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FROM DARKNESS TO LIGHT : MY REFLECTIONS ON THE BLACK MONEY CASE & ON THE ANNA HAZARE MOVEMENT

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The Government will not re-establish respect for law without giving the law some claim to respect. ... If the Government does not take rights seriously, then it does not take the law seriously.

Ronald Dworkin¹

Note at the outset :

I have maintained the symmetry of this Chapter, but have made some changes to update it. Now it is divided in two parts. The **PART I** carries the story of the Black Money Case to March 26, 2014 when our Supreme Court “ rejected the Centre’s plea to recall its 2011 order to set up a special investigation team (SIT) to probe all cases of black money”. But I have thought it prudent to shed some fleeting light on the subsequent developments in the **Postscript IV**. The **PART II** retains my comments on the Anna Hazare Movement so that you can appreciate what I had felt about it when it was in its passionate full bloom.

PART I

A

From Darkness to Light: My Reflections on the Black Money Case

Ram Jethmalani & Ors. v. Union of India & Ors. [2011] 8 SCC 1]

I

The Chapter 23 (The Profile of a PIL in Revenue Matters) of this Memoir begins as under:

“The three Chapters 23 (‘The Profile of a PIL in Revenue Matters’), 24 (‘Our World-view and the trends of our times’), and 26 (‘The Realm of Darkness: the Triumph of Corporatocracy’), constitute a triplet of ideas forming a common spectrum of thought. They would help you to reflect on ‘the moral deficit’ and ‘democratic deficit’ of our times. Whilst the first tries to answer Juvenal’s question: *Quis custodiet ipsos custodes?* (Who will watch the watchers?), the second explores the

trends and tendencies shaping our world-view, and the third would show how ‘the instruments of darkness’ ‘win us with honest trifles, to betray’s in deepest consequence’² to create circumstances for the triumph of Corporatocracy, which can smother Democracy, can wither our Republic, and can build a structure of deception that can catch us the unwary!”

I devoted almost all my time in the first decade of this century in pursuing my PILs³ before the Delhi High Court, and the Supreme Court of India. The prime issues that I had pursued pertained to the subversion of our law and constitution, and the triumph of the instruments of darkness operating from the tax havens and secrecy jurisdictions where most of black wealth and illicit gains are amassed for subsequent layerings and operations. In carrying on my crusade, as a labour of love, I suffered several times frustrations in the litigious process, but I went on in the light of my conscience making an appeal to “the brooding spirit of the law, and justice”.

Observing the way things moved in our country, and scanning the responses of our Government, I felt that in this general gloom, a ray of hope was from Judiciary alone. I had, in my mind, the judicial creativity and integrity that the U.S. Supreme Court had once shown in *Brown v. Board of Education of Toeka* (1954), and again in *Reid v. Covert* [ILR 24 (1957) 549], and had a conviction that our Constitution contemplated judiciary to play a role even more creative and assertive than that under the U.S. Constitution. In his *American Dilemma*, Gunnar Myrdal (1898-1987) appreciated the American institutions but felt that it was the *court alone* which could provide a remedy against the evil of racial segregation⁴. And the U. S. Supreme Court did provide a remedy against racial segregation in *Brown v. Board of Education of Toeka* (1954), which Ivan Hannaford considers ‘the most important single Supreme Court decision in American history’, and again in *Reid v. Coverholding* that all powers, including the treaty-making powers, were subject to constitutional limitations and restraints. I have already told you, in Chapters 21 and 23 about the fruits of my endeavours in our courts. I had framed my premises after a careful study of our Constitution at work. I felt that the greedy crooks had discovered ways to drive the present-day Economic Globalisation into the clasp of Circe. Circe was in the Greek mythology, an enchantress that was said to transform offending humans into animals servile thereafter to her. My premises and ideas are amply set forth in the Book III of this Memoir, mainly in Chapter 24 ('Our Worldview & the Trends of Our Times') and 26 ('The Realm of Darkness: the Triumph of Corporatocracy').

Soon after the completion of this Memoir, two great events have taken place in our country: first, the reasoned Order of our Supreme Court in *Ram Jethmalani's Case* (referred in this Chapter as the “Black Money Case”) delivered on July 4, 2011; and second, the movement against corruption, with its widening gyre organized under the impeccable leadership of Anna Hazare. The Black Money Case, as I read it, articulates ideas which I had wished our Supreme Court to accept and declare in exercise of its duty to uphold our Constitution. The Anna Hazare movement is an effort to rid our country of corruption; it is a stride from Darkness to Light. In this Chapter, I wish to say a few words on these two events as my tributes to those who have contributed to bring about these two events:

one, by showing how we are governed, and the other, by showing how our brothers and sisters can respond to a clarion call for a public cause.

II THE BLACK MONEY CASE

(i) The Structure of the Judicial Order

The judicial order in the *Black Money Case* is structured in three parts though in their logic, the parts are closely and organically integrated, and interdependent. The full portrait of the Order cannot emerge unless their inherent unifying and invigorating logic is appreciated. The Petitioners, in a public interest litigation, alleged that some persons “have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals holding such accounts.” After appreciating what had been presented, the Court said in paragraph 20 of the Order:

“These matters before us relate to issues of large sums of unaccounted monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted monies, as alleged by the Government of India itself is massive. The show cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.”

(ii) The Judicial technique evident in the *Black Money Case*

Judicial process provides ‘solutions through insight’. How this ‘thought process’ operates is precisely stated in *The New Encyclopedia Britannica* (Vol. 28, p. 654): to quote –

“In striving toward insight, a person tends to exhibit a strong orientation toward understanding *principles* that might bear on the solution sought. The person actively considers what is required by the problem, noting how its elements seem to be inter-related, and seeks some rule that might lead directly to the goal. The insightful thinker is likely to centre on the problem to understand what is needed, to take the time to organize his resources, and to centre on the problem (reinterpret the situation) in applying any principle that seems to hold promise.”

In effect, the process involves the following stages:

- (i) the Right Knowledge of the Constitution and law without missing its text and context;
- (ii) the Right comprehension of the facts placed before the court playing its role as our Constitution’s watch-dog and sentinel *on the qui vive*;

- (iii) the correct determination of the problems to be judicially solved after applying critical sense, and judicial sensibility taking judicial notice of the fact that there is no presumption that governments do not speak lies;
- (iv) the identification of the law and juristic principles in the light of law and the Constitution with Justice as the non-failing sovereign guiding star; and
- (v) the application of the legal principles to the solution of the problems presented for judicial decision.

In this process, the decision-maker must not allow factors to disturb, distort, or pollute the decision-making process: I mean the factors such as 'inhibitions', 'stock-responses', 'received notions', psychic or crypto-psychic pressures or persuasions of myriad brands.

The Black Money Case is one of the rare cases in this post-1991 phase which has focused on what our Constitution provides, and what our nation needs in this era when the old 'states system' has changed, when the corporatocracy has emerged, and when the mission of our Constitution is being made to yield to neoliberal agenda, when Darkness has descended on the world to rule, and when the governments are fast becoming servile instruments of the realm of Darkness operating from secrecy jurisdictions, tax havens, foreign fora, even the cyberspace! All these have wrought an alarming situation about which I have written in Chapter 21 ('Our Constitution at work') recalling the decadent Milo's Roman Republic whose Constitution had all the features of the present-day so-called democratic constitutions. The state of affairs, described in Part II of the judicial Order in the *Black Money Case*, put the Court on its quest to discover what our Constitution says, and also to discover the Court's own constitutional duty to solve problems posed by the realities evident all around. It would be trite if I say that one of the prime determiners in this constitutional quest, and the exploration of the meaning of our Constitution, is the administrative and political culture of the time. Part I of the Order summarizes deductions from our Constitution and constitutional jurisprudence.

The Part II of the *Black Money Case* states the culpable inaction and the gross remissness on the part of our Government. The facts set forth in Part II are appraised in the light of the observations in Part I stating the mandatory constitutional perspective, and the governing norms. The prepositions of the Part I of the *Black Money Case* are drawn from our constitutional jurisprudence, and the fundamental assumptions on which our Constitution erects our polity. It is good that the Court has not considered our Constitution a mere reflecting-mirror of the neoliberal paradigm, or a mere sounding-board of the ideas crafted by Mephistophelean think-tanks in the service of Mammon operating from the dark zones of this terra firma, the Earth.

Friends, I feel overjoyed to find that the views I set forth in my numerous Petitions before the High Court and the Supreme Court, and which find expression in the Book III of this Memoir, find full support from the observations in the *Black Money Case*. I extract a few lines from the *Black Money Case*, and structure them in the following table convinced that they prove my points which I advanced in the courts, and my articles many of which you can read on my website (www.shivakantjha.org).

	The propositions judicially stated in the reasoned Order
I.	Capitalism: “Increasingly, on account of “greed is good” culture that has been promoted by neo-liberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature.” “Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly it’s poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price.”
II.	Neoliberal Paradigm: The new States System: “They work in the interstices of the micro-structures of financial transfers across the globe, and thrive in the lacunae, the gaps in law and of effort. The loosening of control over those mechanisms of transfers, guided by an extreme neo-liberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-states, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe.” “The paradigm of governance that has emerged, over the past three decades, prioritizes the market, and its natural course, over any degree of control of it by the State”. “As noted by many scholars, with increasing globalization, an ideological and social construct, in which transactions across borders are accomplished with little or no control over the quantum, and mode of transfers of money in exchange for various services and value rendered, both legal and illegal, nation-states also have begun to confront complex problems of cross-border crimes of all kinds.”
III.	The Role of the State: “The more soft the State is, greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker.”
IV.	The Government: FOR WHOM? FOR WHAT: “The amount of unaccounted monies, as alleged by the Government of India itself is massive..... Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.”
V.	Constitutionalism: our Constitution: “We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values.” “Modern constitutionalism ... specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a constitution cannot change the identity of the constitution itself”.

VI.	<p>Supremacy of our Constitution: The judicial review even of treaties: “It is now a well recognized proposition that we are increasingly being entwined in a global network of events and social action. Considerable care has to be exercised in this process, particularly where governments which come into being on account of a constitutive document, enter into treaties. The actions of governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from.” “Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court.”</p>
VII.	<p>The indifference to the State’s resources, and its effects : “In addition, such large amounts of unaccounted monies would also lead to a natural suspicion that they have been transferred out of the country in order to evade payment of taxes, thereby depleting the capacity of the nation to undertake many tasks that are in public interest.” “The question that arises is whether the task of bringing foreign funds into India override all other constitutional concerns and obligations?”</p>
VIII.	<p>Secrecy jurisdictions and tax havens: “Unaccounted monies, especially large sums held by nationals and entities with a legal presence in the nation, in banks abroad, especially in tax havens or in jurisdictions with a known history of silence about sources of monies, clearly indicate a compromise of the ability of the State to manage its affairs in consonance with what is required from a constitutional perspective.”</p>
IX.	<p>The role of the technosphere: “Life, and social action within which human life becomes possible, do not proceed on the basis of specialized fiefdoms of expertise. The result, often, is a system wide blindness, while yet being lured by the dazzle of ever greater specialization.”</p>
X.	<p>Corruption rules: “If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish.”.</p>
XI.	<p>Culture of permissibility and venality: Promotes “broader culture of permissibility of all manner of private activities in search of ever more lucre. Ethical compromises, by the elite those who wield the powers of the state, and those who fatten themselves in an ever more exploitative economic sphere - can be expected to thrive in an environment marked by such a permissive attitude, of weakened laws, and of weakened law enforcement machineries and attitudes.” The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State.</p>

XII.	Treaty-Making Power: “It is now a well recognized proposition that we are increasingly being entwined in a global network of events and social action. Considerable care has to be exercised in this process, particularly where governments which come into being on account of a constitutive document, enter into treaties. The actions of governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from.” (italics supplied)
XIII.	PIL and the Role of Judiciary: “Informed by contempt for the poor and the downtrodden, the elite classes that have benefited the most, or expects to benefit substantially from the neo-liberal policies that would wish away the hordes, has also chosen to forget that constitutional mandate is as much the responsibility of the citizenry, and through their constant vigilance, of all the organs of the state, and national institutions including political parties.”
XIV.	Judicial Role : “We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values..... Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised.”
XV.	Court monitoring: “The resources of this court are scarce, ... Nevertheless, this Court is bound to uphold the Constitution, and its own burdens, excessive as they already are, cannot become an excuse for it to not perform that task. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by this Court would be unconscionable.”

III The Black Money Case: A brief critique

It was prudent on the part of the Court to constitute the Special Investigation Team (SIT) with its duties prescribed in the judicial Order. I would draw your attention to Chapter 12 ('Fodder Scam') where the Court faced an analogous situation, and provided an analogous remedy differing materially on a core point that whilst the Patna High Court ignored the Special Investigation Team (SIT) appointed by the Government of Bihar to supervise the investigation of the Fodder Scam Cases, and assumed an active role itself; the Supreme Court in the *Black Money Case* has constituted the SIT to work under the eyes of two retired Supreme Court Judges. I had examined in my Memoir the issues relating to the reach and ambit of 'Mandamus'⁵, and the relevance of the Theory of the Separation of Powers⁶, and had concluded that any criticism of the Court on these counts is misconceived. I wholly agreed with the view of the Patna High Court that the investigation by the government departments into the Fodder Scam

cases could not be possible because of the triple alliance of the top politicians in power, bureaucrats at the apex, and the strong lobby of businessmen⁷. I have already written how the Aiyar Commission⁸, and the Shah Commission⁹ had found good materials to focus on the might of those constituting, what the Shah Commission called, “the root of all evil”. This evil was the burden of song in various other reports in public domain¹⁰ which stood ignored by governments for understandable reasons. This evil overtook not only the general civil service, like the Indian Administrative Service, but even the statutory civil service like the Income-tax Department. Time has come in which the corporate lobbies call the tunes. The Shah Commission highlighted instances which brought no credit to the CBDT.¹¹ I always felt that the Circular 789 of 2000¹² had been got issued by the CBDT. I need not speculate on who got it issued. When such situations occur, the courts are duty-bound to forge ways and mechanism which can ensure performance of public duties which are the duties owed to people. We are passing through critical times.

When, as the Chief Commissioner of Income-tax, I supervised the regular submissions, before the High Court, of the Status Reports on the investigations into the Fodder Scam Cases, I had occasions to consider the objections to the judicial monitoring by its critics who were too many. They felt that the High Court had no constitutional jurisdiction to do so, and that the judicial monitoring process unwisely blurred the constitutionally prescribed roles of the three organs of the State (often called the theory of Judicial Restraints justified by invoking the Doctrine of the Separation of Powers). I felt that such objections were wholly misconceived. I have summarized my views on the Doctrine of Restraints in my *Judicial Role in Globalised Economy*.¹³ The theory, when all is said, boils down to one point: what is the role of our Judiciary under our Constitution. I had the opportunity to discuss the nature of judicial role with Dr. Bernard Schwartz, when he had come to Kolkata to deliver his Tagore Law Lectures.¹⁴ He had insightfully said:

“The Warren-Frankfurter difference in this respect ultimately came down to a fundamental disagreement on the proper role of judge in the American system.”

The realities of our days have made the Holmes-Frankfurter conflict on judicial role wholly stale and otiose. The changes wrought by Time have to be recognized. In this phase of Economic Globalisation, human rights run the risk of becoming meaningless unless our superior courts freely intervene in the economic realm, and management. Now the political realm stands subjugated to the economic realm. I must say that the view of judicial restraints that our Supreme Court had adopted in *R. K. Garg vs. Union of India*¹⁵ is now anachronistic. The courts have treated TIME as a distinguishing factor in the matters of interpretation. Lord Buckmaster said so suggestively in *Stag Line Ltd. v. Foscolo Mango & Co. Ltd.*¹⁶

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

MY REFLECTIONS ON BLACK MONEY

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

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

I have mentioned in Chapter 26 of this Memoir, the view of Judge Manfred Lachs how law must respond to new realities wrought by the facts of nature or new technology.

I have always considered that our superior courts have ample jurisdiction to ensure that in exercise of Treaty-Making Power, our Government is not competent to transgress constitutional limitations. I have already told you in Chapter 21 of this Memoir that the Delhi High Court accepted this view on my Writ Petition in *Shiva Kant Jha v. Union of India*¹⁷ (see Chapter 21 Part III). Even the Central Government admitted this position in its Counter-Affidavit¹⁸. The *Black Money Case* is a bold and emphatic assertion of this view¹⁹. The effect of all this is that our Government’s Circular to the UNO, saying that in India treaty-making power is under no constitutional restraints²⁰, becomes wrong and misconceived, hence *non est*. Our superior court possesses the jurisdiction on treaties to examine if they transgress constitutional limitations. This proposition has been emphatically stated in this *Black Money Case*,²¹

While pursuing the PILs before the High Court and the Supreme Court, I noticed a maddening craze on the part of our Government for foreign exchange and foreign investments for which passionate paeans were sung by the Attorney General and the Solicitor General with a refrain that without these our country would be trapped in financial crisis. I had pleaded before the Delhi High Court that the Income-tax Act, 1961, was to collect revenues for our Consolidated Fund, not to facilitate obtaining foreign exchange etc. I have told you in Chapter 23 how law was used for extraneous purposes under circumstances which brought no credit to our Government. The Delhi High Court saw through the game, and rejected that dressed-up pleas. The Delhi High Court found as a matter of fact [2002] 256 ITR 563:

“Having regard to the globalization of economic policy adopted by India relaxation on regulations and controls on direct foreign investment took place in 1992 wherefore guidelines have been announced. The said Convention, as would appear from its preamble, was entered into “*for the encouragement of mutual trade and investment in India and Mauritius*”.

It rejected the Government’s contention, and observed in pregnant words:

“It is contended by the learned Solicitor General that by reason of the said treaty a political arrangement has been made. The same, in our opinion, would run counter to the provisions of section 90 of the Indian Income-tax Act. Political expediency cannot be ground for fulfilling the constitutional obligation.”

I have already told you in Chapter 23 how my view, and that of the Delhi High Court, was not accepted by our Supreme Court in *Azadi Bachao Andolan*. Hon’ble Supreme Court in *Azadi Bachao* approved the neoliberal thought by quoting 3 long paragraphs from a book written by a tax haven advisor! I wish you re-read Harold Pinter’s quote mentioned in Chapter 21. I kept on asserting

my stand in other PILs. But my view merited no acceptance. It is great that now our Supreme Court in this *Black Money Case* says, through a rhetorical question in the context of our Constitution, that the concern to bring foreign funds into India cannot override all other constitutional concerns and obligations. What I had asserted in the context of the Indo-Mauritius Tax Treaty Abuse Case, the Supreme Court has recognized in the context of our Constitution.

But I am sorry to submit that our Supreme Court in *Union of India v. Azadi Bachao*²² went wrong by adopting the view of Frank Bennion in saying that the tax treaties are “indirect legislation”. In India, treaties are done entirely through the opaque administrative process, and suffer from gross ‘democratic deficit’.²³ In other countries treaties receive some measure of Parliamentary approval.²⁴ The Indian tax treaties cannot be elevated to the level of ‘indirect enactment’. Bennion must be contemplating the Western major states where even the tax treaties are legislated. It seems, the Supreme Court missed this point again in the *Black Money Case* where it quoted Bennion’s view on which *Azadi Bachao* had erroneously relied.

IV

Judicial Observations on Article 26(1) of the Indo-German Tax Treaty

The Court’s small step on the Article 26 of the Indo-German tax treaty is a big leap in our jurisprudence that removes a lot of cobwebs, and settles certain seminal principles pertaining to the law of Treaties.

But before I come to the Hon’ble Court’s interpretation of the Article 26, I would refer to the Government of India’s core reasons for not disclosing the details about those keeping their black wealth amassed in the foreign banks. The Hon’ble Court summed up our Government’s pleas thus : “(i) that they secured the names of individuals with bank accounts in banks in Liechtenstein, and other details with respect to such bank accounts, pursuant to an agreement of India with Germany for avoidance of double taxation and prevention of fiscal evasion; (ii) that the said agreement proscribes the Union of India from disclosing such names, and other documents and information with respect to such bank accounts, to the Petitioners, even in the context of these ongoing proceedings before this court; (iii) that the disclosure of such names, and other documents and information, secured from Germany, would jeopardize the relations of India with a foreign state; (iv) that the disclosure of such names, and other documents and information, would violate the right to privacy of those individuals who may have only deposited monies in a lawful manner; (v) that disclosure of names, and other documents and information can be made with respect to those individuals with regard to whom investigations are completed, and proceedings initiated; and (vi) that contrary to assertions by the Petitioners, it was Germany which had asked the Union of India to seek the information under double taxation agreement, and that this was in response to an earlier request by Union of India for the said information.”

As to (i) and (vi) *supra*, the Court felt no need to go deep as (i) it found on the proper reading of the Indo-German DTAA that there was nothing to proscribe our Government from disclosure in the judicial proceeding, rather it specifically permitted such disclosure in the judicial proceeding; and also because the

Constitution of India casts certain mandatory duties which might require such a disclosure in the judicial proceeding. In this connection, I consider it proper to mention three more points which also deserve to be noted. The Government of India did not produce before the Hon'ble Court the preparatory materials of the Indo-German DTAA to support its point, even to enhance probability in favour of our Government's plea. Nothing was advanced to show that the *consensus ad idem* at the root of that treaty had such an understanding as controlling and determining the ambit of bilateral obligations. Besides, Germany did not intervene before our Supreme Court which option that country had.²⁵ The transactions in the banks of Liechtenstein could not come under the eye of the Indo-German DTAA. The Hon'ble Court limited its perspective with great practical prudence: it said:

'For the purposes of determining whether Union of India is obligated to disclose the information that it obtained, from Germany, with respect to accounts of Indian citizens in a bank in the Principality of Liechtenstein, we need only examine the claims of the Union of India as to whether it is proscribed by the double taxation agreement with Germany from disclosing such information.'

'Further, and most importantly, we would also have to examine whether in the context of Article 32 proceedings before this court, wherein this court has exercised jurisdiction, the Union of India can claim exemption from providing such information to the Petitioners, and also with respect to issues of right to privacy of individuals who hold such accounts, and with respect of whom no investigations have yet been commenced, or only partially conducted, so that the State has not yet issued a show cause and initiated proceedings.'

The Court closely examined the last sentence of paragraph 1 of Article 26 (1): "They may disclose the information in public court proceedings or in judicial proceedings." The last sentence in Article 26(1) of the OECD Model is independent and additive in effect. It has the effect of providing a new norm permitting disclosure of information in the judicial proceedings. As the expressions indicate, the *consensus ad idem* between the contracting parties, it must be read as not prohibiting the disclosure of information in judicial proceedings. We know that some OECD commentators and writers have held different views as they have failed to see the difference between the structure of the words in the OECD Model and the UN Model of the DTAA. We cannot see an ambiguity where it is not present.

In Chapter 26 (Segment V), I have considered the reach of a DTAA in different situations. This cannot apply to income that is not within its scope. It cannot be invoked to help the crooks and the criminals to hide their fruits of crimes, and their shady deals causing wrongful gains to themselves and wrongful loss to others. I have shed light on the operative facts of our world in the Chapter 26 ('The Realm of Darkness: the triumph of Corporatocracy'). I am happy that my views on those points do not require a change in the light of what our Supreme Court has said in *Ram Jethmalani's Case*. Our Supreme Court has aptly said in paragraph 58 of the Order in this Case:

'The proceedings in this matter before this court, relate both to the issue of tax collection with respect to unaccounted monies deposited

into foreign bank accounts, as well as with issues relating to the manner in which such monies were generated, which may include activities that are criminal in nature also. Comity of nations cannot be predicated upon clauses of secrecy that could hinder constitutional proceedings such as these, or criminal proceedings.'

Two other points that our Government advanced before the Hon'ble Court were noted, but were rightly ignored by the Hon'ble Court. Our Government was wrong in thinking that it could support its stand by invoking the norms of international relations, or comity of states. The Hon'ble Court rightly ignored the Government's argument with reference to the norms pertaining to the Comity of nations. When we think of tax treaties, we must not forget what Viscount Simonds said in the leading case of *Collco Dealings Ltd. v. IRC* [1961] 1 All ER 762 at 765:

"...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."

A cardinal principle our jurisprudence (that we share with England) is that it is the Hon'ble Court that is the ultimate decision-maker in the matters of what sort of norms (their ambit and reach also) of International Law are to be domestically recognized.²⁶ It is not difficult to comprehend what might have worked in the Court's judicial consciousness that made it dub our Government's strategy 'disingenuous' (see para 56). The epithet is well deserved. 'Disingenuous' is defined by the *Shorter Oxford Dictionary* to mean 'Insincere, lacking in frankness or honesty; fraudulent'. H.W. Fowler's *Modern English Usage* interprets it to mean 'having secret motives, lacking in candour; insincere' (said of persons or their actions), whereas *ingenuous*, its antonym, means 'innocent, artless, frank'. What a comedown for our Government!

V Court's Jurisdiction on Treaties

Our Constitution has established a democratic and republican polity where all the organs of the State have been created by the Constitution with granted powers to be exercised both at the international plane and in domestic sphere in terms of the *constitutionally mandated* discipline to achieve the mission sacred at the heart of our Constitution. I had submitted this before the Hon'ble Delhi High Court in *Shiva Kant Jha's Case* (refer to pp. 294-297 of the Memoir), and the Court seems to have approved it. The neoliberals and the MNCs, and the global plutocrats have found in 'international treaties' a powerful device that can be adopted to bend, or break, the frontiers of the domestic space, and the 'soft structure' of a political society as constitutionally conceived. *Ram Jethmalani & Ors. v. Union of India & Ors.* [2011] 8 SCC 1 is a great decision where our Supreme Court has seen through the conspiratorial strategy of the corporate globalists, and has stated certain constitutionally mandated principles which can sustain our Constitution. These observations led me to reflect on our Constitution and the genius of our democratic republic in the Postscript VI ('Reflections on the Constitution of India : Ambit of the Constitutional Restraints on the Treaty-Making Power')

In *Ram Jethmalani's Case*, the Hon'ble Supreme Court examined 'whether in the context of Article 32 proceedings, wherein this court has exercised its jurisdiction, the Union of India can claim exemption from providing requisite information to the Petitioners on the account of the constraints of the Indo-German DTAA. It also examined the ambit of the right to privacy of individuals with respect of whom no investigations had yet been commenced, or 'only partially conducted, so that the State has not yet issued a show cause and initiated proceedings.' The Court's observations on the point of its jurisdiction are clear, categorical and comprehensive with which our jurisprudence goes well. I quote some of the seminal observations that we all understand well, and we do not require the aid of any gloss put on the terms of treaties by the so-called globalists working for the IMF, the World Bank, the MNCs, and the predatory capitalism in the world for whom hired bodies are out to create a new international law drawing a lot from the ideas of the imperialists of the 18th and the 19th centuries. I would revisit this point in Chapter 29 ('Portrait of our Time') see pages 485-500.

Some of the judicial observation which can neither perish nor go stale till our society remains dedicated to our constitutional mission (see pages 286-293 of the Memoir), are stated by the Hon'ble Court thus:

- (i) 'The government cannot bind India in a manner that derogates from Constitutional provisions, values and imperatives.'
- (ii) 'Modern constitutionalism, to which Germany is a major contributor too, especially in terms of the basic structure doctrine, specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a constitution cannot change the identity of the constitution itself.'
- (iii) 'The basic structure of the Constitution cannot be amended even by the amending power of the legislature. Our Constitution guarantees the right, pursuant to Clause (1) of Article 32, to petition the Supreme Court on the ground that the rights guaranteed under Part III of the Constitution have been violated. This provision is a part of the basic structure of the Constitution.'
- (iv) 'In order that the right guaranteed by Clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State.'
- (v) 'The burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, the burden of protection of fundamental rights is primarily the duty of the State.'
- (vi) 'The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. In

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proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court.'

- (vii) 'There is a special relationship between Clause (1) of Article 32 and Sub-Clause (a) of Clause (1) of Article 19, which guarantees citizens the freedom of speech and expression. The very genesis, and the normative desirability of such a freedom, lies in historical experiences of the entire humanity: unless accountable, the State would turn tyrannical.'
- (viii) 'Withholding of information from the petitioners by the State, thereby constraining their freedom of speech and expression before this Court, may be premised only on the exceptions carved out, in Clause (2) of Article 19.'

VI The Court ordered

The full thrust of the judicial order in *Ram Jethmalani's Case*, can be clearly understood from the Operative Order that the Court passed. The various directions contained in the order deserve to be marked in order to appreciate the Order, and also to acquire critical insight into the stream of events they were expected to shape. The judicial directions have been thus summed up in Para 79 of the Court's Order: The Court ordered that

- '(i) The Union of India shall forthwith disclose to the Petitioners all those documents and information which they have secured from Germany, in connection with the matters discussed above, subject to the conditions specified in (ii) below;
- (ii) That the Union of India is exempted from revealing the names of those individuals who have accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of who investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available;
- (iii) That the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations have been concluded, either partially or wholly, and show cause notices issued and proceedings initiated may be disclosed; and
- (iv) That the Special Investigation Team, constituted pursuant to the orders of to-day by this Court, shall take over the matter of investigation of the individuals whose names have been disclosed by Germany as having accounts in banks in Liechtenstein, and expeditiously conduct the same. The Special Investigation Team shall review the concluded matters also in this regard to assess whether investigations have been thoroughly and properly conducted or not, and on coming to the conclusion that there is a need for further investigation shall proceed further in the matter. After conclusion of such investigations by the Special Investigation Team, the Respondents may disclose the names with regard to whom show cause notices have been issued and proceedings initiated.'

B

THE BLACK MONEY CASE: OUR INSTITUTIONS WEIGHED AND FOUND WANTING

"You have been weighed in the balances, and found wanting."

Daniel 5:25-28

(i)

The Union of India moved an Application for Recall (I.A. No. 8 of 2011) before our Supreme Court seeking modification of the order passed in the *Ram Jethmalani's* aforementioned Case.

It is worthwhile to keep in mind some material points discussed in the Supreme Court's order against which the Union of India moved this Application for Recall. Our Supreme Court had criticized the Union of India for its inaction (and remissness) in taking steps to recover the large sums of money deposited by Indian citizens in foreign banks, in particular, in the Swiss Banks. The Writ Petitioners had sought certain specific reliefs: (i) directions for disclosure of information gathered by government agencies; (ii) 'orders from time to time to ensure that the outcome of the investigations are not suppressed, or even unduly delayed'; and (iii) suitable directions to the Government "to apply to the foreign banks, more particularly the UBS Bank, for freezing the amounts in the said foreign banks, particularly, the UBS Bank which as stated above is holding *inter alia*, the Khan, and Tapurias' assets."

In Part 'A' of this Chapter, I have compiled the general propositions stated by our Supreme Court in *Ram Jethmalani's* Case. In my considered view they constitute the perspective under which the Hon'ble Court had issued directions in its order. Though the Court's Order was divided into three parts, its two parts are of great importance. These two parts are summarized in the Hon'ble Court's Order [reported in (2011) 9 SCC 751] on the Government's said Application for recalling the order that had been passed: to quote —

"The first part of the order dealt with the alleged failure of the Central Government to recover the large sums of money kept in such foreign banks and in tax havens having strong secrecy laws with regard to deposits made by individuals. The second part dealt with the unlawful activities allegedly funded out of such deposits and accounts which were a threat to the security and integrity of India. The amounts deposited in such tax havens in respect of one Shri Hassan Ali Khan and Shri Kashinath Tapuria and his wife Chandrika Tapuria were alleged to be in billions of dollars in UBS Bank in Zurich alone. Income Tax demands were made to Shri Hassan Ali Khan for Rs. 40,000 crores and a similar demand was served on the Tapuriyas amounting to Rs. 20, 580 crores. On being convinced that, in the absence of any known source of income, the large sums of money involved in the various transactions by Hassan Ali Khan and the Tapuriyas were the proceeds of crime, which required a thorough investigation, this Court felt the necessity of appointing a Special Investigation Team to act on behalf and at the behest of the directions of this Court."

Considering the facts, and the various lapses and delay in conducting the investigation in such cases, the Supreme Court, after stating broad principles many of which are quoted in Part 'A' of this Chapter, reconstituted the Government's High Level Committee to make it a Court appointed SIT (Special Investigation Team). This SIT was to be headed by two former eminent judges of the Supreme Court: Justice B.P. Jeevan Reddy as the Chairman; and Justice M.

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B. Shah as the Vice-Chairman, later on changed to Justice M.B. Shah as the Chairman, and Justice Arijit Pasayat as the Vice-Chairman of the SIT consisting, in addition, 11 members from the top investigative and enforcement agencies of our country. The Court directed that the said SIT was to "function under their guidance and direction".

The SIT was to be "charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that could enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks. The SIT was to 'report and be responsible' to the Supreme Court and it was under duty to keep the Court informed of all major developments by filing periodic status reports. This body was required to follow the directions of the Court, if any ever made. All public authorities were bidden to extend all cooperation and assistance necessary for that body to work. The sweep of direction, made by the Court was wide and comprehensive as it directed the Union of India, and where needed, even the State Governments, to "facilitate the conduct of the investigations, in their fullest measure", and they were required to provide "all the necessary financial, material, legal, diplomatic and intelligence resources" whether such investigations or portions of such investigations were to be done "inside the country or abroad". The Court empowered the SIT to "investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad."

At the threshold, objections were raised to the said Application contending that it was not maintainable as it was, in effect neither an appeal, nor review. After hearing these preliminary objections for several days, the Hon'ble Court (*Coram*: Altamas Kabir, Surinder Singh Nijjar, JJ.) could not decide the matter finally as the two Hon'ble Judges reached opposite conclusions on the threshold question as to the very maintainability of the said Application. On Sept. 23, 2011 the Hon'ble Court held: "Since we have differed in our views regarding the maintainability of I.A. No. 8 of 2011 filed in W.P. No. 176 of 2009 let the matter be placed before Hon'ble the Chief Justice of India, for reference to a third Judge." I understand no order, consequent to this judicial direction, has yet been made.

I understand that very recently the Chief Justice of India has constituted the Bench consisting of 3 Hon'ble Judges to hear the aforementioned Petition for Recall (I.A. 8). Let us see what happens.

(ii)

Our Government has seldom found wisdom in Shakespeare's well-known saying in *Henry VI* (III.ii.33): 'Delays have dangerous ends.' The 'carefreeness' and the unreasonable delay on the part of the organs of our state might jeopardise the prospect of truth ever coming out. Besides, the present world in which money games are played by the High Finance, is a strange brave world where a carnival of fraud and deception can go on well. Money has become

*"Hot Money" Business Week, March 20,1995 quoted by David Korten in *When Corporations Rule the World* p.185.

abstraction that can move from heaven to earth, and earth to haven, by a mere stroke on the computer keyboard. Its movements are difficult to watch; its ways are difficult to comprehend. All the investigative agencies are now pitted against the challenges posed by the fast changing technology, and financial wizardry.

The raw realities of our day demand us to catch the black cat hidden in the dark room. Gathering information about the crooks' hidden wealth abroad is a daunting problem. At times I feel its ways are as mysterious as of Macavity's. T.S. Eliot writes about this cat:

Macavity's a Mystery Cat: he's called the Hidden Paw - For he's the master criminal who can defy the Law. He's the bafflement of Scotland Yard, the Flying Squad's despair: For when they reach the scene of crime - Macavity's not there!

(iii)

It is appropriate to appreciate that '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.' It is time for us to recognize that the emerging Corporatocracy is fast becoming the shadow world government, a point that has been brought out with discernment in the *Business Week**:

"In this new market ... billions can flow in or out of an economy in seconds. So powerful has this force of money become that some observers now see the hot money set becoming a sort of shadow world government—one that is irretrievably eroding the concept of the sovereign power of nation state."

It is great that our Hon'ble Supreme Court has given very sound and comprehensive mandate to the SIT it has appointed. If the mandate is faithfully carried out, India would evolve, for the first time, with the principles governing the jurisprudence of investigation involving transborder data flows and transactions. Never had our Court ever issued directions so practical and insightful as in this case. These directions would surely help us in our battle against generation of unaccounted monies, and their stashing away in foreign banks; and would also facilitate our bringing back unaccounted monies unlawfully kept in bank accounts abroad. In effect, the instructions to the SIT require this body to explore all the investigative possibilities to the ultimate confines drawing on the latest developments in the information technology. I think this would require the study of the 'computer program' which is used by the crooks to transform money into abstractions, and is used by the professional service providers to transmit money from realms to realms both on the earth and in the virtual space. It is time when it is essential to constitute a core segment of investigators in the investigative structure who can develop software to keep track money leapfrogging from jurisdictions to jurisdictions, from the earth to cyberspace. Such pursuits would require a mechanism to do the needful in foreign jurisdictions, and would help us invoke the legal systems of foreign countries by exploring their laws. Our investigators would endeavour to acquire skill to use the innovative computer information technology that even helps the crooks to backdate transactions to any point of time, past or future. An investigator, like a lawyer or a poet, must possess that imaginative faculty to see the gone past and the looming future by observing the present as it unfolds itself before his mind's eye.

(iv)

Our Apex Court's sublime passion, so well expressed in the judgment, would just be a mere lyric to our ears if the cause is allowed to get lost on account of delay, contrived delay, and creative delay. If such things are allowed to take place, we might find someday that the entire pursuits, by the petitioners, and of the Court, turned out all futile. Perish the thought: I have certain apprehensions. Perhaps we will be told that all the papers, from which the stories of the crafts of the crooks had emanated, were, in fact, a bunch of forged papers; or that Switzerland had never known, never heard of Hassan Ali, or his friends. They may come to be dismissed as just 'airy nothing' in the void. Prudence counsels us to consider: of what use is the industry to squeeze the structure of the honeycomb when the honey has been allowed to be eaten by the honey bees, or when the honey of the comb is already extracted. Those who feel depressed can pep themselves up repeating *Satyameva Jayate* (Truth always triumphs). Mysterious are ways of the persons in power: mysterious are the ways of governments. We all know that in our country things are so managed that crooks are hardly seen, rarely caught, and seldom punished. I wish our courts keep in mind, when taking the Executive Government to task, their own institutional frailty to which C.K. Allen had drawn our attention in these words:

"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. The fact is, however, that nobody on earth can be trusted with power without restraint.."

[Allen, *Law and Orders* 3 rd ed. p. 297].

C**THUS SPAKE THEIR LORDSHIPS**

I had written the content of section B of the Part I of this Chapter sometime in February 2014. I had requested Shri Jethmalani to make his comments on my exposition on the status of the case before the Hon'ble Court. On March 26, 2014, a bench of three Hon'ble Judges of the Supreme Court dismissed the Government's plea for recalling its 2011 order setting up a special investigation team (SIT) to probe into all cases of black money. The Hon'ble Court was not impressed by our Government's arguments in course of the hearing: (i) that the setting up of the SIT, under two eminent former Hon'ble Judges of the Supreme Court, was unnecessary as there was already a mechanism in place to deal with the issues of black money; (ii) that foreign countries and their banks might not cooperate with the SIT as they might 'claim sovereign immunity'; (iii) that many other efforts were being made to deal with the menace of BLACK MONEY.

The point (i) is precisely the point that the Union of India, and the State of Bihar, had advanced in the Fodder Scam Monitoring case (see Chap. 12). The point (ii) is not relevant because the banks of Liechtenstein and Switzerland, whilst transacting with their customers, were operating in the sphere of their non-sovereign activity (*acta jure gestiones*), not in the sphere of their sovereign

activity (*acta jura imperii*). In my view, no aid can be had from the provisions of the VCDR (Vienna Convention on Diplomatic Relations). As to point (iii), effective actions were nowhere seen to prove our Government's assertions.

In my view, the Double Taxation Avoidance Agreements cannot be invoked to refuse the disclosure of information about ill-gotten gains, unless the gains are analytically income. You may read Chapter 26 ('The Problem of the Black Wealth stashed in Foreign Jurisdictions') where I have dealt with some of those problems which our Government considered it proper to submit before the Court. Besides, the supply of the relevant information against the crooks cannot be denied on the ground that the information was derived from some stolen data. It is well established that even an illegally obtained evidence/material can be used [see *Pooranmal v DI* 97 ITR 505; *Sarkar on Evidence* p. 83(4th. ed.); for the US view see: *Mapp v Ohio* (367 U.S. 643 (1961), and Bernard Schwartz, *Some Makers of American Law* Chap. 6]. The information about the persons holding black money in the LGT bank of Liechtenstein, though stolen from the bank by an erstwhile employee, could be utilised to discover black money.

Now let us think how the SIT should work. For the success of the SIT, what is needed most is the WILL to act on the part of our Government. We should consider how the USA, the U.K., and Germany substantially succeeded in obtaining information about their nationals who had evaded their laws to amass their black money abroad. But these countries succeeded because they could show strong political will to get back the black money stashed by their nationals in the foreign banks. They showed both diplomatic astuteness, and exercised strong diplomatic pressure. They asserted with sincerity and with strength. How such things were done deserve a study. A lot of materials are available on the internet for us to study and reflect. We all know well the strategies the crooks adopt in pursuing their ends. It is the same plot illustrating the entente cordiale of Fraud and Collusion that the financial crooks have been accustomed to adopt over the last 400 years. Charles Mackey's *Extraordinary Popular Delusions* (1841) deepens our understanding of how the crooks work (see for its summary pp. 402-3, & 497 of this Memoir). Can't we too strive with verve, vigour, and diplomatic skill to acquit ourselves well in exposing them? Shall we be able to discover our Bernard Madoffs and many others of the same feather? Shall we be able to discover the trails of transactions where the nexus between the beneficial owner and his wealth is concealed? This trade has made Liechtenstein, a country of about 36000 souls, achieve the highest gross domestic product per person in the world !

It is good that the Supreme Court has directed even the 'diplomatic and intelligence' authorities to render assistance to the SIT in discharge of its work. We have seen how our diplomatic mission had betrayed our trust when Mauritius was transforming itself as a tax haven (see pp. 353-354). It is good that the SIT would build the structure, with various functional segments, for effective and comprehensive operations. It would build the 'soft' and 'hard' structures of the architecture of investigation, with customised computer programmes, to crack the shells of secrecy, and track the trails of wired transmissions of the tainted wealth, (even if digitized and transacted through the virtual world), by looking

through the ways in which the transmission, stashing, and even layerings (to bring such wealth back) of such wealth are done. I had discussed some of the noxious strategies adopted to achieve such ends in my *Judicial Role in Globalised Economy* (2005), mainly in its Chapter 2. I had drawn my materials and insight from my researches I made for conducting the PIL (see Chapt. 23 of this Memoir). You can read, on www.shivakantjha.org, the whole text of the book. It had been written 8 years back. Over these years the craft of concealment, and the technique of manipulation have become more challenging on account of the new strides in the electronic technology, and the aggressive wizardry of the financial experts.

The SIT has a broad brief, and a difficult task. If it succeeds, it will be our great achievement; if it fails, the Republic of India would have to reflect whether it is, or is not, a failed state.

[FOR MORE ON THE ‘SIT ON BLACK MONEY’, SEE POSTSCRIPT IV]

PART II

ANNA HAZARE MOVEMENT (Written on August 26, 2011)

When Comus and Kurtz²⁷ rule from the Realm of Darkness, ‘corruption’ waxes wide and deep enmeshing our public institutions. Whilst I write these lines, our great Anna Hazare, is on the 11th day of his fast against ‘corruption’ to rid our system of the crudities of predatory capitalism. He has his point, and the whole nation is greatly responsive to his call. How this movement would move and shape, I cannot say. But the protest has gone to some extent above the point ‘B’ on the scale of revolution that I have drawn up in Chapter 22. I wish our Government is blessed with a modicum of wisdom to adopt a right course to deal with the matter. This apprehension is always a matter of worry as most governments seldom learn from history, and rarely read the text that is written on the wall.

I had witnessed, and suffered, the Quit India Movement of 1942; I had watched, while at Patna, the JP Movement against the Emergency; and now I see Anna’s movement, and our people’s response to his call. In my assessment, the present movement is *sui generis*. The Quit India Movement was against the British rule in India; the JP Movement was against Mrs. Indira Gandhi’s arbitrary rule in breach of Constitution; but the present movement is against the operators from the Realm of Darkness, the MNCs, the corrupt governments, bureaucrats, and corrupt politicians, the very Axis of Evil, the very ‘Root of All Evil’. What is happening in our country is great. Whilst ‘corruption’ has bedeviled our nation over all the decades after our Independence, this evil has grown so much over the recent years that our whole society, our whole system, our whole culture, have come to tread on the path of ruin. Our resources are mercilessly extracted, our environment is cruelly milked, and our national identity is being destroyed. Anna’s movement, massive though it is everywhere in our country, is wholly peaceful the like of which our history has not seen. But I wish the wielders of public power get the wisdom to read the message that this wide

public response conveys. The whole movement is peaceful, but this lull and peace must not be misread. I hope things do not come to such a pass when Krishna is compelled to put aside His flute, and allow His *Sudarshnachakra* to come to swirl and revolve above his finger awaiting instruction to operate as the supreme weapon of creative destruction. Gandhi insinuated to this in *Young India* of December 5, 1928 in a passage I have quoted in Chapter 20 of this *Memoir*. Even Anna, a Gandhian outright, said the same by saying in his address to the nation in the evening of August 15, 2011 that time might come to treat Shivaji as our role model.

In my view our nation would remember Anna Hazare not for the Jan Lokpal Bill, or as the crusader against corruption (though great this endeavour surely is), but for becoming a great catalytic agent to draw together our people's response for nobler values. It is amazingly delighting to see how an earthen lamp has lit lakhs and lakhs earthen lamps of this nation fostering hope that someday we would surely march from Darkness to Light. Despite the instruction of Article 51A(b) of our Constitution ('to cherish and follow the noble ideals which inspired our national struggle for freedom'), we have allowed our country to become what our Supreme Court, in moments of rare insight, has portrayed in the *Black Money Case*. Lakhs of lamps are now lit, thanks to this Anna phenomenon. Our people, I think on reading the text of the passing moments, shall have assertive roles to play in future; (i) if the heart of our Constitution is, perish the thought, gouged out for sale on some Commodities Stock Market; (ii) if our culture and tradition are polluted, or are hurled into the neoliberal gas-chamber; (iii) if Bharat comes to be sacrificed for the India Incorporated, or for the global oligarchy of the plutocrats, exploiters, and bandits striving to establish corporatocracy and the rule of market.....Anna would have gone, but these lakhs and lakhs earthen lamps would burn in the temple of Bharat Mata; and lakhs and lakhs of our countrymen would follow the Buddha to become: "*Appa Dipo Bhabha*" (be thou thy own lamp). Let everyone never forget that whilst a lamp sheds light, its flame can burn and destroy any *Sone-Ki-Lanka*.

In my considered view, Anna would experience greater odds in course of his struggle to free our society from corruption than what Mahatma Gandhi had experienced to free our country from the British yoke, or what Jayaprakash Narayan had faced in the struggle against Emergency. I cannot commit the folly of comparing Anna with Gandhi, or Jayaprakash Narayan (JP) But the problems they had faced were easier for many reasons. To some extent, Anna's movement reminds us of the struggle Jesus had carried on against the powerful Herodian establishment's 'evil or oppressive economic power', and had worked against the unjust social and economic order of the time. The beneficiaries of that corrupt system considered Jesus 'political' and 'social' rebel (see Chapter 20 of this *Memoir*) sufficiently dangerous to the persons in power. Anna's struggle is even more difficult. The gains of corruption are enjoyed by the persons in power, and the corporations who cast their spell on the way we live and think. Anna's fight against corruption seems to me more difficult than any struggle for any public cause about which we have read in recent history. All the beneficiaries, of 'corruption' are bound to flock together from all the spheres to devise strategies, and to hone their Mephistophelian logic, to protect their illicit gains. They know how to collapse their differences to promote their secret agenda. But

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let us see what happens in this land of Krishna and Gandhi, Shivaji and Laxmibai. We believe that, in the end, *Dharma* is always triumphant, Justice always prevails, and Truth always wins. Our society never lost hope, and it shall never lose it in future.

Note : The topic continued in the Postscript I to this Memoir.

NOTES AND REFERENCES

1. Ronald Dworkin, *Taking Rights Seriously* pp. 204-5 [quoted by Peter Watson, *A Terrible Beauty* p. 645]
2. Shakespeare, *Macbeth* (Act I scene iii)
3. *Shiva Kant Jha & Anr v. Union of India* (2002) 256 ITR 563 (Del.); *Union of India And Another v. Azadi Bachao Andolan & Anr.* (2003) 263 ITR 706 -SC ; Curative Petition © D.No 10569 Of 2004; Writ Petition (Civil) No. 334 of 2005; W.P.(C) No.445/2006; CWP No.1357/2007 of the Delhi High Court; Special Leave to Appeal in the Supreme Court in (Civil) No(s).19751/2010. Also see the texts of pleadings at www.shivakantjha.org
4. "Congress, he judged, was unwilling and/or incapable of righting these wrongs. Something more was needed, and that 'something,' he felt, could be provided only by the courts.It was not a popular verdict, at least among whites. Myrdal's conclusions were even described 'sinister'" Peter Watson, *A Terrible Beauty* p. 391.
5. See Chapter 12 of this *Memoir*.
6. See Chapter 12 of this *Memoir*. In my *Judicial Role in Globalised Economy* p. 179 (2005), I summarized my ideas thus: :
‘Sir William Holdsworth in *Halsbury’s Laws of England* states that the doctrine of separation of powers:
“Has never to any great extent corresponded with the facts of English Government...it is not the case that legislative functions are exclusively performed by the Legislature, executive functions by the executive, or judicial functions by the judiciary.”
Even when Montesquieu had written his *Spirit of Laws*, he had committed mistake in comprehending that in England there was any clear-cut Separation of Powers. As a defender of liberty, he erected his erroneous idea to see that his despotically governed France brought about a change towards freedom. Ogg & Zink, in their *Modern Foreign Governments* observe (at p. 39) :
“Today, the principle of separation finds only limited application, the one point at which it really prevails being with respect to judiciary.”
The position of judiciary is, thus, *sui generis*. The U.S. Constitution or Australian Constitution vested the legislative, executive, and judicial powers in the three separate organs of the State. But even in these countries the rigidness of the doctrine has been substantially softened as a response to the demands of the times. This power the Court derives from the very grammar of its existence under our Constitution, and from the terms of its judicial oath.”

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7. See pp. 166-167
8. Chapter 10
9. Chapter 11 p. 165, 176-177
10. Pp. 176-177
11. P. 154-155, 235
12. See Chapter 23 of this Memoir. How could the Income-tax Department ever issue a Circular which helped (a) promote extraneous purpose of promoting the interests of the FIIs and the MNCs; (b) make a trespass on the legislative field by creating certain conclusive presumptions; (c) build and ensure the continuance of an opaque system impervious to public gaze by going counter to the basics of an open and transparent political society; and (d) promote Fraud and Collusion on massive scale through the sinister stratagem of Treaty Shopping.
13. 'It is the time to collapse distinction between the human rights situations and the economic situations. "The hydra of the economic globalization has so enmeshed us that our human rights are exposed to great jeopardy. Now it has become the greatest constitutional duty of our Supreme Court to see that our human rights granted to us under the Articles 14, 19, 21, and 25 are not lost on any specious pleading, for any reason whatever. ... The present tsunami of circumstances unleashed under the architecture of economic globalization is a jeopardy *sui generis*, a like of which never occurred in the past. Our superior courts are under the constitutional oath to uphold the Constitution, even if the Executive or the Legislature betrays its cause. This author has referred to a strange syndrome, which is co-eval with the economic globalization: the gradual subordination of the political realm to the economic realm. The Constitution represents the supremacy of the political realm within which after centuries of struggle we have succeeded establishing a democratic polity. After the setting up of the Bretton Woods institutions and the emergence of economic architecture, the fundamentals of constitutional democracy have been systematically but subtly, by hook or by crook, eroded. These forces, at international level, have damaged the majesty of the U.N.O. which is a prime political institution at the international level. The waxing forces of globalization have acted adversely even on internationally accepted human rights. This point is clear from a resolution of the Sub-Commission on the Promotion of Human Rights which—

"Reminds all Governments of the primacy of human rights obligations over economic policies and agreements." (Economic and Social Council Distr. General E/CN.4/Sub. 2/2000/L.11/Add.1 of 17 August 2000)

Time has come when the courts shall have to recognize that if they show reluctance in interfering in the governmental actions on the ground of non-intervention in economic matters, they would soon find that their restraints would, in the end, turn out to be an institutional death-wish. Days of Holmes are dead and gone. Warren went ahead on the track but could not go whole hog as the corporate *imperium* could not withstand too many of his onslaughts. In this Petitioner's view, in our tryst with destiny it is for our courts to play the role, which Apollonius played in John Keats' *Lamia*. (Apollonius, whose glance alone made the fraudulent Lamia fumble and crumble proving *satyameva Jayate!*.) "In the U.S.A. there is a recrudescence of idea of Charles Beard that the Constitution was meant to redistribute wealth from the poorer sections of the society to the upper class to which the Constitution framers belonged. The great centers of legal learning in the U.S.A. are busy with their programme to make judiciary market friendly. Richard Posner in his "The Constitution as an Economic Document" mentions that today when one thinks of how economics might be used to study the Constitution, no fewer than eight distinct topics (Quoted from *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* 2nd ED. [American Case Book Series] pp. 371-72.) come to mind. These include (i) the economic theory of constitutionalism; (ii) the economics of constitutional design; (iii) the economic effects of specific constitutional doctrines; (iv) the constitutional interpretation with an implicit economic logic. The other 4 topics are so important that this author quotes from Posner:

(5) Proposals to refashion constitutional law to make it a comprehensive protection of free markets, whether through reinterpretation of existing provisions or through new amendments, such as a balanced-budget amendment.

(6) The problem of 'dualism,' by which I mean the paradox of the Supreme Court's being passionately committed to liberty in the personal sphere and almost indifferent to liberty in the economic sphere.

(7) The relationship (if any) between the Constitution, as drafted and as interpreted, and the economic growth of the United States.

MY REFLECTIONS ON BLACK MONEY

(8) The extent to which judges should feel themselves free to use economic analysis as an overarching guide to constitutional interpretation [that is, beyond the limits of points (3) and (4)]; in other words, the relationship between economics and interpretation."

This author prays to God, and the Hon'ble Judges on the Olympus not to allow this tsunami of neo-capitalism overtake our Constitution through the subtle persuasions of the vested interests: the way Lucifer struck a bargain for the soul of Dr. Faustus in Marlowe's *Doctor Faustus*.'

Shiva Kant Jha, *Judicial Role in Globalised Economy* 176-178 (2005)

14. Bernard Schwartz, *Some Makers of American Law* pp. 128 & 144
15. AIR 1981 SC 2138
16. [1931] All ER Rep 666 H L
17. 2009-TIOL-626-HC-DEL-IT
18. The Government admitted in its Counter-Affidavit before the Delhi High Court thus :
"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." "By virtue of article 73 of the Const., the executive power of the Union, in absence of Parliamentary legislation to the matters with respect to which the Parliament has power to make law subject of course to constitutional limitation." ".....there has been no violation of any provisions of the Constitution in signing and ratifying the Uruguay Round Final Act. It is also denied that there has been any breach of Fundamental Rights and basis structure of the Constitution."
19. "No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from." (para 71)
20. U.N. Doc. ST/LEG/SER.B/3, at 63-64 (Dec. 1952) (Memorandum of April 19, 1951).
21. 2011 (6) SCALE 691
22. *Azadi Bachao Andolan & Anr* (AIR 2004 SC 1107)
23. See Chapter 21 of this *Memoir*.
24. See Chapter 16 'Notes & References' 14
25. Crown Forest Industries Ltd. v. Canada, [1995] 2 S.C.R. 802. a tax treaty case where the Government of the United States of America became an *Intervener*; see also TO ASSIST THE COURT, Third Party Interventions in the UK' A JUSTICE report.
26. *Chung Ch Cheung v. R* [1938] 4 All ER 786 at 790; Cockburn CJ in *R. Keyn* (1876) 2 EX.D. 63 at 202; Also see *West Rand Central Gold Mining Co v R* [1905] 2 KB 391;
27. See Chapter 26: Milton's *Comus* and Conrad's *Heart of Darkness*.