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McDowell not interpreted right in *Azadi Bachao* and *Vodafone*

[By Shiva Kant Jha (August 2013)][1]

I
(i) *McDowell*'s 'hard' infrastructure and 'soft' infrastructure

1.Our Supreme Court's Constitution Bench had *decided McDowell & Co. vs. CTO* [(1985)154 ITR 148]. It is submitted that our Supreme Court misread *McDowell's Case* in two recent judgements: one in *UOI vs Azadi Bachao Andolan* [(2003) 263 ITR 706 (Coram: Justice Ruma Pal and Justice B.N. Srikrishna)], and the other in *Vodafone International Holdings v. Union of India & Anr.* [C.A. NO.733 OF 2012 arising out of S.L.P. (C) No. 26529 of 2010 *(coram*: Chief Justice S.H. Kapadia, Justice Swatanter Kumar, and Justice K.S. Radhakrishnan)]. In this short exposition, I intend to consider their views on *McDowe*ll as I get in *Vodafone*. It seems to me that our Supreme Court erred in interpreting, and in applying the principles and the law declared in *Vodafone*, With utmost respect and humility, I submit that our Hon'ble Supreme Court went wrong in comprehending *McDowell* as to both

(i) its hard infrastructure (the inner thematic structure), and

(ii) its soft structure (judicially approved values, assumptions & ideas) determining (i) in the matter of the interpretation of law for providing solutions to the legal issues for judicial consideration.

(ii) The ' hard infrastructure' of *McDowell*

2. Whilst in *McDowell,* Justice Reddy supplements the majority Judgement delivered by Justice Ranganath Misra by providing it with the 'soft structure', the majority decision in *McDowell* is the outcome of the facts as interpreted in the light of the principles and values which constitute the 'soft structure' of *McDowell.* On proper reading of the Judgement, both the structures, 'soft' and 'hard', are integral in deciding the prime issues, and constitute the seamless blend in the judicial thinking that shapes the principles which determine and declare the law that binds usl in terms of Article 141 of the Constitution of India. When Justice Reddy agrees with the majority decision, he agrees because in the light of his declaration of the 'soft infrastructure', the decision of the Majority was clearly right. And when the judges delivering the Majority judgement expressed, in para 45 of the Judgement, their words of agreement, they did so as they agreed with the 'separate and detailed opinion' of Justice Reddy. Justice Reddy's judgement is surely not something said *ab extra* just inflicting an interesting thesis without any contextual relevance, just a solo performance at the expounding of law.

3. In *McDowell,* the hard infrastructure has been developed in the Majority Judgement of Justice Misra. Some material facts deserve to be noticed. The Hon'ble Court was interpreting the Andhra Pradesh Excise Act, 1968 ("Excise Act" for short), the Andhra Pradesh Distillery Rules, the Andhra Pradesh Indian Liquor (Storage in Bond) Rules and the Andhra Pradesh Foreign Liquor and Indian Liquor Rules, all made under the Excise Act. "Excise duty" as defined in section 2(10) of the Excise Act is leviable on the manufacture of liquor and the manufacturer cannot remove the same from the distillery unless the duty imposed under the Excise Act has been paid. The facts stated in *McDowell & Company Ltd.* v. *CTO* [1977] 1 SCR 914; 39 STC 151 would show that the buyers had paid the taxes which had not been taken into account in the books of the

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manufactures. Precedents were referred to, and the court came to the conclusion that excise duty did not go into the common till of the appellant, and did not become a part of the circulating capital. Therefore, the sales tax authorities were not competent to include in the turnover of the appellant, the excise duty which was not charged by it, but was paid directly to the excise authorities by the buyers of the liquor. The appellant, therefore, succeeded before the Supreme Court and the notices issued by the sales tax authorities were quashed.

4. The judgment of the Supreme Court was delivered on October 25, 1976. Rules 76 and 79 of the Distillery Rules were amended with effect from August 4, 1981. Rule 76(*a*) now provided:

> "No spirit or liquor manufactured or stored shall be removed unless the excise duty specified in rule 6 has been paid by a holder of D-2 licence before such removal."

After examining the terms of the law to determine the taxable event, and incidence of the obligation to pay the taxes, the Court concluded that that payment of excise duty is the primary and exclusive obligation of the manufacturer, and if payment be made under a contract or arrangement by any other person, it would amount to meeting of the obligation of the manufacturer and nothing more. The Hon'ble Court held "The consideration for the sale is thus the total amount and not what is reflected in the bill. We are, therefore, clearly of the 'opinion that excise duty though paid by the purchaser to meet the liability of the appellant, is a part of the consideration for the sale and is. includible in the turnover of the appellant. The purchaser has paid the tax because the law asks him to pay it on behalf of the manufacturer."

5. Two ingenuous arguments were advanced by Mr. Sorabjee on behalf the Appellant:

(i) According to Mr. Sorabjee, the excise duty had never come into the hands of the appellant and the company had no occasion or opportunity to turn it over in its hands, and, therefore, the same could never be considered as a part of its turnover.

(ii) A further contention was advanced by Mr. Sorabjee as his last submission that it was open to everyone to so arrange his affairs as to reduce the brunt of taxation to the minimum, and such a process did not constitute tax evasion; nor does it carry any ignominy. [*CIT* v. *Raman & Co.* [1968] 67 ITR 11 (SC), *CIT* v. *B.M. Kharwar* [1969] 72 ITR 603 (SC), and *Bank of Chettinad Ltd.* v. *CIT* [1940] 8 ITR 522 (PC), *CIT* v. *Sakarlal Balabhai* [1972] 86 ITR 2 (SC), were referred].

The Hon'ble Court Dismissed the Appeal, but made the following propositions in paras 45 & 46 of the Majority Judgement:

> "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. *On this aspect, one of us, Chinnappa Reddy J. has proposed a separate and detailed opinion with which we agree.*" [italics supplied]

6. The ideas pertaining to **the 'soft' structure** of the Judgement can be divided, for easy comprehension: (i) Group I being the propositions expounded, and Group II, the importance of what he said in the light of the trends in our times as illustrated by *Azadi Bachao*, and the *Vodafone Case*:.

(iii) The ' soft' infrastructure' of *McDowell*

7. The 'soft' structure of McDowell has been developed by Justice Chinnappa Reddy in his concurring Judgement. His Judgement shows that our Supreme Court had become conscious of our Constitution's Welfare mission, and was conscious of the State's

obligations under the Preamble to our Constitution, and its other provisions[2]. But it is important to know the judicial philosophy of this approach. The main judgment touches this point, but it has been developed in the supplemental judgment wherein Justice Reddy, after enumerating the evil consequences of tax avoidance, articulated a new judicial approach. The evil consequences highlighted include the following:

(i) First, there is substantial loss of much needed public revenue, particularly in a welfare State like ours.

(ii) Next, there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation.

(iii) Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcroft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer, and his perhaps not so skillful advisers on the other side.

(iv) Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it'.

(v) Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guileless good citizens from those of the 'artful dodgers'.

And Justice Reddy states the judicial duty of the court thus:

> "It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance, we now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognize that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in *Wood Polymer Ltd. and Bengal Hotels Limited*, (1977) 47 Com Cas 597 (Guj) where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax."

Justice Reddy's views accord with our Constitution that attempts to build a welfare state.

II

(i) The Right Perspective

8. It deserves to be noted that Justice Reddy has acknowledged the change wrought in the judicial attitudes by TIME. The courts have treated TIME as a distinguishing factor

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

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

in the matters of interpretation.[3] 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."

His approach reminds one of what *F W Maitland* wrote to Dicey : " the only direct utility of legal history… lies in the lesson that each generation has an enormous power of shaping its own law.[4] Justice Reddy had the judicially shared ideas that under the present ethos Lord Tomlin's observation in *IRC* v. *Duke of Westminster* [1936] AC I; 19 TC 490 was no longer in tune with the ethos of our times as shaped by the constitution of the Welfare State. What Justice Reddy has said about the creative role of the court in the field of income-tax law, is precisely what Lord Scarman had observed in *Furnis v. Dawson*[5]*:*

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

And this view portrays the right perspective in the gathering of taxes. This is precisely what Lord Scarman tells us about the modern attitude towards taxation has been described by Lord Scarman in *IRC v. Federation of Self-Employed*[6] *thus:*

> " But I do not accept that the principle of fairness in dealing with the affairs of taxpayers is a mere matter of desirable policy or moral obligation. Nor do I accept that the duty to collect 'every part of inland revenue' is a duty owed exclusively to the Crown. Notwithstanding the *Treasury* case in 1872, I am persuaded that the modern case law recognizes a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect."[7]

(ii) *Duke of Wesminster* is sought to be used to protect 'property interests' of the capitalist West now fast embracing the neoliberal ideology

9. On general overview of the judicial trends in the tax matters at our Supreme Court, I have perceived broadly three phases, each characterized by distinct features, though divergent tendencies, at times, often merge with shifting measure of emphasis. The phases can thus be identified:

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

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

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[3] Lord Buckmaster said in *Stag Line Ltd. V. Foscolo Mango & Co. Ltd*. [1931] All ER Rep 666 H L [3]

"It hardly needed the great authority of Lord Herschell in Hick v. Raymond and Reid (2) 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. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one."

[4] Cosgrove *The Rule of Law: Albeit Venn Dicey: Victorian Jurist* (1980).

[5] [1984] A.C. 474

[6] .(1981) 2 ALL ER 93 at 107 (H L),

[7] (1982) 2 All ER 93 at 112

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

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

10. The Phase I broadly pertains to the period when we still had the fundamental right to hold 'property'. During that period the judicial attitudes towards taxation resembled the British attitudes towards taxation. It was based on the assumption that tax-payers had no social obligation, and was free to arrange their affairs if they can do that without offending the law. An excellent exposition of the characteristic features of this approach has been made by H. H. Monroe in one of his Hamlyn Lectures;

> "If social attitudes to evasion are tolerant, judicial attitudes to avoidance are ambiguous. Inevitably one judge will emphasize the citizen's right to arrange his affairs within permitted legal limits to avoid the incidence of tax.[8] Another will be critical of the expenditure of so much ingenuity and expertise in a pursuit so devoid of public benefit.[9] Yet a third will find the artificial pretences involved in many schemes worthy of censure.[10] Inevitably metaphors are introduced into the discussion of policy and of individual cases: "There is a certain fascination in being one of the referees of a match between a well-advised taxpayer and the equally well-advised Commissioners of Inland Revenue, conducted under the rules which govern tax avoidance. These rules are complex, the moves are sophisticated, and the stakes are high."[11] There can be few other branches of the law where the interaction of interests between community and individual is regarded as no more than a game."

The Phase II reached the apogee of its verve in the early 1980s when an excellent account of judicial creativity and activism was given by some of our most creative and activist judges: to mention the five who constituted a fraternity: they were Krishna Iyer, Bhagawati, Desai, Chinnappa Reddy, and later Justice Thakar,. This approach, to the extent related to 'taxation', found the finest expression in the Constitution Bench judgment in McDowell[12], where Justice Reddy observed, (to which all other four Judges agreed):

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

11. Justice Reddy approved the view of the activist Judges of the U.K. who felt that there could be situations where the judiciary could provide better remedies, than the legislature. Lord Scarman observed in Furnis v. Dawson[13]:

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

The Phase III is characterized by the narrowing of judicial role in this phase of globalization fostering the neoliberal economic paradigm. Two features, dear to the

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[8]. e.g. Lord Tomlin in *Duke of Westminster v. CIR,* [1936] A.C. 119, Tax Cas , 490.
[9]. e.g. Lord Simon in *Latilla v. CIR* [1943] A.C. 377, 25 Tax Cas. 107.
[10]. e.g. Templeman L.J. In *IRC v. Gravin,* [1980] S.T.C. 295 and *W.T. Ramsay Ltd. v. IRC*, [1979] S.T.C. 582.
[11]. Per Donaldson L.J. *In IRC v. Garvin* [1980] STC 296 at 313.
[12] *McDowell & Co v. CTO* (154 ITR, 148 SC
[13] *[1984] 1 ALL ER 530*

proponents of neoliberalism are manifesting themselves in judicial approaches of our Supreme Court: these are[14]—

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

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

(iii) The British courts adopt a new salutary perspective

12. But many eminent Judges of later times preferred the technique of purposive interpretation in the determination of meaning, a method which our *Mimansa* had developed and applied in ancient times. It took years for justice-oriented and welfare-mandated attitudes to develop to acquire judicial recognition. In *lRCv. Federation of Self-Employed*[6], Lord Scarman explained the nature of the income-tax law, and pointed out the duties of the authorities administering the income-tax law. The following propositions follow from Lord Scarman's exposition in this decision of the House of Lords:

(i) In dealing with the affairs of tax payers the principles of fairness should operate, (ii) The duty to collect 'every part of inland revenue' is a duty not owed exclusively to the Crown. It is a legal duty owed by the Revenue to the general body of the taxpayers without discrimination,

(iii) The duty of the Revenue is to "consider as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect",

(iv) The success of tax avoidance scheme increases, *pro tanto,* the load on theshoulders of the great body of good citizens.

(v) To produce a sense of justice is an important objective of taxation policy,

(vi) The courts have a role, long established in the Public Law. There cannot be

> 'the retreat of the courts from this field of public law merely because the duties imposed on the Revenue are complex and call for management decisions in which discretion must play a significant role.' In England this approach got a brilliant illustration in *Furniss* v. *Dawson*[7] which

13. *The Duke of Westminster* dealt with the construction of certain plain transactions where the Revenue had no reasons to doubt the *bona fides*. In *Furniss v Dawson*[15] Lord Bridge highlighted this point when he said:

> "The strong dislike expressed by the majority in the *Westminster case* [1936] AC 1 at 19… for what Lord Tomlin described as the doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" is not in the least surprising when one remembers that the only transaction in question was the duke's covenant in favour of the gardener and the *bona fides* of that transaction was never for a moment impugned". (Emphasis supplied)

In *Simon's Taxes* (3rd ed)[16] in the Chapter on "The Construction of Taxing Acts and Document" the following has been perceptively stated:

> "In the case discussed above there was no suggestion of bad faith, or that the particular form of the transaction was adopted as a cloak to conceal a different transaction. The documents in question were intended to be acted on, and were

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

15. [1984] 1 All ER 530 at p. 536.

16. at p 315.

allowed by the parties to have their proper legal operation. Lord Tomlin stresses this fact in the *Westminister case*.[17] It is different where a deed or agreement is never meant to have effect, even in the absence of bad faith."

III

(a). The judgments in *McDowell* has neither been read rightly in *Azadi Bachao*, nor in *Vodafone*.

14. If their Lordships would have tried to explore *upakraopsamharo (the threshold and the conclusion) of* the judgment of *McDowell*, they would not have criticized the judgment by Justice Chinnappa Reddy as it contains neither the *upakrama* (the threshold issue) nor *upsamhar* (the conclusion) of the judgment. The *upakrama* and *upsamhara* are to be found only in the judgment delivered by Ranganath Misra J. on behalf of Chandrachud C.J., Desai, Venkataramiah and Ranganath Misra J. Justice Chinnappa Reddy '**entirely**' agreed with the judgment delivered by Misra J. and also delivered a separate judgment confined to the points of tax avoidance, which was at the heart of the matter in the main Judgment, which, in its turn, expressed *agreement* with the supplemental judgment in specific terms in the penultimate paragraph.

15. Justice Reddy's judgment is *supplemental.* He supplements the main judgment by an in-depth exposition of the topic of avoidance with a view to articulating the right judicial approaches for the tax avoidance cases. At the outset of his judgment, Reddy J says:

> "While I **entirely agree** with my brother, Ranganath Misra, J. in the judgment proposed to be delivered by him, I wish to add a few paragraphs, particularly to supplement what he has said on the "fashionable" topic of tax avoidance". [emphasis supplied].

"To agree" is explained in *Collins Cobuild* thus: "If one person agrees with another or if two or more people agree, they have the same opinion as each other." The *COD* defines it as "hold a similar opinion." "*Agree*" is semantically cognate with the expression "*approve*". *Collins Cobuild* says, "If you approve of an action, event, situation, etc. you are pleased that it has happened or that it is going to happen." It defines it to mean: "Confirm authoritatively; sanction" [from Latin *approbare,* assent to as good]. In *R. v. Shivpuri*[18] Lord Bridge of Harwich in his principal speech, which sent *Anderton v Ryan* packing only after less than a year holding that if "a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better", observed (at p. 341):

> "I was not only a party to the decision in *Anderton v. Ryan*, I was also the author of one of the two opinions approved by the majority which must be taken to express the House's *ratio*."

The purpose of this reference to the opinion of Lord Bridge is to submit that as the "approval" by the House turns the declarations of principles in Lord Bridge's Opinion in *Ryan* as "the House's *ratio*", so the expression of agreement in the penultimate para in the Judgment of Justice Misra (for himself and the three other Hon'ble Judges) makes the principles stated by Justice Chinnappa Reddy the Constitution Bench's *ratio*. Any other view accords neither with the language used, nor with judicial decorum and propriety we are duty bound to assume. To make the expression "we agree" in the Judgment of the 4 Hon'ble Judges mean something other than the adoption of Justice Reddy's approach in *McDowell* can be done, it is submitted, only on an authority to which Lord Atkin referred in his famous dissent in *Liversidge v Anderson*[19]:

> "I know of only one authority which might justify the suggested method of construction. 'When I use a word' Humpty Dumpty said in rather scornful tone, 'it means just what I chose to mean, neither more nor less'. 'The question is,' said

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[17]. [1936] A.C., at p. 20; 19 T.C., at p.521, H.L..
[18]. [1986] 2 All ER 334 (H.L.).
[19]. (1942) A.C. 206, at 245.

Alice 'Whether you can make words mean different things'. 'The question is,' said Humpty Dumpty, 'who is to be the master ---that is all."

16. In *Azadi Bachao* the Division Bench of the Supreme Court misses the *supplemental* character of the judgment by Chinnappa Reddy. It is surprising to find the Hon'ble Supreme Court saying in *Azadi Bachao*: "This opinion of the majority is a far cry from the view of Chinnappa Reddy J." It even observed:

> "We are afraid that we are unable to read or comprehend the majority judgment in *McDowell's case* [1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J. (as he then was)."

17. Justice Misra in his judgment, in the penultimate paragraph, draws up an excellent summary of Justice Reddy' judgment. **No better précis of Justice Reddy's judgment can be made than what is contained in the concluding paragraph of Justice Misra's judgment.**[20]

(b). There is 'no far cry' in *McDowell* between the Judgement of Justice Reddy and Justice Misra & others.

18. In *Azadi Bachao,* the Hon'ble Court had seen what was "a far cry" between the views of Justice Reddy and Justice Misra", and felt that Justice Reddy's view 'militated" against the view taken by his other four brother Judges. In fact the quotation from Justice Misra's judgment says precisely what Justice Reddy had said in detail with flourish and solemn judicial passion. "Colourable" in the expression "colourable device" would mean "Pretended, feigned, counterfeit" *[The New SOD]*. As to "dubious": "Something that is dubious is not considered to be completely honest or safe, and therefore cannot be trusted or approved of. *[Collins Cobuild English Language Dictionary*]. And subterfuge means, as *Cobuild* says: 'A *subtrerfuge* is a trick or deceitful way of getting what you want". Justice Reddy in his supplemental judgment has said nothing more, nothing less.

(c) Craven (Inspector of Taxes) v. White (Stephen) had extra-juristic factors to control the judicial reasoning. The impact of the Corporation that rule the World.

19. In *Vodafone* Judgement, the Hon'ble Court relied on *Craven (Inspector of Taxes) v. White (Stephen)* (1988) 3 All. E.R. 495 to prove its point that *Furniss v. Dawson* is no longer good in the U.K., suggesting thereby that the Judicial Perspective that it mandated (and is shared in McDowell) is no longer valid for us too. . It said:

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

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[20]. "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. On this aspect one of us, Chinnappa Reddy, J., has proposed a separate and detailed opinion with which we agree."

20. It is strange that what had to the seminal shift in *Craven* was the outcome of the power of the corporate world for whom the tax havens had been established in the Oceania. What happened in the U.K. after the decision of is thus summarized by O.Hood Phillip in his *Constitutional & Administrative Law* (at p. 44):

> "The problem arose in another way in *Furniss* v. *Dawson*[21] where the House of Lords abandoned the principles laid down in earlier cases and, in wide and vague terms, indicated that elaborate schemes designed to minimise tax liability might in future be at risk of being set aside at the instance of the Revenue. To allay alarm the Inland Revenue issued a draft statement of practice indicating what schemes would continue to be acceptable. As the result of concern expressed that the Revenue was claiming a dispensing power, the statement was withdrawn---and a similar one, in the form of a written answer to a parliamentary question, was issued by the Chief Secretary to the Treasury."[22]

21. It was the effect of heavy corporate pressure, cheered and supported by the corporations-sponsored Government, that the British Court in *Craven (Inspector of Taxes) v. White (Stephen*) (1988) struck a different note which is noted by our Supreme Court in the *Vodafone* Judgement. In the U.K., the vested interests behaved no better. Hermann writes:

> "Sensing a certain softness and confusion in 1988 composition of the Judicial Committee of the House of Lords the tax lawyers renewed their attack under the flag of the Special Committee of Tax Consultative Bodies. The first two parts of their report on Tax Law after *Furniss v. Dawson* is a lament on the blow inflicted to tax avoidance industry, which will hardly bring me to tears".[23]

The laments of the tax lawyers promoting this industry, unworthy in the eyes of common people, went in vain in the U.K. as the House of Lords is yet to duck or ditch *Dawson*.

22. But many things the British courts can do , our Courts cannot do. In the British Superior Judiciary, the legal position still continues in England: "In the contemplation of the law the Sovereign is always present in the court….".[24] Besides, the U.K. has no written and comprehensive Constitution with entrenched Rights. The British Court, when all is said, is the product of that country's constitutional history. . In our country, the courts are the creatures of our Constitution, and , thus, are bound to act in accordance with our Constitution. *McDowell*'s Judgement is founded on our Constitution's perspective that accords with our Constitution's Basic Structure. If this perspective was to be altered or modified, the only right way was to refer the matter to the Bench larger than that which decided *Azadi Bachao*, or *Vodafone*. .

23. It is humbly submitted that right from the day *McDowell* was decided by the Court, those who played truants with law were never comfortable with it. One petition had been moved before this Hon'ble Court for a reconsideration of the judgment (165 ITR St 225), but was not pursued.

24. I had read during my college days Bertrand Russell's *Autobiography*. The Chapter 8, on 'The First War', begins with a sentence that comes to my mind. He wrote: "The period from 1910 to 1914 was a time of transition. My life before 1910 and my life after 1914 were as sharply separated as Faust's life before and after he met Mephistopheles." Mephistopheles is the Devil in the Faustian literature . The crafty Devil could cast its spell to enmesh even the most learned Faust. Goethe's *Faust* is a great work

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[21] [1984] A. C. 474.

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

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

[24] O. Hood Phillips' *Constitutional and Administrative Law* 7th ed 371

in the world literature. He knew economics, law and management well as he had worked for sometime as the legal and financial expert in the court of Weimer. The difference between the times of *McDowell* and *Azadi Bachao* (or *Vodafone*) is best expressed by the tsunami of economic globalization that has subordinated the political realm to the economic realm driven under torrential gale of liberalism, and libertinism on account a change thus captured by . Geza Feketeluty in 2001 *Britannica Book of the Year*. 191.
:

> "Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international institutions has outstripped the development of appropriate global political structures."[25]

IV

(a) The Era of the Market-driven Globalisation; the emergence of trends subversive of our Constitution

Azadi Bachao

25. *Azadi Bachao* rejects the constitutional socialist mission of Constitution even by ridiculing said the Constitution Bench decision in *McDowell* 'a hiccup' and 'temporary turbulence', and making much of some casual mistake of Reddy J. in his comment on the *Duke of Wesminster* decided almost a century back which had considered a *bona fide* situation in the old world. The direct pointer to the Court's revolutionary departure from 'the Welfare mission' is in an article written by B. N. Srikrishna J., who had written the *Azadi Bachao* judgment. The article, 'Skinning a Cat'[**(2005) 8 SCC (J) 3]** was written before he retired from the Bench. He wrote:

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

Consider what Justice Sinha said, which B. N. Srikrishna, writing shortly after deciding *Azadi*, and still on Bench, quotes with appreciation (the Hon'ble Judge retired on . 21.5.2006 F.N.). The title of his article is 'Skinning a Cat'. These ideas are clear pointer to the abandonment of our Constitution's 'socialist' mission, and its commitments of the Welfare State agenda. We the citizens of this Republic have good reasons to get worried:

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[25] 2001 *Britannica Book of the Year*. 191.

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

Are we exposed to that national misfortune when under the neoliberal ethos would subvert our Democracy; and our Constitution would, perish the thought, skinned out!

26. If *Azadi Bachao*, or *Vodafone International Holdings v. Union of India & Anr* is to be decided the way it was done, *de hors McDowell*, a Constitution Bench decision, the only right way, in terms of our Constitution, could have been to refer the matter to a larger Bench.

(b) *The Judicial Perception of the Hon'ble Court's role in Azadi Bachao and Vodafone* goes counter to that prescribed in *McDowell.*

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

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

In *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*[27] the three judges Bench of our Supreme Court in its majority judgment reiterated this perception of judicial role, per B.N. Srikrishna, J. ---

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

The Flawed Judicial Thesis Soon Reversed

In *Standard Chartered Bank* our Supreme Court (Coram: N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar and B.N. Srikrishna, JJ.) reversed the view, taken in *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*[28], on the role of judiciary. Hon'ble Justice B.N. Srikrishna in his dissenting Judgment (on behalf of Justice N. Santosh Hegde and himself) acknowledges it tersely in these telling words:

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

By finding no difference between the role perceptions assumed in *Azadi Bachao* and *Vodafone,* both the Judgements make mere a *crie de Coeur* to our Government and Parliament precisely for the reason and purpose that, not even in the exercise of its Common Law Role, it can itself provide a remedy against the abuse of law and the stratagems of Fraud. No court before the decision in *Azadi Bachao* judgment felt it prudent to pass the buck to the Executive or the Legislature." [29] It is submitted that it was our Court's Constitutional Duty to render the administration of justice fair to our people. *Vodafone* is no different where the Hon'ble Bench made just a *crie de Coeur* in the following words:

> "These proposals,therefore, show that in the existing Section 9(1)(i) the word indirect cannot be read on the basis of purposive construction. The question of providing "look through" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the Section by interpretation." [para 71 in the main judgment].

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[27]. (2003) 184 CTR Reports 193].

[28]. [(2003) 184 CTR Reports 193].

[29] Jha, Shiva Kant, The Judicial Role in *Globalised Economy* p. 262 [Wadhwa, 2005]

> "..Necessity to take effective legislative measures have been felt in this country, but we always lag behind because our priorities are different. Lack of proper regulatory laws, leads to uncertainty and passing inconsistent orders by Courts, Tribunals and other forums, putting Revenue and tax payers at bay." [para 55 in the Concurrent judgement).

It is commonplace to say that when the perception of the role itself is wrong, the decision in bound to be wrong. If the 'observation-post' is wrong, things observed can never be right.

28. The Perception of the Judicial Role in *McDowell* is more liberal, more creative, more purposive, and more in tune with the civilized and democratic constitutions, and more in tune with the role of the common law courts. This Hon'ble Court adopted, as the observations show, the perception of the Judicial Role that was suggested by Lord Scarman in *Furniss v. Dawson*[30] already quoted above.

V

THE HIERARCHIC STRUCTURE IN THE SUPREME COURT

(a) Norms seem to have been departed from

29. In *Azadi Bachao,* it respectfully submitted, our Hon'ble Court appear to have erroneously departed from the judicial norms governing the hierarchic structure in the decision-making process of the Superior Judiciary. The treatment meted to *McDowell* does not accord with the doctrine of binding precedent.[31] It is also settled that the effect of a larger Bench *decision cannot be diluted or* read down, or glossed out, *by a smaller Bench*. It is worth underscoring that the Division Bench of two Hon'ble Judges should not have given to the judgment of Justice Reddy, with which all other Hon'ble Judges of the Constitution Bench specifically *agreed*, a short shrift "either by way of elaboration, expansion, clarification or in the process of trying to distinguish the same with reference to either the nature of causes considered therein or the consequences which are likely to follow and which, in their view, deserve to be averted".

30. Even the Privy Council's *Bank of Chettinad,* the Hon'ble Court followed in *Azadi Bachao*, was a decision by only three judges [(AIR 1940 P.C. 183 (Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir M.R. Jayakar)] whereas *McDowell* was by the Constitution Bench of this Hon'ble Court. It is felt that the Hon'ble Court would not have stated in the Judgment with an *ex cathedra* statement which was itself on the judicial anvil.

> "And as far as this country is concerned, the observations of Shah J. in CIT v. Raman [1968] 67 ITR 11 (SC) are very much relevant even today."

31. *Azadi Bachao* failed to notice that even the majority judgment in *McDowell* had noticed the observation of Justice Shah in *CIT v Raman & Co* [1968] 67 ITR 11 [Justice Reddy in para 16, and the Majority Judgement in para 41 of the report: AIR 1986 SC649]; and with full consciousness of this case, the Majority Judgement approved the judgment of Justice Reddy by observing in para 46:

> "On this aspect, one of us, Chinappa Reddy J. has proposed a separate and detailed opinion with which we agree."

"To agree" is explained in *Collins Cobuild* thus: "If one person agrees with another or if two or more people agree, they have the same opinion as each other." The *COD*

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[30]. [1984] 1 ALL ER 30 at page 533.

[31] *Chandra Prakash v. State of U.P.* AIR 2002 S C 1652; UoI & Anr v. Raghubir Singh (178 I T R 548); AIR 1989 SC 1933; *S. Shanmugavel Nadar v. State of Tamil Nadu* AIR 2002 SC 3484; *UoI & Ors v. Godfrey Phillips India Ltd*154 ITR 574) ;AIR 1986 SC 806

defines it as "hold a similar opinion." "*Agree*" is semantically cognate with the expression "*approve*". *Collins Cobuild* says "If you approve of an action , event, situation, etc. you are pleased that it has happened or that it is going to happen." The New Shorter Oxford English Dictionary defines it to mean: "Confirm authoritatively; sanction" [from Latin *approbare,* assent to as good]. In *R. v. Shivpuri* [1986] 2 All ER 334 at (H.L.) Lord Bridge of Harwich in his principal speech, which sent *Anderton v Ryan* packing only after less than a year holding that if "a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected better", observed (at p. 341):

> "I was not only a party to the decision in *Anderton v. Ryan*, I was also the author of one of the two opinions approved by the majority which must be taken to express the House's *ratio*."

32. The purpose of this reference to the opinion of Lord Bridge is to submit that as the "approval" by the House turns the declarations of principles in Lord Bridge's Opinion in *Ryan* as "the House's ratio", so the expression of agreement in the penultimate para in the Judgment of Justice Misra (for himself and the three other Hon'ble Judges) makes the principles stated by Justice Chinnappa Reddy the Constitution Bench's *ratio*. Any other view accords neither with the language used, nor with judicial decorum and propriety we are duty bound to assume.

(b) Both *Azadi Bachao* and *Vodafone* ignored the Judicially established binding rule governing judicial decision-making*:* the Root of All Errors

[A]

33. *Azadi Bachao* illustrates a fundamental error of making certain observations on the Government's Treaty-Making Power in breach of the right mode for deciding such issues. The Supreme Court had established judicially a principle that no court should indulge in unnessary observations which create problems both for other courts and the litigants. In *Basheshar Nath v. CIT* (AIR 1959 SC 149) our Supreme Court said: 'The court will not decide Constitutional question if a case is capable of being decided on other grounds." "The court will not decide a larger Constitutional question than is required by the case before it. In *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr*[32] a Bench of 9 Hon'ble Judges contain the following salutary observation:

> "As this Court has frequently emphasized, in dealing with constitutional matters it is necessary that the decision of the Court should be confined to the narrow points which a particular proceeding raises before it. Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover ground which is strictly not relevant for the purpose of deciding the petition before it. Obiter observations and discussion of problems not directly involved in any proceeding should be avoided by courts in dealing with all matters brought before them: but this requirement becomes almost compulsive when the Court is dealing with constitutional matters."[33]

It is, in effect, there is a binding rule that the " court will not decide Constitutional question if a case is capable of being decided on other grounds." [*Basheshar Nath v. CIT* AIR 1959 SC 149]. And in *M.M. Pathak v. Union* AIR 1978 SC 803 this Hon'ble Court said: (in the context of alternative challenge to the impugned Act under Art. 19(1)(f)) per Bhagawati J.: "It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case." (at p. 828).

[B].

34. Nothing turns on the judicial observation in the *Vodafone Case*, that the Court saw no difference between *Azadi Bachao* and *McDonald*. The Judgement of Justice Reddy ,if

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[32]. AIR 1967 SC 1 Coram : P. B. Gajendragadkar, C.J.I., A. K. Sarkar, K. N. Wanchoo, M. Hidayatullah, J. C. Shah, J. R. Mudholkar, S. M. Sikri, R. S. Bachawat and V. Ramaswami, JJ.

[33]. AIR 1967 SC 1 at p. 7 para 16.

not taken as one providing reasons for the main Judgement in *McDowll*, would just become an essay, without rhyme or reason. Besides, if it did not matter in the actual decision in *McDowell* why was it criticized as a mere ‘hiccup’ or ‘temporary turbulence? If the Hon'ble Court, whilst deciding *Vodafone,* thought that there was no difference between *Azadi Bachao* and that Case, the matter should have gone to a larger Bench for decision.