CHAPTER 7
THE PRAGMATICS OF THE RIGHT JUDICIAL ROLE

SYNOPSIS

The sad-eyed justice, with his surly hum,
Delivering o'er to executors pale
The lazy yawning drone.

—Shakespeare, *Henry V* (I.ii)

An inconclusive play is Reason's toil;
Each strong idea can use her as its tool;
Accepting every brief she pleads her case,
Open to every thought she cannot know.

—Shri Aurobindo in *Savitri*

The Perception of the Division Bench in *Azadi Bachao* of its Judicial Role is not in line with our jurisprudence

1. The Narrowing of the Judicial Role

In *Azadi Bachao*, our Supreme Court overlooked the proper role of the Supreme Court as conceived under our Constitution. The Hon'ble Court articulated its province and function in these words: per B.N. Srikrishna J.---

> "The maxim "*Juices est. jus dicer, non dare"* pithily expounds the duty of the Court. It is to decide what the law is, and apply it; not to make it".

In *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*[1] in a one-sentence paragraph the three judges Bench of our Supreme Court in its majority judgment reiterated the above quoted view: per B.N. Srikrishna, J. ---

> "The maxim pithily expounds the duty of Court. It is to decide what the law is and apply it; not to declare it."

But the minority view of Justice G.P. Mathur struck[2] a contrary note.

2. The Flawed Judicial Thesis Soon Reversed

In *Standard Chartered Bank* our Supreme Court (Coram: N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar and B.N. Srikrishna, JJ.) reversed the view, taken in *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*[3], on the role of judiciary. Hon'ble Justice B.N. Srikrishna in his dissenting Judgment (on behalf of Justice N. Santosh Hegde and himself) acknowledges it tersely in these telling words:

> "The interpretation suggested by the learned counsel arguing against the majority view taken in *Velliappa*, which has appealed to our learned brothers Balakrishnan, Dharmadhikari and Arun Kumar, JJ., would result in the Court carrying out a legislative exercise thinly disguised as a judicial act."

The issue which came up for consideration before the 5-Judges Bench in *Standard Chartered Bank*[4] *Case* is briefly stated by K.G. Balakrishnan, J in the Majority Order:

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1. (2003) 184 CTR Reports 193].

2. From the head note of the Report.
"It will be wholly wrong to allow a company to go away scot free without even being made to suffer part of the mandatory punishment. Courts would be shirking their responsibility of imparting justice by holding that prosecution of a company is unsustainable merely on the ground that being juristic person it cannot be sent to jail to undergo the sentence."

3. [(2003) 184 CTR Reports 193].

4. [2005] 275 ITR 81 (SC).

> "The question that arises for consideration is whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment. In *Velliappa Textiles' case*, by a majority decision it was held that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where punishment provided is Imprisonment and fine, the court cannot impose only a fine. In Velliappa Textiles, prosecution was launched against the respondent, a private limited company, for the offences punishable under Section 276-C, 277 and 278 read with Section 278-B of the Income Tax Act. Under Section 276-C and 277 of the Income Tax Act, the substantive sentence provided is the sentence of imprisonment and fine. Speaking for the majority, one of us, (Srikrishna, J.) held that the first respondent company cannot be prosecuted for offences under Sections 276-C, 277 and 278 read with Section 278-B since each of these sections requires the Imposition of a mandatory term of imprisonment coupled with a fine and leaves no choice to the court to impose only a fine. The majority was of the view that the legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute. If more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty."

The judicial quest was to find out the real parliamentary intention expressed in certain statutory provisions. The Court observed:

> "The question, therefore, is what is the intention of the legislature. It is an undisputed fact that for all the statutory offences, company also could be prosecuted as the "person" defined in these Acts includes "company, or corporation or other incorporated body."

The Court examined comprehensively all the leading decisions on the point. It held that the distinction between a strict construction and more free one has disappeared in modern times and now mostly the question is "what is true construction of the statute?" It quoted with approval a passage in *Craies on Statue Law* 7th Edn. which reads to the following effect :

> "The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. "All modern Acts are framed with regard to equitable as well as legal principles.' "A hundred years ago", said the court in Lyons' case, "statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature."

Attention was also drawn to the observations of *Sedgwick* at page-532 of the same book: to quote--

> "The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the

> legislature without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy."

It deserves to be noted that the Court took into account the raw realities of our times in which corporations often tend to be the cover-let of gross abuse. It perceptively observed:

> "The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporation. The corporate vehicle now occupies such a large portion of the Industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."

Hon'ble Justice B.N. Srikrishna in his dissenting Judgment in *Standard Chartered Bank*[5] has repeated his concept of judicial function which he had taken in *Velliappa Textiles' case.* It deserves to be noted that he had adopted an identical view in *Azadi Bachao* a short while before. The Hon'ble Judge set forth detailed reasons for the stand adopted by him. Normally the view taken in a dissenting judgment is to be simply ignored. Salmond aptly observed that a "dissenting judgment valuable and important though it may be, does not count as part of the *ratio*, for it plays no part in the court's reaching the decision. [6] Yet this author intends to examine them in deference to the Hon'ble Judge. The Dissenting Judgment gives the following as the reasons in support of its view:

(i) One of the functions of the Court is to ascertain the true intention of the Parliament in enacting the statute and, as far as permissible on the language of the statute, to interpret the statute to advance such legislative intent.

(ii) The true function of the Court is best expounded in maxim 'judicis est just dicere, non dare': it is to interpret the law, not to make it.

(iii) If the legislation falls short of the mark, the Court could do nothing more than to declare it to be thus, giving its reasons, so that the legislature may take notice and promptly remedy the situation.

(iv) The argument of purposive interpretation, therefore, does not appeal when the statute in plain terms says something. In other words, the language of Acts of Parliament and more especially of the modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor strained to meet the justice of an individual case.

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5. [2005] 275 ITR 81 (SC).
6. Salmond, Jurisprudence, 12th edn. p. 183.

Both the Majority and the Dissenting Judgments posit a common goal of judicial interpretation, its Holy Grail. It is the intention of Parliament. But when this expression 'the intention of Parliament' is used, it reveals an imprecise zone much prone to creative exploration. It is a metaphor, which reveals itself in many ways. Prof. Cross is right in saying that 'the intention of Parliament' is not so much a description as a linguistic convenience." Perceptions are bound to differ, depending on how the Judges have made themselves, and how they look at the realities of the day. Both the external stimuli and the reservoir of experiences determine judicial sensibility through conditioned neurological response. The constitutional function of the judiciary is to resolve any doubts as to what written laws mean. The ever abiding polestar of the judicial voyage is the demands of justice in a given case. The prime mover in the juristic art of interpretation is this steadfast commitment to ensure that neither the law becomes a command to do the impossible, nor it becomes a mere sophistry that puts law and justice at loggerheads with each other. The matrix of judicial-decision making involves an intuitive factor working in creative symmetry with what is called the human factor.

Hon'ble Justice B.N. Srikrishna in his dissenting Order observed that it was pleaded that the Court should adopt a purposive construction of statutes. The dicta of Denning L.J. in *Seaford Court Estates Ltd. v. Asher* were pressed into service for emulation. The Hon'ble Judge commented that the view of Denning L.J., that 'judicial heroics' were warranted to cope with the difficulties arising in statutory interpretation, was severely criticized by the House of Lords in *Magor & St. Mellons R.D. C. v. Newport Corporation* . The view of Lord Simonds on the reach and ambit of Judicial Function, expressed by him in *Magor and St Mellons Rural District Council v. Newort Corporation*[7], has been invoked by B.N. Srikrishna J. Lord Simonds said, "the duty of the Court is to interpret the word that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited."

Lord Simonds "was a dominating intellect but cast in most conservative mould." Lord Denning, or Lord Diplock, was cast in a liberal mould more responsive to the needs of the time under aspects of justice and equity. Lord Diplock in *Fothergill v. Monarch Airlines*[8] called the approach of Lord Simonds "narrowly semantic approach", often adopted in the past.[9] Lord Diplock observed that it left an "unhappy legacy": to quote-

> "The unhappy legacy of this attitude, although it is now being replaced by an increasing willingness to give a purposive construction to the Act, is the current English style of legislative draftsmanship."[10]

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7. [1951] 2 All ER 839.
8. [1981] AC 189.
9. *Fothergill v. Monarch Airlines* [1980] All ER 696 H.L. at p. 705.
10. *Fothergill v. Monarch Airlines* [1980] All ER 696 H.L. at p. 705.

Even three decades after what Lord Simonds said in *Magor and St Mellons*, the Court of Appeal could refuse to accept the literal meaning saying, per Lord Denning:

> "In these circumstances I think we must abandon our traditional method of interpretation. The rebuffs in *Magor and St. Mellons Rural District Council v. Newort Corporation* no longer hurt. We must fill in gaps which Parliament has left. We must do our best to legislate for a state of affairs for which Parliament has not legislated."

Lord Justice Ormord before the Divisional Court had taken similar view: to quote—

> "We are fortified in our construction of this regulation by the reflection that it is almost inconceivable that Parliament could have intended to bestow major awards for higher education, out of public funds, on persons permitted to enter this country on a temporary basis, solely for the purpose of engaging in courses of study at their own expense. Such an improbable result is not to be accepted if it can properly be avoided."[11]

Had similar reflections been undertaken while deciding *Azadi Bachao* or *Velliappa Textiles,* the judicial response would have been much different. Could our Parliament be ever considered free to decide whether Treaty Shopping is proper or improper as the fraud of Treaty is clearly *mala in se.* How can a literal reading of words or hide-bound judicial approach facilitate a company in becoming a cover-let of abuse, or to escape the dragnet of criminal law when there cannot be any rhyme or reason for Parliament to be so unfairly indulgent to the derelicts.

The Supreme Court in *Bangalore Water Supply v. A. Rajappa*[12] approved the rule of construction stated by Denning L.J. while dealing with the definition of Industry in the Industrial Disputes Act, 1947. The definition is so general and ambiguous that Beg C.J. said that the situation called for "some judicial heroics to cope with the difficulties raised". K. Iyer, J., who delivered the leading majority judgment in that case referred with approbation the passage extracted above from the judgment of Denning, L.J. in *Seaford Court Estates Ltd. v. Asher*. In *M. Pantiah v. Verramallappa*,[13] Sarkar, J., approved of the reasoning adopted by Lord Denning. In fact, it is futile to follow Lord Simonds dictum. Our courts have developed its own jurisprudence. They prefer the liberal view of Lord Denning. Our courts are free to evaluate the views of Lord Denning and Lord Simonds. Our jurisprudence is more in tune with Lord Denning's views. With reference to the decisions of the U.S. Supreme Court also we have our choice. We may not accept the conservative approach of Chief Justice Reinquist; we may prefer the liberal approach of Chief Justice Warren who preceded him. It is not proper to rely on a judicial decision without knowing the jurisprudence of the relevant

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11. [1982] QB 688, 704.
12. AIR 1978 SC 548 Coram : M. H. Beg, C.J.I., Y. V. Chandachud, P. N. Bhagwati, V. R. Krishna Iyer, Jaswant Singh, V. D. Tulzapurrkar and D. A. Desai, JJ.
13. AIR 1961 SC 1107 at p. 1115.

court, and without considering their relevance within our ethos taking into account our mores and the juristic variables.

While interpreting statutory provisions, the Court discharges certain constitutional functions. The Court cannot become a Robinson Crusoe treating a statute, or its individual Section, an island under survey. It is bound to take note of our Public Policy, as the International Court of Justice takes into consideration *jus cogens*.

The Dissenting Judgment explains the nature of judicial function by banking on the well-known maxim of *'judicis est just dicere, non dare'*: the role of the court is to interpret the law, not to make it. The inaptness of this sort of role-perception would be highlighted later. This author intends to reflect on the Hon'ble Judge's comprehension of judicial role expressed through certain imagery from golf which functions both as a metaphor and simile. It says:

> "The Court cannot act as a sympathetic caddie who nudges the ball into the hole because the putt missed the hole. Even a caddie cannot do so without inviting censure and more. If the legislation falls short of the mark, the Court could do nothing more than to declare it to be thus, giving its reasons, so that the legislature may take notice and promptly remedy the situation."

The comparison is most inapt. Once upon a time judiciary had been the Crown's caddie in its conduct of the State-craft. A caddie is one who assists a golfer especially by carrying the clubs, he that waits about for odd jobs. Our judiciary as we have conceived and structured it under our Constitution, is surely not a caddie. Our Parliament is not playing golf as if it were a group of Walter Hagen, Byron Nelson, Chick Evans Chick; Francis Ouimet, or James Braid. A caddie could tell Ian Woosnam after a birdie at the first hole, that he had 15 clubs in his bag, one more than the rules permitted: a lapse for which a two-stroke penalty was imposed on him. Long back Lord Bacon[14] had drawn attention to the fallacy in analogical reasoning. It is strange that often even our courts are betrayed to it.

The Dissenting Judgment dismissed the relevance of the "Argument of Consequence". It observed:

> "A final argument, more in terrorem than based on reason, put forward was that, if the majority view in Velliappa is upheld, it would be impossible to prosecute a number of offenders in several statutes where strict liability has been imposed by the statute. If that be so, so be it. As already pointed out, the judicial function is limited to finding solutions within specified parameters. Anything more than that would be 'judicial heroics' and 'naked usurpation of legislative function'."

It is submitted that this view is not proper. Sydney Smith had aptly said :

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14. See CH. 12 on "Supreme Court on Treaty Shopping".

> "The only way to make the mass of mankind see the beauty of justice, is by showing them, in pretty plain terms, the consequences of injustice."

Lord Reid observed in *Pemsel's Case*[15] that it was relevant to consider the practical effect of allowing the appeal. Our judiciary, nay the whole citizenry, is never expected to function in blinkers.

The ambit of the judicial function, as determined in the Dissenting Judgment, effects a worrisome narrowing of the judicial role impermissible under our Constitution. This approach can delight those who want the judiciary to be in synchrony with the rollback Government, a phenomenon mandated under the economic architecture of globalization. But if this happens, it would be contrary to the spirit and terms of our Constitution; and a disaster for our Republic.

3. Further Revaluation of Ideas

The view of the judicial function, which the Division Bench of our Supreme Court has stated in *Azadi Bachao* (and later in *Velliappa Textiles*), does not accord well with Art. 141 of the Constitution of India. Art 141 says:

> "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

The "declaration" involves the operation of creative faculty, whereas the word "decision" does not carry that import. To "decide" is (as the *Concise Oxford Dictionary* 6th Ed says) "to settle (question, issue, dispute) by giving victory to one side; give judgment)." "To declare" means to " make known, announce openly and formally". Both etymologically and lexically the words may be noticed to have some intersecting points. But the expression "not to make it" in the judicial dictum specifically precludes the element of judicial creativity. "To make" involves creativity. "Make" means (as the above referred Dictionary says): "Construct, frame, create, from parts and other substances [God made man (a rational creature), bees make cells of wax, can make anything out of bamboo]". That the word "declare" in Art. 141 involves creativity is amply proved by induction from a plethora of judgments delivered by this Hon'ble Court. Declaration is creative; though the judicial perception of the right frontiers of judicial creativity may differ on margins. This Hon'ble Court misdirected itself by formulating its judicial role much narrower than what is mandated under the Constitution. This abnegation of the full-throated judicial function is a virtual abdication of the constitutionally established judicial role. In short, by unreasonably and arbitrarily narrowing its role perception, the Court acted *per incuriam.*

Under our jurisprudence, the judicial role is conceived and structured in the common law tradition, which contemplates judicial exploration to do justice to

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15. (1891) A.C. 531.

the very confines of all possibilities. In *Rupa Ashok Hurra v. Ashok Hurra,* [16] our Supreme Court observed:

> "The role of judiciary merely to interpret and declare the law was the concept of by-gone age. It is no more open to debate as it is fairly settled that the Courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. In the recent years there is a discernible shift in the approach of the final Courts in favour of rendering justice on the facts presented before them, without abrogating but by-passing the principle of finality of the judgment".

And according to Chief Justice Mukherji, in *Delhi Transport Corporation* case, "the Court must do away with the childish fictions that law is not made by the Judiciary" [17]

(a) The judicial view is anachronistic

The view of the province and function of law adopted by the Court in *Azadi Bachao* goes counter to the modern juristic thinking. It adopts what is called the Blackstonean view of the jurisdiction of the Superior Courts. Dias in his *Jurisprudence* states:

> 'Since there is no fixed ratio of a case, there is an element of choice in determining it. The orthodox Blackstonean view, however, is that judges do not make law, but only declare what has always been law.[18] This doctrine is the product of many factors. It would appear to result from thinking exclusively in the present time-frame, which gives rise to the belief that there must be some rule which is always 'there' at any given moment and waiting to be applied.'(At 151)

> "Judges do make law. A scrutiny of the judicial process shows that the Blackstonean doctrine is unacceptable. It fails to explain how the common law and certainly equity have grown. No Judge may refuse to give a decision. If no rule is at hand, he invents one. 'It may be' said Lord Denning MR 'that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better'. In such a situation declaring what the law is and what it ought to be amount to the same. More usually a judge narrows, extends or otherwise modifies some existing rule, but all rules, whether created or adapted, are subject to modification in their turn. The ratio of a case may be likened to a pellet of clay, which a potter can stretch and shape within limits. If he wants to stretch it, he can; or he can press it back into a pellet".

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16. AIR 2002 SC 1771 [S. P. Bharucha, C.J.I., S. S. Mohammad Quadri, U. C. Banerjee, S. N. Variava and Shivaji V. Patil, JJ].

17. (1991) Supp. (1) SCC 600 para 134.

18. Blackstone I pp88-89. See also Hale *History of the Common Law* p 90; Lord Esher in *Willis v. Baddely* [1992] 2 QB 324 at 326; Viscount Dilhorne in *Home Office v. Dorset Yacht Co. Ltd.* [1970] AC 1004 at 1045, 1051 [1970] 2 ALL ER 294 at 313, 318; and in *Cassell & Co. Ltd. v. Broome* [1972] AC 1027 at 1107, [1972] I ALL ER 801 at 854.

It is felt that the Court, instead of adopting a functional approach in legal interpretation, has adopted the anachronistic formal and analytical approach. Dr. Bernard Schwartz has aptly stated[19]:

> "All this may seem obvious to us today. We forget how different the judicial approach was at the beginning of the century. The dominant jurisprudence then was analytic, with the judges marching to pitiless conclusions under the prod of a remorseless logic, which was supposed to leave them no alternative. Since Pound presented his sociological approach and theory of social interest, the law in America has been considered a tool serving the ends of law appropriate to the given society. "To paraphrase Mr. Justice Holmes, law teachers in all law schools, practicing lawyers, and judges are moving to the rhythm of Pound's thought, although perhaps not always consciously." That so many of the ideas which he originated or at least sponsored are now commonplace is perhaps the best tribute to his work."

And Cardozo observed[20]:

> "It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean Pound. " Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude."
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> "The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised." Foreign jurists have the same thought: "The whole of the judicial function," says Gmelin, "has. been shifted. The will of the State, expressed in decision and judgment is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless positive statute prevents it; and in weighing conflicting interest, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory. "On the one hand," says Geny, "we are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social phenomena, to ascertain the laws of their harmony and the principles of order which they exact." And again: "Justice and general utility, such will be the two objectives that will direct our course." 'The greater or lesser aptitude of judges to switch from considering the legal form to considering the economic substance of a transaction is, it appears, not so much a question of the underlying doctrine 'abuse' or 'substance versus form'—but rather far more a question of the disposition of a judge or the legal tradition of a particular country.' And Klaus Vogel *observed*[21]*:* " Any penetrating analysis shows that, while theories have provided shells for the attack, the decision as to where the

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19. Bernard Schwartz, Some Makers of American Law p. 103.
20. *The Nature of the Judicial Process* p. 73-75.
21. *On Double Taxation Conventions* at p. 119.

ammunition was to be shot has been the result of the economic and social desires of those who used the artillery."

Our Supreme Court, in *Azadi Bachao*, seems convinced that Treaty Shopping deserves to be eradicated. Once it felt that way, there was nothing to prevent this Hon'ble Court in devising/applying norms, through its legitimate creativity, to prevent it. In no uncertain terms the Court of King's Bench pronounced in 1616 itself the great constitutional mission of the court. It was observed:

> "to this court belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be reformed or punished in due course of law. [22]

And Lord Mansfield, stated the function of the King's Court, as far back in 1774, in these words:

> "Whatever is *contra bonos mores et decorum*, the principles of our law prohibit, and the King's court, as the general censor and guardian of the public manners, is bound to restrain and punish." [23]

Judicial activism naturally follows from the very constitutional role of the court. In course of history, on account of supervening socio-political factors, the role underwent widening or narrowing.

(b) The British ideas on the judicial role

The author would discuss the British perception of judicial role under a sub-heading "A Judicial Oxymoron" where views set forth by the House of Lords in *Reg. v. Brown*[24] would be considered. While dealing with the cases of tax frauds, the courts must keep in view the articulation of the right judicial role by Lord Scarman in *Furniss v. Dawson*[25]:

> "Difficult though the task may be for judges, it is one which is beyond the power of the blunt, instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts: and ultimately it will prove to be in this area of judge-made law that our elusive journey's end will be found."

It was this approach that the Constitution Bench of our Supreme Court adopted in *McDowell & Co.*

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22. *Bagg* (1616), 11 Co. Rep. At 98a, [quoted by W. Friedmann, *Law in a Changing Society*, p. 77].
23. *Jones v. Randall* (1774), Lofft 383, 98 E.R. 706.
24. (1994) 1 A.C. 212.
25. [1984] 1 ALL ER 30 at page 533.

(c) The great U.S. judges delineate their role, which is comprehensive and creative at the same time

The approaches evidenced by the great judges of the U.S. Supreme Court should be considered with reference to the ideas of Justice Oliver Holmes (1841-1935), Benjamin N. Cardozo (1870-1938), and Earl Warren (1891-1974) as they have shown great insight in perceiving and articulating the proper judicial role.

(i) Holmes:

"During the thirty years he spent in Washington, he made the greatest contribution since Marshall to the American conception of the judicial function."[26] He is known for his Doctrine of Judicial Restraints. He believed that balancing of opposed views of public policy, a respect business, economic, and social affairs, were considerations for the legislative choice, to which the courts must defer unless it was demonstrably arbitrary or unreasonable.[27] He contemplated the existence of a legislative version of "reasonable man". He believed in the free trade in ideas. He considered the government an experimental process. He was a legal realist. And his view of judicial function was conditioned by his view of law. At the outset of his *The Common Law* he writes:

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which the judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[28]

Some of his catchy sayings pertaining to the Doctrine of Judicial Restraints[29], frequently quoted even by our courts, deserve to be taken with a pinch of salt.

(ii) Cardozo

Cardozo led the way in adapting the common law to the requirements of the post-industrial society.[30] In the opinion of Chief Justice Stone, he 'believed that the law must draw its vitality from life rather than the precedents, and that 'the judge must be historian and prophet all in one.' He saw in judicial function the opportunity to practice that creative art by which law is moulded to fulfill the needs of a changing social order."[31] "When he became a judge, he tells us, he quickly realized that "the creative element" in the judicial process "was greater than what I had fancied." Few judges of the day were as aware as he of the extent

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26. Bernard Schwartz, *Some Makers of American Law,* p.81.
27. *Duke Power Co v. Carolina Environmental Study Group,* 438 U.S. 59, 84, (1978).
28. *The Common Law,* p 1 (1881).
29. 'This case is decided upon an economic theory which a large part of the country does not entertain." 'A constitution is not intended to embody a particular economic theory, whether of paternalism…..or of laissez faire.'
30. Bernard Schwartz, *Some Makers of American Law,* pp. 104-105.
31. *Ibid* 106.

to which judges must "legislate"[32]. "Cardozo had all the qualities which are the mark of a great common law judge; the sense of history which enables the Judge to understand the reasons which gave birth to the rule and various influences which have affected its development, the sense of philosophy which enables to see the particular rule, not as a separate and individual provision, but as a part of a more general legal principle, and the sense of reality which will encourage him so to adapt the experience of the past that it may serve the needs of the present."[33]

(iii) Warren

"The work of the U.S. Supreme Court period when Earl Warren sat in the Supreme Court's central chair turned out to be 'the most innovative and explosive era in American constitutional law'" since the days of Chief Justice Marshall[34]. "The popular conception of Warren's judicial career has, indeed, been one of a virtual metamorphosis –with the political grub suddenly transformed into the judicial lepidopteron"[35]. "As soon as he took his place on the bench, however, the new Chief Justice was faced with a choice between the two antagonistic judicial philosophies that have contended in American courts throughout this century. In simplified terms, the division was between judicial activism and judicial restraint during the first years of the Warren Court; this activist approach was opposed most strongly by Justice Frankfurter. The Warren-Frankfurter difference in this respect ultimately came down to a fundamental disagreement on the proper role of the judge in the American system. Frankfurter remained true to the Holmes approach, insisting that self-restraint was the proper posture of a non-representative judiciary, regardless of the nature of the asserted interests in particular cases. Warren was willing to follow the canon of judicial restraint in the economic area, but he felt that the Bill of Rights provisions protecting personal liberties imposed on the judges more active enforcement obligations. When a law allegedly infringed upon the personal rights guaranteed by the Bill of Rights, Warren refused to defer to the legislative judgment that the law was necessary. Warren rejected the Frankfurter philosophy of judic ial restraint because he had come to feel that it thwarted effective performance of the Court's constitutional role. Judicial abnegation, in the Chief Justice's view meant all too often judicial abdication of the duty to enforce constitutional guarantees. "I believe," Warren declared in an interview on his retirement, "that this Court or any court should exercise the functions of the office to the limit of its responsibilities."' [36] It is interesting to note that Warren's adherence to this activist approach coincided with his visit to India in the summer of 1956. "He returned with a broadened perspective, aware that the judicial protection of human rights was supported by a constituency

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32. See Levy, *Cardozo and Frontiers of Legal Thinking,* p. 114 (1938).
33. Goodhart, *Five Jewish Lawyers of the Common Law,* pp. 55-56 (1949).
34. Friendly, Some Equal Protection Problems of 1970's. p. 5 (1970).
35. Bernard Schwartz, *Some Makers of American Law,* p. 125.
36. *Ibid* pp. 129-130.

that stretched far beyond American boundaries. The global image of the United States was directly related to the Supreme Court's role in enforcing constitutional guarantees against government infringement."[37]

4. The Warren approach and the Welfare State

The decisions of the Warren Court emerged to constitute the jurisprudential foundation of the Welfare State. "Besides considering the great social/legal problems of the day, Dworkin grounded his work in the all important question of how, in a democracy, the rights of the majority, the minorities, and the state can be maintained."[38]The malaise of the American society was discussed by Gunnar Myrdal (1898-1987) in An American Dilemma: The Negro Problem and Modern Democracy (1944). "Myrdal's solution was every bit as contentious as his analysis. Congress, he judged was unwilling and /or incapable of righting these wrongs. Only the courts could provide a remedy. Like Beveridge and Mannheim, Myrdal realized that after the war there would be no going back ……..in the long run there were two significant reactions to Myrdal's thesis. One was the use of the courts in exactly the way that he called for, culminating in what Ivan Hannaford describes as 'most important single Supreme Court decision in American history', *Brown v. Board of Education of Topeka* (1954).'[39] The era of laissez-faire economy underwent a radical change. The days of the *Lochner v. New York*, 1905 were virtually over. "In the second half of the 20th century the posture of the court changed entirely. The court today seldom concerns itself with economic liberties. It is engaged rather in protecting citizens' non-economic freedoms as well as their equality before the law, focusing on issues such as civil and political rights, procedural rights in the criminal and administrative processes, or the right to privacy." Explaining the trends and tendencies in the U.S. jurisprudence, an expert has observed[40]:

> "Viewed in the light of its two-century performance, U.S. judicial review can be assessed as an institution that defends the values of the political ideology prevailing in a given historical period against by and large occasional deviations from them on the part of the political branches of government. During the 19th and early 20th centuries, for example, the ideal of the minimal state and of a self-governing market was dominant with the elites of the Western world, and the Supreme Court did its best to enforce it in the peculiar context of the U.S. political system. At present the court is dedicated to furthering the values of the currently dominant ideal of a democracy: a system in which the equality and the non-economic freedoms of persons are recognized and the state possesses all the necessary means to regulate the economy. Conflicts between the court and the political powers, state and federal, have occurred, but they have never been sharp except occasionally under particular circumstances: in the difficult years following the establishment of the new federal

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37. *Ibid* 130.
38. Peter Watson, *A Terrible Beauty*, p. 644.
39. *Ibid* 391.
40. *The Encyclopedia Britannica*, Vol. 16 p. 701.

government and in the years of the Civil War; in the phase of transition from one to the other dominant political ideal (the New Deal years) and in the 1950s and 1960s, when the federal and state governments were seriously lagging behind in reshaping the legal system in accordance with fundamental requirements of the new democratic model".

5. Perspective under our Constitution is materially different

There were good reasons for making the U.S. Constitution short and aphoristic; there were good reasons for making the Constitution of India the most comprehensive Constitution yet framed. The framers of the Constitution of India knew that unless the constitutional objectives are concretely articulated, and strong dyke is established to withstand the passions of moments, the Constitution of the nascent Republic would not survive the guiles and chicanery, pressures (direct and cryptic), persuasion by the compradors, and those intellectuals who have no compunction in putting their talents in the service of the fraudsters of all sorts and of all lands.

The concept of the Welfare State in our country is constitutionally mandated till the Constitution of India, as we know it, survives. It has been repeatedly observed that our Constitution sets before Parliament and State Legislatures the goal of creating a Welfare State. Men, like Adam Smith, Malthus and Ricardo and John Stewart Mill were, in their writings on economics, principally concerned with the public welfare. Only, their views of public welfare differed from the views, which underlie the modern "Welfare State". When our Constitution was enacted, and Art 38 incorporated in it, the phrase "economic and social justice" had acquired a definite meaning conveniently described as "the Welfare State". In *Muir Mills Co Ltd v. Suti Mills Mazdoor Union*[41] Bhagwati J. described 'social justice' as 'a very vague and indeterminate expression', and added that whatever I meant, 'the concept of social justice does not emanate from the fanciful notions of any adjudicator but must have a more solid foundation'. On the other hand, Chagla C.J. rejected the submission that the Court should not import its own ideas of social justice in interpreting statutory provisions by saying that social justice, was an objective of the Constitution, and though difficult to define, it was, in the words of Holmes J. 'an articulate major premise' which was personal and individual to every Court and every judge, depending on the judge's outlook on life and society. Laws cannot be interpreted 'without reference to 'social justice' to the achievement of which our country was pledged. Both judges agree that social justice is hard to define"[42]. Our Supreme Court has already clarified the intimate interactions of Part IV and Part III of the constitution in *Chandrabhhavan's case*[43] AIR 1970 SC 2042.

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41. AIR 1955 SC 170.
42. H M Seervai, *The Constitutional Law of India* (4th edn.) Vol. 3 p. 1932.
43. *Ibid* 1949.

6. Judicial pragmatism and the operative realties of our times

The following three factors of prime importance should have been taken into account if the issues, as raised in *Azadi Bachao,* were to be decided *pro bono publico*.

These are the following:

(i) Our Supreme Court was bound by its oath to decide issues in the light of our Constitution, and jural culture conforming to it, rather than in the light of any economic theory, which became fashionable somehow, thanks to the *corporate imperium* and greedy gladiators and manipulators of the day. This author would demonstrate elsewhere that the ideas driving the much boasted Market economy as propounded by Joseph Schumpeter, Friedrich von Hayek, Milton Friedman, or W.W. Rostow are all humbug as they all have shown their servitude to the corporate *imperium*, and as they all expect good from the 'invisible hand' at work in the Market when it simply does not exist! It was a judicial blunder to take into account extra-juristic considerations when all the issues under the judicial consideration required a decision on the counts of legality and procedural propriety alone.

(ii) This case involved judicial review with transnational dimensions. "Thus the idea of the rights of the individual, after having contributed three centuries ago to the birth of the modern constitutional law of the national state, has now become the mainspring of another incipient, promising experience: judicial review with transnational dimensions"[44]

(iii) The Division Bench of our Supreme Court failed in considering the issues raised in this case in appropriate zeitgeist of this globalised world under throes of a clear mismatch between the Executive Government of our country and the players in the foggy and misty sphere of the global economic architecture. The subordination of the political realm to the economic realm is too staggering a reality to go unnoticed. The hiatus at work in the relationship *inter se* these realms can be inferred from what Mary Robinson, the U N Commissioner for Human Rights, said:

> "The legal regimes of trade and human rights have developed more or less independently from one another"[45].

The correct judicial perspective in the context of the present-day realities is thus stated by Judge Manfred Lachs of the International Court of Justice:[46]

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44. *The Encyclopedia Britannica* Vol. 16, p. 703.
45. Gary P. Sampson, *The Role of the World Trade Organization in Global Governance*, P. 210.
46. *In the North Sea Continental Shelf Case,* ICJ 1969, 3 at 222.

> "Whenever law is confronted with facts of nature or technology, its solution must rely on criteria derived from them. For law is intended to resolve problems posed by such facts and it is herein that the link between law and the realities of life is manifest. It is not legal theory which provides answers to such problems; all it does is to select and adapt the one which best serves its purposes, and integrate it within the framework of law[47]."

It would have accorded well with this Hon'ble Court's right role, amply evidenced in many great judgments delivered by it in the past. The Court should have forged new criteria of validity to deal with the intricately shrouded facts. The days are gone when a Cardozo could quote with approval this view of Henry Adams:

> "History, like mathematics, is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last."

The forces unleashed by the economic globalization are transforming and transmuting the roles of the institutions in our polity, and are reshaping our whole approach to human rights, and other priorities. If a bold and imaginative stand is not taken to stop this high jacking of our system for the benefit of the corporate *imperium*, this Hon'ble Court may not get a chance to set things in exercise of its judicial power of the State.

7. The *Cri de Coeur* to Parliament: an exercise in futility

The Division Bench of the Supreme Court refused to exercise the plenitude of its undoubted jurisdiction, in *Azadi Bachao*, by taking a narrow view (the Blackstonean view of the province and function of this Court) of its role to do complete justice by casting it under the Procrustean bed of the maxim '*Judicis est jus dicere - non Dare* pithily expounding the duty of the court; it is to decide what the law is, and apply it and not to make it'. A serious miscarriage of justice has been caused on account of the narrowing of the judicial role and its inevitable crypto-psychic pressure and persuasion in deciding the issues of greatest national importance raised in this case[48]. This narrowing of the judicial perception of its role led the Hon'ble Court to make a *cri de Coeur* in its Judgment for Parliamentary or executive initiative/intervention. Allowing the appeals, in effect, on technical grounds the Hon'ble Court made the following important observations pertaining to the evil of Treaty-shopping:

> "Whether the Indo-Mauritius DTAC ought to have been enunciated in the present form, or in any other form, is none of our concern".
>
> "We are afraid that the weighty recommendations of the Working Group on Non-Resident Taxation are again about what the law ought to be, and a pointer to

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47. J.G Starke's Introduction to International Law, 10th Edn., P. 178.

48. Views of Dias, Lord Radcliffe, G.W.Paton, Bernard Swartz, R. Pound, Cardozo, Klaus Vogel, Lord Mansfield, Lord Denning, Judge Manfred Lachs and of an ordinary citizen's views cited in the Review Petition *vide* paras 95 B to 102 at pages 264 to 275.

the Parliament and the Executive for incorporating suitable limitatations provisions in the treaty itself or by domestic legislation."

"In our view, the recommendations of the Working Group of the

JPC are intended for Parliament to take appropriate action."

"True that several countries like the USA, Germany, Netherlands, Switzerland and United Kingdom have taken suitable steps, either by way of incorporation of appropriate provisions in the international conventions as to double taxation avoidance, or by domestic legislation to ensure that the benefits of a treaty/convention are not available to residents of a third State."

This *cri de Coeur* of the Hon'ble Court could have been avoided, and the evil of Treaty shopping could have been prevented if the Hon'ble Court would have taken the line suggested by Lord Scarman in *Furniss v. Dawson*[49] who explained the efficacy and the reach of the judicial role in these words:

"The law will develop from case to case. Lord Wilberforce in *W T Ramsay Ltd v. IRC* [1981] 1 ALL ER 865 at 872, [1982] AC 300 to 324 referred to the emerging principle of the law. What has been established with certainty by the House in *Ramsay's* case is that the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process. The best chart that we have for the way forward appears to me, with great respect to all engaged on the map-making process, to be the words of Lord Diplock in *IRC v. Burmah Oil Co Ltd.*, [1982] STC 30 at 32 which my noble and learned friend Lord Brightman quotes in his speech. These words leave space in the law for the principle enunciated by Lord Tomlin in *IRC v. Duke of Westminister*, [1936] AC 1 at 19, [1935] ALL ER Rep 259 at 267 that every man is entitled if he can to order his affairs so as to diminish the burden of tax. The limits within which this principle is to operate remain to be probed and determined judicially. *Difficult though the task may be for judges, it is one, which is beyond the power of the blunt instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts: and ultimately it will prove to be in this area of judge-made law that our elusive journey's end will be found."* [Emphasis supplied].

It is submitted that observation of Lord Scarman clarifies the role of the judiciary in responding to such problems. The problem of Treaty Shopping, by its nature, is more amenable to judicial process.

By applying the criteria of predominance, the issues demanding judicial answers can be divided in two segments:

(a) the issues which are amenable to the administration of law and justice; and

(b) the issues that are predominantly legislative.

In deciding what can come within the province and function of judiciary the correct common law approach has been thus summed up by Ogg & Zink: Fundamental":

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49. [1984] 1 ALL ER 30 at page 533.

> "…The common law is still the "tough legal fabric that envelops us all"; the statutes hardly more than ornaments and trimmings. "The statutes," says an English writer, "assume the existence of the common law; they would have no meaning except by reference to the common law. If all the statutes of the realm were repealed, we should still have a system of law' though, it may be, an unworkable one; if we could imagine the common law swept away and the statute law preserved, we should have only disjointed rules torn from their context, and no provision at all for many of the most important relations of life."[50]

The judicial *cri de Coeur* in the impugned Judgment emanates from an abundant, but unrealistic, trust in the executive. The Government's attempts to justify its remissness in not responding to the challenges thrown up by the misuse of the tax Agreement for extraneous purposes in this secretive economic realm of economic globalization are founded on a dangerous doctrine subversive of our constitutional fundamentals. The Court was persuaded to take a judicial notice of the history of the world as to how democratic governments have been subverted on the plea of larger good. One of the most democratic constitutions in the world, the Weimar Constitution, was wrecked by Hitler only by pleading the larger good of *Volk*, the natural unit of mankind of which the greatest, in their way of thinking, was Germany. If Parliament modifies law, it is, of course a different matter. But the executive doing what is in the province of Parliament is a constitutional subversion. Not even with the noblest motives the executive can be allowed to be a law unto itself. Wade & Phillips (in *Constitutional and Administrative Law* 9th ed p.445) observes that certain decisions established the fundamental principle that state necessity does not justify a wrongful act.

The author wonders why this judicial suggestion is being made to the same executive whose ways are under question, and to the Parliament whose decline, judging by the raw realities, is almost complete. Doest this Court have from them the romantic expectations which had once deluded the House of Lords in *Liversidge v. Anderson*[51]*:* the majority of the Lords felt "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"?* If it happens, our rights and aspirations embodied in the great Constitution would become unsafe. Let not the stratagems and strategy of the crooks of all lands be allowed to succeed under our opaque system, as if our great Constitution stands buried under an epitaph: "Here lies the first Constitution of the Republic of India dead on being struck by the market forces unleashed by the economic globalization from which its citizenry failed in preventing it."

The Court's wide powers are derived not only from Art 32, but also from the nature of constitutional oath itself. 'Why otherwise does it direct the judges to

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50. W. M. Geldart, *Elements of English Law* (London) quoted by Frderick A. Ogg and Harold Zink, *Modern Foreign Governments* (Revised Ed) pp. 337-338.
51. (1942) A.C. 206.

take oath to support it [the Constitution]' Chief Justice put a rhetorical question in *Marbury v. Madison.*

> *"Besides, as observed by Brandies J., the need to protect liberty is the greatest when Govt.'s purposes are beneficent."*

Our civic culture is poor. Corruption has characterized globalization almost the world over. The proliferation of the micro States on this terra firma has created new problems pertaining realpolitik. Many so-called Sovereign States are purchasable commodities in this global market, more brute than Hobbes's Leviathan, more opaque than anything our imaginings can conjure up. A measure of judicial realism should have conditioned the judicial approach. History has something to say, let us not evade it. H.G. Wells mentions[52]:

> "Louis XIV was indeed the pattern King of Europe… He made bribery a state method almost more important than warfare. Charles II of England was in his pay, and so were most of the Polish nobility, presently to be described."

And our own Pandit Nehru writing about the role of "Big companies" in the noxious era leading towards the First World War has aptly said:

> "These armament firms were very rich and powerful, and many high officials and ministers in England, France, Germany, and elsewhere held shares in them, and were thus interested in their prosperity. Prosperity to an armament firm comes with war-scares and with wars. So this was the amazing position, that ministers and officials in many governments were financially interested in war! These firms tried other ways also of promoting war expenditure by different countries. They bought up newspapers to influence public opinion, and often bribed government officials, and spread false reports to excite people."[53]

Things have not become different. Things have become worse. Let us not forget what Freud said:

> "There is something to be said, however, in criticism of this disappointment. Strictly speaking it is not justified, for it consists in the destruction of an illusion. We welcome illusions because they spare us unpleasurable feelings, and enable us to enjoy satisfaction instead. We must not complain, then, if now and again they come into collusion with some portion of reality, and are shattered against it."[54]

8. A Judicial Oxymoron & The Judicial *Cri De Coeur*

The Division Bench's *cri de Coeur* for the Executive or Parliamentary intervention to prevent the evil of Treaty Shopping is a matter of grave public concern as it is a conjoint product of two manifest judicial mistakes: (i) an abnegation of an

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52. H.G.Wells *A Short History of the World* (Penguin Books) p. 226.
53. Nehru, *The Glimpses of the World History,* Ch. 146 p.615.
54. Sigmund Freud, *Civilization, Society and Religion* 'Thoughts for the Times on War and Death' p. 67 [The Penguin].

inherent judicial function which amounts to virtual abdication of the right judicial role; (ii) a non-perception of an inherent contradiction in the convoluted judicial reasoning which makes, on the one hand, an invocation to the Executive or Parliament for action, but, on the other, decides the issue by approving it, which the inevitable effect of what the Division Bench has done as a matter of actual decision.

It is submitted that *Reg. V. Brown* sheds much light on the points under consideration[55]. The case pertained to consensual sado-masochistic homosexual activities. Lords Templeman, Jauncey, and Lowry dismissed the appeal. Lord Mustill deliverd a dissenting jdgment with which Lord Slynn agreed.

Lord Templemn dismissed the argument that every person has right to deal with his body as he pleases. He said:

> "I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs…"[56]

Lord Temleman rejected the contention that only Parliament could decide the question by observing that "…the question must at this stage be decided by this House in its judicial capacity in order to determine whether the convictions of the appellants should be upheld or quashed." It is submitted that Lord Templeman was clearly right, because no court can say that it will not decide the question actually raised before it but leave to Parliament to deal with the question raised.'[57] And a set of perspective comments on this decision has thus been made by H M Seervai:

> "It is submitted that Lord Mustill and Lord Slynn did not realize the consequence of their statement that the question whether sado-masochists' homosexual activities should be treated as a crime must be left to parliament to decide. If it is to be left to Parliament, it can only be on the basis that Parliament is free to decide whether it should be made a crime or not. But in realty, there is no free choice. It is absurd even to suggest that the British parliament would not treat as crimes these degrading bestial and de-humanizing activities, which are *mala in se.* This is altogether apart from the fact that while purporting to leave the question to Parliament to decide whether sado-masochistic activities were criminal or not criminal. Lord Mustill and Lord Slynn, far from leaving the decision to Parliament, by allowing the appeal, decided the question in favour of the appellants that these activities were not criminal. This is because the accused had pleaded guilty after trial judge gave his ruling that consent was not a defence to their activity. The Court of Appeal had confirmed this and leave to appeal to the House of Lords was given. In other words, the observation of the dissenting Law Lords that the court was not competent to decide the question raised before it fails, because they did in fact decide the question. In view of Lord Mustill's, and Lord Slynn's theory that Parliament, and

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55. (1994) 1 A.C. 212.
56. *Ibid* p.235.
57. H M Seervai, *Constitutional Law of India* Vol 3 (4th ed.) p. 3227.

> not the courts should decide whether the appellants' activities were lawful or unlawful, the only order which the two Law Lords could pass consistently with their theory would be: "We pass no order on this appeal because it is for Parliament and not for the House of Lords to decide whether or not the appellants' activities were lawful or criminal." But they decided that the appellants' activities were not unlawful---*a reductio ad absurdum* of their theory."[58]

The Judges of the Division Bench in *Azadi Bachao* departed from the correct perception of its judicial role the broad parameters of which were thus explained by Lord Justice Balcombe in his *Maccabean Lecture* on "Judicial decisions and Social attitudes" delivered before the British Academy on 2 Nov. 1993:

> "It seems to me that if judge is faced with the question with which of its divorced parents should a child live: with the father who has remarried or with the mother, who now has set up home with her lesbian partner? The judge cannot avoid taking sides to some extent. To say that the lesbian home of mother is wholly irrelevant to the decision is just as much taking sides as it is to express a view on the issue. Much as I suspect most judges would prefer not to express a view on a controversial issue, they may be compelled to do so if this is necessarily an element to be taken into account in exercise of the discretion, which the law has conferred upon them. It cannot be right to say: I cannot exercise this discretion because this is an issue on which Parliament alone can rule."

Commenting on this observation H M Seervai says:

> "In other words, Lord Justice Balcombe rightly held that refusal to decide a question necessarily involves deciding in or other two ways."[59]

Lord Templeman concluded his judgment commenting:

> "Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized. I wound answer the certified question in the negative and dismiss the appeals of the appellants against conviction."

For Lord Templeman the activity is *mala in se:* he said: "It is submitted that Lord Lowry is right when he described he activities as *mala in se*."

Whilst deciding the legality of Treaty Shopping the Division Bench of our Supreme Court was deciding a contested issue "in its judicial capacity in order to determine whether [Treaty Shopping] should be upheld or quashed." The ambit and reach of the judicial function in the context of this sort had been explained by the House of Lords in *Furniss v. Dawson* to which this Petitioner has drawn attention elsewhere. The Court made, in effect, the following serious errors while treating the issue of Treaty Shopping:

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58. *Ibid* pp. 3227-3228.
59. *Ibid* 3230.

(i) Despite what they said about the role of the Court, they took up the issue and decided against the PIL petitioner rendering he judicial *cri de Coeur* a meaningless exercise contradicting the judicial theory as to what it can do, or what it cannot do[60].

(ii) The judicial theory is totally alien in our juristic zeitgeist, as we have never allowed a dissociation *inter se* morality and justice to set in our sensibility. It would be an insult to our Parliament of India to believe that it would treat the grave injuries caused to the nation's moral fibre and to the resources of this poor country, legal.

(iii) This inane exercise in formal logic was possible, as the Court did not reject the Doctrine of Necessary Evil. Moral vision cannot get divorced from the administration of law. It is inconceivable to hold them at loggerheads with each other. Gupta J. very aptly observed in *R.K.Garg v. Union*[61]*:*

> "To pass the test of reasonableness if it was enough that there should be a differentia which should have some connection with the object of the Act, then these observations made in *Maneka Gandhi* and *Royappa* would be so much wasted eloquence."

9. Our Supreme Court in *Ramachandra Rao v. State of Karnataka*[62]

The 7-Judges Bench of the Supreme Court in *Ramachandra Rao v. State of Karnataka* decided rightly an issue which could have been decided on a short point. It did not admit of any exposition on the nature of judicial role. It decided the issue on a well-known point of law that prescription of limitation is a legislative act. What is interesting, in the present context, is the view of three eminent writers (Sir William Wade, Lord Wright and Professor Sathe) on the role of

superior judiciary. As their views had no bearing on the actual decision, they merely have their exotic and exogenous existence in the judgment.

Prof. Wade cautioned the judiciary that it was the least competent to function as a legislature or the administrative agency. He highlighted the difficulties, which the courts are likely to encounter if embarking in the fields of legislation or administration. He, in the end, counsels: " the Supreme Court could have well left the decision-making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field". Patrick Devlin in 'The Judge' (1979) refers to the role of the Judge as lawmaker and states that there is no doubt that historically judges did make law, at least in the sense for formulating it. Even now when they are against innovation, they have

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60. *Reg. v. Brown* 60.
61. AIR 1981 SC 2138 at 2161.
62. AIR 2002 S C 1856.

never formally abrogated their powers; their attitude is: 'We could if we would but we think it better not.' But as a matter of history did the English judges of the golden age make law? They decided cases which worked up into principles. The judges, as Lord Wright once put it in an unexpectedly picturesque phrase, proceeded 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science'. Professor S.P. Sathe discovers the fundamental difference between the legislative and judicial law making. He exhorts the judiciary not to "cross the border of judicial law making in the realist sense and trench upon legislating like a Legislature." The Professor bewails that the "Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court", (p.242). He calls it 'judicial excessivism' which flies in the face of the doctrine of separation of powers. He holds that while law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law... through directions ... is not a legitimate judicial function.

This author, even at the risk of being imprudent, would venture to evaluate the views of the three musketeers of renown in words as few as possible:

Prof. Wade's observation:a criticism

Professor Sir William Wade, Q.C. seems to have undergone a sea change over these years of *Pax Mercatus*. It is strange to hear him counseling our Supreme Court that it "could have well left the decision-making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field". Could the Professor remember what he had written about the decision of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission?* In that case the Court's main object was to get over the "no certiorari clause". The net effect of the decision was to remove the cobweb of the intricate distinctions *inter se* error within jurisdiction and error going to jurisdiction. This decision, in effect, produced a sort of constitutional revolution for the reasons thus stated by Prof. Wade himself in his *Constitutional Fundamentals* (1980 at p. 68):

> "They (the British lawyers) would be much open to criticism if they remained content with the wretchedly narrow base to which they confined themselves 30 years ago, when they took clauses of the 'if the minister is satisfied' type at face value. For judicial control, particularly over discretionary power, is a constitutional fundamental. In their self-defensive campaign the judges have almost given us a constitution, *establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper functions*. They may be discovering a deeper logic than the crude absolute of statutory omnipotence"

How has he forgotten the judicial creativity shown in hundreds of cases by the courts in the common law jurisdiction? The illustrations of judicial creativity in

the Professor's own country are well known: the decisions relating to the doctrine of promissory estoppel; the Mareva injunction; the conversion of the Crown privilege into Public interest immunity; and the duty to act fairly in administrative actions.

The jurisdiction of our Supreme Court is not so narrow as Prof. Wade thinks. He thinks that if only the Court draws the attention of the executive or the legislature, the lapse would be remedied. Our executive does not have that measure of civic culture, which it needs to possess to be so sensitive to the social needs of the common people of the country. If the executive or the legislature is not responsive to provide effective remedy to the problems, which have constitutional dimensions, then there is no valid reason for the Supreme Court to stop with mere observations. Ours is a low-arousal society, and the executive is thick-skinned. Legislature is virtually managed by the executive, and has failed to arrest its own decline. If government always could be trusted there would have been no need for the Fundamental Rights; and the Supreme Court to "uphold" the Constitution. The deterioration in public life has become a matter to be taken into account. The Supreme Court has aptly observed[63]:

> "This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country, along with or even before cleaning the physical atmosphere. The pollution in our values and standards is an equally grave menace as the pollution of the environment. Where such situations cry out, the Court should not and cannot remain mute and dumb."

It is a theoretical view that the executive and the legislature are better informed than the judges or the lawyers. The level of our political representatives' attainment, as observed in the recent years, does not inspire any confidence in the view that the Professor holds. Prof Wade's ideas smack of an evident judicial rollback mandated these days by what this author calls "the kiss of the Market" *(Pax Mercatus).*

Patrick Devlin's views:

Judicial history attests, to a good extent, the correctness of the observation: "The primary function of judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by Legislation." "Interpretation" is a creative process. Judges have freely created norms and principles, which relate to the *administration* of justice. To illustrate: one of the governing principles of the administration of justice is that fraud should always be unraveled. Determination of material facts and the reach and ambit of a rule are creative process. The doctrine of the Lifting of Corporate Veil

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63. *Shivajirao Nilangaker Patil v. Mahesh Madhav Gosavi*, AIR 1987 SC 294 at page 311and 306 (repeated in R *S Das v. Union,* AIR 1987 SC 593 at 598).

is a tribute to judicial creativity. Julius Stone has explained this aspect of the judicial role[64]:

> "This second challenge is further complicated by the fact that, just as the corporate unit largely displaced the individual entrepreneur of the eighteenth century, so an institutional reality which may be called the 'enterprise entity" may be displacing the legally granted corporate personality. A corporation spawns subsidiaries to extend its fields or for tax reasons; or legally separate corporations unite in substance under common controllers. While the enterprise entity is *prima facie* the legal corporate personality, even the law may sometimes recognize the underlying enterprise entity itself. For instance the doctrine of *de facto* corporations treats as the enterprise entity what has been created by agreement of the associates for the purpose at hand. Again courts may sometimes treat more than one legal corporation as a single entity, where one has a controlling interest in the other or others and has integrated their respective affairs, for the purpose (for example) for finding a broader base for the subsidiary's obligation. Whether reached through a theory of "agency", or of "merger" of operations, the effect is that the enterprise entity is outlined by the Court in accordance with business or economic fact. On some interpretations, too, situations can arise in which the stockholders of a legal corporation can have their liability extended to cover deficiencies in an entity, which has arisen from the control of several other corporations, on which their corporation has entered. Such cases are additional to the better known cases of judicial lifting of the "corporate veil", to uncover tax or criminal liability, or anti-trust violation or enemy character or the like, where there are often related applications of the notion of the enterprise entity."

In *Azadi Bachao* the Court itself should have provided an effective remedy against the evil of Treaty Shopping. After all, the Court had just to lift the veil and see the realities. But the Court did not do that. Fraud is fraud whether it emerges through a domestic perpetration , or peep through a mask donned at the international plane. The abuse of a tax treaty has a domestic impact. Its implementation is neither a matter of public international law nor of the private international law. "Tax treaties, unlike conflict rules in private international law, do not face the problem of choosing between applicable domestic and foreign law. Instead, they recognize that each Contracting State applies its own law and then they limit the contracting States' application of that law."[65] Patrick Devlin in 'The Judge' (1979) refers to the role of the Judge as lawmaker and states that there is no doubt that historically judges did make law, at least in the sense for formulating it. In formulating the principles the judges are highly creative. How a judge proceeds in a given case can be illustrated by examining the judicial technique of Lord Denning. Prof. Schmitthoff said written about Lord Denning's judicial technique:

> "He thinks of the result before he considers the legal reasoning on which it has to be founded. If the result to which established legal doctrine leads is obviously unfair or out of touch with what ordinary people would expect to be the law, he

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64. Julius Stone, *Social Dimensions of Law and Justice*, p. 429.
65. *Klaus Vogel on Double Taxation Conventions*, p. 26.

> will examine first principles in order to ascertain whether they really compel an unjust solution and often this method will enable him to arrive at an answer which is more adequate to modern needs."[66]

Under this technique justice prevails. No barrier can ever stand before a sincere judicial will of doing substantive justice. Judicial decision-making is primarily through insight modulated by principles rather than merely through argumentation howsoever seemingly profound and sharp. Dr Bernard Schwartz, examining the judicial technique of Chief Justice Warren of the US Supreme Court, said: "Every so often in criminal cases, when counsel defending convictions would cite legal precedents, Warren would bend his bulk over the bench and ask, "Yes, yes---but were you fair?"[67]. The quest for fairness provides a wide zone of judicial creativity.

Lord Wright' simile

The ancient mariners in the Mediterranean Sea hugged the coast from point to point as they had their esoteric reasons to do so.

(i) The Mediterranean is an intercontinental sea between the Atlantic Ocean on the west to Asia on the east, and on account of historical reasons is called the incubator of Western civilization. Its west-east extent is about 2,500 miles and its north-south extent about 500 miles, occupying an area of 970,000 square miles. The mariners' inter-actions with the coastal countries were so deep and frequent that they chose to hug the coasts while proceeding further to more distant lands.

(ii) The Mediterranean traders moved close to the coasts, as they feared the ruffled sea, and the roving pirates at large on the waters much distant from the coast.

(iii) The Mediterranean traders of the yore sold their goods to the littoral states, and were under the constant quest of new lands to settle down to solve the over pressing population problem which troubled Athens and Sparta: the first solved it by moving to other lands as traders and professionals, the second by colonizing through the conquest of the adjoining lands. The sailors tended to hug the coasts not only to sell their wares but also settle down. This process brought them even up to the Panda region of South India.

The Judges of modern democracies have no reasons to feel insecure. Their greatest strength is not the constitutional provisions, but the faith of common man in them. If the executive ignores the judges, people would care too hoots for the executive itself ! They need not fear of insecurity. They have ample power to prevent poaching on their authority.

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66. Quoted by H.M Seervai, *Constitutional Law of India*, Vol-III, 3rd Ed. p. 2481.
67. *Some Makers of American Law,* p. 138.

Their mental make-up has nothing in common with the psychology of the Mediterranean sailors kissing the coasts for profits and gains.

(iv) The statement that the Judges of the golden period " did not design a new machine capable of speeding ahead; they struggled with the aid of fictions and bits of procedural string to keep the machine on the road", is untrue. The judicial responses to the challenges of the changing times couldn't be possible without "a new machine capable of speeding ahead". In this process they turned many facts into fictions, and many fictions into facts. Judicial creativity was shaped by the demands of the time, the needs of the context. Is it precisely what Judge Manfred Lachs of the ICJ said in *In the North Sea Continental Shelf Case*[68].

Professor S.P. Sathe's views: a critique

(a) The title of Prof Sathe is remarkably enriched by its ambiguity "Judicial Activism in India - Transgressing Borders and Enforcing Limits" which may mean either of the two:

(i) Judicial activism which prevents transgressing borders, and enforcing limits by the organs of the state; and

(ii) Judicial activism which itself involves transgression of boarders thereby failing in the enforcement of its own limits.

(b) The Court never legislates the way a Legislature legislates. It cannot do so under the structured protocol of its decision-making. The legislative process of the legislature and the creative process of judiciary are different in grammar, reach, and efficacy. Some superficial or peripheral resemblance should not mask their operational differences. Whilst the expression "judicial law making in the realist sense" trenching upon legislating like a Legislature is, at best, a mere garbed denigration bidding judiciary to roll-back leaving the executive to sway all around without the risk of judicial control and discipline. This phenomenon, looming large, may delight those who want the judiciary, an organ of the state, to recede to a narrow area of operation.

(c) The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court". "Interstitial" law making had a mystical significance under the frontiers of the British constitution. In itself the expression "interstitial" carries no sense. The word means "a small gap or space between two things". First, even as a metaphor this term does not mean much. Secondly, most lawyers in our country persist incorrigibly under the hangover of the British jurisprudence.

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68. ICJ 1969, 3 at 222.

The Supreme Court in our country is the supreme constitutional court and apex appellate tribunal rolled into one. It has wider sweep, and more articulate and expansive constitutional mission to pursue.

(d) Prof Sathe says: "In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers." The doctrine of Separation of Power has always been in constitutional history a will-o-wisp. It was devised to rein absolutism, and disperse concentration of power, which always goes with tyranny. The expression "excessivism" lacks sense unless it is made to mean a negation of judicial activism. This author would better like to stress on the discharge of judicial duties rather what goes by 'judicial activism'. There can be 'judicial activism' by the timorous souls with conservative mental-frame under the grip of withdrawal syndrome. On the other hand, 'judicial activism' inheres also in the constitutional expansionism exploring the reach and constitutional ambit of their role to the very confines of their limits. The Professor's precise words have imprecise meaning, which eludes more than illuminates.

Law making is done through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression'. But in the judicial process so many other things get factored in. A circle beyond the constitutional context contains the context of the postulates of our open and democratic society that must condition and make the texture of the whole jural system translucent. In the present context of *Pax Mercatus* the determination of the judicial frontiers narrowly may just be a strategy to increase the already mighty executive power friendly to the market forces. It had happened in the past (see the Chapter on "Towards the Sponsored State"), it is fast happening now.

10. Lesson that the story of the I.T.C. Case teaches

In *M/s. I.T.C. Ltd. v. Commissioner of Central Excise, New Delhi & Anr.*[69] a Division Bench of this Hon'ble Court had observed in the last para of its judgment:

> "The certainty of specific rates which was sought to be achieved by the notification has been undone by the adjudicating authority and the Tribunal. The notification had introduced a system for levy of excise duty on an experimental basis. If the experiment was a failure for whatever reason, it was open to the respondents to do away with it and replace the system by some other as it did in 1987. But as long as the Notification stood, it had to be given effect to."

The Executive promptly acted to undo the effect of the decision of the Court through an Ordinance: the law was retrospectively amended making excise duty

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69. Coram: Hon'ble Mrs. Justice Ruma Pal and Hon'ble Mr. Justice P. Venkatarama Reddi.

payable between 1983 and 1987on amount charged by the retailer. It further declared that no claim or challenge shall be made in, or entertained by, any court, tribunal, or other authority on the ground only that the central government did not have, at the material times, the power to amend retrospectively. It was good to see that the Executive responding to undo the unjust enrichment and the sharp practice of someone wielding enormous power and influence. Then there was staged a morbid melodrama of which the *dramatis personae* were the big-players of the industries, and their pleaders and all others including many *participis criminis* in varying degrees. It was announced through a high-pressure advertisement that it was prudent to forget and forgive otherwise (a) the faith of the global investors would be shaken in India's Rule of Law; and (b) that the corporate world would be annoyed. One high-up of an association of industrialists had once admonished this author that if money brought on the Stock Exchange be ever mandated to be parked in India even for a few years, the FIIs would move to other destinations; and 'India would go to dogs as the hot money would be soon withdrawn'. For a moment this Petitioner suffered from intense concussion of the sort Emperor Bahadur Shah Zaffar must have felt when the British had told him that whatever he was, he was at their pleasure.' But, getting over the shock, this author could muster courage to retort, "Only the crooks, scamsters, fraudsters, and the derelicts would go down the gutter. And it would be a good riddance." Our executive government was prevailed upon to let the Ordinance to lapse. Here our executive government, after the issue of a sound Ordinance, makes a *volte-face*. This story is illustrative. In itself it is a mere expanded metaphor of the morbidity of our public life in which the comprador of all hues and all lands have the last laugh. The ordinance itself was as a flicker of light in the marshy land.

The *cri de Coeur* of the Division Bench of this Hon'ble Court in *Azadi Bachao*, to devise ways to stop the evil of Treaty Shopping hasn't borne any fruit except in a simple sentence in the CMP which: "Misuse of double taxation agreements will be stopped". But nothing has happened to do so. One would just repeat, with Hamlet, "words, words, and words"!

11. What our Superior Courts can do in matters involving a tax treaty

If the Court finds that the Indo-Mauritius DTAC, in whole or in part, conflicts with the law of the land then it may hold it *domestically non-operative* even if the treaty is duly concluded and is internationally binding. (Lord McNair, *The Law of Treaties*, Chapter IV, p. 82; Starke, *Introduction to International Law*, pp, 77-78). The binding force of the treaty under International law is to be distinguished from its internal applicability (Klaus Vogel *on Double Taxation Conventions*, p. 24). The Court has ample jurisdiction even to issue mandamus directing the Central Government to do its public duty which emanates from the power that it wields under section 90 of the Income tax Act, 1961 and under the provisions of the Central Boards of Revenue Act 1963. Commenting on *Teh Cheng Poh v.*

Public Prosecutor, Malaysia, 1980 LR, 458 PC at p. 472 H. M. Seervai observes, "… the importance of Poh's Case lies in the fact, that in the opinion of the Privy Council a *mandamus* would lie against the Cabinet to advise H.M. to revoke the Regulations." (*Constitutional Law of India*, p. 1131). In the *Teh Cheng's Case*, Lord Diplock observed (at p. 473 of the Report):

> "This, however, does not mean, as the defendant would have it, that the security area proclamation can be treated by the court as having lapsed ipso facto as soon as there are no longer any grounds for considering it still to b necessary for the particular purpose described in section 47 for which it was originally made. Apart from annulment by resolutions of both Houses of Parliament it can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32 (1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the cabinet, mandamus could, in their Lordships' view, be sought against the members of the cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the proclamation. No such steps to obtain revocation of the security area proclamation had been taken by January 13, 1976."

The Court can direct the cabinet to advise the President to take correct and remedial actions even at international plane.

On reading the Judgment in *Azadi Bachao*, one is left with an impression that the judicial reluctance to examine the issues pertaining to the legality and the procedural propriety of the issues was on account of an evident reluctance to enter into the realm of international treaty. The basic fallacy is in not recognizing that all the organs under the Constitution are under constitutional limitations; and they bind the Executive whether it acts in New Delhi, or Mauritius, or Nauru, or Marrakesh. If a different view were adopted, the consequences would be shocking. The Executive can someday by entering into a treaty at the international plane, (perish the thought) can mortgage the whole country to a MNC, or can outsource the highest judicial power of our Sovereign Republic to an external agency even by making even our Supreme Court a mere subordinate court of residuary jurisdiction! The Court should guard against it before it is too late. This brings to mind an Old Spanish proverb: Less of less of less. This Hon'ble Court should not have missed obvious points as these:

(1) No country is bound to give effect to a foreign administrative act without examining its legality and propriety.

(2) The doctrine of 'comity' does not apply to the revenue matters.

(3) Not to allow statutory authority to discharge duties amounts to the subversion of the Constitution itself.

(4) The Government has no authority to act detrimental to the nation's resources as the national resources are under public trust.

12. The Limits of the Doctrine of Restraints

If Chief Justice Warren had been at the helms of the affairs of the U.S. Supreme Court, he would have responded to the realities of this economic globalization by collapsing the distinction between the human rights situations and the economic situations. The hydra of the economic globalization has so enmeshed us that our human rights are exposed to great jeopardy. Now it has become the greatest constitutional duty of our Supreme Court to see that our human rights granted to us under the Articles 14, 19, 21, and 25 are not lost on any specious pleading, for any reason whatever. A reference has been made to Chief Justice Warren as it is noticed that there is an evident streak of conservatism in the post-Warren epoch, a tilt towards the Market. Our Supreme Court had adopted a judicial approach analogous to that adopted by the Warren Court. Time has rendered obsolescent those dicta wherein this Court had struck a note of caution of restraint in examining the legality of tax issues in deference to Parliament. The present tsunami of circumstances unleashed under the architecture of economic globalization is a jeopardy *sui generis*, a like of which never occurred in the past. Our superior courts are under the constitutional oath to uphold the Constitution, even if the Executive or the Legislature betrays its cause.

This author has referred to a strange syndrome, which is co-eval with the economic globalization: the gradual subordination of the political realm to the economic realm. The Constitution represents the supremacy of the political realm within which after centuries of struggle we have succeeded establishing a democratic polity. After the setting up of the Bretton Woods institutions and the emergence of economic architecture, the fundamentals of constitutional democracy have been systematically but subtly, by hook or by crook, eroded. These forces, at international level, have damaged the majesty of the U.N.O. which is a prime political institution at the international level. The waxing forces of globalization have acted adversely even on internationally accepted human rights. This point is clear from a resolution of the Sub-Commission on the Promotion of Human Rights which—

> "Reminds all Governments of the primacy of human rights obligations over economic policies and agreements."(Economic and Social Council Distr. General E/CN.4/Sub. 2/2000/ L.11/Add.1 of 17 August 2000)

A time has come when the courts shall have to recognize that if they show reluctance in interfering in the governmental actions on the ground of non-intervention in economic matters, they would soon find that their restraints would, in the end, turn out to be an institutional death-wish. Days of Holmes are dead and gone. Warren went ahead on the track but could not go whole hog as the corporate *imperium* could not withstand too many of his onslaughts. In this Petitioner's view, in our tryst with destiny it is for our courts to play the role,

which Apollonius played in John Keats *Lamia*. (Apollonius, whose glance alone made the fraudulent Lamia fumble and crumble proving *satyameva Jayate*!*)*.

Our Indian judiciary is, in the global jurisprudence, *sui generis*. A history of the U.S. Supreme Court shows that most often the waves of socio-politics have conditioned the judicial response. It is difficult to understand the pronounced streak of conservatism and market-friendliness in the years after the retirement of Warren as the Chief Justice. In the U.S.A. there are good reasons for this trend. First, the U.S Constitution is very brief and skeletal, leaving much scope for judicial creativity. Second, the Chief Justice in the U.S Supreme Court was not the first amongst the equals; he is the moon in the fraternity of the lesser stars. In the U.S.A. the executive appoints the Chief Justice with an eye to his expected performance in matters political and economic. In the U.K., despite a high tradition of judicial detachment and reputation, the Judiciary is the weaker of the other two organs of the State. Its majesty survives only on sound public opinion of a vibrant democratic society. It cannot carry out its mandate without fear from the other two wings of the government. The core of this constitutional commission is set forth in the Preamble to the Constitution of India, and in the provisions pertaining to fundamental rights and the directive principles of state policies. Our Constitution mandates the Judges to be activists. The lily-livered and timorous souls are bound to betray their constitutional mandate. Our Constitution expects the citizenry and the judiciary to be activists in their own spheres of rights and duties. It is a matter of distress to read what Gobind Das has written[70] about our Supreme Court in the decade 1987-98:

> "The recent experience of South-East Asian countries was very depressing. Lenin's statue being pulled down and the collapse of the Berlin Wall symbolized the demise of Russia also of socialism as State policy, and the only alternative appeared to be liberalization and market economy. The five activist judges [Justices Krishna Iyer, Bhagwati, Desai, Chinnappa Reddy and later Justice Thakar] had retired by 1987. The number of judges of the Supreme Court increased from six (1950) to the present strength of twenty-five. ……. The Court did not have any particular doctrine or any particular direction. It had no recognized leader but it functioned collectively and effectively, responding to all the challenges during the first half of the decade, going, as Black J said, for 'jugular'".

The era 1987-98 was an era of the neo-capitalism wrought by market forces under the pretentious rubric of economic liberalism. The five Judges were at the most conscious point of our constitutional culture. It is worrisome to see the tide of creativity receding. It also manifests itself in PIL bashing.

In the U.S.A there is a recrudescence of idea of Charles Beard that the Constitution was meant to redistribute wealth from the poorer sections of the society to the upper class to which the Constitution framers belonged. The great centers of legal learning in the U.S.A. are busy with their programme to make judiciary

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70. Gobind Das "The Supreme Court: An Overview" in *Supreme but notInfallible* ed B.N. Kripal et al.[Oxford] p. 29.

market friendly. Richard Posner in his "The Constitution as an Economic Document" mentions that today when one thinks of how economics might be used to study the Constitution, no fewer than eight distinct topics[71] come to mind. These include (i) the economic theory of constitutionalism; (ii) the economics of constitutional design; (iii) the economic effects of specific constitutional doctrines; (iv) the constitutional interpretation with an implicit economic logic. The other 4 topics are so important that this author quotes from Posner:

> "(5) Proposals to refashion constitutional law to make it a comprehensive protection of free markets, whether through reinterpretation of existing provisions or through new amendments, such as a balanced-budget amendment.
>
> (6) The problem of 'dualism,' by which I mean the paradox of the Supreme Court's being passionately committed to liberty in the personal sphere and almost indifferent to liberty in the economic sphere.
>
> (7) The relationship (if any) between the Constitution, as drafted and as interpreted, and the economic growth of the United States.
>
> (8) The extent to which judges should feel themselves free to use economic analysis as an overarching guide to constitutional interpretation (that is, beyond the limits of points (3) and (4)); in other words, the relationship between economics and interpretation."

This author prays to God, and the Hon'ble Judges on the Olympus not to allow this tsunami of neo-capitalism overtake our Constitution through the subtle persuasions of the vested interests: the way Lucifer struck a bargain for the soul of Dr Faustus in Marlowe's *Doctor Fastus*. Gobind Das is right in his comment that it "would be immensely disturbing to acknowledge that law is nothing but politics."[72] This author would couple it with one of his own: it would be immensely disturbing to acknowledge that law is nothing but economics. As citizens we discharge our constitutional role by a dutiful participation in the constitutional process: but as the members of a political society we are competent to hold all institutions on trial to shape institutions after our heart's desire. If under the market forces of neo-capitalism our Constitution is exposed to the risk of being redesigned, "We, the People" must assert our right to play our role.

13. Great Expectations

It is submitted, that this Hon'ble Court has a source of majestically wide power, of course coupled with duty, in the constitutional oath. A critical study of the protocols of oath would show that only the Judges of the Supreme Court and of the High Courts take oath to "uphold the Constitution". To 'uphold' has the same meaning as we get from Sanskrit *'dhri'* from which is derived '*dharma*' (that which maintains the cosmic order). The Concise Oxford defines 'uphold' as

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71. Quoted from *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* 2nd ED. [Amrican Case Book Series] pp. 371-72.

72. B.N. Kirpal et al, *Supreme but not infallible* (Oxford) p. 45.

'confirm or maintain". Art 5 of the French Constitution requires the President "to see that the Constitution is observed." Members of Parliament also take oath to uphold the Constitution. It is rightly so as through them that the whole nation is, at least in theory, present in Parliament. This indicates the constitutional recognition that, in the end, the responsibility to uphold the Constitution is on those, back on the stream of time, who had given to themselves this Constitution. Art 32 is by way of abundant caution only. Kania C.J perceptively observed it:

> "The inclusion of Article 13 (1) and (2). ……appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the court has always he power to declare the enactment, to the extent it transgresses limits, invalid."[73]

The logic of our written Constitution and the grammar of the constitutional oath that our judges swear could have led us to do what the U.S. Supreme Court did in *Marbury v. Madison*[74], and the era thereafter. In Marbury, the Chief Justice Marshall said:

> "From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature.
>
> Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose on them, if they were to be used as the instrument, and the knowing instruments, for violating what they swear to support!"… Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If such were the real state of things, this is worse than solemn mockery. To prescribe, or to take oath, becomes equally a crime."

We have adopted the Parliamentary form of government on the British Model[75], which is not founded on the strict theory of Separation of Powers. Sir William Holdsworth in *Halsbury's Laws of England*[76] states that the doctrine of separation of powers:

> "Has never to any great extent corresponded with the facts of English Government…it is not the case that legislative functions are exclusively performed by the Legislature, executive functions by the executive, or judicial functions by the judiciary."

Even when Montesquieu had written his *Spirit of Laws,* he had committed mistake in comprehending that in England there was any clear-cut separation of powers. As a defender of liberty he erected his erroneous idea to see that his

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73. *A K Gopalan v. State* AIR 1950 27.
74. 2 L Ed 60 (1803).
75. *Samsher Singh v. Punjab,* AIR 1974 SC 2192.
76. 2nd ed. 6 p. 385 states the British position.

despotically governed France brought about a change towards freedom. Ogg & Zink, in their *Modern Foreign Governments observe*:

> "Today, the principle of separation finds only limited application, the one point at which it really prevails being with respect to judiciary."[77]

The position of judiciary is, thus, *sui generis*. The U.S. Constitution or Australian Constitution vested the legislative, executive, and judicial powers in the three separate organs of the State. But even in these countries the rigidness of the doctrine has been substantially softened as a response to the demands of the times. This power the Court derives from the very grammar of its existence under our Constitution, and from the terms of its judicial oath.

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77. Revised ed. p. 39.