THE REASONS FOR WHICH THE *VODAFONE* NEED NOT BE ACCEPTED: REMEDIES AGAINST THE DECISION TO BE EXPLORED.
VODAFONE CASE: A CRITIQUE

[Drawn up by Shiva Kant Jha as a citizen of the Democratic Republic of Bharat]

PART I

1. As a citizen of the Republic of India, I believe that the Hon'ble Supreme Court has gone wrong in deciding the well-known *Vodafone* Case, and in making various observations constituting the Judgement a veritable potpourri of unconsidered judicial *obiter dicta* The Reasons which have led to this conclusion are set out, in brief, in the Part II of this Critique.

2. I suggest our Government should move our Supreme Court to re-call the Judgement to re-consider in proper light, and in accordance with our law and Constitution. It is aptly said: "The Constitution and the laws bind every court in India, and that though the courts are free to interpret, they are not free to overlook or disregard the Constitution and the laws"[1] In *R. v. Shivpuri* the House of Lords departed from the view taken by five Law Lords in *Anderton v Ryan* given only a year back as the House felt that Anderton caused serious distortions in law. Lord Bridge in his principal speech articulated the ground for reconsideration in an extremely compressed, almost axiomatic statement: *"If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better"*[2]. A distortion of law is itself a matter of gravest concern [as is illustrated by *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mog*[3] wherein *locus standi* was given by the Queen's Bench Division to Lord Rees-Mogg on the sole ground that he brought "the proceedings because of his sincere concern for constitutional issues."] Distortions in law, like the distortions on account

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[1]. H M Seervai, *Constitutional Law of India* 4th ed p. 2677.

[2] *R v. Shivpuri.* [1986] 2 All ER H.L. 334 Lord Hailsham of St. Marylebone L C ,, lord Elwyn-Jones

[3]. [1994] 1 All ER 457.

of a curved mirrors, seriously affect the administration of justice as their pathogenic effects subvert the operation of the Rule of Natural Justice, lead, inevitably, to jurisdictional errors, and result in a serious miscarriage of justice.

3. I suggest that our Government should get the said Judgement examined and evaluated by experts to take appropriate remedial actions. Our Government must see how the said Judgement stands within the parameters of our Constitution. In taking appropriate measures, our Government must evaluate its actions on the talismas that Mahatma had provided all decision-makers of our Independent India: whether legislative, or administrative, or judicial: the talisman is:

> "I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you, apply the following test:
>
> Recall the face of the poorest and weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to control over his own life and destiny? In other words, will it lead to Swaraj for the hungry and spiritually starving millions?
>
> Then you will find your doubts and yourself melting away."

4. I suggest the following possible measures for the Government's consideration; but I consider the (i) infra most appropriate and pragmatic.

The Remedies Suggested

(i) I suggest: to get over the *Vodafone* Case situation, a retro-operative ordinance deserves to be issued, and then appropriate law enacted. The Government can do it[4], and it is settled that it can be done even in the field of tax laws. Retrospective validation of tax was upheld.[5]

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[4] *Mahal Chand Sethia v. W.B*. [SEE Seervai, Const. Law vol. 1 p.223]. Mitter J. observe3d:

> "A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the legislature or if it infringed the rights enshrined in Part III of the constitution …..The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of on effect. It can however pass an Amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. An Amending Act simpliciter will cure the defect in the statute only prospectively. But as a legislature has the competence to pass a measure with retrospective effect it can pass an Amending Act to have effect from a date which is past Usually legislatures pass Acts styled Amending and Validating

(ii) I suggest that our Government moves a Petition for Recall before the Supreme Court praying to exercise its inherent jurisdiction to do justice by invoking the doctrine of ex debito justitiae (as the Government has done in the Black Money Case (*Ram Jehmalani v. UOI 2011 (6) SCALE 691*).

(iii) I suggest: if ideas at (i) and (ii) are not appreciated, to move Review Petition with a prayer that the matter be heard in the open court.

(iv) I suggest: if the course at (iii), perish the thought fails, our Government may consider moving the Curative Petition; and its counsels should submit before the Court that the parameters of the curative jurisdiction deserve to be widened so to become as wide as the Court's inherent jurisdiction *ex debito justiae*, as traditionally understood.

(v) I suggest: if (ii), (iii) and (iv) fail, the ultimate recourse would be to file a Writ Petition under Article 32 of the Constitution as there are good reasons to believe, despite obiter observations to the contrary in some cases, that neither on the text of the Constitution, nor on its context, nor on first principles, the superior courts are beyond Article 32 of the Constitution. This point has not been decided till now. There is a good arguable case to explore this remedy. [vide the Chapter 3 of my *Judicial Role in Globalised Economy*

Acts, the object being not only to amend the law from a past date but to protect and validate actions already taken which would otherwise be invalid as done without legislative sanction. There is nothing in our Constitution which creates any fetter on the legislature's jurisdiction to amend laws with retrospective effect and validate transactions effected in the past. Further, there is nothing in our Constitution which restricts such jurisdiction of the legislature to cases where courts of law have not pronounced upon the invalidity or infirmity of any legislative measure. Instances of the legislature's use of such power, upheld by our courts, are copious."

[5] Rai Ramkrishna v. Bihar AIR 1963 SC 1667 [SEE Seervai*, Const. Law* vol. 1 p. 844-845].

> (Wadhwa 2005) Chapter 3 (pp 51-82). If other organs of the State are subject to Article 32 of the Supreme Court, there is no reason why, in rarest of rare cases, our Supreme Court be excluded from the reach of Article 32 of the Constitution. If considered appropriate clarificatory constitutional amendment be made in Art 32 of the Constitution.

5. I have gone through the Hon'ble Supreme Court's decision with care, and have felt I must express my ideas *pro bono publico*. This I deem as my duty as a citizen of this Republic. I believe I and you, the Government and the courts, all stand before the bar of history, and are surely to be judged by Lady Justice some day.

6. I may submit that in my criticism of *Vodafone*, and in suggesting remedial actions, I have absolutely no personal, professional, political personal interest.

7. If I have even advertently breached the norms of propriety anywhere, in any manner, I tender my unconditional apology. When all is said, I believe in what Ella Wheeler Wilcox said: 'No question is ever settled until it is settled right.'

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PART II.

I. The Hon'ble Court acted <u>without jurisdiction</u> by taking into account factors extraneous to the interpretation of the Income-tax Act 1961.

The Hon'ble Court observes in the 'Conclusion' of its main judgement (para 90):

> ". Applying the look at test in order to ascertain the true nature and character of the transaction, we hold, that the Offshore Transaction herein is a bonafide structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable."

AND THE COURT CONCLUDED summarizing its core reasoning and prime vector in judicial deliberation in these suggestive words:

> "FDI flows towards location with a strong governance Infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner."

The judicial logic is just a categorical syllogism. The major premise is: that which promotes the economic policy of FDI promotion is good. The minor premise is that the Department's view of the tax law, as adopted in the *Vodafone Case*, does not (or is unlikely) to promote the economic policy of FDI promotion. The conclusion follows: the Department's view is not good.

It is submitted that the Hon'ble Court overlooked both our Constitution and the Income-tax Act in adopting its core reasons which appears to be at the heart of the judgment. There is a miscarriage of justice because the effect of the Judgement is to promote extraneous purpose.

Justice Radhakrishnan, in his concurrent judgement has reiterated the need for FDI, and the propriety for promoting that through corporate structuring from the Off-shore centres. The very first paragraph of his Judgement runs as under:

> "The question involved in this case is of considerable public importance, especially on Foreign Direct Investment (FDI), which is indispensable for a growing economy like India. Foreign investments in India are generally routed through Offshore Finance Centres (OFC) also through the countries with whom India has entered into treaties. Overseas investments in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues of global business in India. Potential users of off-shore finance are: international companies, individuals,investors and others and capital flows through FDI, Portfolio Debt Investment and Foreign Portfolio Equity Investment and so on. Demand for off-

> shore facilities has considerably increased owing to high growth rates of cross-border investments and a number of rich global investors have come forward to use high technology and communication infrastructures. Removal of barriers to cross-border trade, the liberalisation of financial markets and new communication technologies have had positive effects on global economic growth and India has also been greatly benefited."

Throughout the main and the concurrent Judgements the most dominant concern is to facilitate FDI. Whatever promotes it is good. Off-shores centres are good, corporate structuring is good, minimal government supervision is good…….; everything is good that that facilitates FDI. The *Vodafone Judgement* clearly states that our Government knows full well wherefrom investment is coming to India, and how it is coming. Justice Radhakrishnan says:

> "No presumption can be drawn that the Union of India or the Tax Department is unaware that the quantum of both FDI and FII do not originate from Mauritius but from other global investors situate outside Mauritius. Maurtius, it is well known is incapable of bringing FDI worth millions of dollars into India. If the Union of India and Tax Department insist that the investment would directly come from Mauritius and Mauritius alone then the Indo-Mauritius treaty would be dead letter." (para 96)

The Hon'ble Judges, it is submitted, cast aside their judicial robe of detachment, and virtually turned to play the role of economic advisors with the neoliberal commitments. They did not realize that inviting FDI is not a judicial quest. They judges are seldom competent to decide the legality and propriety of policy-loaded issues.

Joseph Stiglitz is of opinion is that FDI is often not good for the country. He said in his *Globalization and its Discontents* (pp. 71-72):

> "There is more to the list of legitimate complaints against foreign direct investment. Such investment often flourishes only because of special privileges extracted from the

> government. While standard economics focuses on the *distortions* of incentives that result from such privileges, there is a far more insidious aspect: often those privileges are the result of corruption, the bribery of government officials. The foreign direct investment comes only at the price of undermining democratic processes. This is particularly true for investments in mining, oil, and other natural resources, where foreigners have a real incentive to obtain the concessions at low prices."
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> "The international financial institutions tended to ignore the problems I have outlined. Instead, the IMF's prescription for job creation – when it focused on that issue – was simple: Eliminate government intervention (in the form of oppressive regulation), reduce taxes, get inflation as low as possible, and invite foreign entrepreneurs in. In a sense, even here policy reflected the colonial mentality described in the previous chapter: of course, the developing countries would have to rely on foreigners for entrepreneurship. Never mind the remarkable successes of Korea and Japan, in which foreign investment played no role. In many cases, as in Singapore, China, and Malaysia, which kept the abuses of foreign investment in check, foreign direct investment played a critical role, not so much for the capital (which, given the high savings rate, was not really needed) or even for the entrepreneurship, but for the access to markets and new technology that it brought along."

The Judges have seldom have credentials to decide socio-economic issues of this sort. If such issues were to be decided, the decision-makers would have studied all the shades of views, and the short-term and long-term effects of such untested economic assumptions in the context of our polity: law and the Constitution. At least, some experts knowing the subject well should have been heard: persons like Dr. Amartya Sen, Joseph Stiglitz, Noam Chomsky, or even Dr. Manmohan Singh. The

Hon'ble Judges should have kept in mind what Justice Holmes said in his classic dissent in *Lochner v. New York*[6]:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I desire to study it further and long before making up my mind."

This point would again be pursued under point II i*nfra*.

No extraneous purpose can be pursued under the Income-tax Act, 1961.

(i). All wielders of public power under our Constitution, as also under the U.S. Constitution, are the donees of power with a closely structured grammar of constitutional discipline governing its exercise [surely only for public good]. Denial of inherent power to the Executive is designed to achieve an important constitutional mission thus described in *The New Encyclopedia Britannica* [Vol.28 p.402] :

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> "The limits to the right of the public authority to impose taxes are set by the power that is qualified to do so under constitutional law. In a democratic system this power is the legislature, not the executive or the judiciary….."

(ii). The Policy quotient available to the Executive under the Income-tax Act is nil. The governmental economic policies or any other policy is irrelevant for the tax authorities till they are enacted in the statute itself. And then the tax authorities function not to promote any policy, this or that, but to implement the provisions of the law.

(iii) Art. 265 of the Constitution authorizes the income-tax law to be made under the legislative field prescribed by the entry 82 of the Union List of the 7th Schedule to our Constitution. As per the *preamble* and the *scheme* of the Income tax Act, 1961, the OBJECT of the Act cannot be anything else than what Lord Hewart observed in *Rex v. Special Commissioner* (20TC 381 at 384) that the duties imposed upon the Commissioners of Income tax are "in the interest of the general body of tax payers, to see what the true assessment ought to be, and that process, a

[6] (1904) 198 U.S. 45

public process directed to public ends." To use a law framed in pursuance to the power granted under Article 265 of the Constitution would be a culpable exercise of power if objects extraneous to Art. 265 are sought to be promoted.

(iv) As per the *preamble* and the *scheme* of the Income tax Act, 1961 : the *purpose* is to collect tax as per the law. Lord Scarman's observations on the role of Income tax and the functions of the authorities administering the Law of Income tax are revealing. Referring to the duties of the Board of the Inland Revenue he observed: "The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.[1]"

(v) That if the object of our law is to allow the NRIs and FIIs to exploit the Mauritius route to invite foreign funds in our country, the whole pursuit would become *mala fides,* not in the sense of malice or dishonesty but in the sense of acting unreasonably and using the power to achieve an object other than that for which the authority believed the power had been conferred, even if the intention may be to promote another public interest (de Smiths *Judicial Review of Administrative Action* 4th ed. Page 335)"

(v) It is difficult to understand how the craze for foreign investments for promoting private profits can prevail over the claims of our Consolidated Fund. I had reasons to observe in my book *On the Loom of Time* (p. 362)

> "I fail to understand the wisdom to starve our Consolidated Fund meant for welfare of our nation by crafting such terms in the Double Taxation Agreements which facilitate our country's loot, even unmindful of national security issues, thus creating the evident conditions for the emergence of two Indias: one of the common-run of 'We, the People', the suffering millions whose existence is being fast forgotten, and the other, the 'High Net Worth Individuals', corporations, fraudsters, tricksters, masqueraders operating through mist and fog from various tiny-tots of the terra firma and cyberspace."

Please see :ANNEX I

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II. As the 'Conclusion' of the Main judgment in the *Vodafone Case*, and stray observations therein show , the structure of judicial reasoning illustrates the judicial counterpart of the MBO technique (Management by Objective) taught by the world famous B-Schools. The prime objective is to facilitate the incoming of the FDI which, in effect is, the WTO Compliant economic policy.

The Judgment would help promote the neoliberal agenda of economic globalization by facilitating foreign investment routed through tax havens and secrecy jurisdictions. It may help more funds from outside but shall present an uphill task for the government to know what sort of money is coming, and from whence. In most cases the apparent would not be real. The rich would get richer, but the Consolidated Fund of India is likely to suffer unless we believe that by proving abundant cake to the rich, the poor can hope to get some scrum sometimes someday. The judgment is likely to promote neo-liberalism, rather than the vision of constitutional socialism of our Constitution. It would delight those who believe in neo-constitutionalism, and the neo-liberal agenda of the Economic globalization. The Hon'ble Court erred in accepting and weighing such factors in the tax matters that go beyond the law of the land. Nether our Consitution, nor the Income-tax Act, enacts the ideas of Hayek, or Friedman, or those highly decorated individuals who happen ruling the roost in our Administration. This approach reminds one of Justice Holmes in *Lochner v. New York* who aptly observed: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." This Appellant, variating on that celebrated dictum, would submit: "The Income-tax Act or our Constitution did enact the ideas of neo-liberalism. **This wish to get FDI, a cardinal commitment in the neo-liberal economic paradigm can be answered by quoting what Justice Holmes said in his classic dissent in *Lochner v. New York*[7]:**

> **"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I desire to study it further and long before making up my mind."**

[7] (1904) 198 U.S. 45

What I had felt on reading the Supreme Court's decision in *Azadi Bacho,* seems to me wholly right in the case of *Vodafone.* I said:

> "*Azadi Bachao* could delight only the proponents of the Neo-liberal Economic Paradigm. This outcome of *Azadi Bachao* seems most unfortunate as we are at the turning point of our history in which 'sound and balanced idea of evolving a welfare economy in an open democratic society' is getting befogged and obfuscated under the corporate-driven conspiracy made to pass for a mission for the weal of common men by a band of economists like Friedrich von Hayek[8], Milton Friedman[9]. For Hayek the concept of 'social justice' was itself a threat to law; Friedman felt that true freedom can be brought about only by a market economy which means the Rule of Corporations. In effect *Azadi Bachao* has benedicted and facilitated the evident triumph of the neo-liberal paradigm. How Glamorous."

In Annex II, I present certain features of *Azadi Bachao* as many of these occur in the *Vodafone* decision too.

[See Annex II.]

The assumptions about the 'many principles of fiscal economy' are all *ex cathedra ,* and are based on certain economic theories relating to *government finance* or revenue". Perhaps, the hypothesis is that the loss of revenue matters not, if 'non-tax benefits' [a concept which conceals more than what it reveals] are derived. It is forgotten that the revenue of a country goes to the Consolidated Fund of the country to be used for public purpose only under Parliamentary authorization or approval. It is the nation's wealth. The country which takes seriously the conditions of people think about revenue the way **Viscount Simonds** thought when he **said in: *Collco Dealings LTD v. IRC,* [1961] 1 All E R 762 at 765:**

> **"But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking steps to protect its own revenue laws from gross abuse or save its own citizens from unjust discrimination in favour of foreigners."**

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[8] *The Road to Serfdom* (1944); *The Constitution of Liberty* (1960)

[9] *Capitalism and Freedom* (1962); *Free to Choose* (with Rose Friedman).

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III. The decision in Vodfone is per incuriam as it has overlooked the words and structure of the relevant statutory provisions. The main judgment has decided against the Department holding that the Department went wrong in invoking Section 9(1)(i) of the Income-tax Act, 1961 because "the words directly or indirectly in Section 9(1)(i) go with the income, and not with the transfer of a capital asset (property)."

> "For the above reasons, Section 9(1)(i) cannot by a process of interpretation be extended to cover indirect transfers of capital assets/property situate in India. To do so, would amount to changing the content and ambit of Section 9(1)(i). We cannot re-write Section 9(1)(i). The legislature has not used the words indirect transfer in Section 9(1)(i). If the word indirect is read into Section 9(1)(i), it would render the express statutory requirement of the 4th sub-clause in Section 9(1)(i) nugatory. This is because Section 9(1)(i) applies to transfers of a capital asset situate in India. This is one of the elements in the 4th sub-clause of Section 9(1)(i) and if indirect transfer of a capital asset is read into Section 9(1)(i) then the words capital asset situate in India would be rendered nugatory. Similarly, the words underlying asset do not find place in Section 9(1)(i). Further, "transfer" should be of an asset in respect of which it is possible to compute a capital gain in accordance with the provisions of the Act. Moreover, even Section 163(1)(c) is wide enough to cover the income whether received directly or indirectly. Thus, the words directly or indirectly in Section 9(1)(i) go with the income and not with the transfer of a capital asset (property)." (emphasis supplied)

CRITICISM

Section 9(1)(i) prescribes that the "following incomes shall be deemed to accrue or arise in India :-

> ' all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or

source of income in India, or through the transfer of a capital asset situate in India…."

The Hon'ble Court has overlooked the inevitable presence of 'indirectly' governing the effect of the fourth situation contemplated by Section 9(1)(i). The morphology of the Section can be analysed, and presented thus:

1	2	3	4	5
A	**All income accruing or arising,**	**Whether directly or indirectly**	through or from	(i)any business connection n India,
B			through or from	(ii) Any property in India,
C			through or from	(iii) any asset or source of income in India
D			through	(iv) the transfer of a capital asset situate in India

(1)points out the taxable event; (ii) the mode or protocol for (i); (iii) the zone or cone of causation of (i); (iv) the description of the income, or property, which is the subject-matter of the income brought to charge under Section 9(1) (i). The segment 3 uses the expressions 'through or from', whereas (iv) mentions only 'through'. The following features, both syntactical and semantic, went unnoticed by the Hon'ble Court;

(a) The expressions in Segments 2 and 3, apply to 4 by the inevitable effect of the order of words, and the structure of the sentence; and

(b) the word 'from' refers to pointed source or time of causation, but 'through'[10] is wider than 'from'[11], broad enough to include 'from' even. It is submitted that it is not a case where the Court had taken notice of the adverbial clause (whether…) and construed whether it controls the 4th item. Here the Hon'ble Court did not notice the expression in the structure of Section 9(1) (i): hence the Hon'ble Court has acted *per incuriam*.

The decision, it is submitted, is *per incuriam* on the point under consideration. A decision is *per incuriam*:

(i) where a statutory provision is not perceived or where binding judicial decisions are not followed:

> "… We are correcting an irregularity committed by Court not on construction or misconstruction of a statute but on non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen." *A. R. Antulay v. R. S. Nayak and Anr*[12]

(ii) where statutory provisions stand disregarded. The Court of Appeal observed in the *Bristol Aeroplane Case*[13]:"It cannot be right to say in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own when that provision was not present to its mind. Cases of this description are examples of decision given *per incuriam*." [*Bristol Aeroplane Case].*:

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IV.The Hon'ble Court has erroneously invoked the proposed provisions of the Direct Taxes Code Bill (now before Parliament) to draw support for its conclusion mentioned at point III.

In paragraph 47 of the Judgement, the Court observed:

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[10] 'through': ' travels or covers the whole of a l,ong distance or journey without interruption or change' ; ' From one end, side, or surface of (a body or space) to the other, by passing within it; into one end, side, or surface of and out at the other. from beginning to end of; in our along the whole length or course of; spec. during the whole temporal extent of. (*Shorter Oxford English Dictionary*).

[11] 'from': Denoting departure our moving away: expr. Relation with a person who or thing which is the starting –point or site of motion. (*Shorter Oxford English Dictionary)*

[12]. *A. R. Antulay v. R. S. Nayak and Anr*. AIR 1988 SC 1531 at 1554.

[13]. (1944) 1 K.B. 718.

> "9(1)(i) go with the income and not with the transfer of a capital asset (property). Lastly, it may be mentioned that the Direct Tax Code (DTC) Bill, 2010 proposes to tax income from transfer of shares of a foreign company by a non-resident, where at any time during 12 months preceding the transfer, the fair market value of the assets in India, owned directly or indirectly, by the company, represents at least 50% of the fair market value of all assets owned by the company. Thus, the DTC Bill, 2010 proposes taxation of offshore share transactions. This proposal indicates in a way that indirect transfers are not covered by the existing Section 9(1)(i) of the Act. In fact, the DTC Bill, 2009 expressly stated that income accruing even from indirect transfer of a capital asset situate in India would be deemed to accrue in India. These proposals, therefore, show that in the existing Section 9(1)(i) the word indirect cannot be read on the basis of purposive construction. The question of providing "look through" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the Section by interpretation. For the foregoing reasons, we hold that Section 9(1)(i) is not a "look through" provision. Transfer of HTIL's property rights by Extinguishment?"

The reliance on the DTC is, it is submitted, wholly misconceived for reasons including these:

(i). It is strange that the provisions of a Bill under the consideration of Parliament, were invoked to interpret law for deciding a cause in the final Court. The Revenue should have pointed out that the proposed provisions might not be enacted, or enacted in different form, or phraseology. If it happens, is it possible for the Court to have a re-look at its decision because its core reason would have ceased from its inception?

(ii). The proposed provision in the DTC contemplates the survival of the Bombay High Court's view in the *Vodafone Case*. It is the High Court's exercise at the bifurcation of income that is erected in the form of formula in Section 5 (5) of the DTC. If

Vodafone is lost, the logic of the proposed change vanishes. Why indulge in this exercise at futility?

(iii) Even if you enact such provisions of the DTC, the action is clearly foredoomed. The Parliament would be criticized for enacting something which was dead at nativity. The main Judgement, and the concurrent Judgement have held that in *Vodafone,* transactions took place outside Indian territory, hence the Department's action was invalid. It has clarified that the provision has no extra-territorial effect, though under our Constitution Parliament can frame extra-territorial law under Article 245 (2) of our Constitution. Parliament has not framed such a law. If the transaction had no nexus with the territory of India, then even the provision like that in the DTC can not succeed.

But the core point is that the income of the sort in *Vodafone* is not within Indian territory (what the international lawyers are accustomed to call 'taxable territory). If the transaction is outside India, then be sure that the provision proposed in the DTC are bound to be struck down in future. Why face this willing discomfiture? I wish our Government marks this point, and takes its position on this provision of the DTC.

I express my worry because in the past too our Government has betrayed gross ignorance of international public law. By way of illustration I refer to the decision of the House of Lords in *Government of India, Ministry of Finance (Revenue Division) v. Taylor* [1955] 1 All ER 292:(27 ITR 356 HL]. In a citizen's eye it is a matter of shame that its Government did not know that it is settled law that the steps to recover taxes cannot be taken in foreign jurisdictions.

Even if a law is framed under Article 246(2), we must recover what is due to us before the crooks carry away their assets from our country, or before they are in a position to reap the benefits from their direct or indirect interests in Indian company,. If we do not do that, then the exercise, even under Article 246(2) of our Constitution, would be futile, as futile as imposing wealth tax on Mr. Obama in terms of such law. My point is

absurd, but I have chosen to test the point on the principle of "*Reductio ad absurdum*".

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The Operative Realities of this globalised world

V. The Court erred in its views in *Vodafone* because it failed to appreciate how the Rogue Finance works for tax havens, the new breed in modern 'states system' under which, unless we always see before we leap, unless we get accustomed to seeing through transactions, not to say of the Income-tax Department, not even our sovereign State can save our Constitution from being eclipsed by the predatory capitalism operating through the greed promoting new states many of them so small that many MNCs can buy them by dozens.

The Hon'ble Court seriously erred in adopting, what it says , the **'look at"** approach, rather than the **"look through"** approach. The most evident motivating factor for adopting the look at approach seems to promote the neoliberal agenda to get more and more FDI, and to make things all convenient for the MNCs operating in our country. I have already submitted that the major premise in the judicial reasoning is constitutionally unwholesome, and is statutorily impermissible.

What do the expressions 'look at' and 'look through' mean in plain English? The SOD says that 'look at' means 'to take or accept (a thing), become involved in, , find a person attractive'[, 'to look at in respect of appearance', , 'judging from the appearance of''.'Look through' means ' to direct one's sight through (an aperture, a transparent body, or something having interstices). If the Hon'ble Court would have appreciated the operative realities of the present day Economic Globalisation, it should have said: "Adopt everywhere the look through approach. Adopt the 'look at approach' only if nothing sinister to our interest is noticed.' The old adage 'look before you you leap' is now a matter of prudence. My mind goes to Act V Scene 2 of Shakespeare's *Othello* where before killing the most gracious Desdemona, *Othello* says:

> Yet she must die, else she'll betray more
> men. Put out the light, and then put out the
> light:

The adoption of the 'look at' approach has the effect of 'putting out the light'. The corporations which choose shady jurisdictions, ignoring their own countries, through the device of incorporation and complex corporate structure, deserve closer scrutiny to see the operative realities. This is permitted even under Public international law. Such corporations should not be allowed the scope for futuristic planning, and creation of self-serving evidences, as we have seen in the *Vodafone Case. A Corporation cannot be an impervious coverlet of gross abuse. This pri*nciple went un-noticed in *Azadi Bachao*, it has been ignored in *Vodafone* too.

[See Annex **III.]**

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The New States System and its effect

VI. The judgment would be greeted as the triumph of neo-liberalism, and surely be used to subjugate our Constitution to the neo-liberal agenda of neo-capitalism whose bastion has been built in the Caribbean, South Pacific, the tiny-tots in the Atlantic ocean, Micronesia and Polynesia. The Income-tax Department would be of no match to such strategists, rather India, as a nation state, would find it difficult to save itself from becoming a FAILED STATE. The Hon'ble Court should have taken note of the changes that persons, mostly crooks and knaves, have brought about in this world of fast changing technological world with low morality. I have drawn up the profile of our global state systems in which Vodafone case operates through many realms and lands about which not even one percent of our population know.

[see Annex IV].

The *Vodafone* Case pertained to a category in the present-day world where the Judiciary should have explored to the confines its potential powers under the Constitution. If our Government's intellectual infrastructure was not high enough to place the profile of the world before the Hon'ble Court, the Hon'ble Court was itself bound to take judicial notice of the geo-politics of the globe in this phase of economic globalization.. That would have helped it to respond to the facts in a better

way than by following the 18th century view in certain British decisions. The right approach is what was suggested by Judge Manfred Lachs of the International Court of Justice said:[14]

> "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[15]."

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VII. It is evident from the Judgment that the Court was not inclined to the Department's case because under our law and treaties there is nothing to require the adoption of the 'look through' approach and there is no provision prescribing the doctrines like "Limitation of Benefits". I have already submitted that the Hon'ble Court's view on the 'look through' approach is open to criticism. Now I intend mentioning how the doctrines of "Limitation of Benefits", as we have seen them working, are worse than useless.

A decade back, even in *Azadi Bachao,* the Hon'ble Supreme Court had recommended these doctrines. The Hon'ble Court had made a patent mistake when it had observed:

> "As a contrast, our attention was drawn to article 24 of the Indo-US Treaty on Avoidance of Double Taxation which specifically provides the limitations subject to which the benefits under the Treaty can be availed of. One of the limitations is that more than 50 per cent. of the beneficial interest, or in the case of a company more than 50 per cent. of the number of shares of each class of the company, be owned directly or indirectly by one or more individual residents of one of the Contracting States. Article 24 of the Indo-U.S. DTAC is in

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[14] *In the North Se Continental Shelf Case* ICJ 1969, 3 at 222.

[15] J.G Starke's Introduction to International Law, 10th ed. P. 178

> marked contrast with the Indo-Mauritius DTAC. The appellants rightly contend that in the absence of a limitation clause, such as the one contained in article 24 of the Indo-U.S. Treaty, there are no disabling or disentitling conditions under the Indo-Mauritius Treaty prohibiting the resident of a third nation from deriving benefits thereunder". [pp. 85-86 of the Judgment]

Reference to the Article 24 in the Indo-U.S. treaty is misconceived because in the U.S.A. a treaty is the supreme law in the land as it is done under the U.S. Constitution after deliberations of the Senate. Besides, the United States, whether we like it or not, is above all laws (including Public International Law as the invasion of Iraq has shown) other than the laws of its own country. In the U.S., even a tax treaty is legislated by its Senate after full deliberation over the terms of a proposed treaty sent to the Senate under the Letter of Submittal from the U.S. President. That the inference that the Hon'ble Division Bench has drawn that the absence of something like Art. 24 of the Indo-U.S. DTAC in the Indo-Mauritius DTAC is vitiated by a fundamental mistake caused by an assumption that if something is not prohibited it is, by way of inevitable inference, permitted.

The doctrine of the 'limitation of benefits' would not wholly stop treaty-shopping. It is strange that a bilateral tax treaty, without any warrant under the law or treaty-terms, is being used into a rogue multilateral convention through the device of corporate structuring. Besides it amounts to be fraud on our Constitution. An expert has rightly said;

> " Let us assume that two states have entered into a bilateral beneficial treaty securing certain benefits and advantages for their nationals only. There is no express or implied provision or suggestion to extend the benefits arising out of such treaty to the nationals of third States. In reality, the nationals of the third states pretending to be national entities of one of the contracting states claim such benefits. Objections are raised to such claims. If one of the Contracting States wants to condone this apparent illegal or unethical practice, how should it go about it. There are two courses open. One either the two states by consent amend the terms of the treaty and provide for by an express term in the treaty and then

amend its laws, if the said amendments have financial implications affecting its revenues. But if the executive without amending the laws give a clarification of the provision of the treaty and the law and by executive fiat condones the manifestly illegal practice and does what was not initially intended by the treaty, it would certainly be a fraud on the Constitution and a colourable exercise of power. This is clearly an attempt to do indirectly what it could not do directly." [16]

The effect of the view that the Hon'ble Court seems to approve would lead to strange and unjust results.

> If *mere* incorporation under a Mauritian Law, or *mere* grant of a Certificate of Residence be enough then nothing would prevent if Mauritius decides to provide that status, or to issue that sort of certificates to every person on the globe who complies with the formality by paying some money to the government kitty. But if this happens then all other bilateral tax treaties would be reduced to irrelevance and the income-tax law would become a paradise for marauders leaving the people of India to rue their lot under consolation that the sovereign act of a sovereign friendly State deserves acceptance as a matter of uncritical assumption. This is not a figment of imagination of the petitioner; it has already have taken place. The Authority for Advance Rulings in a case reported as *XYZ/ABC Equity Fund, In re* , [2001] 250 ITR 194 is a case in which the applicant-company moved for rulings on certain points, describing itself as a collective investment vehicle resident in Mauritius. It is a *vehicle* which in modern commerce means by: "A privately controlled company through which an individual or organization conducts a particular kind of business, esp. investment" The Authority records in its order:
>
> > "The applicant has stated in the petition before us that it is a private equity fund (similar to a venture capital fund). It has allotted a large number of shares on a private placement basis to a limited number of

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16. Prof. (Dr.) M L Upadhyaya, Vice President, Amity Law School President, Amity Law School *Former Dean*, *Faculty of Law:* Calcutta University and Jabalpur University:*Director*, Central India Law Institute, Jabalpur:*UGC Visiting Professor*,National Law School of India University, Bangalore.

> prospective investors spread over Belgium, France, Germany, Hong Kong, Japan, Kuwait, the Netherlands, Singapore, Switzerland, the United Kingdom and the United States of America."

> If in the spacious "vehicle" an assortment from such large parts of the globe can sail together across the Indian Ocean to India, then why not construct a vehicle, registered in Mauritius, wide enough to be a Noah's ark where all the treaty-shoppers from all the parts of the globe can be accommodated rendering all double taxation avoidance agreements other than the Indo-Mauritius DTAC irrelevant and otiose. The Indo-Mauritius DTAC should not be made the vanishing point of all other tax treaties. It is strange that what could have been at its best a mere *reductio ad absurdum* has already taken place with the culpable complicity of our own Government. It would be fair and just to take into account, while appraising the conformity of the situation to Art. 14 of the Constitution, the morbid effects of Treaty shopping. Besides, it is in public domain that many Indian companies too are covertly following the Treaty Shoppers. When law gets diluted, and public morality is low, such sinister innovations abound; and none bothers about the morbid effect on our national interests.

It is amazing to find that *Vodafone* Judgement finds nothing wrong with the state of affairs most learned persons in our citizenry consider nothing more than an embellishe fraud. It is possible to hold that certain observations by Justice Radhakrishnan seem to . approve the undesirable state of affairs for the following reasons:

> 'We are, therefore, of the view that in the absence of LOB Clause and the presence of Circular No. 789 of 2000 and TRC certificate, on the residence and beneficial interest/ownership,tax department cannot at the time of sale/disinvestment/exit from such FDI, deny benefits to such Mauritius companies of the Treaty by stating that FDI was only routed through a Mauritius company, by a company/principal resident in a third country; or the Mauritius company had received all its funds from a foreign principal/company; or the Mauritius subsidiary is controlled/managed by the Foreign Principal; or the Mauritius company had no assets or business other than holding the investment/shares in the Indian company; or the Foreign Principal/100% shareholder of Mauritius company had played a

dominant role in deciding the time and price of the disinvestment/sale/transfer; or the sale proceeds received by the Mauritius company had ultimately been paid over by it to the Foreign Principal/ its 100% shareholder either by way of Special Dividend or by way of repayment of loans received; or the real owner/beneficial owner of the shares was the foreign Principal Company." (PARA 93)

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VIII. International Tax Aspects of Holding Structures.

The main Judgment says: "In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle." As this notion is dominant in the Judgement, and as the neoliberal agenda to build Corporatocracy works for this, it is worthwhile to say that our Democracy would come to end if corporatocracy emerges, or the view of Pope Innocent III or IV prevails.

It is submitted that the reasons given in support of the 'holding structure' of corporations are not well considered**:**

(i) The Hon'ble Court refers to the dictum of Pope Innocent IV as stating the right perspective on 'corporation' that determines corporate structuring . This view is fraught with dangerous consequences for our democracy, and our Constitution. Innocent IV (1195 – 7 December 1254), like his predecessor III, considered himself God's vice regent. Most assertive doctrine of the power of Church was in the declaration by Pope Innocent III (1198-1216) who preached at his consecration for all the kings and lords to note: "See, I have this day set thee over the nations and over the kingdoms, to pluck up and break down , to destroy and overthrow, to build and to plant." The R.C. Church was a corporation, all absolute over everyone existing everywhere. If this protocol of 'corporation' is accepted in our times, our democracy and constitution would get subjugated to what has come to be called *Corporate imperium*. The relevant political facts of

the Western history, in the post Greco-Roman phase, can be pigeonholed for an easy comprehension in the following table:

The Phase	**Agenda for operation**	**Effect**
1.The Era of the Church *impeium* that fostered and promoted capitalism with all the features endemic in capitalist system	Established supremacy over all earthly powers, and succeeded in building up the Mammon-worshipping capitalist structure with all the ills that goes with exploitative and extractive capitalism.	Most assertive doctrine of the power of Church was in the declaration by Pope Innocent III (1198-1216) who preached at his consecration for all the kings and lords to note: "See, I have this day set thee over the nations and over the kingdoms, to pluck up and break down , to destroy and overthrow, to build and to plant."
2.The emergence of the nation states in which the economic realm and the political realm turned close in pursuit of power and wealth: a new phase in capitalism was inaugurated. Over a large period, the gladiators of the economic realms established collaborative and co-operative relationship with the governments. This collaboration led	After the Renaissance (the 15th to the 17th century) and the Reformation (the 16th to the 17th century), the nation states emerged which established power, replacing the Church *imperium*, "in alliance with rich merchants: these two share power in different proportion in different countries"[17] which created circumstances when the rich	The ethos had two pronounced features : (i) the diminishing authority of the Church, the increasing authority of the 'nation states', and (ii) the increasing authority of science and commerce facilitating global expansion..

[17] Bertrand Russell, *History of Western Philosophy* p.. 479

to aggressive imperialism and colonialism.	merchants became part of aristocracy, and the emerging mercantilist economy grew to great power and importance.	
3.The Subjugation of the political realm by the Economic Realm where the corporations dominated drawing on their experience of the earlier eras which had taught them: (i) as those who amass wealth and power are only a few, they cannot successfully meet the challenges of people's wrath, so the corporations need government to function for them both as facilitators, and protectors; (ii) as even the mightiest structures cannot survive without people 's consent, every effort is to be made to acquire that through pressure and persuasion, stealth and craft. This led the enormous growth in the PR industry, advertisement and propaganda.	The political realm turned subservient to the economic realm in which facts have led to situations thus captured by an expert: "Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international institutions has outstripped the development of appropriate global political structures. As a result, probably many more years of public confusion and unfocused protests can be expected as the stable new global world order takes	The real victor of the World War II was the United States. The emergence of the USA led to the emergence of the power of the corporations finding their greatest impact through the Washington Consensus and the Bretton Woods system, and then through the institutions like the IMF, World Bank, and, later, the WTO.

	shape" 2001 *Encyclopaedia Britannica*, Book of the Year. p. 191.	
4.The emergence of Corporatocracy with massive economic power. It has emerged by hiring intellectuals, by skilful manipulation of political power; by managing media and the press to become compliant; by engaging the lobbyists; and by establishing powerful global centres to promote the corporate agenda; and by promoting monochromatic culture of consumerism.	Its structure resembles the Trojan Horse. The technique of Deception becomes the supreme technique of management.	Corporatocracy works contrary to real democracy, and principles of 'social justice' and egalitarianism. It helps create islands of affluence wielding power, and helps the emergence of the enclaves of the superrich in their cloud-castles we call their *Sone ki Lanka*..

The art and craft of propaganda have developed with the growth of the corporate power. Corporate interests are being promoted at the cost of democracy. Virgil, a classical Roman poet, tells us about the device of the Trojan Horse, which was adopted to allow the Greek soldiers to enter the city of Troy to destroy it. Finding the enemy's city impregnable, they constructed a huge wooden Horse in which some select fighters were concealed. One can say with a measure of aptness that the MNCs are the Trojan Horses of our times, and the people are being deceived to believe that they would bring about a better dawn someday through what they call the 'trickle down effect' of wealth creation for a few. Had the 'corporations' been just powerful commercial vehicles,

providing goods and services world over under the supervision and control of the political institutions, without being subversive to our culture, I would have appreciated them as important human innovations of great utility.

(ii) It is possible to build corporate structure so complex that a holding company can go round and round over more than 700 islands in the Caribbean, or through such countries which even many of us can buy but we won't because they are worthless.

John Milton's *Comus* was a ' Mask Presented at Ludlow Castle'. It tells us how the spell of deception was cast by Comus on the young Lady through his necromancy and sophistry. Milton contrived the plot to show that she ultimately escapes from the trap. Comus declared, to quote from Milton; ''T is only daylight that makes sin.' Our Supreme Court refers to it in *Shrisht Dhawan v. Shah Bros*[18]. We see these days so many 'Ludlow Castles' in so many 'secrecy jurisdictions' in the world where modern-day Comus rules. When I think of this enchanted castle, my mind goes to many modern versions of Ludlow Castle built in the tax havens: like Uganda House in the Cayman Islands, and the Cathedral Square in Mauritius where the Rogue Finance waxes high, and plays the role of financial wizardry facilitated by a host of global financial wizards, chartered accountants, lawyers, and the experts in geopolitics of micro and macro states, and all the possibilities of the Cyberspace

(iii) It is the settled law that the steps to recover taxes cannot be taken in foreign jurisdictions [*Government of India, Ministry of Finance (Revenue Division) v. Taylor* [1955] 1 All ER 292:(27 ITR 356 HL]. To get over this problem Section 90(1)(d) provides that the double taxation avoidance agreement may provide for terms "for recovery of income-tax under this Act and under the corresponding law in force in that country". Section 228A of the Income Tax Act provides for "Recovery of tax in pursuance of agreements with foreign countries". If incorporation of a "*paper company*"[to borrow an expression by which the United States Court of Appeals, 5th Circuit described the Swiss Company in *Johansson v U S* (336 F.2d 809) is itself enough to modify the customary rule of Public International Law, then recovery of in pursuance to such treaty terms would be utterly futile. By placing a reasonable construction it should be

[18] *AIR* 1992 S C 1555

said that the benefits under a tax treaty is not meant for such paper companies as on initiating recovery proceedings in the jurisdiction of a treaty partner nothing would be recoverable because nothing exists there.

(iv) It is a settled principle that the conferment of a corporate status by a state may not be recognized internationally without question. In the *Nottebohm' Case* the International Court of Justice determined the principles governing "nationality" in these words:

> "… a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State"

"The Court found that there was no bond of attachment between Nottebohm and Liechtenstein, and that there was a long- standing and close connection between him and Guatemala, a link which his naturalization in Liechtenstein in no way weakened; that naturalization had been ' granted without regard to the concept of nationality adopted in international law'. Accordingly the Court held that Guatemala was under no obligation to recognize Nottebohm's Liechtenstein nationality, and that Liechtenstein could not institute proceedings against Guatemala in respect of damage suffered by him."[19]

When it is fair and just to explore the inner realities

A corporation evolved as a form of business organization in which public interest was greatly involved. It was not conceived as an impervious coverlet. This point has been clearly brought out by an eminent author in these words:

> "Before dealing with exceptional situations in which the veil is lifted, it should be emphasized that the veil never means that the affairs of the company are completely concealed from view. On

[19] *Oppenheim,s Internationa Law* 9th ed Vol. 1 PEACE p. 854

> the contrary, the legislature has always made it an essential condition of the recognition of corporate personality with limited liability that it should be accompanied by wide publicity. Although third parties dealing with the company will normally have no right to resort against its members, they are nevertheless entitled to see who those members are, what shares they hold and, in the case of a listed company, the beneficial interests in those shares if substantial. They are also entitled to see who its officers are (so that they know with whom to deal), what its constitution is (so that they know what the company may do and how it may do it), and what its capital is and how it has been obtained (so that they know whether to trust it). And unless it is an unlimited company they are also entitled to see its accounts, or at least a modified version of them-again in order to know whether to trust it[20]."

After examining various cases on "lifting of the veil" ,Gower's *Principles of Modern Company Law* [21]states.

> "Where then does this leave "lifting of the veil"? Well, considerably more attenuated than some of us would wish. There seem to be three circumstances only in which the courts can do so. These are :
>
> (1) when the court is construing a statute, contract or other document:
>
> (2) when the court is satisfied that a company is a "mere façade" concealing the true facts;
>
> (3) when it can be established that the company is an authorized agent of its controllers or its members, corporate or human."

Gower's exposition deserves the following two comments :

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[20] Gower's *Principles of Modern Company Law*, Sixth Ed. by Paul L. Davies, (London Sweet and Maxwell 1997) P. 148-19

[21] Gower's *Principles of Modern Company Law,* Sixth Ed. Paul L. Davies p. 173

(i) *Gower* is correct in holding the view that while construing statute "the court may have regard to the economic reality and treat a group as if it were one entity if that is how the group operates."

(ii) *Gower* observes that the court cannot lift the veil *merely* because it considers that justice so requires. In fact the main purpose for the court's lifting the corporate veil is to do justice in a given case. This grammar of judicial reasoning is evidenced in all the cases on the lifting of the corporate veil. The only point, which is conspicuous for being noted, is to what extent transparency of corporate personality is to be allowed as a matter of Public Policy.

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More Structures: strategic devices, the CAYMANS ISLAND, MAURITIUS

IX. The Hon'ble Court has erred in not comprenending the art and craft of the building of structures with sub-structures, super-structure, vertical and horizontal structures with the sole purpose of reaping benefits of operating through darkness. By not seeing through the evident strategy in the context of the present-day global 'states system', and altered times, the Hon'ble Court has misdirected itself in appreciating the material facts of the Case. I am led to this view for several reasons including these:

(i) At points V, and VI and in the Annex IV ("The global state system: classical state system yielded to the 'neoliberal' State system"), I have portrayed the profile of the new 'states system'. The Hon'ble Court should have appreciated that the dicta of *the Westminster's Case* are no longer valid. When the *Duke of Westminster* had been decided, the world had about 60 States, now there are more than 200 (about 194 states, and several others possessing limited or disputed sovereignty).

(a) The international investors (especially TNCs), and their advisers exploited "the elastic scope of state 'sovereignty' based on regulatory jurisdiction and legal fictions of 'residence' and 'incorporation'[22]. The two aspects of 'sovereignty', internal and external, were creatively utilized to set up regimes for tax havens. 'Internal sovereignty' was utilized as a justification to set up an opaque system inside the domestic sphere. The aspect of the 'external sovereignty' was invoked to ward off foreign intrusion in the domestic sovereign space. The grant of the Certificate of Residency by Mauritius, or the grant of *Carte de Sejour* by Monaco was considered enough to preclude any investigation into the questions of residency of the entities, or the beneficial ownership of income, or wealth. The MNCs float their subsidiaries integral to their corporate structures. When such companies are incorporated under the laws of a country, they become 'residents' of that country. We know that thousands of 'shell' companies were formed in tax havens. We hear that thousands of such corporations pullulate only in the hip-pockets of certain professionals operating from the same building, perhaps the same table without even tentacles outside that hole! It is suggestive to mention that, when the Paris-based Financial Action Task Force subjected the banking system of the Bahamas to a close scrutiny, in one go the Bahamas, it is said, banned the " anonymous ownership of more than 100,000 international business companies registered in the country."[23]

(b) Most of such centres were developed, in their early phase, by the wealthy persons in America and Britain. Dr. Picciotto has noted this point when he says:

> "It was initially encouraged by the authorities in the main capitalist countries, within tolerated limits, for competitive advantage, and to manage the growing contradictions engendered by the commitments to liberalisation under the Bretton Woods system."

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[22] Sol Picciotto of Lancaster University, UK www.lancs.ac.uk/staff/lwasp/endoff.pdf

[23] *2002 Britannica Book of the Year* p. 392

(c) Even Mauritius was helped to develop as a tax haven by the interested persons. mostly from India. America and the UK developed the numerous tiny-tots in the Caribbean and the Pacific as tax havens or secrecy jurisdictions for their purposes of the Big Business. The major western countries and their apex organization, OECD, reacted against the tax havens by taking some steps to stop abuse through those jurisdictions and areas. As these areas cannot afford to annoy the great powers, they can take to their course only to the extent tolerated by these two countries. There are good reasons to believe that the superrich and the MNCs of those countries are much interested in promoting tax havens. So every effort is being made by them and their professionals to let the tax havens have their way.

(d) John Milton's *Comus* was a ' Mask Presented at Ludlow Castle'. It tells us how the spell of deception was cast by Comus on the young Lady through his necromancy and sophistry. Milton contrived the plot to show that she ultimately escapes from the trap. Comus declared, to quote from Milton; ''T is only daylight that makes sin.' Our Supreme Court refers to it in *Shrisht Dhawan v. Shah Bros*[24]. We see these days so many 'Ludlow Castles' in so many 'secrecy jurisdictions' in the world where modern-day Comus rules. When I think of this enchanted castle, my mind goes to many modern versions of Ludlow Castle built in the tax havens where the Rogue Finance waxes high, and plays the role of financial wizardry facilitated by a host of global financial wizards, chartered accountants, lawyers, and the experts in geopolitics of micro and macro states, and skilled in exploring all the possibilities of the Cyberspace. Here I would shed light on one instance so that you can see how the financial wizardry works: and how a nation of intelligent people is taken for a ride. The general pattern of operation of a 'tax haven' has been well described by

[24] *AIR* 1992 S C 1555

Prof Sol Picciotto[25], who had interviewed me on the misuse of the Indo-Mauritius route, and referred to this PIL in some of his articles presented at the international fora.

> "The basic principles of tax avoidance through a haven are relatively straightforward. It simply consists of establishing one or more legal entities (company, trust or partnership) in convenient jurisdictions, through which to channel an income flow derived from international investment or business activities. The deployment of a combination of intermediary entities can reduce or eliminate taxation both at source and in the jurisdiction where the intermediary is resident, while insulating the ultimate beneficiary from tax liability (Picciotto 1992, 135-141). It is also possible, especially since the lifting by most countries of exchange controls, for a resident in a country to 'export' funds and return them as investments into the same country, which is generally referred to as 'round-tripping'. This enables a resident to benefit from tax advantages as well as other inducements offered to foreign investors. Thus, for example, a large proportion of foreign investments into India are routed through Mauritius, due to favourable provisions in its tax treaty with India,and it is suspected that a pro-portion of these derive from Indian residents."

(e) How companies are incorporated and how they are used can be illustrated with reference to one of the many examples. While evaluating the argument to prove residential status on the basis of mere "incorporation", what is happening in this God's good World in this phase of globalization deserve, deserve Judicial Notice. What the *2002 Britannica Book of the Year* (p. 392) says about The Bahamas, a country (Area 5382 sq.mil.) having Population only (2001) 298000 may not be untrue about Mauritius :

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[25] Prof Sol Picciotto, Lancaster University Law School at http://www.tni.org/crime-docs/picciotto.pdf

> "The Bahamian government moved smartly against dubious offshore banks in Feb.2001;it closed down two operations and revoked the licenses of five others following the publication of a U.S. Senate report that described them as conduits for money laundering. In June The Bahamas was removed from the Paris-based Financial Action Task Force list of countries with inadequate laws to fight money laundering. The government had launched several initiatives, including the banning of anonymous ownership of more than 100,000 international business companies registered in the country."

(ii). The Hon'ble Court erred in appreciating the various documents and transactions building up the deceptive corporate structure that came up before the Hon'ble Court. It went to the extent of concluding:

> "As above, the Hutchison structure has existed since 1994. According to the details submitted on behalf of the appellant, we find that from 2002-03 to 2010-11 the Group has contributed an amount of `20,242 crores towards direct and indirect taxes on its business operations in India."

The Hon'ble Court has missed to appreciate how corporate structuring is being done these days. 'Individuals' have limited life-span, and possess something we call 'CONSCIENCE'. It is strange that the distinction between the corporations and the humans is often ignored. J. Brownoski aptly said in his *The Ascent of Man* (at p. 424): "It is not the business of science to inherit the earth, but to inherit the moral imagination: because without that man and beliefs and science shall all perish together."

(iii) 'Corporations' are neither limited by time, nor by space. They are immortal creatures, and are capable of remaining alive till they choose to die as per the provisions of the Companies Law. We must see what differentiates 'corporations' from 'humans. I had felicitously brought out their differentia through our classical lore:

> A story comes to mind: the story of Nisund's two sons, Sund and Upsund. This story I had heard from my mother during my childhood. Sund and Upsund were the mighty creatures who could please though their efforts God Brahma who granted them immortality till they themselves thought to destroy each other. (Was it not something like the charter of incorporations which the corporations obtain?) But it happened, as it always happens, their heads turned. They crafted the realm of their power, and subjugated even divine powers casting their spell of tyrannical authority on all the realms. God Brahma saw no way how to get rid of the monsters. Finally he found out a way. He created a situation in which they could kill each other. He gathered the grains of beauty from the Nature's whole realm and produced the most beauteous Tillotma (before whom Dr. Faustus could have found his Helen of Troy an ugly crone). She appeared before the monsters who, out of greed and lust for her, fought, and killed each other. Let us not allow the MNCs, and other mighty corporations, the present-day versions of Sund and Upsund, use the charter of 'incorporation' for ignoble purposes, or for the purposes for which they were not created. Let us work for moving from darkness to light (*tamaso maa jyotirgamaya*). We must not allow the Instruments of Darkness to rule the world.

A mega, or multi-national, or trans-national, or global company can plan things over decades and decades through intricate and labyrinthine futuristic planning creating self-serving documents, because they know that neither their game would be probed, nor their strategy understood, especially in an environment of neoliberalism wherein brainwashing, consent-engineering, and opinion-manufacturing is the game that the professionals play on high consideration. If our Government, or court, would have understood how the experts in the Uganda House in the Cayman Islands, and the Cathedral Square in Mauritius, and such conclaves from the secrecy jurisdictions, tax heavens, even the swimming ships, play, they would have saved themselves from this criticism.

(iv) The Hon'ble Court has evaluated various transactions, and documents which all originate in the strategic planning by the denizens from darkness. Their strategy is obvious from the fact that those who do not belong to Caymans Islands, or the Netherlands, or Mauritius chose these places to create artificial creature of corporate subsidiaries there. It is strange that parts can be built through 7000 islands and micro-states, to present the picture of the whole. It hardly matters for them if they pay taxes in few millions, on account of such transactions, because someday, may be after a decade or more, they can reap trillions, and make nation states servile to Corporatocracy. The world is on a cross-over point. All lawyers, and all governments should recognise that ours is a new and dangerous world. The Hon'ble court failed to appreciate why Caymans Island was chosen in this Vodafone labyrinth. With no direct taxation, the islands are a thriving offshore financial center. More than 93,000 companies were registered in the Cayman Islands as of 2008, including almost 300 banks, 800 insurers, and 10,000 mutual funds. A stock exchange was opened in 1997. Tourism is also a mainstay, accounting for about 70% of GDP and 75% of foreign currency earnings. The tourist industry is aimed at the luxury market and caters mainly to visitors from North America. Total tourist arrivals exceeded 1.9 million in 2008, with about half from the US. About 90% of the islands' food and consumer goods must be imported. The Caymanians enjoy one of the highest outputs per capita and one of the highest standards of living in the world. ' With an average income of around KYD$47,000, Caymanians have the highest standard of living in the Caribbean. And its total Population is just about 54878.

The Hon'ble Court has appreciated the goings-on in the Caimans Island in such words as these (para 68):

> "It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e.,without a foreign holding or operating company) of an equity interest in a foreign invested Indian company"

Again the Hon'ble Court's notions about Caymans Islands are conditioned by a string of erroneous assumptions. It says (para 53) :

> "OECD's blacklist was avoided by Cayman Islands in May2000 by committing itself to a string of reforms to improve transparency, remove discriminatory practices and began to exchange information with OECD. Often, complaints have been raised stating that these centres are utilized for manipulating market, to launder money, to evade tax, to finance terrorism, indulge in corruption etc. All the same, it is stated that OFCs have an important role in the international economy, offering advantages for multi-national companies and individuals for investments and also for legitimate financial planning and risk management. It is often said that insufficient legislation in the countries where they operate gives opportunities for money laundering, tax evasion etc. and, hence, it is imperative that that Indian Parliament would address all these issues with utmost urgency.'

Even the US, which virtually rules the Caribbean, had considered it prudent to enter into 'Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman islands, for the exchage of information relating to taxes'. It had effective terms: to quote Article 6:

Tax Examinations (or Investigations) Abroad

1. The requested party may, to the extent permitted under its domestic laws, allow representatives of the competent authority of the requesting party to enter the territory of the requested party in connection with a request to interview persons and examine records with the prior writeen consent of the persons concerned. The competent authority of the requesting party shall notify the competent authority of the requested party of the time and place of the meeting with the persons concerned.
2. At the request of the competent authority of the requesting party, the competent authority of the requested party may permit representatives of the competent authority of the requesting party to attend a tax examination in the territory of the requested party.
3. If the request referred to in paragraph 2 is granted, the competent authority of the requested party conducting the examination shall, as soon as possible,

> notify the competent authority of the requesting party of the time and place of the examination, the authority or person authorized to carry out the examination and the procedures and conditions required by the requested party for the conduct of the examination. All decisions regarding the conduct of the examination shall be made by the requested party conducting the examination.

The Tax Information Exchange Agreement between India and Cayman Islands, like all such Agreements are futile and deceptive. They tax havens keep their basket of information of such foreign companies empty. And we cannot get anything of relevance from the basket that is empty. Secondly, the cover of secrecy, built by administrative and legal provisions, is so tight that we cannot even peep through them. Besides, in the Caribbean itself there are so many islands and territories (many phony) that no human being, except the Rogue Finance, can find out what is where.

What I have said about Cayman Islands applies to Mauritius. The Hon'ble Court observes (para 100):

> " Mauritius, and India, it is known, has also signed a Memorandum of Understanding (MOU) laying down the rules for information, exchange between the two countries which provides for the two signatory authorities to assist each other in the detection of fraudulent market practices, including the insider dealing and market manipulation in the areas of securities transactions and derivative dealings. The object and purpose of the MOU is to track down transactions tainted by fraud and financial crime, not to target the bona fide legitimate transactions. Mauritius has also enacted stringent "Know Your Clients" (KYC) regulations and Anti-Money Laundering laws which seek to avoid abusive use of treaty."

Such reasons in the Judgement are, it is submitted, wholly extraneous. What effect this MOU would have on anything has no relevance in the *Voidafone's Case*. True, in the letter of assurance[26] dated May 24, 2000

[26] "OECD's Report, "Harmful Tax Competition: an Emerging Global Issue" (the "OECD Report") said that the Government of Mauritius would elimination of harmful tax by administrative and legislative actions, and would ensure effective exchange of information in tax matters, transparency,

sent by the Minister of Finance of Mauritius to the Secretary-General of the OECD promised to be decent. But promise is one thing, actual deeds are different. OECD deleted its name from the blacklist on account of geo-politic reasons, and zest for FDI etc. Our Court should have asked the Income-tax Department and other investigative agencies to know if anything at all changed. The tax havens or secrecy jurisdictions function as the veritable Alsatia (a sanctuary for criminals) , and centres for money-laundering. The *Wikipedia* concludes that Mauritius based " front companies of foreign investors are used to avoid paying taxes in India utilising loopholes in the bilateral agreement on double taxation between the two countries, with the tacit support of the Indian government".[27]

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X. Observations on the CBDT Circular misconceived

The Concurrent Judgement has reflected on Circular 789 of 2000 issued by the CBDT.Its para 98 says:

> "LOB and look through provisions cannot be read into a tax treaty but the question may arise as to whether the TRC is so conclusive that the Tax Department cannot pierce the veil and look at the substance of the transaction. DTAA and Circular No. 789 dated 13.4.2000, in our view, would not preclude the Income Tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party,solely with a view to avoid tax without any commercial substance. Tax Department, in such a

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and the elimination of any aspects of the regimes for financial and other services that attracted business with no substantial domestic activities in a phased manner by the end of the year 2005. Mauritius assures that it would refrain from introducing any new regime that would constitute a harmful tax practice under the OECD Report. " [26] (http://www.oecd.org/daf/fa/harm_tax/advcom_mauritius.htm).

[27] http://en.wikipedia.org/wiki/Tax_haven

situation, notwithstanding the fact that the Mauritian company is required to be treated as the beneficial owner of the shares under Circular No. 789 and the Treaty is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to the Tax Department to discard the device and take into consideration the real transaction between the parties , and the transaction may be subjected to tax. In other words,TRC does not prevent enquiry into a tax fraud, for example,where an OCB is used by an Indian resident for round-tripping or any other illegal activities, nothing prevents the Revenue from looking into special agreements, contracts or arrangements made or effected by Indian resident or the role of the OCB in the entire transaction."

It is submitted that no Court can bid a statutory authority to do the impossible. If the terms of the said Circular would have been seen, such observations could not have been made. The Central Board of Direct Taxes issued a Circular under 789 dated April 13, 2000: the subject of which runs as under : "Clarification regarding taxation of income form dividends and capital gains under the Indo-Mauritius Double Taxation Avoidance Convention (DTAC)". The effect of the Circular can be summarised in the following propositions :

(i) Incorporation makes, *per se,* a company an entity "liable to tax" under the Mauritius treaty law and "therefore to be considered as resident of Mauritius in accordance with the DTAC".(para 1 of the Circular)

(ii) Certain doubts raised regarding the taxation of dividends in the hands of investors from Mauritius needed clarification. (para 2 of the Circular)

(iii) A Certificate of Residence issued by the Mauritian Authorities
"will constitute sufficient evidence for accepting the status of residence. (the last sentence of the para 2 of the Circular)

(iv) A Certificate of Residence issued by the Mauritian Authorities "will constitute sufficient evidence for accepting ….beneficial ownership for applying the DTAC." (the last sentence of the para 2 of the Circular)

(v) The "FIIs etc., which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph 4 of Article 13". (para 3 of the Circular)

(vi) The circular "shall apply to all proceedings which are pending at various levels." (para 4 of the Circular)

The international investors (especially TNCs), and their advisers exploited "the elastic scope of state 'sovereignty' based on regulatory jurisdiction and legal fictions of 'residence' and 'incorporation'[28]. The two aspects of 'sovereignty', internal and external, were creatively utilized to set up regimes for tax havens. 'Internal sovereignty' was utilized as a justification to set up an opaque system inside the domestic sphere. The aspect of the 'external sovereignty' was invoked to ward off foreign intrusion in the domestic sovereign space. The grant of the Certificate of Residency by Mauritius, or the grant of *Carte de Sejour* by Monaco was considered enough to preclude any investigation into the questions of residency of the entities, or the beneficial ownership of income, or wealth. The MNCs float their subsidiaries integral to their corporate structures. When such companies are incorporated under the laws of a country, they become 'residents' of that country. We know that thousands of 'shell' companies were formed in tax havens. We hear that thousands of such corporations pullulate only in the hip-pockets of certain professionals operating from the same building, perhaps the same table without even tentacles outside that hole! It is suggestive to mention that, when the Paris-based Financial Action Task Force subjected the banking system of the Bahamas to a close scrutiny, in one go the Bahamas, it is said, banned the " anonymous

[28] Sol Picciotto of Lancaster University, UK www.lancs.ac.uk/staff/lwasp/endoff.pdf

ownership of more than 100,000 international business companies registered in the country."[29]

How can the judicial expectation be achieved, so long the said Circular lasts. The statutory authorities have been bidden to go under blinkers. If they keep their eyes shut, they can neither see the Treaty-shoppers marauding our country's revenue, nor can they see the 'round-trippers' bringing back their illicit gains to their home country. The said Circular helps the tax-dogers, money-launderes, fraudsters, and tricksters of all sorts. So long the Circular lasts, all the authorities under the Income-tax Act have no option, I SAY NO OPTION, but to remain silent onlookers of this nation's loot. In short, the judicial observation, it is most humbly submitted, serves no purpose.

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Observations on most issues just *obiter*

XI. The *Vodafone* decision results in judicial miscarriage because it has made observations on numerous matters which were neither points at issue, nor they appear to have been discussed in the court. Even *Azadi Bacho* suffered from the same defect. The decision of the Delhi High Court specifically said that the Court was deciding only the issue of the validity of the CBDT Circular under the Income-tax Act. But the Supreme Court, in *Azadi*, made observations on constitutional issues, on the Treaty-making power etc. *Vodafon*e makes wide ranging observations not needed to be decided, nor articulated as issues for judicial deliberations. The entire discussion on the Indo-Mauritius, and TRC is a wide and unconsidered *obiter*. Such observations are without valid jurisdiction which can make law stated binding under Article 141 of the Constitution. The Hon'ble Court missed the rule of law prescribed in *Naresh Shridhar Mirajkar and Ors. V. State of Maharashtra and Anr AIR 1967 SC 1*: it said---*:*

> "Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover

[29] *2002 Britannica Book of the Year* p. 392

> ground which is strictly not relevant for the purpose of deciding the petition before it".

There is a binding rule that the " court will not decide Constitutional question if a case is capable of being decided on other grounds." [*Basheshar Nath v. CIT* AIR 1959 SC 149]. And in *M.M. Pathak v. Union* AIR 1978 SC 803 this Hon'ble Court said: (in the context of alternative challenge to the impugned Act under Art. 19(1)(f)) per Bhagawati J.: "It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case." (at p. 828) Accordingly the Court having accepted the main argument did not decide the question under Art. 19(1)(f). [H.M. Seervai, *Const Law* pp. 261-262. Salmond thus states the correct legal position:

> "For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides…In course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him…. Here of course, since the issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision[30]."

. In *Orissa v. Sudhansu Sekhar Misra*[31] this Hon'ble Court cited with approval the following observations of the Earl of Halsbury L.C.:

> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and every observation found therein nor what logically follows from the various observations made in it."

In *Ranchhoddas Atmaram v. Union*[32] this Hon'ble Court held that the observations in three of its decisions were not binding as "the question was never required to be decided in any of the cases and could not, therefore have been, or be treated as decided by this Court."

The Circular 789 of 2000, issued by the CBDT deserves to be modified, or, set aside. Even a limited 'limited looking through' in the cases of the round-trippers is not possible if it remains operative. . If the Circular directs authories to shut their eyes, how can they see who is a treaty-

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[30]. Salmond, *Jurisprudence* 12th ed.
[31]. AIR 1968 SC 647 AT 651.
[32]. AIR 1961 SC 935.

shopper and who is round tripper? (see para 106 of the Vodafone Judgement).

(v) The CBDT should explain to the officers how can they implement the following judicial direction with eyes sealed? 106

> **"Certainly, in our view, TRC certificate though can be accepted as a conclusive evidence for accepting status of residents as well as beneficial ownership for applying the tax treaty, it can be ignored if the treaty is abused for the fraudulent purpose of evasion of tax.(106).**

Best to withdraw the said Circular. If our Government cannot do under inexplicable pressure, it should at least modify that.

117. " Revenue cannot tax a subject without a statute to support and in the course we also acknowledge that every tax payer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury." (para 117)

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Judicial Role wrongly perceived

XII. the Hon'ble Court has erred in adopting evidently a wrong role perception of its role, so, it is submitted, the matters decided have gone wrong as a matter of inevitable logic.

(a)

Both the main judgment and the concurrent judegement have made a *crie de Coeur* to our Government and Parliament precisely for the reason and purpose it had made a similar *crie de Coeur* a decade back in *Azadi Bachao:*

> "These proposals,therefore, show that in the existing Section 9(1)(i) the word indirect cannot be read on the basis of purposive construction. The question of providing "look through"

in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the Section by interpretation." [in the main judgment].

"55…..Necessity to take effective legislative measures has been felt in this country, but we always lag behind because our priorities are different. Lack of proper regulatory laws, leads to uncertainty and passing inconsistent orders by Courts, Tribunals and other forums, putting Revenue and tax payers at bay." [Concurrent judgement).

What I had stated on the erroneous role perception of the Hon'ble Court in *Azadi Bachao,* deserves to be said on the Hon'ble Court's afore-mentioned observations. I said, to quote[33]--

"It an interesting point to note how one's 'role perception' determines one's decision. *Azadi Bachao* narrowed the Court's 'judicial role perception' by invoking the ancient doctrine of" *Juices est jus dicer, non* dare"(the duty of the Court is to decide what law is, and then to apply it; not to make it). The Bench narrowed its role, and decided not to be creative to promote what Justice demanded. It is commonplace to say that when the perception of the role itself is wrong, the decision in bound to be wrong. If the 'observation-post' is wrong, things observed can never be right. The Court illustrated the neo-constitutionalism of the neo-liberals by not providing remedy against the fraud of' treaty-shopping', and by not subjecting the executive process to the sunshine. In effect it has fostered the opaque system to go on in our country. It simply wished our government and Parliament to provide against the abuse of treaties, but till now itscri *de coeur* (a cry from the heart with some appeal) has been just all in vain. We see things around us which keep on drumming into our ears that when the interests of the plutocrats and corporations are involved, the unholy alliance of the politicians, top bureaucrats, and the world of Business would never allow thecri *de coeur* to have any effect. The narrowing of the Judicial Role led to a sad consequence. The Court failed in providing judicial remedy against abuse of the tax treaty. In many jurisdictions, the courts have judicially evolved anti-abuse provisions in their laws and treaties. At my request, Prof. Ray August[30] of Washington State University and the author of *lnternational Business Law* (4th ed. 2004) had written to me:

[33] Jha, Shivakant, On the Loom of Time (Taxmann) p. 356-357

> " in countries that do not have specific anti-abuse legislation,the problem of treaty shopping is attacked using general principles of equity. Common law countries (including Australia, Canada, and the United Kingdom) use a "substance over form" approach. That is, their tax authorities attempt to determine if the movement of income between foreign affiliated companies is based on legitimate commercial reasons or if it is merely a sham set up in order to obtain treaty benefits. Civil law countries (including France and Germany) use an "abuse" approach. In other words, their tax authorities ask whether a particular arrangement of companies constitutes an abuse, misuse, or an improper use of a tax treaty."

After examining the suggestion of the Hon'ble Court in *Azadi Bachao*, I had stated:

> "The 1992 Commentary, Philip Baker writes, "also helpfully emphasizes that anti-avoidance measures must comply with the spirit and purpose of tax treaties to avoid double taxation." If through *domestic anti-avoidance* measures the "the spirit and purpose of tax treaties to avoid double taxation" is to be promoted then what survives of the view of the Conduit Companies Report 1987? Clearly Nothing. If only the Court would have seen the worthlessness of the view of the *Conduit Companies Report 1987,* if only this Court would have gone through those pages (pages 94-104) wherein Phillip Baker discusses the anti-avoidance approaches of the courts of various jurisdictions in the World, the judicial decision would have been different! This judicial overlooking led our Supreme Court to one more serious mistake. The Court observes:
>
> > "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 Court would have found on reading those pages of Philip Baker that it is the COURT of these countries, which applied anti-avoidance provisions of the domestic law. Whenever this sort of issue was before a court of law it decided against it. No court before the decision in *Azadi Bachao* judgment felt it prudent to pass the

buck to the Executive or the Legislature." [34] It is submitted that it was our Court's Constitutional Duty to render the administration of justice fair to our people. The idea hammered on over a decade that must find fault with Government alone as it is not incorporating provisions in the law or treaties to stop abuse. It is humbly submitted that if the does not play its own role, no action would prevail. First, our Government stands etherized, for reasons we all know, and is not inclined to please the tax havens. Secondly, even if law like that in DTC is framed, it is bound to be futile because, on the reasons set forth in Vodafone, that would surely be struck down. Besides there can never be legal provision which cannot be stretched this way or that if there be some agenda to promote. We must not forget what Geoffrey Marshall said in his *Constitutional Theory* p. 7 quoted by Cross p. 34.

> "It has been pointed out that in a debate on what has become the Statute of Westminster, 1932, Mr. Winston Churchill and the Solicitor-General agreed that there was no obscurity in the provisions concerning the Irish Free State, although they took diametrically opposite views concerning their effect.'"

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XIII. . The 'judicial role' adopted by the Hon'ble Court is the same as in *Azadi Bachao*, and that view was, later disapproved by the Constitution Bench of the Supreme Court in *Standard Chartered Bank* **.**
Vide Annex V

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XIV. The Right Judicial Role not adopted :

Adam Smith thought that the 'invisible hand' of Reason conditioned the realm of humans by an enlightened self-interest. He

[34] Jha, Shiva Kant, The Judicial Role in *Globalised Economy* p. 262 [Wadhwa, 2005]

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

A great revolution has been brought by our Supreme Court in some of the decided Cases. This is to ignore the Constitution's Welfare mission, and to go in for the neoliberal agenda as is evident in *Azadi Bachao* and *Vodafone*.

The Constitution's mission had been briefly stated by Reddy J. in the Constitution Bench decision in *McDowell and Co. Ltd. v. CTO* (1985) 3 SCC 230: to quote----

> "It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster

> and the alluring logic of tax avoidance, **we now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognize that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.** A hint of this approach is to be found in the judgment of Desai, J. in *Wood Polymer Ltd. and Bengal Hotels Limited*, (1977) 47 Com Cas 597 (Guj) where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax."

Without discussing some other Cases which have trickled down from the Olympus, I would refer to *Azadi Bachao* (2004) 10 SCC 1, and this *Vodafone*. First, *Azadi*.

Azadi Bachao rejects the constitutional socialist mission of Constitution even by ridiculing said the Constitution Bench decision in *McDowell* 'a hiccup' and 'temporary turbulence', and making much of some casual mistake of Reddy J. in his comment on the *Duke of Wesminster* decided almost a century back which had considered a *bona fide* situation in the old world. The direct pointer to the Court's revolutionary departure from 'the Welfare mission' is in an article written by B. N. Srikrishna J., who had written the *Azadi Bachao* judgment. The article, 'Skinning a Cat'[**(2005) 8 SCC (J) 3**] was written before he retired from the Bench. He wrote:

> "9. References and discussions of political ideologies in judgments often lead to inconsistent and gratuitous philosophical debate by Judges. For e.g. in *D.S. Nakara* v. *Union of India*, (1983) 1 SCC 305 at SCC pp. 325-26, para

> 33, Desai, J. observes: "*33*. Recall at this stage the preamble, the floodlight illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic... What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. ... This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism." Compare this with the recent *dictum* of Sinha, J. (dissenting) in *State of Punjab* v. *Devans Modern Breweries Ltd.,* (2004) 11 SCC 26 at SCC p. 148, para 307 who takes the diametrically opposite view: "*307*. Socialism might have been a catchword from our history. It may be present in the preamble of our Constitution. However, due to the liberalisation policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away."[35]

Consider what Justice Sinha says which B. N. Srikrishna, writing shortly after deciding *Azadi*, and still on Bench, quotes with appreciation (retired on . 21.5.2006 (F.N.) The title of his article is 'Skinning a Cat'. We must see that under the neoliberal ethos our Democracy and Constitution are not skinned out.

[vide **Annex II**].

In *Vodafone***, the adoption of the neoliberal approach is evident. It expresses itself in two facts: (i) rejection of the Prayer to reconsider** Azadi**; and (ii) the structure of its reasoning for the decision.**

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[35] **http://www.ebc-india.com/lawyer/articles/2005_8_3.htm Justice B.N. Srikrishna**
Cite as : (2005) 8 SCC (J) 3

As a citizen, I am aghast to know who has repealed our Constitution, and under what authority: Parliament has not done it, our Constituent Assembly has not done it, our 'We, the People' have not done it through a referendum, or a revolution. Our Courts can interpret the Constitution, but it cannot amend it, or repeal it. Who has amended our Constitution's mission: our Nation demands answer.

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XV . The Hon'ble Court erred in making observations on issues not warranted to be made; thus went contrary of the 9-Judges Bench decision in *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr*[36]**. It is difficult to understand why the Hon'ble Court touched many matters not before the Hon'ble Court, and made observations which would facilitate, sooner or later, in creating more and more structures to imperil our Revenue. Such situations would have been avoided if the norms settled in judicial world would have been followed.**

In *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr*[37] a Bench of 9 Hon'ble Judges contain the following salutary observation:

> "As this Court has frequently emphasized, in dealing with constitutional matters it is necessary that the decision of the Court should be confined to the narrow points which a particular proceeding raises before it. Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover ground which is strictly not relevant for the purpose of deciding the petition before it. Obiter observations and discussion of problems not directly involved in any proceeding should be avoided by courts in dealing with all matters brought before them:

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[36]. AIR 1967 SC 1 Coram : P. B. Gajendragadkar, C.J.I., A. K. Sarkar, K. N. Wanchoo, M. Hidayatullah, J. C. Shah, J. R. Mudholkar, S. M. Sikri, R. S. Bachawat and V. Ramaswami, JJ.

[37]. AIR 1967 SC 1 Coram : P. B. Gajendragadkar, C.J.I., A. K. Sarkar, K. N. Wanchoo, M. Hidayatullah, J. C. Shah, J. R. Mudholkar, S. M. Sikri, R. S. Bachawat and V. Ramaswami, JJ.

but this requirement becomes almost compulsive when the Court is dealing with constitutional matters."[38]

It is, in effect, there is a binding rule that the " court will not decide Constitutional question if a case is capable of being decided on other grounds." [*Basheshar Nath v. CIT* AIR 1959 SC 149]. And in *M.M. Pathak v. Union* AIR 1978 SC 803 this Hon'ble Court said: (in the context of alternative challenge to the impugned Act under Art. 19(1)(f)) per Bhagawati J.: "It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case." (at p. 828)

The Judgement in Vodafone makes observations almost on all the issues involved in the corporate tax planning. *Azadi Bachao* has been brought back and supported to immunize it against possible criticism. *Obiter dicta* abound in the judgement, and these would surely be used against our nation's interest by planting posts of distractions on many issues in litigations to which this nation would be subjected. The nation has lost thousands of crores,; if *Vodafone* survives, I am sure our Consolidated Fund of the millions of suffering souls would become no more than a beggar's bowl! The government must act.

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PART 2

XVI CRITICISM OF CERTAIN SPECIFIC POINTS MENTIONED IN THE *VODAFONE* MAIN JUDGMENT

It is submitted that the main Judgment has decided certain issues material to the idecision in the Vodafone: these are ---

(i) Whether the Revenue's contention that *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 needs to be overruled in so far as it departs from *McDowell and Co. Ltd. v. CTO* (1985) 3 SCC 230 adopting the Ramsay's approach in tax evasion situations

[38]. AIR 1967 SC 1 at p. 7 para 16.

(ii) Whether the 'International Tax Aspects of Holding Structures' justify the structures built and their intra- and inter- transactions leading to the case before the Revenue, now, on SLP, before the Supreme Court in the Vodafone Case..

(iii) Whether Section 9 is a "look through" provision as submitted on behalf of the Revenue?
(iv) The relevance and propriety of the structure minted, and the role of CGP in the transactions.
(v) The distinctions between 'share sales' and 'asset sales', and their relevance to the law of taxation in India..
(vi) Scope and applicability of Sections 195 and 163 of IT Act.

With utmost respect it is submitted that the Hon'ble Court has erred in its decision on all the points afore-mentioned. I would mention my reasons for thinking so in the different Sections in this Part of my criticism of the Judgment.

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(i)

***XVII. Azadi Bac*hao *vis a vis McDowell* not correctly appreciated: the matter should have gone to a larger Bench.**

The Revenue's prayer was that *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 needs to be overruled insofar as it departs from *McDowell and Co. Ltd. v. CTO* (1985) 3 SCC 230 principle."

In my considered view *Azadi Bachao* already stands impliedly overruled, but the country needs a declaration to that effect from the Hon'ble Supreme Court itself on this point. My reasons for thinking that *Azadi Bachao* is already impliedly overruled are set forth in **Annex VI.**

It is unfortunate that the Government of India's counsels never touched any of the aforesaid points mentioned in **Annex VI**. It was easy to understand why they chose not to do so. They wanted *Azadi Bachao* to survive as they wanted the CBDT Circular 789 of 2000 to survive. They merely wanted certain observations in *Azadi Bachao* to go: the

observations which had criticized the *Ramsay principle* quoted and approved in *McDowell*. I was amazed to find our Government trying to protect the Circular 789 of 2000 that directed our officers to go into blinkers, allowed the masqueraders from third countries to access the benefits of a bilateral treaty ; prohibited them from discharging their statutory duties, made trespass on the legislative field by creating conclusive presumptions, and went counter to the Art 265 of our Constitution by granting right to tax or untax to the Executive. The continuance of the Circular clearly proves that our Government is not against black money, is not against the abuse of the tax haven routes, and is not in favour of transparency. I was wondering why our Government thought of opposing *Vodafone*, when it is still to withdraw the said Circular. The Government's prayer before the Hon'ble Court to reconsider AZADI was not whole hearted.

I suggest the Circular 789 of 2000 be withdrawn forthwith by Government.

I would evaluate *Azadi Bachao* from two observation-posts:
(i) one to evaluate what the Court did in *Vodafone* on consideration of the pleas and prayers advanced by the Government counsels; and
(ii) the reasons on account of which *Azadi Bachao* deserves to be *overruled* in public interest.

It deserves to be pointed out at in para 58 at p. 31 of *Vodafone*, the Hon'ble Court states the circumstances under which it came to consider the correctness of *McDowell*:

> "58. Before coming to Indo-Mauritius DTAA, we need to clear the doubts raised on behalf of the Revenue regarding the correctness of *Azadi Bachao* for the simple reason that certain tests laid down in the judgments of the English Courts subsequent to *The Commissioners of Inland Revenue v. His Grace the Duke of Westminster* 1935 All E.R. 259 and *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* (1981) 1 All E.R. 865 help us to understand the scope of Indo-Mauritius DTAA. It needs to be clarified, that, McDowell dealt with two aspects. First, regarding validity of the Circular(s) issued by

> CBDT concerning Indo-Mauritius DTAA. Second, on concept of tax avoidance/evasion. Before us, arguments were advanced on behalf of the Revenue only regarding the second aspect."

I must point out that the Hon'ble Court has erred in stating that the CBDT Circulars were under consideration in *McDowel*l. When *McDowell* had been decided, the CBDT had not issued the Circular 789 of 2000. But applying the Mimansa principles governing the reading of book, the mistake is just *Arthwad* , not at all material, as is some observations of Justice Reddy in *McDowell* on Duke of *Westminster. Azadi Bachao* was unfairly read in *Azadi Bachao*, and *Vodafone*.

Annex VII

The reasons in the first segment deserve to be taken into account to decide appropriate action on *Vodafone* decision. The reasons in the second segment would help our government to take steps to get *Azadi Bachao* overruled, or even to consider whether legislative measures deserve to be taken against what is not acceptable in *Azadi Bachao*.

From the main Judgement, it appears that the Revenue pleaded in *Vodafone* for the overruling of *Azadi,* insofar as it departs from *McDowell and Co. Ltd. v. CTO*, on these grounds:

(i) Para 46 of *McDowell* judgment has been missed which reads as under: "on this aspect Chinnappa Reddy, J. has proposed a separate opinion with which we agree". [i.e. Westminster principle is dead].

(ii) That, *Azadi Bachao* failed to read paras 41-45 and 46 of McDowell in entirety. If so read, the only conclusion one could draw is that four learned judges speaking through Misra, J. agreed with the observations of Chinnappa Reddy, J. as to how in certain circumstances tax avoidance should be brought within the tax net.

(iii) That, subsequent to *McDowell*, another matter came before the Constitution Bench of five Judges in *Mathuram Agrawal v.*

State of Madhya Pradesh (1999) 8 SCC 667, in which Westminster principle was quoted which has not been noticed by *Azadi Bachao*.

I have examined all the three reasons given in the main Judgment, but I have not been able to persuade myself to agree with the reasons given by the Hon'ble Court for not considering *Azadi* for being overruled apropos *McDowell*. All the points stated by the Hon'ble Court deserve to be answered to show that the only course open to the Hon'ble Court was to refer the matter to a larger, preferably 7-Judges Bench (as McDowell was by 5-Judges).My reasons are stated in Section II:

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XVIII. The judgments in *McDowell* has neither been read rightly in *Azadi Bachao*, nor in *Vodafone*.

1. If their Lordships would have tried to explore *upakraopsamharo (the threshold and the conclusion) of* the judgment of *McDowell*, they would not have criticized the judgment by Justice Chinnappa Reddy as it contains neither the *upakrama* (the threshold issue) nor *upsamhar* (the conclusion) of the judgment. The *upakrama* and *upsamhara* are to be found only in the judgment delivered by Ranganath Misra J. on behalf of Chandrachud C.J., Desai, Venkataramiah and Ranganath Misra J. Justice Chinnappa Reddy '**entirely**' agreed with the judgment delivered by Misra J. and also delivered a separate judgment confined to the points of tax avoidance, which was at the heart of the matter in the main Judgment, which, in its turn, expressed *agreement* with the supplemental judgment in specific terms in the penultimate paragraph.

2. Justice Reddy's judgment is *supplemental.* He supplements the main judgment by an in-depth exposition of the topic of avoidance with a view to articulating the right judicial approaches for the tax avoidance cases. At the outset of his judgment, Reddy J says:

> "While I **entirely agree** with my brother, Ranganath Misra, J. in the judgment proposed to be delivered by him, I wish to add a few paragraphs, particularly to supplement what he has said on the "fashionable" topic of tax avoidance". [emphasis supplied].

3. In *Azadi Bachao* the Division Bench of the Supreme Court misses the *supplemental* character of the judgment by Chinnappa Reddy. Perhaps this

mistake was made because the main judgment was treated as the 'majority judgment'. It is surprising to read in *Azadi Bachao* the Court saying: "This opinion of the majority is a far cry from the view of Chinnappa Reddy J." It even observed:

> "We are afraid that we are unable to read or comprehend the majority judgment in *McDowell's case* [1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J. (as he then was)."

The Court in *Azadi Bachao* has, through a miscomprehension, treated Justice Reddy's judgment as if it were a dissenting judgment. His ideas have been circled out as is usually done while dealing with a dissenting judgment. Salmond says[39]:

> "A dissenting judgment valuable and important though it may be. Cannot count as part of the *ratio*, for it played no part in the court's reaching the decision."

4. "To agree" is explained in *Collins Cobuild* thus: "If one person agrees with another or if two or more people agree, they have the same opinion as each other." The *COD* defines it as "hold a similar opinion." "*Agree*" is semantically cognate with the expression "*approve*". *Collins Cobuild* says, "If you approve of an action, event, situation, etc. you are pleased that it has happened or that it is going to happen." It defines it to mean: "Confirm authoritatively; sanction" [from Latin *approbare,* assent to as good]. In *R. v. Shivpuri*[40] Lord Bridge of Harwich in his principal speech, which sent *Anderton v Ryan* packing only after less than a year holding that if "a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better", observed (at p. 341):

> "I was not only a party to the decision in *Anderton v. Ryan*, I was also the author of one of the two opinions approved by the majority which must be taken to express the House's *ratio*."

The purpose of this reference to the opinion of Lord Bridge is to submit that as the "approval" by the House turns the declarations of principles in Lord Bridge's Opinion in *Ryan* as "the House's *ratio*", so the expression of agreement in the penultimate para in the Judgment of Justice Misra (for himself and the three other Hon'ble Judges) makes the principles stated by Justice Chinnappa Reddy the Constitution Bench's *ratio*. Any other view

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[39]. Salmond, Jurisprudence, 12th ed. p. 183.
[40]. [1986] 2 All ER 334 (H.L.).

accords neither with the language used, nor with judicial decorum and propriety we are duty bound to assume. To make the expression "we agree" in the Judgment of the 4 Hon'ble Judges mean something other than the adoption of Justice Reddy's approach in *McDowell* can be done, it is submitted, only on an authority to which Lord Atkin referred in his famous dissent in *Liversidge v Anderson*[41]:

> "I know of only one authority which might justify the suggested method of construction. 'When I use a word' Humpty Dumpty said in rather scornful tone, 'it means just what I chose to mean, neither more nor less'. 'The question is,' said Alice 'Whether you can make words mean different things'. 'The question is,' said Humpty Dumpty, 'who is to be the master ---that is all."

5. Justice Misra in his judgment, in the penultimate paragraph, draws up an excellent summary of Justice Reddy' judgment. **No better précis of Justice Reddy's judgment can be made than what is contained in the concluding paragraph of Justice Misra's judgment.**[42]

6.The following paragraph is being quoted from the judgment in *Azadi Bachao's Case* as it contains an assortment of three reasons put forth for criticizing the judgment of Justice Reddy expressly, and the whole of the judgment in *McDowell*, by implication:

> "The judgment of the Privy Council in *Bank of Chettinad's case* [1940] 8 ITR 522, wholeheartedly approving the dicta in the passage from the opinion of Lord Russell in *Westminster's case* [1936] AC 1 (HL); [1935] 19 TC 490, was the law in this country when the Constitution came into force. This was the law in force then, which continued by reason of article 372. Unless abrogated by an Act of Parliament, or by a clear pronouncement of this court, we think that this legal principle would continue to hold good. Having anxiously scanned *McDowell's case* [1985] 154 ITR 148 (SC), we find no reference therein to having dissented from or overruled the decision of the Privy Council in *Bank of Chettinad's case* [1940] 8 ITR 522 (PC). If any, the principle appears to have been reiterated with approval by the Constitutional Bench of this court in *Mathuram's case* [1999] 8 SCC 667 at page 12. We are, therefore, unable to accept the contention of the respondents that there has been a very drastic change in the fiscal jurisprudence, in India, as would entail a departure. In our judgment, from *Westminster's case* [1936] AC 1 (HL); 19 TC 490 to

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[41]. (1942) A.C. 206,at 245.

[42]. "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. On this aspect one of us, Chinnappa Reddy, J., has proposed a separate and detailed opinion with which we agree."

> Bank of 122 *Chettinad's case* [1940] 8 ITR 522 (PC) to *Mathuram's case* [1999] 8 SCC 667, despite the hiccups of *McDowell's case* [1985] 154 ITR 148 (SC), the law has remained the same."

Critically studied, the aforementioned paragraph brings out the following two reasons for treating *McDowell* the way it has been treated: they are---

(i) As the judgment of the Privy Council in Bank of *Chettinad's case* [1940] 8 ITR 522, wholeheartedly approved the dicta in *Westminster's case* [1936] AC 1 (HL); [1935] 19 TC 490, and as the law declared by the Privy Council continued to be the law of the land in terms of Art 372 of the Constitution, the Constitution Bench was not correct in *McDowell* in departing from it.

(ii) As the principle set forth in *Westminster's case* appears to have been reiterated with approval by the Constitution Bench of this court in *Mathuram's case* [1999] 8 SCC 667 at page 12, *McDowell* must be held to have erred in taking a different view.

Mr. Sorabjee, the counsel for *McDowell & Co* had relied on *Bank of Chettinad Ltd v. CIT.* Besides, he relied on *CIT v A Raman & Co*; *CIT v. B. M. Kharwar*; *Jiyajerao Cotton Mills Ltd v. CEPT*; and *CIT v. Sakarlal Balabhai,* but had lost the case. Justice Misra in his main judgment quoted with an implied approval a whole paragraph from the speech of Viscount Simon in *Latilla v. IRC*[43] which is the *locus classicus* of the new approach in tax-jurisprudence of which *McDowell* is as great a crowning achievement in India as *Furniss* is in England. He said:

> "Of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods maybe, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary one result of such methods, if they succeed, is of course to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these maneuvers. Another consequence is that the Legislature has made amendments to our Income Tax Code which aim at nullifying the effectiveness of such schemes."

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[43]. (1943) 25 Tax Cas 107.

It deserves to be noted that Justice Reddy too had quoted Viscount Simon's observations with his clear approval. These ideas resonate in his judgment all along, to quote a fragment:

> "In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it."

7. The Privy Council in *Bank of Chettinad Ltd v. CIT*[44] was dealing with a *bona fide* situation clearly coming within the category to which the situation in the *Duke of Westminster* belongs. It examined facts to see whether there was a business connection within the meaning of Section 42 of the Income-tax Act, 1922. The Privy Council held in favour of the Revenue. In *Mathuram Agrawal v. State of M.P.*[45], this Hon'ble Court referred to *Bank of Chettinad Ltd. v. Commr. of Income-tax* and *Inland Revenue Commissioner v. Duke Westminster* but *McDowell & Co. Ltd v. CTO* was not even referred. The Hon'ble Court was considering matters relating to M .P. Municipalities Act (37 of 1961), S.127A(2)(b) to see whether certain provisions were *ultra vires* the charging section. The fact-situation was a *bona fide* situation involving statutory construction. The Constitution Bench in *Mathuram* said nothing about *McDowell*, though its awareness cannot be doubted. It presented a *bona fide* situation. It is a manifest error to say that this Constitution Bench decision had to deal with a situation with which *McDowell* dealt with. In the case of *Bank of Chettinad Ltd. v. Commr. of Income-tax*, Madras, (AIR 1940 PC 183), the Privy Council quoted with approval a passage from the opinion of Lord Russell of Killowen in *Inland Revenue Commissioners v. Duke of Westminster*, (1936) AC 1.The Hon'ble Court was not examining what should be the right judicial approach in a case involving a camouflage causing wrongful gains to the treaty-shoppers and wrongful loss to the people of India. It was not a case wherein there is a clear evasion of reality by excluding transparency so that a good faith arrangement is used to promote bad faith of deriving profits contrary to law and justice. In *CWT v. Arvind Narottam*[46], the Court did not consider it appropriate to invoke

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[44]. AIR 1940 P.C. 183 [Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir M.R. Jayakar].

[45]. AIR 2000 S C 109.

[46]. (1998) ITR 479 SC.

McDowell as it was dealing with a *bona fide* situation involving no cover-up. In *Mathuram Agrawal v. State of M.P.*[47], this Hon'ble Court considered matters relating to M .P. Municipalities Act (37 of 1961), S.127A(2)(b) to see whether certain provisions were *ultra vires* the charging section: it was a bona fide situation involving merely statutory construction. *Arvid Narottam*, *Mathuram*, and the *Bank of Chettinad* belong to a group evidently distinct from the group to which *McDowell* belongs.

8. It is submitted that the Court was mistaken in thinking that the law declared in *Bank of Chettinad,* which approved *the Westminster,* was binding on the Supreme Court in view of Art. 372 of the Constitution of India. The Hon'ble Court observed:

> "Unless abrogated by an Act of Parliament, or by a clear pronouncement of this Court, we think that this legal principle would continue to hold good".

Art 372 of the Constitution deals with the continuance in force of existing laws even after the commencement of the Constitution. With respect it is submitted that:

(a) what *McDowell* declares is the law which is binding on all courts within the territory of India by Art 141 of the Constitution; and

(b) the Hon'ble Court missed to see that facts in the *Bank of Chettinad* or *Mathuram Agrawal* are as different from those of *McDowell* as chalk is from cheese. The *Bank of Chettinad* did not deal with the bad-faith operators causing wrongful gains to itself by causing wrongful loss to others.

9. Even the Privy Council's *Bank of Chettinad,* which *Azadi Bachao* purported to follow, was a decision by only three judges [(AIR 1940 P.C. 183 (Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir M.R. Jayakar)] whereas *McDowell* was by a Constitution Bench of five Judges. It is surprising that in *Azadi Bachao* it was observed:

> "And as far as this country is concerned, the observations of Shah J. in *CIT v. Raman* [1968] 67 ITR 11 (SC) are very much relevant even today."

despite the fact that not only this view was rejected in Justice Reddy's Judgment in *McDowell*, it was noticed in specific terms in the main Judgment by Misra J. in *McDowell* which in its summing-up observed:

> "On this aspect, one of us, Chinappa Reddy J. has proposed a separate and detailed opinion with which we agree."

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[47]. AIR 2000 S C 109.

10. It is to be noted that the main judgment had taken specific cognizance of Justice Shah's dicta in *Raman's Case,* which had repeated almost verbatim the observations in *Westminster* (1936 AC 1) and *Fishers Executors* (1926 AC 395). The main judgment mentions that the counsel of the appellant cited and relied not only on *Raman* but also on *Commr. of Income-tax v. Kharwar*, 72 ITR 603 (AIR 1969 SC 812). Immediately thereafter the main judgment refers to *Latilla.*

11. It is submitted that it must be a mistake in comprehension which led the Court to hold in *Azadi Bachao* that there was "a far cry" between the views of Justice Reddy and Justice Misra; or to hold that Justice Reddy's view 'militated" against the view taken by his other four brother Judges. In fact the quotation from Justice Misra's judgment says precisely what Justice Reddy said in detail with flourish and solemn judicial passion. "Colourable" in the expression "colourable device" would mean "Pretended, feigned, counterfeit" *[The New SOD]*. As to "dubious": "Something that is dubious is not considered to be completely honest or safe, and therefore cannot be trusted or approved of. *[Collins Cobuild English Language Dictionary*]. And subterfuge means, as *Cobuild* says: 'A *subtrerfuge* is a trick or deceitful way of getting what you want". Justice Reddy in his supplemental judgment has said nothing more, nothing less.

(12) It is felt that the Hon'ble Court has resulted in a serious Miscarriage of Justice because it failed to see how TIME itself has distinguished the *Duke of Westminster*, and made that sort of view anachronistic. **The change wrought by Time has to be recognized.** The courts have treated TIME as a distinguishing factor in the matters of interpretation. Lord Buckmaster said in *Stag Line Ltd. v. Foscolo Mango & Co. Ltd*.[48]

> "It hardly needed the great authority of Lord Herschell in *Hick v. Raymond and Reid* (2) to decide that in constructing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be

[48] [1931] All ER Rep 666 H L

> regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one."

And in *McDowell's case* Justice Chinnappa Reddy referred to the observations of Lord Roskill in *Furniss v. Dawson:*

> "The error, if I may venture to use that word, into which the courts below have fallen is that they have looked back to 1936 and not forward from 1982."

(vi) F. W. Maitland wrote to Dicey: "the only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law"[49] The direct utility of the history of Man is that we learn from our individual and collective experience. Creative steps and corrective steps go together. Human intelligence and ingenuity created technology and 'corporations' to further human welfare, not to promote Deception and Greed. The time has come when the Sun must rise for the darkness to go; for the structures of deception to melt.

(vii). As the Hon'ble Court has failed to appreciate the operative realities of this dangerous World and Cyberspace, the Judgment has caused Miscarriage of Justice. Lord Denning had some prevision he cautioned Judicial System

> "Just as pick and shovel is no longer suitable for winning of coal, so the procedure of mandamus, *certiorari* and actions on case are not suitable for the winning of freedom in the new age."

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XIX *McDowell* when properly read.

McDowell was not properly read in Azadi Bachao.

In *Azadi Bachao,* the Court read *McDowell*, it is most respectfully submitted, in a way no judgment is to be read. Instead of (i) proper

[49] Cosgrove *The Rule of Law: Albeit Venn Dicey: Victorian Jurist* (1980) p 177.

inductions from the actual decision in that case, or (ii) examination and determination of the *ratio decidendi* contained therein, the Court focused only on—

(a) examining whether Justice Chinnappa Ready was correct in his views on certain *dicta* of Lord Tomlin in *IRC v. Duke of Westminster*[50], and how this decision fared in certain other decisions in India and England, and

(b) examining how much "a far cry" exists *inter se* the views of Justice Ranganath Misra (for himself and on behalf of Y.V. Chandrachud, C.J., and D. A. Desai and E.S. Venkataramiah, JJ) and that of Justice Reddy in the matter of tax avoidance.

The assessee devised a way not to pay tax on turnover inclusive of duty paid by the liquor purchasers. The strategy was the conjoint product of two facts:

(i) under an agreed strategy the purchasers had to discharge the manufacture's liability; and

(ii) under this system the transactions of such payments were not made to figure in the assessee's books of accounts; it was stage-managed not to be part of the assessee's trade.

It was held that the fact that excise duty does not go into the common till of the manufacturer (assessee) to become a part of the circulating capital, is not the decisive test for determining whether such duty constitutes the seller's turnover.

. A close reading of the main and supplemental judgments in *McDowell* shows that through points-counterpoints judicial displeasure at tax avoidance has been expressed. This judicial mission is so patent that culling of illustrations to prove it is not needed. But it is important to know the judicial philosophy of this approach. The main judgment touches this point, but it has been developed in the supplemental judgment wherein Justice Reddy, after enumerating the evil consequences of tax avoidance, articulated a new judicial approach. The evil consequences highlighted include the following:

(i) First, there is substantial loss of much needed public revenue, particularly in a welfare State like ours.

50. [1935] ALL ER Rep 259.

(ii) Next, there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation.

(iii) Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcroft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer, and his perhaps not so skillful advisers on the other side.

(iv) Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it'.

(v) Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guileless good citizens from those of the 'artful dodgers'.

And Justice Reddy states the judicial duty of the court thus:

> "It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance, we now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognize that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in *Wood Polymer Ltd. and Bengal Hotels Limited*, (1977) 47 Com Cas 597 (Guj) where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax."

Justice Reddy's views accord with our Constitution that attempts to build a welfare state.

It is submitted that in *Azadi Bachao,* the Court, perhaps through an oversight, made serious mistakes in comprehending *I .R.C v. Duke of Westminster*[51]; and for that reason misunderstood the law declared by the

[51]. [(1926) A.C. 395].

Constitution Bench in *McDowell*. As from this miscomprehension emanated serious distortions in the judicial perspective producing a serious miscarriage of justice, it is worthwhile to mention the following:

(I) Justice Reddy's comments on the *Duke of Westminster* constitute what is called in *Mimansa* an '*arthvaad*' which comes in the sixth category. In *Azadi Bachao* the Court made too much of what, in fact, did not matter.

(II) *The Duke of Westminster* dealt with the construction of certain plain transactions where the Revenue had no reasons to doubt the *bona fides*. In *Furniss v Dawson*[52] Lord Bridge highlighted this point when he said:

> "The strong dislike expressed by the majority in the Westminster case [1936] AC 1 at 19… for what Lord Tomlin described as the doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" is not in the least surprising when one remembers that the only transaction in question was the duke's covenant in favour of the gardener and the *bona fides* of that transaction was never for a moment impugned". (Emphasis supplied)

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XX. The D.B. of 3 Hon'ble Judges should have referred the matter to a larger Bench, preferably 7-Judges Bench (*McDowel*l was a Constitution Bench decision)

The purpose to write all these details is to underscore that it was proper for the Hon'ble Court not to decide this issue, but to refer to a larger Bench.

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It is imperative to note the import and importance of the view taken in the decision by a Special Bench of seven learned Judges in *Antulay's Case* that the practice, that a smaller Bench is bound by the decision of a larger Bench, has now *crystallized into a rule of law*. Dias has made a succinct differentiation between the rule of practice and the rule of law in the context of Note on (Judicial Practice) by which the House of Lords abolished the rule that it was bound by its decisions. To quote Dias:

> "Are the rules regulating the binding force of precedents rules of law or of practice? the House has treated it merely as one of practice[53], which means simply that a new rule of practice has been substituted for the old and is descriptive of what

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[52]. [1984] 1 All ER 530 at p. 536.

[53]. [1966] 3 All ER 77.

> the House is now doing without prejudice to what it may decide to do in future. If, on their hand, it were treated as a rule of law, there might be doubt as to whether a rule of law can be unsettled by a practice statement forming no part of the decision of any dispute."[54]

Under our Constitution there is no scope for any ambiguity on this score. For a proper working management in the Court, Rules have been framed in exercise of power under Art 145 of the Constitution. The Rules are subject to only two restrictions:

(a) the rules are subject to a Parliamentary enactment; and

(b) the rules require the approval of the President of India.

The Chief Justice constitutes benches for disposal of cases. Order VII R. 1 of the Supreme Court Rules, 1966 provides that a Bench consisting of not less than two judges nominated by the Chief Justice shall hear every cause, appeal or matter. But this rule is subject to the requirement under Art. 145(3) of the Constitution. Art. 145(3) requires a minimum number of five judges for deciding any case involving substantial question of law as to interpretation of the Constitution. In any event, the Supreme Court has to sit in benches with judges distributed as the Chief Justice desires. Order VII R. 2 of the Supreme Court Rules provides:

> "Where in the course of the hearing of any cause, appeal or other proceeding, the bench considers that the matter should be dealt with by a larger bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a bench for the hearing of it."

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XXI. The Relevance of 'share sales' and 'asset sales'

The Hon'ble Court has erred in holding in favour of Vodafone because the transfer involved 'share sales' rather than 'asset sales'.

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[54]. Dias, Jurisprudence 5th ed p. 132.

(a). It is submitted that nothing turns on the distinction of 'asset sale, and 'share sale'. This proposition can be tested on simple logic. Think, what can happen to such shares if India nationalizes the assets of the company (the underlying assets). Think of a situation where by act of man or of God, the assets, giving real value to the shares in the international world of commerce, is destroyed. The impact of such events on the CGP shares would be sure and certain. This is because such shares being transacted outside India have close nexus with the economic matrix situated in India. I have advanced this reasoning to prove my point logically by invoking "*Reductio ad absurdum*"

(b) In the 'designed' and well-crafted world of finance, the 'shares may be given value, but when all is said, it is the character and quality of economic matrix that gives them value which matters when shares are transferred. If the economic matrix is in India, share transfer in tax havens between non-residents has clear nexus with our territory.

© **Tax treaty rules** assume that both contracting States tax according to their own law; unlike the rules of private international law, therefore, treaty rules do not lead to the application of foreign law." (*Klaus Vogel on Double Taxation Conventions p.20; Philip Baker pp.34-35.* The position presented in Part 3 of this Note (*Vodafone: a Critique*) shows the right legal perspective which the Hon'ble Court has unfortunately missed. If at all, in the corporate world such a distinction is often maintained, the point to be seen is whether this classification is relevant within the parameters of our tax law, or even the law if international taxation.

(d) Besides, this differentiation of 'share sales' and 'asset sales' is, it is submitted, unreasonable because this can produce the following unfortunate consequences:

(i) It would be unjust to permit a situation for the international financiers operating out of India to take the benefit of situations where cuckoos lay their eggs in crows' nest.

(ii) It would be unfair for the people and the government of this country, which supports and protect the economic matrix, and contribute to its operation, to be left high and dry on account of this reason or that. Taxation law and Justice may not

be close friends, they are surely not at loggerheads with each other.

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PART 3

XXII. The DECISION OF THE HON'BLE COURT IS UNREASONABLE: hence it results in the Miscarriage of Justice

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?"[55], This Appellant would also humbly posit this question: "Is this Vodafone Judgement fair to our country?"

To a common man, the decision of *Vodafone* would appear erroneous for the following precise reasons:

(i) The economic matrix ['A situation or surrounding substance within which something else originates, develops, or is contained: "Freedom of expression is the matrix, the indispensable condition, of nearly every from of freedom" (Benjamin Cardozo)] is situated in the territory of India. Shares representing, or reflecting, or bearing nexus with the economic creativity in such a matrix deserve to be amenable to the Indian taxable jurisdiction.

[55] *Some Makers of American Law* p. 138

(ii) 'Income' originates on the complex interactions of 'capital and labour'. Karl Marx had deepened our insight into this economic creativity of which 'income' is a fruit. This was precisely stated by him thus:

> 'Surplus value is produced by the employment of labour power. Capital buys the labour power and pays the wages for it. By means of his work the labourer creates new value which does not belong to him, but to capitalist.'

If in the economic creative matrix foreign factors work, then proper apportionment of profits is warranted. This is what Bombay High Court had done in *Vodafone,* and this is what DTC wants to do by the proposed provisions under Section 5.

(iii). "Income, it is true, is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation ….Sir George Lowndes speaks of 'income' being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similes cannot be used to limit the true character of income (approved in *Venkataswami v. CIT* 35 ITR 594). And this tree is in the territory of India, and is watered and protected by India's sons and daughters.

(iv) The value of the shares of the Cayman Islands subsidiary is because the worth and vectors in the economic matrix in India's territory. To test the worth of this proposition, please think what can happen to the capital worth or share worth of such shares if we nationalize the underlying assets,

(v) The concept of income' is wide, and its definition in the Income-tax Act (see Secion 5) is 'inclusive'. So the categories are never closed. 'The word 'income' is an expression of elastic ambit, and courts when describing income have almost always qualified their description by saying that it is not exhaustive.' Section 5 says: "Subject to the provision of this Act, the total income of any previous year of a person who is a resident **includes** all income from whatever source derived which----".

(vi). If the corporate structure, appreciated in Vodafone, stands, it will have disastrous consequences for our nation, not only because many cases cast in the same protocol would be lost to-day or to-morrow, but also because most commercial and economic activities would be so arranged as to deprive our country of

revenue in future. If it happens that way, our Democratic Republic would come to and; and if it survives it would be worse in Milo's Rome.

(vi) If Vodafone view is allowed to stand, what prevents men, or robots, to ensure registration of companies at the Servers placed on the moon, or another part of the space. If it happens, all ' share sales' transactions can be arranged in the cyberspace by robots residing in the space, or in the Oceania, or on some remote terra firma which we might not see on the map through most powerful magnifying glass. That will be the India of the airy creatures about whom I had a written story[56].

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[56] **(v) The three Indias**

Three persons met in a conclave at the 'swimming city' in the Pacific to deliberate on the affairs of our world. They assembled in this ship. They were advertised in the media as the three flowers out to herald a new spring all around. One was with the highest Business Management doctorate from the world's most prestigious university; the second was an economist flaunting gaudy academic distinctions; and the third had a distinguished career as a financier reigning with his wizardry the world of finance. Each claimed to be in hand and glove with the government which pretended in the public domain to work as the *parens patriae* for the ordinary mortals. People somehow believed that their government was an institution, set up through elections, and was, therefore, surely faithful to people as was Penelope to her husband! So the modern versions of Medicis and Sir Basil Zaharoffs were there on that swimming ship assembled to forge how best to exploit the 'great beast', as common 'people' had appeared to Alexander Hamilton then[56], and as they appear to the leaders of the present-day of the Economic Globalization.

They thought of three Indias. One India, called 'India Incorporated', of the *nouveau riche*, the high net worth individuals, the most successful looters, the most successful crooks, the MNCs and creatures of the similar stuff. Mammon is their guide and Lucre is their love. They need a country on this planet because some stellar world is still to be discovered or explored. They feel that all others beyond their circle are mere commodities to be turned into the grist of the mill of their greed. They feel the world exists for them. Not to say of a government, even God exists to promote their welfare. The Second and the third Indias exist in the spheres away from the first, separated by the thickest smog ever seen. These two constitute Bharat, itself vivisected into two realms, one working for the first India as their workers, lobbyists, advertisers and cheerleaders. Some of these have before them inviting carrots for which any donkey is accustomed to bray, and move towards. The Third India is the Bharat of ordinary mortals whose destiny makes them either to become the instruments to run the market, or to become raw materials for creation of new products, or to become what the lawyers say *res commercium*. Most of them, about 80% of the 90% of Bharat can be just dispensed with

(vii) Think from our Constitutional observation-post. Why should they escape paying capital gains on the transfer of shares when transacted by two non-residents outside territory but we the nations of the Republic of India have to pay capital gains if we can not masquerade as non-residents through the corporate protocols like that in *Vodafone.* Is it not arbitrary? Does it not violate Article 14 of our Constitution, does not it prove Bentham's view right that the Declaration of the Rights of Men is a mere nonsense on stilts, 'a metaphysical work --- *the ne plus ultra of metaphysics'*

(viii) If *Vodafone* thesis is allowed to rule, through treaty-terms our Constitution can be overridden. Georg Schwarzenberger in *A Manual of International Law* (5th ed.pp. 46-47) formulates certain core propositions to show how the so-called International Lawyers have tried to subjugate the democratic constitutions. He has prefaced his exposition with a remarkable observation which deserves to be borne in mind. He says:

> "The doctrine of the supremacy of international law over municipal law appeals to the *amour proper* of international lawyers and has its attractions *de lege ferenda.* In *lex lata,* it corresponds to reality on the –

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by devising protocols to turn them to profits, which is the sovereign goal of the majestic Market. The conclave on the swimming ship unanimously decided that the best solution was to turn them into the 'beast of burden', or better still, into an animal farm for harvesting human organs etc. so long such resources could last.

Justifying their ideas they drew on the wisdom of J.B. Priestley who discovered three Englands in his *English Journey* (1934). He discovered three Englands:[56] (i) the traditional England rich with wealth; (ii) the "bleak England of harsh industrial towns," and (iii) the "England of dole", a subdivision of England No. 2." But the delight of the experts in the conclave found no bounds, when a professor from a prestigious Business School getting salary in lakhs and lakhs pointed out that there existed precedents even in 'the best of all times'. Even Benjamin Disraeli, who worked to make Victoria the Empress of India in the 19th century, had witnessed two Englands:

> "Two nations; between whom there is no intercourse and no sympathy; who are as ignorant of each other's habits, thoughts and feelings, as if they were dwellers in different zones, or inhabitants of different planets; who are formed by a different breeding, are fed by a different food, are ordered by different manners, are not governed by the same laws…the Rich and the Poor."[56]

[from Shiva Kant Jha's Autobiographical Memoir, *On the Loom of Time* pp 400-401

always consensual –level of international institutions, in particular international courts and tribunals."

'*Amour proper'* means "Respect for oneself" which easily turns into egoistically pursuit to aggrandize power and status. Schwarnenberger states.

(ix) The structure erected in *Vodafone* requires us to keep our eyes shut, and brain clogged. It would be disaster for our Republic if this sort of strategy survives, and even our Courts provide us no remedy. Prof. Schmitthoff has described the judicial technique of Lord Denning it thus:

" 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 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."[57]

As in Keats's *Lamia* the fake and the fraud could not stand the critical gaze of Apollonius[58], so our Supreme Court should not have allowed the setting up of corporate structuring that promotes fraud.

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PART 4

SUGGESTIONS

I. (i) I suggest: to get over the *Vodafone* Case situation, a retro-operative ordinance deserves to be issued, and then law enacted. The

[57] Quoted by H.M Seervai, *Constitutional Law of India*, VOL-II, 3rd Ed. p 2481

[58] Philosophy will clip an Angel's wings,
Conquer all mysteries by rule and line,
Empty the haunted air, and gnomed mine—
Unweave a rainbow, as it erewhile made
The tender-person'd Lamia melt into shade.
John Keats *Lamia* II

Government can do it[59], and it is settled that it can be done even in the field of tax laws. Retrospective validation of tax was upheld.[60]

(i) I suggest that our Government moves a Petition for Recall before the Supreme Court praying to exercise its inherent jurisdiction to do justice by invoking the doctrine of *ex debito justitiae (*as the Government has done in the Black Money Case (*Ram Jehmalani v. UOI 2011 (6) SCALE 691*).

(ii) I suggest: if ideas at (i) and (ii) are not appreciated, to move Review Petition with a prayer that the matter be heard in the open court.

(iii) I suggest: if the course at (iii), perish the thought fails, our Government may consider moving the Curative Petition; and its counsels should submit before the Court that the parameters of the curative jurisdiction deserve to be widened so to become as

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[59] *Mahal Chand Sethia v. W.B*. [SEE Seervai, Const. Law vol. 1 p.223]. Mitter J. observe3d:

> "A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the legislature or if it infringed the rights enshrined in Part III of the constitution …..The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of on effect. It can however pass an Amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. An Amending Act simpliciter will cure the defect in the statute only prospectively. But as a legislature has the competence to pass a measure with retrospective effect it can pass an Amending Act to have effect from a date which is past Usually legislatures pass Acts styled Amending and Validating Acts, the object being not only to amend the law from a past date but to protect and validate actions already taken which would otherwise be invalid as done without legislative sanction. There is nothing in our Constitution which creates any fetter on the legislature's jurisdiction to amend laws with retrospective effect and validate transactions effected in the past. Further, there is nothing in our Constitution which restricts such jurisdiction of the legislature to cases where courts of law have not pronounced upon the invalidity or infirmity of any legislative measure. Instances of the legislature's use of such power, upheld by our courts, are copious."

[60] Rai Ramkrishna v. Bihar AIR 1963 SC 1667 [SEE Seervai, Const. Law vol. 1 p. 844-845].

wide as the Court's inherent jurisdiction *ex debito justiae*, as traditionally understood.

(iv) I suggest: if (ii), (iii) and (iv) fail, the ultimate recourse would be to file a Writ Petition under Article 32 of the Constitution as there are good reasons to believe, despite *obiter* observations to the contrary in some cases, that neither on the text of the Constitution, nor on its context, nor on first principles, the superior courts are beyond Article 32 of the Constitution. This point has not been decided till now. There is a good arguable case to explore this remedy. [vide the Chapter 3 of my *Judicial Role in Globalised Economy* (Wadhwa 2005) Chapter 3 (pp 51-82). If other organs of the State are subject to Article 32 of the Supreme Court, there is no reason why in rarest of cases the Supreme Court be excluded from the reach of Article 32 of the Constitution.

II. I suggest our Government should frame law under Article 245(2) in exercise of its extra-territorial jurisdiction to impose liability on income accruing or arising, directly or indirectly, to any person or property, outside India, having proximate or remote nexus with this country. Hence I SUGGEST that a law be framed:

(a) under Article 246(2) of our Constitution in comprehensive words as the international tax planners know how to make a camel pass through the eye of a needle; and
(b) to provide that the recovery of taxes etc is done before any benefit is allowed to be reaped outside (or repatriated or transmitted to) , whether in New York, or Mauritius, or in any of the odd tiny tots in the Caribbean.

III. I further suggest that all the relevant issues by examined by the Law Commission of India, or a Committee of experts[61] (consisting two eminent

[61] "**(e) Suggestion for constituting certain Committees for ongoing reforms**

I have all alongf elt that there should be two permanent c ommittees, one of our Parliament and the other of our eminent experts to study and suggest measures for administrative

sitting Judges, two jurists, two representatives of the Revenue, and one expert of established credentials from the international academic world). But no tax lawyers, C.As, financial planners, representatives or the lobbyists (may be for the OEC, the WTO, the IMF) should be associated as moist of them have agenda to promote which may not be in our

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and legislative steps in the matter of the tax law and its administration, almost on a continuing basis.

Considering the factors contributing to the complexity of the tax law, H.H. Monroe, who had the experience of having worked as the Presiding Special Commissioner in the United Kingdom, and had wide experience as a leading member of the British Tax Bar, suggests:

> "Given goodwill, co-operation and a readiness to accept something short of perfection, measures to improve the existing law and such additions to it as are on mature reflection really necessary should not be difficult to achieve.Parliamentary procedures seem to hold the key; some sort of permanent committee, with experienced and expert assistance, to review existing and future legislation not just in relation to its content but in relation to its form seem to offer a practical expedient worth a try. Is the will lacking? Should we all shout together? We might be heard." His rhetorical question must be answered: "YES".

It would be good if our Parliament establishes a Permanent Committee on Taxation on the analogy of the Committee on Treaties in Australia, and Canada. *Ad hoc* Parliamentary committee is not good enough. I may state that my study of our Parliamentary practice and procedure, with the *Parliamentary Practice of Erskine Mayas* my manual, has led me to conclude that our Parliamentary system of Committees, including those on Petitions, have not worked well for reasons not appropriate for being examined here in this autobiographical *Memoir*.

The draft of the Income-tax Act, 1961 had been drawn up by an expert Committee consisting of P. Satyanarayan Rao, G.N. Joshi, N. A. Palkhivala, under the Chairmanship of M.C. Setalvad. They had drawn up the 12th Report of the First Law Commission (1958). In framing the Act, much was drawn from the Direct Taxes Administration Enquiry Committee Report (1959). These Reports were comprehensive enough to giveus full ideas of the problems which Commissions and the Committees had considered. We knew that their authors were great masters of jurisprudence, possessed internationally recognized professional calibre, and integrity, and had wisdom and sagacity rarely noticed these days. Perish the thought, the Government must not give an impression that things are being engineered through stealth for ulterior purposes (which might include the unworthy practice of 'outsourcing[7] the drafting of the law to those who have their own interests to promote.)." [An Extract from Shiva Kant Jha'a Autobiographical Memoir, *On the Loom of Time* pp. 218-219

nation's interest.[62] Besides, this work is so important that this work must not be outsourced, directly or indirectly.

IV. I suggest that the Hon'ble Supreme Court be persuaded to recall *Vodafone*, and before it decides issues after a recall, the Hon'ble Court must explore its right Constitutional role by clarifying what it believes to be the mission of the Constitution. The People of the Republic want to know where they stand, and how their Constitution stands under the tsunami of neoliberal ideas that seems to rage on everything round the clock.

"Satyameva Jayate"

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62 The evasion of taxes, and the commission of crimes are facilitated not only by many banks, but also by experts, and persons wielding high political positions. The Paris-based *Financial Action Task Force on Money Laundering*[62] in its Report on the Laundering Typologies 2003-2004 examined the unwholesome role of many professionals and the 'politically exposed persons' (PEPs) [an euphemism for the persons holding public offices].

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

(a) Payments structured to avoid detection.

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

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

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

(e) Legal professionals facilitate in money laundering.

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

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

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

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

ANNEX I

No extraneous purpose can be pursued under the Income-tax Act, 1961.

1. All wielders of public power under our Constitution, as also under the U.S. Constitution, are the donees of power with a closely structured grammar of constitutional discipline governing its exercise [surely only for public good]. Denial of inherent power to the Executive is designed to achieve an important constitutional mission thus described in *The New Encyclopedia Britannica*[63]:

> "The limits to the right of the public authority to impose taxes are set by the power that is qualified to do so under constitutional law. In a democratic system this power is the legislature, not the executive or the judiciary….."

2. The Policy quotient available to the Executive under the Income-tax Act is nil. The governmental economic policies or any other policy is irrelevant for the tax authorities till they are enacted in the statute itself. And then the authorities function not to promote any policy, this or that, but to implement the provisions of the law. This Hon'ble Court, in *Azadi Bachao*, went against the very grains of the Income-tax Law by approving the thesis advanced by the Attorney-General that the object of the impugned CBDT Circular and of the Indo-Mauritius Double Taxation Avoidance Convention was to promote the massive incoming of foreign exchange. The net effect of all this is that purpose extraneous to the law was promoted.

3. As per the *preamble* and the *scheme* of the Income tax Act, 1961 : the *purpose* is to collect tax as per the law. Lord Scarman's observations on the role

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[63]. Vol.28 p.402.

of Income tax and the functions of the authorities administering the Law of Income tax. Referring to the duties of the Board of the Inland Revenue he observed : "The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.[64]" Lord Diplock explaining the function of the Board of Inland Revenue says "All that I need say here is that the Board are charged by statute with the care, management and collection on behalf of the Crown of income tax corporation tax and capital gains tax. In the exercise of these functions the Board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection.[65]" Lord Hewart observed in *Rex v. Special Commissioner* (20TC 381 at 384, quoted by *Kanga & Palkhivala* at p. 1509 : the duties imposed upon the Commissioners of Income tax are "in the interest of the general body of tax payers, to see what the true assessment ought to be, and that process, a public process directed to public ends." And the Revenue's slogan: not a paisa less, not a paisa more. That it could be permissible to bend law to promote purpose extrinsic to the Act was rejected by the Authority for Advance Ruling in one of its rulings said (1999) 239 ITR 650 at 674 stating:

> *"In order to encourage inflow of funds form the emirates to India, the Government of India could bring about a legislation granting relief to such inflow of funds and income earned by investments of such funds….. The object of the agreement was avoidance of double taxation of income and prevention of fiscal evasion. The agreement was entered into in exercise of the power conferred by section 90 of the Income-tax Act… Such an agreement could only be entered into, (a) for granting relief in respect of tax actually paid twice on the same income under the tax laws in force in both the countries, or (b) for avoidance of double taxation of income under the Income –tax Act and the Corresponding law in force in the foreign country."*

And the observation of Lord Radcliffe who "never understood the procedure of extra- statutory concessions in case of a body to whom at least the door of Parliament is opened every year for adjustment of the tax code" (quoted by Lord Edmund-Davies in *Vestey v IRC* (1997) 3 ALL ER 976 at 1002).

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[64] *Inland Revenue Comrs v National Federation of Self- Employed and Small Businesses Ltd.*(1981) 2 ALL ER 93 at 107 (H L) at p. 112.

[65] Ibid p.112

4. Art. 265 of the Constitution authorizes the income-tax law to be made under the legislative field prescribed by the entry 82 of the Union List of the 7th Schedule to our Constitution. As per the *preamble* and the *scheme* of the Income tax Act, 1961, the OBJECT of the Act CANNOT be anything else that what Lord Hewart observed in *Rex v. Special Commissioner* (20TC 381 at 384) that the duties imposed upon the Commissioners of Income tax are "in the interest of the general body of tax payers, to see what the true assessment ought to be, and that process, a public process directed to public ends." To use a law framed in pursuance to the power granted under Article 265 of the Constitution would be a culpable exercise of power if objects extraneous to Art. 265 are sought to be promoted.

5. Under our Constitution even grant of *exemption* is a legislative act. It is a constitutional principle of highest importance that neither we can be taxed through an executive fiat, nor untaxed through an executive concession. To tax or grant *exemption* form the two facets of the same thing. It was aptly stated by the Rajasthan High Court in *H.R.& G. Industries v. State of Rajasthan* (A I R 1964 Raj. 205 at 213)

: "It is well established that the power to exempt from tax is a sovereign power and no State can fetter its own much less the future legislative authority of its successor. *See Associated Stone Industries Kotah v. Union of India ILR (1958) 8 Raj 700 and* ***Maharaja Shree Umed Mills Ltd v. Union of India ILR (****1959) 9 Raj. 984"*

247. That the plea that a Double Taxation Avoidance Agreement is to facilitate the incoming of foreign money is to assert that it is valid to use a tax treaty for ulterior purposes which amounts to a *mala fide* exercise of public power conferred to be used only within the frontiers set under the Income-tax Act. It is *mala fides* , not in the sense of malice or dishonesty but in the sense of acting unreasonably and using the power to achieve an object other than that for which it was conferred. It is common knowledge that those who act *mala fide* do not proclaim that fact ; and *mala fides* is a matter of inference from the conduct of the parties.

248. That if the object of allowing the NRIs and FIIs to exploit the Mauritius route, is to invite foreign funds in our country the whole pursuit become *mala fides* : not in the sense of malice or dishonesty but in the sense of acting unreasonably and using the power to achieve an object other than that for which the authority believed the power had been conferred, even if the intention may

be to promote another public interest (de Smiths *Judicial Review of Administrative Action* 4th ed. Page 335)"

ANNEX II

Azadi Bachao has the effect of promoting the Neo-liberal paradigm

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

	The Points in the Neo-constitutionalism promotive of Neo-liberal paradigm	**The emerging effects of the judicial position in *Azadi Bachao***
1	**A paradigmatic change** in constitutional philosophy[66] now erecting altered institutional and legal structures to	*Azadi Bachao* (i) promotes the interest of the MNCs both those entitled to avail of the

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

	promote the market order aiming to establish *Pax Mercatus*, or *Pax Corporatus* run by rabid *Homo Economicus* illustrating Friedrich A. Hayek's *The Constitution of Liberty, published in* 1960, about which Margaret Thatcher is reported have said "This is what we believe"'	benefits of a bilateral tax treaty, and also those who wrongfully turned masqueraders from the third States to avail of such benefits beyond the Personal Scope of Tax Treaties through **the entente cordiale** of fraud and collusion. *Azadi Bachao* considered corporations' 'personality' so impregnable by holding that in the realm of Tax Treaties the Doctrine of the Lifting of the Corporate veil was not applicable because it applied in the domestic law. This illustrates 'the continuing pressure by corporate interests to expand corporate rights and limit the corporate obligations'. *Azadi Bachao* sustains of the Circular 789 of 2000, ignoring Justice Reddy's legal perspective provided in the Constitution Bench decision of *McDowell*. This led Azadi Bachao to recognize the paper companies of Mauritius thousand of which hibernated in the tax haven's chartered accounts' hip-pocket,…..
2.	The abandonment/modification of the traditional constitutional assumptions evolved through national institutional structures to promote primarily national agenda.	Azadi Bachao amply illustrate the assumptions evolved under the neo-liberal paradigm. The *Encyclopaedia Britannica* notes: "In the middle years of the century (the 19th century) it had been widely held that colonies

		were burdens and that materials and markets were most effectively acquired through trade."[67] But after the emergence of this global architecture, a ruthless regime of Market got established.The corporations which emerged triumphant after World War II, succeded in establishing their hegemonial impact through the Bretton Woods institution culminating in the WTO. Their toughest problem was how to supersede the national constitutions and laws, as they threatened their corporate regime with their constitutional mission and agenda. It was decided to erect a system through the Treaties which can validly derogate from them for pursuing the corporate objectives. The WTO Treaty and the Agreements under its umbrella, and the Tax Treaties (and many otheres not needed to be catalogued) illustrate this strategy. Whilst the USA and many other States did such things with various riders legislatively imposed.. The Government of India executed such traties wholly under the opaque system wholly by the Executive under the notion

[67]. Asa Briggs in the *Encyclopaedia Britannica* Vol. 29 p. 85 in the article on the United Kingdom.

		that its Treaty-making power was not subject to constitutional restraints. *Azadi Bachao* erroneously holds that the Government's sovereign power to make treaties for political ends under the conviction that the Treaties prevail over the statute or law.
3.	Commitment to the neo-liberal economic paradigm for promoting and establishing capitalism as a hegemonic over-weaning system: thus emergence of new Market Leviathan to tame which the national constitutions are yet to evolve mechanism of control and accountability.	*Azadi Bachao* has the effect of promoting the neo-liberal economic paradigm for promoting and establishing capitalism. *Azadi Bachao* permits the creation of 'residents' out of airy nothing so that taxes can be evaded, dirty wealth can be layered through stratagem, so that the triumph of capitalism creates situation when some are born to all delight but many to eternal night.
4.	Norms of private property and individual liberty As perceived by 'the Invisible Hand' of the Market which considers 'Equality' and'Social Justice' detrimental to socio-economic growth[68].: hence the Objective	A little reflection on what emerged from the decision of *Azadi Bachao* would show how it goes against 'Equality' and'Social Justice' without which our Constitution

[68] . The commitments of our government (under the Uruguay Round of GATT, of which the apex institution is the WTO, with a close nexus with the IMF and the World Bank) have the direct and inevitable effect of subverting our Fundamental Rights. The Market Economy, it is well known, is founded on the ideas of Frederich von Hayek who in *The Road to Serfdom* considers freedom as the function of the market, and those of Milton Friedman in his *Capitalism and Freedom* and *Free to Choose*. It is obvious that the idea of **Social Justice** seethes through the Preamble to Arts 14, 19, 21 and 29 (only to illustrate), and this idea is given a go bye the Fundamental Rights stand subverted. And this is the mandate of the Market Economy which the WTO has imposed on us through the deeds of our Executive. **Hayek considers the concept of 'social justice' the most powerful threat to law conceived in recent years. Social justice**, said Hayek, 'attributes the character of justice or injustice to the whole pattern of social life, with all

	of the Rule of Law is the preservation of private property and individual liberty in the specific neo-liberal sense.	gones with the wind.
5.	**The Executive** To promote the neo-liberal Market Order there must be almost wholesale delegation of the legislative power : hence Parliament should pass open-ended legislation leaving law-making power to the executive not subject to public scrutiny or accountability. Where there no specific limitation imposed by a statute, the executive's perception is itself binding law. The executive is beyond constitutional limitations in promoting the new agenda. To roll back the welfare state. In the constitutional state conceived under the neo-liberal paradigm the welfare state[69] deserves to be rolled back, and a limited government must operate for the exclusive welfare of the Market Order.[70]	*Azadi Bachao* has the effect of granting powers wide enough to override the law of the land and its Constitution. As the tax treaties are wholly executive acts, the executive becomes unaccountable to Parliament, and the procedure suffers from 'democratic deficit'. . As in other instances of the intrusion of domestic space through existing laws by widening their province, through the existing law. The MAP is sought to be justified under Section 90(1) when that was never under its contemplation (as the Government promotes IMF-WTO agenda by invoking the Land Acquision Act of the last century. This Mutual Agreement Procedure subverts the rule of law by subverting the statutory

its component rewards and losses, rather than to the conduct of its component individuals, and in doing this it inverts the original and authentic sense of liberty, in which it is properly attributed only to individual actions'. [Hayek , *The Constitution of Liberty* quoted by Peter Watson, *A Terrible Beauty* p. 518]

[69] 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."[69] [Peter Watson, *A Terrible Beauty* p. 644]

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

		judicial control and by allowing even adjudication in certain situations to be shifted to foreign fora. And all this done without the statutory foundation which was provided in the U.K. through statutory amendment. The judicial view that tax treaties can override the law is, if investigated, based only on the self-serving circulars issued by the CBDT to establish strange executive *imperium* to serve the interests of those who can manipulate the governmental system for their benefit.
6.	**Legislature** As the electoral politics has failed in creating a democratic order promotive of the Market Order, the wings of the Legislature must be clipped leaving the power and discretion to rule to the executive and judiciary bidden to act to promote the neo-liberal agenda. Parliament must allow the subjugation of the political realm to the economic realm as per the architecture of the neo-liberal paradigm.	In the realm of treaty-making our Parliament is said to have no function. There was a time before the onset of the neo-liberal waves when this 'democratic deficit' did not matter as the governmental acts at international plane did not matter in the domestic realm. But through the Treaty terms the domestic space of policy and sovereignty are now invaded. *Azadi Bachao* failed to see how certain dicta to that effect in *Maganbhai* and *Berubari* had lost their constitutional relevance, and are ex facie erroneous *Azadi Bachao* .permits most unfortunate trespass by the Executive on the legislative sphere, illustrating

		the growing irrelance of our Parliament. Nothing illustrates it better than than the reasons for which the CBDT Circular 789 of 200 was sustained in *Azadi Bachao*: viz. its approval of the conclusive presumptions as to owenership and residency in the said Circular forgetting that presumptopns or conclusive presumptions are only legislatively enacted. And MAP override limitations provisions which can be done only legislatively..
7.	**The Role of Judiciary** The Judiciary to give a new pro market and corporation view of the Rule of Law and the Doctrine of the Separation of Powers. The judiciary's policy making role must be in synergy with the executive's. Judiciary's constitution role must undergo a functional change. through the technique of MBO (management by objective). To take steps roll back the welfare state thus complementing the task of the executive. .	*Azadi Bachao* has the effect of patronizing the new despotism of the executive by approving for judiciary a costitutional role under which groundswell of neo-liberal ideas will allow judges to roll back the welfare state, and narrow the domain of the judicial control on the specious plea invoking the doctrine of "*Juices est. jus dicer, non dare"* (now not approved in *Standard Chartered Bank*[71] *Case* }. This led the Hon'ble Court to severely criticize *McDowell* which reflected the ideas in *Furniss v. Dawson* [1984] 1 All ER 530, [1984] AC 474 and *National Federation of*

[71]. [2005] 275 ITR 81 (SC).

		Self-Employed and Small Businesses Ltd[72] which our Court had accepted before and approved later [as in *S.P. Gupta & Ors v President of India & Ors* (AIR 1982 SC 149] . The net effect of *Azadi Bachao* is a futile *cri de Coeur* to Parliament and the executive defeating Lord Denning's dictum that 'Fraud unravels everything'"[73] and benedicting the neo-liberal stratagem by considering certain **evils 'tolerable'**. This approach led *Azadi Bachao* to ridicule its own Constitution Bench decision, and to bank on a book by the interested party illustrating a gruesome departure from judicial norms. This also led it wrongfully to assume that the doctrine of the Lifting of the corporate veil belonged to the sphere of domestic law. Our law and Constititution were ignored, our value even under our Fundamental Duties were ignored but copious borrowings of ideas were made from the OECD etc countries commiting the fallacy which Sir Francis Bacon, the Lord Chancellor of England 1618-21) called the fallacy of non "recognition of similitudes".

[72] *[1981] 2 All ER 93 HL*
[73] *Lazarus Estate Ltd. v. Beasley*[1956] 1 QB 702 and 712

8.	**Even Satan be the Guide** Market Forces are amoral, if it helps even Satan be its Guide as he was always a better logician than God who could Paradise lost meekly whereas He had lost it to the majestic Satan. In effect. Means matters not end.[74]	*Azadi Bachao* is gnawingly unfortunate. If the doctrine of toleration of Evil "in the interest of long term development", is allowed to have a grip over our thinking, even God would leave us to groan under the Slough of Despond. Hitler destroyed the

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Some illustrative ideas dear to the WTO agenda are just sprinkled here by way of illustration:

- The Welfare State is bidden a good-bye. The role of the government is narrowed to act merely as the protector and facilitator of the neo-capitalists believing in, as Gailbraith[117] says,:

(i) tax reduction to the better off,
(ii) welfare cuts to the worse off
(iii) small, 'manageable wars' to maintain the unifying force of a common enemy, the idea of 'unmitigated laissez-faire as embodiment of freedom', and
(iv) a desire for a cutback in government.

- The government may break new grounds for resourced by granting lands to the corporate zamindars, by granting right to exploit our resources by conferring licenses and franchises.

- It is mandated that the planning which promotes socialism should be given up. But Government through its policies promote the interests of big corporation which work under oligopolistic situation by

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Our egalitarian 'Democracy' cannot survive in fidelity with our Constitution if the country itself gets trapped in the capitalist philosophy the core of which had been stated by one of the founding fathers of the U S Constitution, James Madison. He said that Power should be in the hands of "the wealth of the nation…the more capable set of men." 'Warning his colleagues at the Constitutional Convention of the perils of democracy, Madison asks them to consider what would happen in England "if elections were open to all classes of people." The population would then use its voting rights to distribute land more equitably."[74] Our Constitution rejects such unjust parochial and anachronistic idea of the syndicate of the capitalists.

		Weimer Constitution justifying his act as a necessary evil to wipe out the disgrace that the Peace Treaty of Versailles. Mrs. Gandhi justified the ignominious Emergency pleading this as a justification.
9.	**Democracy** [75] But our constitutional socialism cannot allow the neo-liberals to promote GREED as socially accepted good. They believe, as Milton Friedman said in *Capitalism and Freedom*, that freedom could only be brought about by a return to market economy which would ensure economic freedom to men; that as Friedman argued, that 'health, schooling, and racial discrimination could be helped by a return to free market economics only'	*Azadi Bachao* has the effect of approving such strides away from all that we valued in course of our Struggle for Independence, and Constitution. .
		Azadi Bachao has the effect

[75] Our Constitution wants the State to work for people's welfare. It rejects the duplicity of the neo-capitalism which wants the Government to roll back from people's welfare activities, but requires it to keep a symbiotic relationship between the state and the corporations. This strategy, which made the government an instrument for the market, had been advocated by Bentham, James Mill, John Stuart Mill and T.H. Green in the 19th century; and it is now the nostrum prescribed by the neo-liberals. Their *laissez-faire* economics was basically elitist, and undemocratic. The tiny creative (?) minority of the corporate oligarchy and the syndicates of the nether-world power wielding vested interests are asserting shamelessly their power to make the political government dance to their tune. Our Constitution does not permit such subversion. But the point is what is to be done to preserve, protect and uphold it.

10.	Fundamental Rights and the Doctrine of Basic Structure must be wrecked where to do so is good for the Market Order.	of approving such strides. *Azadi Bachao* approves the *per incuriam* ideas as to Treaty-Making Power casually stated in *Maganbhai* where none bothered about the Fundamental Rights, the Basic Structure of our Constitution, or the Preamble to the Constitution.
11.	**The Holistic approach**[76] To acquire a holistic control over matters cultural, political, social and social to charter ways following the loadstone of the Neo-liberal Paradigm. No idealism is higher than the Market	*Azadi Bachao, in effect,* reiterates what Roy Rohatgi said: 'Overall countries need to take, and do take, the holistic view' Under the Rogue Financial system the lobbyists paint rainbow. It is not clear how the calculus of revenue losses and non-tax benefits works when the tax authorities are prohibited from examining operative facts, and when Azadi Bachao approves this opaque system.

For upholding Treaty Shopping, this Hon'ble Court relied upon the views of in a book by a tax consultant called Roy Rohatgi quoting three paragraphs from Rohatgi's *Basic International Taxation* in *Azadi Bachao.* Roy Rohatgi, who is a Chartered Accountant who described himself as a "strategy and International Tax consultant to several Indian and Overseas companies", and had figuring as an expert on the website of certain professionals working for the offshore jurisdictions It is humbly submitted that as this Hon'ble Court in *Azadi Bachao* relied on a book got written by an interested person, this Appellant has examined not only the credentials of the author of the said book but also the worth of the ideas set forth in the 3 paragraphs which were quoted with total approval in *Azadi Bachao.* .

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

When I read the decision in *Azadi Bachao*, I felt aghast that the Court considered it fit to quote three long paragraphs from *Roy* Rohatgi's book *Basic International Taxation.* As Thomas Hobbes in his *Leviathan* whored his intellect to propagate the ideas of the foolish James I, as Prof. Hayek and Milton Friedman theorized for the neo-liberal paradigm, the authors like Roy Rohatgi act merely as the apologists for the present-day Finance in love with secrecy jurisdictions for understandable reasons. They illustrate what Prof. John Kenneth Galbraith said in his *A Short History of Economics: The Past as the Present* (at p. 236):

> ' Here another great constant in economic life: as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently much preferred.

One of the three paragraphs quoted in the Judgment runs thus:

> "Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The use of Cyprus as a treaty haven has helped capital inflows into eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa. ….."

If the principle of "proportionality" is an attribute of wisdom; the comparison of India with Cyprus, Madeira (Portugal), and Singapore is a sacrilege. If the doctrine of toleration of Evil "in the interest of long term development", is allowed to have a grip over our thinking, even God would leave us to groan only under the Slough of Despond. This sinister doctrine has always worked as the supreme justification for what the dictators, tyrants, crooks, and scamsters have done in all times, and in all lands. Mrs. Gandhi justified the ignominious Emergency by telling us the shibboleth of Necessary Evil. The reasoning founded on such comparison, appears to me to suffer from the grossest error that the Fallacy of Similitude can ever suffer from. The analogical reasoning with reference to Madeira, Cyprus, and Mauritius is shocking. It would be the end of our tradition if we degrade our nation going down to such dunghill as to deserve comparison with Madeira, a tiny piece amongst the terrestrial tiny tots suggesting only what is the best in wine: our Sanskrit grammarians too had felt that one could easily go on merry errands after taking □□□□□ (*madira,* wine*)*.

After quoting three long paragraphs from *Basic International Taxation,* the Division Bench of our Supreme Court set forth its reasons for upholding treaty shopping in these words:--

> "There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the Petitioners over the so called 'abuse' of 'treaty shopping', perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into. ….A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy."[77]

As the above paragraph seems to be the very synopsis of Roy Rohatgi's book, I must express my agony at such ideas expressed in such masterly tone:

(i). One cannot 'tolerate' or 'encourage' such a practice. A nation 'tolerates' what is unworthy only when it is turned a slave [as Germany had to do for some time after the Treaty of Versailles]. 'Treaty shopping' cannot be 'encouraged' as it is a fraud.

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

(iii). Under whose authority what is 'unintended or unjustified' can be tolerated ? Are we being ruled by some sinister Shadow from some opaque and foggy world? The tsunami of economic globalization has subordinated the political realm (to which our judicial institutions belong) to the economic realm (ruled by the economists[78], corporators and 'the the protagonists of the Rogue Finance') established under the overweening majesty of Pax Mercatus. Robert L. Heilbroner says:

> "Perhaps of greater importance in perceiving Smith's world as capitalist, as well as market-oriented, is its clear division of society into an economic and a political realm."

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[77] (2003) 263 I T R 706 , 753].

[78] Robert L. Heilbroner rightly observed in his article in the *Encyclopedia Britannica*:

"Thus did the appearance of capitalism give rise to the discipline now called economics."

(iv). Roy Rohatgi justifies his greed-stuffed thesis that 'treaty shopping' is considered justified for "other non-tax reasons". And those reasons are known only to the "Invisible Hand" of Adam Smith fast turning into a vampire for the society of the common people running the risk of losing their soul, self, liberty, and property even before they come to realize what already happened. The Paris-based *Financial Action Task Force on Money Laundering*[79] in its Report on the Laundering Typologies 2003-2004 had aptly pointed out in its Report how the 'politically exposed persons' [(PEPs), an euphemism for the persons holding public offices] concealed their ill-gotten wealth and how 'accountants and lawyers assist in a money-laundering scheme': 'legal professionals facilitate in money laundering', and the 'accountants provide financial advice'. They advise and lobby how to organize the structures of transactions as the instruments of darkness. 'A lawyer uses offshore companies and trust accounts to launder money' and 'a solicitor uses his client's account to assist money laundering'. Then whose 'intention' this tax haven apologist has in his mind?

(v). Rohatgi allows 'treaty shopping' 'unless it leads to a significant loss of tax revenues'. Who has the legitimate authority to say that it can go on ' unless it leads to a significant loss of tax revenues? 'Significant' by whose assessment? Why were the Delhi High Court, and the CAG and the JPC not trusted when they had reasons to hold that massive loss of resources had been caused? Why were the facts of heavy concealment of income and evasion of tax, evidenced through more than 20 Assessment Orders, distrusted, and ignored? Facts speak, and facts must be allowed to speak. Why were the propriety of those Assessment Orders, not allowed to be tested before our tribunals and courts? Why should we facilitate Fraud to have the last laugh? It is amazing that the following statement was appreciated:

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

But whose voice is this?: of the 'high net worth looters' with chest outside the country, or of the creeping, crowing and cringing 'crushed' millions we call 'We, the People'?

[79] contact@fatf-gafi.org.

(vii) The expression *holistic* is meaningless unless we know whether the common suffering souls of this country are within this *holos* (the whole), or they are out of it! In Rohatgi's *holos* Gandhi's talisman stands sold for a pebble. General J.C. Smuts, the author of *Evolution and Holism,* would have shuddered at the use of this word: *holos*. It is quite understandable for the former partner of Arthur Anderson, to invoke holism to drape his agenda. But it baffles us most when it rings in the judgment of our Supreme Court for which we have highest admiration, and from which we have the greatest expectation.

ANNEX III[80]

A Corporation cannot be an impervious cover-let of gross abuse.

The great British Judge, Lord Denning, had said for all times and all lands that : 'Fraud unravels everything'.[81] The court is, in effect, an instrument of Justice (*Dike*). In another well known British decision, *Re R.G. Films Ltd,* it was aptly said: "Public policy may make it necessary to look at the realities behind the corporate façade…….Courts are always vigilant to prevent fraud or evasion. Thus, they will not permit the evasion of statutory obligations". The House of Lords, in *Furniss v. Dawson*[82] ignored the existence of a tax haven company by circling out transactions effected though it. The U.S Supreme Court, in *Knetsch v. United States*[83] even went to the extent of saying that even a legitimate corporation can engage in transactions lacking in economic substance; and the transactions between related legitimate corporations could be disregarded if justice demands that. Corporate personality, which incorporation brings about, is designed to operate only within permissible province. 'Incorporation' can never be allowed to become a rogue's charter. It cannot be allowed to become an impervious coverlet for pursuing interests contrary to law, or public policy. Where the line should be drawn is a matter for judicial statesmanship. In *Johns*

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[80] An extract from the Chapter26 (The Realm of Darkness) in *On the Loom of Time* by Shiva Kant Jha pp. 419-421

[81] *Lazarus Estate Ltd. v. Beasley*[1956] 1 QB 702 and 712

[82] [1984] 1 All ER 530,

[83] 364 US 361 (1960)

v. Lipman[84]the Chancery Division granted specific performance holding that the defendant company was a creature of the first defendant, a mask to avoid recognition under the 'eye of equity'. The expression 'eye of equity' is an expanding and suggestive metaphor. 'Transparency' and the 'eye of equity' can ensure justice in this global world where opaqueness and lack of public accountability are the most disturbing facts. The Multinational Corporations argue for the recognition of their impregnable corporate shell so that how they really operate is not subjected to a close scrutiny. The tax havens, and those who sail in the common boat, think that it is not for them to see whether certain companies are managed by criminals, or whether they draw their fund from the tainted earnings from the most unscrupulous sources.

Before the onset of the neoliberal Economic Globalisation, certain principles had been judicially settled well. These can be thus summarized:

(i) The courts have recognized that "fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence".

(ii) Judicial abhorrence to fraud is so deep that the courts recognize the taint of fraud as a special defence against a foreign judgment.

(iii) Fraud "is an extrinsic" collateral act.

(iv) Fraud vitiates not only the acts done in course of judicial proceedings but also the acts done through the administrative process.

(v) It is fair and just that no one should take advantage of one's wrong.

(vi) It has been held that "all frauds affecting the Crown and public at large are indictable as cheats at common law".

(vii) Frauds in public law and in private law differ in effect and operation without ceasing to be species of the same genus of culpable wrong.

In Chapter 23, I have mentioned my surprise at our Supreme Court not invoking the profound well settled principle that the Judiciary must provide a remedy against all frauds against public interests, of which 'taxation' is the most important. This principle is so fundamental that many Civil Law countries have developed the judicial technique to undo fraud by cracking the corporate shell to see realities operative inside the corporate structure. In France, *fraud* is frustrated by invoking the doctrine of the "*less principles generaux du droit*." by *Conseil d'Etat*. The Netherlands Supreme Court (the *Hoge Raad*) in 1986 applied, with impact, the doctrine of *fraus legis*. A conduit company can be

[84] [1962] 1 W. L. R 832 Ch

exposed by invoking this doctrine. *Fraus* is a Latin expression which means 'deceit'. *Fraus legis* means "fraud on law". In Roman law it means: to quote from Black's Law Dictionary: "Evasion of the law; specif., doing something that is not expressly forbidden by statute, but that the law does not want done." This doctrine has been thus explained :

> "The doctrine of *fraus legis* may apply if a chosen structure – though legally different –produces the same results as another structure provided by the tax legislation and if it can be proved that there are no commercial reasons for this particular structure other than tax avoidance. In such a case the courts may disregard the artificial structure if it conflicts with the purpose and the spirit of the law, and they might look to the final result before passing judgment."

The Netherlands Supreme Court (the Hoge Raad) applied the doctrine of *fraus legis,* and called upon the subordinate courts to appraise the abuse of the double taxation avoidance claim in this light. Analogous approach is evident in the approaches of the German courts. Phillip Baker's discussion of the Swiss approach leads to the following conclusions:

(a) Switzerland felt so strongly against 'treaty shopping' that a domestic legislation was framed.

(b) The Bundesgericht adopted the civil law approach to defeat *fraus legis*

Phillip Baker discusses positions in the U.K. and the U.S. A. wherein the Courts have, in exercise of their normal jurisdiction of administering justice, never appreciated 'treaty shopping'.

After examining various cases on "lifting of the veil", Gower's *Principles of Modern Company Law* [85]states.

> "Where then does this leave "lifting of the veil"? Well, considerably more attenuated than some of us would wish. There seem to be three circumstances only in which the courts can do so. These are:
>
> (1) When the court is construing a statute, contract or other document:

[85] Gower's *Principles of Modern Company Law,* Sixth Ed. Paul L. Davies p. 173

(2) when the court is satisfied that a company is a "mere façade" concealing the true facts;

(3) When it can be established that the company is an authorized agent of its controllers or its members, corporate or human."

And this Doctrine of Lifting Corporate Veil was recognized by our Supreme Court in a number of decisions. It is only after the onset of this Neo-liberal phase, that the Indian Supreme Court adopted a hyper-technical view of the 'corporate personality' in *Azadi Bachao*[86], discussed in Chapter 23. So strong was the spell of neo-liberal ideas that not only earlier decisions were overlooked, even the well-known decision of the International Court of Justice was ignored. In the case concerning *the Barcelona Traction, Light and Power Company Ltd*[87] the International Court noticed "the profound transformations which have taken place in the economic life of nations"; and, after discussing the circumstances in which this doctrine is invoked in domestic jurisdictions, stated that the process of lifting the veil "is equally admissible to play a similar role in international law."

ANNEX IV

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[86] *Union of India & Anr. vs. Azadi Bachao Andolan & Anr* (2003) 263 ITR 706 SC

[87] [1970] *International Court of Justice Reports* Index p.4

THE PRESENT-DAY GLOBAL STATES SYSTEM UNDER WHICH OUR CONSTITUTION HAS TO SURVIVE, AND OUR COURTS ARE TO WORK[88]

The global state system: classical state system yielded to the 'neoliberal' State system

Fisher aptly said that for many generations the public law of Europe was settled through the terms of the Peace of Westphalia (1648)[89] recognizing the principles of 'territorial sovereignty of states', and 'equality *inter se* the States'. But things happened, as they are always made to happen in international politics: a wide hiatus set in between the precepts and practice amongst the states. The Concert of Europe, set up after the Congress of Vienna (1815), continued to lead the Eurocentric world politics almost till the World War I (1914), nay it continued, at its basics, till the global lunacy expressed itself in the World War II posing challenging problems for creative responses from the statesmen. E. Lipson observed: "In the nineteenth century the destinies of Europe were in the hands of five or six States, which arrogated to themselves a preponderant influence in all matters of general concern".[90] The equality of the sovereign states could not work in the world where the states were grossly unequal because of their gross differences in wealth and power: in short, in their capacity to shape the *Realpolitik.* This brought about a dichotomy between political sovereignty and legal sovereignty of the international actors. The post-World War II has borne an analogous pattern. The USA became most dominant. 'The Big Business', represented by the corporations, mainly MNCs (Multinational corporations) and TNCs (Transnational corporation) called the shots. It may not be far from truth if we say that the political sovereignty has yielded, in effect, place to the corporate sovereignty, establishing what we can call 'corporate *imperium*'.

But this is an outcome of a radical changes in the international states system brought about by the changes so aggressively manifest after the World War II. Prof. Sol Picciotto has insightfully observed:

> "The emergence of `offshore' statehood acted as a catalyst for the undermining of the classic liberal international system, which was reinstated within a framework of multilateral institutions after 1945.

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[88] Extracted from Chap. 26 of *On the Loom of Time* by Shiva Kant Jha (Taxmann, 2011) pp. 412-416

[89] H. A. L. Fisher, *A History of Europe* p.636

[90] E. Lipson*, Europe in the 19th & 20th Centuries* 211

> `Offshore' statehood was created by international investors (especially TNCs) and their advisers, responding to and exploiting the elastic scope of state sovereignty based on regulatory jurisdiction and legal fictions of residence and incorporation."[91].

Prof Picciotto explains what led to the changes after 1945 thus:

> "The phenomenon of 'offshore' statehood has been an important catalyst in the transformation of the international system. By providing a channel for routing global flows through the use of artificial persons and transactions, 'offshore' has helped to dislocate the international state system, and induce its substantial reconstruction. Any project for the reconstruction of the public sphere must begin from a fuller understanding of the ways in which statehood has been transformed than is provided by most discussions of the state. Commonly 'the state' is reified and personified, which makes it hard to understand statehood as a way of organizing society, a set of social relationships involving specific, historically-developed institutional forms and cultural practices."

I am in agreement with Prof Picciotto that statehood is only a way of organizing society, a set of social relationships. History has shown how the post-1945 political societies have been organized on ideas starkly different from those in the Westphalian states system. Philip G. Cerny is only partly correct in saying that the present-day "global governance"…continues to rest on a Westphalian bargain", though he is wholly right in pointing out that we have not succeeded in building up "an authoritative, effectively supranational superstructure".[92] We may call what has emerged as the 'post-modern' states system. The observation of Judge Manfred Lachs of the ICJ in *In the North Se Continental Shelf Case*[93] is very relevant:

> "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."

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[91] Sol Picciotto of Lancaster University, UK
http://www.lancs.ac.uk/staff/lwasp/endoff.pdf

[92] Philip G. Cerny, *Rethinking World Politics* P.214

[93] ICJ 1969, 3 at 222.

The post-modernist states system has been choreographed on neoliberal assumptions in order to facilitate the global agenda of extractive capitalism. It becomes difficult to evaluate the importance of 'democracy', 'social justice', and 'public welfare' in such states. Their PR industries subject us to deceptive logic and insincere words through high pressure propaganda conducted by hired intellectuals and institutions. They say that the world is getting 'globalised' but we find mind-boggling divisions between the haves and have-nots; they say we have a global fraternity, but we find how even the billionaires are stealing from the beggars' bowl.

They say that the 'government' has gone yielding place to 'governance'. Dr. Picciotto defines this term thus:

> "At the same time, the term 'governance' is also used to signify the provision of public order, protection of private property, but not necessarily liberal democracy, to required global standards by countries, especially in eastern Europe and Africa, as a condition of political support and economic investment from the West.'[94]

To my mind, 'governance', so understood, means a system which protects property, and enhances the neoliberal agenda which rejects both 'democracy' (as we read this concept within the meaning of our Constitution), and 'social justice'. Outright rejection of 'democracy' is not made as they fear that that course would bring about a revolution in many countries.

The classical India had organized our complex society as a *rashtra* in which all the power-wielders were subject to *Dharma.* The Islamic society believes in Pan-Islamic values with sovereign power resting only with Allah. On the other hand, the states systems in the West have always been to protect dominant social and economic interests. The way the Western states system has evolved is accurately described by Bertrand Russell:

> "Glorification of the State begins, so far as modern times are concerned, with the Reformation. In Roman Empire, the Emperor was deified, and the State thereby acquired a sacred character; but the philosophers of the Middle Ages, with few exceptions, were ecclesiastics, and therefore put the Church above the State. Luther , finding support in Protestant princes, began the opposite practice; the Lutherian Church, on the whole, was Erastian. Hobbes, who was politically a Protestant, developed the doctrine of the supremacy of the State, and Spinoza, on the whole, agreed with Rousseau, as we

[94]http://www.lancs.ac.uk/staff/lwasp/fragmented.pdf

> have seen, thought the State should not tolerate other political organizations. Hegel was vehemently Protestant, of the Lutheran section; the Prussian State was an Erastian absolute monarchy. These reasons would make one expect to find the State highly valued by Hegel. But, even so, he goes to the lengths which are astonishing."[95]

The history of the West shows one point clearly: the states have functioned to protect and promote economic interests of the dominant class.

The factors, which altered the 'global states system', can be briefly stated thus:

(a) Even till the 19th century we had on our planet many areas on land and in the oceans which were *terra incognita* (unknown land) and *mare incognitum* (unknown sea). Many areas, before the intrusion of the colonial powers, were without human habitation, or were under the occupation of exiles, pirates, looters, criminals and nomadic tribes. But they were soon trapped under the imperial authority of the dominant European powers. With the decline of colonial powers, and their adoption of the alternate strategies for maintaining control over those areas, they were turned into tiny states, dependencies, overseas dependencies, defacto recognised and specified territories.[96]

(b) The development of science and technology in the second half of the last century helped people to get access to all the areas on the globe. Thousands of islands in the Pacific, the Indian Ocean, and the Caribbean became easily accessible: and convenient network was established on our planet and in the cyberspace. Most of these places were suitable for hiding things. And by manipulating the elastic concepts of 'territorial sovereignty', 'residence' and 'incorporation', many of them turned themselves into effective and inviting centres for fast growing

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[95] Russell, *History of Western Philosophy* p. 709

[96] The world has about 200 states out of which 193 are the members of the United Nations. Most of the tiny states were recognized sovereign without realizing that time would soon come when their jurisdiction would become secrecy jurisdictions for tax avoidance, amassing illicit wealth, become alsatias for criminals and fugitives.. I would refer only to one by way of illustrations: :Saint Kitts and Nevis . Saints Kitts is in the Caribbean so tiny that even on a big map you would not be able to place it. But we heard about it in the alleged scandal in which Mr Narasimha Rao's name had been dragged for wrong reasons. Its area is just 104 sq. miles, and its population comes to about 51300. Its per capita GDP (PPP) comes to 13429. It has rich offshore-banking sectors, and grants citizenship to those who invest there in real estates. (Information drawn from Wikipedia).

international finance. I had occasions to witness how this game was being played. Something about that I have mentioned in Chapter 23.

(c) Such exclusive and remote areas were found most suitable for the operations as the offshore centres for finance. There the financial experts could operate under legal regime tailor-made for them. In most situations the arrangements showed the operation of the *entete cordiale* of fraud and collusion between governments and corporations. Their operated mostly in the virtual world. Their computers, by indulging in the creation of illusionary money, enabled the big capitalists to steal from the Poor's petty resources.[97] This strange architecture of finance created illusory wealth without creating goods and services for people to live as human beings.

(d) The international investors (especially TNCs), and their advisers exploited "the elastic scope of state 'sovereignty' based on regulatory jurisdiction and legal fictions of 'residence' and 'incorporation'[98]. The two aspects of 'sovereignty', internal and external, were creatively utilized to set up regimes for tax havens. 'Internal sovereignty' was utilized as a justification to set up an opaque system inside the domestic sphere. The aspect of the 'external sovereignty' was invoked to ward off foreign intrusion in the domestic sovereign space. The grant of the Certificate of Residency by Mauritius, or the grant of *Carte de Sejour* by Monaco was considered enough to preclude any investigation into the questions of residency of the entities, or the beneficial ownership of income, or wealth. The MNCs float their subsidiaries integral to their corporate structures. When such companies are incorporated under the laws of a country, they become 'residents' of that country. We know that thousands of 'shell' companies were formed in tax havens. We hear that thousands of such corporations pullulate only in the hip-pockets of certain professionals operating from the same building, perhaps the same table without even tentacles outside that hole! It is suggestive to mention that, when the Paris-based Financial Action Task Force subjected the

[97] 'This growth depends on the ability of the system to endlessly increase the amount of money circulating in the financial economy, independent of any increase in the output of real goods and services. As this growth occurs, the financial or buying power of those who control the newly created money expands, compared with other members of society who are creating value but whose real and relative compensation is declining.' David C. Korten, *When Corporations Rule the World* p 189

[98] Sol Picciotto of Lancaster University, UK www.lancs.ac.uk/staff/lwasp/endoff.pdf

banking system of the Bahamas to a close scrutiny, in one go the Bahamas, it is said, banned the " anonymous ownership of more than 100,000 international business companies registered in the country."[99]

(e) Most of such centres were developed, in their early phase, by the wealthy persons in America and Britain. Dr. Picciotto has noted this point when he says:

> "It was initially encouraged by the authorities in the main capitalist countries, within tolerated limits, for competitive advantage, and to manage the growing contradictions engendered by the commitments to liberalisation under the Bretton Woods system."

(f) Even Mauritius was helped to develop as a tax haven by the interested persons. mostly from India. America and the UK developed the numerous tiny-tots in the Caribbean and the Pacific as tax havens or secrecy jurisdictions for their purposes of the Big Business. The major western countries and their apex organization, OECD, reacted against the tax havens by taking some steps to stop abuse through those jurisdictions and areas. As these areas cannot afford to annoy the great powers, they can take to their course only to the extent tolerated by these two countries. There are good reasons to believe that the superrich and the MNCs of those countries are much interested in promoting tax havens. So every effort is being made by them and their professionals to let the tax havens have their way.

The Indian Position

India has yet not taken an effective step against any tax haven. Our country has rather allowed the abuse to go on. I am painfully led to this view for several reasons. I touch only a few of them here: (i) the noxious CBDT Circular of 2000, discussed in Chapter 23 is still operative; (ii) the opportunity to denunciate the Indo-Mauritius DTAC on the ground of the unilateral change brought about by Mauritius turning as a tax haven was not taken by invoking the doctrine of *rebus sic stantibus* ': (iii) non-action even at the judicial *cri de coeur* of our Supreme Court, in *Azadi Bachao,* against 'treaty shopping' (discussed in Chapter 23); and (iv) the Section 90 of the Income tax Act, 1961, which grants power to enter into a tax treaty, has undergone several legislative changes in the recent years, but these are more to help the abuse of the route from

[99] *2002 Britannica Book of the Year* p. 392

that tax haven than to prevent that. Besides, our Government has failed to see that no purpose would be served by investigating 'shelf' companies which exist only on paper. We will not be able to proceed against such 'shelf companies' or 'shell companies" even under the international law of Nationality because no substantial nexus can be said to exist between such companies and Mauritius.[100] Besides, the real wealth earned in their name, might have gone to some other country, at times after passing through many intermediaries and filters! Instead of taking effective steps against the secret jurisdictions, the Income-tax Act of our country[101] was amended by the Finance Act 2006 inserting Section 90A. in the Income-tax Act, 1961, providing that " any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may, by notification in the Official Gazette, make such provisions as may be necessary for adopting and implementing such agreement". The concept of "specified territory" is open-ended, and may even include the micro-islands and mini-states the routes wherefrom can be conveniently used for maxi crimes, and massive tax evasion. The safeguard provided in the law is a broken reed. Writing more about this, and that too with candour, is embarrassing, and cannot be done within the constraints of this *Memoir*. The purpose of my observation is just to plant this apprehension in your mind. It is for you to watch out!

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[100] See **Nottebohm' Case decided by** the International Court of Justice; *Oppenheim,s Internationa Law* 9th ed Vol. 1 PEACE p. 854

[101] The G-20-summit meeting held in London on the April 2, 2009 deliberated over the noxious economic effects of the opaque system set up in the tax havens; but we witnessed wrangles bred by geo-politics, and by ambivalence in the approaches for selfish and esoteric reasons. China defended combatively the regime in Hong Kong to ensure it escaped the measures forged for other tax havens. Dr. Manmohan Singh of India maintained his silence on the issues pertaining to the misuse of the routes from the tax havens and the off-shore finance centres……Hong Kong is a non-sovereign territory, now known merely as the specified territory. It is China's administrative region. It is a successful financial centre, and constitutes the most widely used theatres of finance operations through an opaque system. Its Stock Exchange is the 6th largest in the world. The Administration of the Region follows what is called 'positive non-interventionism', which means, shorn of embellishments, that the government exists as the protector and the facilitator of free-market which is the veritable matrix the growth of capitalism. Its currency is wedded to the US dollars. It would be interesting to see our Sovereign Secular Socialist Republic entering into a Double Tax Avoidance Convention with a non-sovereign region, when the Art. 5 that region's Constitution (the Basic Law) rejects 'socialism' outright.

ANNEX V

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*[102] 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[103] a contrary note.

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[102]. (2003) 184 CTR Reports 193].

[103]. 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

The Flawed Judicial Thesis Soon Reversed

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*[104], 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*[105] *Case* is briefly stated by K.G. Balakrishnan, J in the Majority Order:

> "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:

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company is unsustainable merely on the ground that being juristic person it cannot be sent to jail to undergo the sentence."

104. [(2003) 184 CTR Reports 193].

105. [2005] 275 ITR 81 (SC).

> "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."

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*[106] 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.

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.

ANNEX 'VI'
A NOTE ON *AZADI BACHAO*

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[106]. [2005] 275 ITR 81 (SC).

***Azadi Bachao* is impliedly *overruled*: hence not good under Article 141 of our Constitution**

Without prejudice to the above points, it is submitted that *Azadi Bachao* is *impliedly overruled,* and hence is no longer good. It is so for reasons, inter alia, these:

I. The juristic foundation of *Azadi Bachao* no longer survives because its role perception has been disapproved by the Constitution Bench of the Supreme Court[107]. When the

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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 [*2003) 184 CTR Reports 193].
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."

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The Flawed Judicial Thesis Soon Reversed. The Flawed Judicial Thesis Soon Reversed
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> "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."

B.N. Srikrishna, J., in his dissenting Order observed that the dicta of Denning L.J. in *Seaford Court Estates Ltd. v. Asher* had been dismissed in by the House of Lords, per Lord Simonds, in *Magor & St. Mellons R.D. C. v. Newport Corporation* . 'judicial heroics' Lord Simonds had said, "the duty of the Court is to interpret the word that the legislature has used." Our Supreme Court in *Bangalore Water Supply v. A. Rajappa*[107] approved the rule of construction stated by Denning L.J. while dealing with the definition of Industry in the Industrial Disputes Act, 1947. Beg C.J. nodded at "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

> perception of the role is wrong, the decision in exercise of that jurisdiction can never be treated as law binding within the meaning of Article 141 of the Constitution of India.

II. In the penultimate para of *Azadi Bahao*, the Court's operative order, highlighting the prime issues for actual decision, is thus set forth:

> "The judgment under appeal is set aside and it is held and declared that Circular No. 789 dated April 13, 2000 ([2000] 243 ITR (St.) 57), is valid and efficacious."

The grounds which enabled the Court to come to the aforementioned conclusion are the following:

(a) It is clearly established that "the principle that circulars issued by the Central Board of Direct Taxes under section 119 of the Act are binding on all officers and 39 employees employed in the execution of the Act, even if they deviate from the provisions of the Act" [Navnit Lal C. Javeri v. K. K. Sen, AAC [1965] 56 ITR 198 (SC); Ellerman Lines Ltd. V. CIT [1971] 82 ITR 913 (SC); CIT v. Anjum M. H. Ghaswala [2001] 252 ITR 1 (SC); Collector of Central Excise v. Dhiren Chemical Industries [2002] 254 ITR 554. After examing the 'Effect of circular under section 119' the *Azadi Bachao* relied on *Dhiren Chemical* where the Supreme had observed in para 11:

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from the judgment of Denning, L.J. in *Seaford Court Estates Ltd. v. Asher*. Further, in *Rupa Ashok Hurra v. Ashok Hurra* [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] our Supreme Court had 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".

[*For more vide* "The Pragmatics of the Right Judicial Role" in *Judicial Role in Globalised Economy* by Shiva Kant Jha [Wadhwa 2005] pp. 145-180

> "We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."

(b) "The impugned Circular 789 of 200 was *intra vires* Section 119 of the Income-tax Act, 1961. The Court held :it is erroneous to say that the impugned Circular No. 789 dated April 13, 2000 ([2000] 243 ITR (St.) 57) is ultra vires the provisions of section 119 of the Act. In our judgment, the powers conferred upon the Central Board of Direct Taxes by sub-sections (1) and (2) of section 119 are wide enough to accommodate such a circular."

(c) From the above two premises followed the judicial verdict as an inevitable corollary. The Supreme Court reversed the decision of the High Court holding that the " said circular is *ultra vires* the provisions of section 90 and section 119 of the Income-tax Act, 1961, and also otherwise bad and illegal."

SUBMISSIONS

115 It is submitted that the above reasons buttressing the Court's order do not accord well with a number of subsequent decisions, even one by the Constitution Bench. The reasons for so submitting are, in brief, the following:

(i) Very recently our Supreme Court in *Commissioner of Central Excise, Bolpur vs M/s Ratan Melting & Wire Industries* [**2008-TIOL-194-SC-CX-CB**] has disagreed with *Dhiren Chemicals* on which *Azadi Bachao's* core finding is based.: vide the following articles---

(i) '*Ratan Melting* – A landmark decision to the extent it goes!'
(ii) 'The shadow of *Ratan Melting* on *Azadi Bachao*!'

(ii) The Effect of *Ratan* has been examined by an expert[108] who thinks that "the decisions given earlier get impliedly overruled and the CBDT/CBEC's circulars, contrary to the enacted laws or SC's decisions, would be invalid."[109]

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[108] *T. N. Pandey,* in Business Line of Saturday, Jan 03, 2009 [http://www.thehindubusinessline.com/2009/01/03/stories/2009010350800900.htm]

[109] "**Apex court's decision**

The scope of circulars issued by the CBDT/CBEC has been clarified by the five-judge bench of the apex court in the *CCE vs Rattan Melting & Wire Industries (2008 220 CTR SC 98)* case, decided on December 14, 2008. The issue considered in this decision relates to the binding nature of CBEC's circulars *vis-À-vis* the apex court's decision, but the decision given should apply to circulars concerning all legislated laws.

The Supreme Court has said that circulars and instructions issued by the Board are, no doubt, binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of the apex court or the High Court.

So far as the clarifications/circulars issued by the Central Government and the State Governments are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the court.

It is for the court, and not the executive, to declare what the particular provision of statute says. Looked at from another angle, a circular, which is contrary to the statutory provisions, has really no existence in law.

Thus, the court has held that a circular, which is contrary to the statutory provisions, has no existence in law [para 6].

The law declared by the Supreme Court is supreme law of the land under Article 141 of the Constitution and the circulars issued by executive bodies such as the CBDT/CBEC cannot be given supremacy over the apex court's decisions.

Thus, the decisions given earlier get impliedly overruled and the CBDT/CBEC's circulars, contrary to the enacted laws or SC's decisions, would be invalid.

The decision of the five-judge bench of the apex court has settled the controversy that circulars and instructions issued by the Central/State governments, CBDT/CBEC or any

(iii). The view to which the Constitution Bench of the Supreme Court has a long and complex background in the post-*Azadi Bachao* phase. In *Commissioner of Customs, Calcutta v. Indian Oil Corporation Ltd*. [2004 (165) E.L.T. 257 (S.C.), decided on February 2004, the Supreme Court considered the status of the CBDT circulars. Justice P. Venkataraman Reddy J took note not only of *Dhiren Chemical Industries, Navnit Lal C. Javeri v. K. K. Sen, Ellerman Lines Ltd. V. CIT, K. P. Varghese v. ITO, Sirpur Paper Mills Ltd v. CWT,*[110] *Keshavji Raiji & Co v. CIT*[111]*, Bengal Iron CTO*[112]*, CST v. Indra Industries*[113]*, Wilh, Wilhelmsen v. CIT*[114] but also of *UOI v. Azadi Bachao Andolan*[115]*. Hindustan Aeronautics v. CIT*[116]. Justice Reddy referred to *Sirpur Paper Mills Case* on which the Hon'ble Delhi High Court too had relied for formulating the propositions governing the CBDT's power under consideration. He observed:

> "It is now trite law that by reason of any power conferred upon any statutory authority to issue any circular, the jurisdiction of a quasi judicial authority in relation thereto can[not] be taken away".

Hon'ble Justice Reddy concludes his judgment expressing his desire that the matter should go to the Constitution Bench. The Hon'ble Lordship was pleased to observe:

> "I have referred to these cases to demonstrate that a common thread does not run through the decisions of this Court. The dicta/observations in some of the decisions need to be reconciled or explained. The need to redefine succinctly the extent and parameters of the binding character of the circulars of Central Board of Direct Taxes or Central Excise

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other authority, contrary to the legislated law or the law pronounced by the Supreme/High Courts, even if such circulars give benefits to the persons concerned, would not be valid and would have really no existence in law. "

[110]. (1970) 1 SCC 795.
[111]. (1990) 2 SCC 231.
[112]. (1994) Supp 1 SCC 310.
[113]. (200) 9 SCC 66.
[114]. (1996) 161.
[115]. 2003(8) SCALE 287, 306.
[116]. (2000) 5 SCC 365.

looms large. *It is desirable that a Constitution Bench hands down an authoritative pronouncement on the subject.*"(emphasis supplied)

A Division Bench of 3 Hon'ble Judges[117] in their judgment dated February 23, 2005 in *Commissioner of Central Excise, Bolpur v. M/s Ratan Melting & Wire Iindustries, Calcutta*[118] has directed a reference to a Constitution Bench in these words:

> "Though the view expressed in Kalyani's case (supra), and our view about invalidation might clarify the observations in para 11 of Dhiren Chemical's case (supra), we feel that the earlier judgment in Dhiren Chemical's case (supra) being by a Bench of five Judges, it would be appropriate for a bench of similar strength to clarify the position. In the circumstances, we refer the matter to a larger bench of five Hon'ble Judges. Let the papers be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench."

The propositions, which our Supreme Court in *Pahwa Chemicals Pvt Ltd v. the Commissioner of Central Excise*[119] (decided by a Division Bench of 3 Hon'ble Judges) established, go counter to the basics of the judicial thinking in *Azadi Bachao*.[120]

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[117]. Ruma Pal, Arijit Pasayat and C.K. Thakker, JJ.

[118]. Case No: Civil Appeal No. 4022 of 1999.

[119]. (2005) 2 SCC 720 at p. 27.

[120] It laid down the following propositions:

(1) '*It is the Act which confers jurisdiction on the concerned Officer/s.* If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, *the Board has no power to cut down that jurisdiction*.'

(2) 'However, *for the purposes of better administration of levy and collection of duty* and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers'.

(3) 'It is thus clear that the Board has *no power to issue instructions or orders contrary to the provisions of the Act or in derogation of the provisions of the Act*.'

(4) 'The instructions issued by the Board have to be within the four corners of the Act.'

(5) 'The Circulars relied upon are, therefore, nothing more than administrative directions allocating various types of works to various classes of Officers.'

(v). To call the Constitution Bench in *McDowell's case* [1985] 154 ITR 148 (SC) mere ' hiccups" or ""temporary turbulence" is not only wholly *obiter* but patently without the jurisdiction of the D.B. of the two Hon'ble Judges[121] as other 4 Judges had agreed with Justice

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(6) 'These *administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act.*''But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.'

[121] The Court relied on A. *R. Antulay v. R. S. Nayak (*AIR 1988 SC 1531) wherein Sabyasachi Mukharji, J., speaking for the majority, said that under our practice the structure of the Court is hierarchic. The Court made out the following two points:

(a) In our Supreme Court the structure that has evolved is hierarchic where under " larger Benches overrule smaller Benches". The concept of "hierarchy within the Court itself" is one of seminal importance, as disobedience to this binding norm would render the decision in breach of the norm clearly without jurisdiction, hence *non est.*

(b) "This is the practice followed by this Court and now it is crystallized into a rule of law." *Crystallization* as a rule of law means the emergence of a binding rule of substantive law. In effect, the view is derived from the well-known maxim *Cursus Curlaef Est Luxe Curiae* (The practice of the Court is the law of the Court).

Our Supreme Court stated in *Triveniben v. State of Gujarat*[121] *per Shetty J. (*AIR 1989 SC 465):

"This is undoubtedly a salutary Rule, but it appears to have only a limited operation. It apparently governs the procedure of a smaller bench when it disagrees with the decision of a larger bench. If the bench in the course of hearing of any matter considers that a larger bench should deal with the matter it shall refer the matter to the Chief Justice. The Chief Justice shall then constitute a larger bench for disposal of the matter. This exercise seems to be unnecessary when a larger bench considers that a decision of a smaller bench is incorrect unless a constitutional question arises. The practice over the years has been that a larger bench straightway considers the correctness of and if necessary overrules the view of a smaller bench. This practice has been held to be a crystallised rule of law in a recent decision by a Special Bench of seven learned Judges."

> Reddy who had delivered the concurring judgment In case of conflict between decisions of the Supreme Court itself, it is the latest pronouncement which will be binding upon the inferior Courts, unless the earlier was a larger Bench.
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> *State of U.P. v. Ram Chandra* AIR 1976 SC 2547 (para 22);
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> *Mattu Lal v. Radhe Lal* AIR 1974 SC 1596 (para 11).

:(v) It is respectfully submitted that none of the above cases the issues, now under consideration in this Writ Petition, had been joined. So such observations create no law under Art. 141 of our Constitution. The principle, on which this submission is made, is well recognized by our Supreme Court in *Rupa Ashok Hurra v. Ashok Hurra* (AIR 2002 S.C. 1771), where the Supreme Court observed (para 13):

> "13. It is, however, true that in Supreme Court Bar Association v. Union of India and another (1998 (4) SCC 409), a Constitution Bench and in M. S. Ahlwat v. State of Haryana and another (2000 (1) SCC 278) a three-Judge Bench, and in other cases different Benches quashed the earlier judgments/orders of this Court in an application filed under Art. 32 of the Constitution. But in those cases no one joined issue with regard to the maintainability of the writ petition under Art. 32 of the Constitution. Therefore, those cases cannot be read as authority for the proposition that a writ of certiorari under Art. 32 would lie to challenge an earlier final judgment of this Court. 1998 AIR SCW 1706 : AIR 1998 SC 1895"

ANNEX VII

CHAPTER 6 FROM *JUDICIAL ROLE IN GLOBALISED ECONOMY* BY SHIVAKANTJHA (PUBLISHED BY THE WADHWAS, 2005) PP.127-144

McDOWELL: THE DECISION AND THE RATIO

SYNOPSIS

In the end the words were said: 'I beseech you, in the bowels of Christ, think it possible you may be mistaken.'

—Quoted in J. Brownski, *The Ascent of Man*

In *Azadi Bachao* a Division Bench of the Supreme Court examined at length the Constitution Bench decision in *McDowell and Co. Ltd v. CTO*[122]. The first paragraph of the section dealing with *McDowell* runs as under:

> "The respondents strenuously criticized the act of incorporation by FIIs under the Mauritian Act as a 'sham' and 'a device' actuated by improper motives. They contend that this Court should interdict such arrangements and as if by waving a magic wand, bring about a situation where the incorporation becomes *non est.* For this they heavily rely on the judgment of the Constitution Bench of this Court in *McDowell and Company Ltd. v. Commercial Tax Officer.* Placing strong reliance on McDowell it is argued that McDowell has changed the concept of fiscal jurisprudence in this country and any tax planning that is intended to and results in avoidance of tax must be struck down by the Court. Considering the seminal nature of the contention, it is necessary to consider in some detail as to why McDowell, what it says and what it does not say."

Before this author examines the actual decision and the *ratio* of *McDowell*, it is worthwhile to dispel certain confusions in the judicial reasoning in the above stated assortment of points.

There was no attempt to impeach the incorporation of companies by the residents of the third States in Mauritius on the ground of their **motive** for taking undue advantage of the tax treaty (hereinafter referred as the Indo-Mauritius Double Taxation Avoidance Convention, (DTAC, for short) between India and Mauritius. The Petitioner's case was that on the proper interpretation of the terms of the bilateral Indo-Mauritius DTAC the persons belonging to third States had no credentials to avail of benefits under the DTAC. In short, such persons did not, in reality, come within the Personal Scope of a DTAC. It is taken as a cardinal principle in the administration of justice that masqueraders are never allowed to cause wrongful gains to themselves and wrongful loss to others. The Petitioner's case was neither concerned with incorporation nor with the *situs* of incorporation; his case was with reference *to the functional approach to the issue of incorporation from the observation post of the income-tax law*. The irrelevance of 'incorporation' as the decisive fact for this purpose is clear from numerous cases from several jurisdictions. One such case is *Furniss v. Dawson*[123] decided by the House of Lords to which reference is made in the Constitution Bench in *McDowell & Co. v. CTO*[124]. In *Furniss v. Dawson,* the Dawson wanted to sell their shares in the family business to a company called Wood Bastow Holdings Ltd. But they wanted to postpone the payment of capital gains tax. So they formed an Isle of Man company ("Greenjacket") and exchanged their shares in the company owning the business for an allotment of shares in Greenjacket. By a preplanned transaction, Greenjacket sold the shares to Wood Bastow for cash. But the Revenue claimed that there had been no "real" disposal to Greenjacket. It was merely a preplanned stage in a disposal from the Dawsons to Wood Bastow and fell outside the exception for a reorganization of share capital. Greenjacket was merely an artificially introduced intermediate party that was never intended to own the shares for more than an instant. Commercially, therefore, the transaction was a transfer by the Dawsons to Wood Bastow in exchange for a payment to Greenjacket. In answering the statutory question: "To whom was the disposal made?" the fact that the shares were routed through Greenjacket was irrelevant. The Isle

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[122]. AIR 1986 SC 649.
[123]. [1984] AC 474.
[124]. AIR 1986 SC 649.

of Man company ("Greenjacket") continued its existence as an incorporated company but for tax purposes its operative realities were explored.

What matters is the legal effect of facts in the light of the statutory provisions. This is what Lord Hoffmann said in *Norglen Ltd. v. Reeds Rains Prudential Ltd.* [1999] 2 AC 1, 13-14:

> "If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think that it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work (*Inland Revenue Commissioners v. Duke of Westminster* [1936] AC 1) or they do not (*Furniss v. Dawson* [1984] AC 474.) If they do not work, the reason, as my noble and learned friend, Lord Steyn, pointed out in *Inland Revenue Commissioners v. McGuckian* [1997] 1 WLR 991, 1000, is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes."

It is apt to refer to the judgment of the Delhi High Court in *Shiva Kant Jha & Anr. v. Union of India & Anr.*[125]:

> "Be it recorded that counsel for the parties have argued before us at great length and raised before us a large number of questions which have been noticed hereinbefore to put keeping in view the fact that only an interpretation of the statute *vis-à-vis* the impugned circular."

For the adoption of this approach in a given case, a court needs three kinds of knowledge[126]:

(a) Knowing the facts;

(b) Knowing the law applicable to the facts; and

(c) knowing the just way of applying law to them.

The whole case of the Petitioner was that, on proper construction of the law, the impugned Circular was bad, and the Indo-Mauritius DTAC was abused. Explaining the *ultra vires rule* Hood Phillips says how the examination of *vires* can be effectively done through the technique of interpretation. He observes: [127]

> "As regards the innumerable statutory powers, the question is one of interpretation of the statute concerned. The acts of a competent authority must fall within the four corners of the powers given by the legislature.[128] The court must examine the nature, objects and scheme of the legislation, and in the light of that examination must consider what is the exact area over which powers are given by the section under which the competent authority purports to act."[129]

On this approach nothing turns on the catchy and flashy word "sham" or "device".

The Court, in *Azadi Bachao,* raised a point that could not be at issue for obvious reasons. It observed:

> "They (the respondents) contend that this Court should interdict such arrangements and as if by waving a magic wand, bring about a situation where the incorporation becomes *non est*."

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125. (1985) 154 ITR 148 SC.

126. Dias, *Jurisprudence* 5th ed p. 126.

127. O. Hood Phillips' *Constitutional and Administrative Law* 7th ed. P. 662.

128. Per Lord Greene M.R. in *Carltona Ltd v. Commissioners of Works,* [1943] 2 All ER 560, 564.

129. Per Sachs J., *Commissioners of Customs and Excise v. Cure and Deeley Ltd*., [1962] 1 Q.B. 340.

The administrative act of a foreign jurisdiction could not have been impeached in our domestic court. Our courts could not be invited to render the factum of the incorporation of a company in Mauritius *non est*. *Oppenheim* observes that there "is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by international law."[130] But it is an established principle of Public International Law that a State is competent to examine whether a foreign official having the domestic effect accords with the law before it recognizes it valid in its own jurisdiction. The International Court of Justice in *Nottebhom's Case*[131] held that "a State cannot claim that the rules [pertaining to the acquisition of nationality] are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States".

The Hon'ble Court observed: "…it is argued that *McDowell* has changed the concept of fiscal jurisprudence in this country and any tax planning which is intended to and results in avoidance of tax must be struck down by the Court." This topic has been discussed in the Chapter "Paradigm Shift in Tax Jurisprudence." It is felt, perish the thought, that the Court shares the post-welfare state ethos characterized by the rollback of the governmental activities and a consequent change of attitude to tax law.

II

1. *McDowell* when properly read

McDowell when properly read

In *Azadi Bachao,* the Court read *McDowell*, it is most respectfully submitted, in a way no judgment is to be read. Instead of (i) proper inductions from the actual decision in that case, or (ii) examination and determination of the *ratio decidendi* contained therein, the Court focused only on—

(a) examining whether Justice Chinnappa Ready was correct in his views on certain *dicta* of Lord Tomlin in *IRC v. Duke of Westminster*[132], and how this decision fared in certain other decisions in India and England, and

(b) examining how much "a far cry" exists *inter se* the views of Justice Ranganath Misra (for himself and on behalf of Y.V. Chandrachud, C.J., and D. A. Desai and E.S. Venkataramiah, JJ) and that of Justice Reddy in the matter of tax avoidance.

Whilst conventionally the *material facts test* and *reversal test* are applied to determine the principles which a case brings out, this author believes that a better method (approximating the approach of I.A. Richards and C.K. Ogden in *The Meaning of Meaning*) would have been be to read *McDowell* in the light of what the *Mimansa* tells us:

(The author renders in English this *sloka* thus) :

There may be seven ways to read a book:
First and second, concentrate on the threads
which unite the beginning and the end;
Third, is what is said again and again;
Fourth, is what is new therein,
Fifth, is the targeted consequence

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130. Section 112.
131. ICJ Report (1955) at p. 23.
132. [1935] ALL ER Rep 259.

Sixth, is what is mere peripheral

And the last is the logic, either supporting or countering.

It says that in order to comprehend the meaning and import of a book, seven determiners should be taken into account. First, what is the central strand in the thematic structure of a piece of work directly connecting the beginning to the end? Second element is the *purpose* revealing itself even through tone and tenor. Third element is what is suggested through variations on the core ideas. Fourth element is the quest to discover what is new (as any great work is intended to venture something new). Fifth element is the consequence, and its impact on public interest. Sixth element is constituted by the illustrative fillers, analogical reasoning, and supportive references. The incorrectness of materials in this sixth category, being merely illustrative fillers, may not have any bearing on the central meaning.[133] The seventh is the thrust of reasoning for and against the position adopted.

It is seen that the *upakrama* (the threshold situation) *and upsamhara* (conclusion) of the cause before the Court are only in the main judgment of *McDowell* delivered by Ranganath Misra J. on behalf of Chandrachud C.J., Desai, Venkataramiah and Ranganath Misra J. In the *upakrama,* material points were these:

(a) Purchasers of Indian liquors for obtaining distillery passes paid excise duty under Excise Rules. Under the governing law it was includible in the turnover of the manufacturer of liquor. Excise duty though paid by the purchaser to meet the liability of the manufacturer, is a part of the consideration for the sale and is includible in the turnover of the manufacturer. The purchaser has paid the tax on behalf of the manufacturer. In terms of the law the manufacturer was liable to pay excise duty on the manufacture of liquor. The excise duty paid on his behalf was integral to the consideration for the sale of liquor.

(b) The assessee devised a way not to pay tax on turnover inclusive of duty paid by the liquor purchasers. The strategy was the conjoint product of two facts:

(i) under an agreed strategy the purchasers had to discharge the manufacture's liability; and

(ii) under this system the transactions of such payments were not made to figure in the assessee's books of accounts; it was stage-managed not to be part of the assessee's trade.

It was held that the fact that excise duty does not go into the common till of the manufacturer (assessee) to become a part of the circulating capital, is not the decisive test for determining whether such duty constitutes the seller's turnover.

As to *upsamhara* (conclusion) is the final outcome of the case when after determining the facts, and ascertaining the law, the latter is applied to the former. In this case Misra J succinctly states the legal perspective under which the facts were appraised. He observed:

> "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. On this aspect one of us, Chinnappa Reddy J., has proposed a separate and detailed opinion with which we agree."

It is submitted that it must be a mistake in comprehension which led the Court to hold in *Azadi Bachao* that there was "a far cry" between the views of Justice Reddy and Justice Misra; or to hold that Justice Reddy's view 'militated" against the view taken by his other four brother Judges.

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[133]. Tilak, *The Geeta Rahashya* p.22.

In fact the quotation from Justice Misra's judgment says precisely what Justice Reddy said in detail with flourish and solemn judicial passion. "Colourable" in the expression "colourable device" would mean "Pretended, feigned, counterfeit" *[The New SOD]*. As to "dubious": "Something that is dubious is not considered to be completely honest or safe, and therefore cannot be trusted or approved of. *[Collins Cobuild English Language Dictionary*]. And subterfuge means, as *Cobuild* says: 'A *subtrerfuge* is a trick or deceitful way of getting what you want". Justice Reddy in his supplemental judgment has said nothing more, nothing less.
Third element in discovery of meaning as per *Mimansa* is the core ideas coming up again and again in different ways as such ideas have generally a gripping presence in the mind of the writer. A close reading of the main and supplemental judgments shows that through points-counterpoints judicial displeasure at tax avoidance has been expressed. This judicial mission is so patent that culling of illustrations to prove it is not needed. But it is important to know the judicial philosophy of this approach. The main judgment touches this point, but it has been developed in the supplemental judgment wherein Justice Reddy, after enumerating the evil consequences of tax avoidance, articulated a new judicial approach. The evil consequences highlighted include the following:

(i) First, there is substantial loss of much needed public revenue, particularly in a welfare State like ours.

(ii) Next, there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation.

(iii) Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcroft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer, and his perhaps not so skillful advisers on the other side.

(iv) Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it'.

(v) Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guileless good citizens from those of the 'artful dodgers'.

And Justice Reddy states the judicial duty of the court thus:

> "It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance, we now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognize that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in *Wood Polymer Ltd. and Bengal Hotels Limited*, (1977) 47 Com Cas 597 (Guj) where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax."

Justice Reddy's views accord with our Constitution that attempts to build a welfare state. But this complex topic would be dealt with in a separate chapter on the Role of Judiciary.

The fourth element involves the discovery of what is new in a book (here, in the judgment). The very tenor of the judgment shows that it is not a mere application of law to facts. Its novelty is the juristic creation of legal perspective in tune with our Constitution. The judges adopted a historical perspective under which Lord Tomlin's ideas expressed in the *Duke of Westminster* had become anachronistic and unfair.

The fifth element is to consider the *effect* of a particular act, whether of a book or a judgment. The outcome in *McDowell* is a fair determination of tax liability by frustrating a strategy to dodge the law.

Arthwad is a technical concept in *Mimansa.* Often, once the heart of the matter is clear, an author resorts to illustrations and comparisons, and mentions many matters of peripheral and incidental relevance. In the *arthwad* the author is often not very particular about accuracy and exactness. The fatal flaw in the Court's exposition of *McDowell* in *Azadi Bachao* is not to notice what is mere *arthwad.* The entire criticism of *McDowell* boils down to one point only: that Justice Reddy was wrong in his assessment of Lord Tomlin's dictum in *IRC v. Duke of Westminster*[134]. Though the Bench avows its objective to "consider in some detail as to why *McDowell's case* [1985] 154 ITR 148 (SC), what it says, and what it does not say", it remains throughout engrossed with what was surely not the heart of the matter. The words of Lord Sumner in *IRC v. Fisher's Executors*[135] were quoted:

> "My Lords, the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any expressed terms or of any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability nor incurs blame."

It was further pointed out that similar views were expressed by Lord Tomlin in *IRC v. Duke of Westminster* that reflected the prevalent attitude towards tax avoidance:

> "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioners of Inland Revenue or his fellow tax payers may be of his ingenuity, he cannot be compelled to pay an increased tax."

The Court observed that these ideas were the pre-Second World War sentiments expressed by the British courts. The Court in *Azadi Bachao* says:

> "It is urged that *McDowell's case* has taken a new look at fiscal jurisprudence and "the ghost of *Fisher's case* and *Westminster's case* have been exercised in the country of its origin". It is also urged that McDowell's case radical departure was in tune with the changed thinking on fiscal jurisprudence by the English courts, as evidenced in *W.T. Ramsay Ltd. v. IRC*[136], *Inland Revenue Commissioners v. Burmah Oil Company Ltd*[137]and *Furniss v. Dawson*[138]."

And the whole judicial pursuit is to show that far from being exorcised in its country of origin, *Duke of Westminster's case* continues to be alive and kicking in England. But this point relating to *Duke of Westminster* is mere perpheral, a mere *arthwad.* Tilak, explaining *arthwad*, says; "Even if not totally out of context, things are referred to add weight or clarity. Such things may not even be always correct"[139].

The seventh element under the *Mimansa* principle of interpretations is *uppapatti*, which means criticizing what appears to go against a proposed view. Justice Reddy tried to place ideas under

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[134]. [1936] AC 1 (HL); 19 TC 490, 520 (HL).
[135]. [1926] AC 395 at 412 (HL).
[136]. [1982] AC 300.
[137]. [1982] Simon's Tax Cases 30.
[138]. [1984] 1 All ER 530 (HL).
[139]. Tilak, *Geeta Rahashya* 27tgh ed. p. 22.

historical perspective. Time itself is a distinguishing factor. He reflects on the march of the law against tax avoidance schemes. F W Maitland wrote to Dicey that the only direct utility of legal history lies in the lesson that each generation has an enormous power of shaping its own law.[140] He refers to the celebrated dictum of Lord Simon in *Latilla v. Inland Revenue Commissioners*[141], and many other decisions. He rejects contrary ideas stated in *A. Raman and Co*[142], and *Commr. of Income-tax, Gujarat v. Kharwar*[143]. Misra J. takes note of a lot of cases including the decision of the Privy Council in *Bank of Chettinad Ltd. v. Commr. of Incometax.*[144]

2. Ratio Analysis

Ratio Analysis

It is well known that the law declared by the Supreme Court is to be found in the ratio of a case. Lord Denning said: "We can only accept a line of reasoning which supports the actual decision of the House of Lords."[145] Critically examined the *upakrama* and *upsamhara* of *McDowell* reflects its *ratio.* It can be discovered either by "reversal test" or by "the material facts test". In the former, we take proposition of law put forward by the judge, reverse or negate it, and then see if its reversal would have altered the actual decision. Under the "material facts" test, the *ratio* is to be determined by ascertaining the facts treated as material by the judge together with the decision on those facts. A manufacturer of liquor is liable to pay duties, which, even if paid by the purchaser on his behalf, enters into the manufacturer's turnover. Bereft of details, in *McDowell* an arrangement of transaction was so done that the only effect was avoidance of tax. It was structured to conform to the law if the legal identities of apparently *dressed-up* transactions alone were seen. The Hon'ble Court explored the operative realities, determined the true nature of the transactions, and gave legal effect to what emerged in true form. This would be clear from what the majority Judgment says:

> "According to Mr. Sorabji the excise duty had never come into the hands of the appellant and the Company had no occasion or opportunity to turn it over in its hands, and, therefore, the same could never be considered as a part of its turnover. The observations made by this Court were in a very different setting and what was being considered was whether the additional tax levied under the Madras Act formed a part of the turnover. If we accept the observations of Hidayatullah, J. as laying down the test for general application, it would be very prejudicial to the Revenue as between the seller and the buyer, by special arrangement, a part of what ordinarily would constitute consideration proper could even be kept out and the turnover could be reduced and tax liability avoided. We are of the view that the conclusion reached in the appellant's case in (1977) 1 SCR 914: (AIR 1977 SC 1459) on the second aspect of the matter, namely, when the excise duty does not go into the common till of the assessee and it does not become a part of the circulating capital, it does not constitute turnover, is not the decisive test for determining whether such duty would constitute turnover."

If through some device a situation is sought to be created which subverts right legal effect, the attempt must be frustrated. This exercise is to be done under a legal perspective which Justice Reddy explained at length in his supplemental judgment. This approach is stated with extreme precision by Misra J. in the paragraph already quoted. A judicial decision becomes, in the end, an exercise at construction involving the application of proper law on material facts. In effect the

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140. Cosgrove *The Rule of Law: Albeit Venn Dicey: Victorian Jurist* (1980) p 177.
141. 1943 AC 377.
142. AIR 1968 SC 49.
143. AIR 1969 SC 812.
144. AIR 1940 PC 183.
145. In re *Harper v. N.C.B* (1974) 2 w.l,r. 775.

Court applied in *McDowell* the principles that were thus stated in the speech of Lord Nicholls in *MacNiven (Inspector of Taxes) v. Westmoreland Investments Ltd*[146]:

> "*Ramsay* brought out three points in particular. First, when it is sought to attach a tax consequence to transaction, the task of the courts is to ascertain the legal nature of the a transaction…
>
> Second, this is not to treat a transaction, or any step in a transaction, as though it were a 'sham', meaning thereby, that it was intended to give the appearance of having a legal effect different from the actual legal effect intended by the parties: see the classic definition of Diplock LJ in *Snook v. London and West Riding Investments Ltd.,* [1967] 2 QB 786, 802. Nor is this to go behind a transaction for some supposed underlying substance. What this does is to enable the court to look at a document or transaction in the context to which it properly belongs.
>
> Third, having identified the legal nature of the transaction, the courts must then relate this to the language of the statute. For instance, if the scheme has the apparently magical result of creating a loss without the taxpayer suffering any financial detriment, is this artificial loss a loss *within the meaning of the relevant statutory provision*? ……."

It is submitted that in *Azadi Bachao* the Court, perhaps through an oversight, made serious mistakes in comprehending *I .R.C v. Duke of Westminster*[147]; and for that reason misunderstood the law declared by the Constitution Bench in *McDowell*. As from this miscomprehension emanated serious distortions in the judicial perspective producing a serious miscarriage of justice, it is worthwhile to mention the following:

(I) Justice Reddy's comments on the *Duke of Westminster* constitute what is called in *Mimansa* an '*arthvaad*' which comes in the sixth category. In *Azadi Bachao* the Court made too much of what, in fact, did not matter.

(II) *The Duke of Westminster* dealt with the construction of certain plain transactions where the Revenue had no reasons to doubt the *bona fides*. In *Furniss v Dawson*[148] Lord Bridge highlighted this point when he said:

> "The strong dislike expressed by the majority in the Westminster case [1936] AC 1 at 19… for what Lord Tomlin described as the doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" is not in the least surprising when one remembers that the only transaction in question was the duke's covenant in favour of the gardener and the *bona fides* of that transaction was never for a moment impugned". (Emphasis supplied)

In *Simon's Taxes* (3rd ed)[149] in the Chapter on "The Construction of Taxing Acts and Document" the following has been perceptively stated:

> "In the case discussed above there was no suggestion of bad faith, or that the particular form of the transaction was adopted as a cloak to conceal a different transaction. The documents in question were intended to be acted on, and were allowed by the parties to have their proper legal operation. Lord Tomlin stresses this fact in the *Westminister case*.[150] It is different where a deed or agreement is never meant to have effect, even in the absence of bad faith. Thus, where a member of a congregation of secular priests, acting as headmaster of a school established by the congregation, entered into a written agreement, under which he was entitled to a salary, but in fact received nothing, the agreement having been drawn up simply to comply with the requirements of the Board of Education, Finlay, J., held that the agreement did not represent the real bargain, or any bargain, between the parties. In

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146. [2001] 1 All ER 865 H.L.
147. [(1926) A.C. 395].
148. [1984] 1 All ER 530 at p. 536.
149. at p 315.
150. [1936] A.C., at p. 20; 19 T.C., at p.521, H.L..

this special case, therefore, the priest was not assessable under Schedule E.[151] It follows therefore that if the tribunal of fact finds, on proper evidence that a party setting up a transaction has not established that it was a genuine transaction carried through bona fide, it can have not effect for tax purposes.[152] No case or argument can be founded on a non-genuine basis. Thus, in Johnson V. Jewitt[153] a taxpayer attempted to create an artificial loss of a huge sum of money by creating and juggling with seventy-nine companies and so claim a large tax rebate. The transaction was held to be a complete sham:

"We were asked, what was this if it were not trading?……. I would call it a cheap exercise in fiscal conjuring and book-keeping phantasy, involving a gross abuse of the Companies Act and having as its unworthy object the extraction from the Exchequer of an enormous sum which the Appellant had never paid in tax and to which he has no shadow of a right whatsoever".[154]

From the above the following two seminal points emerge:

(a) *The Duke of Westminster* dealt with a *bona fide* situation; and

(b) The statement of Lord Tomlin involved an ambiguity. Ambiguity adds richness in poetry but is a blemish in legal prose. There was no need to resolve this ambiguity in the *Westminster* case, as the decision was absolutely right as it came within the principle stated by Lord Tomlin. Had Lord Tomlin faced a problem involving *a mask* he would have been the first to rip the mask off. His statement should not be construed as if it were a statute. Treaty Shopping is, on all juristic principle, a fraud. It is respectfully submitted that Treaty Shopping is not a *bona fide* situation.

(c) The ambiguity in Lord Tomlin's dictum, which bewildered many later judges, stands explained by Lord Hoffmann in *MacNiven (Inspector of Taxes) v. Westmoreland Investments Ltd.*

It deserves to be noted that in all the cases, to which the Hon'ble Court refers as approving *Duke of Westminster,* this fundamental difference (*bona fide* and *mala fide* situations) remained under the prime focus. The Privy Council in *Bank of Chettinad Ltd v. CIT*[155] was dealing with a *bona fide* situation clearly coming within the category to which the situation in the *Duke of Westminster* belongs. It examined facts to see whether there was a business connection within the meaning of the relevant provision under the Income-tax Act, 1922. The Privy Council held in favour of the Revenue. In *Mathuram Agrawal v. State of M.P.*[156] this Hon'ble Court referred to *Bank of Chettinad Ltd. v. Commr. of Income-tax* and *Inland Revenue Commissioner v. Duke West Minister* but *McDowell & Co Ltd v. CTO* was not even referred**.** The Hon'ble Court was considering matters relating to M .P. Municipalities Act (37 of 1961), S.127A (2)(b) to see whether certain provisions were *ultra vires* the charging section. The fact-situation was a *bona fide* situation involving statutory construction. The Constitution Bench in *Mathuram* said nothing about *McDowell*, though its awareness cannot be doubted. It presented a *bona fide* situation. In the case of *Bank of Chettinad Ltd. v. Commr. of Income-tax*, Madras, (AIR 1940 PC 183), the Privy Council quoted with approval a passage from the opinion of Lord Russell of Killowen in *Inland Revenue Commissioners v. Duke of Westminster*, (1936) AC 1. The Hon'ble Court was not examining what should be the right judicial approach in a case involving a camouflage causing

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[151]. *Reade v. Brearley,* (1933), 17 T.C. 687; and see *Dickenson v. Gross,* (1927) 11 T.C.614.

[152]. *Kirby v. Steele,* (1946), 27 T.C. 370.

[153]. (1961), 40 T.C. 231, 253, C.A.

[154]. Per Donovan, L.J., 40 T.C. 231, 255. Sell also *Johns v. Wirsal Securities, Ltd.,* (1966) 1 ALL E.R. 865; 43 T.C. 629.

[155]. AIR 1940 P.C. 183 [Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir M.R. Jayakar].

[156]. AIR 2000 SC 109.

wrongful gains to the treaty-shoppers and wrongful loss the people of India. It was not a case wherein there is a clear evasion of reality.

It is submitted that by not resolving the ambiguity in Lord Tomlin's dictum the Hon'ble Court misdirected itself in law. Lord Tomlin's dictum is still valid in *X* situation, not the *Y* situation. . The effect of both *Craven v White* and *MacNiven (Inspector of Taxes) v. Westmoreland Investments Ltd* is that the view propounded by Lord Tomlin cannot be applied to the X situation; hence, to that extent, the rule is obviously dead in England. Hence, it is most respectfully submitted, that the principle in *Duke of Westminster* is surely alive and kicking in the country of its birth but only within the legitimate sphere of its operation i.e. to cover situation *X*, not situation *Y*.

It is humbly submitted that right from the day *McDowell* was decided by the Court, those who played truants with law were never comfortable with it. One petition had been moved before this Hon'ble Court for a reconsideration of the judgment (165 ITR St 225), but was not pursued. The flak that this great decision of the Constitution Bench received in the open Court is extremely worrisome. In the U.K. too the vested interests behaved no better. Hermann writes:

> "Sensing a certain softness and confusion in 1988 composition of the Judicial Committee of the House of Lords the tax lawyers renewed their attack under the flag of the Special Committee of Tax Consultative Bodies. The first two parts of their report on Tax Law after *Furniss v. Dawson* is a lament on the blow inflicted to tax avoidance industry, which will hardly bring me to tears".[157]

The laments of the tax lawyers promoting this industry, unworthy in the eyes of common people, went in vain in the U.K. as the House of Lords is yet to duck or ditch *Dawson*.

It is respectfully submitted that the Hon'ble Court misdirected itself in relying on the American law. American Jurisprudence rejects *motivation* as a ground for the rejection of a claim. In *Azadi Bachao* the question was not of *motivation* but of appropriate construction of the Income-tax Act and the terms of the Indo-Mauritius DTAC. It contemplates a *bona fide* situation. The whole confusion sprang up on account of the exclusion of the factual substratum of the case which the Petitioner sought to bring to the notice of the Hon'ble Court by producing before it the uncontroverted facts from the Assessment Order passed in the case *M/s Cox & King*. This exclusion distorted judicial perspective, as it was a clear breach of the rules of Natural Justice. The effect of *Duke of Westminster* and *Helvering* was thus stated by Lord Bridge in *Furniss v. Dawson*[158]:

> "But in another sense the present appeal marks a further important step, as a matter of decision rather than as a matter of dictum, in the development of the court's increasingly critical approach to the manipulation of financial transactions to the advantage of the taxpayer. Of course, the judiciary must never lose sight of the basic premise expressed in the celebrated dictum of Lord Tomlin in *IRC v. Duke of Westminster*…. that—
>
> 'Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.'
>
> Just a year earlier Learned Hand J, giving the judgment of the United States Second Circuit Court of Appeals in *Helvering v. Gregory* (1934) 69 F 2D 809, had said the same thing in different words:
>
> 'Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury.'
>
> Yet, while starting from this common principle, the federal courts of the United States and the English courts have developed, quite independently of any statutory differences, very different techniques for the scrutiny of tax avoidance schemes to test their validity".

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157. A.H. Hermann, *Law v. Business* p.17 (Butterworth).

158. [1984] 1 All ER 530 at 535.

3. Historical Perspective

Historical Perspective

The Court made serious mistake by not sharing the historical perspective which *McDowell* adopts. The most important point in *McDowell's* case is the recognition of TIME itself as a distinguishing factor in matter of interpretation. This approach brings to mind what Lord Buckmaster said in *Stag Line Ltd. v. Foscolo Mango & Co. Ltd*.[159] :

> "It hardly needed the great authority of Lord Herschell in *Hick v. Raymond and Reid* (2) to decide that in constructing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one."

Justice Chinnappa Reddy in *McDowell's Case* observed:

> "During the period between the two world wars, a theory came to be propounded and developed that it was perfectly open for persons to evade (avoid) income-tax if they could do so legally [160]…Then came World War II and in its wake huge profiteering and racketeering, something which persists till today, but on a much larger scale. The attitude of the courts towards avoidance of tax perceptibly changed and hardened…"

He referred to the observations but many eminent judges in many well-known cases, against tax avoidance. He quoted the observation of Lord Roskill in *Furniss v. Dawson* wherein the following had been observed:

> "The error, if I may venture to use that word, into which the courts below have fallen is that they have looked back to 1936 and not forward from 1982."

Azadi Bachao expresses the ethos of the post-welfare State phase, which has its own special features and a distinct perspective and observation-post. This aspect of the matter would be discussed in a separate chapter. The convoluted reasoning in many of the observations in *Norglen Ltd v. Reeds Rains Prudential Ltd.,*[161] and in *MacNiven (Inspector of Taxes) v. Westmoreland Investments Ltd.,*[162] evidence a patent shift in judicial observation-post striking a synchrony with the roll-back State in the present phase of economic globalization. They do not depart from the approaches approved in *Furniss* but they lack in perspicacity and sublime passion, which dominate *Furniss* and the other decisions illustrating the new judicial approach. Whilst in England it is possible for judiciary to depart from the fundamental postulates of the Welfare State, in India the constitutional commitments to evolve a Welfare State cannot be given up without going beyond the Constitution itself.

4. Judicial Role: *Causa causans*

Judicial Role: *Causa causans*

What differentiates *Azadi Bachao* from *McDowell* is the perception of the ambit and reach of judicial role. This narrowing of judicial role in *Azadi Bachao* is a worrisome departure in this phase of globalization wherein our democratic polity and our Constitution both are up against sinister hazards posed by heartless predatory international financiers, and those gentlemen of the accounting profession whose feats of creativity are designed to promote the interests, worthy or unworthy, of a miniscule section of the haves. Referring to Chinnappa Reddy's ideas as to the judicial role, *Azadi Bachao* says:

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[159]. [1931] All ER Rep 666 H L.
[160]. 154 ITR 148 at 152.
[161]. [1999] 2 AC 1.
[162]. [2001] I All ER p. 865, at 874; [2002] 255 ITR 612 at 623.

"This opinion of the majority [as stated in the para quoted in para 9 *supra*] is a far cry from the view of Chinnappa Reddy J.: "In our view the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether a provision should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it." We are afraid that we are unable to read or comprehend the majority judgment in McDowell's case [1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J."

What Justice Reddy has said about the creative role of the court is precisely what Lord Scarman observed in *Furnis v. Dawson.* This author has shown, on analysis of facts, that all other four Judges in *McDowell* agreed with what Justice Reddy said. It is distressing to note that this narrowing of the judicial view led the Court to make a mere *cri de Coeur* to the executive and legislature to provide a remedy against the fraud of Treaty-Shopping when the grant of this remedy was clearly within the province and function of judiciary itself. Role perception has an inevitable impact on judicial decision-making . A judicial decision provides a solution through insight. In discovering principles, in organizing resources, the perception of role is crucial. Every problem constitutes an external stimuli to which the deep well of the judge's mind makes response depending on numerous variables, psychological and functional. As this aspect of the matter requires a comprehension of judicial role under our Constitution, it would be examined in a separate chapter on the Role of Judiciary.

5. Judicial remedy against an *entente cordiale* of Collusion and Fraud

Judicial remedy against an *entente cordiale, etc*.

Azadi Bachai begins its exposition of "Rule in McDowell" with a sentence, which could be a part of the shadowboxing of the Appellants (the Union of India and a Mauritian company) rather than a plea of the Respondents (the PIL Petitioners). The said Judgment says:

"The respondents strenuously criticized the act of incorporation by FIIs under the Mauritian Act as a "sham" and "a device" actuated by improper motives."

The author's whole case before the Court was founded on an assertion that Collusion and Fraud through their congeneric operation through an opaque system led the depredation on our country's economic resources to as a matter of natural consequence contributed to moral degradation and national insecurity. The plea was that, on analysis, Treaty Shopping is a conjoint product of *Collusion* and *Fraud*[163] *inter se* the vested interests in Mauritius and the residents of the third States. The strategy was crafted through a network of collusion. The dressed-up evidence presented by those who wanted to masquerade as the Mauritian residents before the income-tax authorities to obtain benefits of a bilateral tax treaty between India and Mauritius, was a stratagem of fraud to cause wrongful gains by inflicting wrongful loss on others."[164] As Comus

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[163]. "In such a proceeding, the claim put forward is fictitious the contest over it unreal and the decree passed therein is mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that claimant has managed to obtain the verdict of the Court in his favour and against his opponent by practicing fraud on the Court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as a result of an understanding between the parties. While in the collusive proceedings the combat is mere sham, in a fraudulent suit it is real and earnest.

[164]. Wharton's *Law Lexicon* quoted by the Supreme Court in *Nagubai Ammal v. B. Shama Rao* AIR 1956 SC 593.

was an offspring of Bacchus and Circe, a Treaty Shopping is fathered by Collusion and Fraud in Darkness.

Assuming *arguendo* that it was this author's case that the "incorporation" in Mauritius was a 'device' or 'sham', the principal plea went unnoticed with a disastrous consequence on the cause. "Incorporation" is a domestic legal act of Mauritius.In *Furniss v. Dawson*[165] the House of Lords ignored the existence of tax haven company for the purpose of tax law. As, in *Furniss* there was no economic impact of the transposed entity, its relevance was not recognized *for the purposes of the tax laws.* In *Knetsch v. United States*[166] the U.S Supreme Court shows that even legitimate corporation may engage in transactions lacking economic substance; and so the Commissioner could disregard transactions between related legitimate corporations. The 1986 decision of the Bundesfinanzhof in German jurisdiction: the doctrine of the abuse of legal form[167] has been recognized. Klaus Vogel has outlined the judicial perspective in these words[168]:

> "If the form of a transaction is not recognized for tax purposes under domestic law or under treaty law, the tax consequences which the tax payer sought to obtain through structuring the transaction in question will not occur and tax authorities will then apply those tax rules which would have applied according to the appropriate legal form of transaction…"

That the aforesaid facts show that a company can be a legal person without being a *resident* for the purpose of a tax convention.

III

6. The present status of *McDowell*

The present status of *McDowell*

Technically speaking *Azadi Bachao*, being a decision by a Division Bench of two Judges cannot have any adverse impact on the rule in *McDowell*, a decision by the Constitution Bench, because if it does so, it would be to that extent *non est*.

As the supplemental judgment by Chinnappa Reddy is an integral part of the judicial decision in *McDowell,* any attempt at excision of Justice Reddy's opinion from the corpus of the judgment is a clear disrespect for the Supreme Court.

If the Division Bench, which decided *Azadi Bachao,* felt that Justice Reddy was not correct, the only course available to it was refer the matter to a larger Bench. It was beyond its competence to put its own gloss *de hors* the supplemental judgment with which the four other judges had not only agreed in specific terms, and had struck no note of discordance. This action was clearly an act without jurisdiction. The legal view, laconically expressed by Misra J (alredy quoted above), is itself enough to play the Lancelot for Revenue.

McDowell is most often relied as an authority for exploring the operative realities of a case suspected to have resorted to tax fraud. In *Azadi Bachao* the Court had recognized the operation of the doctrine of the Lifting of the Corporate Veil only in domestic law. The judicial observation on this point has been discussed in detail in the Chapter on "A Corporation cannot be an impervious coverlet of gross abuse". However, it is worthwhile to make the following comments:

(i) *F.G. (Films) Ltd., In re* is a classic case empowering the revenue authorities to protect revenues from the tax dodgers and fraudsters. None is entitled to deceive the authorities by putting on mask.

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165. [1984] 1 All ER 530.
166. 364 US 361 (1960).
167. Philip Baker in *Double Taxation Conventions and International Law* 2 ED. p. 101.
168. *Klaus* Vog*el on Double Taxation Conventions* at pp. 41-42.

(ii) The Court went wrong in stating: "There is no doubt that, where necessary, the courts are empowered to lift the veil of incorporation *while applying the domestic law*." [Italics supplied]. God knows wherefrom the Court got it that the doctrine of the lifting of the corporate veil apples only within a domestic jurisdiction. This judicially created doctrine to applies to the whole judicial making process[169]. Secondly, it missed that even the International Court of Justice explores operative realities, and this doctrine is invoked even in international jurisprudence[170].

(iii) The judicial view that "the whole purpose of the DTAC is to ensure that the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income-tax Act" goes against law and principle (as this author would state in a separate chapter).

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169. *CIT v. Sri Meenakshi Mills Ltd*., AIR 1967 SC 819 ; *New Horizons Ltd. v. Union of India,* [1995] 1 SCC 478 ; *State of UP v. Renusagar Power Company,* [1988] 4 SCC 59.

170. *In the North Sea Continental Shelf Case* ICJ 1969, 3 at 222.; *Nottebhom's Case* ICJ Report (1955) at p. 23.