the invisible hand often seems invisible is that it is not there.* That means that there is an important role for government. Or to put it another way, every game needs rules and referees to avoid chaos, and that is true of the market game as well."

Mirage and Deception worked for the advent of the Age of Finance, the characteristic features of which had been noted in the thirties by Jawaharlal Nehru as exact then as they are now:

> "Bankers therefore are the real bosses in the capitalist world today, and people have called our times the "Financial Age", coming after the purely Industrial Age. Millionaires and multi-millionaires crop up in Western countries, and especially in America…. But daily it is becoming more evident that the methods of "high finance" are most shady, and differ from what is usually considered robbery and deception only in the big scale. Of their operations. Huge monopolies crush all small concerns, and big financial operations, which few people can understand, fleece the poor confiding investor. Some of the biggest financiers in Europe and America have been exposed recently, and the sight was not a pleasant one."[25]

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[24]. Robert L. Heilbroner, Norman Thomas Professor Emeritus of Economics, New School for Social Research, New York City.

[25]. Nehru, *Glimpses of the World History.* P. 905.

What was a trickle in the thirties is now a flood, if not a *tsunami*. Under this predatory financial system, exotic financial instruments have been forged. Value is delinked from money. Investments have become extractive. Options trading, stock speculation, futures, derivatives, and trade in interest rates are used to obtain super profits. Endemic volatility (generated through Arbitraging, Speculating and Insuring) is deliberately created for the benefit of the speculators. "Hedge funds" are new innovations designed to serve the same end. Funds are turned into vehicles for all sorts: good, bad and indifferent. As Korten says,

> "Financial institutions that were once dedicated to mobilizing funds for productive investment have transmogrified into a predatory, risk-creating, speculation-driven global financial system engaged in the unproductive extraction of wealth from taxpayers and productive economy."

So far India is concerned, the Indo-Mauritius route has been most exploited by the financial experts and the banks handling this strange money game for the FIIs and the MNCs and by the mangers of the frosty Funds. But they constitute only the façade. The real beneficiaries are masked through various devices including the system of Participatory Notes (PNs as they are called). This is the world led and driven by big corporations. And we know that a corporation has no conscience. Persons behind them are profit-seekers with no holds- barred. Then there is a breed of money-managers who assist the money launderers, and help managing the dirty wealth of a Suhrato, or a Mobutu, or an Abacha , *et al.* We are not sure, because of the opaque system, which prevails in our country, how many mini or maxi Suhartos or Abachas our system has produced, or is producing in our country. Nothing delights the embezzlers, tax-evaders, fraudsters, tricksters, and economic gangsters more than an opaque system. The CBDT's Circular No 789 of 13th April, 2000, and the Instruction No 12 of 2003 illustrate the triumphs of the exploiters of the opaque system.

The universal feature of all tax havens is secrecy, and the grant of an assurance that the details of real ownership shall remain masked. For providing infrastructure for playing this game they get heavy fees. In this strange game nothing moves, not even money because under the present global financial architecture MONEY IS DEAD[26]. The fund Mangers just route figures through tax havens, or the cyberspace. But all the tax havens are not made of the same stuff. The Swiss political system has given evidence of high probity and ethical standards. The policy of *neutrality* that Switzerland followed in its history is the product of its geo-political situation. Its system of confidentiality ensued from its political neutrality; whereas the system of confidentiality in Mauritius is by way of a design generally crafted by a tax haven.

Our economic and fiscal policies evidence our strides towards becoming a sponsored state. J.K. Galbraith made an excellent analysis of this sort of scenario in his *The Culture of Contentment.* He drew on his 'insider status' as a trained

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26. Joel Kurtzman, *The Death of Money*.

economist in formulating his ideas. Peter Watson in his *A Terrible Beauty* has thus made a graphic account of the central thesis of this book:

> "The *Culture of Contentment* is a deliberate misnomer. Galbraith is using irony here, irony little short of sarcasm. What he really means is the culture of smugness. His argument is that until the mid-1970s, round about the oil crisis, the Western democracies accepted the idea of mixed economy, and with that went economic social progress. Since then, however, a prominent class has emerged, materially comfortable and even very rich, which far from trying to help the less fortunate, has developed a whole infrastructure—politically and intellectually—to marginalize and demonise them. Aspects of this include—
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> (i) tax reduction to the better off,
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> (ii) welfare cuts to the worse off
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> (iii) small, 'manageable wars' to maintain the unifying force of a common enemy, the idea of 'unmitigated laissez-faire as embodiment of freedom', and
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> (iv) a desire for a cutback in government.
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> The more important collective end result of all this, Galbraith says, is a blindness and a deafness among the 'contended' to the growing problems of society. While they are content to spend, or have spent in their name, trillions of dollars to defeat relatively minor enemy figures (Gaddafi, Noriega, Milosevic), they are extremely unwilling to spend money on the underclass matter nearer home. In a startling paragraph, he quotes figures to show that 'the number of Americans living below the poverty line increased by 28 per cent in just ten years, from 24 million in 1978 to 32 million in 1988. By then nearly a one in five child was born in poverty in the United States, more than twice as high a proportion as in Canada or Germany."[27]

7. The loot in darkness

The Delhi High Court in its Judgment[28] had observed:

> "We would however like to make an observation that the Central Govt. will be well advised to consider the question raised by Shri Shiva Kant Jha who has done a noble job in bring into focus as to how the Govt. of India had been losing crores and crores of rupees by allowing opaque system to operate".

But what this observation suggests is a miniscule part of the total drain. As the CBDT's infamous Circular 789 of April 13, 2000 handcuffed its officers, and drove them wear blinkers: so none knows how much we lost, or how much we are losing everyday. An expert writing about tax havens says:

> "…..at a conservative estimate, tax havens have contributed to revenue losses for developing countries at least US dollars 50 billion a year. To put this figure in context, it is roughly equivalent to annual aid flows to developing countries. We stress

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27. Vide Peter Watson, *A Terrible Beauty* p. 653 (Phoenix).
28. (2002) 256 ITR 563 Del.

> that the estimate is conservative one. It is derived from the effects of tax competition and the non-payment of tax on flight of capital. It does not take into account outright tax evasion, corporate practices such as transfer pricing, or the use of havens to under-report profit."

He further points out: "It is estimated that the equivalent of one-third of total global GDP is now held in financial havens." With globalization the reach of dirty money is global. There is a point in the saying that globalization and barbarization are coeval; and wax together cheeks by jowl.

The proponents of this new predatory financial system plead a lot for capital market liberalization. Capital-market liberalization would flourish best under an opaque system. An opaque system in a democracy is always anti-national. Commenting on its impact on poverty eradication Stiglitz says: " Capital-market liberalization is inevitably accompanied by huge volatility, and this volatility impedes growth and increases poverty."

8. A specimen of the craft of the crafty

This author has commented at several places on the sinister manipulation of the stock market. The most important factor that has helped this sordid phenomenon to grow is the lack of transparency under which the real owners and the real culprits hide themselves. This phenomenon is a matter of concern not only because it causes wrongful loss to our country and wrongful gains to the unworthy, but also because it provides a continent of darkness for crooks of all sorts to flourish. It is also a matter of national worry that whilst our government has, through silence and evasive actions, been a clear *particeps criminis*, our judiciary too has failed in preventing the waves of darkness subjugating the stock-market transactions and ruling crest-high in the realm of economic operations. One instance of this is how mere hoisting of the Certificate of Residence can ward off the critical gaze of the income-tax authorities even if the fund transmitted to the Indian stock market belongs to the corrupt Indians, the round-trippers, the masqueraders from different countries, and the terrorists and the anti-national elements of all sorts.

What this author has stated is amply borne our by an article in India To-day of June 6, 2005 entitled "What happened on May 17, 2004?" by Puja Mehra. The prospect of a Left-supported government was made a cause of panic which led to Sensex crashing 842 points on May 17, 2004. The investigation by SEBI has informed that this fall was brought about by one of the mighty foreign institutional investors, the UBS which sold, on a large scale, shares of "unidentified clients, many of whom SEBI suspects could be Indians." They "transacted in Indian stocks through UBS, but hid behind a maze of investment deals extending all the way from India to Mauritius, London, British Vigin Islands, the U.S. and back to India….It is Indian money circulating around the world and entering the country as foreign money—all illegal, of course." The FIIs issue participatory notes (PNs), which are issued by the broking firms to investors (individuals or institutional)

who prefer not to come in open. Even the FIIs may not know the real investors on account of intricate and multiple layering of transactions spread over several countries" viz. Mauritius, Virgin Islands, the Bahamas or this or that. "PNs account for 20 per cent of the FIIs inflow…..Some FIIs suspect 50-60 per cent of the amount (about $2 billion) has come from Indians." Even the JPC had noted the misuse of the PNS. The steps to prevent the misuse, which the SEBI has taken, are ineffective. Its "know your client" has failed as the FIIs make a mere formal compliance by knowing only the immediate clients who may be figments of delight of some crooks shrouded under many layers of ever deepening darkness.

The article, above mentioned, says that the SEBI is "also investigating 12 entities other than UBS for similar dealings." It is not credible, at least to this author, that the Central Government, whose agency (the CBDT) has issued the Circular 789 to allow the FIIs and their cohorts to reap the fruits of poaching through an opaque system, has any real will to tackle the real problem. It is further illustrated by the unworthy verve of its law officers our Government to defend the treaty shoppers before the Supreme Court in the PIL which was disposed of by the judgment in the Case of *Azadi Bachao*. This author would come to this aspect of the matter in several contexts in the course of the book.

9. The Remedy against the Executive Power

There is a strange syndrome of a simultaneous rollback of the State's functions and an incessant aggrandizement of the executive power. Allen has explained the right legal approach in these words, which have become *locus classicus*:

> "Entrusting great powers, says Lord Finlay , L.C., in (*R.v. Halliday*) [29] Parliament can feel 'certain that such powers will be reasonably exercised'. In *Liversidge v. Anderson* [30], the majority of the Lords felt the same confidence in the wisdom and moderation of executive officials; *there is, apparently, something in the tranquil atmosphere of the House of Lords, which stimulates faith in human nature.* The fact, is, however, that nobody on earth can be trusted with power without restraint. It is 'of an encroaching nature', and its encroachments, more often than not, are for the sake of what are sincerely believed to be good, and indeed necessary, objects." [31] (*italics* supplied).

In this context it is worthwhile to make the following two comments:

(a) The PIL in *Azadi Bachao* was against the executive's lawlessness that our Parliament took no steps to prevent. Despite this the Supreme Court found it prudent to make an appeal to our Parliament and the Executive to take steps to prevent Treaty Shopping; and

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[29]. (1917) A.C. at p. 268.
[30]. (1942) A.C. 206.
[31]. Allen, *Law and Orders* 3rd Edn. p. 297.

(b) Through the substitution and insertion in Section 90 our government tells us[32]: "Hands off: the executive knows more and understands better what is to be done here. You are not judges of these matters." Our Government often tends to forget the principle so felicitously stated by Prof. Wade in his *Administrative Law* (4th edn., 1977):

"As has been seen, the courts are to-day resistant to the whole notion of uncontrollable power and this is the best security against another lapse"

10. The vice of excessive delegation

The maximum beneficiaries in an opaque system are always the executive. Stiglitz is absolutely correct in observing:

'Earlier, in my days at the Council of Economic Advisors, I had seen and come to understand the strong forces that drove secrecy. Secrecy allows government officials the kind of discretion that they would not have if their actions were subject to public scrutiny. Secrecy not only makes their life easy but also allows special interests full sway. Secrecy also serves to hide the mistakes, whether innocent or not, whether the result of a failure to think matters through or not. As it is sometimes put, "Sunshine is the strongest antiseptic."'[33]

There is an evident trend to delegate wide and uncontrolled power to the executive. Both the law and the Constitution of our country are designed not to grave to the executive any open ended and extensive power of delegation. But so great is the power of the corporate *imperium* that for their benefit even this discipline is evaded. After the substitution and insertion in Section 90 brought about by the Finance Act, 2003, the executive has acquired an uncanalised and vagrant delegated power. A delegation of power of this sort granted under the National Recovery Act was struck down in *Schechier Poultry Corp's Case*[34] by the U.S. Supreme Court. The *delegation* of power granted by the newly inserted provisions under Section 90 goes counter to the principles of permissible delegation as set forth in *Ramesh Birch v. Union of India*[35].

11. An eclipse of transparency

Under an opaque system transparency is disliked by the executive, international institutions (like the IMF, World Bank, and the WTO), and the vested interests of ever waxing corporate *imperium* and their lobbyists. All this has lethal effects for the global civil society. Without going into detail, this author focuses on the following points:

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32. Vide the chapter on "A Morbid Story of the Mauritian DTAC".
33. Joseph Stiglitz, *Globalization and its Discontents.*
34. 1934 U.S. 495, 79 L. ED.
35. AIR 1990 SC 560.

(i) An opaque system always frustrates fundamental rights, and always dilutes the authority of the courts, which have the constitutional duties to protect them;

(ii) An opaque system does not help the formation of well-informed public opinion, which is the prime essential for the working of a democratic government;

(iii) If a system is opaque, the political and international institutions do not work under public gaze; hence, are not accountable to people;

(iv) A government which fosters an opaque system does no good to itself as it easily, and for evident reasons, becomes target of criticism for lack of probity and integrity;

(v) Secrecy works to the detriment of a democratic society. Stiglitz aptly puts it thus: 'There can be democratic accountability only if those to whom these public institutions are supposed to be accountable are well informed about what they are doing—including what choices they confronted and how those decisions were made".[36]

12. A sponsored state syndrome: and the tax law

The opaque system and its events have bearing on the ordinary citizens' right to dignified life. The East India Company wanted a revenue system more beneficial to them than to the natives. It is the same stance illustrated in tax policy even in the USA to which Stiglitz has referred while portraying *the Roaring Nineties*: "Another example was what we did with tax policy. As the bubble was going up and getting worse, what did we do? We cut capital gains taxes, saying to the market: if you make more money out of this speculative bubble, you can keep more of it. If you look at what happened to tax policy during the nineties, it is quite astounding. What we did in 1993 was raise taxes on upper-middle-income Americans who worked for living, and then in 1997 we lowered taxes for upper income Americans who speculated for a living. You ask the question: what sorts of values did this change represent?" Taxation, to have legitimacy, must not be at loggerheads with equity and propriety.

The corporate world and the international financiers have their distinct agenda to promote. They know how best to wring benefits for themselves. Pressure groups and persuaders abound in the corridors of power. The cheerleaders from the press and the lobbyists have largely worked together. The pressure and persuasion of the corporate world dominated by the MNCs, FIIs, and those masquerading through the foreign routes succeeded in their agenda in convincing the government by 1988, in what is called the first phase of "reform," that capital gains on shares deserved a shorter period for determination of "short-term capital gains" *vis-à-vis* other short-term capital assets. With effect from 1.4.88, in the case

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36. Stiglitz, *Globalization and its Discontents* 229.

of a share held in a company the holding period for being treated as a short-term gain became 12 months instead of 36 months in other cases. After 1991 we pampered and tolerated for diverse motives, not all honourable, the waves of foreign investors to frolic and play on our stock-market to reap profits, and to let them go out of the country without any let or hindrance, in most situations our government either snoring or under impervious blinkers evidencing an utter imbalance between the government and the market. In our irrational exuberance in the nineties we most often slurred over our commitment to the national cause. Capital market liberalization allowed investment capital to flow in and out. The predatory international financiers made best of this crazy international capital churn. The vested interests of certain segments highjacked our system under the abracadabra of our experts most of them with their souls mortgaged. The watchers of our national interest allowed our tax treaties to be massively abused. Not only what was obvious was not being seen, steps were taken through administrative omissions and commissions to exclude transparency to the maximum. The dominant operators in the share market had best of times;, our regulators wielding powers, both administrative and statutory, did, in effect, nothing more than illustrating Brownian motion. Jaswant Singh, in exempting the long-term investments in the blue chip stocks (the BSE 500 shares) from capital gains held for a year, was just implementing an item on the corporate agenda. And P. Chidambaram added icing on the cake for the benefit of all international investors by exempting long-term capital gains on all shares transferred on the bourses. Tax on capital gains had been imposed through the insertion of Section 12B in the Indian Income-tax Act, 1922 for raising resources for the country, now tax on capital gains has been avoided or mitigated for the benefit of the corporate *imperium*. The provisions pertaining to the Securities Transactions Tax illustrate the same policy of appeasing the foreign vested interests of the speculators and the gladiators operating through dense smog.

The argument that the turnover tax is a substitute of capital gains is absurd. We are virtually untaxing those who should bear tax, rather more of tax. It is unfair to increase the burden of taxes on the common people of this country, when unfair advantage is given to the FIIs, OCBs, and host of others for whom the rapacious international financiers are working. How long will our common people suffer, with tongue-tied patience, poverty, and all that goes with it? In the matters of poverty eradication, education, health, and agriculture we have largely gilded words of a bankrupt benefactor. If only transparency is ensured in our system of economic management, and equity is made to inform and condition under which taxes are levied, we would have surely more resources than we need! At present the Stock Market functions to illustrate what William Blake said:

Some are born to Sweet delight,
Some are Born to Endless Night.