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## OUR CONSTITUTION AT WORK

*Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? . . . If such were the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.*

Chief Justice Marshall of the US Supreme Court in  
*Marbury v. Madison* 2 L Ed 60 (1803)

I have referred in Chapter 15 about my interactions with Dr. T. B. Smith who had come to Kolkata to deliver his Tagore Law Lectures of 1977. I recall, in some context, he asked me to tell him (i) what constituted the most important feature of India's polity as structured under the Constitution; (ii) what appeared to me to be the prime mission of the Constitution of India; and (iii) what was, to my mind, the most worrisome aspect of India's constitutional regime. What I told him boiled down to the following three propositions:

- (i) the most important feature of our Constitution is its closely structured polity where all the organs are constitutional creatures, with specifically conferred powers, to operate only under the prescribed parameters;
- (ii) the prime mission of our Constitution is to promote what I call 'constitutional socialism' as conceived by our Constituent Assembly whose thoughts seem to reveal the presence of the *Bhagavad-Gita* at their most conscious point; and
- (iii) the most worrisome aspects of our constitutional arrangements are the lack of assertive and effective popular vigilance on our institutions, and the gruesome 'democratic deficit' in the exercise the high executive power.

Dr. Smith heard me attentively but kept silence. He, when we were ready to part, wished our Constitution a long glorious life, and wished our Republic never to become anything like Milo's Rome. I did not understand, for years his reference to Milo's Rome. But I understood it when I read Will Durant's pregnant comments in his letter to Bertrand Russell<sup>1</sup>: "Democracy has degenerated into such corruption as only Milo's Rome knew; and our youthful dreams of a socialist utopia disappear as we see, day after day the inexhaustible acquisitiveness of men." Over all these years, I have reflected on Dr. Smith's pregnant cautionary reference to Milo's Rome. In Section VI of this Chapter, I would mention some of the morbid features of the Roman Republic; and would also touch certain points

showing how our Republic too seems, unfortunately, caught under similar whirls produced by moral degradation.

First, I intend to develop my ideas which had made me formulate those three propositions that I had told Dr. Smith. The constraints of the space in this Memoir would not allow me to go into the details. I would summarize what had led me to say what I had told Dr. Smith. But I would reflect on them from my present observation-post so that they do not sound outdated, and are seen in right perspective.

## I

### **THE CREATURES OF THE CONSTITUTION MUST ACCEPT THE DISCIPLINE OF OUR CONSTITUTION**

The American Constitution, which provided us with a model of a written constitution with fundamental rights, provides an appropriate perspective for comprehending constitutional issues under our Constitution. The Attorney-General, addressing the court in the *Five Knights' Case* (one of the state trials of Stuart England) for the Crown asked, "Shall any say, The King cannot do this? No, we may only say: He will not do this."<sup>2</sup> It was precisely to ensure that in the American system one would be able to say, "the State *cannot* do this," that the people in America enacted written Constitution containing basic limitations upon the powers of government<sup>3</sup>. But our Constitution-makers were great as they made our Constitution by subjecting the entire State power, I repeat 'entire', to the discipline of our Constitution, whether exercised within domestic jurisdiction or at the international plane.

Our Constitution was framed under circumstances different from the circumstances under which the US polity was framed. The material specifics of the U.S. polity were in the mind of Justice Sutherland, who was led to believe in *Curtiss Wright Case* [299 USA 304 (1936)], that the USA possessed 'extra-constitutional' power at the international plane. Our Constitution was framed by our sovereign Constituent Assembly. Mahatma Gandhi said in 1922 that the Swaraj would not be a gift of the British Parliament, but must spring from 'the wishes of the people of India as expressed through their freely chosen representatives'. Nehru had said that the British could dissolve the Constituent Assembly only by force. He declared that India's constitution-making could not be "under the shadow of an external authority".

The U.K. Constitution is the product of the nation's constitutional struggle over the centuries. Courts and Parliament have stripped the Crown of many powers by subjecting them to constitutional discipline. Whatever is still left with the Crown, it belongs to that realm of the Executive's powers which is called 'the Crown's Prerogative' generally invoked in matters pertaining to the foreign affairs and the exercise of the Treaty-Making power.

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

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

But our Constitution-makers used 'prohibitory words everywhere in our Constitution so that all powers, exercised by our constitutional organs, are subject to our Constitution's specific limitations. Had the U.S. Constitution subjected all powers under constitutional limitations, the powers even at the international plane, the decision in *Missouri v. Holland* would have gone the other way. And Justice Sutherland would not have granted 'blank check' to the US President in exercise of foreign affairs powers in *Curtiss-Wright*. To undo this view of Justice Sutherland, Mr. Bricker moved a constitutional amendment to subject the Treaty-making power to some constitutional control. The Bill was passed by the Congress but could not be cleared by the Senate mainly because President Eisenhower did not like that for certain reasons close to his heart. No Executive Government would ever like to subject its brute power to constitutional discipline. But credit goes to the U.S. Supreme Court which, in *Reid v. Covert* (1957), held certain provisions of certain treaties, made in exercise of 'foreign affairs power', unconstitutional.

Our Constitution is unique in structuring and distributing the entire gamut of the State's sovereign power through the terms of our Constitution. H.M. Seervai is right to observe: "the main reason given for the *Berubari Opinion* is clearly wrong, for no power can be outside our Constitution."<sup>4</sup> And the organs function subject to our Constitution. It matters not whether they are exercised in Delhi or in Detroit. This is the effect of the specific Articles of our Constitution (vide Articles 53, 73, 245, 253, 265, 363, 368, 372, 375). It is also worth mentioning that our Constitution imposes no limitations on our national sovereign powers, as organized under our constitution, even on the spacious plea to promote international cooperation.<sup>5</sup> The effect of this is that our government is subject to the constitutional limitations, both in the domestic sphere and at the international plane.

## II

### (a) Our 'Constitutional Socialism': Historical Perspective

What led Mrs Gandhi to go in for the 42nd Amendment Act, 1976, inserting specifically the idea of 'socialism' into the Preamble to the Constitution operative from 3.1.1977, has been much speculated upon mainly in the phase when the creeping ideas of capitalism tend to capture the thought process of the wielders of our political power. What has led to this is not far to seek though its realities are evaded even by the experts. The mission of our Constitution's 'socialism' was never appreciated by the capitalists. Even the word 'socialism' seems to them like a red rag to a bull. I remember to have participated, whilst I was a student at my school and college at Darbhanga, in the frequently organized processions, meetings and peace marches for our Constitution's 'socialist' mission. In doing so I had in one of my cousins a role model, though he was just a petty socialist leader but with great verve and conviction.

But only in the 1990s, I could become conscious that the conspirators against our Constitution's mission had much succeeded in subverting our system to serve the interests of the growing capitalists of all brands, national or international. Even whilst Mrs. Gandhi was at the helm of our political affairs, it was obvious that such forces had exercised their *ultima ratio* through the strategies of 'money power' and 'deception' slowly at work to turn India into a 'Sponsored State'. As

a student of history, I am of the firm conviction that ‘capitalism’ triumphs only through the conjoint operation of Mammon’s Power of wealth and Mephistopheles’ power of allurements through deception. The scope of this Chapter does not permit me to go deep and wide into such matters, but I would mention the trends which even Mrs. Gandhi must have marked emerging in our country and elsewhere.

Anybody who has critically studied the history of our times would have marked that the real victor in World War II was America in which politics works under the dense shadow of the Big Business. The trends to subjugate political institutions to the economic realm have been at the heart of the neoliberal paradigm. Even when Mrs Gandhi was in power, massive efforts had been made by the US Government, big corporations, and their alter-ego, the institutions set up at the international plane, to promote their interests. The strategy of providing ‘aid’ was used even in the late 1960s and in 1970s to crowbar for the intrusion of the American corporate interests. How this sort of system worked over the years find a graphic description in the words of Noam Chomsky:

“Within the nation-state, the effective “national purpose”, will be articulated, by and large, by those who control the central economic institutions, while the rhetoric to disguise it is the province of the intelligentsia.”<sup>6</sup>

I would show in Chapter 24 (‘Our world-view and the trends of our times’) of my Memoir how adroitly the imperialists had worked to establish in our country a Sponsored State to promote the interests of the British in India. The East India Company ensured that the key-functionaries in the Nawab’s Government remained loyal to the Company Bahadur, and promoted that Company’s interests showing only ostensible loyalty to the Nawab. In my *Judicial Role in Globalised Economy*, I examined their strategy, and stated:<sup>7</sup>

“Clive pursued this objective with a stroke of stealth by securing for Rida Khan, who was Clive’s deputy diwan, the post of the nawab’s deputy. The inevitable consequence was the emergence of powerful coterie of bureaucrats and self-seekers who worked for the Company whilst swore loyalty to the nawab.”

The lobbyists, the corporations and the vested interests brought about similar situations in our country. How such things happened has been well described by Noam Chomsky with whose conclusion I wholly agree. Chomsky quotes<sup>8</sup> Mr. Meagher: “If it was possible, India would probably prefer to import technicians and know-how rather than foreign corporations. Such is not possible; therefore India accepts foreign capital as a necessary evil.” Even by 1966, enough had been done indicating that the American Government and the World Bank ‘arrogated to themselves the right to lay down the framework in which our economy must function.” Chomsky quotes a dispatch of that year which reveals how our mission of constitutional socialism was lost. He quotes the dispatch:

‘There are signs of change. The Government has granted easy terms to private foreign investors in the fertilizer industry, is thinking about decontrolling several more industries and is ready to liberalize import policy if it gets sufficient foreign aid... Much of what is happening now is a result of steady pressure from the United States and the

International Bank for Reconstruction and Development, which for the last year have been urging a substantial freeing of the Indian economy and a greater scope for private enterprise. The United States provides by far the largest part of foreign exchange needed to finance India's development and keep the wheels of the industry turning. Call them "strings," call them "conditions" or whatever one likes, India has little choice now but to agree to many of the terms that the United States, through the World Bank, is putting on its aid. For India simply has nowhere else to turn'

Commenting on this, Chomsky writes aptly, what was becoming evident to all: "The heading of the article refers to this development as India's "drift from socialism to pragmatism.""<sup>9</sup>

Such developments must have jolted Mrs Gandhi, as she had an unswerving faith in our 'constitutional socialism'. A lot of domestic and international distractions and challenges had drained her out. It was humanly impossible for her to gauze all the implications of the economic structure being devised by the vested interests. Besides, after the Emergency, she developed some fatigue and had grown lonely and indifferent. It was natural But it is not far to seek that the 42nd Amendment, operative from 3.1.1977, had inserted the idea of 'socialism' into the Preamble to our Constitution to forestall the trends of the neo-imperialism of corporatocracy, growing fast in the post-Yom Kipper (1973)-phase. It was to make explicit what was at the heart of the constitutional provisions, and also to emphasize certain norms and values at the heart of our Constitution. M.P. Jain rightly says:

"the concept of 'socialism' has been made explicit and India's commitment to this ideal has been underlined and strengthened."

Just a year before the 42nd Constitutional Amendment, a powerful book had come out: Bell's *The Cultural Contradictions of Capitalism* highlighting the irreconcilable contradictions of the neo-liberal capitalist society producing the sinister trends evidencing the gruesome, to quote Peter Watson, "separation of law from morality, 'especially since the market has become the arbiter of all economic and even social relations (as in corporate obligations to employees) and the priority of the legal rights of ownership and property over all other claims, even of moral nature.'" It was natural that, on reading the trends of the time, she thought it appropriate to underscore our Constitution's prime mission.

But most graphic account of the fundamentals of our Constitutional Socialism is found in some of the celebrated decisions of our Supreme Court: to quote from two widely known judgments. In *Excel Wear v. Union of India* (AIR 1983 SC 130 (para 33), the our Supreme Court explained the concept of Socialism comprehensively. But the classic exposition of, Socialism, under our Constitution, was made by Justice Chinnappa Reddy in a Constitution Bench decision in *D. S. Nakarav. Union of India* AIR 1983 S.C. 130: to quote in *extenso*—

"The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income."

**(b) The collective consciousness of the Constituent Assembly**

On the examination of the broad profile of our Constituent Assembly the following points emerge:

- (i) The Constituent Assembly was virtually a microcosm of India. Most of the leading lights of our Freedom Movement were assembled there. They had in their marrow, the fire that burnt to inspire us in waging struggle for our freedom. We must not forget their noble ideas in running our polity for socio-economic management. Art. 51A of our Constitution wants every citizen of this Republic to “cherish and follow the noble ideals which inspired our national struggle for freedom”.
- (ii) The Constituent Assembly was never under the hangover of Karl Marx. Neither the Communist Party nor the Socialist Party had their representatives in the Constituent Assembly. Glanville Austin says: the “absence of a formal Socialist group meant little, however, for most members of the Assembly thought themselves as Socialists, and with few exceptions the members believed that the best and perhaps only way to the social and economic goals that India sought was by the road of government initiative of industry and commerce.’

The members of the Constituent Assembly were well versed in oriental cultural ideas, and most of them were distinguished masters in humanities and jurisprudence. On a close scanning of the career and thoughts of many of them, I concluded that the *Bhagavad-Gita* had the greatest impact on their thoughts which found expressions in our Constitution. It is really tragic to note that our jurists have not appreciated this fact. Certain points are obvious:

- (a) The *Bhagavad-Gita* and our Constitution contemplate no class conflict, or class struggle. We have rejected Marx’s dictum: “The [written] history of all hitherto existing society is the history of class struggle”. Our society has always believed in co-existence and harmony of all.
- (b) The driving force in the cosmic affairs for Hegel is Spirit. For Marx the driving force is ‘matter’, which means that for him “the driving force is really man’s relations to matter, of which the most important part is the mode of production”, in effect, his ‘materialism, in practice, becomes economics.’ In the *Bhagavad-Gita* (and our Constitution) the driving force is *lok-mangal*, welfare of all. The great poet ‘Dinkar’ had felicitously described in his epic *Kurukshetra* that peace cannot last long unless it is based on the just socio-economic arrangements of the affairs in a given society.
- (c) The *Bhagavad-Gita* and our Constitution contemplate Rights and Duties for the development and happiness of all. The Utilitarians are satisfied with the happiness of a few, thereby facilitating the emergence of Capitalism, Fascism, and now neo-liberalism. Their arch-priest Bentham cared little for the weal of all. He thought of the liberty only for a few dear to Adam Smith’s ‘Invisible Hand’. The rights of man, he said, were plain nonsense. When the French revolutionaries made their ‘*Declaration des droits de l’homme*,’ Bentham called it ‘a meta-physical work—the *ne plus ultra* of metaphysics’. Our Constitution posits an over-arching social vision for the Free India: in short, it rejects Adam Smith’s unfair assertions.

**(c) 'Socialism' under our philosophy**

I have always believed that our Constitution's attitudes towards 'property' are socialistic. H. G. Wells has very perceptively observed:

"Essentially Socialism is no more and no less than a criticism of the idea of property in the light of public good....A steady, continuous criticism of the permissible scope of property seems to have been going on for the last twenty-five centuries."<sup>10</sup>

The socialist vision expressed in the Constitution can be called 'Constitutional Socialism'.<sup>11</sup> It is not 'socialism' as understood by Marx. The neoliberal philosophers of the West sought to promote capitalism by rejecting 'social justice' and 'equality'. The philosopher, whose influence is writ large in the Constitution and the political economy of the United States, was John Locke (1633-1704). The system of checks and balances in the structure of constitutional polity is a mere adjunct to his view of political economy. Bertrand Russell insightfully points out that the proponents of capitalism tend to believe that the glory of the West is on account of capitalism. Bertrand Russell draws up this spectacle of this alluring illusion in these words:

"No doubt he was impressed, as all men of his time were, by the gains to civilization that were due to the rich men, chiefly as patrons of art and letters. The same attitude exists in modern America, where science and art are largely dependent upon the benefactions of the very rich. To some extent, civilization is furthered by social injustice."<sup>12</sup>

The objectives set under our Constitution, as also in the *Bhagavad-Gita*, are not "greatest good for the greatest number"; but the welfare of all. We are free to earn, but not to turn robbers. This is the principle of *lokamangal* suggested in the *Gita*. This view provides right alternative to the Lockean view of property.

Our Constitution's Socialism is an expanded metaphor. It has an activist content of Justice. It exfoliates itself in the Preamble to the Constitution, and also in the harmony and synergy of the Fundamental Rights and the Directive Principles prescribed under our Constitution. Under our 'Constitutional Socialism', the State has a positive role to play. It represents the people of the country.

**(d) Dimensions of our constitutional socialism**

In course of my reflections over years, and whilst assisting the Delhi High Court and the Supreme Court in deciding certain constitutional issues, I analysed and articulated some important dimensions of our 'constitutional socialism'. I would summarize them thus:<sup>13</sup>

**[A] Philosophical dimension:**

1. Driving force in human history, according to Hegel, is 'Spirit'; but it is 'Matter' according to Karl Marx, but for Marx 'it is a matter ... , not the wholly dehumanized matter of the atomists, hence, in effect, it turns out 'really man's relation to matter, of which the most important part is his mode of production: in short economics.<sup>14</sup> This is the philosophical foundation of the Hegelian dialectics utilized by Marx to interpret history. We have not shared this view. Our spiritual vision of the universe is not simplistic. Besides, we believe in the welfare of all. Our history has developed in a trajectory much different from the West's. Our

Constitution commits our polity to an egalitarian vision for everyone's welfare: it, thus, reflects our philosophical tradition.

2. Hegel, Darwin and Marx believed in the *inevitability* of progress as universal law, which made them impervious to ethical considerations. The norms set forth in the Preamble, the Fundamental Rights and the Directive Principles stress on the *karma* and *kartavya* both towards the individuals and the State. This philosophical dimensions of our 'constitutional socialism' would again come up for reflections in Chapter 24.

**[B] Political Dimension**

3. Our Constitution reflects the ethos of our Struggle for Freedom in which our nation had participated as a whole: the sacrifice made by the poor was surely more than that of others who had reasons to calculate their profits. Democracy is not just a system to set up a political structure which can be allowed to be captured by vested interests through art or craft; it is, in fact, a system to provide a mechanism to realize the welfare of all, without riding roughshod over the fair and legitimate interests of individuals whatever be the segments to which they belong.

4. The Political Realm is not to be made subservient to the Economic Realm, where the Rule of Corporations and the Market (*Pax Mercatus*) prevails. The State, under our Constitution, cannot roll back its activities as that would be a gross constitutional dereliction. Even the policy changes must conform to the constitutional policies, and our Constitution's principles and provisions

5. There must not be an opaque system, as darkness is never conducive to promote the ideas and the ideals of our Preamble, the Fundamental Right, and the Directive Principles of our Constitution.

6. Our 'Constitutional Socialism' is founded on the fundamental principle of our Constitution's supremacy, and the inevitable subservience of all the organs of the State to the Constitution. As I have already said, this supremacy operates both in the domestic sphere, and at international plane.

**[C] Social Dimension**

7. Our Constitution is committed to bring about a social revolution to change the unjust stratification of our society which trapped us over the centuries, but this objective cannot be realized if wealth and power get polarized in our country.

8. It is this over-arching egalitarian constitutional vision which conditions the content of such seminal concepts as 'liberty', 'equality', 'fraternity', 'dignity', 'unity'..... 'Liberty' cannot be reduced to a mere license to exploit and loot; and 'equality' cannot exist in grossly unfair and unequal society. 'Fraternity' and 'dignity' cannot be achieved in plutocratic and oligarchic tyrannies of the vested interests.

9. 'Social Justice' is the very purpose of our polity, and the very heart of our Constitution. This requires creation of conditions for all so that quality of life improves.

**[D] Economic Dimension**

10. Our constitutional socialism contemplates no class struggle: it believes in the welfare of all.

11. Our constitutional socialism does not permit greedy acquisitiveness of capitalism, and believes in an equitable distribution of social resources so that even the so-called 'last man' is not without the basic amenities for existence, and is not



excluded from the conditions needed for dignity, and for the fruition of his natural faculties.

12. The Government is a trustee to promote the welfare of the people by securing and protecting a social order “in which justice, social, economic and political, shall inform all institutions of national life”.

13. The State must ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

14. The natural resources should be managed wholly with egalitarian ideas, and to the exclusion of the gross commercial motives of the market economy.

15. The standard for decision-making in our public spheres should be judged on the talisman given by Mahatma Gandhi<sup>15</sup>, so that justice is done even to our ‘last man’.

16. The State must ensure that the integrity of our society is not subverted by consumerism, and the deceit of the vested interests. The State must preserve our value system, education and health so that they are not degraded, polluted, or subverted under this neo-liberal craze generated by the high pressure advertisement.

17. To ensure that we can build our socialist society under the aspect of justice, we must work for peace so that our limited resources are not wasted for the benefit of capitalists, who need wars to sell their armaments, and need an opaque rogue system of ethereal finance; to amass their extractively acquired wealth in dark corners away from people’s gaze, to be laundered back as and when considered expedient.

18. Consumerism is sin till the last man receives just treatment, and is well provided for to live as a human being. Human beings must not be treated as commodities for trade.

19. As planning and market help economic management, these tools be used, but under the critical gaze and supervision of the State ensuring public accountability. The real questions pertain to what sort of Market, and what sort of State (or government) we must have.

20. The State preserves the sovereign space of socio-economic management free from the imperialistic, crypto-imperialistic, and the neo-liberal gladiators and intruders.

21. The government, which is no more than people’s agent, must be under effective popular control and accountability. There must be a system to enforce continuous accountability of all the organs of the State to our people.

**(e) Attitudes towards ‘PROPERTY’ under our ‘Constitutional Socialism’**

The framers of Constitution had inherited the tradition of our culture which had developed a very mature and discreet view about property. The Western thinking about ‘property’ oscillates between two extremes : the rejection of ‘property’, as we get in the thought of Jesus; and the greedy attachment to property as we see amongst the neoliberals of our day. Even those who strove to further only their ‘enlightened self-interests’, promote, in effect, only their selfish interests. The history of our culture shows that we never looked down upon wealth. Under our pantheon the deity representing ‘wealth’ is Goddess Laxmi. You will find nowhere in our culture anything going near to *Mathew* (6.24) which

says: “You cannot serve God and mammon”. *The Bhagavad-Gita* (III.20) requires everyone to work for public benefit (*Lokasamgraha*). “The words ‘welfare of a nation’ have been used in the same sense in the *Manu Smriti* (7.44). In the light of what I learnt about our cultural tradition I would spell out, in the following tabular form, the two distinct ways of working, and earning wealth.

Subject	Relation <i>inter se</i> Subject & Object	Vector and dynamics	Object
The unwise	Working with ‘attachment’ to the fruits of work	With a sense of full involvement to further one’s desires	Work for own welfare
The wise	Working with a sense of duty	With a sense of full involvement in one’s <i>kartavya-karma</i> (duty)	<i>Lokasamgraha</i> (which involves the welfare of all, humans, animals and environment)

**(f) The criticism of our Constitution’s ‘socialist mission’ is unwarranted**

I was surprised when a Writ Petition against insertion of the word ‘socialism’ was filed before our Supreme Court [ *Good Governance India Foundation v. Union of India* [W.P.(C.) No. 679 of 2007] on the ground that Section 2(a) of the Constitution (42nd Amendment) Act, 1976 violated of the basic structure of the Constitution. I preferred before the Supreme Court my ‘Intervention Petition’. It was good that the Supreme Court saw no good reasons to proceed with the Writ Petition.

It was surprising to find Justice B.N. Srikrishna, who spoke for the Supreme Court in *Azadi Bachao Andolan*<sup>16</sup>, suggested in his article,<sup>17</sup> while still on the Bench, that the era, when the ‘Preamble’ of our Constitution mattered, had gone ‘due to the liberalization policy adopted by the Central Government from the early nineties’. He even quoted the dictum of Sinha, J. (dissenting) in *State of Punjab v. Devans Modern Breweries Ltd.*,<sup>18</sup> who had shocked us by observing:

“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.”

But *Good Governance* had raised an important point which deserves to be considered by the Election Commission of India. When it registers political parties only when they swear by ‘socialism’, as required by Section 29A(5) of the Representation of the People Act, 1951, it becomes its duty to derecognize the political parties which “have wrongly sworn allegiance to the socialist ideal despite their contrary objectives as evident from Manifestoes, political speeches, Common Minimum Programmes and other such documents.” If the Election Commission finds later that the declaration by a political party was fraudulent, it must cancel the registration granted to it. As the Election Commission grants certain statutory benefit, it has an inherent power to withdraw that grant on good grounds. Besides, there should be no reason why this Commission cannot

reconsider the permission granted to political parties if there is a culpable hiatus between their sworn statements and their public acts.

### III

#### INTRODUCTORY COMMENTS

When I told Dr. T.B. Smith as to the ‘democratic deficit’ in our country in the exercise of the high executive powers, I had in my mind the way Mrs. Indira Gandhi got the infamous Emergency declared in our country on 25 June 1975. She had announced the infamous Emergency without informing Parliament, or her cabinet. Perhaps she got her precedent in the manner in which King George V declared World War I. A.J.P. Taylor aptly writes: “Formally speaking, the war came as though King George V still possessed undiminished the prerogatives of Henry VIII.”<sup>19</sup> But in this Section of this Chapter, I would develop that point with reference to the Treaty Making power of our government, because this subject has become a most important constitutional topic of the greatest contemporary relevance. Besides, over the whole of the first decade of this century, I devoted much of my time in studying this topic.

#### (a) ‘Democratic deficit’ in the exercise of our Government’s Treaty-making power

It was just a chance that Shri B.K. Keayla called on me sometime in 2005, and presented to me a copy of the *Peoples’ Commission Report on GATT* by V R Krishna Iyer, O Chinappa Reddy, D A Desai, (all the former Judges of the Supreme Court); and Rajinder Sachar (the then Chief Justice of Delhi High Court). This Commission was a non-official panel of judges. It was a report, drawn up in 1996, on the Constitutional Implications of the Final Act embodying the, Results of the Uruguay Round of Multilateral Trade Negotiations, (to be referred as ‘the WTO treaty’). It had been set up at the initiative of the National Working Group on Patent Laws, a Delhi-based NGO. I agreed with the view suggested in the Report that the WTO treaty was contrary to our Constitution, and the Central Government possessed no power to undertake any obligation under a treaty which offended our Constitution. I felt it was the time to move the High Court to declare the ambit of our Government’s treaty-making power. I was amazed that our Government had even written to the UNO for the information of the whole world that the President’s power to enter into treaties (which is after all an executive act) remains unfettered by any “internal constitutional restrictions.”<sup>20</sup> I fully shared the worrisome concern of Joanna Harrington at undemocratic exercise of treaty-making power in the Westminster-style democracies<sup>21</sup>.

I brought<sup>22</sup> certain matters to the attention of the Delhi High Court to vindicate our Constitution and the Rule of Law. I filed a Writ Petition, and sought, in public interest, the issuance of appropriate directions, orders or writs in the nature of mandamus or declaration, or any other writ or order to the Central Government so that the executive acts, done even at the international plane, but *ultra vires* the Constitution of India, were held *domestically* inoperative. My complex constitutional arguments at the High Court were founded on certain basic assumptions which I summarize for all our readers to consider and assert in the times to come. Such assumptions, and their corollaries are these:

- ◆ The Sovereignty of the Republic of India is essentially a matter of constitutional arrangement which provides structured government with powers granted under express constitutional limitations.
- ◆ The Executive does not possess any “hip-pocket” of unaccountable powers”, and has no *carte blanche* even at the international plane.
- ◆ The executive act, whether within the domestic jurisdiction, or at the international plane, must conform to the constitutional provisions governing its *competence*.
- ◆ The direct sequel to the above propositions is that the Central Government cannot enter into a treaty which, directly or indirectly, violates the Fundamental Rights or the Basic Structure of the Constitution; and if it does so, that treaty must be held *domestically inoperative*.
- ◆ The Executive’s signing and adoption of the Final Act of the Uruguay Round Final Act in 1994 was a blatant violation of some of our fundamental rights, and certain vital features of the Basic Structure of our Constitution..
- ◆ The signing and adoption of the Final Act bypassed the democratic process as it was neither presented for discussion, nor for an approval before our Parliament despite the fact that it imposed provisions on us grossly against our national laws and Constitution.
- ◆ The Final Act (the WTO treaty) established a ‘totalitarian’ intergovernmental body, and made that the World’s highest Legislative Body and also a supreme Judicial Court for the benefit of the MNCs and other economic gladiators who have succeeded in establishing, through strategy and stratagem, the Rule of ruthless, faceless and heartless Market (*Pax Mercatus*);
- ◆ The Uruguay Round Final Act virtually subjects our Parliament to morbid coercion and crypto-psycho pressure to legitimize the provisions which the Executive made a *fait accompli*, through a treaty done under an opaque administrative system.
- ◆ The terms of the Final Act are adroitly made to ‘police’ country level economic and social policies thereby making trespass on our nation’s sovereign space reserved for our national government.
- ◆ Many pernicious acts are being done under pressure and persuasion of the WTO and other international fora working for the MNCs and other vested interests. The impact is clear from what have been done, (or are being done) in the matters of the collusive intellectual piracy by MNCs, ‘the derogation of plant breeders rights, the genetic manipulation by the biotechnology giants, the patenting of life forms including plants, animal, micro-organisms, genetic material and human life forms under the TRIPs agreement’.

With reference to the above propositions, I submitted before the High Court how our Constitution was being subverted by many of the provisions under the WTO Treaty (and the Agreements coming within its umbrella) having the effect of prescribing (i) wrongful change in primary governmental functions; (ii) wrongful assignment of the legislative power of Parliament: (iii) wrongful assignment of the Judicial Power: and (iv) wrongful prescription of provisions which have the effect of amending our Constitution. Article XVI(4) of the WTO Charter has the effect of making the WTO the highest legislative and judicial body as it declares:

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

David Korten, after describing the WTO as “the World’s Highest Judicial and Legislative Body”, aptly says<sup>23</sup> :

“The ‘annexed Agreements’ include all the multilateral agreements relating to trade in goods and services and intellectual property rights. Once these agreements are ratified by the world’s legislative bodies, any member country can challenge, through the WTO, any law of another country that believes deprives it of benefits it expected to receive from the new trade rules”.

We have not granted our representatives in Parliament authority to assign legislative power to a foreign fora because through the electoral process we have required our representatives to exercise legislative power themselves. We have not elected the WTO or any other organ at the foreign fora: hence we do not trust them.

A Division Bench of the High Court (Coram: Sanjay Kishan Kaul and Ajit Bharihoke, JJ.) heard the said Writ Petition, and declared their judgment, given in the open court, on November 11, 2009. The High Court made some important observations [ see *Shiva Kant Jha v. Union of India* (2009-TIOL-626-H.C.-DEL)]:

“7. One of the serious challenges sought to be raised by the petitioner is that the system of governance in our country has to be satisfied on the touchstone of the Constitution. The Parliament, the Executive and the Judiciary are all creations of the Constitution which is supreme. It is, thus, the submission of the petitioner that it can never be pleaded on behalf of the respondents or portrayed in different forums that this basic touchstone is not to be satisfied while entering into international treaties. In this behalf the petitioner seeks to refer to the principle of “*Reductio ad absurdum*” to canvas the proposition that where one assumes a claim for the sake of argument and derives an absurd or ridiculous outcome then the natural conclusion is that the original claim must have been wrong as it led to an absurd result. As an illustration the petitioner submits that could an executive through a treaty establish any highest legislative or judicial body for India in some foreign land whose writ would run on the constitutional organs of the Republic India ..... The petitioner has also referred to the report published as “Report of the Peoples’ Commission on GATT” on the constitutional implications of the Final Act embodying the results of Uruguay Round on Multilateral Trade Negotiations.

9. “ ..... insofar as the fundamental question of any act of the Government in pursuance to an international treaty resulting in violation of any provision of the Constitution or not satisfying the test of being in compliance with the doctrine of basic structure is concerned, the respondents do not even dispute the said position and have drawn our attention to their counter affidavit where while dealing with the treaty making power of the Union executive and the Parliament it has been stated in para 1 “it is humbly submitted that the Government of

India can only enter into a treaty in conformity with the constitutional provisions laid down in the Constitution of India”.

As I felt the High Court did not decide some of the core issues, I filed the Special Leave Petition before the Supreme Court. I argued the matter on August 16, 2010. *The Times of India* of August 17, 2010 made some insightful comments under a suggestive title: “Centre’s treaty-making power must conform to Constitution: SC.”<sup>24</sup> The comment, I would have made on the observations of the Supreme Court, has been insightfully made by the journalist who said:

“A petitioner, advocate Shiva Kant Jha, complained before a Bench comprising Chief Justice SH Kapadia and Justice KS Radhakrishnan that the executive was going ahead and signing a large number of multilateral treaties to fulfil its WTO obligations and was refusing to adhere to constitutional provisions. When he argued that Delhi High Court had dismissed his petition on the ground that treaty-making power of the executive was not subject to the constitutional framework, the Bench said, “Who says it is not. If you show us that a certain provision was in breach of the Constitution, certainly the apex court can examine it. Such treaties which violate the basic structure of the Constitution will be struck down. This is already stated in the HC judgment.” ... Though the court did not entertain the petition, it surely showed a shift in approach in scrutinizing the constitutional validity of the multilateral and bilateral agreements entered into by India. In contrast, the apex court was not ready to entertain any of the four PILs filed during those days when there was a huge controversy over the India-US nuclear agreement. A Bench headed by then CJI K G Balakrishnan had dismissed the PILs challenging the nuclear deal.”

But the unrestrained power of treaty-making is most delicious to the executive governments. This provides an efficacious way to get round the strict discipline and limitations that laws and constitutions impose. History evidences the executive government’s limitless craze for unrestrained power.

#### IV

##### **I ILLUSTRATED *REDUCTIO AD ABSURDUM* BEFORE THE DELHI HIGH COURT**

Before the Delhi High Court, I criticized the circular of our Government to the UNO that the President’s power to enter into treaties remains unfettered by any “internal constitutional restrictions.”<sup>25</sup> So strongly I felt against this perverse view that I went to the extent of arguing on *Reductio ad absurdum*. I wrote in my Written Submissions to the Court:

“Perish the thought: “*Reductio ad absurdum* also known as an apagogical argument, is a type of logical argument where one assumes a claim for the sake of argument and derives an absurd or ridiculous outcome, and then concludes that the original claim must have been wrong as it led to an absurd result. If the Respondents’ view is allowed to prevail, both our democratic polity and the Constitution may get subverted through the Treaty-Making Power.”<sup>26</sup>

I think I did a right thing in pleading on *Reductio ad absurdum*. It is clear from the Court's Judgment: it caught the point well, and made some meaningful comments in its judgment.

## V

### MY SUGGESTIONS ON VALID TREATY MAKING PROCEDURE

After much deliberation over years, I have formulated some suggestions for our people to consider. As in this phase of globalization, 'Treaties' have great impact not only on the affairs at the international plane but also in the sovereign domestic space, I consider it high time that certain changes be made in our Treaty-making procedure:

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

The following three comments are also worthwhile:

- (i) If the procedure of reference to the Supreme Court is to be avoided, then a treaty should be ratified after Parliamentary approval accorded in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.
- (ii) Our Constitution does not prescribe recourse to referendum. But people's claim that such treaties be decided through a referendum emanates from the very fact that 'We, the people' have adopted, enacted and given to ourselves the Constitution. Whatever protocol of referendum is chosen it must be an effective plebiscitary device to support the terms of a contemplated treaty.
- (iii) The adoption of the above-suggested procedure would help our country to withstand the pressures to which it is being subjected to in handling the international negotiations. If a particular draft treaty is not approved per procedure described above, the government would have no option but not to proceed further in the matter. Besides, this would make the process of treaty making transparent, and democratic. This would help our government to answer effectively the predatory international financiers by letting them know that the executive government of India works under constitutional limitations, which cannot be ignored or evaded. An idea must be drummed into the ears of all that obligations under a treaty should neither be created in darkness, nor carried out under an opaque system. This would put every body under notice that ratification as such does not entitle anybody to any legitimate expectation before the treaty's incorporation into

domestic law as per procedure suggested. This procedure would inhibit the executive from taking things for granted.

## VI

### OUR REPUBLIC IS IN CRISIS : WHAT WENT WRONG WITH THE ROMAN REPUBLIC

The Roman Republic lasted for 482 years from c.509 B.C. Its Constitution, though unwritten, established a polity with the broad features which characterize our modern constitutions. Like our Constitution, it bore certain dominant features: (i) the Roman Republican constitution was shaped by a long-drawn struggle between the patricians and the 'plebs' in which struggle the plebs succeeded in being recognized equal in exercise of the state powers; (ii) it illustrated remarkably well the theory of the separation of powers; (iii) it established accountability by ensuring the operation of checks and balances; (iv) it was founded on the shared view that sovereignty inhered in *demos* (people); (v) it was generally accepted that it was the People of Rome who exercised legislative powers through the assemblies; and (vi) it was an excellent product to ensure liberty to people founded on egalitarian ideas so noble that Tiberius, the tribune, reminded the people of their great dignified status in the words capable to give everlasting joy to any republican and democratic society. Yet the Roman Republic sank into morass, and declined through civil wars, power-maneuverings, and the greed of the power-hungry leaders. The death-knell of the Republic was sounded in the battle of Pharsalus, in Thessaly, in 48 B.C. when the forces commanded by Pompey failed to stop Julius Caesar from acquiring brute power. The way he did that is graphically portrayed by the historian H.A. Davies in Chapter XII of his *An Outline History of the World* (Oxford, 1937 ed.):

“He [Caesar] got himself appointed dictator for life and consul for ten years; he filled the Senate with his own supporters and nominees, so that it was always prepared to do his bidding; divine honours were paid to him; and to all intents and purposes Rome was ruled by one man.”

The Republic was almost dead, and military dictatorship had begun. It was 1954, only about four years after the commencement of our Republic's Constitution (the precise date being 26 January 1950), that my teacher of history had expressed his apprehensions that, if things did not go well in our country, our Republic too would not survive. At his instruction, I read H.A. Davies<sup>27</sup>. It is also not possible to forget that song of a Hindi film which had expressed the most sincere expectations of our freedom-fighters from their countrymen: *Ham layein hain toofan se kashti nikal ke, Is desh ko rakhna mere bachhon sambhalke* ('We have brought our canoe to the coast suffering tempests in our way. We hope, dear children, that you would preserve and protect it.)

I have felt over the years that many things have happened in our country which do not augur well for our Republic. I intend to summarize the features of the Roman Republican polity, and to show how such sinister features are becoming manifest in our country more and more. It is not a mere figment of my mind if I see the ship of our Constitution sinking into the treacherous sea; it is no hallucination for me to hear some silhouette singing the very requiem for our



Constitution. In order to be brief, I would draw up a table setting forth some of the morbid features of the Roman polity which bring to my mind some of the symptoms and features of our present ailing Republic. I am indebted to H.A. Davies, H.A.L. Fisher, and Nehru, from whose books I had profited a lot as a student, and from which I have received my insight into the current affairs of our Indian Republic.

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
<b>1</b>	<p><b>The Corruption galore amongst the wielders of the governmental powers.</b></p> <p>“The supremacy of Rome in the world was now indisputable, but it had been won at a ruinous cost for the majority of the Roman people. The long wars and the resulting conquests caused money to flow into the Roman treasury, and Roman officials were able to enrich themselves at the expense of the conquered provinces.”<sup>28</sup></p> <p>“The supremacy of Rome in the world was now indisputable, but it had been won at a ruinous cost for the majority of the Roman people. The long wars and the resulting conquests caused money to flow into the Roman treasury, and Roman officials were able to enrich themselves at the expense of the conquered provinces. The city of Rome reflected the new prosperity in the many public buildings that sprang up; the gardens and villas of the rich, filled with sculpture from the cities of Asia and Greece; the reading of Greek books and the sending of Roman youths to Athens to receive a Greek education; and the many fine roads spreading in all directions from the city. But the condition of the Roman farmers was lamentable in the extreme. Military service in Africa and Spain had torn them away from their small holdings, and when they returned it was to find that the holdings of their neighbours had been gradually absorbed by the large estates of wealthy landowners, worked by slaves. The returned soldiers could</p>	<p>Things are happening in public life which were never anticipated before. There are several glaring instances of misuse of power by men in authority and position. This is a phenomenon of which the Courts are bound to take judicial notice. “This Court cannot be oblivious to the fact that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country, along with or even before cleaning the physical atmosphere. The pollution in our values and standards is an equally grave menace as the pollution of the environment. Where such situations cry out, the Court should not and cannot remain mute and dumb.”<sup>29</sup> “One, it suggests that corruption is a way of life in India and two, that there is one law for the citizens and another for the rich and powerful who hold or have held political office.”<sup>30</sup></p> <p>“...the country’s economy may “increasingly be dynamic, but our moral universe seems to be shrinking. Graft and greed are on the rise. The principles on which Independent India was founded, for which a generation of great leaders fought and sacrificed their all, are in danger of being negated.”<sup>31</sup> “Gaining inappropriately from a range of sectors, cattle fodder to civil aviation, corruption knows no limits. Its width and depth cut across party lines.”<sup>32</sup> “The scams have a symbiotic relationship with the black economy. The number of scams is growing and so is the size of the black economy, which has reached a mind-boggling level of 50 per cent of the Gross Domestic Product, that is, it annually generates Rs.33 lakh crore in black income. While the 1980s saw eight major scams, in the period between 1991 and</p>

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
	<p>not hope to compete with these and it was only a matter of time before their estates were also absorbed and they themselves obliged to drift into the capital, where living was cheap, where candidates for office were ready to buy votes, and where were the distractions of the theatre and the circus. Another circumstance that helped to reduce so many of the Roman people to a swarm of state-fed paupers — for the state also gave doles — was the fact that with the expansion of the Roman Empire great corn ships sailed up the Tiber from Sicily, Sardinia, and the Nile country. The result was that the produce of the small farmers was undersold in the Roman market, and they themselves were forced to sell their lands, and flock into the capital....” ( H.A. Davies, <i>An Outline of the History of the World</i> pp. 172- 174)]</p> <p>“Livy’s history of the Roman Republic is no mere record of facts; it is almost a moral treatise, sanctifying such virtues as fidelity to the pledged word and the subordination of personal ambition to public duty, the qualities which made Rome great. Tacitus, on the other hand, exposes the vices which brought her down from her high position : the conservatism of the governing classes, the loss of the old civic spirit, the general apathy and hedonism of the people. “ (H.A. Davies, <i>An Outline History of the World</i> p, 202)</p>	<p>1996 there were 26 and during 2005-08, there were around 150.... It is suspected that many have their hands in the till. Included here are Prime Ministers, Chief Ministers, Ministers, top industrialists, military personnel, judges, bureaucrats, policemen, and professionals and so on.... Underlying this vast illegality is a ‘Triad’ involving the corrupt business class, the political class and the executive. Since the mid-1980s, the criminal has also entered this Triad, leading to growing criminalization”.<sup>33</sup> ‘In July 2008 The Washington Post reported that nearly a fourth of the 540 Indian Parliament members faced criminal charges, “including human trafficking, immigration rackets, embezzlement , rape and even murder”.<sup>34</sup> In recent years a number of serious scams have disturbed us. Things have become much worse now than what they were in 1980s when our Supreme Court considered it appropriate to make the above quoted observation. In 2010, the Transparency International’s Corruption Perception Index ‘India was ranked 87th out of 178 countries’.</p> <p>Corruptions have much increased, and have become chronic in our country. If you cry against this evil, mighty Satanic forces emerge to destroy such initiatives. Such things have led to the present gloom. Now persons have emerged to justify ‘corruptions’. How ‘development’ and ‘morality’ can go apart can be illustrated with reference to the justification of ‘corruption’ in Korea even in this phase of its great economic growth. It is publicly argued there: “Organized corruption thus quietly served a purpose that open public administration could not.”<sup>35</sup> We are not far behind. Their number is increasing fast who consider “corruption” justified and “greed” good.. These so-called intelligent people amass their gains on tiny islands, or in the digitally numbered bank faults in secrecy jurisdictions. They would never think that such islands are close to be</p>

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
2	<p><b>The triumph of Consumerism and hedonism.</b>                      “The city of Rome reflected the new prosperity in the many public buildings that sprang up; the gardens and villas of the rich, filled with sculpture from the cities of Asia and Greece; the reading of Greek books and the sending of Roman youths to Athens to receive a Greek education; and the many fine roads spreading in all directions from the city.”<sup>36</sup></p>	<p>sucked inside the waters; and such numbers are likely to get lost somehow. ‘Mystery’, thy name is ‘Man’!</p> <p>We find that life is a struggle in which, we, like Sisyphus, keep pushing a stone uphill, knowing that when we stop for a momentary respite “it will roll back down again.” Billionaires increase; paupers increase, inequality is growing. Massive propaganda by vested interests have promoted luxury and consumerism in a country in which ‘a third of the world’s poor’ live, and where ‘around 7,00,000 Indians die each year from diarrhoea’. The growing hedonistic culture has led the rich to callousness, and they have no sense of fraternity with the rest. The number of starvation deaths can go down substantially if even this growing craze to look beautiful abates, if this ugly fashion of hair colouring goes, and the sale of the hair color refreshers goes down. And all this is happening in a country of which half of children are underweight calling to mind the pathetic conditions of Sub-Saharan Africa.</p>
3	<p><b>The triumph of the plutocratic oligarchy and the plight of common citizenry</b>                      “One of the most noticeable features of the time was the increased wealth of the richer classes. This wealth came from the conquered provinces. Most of the Roman governors looked upon provinces as legitimate prey. The unfortunate inhabitants were shamelessly taxed, bribes were accepted without scruple, and a provincial’s hope of justice generally depended upon his ability to pay for it. From 73 B.C. to 71 a man named Verres was governor of Sicily, and his exactions during these three years are said to have desolated the island more than the war between Rome and Carthage for its possession.”<sup>37</sup> ‘... yet the age which witnessed these dazzling feats of arms was one of</p>	<p>Noam Chomsky, one of the greatest amongst the American intellectuals, says in his <i>Hegemony and Survival</i> (at p. 133): “India ...is governed by a proto-fascist party that is handing the country’s resources to foreign multinationals while preaching an ultra nationalist line for domestic purposes...India has a wonderful software industry and sectors of great wealth—uninterestingly, also hundreds of millions of people living under some of the worst conditions in the world, where the plight of women is not very different from life under the Taliban.” “In nutshell, the root of money power in Indian politics is essentially its non-representative nature and this is deliberate. It is not that politics needs big money but that money needs to control politics. Black money is a result of a basic contradiction in our system and the elite wish to control the political process for their continued charmed existence.”<sup>39</sup></p>

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
	<p>the most unhappy and uncomfortable in Roman history. . It was marked, indeed by a great advance in wealth and luxury, by the growth of huge private fortunes...'<sup>38</sup></p>	<p>“Whilst our economy is growing at 9 per cent and the much crafty crony capitalism is working for the elite and the corporations producing the largest number of poor in the world with hundreds of millions earning less than \$1 per day and the billionaires more than the number Japan (when a per capita income in Japan is \$36,000 ‘being roughly 60 times India’s figure of \$600.’). The pathetic conundrum in the 6th decade of Independent India is clear if these facts are turned into metaphors.”<sup>40</sup></p>
<p><b>4</b></p>	<p><b>The plight of the Roman farmers.</b>                      (a) “But the condition of the Roman farmers was lamentable in the extreme. Military service in Africa and Spain had torn them away from their small holdings, and when they returned it was to find that the holdings of their neighbours had been gradually absorbed by the large estates of wealthy landowners, worked by slaves.”                      (b) “The returned soldiers could not hope to compete with these and it was only a matter of time before their estates were also absorbed and they themselves obliged to drift into the capital, where living was cheap, where candidates for office were ready to buy votes, and where were the distractions of the theatre and the circus..”                      (c) “Another circumstance that helped to reduce so many of the Roman people to a swarm of state-fed paupers – for the state also gave doles — was the fact that with the expansion of the Roman Empire great corn ships sailed up the Tiber from Sicily, Sardinia, and the Nile country.”<sup>41</sup>                      (d) “The result was that the produce of the small farmers was undersold in the Roman market, and they themselves were forced to sell their lands, and flock into the capital.”</p>	<p>“Dr. Vandana Shiva, Director, Research Foundation for Science, Technology and Ecology has called the suicides of more than 40,000 farmers a genocide. This genocide is a result of deliberate policy imposed by the WTO and the World Bank, implemented by the Government, which is designed to destroy small farmers and transform Indian agriculture into large scale corporate industrial farming. The suicides are a result of debt and debt is a result of a rising cost of production and falling prices, both linked to free trade and trade liberalization policies in agriculture. Sonia Gandhi, the Congress President has cautioned the Prime Minister to not rush head long into Free Trade Agreements in the context of farmers suicides.” (<a href="http://www.navdanya.org/news/06may08.htm">http://www.navdanya.org/news/06may08.htm</a>) Our government may break new grounds for resources by granting lands to the corporate zamindars, by granting right to exploit our resources by conferring licenses and franchises to corporations to rule the country. If water resources are exhausted, riverbeds can be leased or auctioned. When all these are exhausted, human beings, now fast becoming commodities can be sold in international market. After all, under the WTO regime it is the Market which rules.<sup>42</sup> India’s Constitution, it is possible to argue, stands repealed to the extent it con-</p>

OUR CONSTITUTION AT WORK

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
		flicts with the commands of Market, and the WTO.
<b>5</b>	<p><b>The Corruption at the highest judicial level</b></p> <p>“As chief judge he (Verres) sold all his decisions, and he plundered the farmers of their crops, keeping the proceeds for himself. He was fond of art, and as he journeyed through the island he stole pictures, statues, vases, and any other objects of value which appealed to him from both private houses and temples. He crucified on the beach a trader who resisted his demands, so as to discourage similar conduct in others. Asked if he did not fear judgement when he returned to Rome, he replied that he intended to use two-thirds of his wealth to bribe the lawyers and judges, and that the third which remained would be quite sufficient to make him rich for life.”<sup>43</sup></p>	<p>Never had we heard so much being said by so many against the integrity of the judges. It is no solace for us that the Judges of the United States are no better, or even the great British Judiciary has been bitten by the vice of our time. Even the judges are not seen to appreciate that when serious allegations are made by persons, not subjecting themselves to credible investigation, can have only one result: the charges made would stand amply proved in public mind.</p>
<b>6</b>	<p><b>Reforms by Tiberius and Grachus, and the morbid response of the ungrateful Roman citizenry. The plight of those who work for public weal.</b></p> <p>(i) ‘Tiberius and Grachus, realizing how the real strength of Rome was being sapped and undermined, endeavoured to improve the situation by limiting the amount of land which any one could hold (in accordance with the <i>Lex Licinia</i> of 367 B.C.) and redistribution what was left over among the poorer citizens, as property which could not be alienated and for which they paid a nominal rent to the state.’</p> <p>(ii) ‘In his desire that the poorer classes should reap the benefits of empire [Caius Grachus] set up great corn depots in Rome, where they could purchase corn at an exceptionally low price.’</p>	<p>“It was during the struggle for independence that it had been realized that political independence without social and economic freedom was not enough. The cultivators of land should acquire ownership rights. The Congress Agrarian Reforms Committee had prepared a blue print of the abolition of intermediaries of all kinds.” “The Planning Commission noted the existence of impediments of the pre-independence agrarian system and realized that their removal was necessary to bring about changes in the agrarian structure to realize the constitutional objective of a just social order.” “The Constitution (Twenty-fifth Amendment) Act, 1971 inserted a new Article 31C in the Constitution to protect legislations enacted to give effect to directive principles contained in Article 39(b) and (c) against a challenge on the ground of alleged inconsistency with fundamental rights guaranteed....The Supreme</p>

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
(iii)	<p>'He also proposed to pay the citizens for their share in government, a scheme that worked well under Pericles. But Rome was not Athens.'</p> <p>"When Tiberius became tribune in 133 B.C. he tried to rouse the Romans to a sense of their position: <i>'The beasts which roam over Italy', he declared, 'have each his den, his resting-place; they who fought for Italy have only light and air as their share in it ... called masters of the world, you have not really a clod to call your own.'</i> But the work of Tiberius and his brother Caius ended in failure: senatorial authority was too strong; the Roman mob was little better than <i>canaille</i> utterly demoralized and unprincipled; it was easy to work upon their ignorant prejudices; and at the end of his year of office in 133 B.C. Tiberius Gracchus was murdered by them, while eleven years later his brother Caius experienced the same fate..... His unselfish soul never dreamed that those who shouted for their own freedom would deny liberty to others....."<sup>44</sup></p>	<p>Court from beginning till today has upheld the validity of agrarian reform legislation against all kinds of attack." But we have forgotten all those ideas and ideals. Who remembers Art 51A of our Constitution: "to cherish and follow the noble ideals which inspired our national struggle for freedom". The Zamindari system (we may call it 'corporate zamindari') is back. The Special Economic Zones, and other ventures in the Special Economic Zones are negation of our constitutional commitments. Farmers are dying in thousands: how many of them are dead is a matter for speculation for our Stock-Market-ruled Government. Our people have forgotten their commitments to the great cause, perhaps believing as the decadent Romans had once felt: "no point in steadfast adherence to a cause, when no cause is important or has a chance of stable victory... The man, whose virtue has no source except a purely terrestrial prudence will, in such a world, become an adventurer if he has the courage, and, if not, will seek obscurity as a timid time-server."<sup>45</sup></p>
7	<p>The greatest irony of history is that the 'great beast', the <i>demos</i>, could be easily befooled. "The only result of paying the citizens of Rome was to turn them into the most shameless species of paupers, ready to support Gracchus when he gave them what they wanted, but quite as ready to go against him when a fellow tribune named Drusus, put up to it by the Senate, outbid him in the Comitia with wild promises which he never intended to fulfil."<sup>46</sup></p>	<p>The political realities in our world's some of the greatest so-called democracies reveal themselves the political morality of the wielders of political power. Harold Pinter has aptly said: ".... the majority of politicians, on the evidence available to us, are interested not in truth but in power and in the maintenance of that power." Here, in our country the cleavage between practice and precepts is so shockingly wide that a candid reflection on the situation becomes difficult. [But Indian genius deserves to be understood well. The common Americans might have appeared "great beast."<sup>47</sup> to Alexander Hamilton, the common people of our country have insight, critical sense, and competence to see through games.]</p>

OUR CONSTITUTION AT WORK

	<b>The features of the decadent Roman Republican Polity</b>	<b>Features marking the polity in the Republic of India of these years</b>
8	During the declining years of the Roman Republic the popular representative institutions lost vigour, creativity and assertiveness. The Senate of the Republic even persuaded to appoint Caesar the dictator. After the battle of Pharsalus, it had a short melodramatic existence but ever bleeding fast to death.	The Executive government thinks its Treaty-making power is not under our Constitution's discipline. It could enter into the WTO Treaty without Parliament's approval. Our Parliament could not inhibit the Executive assigning legislative powers to the WTO. Our Constitution does not permit assignment or outsourcing of legislative or judicial powers. The Indian citizens do not vote for the WTO.
9	The republican democracy was dead. "Roman was thus an aristocratic republic." <sup>48</sup> Carthage was 'the great commercial republic.' <sup>49</sup>	Our democracy is critically ill. "Indian democracy appears to be tottering. Corruption charges have been leveled against chief ministers and prime ministers. With no one owning responsibility, democracy is taking a beating...." <sup>50</sup> "The foundations of the Constitutions have been shaken by the <i>folly</i> of the people, the <i>corruption</i> of our politicians and the <i>negligence</i> of the elite" <sup>51</sup> "India, the republic, is now on sale. Participating in the auction is a group of powerful individuals, corporate houses, lobbyists, bureaucrats and journalists." <sup>52</sup> "Under the present-day neoliberal paradigm, powerful vested interests have transformed the present-day republics into oligarchic republics. We see with what nakedness the corporate oligarchy calls shots even in our own country."
<b>10</b>	<b>Decline of Senate</b> "More important was a decline in morale, a loss of heart, evident even in the Senate, the body which should have led the Commonwealth in the civic virtues of honour and independence, courage and patriotism. No contrast can be more tragic than the picture which Levy paints of the Roman Senate in the days of its glory during the Punic Wars, and the image of the same assembly abasing itself in servile adulation before the somber Tiberius, which Tacitus presents to his readers." <sup>53</sup>	<b>Decline of Parliament</b> I would set forth my reflections on our Parliament at work in the next Chapter.

## VII

### WE ARE, WHEN ALL IS SAID, INCORRIGIBLE OPTIMISTS

I have drawn up the portrait of our plight with the sole objective to stimulate our great people to think of our sad comedown. I am sure that we can set our affairs right. If we assert with wisdom and creativity, we can prove our worth, and make our country great. Time has come to realize :

*Uddhared atmanatmanam  
Natmanamavasadayet  
Atmaiva hy atmano bandhur  
Atmaiva ripur atmanah.*<sup>54</sup>

[We can lift ourselves through our endeavours alone.  
We must not degrade ourselves through our actions or inactions.  
We are ourselves our friends, and are ourselves are our foes.]

Prometheus in Shelley's *Prometheus Unbound* establishes the triumph of the moral order ensuring Hope despite all the sufferings of being bound on the wheel of fire. Demogorgon, who overthrew the tyrant Jupiter, whose wrath Prometheus suffered, comes to tell people to struggle to save what we cherish : the weal of all :

To suffer woes which Hope thinks infinite;  
To forgive wrongs darker than Death or Night;  
To defy Power which seems Omnipotent;  
To love, and bear; to hope, till Hope creates  
From its own wreck the thing it contemplates. . .

To decide what is '*karyakarya-vyavasthiti*' (meaning prudence is to decide what should be done, and what should not be done), we must interpret our Constitution in accordance with ethics of a democratic republican polity. Joseph Storey had aptly said in *The Miscellaneous Writings of Joseph Storey*; "Frame constitutions of government with what wisdom and foresight we may, they must be imperfect, and leave something to discretion, and much to public virtue." Art. 20(4) of the Constitution of the Federal Republic of Germany goes to say:

"All Germans have the right to resist any person seeking to abolish the constitutional order, should no other remedy be possible."

Though our Constitution does not say such a thing in so many words, such commitments are implied in our Constitution; also as this Constitution has been made by 'We, the People' in whom the unalienable ultimate political authority vests. Our Constitution makes certain high constitutional functionaries to swear to 'uphold' our Constitution. But it is the ever abiding duty of the political sovereign, 'We, the People', to keep even them under critical vigilance. Ultimately the people alone can protect, preserve, and destroy the Constitution they have framed through their representatives. Only time would judge us and our institutions whether our wisdom matches with the responsibility which our Destiny has cast on us. How infinitely wise was Sachchidananda Sinha, provi-



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sional Chairman of the Constituent Assembly, in quoting the words of the great Joseph Story who, after praising the features of his country's Constitution, warned its keepers:

'The structure has been erected by architects of consummate skill and fidelity;.... It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE. Republics are created – these are the words which I commend to you for your consideration – by the virtue, public spirit and intelligence of the citizens. They fall when the wise are banished from the public councils because they dare to be honest, and the profligate are rewarded because they flatter the people in order to betray them.'

NOTES AND REFERENCES

1. Russell, *Autobiography* pp 443-445
2. 3 Howell's *State Trials* 45 (1627)
3. Bernard Schwartz, *Some Makers of American Law* Tagore Law Lectures p. 37
4. H. M. Seervai, *Constitutional Law of India* p. 309 (4<sup>th</sup> ed.)
5. Oppenheim, *International Law* (Peace) fn 6 at p. 125
6. Noam Chomsky, *The Essential Chomsky* p. 165 (Penguin Books)
7. Shiva Kant Jha, *Judicial Role in Globalised Economy* p. 24 (Wadhwa, 2005)
8. Noam Chomsky, *The Essential Chomsky* p. 59 (Penguin Books)
9. Noam Chomsky, *The Essential Chomsky* pp. 59-60 (Penguin Books)
10. H.G. Wells in his *A Short History of World* pp. 264-265
11. See my article on 'Constitutional Socialism' at: [http://shivakantjha.org/openfile.php?filename=articles/constitutional\\_socialism.htm](http://shivakantjha.org/openfile.php?filename=articles/constitutional_socialism.htm)
12. Russell, *History of Western Philosophy* p. 613
13. Also at [http://shivakantjha.org/openfile.php?filename=articles/constitutional\\_socialism.htm](http://shivakantjha.org/openfile.php?filename=articles/constitutional_socialism.htm)
14. Bertrand Russell, *History of Western Philosophy* p. 750
15. See quoted in Chapter 19.
16. AIR 2004 SC 1107
17. Entitled 'Skinning a Cat' (2005) 8 SCC (J) 3
18. (2004) 11 SCC 26 at SCC p. 148, para 307
19. Taylor, *English History 1914-1945* Chapter 1.
20. [ U.N. Doc. ST/LEG/SER.B/3, at63-64 (Dec. 1952) (Memorandum of April 19, 1951) quoted in *National Treaty Law and Practice* ed. Duncan B Hollis, Merritt R. Blakeslee & L. Benjamin Ederington p. 356-357 (2005 Boston).
21. For the undemocratic procedure of treaty-making, see 'The Role of Parliaments in Treaty-Making' by Joanna Harrington in *The Fluid State* edited by Hillary Charlesworth.
22. *Shiva Kant Jha v. Union of India* [W.P.(C) 1357/2007]
23. David Korten, *When Corporations Rule the World* p. 174
24. <http://timesofindia.indiatimes.com/india/Centres-treaty-making-power-must-conform-to-Constitution-SC/articleshow/6320822.cms>
25. [U.N. Doc. ST/LEG/SER.B/3, at63-64 (Dec. 1952) (Memorandum of April 19, 1951) quoted in *National Treaty Law and Practice* ed. Duncan B Hollis, Merritt R. Blakeslee & L. Benjamin Ederington p. 356-357 (2005 Boston).
26. "1. Can the Executive, through treaty terms, saddle this nation with an obligation to conscript its young men and women to combat as the 'strategic partners' of a foreign state to sacrifice themselves for the ignoble cause of protecting the economic interests of the *Pax Mercatus* promoted and protected by corporate *imperium* ?  
2. Can the Executive, through its treaty-making power, introduce corporate *zamindari* to turn common men into slaves by gladly putting the organized rural culture to flame by providing a few chips to be looted again by generating desires for consumerism, or a few petty jobs sure to turn them into serfs, even worse than the Third Estate of the French society before the French Revolution ? ....."
27. Quotations are from, and the exposition of the situations in the Roman Republic, as discussed in, Chapter XII (The Roman Republic) of *An Outline History of the World* by H.A. Davies (Oxford, 1937 ed. Reprint 1950)
28. H.A. Davies, *An Outline History of the World* p. 172
29. *Shivajirao Nilangaker Patil v. Mahesh Madhav Gosavi*, AIR 1987 SC 294 at page 311 and 306 (repeated in *R. S Das v. Union* AIR 1987 SC 593 at 598).
30. The Statesman, 27 Sept. 1992. in C.R. Irani, Caveat p.33
31. Smt. Sonia Gandhi, as reported in the Times of India dated Nov. 20, 2010 (Patna edition)
32. The editorial in the *Times of India* dated Nov. 18, 2010 (Patna edition)
33. Prof Arun Kumar of JNU, 'Honesty is indivisible' (*The Hindu* of Jan 30, 2011)
34. Wikipedia. Accessed on March 18, 2010
35. Alan Beattie, *False Economy* P. 222 (Viking, 2009)
36. H.A. Davies, *An Outline History of the World* p. 172
37. H.A. Davies, *An Outline History of the World* p. 183
38. Fisher, *A History of Europe* P.77
39. Prof. Arun Kumar, *The Black Money Economy of India* Ch. 5

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40. Quoted from my Intervention Petition in *Good Governance India Foundation v. Union of India* W.P.(C.) No. 679 of 2007 before the Supreme Court of India
41. H.A. Davies, *An Outline History of the World* p. 174
42. The WTO admits that 'Overall, the results of the negotiations provide a framework for the long-term reform of agricultural trade and domestic policies over the years to come.' "The terms, tone and temper of the Agreement on Agriculture, under the WTO umbrella no different from those which had been shown by the imperialists in such treaties as the Treaty of Allahabad, the Treaty of Nanking, the Treaty of Wanghia and the Treaty of Whampoa while spreading imperialism in the 18th and the 19th centuries." "It was during the struggle for independence itself that the Indian National Congress had realized that political independence without social and economic freedom was not enough. It was also accepted that the permanent settlement of 1793 must be repealed and actual cultivator of land should be granted ownership rights. The Congress Agrarian Reforms Committee had prepared a blue print of the abolition of intermediaries of all kinds." [ Prof. M.L. Upadhyaya, *Law, Poverty & Development* (Taxman) p. 104]; "The Planning Commission noted the existence of impediments of the pre-independence agrarian system and realized that their removal was necessary to bring about changes in the agrarian structure to realize the constitutional objective of a just social order." [ibid] "The Constitution (Twenty-fifth Amendment) Act, 1971 inserted a new Article 31C in the Constitution to protect legislations enacted to give effect to directive principles contained in Article 39(b) and (c) against a challenge on the ground of alleged inconsistency with fundamental rights guaranteed....The Supreme Court from beginning till today has upheld the validity of agrarian reform legislation against all kinds of attack."<sup>42</sup> [Prof. M.L. Upadhyaya]. "The effect of the Agreement on Agriculture is in utter forgetfulness of our constitutional commitment of binding nature. The constitutional commitments have been given up under the WTO instructions/influence. Zamindari system is back." "The Special Economic Zones, and other ventures in the Special Economic Zones are negation of our constitutional commitments. Farmers are dying in thousands: how many are dead is a matter for speculation for our Stock-Market ruled Government". [all are the extracts from my Writ Petition (c) 445 of 2006 that I had filed before the Supreme Court of India].
43. H.A. Davies, *An Outline History of the World* p. 184
44. H.A. Davies, *An Outline History of the World* p. 174
45. Bertrand Russell, *History of Western Philosophy* p. 237
46. H.A. Davies, *An Outline History of the World* p. 175
47. Chomsky, *Hegemony or Survival* p. 5
48. H.A. Davies, *An Outline History of the World* p. 164
49. H.A. Davies, *An Outline History of the World* p. 166
50. Prof. Arun Kumar, *The Black Money Economy of India* Ch. 5
51. Nani Palkhivala, *Selected Writings* p. 75 (Bhartiya Vidya Bhavan, 1999)
52. Nani Palkhivala, *Selected Writings* p. 75 (Bhartiya Vidya Bhavan, 1999)
53. H.A.L. Fisher, *A History of Europe* p.108
54. *The Bhagavad Gita* VI. 5