POSTSCRIPT VI

REFLECTIONS ON THE CONSTITUTION OF INDIA: AMBIT OF THE CONSTITUTIONAL RESTRAINTS ON THE TREATY-MAKING POWER

(I) FUNDAMENTAL PROPOSITIONS

(a) The 'State' is itself the creature of Constitution: hence the Constitution alone is supreme in the domestic jurisdiction.

K. Ramaswamy, J. said in *S. R. Bommai v. Union of India*[1]*:* **"**The State is the creature of the Constitution". This is the view which had been taken by the International Court of Justice in its *Advisory Opinion in the Western Sahara Case*, where it said:

> 'No rule of international law…requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world to-day.' (ICJ Report (1975) PP. 43-44).

And Oppenheim observes in his *Public International Law* p. 122 fn. 5:

> "The existence of a state, as the legal organization of a community, is determined by the state's internal constitutional order." *Oppenheim* p. 130 para 40.

Our Supreme Court quoted with approval, in *Bengal Immunity (* AIR 1955 SC 661 at 671 para 13), what Justice Frankfurter had said so perceptively:

> "….the ultimate touchstone of constitutionality is the Constitution itself and not what we [court] have said about it".

"If we take the *Brown opinion*, as it is written, it certainly ranks as one of the great opinions of judicial history — plainly in the tradition of *Chief Justice Marshall's seminal 1819 dictum that the Court must never forget that it is a Constitution it is expounding*." {Italics supplied)[2].

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1. AIR 1994 SC 1918.
2. Quoted in Pollack, *Earl Warren: The Judge Who Changed America* 209 (1979); referred by Dr Bernard Schwartz in *Some Makers of American Law* (Tagore Law Lectures) p. 133

(b) The Fundamental Constitutional Principles

The relevant fundamental constitutional Principles are stated thus:

- The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.
- The Executive does not possess any "hip-pocket" of unaccountable powers, and has no *carte blanche* even at the international plane.
- The executive act, whether within the domestic jurisdiction, or at the international plane, must conform to the constitutional provisions governing its *competence.*
- The direct sequel to the above propositions is that the Central Government cannot enter into a treaty which, directly or indirectly, violates the Fundamental Rights or the Basic Structure of the Constitution; and if it does so, that treaty must be held *domestically inoperative* to the extent it violates the restraints.

In India all the organs of the State have only *conferred* powers and *prescribed* roles, and all these, without an exception, are subject to our Constitution's limitations. **This is the effect of the text and the context of the Articles 53, 73, 245, 246, 253, 265, 363, 368, 372, and 375 of our Constitution.**[3] Our Constitution contains no provisions for limitations on national sovereign powers, in the interests of international co-operation[4]. The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with *powers* granted under express constitutional limitations. There **are** primarily only two Articles in our Constitution supremely relevant in considering the grant of Treaty-making power: these are Art 73 and Art 253. If the executive enters into a treaty, agreement or convention, in breach of the BASIC FEATURES of our Constitution, or the Constitution's mandatory limitations, then such an agreement, or treaty, or convention, would be constitutionally invalid: hence domestically inoperative. "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".[5]

Basu makes a significant observation about Art. 253. He says that Parliament shall be competent to legislate on List II items, if necessary, to implement treaties

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3. **Articles 53, 73, 245, 246, 253, 265, 363, 368, 372, and 375 of our Constitution of India.**
   - Art. 53 Executive power of the Union.
   - Art. 73 Extent of executive power of the Union.
   - Art. 245 Extent of the laws made by Parliament and by the Legislatures of States.
   - Art. 246 Subject-matter of laws made by Parliament and by the Legislatures of States.
   - Art. 253 Legislation for giving effect to international agreements.
   - Art. 265 Taxes not to be imposed save by authority of law.
   - Art.363 Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.
   - Art. 368 Power of Parliament to amend the Constitution and procedure therefor.
   - Art. 372 Continuance in force of existing laws and their adaptation.
   - Art. 375 Courts, authorities and officers to continue to function subject to the provisions of the Constitution.
4. Oppenheim, International Law PEACE Vol. 1 (9th ed.) p. 124 fn.6
5. *Ajaib Singh v. State of Punjab* AIR 1952 Punj. 309 at 319

or agreements. "But other provisions of the Constitution, such as the Fundamental Rights, cannot be violated in making such law". [*Constitution of India* by Basu (1994 Edn. P. 858)]

(II) The views of some of our great jurists

In Chapter 7 of the *Report of the Peoples' Commission on GATT,* V R Krishna Iyer, O. Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court) and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court**),** have examined the text and the context of Constitution, and have stated the circumstances under which the Treaties become subject to Judicial Review before our Supreme Court. The issues deserve to be examined in the light what our Constitution says (at p. 150 of the said *Report*):

> "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 bodies and Article 73 (1) (b) provides for the executive power of the Union 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.
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> Article 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 legislative and executive power to implement such treaty, agreement, etc. however made but must be one made according to the Constitution and not contrary to the Constitution. 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.
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> Thus, an international treaty or agreement entered into by the Union Government in exercise of its executive power, without the concurrence of the States, with respect to matters covered by Entries in List II of the Seventh Schedule, offends the Indian Constitutional Federalism, a basic feature of the Constitution of India and is therefore void *ab initio*. The Final Act (of Uruguay Round) is one of that nature. This is our *prima facie* opinion on the question whether the Final Act is repugnant to the Federal nature of the Constitution and we strongly urge the Union Government to do nothing which abridges that principle."

Our Courts are under the Constitutional duty to ensure that our Constitution never becomes dysfunctional. This is the effect of the right comprehension of our Constitution's provisions. Justice V.R. Krishna Iyer, former Judge of the Supreme Court of India, Justice P.B. Sawant, former Judge of the Supreme Court

of India, and Justice H. Suresh, former Judge of the Bombay High Court explain the legal position thus in their Opinion[6] :

> **"1.** The Executive has no power to enter into any agreement, either with a foreign government or a foreign organization, which is binding on the nation. The agreement will be binding only when it is ratified by Parliament…There is no provision in the Constitution which gives such authority to the executive. We have a written Constitution and, therefore, we must have a written provision in the Constitution which gives such authority to the Executive.
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> **2.** Articles 73 and 253 and entries 6, 13, & 14 in the Union List of the Constitution refer to the powers of the Executive. Articles 73, among other things, states that,...the executive power of the Union shall extend (a) to the maters with respect to which Parliament has powers to make laws, and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement." This means that the matters on which Parliament has no powers to make laws are also matters on which the Union Government cannot exercise its executive power. It also means, conversely, that the Union Government cannot exercise its executive powers beyond the legislative powers of the Union. Both these propositions have an underlying assumption that, before the Union Government exercises the executive power, there is a law enacted by the Parliament on the subject concerned. Some argue that the provisions of Article 73(1) (a) gives power to the Executive to act on subjects within the jurisdiction of Parliament, even if the Parliament does not make a law on those subjects. This is both a distortion and a perversion of the said provision and a subversion of Parliament's supreme control over the Executive. If this interpretation is accepted then the Union Executive can act on all subjects on which Parliament has to make law, without there being any law made by Parliament. You can thus do away with Parliament and the Parliament's duties to make laws. We will then have a lawless Government. Democracy presumes there should be a rule of law and all Executive actions will be supported by law and that there shall be no arbitrary action by any authority, including the Union Executive. It may also be necessary in that connection to remember that it is for this very reason that when Parliament is not in session and, therefore, unable to enact a law, that the power is given to the President to issue an ordinance (which is a law), so that the Executive may act according to its provisions. These ordinances are to be placed before the Parliament within six weeks of its reassembly, and if Parliament approves they become law. The Constitution-makers were, therefore, clear in their mind that the Executive cannot act without the authority of law and it has no power independent of law and it has no power independent of law made by Parliament."

6. *See at* http://www.shivakantjha.org/openfile.php?filename=legal/statement_3judges.htm

(III) Our Government's view on its Treaty-Making Power is invalid. Its Circular to the U.N. Secretary General violates our Constitution.

Our Government has acted contrary to our Constitution by entering into the WTO Treaty. It is a matter of gravest concern for all those who bother about our Constitution that our Executive believes that their acts are under no constitutional restraints in the matters of Treaty-making. It is essential to adopt correct constitutional position because the document[7] that our Government had communicated to the Secretary-General of the UNO does not portray the Indian position correctly. It wrongly stated that "*the President's power to enter into treaties (which is after all an executive act) remains unfettered by any internal constitutional restrictions.*" So what our Government had communicated its position on India's Treaty-power to the Secretary General of the UNO in 1951 did not accord well with our Constitution.

(IV) 'Our Constitution exhaustively distributes the State's 'Sovereign Functions'

(a) No organ of our Government has unrestrained powers

In sustaining the *Migratory Bird Treaty Act of 1918*, Justice Holmes, delivering the opinion of the U.S Supreme Court, stated his core reason as the following:

> "The treaty in question does not contravene any prohibitory words to be found in the Constitution**.** The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment."

It is all clear that our Constitution-makers used 'prohibitory words' under all the Articles mentioned on the first page of this PS. Everywhere in the Articles mentioned above, "subject to the Constitution" is a powerful and all-embracing

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7. [U.N. Doc. ST/LEG/SER.B/3, at63-64 (Dec. 1952) (Memorandum of April 19, 1951) quoted in *National Treaty Law and Practice* ed. Duncan B Hollis, Merritt R. Blakeslee & L. Benjamin Ederington p. 356-357 (2005 Boston): TO QUOTE—
   1. "Under Article 73 of the Constitution of India "the Executive power of the Union shall extend to the matters in respect to which Parliament has power to make laws", and under Article 53 the Executive power of the Union "is vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution." Under Article 246(1), "Parliament has exclusive power to make laws with respect of any matter enumerated in List I in the Seventh Schedule (in the Constitution referred to as the "Union List." List I, clause 14, contains the item: "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."
   2. Parliament has not made any laws so far on the subject, and, until it does so, the President's power to enter into treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions."
   3. .....
   4. In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose, and they act under full powers issued by the President. It is, however, the President who ratifies a treaty.
   5. Apart from treaties made between heads of States, agreements of technical and administrative character are also made by Government of India with other governments. Such agreements are made in the name of the signatory governments, and are signed by the representatives of these governments. Full powers are granted, ratification is effected on behalf of the Government."

limitation on the Executive's powers [The effect is no different in Article 253 as here too the supreme rider is the constitutional validity]. Had the U.S. Constitution subjected all powers under specific limitations, *Missouri v. Holland* would have gone the other way. And Justice Sutherland would not have granted a 'blank cheque' to the President in exercise of foreign affairs powers in *Curtiss-Wright*. To undo his view Mr. Bricker moved a constitutional amendment to subject the Treaty-making power to the constitutional control. It was passed by the Congress but could not be cleared by the Senate mainly because the President Eisenhower did not like that for obvious reasons. No Executive Government would ever like to subject its brute power to constitutional discipline. But credit goes to the U S Supreme Court which in *Reid* v. *Covert* (1957) had held certain provisions of certain treaties unconstitutional.

(b) The Government has no inherent Power

It is submitted that the proposition that "the power of entering into a treaty is an inherent part of the sovereign power of the State", is again wholly *obiter* and *per incuriam* both. This observation occurs in *Azadi Bachao* that harks back to what itself is merely an *orbiter* observation in *Berubari Union (In re)* (AIR 1960 SC 845). As the observation in *Berubari* was clearly *per incuriam*, its repetition later is bound to be also *per incuriam*. 'We the People' have distributed the entire gamut of the State's 'sovereign power' in terms of the provisions of the Constitution leaving no residuary, or reserved, or extra-constitutional power to our executive government. Writing about *Berubari*, H. M. Seervai observes:

> "Our Constitution confers on the Union of India exclusive legislative and executive powers which embrace the total field of external sovereignty: see Art. 245 and 246 read with the undernoted entries.[8] In any event, in India no part of external sovereignty can be outside the Constitution, since the residuary power would cover it." [*Const. Law* p. 304]

David M. Levitan has put it felicitously when he observed: Government just was not thought to have any "hip-pocket" of unaccountable powers.[9] Examining the concept of Sovereignty *Oppenheim*[10] 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 framework 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.

The theory of inherent power emanating from Sovereignty is on account of not noticing a fundamental difference between the British Constitution and the

8. Fn. 3a at p. 304
9. *The Yale Law Journal* Vol. 55 April, 1946, No 3 p. 480
10. Oppenheim, *Inter. Law* 9th ed. Vol. 1 'Peace' p. 125

Indian Constitution (or the U.S. Constitution). In the U.K., seen in the historical perspective, the Crown had, once upon a time, all the powers conceivable. It lost many of such powers, in course of its grand constitutional history, to Parliament and the Courts so that people could enjoy the fruits of democracy under the Rule of Law. But it 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 the U.K the Crown is still the inheritor of*inherent powers* not yet deprived of.

"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 state's 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." Lord McNair states his 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 relevant constitutional requirements, such a consequent of a legislative organ, is, subject to what follows, not binding upon that State…."

In *Poindexter v. Greenhow*, 114 U.S. 270 (1885), the US Supreme Court explained the Constitutional principle:

(*i*) That draws a distinction between the 'Government' and the 'State'; and

(*ii*) That points out when the Government can itself become guilty of the usurpation of power.

Under our constitutional framework 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. Ours is a government under the constitutional limitations, and hence, by inevitable logic of law, under the legal discipline imposed by parliament and the courts of law. 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 revealed 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".

Our State has no Sovereign power, unbridled and unlimited, to enter into a treaty even at the international plane; it has only a Treaty-making*capacity* under the constitutional limitations. As the Executive represents our State at international plane, it acts only as *the authorized agent of the State*, and as such it is incompetent to transgress the obvious limitations on its power imposed by the Constitution which creates it and keeps it alive only with controlled competence. "In general it seems that the Crown makes treaties as the authorized representa-

tive of the nation." (Keir & Lawson, *Cases in Const Law* p.160). Oppenheim observes[11] :

> "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."

(c) : The Political Question' Theory

When the Central Government's power in exercising Treaty-making is questioned, it is done on constitutional grounds and not for political reasons. H. M Seervai aptly said *Constitutional Law* pp. 2636: "It is submitted that there is no place in our Constitution for the doctrine of the political question." He said further:

> "In this sense, there is nothing outside the judicial process.The jurisdiction of a court may be excluded by the Constitution." (at p. 2640)

Whilst invoking this Doctrine, the following points have been noticed by H.M. Seervai in his *Constitutional Law of India.* They deserve notice (references are to Seervai's book):

(*a*) Doctrine evolved with reference to U.S. Constitution, (at p.2636 of*Seervai)*

(*b*) Doctrine has no place in our Constitution, (p.2636)

(*c*) Doctrine based on separation of powers, (p. 2636)

(*d*) Doctrine drained of its content in U.S. (p. 2636, 2642)

(*e*) Power of President of India and the President of U.S., differences in, (p.2636)

(*f*) President only constitutional head of Executive, (p. 2637)

After examining the WTO Treaty and the other Agreements under its umbrella, V R Krishna Iyer, O. Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court); and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court), have thus summarized the law in their *Peoples' Commission Report on GATT* : [p. 141]

> "The Supreme Court has therefore taken the view that where it is asked to determine the nature, scope and power of the Executive under a provision of the Constitution, it was irrelevant that the nature of the Executive's decision was wrapped up in the political thicket. The Supreme Court in *S. R. Bommai* (1994) 3 SCC at pp. 200-201, observed:
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> > "The question relating to the extent, scope and power of the President under Article 356 though wrapped up with political thicket, *per se* it does not get immunity from judicial review."
> > "....pure legal questions camouflaged by the political questions are always justiciable."

11. Oppenheim, *International Law* (Peace) ibid p 1232 para 606

(V). Right Legal Perspective that we have shared with the U.K

Brownlie, in *Public International Law* (12th ed.) pp. 63-64, summarises the position that prevails in the United Kingdom as India too has adopted the "dualist" model (rather than the "monist" approach). Both in the U.K. and in India, even the norms of International Law are recognised only after they have been recognised by our courts. The following cardinal points, as stated in Brownlie, deserve to be taken into account to appreciate what is wrong with the WTO Treaty and the Agreements under its umbrella, and the Bilateral Investment Treaties (BITs) [to be referred hereinafter as the 'Questioned Treaties']. The settled principles are : to quote —

(i) "In England the conclusion and ratification of treaties are within the prerogative of the Crown, and if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent, in violation of the basal notion of parliamentary sovereignty. The rule does not apply in the very rare cases where the Crown's prerogative can directly extend or contract jurisdiction without the need for legislation".[12]

(ii) Thus, as a strongly dualist system, English law will not ordinarily permit *unimplemented* treaties to be given legal effect by the courts. A concise statement of this rule was provided by the Privy Council in *Thomas v Baptists*[13] :

> 'Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty....is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty.'[14]

(*iii*) In *R v Lyons*,[15] Lord Hoffmann noted that despite the fact that the judiciary is one of the three organs of state, it was not the responsibility of the courts to uphold the UK's international obligations in such cases:[16]

> "The *argument that the courts are an organ of state and therefore obliged to give effect to the state's international obligations is in my opinion a fallacy*. If the proposition were true, it would completely undermine the principle that the courts apply domestic law and not international treaties....International law does not normally take account of the internal distribution of powers within a state. It is the duty of the state to comply with international law, whatever may be the organs which have the power to do so. And likewise, a treaty may be infringed by the actions of the Crown, Parliament or the courts. From the point of

12. Brownlie, *Public International Law* (12th ed.) p, 63
13. (2003) 1 AC 976
14. Brownlie, *Public International Law* (12th ed.) p, 63
15. [2003] 1 AC 976, 995
16. Brownlie, *Public International Law* (12th ed.) p, 64

view of international law, it ordinarily does not matter. In domestic law, however, the position is very different. The domestic constitution is based upon the separation of powers. In domestic law, the courts are obliged to give effect to the law as enacted by the Parliament. This obligation is entirely unaffected by international law."[17]

(VI). There are better reasons to appreciate the doctrine of complete constitutional restraints on the Treaty-Making Power in India than in the USA

The reasons are shortly stated thus:

(i) The Union of India does not possess, in the international field, powers without constitutional restraints, but under the U S Constitution, as Justice Sutherland said in *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), the U.S. President possesses this power in certain areas at the international plane in certain situations. It seem that Justice Black's observations in *Reid v, Covert* [ILR 24 (1957)] is getting diluted to the acts at the international plane by confining its ratio to those entitled only to the U.S. domestic law protection. *Curtiss-Wright* is yet not dead, and forgotten, as it has been cited in certain cases pertaining to the U S Foreign Affairs (viz. *Pasquantino et al* ***v.*** *United States* (Decided April 26, *2005),* and *Clinton, President of the United States v. City of New York* (Decided June 25, 1998). Our Constitution grants no such 'blank check' to our Executive Government, grants no extra-constitutional powers to the President or the Cabinet.

(ii) The dominant lights amongst the US Constitution-framers, like Washington, Hamilton, Madison and many others, had considered the Constitution a device to protect the interests of the 'propertied class', and considered ordinary people not worthy to participate in the high affairs of the State, believing that "the anarchy of the property-less would give way to despotism". The common 'people' had appeared to Alexander Hamilton, then, as the 'great beast', as they appear to the leaders of the Economic Globalization these days. When the French revolutionaries made their '*Declaration des droits de l'homme*,' Bentham called it 'a metaphysical work—the *ne plus ultra* of metaphysics'. Our Constitution posits an over-arching social vision for the Free India: see Chapter 21 of the Memoir.

(iii) The USA has had a long history of the corporations vetoing people's laws and making their own. Michael Glennon considered international law just "hot air". John Dewey aptly described politics as the "shadow cast on society by big business". Condolezza Rice explained the U.S. indifference to the International Court of Justice decision. It is worth realizing that a democratic and egalitarian's society's view of the constitutional limitation is bound to be different from the view of the global hegemony that wishes to alter the laws and constitutions of other lands through Treaties (as it had been done by the imperialists of the past).

(iv) The US President can even become the Grand Mughal as President Regan had done by issuing the **Executive Order 12662** to shield the decisions of the binational panels and the Extraordinary Challenge Committees having the

17. [2003] 1AC 976 N995

effect of trumping the US Constitution. In considering the constitutionality of the CUSFTA's binational panels, strange efforts were made, through "an unprecedented cooperation between Congress and the President, to shield an international agreement from constitutional challenge"[18]. A thing so bizarre as this is inconceivable and impermissible under the Constitution of India, till its *élan vital* gets sapped and it becomes moribund, defaced, and defiled.

(v) Justice Homes sustained the Migratory *Bird Treaty Act of 1918*, as he found that the "treaty in **question does not contravene any prohibitory words to be found in the Constitution."** One finds that under the Constitution of India all powers are subject to constitutional control, whether exercised in the domestic realm, or at the international plane. Our Constitution-makers had pointed purpose, and well-articulated mission eloquent in Constitution's Preamble. "Subject to the Constitution" is a powerful and all-embracing limitation on the Executive's powers. Had the U. S Constitution subjected all powers under specific limitations, *Missouri v. Holland* would have surely gone the other way.

(VII). THE RIGHT PERSPECTIVE OF ARTICLE 51 OF OUR CONSTITUTION

Fisher aptly said that for many generations the public law of Europe was settled through the terms of the Peace of Westphalia (1648) recognizing the principles of 'territorial sovereignty of states', and 'equality *inter se* the States'. But things happened, as they are always made to happen in international politics: a wide hiatus set in between the precepts and practice amongst the states. The Concert of Europe, set up after the Congress of Vienna (1815), continued to lead the Eurocentric world politics almost till World War I (1914), nay, it continued, at its basics, till the global lunacy expressed itself in World War II posing challenging problems for creative responses from the statesmen. E. Lipson observed: "In the nineteenth century the destinies of Europe were in the hands of five or six States, which arrogated to themselves a preponderant influence in all matters of general concern". The equality of the sovereign states could not work in the world where the states were grossly unequal because of their gross differences in wealth

18. "Indeed, the constitutionality of CUSFTA's binational panels was challenged in court, but the case was dismissed for lack of jurisdiction. Well before that suit, however, observers were familiar with the constitutional issues raised by CUSFTA. At the time of its implementation, the chair of the House Judiciary sub-committee posed three issues for consideration: (i) whether the bill violated Article III of the Constitution by failing to authorize judicial review; (ii) whether the bill violated the Appointments Clause; and (iii) whether the Due Process Clause of the Fifth Amendment required that some form of judicial review be available to claimants in these AD and CVD cases. In response to these concerns, Congress provided in the implementing legislation that if the binational panel review system were found unconstitutional, the President would have the authority to accept the decisions of the binational panels and the Extraordinary Challenge Committees on behalf of the United States. [FN74] President Reagan completed this "safety valve" by issuing Executive Order 12662, which stated that in the event of such a determination of constitutionality, he would accept in whole all the decisions of the binational panels. [FN75] These efforts represented an unprecedented cooperation between Congress and the President to shield an international agreement from constitutional challenge."
[Yong K. Kim, 'The Beginning of the Rule of Law in the International Trade System despite U,S. Constitutional Restraints' 17 Mich. J. Int'l L. 967.]

and power: in short, in their capacity to shape the *Realpolitik*. This brought about a dichotomy between political sovereignty and legal sovereignty of the international actors. The post-World War II has borne an analogous pattern. The USA became most dominant. 'The Big Business', represented by the corporations, mainly MNCs (Multinational corporations) and TNCs (Transnational Corporations), called the shots. It may not be far from truth if we say that the political sovereignty has yielded, in effect, place to the corporate sovereignty, establishing what we can call 'corporate *imperium*'. The tsunami of economic globalization has subordinated the political realm to the economic realm established under the overweening majesty of Pax Mercatus. With the onset of the economic globalization, the economic organizations and institutions, like the IMF, World Bank, and the World Bank emerged as aggressive international persons. Because of their enormous power, they are in a position to condition the evolution of international law after their heart's desire.

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."[19]

The new realities of this phase of Economic Globalization have been well described[20] 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."

19. *A Manual of International Law* 5th ED p. 46-47
20. Sol Picciotto, I*nternational 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

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 generalized concepts of the human good."

It is 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 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 the law in the U.K.: and this is the constitutional law and practice in India. 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 require 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 acts 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 Central Gold Mining Co v R*[21] that 'the international law, sought to be applied must, like anything else, be proved by satisfactory evidence which must show 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*[22] *:*

> "….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".

(VIII). Our courts possess the Jurisdiction to decide which rule, standard, or norms said to be the part of customary International Law deserve domestic recognition

India is following the 'dualist' approach in the matter of applying International obligations in the domestic sphere.[23] It is a cardinal principle of our jurisprudence that Hon'ble Court is the ultimate decision-maker in the matter of what sort of norms (their ambit and reach also) of International Law are expected

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21. [1905] 2 KB 391
22. [1938] 4 All ER 786 at 790
23. "The relationship between international and national law is often presented as a clash at a level of high theory, usually between 'dualism' and 'monism'. Dualism emphasizes the distinct and independent character of the international and national legal systems. International law is perceived as a law between states whereas national law applies within a state, regulating the relations of its citizens with each other and with that state. Neither legal order has the power to create or alter rules of the other. When international law applies in whole or in part within any national legal system, this is because of a rule of that system giving effect to international law. In case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail."
Brownlie, *Public International Law* (12th ed.) pp. 48-49

to be given effect within the constraints and culture of polity as structured by our Constitution. Stephension LJ quoted the illuminating comment of Lord Alverstone CJ, in *West Rand Central Gold Mining Co v R*[24] :

> "…any doctrine, so invoked must be one really accepted as binding between nations, and the international law, sought to be applied must, like anything else, be proved by satisfactory evidence which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, any civilized state would repudiate it. …. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the Law of England, opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her Courts."

(IX). Our Constitution differs from Constitutions of the U.K., USA, Canada, and Australia where claims for extra-constitutional powers are possible under certain circumstances

(a) The U.K. The Crown possesses the entire prerogative power except what it has lost in favour of Parliament, or the courts.[25]

In the U.K., whilst the*formation* of a treaty is an executive act, the*implementation* of a treaty is a legislative act. Lord Atkin considered this British position operative in Canada too in view of the context and the text of the Canadian law [*Attorney General for Canada v. Attorney General for Onterio* (AIR 1937 PC 82)]. How a democratic government functions, even where there is no written constitution, is illustrated by what was done in the U.K. while entering into the EEC:

(*a*) It was only with the approval of Parliament that the Treaty of Accession was signed in Brussels in 1972.

(*b*) Effect was given inside the U.K. to the treaties establishing and regulating the European Communities by the European Communities Act, 1972.

(*c*) "The passing of the Referendum Act, 1975, under the authority of which the referendum was held, implied that the Government and members of Parliament generally presumed that, if the result of referendum in the U.K. as a whole went against continued membership, this country would withdraw from the EEC and Parliament would pass legislation repealing the

24. [1905] 2 KB 391

25. "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 obtaining parliamentary assent. Since failure to give any necessary internal effect to 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 the law are required, for the necessary legislation to be passed before the treaty is ratified." Oppenheim's *International Law* 9th Ed Vol I Peace p. 60-61 p. 60-61

European Communities Act and disentangling our domestic law from Community law."[26]

(*d*) "The European Assembly Elections Act, 1978, per section 6, provided that no treaty which is intended to increase the powers of Assembly shall be ratified by the U.K. unless it has been approved by an Act of Parliament. Normally treaties are ratified by the Crown (or executive) although legislation is required subsequently if they are to have effect within the U.K. In this instance the Executive is precluded from even concluding an agreement without legislative approval."[27]

(b) The USA. In view of the provisions of the U.S. Constitution, and its history, the *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936) held that the federal powers in foreign affairs arose 'extra-constitutionally'. The Bricker Amendment in 1950 sought to undo this view though Constitutional Amendment.[28] The Constitution could not be amended, but the Supreme Court departed from the conventional views in certain types of treaties. In the USA The Supreme Court held, in ***Reid v. Covert*** [ILR 24 (1957) p. 549][29], 'the provisions of certain treaties unconstitutional'. Justice Black observed said in *Reid:*

> "There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."

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26. Hood Phillips' Const & Adm. Law p. 74
27. ibid 100, Section 1(3): says: "(3) If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament." And European Parliamentary Elections Act 2002 states in Art 12.
28. Michael D. Ramsey, 'Why Curtiss-Wright is wrong: The Myth of Extra-constitutional Foreign Affairs Powers William & Mary Law Review, Vol. 42, p.2, December 2000
29. 'Although a Status of Forces Agreement may give the sending state a right to exercise jurisdiction the law of that state may not permit it to exercise that right. The conclusion was reached by the U S Supreme Court in relation to the scope of the jurisdiction of US courts martial, which were on constitutional grounds held not to have jurisdiction in peacetime over civilian dependents or employees accompanying members of US forces abroad. (vide *Oppenheim* p. 1160 fn. 24)

(c**) Canada**: Canada adopted the British Constitutional position in the matter of Treaty-making. This is the effect of the British North America Act, 1867, the Art 9 of which clearly says: "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen." Lord Atkin examined the Canadian position in *Attorney General for Canada v. Attorney General for Ontario.* 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. *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 performance *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.

(d) Australia: It can be said that whatever extra-constitutional power the British Government possessed as the yet untamed prerogative power, Australia could claim to have that much under the Commonwealth of Australia Constitution Act, 1900 as the people had "agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland..."

(X). Seminal differences between the Indian position and the OECD position illustrated, with reference to the tax treaties

The pronounced differentia can be summarized thus:

(i) In the OECD countries a tax Agreement is a legislative act whereas in India it is an administrative act in exercise of the power delegated to the Executive under section 90(1) of the Income-tax Act, 1961.

(ii) In the OECD countries a tax Agreement cannot be questioned in view of the relevant provisions under their constitutional law.

(iii) The power to structure the terms of a tax Agreement in the OECD countries is wider as it is in tune with their legislative practice developed in the OECD countries during the interregnum between the Two World Wars, and thereafter.

(iv) In India a tax Agreement is neither discussed in Parliament, nor it is tabled in the House.

(v) In India the terms of the grant of power to the Executive is extremely precise, and constitute express limitations on the Executive power in consonance with the Indian legislative practice determining the meaning of the terms in section 90(1).

(XI). The Doctrine of the Constitutional Restraints recognized even in International Law; & is a UNIQUE feature of the Constitution of India. No provisions for limitations on national sovereign powers exist in the interests of international co-operation. No overriding to promote internationalism

Oppenheim points out that a "number of states in their constitutions have made express provision for limitations on national sovereign powers in the interests of international cooperation."[30] In the present context, it is worthwhile

30. Oppenheim, *International Law* p. 125

to notice that our Constitution has made no express provision for limitations on national sovereign powers in the interests of international cooperation.

As in all such situations wherein the Constitutional Restraints operate, the right course is to have a law in place before such treaties / agreements are entered into to avoid embarrassing consequences emanating from —-

(a) Parliament may decline to implement, and get exposed to humiliation externally inviting measures for the breach of International Responsibility;

(b) Parliament may be driven, laughing or sobbing, to implement the obligations formed at the international plane as it stands facing a *fait accompli;* hence is driven to wall.

These important points can be well understood by perusing the following:

- "By the making of a treaty the Crown may morally bind Parliament to pass any legislation needed to give full effect to it. The negotiation of treaties, which must often be done in secret, is less under parliamentary controls than any other branch of the prerogative, and Parliament may be met with a fait accompli. But there is an increasing tendency to keep Parliament informed and to invite expressions of opinion before the Crown finally commits itself, as was done during the Common Market negotiations in 1962-1971. This is only expedient, as the government relies on the support of Parliament, and especially of the Commons. Where legislation will be required to supplement a treaty, there is probably a convention that Parliament should be consulted in principle before the treaty is concluded. Parliament will also be consulted in very important matters, such as the declaration of war or the conclusion of a peace treaty."[31]
- "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." [Oppenheim's *International Law* 9th Ed Vol. I Peace p. 60-61]
- "This is only expedient, as the government relies on the support of Parliament, and especially of the Commons, Where legislation will be required to supplement a treaty, there is probably a convention that Parliament should be consulted in principle before the treaty is concluded. Parliament will also be consulted in very important matters, such as the declaration of war or the conclusion of a peace treaty..... If then the Crown acting alone should by treaty promise to make some alternation in the law, the treaty would theoretically be binding; if, however, some party to an action were to rely

31. Hood Phillips, *Constitutional Law*, P.287

upon it as having effected a change in the law, he would be disappointed, for the courts would take no account of it in the absence of an Act of Parliament. The Crown would have made a promise which it was unable to carry out, and the practical conclusion is that the Crown may not without the aid Parliament make a treaty which involves an alteration in the law. In all such treaties it is usual to insert a clause making the validity of the treaty dependent on its ratification by Parliament. The same reasoning applies to treaties which purport to tax the subject. Most modern treaties are of this kind; and of course every exercise of the treaty-making power of the Crown is subject to the political control of the House of Commons in the same way, though not perhaps in practice to the same degree, as any other exercise of the Prerogative." [Hood Phillips, *Constitutional Law* p. 287]

(XII). Democratic deficit: Parliament wholly ignored

The exercise of the treaty-making power suffers from gross 'democratic deficit' as in our country, treaties are done without Parliament's approval, even without letting our Parliament, or citizenry know the details of the treaty terms, and appreciate the implications of the treaty stipulations, and the extent and incidence of obligations accepted. Explaining the 'democratic deficit', *Peoples' Commission Report on GATT*[32] tells us:

"While it is arguable that since treaties do not give rise to enforceable obligations within the Indian legal system, there is no room for judicial interference until legislation is passed; and, further-flowing from this argument——since Parliament will assess the situation when enacting implementing statutes, there is no scope for the judiciary to intervene. This argument proceeds on the fallacious assumption that treaties do not pose a danger to the constitutional system and fundamental rights until they are given shape in the form of legislation. Treaties are solemn obligations. Within their own legal contexts—and the domain of international law —they are legal and binding on the Union of India and States. They cannot be resiled from, even if legislation implementing them is not passed. The consequences of treaty violation are in the realm of international law. Particular treaties may contain vigorous forms of enforcement. They may prove to be self fulfilling (even though they are not self-executing and applicable in the domestic legal system). Treaty violations may bring reparations and trade distortions. In this day and age where the international order is increasingly regulated by multilateral treaties, there is little protection from the falsely comforting that that realities do not pose a threat since Parliament has to pass implementing legislation to make the treaty enforceable within the Indian legal system."

Two justifications have been often offered in support of the continuance of the current practice in India: these are: (i) Cabinet accountability to Parliament, and (ii) the mandatory requirement of parliamentary approval implicit in adoption of

32. by V R Krishna Iyer, O Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court); and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court.

legislation enabling implementation of a treaty. Both those justifications are theoretical, and become wholly irrelevant in most situations. It deserves to be realised. Both the reasons are weak. Prof Mani has answered how both the pleas are not effective:[33]

(i) "But Cabinet accountability comes into play only after the country has been bound by the treaty obligations…. a change of government does not *per se* terminate or alter the international obligations undertaken by the outgoing regime."

(ii) "The justification based on enabling legislation equally begs the question. The issue of enabling legislation arises only after the government has committed the country to a treaty, and Parliament is faced with a fait accompli. Even if Parliament refuses to pass the enabling legislation, it will have no effect on India's international responsibility to comply with the obligations already undertaken. Indeed, failure to enact the enabling legislation could in appropriate cases amount to a violation of the treaty."

Joanna Harrington, in his article on 'The Role of Parliaments in Treaty-Making',[34] has put sharp focus on many different ways through which the treaty powers are exercised even within the domestic jurisdiction, and affect our rights, even those constitutionally and legally guaranteed to us. These ways are (footnotes omitted):

(i) Law-making by treaty "does not always require the enactment of legislation, particularly if the treaty obligation can be implied within or carried out through a pre-existing law, and thus Parliament may not always have a role."

(ii) "Moreover, once ratified, treaties are clearly binding under international law and their legal character puts pressure on a state's domestic institutions to ensure compliance, as evidenced by a long-standing rule of statutory interpretation that presume conformity with international law, at least where an ambiguity can be found."

(iii) "Further evidence of the domestic effect of treaties can be seen in the courts in the form of judicial modification to the doctrine of legitimate expectation in Australia, new rules on statutory interpretation in New Zealand and new uses for the values of an unimplemented treaty in Canada."

(iv) "Despite the fact that most treaties are in practice permanent law, made by one government with the ability to bind the next, the common law imposes no obligation on either the executive or the courts to secure or ensure the consent of the ultimate law-making authority in a Westminster style democracy. This lack of Parliamentary involvement supports complaints that a democratic deficit exists in the treaty-making process. It also motivates the reforms discussed in this evaluation of the role played by Parliament in the treaty-making practice of these comparable Commonwealth states: the UK, Australia and Canada."

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33. 'Meeting treaty obligations' By V. S. Mani [http://www.hinduonnet.com/2000/08/28/stories/05282524.htm

34. George Williams, Hillary Charlesworth, *The Fluid State* pp. 36

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 it's 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, even much worse, might be happening under the opaque administrative system.

(XIII). Our Parliament must frame law under Article 245 of our Constitution

Our Constitution itself provides that our Parliament could frame a law to remove this 'democratic deficit' in the treaty-making process. Why has our Parliament forgotten the item 14 of the Union List of the Seventh Schedule to the Constitution which empowers it to frame law to regulate "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries"? The National Commission to Review the Working of the Constitution had suggested that the first thing that should be done by Parliament is to make that sort of law.[35]

(XIV) The Basic Assumptions in understanding Constitution

The collective consciousness of our Constituent Assembly

The Constituent Assembly was virtually a microcosm of India. All the leading lights of our Freedom Movement were assembled there. They had in their marrow the fire that burnt throughout our Struggle for Freedom. They possessed what the Art 51A of our Constitution wants every citizen of this Republic to acquire: the ideal to "(b) cherish and follow the noble ideals which inspired our national struggle for freedom." It was, as Granville Austen says a one-party body in essentially one-party country. "The Assembly was the Congress and the Congress was India."[36] That was the shape of things at the dawn of our Independence. 'The membership of the Congress in the Constituent Assembly and outside held social, economic, and political views ranging from the reactionary to the revolutionary.'[37] Austin comments: "…because the Congress and its candidates covered a broad spectrum, those elected to the assemblies did represent the diverse viewpoints of voters and non-voters alike."

The Bhagavad-Gita and our Constitution contemplate Rights and Duties for the development and happiness of all. The Utilitarians are satisfied with the happiness of a few, thereby facilitating the emergence of Capitalism, Fascism, and now neo-liberalism. Their arch-priest Bentham cared little for the liberty of all. He thought of the liberty only of a few. The rights of man, he said, are plain nonsense, nonsense on stilts. When the French revolutionaries made their '*Declaration des droits de l'homme*,' Bentham called it 'a meta-physical work—the *ne plus ultra* of metaphysics'. It was argued that the "articles could be divided into three classes: (1) Those that are unintelligible, (2) those that are false, (3) those that are both."

35. http://ncrwc.nic.in/
http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm Accessed 11 July 2006
36. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* p. 8 [Oxford University Press 1966]
37. ibid 9

We have, as is evidenced under our Constitution, rejected such foolish ideas. Our Constitution posits an over-arching social vision for the Free India. Our Constitution, right from its inception, is cast to promote the welfare of all sections of our political community. On this point it differs from all other celebrated Constitutions, be of the USA, France, Russia, or even the U.K. In all these Constitutions, polity had been constructed for the delight of the affluent and dominant sections of people, and the commoners of the societies had to wait and struggle for long to acquire the rights to universal suffrage. Our Constitution, like the *Bhagavad-Gita,* is universal and egalitarian: mandating a quest for universal weal. It is remarkable that even the members, elected to the Constituent Assembly to frame our Constitution on a narrow franchise, had an over-arching vision, which can best be called our 'Constitutional Socialism' (developed in Chapter 21 pp. 286-293).

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PS TO THE POSTSCRIPT VI "THE AMBIT OF CONSTITUTIONAL RESTRAINTS IS YET TO BE SETTLED BY OUR SUPREME COURT "

The nature and the extent of **the constitutional restraints on our Government's Treaty-Making Power are yet to be decided and settled by our Supreme Court**. Most often our courts draw on *Berubari*[38] and *Maganbhai*[39], and *Azadi Bachao*[40]. Hence I make some brief comments on these three decisions.

In *Berubari,* the Court held that the Agreement could not be implemented without the amendment of the Constitution as it had led to cession of a part of territory which is not permissible without an Amendment to the Constitution. The Court again assumed exploratory jurisdiction in *Maganbhai* but held that the determination of boundaries could be settled through an executive act. "The Petitioner did not dispute that the Union Government could enter into a covenant to be bound by the decision of an International Tribunal, and that its award could be binding on India, they merely contended that a constitutional amendment was necessary, since the award affected the territorial limits of India" (*Seerva*i p. 310). The launching-pad of arguments in *Maganbhai* was *Berubari*. As the constitutional competence of the Union of India to set up an international arbitration had not been contested, there was no occasion for the Court to examine the competence of the Central Government to form, ratify, or implement a Treaty. So it is submitted, the entire observation of Justice Shah, in *Maganbha*i, on treaty-making power is a casual *obiter*. Both the judgments given in *Maganbha*i, one by Hidayatullah C.J., and the concurring one by Shah J., rely on the following three decisions well known in the British jurisprudence: (i)*In re Parlement of Belge* (1879) 4 p.d. 129; (ii) *Walker v. Baird* (1892) A.C. 491 (J.C.); (c) *Attorney General for Canada v. Attorney General of Ontario* [1937]. As the parties had no reasons to get interested in the problems of the Treaty-Making Power, the relevance of these Cases under the ethos of modern times and our Constitution

38. AIR 1960 SC 845 *Reference by The President of India under Article 143 (1) at 846*
39. AIR 1969 SC 783
40. 2003-(263)-ITR -0706 -SC

was not considered. H. M. ***Seervai*** rightly wondered (at pp. 311-312 of his *Const. Law*):

"It is difficult to state what exactly was laid down by Hidayatullah C.J. about the Treaty-Making power under our Constitution. The survey of the English practice, and the distinctions made in England between cession of territory in times of peace and in times of war, and between the cession of territory held in freehold by the Crown and cession of territory not so held, is unhelpful, because our Constitution makes no such distinctions."

Besides, *Berubari Opinion* and *Maganbhai* belong to the pre-*Keshvanand* era: hence the Hon'ble Court had no occasion to consider the limitations ensuing from the Doctrine of the Basic Structure. What our Parliament cannot do even after deliberations under the public gaze, the Executive Government can certainly not do that through its Treaty-making power exercised under an opaque administrative system.

I had occasion to examine these issues in the Chapter 3 of my book *Judicial Role in Globalised Economy* (2005) now put on my website *www.shivakantjha.org*. I concluded my submissions thus (at page 79):

Neither in *Maganbhai* nor in *Azadi Bachao* it was essential to decide the issues pertaining to Treaty-making power. In *Maganbhai* none disputed the Agreement *inter se* the two governments, nor it was a case of cession as was *Berubari*. In *Maganbhai* the border determination was upheld as it was an exercise of mere executive power. In *Azadi Bachao* no such constitutional issue was involved, and the parties had no reason to examine Justice Shah's *obiter* in *Maganbhai* made on the selective quotes from Lord Atkin. Both in *Maganbhai* and *Azadi Bachao* this high constitutional issue was decided forgetting the norm to which *Naresh Shridhar Mirajkar and Ors. vs. State of Maharashtra and Anr AIR 1967 SC 1* refers:

"Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover ground which is strictly not relevant for the purpose of deciding the petition before it".