Final Act of WTO: Abuse of Treaty-Making Power

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Where the mind is without fear
And the head is held high;
Where knowledge is free;
Where the world has not been broken up
Into fragments by narrow domestic walls;
Where the words come out from the depth of truth;
Where tireless striving stretches its arms
Towards perfection;
Where the clear stream of reason
has not lost its way into the dreary sand
of dead habit;
Where the mind is led forward
By thee into ever widening thought and action
Into that heaven of freedom,
My Father, let my country awake.

– Rabindranath Tagore

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Preface

Any citizen of the Republic of India has right to bring to the notice of the Supreme Court acts which grossly violate the law and the Constitution of India. This right emanates from the terms of the Preamble to our Constitution. In fact, such a right is implied in the constitutions where the ultimate sovereignty resides in the people. Art 20(4) of the Constitution of the Federal Republic of Germany even goes to say: "All Germans have the right to resist any person seeking to abolish the constitutional order, should no other remedy be possible." Dr Meghnad Desai very aptly observed: "The hope of India lies not in its politicians but in its citizens." The role of citizenry in this phase of Economic Globalization, is very perceptively suggested by Harold Pinter, the 2005 Nobel Prize Winner for Literature, concluding his Nobel Lecture:

> "I believe that despite the enormous odds which exist, unflinching, unswerving, fierce intellectual determination, as citizens, to define the real truth of our lives and our societies is a crucial obligation which devolves upon us all. It is in fact mandatory."

It is time to reflect over our government's treaty-making power. In some delirium our executive-government negotiated and ratified the Uruguay Round Final Act which placed us under the WTO regime. *The Peoples' Commission on GATT* (consisting of V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges of great distinction) examined the Act, and found India's obligations under it subversive of the basic features of our Constitution. Only sometime back, our government entered into an Agreement with Singapore, Comprehensive Economic Cooperation Agreement (CECA) , which is no less devastating than the Final Act. Many more treaties are in the offing. Our executive government's approach to treaty-making is dangerous. These days the whole nation has the Indo-Nuclear Deal at the most conscious point. In this phase of Economic Globalization, we must establish treaty-making procedure without betraying the trust reposed by our Constitution. Some suggestions in the matter have been mentioned in this book. There are good grounds to believe that in these locust-eaten years circumstances are conspiring to effect a sort of genuflection of our Constitution.

It is likely that a Writ Petition may be moved before the Supreme Court agitating the issues above mentioned. But as this will be a Public Interest Litigation, those who would be represented in the Court in making submissions must know the stand their self-assumed representative takes in their name. Even if, for any reason, this move does not materialize, the citizens should know the problems of our day, so that some way some day ways can be found out to solve them *pro bono publico*. We must not forget what Ella Wheeler Wilcox said in *Settle the Questions Right*: "No question is ever settled until it is settled right".

Shri B. K. Keayla, Secretary General of the Centre for Study of Global Trade System and Development, expressed his desire to publish my ideas questioning the propriety, legality and constitutional validity of our acceptance of the Uruguay

propriety, legality and constitutional validity of our acceptance of the Uruguay Round Final Act which spawned the WTO designed to subjugate the political realm to the economic realm to establish the sovereignty of the present-day Leviathan, *Pax Mercatus*. I appreciated his ideas. I felt that the entire citizenry is entitled to know what a citizen thinks about an issue of the greatest importance in this phase of Economic Globalization, so that the worth of his effort is evaluated by the political sovereign of our body politic. Our great country cannot enact Beckett's play *Godot* in which nothing happens. Its last lines and stage direction are very suggestive:

Vladimir: Well? Shall we go?
Estragon: Yes, let's go.
They do not move.

Our country must move with courage and imagination; it is now or never.

New Delhi
August 9, 2006

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Introduction

Indian Governance and Treaties: The Advent of the WTO

Dr Rajeev Dhavan

I. Introduction

Indian governance faces a very serious challenge. Increasingly – and certainly since the advent of the WTO – the world is going to be governed by treaties. A new world order is being grafted on the sovereign states of the world. There is no shortage of defenders and critics of this new world order. It has been suggested that the world is only 10 years old and began life somewhere around 1989:

> "The slow, fixed, divided cold war system that had dominated international affairs since 1945 had been firmly replaced by a new, very greased inter-connected system called globalization. If we didn't fully understand that in 1989, when the Berlin wall came down, we sure understood it a decade later"[1]

Different perspectives may read this phenomenon differently. It is no real consolation to be told that "globalization is a myth" or that the "engines of international business...think regional and act local".[2]

Indubitably, there has been a distinct shift in the global economy. There are around 145 countries which are members of WTO and approximately 30 odd developing countries who wish to join the club. But, any description of the WTO as a club is really a misnomer. The WTO is virtually an all purpose treaty designed principally to benefit predator economies to seek a diversity of global markets relating to trade, investment, services, intellectual property. There is no country in the world which does not have to adjust to the workings of the WTO.

Although the WTO grows out of the General Agreement on Trade and Tariffs (GATT), the idea of a much wider treaty was conceived in November 1982 when the parties to GATT met for the Uruguay Round. This was followed by the profiling of what was perhaps one of the biggest negotiating agendas since the League of Nations after 1919 or the creation of the UN after 1945. This agenda was arrived at the ministerial declaration at Punta Del Este in 1986. Apart from those directly involved in planning this, the world was not entirely alive to the width and implications that this agenda had in store for it. Several meetings followed in Montreal (1988), Brussels (1990) and Geneva (1993) where the finer edges of the agenda were drawn together. The principal basis for the agenda was to break down barriers in the name of free trade. But there were many incongruities.

In many ways, the treaty dealing with Intellectual property protection (called the Trade Related Aspects of Intellectual Property Rights (TRIPS)) had no place in a free trade treaty. Intellectual property rights are monopoly rights.[3] As soon as a person is granted a patent, he obtains exclusivity over the rights to manufacture and

market that particular process or product. However, despite – and perhaps because of – the disconcerted protest by developing nations, the meeting at Geneva in December 1993 confirmed the place of TRIPS as part of the concluding agenda of the WTO. Once this was done and the developed nations of America, Europe, Japan and the Commonwealth got all that they wanted, the Agreement to create the WTO was signed at Marrakech on 15 April 1994. This was known as the Final Act. Seen at close range, the entire process seemed to have more than a 'final air' to it. History abjures finality. It was not as if the impact of the WTO was fluid. But, from now on, those that wanted to challenge the vires of the WTO treaty had to challenge it from within and by celebrating the voice of the people.

WTO had engineered its agenda with its basic agenda in place, some provisions that were transitional and some issues that were still to be worked through. But, there was a stormy road ahead. Between 1995 and 1997, an accord was reached on financial services. In Singapore 1996, working groups were established on (a) trade and investment (b) trade and competition policy and (c) transparency in government procurement. This has still to come through. Murmurings of protest began when the Ministerial Conference took place in Geneva in 1998. A much more elaborate agenda was devised for the meeting at Seattle in 1990 to take up issues relating to labour, trade facilitation, investment, competition, agriculture, subsidies, bio-technology and market access. But there were violent protests by peoples' activists. The Seattle meeting virtually collapsed.

The Seattle discussions were followed by those at Doha in 2001 which sought to gather together the various agendas. 21 subjects were listed for discussion and implementation at Doha. Significantly, the Doha meetings were also confronted with activist responses in the streets as well as in the lobbies. Some concessions were wreaked out of the agenda on public health and medicine – a matter of some concern for the poorer nations struggling to meet the problems of the AIDS virus. But, the various developing countries who had lost ground preceding the pre-WTO negotiations between 1986 and 1994 were now asserting themselves in a more concerted way. It was in Cancun in September 2003 where the developing nations struck back. Discussions were slated on agriculture, industrial goods, trade in services and customs. With a huge activist presence and a much more aggressive stance by the developing nations, the Cancun discussions collapsed within days – especially in respect of farm subsidies and access to markets. A new trading bloc of 20 developing Governments ('G-20') brought a counter caucus together. At the head of this were 4 nations: China, India, Brazil and South Africa ('G-4'). Such a getting together was inevitable. It was only a lack of political will and fractions and dissensions that had kept these nations apart. After all, the G-20 spoke for 65% of the world's population and 3 in every 4 of the farmers of the world. If they were not to have their say and get something of what they wanted, the entire exercise of a "fair" and "free" globalization was an imperial farce. In Geneva 2004, some nations agreed to end export subsidies. The poorer nations agreed to reduce duties on manufacturing goods except in key industries. There was some movement which could not exactly be reported as progress. By the time discussions took place in Paris in 2005, there were protests and niggling differences on many patterns, including France's resistance to the subsidies of its farmers being taken away. The conference in Hong Kong in

2005 saw violent clashes between protesters and the organizers of the meeting. At the meetings, the issue of market access of poorer nations to the North nations surfaced. The big issue related to agricultural subsidies in Europe and America. For decades, farmers from these areas had been subsidized. This had the dual effect of making their products more financially accessible and to ward off market challenges from the producers of food in poorer nations. It was this stumbling block that was to destroy the Geneva meeting of July 2006 and put a dampener on the future of the WTO agenda on many matters. WTO had arrived with a bang; but where was it going?

There is an interesting aspect of the time tabling of these discussions. The US had long been protective of their markets while seeking forced entry into the markets of the world. Using its unilateral procedures under its legislation of trade Acts of 201 and super 301, it placed nations which did not yield to their demands on a watch list or priority list. If this threat did not work, the US government was authorized to take suitable coercive trade steps to ensure compliance. This legislation continues even after the WTO came into force to which it is entirely antithetical. But, the US had another problem. In the year 2002, Congress had given a broad authority to President Bush to negotiate trade matters. This was for a five year period which was to expire in 2007. The US expected that WTO issues would be resolved during this time. This was unlikely. It was also unlikely that such a broad authority would continue beyond this five year period. In the absence of such continuance, negotiating binding decisions was going to be more difficult for the US.

This shows an important interface between the Treaty system and the legal and constitutional system of the US. Under the American Constitution, treaties have the same status of law if the treaties are self executing in nature and do not require any further law to implement them. More significantly, the treaties have to be ratified by the Senate unless some leeway was provided by the law. So, every treaty has to be tested under the procedures provided by the Constitution as well as the framework of laws within which decisions in respect of treaties have to be made. The world had to wait until all this was done or move at speeds dictated by the inner compulsions of governance of the US. In the year 2005-06, India has entered into an agreement with the US on the supply of nuclear fuel. The US wants to impose its will on India by interposing new conditions which India is required to meet. But, even if signatures were made on the agreement, it had to be ratified by the Senate. For several months, India had to wait and respond to the treaty making system of the US. For India this created issues of pride and prejudice. Within India, political parties of the right and left criticized India's Prime Minister for entering into such humiliating and inchoate agreements. Prime Minister Manmohan Singh had to reply to a debate in Parliament on 17 August 2006[4] and assure both Parliament and India's populace that he would not countenance a surrender of India's sovereignty to the US or agree to conditions which were onerous. Whether this was a good parliamentary tactic or a bonafide assurance remains to be seen. On WTO, India simply capitulated during the treaty making process.

But, there is another – perhaps deeper – lesson to be learnt from the interface between treaty making and the democratic process in the US. In the US system,

treaty making surrenders to the democratic processes of the Constitution. In India this is not the case. This will become self evident when we examine the manner in which decisions were made on WTO issues in India.

II. Treaty Making and Democratic Governance in India

Treaties play, and will play, an increasing role in Indian governance. But, the practice in India has generally been to allow the executive to make treaties without really invoking the democratic process other than the fact that the Prime Minister and his Cabinet are collectively responsible to Parliament. No doubt, a debate can be raised in Parliament but even such a process lacks both persistence and rigour.

The WTO treaty is a case in point. In 1995-96, the National Working Group on Patent Laws set up a *Peoples' Commission on GATT.* The membership of this Commission included Justices Krishna Iyer, Chinappa Reddy, D.A. Desai and Rajinder Sachar. In the Submissions of PILSARC (a legal public interest group), I included an account of how, the then Government and Parliament handled the negotiations. This submission finds place in the Report of the Commission and reads as follows:

> "On March 15 and 30, 1990, the Government stated "... that it will not participate in any negotiation ... under threat of retaliation" (Lok Sabha Qn. 33 and 2873).
>
> On March 19 and 27, 1990 the Government stated that there was no proposal to amend the Indian Patents Act which was a salutary legislation (Rajya Sabha Qn. 643 and 660; Lok Sabha Qn. 2221 and 2312).
>
> On May 3, 1990 the Government stated that investment and services "... lie in the domain of sovereign decision making not covered by GATT or any other multi-lateral or bilateral agreement" (Rajya Sabha Qn. 88).
>
> On 4-10th May, 1990, the Government reiterated that "... it cannot enter into bilateral negotiations to change basic economic policies which are in the domain of our sovereign decision making, and that too, under threat of retaliation". India would provide support and leadership to the concerns of developing nations (Lok Sabha Qn. 7452; Rajya Sabha Qn. 7603).
>
> On 4th and 11th May, 1990 the Government maintained that the intellectual property laws are adequate (Lok Sabha Qn. 7452, 8442 and 8443).
>
> On May 11, 1990 the Government was hopeful that the GATT Negotiations would result in a "balanced outcome" for developing countries; and ensure that India's interests were safeguarded (Lok Sabha Qn. No.8334).
>
> On 17th May, 1990 the Indian Government repeated, "The Indian delegation also reiterated its stand that it would not negotiate under the threat of retaliation under Super 301 (Rajya Sabha Qn. 221).
>
> On 9–10 August, 1990, the Government reported that there would be no negotiations under threat of retaliation but admitted that the U.S. had stayed its hand because of India's potential through (its) participation ... in negotiations on (TRIMS and Services)" (Rajya Sabha Qn. 46; Lok Sabha Qn. 883).
>
> On 31st August, 1990, the Government admitted that the comprehensive package of the developed nations in GATT "did not ... take our development

and other concerns fully into account." The Government claimed that India had "held its position" in GATT and much depended on the ability of the developing nations to "stand together and firmly" in the final phase of negotiations" ...

In another statement it was also repeated that India will not negotiate under threat of retaliation (Statement in reply to Lok Sabha Qn. 3868).

On 28th December, 1990, the Government declared that its stance in GATT was that developing countries are different and unique and that Indian labor should be able to travel to industrialized countries temporarily. Aspects of India's tentative position were stated in one line policy statements on textiles, patents and services. (Lok Sabha Qn. 382).

However, with the change of Government in June, 1991, a process of adjustment and reversal seems to have resumed once again.

By 16th July, 1991 the stance that India would not negotiate under threat of retaliation was softened and India simply "regretted the unilateral decision of the U.S. while these issues are already being negotiated" (Rajya Sabha Qn. 127).

On July 19, 1991 the Government talked of "different perceptions on patent and trademarks" from the U.S.; but took no stand. (Lok Sabha Qn. 418).

On 11th September, 1991 the Government reiterated that there was no proposal to amend the Patents Act (Lok Sabha Qn. 6771) but stopped short of reiterating the position that the present law was adequate.

On 25th December, 1991, the Government admitted that the Dunkel proposals would fundamentally alter various aspects of the economy including patents.

Thus, it is evident that during the first five years of the Uruguay Round, the Indian Government failed to make any substantive policy statement to Parliament, the State Assemblies, the chief Ministers or the people. The Union Government failed to issue any position paper detailing the status of the negotiations, the position taken by various countries, the proposed changes to domestic legislation and anticipated consequences of signing the Treaty."[5]

This evasive conduct on the part of the Government continued.

After some time, the Arjun Singh Committee was informally established in 1992–93. Its sessions were in camera. Its report remained secret. One of the Committees of Parliament, headed by Shri Gujral was very critical of the implications of the Treaty on India's people and its economy. This made little difference to the government which knew it had the power to do what it wanted. The Indian constitutional system does not keep an eye on treaties which are signed by the Executive without submitting to the democratic process.

It is necessary to examine the framework of the Indian Constitution in relation to treaties. The Union Government has the power to legislate on treaties. This legislative power is covered by various 'entries' in the Constitution exclusively authorizing the Union to legislate on certain matters. For our present purposes, the relevant entries are in List I, Entries 10 to 14:

"10. Foreign affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.
12. United Nations Organisation.
13. Participation in international conferences, association and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries..."

In addition, Article 253 of the Constitution states:

"Legislation for giving effect to international agreements.-Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

When these two provisions are read together, they imply that (a) the Union has the exclusive power to deal with foreign affairs in general and treaties in particular; and (b) that any legislation which is undertaken to implement any "treaty, agreement, or convention ... or any decision made at any international conference, association or body" (Article 253) *can collapse Indian federalism* by submitting the Union to legislate on subjects otherwise within the legislative domain of the States. To illustrate, the WTO treaty deals with agriculture. But, agriculture is an exclusive subject of legislation and executive action reposed in the States. If the Union Parliament wants to legislate on agriculture to implement a treaty, it can collapse Indian federalism to do so. Thus, the implications of the treaty making power for Indian federalism can be very far reaching.

Given the broad mandate of the Constitution, it is within Parliament's gift to legislate on treaty making. Parliament could easily lay down a procedure for making treaties. Such a procedure could include ensuring (a) dissemination of preliminary information on treaties to people, (b) inviting public debate, (c) ensuring parliamentary discussion, (d) laying down that treaties will not be binding unless ratified and (e) ensuring a legislative ratification procedure in consultation with the states on matters concerning them. These processes may be differentially applied to various kind and classes of treaties. *In fact, Parliament has never exercised its powers to discipline treaty making within a legislative framework.*

But, before we go further, we should examine how the executive is authorized to exercise the power of treaty making without legislation. Normally, the job of the executive is to execute, implement and enforce laws. In the case of treaty making, the Constitution gives the legislature the power to legislate on treaty making, but gives no specific power in this regard to the executive. This cannot mean that until parliament legislates, the Indian government is helpless and cannot negotiate or enter into treaties. Such helplessness cannot be imposed on the executive. In the *Punjab Text Book case*[6] (1955), the Supreme Court concerned itself with the width of the executive power in the absence of legislation. The Court took the view that the executive power of the Union can be exercised on all such matters in relation to which the Union has the power to legislate. Likewise, a State Government can exercise power on such matters on which the State legislature has the power to legislate. Thus, treaties could be entered into by the Union. Once entered into, they

may be binding internationally, but they would not create rights in India unless they were implemented by legislation. The executive act of entering into a treaty can be debated in Parliament. Implementation would require legislation to be enacted through the parliamentary system.

Thus, even though there is some potentially possible accountability to the legislature in respect of treaty making power, this system of exercising the executive power without being authorized to do so by legislation could create problems for Indian governance – giving rise to the need for safeguards. These safeguards were provided in various decisions of Indian Courts and constitutional understandings by which the potential excesses of the executive power could be harnessed. In the *first* place, no rights of an individual can be taken away or invaded by merely an exercise of the executive power. In one case, the Supreme Court held:

> "...Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority..."[7]

Indeed it has been observed:

> "...The quintessence of our Constitution is the rule of law. The *State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts.*"[8] (emphasis added)

The exercise of the executive power cannot infringe the rights of an individual:

> "...If the executive action taken by the State Government encroaches on any private rights, it would have to be supported by legislative authority, for under the rule of law which prevails in our country every executive action which operates to the prejudice of any person must have the authority of law to support it..."[9]

It should be borne in mind that the treaty making power is no more than an exercise of executive power.

The second safeguard is that a fundamental right guaranteed by the constitution cannot be infringed by a pure exercise of the executive power. In a series of cases, the Supreme Court has made it clear that the authority of law is necessary to regulate or restrain any fundamental rights of people and their various freedoms.[10]

Thirdly, in respect of treaties, the doctrine of incorporation ensures treaties will not become part of the law of the land unless Parliament enacts legislation to implement them. But, this rule has to be modified in two distinct ways. If a rule of international law or a treaty does not conflict with an Indian law, it may be given weight in interpreting laws as well as interpreting the exercise of various executive powers sanctioned by the Constitution.[11]

While this principle of interpretation is as inchoate as its application, its presence must be understood to comprehend the import of the treaty making power on Indian governance. Equally, in the important decision of *Vishaka*, (1997), the Supreme Court proceeded on the basis that rights-enhancing treaties may be read into the

Indian Constitution to expand and elaborate the scope of the fundamental rights guaranteed to citizens and others. The Court gave directions about the procedure to be followed until legislation was enacted on the subject.

To this extent, we can perhaps, say that the treaty making in India suffers from some constitutional discipline. But the issue is not whether some safeguards exist in respect of making and enforcing the treaty norms within the domestic national or domestic legal system. The real point is whether India possesses a democratic and accountable system whereby treaty making is not just seen as an elite executive power which is exercised without reference to the people. *There is an urgent need to democratize the treaty making power.*[12]

This has become particularly important in our day and age of multi lateral treaties. WTO is a multi lateral treaty. Such treaties (a) create and consolidate norms that are to be followed, (b) lay down processes and institutions to monitor the working through of rights and obligations arising out of the treaty and (c) import dispute settlement procedures and fora with enforcement mechanisms which will be put into effect as part of the international law system even if the treaty has not been implemented within the domestic national law of a signatory state. Such treaties are self fulfilling. They pose a threat to a country by creating an enforcement system of rights and obligations even through the treaty making process which by passes the democratic parliamentary system.

This is eminently true of the WTO which firstly lays down various predatory norms which mean different things to powerful nations as opposed to weaker nations. These norms are mandatory. In the case of patents, India was forced to change its patent laws even though parliament had initially refused to do so.[13] If India had denied such a change to American pharmaceutical companies, it would have been open to sanctions and pressures from the dispute settlement machinery. A case was filed. The pressure of filing the case was enough. India gave in.

III. Confronting the WTO

The WTO raises a number of issues that confront democratic governance. These may be broadly identified as follows:

(a) Sovereignty issues

There is a distinct loss of sovereignty in that the treaty norms cover a large number of subjects on which Parliament and India's state legislatures have the power to legislate. The treaty does not directly take away this power of legislation. But the direct and inevitable effect of the treaty is that the WTO's prescriptions are 'must do' provisions which no legislature can avoid without inviting threats, sanctions and penalties from the powerful nations of the international community. Since the WTO system is self executing, it is no real comfort that the incorporation theory requires legislation to implement the WTO.

(b) Federal issues

Since the WTO deals comprehensively with a large number of sectors of the economy,

it necessarily impinges on the exclusive empowerments of the state. Agriculture is a case in point. Thus, the States of Orissa, Tamil Nadu and Rajasthan had filed cases in the Supreme Court raising federal disputes against the Government of India. But some of these cases were withdrawn and others went were put on the back burner and went by default. By the simple signing of a pen, federal interests became vulnerable to collapse without the States even being consulted on the treaty.

(c) Fundamental Rights

The WTO has an inevitable impact on a number of guaranteed fundamental rights. TRIPS affects the availability of medicine; and therefore the right to health. Agricultural aspects affect food security and the right to food and livelihood. At a time when farmers are committing suicides due to seeds from multi nationals and crop failures, the right to livelihood is affected as also the right to pursue one's profession.[14] Vast pressures are going to be put on various vulnerable trades, professions and occupations.

(d) Democracy

There can be no doubt that the entire process of treaty making is an executive process in which the democratic process is changed. People have a right to know of treaties, to be informed as party of the treaty making process and have participatory rights in the process. This is independent of the Union's duty to consult the State governments especially in matters that affect the federal system.

Of their own will, the Indian government will not readily accede to demands to democratize the treaty making process. It may be recalled that in the exercise of constitutional power, successive governments were weary of subjecting themselves to judicial scrutiny. When the Supreme Court considered the broad issue of the exercise of the President's power in matters relating to pardons, it imposed a due process and judicial review.[15] Again the power to impose President's Rule was hitherto immune from judicial review. In the *Bommai* case (1994) as, indeed, the Bihar case (2006), judicial scrutiny has been superimposed.[16] If all these wide ranging powers can be subject to judicial scrutiny, there is little reason to suppose that the treaty making power should not be subjected to a responsive democratic framework and examined in respect of the extent to which it infringes federalism, sovereignty, fundamental rights as well as democracy. All these four aspects of constitutional governance in India are part of the basic structure of the Constitution.

Issues connected to the WTO Treaty must go to the Supreme Court which must examine their import on constitutional governance in India, place the treaty making power in a democratic framework and consider the manner and extent to which the provisions of the WTO infringe constitutional limitations. The Court should examine the validity of the various provisions and give directions.

The treaty making power is an exercise of the executive power. Such a power cannot be allowed to threaten the very basis of India's constitutional governance by surrendering to a predatory of globalization in the name of development. This monograph raises and resurrects important issues which should not be allowed to lie fallow.

Notes

1. (Thomas L. Friedman: *The Lexus and the Olive Tree* (2000, Anchor Books, New York) xvi – taking the idea that the world is 10 years old from a Merrill Lynch advertisement).
2. Alan Rugman: *The End of Globalization:* (London Random House).
3. See R. Dhavan: "A Monopoly by any other name" in R. Dhavan et. al: *Conquest by Patent* (National Working Group on Patent Laws, New Delhi 1993).
4. This speech was widely reported in Times of India, Hindustan Times, Hindu and Statesman of 18 August 2006.
5. Extracted from Report of the Peoples Commission (1996).
6. Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225.
7. Bennett Coleman Co. v. Union of India, (1972) 2 SCC 788 at para 27.
8. Bishambhar Dayal Chandra Mohan v. State of U.P., (1982) 1 SCC 39 at paras 27 & 41.
9. Naraindas Indurkhya v. State of M.P., (1974) 4 SCC 788 at paras 10& 21.
10. Kharak Singh v. State of U.P., (1964) 1 SCR 332 at 339; Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615 at paras 16-17; Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225 at 239.
11. Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey, (1984) 2 SCC 534 at para 5:

    > "...The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or not, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield..."

12. R. Dhavan: "Treaties and People: Reflections" (1997) 39 Journal of the Indian Law Institute 1–46.
13. For the earlier law and its operation see R. Dhavan et al: "Whose interest?

Independent India's Patent Law and Policy" (1990) 32 Journal of the Indian Law Institute 429–477; R. Dhavan et al: "Conquest by Patent: The Paris Convention Revisited" (1990) 32 Journal of the Indian Law Institute 131-178; R. Dhavan et al: "Patent Monopolies and Free Trade: Basic Contradictions in Dunkel Draft" (1995) 37 Journal of the Indian Law Institute 195–208; R. Dhavan: "A Monopoly by any other name" in R. Dhavan et. al: *Conquest by Patent* (National Working Group on Patent Laws, New Delhi 1993).

14. C.E.S.C. Ltd. v. Subhash Chandra Bose, (1992) 1 SCC 441; Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545; Delhi Transport Corpn. v. DTC Mazdoor Congress, 1991 Supp (1) SCC 600; Bandhua Mukti Morcha v. Union of India, (2000) 9 SCC 322.
15. Satpal v. State of Haryana, (2000) 5 SCC 170; Bikas Chatterjee v. Union of India, (2004) 7 SCC 634; Maru Ram v. Union of India, (1981) 1 SCC 107.
16. S.R. Bommai v. Union of India, (1994) 3 SCC 1; Rameshwar Prasad (VI) v. Union of India, (2006) 2 SCC 1.

The Executive Summary

The core question with which the author deals within this booklet centres round the proposition that the Central Government has no extra-constitutional power to be exercised at international plane *de hors* the mandatory constitutional restrictions as even at the international plane it has no hip-pocket having unbridled power. 'It is well established as a rule of customary international law that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it, since the state's organs and representatives must have exceeded their powers in concluding such a treaty.'

The Executive government signed and ratified the Uruguay Round Final Act without taking the nation in confidence by obtaining our Parliament's approval, and without conforming to the constitutional limitations as if the Executive was signing and ratifying a Treaty like the Treaty of Versailles, or the Treaty of Surrender. But, on proper analysis, that Treaty is no different from the Treaty of Surrender as it is in complete defilement and defacement of our Constitution by subjugating the nation under a *pactum de contrahendo* to a regime under which (a) our Fundamental Rights have been violated; (b) the constitutionally mandated objectives of the Government are substituted by the objectives articulated under the Uruguay Round Final Act; (c) the legislative power has been shed off in favour of the WTO and other institutions arising from the cauldron of the Act as their overt and covert commands create a situation of *fait accompli* to coerce Parliament to enact law toeing such lines, and as also because the Executive makes a trespass on several legislative fields, yet not occupied by Parliamentary enactments, thereby precluding our Parliament to legislate in future on such fields as they would stand occupied by the WTO commands masquerading as the policies of the government implemented under Art 73 of the Constitution; (d) the judicial power has been illegally granted to foreign bodies, like the Disputes Settlement Body by reducing even our Supreme Court to the level of a subordinate court of residuary jurisdiction; (e) our domestic institutions, like Parliament and the Superior Courts are bidden to conform their laws to the obligations under the Uruguay Round Final Act; (f) the executive has in effect exercised powers of constitutional amendments, even in matters which not even our Parliament can amend in exercise of its constituent power; and (g) even some of the profoundest principles of constitutional polity, of which the earliest masterly exposition were done by Chief Justice Marshall in *Marbury*, stand overridden.

This author agrees with the findings of in the *Report of the Peoples' Commission on GATT* (by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai , the former Judges of the Supreme Court, and Rajinder Sachar, the former Chief Justice of Delhi High Court) that our adoption/ratification of the Uruguay Round Final Act is unconstitutional (a) for being the Executive's act under the opaque system abdicating our sovereignty in socio-economic space, (b) for breaching the basic features of our Constitution, (c) for violating the mandatory constitutional limitations under Articles 73 and 253 of the Constitution, (d) for violating the constitutionally mandated

principles and directives viz. (i) Constitutional basics, (ii) Judicial Review, (iii) Treaty-making power,(iv) Federal structure, (v) Fundamental Rights, (vi) Democracy, and (vii) Sovereignty. Another Commission (consisting of Shri I.K.Gujral, Prof Yashpal, Shri B.L.Das, Dr Yusuf Hamied and Dr. Rajeev Dhavan) also came to similar conclusions. Treaties in every civilized and democratic country world over are done with Parliamentary consent obtained after proper deliberations. But treaties in our country are made in an opaque system in total indifference to the Constitution.

It is the time to question the constitutionality of our acceptance of the obligations under the World Trade Organization seeking a rule that the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the Final Round of the General Agreement on Tariffs and Trade, the Agreement Establishing the World Trade Organization, and our participation in the World Trade Organization as a member of that organization, is repugnant to the provisions of our Constitution and therefore, unconstitutional.

This booklet is a bye-product of a Writ Petition going to be filed soon raising issues including these:

(i) seeking a declaration that the Central Government must conform to the constitutional limitations holding that it has no hip-pocket to hold any reserve power to be exercised at an international plane;

(ii) praying to hold that to the extent the impugned Treaties violate mandatory constitutional limitations the impugned Treaties, both in formation and implementation, are bad; and, hence, domestically inoperative;

(iii) seeking directions to the Executive to take steps/ initiatives so that Parliament frames law under entry 14 ('Entering into treaties and agreements with any foreign countries and implementing of treaties, agreements and convention with foreign countries.') of the Union List of the Seventh Schedule to the Constitution; and

(iii) seeking a declaration of the right constitutional perspective under which a Treaty can be negotiated, adopted, and ratified.

It has been shown on good authorities that our Supreme Court has an ample jurisdiction to consider all the issues aforementioned, and is competent to hold a Treaty *domestically non-operative* to the extent it is beyond the constitutional *competence* of the contracting party , and also to direct the Central Government to take corrective and remedial actions even at international plane so that the constitutional limitations are not breached.

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Author of *The Judicial Role in Globalised Economy*

Shri Shiva Kant Jha was born in 1940 in the family of distinguished freedom fighters. He too had contributed to our country's Struggle for Freedom. He did his M.A. from Bihar University and LL.M from Patna University standing first at both the examinations. He specialized in Public International Law. He became a lecturer in Bihar University at the age of 20, and soon was appointed a permanent post-graduate lecturer in the Magadh University where he worked till 1964 when he joined the Indian Revenue Service which he served in various capacities retiring in 1998 from the post of the Chief Commissioner of Income-tax.

He was enrolled as an advocate in 1977; and was for about 15 years a paper-setter and examiner for the LL.M. Exam of the Calcutta, Patna and Nagpur Universities. He was a member of the Council for Higher Legal Studies of Nagpur University. He conducted and participated in several seminars; wrote several articles, and had the good luck of getting a reference in *Property Problems in the Law of Sales* written by Dr T.B. Smith, a jurist of international eminence who had been the Chairman of the Scottish Law Commission. He is the author of *The Judicial Role in Globalised Economy* which received high appreciation from persons like Shri D.P. Wadhwa, a former Judge of the Supreme Court; Shri Shanti Bhushan, Sr. Advocate of the Supreme Cort; Dr. M.L Upadhyaya, former Dean & Head of the Department of Law of Calcutta University; Prof Arun Kumar of the JNU.

He joined the Bar of the Supreme Court of India in 1998. As a lawyer he has conducted many important cases including the celebrated PIL challenging the misuse of the Indo-Mauritius Double Taxation Avoidance Convention which he argued before the Delhi High Court and the Supreme Court. The High Court, in its judgment, recorded words of appreciation by observing:

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

He is the founder-director of the *Bhagavad-Gita Swadhyaya Kendra* at Laheriasarai, and is the founder-secretary of the Gopi Kant Jha-Draupadi Devi Charitable Trust.

Chapter 1

Treaty Making Power: The Context

I

To provide a sound perspective for examining the constitutional validity and propriety of our executive government signing and ratifying the Uruguay Round Final Act, which set up the WTO, it is worthwhile to examine the ambit and reach of the Central Government's Treaty making power under of the Constitution of India, a subject yet not decided by any court by putting this issue under central focus.

Very often *Maganbhai v. Union*[1] is considered as stating law on the point, but this view is incorrect for various reasons. The treaty-making power, as such, was not raised in that case. The dispute about the boundary between India and Pakistan in the Rann of Kutch, which had led to an armed conflict, was brought to an end by referring the dispute to an International Tribunal, by whose award both countries agreed to be bound. The issue was decided in view of the International Award. The observations on the treaty-making power were casual as the issue did not turn on Treaty Making power. Two points are worth noting:

(i) Neither the issues of constitutional limitations nor the governing principles of public international law were presented before the Hon'ble Court, nor were these even noticed by the Court.

(ii) The decision in *Maganbhai* can stand even if the judicial extraversion on the treaty-making power is respectfully ignored.

(iii) The observations of Lord Atkin in *Attorney General for Canada v. Attorney General for Onterio*[2] were quoted with approval both in the majority judgment delivered by Chief Justice Hidayatullah and in his concurring judgment by Justice Shah in *Maganbhai v. Union of India*[3] without taking into account the relevant provisions of our Constitution.

In *Maganbhai* the observation on Treaty-Making power is just an *obiter.* The learned Chief Justice commented:

> "The Constitution did not include any clear direction about treaties such as is to be found in the United States of America and the French Constitutions."

"*A Consultation Paper on Treaty-Making Power under our Constitution*" placed before the National Commission to Review the Working of the Constitution perceptively observed (in para 10):

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[1] AIR 1969 SC 783
[2] AIR 1937 PC 82
[3] AIR 1969 SC 783 (para 30 & 81)

'If I may say, with the greatest respect at my command, the above statement of law does not appear to take notice of the effect of placing the treaty-making power in the Union List which necessarily means that Parliament is competent to make a law laying down the manner and procedure according to which treaties and agreements shall be entered into by the Executive as also the manner in which they shall be implemented. It bears repetition to say that under our Constitution, treaty-making power is not vested in the Executive or the President – as has been done in some other Constitutions. It is squarely placed within the domain of the Parliament. Theoretically speaking, Parliament can by making a law prohibit the Executive to enter into a particular treaty or a particular kind of treaties; similarly, it can also direct the Executive to enter into a particular treaty or may disapprove or reject a treaty signed and/or ratified by the Executive. It is a different matter that Parliament has not chosen to make a law in that behalf, leaving the Executive totally free to exercise this power in an unfettered and, if I may say so, in an unguided fashion."

The most glaring mistake in *Maganbhai* was not to see the patent differentia which existed vis-à-vis the British Constitution and the Indian Constitution, and also to slur over the obvious analogy that exists between the Indian Constitution and the U.S Constitution, despite some procedural differences.

In *Gujarat v. Vora Fiddali*[4] our Supreme Court held that in India Treaties occupy the same status, and adopt the same treaty practice as in the United Kingdom. The British Parliament which enacted G.I. Act, 1935 did not embody the American view of treaties in it. The existing law was continued by the G.I. Act,1935 by the Indian Independence Act 1947, and by our Constitution.[5] But the Treaty-making power in the U. K. is an exercise of the Crown's Prerogative to the extent recognized as still subsisting by the courts and Parliament. Besides, the Crown is under no constitutional constraints (which over-grip our Central Government), and it possesses certain inherent powers which can be used at the international plane. But our Central Government is denied any such power as its powers are only constitutionally conferred powers. What differentiates our constitutional position from the British constitutional position went unnoticed.

II

Central Government's Treaty-making power: delineation of perspective

(a) General Treaty-making power

In *Attorney-General of Israel v. Kamiar*, President (Justice Agranat) perceptively observed[6]:

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[4]AIR 1964 SC 1043

[5]*Gujrat v. Vora Fiddali* (1964) AIR, SC 1043

[6]*A.G. of Israel v. Kamiar* ILR 44

"I will summarize what I have said by stating that the system in force in Israel for the conclusion of international treaties is similar to that which is characteristic of the English legal system and which was described by Lord Atkin in *Attorney General for Canada v. Attorney General of Ontario* [1937] A.C. 326 at 347 in the following words:

> 'Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval....Parliament ..... has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created , while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. *In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliaments will either fulfill or not treaty obligations imposed upon the State by the executive.* The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.'" [emphasis supplied]

Israeli courts act in accordance with principles similar to those applied by English courts where a statute is in conflict with a treaty, a statute prevails..."[7]

The observations of Lord Atkin in *Attorney General for Canada v. Attorney General for Onterio*[8], which emanated from Canada and, were quoted with approval both in the majority judgment delivered by Chief Justice Hidayatullah, and in his concurring judgment by Justice Shah in *Maganbhai v. Union of India*[9], should be read in the context of the facts of that case. Lord Atkin was stating law in the context of the British jurisprudence, and treaty practice. But he did say something which is of paramount importance for us whose Government is under constitutional limitations. He observed:

> "But in a State where the Legislature does not possess absolute authority: in a federal State where legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the classes of subject matter submitted for legislation, *the problem is complex*. The obligations imposed by treaty may have to be performed, if at all, by several legislatures: and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible: but possibly of several Parliaments to whom they stand in no direct relation. *The question is*

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[7] Oppenheim's *International Law* 9thED p. 79
[8] AIR 1937 PC 82
[9] AIR 1969 SC 783 (para 30 & 81)

not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures." [italics supplied]

The Privy Council in this case stated two things:

(a) The Privy Council stated the typical British approach in this case emanating from the Canadian jurisdiction "as the Executive Government and Authority of and over Canada is vested in the Queen."

(b) The Privy Council held that legislation implementing an international convention was void as it contravened Sections 91 and 92 of the British North America Act, 1867.

Lord Atkin's distinction, between (1) the *formation*, and (2) the *performance* of the obligations created under a treaty, is correct and well understandable under the British constitution. Under the British Constitution the Crown is not a creature of the constitution, it is, of course, an integral part of the constitution. The British constitutional history is an expanded metaphor of the struggle conducted over centuries in the name of people against the absolute power of the Crown. Even this day there is nothing wrong in saying that the Crown has all the powers conceivable except those which it lost to Parliament and the courts in course of the country's grand and majestic constitutional history. It is, hence, understandable to think that the Crown has certain inherited and inherent powers. Treaty is done in exercise of prerogative power by the Crown as it concerns the Crown's foreign affairs. The exercise of this power was not of much consequence till the beginning of the 20th century. The Crown had all the conceivable power at the international plane as it had not been tamed by any constitutional mandate. Hence the formation of a treaty at international plane was wholly in the Executive's province. *In India the Executive possesses no extra-constitutional power.* As a creature of the Constitution it is subject both in the matter of the *formation* of a treaty and the *performamce of obligation,* to the limitations placed by the Constitution and the law. Whether a member functions in Delhi, or Detroit, it must conform to the Rule of Law. Even in the United Kingdom the predominant view is that even the Prerogatives of the Crown are under limitations. Despite the specifics of the unwritten and evolutionary constitution the treaty-making power of the Crown is not without limits.

The Crown still retains powers which Parliament or the Courts have not chosen to deprive it of. We call this prerogative power. Under our Constitution no such cobwebs of the past survive. In India the Executive would sink or swim in terms of the Constitution. But limitations on the prerogative of the Crown are now well recognized[10] even in the U.K. Quite recently the House of Lords set a limit to the war prerogative when it declared that, even in time of war, the property of the British subject cannot be requisitioned or demolished without making compensation to the owner of it: see *Burmah Oil Co(Burma Trading) Ltd v. Lord Advocate*[11]. It has also circumscribed the treaty prerogative by holding that it cannot be used to

[10]*Laker Airways Ltd. v. Department of Trade* [1977] 2 All ER 182 At 192–193
[11][1964] 2 All ER 348

violate the legal rights of a British subject, except on being liable for any damage he suffered: see *Attorney-General v. Nissan*[12].

(b) Treaty-making Procedure in the U.K, the U.S.A. and Australia: the latest trends

(i) The British Treaty-making Procedure

The British Treaty-making practice has been well explained by the House of Commons Information Office[13]. The effect this exposition is to point out:

(i) The lack of formal parliamentary involvement in treaty-making differentiates the British Parliament from most other national legislatures. With few exceptions, most written constitutions stipulate that parliamentary approval of treaties is required before ratification for at least some categories of treaty.

(ii) The difference between UK and practice elsewhere is actually smaller than it appears and there are a number of conventions which ensure the scrutiny of treaties by Parliament:

- Treaties with direct financial implications require the assent of Parliament because they affect revenue. The most common type are bilateral agreements to avoid double taxation. The texts are laid in the House of Commons in the form of draft Orders in Council and are occasionally debated.
- Treaties which stipulate Parliamentary approval - where an agreement is of a political nature and is known to be controversial, one or both of the governments involved may wish to safeguard its position by writing an express requirement for parliamentary approval into the text.

(iii) The effect of the acceptance (in October 2000) by the British government of the recommendations made by the Procedure Committee in its second report of 1999-2000, *Parliamentary Scrutiny of Treaties* was to grant the departmental select committees a greater role in the scrutiny of treaties. The Government undertook to provide a copy of any treaty laid before Parliament under the Ponsonby Rule, with an Explanatory Memorandum, to what it regarded as the most appropriate departmental select committee, so that the committee could carry out an inquiry if it so wished. The committee could choose to pass it on to another committee or committees if it thought this appropriate. The normal time for scrutiny by the committee(s) would still be 21 days, although "the Government would aim to respond positively" to requests for an extension. The Procedure Committee also recommended that the Government undertake to accept a recommendation made by the relevant select committee and supported by the Liaison Committee for debate on the

[12][1969] 1 All ER 629 at 637

[13]Fact-sheet P14: Procedure Series: Revised June 2003: House of Common Information Office *http;//www.parliament.uk/directories/hcio.cfm* 5 July 2006

floor of the House of a treaty requiring ratification and having major political, military or diplomatic implications.

The fundamental reasons at work under the British procedure have been thus stated by Oppenheim[14]:

> 'The departure from the traditional common law rule is largely because according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown, which would otherwise be in a position to legislate for the subject without parliamentary assent. Since failure to give any necessary internal effect to the obligations of a treaty would result in a breach of the treaty, for which breach the United Kingdom would be responsible in international law, the normal practice is for Parliament to be given an opportunity to approve treaties prior to their ratification and, if changes in law are required, for the necessary legislation to be passed before the treaty is ratified."

The position under our Constitution is materially different. But, it is worth noting that in the U.K. the Crown takes Parliament under so much of confidence that the threats of later embarrassment is avoided. In our country Parliament is ignored.

It is submitted, that whatever role that the Crown still possesses in the U.K. has no persuasive effect under our Constitution rigidly subjecting all the State organs to constitutional limitations and discipline. The impact of the democratic governance was amply felt in Britain also as is clear from the ways the two World Wars were declared. The First World War came as though King George V still possessed undiminished the prerogative of Henry VIII. At 10.30 p.m. on 4 August 1914 the king held a privy council at Buckingham palace, which was attended only by one minister and two court officials. The Council sanctioned the proclamation of a state of war with Germany from 11 p.m. That was all.[15] But in the case of the Second World War it was the House of Commons which forced war on a reluctant British government. Parliament approved it. It meant the approval by the people of Britain. Sir Thomas Smith had said aptly the following about on Parliament as far back 1565!:

> "And, to be short, all that ever the people of Rome might do either in Centuratis comitiis or tributes, the same may be done by Parliament of England which representeth and hath the power of the whole realm, both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what preeminence, state, dignity, or quality so ever he be, from the prince (be he king or queen) to the lowest person in England. And the consent of the Parliament is taken to be every man's consent"[16]

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[14]Oppenheim's *International Law* 9th Ed Vol I Peace p. 60–61

[15]A.J.P. Taylor, *English History 1914–1945* (Oxford) p.2

[16]quoted from *De Republica Anglorum* 48–9 in G. R. Elton, The Tudor *Constitution* (Cambridge) p. 235

(ii) The U S Treaty-making Procedure

In the United States Constitution provides in Article VI, cl. 2, that:

> all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, all treaties made under the authority of the United States are to be the supreme law of the land, and superior to domestic tax laws [*Cook v. United States*, 288 U.S. 102 (1933)].

In the United States the Uruguay Round Final Act, was accepted by adopting a democratic procedure. It was adopted by an enactment by the Congress[17] after a comprehensive deliberations. It prescribed the mode of implementation, and it declared that in Section 3512 the Relationship of Agreements to United States by stating in clear words that United States "law to prevail in conflict". It said, "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." It required the Trade Representative to oversee a Federal-State consultation process for addressing issues relating to the Uruguay Round Agreements that directly relate to, or will potentially have a direct effect on, the States. The Final Act was enacted. This procedure was, perhaps, adopted as the Congress has the constitutional authority to regulate commerce with foreign nations under Article 1 of the Constitution. It is felt that the U.S.A was conscious of the all embracing dimensions of the Uruguay Round Final Act which was not a treaty in the usual popular sense contemplated by the U.S Constitution in Art VI Cl 2. It is distressing that this practical prudence was denied to our authorities.

A distinction is made in the U.S.A. between treaties and agreements. It deserves to be mentioned that the Vienna Convention on the Law of Treaties applies only to treaties and not to International Agreements (Article 2)]. The agreements are generally Executive agreements entered into and signed by the President in exercise of his Executive power. There is a school of thought in the U.S.A. that such agreements are not 'treaties' under the US Constitutional frame of reference. While adopting the Uruguay Round Final Act, they must have had in their mind what Justice Homes had said in *Missouri v. Holland*[18], after considering various aspects of Constitutional limitations, that even a treaty can run the risk of being struck by *"some invisible radiation from the general terms of the Tenth Amendment."*

The above procedure deserves to be contrasted with the Procedure that was followed in India in ratifying the Uruguay Round Final Act. *The Peoples' Commission on GATT* (consisting of by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges of great distinction) gives a comprehensive account how our government adopted the Final Act without Parliamentary approval,

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[17] *http://caselaw.lp.findlaw.com/casecode/uscodes/19/chapters/22/subchapters/i/parts/c/sections/section%5F3532.html* accessed 6 July 2006

[18] 252 US 416, 64 L.Ed. 641 (1920)

and without taking the nation in confidence. It was ratified through an executive act done under an opaque system. This aspect of the matter would be developed in Chapter II.

(iii) Position in Australia

The Australian Constitution Act, 1900 creates a federal polity distributing powers between the Federal Government and the States. "*A Consultation Paper on Treaty-Making Power under our Constitution,* placed before the National Commission to Review the Working of the Constitution perceptively summarizes the Australian position thus:

> "Under Section 61 of the Constitution, the power to enter into treaties is an Executive power. ....Be that as it may, a practice has developed in that country whereunder Australia would not ratify a treaty or accept an obligation under the treaty until appropriate domestic legislation is in place in respect of treaties where legislation is necessary to give effect to the treaty obligations. Several proposals have been made by groups of parliamentarians to provide for greater overview by Parliament of the treaty-making power and also to identify and consult the groups which may be affected by the treaty. All of them are strongly critical of the lack of transparency in the treaty-making process. One of the NGOs in that country, namely, National Farmers Federation has suggested that not only the treaties should be laid on the table of the House before they are finalized but the text of the treaty should be accompanied by a statement clearly setting out the important treaty obligations being undertaken by the country thereunder, what effect the treaty will have on the Australian national interests including economic, social and environmental and the extent of consultation already held by affected groups and so on – impact assessment statement, if one can call it, for short. In May, 1996, the Foreign Minister made a statement to the House of Representatives outlining a new treaty-making process. According to this, the treaties will be tabled at least for 15 sitting days, after signature but before they are ratified, to allow for parliamentary scrutiny. This arrangement was to apply to both bilateral and multi-lateral treaties and to their amendments. Where however urgent action has to be taken, a special procedure was devised under which the Agreements will be tabled in the House as soon as possible with an explanation of reasons for urgent action. Further, the States will be consulted before entering into treaties and any particular information about the treaties will be placed before the Premiers and Chief Ministers' Department. The Government has also agreed in principle to append a statement indicating the impact of the proposed treaty to the papers laid before the House. A joint Standing Committee on treaties was established comprising Members of both Houses and consisting of Federal and State Officers who shall meet twice every year and consider and report upon the treaties tabled before the House."

In *Australia* Art 50 of the Constitution provides that treaties containing provisions modifying or completing existing laws require for their validity the approval of the

National Assembly, which at the time of giving approval may decide that treaty should be implemented by the promulgation of laws.

(iv) Constitutional Provisions in France, Ireland, Japan and South Africa, and others

Under the French Constitution the President is more powerful than the all other organs of the Government. Per Art 52 he can negotiate and ratify treaties. But Art 53(1) prescribes:

> "Peace treaties, commercial treaties and treaties or agreements relating to international organization, or implying a financial commitment on the part of the State, or modifying provisions of a legislative nature, or relating to the status of persons, or entailing a cession, exchange or ad junction of territory, may be ratified or approved only by Act of Parliament."

Art 54 of the French Constitution is of importance. It says:

> "If, upon the demand of the President of the Republic, the Prime Minister or the President of one or other Assembly or sixty deputies or sixty senators, the Constitutional Council has ruled an international agreement contains a clause contrary to the Constitution, the ratification or approval of this agreement shall not be authorized until the Constitution has been revised."

Like India, *Ireland* 'accepts the generally recognized principles of international law as its rule of conduct in relations with other States [(Art 29(3)]. Art. 29 (5) and (6) of the Constitution prescribes the following:

"(5.1) Every international agreement to which the State becomes a party shall be laid before the House of Representatives.
(5.2) The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by the House of Representatives.
(5.3) This section shall not apply to agreements or conventions of technical and administrative character.
(6) No international agreement shall be part of the domestic law of the State save as may be determined by Parliament."

Under Art 73 of the Constitution of *Japan* the Cabinet 'concludes treaties. However, it shall obtain prior or, depending on circumstances subsequent approval of the Diet." Art 231 of the Constitution of *South Africa* provides detailed rules governing International Agreement: to quote—

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred in sub-section (3).
(3) An international agreement of technical, administrative or executive nature, or an agreement which does not requires either ratification or accession,

entered into by the national executive, binds the Republic without approval by the National Assembly and he Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is entered into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic *unless inconsistent with the Constitution or an Act of Parliament...*"

Oppenheim in his *International Law* [9th Ed Vol I 'Peace' pp. 56-81] has examined at length the treaty-making power and procedure of all the major countries of the world. His exposition suggests that in all major states important treaties are made with the approval of the legislative organ of the state.

(v) Parliamentary control on Tax Treaties in the U.K. and the USA, Australia, and Canada

In the U.K. the Crown's power of treaty-making, and limitations thereon, have been thus stated in Keir & Lawson's *Cases in Constitutional Law:*

> "There is no doubt that the Crown has full power to negotiate and conclude treaties with foreign states, and that, the making of a treaty being an act of State, treaty obligations cannot be enforced in a municipal court... Can the Crown bind the nation to perform any and every treaty which it makes? In general it seems that the Crown makes treaties as the authorized representative of the nation. *There are, however, two limits to its capacity: it cannot legislate and it cannot tax without the concurrence of parliament"* [emphasis supplied].

In the U.K. the Tax Treaties are approved by a resolution of the House of Commons, which means, in effect, the British Parliament itself. This effect inevitable follows from certain provisions of the Parliament Act, 1911 similar to which we have incorporated in our Constitution. Pointing out this aspect of the matter Keir & Lawson points out the following in their *Cases of Constitutional Cases* [5th Ed p. 54]:

> "Once the House of Commons had, by the Parliament Act, 1911 (1 & 2 Geo. 5,c. 13), secured the full and exclusive control of taxation, there was no reason why taxation should not be levied at once under the authority of a resolution of the House".

In the U.K a Tax Treaty is done through an Order in Council after a resolution is passed by Parliament, and is communicated to the Crown. If any provision under a treaty affects revenue, or the rights of the people, a statutory foundation must be provided. Its clear illustration is the Section 815AA *(Mutual agreement procedure and presentation of cases under arrangements),* which was inserted in the British I.C.T.A., 1988 to provide a statutory foundation to Mutual Agreement Procedure part of a Tax Treaty.

In the **United States**, the Constitution provides in Article VI, cl.2 that all treaties "shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding ". Under the US practice the President of United States explains to

the Senate the considerations involved in framing a tax treaty. The letters of Submittal and of Transmittal pertaining to the Indo-US tax treaty are comprehensively drawn for the full information of the mind of the Senate, and through that to the whole nation.

In **Canada** every Tax-treaty is an enactment under a separate Act. In *Crown Forest Industries v. Canada* (1995) 2 S.C.R. 802 the Canadian Supreme Court was considering the Canadian-US Tax treaty as done under the Canada-United States Tax Convention Act, 1984.

In **Australia** every Tax-treaty is specifically examined and integrated as a statute under the International Tax Agreements Act, 1953.

(c) Treaty-making power where the Government is a constitutional creature (as in India)

Lord Atkin, in *Attorney General for Canada v. Attorney General of Ontario,* was examining the British view about treaty-making. But he was quite conscious of the fact that in a country with a written constitution, like ours, a different set of considerations would need consideration. He mentioned this fact in so many words in his judgment itself.

The Executive under the Constitution of India is a creature of the Constitution, and, by way of constitutional logic, possesses no "inherent" sovereign power. This view is based on a mandatory norm recognized by international law also as would be evident from what Oppenheim's states in his *International Law*:

> "**Constitutional restrictions:** It is well established as a rule of customary international law that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it, since the state's organs and representatives must have exceeded their powers in concluding such a treaty..... For the United Kingdom, constitutional restrictions do not play a prominent part in the conclusion of treaties. ... Article 45 [Art 46] of the Vienna Convention – probably reflecting rules of customary international law – allows a state (by way of exception) to invoke non-observance of its internal law as a basis for invalidating its consent to be bound by the treaty only if the rule of internal law relates to competence to conclude treaties, if it is a rule of fundamental importance, and if the violation is manifest, i.e objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith."[19]

Lord McNair states the legal position in the same way. But the first point in his "Conclusion" deserves a specific notice because of its contextual relevance: to quote—

> "A treaty which is made on behalf of a State by an organ not competent to conclude treaties or that kind of treaty, or which fails to comply with any

[19] Oppenheim's *International Law* – Vol.1 Part 2 & 4 pg.1288 – para 636;

relevant constitutional requirements, such a consequent of a legislative organ, is, subject to what follows, not binding upon that State...."[20]

"In International Law, nations are assumed to know where the treaty-making power resides, as well as the internal limitations on that power.[21] J. Mervyn Jones in his article on "Constitutional Limitations on Treaty-making Power" examines the effect of constitutional limitations.[22] Two important English writers support the view that constitutional limitations are completely effective under international law[23]. It is time to give democratic orientation to international law.[24] *The New Encyclopedia Britannica*[25] aptly observes: :

"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. ..... The historical origins of this principle are identical with those of political liberty and representative government – the right of the citizens."

It would be contrary to our Constitution to grant the Executive "extra-constitutional powers". David M. Levitan has put it felicitously when he observed: "Government just was not thought to have any "hip-pocket" unaccountable powers".[26] The theory of inherent sovereign power is anachronistic, hence erroneous in the context of our type of polity we have set up under the Constitution of India. Examining the concept of Sovereignty *Oppenheim* observes:

"The problem of sovereignty in the 20th Century. The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein"

Under our constitutional frame-work the question of inherent power does not arise. The right question is: whether the government possessed the legal power to do what it has done. Prof. Laski observed :

"We have to make a functional theory of society in which power is organized for ends which are clearly implied in the materials we are compelled to use. The notion that this power can be left to the unfettered discretion of any section of society has been reveled as incompatible with the good life. The sovereignty of the state in the world to which we belong is as obsolete as the sovereignty of the Roman Church three hundred years ago". [27]

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[20]*McNair*, pp. 76–77
[21]Seervai's *Constitutional Law of India*, vol- I, pp. 306–307
[22][1941] 35 American Journal of International Law p.462
[23]Hall and Oppenheim
[24]Schuckking and Wehberg refereed by Charles Fairman in his article 30 A.JIL 131
[25]Vol. 28 p. 402:
[26]*The Yale Law Journal* Vol. 55 April, 1946, No 3 p. 480
[27]ibid p. 102

In our days International Law and International Institutions have made great strides towards making the countries of the world good neighbours[28]. Human rights have received such wide expansion and reorganizations that even the levy of income-tax has acquired a human right dimension. Our world has shrunk to become a global village. We are through a process of globalization. In this sort of the world invocation to sovereignty is meaningless. Any action and every action of a public authority is to be weighed on the calculus of rights and duties recognized under municipal law, and also under international law. Under our Constitution it is erroneous to hold that any organ of the State has any inherent Sovereign Power. This view brings to mind Hobbes' *Leviathan:* "The Leviathan or commonwealth is 'an artificial man', sovereignty is its soul, the magistrates are its joints, 'reward and punishment, by which fastened to the seat of the sovereignty every joint and member is moved to perform his duty, are the nerves that do the same in the body natural."[29] But this doctrine of inherent sovereign power of the Executive was tamed finally by *the Bill of Rights* whereunder it lost all many powers including the power over taxation, inaugurating an effective control of the Executive by Parliament.

The Report of the Peoples' Commission gives a graphic account of the **constitutional limitations** on Treaty-Making Power: to quote—

> "The limitations on the exercise of the Treaty-making power flow from certain principles which are fundamental to constitutional governance of India. The *first* is the general principle of accountability which requires government to account to the people for every exercise of power through the aegis of institutions set up by or under the Constitution. Such accountability may be through the law which lays down norms which discipline and govern the exercise of the power. Where no such law exists –and none exists to discipline the exercise of the treaty-making power – the government is not free to do what it likes. Where the government chooses to proceed without serious recourse to any form of accountability, other institutions of governance cannot stand idle by. Where Parliament is rendered powerless, other institutions must secure this accountability to such measure as may be deemed necessary. Where something is done in secret, simply breaking the veil of secrecy may be enough. It all depends on the facts and circumstances. The *second* principle which is fundamental to the rule of law is that no person's rights can be altered without reference to 'law'. If the executive simply interfere with the exercise of rights or alter them in any way other than *de minimus* infringement, this would constitutionally improper and call for the interdiction of judicial process. The *third* set constraints flow from the basic structure of the Constitution. Although the basic structure doctrine was first enunciated to contain an over-extensive use of power to amend the Constitution, the principles underlying the basic structure are also crucial aids to interpretation and factors to be borne in mind when considering the exercise of the executive power."

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[28]Misuse of a tax treaty violates the Standard of Economic Good Neighbourliness. [G. Schwarzenberger in his *Manual of International Law* states (at p. 111)]

[29]*The Oxford Illustrated History of English Literature* ed. Pat Rogers 195

(d) Art 73 of the Constitution of India

In terms of Art. 73 of the Constitution the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. That power is co-terminus with the Union's legislative power under entries 13 and 14 of List I of the Seventh Schedule[29a]. Under Art. 53 of the Constitution, the executive power of the Union vests in the President. The Constitution requires that the executive power of the President must be exercised in accordance with the Constitution. Article 73 is also "subject to the provision of our Constitution". It is true that Article 253 enables Parliament to make laws for implementing any treaty agreement or convention with any other country or countries or any decision made at international conferences, associations or other body. Article 73 (1) (b) provides for the executive power of the Union extends also in respect of the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Articles 253 and 73 (1) (b) both deal with an *ex post facto* situation, that is, a consequential situation arising out of an international treaty, agreement or convention already entered into. They confer the necessary power to make and implement such treaty, agreement, etc., but nothing can be done contrary to the Constitution of India: for example, the Union Government cannot barter away the sovereignty of the people of India by entering into a treaty making India a vassal of another country and then invoke Articles 253 and 73 (1) (b) to implement the treaty. Such a treaty would be void *ab initio* being repugnant to the basic features of the Constitution, namely, the sovereignty of the people.

In India, exercise of all powers, executive or legislative, are under constitutional limitations. Our Constitution has not granted the executive any 'exclusive' power to enter into a treaty or agreement. Our Constitution subjects the executive power of treaty making to the following two limitations:

(i) It must not contravene our fundamental rights, and must not breach the basic features.

(ii) It must satisfy the existence of the conditions precedent in exercise of power under Art 253, i.e. there must exist an agreement done by the executive without transgressing constitutional limitations.

K. Ramaswamy, J said in *S. R. Bommai v. Union of India*[30]: "The State is the creature of the Constitution". In India the executive derives power to enter into treaties from Art. 73 of the Constitution. The executive government of our country possesses no inherent powers. It is true that exercising such powers the zone of the executive operation is co-terminus with the expanse of legislative power in view of the entries 13 and 14 of List I of the Seventh Schedule. But the exercise of these derivative powers is themselves under constitutional limitations.

[29a] (13) Participation in international conferences, associations and other bodies and implementing the decisions made thereat

(14) Entering into treaties and agreements with foreign contries and implementing of treaties, agreements and conventions with foreign countries.

[30] AIR 1994 SC1918.

This treaty making power is to be read with Art 253 of the Constitution, which allows Parliament to make laws implementing a treaty notwithstanding the fact that the subject matter of the treaty is contained in List II of the Seventh Schedule containing subjects within the legislative competence. But the executive power is, as per Art 53, to be exercised it in accordance with the Constitution. Though Article 253 does not mention that it is under constitution limitations yet on proper construction even this is under constitutional limitations. It contemplates "any treaty, agreement or convention". If the executive enters into a treaty, agreement or convention in breach of the basic features of our Constitution, or the Constitution's mandatory mandate, then such an agreement, treaty or convention is constitutionally invalid: hence domestically inoperative and *non est*. Our courts, as the creatures of the Constitution, must uphold the Constitution by declaring such a treaty, agreement or convention bad. Ours is a written constitution under which all the organs of the polity are the creatures of written constitution: hence bound by its limitations, both express and implied. Our Supreme Court clearly stated in *Ajaib Singh v. State of Punjab*[31]:

> "Neither of Articles 51 and 253 empowers the Parliament to make a law which can deprive a citizen of India of the fundamental rights conferred upon him".

(e) A miscomprehension which must be removed.

The simplistic view, adopted by many under the influence of the British constitutional practice, is that a Treaty is not a matter of domestic concern unless it affects:

(a) the law of the land, and
(b) the vested rights protected under the law.

These issues are to be considered under the parameters of the Constitution of India:

(i) The Executive power, under our Constitution, is co-terminus with the powers of Parliament. But the Executive power, too, must be exercised not *de hors* the constitutional provisions. No Treaty can authorize, even in the realm of the exercise of the Executive power, to ride roughshod over our Constitution's commitments to the nation. In most matters the exercise of the Executive power "are not far removed from legislation"[32]. Hence the exercise of the executive power cannot avoid constitutional limitations.

(ii) The Executive can coerce our Parliament to implement a Treaty provisions by hoisting the dread of India's *international delinquency.* Chapter and verse can be quoted from the text-books of International Law and the decisions of the international tribunals to mesmerize and coerce our representatives[33] (as it has already happened vide Chapter II).

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[31]AIR 1952 Punj. 309 at 319.
[32]*Jayantilal Amritlal v. F.N. Rana* AIR 1964 SC 648
[33]Shiva Kant Jha, The Judicial Role in Globalised Economy p.

(iii) Executive can subject our country to several international and domestic commitments of momentous consequences. Every student of history knows that the Weimer Constitution of Germany was destroyed by the covert and overt maneuverings of the Executive Government. Perhaps, perish the thought, the bell is tolling for our Constitution too.

(iv) The *Report of the Peoples' Commission on GATT* has rightly summarized the correct constitutional principle when it said[34]:

"The Constitution makers intended the government to be possessed of an executive power which is wider than the narrower duty to give effect to legislation (see *Ram Jawawayya Kapur v. UoI* AIR 1955 sc 549). *But in exercise of this wider power, the rights of citizens cannot be taken away without specific legislative sanction and authority* (*Bijoe Emmanuel* AIR 1987 SC 788).This rule is fundamental and a necessary adjunct to the recognition of a wide executive power. Equally, in normal circumstances, it is somewhat sanguinely assumed that all exercises of the executives power would be consistent in a manner consistent with the principles of the basic structure of the Constitution. But, normal times tread unwarily into abnormality. That is why the touchstone of the basic structure has been inducted to discipline the exercise of even those special exercises of sovereign power such as the imposition of President's Rule and the like (see *S.R. Bommai* (1994) 3 SCC 1; .... The older view that the exercises of executive power are immune from judicial review has now correctly been abandoned (see *Central for Civil Services Union v. Minister of Civil Service* (1984) 3 All ER 935)."

(v) It is often said that the treaty provisions, when they offend a law, or cause prejudice to the vested rights of people, require Parliamentary consent for implementation. But the executive has open to it vast areas wherein it is free to implement treaty terms by purporting to exercise its powers in the executive realm which is much wider than the conventionally conceived legislative realm. It is submitted that this sort of fine distinction is, under the present-day polity, totally otiose and anachronistic.

(vi) The point emerges very clear through the fact that despite the laws protected under the 9th Schedule to the Constitution, the Government is liberally granting corporate *zamindaris* by facilitating the acquisition by the big corporations, almost free, huge plots of land even by uprooting many humble citizens.

(f) No Power to the Executive at the International Plane.

It is worthwhile to consider a specific constitutional question: what was the understanding at the time the Constitution was drafted, and what emerges from the various provisions of our Constitution? The Constitution vests executive power in the President but he is not in the position in which he, as Professor Woodrow

[34]At p. 140 of the Report

Wilson noted, "has the right, in law and conscience, to be as big a man as he can" and in which "only his capacity will set the limit." In India it is wrong to think that powers of external sovereignty passed from the Crown to our Republic of India. Our Constitution does not grant our Executive any external sovereignty through affirmative grants. Under our Constitution it is wrong to think that power over external affairs, in origin and in its essential character, is different from that over internal affairs. The President speaks or listens as a representative of the nation but only within Constitutional limitations. The Executive under our Constitution cannot preempt law. If this is allowed to happen, our Constitution may be driven by the Executive to commit suicide by its own boot-straps; and our Democracy will come to an end.The Constitutional limitations within which all Executive power is to be exercised are set forth itself. The Sovereign status of the Constituent Assembly had been boldly acknowledged by the great Indian leaders. Granville Austen very perceptively observed[34a] :

> "Gandhi expressed the truth first —that Indians must shape their own destiny, that only in the hands of Indians could India become herself –when in 1922 he said that Swaraj would not be a gift of the British Parliament, but must spring from 'the wishes of the people of India as expressed through their freely chosen representatives'. Twenty-four years later these words were repeated during the opening session of the Constituent Assembly; they were, some said, the Assembly's origin; all agreed that they were its justification."
> "The Assembly was the people's. As Nehru said, the British could now dissolve the Assembly only by force. 'We have gone through the valley of the shadow, and we will go through it again for true independence, he said."

Jawaharlal Nehru had declared that India's constitution-making couldnot be "under the shadow of an external authority". The Cabinet Mission had come to New Delhi to help the Viceroy set up in India a machinery by which Indians could devise their own constitution. Our Constitution was not to be one written in the colonial office of the imperial powers and passed by the British Parliament. Austen aptly points out that the desire for a "home-made' constitution is the source of what K.C. Wheare has named the "principle of constitutional " autochthony", or desire for a constitution sprung from the land itself.[35] The Constituent Assembly arrogated to itself an absolute authority to control its being. It declared:

> "The Assembly shall not be dissolved except by a resolution assented to by at least two-thirds of the whole number of members of the Assembly."[36]

The unique character of our constitution-making revealing its sovereign competence in constitution-making (in contradistinction to its acknowledgement that whilst acting as a legislative body under the federal system of the 1935 Act. Austen says:

34a. Granville Austen, The Indian Constitution, Corner Stone of a Nation p. 1 & 7
[35]K. C. Wheare, *Constitutional Structure of the Commonwealth* p. 89
[36]*Constituent Assembly, Rules of Procedure and Standing Orders* Chapter III. Rule 7

"India was an emergent , formerly colonial territory, where a sovereign people framed their Constitution in a Constituent Assembly while at the same time working a federal government that pre-existed independence –the federal system of 1935 Act."

The Indian Independence Act came into effect on 15 August 1947, merely recognizing what was *fait accompli*. In terms of Public International Law it was a mere *recognition* of cognitive nature by a defunct and uprooted foreign power. The Act did not grant sovereign status to us either in domestic sphere or at the international plane.

Our Constitution organizes and distributes the whole of the State power through its well-knit structure leaving the Executive with no hip-pocket with reserve power outside the ken of the Constitution. This deduction is amply borne out by the provisions of our Constitution viz.:

Art 53(1) The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him *in accordance with the Constitution.*

Art. 73 Extent of executive power of the Union. —(1) *Subject to the provisions of this constitution*, the executive power of the Union shall extend.....

Art. 245 Extent of laws made by Parliament and the Legislatures of the States.— *Subject to the provisions of this Constitution*, Parliament may....

Art. 372. Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but *subject to the other provisions of this Constitution*, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

David Levitan, examining an analogous issue in the context of he U S Constitution, struck an apt note by highlighting the *reductio ad absurdum* of the argument when he so perceptively said:

"Were one to assign binding effect to the more sweeping statements on the scope of the external powers, then, it would appear that treaty provisions even violative of of substantive phrases of the Constitution , i.e., the bill of rights, or the Fifth Amendment, would be binding on the United States."[37]

Reflecting on the idea of "inherent power" of the government at the international plane, David M. Levitan further observes:

"Regarding the "inherent" powers doctrine, it is well to add, that though the existence of such powers has sometimes been referred to by the courts and by writers on public law, there is little justification for the perpetuation of such a theory. Its introduction was contrary to the spirit of a written constitution, Whether or not a written constitution is the most desirable basis of government,

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[37]*The Yale Law Journal* VOL 55, April, 1946 No 3 page 467 referring to Law of Treaties, Harvard Draft (1935) 29 *Am. J. Int L*(Supp.) art 24; and W.B. Cowles, *Treaties and Constitutional Law* (1941)

as long as we live under such a document there appears little room for the theory of "inherent" powers. Instead a liberal and broad interpretation of such provisions is more in harmony with our philosophy that the Constitution limits governmental authority. The argument that the interpretation and reinterpretation of constitutional phrases in the light of modern conditions makes little more than a fiction out of the notion that we are living under the Constitution, will not be denied. Our government should continue to meet the ever changing needs of the people within the frame-work of the general philosophy of the supreme Constitution with some specific prohibitions."[38]

Michael D. Ramsey revisits the Inherent Powers Theory, and concludes his exposition (again in the context of the US Constitution):

"In short, the drafters (of the Constitution) thought about foreign affairs powers as they did other powers. Foreign affairs powers were granted to the national government, or denied to the states, by the terms of the national government's governing document. Careful attention to detail was required to achieve the best allocation of powers between the national government and the states. This is confirmed by the language of both the Articles and the Constitution, by practice under the Articles and by the drafters' own explanation of what they had written. They had no idea of an inherent division of powers into "external sovereignty" and "internal sovereignty" that automatically governed which powers would be held by the national government and which by the states, but were groping for the right balance in a very real, practical manner— carrying over allocations from the Articles to the Constitution where they seemed to work. And making adjustments where problems had arisen."[39]

He points out that the U S Constitution was not drafted with a background assumption of 'inherent powers' in foreign affairs. He found it clear from the following pointers:

(1) First, the constitutional text itself delegates and allocates core foreign affairs powers directly, which would be unusual if inherent powers were widely assumed.

(2) Second, the drafters explained the foreign affairs powers of the national government under the new Constitution as *grants* of power, not as confirmations of *existing inherent powers*. No one suggested that the Constitution's grants of foreign affairs powers were superfluous, although members of the constitutional generation were quick to point out superfluous provisions in other contexts.

(3) Third, the Articles of Confederation– an important model for the Constitution in the foreign affairs area– had no concept of *inherent foreign affairs* powers. The text of the Articles did not grant Congress certain key foreign affairs powers– such as the power to regulate foreign commerce and the power to

[38]ibid 497

[39]Michael D. Ramsey, 'The Myth of Extra constitutional Foreign Affairs Powers" *William and Mary Law Review* Vol 42 No 2 Dec. 2000 at p. 431

enforce treaties and the law of nations– and Congress therefore thought it lacked these powers. No one suggested that Congress had these powers inherently. The only remedy for Congress' lack of textual foreign affairs powers was thought to be amendment, a strategy pursued piecemeal and without success in the mid-1780s, and ultimately accomplished by the Constitution's grant of broader textual powers.

The American Constitution, which provided us with a model of a written constitution with fundamental rights [and the borrowings wherefrom are so evident in our Constitution (especially in Art 14),] provides an appropriate perspective for comprehending constitutional issues under our Constitution. The Attorney-General, addressing the court in the *Five Knights' Case* (one of the state trials of Stuart England) for the Crown asked, "Shall any say, The King cannot do this? No, we may only say, He will not do this."[40] It was precisely to ensure that in the American system one would be able to say, "The State *cannot* do this," that the people in America enacted written Constitution containing basic limitations upon the powers of government[41]. We have done precisely the same under our Constitution.

(g) Light from *Hamdan v. Rumsfeld, Secretary of Defense*, et al decided by the U.S. Supreme Court on June 29, 2006

The United States Supreme Court has in its decision dated June 29, 2006 (No 05-184. 2006 has made out propositions, inter alia, these:

(i) "It supports the proposition not only that these military commissions are inconsistent with federal statutes and U.S. treaty obligations, but also with the broader basic principle that mere assertions of military necessity are not sufficient to overcome serious judicial review of a president's conduct."

(ii) 'The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Cf. *Hamdi* v. *Rumsfeld, 542 U.S. 507, 536* (2004) (plurality opinion)'. [*Justice Breyer*, with whom *Justice Kennedy*, *Justice Souter,* and *Justice Ginsburg* join, concurring.]

(iii) The Court upheld its commitment to uphold constitutional protection and international human rights.

(iv) The Court showed no appreciation for the fact that the Congress and the President might well know more than the Judges do about the security needs of the U.S.

(v) The Detainee Treatment Act, 2005, which included a provision that 'no court, justice, or judge' had jurisdiction to hear application for habeas corpus from any prisioner detained at Guantanamo, could not stand in the way of the Court in exercising the power of Judicial Review.

(vi) The Court rejects the view that it is the President, not the Court, who' has expertise to decide an issue of the type considered in *Hamdan.*

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[40]3 Howell's *State Trials* 45 (1627)

[41]Bernard Schwartz, *Some Makers of American Law* Tagore Law Lectures p. 37

(vii) *United States v. Curtiss-Wright Export Corporation* is referred only in the dissenting judgment. The general tenor of the Court's judgement strikes a note clearly different from that in *curtiss- Wright*

But much before this decision in the *Youngstown Sheet and Tube Co v. Sawyer* [343 U S 579 (1952)], the concept of the 'Executive Power" was extensively considered, and multiple opinions were delivered. During the Korean War President Truman had seized certain steel industry in the throes of strike. It was defended as an exercise of 'executive power' including the power wielded as the Commander-in-Chief. Six-to-three the Court rejected this argument, and held the seizure void.

(h) Constitutional provisions governing the Tax Treaties.

Art. 265 of our Constitution says : "No tax shall be levied or collected except by authority of law." *Law* refers to a valid law. In the context of Article 265 of the Constitution it means an Act of the Legislature. In its import it states the British position resting on the Bill of Rights that "TAXATION in England must be authorized by statute." Hood Phillips aptly says:

> "It was supposed to have been settled by Magna Carta and by legislation in the reigns of Edward I and Edward III that taxation beyond the levying of customary feudal aids required the consent of Parliament."

The impact of the Parliament Act of 1911 enacted in the UK is clear on Articles 109 and 110 of a Constitution of India. Article 110 (1) provides definitions of Money Bills which includes a Bill dealing with the imposition, abolition, remission, alternation, or regulation of any tax. This is what we get in the definition of Money Bill given in section 1 (2) of the Parliament Act 1911 with only one change that for "repeal" used in the UK Act, Article 110 (1) (a) uses the expression "abolition." On this point our Constitution prefers the comprehensive definition of the terms pertaining to taxation than the Government of India Act, 1935 used in its section 37. Article 109 of the Constitution of India deals with the special procedure in respect of Money Bills. The Parliament Act, 1911 of the UK put an end to the power of the House of Lords to amend or reject a Money Bill. After this act they can cause delay for a period no more than a month. Under our Constitution a Money Bill originates only in the House of the People. The Council of States has no competence to reject or amend a Money Bill : only suggestion can be made which the House of the People may accept or may not accept. But this must be within 14 days of the receipt of Bill otherwise the Bill is deemed to have been passed by both Houses at the expiration of period of fourteen days from the date of the receipt of the Bill. The Government of India Act 1935 did not draw up distinction between Money Bills and other Financial Bills. *The Constitutional provisions in our country establish full and exclusive authority of our Parliament in matters of taxation.* In effect the full and exclusive authority in matters of taxation is of the House of the People, as it is in the United Kingdom. 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 to grant exemption form the two facets of the same thing.

In all the major countries, which have adopted OECD Model of tax- treaties, such treaties are done with legislative approval. It is worthwhile to quote Klaus Vogel who states[42]:

"In parliamentary democracies, the executive ordinarily must obtain the **consent of parliament** to conclude important agreements..."

(i) The International Law observation-post.

Our Raw Realities

The profile of the political structure of the world shows that it consists of sovereign States at different levels of political integration, socio-economic attainments, socio-political morality and cultural achievements. Some of them have vast potentialities of development whereas many others have not much scope to do so on account of poor natural and human resources. The countries less endowed with resources are ironically more prone to assertions of their sovereignty. Many of them tried, in varying measures, to turn their countries into spheres of darkness where the possessors of the ill-gotten wealth can find best places to keep that un-noticed by those who are swindled. Many of such States are the members of United Nations, and are the recognized players in international politics because of their sovereign status. The tsunami of economic globalization has subordinated the political realm to the economic realm established under the overweening majesty of Pax Mercatus. Geza Feketeluty has brought out this reality thus:

> "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."[43]

In the last five decades of the 20th century great strides were made in the sphere of public international law. At the time of Dutch jurist Hugo Grotius the States that mattered were only a few. The rules resembled the rules of game in which sharp practices were the privileges of the mighty. The range of the subjects of international law has remarkably increased in the recent decades. With the break-up of colonialism in the post-Second World War era, a host of new States have emerged. New States are being minted even now. But a most dominant theme is that international law is being shaped by the desires of the mighty States to suit their interests in furtherance of their own economic gains; and for other geopolitical reasons. International organizations have acquired international personality. With the onset of the economic globalization, the economic organizations and institutions, like the IMF, World Bank, and the World Bank emerged as international persons. Because of their enormous power, they are in a position to condition the evolution of international law after their heart's desire. As they exist to protect and advance the interests of

[42]Klaus Vogel on *Double Taxation Conventions* 3rd Ed Kluwer Law pp. 23–25
[43]2001 *Britannica Book of the Year*. 191.

the corporate *imperium*, this results in the triumph of *Pax Mercatus*. This sort of system is bound to be both opaque and undemocratic. We are duty-bound to reflect on this emerging scenario from the observation-post of our Constitution, and the general principles of civilized jurisprudence.

In this world we are faced with complex nerve-wrecking problems. Our executive may through its commitments at the international plane, give rise to international customary law on a particular point; or may make our country party to a treaty having domestic or extra-domestic impact. This situation is likely to be worse as the institutions of economic globalization are clearly in a position to call the shots. Under such circumstances we must uphold our Constitution. No norm of international law can be so forged or evolved as to enable the executive to defile or deface our Constitution. It is hoped that our Supreme Court would uphold our Constitution against the onslaughts by the lobbyists of international law of this neo-classical phase. Long before this situation, Georg Schwarzenberger had noticed this phenomena when he laconically said:

"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 –always consensual–level of international institutions, in particular international courts and tribunals." [44]

The new realities of this phase of Economic Globalization have been well described[45] by Prof. Sol Picciotto of the Lancaster University with whom this author had the privilege of discussing the subject at length:

> "Significantly, the new wave of debate in the 1980s, as writers from various perspectives have sought to rethink the nature and role of law in international affairs, pre-dated the major changes in inter-state relations which occurred in the 1990s. Much of the writing on international law in the 1970s accepted a functionalist and even instrumentalist view of law, arguing for an adaptation of law to the changed 'realities' of international society, especially the creation of many new states by decolonization."

Then Prof Picciotto mentions the crude realties of the present-day international geo-politics: he says –

> "Thus, especially in the hands of the dominant Yale theorists of the Lasswell-McDougall school, it tends to result in apologia for the perspectives of authoritative decision-makers, and especially of US foreign policy-makers, cloaking their policies in value-justifications based on generalised concepts of the human good."

It appropriate to sound a note of caution in any reliance on Art. 51 of the Constitution which directs the State to "foster respect for international law and treaty obligations

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[44] *A Manual of International Law* 5th ED p. 46–47

[45] Sol Picciotto, *International Law: the Legitimation of Power in World Affairs*: Published in P. Ireland and Per Laleng (eds.), *The Critical Lawyers' Handbook 2* (Pluto Press 1997), pp. 13–29

in the dealings of organized peoples with one another." The norms of International Law in order to be recognized such norms must receive judicial recognition by our Constitutional Courts. *No rule can be recognized as a rule of international law unless it is judicially so recognized.* This is required most in our time when the astute players of the dominant economic realm shape the present-day international law. It becomes the duty of our constitutional courts to preserve and maintain the supremacy of our Constitution and the law. Realities of the Economic Globalization requires now, as never before, that while formulating our view as to International Law in the context of Art. 51 of our Constitution, we should take into account the realities which are quite often created and shaped through the Art of Corruption and the Craft of Deception. After all it is for our Superior Courts to ascertain which norms should be treated the norms of customary international law. Lord Alverstone CJ said, in *West Rand Centrla Gold Mining Co v R*[46] that 'the international law, sought to be applied must, like anything else, be proved by satisfactory evidence which must shew either that the particular proposition put forward has been recognized and acted upon by our own country....' And Lord Atkin said in *Chung Ch Cheung v. R*[47]*:*

> "....so far at any rate as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law".

(j) Certain dicta of our Supreme Court are clearly obiter, and *per incuriam*

Certain observations made by our Supreme Court on the Treaty-making power are both obiter and *per incuriam*: to illustrate –

(a) In *Maganbhai Ishwarbhai Patel v. Union of India*[48]. After relying on the following observation of Lord Atkin in *Attorney General for Canada v. Attorney General for Onterio*[49], Which our Supreme Court quoted in extensor :

> "It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."

Our Supreme Court observed:

> "The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations

[46][1905] 2 KB 391
[47][1938] 4 All ER 786 at 790
[48]AIR 1969 SC 783
[49]AIR 1937 PC 82

which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals."

(b) In *Union Of India v. Azadi Bachao Andolan*[50] a Division Bench of this Hon'ble Court, per Justice B.N. Srikrisna, observed:

"The power of entering into a treaty is an inherent part of the sovereign power of the State. .... The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. ..."

These above observations are *per incuriam* for reasons, *inter alia*, the following:

(1) This Hon'ble Court went wrong in relying on Lord Atkin's observations as the Privy Council was considering the British position, and not the provisions analogous to what we have under our Constitution. He himself made this reservation by observing:

> "In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliaments will either fulfill or not treaty obligations imposed upon the State by the executive."

(2) It is a patent mistake to consider the Executive as the exclusive repository of unbridled power at the international plane in entering into a treaty, or an agreement, or arrangement. It is correct that every State possesses treaty-making capacity. The Executive is as much an organ of the State as is the Legislature or Judiciary. It is true that the Treaty-making capacity is generally exercised by the Head of the State or its government. But both the domestic law and international law treats the Executive as *an authorized organ* which can run the risk of acting without capacity if it goes in breach of the constitutional limitations on its capacity. Oppenheim observes[51]:

> "If the Head of State ratifies a treaty without first fulfilling the necessary constitutional requirements (as, for instance, where a treaty has not received the necessary approval from Parliament of the state), his purported expression of his state's consent to be bound by treaty may be invalid."

(3) "It is well established as a rule of customary international law", says Oppenheim, " that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it, since the state's organs and representatives must have exceeded their powers in concluding such a treaty.. Such constitutional restrictions take various forms."

(4) Art. 53 of the Vienna Convention states that if a treaty which at the time of conclusion conflicts with peremptory norm of international law, it would be

[50] 2003-(263)-ITR -0706 -SC
[51] ibid p 1232 para 606

void. And Article 45 of the Vienna Convention – probably reflecting rules of customary international law – allows a state (by way of exception) to invoke non-observance of its internal law as a basis for invalidating its consent to be bound by the treaty only if the rule of internal law relates to competence to conclude treaties, if it is a rule of fundamental importance, and if the violation is manifest, i.e objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

(5) Nothing turns on the concept of "inherent sovereign power" theory because sovereignty inheres in our Constitution, and it is essentially, as Oppenheim says, " a matter of internal constitutional power". Oppenheim, while analyzing what Sovereignty means in the 20th century, observed:

> "Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein"

(7) Nothing turns on the idea that power of entering into a treaty is an 'inherent part of the sovereign power of the State". The sovereign power of our State is structured under the Constitution. We have permitted the Executive to exercise Treaty-making power 'subject to the provisions of this Constitution". Even if our Parliament wants to play its legislative role (as was done by the U.S Congress in making the Uruguay Round Agreement Act), it must act 'subject to the provisions of this Constitution". The Executive cannot, transgress fundamental constitutional limitations.

(8) If the Executive is granted unbridled power at the international plane to act as the legitimate surrogate of the State itself, the consequences would be disastrous. If it so happens, perish the thought, the Executive, already subservient to corporate *imperium* under the U.S hegemony,may through Treaty terms do away with our Supreme Court (this *reductio ad absurdum* has already taken place to some extent) can grant legislative powers to the creatures beyond our ken, and constitute corporate oligarchy on the wreck of our democracy. This Petitioner quotes again what Bronowski said in the *Ascent of Man*:

> "There are many gifts that are unique in man; but at the centre of them all, the root from which all knowledge grows, lies the ability to draw conclusions from what we see to what we do not see."

(9) Even the U S Supreme Court has observed in *Hamdan's Case*, decided in June, 2006 that 'The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check. [*Justice Breyer*, with whom *Justice Kennedy*, *Justice Souter,* and *Justice Ginsburg* join, concurring.]

(10) 'A number of states in their constitutions have made express provision for limitations on their national sovereign powers in the interest of international co-operation. These provisions are to the effect that certain sovereign rights and powers of the state may be limited in connection with international organiztions, or may be conferred upon or transferred to international organizations. This has particularly become necessary in some states whose

constitutions provide for certain rights and powers, for example the power to legislate, to be exercised only by organs of the state: by becoming a member of an international organization which can in some degree be said to be exercising such powers, the state, in absence of a provision envisaging a transfer of those powers, could be said to be acting unconstitutionally and the resulting exercise of the powers by the organization could be said to be ineffective within the state.'[52]

Under the Constitution of India there is no provision for limitations on the national sovereign powers of our State

(11) While appreciating the above-mentioned points, none should lose sight of a historic fact that if Parliament ends, if this Court goes, the Executive would lose nothing, rather it would gain everything that it lost over centuries of democratic struggle. Even if Parliament goes or becomes inert, even if our Superior Courts lose everything which has made them the protectors of the Constitution (and so of democracy), the Executive would remain embodying in itself all the legislative and judicial powers as it was during the times of the Stuarts or before. After a lot of research this Petitioner submits that at present there is a global conspiracy against democracy of the sort our Constitution contemplates. Power is most delicious to the executive. There is nothing like a ' democratic executive'. Lust of power is chronic. The lust begets enchanting delirium that the wielder of power is the wisest. Then the go-getters abound. Constitutional discipline is subverted. The learned ignoramuses become grand wordsmith for them. History tells us that when such things happen democracy and constitution expire. A Constitution tames the executive by subjecting it to the Rule of Law.

(k) The Ambit of Art 253 of the Constitution

Shah J. in his separate but concurrent opinion in *Maganbhai observed*:

"The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power; thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizen or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation : where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power."

[52]ibid pp. 125–126

It is most respectfully submitted that as the aforementioned observation is *obiter*. The Supreme Court did not consider the following relevant points:

(a) The point to be seen is whether the Executive is free from all constitutional limitations when it signs and ratifies a Treaty. If it is even then subject to constitutional limitations, any departure by it from the peremptory constitutional norm affecting *competence,* would surely render the Treaty *ultra vires*.

(b) As the exercises of all legislative power, and all executive power are subject to constitutional limitations, the exercise of such powers, with reference to Art. 253 would clearly be subject to constitutional limitations.

(c) If a treaty or Agreement at any international deliberative forum is done in breach of fundamental constitutional limitations, such a Treaty or Agreement is *ab initio* void: it dies at its nativity itself. Hence nothing survives to be given an effect under Art. 253 of the Constitution. The logical principle that nothing comes out of nothing (*ex nihilo nihil fit*) applies.

(d) In *Ajaib Singh v. Punjab* AIR 1952 Punj 309 (321) [reversed on other points in, by *State of Punjab v. Ajaib Singh* AIR 1953 SC 664] held that despite Art. 253, other provisions of the Constitution, such as Fundamental Rights, cannot be violated in making laws. Again, no cession of Indian territory can be made without amendment to the Constitution.[53]

(e) Assuming *arguendo* that a Treaty or Agreement is valid, yet the Executive power would not extend to implement it by invoking Art. 253 the Constitution, as it cannot be contemplated that it was ever contemplated that the federal features can be knocked down by side winds.

(l) Universal Notice Presumed

It has been submitted, on the authority of Oppenheim's *International Law*, that even in the matter of treaty-making constitutional limits of competence cannot be transgressed. Besides International law permits no derogation from *jus cogens*. Art. 53 of the Vienna Convention states that if a treaty which at the time of conclusion conflicts with peremptory norm of international law it would be void. The doctrine that fraud unravels is the very *jus cogens* in the jurisprudence of international law. "Because of the importance of rules of *jus cogens* in relation to the validity of treaties, Article 66(a) of the Convention provides for the compulsory jurisdiction of the International Court of Justice (unless the parties agree to arbitration) over disputes concerning the interpretation or application of Article 53."[54]

In International Law, nations are assumed to know where the treaty-making power resides, as well as the internal limitations on that power.[55] J. Mervyn Jones in his article on "Constitutional Limitations on Treaty-making Power" examines

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[53]*Maganbhai v.UoI* AIR 1969 SC 785 (798)

[54]ibid 1293

[55]Seervai's *Constitutional Law of India*, Vol- I, pp. 306–307.

the effect of constitutional limitations.[56] Two important English writers support the view that constitutional limitations are completely effective under international law[57]. It is time to give democratic orientation to international law.[58] *The New Encyclopedia Britannica*[59] aptly observes:

> "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... The historical origins of this principle are identical with those of political liberty and representative government—the right of the citizens."

It would be contrary to our Constitution to grant the Executive "extra-constitutional powers". David M. Levitan has put it felicitously when he observed: "Government just was not thought to have any "hip-pocket" unaccountable powers".[60] Willoughby has pointed out that the foreign states are held to have a knowledge of the location of treaty making powers. [Willoughby's *The Constitutional Law of the United States*, p. 528,] The effect of the elaborate discussion by Willoughby is thus stated by H.M. Seervai : "In International Law, nations are assumed to know where the treaty-making power resides, as well as the internal limitations on that power. [Seervai's *Constitutional Law of India*, vol- I, pp. 306–307] This rule puts all the contracting parties under public notice of the manifest constitutional limitations. It is a manifest limitation under our Constitution as much under the British Constitution that a treaty affecting taxation can not be done in exercise of power under the executive domain.

Under a democratic polity structured under constitutional limitations, the Executive would not be competent even at the international plane to incur obligations which can expose the State to the commission of defaults under international law. There is a vast jurisprudence on the Principle of International Responsibility The widely known and implemented rules are: "(1) the breach of any international obligations constitutes an illegal act or international tort, and (2) the commission of international tort involves the duty to make reparation."[61] But to-morrow there may emerge, or be created, international criminal jurisprudence to take punitive actions for breach of such obligations. And it may not be mere morbid phantom of surcharged brain to think some day a foreign power to protect the interests of some MNCs may exercise power, overt or covert, to pressurize our country with coercion and sanctions on the ground of the breach of treaty obligations incurred by the Executive. No democratic polity in the present globalized world would consider it proper.

(m) On Parliamentary Approval

In February, 1992, Shri M.A. Baby, Member of Parliament, Rajya Sabha gave a

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[56][1941] 35 *American Journal of International Law*, p. 462.
[57]Hall and Oppenheim.
[58]Schuckking and Wehberg referred by Charles Fairman in his article 30 A.JIL 131.
[59]Vol. 28 p. 402.
[60]*The Yale Law Journal*, Vol. 55 April, 1946, No 3 p. 480.
[61]Georg Schwarzenberger, *A Manual of International Law* 173

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

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

Each one of the aforesaid points are absurd amounting not only to the contempt of Parliament but an insult to India's citizenry who are present in Parliament through their Representatives[62]. Though such comments deserve to be dismissed from any serious consideration, yet as an act of deference to the speaker, and also to show how with what little awareness great issues are handled, it is worthwhile to advert to them economizing with words, but not with truth:

(i) Under the Treaty of Versailles, which concluded the World War II, Germany

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

was put on the mat under the spiky boots of the rapacious victors. After vivisecting Germany, the victors stripped the great country of its honour. 'Article 227 through 230 gave the Allies the right to try individual Germans, including the former emperor, as war criminals.' And Japan signed the Treaty of Surrender, after being trounced and pulverized after atomic bombardment, on September 2 in Tokyo Bay aboard the battleship USS Missouri concluding the World War II. Humiliation of the nation was accepted in the mood of utter frustration, and sheer helplessness. Such treaties as these are done on the wreck of constitutions. The vanquished nations owe their existence of Statehood to the mercy of the rapacious victors. It is, hence understandable, why the western jurists (including Oppenheim) ignore the Treaty of Versailles from their work on treaties. Such treaties are not treaties; they are the ruthless impositions of cruel terms on hapless nations.

(ii) The U.S Congress showed great sagacity and political insight in rejecting the Treaty of Versailles from which cauldron emerged the evil forces which pushed Europe to a delirious destruction of the Second World. It was this decision of the Congress which saved America from President Wilson, "the blind and deaf Don Quixote"[63]. It was this refusal which saved Wilson from the culpable idiocies of Gorges Clemenceau of France, who had " one illusion –France; and one disillusion –mankind"[64], and David Lloyed George of Britain, "this half human visitor of our age"[65], who wove the web for the destruction of Europe through the Treaty of Versailles. Whilst Europe was busy making noose to hang itself, America was relaxing and equipping itself to become the master of the whole world as it has become. John Maynard Keynes, who was himself associated with what was happening in the Hall of Mirrors, at the Palace of Versailles, wrote his *Economic Consequences of Peace*. He made out a point that this Treaty gave rise to Hitler, who couldn't have taken control of Germany without the wide resentment against this Treaty. Shri Pranab Mukherjee should have appreciated the U.S Senate which saved its country from the foolish errand of Wilson. This Petitioner would have been infinitely grateful to our Parliament if it could have told the Executive, while the Uruguay Round Final Act was in the air, THIS FAR, AND NO FURTHER.

(iii) That, often our Government feels that hurling a few ideas in the public domain is enough. The right course should be place the draft of a treaty for popular consideration, and deliberation by Parliament. Besides, there are special reasons why treaties with great socio-political impact be done with popular consent. How could a governmental functionary saddle this country with a treaty so noxious as the Uruguay Round Final Act? Why should we

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[63]Keynes, The Economic Consequences of Peace. P. 41

[64]ibid , p. 32

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

allow the Executive Government to enter into deals which may become the counterparts of the Entente and the Alliance which endeared themselves to the executive governments working for self-destruction on way to the second World War. Our world is more fragile. The clouds of the Third World War are gathering fast. If in this era of critical development, we fail to shape the laws to respond to the challenge, (perish the thought,) our political institutions would perish in a surrealistic delirium when persons right, and persons wrong, would face the same Fate. We apprehend that the years ahead may not be much different from what Galbraith has said:

> "Here another great constant in economic life: as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently preferred".[66] How can this great nation be allowed to become, through an executive act, a foreign country's, or institution's bleating little lamb tagged behind on a lead , pathetic and supine, consoling herself with an idea, minted in a much different context, that the executive is absolute at an international plane?

(iv) That it was wrong to say that the other treaties to which he referred could not have been considered by Parliament. The real problem with the Executive Government, like the passionate misdirection of Wilson, was that it wanted them to be done somehow for purposes not all worth appreciation. History proves that Parliament and people are right more often than the Executive with its hubris for power. The criticism, hence, is totally misconceived.

(v) No comments is worthwhile. The Executive government can implement treaty obligations within its executive field which is much wider than the legislative field. Besides, through treaty commitments the Executive can coerce Parliament to fall in line with it. Such things, in the context of the Uruguay Round Final Act, have already taken place. The haplessness with which our Parliament enacted Amendments to the Patent Act is a case of point. We lost our case before the WTO's DSB, and its Appellate Forum. Our Parliament had to bend. Virtually it ceased to be sovereign. Again, we removed the Quantitative Restrictions on agricultural products after having lost Case before the DSB and its Appellate Forum. These are the well-known instances. Many things much worse might be happening under the opaque administrative syste.

(vi) Whenever the WTO is criticized for being an undemocratic institution, its proponents stress eloquently that the Uruguay Round Final Act was accepted by the nations with the approval of their democratic legislative agencies. This is a dressed-up argument. There are good reasons to believe that our Executive imposed on the nation a treaty about which itself did not know much.

(vii) The idea that Parliament is not so constituted as to discuss the international treaties and agreements it is not correct. If Britain could deliberate in its Parliament whether it was right to declare a war, there was no reason why

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

the text of the Uruguay Round Final Act couldn't have been placed before Parliament for an in-depth scrutiny, or why the text of the Indo-US Nuclear deal cannot be examined threadbare by our Parliament. It has already been pointed out how decision to go the Second World War was taken by Parliament, and not by the Crown. A.J.P. Taylor describes the difference between the ways the First and the Second World Wars were declared by the U.K. Besides Shri Pranab Mukherjee's argument brings to mind what the destroyers of the Weimer Constitution had said about Parliament, or what Bismarck said about the German Diet before it was all gloom.

(viii) What would facilitate the formation of an economic bloc is a pet idea of the corporate conspirators ruling the Economic Realm, which in this era of the Bretton Woods institution and the Washington Consciousness, has subjugated the Political Realm. The argument smacks of the smugness of the compradors who work for the neo-colonialists, and neo-capitalism.

(ix) If our Constitution would have trusted the Executive wholly it would not have made it an institution with granted powers, and it would not have prescribed the Fundamental Rights. In this era of Economic Globalizaton, the executive leadership in Parliament may mean nothing but the triumph of corporate oligarchy. True there was a phase when the executive led Parliament. Now the executive is itself led by the corporate imperium.

Such criticism should not have been inflicted on Parliament by one who evaluated the Treaty-Making Procedure under our constitutional frame-work with reference to the Treaty of Versailles. The nation knows what is wrong with our Parliament, and surely some day, ways would be found/forged to set the institution right. But this does not prove the point Pranab Babu was making. It is true that things are moving from bad to worse. This is inevitable, says Erich Fromm in his *The Sane Society*, in the mass society which turns man into a commodity; 'his value as a person lies in his saleability..'. This is also inevitable in capitalism as, says Tawney in his *Acquisitive Society*, capitalism is, at bottom, incompatible with democracy. This is also because of the compradors and the lobbyists, about whom Vance Packard wrote his triology: *The Hidden Persuaders*, *The Status Seekers*, *The Waste Makers,* rule the roost. This is also because the Rise of the Meritocracy, about which Michael Young has written setting his account in 2034, has led to trends towards eugenic nonsense and monstrosities, which would create the new lower classes –by definition stupid — without leadership worth the name , and that the new IQ-rich upper classes would soon devise ways to keep themselves in power. The waxing corporate imperialism has already made our best talents exportable merchandise, and our nation would have to manage with left-overs. Even if all these happen our hope is only through Parliament. In 1915 Einstein wrote to Lorentz in Holland "that men always need some idiotic fiction in the name of which they can face one another. Once it was religion, now it is the State". On scanning the present realities, shouldn't we say: "Once it was religion, then it was the State, now it is the Market, Pax Mercatus". Market is ruled by corporate oligarchy with which, as indicated by the treaties being done, our government has a clear symbiotic relationship.

That sidetracking Parliament and people in a democratic country, with a structured

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

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

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

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

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

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

(n) CONCLUSION

(i) Recommendations by the National Commission to Review the Working of the Constitution

The National Commission to Review the Working of the Constitution has made a number of valuable suggestions after considering our Constitutional parameters[67]: a few of them are set forth as under:

(1) The first thing that should be done by Parliament is to make a law on the

[67] *http://ncrwc.nic.in/ http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm* Accessed 11 July 2006

subject of "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries" as contemplated by Entry 14 of List 1 of the seventh Schedule to the constitution. The law should regulate the 'treaty-making power' (which expression shall, for the purpose of this discussion, include the power to enter into agreements and the implementation of treaties, agreements and conventions).

(2) There is an urgent and real need to democratize the process of treaty making. Under our constitutional system, it is not the prerogative (if we can use that expression) of the Executive In a democracy like ours, there is no room for non-accountability.

(3) The power of treaty-making is so important and has such far-reaching consequences to the people and to our polity that the element of accountability should be introduced into the process.

(4) The exercise of power must be open and transparent (except where secrecy is called for in national interest) – what was called by President Wilson of USA, "open covenants openly arrived at".

(5) We may have already suffered enough by entrusting that power exclusively to the Executive. They do not appear to have been vigilant in safeguarding our interests, at least in some instances.

(6) Law must provide for clear and meaningful involvement of Parliament in treaty-making. As has been done in some countries, there must be constituted a committee of Parliament to whom every treaty/agreement/convention proposed to be signed and/or proposed to be ratified shall be referred.

(7) While placing the draft/signed treaty before such committee, a statement setting out the important features of the treaty/agreement, reasons for which such treaty/agreement is proposed to be entered into, the impact of the treaty/agreement upon our country and upon our citizens, should be clearly and fully set out. The committee would be a statutory committee clothed, of course, with all the powers of a Parliamentary Committee.

As a matter of fact, it would equally be desirable if the law made by the Parliament categories the treaties/agreements/conventions/covenants viz., (a) those that the executive can negotiate and conclude on its own and then place the same before both Houses of Parliament by way of information. In this category may be included simple bilateral treaties and agreements which do not affect the economy or the rights of the citizens; (b) those treaties etc. which the executive can negotiate and sign but shall not ratify until they are approved by the Parliament. Here again, a sub-categorisation can be attempted: Some treaties may be made subject to approval by default (laying on the table of the House for a particular period) and others which must be made subject to a positive approval by way of a resolution; (c) important, multi-lateral treaties concerning trade, services, investment, etc. (e.g. recent Uruguay round of treaties/agreements signed in 1994 at Marrakesh), where the Parliament must be involved even at the stage of negotiation. Of course, where a treaty etc. calls for secrecy, or has to be concluded urgently, a special procedure may be provided, subject to subsequent Parliamentary approval consistent with the requirements of secrecy.'

The Constitutional Review Commission made two very relevant suggestions:

1. 'The Parliament may consider enacting suitable legislation to control and regulate the treaty-power of the Union Government whenever appropriate and necessary after consulting the State Governments and Legislatures under article 253 "for giving effect to international agreements'.
2. In order to reduce tension or friction between States and the Union and for expeditious decision-making on important issues involving States, the desirability of prior consultation by the Union Government with the inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.

(ii) Suggestions on Treaty-Making Procedure given by the People's Commission

The Peoples' Commission on Patents Laws for India[68] made the following suggestions on the Government's treaty making power:

"In the light of the above, it is recommended:

(a) Whilst the treaty making power (Article 73 read with List 1 entries 13 and 14) vests in the Union and requires legislation in order to translate the treaty into validly enforceable law (Article 253), the treaty making power cannot be seen as a law unto itself, but must operate within the discipline of the Constitution. This is all the more important because the world is being increasingly governed by treaties, which are being enforced through their own mechanisms, and by intense social, economic and political pressure.

(b) The discipline of the Constitution requires that the Union government, which is the exclusive repository of the treaty making power, cannot, and should not, enter into treaties which undermine the Constitution.In particular, treaties would be violative of the Constitution if they affect or infringe fundamental rights or affect matters which are in the exclusive concurrent domain of the States (Lists II and III) or affect the secular and socialist dimensions of the Constitution (see Preamble and Articles 38, 39 and 51 of the Constitution amongst other articles of the Directive Principles).

(c) Procedurally, before a treaty (especially a multilateral treaty) is signed it is imperative that it should be (i) placed for discussion before parliament with full particulars (ii) placed within the public domain for discussion (iii) circulated to the States for their opinion and discussion and (iv) not confirmed until and unless this discussion is over. This exercise necessarily needs to be repeated as further issues arise in respect of any one treaty.

(d) Parliament needs to set up a special treaties committee which earmarks treaties for consideration and ensures that the public, federal and parliamentary process is compiled with specially listing areas for confirmatory procedures.

[68]Chairman: Shri I.K. Gujral, the former Prime Minister of India; and Members: Prof. Yashpal, Prof. Muchkund Dubey, Shri B.L. Das, Dr Yusuf Hamied and Dr. Rajeev Dhavan

(e) There is nothing in the Constitution which forbids this process being regulated by statute which should be enacted."[69] [italics supplied].

(iii) This Petitioner's Suggestions on valid Treaty Making Procedure

This author makes the following suggestions for bringing about changes in our Treaty-making procedure:

(i) Treaties which modify or override the domestic laws must be ratified only after Parliament's approval through a legislation, or on a resolution by the *Lok Sabha* (the way a tax treaty is done in the U.K.).
(ii) Treaties of domestic operations, affecting the areas for legislative operations under the entries in the Seventh Schedule, should be ratified only after Parliamentary approval is accorded or the bill is enacted as an Act.
(iii) Treaties affecting constitutional provisions, other than those affecting the basic features of the Constitution should be made only after obtaining an advisory opinion of the Supreme Court thereon as to its constitutional validity.
(iv) Treaties, which affect the basic features of our Constitution, should be subjected to popular referendum, after obtaining the opinion of the Supreme Court thereon, before they are ratified.

The following two comments are also worthwhile:

(i) If the procedure of reference to the Supreme Court is to be avoided, then a treaty should be ratified after Parliamentary approval accorded in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.
(ii) Our Constitution does not prescribe recourse to referendum. But people's claim that such treaties be decided through a referendum emanates from the very fact that 'We, the people' have adopted, enacted and given to ourselves the Constitution. Whatever protocol of referendum is chosen it must be an effective plebiscitary device to support the terms of a contemplated treaty. As Chief Justice Marshall could hold in *Marbury v. Madison*[70] that the power of Judicial Review emanates from the judicial oath taken under a written constitution with entrenched rights, so should our courts and our Parliament see the legitimacy of this procedure in the fact that, when all is said, political sovereignty inheres in the people of India.

The adoption of the above-suggested procedure would help our country to withstand the pressures to which it is subjected in handling the international negotiations. If a particular draft treaty is not approved per procedure described above, the government would have no option but not to proceed further. "This would put the onus on the rest of the members of the WTO to accommodate us and modify the take-it-or-leave-it character of the Uruguay Round package."[71] This would make the process

[69]Report of *the Peoples' Commission on Patent Laws* for India January , 2003 pp. 111–112.
[70](1803) 1 Cranch 137, 177–79, 2 L ed. 60.
[71]Dubey, *An Unequal Treaty* p. 135.

of treaty making transparent, and democratic. This would help our government to answer effectively the predatory international financiers that the executive government of India works under constitutional limitations, which it cannot evade. An idea must be drummed into the ears of all, that obligations under a treaty should neither be created in darkness, nor carried out under an opaque system. This would put every body under notice that ratification as such does not entitle anybody to any legitimate expectation before the treaty's incorporation into domestic law as per procedure suggested. This procedure would inhibit the executive from taking things for granted.

Chapter 2

Unconstitutional Governmental Action Complaint

Constitutional Validity of India's participation in the World Trade Organization as a member questioned as it is repugnant to the provisions of our Constitution, and therefore, unconstitutional.

The Uruguay Round Final Act was agreed to on 15 December, 1993 and formally approved and signed at the Ministerial level in Marrakech, Morocco, on 15 April, 1994 which included the Agreement for setting up of the WTO which came into effect from January 1, 1995. The Final Act ran into several hundred pages which our Government, in all probability signed and ratified, even without reading.

The Uruguay Round Final Act is a treaty beyond the contemplation of the Executive Power, or Legislative Power as conceived under the Constitution of India. It is difficult to understand why our Executive succumbed to the corporate pressure, under the U S hegemony, to become a party to the Final Act. This act was ex facie *ultra vires* its power, and was likely to have an octopus-grip on our whole polity, internal and external. It turns India into a Sponsored State, and drives our Constitution to the margin. This sort of treaty should have been subjected to popular r*eferendum.*

India's Handling of the Uruguay Round negotiations

Explaining the background of the Uruguay Round Final Act, Muchkund Dubey writes[72]:

> "During the best part of this period, the Government of India did not take any step known to the public, to renegotiate on issues of interest to India. No indication was given to the Parliament or to the public that the minimum must which India should have taken up for negotiation had been identified. .....It was only towards the end of 1992, and that too under the strong pressure of nation-wide agitation mounted against some key provisions of the Dunkel Text, that the Government of India bestirred itself and identified a few issues in which our interest needed to be protected. But that was too little and too late. There was no substantial change in the Dunkel Draft as finally adopted, from the point of India's interest."

[72]*An Unequal Treaty* pp. 9–10

In the early phases of the negotiations India was assertive on her stand that the ambit of the negotiations could not subsume issues relating to IPR protection as this issue was not relevant to a liberal multilateral trading system. Then came the sudden reversal of India's position and an abject surrender in the mid-term review in Geneva in April 1989. What led to this shift in Government of India's position was not clear at first. But soon the real reason was known." From the mid-term review session of the Trade Negotiation Committee in Montreal in December 1988, the word passed on to the Indian delegation at the political level was: "Do not appear to be ganging up against the Americans". In operational terms, it meant that India should not try to be on the vanguard of the struggle of the developed countries ....."[73].The Peoples' Commission[74] too had reasons to wonder why the Government of India did not publish a position paper explaining the reasons for the radical shift in India's stance and the likely impact of providing enhanced levels of intellectual property protection and liberalization of investment and service industries demanded by the U.S.

There was a much greater need to get the Uruguay Round Final Act approved by our Parliament where its constitutional conformity would have been deliberated. On September 19, 1991 itself 250 Members of Parliament and Eminent Persons (including some former Chief Justices and Judges of this Hon'ble Court) signed a Press Release wherein transgressions of constitutional limitations, and encroachment of Parliamentary jurisdiction were brought out with remarkable perspicacity and perceptiveness : to quote[75]

> 'The worst aspect of the GATT Agreement/ Treaty is that the role of our Parliament in law-making will be substantially curtailed. To protect the sovereignty and dignity of the Indian people and Parliament, we seek that the Government places a Resolution to reiterate the need for ratification by Parliament of international treatises entailing the introduction of new legislation and wholesale amendment of existing legislation and incurring of financial costs. This will ensure the Indian people and Parliamentarians that the debate in Parliament at the GATT treaty ratification stage will not be a mere formality. The right of Indian Parliament to legislative the domestic laws through the democratic process is inalienable and must be upheld at any cost.'

The *Report of the Peoples' Commission on GATT* found that the entire negotiating process was neither transparent, nor it showed any accountability to the elected representatives of people in a democracy[76]. It further found that adequate information regarding India's stance at the GATT negotiations, and the position taken by other

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[73]ibid p. 8

[74]*Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai , the foremer Judges of the Supreme Court,and Rajinder Sachar, the former Chief Justice of Delhi High Court.

[75]*A Comment in Defence of Indian Patent Regime* [Enlarged ED] National Working Group on Patent Laws (79, Nehru Place, N.Delhi) p.3

[76]Report *of the Peoples' Commission on GATT* gives a meaningful Chronology of events: to quote rom pp. 11-12 of the Report:

countries was not given to the people or their representatives. The nature of the possible impact of the treaty under negotiation was never brought in public domain. The results of the Uruguay Round of Multilateral Trade Negotiations ("Dunkel Draft") came out in several hundred pages in December 1991 as a *fait accompli.* The element of coercion struck at the outset itself where the Draft Treaty said:

> "No single element of the Draft Final Act can be considered as agreed till the total package is agreed."

The Draft Treaty, the Peoples' Commission felt, exemplified realpolitik: take-it-or-leave-it. The Commission found facts to hold that the steps taken by the Government after December 1991 barely disguised the fact that the Government intended to comply with the U.S. demands at GATT regardless of what Parliament, the States or the public had to say. The Government authenticated the Final Act on April 15, 1994. Even in December 1993 the Members of Parliament were demanding information on the Dunkel Draft. Many members of the Rajya Sabha walked out in protest. The Minister of Commerce refused to discuss the Dunkel Draft in Parliament before accepting it. The Government failed to make any coherent analysis which could explain the basis for the Government's claim that India had more to gain than lose by accepting the Draft Treaty. The Government cited in the support of its view a report by the Organization for Economic Cooperation and Development. It is an

(Footnote cont.)

"....12.1993 : Opposition parties in Parliament failed to secure a substantive discussion on the implication of the Dunkel Draft.
14.12.1993: U.S. and EC reach an agreement on agriculture which permitted the Uruguay Round to draw to a close.
15.12.1993: GATT Secretariat issues the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" which countries agree to submit to their governments for approval. The Uruguay Round closes.
30.12.1993: The Chief Ministers of Orissa, Sh. Biju Patnaik, wrote to the Prime Minister demanding that the States be consulted before the Final Act is signed.
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4.1.1994: The Chief Ministers of Tamil Nadu, Smt. Jayalalitha, wrote to the Prime Minister demanding that a Conference of Chief Ministers be convened to examine the implications of the new treaty.
4.3.1994: The Chief Minister of Tamil Nadu repeated the request to the Prime Minister to convene a Conference of Chief Ministers.
18.3.1994: The Chief Minister of Orissa repeated his request to the Prime Minister for consultation with the Sates.
15.4.1994: The Government of India authenticated the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations with its signature.
31.12.1994: Promulgation of Ordinance by Government of India amending the Patents Act, 1970 and acceding to the WTO.
1.1.1995: Establishment of WTO.
3.1995: Introduction of Patents Bill (Amendment) Bill, 1995 in Lok Sabha and its passing by Lok Sabha with a slender majority. The Bill could not be introduced in Rajya Sabha due to strong opposition by Opposition and Independent Members of Parliament in Rajya Sabha."

irony of the worst type that our Government chose to be deluded by the OECD report! The Final Act was agreed on December 15, 1993, and it was formally signed at the Ministerial level in Marrakesh on April 15, 1994. On December 31, 1994 the Government Promulgated an Ordinance amending the Patents Act 1970; and acceded to the World Trade Organization, an institution to dominate the whole economic architecture of the World which commenced work from Jan. 1, 1995. One wonders how the Executive couldn't wait for an adequate popular deliberations when the Marrakesh Declaration of 15 April 1994 said in so many words:

> ".....so that it can enter into force by 1 January 1995 or as early as possible thereafter. Ministers have furthermore adopted a Decision on Trade and Environment."

The real state of affairs was thus brought out in the Consultation Paper on Treaty Making Power placed before the Constitutional Review Commission (forming part pf the Vol. II of the Report)[77]:

> "We in India cannot afford to ignore this subject any longer, particularly because of the experience of W.T.O. treaties signed by our Government without consulting or without taking into confidence either the Parliament or the public or, for that matter, groups and institutions likely to be affected adversely thereby."

After the ratification of the Final Act of Uruguay Round of GATT negotiations, our Government came under an obligation to implement the various agreements incorporated in the Final Act. The Trade Related Aspects of Intellectual Property Rights (TRIPS) was implemented by amending various IPR Laws to make them conform to the treaty obligations. Our Parliament found itself up against a *fait accompli*. Our sovereign Parliament got subjected to the servitude of the overweening exogenous forces. It worked under a crypto-psychic pressure, if not under a psychosis, of an apprehended breach of international obligations, which could not only embarrass our country in the comity of nations, it could have even exposed the country to sanctions. Those who had brought about this situation had brave words to blabber, but others found themselves in a Kafkaesque no-exit situation. This mood was evident in the speeches made in both the Houses of Parliament when the Patents (Second Amendment Bill) was under consideration. Whilst Pranab Mukherjee excused the unequal treaty as it was begotten in an unequal world, Manoj Bhattacharya was quite outspoken in his sublime wrath. With an iron in his soul he said in the Rajya Sabha:

> "One thing transpired, that there is an element of helplessness; they are trying to plead that we are in a helpless condition, that we cannot do it because we are already a member of the WTO, we are already committed we are already in the trap; and so we cannot come out of that trap, and for that only we have to effect these changes to the already existing very, very good and very, very progressive Indian Patents Law of 1970".

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[77] *http://ncrwc.nic.in/ http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm* Accessed 11 July 2006

"Kindly forgive me for saying so, the multi-national corporations work only to amass super-profits".

"They work only to amass super-profits. They are not satisfied. Their lust is not satisfied with the profits only. Their lust is satisfied only with super-profits. They are working only for super-profits. They have no concern for the public health, they are not concerned for the ailing children of ours, they have got no concern for the malnutritioned women of our country and they have no concern for the poor people of this country".

Whilst all these happened, our leaders, the press and other opinion-makers were over busy with the inane trivialities of self-seeking politicking. Never had such an indifference ever been shown by a democratic country when it had sufficient presentiment of a strange tsunami creeping fast to overtake it. This plight of the nation takes mind again to the days of the Nawab of Awadh when, whilst the imperial forces were on his head, the Nawab was playing with pigeons. This Petitioner recalls someone writing about a person who played chess in his portico unmindful of the fact that inside the house he was being robbed and his wife raped![78]

185. The *Report of the Peoples' Commission on GATT* examined at length in its Report the various aspects of the Agreement in question, and held unanimously that India's acceptance of the Final Act was in breach of the mandatory constitutional principles considered basic under our Constitution :

(a) Constitutional basics,
(b) Judicial Review,
(c) Treaty-making power,
(d) Federal structure,
(e) Fundamental Rights,
(f) Democracy, and
(g) Sovereignty.

And they held at p. 164 of the Report :

"Such a treaty is not constitutionally binding within the Indian Constitutional System and, in the facts and circumstances cannot be given effect to."

And at p. 179:

"If the Constitution is what the Judges have told us it is and the text with the Preamble explicates it, the TRIPS part vis a vis Indians will in all probability be *ultra vires*."

It is worthwhile to mention that in any appraisal of these constitutional issues one should keep in view the morbid phenomenon of Sponsored State under which our Constitution is ridden roughshod by the corporate interests by corruptly enchanting our Government under the spell cast by the new compradors. In the early history of British India two models of imperialism were minted: in one the imperialist power controlled the administration and the markets leaving the façade of the Nawab's

[78]The game of chess in Middleton's *Women beware Women;* and T S Eliot, *The Waste Land*

government intact to receive all the brickbats from his people for things getting wrong; in the other no such pretence was maintained, and power was directly assumed over the people who could see the targets of their wrath, or objects of their veneration straight within their sight. The Sepoy Mutiny was a great revolution terribly underplayed by the British historians. But the imperialists learnt a lesson that the best strategy was to capture market for trade leaving political power with the native factotum[79]. The first model of covest vampirism won approval of the think-tanks of the distraught imperialists. This model is now the delight of the neo-imperialists dexterously engaged in a scramble of power to capture the markets and the economic resources of their target countries under deceptive strategy. The IMF-World Bank strategy illustrates what the early imperialists had thought and devised. The Uruguay Round Final Act is also designed to promote this morbid strategy.

This Petitioner submits that the horrendous Treaty like the Uruguay Round Final Act should have been considered by our people through *referendum*, because 'We, the People' alone are competent to decide whether to have this Constitution, or not. This Treaty was not a conventional consensual engagement: it was a *pactum de contrahendo*[80]. It involved an undertaking to negotiate or conclude a set of pre-fabricated agreements. The signing of this Final Act was a most important event of modern times. When a Treaty is done in the protocol of *pactum de contrahendo*, the contracting Parties agree to carry on negotiations to achieve arguments as conceived in a treaty. To hope that we would stand erect at the later stages of the negotiations would be hoping against hope knowing how our Executive cringed at Marrakesh, and how much ready it is to further the interests of those who have hardly any commitment to our Constitution.

Now it is appropriate to examine the features of this Final Act to demonstrate how grossly it offends our Constitution, and to see how atrociously it show the Executive's usurpation and desecration of legislative and the judicial powers.

Relevant Provisions of The Final Act

It is appropriate to consider specific provisions of the Final Act, and also of those provisions of our Constitution which lead this author to assert that the Government Action transgressed the mandatory constitutional limitations: but first some extracts from the Final Act containing some crucial provisions;

Article I. The World Trade Organization (hereafter referred to as "the WTO") is hereby established.

Article II, Paragraph 1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

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[79]The *Encyclopedia 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." [Asa Briggs in the Encyclopedia Britannica Vol. 29 p. 85]

[80]D.P.O'conell, *International Law* Vol 1 Chap 7

Article II, Paragraph 2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

Article III, Paragraph 3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

Article XVI, Paragraph 4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

Article XVI, Paragraph 5. No reservations may be made in respect of any provision of this Agreement.....

Articles from Annex 2 of the Agreement Establishing the World Trade organization, "Understanding on Rules and Procedures Governing the Settlement of Disputes.

Article 1, Paragraph 1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

Article 2, Paragraph 1. The Dispute Settlement Body (DSB) is hereby established to administer these rules and procedures.....

Article 6, Paragraph 1. If the complaining party so requests, a panel shall be established at the DSB meeting following that at which the request first appears as an item on the DSB's agenda.....

Article 12, Paragraph 7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB.....

Article 16, Paragraph 4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.

It is important to note that whenever the WTO is criticized for being undemocratic, it counters asserting[81]:

[81]http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m10_e.htm

"What is more, the WTO's trade rules, resulting from the Uruguay Round trade talks, were negotiated by member governments and ratified in members' parliaments."

So far India is concerned, the WTO is clearly undemocratic as this Treaty was not "ratified in members' Parliament".

Sampling Some Provisions from The Uruguay Round Final Act

Never in this World ever a Treaty was done more comprehensive, more embracing, and more dominating, with widest spectrum, than the Uruguay Round Final Act. Not only it defies a systematic analysis in any clear frame of reference, it also deceives and ditches any honest analyst as its protocol of *pactum de contrahendo* half reveals and half conceals the truth within. It is an Agreement to Agree to terms , on negotiations (under duress) with regard to matters some clear, some in silhouette, but many creeping through mist. Besides, it has so many casements for corporate delight that anything can be interjected into it by through pressure and persuasion.

To provide some insight into the Final Act a fleeting focus on the following two segments is put to show how they are clear usurpation of our Sovereignty, breach of fundamental constitutional limitations, encroachment on or shedding off of the legislative power of Parliament, and how they direct us in a morbid peremptory tone of command which only a nation under the victors' boots can tolerate. These are: (a)Agreement on Agriculture; and (b) Agreement on the Trade-Related Aspects of Intellectual.

(a) Agreement on Agriculture

The Agreement on Agriculture consists of four portions: the Agreement on Agriculture itself; the concessions and commitments Members are to undertake on market access, domestic support and export subsidies; the Agreement on Sanitary and Phytosanitary Measures; and the Ministerial Decision concerning Least-Developed and Net Food-Importing Developing countries. The WTO admits:

'*Overall, the results of the negotiations provide a framework for the long-term reform of agricultural trade and domestic policies over the years to come.* It makes a decisive move towards the objective of increased market orientation in agricultural trade..... The agricultural package also addresses many other issues of vital economic and political importance to many Members. These include provisions that encourage the use of less trade-distorting domestic support policies to maintain the rural economy, that allow actions to be taken to ease any adjustment burden, and also the introduction of tightly prescribed provisions that allow some flexibility in the implementation of commitments. Specific concerns of developing countries have been addressed including the concerns of net-food importing countries and least-developed countries.'...

Further, under this Agreement , the Members are required to reduce the value of mainly direct *export subsidies* to a level 36 per cent below the 1986-90 base period

level over the six-year implementation period, and the quantity of subsidised exports by 21 per cent over the same period. In the case of developing countries, the reductions are two-thirds those of developed countries over a ten-year period (with no reductions applying to the least-developed countries) and subject to certain conditions, there are no commitments on subsidies to reduce the costs of marketing exports of agricultural products or internal transport and freight charges on export shipments. Where subsidised exports have increased since the 1986-90 base period, 1991-92 may be used, in certain circumstances, as the beginning point of reductions although the end-point remains that based on the 1986-90 base period level.

It is made clear that *the package is conceived as part of a continuing process with the long-term objective of securing substantial progressive reductions in support and protection.* In this light, it calls for further negotiations in the fifth year of implementation which, along with an assessment of the first five years, would take into account non-trade concerns, special and differential treatment for developing countries, the objective to establish a fair and market-oriented agricultural trading system and other concerns and objectives noted in the preamble to the agreement.

The Agreement on Agriculture commands, *inter alia* other things, the following:

"(a) To reduce domestic support, measured in terms of AMS (Agregate Measurement of Supports), by 20%;

(b) To reduce barriers to trade (comprising tariff and tariffed non-tariff barriers)by 36% (tarrification means that all border non-tariff barriers will be replaced by tariffs yielding the same level of protection); besides all agricultural tariff lines will have to be bound;

(c) To reduce export subsidies by 36% of budget outlays and 24% in quantity;

(d) For those countries which decide to convert their non-tariff barriers into equivalent tariffs, to maintain the current level of market access and to grant minimum access through tariff quotas representing 4% of domestic consumption in the base year in the first year of the implementation period, going up to 8% by end of the period. For an agricultural commodity that is designated staple food in a developing country, the minimum access opportunity would have to be 1% of consumption in the first year, going to 2% at the beginning of the fifth year, and further to 4% at the beginning of the tenth year...."[82]

In tone and the temper of the above stipulations are no different from those shown by the imperialists even in such treaties as the Treaty of Allahabad, the Treaty of Nanking, the Treaty of Wanghia and the Treaty of Whampoa while effecting the earlier version of the Sponsored State.

The Executive while ratifying the Act forgot all the constitutional commitments to create an agrarian structure based on justice and equality. One of the Fundamental Duties is "to cherish and follow the noble ideals which inspired our national struggle for freedom". It is to say the obvious that the sequel to the Fundamental Duty requiring a citizen to do certain thing in certain way, is inevitable to require the

[82]Dubey, *An Unequal Treaty* p. 75.

Government not be carefree about that. In this connection the following deserve to be considered:

(i) "It was during the struggle of independence itself that the Indian National Congress had realized that political independence without social and economic freedom was not enough. It was also accepted that the permanent settlement of 1793 must be repealed and actual cultivator of land should be granted ownership rights. The Congress Agrarian Reforms Committee had prepared a blue print of the abolition of intermediaries of all kinds."[83]

(ii) "The Planning Commission noted the existence of impediments of the pre-independence agrarian system and realized that their removal was necessary to bring about changes in the agrarian structure to realize the constitutional objective of a just social order.....The programme[84] was further divided in five phases as follows:

(1) Abolition of Intermediaries;
(2) Tenancy reforms with security to actual cultivators;
(3) Redistribution of surplus ceiling land;
(4) Consolidation of holdings; and
(5) Updating of land records"[85]

(iii) "The Constitution (Twenty-fifth Amendment) Act, 1971 inserted a new Article 31C in the Constitution to protect legislations enacted to give effect to directive principles contained in Article 39(b) and (c) against a challenge on the ground of alleged inconsistency with fundamental rights guaranteed by Articles 14, 19, and 31. The validity of the Article was also upheld.....The Supreme Court from beginning till today has upheld the validity of agrarian reform legislation against all kinds of attack."[86]

The effect of the Agreement on Agriculture is in utter forgetfulness of our constitutional commitment of binding nature. The constitutional commitments have been given up under the WTO instructions/ influence. Zamindari system is back. The Special Economic Zones, and other ventures in the Special Economic Zones are negation of our constitutional commitments. Farmers are dying in thousands: how many are dead is a matter for speculation for our Stock-Market ruled Government. One expert has this to say[87]:

> "Dr. Vandana Shiva, Director, Research Foundation for Science, Technology and Ecology has called the suicides of more than 40,000 farmers a genocide. This genocide is a result of deliberate policy imposed by the WTO and the World Bank, implemented by the Government, which is designed to destroy small farmers and transform Indian agriculture into large scale corporate industrial farming."

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[83]Prof. M.L.Upadhyaya, *Law, Poverty & Development* (Taxman) p. 104
[84]Government of India, Planning Commission, the Eighth Five Year Plan, Vol II, p. 33
[85]Prof. M.L.Upadhyaya, *Law, Poverty & Development* (Taxman) p. 105
[86]ibid 105-106
[87]*http://www.navdanya.org/news/06may08.htm*

All this is happening when not less than one-third of the World GDP is stashed in the tax havens. The speculators thrive on extractive investments. We give concessions worth Rs 90,000 to the corporate world. Our country's black economy is at least 40% of GDP and the government is losing at last Rs. 4.5 lakh crores of taxes. So that the exploitative practices go unnoticed. We have built an Opaque System under which the CBDT issued Circular 789 of April 13, 2000 preventing the statutory authoritative from looking into the loot from the tax havens. And all this despite our Constitution which grants us Right to Know, and despite our commitment to transparency under the *U.N. Convention against Corruption,* and also to the provisions as to transparency mandated even under the Uruguay Round Final Act. It is distressing to say that our government may break new grounds for resources by granting lands to the corporate zamindars, by granting right to exploit our resources by conferring licenses and franchises to corporations to rule the country. If water resources are exhausted, riverbeds can be leased or auctioned. When all these are exhausted, human beings, now fast becoming commodities (vide David Riesman's *The Lonely Crowd*), can be sold in international market. After all under the WTO regime it is the Market which rules. India's Constitution , it is possible to argue, stands repealed to the extent it conflicts with the commands of Market, and the WTO.

The only purpose of submissions made hereinbefore is to respond to a rhetorical question which this author puts to himself: Was our Executive Government competent to enter into the Treaty under question in exercise power under Article 73 of the Constitution? The only right reply seems be: NO.

(b) Agreement on the Trade-Related Aspects of Intellectual

The TRIPS Agreement was done under abhorrent circumstances, and in breach of our Fundamental Rights. The following two observations deserve to be noted:

(i) "TRIPS Agreement during the Uruguay Round of Negotiation was pushed by developed countries at the behest of the Association of Multinational Corporations viz. The Intellectual Property Committee (USA), Keidanren (Japan) and UNICE (Europe). In fact these Associations submitted a joint Memorandum to the GATT Secretariat in June 1988 and this became the basis for the TRIPS frame-work. On the other hand USA enacted special 301 and super 301 laws and started pressurizing many countries to accept the TRIPS frame-work. Thus this Agreement became part of the Final Act virtually without negotiations..."[88]

(ii) The People's Commission perceptively observed:
"In view of the foregoing changes to the existing laws required by the TRIPS Agreement and Agriculture Agreement and the anticipated effect on the price of medicines and self-sufficiency of food, we are of the view that

[88]The Commission consisted of Shri I.K.Gujral, Prof Yashpal, Shri B.L.Das, Dr Yusuf Hamied p. 40

the Final Act will have a direct and inevitable effect on the fundamental right to life enshrined in Art 21 of the Constitution"[89]

(iii) "The main reason for bringing the protection of IPRs under the trading system under GATT was to secure the right to use the GATT retaliatory trade sanctions because other enforcement mechanisms at the national and international levels, were proving inadequate."[90]

Some major differences between the Patent Act of India, 1970 and the TRIPS Agreement are these:

- "The Indian Act excludes nuclear energy, methods of agriculture and horticulture and bio-technological processes and products from patentability. The TRIPS Agreement makes all these methods and products patentable.
- Under the Indian Act, only process patents can be granted to food, medicines, drugs and chemical products. The TRIPS Agreement provides for granting product patents also in these areas.
- The duration of patents according to the Indian Act is 5 to 7 years for products for which only process patent is granted and 14 years for those for which product patent is also granted. Under the TRIPS Agreement, it will have to be 20 years in all cases....."[91]

The only purpose of submissions made hereinbefore is to respond to a rhetorical question that this author puts to himself: Was our Executive Government competent to enter into the Treaty under question in exercise power under Article 73 of the Constitution ? His only answer would be: NO.

The Syndrome of The Sponsored State[92] Under Which Our Constitution is Defaced and Defiled.

It is respectfully submitted that juristic approach to our Constitutional rights must take account the factors which are turning our Republic into a Sponsored State. This ethos has been created through the Treaties and Agreements done under the executive power. Roscoe Pound said that the march of jurisprudence is from analytical to functional. Any functional comprehension of our Constitution is meaningless unless the issues are examined under the aspects of the present-day realities created by the hegemonic economic realm under the twin forces unleashed by the greedy Market (Pax Mercatus), and the corporate hegemony.

One of the pronounced features of the Sponsored State is the unbridled executive for promoting the interests of the capitalists, imperialists, and the stooges whom we

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[89]The People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar at P. 157

[90]Dubey, *An Unequal Treaty* p. 25.

[91]Ibid p. 24

[92]Features explained by the author in his *Judicial Role in Globalised Economy* Chapter I (2005) [Wadhwa & Co, Nagpur and New Delhi]

call compradors. This Petitioner, while examining the features of the Sponsored State, has stated[93] in his *Judicial Role in Globalised Economy :*

> "Under the sponsored state system which Clive set up he found that despite the dewani which enabled to promote the commercial interests of the East India Company with no holds barred, it was essential to manage the system of governance from inside the ramshackle and truncated political structure over which Mir Jafar or Mir Kasim presided as nawab. Clive pursued this objective with a stroke of stealth by securing for Rida Khan, who was Clive's deputy diwan, the post of the nawab's deputy. The inevitable consequence was the emergence of powerful coterie of bureaucrats and self-seekers who worked for the Company whilst swore loyalty to the nawab."

How can we trust the executive to exercise the power which ignores our people, scuttles our Constitution, and proves that all our Freedom Fighters were fools who fought for this Country's Independence? This author's words should not be treated as casting an aspersion on anybody as he cannot do it as his family itself had produced some distinguished Freedom Fighters, and he himself had suffered, with joy, the trials and tribulations of the Struggle for Freedom.

There is one more special reason why express Parliamentary approval of a treaty must be obtained. In a Sponsored State, the high bureaucrats cannot be wholly trusted. Even now we have a lot of Rida Khans at work. It is in public domain that a lot of civil servants who worked as negotiators in the matters of the Uruguay Round Final Act, and the WTO, succeeded in ensuring for themselves high assignments in the WTO, World Intellectual Property Organization (WIPO) etc. We have seen that most often key posts in the high realm of economic management go to those who have undergone training at the IMF or the WTO. This syndrome becomes all the more gruesome when we recall the observation of Justice Shah in the Shah Commission Report, that there is "the Root of All Evil" emanating from the nexus between the politicians and the bureaucrats.

What Our Domestic Court Can Do

Our Superior courts are competent to hold a treaty *domestically non-operative* to the extent it is beyond the constitutional competence of a contracting party even if it is concluded, and is internationally binding (vide: Lord McNair, *The Law of Treaties*, Chapter IV, p. 82; Starke, *Introduction to International Law*, pp, 77-78). The Court can even direct the Central Government to take corrective and remedial actions even at international plane. Commenting on *Teh Cheng Poh v. Public Prosecutor,* Malaysia, 1980 LR, 458 PC at p. 472 ; (Paper Book Vol-II, p. 94. at p.110 H. M. Seervai observes, "..... the importance of *Poh's* Case lies in the fact, that in the opinion of the Privy Council a *mandamus* would lie against the Cabinet to advise H.M. to revoke the Regulations." (*Constitutional Law of India*, p. 1131). Our Supreme Court is under duty to preserve and protect the Constitution. Our

[93]at p. 24

Constitution mandates in clear terms. The Supreme Court is duty bound to uphold the Constitution as it is bound under oath to do so. In *Marbury v. Madison*[94], the Chief Justice Marshall refers to the effect of the judge's oath in words which time cannot make stale till our Constitution meets the fate of the Weimer Constitution:

> "How immoral to impose on them, if they were to be used as the instrument, and the knowing instruments, for violating what they swear to support!"... Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If such were the real state of things, this is worse than solemn mockery. To prescribe, or to take oath, becomes equally a crime."

And in evaluating the submissions of the Executive of a Sponsored State, one must keep in view the perceptive assessment of the Executive in our day made as by Harold Pinter, the 2005 Nobel Prize Winner for Literature, in his Nobel Lecture:

> "Political language, as used by politicians, does not venture into any of this territory since the majority of politicians, on the evidence available to us, are interested not in truth but in power and in the maintenance of that power. To maintain that power it is essential that people remain in ignorance, that they live in ignorance of the truth, even the truth of their own lives. What surrounds us therefore is a vast tapestry of lies, upon which we feed."

[94]2 L Ed 60 (1803)

Chapter 3

Grounds to Assail India's Acceptance of The Uruguay Round Final Act, And India's Participation in the WTO

Never were the words of Lord Denning, which he uttered in 1949 in his public lecture (*Freedom under the Law* p. 126):

> "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."

More timely than in evaluating the complaints as to the violation of Fundamental Rights in this phase of Economic Globalization when there is an evident and dexterous strategy to drive our Republic towards the Sponsored State wherein Social Justice and Democracy become neglected values. For "the winning of freedom in [this] new age" this Hon'ble Court must take a holistic view as to the survival of our Fundamental Rights in this age where corporations rule, where Market conditions and controls ethical and value judgments, when there is a commoditization of individuals, where the Strategy of Corruption and Craft of Deception are triumphant, where we have virtually two Indias, one the India of the India Inc. and the high net-worth creatures, and the other, the India of starving and suffering millions, where covert and sinister invasions on Fundamental Rights can be made under camouflage.

As perspective is always a determiner of a decision, we must consider the realities begotten by the syndrome of the Sponsored State, more specifically, 'Sponsored Government' under the WTO commitments aggravated by the IMF Directives. The Uruguay Round Final Act itself speaks of a close relationship between the WTO and the IMF (vide 'Declaration on the Relationship of the WTO with the IMF'). The Final Act establishes the Rule of the Market (vide Art. 29 of the Agreement on Import Licensing Procedure [95]). Our courts have the difficult task of protecting our Fundamental Rights in this Sponsored State because the government of such a State becomes, in reality, just a front only. To respond to the challenge of our times, our courts shall have to revise the judicially created conventional norms governing the enforcement of Fundamental Rights. Our Supreme Court has already advanced in this matter when it observed in *Maneka Gandhi* (AIR 1978 SC 597):

> "The attempt of this Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

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[95] Members in the process of transformation from centrally-planned into a market, free enterprise economy may apply programmes and measures necessary for such transformation

The new realities demand a new perspective. Judge Manfred Lachs of the ICJ in *In the North Se Continental Shelf Case*[96] had aptly observed:

"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."

Violation of our Fundamental Rights

Art 14 breached

The conformity with the WTO-IMF commitments are bound to be subversive of Art. 14 of the Constitution as it is impossible for the mandate of this Article to operate in the ethos thus created by the market that rules the world.. The Right to Equality is not only a fundamental right, it is also a basic feature of the Constitution. Art 14 has two facets:

(i) Art 14 is a constitutional command directed against the 'State' on whose behalf the Executive government enters into a treaty. Even if an executive act is done at the international plane, it would be per se domestically unenforceable if it violates the Art 14 of the Constitution.

(ii) Art. 14 confers the Right to Equality to any person as a correlative to the duty that is cast on the 'State' not to deny equality before the law or the equal protection of the laws within the territory of India. This right inheres in every person, or groups of persons, or their political formation, the nation.

Conformity with the WTO-IMF commitments may also be subversive of Art 14 of the Constitution even if 'the doctrine of classification', which is a subsidiary rule not needing an over-emphasis[97], is applied. These issues deserve to be examined only in the macro-perspective, not merely under micro-perspective of individuals.

The duty under Art. 14 is cast on the 'State', and is to be discharged in favour of persons both as individuals, and as groups. What the new governmental commitments have spawned is revealed in the plight of our nation: Such a tragic state of affairs is the consequence of the studied indifference to the people's rights under Articles 14 and 21 of our Constitution. Let the figures speak:

(i) *Prof. Fatima Meer* states[98]:
"The rich countries enjoy 60% of the world's GNP but have only 15% of the world population. In 1960, 20% of the world's richest countries had 30 times the incomes of the poorest 20%; in 1997, 74 times.The gap between the world's richest and poorest countries has doubled in the last 50 years.

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[96]ICJ 1969, 3 at 222

[97]L.I.C. of India v Consumer Education and Research Centre AIR 1995 SC 1811, 1822

[98]*http://www.humanities.mcmaster.ca/gandhi/Lectures/2001-Meer.htm* accessed 5 July 2006

It was 3:1 in 1820, 11:1 in 1913, 35:1 in 1950 and 72:1 in the nineties. World poverty is escalating, as is too unemployment with one third of the world's labour force being unemployed or underemployed."[99]

(ii) P. Sainath comments[100]:

"India is a classic example of engineered inequality. On 20 October, *The New York Times* had a front page lead celebrating the birth of a class of people in India who spend their weekends at malls. It failed to mention that this year, India slipped three places in the human development ranking of the United Nations. We now stand at rank 127. This year's UN Human Development Report had found that for the bulk of the Indian population, living standards are lower than those of Botswana – or even the occupied territories of Palestine. So while some of the richest people in the world live in India, so do the largest number of the world's poor.

The euphoria over one good monsoon (actually, we've had several these past 15 years) seems to have erased any debate in the media on what's happening in Indian agriculture. Small farms are dying. Investment in agriculture is down. Rural credit has collapsed and debt has exploded. Many are losing their lands as a few celebrate at the malls. In March this year, as Professor Utsa Patnaik points out, the per person availability of foodgrain was lower than it had been during the notorious Bengal Famine of 1942-43. Thousands of farmers have committed suicide since the late 1990s. In a single district of Andhra Pradesh, Anantapur, more than 2400 farmers have taken their own lives since 1997. Elsewhere in India, like in Gujarat or Mumbai, the loss of countless jobs in industry is boosting religious fundamentalism. In the 2002 violence in Gujarat in which over 1500 lives were lost, many of the rioters were workers from shut-down textile mills.

The huge new inequalities are feeding into existing ones: For instance, in a society where they are already disadvantaged, hunger hits women much harder. Millions of families are making do with less food. In the Indian family women eat last. After they have fed their husbands and children. With smaller amounts of food being left over now, poor Indian women are eating even less that they did earlier. The strain on their bodies and health becomes greater. Yet, health care is ever more expensive.

So what sort of a society are we building in the new, confident India? We are closing small health centres and opening super luxury hospitals that 90 per cent of Indians cannot afford; shutting down primary schools and opening colleges based on exorbitant donations for admissions; closing libraries and opening multiplexes; winding up bus depots and services as we expand the airport systems."

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[99]"The gap that separates the world's rich and poor, both within and between countries, is unconscionable and growing. ... the 20% of the world's people who live in the wealthiest countries receive 82.7 % of the world's income; only 1.4% of the world's income goes to the20% who live in the world's poorest country." David Karten, *When the Corporations Rule* p. 108

[100]http://www.india-seminar.com/2004/533/533%20p.%20sainath.htm

And the above state of affairs is largely crafted by the WTO commitments. An expert observes:

> "Some of these changes are the result of WTO regulations, We removed Quantitative Restrictions on imports in April 2001 fully two years ahead of the time we are required to do so by the WTO! The portrayal of the Indian farmer as non-competitive is also sleight of hand; sensing the changing environment, the industrialized nations increased their subsidies 2-6 times in 1980s, and are now reducing them fractionally, portraying this as a scale-back of government support! It is a myth that the Indian farmer is not competitive. There is no level playing field in India. The free market is a farce. Who are the people who negotiated on India's behalf at the WTO? What positions do they now hold? During the earlier round of GATT negotiations, we saw that many who allegedly represented India instead sold the country down the drain, and took plush jobs in the west for their own personal gain."

Nearly 380 million Indians live on less than a dollar a day. Our country's $ 728 per capita GDP is just slightly higher than that of sub-Saharan Africa. A sort of s genocide is a result of deliberate policy imposed by the WTO and the World Bank, implemented by the Government, which is designed to destroy small farmers and transform Indian agriculture into large scale corporate industrial farming. International agribusiness is intent upon driving the family farm into bankruptcy. Starvations by the farmers are not much reported in our Press.

The breach of Art 14 of the Constitution of India to create conditions under which the ideals set forth by our Constitution are defeated by creating two Indias, one of the growing breed of high net-worth persons, and the greedy India Inc. and the other of the ill-fed, ill-clad, ill-educated, and starving millions. This growing discrimination defeats social justice and inequality. This sort of discrimination emanates from the policies, legislative and executive, being implemented by our government in gross forgetfulness of its constitutional commitments. Such policies, mandated under the WTO-IMF directives, lead to the shocking delight for a few, and sorrow for many calling to mind what Blake said:

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

The action of the Executive in accepting a strange servitude under the Uruguay Round Final Act reveals an utter disregard for the principles of reasonableness and fairness, and amounts to an act of overweening arbitrariness and arrogance. Our Supreme Court expounded *Ajay Hasia v. Khalid Mujib Sehravardi*[101] what is known as the New Doctrine of Art 14 in these words:

> "It was for the first time in *E. P. Ayyappa v. State of Tamil Nadu*, (1974) 2 SCR 348: (AIR 1974 SC 555), that *this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness... From a positivistic point of*

[101] AIR 1981 SC 487

view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. *Articles 14 and 16 strike at arbitrariness* in State action and ensure fairness and equality of treatment".

"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of *equality or non-arbitrariness pervades Article 14* like a brooding omnipresence."

Kruse v. Johnson[102] and *Slattery v. Naylor*[103] strike similar note as even in the context of the British system certain bye-laws were held "unreasonable", hence bad. There are good reasons to believe that was highly unreasonable on the part of the Executive government:

(i) to slice off/ shed off certain legislative power in favour of the WTO;
(ii) to assign certain judicial power in favour of the DSB of the WTO;
(iii) to effect a wrongful change in Primary-Governmental Functions, enjoinedby the Constitution;
(iv) to enter into a devastating treaty, (as the *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges **Annex 'D'**) under an opaque system violating certain basic features of our Constitution, viz: (a) Constitutional basics, (b) Judicial Review, (c) Treaty-making power, (d) Federal structure, (e) Fundamental Rights, (f) Democracy, and (g) Sovereignty; and
(v) to transform, through conduct, the Uruguay Round Final Act virtually into self-executing treaty camouflaged, of course, under the *pactum de contrahendo* protocol (evidenced by the Amendments done under the Patents Act, and the Lifting of Quantitative Restrictions under the binding decisions of the DSB of the WTO).

Art 19 breached

The controlling organization created by the Uruguay Round Final Act, the WTO, defeats our Fundamental Right under Art 19(1)(a) of the Constitution of India which grants to the citizenry of this Republic a fundamental "right to freedom of speech and expression". In *R. v. Cmmr of Police Ex p Blackburn* (No 2)[104] Salmon L.J. aptly said:

"It is the inalienable right of everyone comment fairly upon any matter of

[102](1898)2 Q.B. 91.
[103](1888) 13 App. Cas 446
[104](1968) 2 QB 150

public importance. This right is one of the pillars of individual liberty—freedom of speech, which our courts have always unfailingly upheld... The criticism here complained of, however, rumbustious, however wide of mark, whether expressed in good taste or in bad taste, seems to me to be well within (the limits of reasonable courtesy and good faith)."[105].

And the fundamental right to "freedom of speech and expression" cannot be exercised properly unless with it goes the Right to Know[106]. This Hon'ble Court has recognized the supreme importance of the Right to Know.

The WTO is a secretive body sans transparency, and sans democratic commitment to unfold itself to critical public gaze. How the WTO functions has been vividly described by Joseph Stiglitz, the winner of the Nobel Prize foe Economics 2001, and a former Chief Economist at the World Bank, in these words[107]:

"The problem of lack of transparency affects each of the international institutions, though in slightly different ways. At the WTO, the negotiations that lead up to agreements are all done behind closed doors, making it difficult —until it is too late --to see the influence of corporate and other special interests. The deliberations of the WTO Panels that rule on whether there has been a violation of the WTO agreements occur in secret. It is perhaps not surprising that the trade lawyers and ex-trade officials who often comprise such panels pay, for instance, little attention to the environment; but by bringing the deliberations more out into the open, public scrutiny would either make the panels more sensitive to public concerns or force a reform in the adjudication process".

The executive government enjoys transacting with the areas of darkness like the tax havens. It has no pangs of conscience in issuing directions like the Central Board of Direct Taxes Circular No 789 of April 30 of 2000 which commands the statutory authorities under the Income-tax Act, 1961, to go in blinkers when transactions are routed through Mauritius, a popular tax haven. Secrecy goes against our Public Policy and international *jus cogens*, as it breeds corruption. Stiglitz aptly says[108]:

"Secrecy allows government officials the kind of discretion that they would not have if their actions were subject to public scrutiny. Secrecy not only makes their life easy but allows special interests full sway. Secrecy also serves to hide mistakes, whether innocent or not, whether the result of a failure to think matters through or not. As it is sometimes put, "Sunshine is the strongest antiseptic."

Art 21 breached

Our Right under Art 21 is bound to suffer under the predatory system of economic

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[105]ibid p 155

[106]Reliance Petrochemicals Ltd. v Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. (AIR 1989 SC 190)

[107]Joseph Stiglitz, Globalization and its Discontents. (Penguin) p. 227-228

[108]ibid pp 228-229

management which our government has uncritically accepted under corporate duress. This Hon'ble Court in *Vincent v. UoI* (1987) 2 SCR 468 at 478 considered right to health enshrined in the Right to Life under Art 21. The Court observed:

> "As pointed out by us, maintenance and improvement of public health have to rank high as these are indispensable to very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution-makers envisaged."

The commitments made by the Executive under the Final Act were criticized by *the Report of the Peoples' Commission on Patents Laws in India* (by Shri I.K.Gujral, Prof Yashpal, Prof Muchkund Dubey, Shri B. L. Das, Dr Yusuf Hamied and Dr. Rajeev Dhavan) which observed:

> "The provision of our Constitution should be fully respected and there should be no compromise in amending our patents laws with these provisions".[109]

The changes to the existing laws required by the TRIPS Agreement and Agriculture Agreement, and the anticipated effect on the price of medicines and self-sufficiency of food, will have a direct and inevitable effect on the fundamental right to life enshrined in Art 21 of the Constitution. The People's Commission (headed by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai, the former Judges of our Supreme Court; and Rajinder Sachar, former Chief Justice of Delhi High Court) also came to the same view after making a detailed study of the commitments undertaken by our Executive government.[110]

The TRIPS are designed to promote the interests of the corporate oligarchy by generating monopoly, which is bound to affect the Right to Life which our Constitution grants. Mrs Gandhi, while addressing the WTO conference in Geneva, on May 1981, expressed what accords well with Art 21. She said:

> "My idea of a better ordered world is one in which discoveries would be free of patents and there would be no profiteering from life or death."

Prices of life-saving drugs are bound to increase so much that for many Right to Life would become meaningless. It is evident from the price differentials clear from international comparison of drug prices.[111]

Art 29 breached

Our Right to Culture, granted by Art. 29 of the Constitution is alarmingly threatened by the corporatism, consumerism, crash materialism being generated by Market engineered and facilitated by the WTO. In 1915 Einstein wrote to Lorentz in Holland "that men always need some idiotic fiction in the name of which they can face one another. Once it was religion, now it is the State". This author would say: "Once it

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[109]at p. 85

[110]Report of the Peoples' Commission on GATT by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar at p.157.

[111]Peoples' Commission Report 2003 p.100

was religion, then it was the State, now it is the Market, Pax Mercatus". We had tamed the State power through the Constitution, now there is time to tame the Market somehow before it destroys our culture.

The Right to Culture is available to all citizens, whether they belong to the majority or minority group. [*State of Bombay v. Education Society* (1955)1 S.C.R. 568] The waves of sub-culture are being generated to destroy our cultural moorings so that not only we would subject ourselves to servitude under hypnosis, but we would also be exhibiting the slave's syndrome by falling in love with our slavery. The neo- liberalism is a variant on neo-colonialism. In the Sponsored State, that the British established, we had lost independence but we could protect our culture, though bruised and somewhat battered; yet having potentialities enough to enable us to organize our Struggle for Independence. But the Sponsored State, that our commitments under the Uruguay Round Final Act have built / and are building under the command of the WTO, would become the veritable Waste Land for all our values.

This would be so as culture is learnt in an environment, and it is lost if the environment becomes negative[112]. It is going to be a case of cultural evolution through indigenous assimilation, but of a cultural imposition through high pressure, unethical allurements, and morbid deception.

The persuaders and pressurizers, working as the lobbyists and the compradors for the WTO, are creating an ethos under which our Constitution, may fare much worse than the Weimer Constitution in Germany. Time has come when our courts should take the judicial notice of these facts; and direct the Executive to desist from subverting our Constitution .

The morbid state of affairs pose a lot serious risks which include risks as sinister as these:

(i) The Universities are fast coming under the corporate influence. Universities are now becoming both producers of commodities (future employees) as well as consumers. Corporations are playing a growing role as the universities are tempted to turn to the corporate sector to supplement the budget of the institution. This coming together of the academy and the business world is having an impact on the culture as the universities are fast moving towards commercialism under the subjugation of Market.

(ii) We are bidden to take into account the impact of legal institutions and rules on markets, and to undertake an economic analysis of law. 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. This trend would impact even the functioning of judiciary.

Our courts will have to take a judicial notice of hegemonic and monochromatic culture that the Market is generating, and issue such directions, or make such observations as they consider proper in exercise of its role as the guardian of the Constitution warrants.

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[112]Stephen J. Gould in Britannica Year Book 1999 p.9

Wrongful Change in Primary Governmental Functions

By accepting commitments under the Uruguay Round Final Act under the aegis of the WTO, our Executive government has blatantly breached the commands of the Preamble to the Constitution, and the Fundamental Rights read with the Directive Principles. A constitution is written by citizens to establish the government they live under. The prime purpose of a constitution is to delineate how government will operate and function. In the Pax Mercatus, whereunder the corporations become the Leviathan, the government surrenders itself to the World Bank and its cognate the IMF. How can our Fundamental Rights survive erect to protect us when the head of our Executive runs the risk of being a cringing slave? This Petitioner is not over-painting a scenario. If it happened in Indonesia, it can happen in India. In fact it might have already happened but none has yet written an account as graphic as that about Indonesia by Joseph Stiglitz[113]:

> "But the IMF is not particularly interested in hearing the thoughts of its 'client countries' on such topic as development strategy or fiscal austerity. All to often, the Fund's approach to developing countries has had the feel of a colonial ruler. A picture can be worth a thousand words, and a single picture snapped in 1998, shown throughout the world, has engraved itself in the minds of millions, particularly those in former colonies. The IMF's managing director , Michel Camdessus (the head of the IMF is referred to as its 'Manging Director'), a short, neatly dressed former French Treasury bureaucrat, who once claimed to be a Socialist, is standing with a stern face and crossed arms over the seated and humiliated president of Indonesia. The hapless president was being forced, in effect, to turn over economic sovereignty of the country to the IMF in return for aid his country needed. In the end, ironically, much of the money went not to help Indonesia but to bail out the 'colonial power's 'private sector creditors. (Officially, the 'ceremony' was the signing of a letter of agreement, an agreement effectively dictated by the IMF, though it often still keeps up the pretence that the letter of intent comes from the country's government!)'

A government which reduces itself to such a sordid situation is surely a continuous perpetrator of the subversion of the Constitutional objectives enshrined in the Fundamental Rights. How can the State grant 'equal protection of the laws' (Art 14) when the Executive government drives our nation to such a predicament? Slaves are never known to protect their liberty; they tend to fall in love with servitude itself (but often with an incessant denials).

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 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

[113]Globalization and Discontent pp 40-41

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*.[114] 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 ideals are frustrated if our the Fundamental Rights stand subverted. 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 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'.[115] In *Indra Sawheny v. UoI* (AIR 1993 SC 447 para 4) this Hon'ble Court held that Art 14 is to be understood in the light of the Directive Principles. But how incompatible are the commitments under the WTO to Art 39 of our Constitution, not to say of the others! This Article has been described as having its object the securing a Welfare State; and this Directive Principle was conceived to be utilized for construing the fundamental rights.[116]

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. 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 establishing a symbiotic relationship between the government and the business.[118]

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[114]Nowhere is the gap between rich and poor wider, nowhere are the rich richer and the poor poorer, than in those societies that do not permit the free market to operate.' Free to Choose 179

[115]Hayek, The Constitution of Liberty quoted by Peter Watson, A Terrible Beauty p.518

[116]Keshvanand Bharti AIR 1973 SC 1461 ; Snjiva Coke AIR 1983 SC 239

[117]J.K. Galbraith, Culture of Contentment (Boston)

[118]Ibid 590

- The government is fast becoming the protectors and the facilitators for the super-rich and the corporate world; in effect the government is fact becoming a bunch of *lathaits* (the lathi wielders).

The operative facts of our country's socio-economic management amply show the adoption of the neo-liberal agenda of the neo-colonialism of the Pax Mercatus under which there would, in the end be only one touchstone for decision- making: whether it is market-friendly?

It is strange that in enacting some major laws, our Government shows studied forgetfulness of the Preamble to the Constitution, the Fundamental Rights, Directive Principles of State Policy, but is nauseatingly imperious in pointing out its servitude to the Uruguay Round Final Act. To illustrate: the Protection of Plant Varieties & Farmers' Rights Act, 2001 states in its Preamble:

> ".....And whereas India, having ratified the Agreement on Trade Related Aspects of Intellectual Property Rights should *interalia* make provision for giving effect to sub-paragraph (b) of paragraph 3 of article 27 in Part II of the said Agreement relating to protection of plant varieties;"

The new unconstitutional trends are evident in many areas which have been explained by the People's Commission in their *Report of the Peoples' Commission on GATT* already referred.

Wrongful Assignment of the Legislative Power of Parliament

The terms of Uruguay Round of GATT, as the Articles quoted from the Final Act would show, require the Members to ensure that their laws, regulations, and administrative procedures conform to the obligations under the Final Act as agreed. The Agreement establishing the WTO, establish a procedure, whereby, if member nations are unable to negotiate a mutually satisfactory solution to a dispute or controversy, then the Disputes Settlement Body (DSB) may adopt a solution as recommended by a Panel. This adopted ruling is legally binding upon the disputing parties, and all other member nations of the WTO. Therefore, when a Panel ruling is adopted by the DSB, the DSB, in effect, performs a legislative act. Our Supreme Court in *Kesavananda's Case* (AIR 1973 SC1461) determined certain features of our Constitution constituting basic structure,; these are—

(1) Supremacy of the Constitution;
(2) Republican and Democratic form of Government;
(3) Secular character of the Constitution.
(4) Separation of powers between the legislature the executive and the judiciary
(5) Federal character of the Constitution.

These basic features, read with the provisions of Articles 79,107, 245 and 246 of the Constitution of India, have the express and implied effect of suggesting that the legislative powers of our Nation are constitutionally earmarked for the nation's democratic body, our Parliament. If rulings adopted by the DSB are legislative acts, legally binding upon member nations, then a part of the legislative power granted

to Parliament by Constitution, no longer remains in Parliament, but instead, it stands assigned to the WTO. Nowhere in the Constitution is even Parliament, not to say of the Executive, given authority to assign any part of its legislative powers to any other institution, much less to a foreign institution being a creature of a dubious treaty made under an Opaque System. If a portion of the legislative power of Parliament is now vested in the WTO, then the structural constitutional provisions have been breached. For this reason our acceptance of the Uruguay Round Final Act and participation in the WTO as member is repugnant to our Constitution.

The Parliament under Article 81 of the Constitution of India is a body of representatives we have elected to frame law and to hold the Executive under accountable and responsible to it. The constitutional effect of this had been highlighted centuries back by Sir Thomas Smith in his Exposition on Parliament in his *De Republica Anglorum* which has already been quoted.

If the legislative power vested in Parliament is allowed to be divided between Parliament and the WTO, then a fundamental constitutional principle would be destroyed. The Indian citizens do not vote for the WTO representatives. The citizens have elected our representatives to make law in consonance with our Constitution. We have neither empowered Parliament, nor the Executive to shed off legislative functions to any body else. Hence, our Executive went counter to our Constitution by agreeing to assign legislative functions to a foreign body. The effect is a wrongful abridgement of the voting rights of the Indian citizens. For these reasons, the acceptance of the Uruguay Round Final Act and our membership in the WTO, is repugnant to our Constitution and unconstitutional. The effect of Article XVI (4) has the effect of making the WTO the highest legislative and judicial body. This Article says:

> "Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements."

David Korten, after describing the WTO as "the World's Highest Judicial and Legislative Body", aptly says[119]:

> "A key provision in some 2000 pages of the GATT agreement creating the WTO is buried in paragraph 4 of Art XVI.....The 'annexed Agreements' include all the multilateral agreements relating to trade in goods and services and intellectual property rights. Once these agreements are ratified by the world's legislative bodies, any member country can challenge, through the WTO, any law of another country that believes deprives it of benefits it expected to receive from the new trade rules"

Our Parliament and Judiciary are now placed under a peremptory command to conform its laws to the WTO obligations. And this unthinkable has happened under the executive act done under an Opaque System.

The effect of this Article is to issue a command to our High Courts and this Hon'ble Court to come in conformity with the WTO obligations even if that may

[119]David Korten, *When Corporations Rule the World* p. 174

require its giving up of the constitutionally mandated view. This sort of commitment is the enactment of the Sponsored State Syndrome in the fifth decade of our Independence.

A close reading of the Uruguay Round Final Act shows the following facts very clearly:

(a) The tone of the legal texts of the Final Act is legislative. The norms are structured in the typical "if-then" (protasis-apodosis) format. The prescribed norms are mandatory as the Act commands total subjection to its terms, or a clear exit. It prescribes punitive measures including retaliatory actions.

(b) The *Black's Law Dictionary* defines ' legislative function' as under: '1. The duty to determine legislative policy. 2. The duty to form and determine future rights and duties.' This *Dictionary* defines 'norm' to mean 'a model or standard accepted (voluntarily or involuntarily) by society or other large groups, against which society judges someone or something.' The obligations under the Act are couched in style of legislative character. Neither our Executive, nor even Parliament, has jurisdiction to shed off the legislative function to any external body. 'We, the People' have not granted the power to delegate this essential democratic function.

(c) If at all the matters are brought up before Parliament to implement the treaty obligations through legislation, our Parliament would find itself helpless against a *fait accompli*, promoted through executive coercion of the sort to which Manoj Bhattacharya referred in the *Rajya Sabha* in a paragraph already quoted.

The Uruguay Round Final Act contains overweening norms for implementation encroaching on the realm of Parliamentary & Executive decision-making, and command subservience to, as *the Report of the Peoples Commission on Patents Laws for India*[120] says, "a totally new environment for policy and law making at the national and international levels".

The Uruguay Round of GATT, Article II, Paragraph 1, states that, "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement". This is clearly a Wrongful Assignment of the Power to Regulate Commerce with Foreign Nations. In contrast, entry 41 of the Seventh Schedule to the Constitution of India grants to Parliament power to frame law pertaining to "Trade and commerce with foreign countries; import and export across customs frontiers; definitions of customs frontiers". It is also evident that these Agreements under the Final Act would have an impact on Part XIII of the Constitution (Trade, Commerce and Intercourse within the Territory of India). Nowhere in our Constitution is the Executive, or even Parliament, given authority to assign its power to regulate commerce to foreign nations, or alien bodies. For these reasons, the enactment of GATT and membership in the WTO, is repugnant to our Constitution and unconstitutional.

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[120]The Commission consisted of Shri I.K. Gujral, Prof. Yashpal, Shri B.L. Das, Dr. Yusuf Hamied and Rajeev Dhavan

We are a Democracy because we elect our representatives for framing laws for our governance; we are a Republic because our representatives and other State functionaries are bound by our Constitution to lead us towards the constitutional goals. The Constitution cannot be allowed to become dysfunctional and void. If that happens, then our government itself becomes illegal and unlawful, and it can no longer hold claim to being a Republic.

Wrongful Assignment of the Judicial Power

By and large we share the common law tradition. In *Att-Gen v BBC* [1980] 3 All ER 161 at 181 Lord Scarman recognizes that under the common law tradition, whether in the U.K. (with an unwritten constitution) or Australia (with a written constitution), the judicial power is a species of sovereign power [of the State]:

> ".... Though the United Kingdom has no written constitution comparable with that of Australia, both are common law countries, and in both judicial powers is an exercise of sovereign power. I would identify a court in (or 'of') law, i.e. a court of judicature, as a body established by law to exercise either generally or subject to defined limits, the judicial power of the state...".

The judiciary exercises the judicial power of the State. Art. 144 of the Constitution of India directs all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court.

The Article XVI (4) of the WTO Charter mandates that each "Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements". This undermines the Rule of Law. The Understanding on Dispute Settlement mandates a procedure sans transparency, sans judicial control, sans all the trappings of procedural fairness and moderation considered sacrosanct under civilized jurisprudence. There is not much distance between retaliation or cross-retaliation, and retortion and reprisal.

It is a matter of history that in India the administration of civil justice was closely associated with the management of revenue, and the grant of Diwani rights in 1765 comprised both these functions."[121] The Company and their English employees secured the administration and management of the civil courts , leaving the administration of criminal law in the hands of the natives. The English believed that with the control over the administration of civil justice they could protect their person and property better; they could carry on their arbitrariness and the loot of the land without any effective judicial control. This system protected and promoted their trade and investment. The colonialists were accustomed to follow this approach in all the countries which had come under their sway. In China too somewhat similar situation was brought about after establishing their privileges including the most-favoured-nation (MFN) which ensured trading equality This was brought about through the Treaty of Nanking, the Treaty of Wanghia (with the United States in 1844), and the Treaty of Whampoa (with France in 1844). Later on the colonial

[121] R.C. Majumdar et al, An Advanced History of India p. 788

power obtained certain benefits of extraterritoriality also. This had the effect of exempting them "from the application or jurisdiction of local law or tribunals." How close is this to Article XVI (4) of the *Agreement Establishing the WTO* which obligates :

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

And Article III (3) prescribes:

> "The WTO shall administer the Understanding on Rules and Procedures Governing the Settlements of Disputes ...in annex 2 of this Agreement."

Article 23 (12) of the Disputes Settlement Understanding, deals with strengthening of this Multilateral System.

Under the Uruguay Round of GATT regime we have agreed that if a member nation of the WTO is offended by any breach of the Treaty obligation, it can bring this issue or controversy before the DSB for resolution. If the DSB adopts a panel report in favor of the offended Nation, or in favour of its national, we have agreed, without reservation, to nullify the offending law. Therefore, DSB adopted rulings resulting in the repeal of the Indian law. The decision of the Appellate body becomes final. In effect the Articles quoted above declare that the DSB is the super Supreme Court. Nowhere in the Constitution is the Executive or Parliament given authority to assign the judicial power to any other body. The Executive was not competent to ratify such noxious provisions as it was not authorized by the Constitution or 'We, the People'.

Our Constitution wrongfully Amended.

Our Constitution prescribes a procedure for amending its provisions. This amendment procedure is rigorous to preclude frivolous changes, and it demands a higher level of passage than a simple legislative act. Besides, there are basic features which cannot be amended even in exercise of constituent power. But the effect of our adoption/acceptance of the Final Act is to bring agreed – amendments in our Constitution even in matters we consider fundamental. No amendments can be brought about to subvert the Rule of Law to rob parliament or judiciary its legitimate powers and functions, to modify the objectives which people chose to erect through the terms of our constitution as the loadstone for our government to act.

Judicially Pronounced Principles Breached

For that the impugned Executive Act is in breach of the judicially pronounced principles articulated by Chief Justice John Marshall in his opinion written in the case of *Marbury v. Madison*[122]. Some of the principles which he considered 'long and well established' are as follows:

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[122]Marbury v Madison [2 L ED 60 (1803)]

1. That the people have an original right to establish, for their future government, such principles as in their opinions shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.
2. This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.
3. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on which they are imposed and if acts prohibited and acts allowed are of equal obligation.
4. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature, illimitable.
5. This theory is essentially attached to a written constitution and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.
6. If an act of the legislature repugnant to the Constitution is void, does it, not withstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.
7. It is, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
8. Those then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions.
9. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, ... that a law repugnant to the Constitution is void; and that the courts, as well as other departments are bound by that instrument."

Constitutional Basics Subverted

After a close examination of our commitments under the Uruguay Round Final Act, the Peoples' Commission on GATT (consisting of by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges of great distinction)

held that the said commitments serious subversion of certain basic features of our Constitution. These features are: (a) Constitutional basics, (b) Judicial Review, (c) Treaty-making power, (d) Federal structure,(e) Fundamental Rights, (f) Democracy, and (g) Sovereignty. Some of the reasons showing the commission of the gross derelictions have already been referred. Those who wish to get a comprehensive account should go through the *Report of the Peoples' Commission on GATT,* and this author's Chapter on 'The Uruguay Round Final Act: A Bertayal of the Nation" in his book *The Judicial Role in Globalised Economy* .[123]

Our High Hopes from the Supreme Court

After analysing the present procedure of treaty-making in our country the '*Consultation Paper on Treaty-Making Power under our Constitution'*, placed before the National Commission to Review the Working of the Constitution, reflects on the role of Judiciary which it is hoped, it will play with creative boldness:

> "Judiciary has no specific role in treaty-making as such but if and when a question arises whether a treaty concluded by the Union violates any of the Constitutional provisions, judiciary come into the picture. It needs no emphasis that whether it is the Union Executive or the Parliament, they cannot enter into any treaty or take any action towards its implementation which transgresses any of the constitutional limitations. ..... I am sure that if and when any such question is considered by the Supreme Court, it will be considered in greater depth."

It is hoped that our Supreme Court would someday grant our prayers to:

(a) to hold the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the Final Round of the General Agreement on Tariffs and Trade, the Agreement Establishing the World Trade Organization, and our participation in the World Trade Organization, as a member of that organization, repugnant to the provisions of our Constitution and therefore, unconstitutional and, hence, domestically inoperative;

(b) to declare that the Central Government has no extra-constitutional power, or has no inherent sovereign power, which it can utilize at the international plane transgressing the limitations placed by our Constitution, as it has no extra-constitutional power in its hip-pocket;

(c) to declare that the Central Government's Treaty-Making Powers are subject to the constitutional limitations which operate both against the Executive, and Parliament;

(d) to declare a treaty, or an agreement, or convention, to which reference is made in Art 253 of the Constitution of India, must be valid within our constitutional parameters first as the mandatory limitations, imposed by our constitution, are the conditions precedent to the exercise of power.

(e) to declare that no exercise of the executive power (whether through

[123]Shiva Kant Jha, The Judicial Role in Globalised Economy (Wadhwa, Nagpur) pp.341-357

Instructions, Circulars, subordinate legislation or Agreements, understandings, announcements etc. in pursuance to the obligations under the Uruguay Round Final Act, and the Agreements done under the auspices of the WTO) can override the Constitution of India without adopting the right constitutional procedure;

(f) to pass a direction that no functionary of the Central Government, acting as an administrator, or manager, or negotiator, or holder of full powers, or acting as plenipotentiary, or any other analogous capacity, is competent to transgress constitutional limitations whether they act within domestic jurisdiction, or at international plane;

(g) to hold that it would promote national interest better if those who negotiated (whether from India or in foreign jurisdictions) a treaty, be prevented least for five years before they accept an office of profit, or any other assignment, in the organizations or institutions created under the terms of that Treaty, or having a dominant interest in such a treaty;

(h) to direct complete transparency in the negotiations and ratification of Treaties so that our Right to Know is not jeopardized, except in the rarest of Cases of the treaties coming within a small segment where critical national defense, or security, is primarily involved, though even in such matters petitions should lie to our Supreme Court for consideration;

(i) to direct our Executive Government to take immediate initiative so that our Parliament may frame law in exercise of power granted to it under Entry 14 in the Union List of the 7TH Schedule to the Constitution of India as this step is needed in this phase of Economic Globalization;

(j) to declare the constitutional principles in conformity with which the Treaty-Making Procedure can be prescribed;

(k) to pass such order/orders, or directions/ guidelines (in terms of the plenitude of the constitutional power emanating from Art 32, or from the reach of the constitutional oath, or from any other legal and constitutional source) which the Court may consider fit and proper in the interest of justice *pro bono publico.*

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- To discuss issues of national interests and concerns of the country of the South arising out of the Final Act Embodying the Results of the Uruguay Round.
- To arrange for research and publication of papers, books reports etc. relating to these issues.
- To help create a better understanding of these issues by organizing discussions, conferences, seminars and symposia.
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