CHAPTER II

A NOTE

JUSTIFYING THE PROPOSED RETROSPECTIVE AMENDMENTS IN THE INCOME-TAX ACT IN THE CONTEXT OF THE *VODAFONE* JUDGEMENT.

by

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(Written on April 22, 2012)

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THE CORPOROCRATIC INTERVENSIONISM IN OUR SOVEREIGN DOMESTIC SPACE

Let us not sign a Treaty of Surrender at the wreck of our Constitution and Democracy

INTRODUCTION

Our Supreme Court delivered on January 30, 2012 its judgment in Vodafone *International Holdings v. Union of India & An* (Civil Appeal No...733 of 2012). As an informed citizen of the Republic of India I wrote, on January 30, 2012, a long letter (enclosed herewith as Annex 'A') to Shri Pranab Kumar Mukherjee appending therewith a Critique of this Judgement running into pages. In paragraph 10 of my letter I had stated :

"10. I have suggested certain remedial steps (please see my *Critique* at pp.1-2, and pp. 70-74), but I consider the best course is to frame retro-operative law through ordinance." I quoted in the foot-note of the letter the summary of law on Parliament's retrospective competence[1].

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

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

I, as a citizen of this Republic, felt overjoyed when our Government moved the Finance Bill seeking to undo the morbid effects of the said decision through retro-operative legislation.

The media and the lobbyists moved heaven and earth criticizing our Government on several grounds which I had answered in my short article published in the Hindustan Times of March 20, 2012. As these grounds are being pleaded in shriller and shriller voices by the corporations and their global consortia, and their political mentors, I deem it fit to quote that though the points stated therein would be more comprehensively examined later in this NOTE"

'Three points need to be answered: (i) whether our government is competent to undo the effect of the Vodafone decision by legislatively validating the Executive's act; (ii) whether the government's decision to do so is fair and reasonable; (iii) whether the proposed provisions would affect the inflow of FDI.

It is settled that the legislature cannot declare any decision of a court of law to be of no effect. It can however pass an amending act to remedy the defects pointed out by a court of law. As a legislature has the competence to pass a measure with retrospective effect, it can pass an amending act to have effect from a date which is past. There is nothing in our Constitution which creates any fetter on the legislature's jurisdiction to amend laws with retrospective effect and validate transactions effected in the past.

There can be good ground to believe that as the economic matrix was in India, and as the incidence of the 'transfer' has an obvious incidence and bearing on the Indian enterprise and its assets, the attempt in the Vodafone case to deflect the incidence of taxation away from India was neither fair nor reasonable. The Vodafone transaction causes wrongful loss to the country where the theatre of commercial operations exist, and causes wrongful gains to some non-resident players staging transactions in Cayman Islands, which you may not be able even to locate on a big map.

It is wrong to say that the Government's action would adversely affect incoming FDI into India. The transaction in the Vodafone case was not designed to bring any FDI to India. No FDI came to India because of that deal. It was simply an unfair attempt to reap the whole benefit of capital gains through structuring transaction of transfer outside India for the gains of some non-residents. "

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where courts of law have not pronounced upon the invalidity or infirmity of any legislative measure. Instances of the legislature's use of such power, upheld by our courts, are copious."

I clarified my point later when I wrote on my website:

> "If the legislature finds that on some legal provisions the judiciary missed to catch the meaning intended by it, it can make clarificatory amendments in the existing provisions by adding explanations. I am not reflecting on the retrospective operation of what is called the substantive provisions. In this short article, I focus only on the changes in the Finance Bill relevant to the *Vodafone* context. In my assessment the changes are merely clarificatory so that the intent of the law makers is not frustrated under forensic process rich in logomachy and semantic sophistry."

In this NOTE, I intend to examine all the relevant points involved in the present controversy created by the global corporate consortia and their lobbyists and hirelings trying to misguide us, even to frighten us thinking that their game would succeed in India as it had succeeded in the years of our servitude. I would take up the points one by one, and I would meet them one by one showing their futility and mischievous strategy. I only solicit your patience to go through the whole This Note is drawn up by one of your brothers who has no motive to burn his mid night oil except an interest in the preservation of our democratic Constitution and the freedom of the organs created by it.

I.

Retrospective legislation is constitutionally sound, and is economically justified, and morally apt.

(a)

The provisions of the Finance Bill, to which retrospective effect is being given, are *ex facie* valid because they are within the legislative competence of the Parliament, and because they would not offend Article 13 of our Constitution that grants to our Supreme Court the power of judicial review. Our Supreme Court's Constitution Bench had stated with masterly brevity in *Indira Gandhi v. Raj Narain AIR 1975 SC*: "The rendering of a judgment ineffective by changing the basis by legislative enactment is not encroachment on judicial power because the legislation is within the

competence of the legislature." In that case the challenge to Article 329A(4) of the Constitution succeeded because it had excluded judicial review to immunize Mrs. Gandhi's election from judicial scrutiny; but her appeal was allowed and the cross-appeal dismissed because of the retrospective application of the Election Laws (Amendment) Act, 1975 had altered law.

The sweep of the retrospective amendment can be wide though it cannot pertain to criminal matters. The plea of inconvenience cannot be advanced against the exercise of legislative sovereignty. It was held that the validity of the imposition of sales tax with retrospective effect cannot be challenged even on the ground that it was not possible for the sellers to pass on such tax to the consumers.

In the context of the *Vodafone* Case, it can be said that the proposed retrospective provisions of the Finance Bill, when enacted, would not be an exercise of legislative judgement superseding or modifying the Supreme Court's decision in *Vodafone*. They are sought to change the law from 1962 so that the governing law for deciding the issues in the *Vodafone* would be as they would stand by our Parliament. In effect, the legal foundation of the *Vodafone* Judgement is sought to be legislatively altered. The effect of the law, as it reigns at a particular point of time, must be given. It is interesting to notice a wonderful sync and synergy between the two great organs of the State illustrated through the principle that when judiciary declares a law *ultra vires*, it ceases to have effect though it is not erased; and when legislature knocks down the legal foundation on which a judgement stands, it ceases to operate though it is not erased.

Once the proposed provisions become the law of the land, the Income-tax Act would operate *de novo* on the facts of the Vodafone Case in the light of law as altered. All points of disputes would come to be governed by the altered provisions Facts would be investigated and examined by the income-tax authorities, and courts, to determine relevant adjudicative facts. Both the chargeability of capital gains and the process of tax recovery would be done in accordance with the law as it stands altered. The established proposition of law is 'that the Constitution and the laws bind every court in India, and that though the courts are free to interpret, they are not free to overlook or disregard the Constitution and the laws.'

(b)

While construing Section 9(1)(i) of the Income-tax Act, the intention of the law makers is clear as the word 'indirectly' governed all the four situations, and the word 'through' was comprehensive enough (*Shorter Oxford English Dictionary*) to take within its sweep even 'indirect' transfers demanding 'look through' approach. This is how the CBDT Circular No. 372, dated 8th December, 1983 understood it, and wanted others to understand. It was a contemporaneous exposition so deserved due weight (*Verghese Case* AIR 1981 SC 1922). The said Circular said: *"Income deemed to*

accrue or arise in India—Section 9.---**10.1** Under section 9(1)(i) of the Income-tax Act, any income accruing or arising whether directly or indirectly,--

(a) through or from any business connection in India, or

(b) through or from any property in India, or

(c) through or from any asset or source of income in India, or

(d) through the transfer of a capital asset situate in India,

is deemed to accrue or arise in India. "

It is worthwhile to reflect that whilst Sections 4 and 5 contemplate normal situations of tax charge on the conventional basis of territorial jurisdiction of the State, Section 9 (1) pertains to 'Income deemed to accrue or arise in India', which is not concerned with 'territoriality'. This 'deeming' colours and controls all the concepts incorporated in Section 9 of the Income-tax Act. The Bill seeks to explain what is obviously fair and just; and are designed to clarify what is obvious in common sense, but often not known to our experts in the forensic process. But such things keep on happening, and such remedies are frequently provided.

The concepts of "property" in the Section 2(14), 'capital asset' in Section 9(1)(i) have been clarified through the insertions of explanations. Whilst all rights are merely legally protected interests, 'property' is, in the ultimate analysis, a mere bundle of right. The word 'transfer' cannot merely mean the transfer of papers, when through that act rights are being vested and divested in India. It matters not how the arrangement is choreographed. The words 'through', and 'situate' are being legislatively made to mean what they precisely mean even in the *Concise Oxford Dictionary*. What the words 'property' 'transfer' 'through' 'situated in India' mean in the legal provisions in the *Vodafone context,* cannot be understood without taking account of the context that all the prime commercial operations, and contractual obligations, adding value and worth to 'shares', had their trajectory in India, had their nexus with the economic matrix in India, and thus had close and vital nexus with the territory of India. The shares, wherever they could be transferred in terms of the Company Law, acquired relevance and value on account of the subjacent capital asset in India. All the 'Explanations' introduced in Section 9 of the Act, are clarificatory. We must not forget that sophistry and hyper-technicality cannot highjack what is in all fairness due to the Consolidated Fund of India. Viscount Simonds said in *Collco Dealings*' Case [1961] 1AllER 762: "I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking steps to protect its own revenue laws from gross abuse or save its own citizens from unjust discrimination in favour of foreigners."

And for recovering taxes from such non-residents', the only just ways is, what constitutes the heart of Section 195 of the Income-tax Act, to collect due share of tax before it vanishes in the thin air. In *Clark (Inspector*

of Taxes) v. Oceanic Contractors Inc. (1983) 1 ALL ER 133, 152, the British Judge rightly said: the right question to be asked was s "who … is within the legislative grasp, or intendment, of the statute under consideration?"'

In short, the aforementioned changes proposed in the Finance Bill simply clarify the legislative intention of our law- as originally. Besides, the legislative effort is fair and just to all conflicting claims.

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In *R (on the application of Huitson) v Her Majesty's Revenue and Customs* (28 January 2010), a British Judge aptly said: "The imposition of a tax is not devoid of reasonable foundation by reason only that it may have some retrospective effect: see, for example, *R (on the application of Federation of Tour Operators, TUI UK Ltd, Kuoni Travel Ltd v Her Majesty's Treasury* [2007] EWHC 2062 (Admin) at 149, [2008] STC 547; affirmed [2008] EWCA Civ 752, ….." And the Court succinctly put forth ideas which guided it to adopt its view. What it said deserves to be noticed by our courts too. It said:

"Parliament was also entitled, having regard to the background that I have set out, to legislate with retrospective effect, particularly in order to ensure a "fair balance" between the interests of the great body of resident taxpayers who paid income tax on their income from a trade or profession in the normal way, and the taxpayers, like the Claimant, who had sought to exploit, by artificial arrangements, the DTA, in plain contravention of the important public policy set out above, and in full knowledge of how Parliament had maintained that public policy after *Padmore*."

On 25 July 2011, a British Court decided in *R (on the application of Shiner and another) v Revenue and Customs Commissioners* the effect of which is thus stated in the summary of the major points therein: to quote---

> *"Tax avoidance - Retrospective operation of statute - Income tax - United Kingdom resident claimants seeking to take advantage of double taxation agreement in order to reduce liability to income tax in the UK - Parliament enacting legislation with retrospective effect to counter operation of such schemes - Claimants seeking judicial review of Revenue's decision to impose retrospective liability - Whether transfers made by claimants' transfers of £10 to trust foreign companies comprising movement of capital within relevant legislation - European Community Treaty, art 56 - Finance Act 2008, s 58(4), (5).*

(d)

Where fairness demands, retrospective legislation to set the things right becomes Parliament's duty to the nation to do so. C. K. Allen, in his *Law in the Making*, has thoroughly examined the rationale of the retrospective legislation; and has supported this step if on balancing of competing interests under the aspects of justice this step is considered prudent and pragmatic. I would come to the topic of the balancing of claims and interests under the aspects of justice in subsequent articles. Here it is enough to anticipate my conclusion that what our Government has decided to do through the proposed provisions in the Finance Bill is wholly right as our government represents the people of India, not the syndicate of investors of the foreign lands, or the gang of the looters of the nation through complex strategies and baffling strategems. Even the British Court considers, in *Huitson*, the following principles sacrosanct (see para 76 of the Judgement):

> i) It is a truth universally acknowledged that in contemporary society a state is entitled to impose income tax on any person who resides in the state in question and who earns income there (or indeed elsewhere), including income from the exercise of a trade or profession….
> ii) As a correlative to (i), any resident of a state must reasonably expect to be taxed by the state in question on the income that he or she earns there (or indeed elsewhere), including income from the exercise of a trade or profession.
>
> iii) The expectation in (ii) has also an important moral dimension. *As Mr Singh QC submitted, those who reside in a state and enjoy the safety and security that it offers, and all the other public goods that it makes available (such as a fair and efficient system of civil justice), can hardly complain if they must by law pay income tax to the state of residence.*
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> v) The fundamental purpose of DTAs is to avoid double taxation. It is not a purpose of DTAs to facilitate the complete avoidance of income tax in any jurisdiction, or to allow residents of a particular state to reduce the tax on their income to a level below that which would ordinarily be exacted by the state of residence.
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> vi) It is a legitimate and important aim of UK public policy in fiscal affairs that a DTA should do no more than relieve from double taxation, and that a DTA should not be permitted to become an instrument by which persons residing in the UK avoid, or substantially reduce, the incidence of income tax that they would ordinarily pay on their income, including income earned from the exercise of a trade or profession. That is particularly the case where

> the means chosen to exploit the DTA in that way comprises artificial arrangements.
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> vii) Such is the importance of the public policy in (vi) above that the UK legislature is entitled, and can reasonably be expected, to enact legislation to ensure that any relevant DTA does not become an instrument of tax avoidance in the sense identified in (vi) above.
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> viii) *In principle*, the policy in (vi) is of such importance that *retrospective* legislation may be justified, such as that which followed *Padmore*.
> ix) The fact that, following *Padmore*, Parliament *had* legislated with retrospective effect put taxpayers and their advisers on notice that it might well do so again, if it believed that such legislation were necessary and appropriate to maintain the important public policy in (vi) above, especially if the means of exploiting the DTA comprised artificial arrangements.

In the context of Vodafone, I would discuss later what Justice Demands, and I would show the shocking facts and decadent morality with which our public interest has been trapped and asphyxiated through the phantoms of interposed corporate structuring through tax havens and secret jurisdictions which the Rogue Finance has set up to deceive and loot the unwary. [See Part II of this Note]

(e)

Those who object to the retrospective legislation do not realize that, not to say of retrospective legislation, even treaties are sometimes given retrospective effect. At page . 1240 of International Law, Oppenheim mentions such treaties:

> 'A treaty may by express provision enter into force retrospectively: e.g. the US—Korea Utilities Claims Settlement Agreement 1958 (TS No 57 (1959)); see also Lighthouses Arbitration between France and Greece, ILR, 23 (1956), pp 659,665-6.'

II.

The corporate croaking , crookery, and culpable intrusion in our sovereign space of economic management within the constraints of our Constitution. The Emerging Corporatocracy and Palmerstonian strategy is being exhibited.

The Nazis had brought the technique of propaganda to the point of horrific excellence in order to hide and smother truth, and to advance their

agenda now dumped into the dustbin we call history. But the MNCs and their mentors have not only outshone Hitler and Mussolini in their imperial necromancy.

After our Supreme Court's decision in the *Vodafone Case*, there is a deafening noise that if that decision, under which Vodafone received, in my assessment unjust enrichment, is ever undone through a legislative act of our democratic Parliament, our India would go down, as one of the financial wizards of a global firm had told me once, into the gutters, and the Indians would rue their destiny for long. The corporate i*mperium* keeps on admonishing us in high decibels against the proposed changes in the Bill now before Parliament. It is most shocking that the hired intellectuals and the captive press keep ceaselessly encoring this thesis, spun with greed and deception, with ruthless intensity as if they are the Huns of our times. By way of illustrations only I quote the following though the propaganda machine of the international corporate lobby is working round the clock, hiring all sorts creatures who consider even their souls mere wares for trade:

(i) The Economic Times of April 10, 2012:

> *"Two international trade bodies have joined the global chorus seeking a review of the government's move to retrospectively tax overseas transactions involving Indian assets ... The France-based International Chamber of Commerce and the Business and Industry Advisory Committee has written to the finance ministry, cautioning that the government's proposal in its recent budget could have adverse implications for the country....While ICC claims to represent hundreds of thousands of member companies and associations from over 130 countries, BIAC is the industry body of the OECDs business community. The letter adds to the global pressure being mounted on the government, which had earlier been warned by trade bodies representing more than 250,000 companies across US, Europe and Asia that retrospective taxation could hurt foreign investment. Britain's Chancellor of the Exchequer (or finance minister) George Osborne had last week suggested that Vodafone was being unfairly treated."*

(II), The Times of India April 19, 2012

> "A dozen powerful U.S. trade and industry bodies turned the heat on Washington to challenge some recent Indian tax amendments, including retroactive tax collection, which they warned will be detrimental to the investment climate in India and future US business prospects."

(iii) The Telegraph (London) of March 30, 2012 reports: "India could be facing a constitutional crisis, after the government proposed new legislation which would overrule the courts and tax companies for deals retrospectively." They tell us that the change "stands to torpedo foreign investment in the country."

Why should we tolerate the global corporate intervention in our sovereign economic and legal spheres? Who is there who does not know the U.N. General Assembly Resolutions prohibiting non-intervention and non-interference in the internal and external affairs of sovereign states and peoples? Do we not have the democratic right to shape our political economy in the light of our wisdom, and pragmatic assessment of our needs in the light of the plenitude of our national interests?

What we see and hear being said day and night these days reminds us of what Pandit Nehru had written about the Big Business in the USA with his remarkable perspicacity on June 16, 1933:

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> "….the population of the United States was only 6 per cent of the world's population. The general standard was thus very high, and yet it was not as high as it might have been, for wealth was concentrated in the hands of a few thousand millionaires and multi-millionaires. *This "Big Business" ruled the country. They chose the President, they made the laws, and often enough they broke the laws. There was tremendous*
> *corruption in the Big Business, but American people did not mind so long as there was general prosperity."* (Italics supplied)

Those, who have reasons to shun sunshine, are panicky because they cannot stand light on their ways. They are not only worried that their unjustly acquired benefit would go, they are agonized by the apprehension that if the technique of retrospective amendment works in India, it would become the standard technique for dealing with the MNCs in most other countries. They know that this may become the way to set right their misdeeds begetting corporate scandals through corporate structuring luxuriating through unknown and foggy tax havens and overseas finance centres.

The MNCs love crony capitalism as that helps them. If they have their way they would like the local state to become mere facilitator, protector, sentinel, and an agency to work symbiotically with them even by riding roughshod over the nation's Constitution. It is shocking to see that those who cherish the principles of territorial sovereignty are deliriously passionate in intruding into our sovereign space. When we hear some Prime Ministers and Finance Ministers of other countries giving us unsolicited advice, veiled threats, and big-brotherly homilies, we, as citizens of this Republic, feel that some creatures are out to play the role of that rabid imperialist we call Palmerston. I quote from my Autobiographical Memoir, *On the Loom of Time* (Taxmann, 2011, at p. 34) **,** to express with brevity what we see at work these days:

> "The outcome of the corporate imperium would be a corporate empire to which the peoples of the world must remain obedient. The global consortium of the corporations would look after the corporate interests. Any global corporation, wherever incorporated, would receive the protection by the consortium. Like the Concert of Europe in the European political history, the corporate consortium would work for the corporations. The structure of 'government' must remain only to protect the corporations from people's wrath. We all know how Palmerston justified his intervention to protect the commercial interests of Don Pacifico by invoking the doctrine of the Roman Empire: *civis Romanus sum* ("I am a Roman citizen"), by which an ancient Roman could proclaim his rights throughout the empire to get his native State's protection."

India can never be a mere bleating little lamb tagged behind the MNCs and the politicians whom they support, and the economists whom they hire to brag greed-driven shibboleths for the media to overcast our realm. My reflections had led me to write in my Memoir the above lines.

The days have gone when engineered psychosis, and bribed pressure-groups had compelled the Mughal Emperor to break and bend to sign the infamous Treaty of Allahabad, or when in other countries a mix of propaganda and coercion had led to the morbid situations portrayed in the Treaty of Nanking, or the Treaty of Wanghia, or the Treaty of Whampoa while spreading imperialism in the 18th and the 19th centuries. Even those bad days have gone when we signed the WTO Treaty bypassing our Parliament, and by deceiving even our nation. Our Constitution stood bruised and battered, and it is not difficult to see where its blood is still oozing out.

The cat is out of bag when we read the great point shortly made: "We are concerned the recent introduction of retroactivity is not only unwelcome for the future of India's investment climate, it will also send a signal to other countries that…." What has let the Trojan horse straddle our space these days is precisely this reason. They apprehend that what India intends doing now, even other countries would do; hence India must be tamed so that others get frightened even in pursuing what they consider a public good.

(b)

The financial experts of the neoliberal economy are waxing high all around the globe criticising the retrospective legislation designed to frustrate the unfair and unjust tax planning through corporate structuring. Indulgence in such wild criticism, and making the Sensex swing up and down to suggest that the country's economy would go to dogs, or into the gutters, if we do not tread on their lines, are the segments of an old game

which the Rogue Finance has been accustomed to play from the early 17th century. If you want to witness how this game is played, then read Charles Mackay in his *Extraordinary Popular Delusions and Madness* (1841) after taking a pill of avomin as you are sure to feel nausea reflecting how they worked against people. Pandit Nehru had insightfully written in his *Glimpses of the World History* (Chap. 186: 'The Struggle of America and England for leadership'):

> "High Finance, as this was called, was and still is, one of the most effective of the methods of coercion of the imperialist Powers". How exact was John Kenneth Galbraith in *The Age of Uncertainty* (1977) where he said: ***"The man who is admired for the ingenuity of his larceny is almost always rediscovering some earlier form of fraud. The basic forms are all known, have all been practiced. The manners of capitalism improve. The morals may not."***

It is amazing how they forget what they have witnessed in the United Kingdom itself. The Government found that good Banking Practice on Taxation involved commitment not to engage in tax avoidance. Finding what was done in *Barclays* grossly unfair, as it used " two schemes that were intended to avoid substantial amounts of tax", the Government thought it appropriate to take "the unusual step of introducing retrospective legislation to end such "aggressive tax avoidance" by financial institutions." The Telegraph (London) reports: "Announcing the crackdown, Exchequer Secretary to the Treasury, David Gauke, said the bank should never have devised the schemes in the first place." The history of modern times attests that the Rogue Finance seldom abandons Machiavellian logic and Mephistophelian stratagems. God save humanity.

III,

FDI: the issue is wholly irrelevant

(a)

The supreme vector, shaping the premises in the reasoning in this *Vodafone Case* is, it is respectfully submitted, the neoliberal zest to promote FDI. It is interesting to note that our Government countered this quest for FDI through its Review Petition before the Supreme Court, which was rejected in chamber.

The Vodafone's "contextual of facts" called for, in the wisdom of this humble self, no judicial quest for conditions to create conditions for facilitating FDI, as the corporate structuring involved, about which I would tell you later was not designed to bring any FDI to India. But the Judgement was cast in the form of a simple categorical syllogism that ran: the **major premise**: that which promotes the incoming of FDI is good; the **minor premise**: that the Department's view of the tax law, as adopted in the

Vodafone Case, does not (or is unlikely to) promote that policy; hence the **conclusion**: the Department's view is not good.

In the *Vodafone* Judgement there is not even a whisper to suggest that the relevance of the issue of FDI was subjected to the deliberative process in course of arguments. This point stands corroborated by the words, tone, and tenor of the Government's Review Petition. If this sublime passion for FDI is begotten by the Hon'ble Judges' private research, the outcome of their intellectual odyssey should not have gone into the judgement.

This quest to facilitate FDI that we get in Vodafone goes against the language of the Income-tax Act which nowhere authorizes the pursuit for obtaining FDI as the legitimate mission to be promoted under that Act. The Hon'ble Court had clearly admitted at the outset that it was deciding a tax dispute.

The Judgment would help promote the neoliberal agenda of economic globalization by facilitating foreign investment routed through tax havens and secrecy jurisdictions. It may help more funds from outside but shall present an uphill task for the government to know what sort of money is coming, and from whence. In most cases the apparent would not be real. Nether our Constitution, nor the Income-tax Act, enacts the ideas of Hayek, or Friedman. This approach reminds one of Justice Holmes in *Lochner v. New York* who aptly observed that the Fourteenth Amendment of the U.S. Constitution did not enact Herbert Spencer's *Social Statics* (1851). This humble self would submit, variating on that celebrated dictum : "The Income-tax Act, or our Constitution, has not enacted the ideas of Milton Friedman, or Hayek."

The ***Vodafone decision*** would surely delight the proponents of the Neo-liberal Economic Paradigm. This concern for more and more FDI had led the Hon'ble Court to act the way it acted in *Azadi Bachao* . Perhaps, the hypothesis is that the loss of revenue matters not, if 'non-tax benefits' [a concept which conceals more than what it reveals] are derived. It is forgotten that the revenue of a country goes to the Consolidated Fund of the country, and remains under public gaze and control.

All issues pertaining to the incoming of FDI are to be decided by our Government pragmatically keeping our constitutional mission at the most conscious point of decision-making. Borrowings words from Noam Chomsky, I would say that we shall fail in our duty to our nation if we confer decisions in such economic matters to "the hands of a "virtual Senate" of investors and lenders." Let us not pit the interests of voters against foreign currency traders and hedge fund managers 'who conduct a moment-to-moment referendum' on the economic and financial policies of developing and developed nations alike," and the competition is highly unequal."

The way FDI is invited in our country, and the way it operates in our economy, is, it seems on good grounds, only designed to help the extractive

investors, who reap short-range profits somehow, and vanish without any loyalty for our country. What goes into the productive process that too becomes worrisome as its maximum benefits are reaped by a few only. A lot of that is siphoned off to other jurisdictions, some of which are brought back through layerings facilitated by corporate structures from the foggy lands and misty space, about which I shall have many things to say in some other articles.

It is time for us to consider that the effect of more and more FDI is to make a small band of creatures amass lot of wealth trying to appease the critical eyes by theorizing on the 'trickle down effect of their wealth'. If the tax laws are bent to promote FDI, a horrendous consequence would ensue. The rich would get richer, but the **Consolidated Fund of India** is likely to suffer unless we believe that by providing abundant cake to the rich, the poor can hope to get some scrums sometimes someday. This point can be appreciated if we keep in mind the role of the Consolidated Fund under our Constitution , to which the taxes and other public resources go, in discharging public commitments and obligations. My reflections had led me to make the following comment in my book *On the Loom of Time* (p. 362)

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

.Article 292 of our Constitution 'provides that the executive power of the Union extends to borrowing upon the security of the Consolidated Fund of India'. In terms of Article 266, all revenues, go to the Consolidated Fund of India are to be spent in accordance with our Constitution's provisions, and under a close Parliamentary control. Such resources are under trust to meet expenditure for public cause. FDI, on the other hand, comes and goes for the corporate benefits, and the 'High Net Worth Persons', and the global economic gladiators over whom, under the present-day WTO regime, our Parliament has no control. Greed is their loadstone, and Deception their strategy.

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

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

IV

VODAFONE: Its profile of facts, its dexterous choreography but Hazardous consequence

(a)

That in the main Judgement delivered in *Vodafone International Holdings v. Union of India & Anr* (C. A. No. 733 of 2012), the Hon'ble Chief Justice has summarized in the Introduction of the Judgement the main points giving rise to the core Issues thus:

> 'This matter concerns a tax dispute involving the Vodafone Group with the Indian Tax Authorities [hereinafter referred to for short as "the Revenue"], in relation to the acquisition by Vodafone International Holdings BV [for short "VIH"], a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. [for short "CGP"], a company resident for tax purposes in the Cayman Islands ["CI" for short] vide transaction dated 11.02.2007, whose stated aim, according to the Revenue, was "acquisition of 67% controlling interest in HEL", being a company resident for tax purposes in India which is disputed by the appellant saying that VIH agreed to acquire companies which in turn controlled a 67% interest, but not controlling interest, in Hutchison Essar Limited ("HEL" for short). According to the appellant, CGP held indirectly through other companies 52% shareholding interest in HEL as well as Options to acquire a further 15% shareholding interest in HEL, subject to relaxation of FDI Norms.."

Two points come to mind. What sort of concept is this 'residency for tax purposes'? Do we still believe that tax-

gathering depends on some game played in some casino which can be set up anywhere, in the air, or on waters? One gets reminded of the attitudes that the ghosts had towards taxation in W.S. Gilbert's comic opera *Ruddigore*; or, *The Witch's Curse*, are even now In this opera, Sir Ruthven Murgatroyd, Bad Baronet of Ruddigore, was cross examined by his ghostly ancestors who had obliged his descendants to commit a crime a day? That conversation is profoundly suggestive:

"Rob. Really : I've committed a crime punctually every day. Sir, Rod : Let us inquire into this Monday?

Rob : Monday was Bank Holiday

Sir Rod : True, Tuesday

Rob : On Tuesday I made a false income tax return.

All : Ha! Ha!

1st Ghost : That's nothing.

2nd Ghost : Nothing at all.

3rd Ghost : Everybody does that.

4th Ghost : It's expected of you.

The following core points emerge from the Judgement:

(i) that the Hon'ble Court was deciding a " tax dispute", its determination was strictly controlled by the consideration of the Income-tax Act, 1961 framed in exercise of legislative power under Article 265 of the Constitution of India;

(ii) that the Hon'ble has, in effect, considered the corporate structure impregnable as warranting only the 'look at' approach, not the 'look through' approach, the nature of the 'holistic' structure is to be kept in view critically examining its parts and their roles inter se to examine their effect on our nation's interest;

(iii) that the Case of the Revenue was wholly misunderstood when the Hon'ble Court put it thus: 'the Revenue seeks to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, holds the underlying Indian assets.

Let us see how things were choreographed: In Feb.2007, Vodafone International Holdings (VIH) of the Netherlands acquired 100% shares a Cayman Islands company, CGP Holdings (CGP) on the consideration of US $ 11.1 billion from another Cayman Islands company, Hutchinson Telecommunications International Limited (HTIL), which was incorporated in 2004. CGP's sole shareholder on its incorporation was Hutchison Telecommunications Limited, Hong Kong. They set afloat corporate structures through many lands in the Caribbean, effected the deal transferring the sole shareholding of the CGP whose existence has been assumed as from lands on God's good Earth every chimerical structure has to be accepted because who can see the black cat in the Caribbean darkness? CGP, through various intermediate companies and contractual arrangements controlled 67 % of Hutchinson Essar Limited (HEL), an Indian company.

I wish someone would have told the Hon'ble Court the facts about the Caymans Islands and the Virgin Islands which are stranger than fiction (Please see later).

It seems to erase or shroud commercial presence the HTIL in India, a phony structure through Cayman Island was created, and the CGP Cayman Island was introduced just to promote as an interloper to promote a fraudulent design. Thus Vodafone acquired control over CGO and its downstream subsidiaries including, ultimately, HEL providing cellular telephony services in different circles in India. The corporate snakes moved up and up into the fog and dust of the Caribbean about which none seems to know much. , It is strange that the strategic but fraudulent design at work in the corporate structuring in the Vodafone Case was noticed neither by our Government, nor by the Humble Court. It was designed to cover up, or shroud, the massive operational presence of the companies of the Hutch Group in India by erecting corporate structure in order to cover up their *de facto* and *de jure* commercial 'presence' in India. Various corporate segments were created, and were melted and joined to heart's desires (if a corporation can possess that) through Shareholders Agreements, Framework Agreements etc. to transmit formal legal ownership of the shares transmitted from India, to Mauritius, to Virgin Islands, to Caymans Islands. It never became clear why the gentleman from Hong Kong and the U.K. chose such regions when their economic matrix that provided value to their shares was in India.

(c)

In the 'designed' and well-crafted world of finance, the 'shares may be given value, but when all is said, it is the character and quality of economic matrix that gives them value which matters when shares are transferred. If the economic matrix is in India, share transfer in tax havens between non-residents has clear nexus with the asset in our territory, howsoever held. The Hon'ble Court failed to appreciate that as the economic matrix was in India, mere 'shares sale' in foreign jurisdiction cannot deprive India a share in tax. To hold otherwise would be unfair to those who protect the matrix, and contribute to the economic events which have proximate nexus, on the territoriality principle, with sale of such shares in foreign jurisdiction.

The economic matrix ['A situation or surrounding substance within which something else originates, develops, or is contained'] is situated in the territory of India. Shares representing, or reflecting reasonable 'nexus' with the theatre economic creativity, cannot become alien to our jurisdiction by creating the world of make-believe through the seeming corporate structures from the managed sphere of foggy lands. . The Hon'ble Court failed to appreciate that as the economic matrix was in India, the dichotomy between 'share sales' and 'asset sales' goes against common sense that goes with 'reasonableness' and justice. To hold otherwise would be unfair to those who protect the matrix, and contribute to the economic events which have proximate nexus, on the territoriality principle, with sale of such shares in foreign jurisdiction as providing them the real worth as without that the Share Certificates are worth nothing, the 'transfer of that Certificates' an exercise in utter futility.

The value of the shares of the Cayman Islands subsidiary is because the worth and vectors in the economic matrix in India's territory. To test the worth of this proposition, please think what can happen to the capital worth or share worth of such shares if we nationalize the underlying assets. We had done nationalization several times before, and we can do that again despite the terms under the WTO regime and Agreements under its sprawling umbrella..

If the corporate structure, appreciated in Vodafone, stands, it will have disastrous consequences for our nation, not only because many cases cast in the same protocol would be lost to-day or to-morrow, but also because most commercial and economic activities would be so arranged as to deprive our country of revenue in future. Chief Justice Warren, the most important U.S Supreme Court Chief Justice after Chief Justice Marshall, would have posed in such situations: "Yes, yes---but were you fair. IIf Vodafone view is allowed to stand, then what prevents men, or robots, to ensure registration of companies at the Servers, placed on the moon, or another part of the space, as the places for incorporation. If tint-tot of our mother Earth can become a 'Sovereign State', recognized by the OECD, and the UNO, what can prevent if the fast technology, and the corporate make even that possible. . If it happens, all ' share sales' transactions can be arranged in the cyberspace by robots residing in the space, or in the Oceania, or on some remote terra firma which we might not see on the map through
most powerful magnifying glass. The distinction between 'asset sales' and 'shares sale' is only the creation of the financial experts ruling roost in the market-ruled globalized economy. The distinction is a distinction recognized only in the system of Creative Accountancy. The Income-tax law is yet to recognize it.

(d)

This mistake has occurred because neither the Hon'ble Court took a Judicial Notice of the new 'states system' and the ways of many tiny-tots in the Caribbean, and in many other foggy parts of the globe. But this is an outcome of radical changes in the international states system brought about by the

changes so aggressively manifest after the World War II. Prof. Sol Picciotto has insightfully observed:

> "The emergence of `offshore' statehood acted as a catalyst for the undermining of the classic liberal international system, which was reinstated within a framework of multilateral institutions after 1945. `Offshore' statehood was created by international investors (especially TNCs) and their advisers, responding to and exploiting the elastic scope of state sovereignty based on regulatory jurisdiction and legal fictions of residence and incorporation."[2].

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

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

The Government had to seek enactment of retroactive law both (i) to make explicit was implicit through the existing words of the Income-tax Act, 1961,; and (ii) to make clarificatory provisions needed as response to the strategies and stratagems of the tax haven operators. The observation of Judge Manfred Lachs of the ICJ in *In the North Se Continental Shelf Case*[3] is very relevant:

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

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

[3] ICJ 1969, 3 at 222.

(e)

Vodafone's Strategies can be clearly seen

Earlier their corporate structures had Mauritius roots, and the Mauritian operations had much impact in India's commercial field wherein their economic matrix had been set up. They felt that the operations through Mauritius were becoming risky. The Mauritius routes were under scanner right from 1995, but were under close and assertive scrutiny after the 20 Assessment Orders were framed by some Mumbai officers in the year 2000 exposing the abuses committed through the Mauritian routes invoking the Indo-Mauritius Tax Treaty. In 2000, *Shiva Kant Jha*, and *Azadi Bachao Andola*n filed two Writ Petitions before the Delhi High Court. The Delhi High Court agreed with the Petitioners that the Indo-Mauritius routes were abused [*Shiva Kant Jha vs UOI* (2002) 256 ITR 536]. Against this judgement, a SLP was filed by the Union of India which was decided by our Sup. Ct under the cause title *Azadi Bachao Andolan & Shiva Kant Jha v. UoI.* A Mauritian company was allowed to become a co-appellant at the Sup. Ct. level. The High Court's decision was reversed in *Azadi Bachao. Shiva Kant* challenged th*e* Supreme Court's decision in the said Case over a number of years in different proceedings : the process continued till 28.11.2007. The strategic corporate structures and their adroit roaming from one tax haven to another, with denser fog, was projected before our Supreme Court.

Not many persons marked how through skilful stealth the financial planners, working for the Vodafone, re-acted and responded to what was happening in the litigations I conducted before the Supreme Court. My this assertion is, of course, on prudent probability for believing which I have had enough reasons. To illustrate, I would mention some events on the stream of time in the context of which you can mark the said company's odyssey from India to Mauritius, Caymans Islands, and the British Virgin Islands the countries about which our knowledge is small, and even our senior lawyers' knowledge is hardly more than a little. Through the following List I provide material days which would explain how the cavalcade of the Hutchinson structure moved and moved through islands turning its pyramidal peak up in Caymans Islands. , appraise and appreciate facts how the cavalcade of the assorted components, compendiously

Chronology of Dates challenging *Azadi Bachao* by Shiva Kant Jha

31. 5. 2002	*Shiva Kant Jha vs UOI* (2002) 256 ITR 536
10. 2. 2003	Circular 1 of 2003 Clarification regarding residential status under Indo-Mauritius Double Taxation Avoidance Convention (DTAC)-Reg.
7. 10. 2003	*UOI vs Azadi Bachao Andolan* (2003) 263 ITR 706
29. 1. 2004.	Review Petition (Civil) Nos.. 1917-18 0f 2003

8. 12. 2004 Curative Petition dismissed

28.11.2007 Shiva Kant Jha v. Unon of India & Anr W.P. (C) NO(s). 334 of 2005

In this Writ Petition, *Shiva Kant Jha* had challenged *Azadi Bachao & Anr*. by invoking Art. 32 of the Constitution seeking a constitutional remedy. . This Writ Petition was heard by the 3 Hon'ble Judges. The Supreme Court appointed Mr Sorabjee and Mr. Gopal Subrananium, both Senior Advocates, as *amici curiae.* But the Court declined to allow the Writ Petition, moved by one who had himself been a party to the Case against which a Writ had been sought. Disposing the Writ Petition, the Hon'ble Supreme Court observed in *Shiva Kant Jha v. UoI* [W.P. © 334 OF 2005]:

> "We heard petitioner-in-person at length and learned Additional Solicitor General of India. Petitioner argued that all final decisions of this Court are subject to the remedy available under Article 32 of the Constitution. Petitioner contended that there may be occasions where the decisions of this Court may violate the fundamental rights of citizens and under those circumstances, the aggrieved should have remedy under Article 32 of the Constitution against such decisions. In support of his contentions, he referred to the views of several learned authors and the decisions of English Courts. It is not necessary to refer to them, as the question has been exhaustively considered by the Constitution Bench of this Court in Rupa Ashok Hurra (supra).
>
> Of course, the decision of this Court could be reviewed and if necessary varied in appropriate cases, as pointed out in Rupa Ashok Hurra. The decision of an earlier Bench could also be overruled by a larger Bench. But we do not accept the submission of the petitioner, that the decision of this Court which has attained finality could be subjected to judicial review under Article 32 of the Constitution, at the instance of one of the parties to the decision. We find no merit in the writ petition. The writ petition is accordingly dismissed."

Everybody knew that some day someone who was not a party to the *Azadi Bachao* would file a Writ Petition against the Supreme Court's judgement in *Azadi Bachao* the outcome of which might not be in favour of the operators in India through Mauritius. Hence these structures needed to be removed further and further into deep and dense mist of Cayman Islands and the British Virgin Islands.

These sharp operators through tax havens are conscious how not to leave any evidence of their 'presence' in India in order escape being charged to tax in terms of Section 195 of the Income-tax Act, 1961, read with Section 9. Hence the evidence of any 'presence in India had to be removed through the process of corporate structuring. The law on this point is the same in India and England, and has been thus summarized by the House of Lords in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130, quoted with approval in *Agassi v. Robinson [2006] 1 WLR 2126. To quote from para 16 of Agassi v. Robinson [2006] 1 WLR 2126* .

V.

Let us play Columbus to explore the regions of Darkness on our good Earth from which the Hutchinson structure travelled allowing the Vodafone's deal

. The Hon'ble Court has found reasons for the Pyramidal corporate structure through the holding companies and the corporate conglomerates forming one architecture in which the ' corporations', forming the corporate behemoth, can travel all lands to promote what they consider their corporate purpose. They love to operate through opaque systems so that the World can see the Trojan horse, but not the soldiers hidden in that. As the MNCs rule the world from the realm of darkness, I would tell you something about the areas at which the *Vodafone* drama had reached its climax, or denouement (it would depend how you look at the drama). That well known devil Comus had declared, to quote from Milton; ''Tis only daylight that makes sin.' Our Supreme Court refers to it in *Shrisht Dhawan v. Shah Bros*[4].

Once I asked the lawyers present in our Supreme Court Library: "Do you know where is 'Cayman Islands'?" None could say where it was, or what it was. I asked one of my brilliant juniors to find that out on a big map. After devoting about one hour he could discover a tiny dot on this terra firma in the region called the Caribbean. Those were the days when our Hon'ble Supreme Court was hearing almost daily for more than a month the *Vodafone* Case. . When the Hon'ble Court delivered its judgement, it said with remarkable brevity (para 68):

> "It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign

[4] *AIR* 1992 S C 1555

investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company."

(a)

The Realm of Darkness out to subjugate the Realm of Light

When I call such jurisdictions the Realm of Darkness, I do not call them so because the Sun does not shine there. The Sun shines their brighter, and almost all the year round, because the Caribbean is in the tropical region. The whole of the Caribbean in which are located about 7000 islands is the most well-lit, and the rays which must be making the coral ridges wear romantic smile turning the turtles to go on the paroxysm of joy. I call such regions the Realm of Darkness because they frustrate our right to know, they ensure that access to sources of knowledge is denied. They establish legal regime to ensure that such regions function as the present-day versions of the old Alsatia where law-breakers and law evaders sought refuse in olden days. The tiny tots in the vast Oceania serve the purposes that the notorios Kalapani (Andman Islands) had played during the British imperialism. Those were the days when we did not have quick communication, and the electronic technology of fast knowledge transmission did not exist. The new states were created in the Caribbean so that the things going on could be evaded from public gaze, communication could be tightly controlled, and such regions could be insulated against public wrath, and the penetration of the outsiders for tolerating whom the ancient Egypt and Rome had paid the heavy penalty of total destruction.

For the benefit of the beneficiaries of the neo-liberal agenda of neo-capitalism impregnable bastions were been built in the Caribbean, South Pacific, the tiny-tots in the Atlantic ocean, Micronesia and Polynesia. Let us cast a fleeting eye on some tiny states of the Caribbean Sea in this Vodafone context.

i

The Cayman Islands

In the post-World War II phase, circumstances got created which helped the rich capitalists and finance to shift their core-operating systems to some of the tiny islands in the Caribbean. Those, who did not belong to Caymans Islands, chose these places to create artificial creature of corporate subsidiaries there. In this virtual world, the electronic communication, and technological equipments it is possible to project the phantoms of the states and regions existing on our planet into the cyberspace where it is possible to operate anytime and anywhere arranging matters to the heart's desire.

The Cayman Islands is a British Overseas territory. It always runs the risk of being struck by hurricanes and storms. The Wikipedia writes about Grand Cayman: "Due to the tropical location of the islands, more hurricane or tropical systems have affected the Cayman Islands than any other region in the Atlantic basin; it has been brushed or directly hit, on average, every 2.23 years." Most of its early settlers "were British mariners and privateers and shipwrecked passengers and African slaves, as well as land-grant holders from Jamaica." Its history does not evidence that it could have developed high in culture or finance. But thanks to the superrich and the MNCs, it has now become a 7-star hotel enabling the people there to enjoy the highest standard of living. With an average income of around KYD$47,000, Caymanians have the highest standard of living in the Caribbean. Its total Population is just about 55000. Consider the following vital statistics pertaining to Cayman Islands (gathered from Annual Economic Report 2006):

	2005	2006	
Mutual fund licenses	7,106	8,134	
Insurance licenses	759	767	
Banking and trust licenses	305	291	
Trust companies	127	135	
Stock exchange listings	1,015	1,169	
Company registration	74,905	83,532	
Stock exchange capitalization	75.6	106.2	

Total Company Registrations in 2004; 2005 and 2006 were 70,133; 74,905; 83,532 respectively. How can a country of about 55000 can create and manage juristic persons aggregating to almost a lac. Most of these must be in someone's hip-pocket!.

How things are done in Caymans Islands would be evident from what is done in the Ugland House. United States Government Accountability Office in its Report to the Chairman and Ranking Member, Committee on Finance, U.S. Senate (July 2008)[5] portrayed the way things move there:

> "The sole occupant of Ugland House is Maples and Calder, a law firm and company-services provider that serves as registered office for the 18,857 entities it created as of March 2008, on behalf of a

[5] http://www.gao.gov/new.items/d08778.pdf

> largely international clientele. According to Maples partners, about 5 percent of these entities were wholly U.S.-owned and 40 to 50 percent had a U.S. billing address. Ugland House registered entities included investment funds, structured-finance vehicles, and entities associated with other corporate activities."

We get from that Report that the sole tenant of the Ugland House is the well-known Maples and Calder law firm. There, the Report says, 18,857 registered entities are created to exist, though very few of these have significant physical presence in the Cayman Islands, and about 50 percent of them have a U.S. billing address. As we all know what the infamous Enron had done in our country, it is worthwhile to read what the Report says something about it:

> "Additionally, because offshore entities such as SPVs can be used to achieve a wide array of purposes, they can be abused even when the entities, the parties involved, and the stated business purposes pass scrutiny at the time of establishment. For instance Enron, a global energy company had 441 entities in the Cayman Islands in the year that it filed for bankruptcy. Maples and Calder partners said they created entities for Enron at the instruction of major U.S. law firms. The partners noted that Enron's legitimate business activity often involved holding assets in offshore subsidiaries, including many in the Cayman Islands. However, Enron did use structured-finance transactions to create misleading accounting and tax outcomes and deceive investors."

We get a wonderful appreciation of this Ugland House in the very first sentence of the Wikpedia'a article on the Ugland House: it says:

> "Ugland House registered office address for 18,857 entities and has for years[been linked to tax evasion. During his presidential campaign, U.S. President Barack Obama referred to Ugland House as "the biggest tax scam in the world."

It was reported that Mr Obama had said, while referring to "a building in the Cayman Islands that… supposedly housed 12,000 US-based corporations, that "That's either the biggest building in the world or the biggest tax scam in the world," he said.[6]

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

[6] http://news.bbc.co.uk/2/hi/americas/7972695.stm

1. The requested party may, to the extent permitted under its domestic laws, allow representatives of the competent authority of the requesting party to enter the territory of the requested party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned. The competent authority of the requesting party shall notify the competent authority of the requested party of the time and place of the meeting with the persons concerned.
2. At the request of the competent authority of the requesting party, the competent authority of the requested party may permit representatives of the competent authority of the requesting party to attend a tax examination in the territory of the requested party.
3. If the request referred to in paragraph 2 is granted, the competent authority of the requested party conducting the examination shall, as soon as possible, notify the competent authority of the requesting party of the time and place of the examination, the authority or person authorized to carry out the examination and the procedures and conditions required by the requested party for the conduct of the examination. All decisions regarding the conduct of the examination shall be made by the requested party conducting the examination.

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

> "OECD's blacklist was avoided by Cayman Islands in May 2000 by committing itself to a string of reforms to improve transparency, remove discriminatory practices and began to exchange information with OECD. Often, complaints have been raised stating that these centres are utilized for manipulating market, to launder money, to evade tax, to finance terrorism, indulge in corruption etc. All the same, it is stated that OFCs have an important role in the international economy, offering advantages for multi-national companies and individuals for investments and also for legitimate financial planning and risk management. It is often said that insufficient legislation in the countries where they operate gives opportunities for money laundering, tax evasion etc. and, hence, it is imperative that that Indian Parliament would address all these issues with utmost urgency.'

The Tax Information Exchange Agreement between India and Cayman Islands, like all such Agreements are, to a large extent, futile and deceptive. The tax havens keep their basket of information of foreign companies empty. And we cannot get anything of relevance from the basket that is itself empty. Secondly, the cover of secrecy, built by administrative and legal provisions, is so tight that we cannot even peep through that. Besides, in the Caribbean itself

there are so many islands and territories (many phony) that no human being, except the Rogue Finance, can find out what these are and where they exist.

In this short article I cannot evaluate what the Hon'ble Court said in the para quoted. I would restrain myself by quoting a well-known proverb: "the proof of the pudding is in the eating" . The way the Court accepted what was submitted before it reminds me what C. K. Allen said in the context of *Liversidge v. Anderson*: "In *Liversidge* v. *Anderson* the majority of the Lords felt the same confidence in the wisdom and moderation of executive officials; there is, apparently, something in the tranquil atmosphere of the House of Lords which stimulates faith in human nature".

ii

The Virgin Islands

Another theatre of operation relevant to the *Vodafone* Case is the British Virgin Islands, (BVI). It is a British overseas territory with an area of 59 sq. miles, and population at 28000. In the context my articles, it is enough to quote from the Wikipedia to show how economy runs there: to quote--

> "Substantial revenues are also generated by the registration of offshore companies. As of June 2008, 823,502 companies were so registered (of which 445,865 were 'active'). In 2000 KPMG reported in its survey of offshore jurisdictions for the United Kingdom government that over 41% of the world's offshore companies were formed in the British Virgin Islands. Since 2001, financial services in the British Virgin Islands have been regulated by the independent Financial Services Commission."

What happens to about 400000 non-active incorporated companies? Aren't they ready enough commodities for instant supply to the global customers within the shortest possible time , dated from any point of time from the remote past to distant future? Companies already minted are available in such tax havens.

I have told you about the Ugland House in the Cayman Islands. The Cathedral Square in Mauritius, is no different.

iii

The goings-on in the Caribbean

I do not intend to tell you more about the tiny-tots of the foggy dark lands. How companies are incorporated and how they are used can be discovered from what I have said about Caymans Islands and the British

Virgin Islands. That is why things move in the Caribbean. How a 'corporation' is got *incorporated* in this phase of globalization deserved a Judicial Notice. What the *2002 Britannica Book of the Year* (p. 392) says about The Bahamas, a country (Area 5382 sq.mil.) having Population only (2001) 298000 may not be untrue about Mauritius, Caymans Islands, or the Virgin Islands: to quote

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

When the *Duke of Westminster* had been decided, the world had about 60 States, now there are

more than 200 (about 194 states, and several others possessing limited or disputed sovereignty), most of them densely shrouded, and promoting agenda to provide, for good gains, an apt environment for the Rogue Finance. It is suggestive to mention that, when the Paris-based Financial Action Task Force subjected the banking system of the Bahamas to a close scrutiny, in one go the Bahamas, it is said, banned the " anonymous ownership of more than 100,000 international business companies registered in the country."[7]

VI

The proposed retroactive legal provisions would go a long way to correct our Supreme Court's misunderstanding/ rejection of certain constitutional fundamentals in the Vodafone Judgement for the larger good of people.

.Every Judgement, in fact every decision, has inherently two structures constituting it's integral web that controls and conditions the perception of the 'hard' structure that the words of the statute and precedents constitute. The VODAFONE decision shows in its architecture: (i) 'soft infrastructure'

[7] *2002 Britannica Book of the Year* p. 392

of assumptions and ideas, and its (ii) 'hard' infrastructure revealed through the interpretation of Sections 9(1)(i) and 195 of the Income-tax Act, and the norms of law as seen to emanate from precedents of considered relevant. Whilst 'hard structure' may keep on changing from case to case, the 'soft' structure has substantial stability and continuity as it is determined by the fundamental juridical norms developed to promote the Constitution's mission and value perception of the society that has set up its values for constant pursuit in its Constitution..

A comparative comprehension of the 'soft' structure of *Azadi Bachao* and *Vodafone* shows that they shared in common the neoliberal capitalist world view; and remained wholly indifferent to the constitutionally mandated 'welfare' and 'socialistic' commitments evident in the 'soft' structure of *McDowell,* but absent in the 'soft' structure of *Azadi Bachao* and *Vodafone.*. What has happened illustrates what I had written some years back (2005), in my I had written in *The Judicial Role in Globalised Economy*:

> "It is clear from the trends and tendencies of our day that Market is planting its kiss on all the institutions spawned by the political realm. It has enchanted the executive to become market-friendly. Its persuaders have not left outside their spell even Judiciary. Richard Posner speaks of the Constitution as an Economic document, and proposals have been made to refashion constitutional law to make it a comprehensive protection of free markets, whether through new interpretation or new amendment, such as a balanced-budget amendment.[8] We are bidden to take into account the impact of legal institutions and rules on markets, and to undertake an economic analysis of law. Even the role of the State is defined in terms of our deference to the market. The Chicago University and the Yale Law School are the centres for the study of law and economics wherein economics dominates legal discourse. *Homo juridicus* is becoming *homo economicus*. Public policy of the State is manipulated to come to terms with the ideas of the mainstream neoclassical economics. The triumphal march of the Market, taking all institutions for granted as its minions, has generated forces which are taking us fast towards the Sponsored State."

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[8]. See Chapter 7.

And on *Azadi Bachao* I was led to comment thus in my Memoir, *On the Loom of Time*:

> "Writing about *A.D.M. Jabalpur* v. *Shivkant Shukla*, some experts observed: "Thejudgment can be best described, in the words of C.K. Allen, as the contribution of the Supreme Court to the emergency"[22] . With greatest humility, I feel that *AzadiBachao Andolan*, about which I would tell you in detail in Chapter 23 of this*Memoir*, can be considered our Supreme Court's contribution to the Market Economy in this phase of Economic globalisation."

As the Hon'ble Court, in *Vodafone*, shared the 'soft' structure assumed in *Azadi Bachao*, it went ahead on the same track. . As in *Azadi Bachao* the Hon'ble Court had ignored *McDowel*l going to the extent of ridiculing this Constitution Bench decision as 'a hiccup' and 'temporary turbulence' even by ignoring the settled norms of judicial decorum not a smaller Bench follows the decision of a larger Bench. In *Vodafone*, the Hon'ble Court adopted a subtler way with the same effect by not seeing any difference between *Azadi Bachao* and *McDowell*. The 'soft' structure of the former differs from the 'soft' structure of *Vodafone* as widely as does cheese from chalk. *Azadi Bachao* and *Vodafone* are the judicial attempts to bring about a constitutional revolution by departing *sub silentio* from the 'welfare state' approach to the promotion of the neoliberal paradigm constantly working to promote corporatocracy at the cost of democracy. It is interesting to note that no difference was seen between *Azadi Bachao* and *McDowel*l as without this sort of perception, *Vodafone* could not have been decided the way it has been decided.

(b)

I intend to examine the 'soft' structure of the above mentioned Cases so that later on I can submit that retrospective amendments are needed to clarify what our law is in the statute and our Constitution. The Judges' duty is to interpret law, but they are not above law, and cannot ignore the vision that our Constitution mandates them to apply while interpreting the provisions of law in a given case. H.M. Seervai has aptly said:. that "the laws bind every

court in India, and that though the courts are free to interpret, they are not free to overlook or disregard the Constitution and the laws."[9]

These retrospective changes would suggest the administrative and judicial bodies to realize what they missed: and thus would make our Constitution remain supreme, not under the neoliberal gloss but in the light as shed by *McDowell* that, in my view, is in the total fidelity to our Constitution. Justice Reddy supplements the majority Judgement delivered by Ranganath Misra J. by providing the 'soft structure'. In *McDowell* the hard infrastructure has been developed in the Majority Judgement of Justice Misra. *McDowell* presents a judicially shared thematic structure integrating the 'soft' with 'hard' in interpreting law in the light of our Constitutional values shared in numerous earlier decisions of our Supreme Court.

I. Both *Azadi* and *Vodafone* has the neoliberal agenda to promote (as if) everything that can promote FDI is good.

In *Azadi Bachao*, the Court considered it fit to quote three long paragraphs from a book written by an interested 'tax haven advisor', and ex-partner of the infamous Arthur and Anderson; and constituted them as the sole reason for the decision. One of the three paragraphs quoted in the Judgment runs thus:

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

And the Hon'ble Court concluded their central reasons upholding the evil of Treaty Shopping:

> "There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing

[9] H.M. Seervai, Constitutional Law of India (4th ed.) p. 2677

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

I have already shown above how in Vodafone the supreme driver in the judicial reasoning, and the prime vector in the judicial decision is the immanent vector of concern for FDI. The judicial commitment to the neoliberal quest is so strong that the Hon'ble Court virtually made it, even in the tax law situation, a veritable Holy Grail for the Knights of Government must work forgetting the ideas that had constituted the 'soft' structure of *McDowell*.

II. The judicial refusal to 'LOOK THROUGH' the corporate structures is evident both in *Azadi* and *Vodafone* registering a volte-face from the position taken in *McDowel*l. What was unstated premise in *Azadi,* has become clear in *Vodafone* where in the main judgement, the Hon'ble Court states what is the core reasoning of the neoliberal capitalist strategists of our days. While examining the 'International Tax Aspects of Holding Structures' (para 66), the main Judgement says:

> "In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person."

The Hon'ble Court missed to notice that through this thesis the Pope sought to propound the majesty of the R. C. Church striving to

establish its absolute might through the corporate structuring of the tyrannical theocracy, that surely provided the model for the neoliberal corporatocracy of our days. Our Constitution, which is committed to 'welfare' ideas, has wholly excommunicated the ideas that Pope expounded as a device to build the imperial authority of the R. C. Church. We cannot allow our democracy to end, and the corporate imperium to emerge. What I have said would be borne out by the following chart showing how political structuring in the West has moved over times:

The Phase	**Agenda for**	**Effect**
1. The Era of the Church *impeium* that fostered and promoted capitalism	Established supremacy over all earthly powers, and succeeded in	Most assertive doctrine of the power of Church was in the declaration by Pope

The Phase	Agenda for operation	Effect
	with exploitative and extractive capitalism.	have this day set these over the nations and over the kingdoms, to pluck up and break down, to destroy and overthrow, to build and to
2. The emergence of the nation states in which the economic realm and the political realm turned close in pursuit of power and wealth: a new phase in capitalism was inaugurated. Over a large period, the gladiators of the economic realms established collaborative and	After the Renascence (the 15th to the 17th century) and the Reformation (the 16th to the 17th century), the nation states emerged which established power, replacing the Church *imperium*, "in alliance	The ethos had two pronounced features: (i) the diminishing authority of the Church, the increasing authority of the 'nation states', and (ii) the increasing authority of science and commerce facilitating global expansion.
3. The Subjugation of the political realm by the Economic Realm where the corporations dominated drawing on their experience of the earlier eras which had taught them: (*i*) as those who amass wealth and power are only a few, they cannot successfully meet the challenges of people's wrath, so the corporations need government to function for them both as facilitators, and	The political realm turned subservient to the economic realm in which facts have led to situations thus captured by an expert: "Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international	The real victor of the World War II was the United States. The emergence of the USA led to the emergence of the power of the corporations finding their greatest impact through the Washington Consensus and the Bretton Woods system, and then through the institutions like the IMF, World Bank, and, later, the WTO.

The Phase	Agenda for operation	Effect
the enormous growth in the PR industry, advertisement and propaganda	protests can be expected as the stable new global world order takes shape" 2001 *Encyclopedia*	
4. The emergence of Corporatocracy with massive economic power. It has emerged by hiring intellectuals, by skilful manipulation of political power; by managing media and the press to become compliant; by engaging the lobbyists; and by establishing	Its structure resembles the Trojan Horse. The technique of Deception becomes the supreme technique of management.	Corporatocracy works contrary to real democracy, and principles of 'social justice' and egalitarianism. It helps create islands of affluence wielding power, and helps the emergence of the enclaves of the superrich in their cloud-castles we call their

III. In *McDowell* the Supreme Court was conscious of our Constitution's Welfare mission, and the State's obligations under the Preamble to our Constitution, and its other provisions[10], whereas in *Azadi Bachao* and

[10] Justice Reddy said in *McDowell and Co. Ltd. v. CTO* (1985) 3 SCC 230 :

> "We must recognize that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.."

Vodafone, would help, I believe, promote the neoliberal agenda in this phase of Economic Globalisation wherein the corporations are striving to rule the world. . *McDowell* noticed the welfare commitments made under our Constitution, and expressed judicial earnestness in the judicial perspective. The Hon'ble Court realized that the test of the judicial sensibility was in promoting conditions for the welfare State in the light of values so well expressed in our Constitution. It is to be noted that the Hon'ble Court recognized the changes wrought by Time. The courts have treated TIME as a distinguishing factor in the matters of interpretation. *McDowell's case* Justice Chinnappa Reddy referred to the observations of Lord Roskill in *Furniss v. Dawson:*

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

Justice Reddy held the judicially shared ideas that under the present ethos Lord Tomlin's observation in the *Duke of Westminster* [1936] AC I; 19 TC 490 was no longer in tune with the ethos of our times as shaped by the constitution of the Welfare State. Both *Azadi Bachao* and *Vodafone* strike different and discordant notes.

IV. The Judicial Role in the matters of taxation evident in *Azadi Bachao* and *Vodafone* seem to bear the imprint of neoliberal thought. Both these have adopted the traditional capitalist point of view on taxation and on the discharge of tax obligations. The present-day neo-liberal economic thinking holds rabid Lockean

views[1] about 'property', which, bereft of all deceptive rigmarole, means that the government exists for the preservation of 'property'. *McDowell , on the other hand, shares the perspective of* Lord Scarman, and it tells us about the modern attitude towards taxation well expressed by Lord Scarman in *IRC v. Federation of Self-Employed*[11] *thus:*

> " But I do not accept that the principle of fairness in dealing with the affairs of taxpayers is a mere matter of desirable policy or moral obligation. Nor do I accept that the duty to collect 'every part of inland revenue' is a duty owed exclusively to the Crown. Notwithstanding the *Treasury* case in 1872, I am persuaded that the modern case law recognizes a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect."[12]

McDowell follows this approach as applied in *Furnis v. Dawson*[13], whereas *Azadi Bachao* and *Vodafone* reject it.

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[11] .(1981) 2 ALL ER 93 at 107 (H L),

[12] (1982) 2 All ER 93 at 112

[13] [1984] A.C. 474

V. The Perception of Judicial Role in *Azadi*, and *Vodafone* goes counter to that of *McDowell* which needs to be legislatively corrected

What Justice Reddy has said in *McDowell* about the creative role of the court in the field of income-tax law, is precisely what Lord Scarman had observed in *Furnis v. Dawson*[14]*:*

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

Both in *Azadi Bachao* and *Vodafone,* this judicial creativity is forgotten. In *Azadi Bachao* the Hon'ble Court's *crie de Coeur* to the Executive and Parliament to provide remedy against fraud still remain a futile exercise though a decade has gone. In *Vodafone* again there is a judicial *crie de cour* to Parliament that something, like the Limitation of Benefits provisions, should be incorporated in the Tax Treaties. *McDowell's* judicial creativity is abandoned as the neoliberal agenda wants judiciary not to be creative except when that promotes their cause. The guiding idea in the neoliberal worldview is that our Judiciary should always work in symbiosis with Market, and its ever-waxing demands.

VI. Both *Azadi Bachao* and *Vodafone* seem to promote the capitalist vision of neoliberalism. As *Vodafon*e accepts *Azadi Bachao*, and adopts its reasons, it is

[14] [1984] A.C. 474

worthwhile to see what the Judge, who had delivered *Azadi Bachao* , had said in his article published while still on the Bench.This contains ideas to suggest the Court's revolutionary departure from 'the Welfare mission'. Even such suggestions obliquely made are worrisome. It was Justice B. N. Srikrishna who wrote in his article **[**(2005) 8 SCC (J) 3]: to quote--.

> "9. References and discussions of political ideologies in judgments often lead to inconsistent and gratuitous philosophical debate by Judges. For e.g. in *D.S. Nakara* v. *Union of India*, (1983) 1 SCC 305 at SCC pp. 325-26, para 33, Desai, J. observes: "*33*. Recall at this stage the preamble, the floodlight illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic... What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. ... This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism." Compare this with the recent *dictum* of Sinha, J. (dissenting) in *State of Punjab* v. *Devans Modern Breweries Ltd.,* (2004) 11 SCC 26 at SCC p. 148, para 307 who takes the diametrically opposite view: "*307. Socialism might have been a catchword from our history. It may be present in the preamble of our Constitution. However, due to the liberalisation policy adopted by the Central Government from the early nineties, this view that the Indian*

society is essentially wedded to socialism is definitely withering away."[15] [italics supplied]

Historical Perspective in the Judicial decisions: *Azadi* and *Vodafone* seem to give prime importance to the promotion of the corporate interests of the MNCs

VII. The eulogy of the *Duke of Wesminster* in *Azadi Bachao* and *Vodafone* shows the neoliberal zest to provide protection of the 'property' interests of the the MNCs operating through corporate structuring. On general overview of the judicial trends in the tax matters at our Supreme Court, I have perceived broadly three phases, each characterized by distinct features, though divergent tendencies, at times, often merge with shifting measure of emphasis. The phases can thus be identified:

(i) The Phase I: when the Right to Property was still a Fundamental Right, i.e. up to 1978;

(ii) The Phase II: when the organs of the State strove to carry out their Constitutional mission of socialism and egalitarianism ; and

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

(iii) The Phase III: when law and justice are supposed to be 'market-friendly' as it is conceived and interpreted under the neoliberal paradigm of the present-day Economic Globalization.

From the observation-post of income-tax law, I have discerned the above-mentioned three broad phases in the judicial approaches to the tax law.

The Phase I broadly pertains to the period when we still had the fundamental right to hold 'property'. During that period the judicial attitudes towards taxation resembled the British attitudes towards taxation. It was based on the assumption that tax-payers had no social obligation, and was free to arrange their affairs if they can do that without offending the law.

The Phase II reached the apogee of its verve in the early 1980s when an excellent account of judicial creativity and activism was given by some of our most creative and activist judges: to mention the five who constituted a fraternity: they were Krishna Iyer, Bhagawati, Desai, Chinnappa Reddy, and later Justice Thakar,. This approach, to the extent related to 'taxation', found the finest expression in the Constitution Bench judgment in *McDowell*[16], where Justice Reddy observed, (to which all other four Judges agreed):

> " The evil consequences of tax avoidance are manifold…. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the

[16] *McDowell & Co v. CTO* 154 ITR 148 (SC)

transaction is such that the judicial process may accord its approval to it..”

The Phase III is characterized by the narrowing of judicial role in this phase of globalization fostering the neoliberal economic paradigm. Two features, dear to the proponents of neoliberalism are manifesting themselves in judicial approaches of our Supreme Court: these are[17]—

(i) the agenda to roll-back State activism in welfare measures, and aggressive cutback in the activities of government; and

(ii) the Government, through its policies, must be market-friendly, and it must ensure the promotion of the interests of big corporations which work by establishing a symbiotic relationship between the government and the *business.*

Azadi and Vodafone belongs to this phase.

VIII. *The Judicial Perception of the Hon’ble Court’s role in Azadi Bachao and Vodafone* goes counter to that prescribed in *McDowell* that was binding on the Benches which decided them.

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

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

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17 J.K. Galbraith,* Culture of Contentment *(Boston); Hayek,* The Constitution of Liberty *quoted by Peter Watson,* A Terrible Beauty *p.518

In *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*[18] the three judges Bench of our Supreme Court in its majority judgment reiterated this perception of judicial role, per B.N. Srikrishna, J. ---

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

In *Standard Chartered Bank* our Supreme Court (Coram: N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar and B.N. Srikrishna, JJ.) reversed the view, taken in *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*[19], on the role of judiciary. Hon'ble Justice B.N. Srikrishna in his dissenting Judgment (on behalf of Justice N. Santosh Hegde and himself) acknowledges it tersely in these telling words:

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

IX. **Vodafone relies on *Craven (Inspector of Taxes) v. White (Stephen)* which was decided in the ethos of corporate and neoliberal pressures and persuasion. Our Government failed to tell the Court how the pressure groups had behaved in the U.K.**

. In *Vodafone* Judgement, the Hon'ble Court relied on *Craven (Inspector of Taxes) v. White (Stephen)* (1988) 3 All. E.R. 495 to prove its point that *Furniss*

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[18]. (2003) 184 CTR Reports 193].

[19]. [(2003) 184 CTR Reports 193].

v. Dawson is no longer good in the U.K., suggesting thereby that the Judicial Perspective that it had mandated (and is shared in *McDowell*) was no longer valid. It said:

> "After Dawson, which empowered the Revenue to restructure the transaction in certain circumstances, the Revenue started rejecting every case of strategic investment/tax planning undertaken years before the event saying that the insertion of the entity was effected with the sole intention of tax avoidance. In *Craven (Inspector of Taxes) v. White (Stephen*) (1988) 3 All. E.R. 495 it was held that the Revenue cannot start with the question as to whether the transaction was a tax deferment/saving device but that the Revenue should apply the look at test to ascertain its true legal nature. It observed that genuine strategic planning had not been abandoned."(para 63 of the main Judgement).

It is strange that the real reason for the seminal shift in the perspective in *Craven* was not noticed. It was the power of the corporate world which brought terrible pressure on the British Government to depart from *Dawson*; and it was the corporate pressure that sought re-consideration of *McDowell* before our Supreme Court. What happened in the U.K. after that decision is thus summarized by O.Hood Phillip in his *Constitutional & Administrative Law* (at p. 44):

> "The problem arose in another way in *Furniss* v. *Dawson*[20] where the House of Lords abandoned the principles laid down in earlier cases and, in

[20] [1984] A. C. 474.

> wide and vague terms, indicated that elaborate schemes designed to minimize tax liability might in future be at risk of being set aside at the instance of the Revenue. To allay alarm the Inland Revenue issued a draft statement of practice indicating what schemes would continue to be acceptable. As the result of concern expressed that the Revenue was claiming a dispensing power, the statement was withdrawn---and a similar one, in the form of a written answer to a parliamentary question, was issued by the Chief Secretary to the Treasury."[21]

How in the U.K., the vested interests behaved has been thus summarized by . Hermann:

> "Sensing a certain softness and confusion in 1988 composition of the Judicial Committee of the House of Lords the tax lawyers renewed their attack under the flag of the Special Committee of Tax Consultative Bodies. The first two parts of their report on Tax Law after *Furniss v. Dawson* is a lament on the blow inflicted to tax avoidance industry, which will hardly bring me to tears".[22]

It was the effect of heavy corporate pressure, cheered and supported by the corporations-sponsored Government, that the British Court in *Craven (Inspector of Taxes) v. White (Stephen*) (1988) struck a different note which is followed by our Supreme Court in the *Vodafone J*udgement

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[21] Dawn Oliver, "Tax planning and Administrative Discretion" [1984] P. L. 389. The case for the legality of the Revenue's practice of making concessions is argued by John Alder, "The Legality of Extra-Statutory Concessions," 180 N.L.J. 1980,180.

[22]. A.H. Hermann, *Law v. Business* p.17 (Butterworth).

It is humbly submitted that right from the day *McDowell* was decided by the Court, the big corporations and their mentors were never happy. A petition had been moved before this Hon'ble Court for a reconsideration of the judgment (165 ITR St 225), but was not pursued as the Judges were certain about its correctness.

CONCLUSION

HENCE, I SUBMIT THAT IT IS THE DUTY OF PARLIAMENT TO ENACT THE PROPOSED RETROSPECTIVE PROVISIONS SO THAT THE COURT CAN SEE WHAT THE NATION SEES AS THE LAW IN TUNE WITH THE CONSTITUTION AND THE STATUTE; AND ALSO, BY IMPLICATIONS, TO TELL THE HON'BLE COURT THAT OUR CONSTITUTION DOES NOT ADMIT OF NEOLIBERAL GLOSS. I THINK THE PROPOSED RETROSPECTIVE CHANGES IN THE INCOME-TAX LAW WOULD BRING TO THE HON'BLE COURT'S CONSCIOUSNESS WHAT THIS HON'BLE COURT HAS MISSED TO TAKE NOTE OF BECAUSE OF THE CRESCENDO OF THE NEOLIBERAL PLEADINGDS IN THIS PHASE OF GLOBALISATION. THIS IS PARLIAMENT'S DUTY TO TELL ALL THAT THE CONSTITUTION'S BASIC COMMITMENTS AND MISSION CAN BE ALTERED ONLY BY PARLIAMENT AND THE PEOPLE OF THIS COUNTRY; NOT BY THE MIGHTY INTERNATIONAL SYNDICATE OF INVESTORS, NOT EVEN BY OUR HON;BLE COURTS. THE WHOLE THING DEPENDS ON THE RIGHT COMPREHENSION OF THE BASICS OF OUR POLITY, AND THE RIGHT PERCEPTION OF DUTIES BY THE ORGANS WE HAVE CREATED THROUGH OUR CONSTITUTION.

X

HENCE, WHAT JUSTICE DEMANDS

Early in this Chapter I had referred to C. K. Allen, in his *Law in the Making*, who after a thorough examination of the rationale for retrospective legislation, supported this step if on balancing of competing interests under the aspects of justice, this step is considered *prudent and pragmatic*. The following rhetorical questions are posed as their answer is evidently inherent therein:.

(i) Why are these corporations in love with the areas of darkness with which they have no worthwhile nexus except the lust to reap the unfair advantages of darkness as that facilitates in hiding their ways, and also as the governments there work hand in glove with them to promote strange *entente cordiale* of Fraud and Collusion?

(ii) Doesn't such pursuits illustrate what Hans Christoph Binswanger says in his *The Challenge of Faust*: how modern man tends to build a realm of prosperity in partnership with Mephistopheles, that trusted lieutenant of Satan, that rules in the Realm of Darkness where our Paradise can get lost unless our wisdom ensures that what survives is not lost, and what has been lost is regained?

(iii) Doesn't deception and corruption thrive best only when Darkness is deep and dense? We know what Stiglitz aptly says[23]:

> 'Earlier, in my days at the Council of Economic Advisors, I had seen and come to understand the strong forces that drove secrecy. Secrecy allows government officials the kind of discretion that they would not have if their actions were subject to public scrutiny. Secrecy not only makes their life easy but 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."

(iv) Is it prudent to allow the syndicates of corporations and the financial planners to devise their instruments and structures, layers upon

[23] ibid pp. 228-229

layers pyramiding into tax havens and secret jurisdiction to exploit the economy of the real world of humans by contriving a virtual world of the Rogue Finance which, unnoticed by the humans and the courts, suck the resources for the use of a few sojourning in the worlds surely not existing on this planet? My ideas may sound grotesque and strange. We live in the times of highly developed technology but stagnant morality. This syndrome is most manifest in the corporate GREED. When we see what was done in *Vodafone*, a bird on the twig asks: Is not this corporate structuring an unfair device causing a wrongful loss to the country which protects and furthers that which gives real value and worth to the shares ? But those who operate from such dark regions, seldom see what is just and fair to the people whose blood surges in the corporate value structure: it matters not whether we distinguish the parchments we call 'shares' from other assets and commercial transactions in the interstices of 'income' or 'capital gains' originate as pealrs do in chrysalis. Justice seldom turns on the strategic difference brought about through terms minted by the corporations in their own factories run by the Rogue Finance, as Pandit Nehru rightly called it. How correct was Mahatma Gandhi in providing to all the decision-makers of free India a wonderful *talisman* in the words so precious as these::

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

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XI

CONCLUSION

(a)

I have written all these pages with utmost precision yet it has become so long as to fatigue most readers. But I have done this exposition :

(i) To submit that the retrospective provisions proposed in the Finance Bill are fair and just from all observation-posts;

(ii) To submit that the effect of such changes would give signal to all that our Constitution is not subject to the neoliberal gloss: hence our democracy does not run the risk of drifting fast to the corporate *imperium*..

(b)

I would end this Chapter by quoting from the hymn with which the *Rig-Veda* ends:

समानो व आकूतिः समाना हृदयानि वः

समानमस्तु वो मनो यथा वः सुसहासतिं

> 'Your purpose in pursuits should be common/ your mind should be in harmony with that of others./ Your heart should bleed for the weal of all / As this broadness alone will herald your welfare / and will strengthen the strength of your Union.'

The hymn was said addressing the gathering of people telling them how they should go about doing things. I pray to God that the members of our Parliament would appreciate the points that this humble self has made in the evening of his life wholly *pro bono public*o.

(c)

I tender my Apology

. If in course of my exposition in these Two Chapters written in the *Vodafon*e context, I have made any comment which you consider not becoming of a good citizen, I regret that. Where I have criticized the judgements of the Hon'ble Courts, I have just exercised my democratic rights, which they have recognized with magnanimity. I have written with candour but with utmost good faith. I am eternally grateful to our great judiciary for which I have highest respect and admiration. I have just done my duty (I recall the words of Lord Nelson in which he had made a call at the Battle of Trafalgar; 'England [*read* India, in the present context] expects that every man will do his duty".

I bow down to you to apologize if I have even annoyed anyone with my words, tone, or tenor. I would explain my plight only through the following words from the famous *Panchtantra*:[24]

नरपतिहितकर्ता द्वेष्यतां यति लोके

जनपदहितकर्ता त्यजते पर्थिवेन्द्रैः

इति महति विरोधे वर्तमाने समाने

नृपतिजनपदानां दुर्लभः कार्यकर्ता

> Some years ago, the then Pope said that silence with which the world witnessed the *Hiroshima was culpable and criminal. Let not our children ask the question, 'Where were you when mafia rule brooded over benighted country.'*
>
> —N.A. Palkhivala

[24] I would translate the *shloka* thus: If one works only in the King's interest, people have reasons to get angry, if one works in the interest of people, the King becomes wrathful. Good workers, working *pro bono publico*, suffer between Scylla and Charybdis, and find it difficult to survive.