(Shri Shiva Kant Jha's Constitutional Essay on current legal problems)

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AZADI BACHAO AND *VODAFONE,* AND NEW CORPORATE LIBERALISM OF MARKET-DRIVEN GLOBALISATION : A Critique

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Synopsis

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	Azadi Bachao and Vodafone seem to have misled the Andhra Pradesh in deciding *M/s.Sanofi Pasteur Holding SA, v. The Department of Revenue Ministry of Finance*
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I

The Heart of the Matter

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

> **'This matter concerns a tax dispute involving the *Vodafone* Group** with the Indian Tax Authorities, in relation to the acquisition by Vodafone International Holdings BV, a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd., a company resident for tax purposes in the Cayman Islands vide transaction dated 11.02.2007, whose stated aim, according to the Revenue, was "acquisition of 67% controlling interest in HEL",....' (emphasis supplied)

In Vodafone the Hon'ble Supreme Court was considering a tax dispute the determination of which was strictly controlled by the provisions of the Income-tax Act, 1961. The Court considered the 'corporate structure' impregnable justifying only the 'look at' approach, not the 'look through' approach in exploring the relevant facts. In that

case the facts disclosed a ' complex corporate structure' through the intricate lattice of holding and subsidiary companies establishing inter-active conglomerates spanning the globe though their operational theatre was in India.

II

The 'soft' and ' hard' structure of *Vodafone*

.Every Judgement, in fact every decision, has inherently two structures.: 'hard' and 'soft'. The VODAFONE decision shows in its architecture:

(i) 'soft structure' of assumptions and ideas, and its

(ii) 'hard structure' revealed through the interpretation of Sections 9(1)(i) and 195 of the Income-tax Act as interpreted by our courts. .

A comparative comprehension of the 'soft' structure of *Azadi Bachao* and *Vodafone* shows that they shared common the neoliberal capitalist worldview; and remained wholly indifferent to the constitutionally mandated 'welfare' and 'socialistic' so effectively set forth in the 'soft' structure of *McDowell*..

As the Hon'ble Court, in *Vodafone*, shared the 'soft' structure assumed in *Azadi Bachao*, it went ahead on the same track. In *Azadi Bachao* the Hon'ble Court had ignored *McDowel*l by going to the extent of ridiculing this Constitution Bench decision as 'a hiccup' and 'temporary turbulence'; but in *Vodafone,* a subtler way to achieve the same end was adopted. by not seeing any difference between *Azadi Bachao* and *McDowell,* they differed on fundamental points having bearing on the interpretation of law, and on the perception of the mission of our Constitution. . The 'soft' structure of the former differs from the 'soft' structure of *Vodafone* as widely as does cheese from chalk. *Azadi Bachao* and *Vodafone* are the judicial attempts to bring about a constitutional revolution by departing *sub silentio* from the 'welfare state' approach to the promotion of the neoliberal paradigm that is bound to help promote the cause of 'corporatocracy', at the cost of democracy. .

III

THE 'SOFT' INFRASTRUCTURE IN THE *VODAFONE* JUDGEMENT, AND

a

The supreme vector, shaping the premises in the reasoning in this *Vodafone Case,* is, it is respectfully submitted, the neoliberal zest to promote FDI. This is demonstrated by the content, tone and tenor expressed in *Vodafone.* Besides, the judicial logic at work in *Vodafone* is just a categorical syllogism that runs thus:

> The **major premise** is: that, which promotes the economic policy of FDI promotion, is good.
>
> The **minor premise** is: that the Department's view of the tax law, as adopted in the *Vodafone Case*, does not (or is unlikely) to promote the economic policy of FDI promotion.
>
> The **conclusion** follows: the Department's view is not good.

Throughout the main and the concurrent Judgements the most dominant concern is to facilitate FDI. Whatever promotes it is good. Off-shores centres are good, corporate structuring is good, minimal government supervision is good…….; everything is good that that facilitates FDI.

It is submitted that the Hon'ble Court overlooked both our Constitution and the Income-tax Act. There is a miscarriage of justice because the effect of the Judgement is to promote *extraneous purpose*. If the statutory remit is transgressed, it is clearly acts

ultra vires; and such an act amounts to malice in law.[2] This proposition is illustrated in matters of foreign affairs in *R. v. Secretary of State for Foreign Affairs, ex parte World Developed Movement Ltd*[3], in the context of the Overseas Development Act 1980 where the QBD holding, to quote from the head note:

> "Although the Foreign Secretary was entitled , when considering whether to provide overseas aid to developing country pursuant to s. 1 of the 1980 Act, to take into account political and economic considerations,….., the grant of the aid had to be for the purpose of s. 1, namely the promotion of economically sound development.

.Besides, the Judges seldom have the credentials to decide socio-economic issues of this sort. If such issues were to be decided, the decision-makers would have studied all the shades of views, and the short-term and long-term effects of such untested economic assumptions in the context of our polity: law and the Constitution; and should have heard in the open court persons with sound proficiency in socio-management. The Hon'ble Judges should have kept in mind what Justice Holmes had said in his classic dissent in *Lochner v. New York*[4]:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I desire to study it further and long before making up my mind."

b

FDI: a short Inquest to show that the quest for FDI is extraneous, and misconceived.

The Hon'ble Judges, it is submitted, cast aside their judicial robe of detachment, and virtually turned to play the role of economic advisors with the neoliberal commitments. They did not realize that inviting FDI, or facilitating its incoming , is not a judicial function. The Hon'ble Court failed to consider our Constitutional provisions, and failed to evaluate the role of FDI in the economic management of our country. Some of the reasons, which have led this humble self to submit thus, are summarized thus:

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

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[2]. *Education Sec v. Tameside* BC(50) 1977 AC 1014, quoted at page 1535 of Seervai's *Constitutional Law*, Vol – II; Lord Somervell quoting *Brett v. Brett* in *AG v Prince Earnest Agustus* 1957 AC 436 at 473 [quoted in Seervai, *Cons. Law* pg. 189]; per Justice Krishna Iyer in *M.P v. Orient Paper Mills* (AIR 1977 SC 687 overruled on another point in *Orissa v. Titagarh Paper Mills Ltd*. AIR 1985 SC 1293; per Lord Esher M.R. in *R. v. Vestry of St. Pancras*; *Federation of Self-employed and Small Business Ltd*. (1981) 2 ALL ER 93 at 107 (HL) quoted in *S.P. Gupta v. President of India & Ors*. (AIR 1982 SC 149 at page 190.; *Rohtash Industries Ltd. v. S.P. Agarwall*, AIR 1969,SC 707.; *The Cheng Poh v. Public Prosecutor*, (1980, AC 458, PC) discussed by H.M. Seervai on opp. 1125-1128 of his *Constitutional Law*, vol -II.; Lord Denning in *Breen v. A.E.U* (1971) 2 QB 175.; *Padfield v. Minister of Agriculture, Fisheries and Food* (quoted by Seervai, *Constitutional Law of India,* Vol-II 4th ed.P. 1529).

[3] [1995] 1 All ER p. 611

[4] (1904) 198 U.S. 45

(ii) Joseph Stiglitz possesses an undoubted authority to speak on the relevance of FDI, and he has posed serious embarrassing questions about its worth in his *Globalization and its Discontents*. Some of his points are cryptically quoted from that book:

> "There is more to the list of legitimate complaints against foreign direct investment. Such investment often flourishes only because of special privileges extracted from the government."
>
> "The foreign direct investment comes only at the price of undermining democratic processes. This is particularly true for investments in mining, oil, and other natural resources, where foreigners have a real incentive to obtain the concessions at low prices."
>
> 'There is more to the list of legitimate complaints against foreign direct investment. Such investment often flourishes only because of special privileges extracted from the government. While standard economics focuses on the distortions of incentives that result from such privileges, there is a far more insidious aspect: often those privileges are the result of corruption, the bribery of government officials. The foreign direct investment comes only at the price of undermining democratic processes. This is particularly true for investments in mining, oil, and other natural resources, where foreigners have a real incentive to obtain the concessions at low prices." (at p. 71

(iii). The way FDI is invited in our country, and the way it operates, is designed only mainly to help the extractive investors, who reap short-range profits somehow, and vanish without any loyalty for our country. How the factors, set out at (i), (ii) and (iii) *supra*, seem, to have operated in this *Vodafone Case* deserve to be seen..

c

No extraneous purpose can be pursued under our Constitution or the Income-tax Act, 1961

.(i) Concern to promote the incoming of the FDI cannot be, in our country. a ground for departing, or over-straining, the law and the Constitution. In India all the organs of the State have conferred powers and prescribed roles: and all these, without an exception, are subject to our Constitution's limitations. This is the effect of the Articles 53, 73, 245, 246, 253, 265, 363, 368, 372, and 375 of our Constitution. Our Constitution contains no provisions for limitations on national sovereign powers, in the interests of international co-operation, as is the case in the constitutions of *Belgium* (Art 25bis*), Denmark* (Art 20), *Italy* (Art 11), the *Netherlands* (Art 92), *Spain* (Art 93), the *Federal Republic of Germany* (Art 24), nor it lacks the *terms of prohibition* as fetters on the Executive's Treaty-Making Power [as it was found in the U.S. Constitution noted by Justice Holmes to sustain the *Migratory Bird Treaty Act of 1918]*,

(ii) Our Executive Government possesses ample powers for economic management , and for policy formulations pertaining to trade and investments. But it has absolutely no power to do such things, howsoever desirable, by invoking the provisions of the Income-tax Act. . There is no scope for invoking the executive power, *simplicitor,* when the issues pertain to this branch of law. Denial of inherent power to the Executive in the field of tax law, is designed to achieve an important constitutional mission thus described in *The New Encyclopedia Britannica* [Vol.28 p.402] :

> "The limits to the right of the public authority to impose taxes are set by the power that is qualified to do so under constitutional law. In a democratic system this power is the legislature, not the executive or the judiciary….."

(iii) The Policy quotient available to the Executive under the Income-tax Act is *nil.* The governmental economic policies, or any other policy, is irrelevant for the tax authorities *till they are enacted in the statute itself.* And then the tax authorities function not to promote any policy, this or that, but they act to implement the provisions of the law for implementing which they hold Parliamentary commission (justifying the word 'commissioner' with the designation of the posts they hold.. The governmental economic policies, or any other policy, is irrelevant for the tax authorities till they are enacted in the statute itself. And then the tax authorities function not to promote any policy, this or that, but they act only in discharge of their statutory DUTIES.

(iv) Art. 265 of the Constitution authorizes the income-tax law to be made under the legislative field prescribed by the entry 82 of the Union List of the 7th Schedule to our Constitution. As per the *preamble* and the *scheme* of the Income tax Act, 1961, the OBJECT of the Act cannot be anything else than what Lord Hewart observed in *Rex v. Special Commissioner* (20TC 381 at 384) that the duties imposed upon the Commissioners of Income tax are "in the interest of the general body of tax payers, to see what the true assessment ought to be, and that process, a public process directed to public ends." To use a law framed in pursuance to the power granted under Article 265 of the Constitution would be a culpable exercise of power if objects *extraneous* to Art. 265 are sought to be promoted.

(v) As per the *preamble* and the *scheme* of the Income tax Act, 1961, the mission of the Income-tax Administration, is to collect tax as per the law. Lord Scarman's observations, on the role of Income tax, and the functions of the authorities administering the Law of Income tax, are revealing. Referring to the duties of the Board of the Inland Revenue he observed:

> "The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.[1]"

d

The *Azadi Bachao* 's and *Vodafone* 's *amour proper* for the needs of the market-driven globalised economy

The impugned Judgement relies on 'international law practice' which is an extra-juristic argument made fashionable by those who work for the MNCs, and the global economic gladiators of the present-day neo-capitalist system. Georg Schwarzenberger in *A Manual of International Law* (5th ed.pp. 46-47) formulates certain core propositions to show how the so-called International Lawyers have tried to subjugate the democratic constitutions. He has prefaced his exposition with a remarkable observation which deserves to be borne in mind. He says:

> "The doctrine of the supremacy of international law over municipal law appeals to the *amour proper* of international lawyers and has its attractions *de lege ferenda.* In *lex lata,* it corresponds to reality on the –always consensual –level of international institutions, in particular international courts and tribunals."

'*Amour proper'* means "Respect for oneself" which easily turns into egoistically pursuit to aggrandize power and status. Taxation is wholly a domestic jurisdiction of a State. There is nothing like 'International Law of Taxation'. It is nowhere mentioned under the statute, it is nowhere recognized under our Constitution. Even the provisions under the Tax Treaties apply only with reference to our domestic statutory provisions. *Klaus Vogel on Double Taxation Conventions (p.20)* aptly said that the "**Tax treaty rules** assume that both contracting States tax according to their own law; unlike the rules of private international law, therefore, treaty rules do not lead to the application of foreign law."

e

The ONLY course by which the Income-tax Act could have been made to help the incoming of the FDI

If the purpose is to invite FDI, by relaxing the terms of the Income-tax Act, 1961, the ONLY right course for the Government of India was to frame a law facilitating the incoming of foreign funds. This would ensure transparency, and would accord with the law of our country. The Authority for Advance Ruling had aptly observed:[5]

> "**In order to encourage inflow of funds form the Emirates to India, the Government of India could bring about a legislation granting relief to such inflow of funds and income earned by investments of such funds. The Government of India has not chosen to do so. Therefore it will not be right to hold that the real object of this agreement instead of avoiding double taxation was to encourage inflow of foreign funds into India by reducing rates of taxes even when there was no double taxation of income at all.** ***The object of the agreement was avoidance of double taxation of income and prevention of fiscal evasion. The agreement was entered into in exercise of the power conferred by section 90 of the Income-tax Act, section 24A of the Companies Profits (Surtax)Act and section 44 of the Wealth-tax 1957. Such an agreement could only be entered into, (a) for granting relief in respect of tax actually paid twice on the same income under the tax laws in force in both the countries, or (b) for avoidance of double taxation of income under the Income –tax Act and the Corresponding law in force in the foreign country."*** **(Emphasis supplied.}**

Lord Edmund-Davies in *Vestey v IRC* (1997) 3 All ER 976 at 1002) said that Lord Radcliffe "never understood the procedure of extra- statutory concessions in case of a body to whom at least the door of Parliament is open every year for adjustment of the tax code."

f

60.The Hon'ble Court's decision suffers from an 'error apparent on the face of the record as it goes against the language of the Income-tax Act which nowhere authorizes the pursuit for obtaining FDI as the legitimate mission for pursuit by any authority at work under the Income-tax Act..

. The Judgment would help promote the neoliberal agenda of economic globalization by facilitating foreign investment routed through tax havens and secrecy jurisdictions. It may help more funds from outside but shall present an uphill task for the government to know what sort of money is coming, and from whence. In most cases the

[5] (1999) 239 ITR 650 at 674

apparent would not be real. The rich would get richer, but the **Consolidated Fund of India** is likely to suffer unless we believe that by proving abundant cake to the rich, the poor can hope to get some scrum sometimes someday. The judgment is likely to promote neo-liberalism, rather than the vision of constitutional socialism of our Constitution. It would delight those who believe in neo-constitutionalism, and the neo-liberal agenda of the Economic globalization. Nether our Constitution, nor the Income-tax Act, enacts the ideas of Hayek, or Friedman, or those highly decorated individuals who happen ruling the roost in our Administration. This approach reminds one of Justice Holmes in *Lochner v. New York* who aptly observed that the Fourteenth Amendment of the U.S. Constitution did not enact Herbert Spencer's *Social Statics*. This humble self would submit, variating on that celebrated dictum : "The Income-tax Act, or our Constitution, has not enacted the ideas of Milton Friedman, or Hayek." This wish to get FDI, a cardinal commitment in the neo-liberal economic paradigm, can be answered by quoting what Justice Holmes said in his classic dissent in *Lochner v. New York*[6]:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I desire to study it further and long before making up my mind."

g

This humble as a witness to our Government's craze for FDI

This humble self had seen, for several years, our Government's passionate craze for the FDI unmindful of its consequences. When this this humble self was arguing before the Delhi High Court (the matter which on appeal before the Supreme Court became *Azadi Bachao*), he found the Solicitor General (Mr. H. Salve as he then was, and was later to become the counsel for a Mauritian company in *Azadi Bachao*, and still later the eminent counsel for *Vodafone*) all for FDI even going to the point of not seeing any difference between an Indian citizen and a foreigner. The High Court had rejected his plea, with a well-deserved curt judicial comment:

> "So far as submission of the learned Solicitor General to the effect that Mauritius route may be taken recourse to for gaining benefit as is done by the industrialist setting up industries in M.P or some other place in the country where tax benefit are given re concerned, the same is stated to be rejected. "

Our Government, it seemed, had forgotten that the Indians live to swim and sink with the lot of our country, and can never be its mere fair weather friends. If the Government's morbid assumption is interiorized by our people, all patriotic ideas would vanish exposing us to the servitude to some hegemonial power, be that a foreign state, oligarchic institution, or the corporations whatever be their structure.

. This humble self witnessed the strange scenario when *Azadi Bachao* (2004) 10 SCC 1], came up for hearing before the Supreme Court. . The Union of India appealed to the Supreme Court where, at the persuasion of Sri Arun Jaitley, Senior Advocate, 'a tax haven' company was allowed to become a co-appellant! It was amazing to see Mr. Salve , who, as India's Solicitor-General, had argued before the Delhi High Court, chose to change his role to become the chief Counsel for the tax haven company. And Mr. Soli Sorabjee, the Attorney General, who represented our Government before the same Court in *Azadi Bachao*, had once upon a time appeared in *McDowell's case* and lost it to the Government of India, but now, as India's Attorney General, he saw to it that the Court turned critical of that decision, even going to the extent of ridiculing that Constitution Bench decision by calling it 'a hiccup' and 'temporary turbulence'! The bastion of the

[6] (1904) 198 U.S. 45

Revenue suffered a quake. It was a strange spectacle to see how a deep fraternity between the 'tax-haven' company and our Government grew. At the end, of the day, the Division Bench of the Supreme Court overruled the Delhi High Court by dubbing it as one in which the High Court had 'erred on all counts in quashing the impugned circular'. The tax haven company and the Government of India were seen to sail in the same boat: crying for FDI, FDI, and FDI.....

Then the Petitioner saw with amazement that this Hon'ble Court uncritically adopted the ideas of an 'interested' person's book by quoting three long paragraphs. The serious breach of Natural Justice was on account of relying on Roy Rohatgi's *Basic International Taxation.* This author had been a partner of the infamous M/S Arthur Andersen for many years. The book was published in 2002 when the matter was before the Supreme Court, it was being written when the PIL was being pursued before the Hon'ble Delhi High Court. Its author was an advisor to many tax haven companies. It was written from the point of view of the OECD and tax havens. India is not a member of the OECD despite the occasional honeymoon we see between the spokespersons of India Incorporated and the OECD. In the considered view of this humble self it was this book which led the Court to observe ideas so apparently flawed as these:

> "There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development…."

Had this book been ever brought into focus in course of hearing, the Court could have been persuaded to agree that such a book could not ever be basis of a judicial decision.[7] . The fruits of the Hon'ble Judges' private research could not be used with hearing the parties. Lord Bridge L.J. in *Goldsmith v. Sperrings Ltd* [1977] 2 ALL ER 566 at 590. . Lord Bridge L.J. in *Goldsmith v. Sperrings Ltd* [1977] 2 ALL ER 566 at 590 had aptly observed:

> "….But the fourth and most important reason is that this part of the Master of Rolls' judgment decides against the plaintiff on a ground on which Mr. Howser, for the plaintiff, has not been heard. This is because Mr. Comyn never took this point, *and* the Court did not put the point to Mr. Howser during the argument. *Hence there is a breach of the rule of audi alteram partem which applies alike to issues of law as to issues of fact. In a court of inferior jurisdiction this would be ground for certiorari ; and I do not think that this Court should adopt in its own procedure any lower standards than those it prescribes for others*." (italics supplied).

This humble self recalls that Shiva Kant Jha, the Respondent before the Court in *Azadi Bachao*, after witnessing all that had happened, wrote a letter to Shri Jaswant Singh, the Minister of Finance (during 2002-2004) in the BJP Government, bringing to his knowledge of the Government how things had unfolded themselves, and he requested him to take appropriate actions: to consider whether some legislative change was worthwhile, or whether it was feasible to move the Supreme Court for a reconsideration of its decision in *Azadi Bachao* so that public revenue and public values were not jeopardized. In the penultimate paragraph of that letter, he had written to then Finance Minister:

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[7] *Hood Phillips' Constitutional and Administrative Law* (7th ed) at p 24; *Oppenheim's International Law* (9th ed) at p. 43; Shiva Kant Jha, *Judicial Role in Globalised Economy* (2005) , Chapt. 8 : 'Reading with Discrimination on the use of a textbook in a Judicial proceeding'.

> " This letter is just *pro bono publico* in the interest of the common people of this country with per capita income just U.S. dollars 440 [when in Mauritius it is U.S. dollars 3,540]. We can forget only at our peril Gandhiji's *talisman*: " Recall the face of the poorest and weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it?"

But the Government took no action This humble self was not surprised as our Government is accustomed to behave this way. In the penultimate para of its Judgement [Shiva *Kant Jha vs UOI (2002) 256 ITR 536]* (whose cause title was changed to become *Azadi Bachao* when the SLP, settled by Mr. Salve was filed before the Supreme Court), the Delhi High Court had observed:

> " We would however like to make an observation that the Central Govt. will be well advised to consider the question raised by Shri Shiva Kant Jha who has done a noble job in bring into focus as to how the Govt. of India had been losing crores and crores of rupees by allowing opaque system to operate."

But our Government, whose cause, in effect, this humble self had espoused before the Court,,never thought it fit to seek his help. After all what was there to ask him which our Government itself was not fully aware? T.S. Eliot had said in his *Gerontion:*:

After such knowledge, what forgiveness?
Think now History has many cunning passages, contrived corridors…

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IV

(a) THE 'HARD' STRUCTURE IN THE *VODAFONE* JUDGEMENT

The litigation originated as the consequence of the Income-tax Department of our country claiming that under the Income-tax Act, 1961, tax was to be withheld on the payments made to the HTIL in relation to the transaction described above. The Hon'ble Court, in the main Judgement of the two Hon'ble Judges, concentrated mainly on the following crucial aspects:

(i) The interpretation of Section 9(1)(i) of the Income-tax Act, 1961;
(ii) The nature of the Harrison Corporate Structure;
(iii) The Role of the CGP in the transaction;
(iv) The extinguishment of HTIL's interests;
(v) Rights and entitlements;
(vi) The norms declared by the Hon'ble Supreme Court in *UoI v. Azadi Bachao Andolan* and *McDowell and Co. Ltd v. CTO.*
(vii) The interpretation of Sections 195 and 163 of the Income-tax Act,

In the light of its views on the topics afore-mentioned, the Hon'ble Court felt that no case was made out by the Revenue as the gains arising from the transaction, discussed above, were not liable to tax in India, as that event had taken place between two non-residents outside India's territory.

(b) Section 9(1) (a) of the Income-tax Act, 1961

The main judgment decided against the Department holding that the Department went wrong in invoking Section 9(1)(i) of the Income-tax Act, 1961 for the reasons

stated in the main Judgement: they are thus broken into fragments for the convenience of discussion. The Hon'ble Court said:

(i) "For the above reasons, Section 9(1)(i) cannot, by a process of interpretation, be extended to cover *indirect transfers* of capital assets/property situate in India. To do so, would amount to changing the content and ambit of Section 9(1)(i)."

(ii) "The legislature has not used the words indirect transfer in Section 9(1)(i)."

(i) "If the word indirect is read into Section 9(1) (i), it would render the express statutory requirement of the 4th sub-clause in Section 9(1)(i) nugatory."

(ii) "This is because Section 9(1)(i) applies to transfers of a capital asset situate in India."

(iii) " This is one of the elements in the 4th sub-clause of Section 9(1)(i) and, if indirect transfer of a capital asset is read into Section 9(1)(i), then the words capital asset situate in India would be rendered nugatory."

(iv) 'Similarly, the words underlying asset do not find place in Section 9(1)(i)."

(v) ' Further, "transfer" should be of an asset in respect of which it is possible to compute a capital gain in accordance with the provisions of the Act.".

(vi) "Thus, the words directly or indirectly in Section 9(1)(i) go with the income and not with the transfer of a capital asset (property)."

And later the Hon'ble Court pointed out (i) that Section 9(1) (i) does not have a 'look through provision', so indirect transfers of capital assets situated in India is not covered; and (ii) Section 9 (1) of the Act is a legal fiction cannot be given a purposive interpretation that would transform the character of the charge imposed under Section 9(1)(i) of the Act. Therefore, the Hon'ble Court held that the transfer of the CGP share did not result in the transfer of the capital asset in India. It is most respectfully submitted : (a). that the Hon'ble Court, in spelling out such reasons determining the content of the Section 90(1)(i) has misdirected itself in many ways.

. Section 9 (1) (i) created a charge, Section 195 gives it an effect in the matter of recovery. Once it has been done, recovery is always the matter of power. If it can be recovered within our territory, Section 195 is operative; if not, the Section 195 cannot help. When Section 195 cannot help, taxes to be recovered may not be recovered through any proceeding in foreign jurisdictions, except to the extent the terms of a treaty permit [see *Government of India v. Taylor* (27 ITR 356 HL)].

(c) CRITICISM

. Section 9(1)(i) prescribes that the "following incomes shall be deemed to accrue or arise in India :-

' all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India…."

The Hon'ble Court has overlooked the inevitable presence of 'indirectly' governing the effect of the fourth situation contemplated by Section 9(1)(i). The morphology of the Section can be analyzed, and presented thus:

1	2	3	4	5
A	**All income accruing or arising,**	**Whether directly or indirectly**	through or from	(i)any business connection n India,
B			through or from	(ii) Any property in India,
C			through or from	(iii) any asset or source of income in India
D			through	(iv) the transfer of a capital asset situate in India

(1) points out the taxable event; (ii) the mode or protocol for (i); (iii) the zone or cone of causation of (i); (iv) the description of the income, or property, which is the subject-matter of the income brought to charge under Section 9(1) (i). The segment 3 uses the expressions 'through or from', whereas (iv) mentions only 'through'. The following features, both syntactical and semantic, went unnoticed by the Hon'ble Court;

(a) The expressions in Segments 2 and 3, apply to 4 by the inevitable effect of the order of words, and the structure of the sentence; and

(b) the word 'from' refers to pointed source or time of causation, but 'through'[8] is wider than 'from'[9], broad enough to include 'from' even.

It is submitted that it is not a case where the Court had taken notice of the adverbial clause (whether…) and construed whether it controls the 4th item. Here the Hon'ble Court did not notice, the expression in the structure of Section 9(1) (i) though stylistically and morphologically always present. Besides, the word 'property' in Section 9 (1)(i) is wider than the concept of 'asset' , and this Petitioner would submit that the Hon'ble Court has misdirected by discovering the concept of "underlying asset" in Section 9(1)(i), when it speaks of something much different and wider,

The above analysis is also supported by the CBDT Circular No 372 of 8 Dec., 1983: to quote from the said Circular---

> "The scope and effect of these amendment have been elaborated in the following portion of the departmental **circular** No. 372, dated 8th December, 1983:-
>
> *Income deemed to accrue or arise in India—Section 9*.---**10.1** Under section 9(1)(i) of the Income-tax Act, any income accruing or arising whether directly or indirectly,--
>
> (a) through or from any business connection in India, or
>
> (b) through or from any property in India, or
>
> (c) through or from any asset or source of income in India, or
>
> (d) through the transfer of a capital asset situate in India,
>
> is deemed to accrue or arise in India. "

[8] 'through': ' travels or covers the whole of a l,ong distance or journey without interruption or change' ; ' From one end, side, or surface of (a body or space) to the other, by passing within it; into one end, side, or surface of and out at the other. from beginning to end of; in our along the whole length or course of; spec. during the whole temporal extent of. (*Shorter Oxford English Dictionary*).

[9] 'from': Denoting departure our moving away: expr. Relation with a person who or thing which is the starting –point or site of motion. (*Shorter Oxford English Dictionary)*

The expression " whether directly or indirectly" is shown to govern all the (a), (b), (c), and (d). The Courts have recognized in various decisions that the CBDT's contemporary circular explaining a statutory provision is a good aid to exposition as it is considered *contemporanea exposition*.

. The Hon'ble Court missed to notice the difference between Sections 4 (the Basis of Charge) and 5 (Scope of total income), and Section 9 (1)(i) of the Income-tax Act, 1961. Whilst Sections 4 and 5 contemplate normal situations of tax charge on the conventional basis of territorial jurisdiction of the State, Section 9 (1) (i) belongs to a different realm. Section 9 pertains to 'Income deemed to accrue or arise in India', which is not concerned with 'territoriality' or 'extra-territoriality' but traps transactions to the charge of tax on a new criteria for prescribing which Parliament is competent under Article 245 (1) (2), and under the general principle of taxation discussed in the two leading British Cases cited by Justice Radhakrishnan but to prove a point which these Cases, in effect, disprove: these are *Clark (Inspector of Taxes) v. Oceanic Contractors Inc*. (1983) 1 ALL ER 133 and *Agassi v. Robinson [2006] 1 WLR 2126.*

The Section 9 refers to 'income' as the Charge to tax can only be on income (ultimately the authority to tax rests on the entry 82 of the Union List in the 7th Schedule of our Constitution). Section 9(1)(i) is a 'deeming' provision operating within the semantic environment of Section 9 of the Act. 'Legal fiction' assumes existence of a fact which does not really exist,[10] provided the declaration does not offend the constitution[11]. In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created[12], and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. [13] This 'deeming' colours and controls all the concepts incorporated in Section 9 of the Income-tax Act so that no interpretation can be given to any term in Section 9 which upsets the full effect of the legal fiction. In the last clause of Section 9 (1)(i) the the term transfer means the change of ownership as it is construed by the word in the Income-tax Act. It can neither be narrowed, nor subject to the constraints and constrictions under the Company Law as the objectives of the Income-tax Act are different from the Company law, The other two expressions, 'capital asset' and ' situate in India' are to be taken in the sense as explained the following two paragraphs.

. The 'capital asset' in Section 9(1)(i) is an expression of a wide connotation. It includes many contractual rights It includes a fixed deposit in a bank[14], it includes even foreign currency[15]. It is wide enough to take in its ambit all that comes within 'capital field'.' Capital structure' builds its subjacent and super-structure integral to the capital structure. In the ultimate analysis, what is this CGP 'share? It is just a paper evidencing, and granting entitlement to certain claims on the fund, and the operational matrix of the HEL in India. This view cannot be given up by importing the two concepts of corporate accounting: what Black calls 'asset acquisition' and 'share acquisition'. Or what this Hon'ble Court has called 'the asset sale' and 'share sale' Such distinctions pertain to different realms. In determining how the transfer of shares in the CGP-Vodafone situation involves the pro tanto transfer in all rights and interests inhering in the claims which stood granted to *Vodafone* through the transaction at the heart of the litigious situation in the *Vodafone* Judgement.

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[10] J.K. Cotton Spinning & Weaving Mills Ltd v. UoI AIR 1988 SC 191 P. 202 [Justice G P Singh, Principles of Statutory Interpretation pp 365-366 (11th ed.)]
[11] *Indira Sawhney v. UoI*. AIR 2000 SC 498
[12] AIR 1953 SC 333 at 342-343
[13] East End Dwelling (1951) 2 All ER 587, at 599
[14] CIT v East India 206 ITR 152
[15] Kirloskar v. CIT 117 ITR 82

. The expression 'situate in India' can be understood by examining the meaning of 'situate' The *Concise Oxford Dictionary* mentions two senses: '*put in certain position or circumstances*' and '*put in a context'*. All the pattern of commercial operations, and contractual obligations pertaining to that domain have their trajectory in India, have nexus with the economic matrix in India. The shares, wherever they be transferred in terms of the Company Law, acquire relevance only because of capital asset in India. If destroy the HEL in India, or nationalize it, see the impact of that act on its papers, they call shares, in the Netherlands, or Cayman Islands, or at the Hong Kong Stock-Market.

V

(a) Towards 'Corporatocracy' by resuscitating ideas of dead and gone time

Vodafone asserts that the International Tax Aspects of Holding Structures and the operational pattern of the holding Structure & the strategies of the corporate conglomerate were designed in the light of the ideas of the 13th century Pope Innocent IV, and the 19th century decision of the House of Lords in Salomon *v. Salomon* (1897) A.C. 22. From such corporate architecture followed the independent role of the subsidiaries, with a measure intra-group restrictions, being the "**the inevitable consequences of any group structure"** generally accepted, both in corporate and tax laws.

It seems the decisions like *Azadi Bachao* and *Vodafone* would help the operations through tax havens and secrecy jurisdictions, and would also have the effect of undermining democracy, and promote corporatocracy operating these days from the foggy areas which, unfortunately, on our planet. The Hon'ble Court says (in para 68 of the main Judgement. :

> "It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company"

The reason for building the Pyramidal corporate structure, in my submission, is something sinister. The strategy seems to let the Trojan horse have its way with the hidden soldiers, and their strategies, well concealed. . The Harrison Corporate Structure illustrates what Pope Innocent IV said, and what *Salomon v. Salomon* can be stretched to mean. History knows that following the Pope's corporate model, the R.C. Church had become a disaster in the West till the Renascence and the Reformation exposed its ways, and the Peace of Westphalia (1648) clipped its wings. ..

VI

(a) The New States System and its effect

Fisher aptly said that for many generations the public law of Europe was settled through the terms of the Peace of Westphalia (1648)8 recognizing the principles of 'territorial sovereignty of states', and 'equality *inter se* the States'. But things happened, as they are always made to happen in international politics: a wide hiatus set in between the precepts and practice amongst the states. The Concert of Europe, set up after the

Congress of Vienna (1815), continued to lead the Eurocentric world politics almost till the World War I (1914), nay, it continued,at its basics, till the global lunacy expressed itself in the World War II posing challenging problems for creative responses from the statesmen. E. Lipson observed: "In the nineteenth century the destinies of Europe were in the hands of five or six States, which arrogated to themselves a preponderant influence in all matters of general concern".9 The equality of the sovereign states could not work in the world where the states were grossly unequal because of their gross differences in wealth and power: in short, in their capacity to shape the *Realpolitik*.. This brought about a dichotomy between political sovereignty and legal sovereignty of the international actors. The post-World War II has borne an analogous pattern. The USA became most dominant. 'The Big Business', represented by the corporations, mainly MNCs (Multinational corporations) and TNCs (Transnational corporation), called the shots. It may not be far from truth if we say that the political sovereignty has yielded, in effect, place to the corporate sovereignty, establishing what we can call 'corporate *imperium*'. But this is an outcome of a radical changes in the international states system brought about by the changes so aggressively manifest after the World War II. Prof. Sol Picciotto has insightfully observed:

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

(b) 'CORPORATIONS: their drivers and vectors: the Context for appreciating *Azadi Bachao* and *Vodafone*

"'Corporation' had been created as a commercial vehicle. It emerged in the early 17th century as an institution for international trade; but became an engine of imperialism". It was never conceived to be an impregnable and impervious coverlet of gross abuse, but it has become that. Writing about the invisible empire of America, Pandit Nehru had aptly said in *Glimpses of World History* (at p. 570): "This latest kind of empire does not annex even the land; it only annexes the wealth or the wealth-producing elements in the country. " The Supreme Court of the USA held, in *Dartmouth College v. Woodward* [17 U.S. Reports 518 (1819)], that the 'corporation' is "… capable of acting… like one immortal being". And over years later, this immortal being was endowed with the rights of the human beings. Its effect has been, what Abraham Lincoln had said:

> "I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."

One fails to understand how our Supreme Court, in the *Vodafone Case,* justified the corporate structuring done in the *Vodafone* Case by quoting Pope Innocent IV. Under the rubric 'International Tax Aspects of Holding Structures, the Hon'ble Court held that the International Tax Aspects of Holding Structures, and the operational pattern of the holding Structure of the MNC, were designed in the light of the ideas of the 13th century Pope Innocent IV, and the 19th century decision of the House of Lords in *Salomon v. Salomon* (1897) A.C. 22. This sort of view helps the emergence of corporate *imperium*. There are good reasons to think that if a MNC is structured on that model, it would become an imperious instrument of darkness to wreck our democracy, and all the values, which we believe, give legitimate content to it.

The MNCs, and their experts, consider 'corporations' virtually mystical and magical structures, which can be erected on the waves, in the thin air, in the ethereal space choosing their span of life, and the points of their birth, and also of their death. The pleaders for 'corporations' and 'corporate i*mperium*' drew their light from the ideas in *Mystci Corporis*, (translated into English as 'The Mystical Body') on which Pope Innocent had founded his self-serving view. The Church was the mystical body of Christ in the City of God; to which the City of Man subservient to the City of God. .

The second halves of the 19th century and the 20th century have witnessed strange conspiratorial innovations in structuring 'corporations'. The corporate lawyers and the beneficiaries of the corporations have cast their spell on all realms. They build the impervious 'corporate shell' so that none can know what is being done inside the shell. They have innovated in many other ways to strengthen their powers. They have created the inscrutable financial products in which the Rogue Finance deals , and have created other devices to escape 'taxation' by fragmenting a 'property' into two parts (it can be even more than two): "one, the physical assets of the corporation, operated by its managers; the other, the claim of investors to a share in profits generated by such operation." They have turned 'corporations' into a bundle of rights: one set of rights with the owners of the value that shares represent, and the other set with the owners owning the underlying assets that give value to such 'shares'. Peter d'Errico, who discussed the assertiveness and dominance of 'corporations' in the USA, observed with perceptiveness:

> "The doctrine of full-fledged corporate personality in legal discourse coincided with the historical separation of finance capital from industrial management. Two types of property were presented by an emerging fragmentation of corporate political economy: one, the physical assets of the corporation, operated by its managers; the other, the claim of investors to a share in profits generated by such operation."

This fragmentation has been used as a device to promote what this humble self considers fraud causing wrongful gain to some, and wrongful loss to the others. This humble self felt amazed to see how our Supreme Court, in the *Vodafone* judgement, considered this sort of 'fragmentation', dear to the corporate political economy, permissible under our jurisprudence. It is worth noting that the main thesis in *Vodafone* is bases on this sort of 'fragmentation' providing logic to the point that led to the holding that *Vodafone* was not chargeable to capital gains in India

(c) CGP Cayman Islands that illustrates the pathology of the New States System amenable to concealment and fraud

. The Hon'ble Court mentions in *Vodafone* that the 'CGP Cayman Islands' was incorporated on 12. 1. 1998. The Court says:

> "On 12.01.1998, CGP stood incorporated in Cayman Islands, with limited liability, as an "exempted company", its sole shareholder being Hutchison Telecommunications Limited, Hong Kong ["HTL" for short], which in September, 2004 stood transferred to HTI (BVI) Holdings Limited ["HTIHL (BVI)" for short] vide Board Resolution dated 17.09.2004. HTIHL (BVI) was the buyer of the CGP Share. HTIHL (BVI) was a wholly owned subsidiary (indirect) of Hutchison Telecommunications International Limited (CI) ["HTIL" for short]."

On the facts, the date of the incorporation of CGP (12.1.1998) does not appear to be correct. It must have been incorporated when HTIL Cayman Islands was incorporated in the Cayman Islands. But this is not of importance. It is a matter of common knowledge that thousands and thousands of ready-to-use companies sojourn in the hip-pockets of the professionals who swarm in countries like Cayman Islands. In our days of

fast-changing technology and decadent morality, it is easy to get in the tax havens companies which can be minted any way one wants, from any point of time they are needed: their births and deaths are managed by the professionals of high distinction. Such things are easily made to happen as they get created on paper only, and sojourn in the hip-pockets of such experts, or remain on the shelves till drawn into circulation by the market forces!. .

. This miscomprehension was the outcome of not taking the Judicial Notice of the new 'states system' and the trajectories of operations from the foggy parts of the globe. It is surprising that our Government failed to place facts of the present-day realities to convince the Hon'ble Court that the days of the *Duke Westminster* are dead and gone. The following facts may be considered, and what they suggest deserve to be noted. A mega, or multi-national, or trans-national, or global company can plan things over decades and decades through intricate and labyrinthine futuristic planning creating self-serving documents, because they know that neither their game would be probed, nor their strategy understood, especially in an environment of neoliberalism wherein brainwashing, consent-engineering, and opinion-manufacturing are the games that the professionals play on high consideration. If our Government, or court, would have understood how the experts in the Ugland House in the Cayman Islands, or at the Cathedral Square in Mauritius, or in other secrecy jurisdictions, or the tax heavens, work, things would have been different.

(d) The Structures which are the strategic devices galloping into our country from the CAYMAN ISLANDS, MAURITIUS, THE NETHERLANDS…..

The Hon'ble Court has erred in not comprehending the art and craft of the building of structures with sub-structures, super-structure, vertical and horizontal structures with the sole purpose of reaping benefits of operating through darkness. By not seeing through the evident strategy in the context of the present-day global 'states system', and altered times, the Hon'ble Court has misdirected itself in appreciating the material facts of the Case:

. The Hon'ble Court should have appreciated that the dicta of *the Westminster's Case* are no longer valid under the conditions taking shape in the New States System.. When the *Duke of Westminster* had been decided, the world had about 60 States, now there are more than 200 (about 194 states, and several others possessing limited or disputed sovereignty), most of them densely shrouded, and promoting agenda to provide, for good gains, an apt environment for the Rogue Finance. It is suggestive to mention that, when the Paris-based Financial Action Task Force subjected the banking system of the Bahamas to a close scrutiny, in one go the Bahamas, it is said, banned the " anonymous ownership of more than 100,000 international business companies registered in the country."[16] The following features deserve notice:

(a) The international investors (especially TNCs), and their advisers exploited "the elastic scope of state 'sovereignty' based on regulatory jurisdiction and legal fictions of 'residence' and 'incorporation'[17]. The two aspects of 'sovereignty', internal and external, were creatively utilized to set up regimes for tax havens. 'Internal sovereignty' was utilized as a justification to set up an opaque system inside the domestic sphere. The aspect of the 'external sovereignty' was invoked to ward off foreign intrusion in the domestic sovereign space. The grant of the Certificate of Residency by Mauritius, or the grant of *Carte de Sejour* by Monaco

[16] *2002 Britannica Book of the Year* p. 392
[17] Sol Picciotto of Lancaster University, UK www.lancs.ac.uk/staff/lwasp/endoff.pdf

was considered enough to preclude any investigation into the questions of residency of the entities, or the beneficial ownership of income, or wealth. The MNCs float their subsidiaries integral to their corporate structures. When such companies are incorporated under the laws of a country, they become 'residents' of that country. We know that thousands of 'shell' companies were formed in tax havens.

(b) Most of such centres were developed, in their early phase, by the wealthy persons in America and Britain. Dr. Picciotto has noted this point when he says:

> "It was initially encouraged by the authorities in the main capitalist countries, within tolerated limits, for competitive advantage, and to manage the growing contradictions engendered by the commitments to liberalisation under the Bretton Woods system.

(c) Even Mauritius was helped to develop as a 'tax haven' by the interested persons. mostly from India. America and the UK developed the numerous tiny-tots in the Caribbean and the Pacific as tax havens or secrecy jurisdictions for their purposes of the Big Business. The major western countries and their apex organization, OECD, reacted against the tax havens by taking some steps to stop abuse through those jurisdictions and areas. As these areas cannot afford to annoy the great powers, they can take to their course only to the extent tolerated by these two countries. There are good reasons to believe that the superrich and the MNCs of those countries are much interested in promoting tax havens. So every effort is being made by them and their professionals to let the tax havens have their way.

(d) Comus declared, to quote from Milton; ''T is only daylight that makes sin.' Our Supreme Court refers to it in *Shrisht Dhawan v. Shah Bros*[18]. We see these days so many 'Ludlow Castles' in so many 'secrecy jurisdictions' in the world where modern-day Comus rules. We can see many modern versions of Ludlow Castle built in the tax havens where the Rogue Finance waxes high, and plays the role of financial wizardry facilitated by a host of global financial wizards, chartered accountants, lawyers, and the experts in geopolitics of micro and macro states, and skilled in exploring all the possibilities of the Cyberspace. Here this humble self would shed light on one instance so that it can be shown with clarity how the financial wizardry works: and how a nation of intelligent people is taken for a ride. The general pattern of operation of a 'tax haven' has been well described by Prof Sol Picciotto[19]:

> "The basic principles of tax avoidance through a haven are relatively straightforward. It simply consists of establishing one or more legal entities (company, trust or partnership) in convenient jurisdictions, through which to channel an income flow derived from international investment or business activities. The deployment of a combination of intermediary entities can reduce or eliminate taxation both at source and in the jurisdiction where the intermediary is resident, while insulating the ultimate beneficiary from tax liability (Picciotto 1992, 135-141). It is also possible, especially since the lifting by most countries of exchange controls, for a resident in a country to 'export' funds and return them as investments into the same country, which

[18] *AIR* 1992 S C 1555

[19] Prof Sol Picciotto, Lancaster University Law School at http://www.tni.org/crime-docs/picciotto.pdf

is generally referred to as 'round-tripping'. This enables a resident to benefit from tax advantages as well as other inducements offered to foreign investors. Thus, for example, a large proportion of foreign investments into India are routed through Mauritius, due to favourable provisions in its tax treaty with India, and it is suspected that a pro-portion of these derive from Indian residents."

(e) How companies are incorporated and how they are used can be illustrated. How a 'corporation' is got *incorporated* in this phase of globalization deserves deserve Judicial Notice. What the *2002 Britannica Book of the Year* (p. 392) says about The Bahamas, a country (Area 5382 sq.mil.) having Population (in 2001) only 298000 may not be untrue about Mauritius :

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

(e) The Role of the CGP in the transaction;

In Vodafone, the Hon'ble Court observed that two routes were available: the Mauritius route, and the CGP route.. It was open to the parties to opt for any of these routes. The transaction of sale was structured at an appropriate tier (i.e. the CGP route), so that the buyer acquired the same degree of control as was hitherto exercised by HTIL.

(ii) The Hon'ble Court held that Situs of shares is at the place where the company is incorporated and/ or the place where the share can be dealt with by way of transfer. CGP share was registered in Cayman Island where the shares could be transferred

(iii) The Hon'ble Court held that the sole purpose of CGP was not only to hold shares in subsidiary companies but also to enable a smooth transition of business. Therefore, it cannot be said that the intervened entity (CGP) had no business or commercial purpose. (para 81 of the Judgement).

(iv) In the circumstances, the Hon'ble Court was not inclined to accept the arguments of the Revenue that the situs of the share of CGP, being a holding company, was situated in the place (India) where the underlying assets stood situated.

(f) The corporate strategy and stratagems: some illustrative details

A Portrait of operative realities: why Cayman Island was chosen in this *Vodafone* labyrinth

The Hon'ble Court has evaluated various transactions, and documents which all originate in the strategic planning by the denizens from darkness. Their strategy is obvious from the fact that those who do not belong to the Cayman Islands, or the Netherlands, or Mauritius chose these places to create artificial creature of corporate subsidiaries there. It is strange that parts of a corporate structure can be built even through 7000 islands and micro-states, to present the picture of the whole. It hardly matters for them if they pay taxes in few millions, on account of such transactions, because someday, may be after a decade or more, they can reap trillions, and make nation states servile to Corporatocracy. The world is on a cross-over point. The Hon'ble court

failed to appreciate why the Cayman Island was chosen in this *Vodafone* labyrinth. With no direct taxation, the islands are a thriving offshore financial center. More than 93,000 companies were registered in the Cayman Islands as of 2008, including almost 300 banks, 800 insurers, and 10,000 mutual funds. A stock exchange was opened in 1997. Tourism is also a mainstay, accounting for about 70% of GDP and 75% of foreign currency earnings. The tourist industry is aimed at the luxury market and caters mainly to visitors from North America. Total tourist arrivals exceeded 1.9 million in 2008, with about half from the US. About 90% of the islands' food and consumer goods must be imported. The Caymanians enjoy one of the highest outputs per capita and one of the highest standards of living in the world. ‘ With an average income of around KYD$47,000, Caymanians have the highest standard of living in the Caribbean. And its total Population is just about 54878.

The Hon’ble Court has appreciated the goings-on in the Cayman Island in such words as these (para 68):

> “It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e.,without a foreign holding or operating company) of an equity interest in a foreign invested Indian company”

Again the Hon’ble Court’s notions about the Cayman Islands are conditioned by a string of erroneous assumptions. It says (para 53) :

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

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

'Tax Examinations (or Investigations) Abroad

1. The requested party may, to the extent permitted under its domestic laws, allow representatives of the competent authority of the requesting party to enter the territory of the requested party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned. The competent authority of the requesting party shall notify the competent authority of the requested party of the time and place of the meeting with the persons concerned.

2. At the request of the competent authority of the requesting party, the competent authority of the requested party may permit representatives of the competent authority of the requesting party to attend a tax examination in the territory of the requested party.
3. If the request referred to in paragraph 2 is granted, the competent authority of the requested party conducting the examination shall, as soon as possible, notify the competent authority of the requesting party of the time and place of the examination, the authority or person authorized to carry out the examination and the procedures and conditions required by the requested party for the conduct of the examination. All decisions regarding the conduct of the examination shall be made by the requested party conducting the examination..'

. The Tax Information Exchange Agreement between India and Cayman Islands, like all such Agreements are futile and deceptive. The tax havens keep their baskets of information of such foreign companies empty. And we cannot get anything of relevance from the basket that is empty. Secondly, the cover of secrecy, built by administrative and legal provisions, is so tight that we cannot even peep through them. Besides, in the Caribbean itself there are so many islands and territories (many phony) that no human being, except the Rogue Finance, can find out actual facts. .

What the Petitioner has e said about Cayman Islands applies to Mauritius. The Hon'ble Court observes (para 100):

> " Mauritius, and India, it is known, has also signed a Memorandum of Understanding (MOU) laying down the rules for information, exchange between the two countries which provides for the two signatory authorities to assist each other in the detection of fraudulent market practices, including the insider dealing and market manipulation in the areas of securities transactions and derivative dealings. The object and purpose of the MOU is to track down transactions tainted by fraud and financial crime, not to target the bona fide legitimate transactions. Mauritius has also enacted stringent "Know Your Clients" (KYC) regulations and Anti-Money Laundering laws which seek to avoid abusive use of treaty."

Such reasons, as given in the Judgement, are, it is submitted, wholly extraneous. What effect this MOU would have on anything has no relevance in the *Voidafone's Case*. True, in the letter of assurance[20] dated May 24, 2000 sent by the Minister of Finance of Mauritius to the Secretary-General of the OECD promised to be decent. But promise is one thing, actual deeds are different. OECD deleted its name from the blacklist on account of geo-politic reasons, and zest for FDI etc. Our Court should have asked the Income-tax Department and other investigative agencies to know if anything at all changed. The tax havens or secrecy jurisdictions function as the veritable Alsatia (a sanctuary for criminals) , and centres for money-laundering. The *Wikipedia* concludes that Mauritius based **"** front companies of foreign investors are used to avoid paying

[20] "OECD's Report, "Harmful Tax Competition: an Emerging Global Issue" (the "OECD Report") said that the Government of Mauritius would elimination of harmful tax by administrative and legislative actions, and would ensure effective exchange of information in tax matters, transparency, and the elimination of any aspects of the regimes for financial and other services that attracted business with no substantial domestic activities in a phased manner by the end of the year 2005. Mauritius assures that it would refrain from introducing any new regime that would constitute a harmful tax practice under the OECD Report. " [20] (http://www.oecd.org/daf/fa/harm_tax/advcom_mauritius.htm).

taxes in India utilizing loopholes in the bilateral agreement on double taxation between the two countries, with the tacit support of the Indian government".[21]

VII

(i) The Relevance of 'share sales' and 'asset sales' is this distinction

This dichotomy *inter se* the 'shares sale' and the 'assets sale' was conceived by the jurists of the American Corporatocracy. The Hon'ble Court has erred in holding in favour of *Vodafone* because the transfer involved 'share sales' rather than 'asset sales'. It is submitted that nothing turns on the distinction of 'asset sale, and 'share sale'. This proposition can be tested on simple logic. Think, what can happen to such shares if India nationalizes the assets of the company (the underlying assets). Think of a situation where by act of man, or of God, the assets, giving real value to the shares in the international world of commerce, is destroyed. The impact of such events on the CGP shares would be sure and certain. This is because such shares being transacted outside India have close nexus with the economic matrix situated in India. **In the 'designed' and well-crafted world of finance, the 'shares may be given value, but when all is said, it is the character and quality of economic matrix that gives them value which matters when shares are transferred.** The Hon'ble Court failed to appreciate that as the economic matrix was in India, mere 'shares sale' in foreign jurisdiction cannot deprive India its rightful share in tax. To hold otherwise would be unfair to those who protect the matrix, and contribute to the economic events which have proximate nexus, on the territoriality principle, with sale of such shares made in foreign jurisdictions many of which are so tiny as to escape our eyes. . To the best of this humble self's awareness, the distinction between 'asset sales' and 'shares sale' is only the creation of the financial experts ruling roost in the market-ruled globalized economy. The distinction is a distinction recognized only in the system of Creative Accountancy. The Income-tax law is yet to recognize it.

(c) On the facts of *Azadi Bachao*, and *Vodafone* the right approach is to 'LOOK THROUGH', not 'LOOK AT'

The neoliberal culture of the WTO-IMF expresses itself through the WTO Treaty, BITs, and the Regional Trade Pacts; is evident in the deliberative process of these mega global institutions, and in their subsidiaries and affiliates; and is undoubtedly most pronounced in the International Arbitrations, it matters not under which rules they are conducted (whether under the auspices of the ICSID, or the UNICITRAL, or bodies playing analogous roles). The immanent feature most disturbing to us is Secrecy and Opaque. It is this impact that seems to be responsible for the judicial reluctance to probe into the inner realities of a well-crafted corporate structure. This judicial appreciation, in *Azadi Bachao* and *Vodafone,* for the impregnable corporate structure trotting from nooks to nooks on the globe shows a shift from Light to Darkness giving a a short shrift to our traditional view *Tamso maa jyotirgamaya*. Facts of *Vodafone* are well stated in the judgement, so any reader can go through to evaluate the judgement.. But the facts of *Azadi Bachao* have gone almost unnoticed in ***Azadi Bachao*[22].** Hence I wish to set forth the facts to help the critical readers to evaluate and appreciate the Delhi High Court's decision, and its reversal in *Azadi Bachao.:*

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[21] http://en.wikipedia.org/wiki/Tax_haven

[22] Profile of Facts in *Azadi Bachao*

An instance of the touch of Comus

162. M/s Cox & Kings Overseas Funds (Mauritius) Ltd. filed income-tax return for assessment year 1997-98 as a non-resident in the status of company (FII). The assessee filed its return showing as its total income a sum of Rs. 74,39,911 from dividend. The Assessing Officer investigated the case and adjudicated on the facts as stated in the order under section 143 (3) of the Income-tax Act dated March 29, 2000. He computed total

income at Rs. 3,88,72,822 which included short term capital gains to the tune of Rs. 2,91,76,094 and long-term capital gains to the tune of 22,56,817. The assessee's claim that it was entitled to the benefit of the Indo-Mauritius DTAC was considered but was not granted. If the claim had been in order the capital gains would not have been brought to charge in the assessment order. Under Article 13 of the Indo-Mauritius DTAC the capital gains are chargeable in the country of residence. As capital gains are not chargeable in Mauritius, the Mauritian residents do not pay tax on capital gains. The company was registered with the SEBI as a FII, and the assessing officer made assessment in terms of section 115 AD of the Income-tax Act, 1961 and initiated proceedings for concealment of income under section 271, (1) (c) of the Act.

M/s Cox & Kings Overseas Fund was incorporated in Luxemburg. There was no Double Taxation Avoidance Agreement between India and Luxemburg. If the Luxemburg investor had earned on the Indian Stock Market it would have been treated as a non-resident *simplicitor and* charged to tax as such. The company decided to create a fully owned subsidiary company incorporated in Mauritius. It contacted M/s International Management (Mauritius) Ltd., a professional consultants licensed by Mauritius Offshore Business Activities Authorities to work as offshore management company. They handled pre-incorporation formalities for incorporation of offshore Mauritius Company. They also provided two professionals to be placed on the Board of Directors. After completing all these formalities M/s Cox & Kings Overseas (Mauritius) Ltd. was got incorporated in Mauritius in 1994. After incorporation of a Mauritian subsidiary, M/s International Management (Mauritius) Ltd. was appointed to work as its Administrator, Registrar and Company Secretary. M/s J. Henry Schroeder Bank AG, a company incorporated in and operating form Switzerland, handled the management of investment, the sole business of the assessee company. The object clause of Memorandum of Association of Assessee Company makes following provision.

> "The object of the company specified in the Memorandum shall be carried on outside Mauritius."

The Assessing Officer found the following material facts which are reproduced for a better insight of the façade of the Certificate of Residence:

> "As per the restrictions imposed, the assessee is not allowed to either acquire any property in Mauritius to raise any fund in Mauritius to make any investment or conduct any kind of business activity in Mauritius. M/s International Management (Mauritius) Ltd. is a professional consultancy company looking after the formalities relating to Company Law and taxation law of Mauritius. Investment Company of the group incorporated and operating outside of Mauritius takes the business decisions. No activity is conducted in Mauritius. The Mauritian directors nominated by professional consultants are directors in hundreds of companies; hence they cannot work as working directors. They are only professional consultants and they do not have effective control of the management of the company. The source of fund is from outside Mauritius. All these facts clearly show that the real control of affairs of Mauritian company is in the hands of the holding company incorporated outside Mauritius and the Mauritian subsidiary has been created with main purpose to avoid tax.
>
> In view of the above facts, the assessee was asked to show cause as to why the corporate veil created by incorporation of Mauritius subsidiary should not be lifted and it should not be held that the assessee is not a *bonafide* resident of Mauritius but is a resident of the country in which the holding company is incorporated and also to show cause as to why the benefits under Indo-Mauritius Treaty should not be denied to the assessee since the assessee is not a *bonafide* and genuine resident of Mauritius. All facts of the assessee's case were discussed in the show cause notice and the assessee was asked to clarify if any fact was wrongly mentioned."

The Assessing Officers examined the assessee's plea that its effective control and management was in Mauritius; and they appraised various contentions made before them. The Assessing Officers found:

(i) They found that the effective control was in the hands of the holding company with power to override all decisions taken by the Mauritian Directors who were only professionals.

(ii) They found that the Board meetings in Mauritius were mere façade merely to keep the certificate of incorporation alive.

(iii) They found that the records in Mauritius were managed as a façade for the conduit company transacting on their instructions of its global custodian and Indian custodian both outside Mauritius.

(iv) The secretaries and the auditors in Mauritius were only for the limited purpose of complying with formalities.

(v) The assessee was not allowed to operate a Bank Account in Mauritius in Mauritian Rupee. A Dollar account in Mauritius branch of a non-Mauritian bank is maintained by the assessee with the sole purpose to transfer funds from global custodian to Indian custodian through Mauritius branch by telegraphic transfer. This routing of funds is done as a condition for keeping the incorporation certificate of Conduit Company alive.

(vi) The real control of the assessee company lies in the hands of the holding company. The source of fund also lies outside Mauritius.

(vii) The certificated of incorporation was granted with the following conditions:

(a) it cannot acquire any property in Mauritius;

(b) it cannot deal with any resident of Mauritius;

(c) it cannot raise any fund in Mauritius;

(d) it cannot make any investment in Mauritius;

(e) it cannot conduct any kind of business activity or gainful activity in Mauritius.

(viii) The investment managers were group concern of the holding company and were at the pleasure of the holding company.

(ix) This was one of the several conduit companies setup for treaty shopping formed after enactment of MOBA in 1993 when Mauritius became a tax haven.

In view of the above facts the Assessing Officer held that the assessee company was not a resident of Mauritius but was a mere treaty-shopper not entitled to the benefits under the Indo-Mauritius DTAC.

Mauritius knew the nature of juristic person being created by the foreign holding companies. The Government of Mauritius cannot plead ignorance of the objectives of the offshore company. Its knowledge is evident from the space of operation allowed to such a company in Mauritius. It must have known that it was poaching on India's revenue. We live in closely-knit world. Some say that we live in a global village. Others overstress that we the people of different countries now live in a common space. It is said that this emerging global society is to be organized on the principle of social interdependence and social solidarity. Stammler's ideas of justice incorporated the twin principle of *respect* and *participation*. We have no doubt that India and Mauritius are good neighbours. In the field of jurisprudence this question had been seriously asked, "who is my neighbor." The celebrated decision of the House of Lord in *Donoghue v. Stevenson*[22], comes to mind. Lord Atkin held the manufacturer liable for the impure bottle of ginger beer. He observed:

> "The answer seems to be –persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so effected when I am directing my mind to the acts and omissions which are called into question."

Modern International Law and International Institutions have made great strides towards making the countries of the world good neighbours[22].

In Vodafone

In Vodafone, the Hutchison Structure is just 'looked at', as the Hon'ble Court declined to "look through". But, it is submitted, the statute does not require the statutory authorities ever to slip into blinkers. All the authorities under the income tax law have the statutorily structured roles for achieving the objects set by the Income-tax Act itself. The object is to determine the correct quantum of tax as per law, and to recover tax in accordance with the law. An Assessing Officer plays a composite role as he is both an investigator and an adjudicator; and the relationship between these two roles is both sequential and consequential. After discovering the correct state of facts in a given case, he evaluates them as an adjudicator. His role has been well explained by Delhi High Court in *Gee Vee Enterprise v Addl. CIT*[23]

> "The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry."

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(d) 'LOOK THROUGH' vs 'LOOK AT"

The expressions "look at" and "look through" deserve examination to ascertain the meaning of these expressions. The *Shorter Oxford Dictionary of English Dictionary* defines 'Look at' thus: " (a) take or accept (a thing), become involved to, find (a person) attractive....."; and 'look through' thus: "(a) direct one's sight through (an aperture, a transparent body, or something having interstices) ,,," A tax authority looks at facts not to 'accept' but to ascertain the substance and reality of what is staged to appear.

This humble self thinks that 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 Keats's *Lamia,* the serpent, masquerades as the most beauteous girl, Lamia; but could not stand the critical gaze of Apollonius that unwove the rainbow of her fraudulent romance. With Lamia thus exposed, her lover Lycius dies of grief. Our Court's role is precisely of Apollonius. We are told: look before you leap. We must not leap into the dark vortex of the globalisation under the neoliberal regime regime without high measure of critical vigilance. We should see through the global economic game being played through the WTO Treaty and BITs in this dark world of crafty crooks with fast technology but low morality (managed and operated by institutions suffering from terrible 'democratic deficit' and also 'moral deficit..

(e) The Opaque System

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[22] *Kishan Prasad v. Har Narain Singh* (1911) 33 ALL. 272, 276, 9 I.C. 739 P.C.; *Shahsaheb v. Sadashiv* (1919) 43 Bom. 573, 51 I.C. 223
[22] ibid pp. 228-229

[23] (1975) 99 ITR 375 at 386.

The Opaque System works to promote the vested interests. *Azadi Bachao* and *Vodafone* failed to provide a remedy against corruption by mandating transparency where through 'corporate complex structuring'. . Secrecy goes against our Public Policy and international *jus cogens*, as it breeds corruption. Stiglitz aptly says[24]:

> 'Earlier, in my days at the Council of Economic Advisors, I had seen and come to understand the strong forces that drove secrecy. Secrecy allows government officials the kind of discretion that they would not have if their actions were subject to public scrutiny. Secrecy not only makes their life easy but allows special interests full sway. Secrecy also serves to hide mistakes, whether innocent or not, whether the result of a failure to think matters through or not. As it is sometimes put, "Sunshine is the strongest antiseptic."

Milton's Comus to which the Supreme Court referred in *Shrisht Dhawan v. Shah Bros*[25] makes his Comus say:

> ''T is only daylight that makes sin.

It is for this reason that Samkar had said in Aparoksanubhuti:

notpadyate vina jnanam vicarena nyasadhanaih

yatha padarthabhanam hi prakasena vina kvacit

(Without inquiry, wisdom cannot be attained by any other means,

even as things of the world cannot be seen without light.)

And Shah Commission Of Enquiry, *in Third and Final Report P. 231* said precisely the same:

> " It has been established that more the effort at secrecy the greater the chances of abuse of authority by the functionaries".

VIII

(i) Lifting of the Corporate Veil

Azadi Bachao and *Vodafone* would help the MNCs to become the impregnable shells of gross abuse.

The Andhra Pradesh High Court, in *M/s.Sanofi Pasteur Holding SA, v. The Department of Revenue Ministry of Finance*, [ ] observes under the caption "*Rationes* and conclusions in *Azadi Bachao Andolan"* :

> *"As a general principle authorities and courts are empowered to lift the veil of incorporation where necessary or appropriate while applying the domestic law. Where the terms of Treaty apply, even if these derogate the provisions of the Act, the principle of lifting the veil of incorporation cannot be applied. The whole purpose of a Treaty is to ensure that benefits thereunder are available even if they are inconsistent with the provisions of the Act."*

It is submitted that *Azadi Bachao* went wrong in its assumption above mentioned; *Vodafone* went wrong by working on the same assumptions; and *Sanofi Pasteur Holding* just followed the erroneous view set forth in *Azadi Bachao.* The doctrine of the Lifting of Corporate Veil was considered in Public International Law also as it is a step in the quest of justice the province of which does not end with municipal law of any

[24] ibid pp. 228-229
[25] *AIR* 1992 S C 1555

country. In the case concerning *the Barcelona Traction, Light and Power Company Ltd*[26] the Court noticed "the profound transformations which have taken place in the economic life of nations"; and, after discussing the circumstances in which this doctrine is invoked in domestic jurisdictions, stated that the process of lifting the veil "is equally admissible to play a similar role in international law[27]." Hence it is submitted that it wrong to say that " the courts are empowered to lift the veil of incorporation while applying the domestic law." This observation is clearly *per incuriam*.

Before the onset of the neoliberal Economic Globalisation, certain principles had been judicially settled. These can be thus summarized:
(*i*) The courts have recognized that "fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence".
(*ii*) Judicial abhorrence to fraud is so deep that the courts recognize the taint of fraud as a special defence even against a foreign judgment.
(*iii*) Fraud "is an extrinsic" collateral act.
(*iv*) Fraud vitiates not only the acts done in course of judicial proceedings but also the acts done through the administrative process.
(*v*) It is fair and just that no one should take advantage of one's wrong.
(*vi*) It has been held that "all frauds affecting the Crown and public at large are indictable as cheats at common law".
(*vii*) Frauds in public law and in private law differ in effect and operation without ceasing to be species of the same genus of culpable wrong.

The Doctrine of Lifting Corporate Veil was recognized by our Supreme Court in a number of decisions. It is only after the onset of this Neo-liberal phase, that the Indian Supreme Court adopted a hyper-technical view of the 'corporate personality' in *Azadi Bachao*. So strong was the spell of neo-liberal ideas that not only earlier decisions were overlooked, even the well-known decision of the International Court of Justice was ignored. In the case concerning *the Barcelona Traction, Light and Power Company Ltd*33 the International Court noticed "the profound transformations which have taken place in the economic life of nations"; and, after discussing the circumstances in which this doctrine is invoked in domestic jurisdictions, stated that the process of lifting the veil "is equally admissible to play a similar role in international law."

(ii) **A new gloss by the International Lawyers with 'capitalist brief'**

History evidences the continuous quest of the MNCs and their mentors to prevent the prying eyes from seeing what goes on inside the corporate shells wherever the trajectory of operations is located, be it on the earth, or in waters, or space. The theory of the genuine link between the corporations and the lands wherein incorporated had been well

[26] [1970*] International Court of Justice Reports* Index p.4
[27] The Court observed:

> ".....Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting of corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain case of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations." [27]

established by the International Court of Justice in the *Nottebohm Case*[28] [ICJ Report 1955 p.4] But such exploration of facts as to see what sort of 'genuine link' a MNC had with Mauritius, or the Cayman Islands, was never judicially taken, or approved. In the *Nottebohm' Case* the International Court of Justice determined the principles governing "nationality" in these words:

> "… a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State"

"The Court found that there was no bond of attachment between Nottebohm and Liechtenstein, and that there was a long- standing and close connection between him and Guatemala, a link which his naturalization in Liechtenstein in no way weakened; that naturalization had been ' granted without regard to the concept of nationality adopted in international law'. Accordingly the Court held that Guatemala was under no obligation to recognize Nottebohm's Liechtenstein nationality, and that Liechtenstein could not institute proceedings against Guatemala in respect of damage suffered by him."[29] *Oppenheim* refers to the Federal German Constitutional Court's decision in *German Nationality (Annexation of Czechoslovakia* Case ILR, 19 (1952), No. 56 in which the Court 'accepted that while as a rule every state was entitled to provide in its own discretion how its nationality was acquired and lost, that discretion was subscribed by the general rules of international law according to which a state may confer its nationality only upon persons who have some close factual connection with it'[30]

A corporation evolved as a form of business organization in which public interest was greatly involved. It was not conceived as an impervious coverlet of abuse for commercial purposes. Transparency is not excluded by "incorporation". It is a matter of public policy that the affairs of a company should be under public gaze so that this form of 'business organization' is not used for extraneous purposes. But, as is evident from the realities in this era of the economic globalization, every effort is being made to evade scrutiny of the ways of 'corporations': as they have a lot of skeletons in their cupboards which they want to keep shrouded in secrecy. between such companies and Mauritius.

It happened first in the U.S. that the humans and the corporations were placed in the same genus: of being "legal persons". In *Santa Clara County v. Southern Pacific Railroad* (118 U.S. Reports 394 [1886]), the United States Supreme Court conceded to 'company' a 'corporate personality' within the Fourteenth Amendment of the U.S. Constitution granting it the equal protection benefit. The gross individualism, bordering on

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[28] *Oppenheim,s Internationa Law* 9th ed Vol. 1 PEACE p. 854 gives the effect of the Law of Nationality, as decided in the *Nottebohm*, thus:

> "The Court found that there was no bond of attachment between Nottebohm and Liechtenstein, and that there was a long- standing and close connection between him and Guatemala, a link which his naturalization in Liechtenstein in no way weakened; that naturalization had been ' granted without regard to the concept of nationality adopted in international law'. Accordingly the Court held that Guatemala was under no obligation to recognize Nottebohm's Liechtenstein nationality, and that Liechtenstein could not institute proceedings against Guatemala in respect of damage suffered by him."

[29] *Oppenheim,s Internationa Law* 9th ed Vol. 1 PEACE p. 854

[30] *Oppenheim,s International Law* 9th ed Vol. 1 PEACE p. 856 fn. 20

narcissism, and the ever increasing craze for property, without social restraints, constituted the cardinal principles in the American worldview on commerce.

(iii) When it is fair and just to explore the inner realities

A corporation evolved as a form of business organization in which public interest was greatly involved. It was not conceived as an impervious coverlet for abuse. This point has been clearly brought out by an eminent author in these words:

> "Before dealing with exceptional situations in which the veil is lifted, it should be emphasized that the veil never means that the affairs of the company are completely concealed from view. On the contrary, the legislature has always made it an essential condition of the recognition of corporate personality with limited liability that it should be accompanied by wide publicity. Although third parties dealing with the company will normally have no right to resort against its members, they are nevertheless entitled to see who those members are, what shares they hold and, in the case of a listed company, the beneficial interests in those shares if substantial. They are also entitled to see who its officers are (so that they know with whom to deal), what its constitution is (so that they know what the company may do and how it may do it), and what its capital is and how it has been obtained (so that they know whether to trust it). And unless it is an unlimited company they are also entitled to see its accounts, or at least a modified version of them—again in order to know whether to trust it[31]."

It is clear from the above that transparency is not excluded by "incorporation". It is a matter of public policy that the affairs of a company should be under public gaze so that the form of business organization devised, with the best of commercial interests, is not used for extraneous purposes. Under the very grammar of its existence it must remain under public scrutiny. But, as is evident from the realities of the economic globalization, every effort is being made to evade scrutiny:

(a) by the whole corporate *imperium* as its constituents have a lot of skeletons in their cupboards which they want always to remain shrouded in secrecy;

(b) by the big players under the present global architecture, like the IMF, World Bank and the WTO, which provide models of secrecy, lack of public accountability, and absence of democratic character;

(c) by the tax havens and many other states having an opaque system to wax on the ill-gotten wealth of others who can manage their tainted wealth from those regions of darkness most vociferous about their sovereignty as it provides them with sword and shield against those who suffer wrongful loss;

(d) by all those who believe that illegal wealth and illicit power can flourish most when opaqueness is ensured.

IX

The Corporate Structural Strategy is deceptive, illustrating the *entente cordiale* of Fraud and Collusion.

Bereft of technical rigmarole and the inter-jetted labyrinth of the corporate conglomerate in the seemingly complex pyramidal structure, the fact-situation in the Hutchinson that *Vodafone* presents has certain pronounced features:

(i) As the economic matrix, and the theatre commercial operations were in India, the corporate structuring through Mauritius, Cayman Islands, or the Virgin

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[31]. Gower's *Principles of Modern Company Law*, Sixth Ed. by Paul L. Davies, (London Sweet and Maxwell 1997) pp. 148-49.

Islands was crafted and inserted with the sole purpose to play truant with the Indian tax-law;

(ii) If the corporate positioning in Mauritius is considered justified for any reason, they could not be sure to access benefits under the Indo-Mauritius DTAA as that was a bilateral treaty, and the Treaty-shoppers ran the risk of not getting the treaty benefits.

(iii) It could not even possible to bring the Case within the sub-Section 90(1)(a), inserted by the Finance Act 2003 w.e.f. 1.4.2004. As the Indo-Mauritius Double Taxation Avoidance Convention was done in 1983, and as the statutory change was only *prospective*. Such Treaty Shoppers, or Nationality Shoppers could not access to the benefits under the said DTAA. .

(iv) In *Azadi Bachao*, whilst everyone knew that the masquerader acted through Luxembourg, the Hon'ble Bench of this Court chose to close its eyes to the detailed factual substratum presented before it.[32] But in the Vodafone, we all know who were the actors, and how they acted, hopping from this continent to that, from this island to that. The whole strategy revealed the strategy and the stratagem of the 'corporate fraud'. .

(v) The movement of the mega MNC, scaling the ethereal heights, to the Cayman Islands, and the Virgin Islands, can be comprehensible as the studied design to frustrate India's legitimate claim to tax. These two Islands in the Caribbean Sea, and the Leeward Islands (both British Overseas Territories, were part of the British and the U.S. corporate strategy to develop some microscopic islands in the Caribbean and the Atlantic to let Fraud have best of times for their global operations for the neo-capitalists.

(vi) It is beyond comprehension for what good commercial reasons they would have gone to the Cayman Islands. It is unreasonable to draw rational inferences from human conduct, more so from the corporate conduct. This humble self has drawn up the profile of Cayman Islands in this paper, The so-called country is just a 5-Star hotel where hired professionals manufacture companies to shelve them in their hip-pockets. What resources that country has? It has high GDP and per capita income, but these things are because by helping the corporate strategists in their game, golden morsels reach to the islanders as trickle-downs.

(vii) Dr Bernard Schwartz, said about Chief Justice Warren of the US Supreme Court: "Every so often in criminal cases, when counsel defending convictions would cite legal precedents, Warren would bend his bulk over the bench and ask, "Yes, yes---but were you fair?"[33]'

One can ask: "Was the Hutchinson structure, examined in *Vodafone,* FAIR, bereft of greed?" But can one put this question in these locust-eaten times when GREED is considered GOOD. In examining such facts, no court can be

[32] It was not proper to exclude from consideration the facts found in the statutory assessment orders on the ground that those assessees were not before the Court. The Court failed to appreciate that the Petitioner's grievance was against the wielders of the public power in our country, not against any beneficiary of the public power. It was amazing to see that concrete facts establishing fraud, both *actus reus* and *mens rea*, were ignored on the ground that the company was not before the Court to answer. Such companies could not be the *necessary parties29* in the PIL,because the grievance was only against our Government, not against X or Y or Z. If an unauthorized house is demolished under a legal order there is no reason to bother about what happens to the rats and cockroaches which swarmed in the house. The effect of what the Court did by circling out the factual substratum was to destroy the very foundation of the case without which the judicial perspective could neither be concrete, nor correct.

[33] *Some Makers of American Law* p. 138

oblivious to the realities of the our 'globalized' world'. Joseph Stiglitz has perceptively highlighted its 'moral deficit' of this corporate ruled neoliberal world. He says in his *Free Fall* (2010):

"…too little has been written about the underlying "moral deficit" that has been exposed – a deficit that may be larger and even harder to correct. The unrelenting pursuit of profits and the elevation of the pursuit self interest may not have created the prosperity that was hoped, but they did help create the moral deficit."

X

THE INEQUITY AND INJUSTICE DEMONSTRATED: The Effect of the ideas sanctified in the Vodafone Judgement.

If the corporate structure, as delineated in the *Vodafone* Judgement, is accepted, the following may not be prevented from happening:

(i). If we take a realistic view of the ways the tax havens and the secrecy jurisdictions operate, the 'corporate structure, so structured, impervious and obdurate, with tentacles to various foggy lands through corporate silhouettes, would become a strategy for the crooks, fraudsters, money-launderers, tricksters, and terrorists to bring their money under the garb of FDI in many cases the ill-gotten wealth brought back after studied and adroit layerings. .

(ii). The operators and the masters of the 'Hutchinson structure' reaped profits from their Indian operations. Such profits, and commercial 'good will", gained within the territory of India by operating the economic matrix in our country, added worth and value to the shares. . An ordinary tax-payer would have paid rightful tax before appropriating capital gains, but the 'Hutchinson structure' helped others to get all the gains by presenting the spectacle of extra-territorial transfer. They say (!?): the 'states system' has changed', global realities of changed, the economic operations have changed, but the norms of *Salomon v. Salomon* (1897), have not changed.

(iii) The very invocation to the idea of the 13th century Pope Innocent, quoted and relied on by the Hon'ble Court in *Vodafone* , seems to negate the fundamental assumptions of democracy as conceived under our Constitution.

After the fall of the Roman Empire, the Roman Catholic Church developed institutions to protect *property interest* of the Church. The circumstances of history wrought situation which brought about the emergence of the nation states which acquired dominance to work for the dominant classes of property owners, traders, and power wielders. Their collective and collaborative pursuits led to the growth of the sinister geopolitical phenomena of 'colonialism' and 'imperialism'. During this phase of Economic Globalisation pursuing neoliberal paradigm, corporatocracy has emerged to subjugate the political realm to its corporate imperium, by a dexterous operation of the mechanism of the Rule of Market *(Pax Mercatus)* characterized both by gross 'democratic deficit' and abysmal 'moral deficit'.

(v) It would be unfair to help the global extractive corporations merely because they bring in FDI for some to amass wealth from which the common people can just hope to get the benefit supposed to come from, hat the IMF-WTO trained persons call 'the trickle down effect'. This worldview would lead the world to the plight thus portrayed;

"The Cloud Minders, episode 74 of the popular science fiction television series **Star Trk,** took place on the planet Ardan. First aired on Feb. 28, 1969, it depicted a planet whose rulers devoted their lives to the arts in a beautiful and

peaceful city, Stratos, suspended high above the planet's desolate surface. Down below, the inhabitants of the planet's surface, the Troglytes, worked in misery and violence in the planet's mines to earn the interplanetary exchange credits used to import from other planets the luxuries the rulers enjoyed on Stratos."

XI

Vodafone undone through the Retrospective Legislation

The prime legal issues decided in *Vodafone* were legislatively undone by the retrospective amendments through the Finance Act, 2012 (Act No.23 of 2012)]. Our Supreme Court delivered, on January 30, 2012, its judgment in *Vodafone International Holdings v. Union of India & An* (Civil Appeal No...733 of 2012). As an informed citizen of the Republic of India this humble self wrote, on January 30, 2012, a long letter to Shri Pranab Kumar Mukherjee, the Finance Minister of India, (as he then was) appending therewith a Critique of this Judgement. In paragraph 10 of his letter he had written to him: " I have suggested certain remedial steps, but I consider the best course is to frame retro-operative law through ordinance." It bore a footnote providing a short summary of law on Parliament's competence to enact retrospective legislation..[34]

Further, this humble self wrote to the F.M. that as a citizen of this Republic, he felt overjoyed when the Government moved the Finance Bill seeking to undo the effects of the said decision through retro-operative legislation. As the media and the lobbyists moved heaven and earth criticizing our Government on several grounds for doing that, this humble self wrote his response in his short article, published in the Hindustan Times of March 20, 2012. This humble self wrote: "'Three points need to be answered: (i) whether our government is competent to undo the effect of the *Vodafone* decision by legislatively validating the Executive's act; (ii) whether the government's decision to do so is fair and reasonable; (iii) whether the proposed provisions would affect the inflow of FDI"[35].

XII

THE IMF-WORLD BANK AGENDA REVEALS ITSELF IN MANY WAYS

This humble self is of the considered view that under our Constitution, it is atrocious to accept Article XVI (4) of the WTO Charter that mandates: " Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements". He wishes that our Parliament and the Superior Courts declare in no uncertain terms. The present-day international law suffers from gross 'democratic deficit', and also suffers from grave 'moral deficit' as in this world the 'political realm' is now wholly subjugated to/by the'economic realm' controlled and guided by the IMF-World Bank-WTO triumvirate

Writing about *A.D.M. Jabalpur* v. *Shivkant Shukla*, some experts observed: "The judgment can be best described, in the words of C.K. Allen, as the contribution of the Supreme Court to the emergency". With greatest humility, this humble self believes that *Azadi Bachao Andolan*, and *Vodafone* can be considered our Supreme Court's contribution to the Market Economy in this phase of Economic globalization. Under this global sweep, and the expansive and imperious interpretation on the said sinister Article XVI (4), our Constitution receive a short shrift. To escape from being charged with morbid imaginings, I would illustrate my point just in passing.\:

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[34] *Mahal Chand Sethia v. W.B;* Rai Ramkrishna v. Bihar AIR 1963 SC 1667 [SEE Seervai, Const. Law vol. 1 p. 844-845].

[35] Both the letters addressed to Shri Pranab Kumar Mukherjee, the Finance Minister of India, (as he then was) ,are on www.shivakantjha.org

(i) In *Azadi Bachao*, *Vodafone*, and in the recent Andhra Pradesh High Court M/*s.Sanofi Pasteur Holding* SA,, this Hon'ble Courts have erred in not realizing that it was not proper for it to rely on *John N. Gladden v. Her Majesty the Queen* 85 D.T.C. 5188 at 5190, *John N. Gladden v. Her Majesty the Queen* 85 D.T.C. 5188 at 5190; *Chong v. Commissioner of Taxation* [2000] FCA 635; *The Estate of Michel Hausmann v. Her Majesty The Queen* [1998] Can. Tax Ct. LEXIS 1140; *Barber-Greene Americas, Inc. v. Commissioner of Internal Revenue* [1960] 35 TC 365, because in Australia, Canada, the USA, and also in the U.K, the Tax Treaties are *through enactments* by their legislature. In their Tax Treaties any terms could be prescribed as those could bear legislative mandate. By relying on the observations in the Judicial decisions from Canada, Australia, the USA, Germany and many other OECD countries, and the books by the commentators expounding on the basis of such law, this Hon'ble Court missed to see the difference that exists between those countries and India

(ii) This humble self fails to understand why the courts, in all the aforesaid cases, be guided by Bennion who had examined treaties in different legislative and constitutional parameters. The Hon'ble Court failed to notice that the tax treaties in India can be interpreted only in terms of the 'implementing 'Act. It is not correct to interpret statute in the light of the terms of treaties, and their expectations whatever they be. The terms of Section 90 cannot at loggerhead with our law and the Constitution. [36] Bennion, and the Hon'ble Court missed to take a functional view of the statutes in the matter of the interpretation of treaties. The Treaties/ Agreements can be put into 4 groups with their differential, but governing, features which are set forth in the footnote below.[37] The right approach is to adopt functional approach to the

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[36] "Questions surrounding the interpretation of treaties and statutes in English law can generally be divided into two categories: the interpretation of enabling instruments, and the interpretation of other legislation in light of treaties entered into, both incorporated and unincorporated. As to the former, it is to be remembered that primary object of interpretation is the implementing statute, and only at one remove the treaty which implements or incorporates it.[36] Accordingly, although international courts and tribunals may rule on the interpretation of a treaty, their rulings are not binding.[36] Brownlie, *Principles of Public International Law* (8th ed) p. 65-66

[37] (1).Where priority to a Treaty is specifically granted by a Statute: as in Section 2(1) of the European Communities Act, 1972 providing ' that such provisions of the Community law as in accordance with the Community treaties are to have direct effect shall be given such effect in the U.K.; and s. 2(4) provides that any past or future statute shall be construed and have effect subject to the provisions of s. 2 (including, therefore, those providing for the direct effect of the Community law.' *[Oppenheim* p. 72]

(2).Where the Orders in Council under the Extradition Act 1870 [now replaced by the Extradition Act 1989 allowing for equivalent Orders in Council under ss. 3 and 4] provide that the Acts shall apply 'under and in accordance with ' the relevant Extradition Treaty, the terms of which are directly before the courts'[37] But Oppenheim comments: "But even in such circumstances a court may still ignore the treaty: *R.v. Davidson* (1976) 64 Cr. App R. 209."

(3)Where the provisions of a Treaty are set out in a Schedule to an Act (e.g. The Diplomatic Privilege Act 1964. But *Oppenheim* comments: at p. 59 fn. 25:

> "since it is not wholly clear in that case whether the court would be applying a treaty , or a Schedule to an Act (which happens to be in identical terms with the provisions of a treaty): the latter is probably the correct view…..]

(4). Where treaties belong to the category in which come the Double Taxation Avoidance Agreements. These Treaties are done in exercise of the statutory power (Section 90 of the Income-tax Act, 1961) within the frontiers and under the discipline of Art. 265 of our Constitution (which imports in our Constitution analogous provisions from the Bill of

treaties which can be duvuded in 4 groups each with their esoteric differentia and characteristics.

(iii) What begins as trickle becomes flood in *Sanofi.* Though the words 'assign' and 'allocate' occur several times in *Azadi Bachao,* inapt though the expressions were even there, they did not erect, or benedict, that dangerous doctrine subversive of our Constitution, as was done by the Hon'ble Andhra Pradesh High Court in making certain *obiter* observations to oust the very jurisdiction of our Parliament on certain segments of 'taxation'. If these stray observations are considered to mean that through the stipulations in a Tax Treaty, 'Jurisdiction to tax'. itself is lost, the Hon'ble Court has erred in not appreciating certain basic constitutional principles. 'Jurisdiction' and 'Power 'are distinct concepts. Tax treaties modulate and modify through the exercise of 'power' the incidence of tax by the consensual arrangements inter the sovereign parties. The sovereign 'jurisdiction' to tax can never be shed off without specific legislation, nay, without constitutional amendment. Whilst through a Tax Treaty it is not possible to cede 'jurisdiction to tax' to a foreign country, , 'situations' can be arranged and manipulated in exercise of 'power'. Section 90 of the Income-tax confers only power to choreograph the incidence of taxation in on strict preconditions. The effect of this logic is clearly this: the 'Jurisdiction' of Parliament to make law, retrospective or prospective, cannot be ever lost. The Hon'ble Andhra Pradesh failed to notice this high constitutional principle. This humble self believes that the retrospective legislation, made by the Finance Act 2003, is in order. But worse problems are posed by the Bilateral Investment Treaties whose prime purpose is to get more and more FDI. The quest for FDI that got recognition in *Azadi Bachao*, received sacred canonization in *Vodafon*e, and has become the most loved Abracadabra of Dr. Manmohan Singh Government . FDI can be good, can be bad: it depends This humble self's evaluation of FDI in our economy is based on what we seeing. .This topic I cannot touch in this short essay already long beyond endurance. But this context is apt to caution our Government against the conspirators who, by invoking the unconstitutional BITs, would try to prevent our Parliament from exercising power to amend law retrospective.ly[38] Charles Mackay, in his *Extraordinary Popular Delusions and Madness* (1841) told us about the technique of mega frauds adroitly revealed in certain financial/money manias in the three chapters 'Money Mania', 'the South-Sea Bubble'; and 'the Tulip mania'. . This humble self wishes that someday someone would write a book called *Extraordinary Popular Delusions and Madness for FDI in the Republic of India !*

Rights 1688). In a case of this sort the terms of a Tax Treaty can operate in the domestic jurisdiction only to the extent of the conformity with Section 90 of the Income-tax Act, 1961, Article 265 of our Constitution, and all other constitutional limitations to which the powers of the organs of the State are subject. Tax Treaties *in our country* do not come under the types (i) to (iii) *supra*. Grant of concessions , beyond the reach of the terms of Section 90, is unconstitutional.

[38] " The term 'stabilization clause' relates to any clause contained in an agreement between a government and a foreign legal entity by which the government party undertakes not to annul the agreement nor to modify its terms, either by legislation or by administrative measures. The legal significance of such clauses is controversial, since the clause involves a tension between the legislative sovereignty and public interest of the state party and the long-term viability of the contractual relationship. If the position is taken that state contracts are valid on the plane of public international law then it follows that a breach of such a clause is unlawful under international law. "

Brownlie, *Principles of Public International Law* (8th ed) p. 629-630

(iv) On this very wave-length, this humble self finds himself driven to make ascorbic comments on India's Bilateral Investment Treaties (BIT) that illustrate the WTO agenda. Shortly before his death, President Abraham Lincoln (1809-1865), the 16th President of the United States, expressed, on 21 November 1864, his apprehension about the future of his Republic:

> "I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."

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XIII

'CORPORATOCRACY' WOULD RULE THE WORLD

"'Corporation' had been created as a commercial vehicle. It emerged in the early 17th century as an institution for international trade; but became an engine of imperialism". It was never conceived to be an impregnable and impervious coverlet of gross abuse, but it has become that. Writing about the invisible empire of America, Pandit Nehru had aptly said in *Glimpses of World History* (at p. 570): "This latest kind of empire does not annex even the land; it only annexes the wealth or the wealth-producing elements in the country. " The Supreme Court of the USA held, in *Dartmouth College v. Woodward* [17 U.S. Reports 518 (1819)], that the 'corporation' is "… capable of acting… like one immortal being". And over years later, this immortal being was endowed with the rights of the human beings. Its effect has been, what Abraham Lincoln had said in the pregnant words I have already quoted above. The corporate pressures and persuasions led to devise the mechanism of control over the organs of the state. It is interesting to see how an artificial creature, without conscience, got judicially recognized as a living being. The process of this strange transformation is well captured by Noam Chomsky, in his *Failed States* (at p. 207): to quote what he has written in the context of the USA --

> "The political system that is the subject of these critiques bears some resemblance to the initial design, though the framers would surely have been appalled by many subsequent developments, in particular the radical judicial activism that granted rights of persons to "collectivist legal entities" (corporations), rights extended far beyond those of persons of flesh and blood in recent international economic arrangements (mislabeled "free trade agreements")."

In the Introduction to his *Judicial Role in Globalised Economy* (2005), Shiva Kant Jha had observed:

> "The Chicago University and the Yale Law School are the centres for the study of law and economics wherein economics dominates legal discourse. *Homo juridicus* is becoming *homo economicus*. Public policy of the State is manipulated to come to terms with the ideas of the mainstream neoclassical economics."

One can read with deep consternation our Supreme Court's decision in the *Vodafone Case*[39] where the Hon'ble Court justified the corporate structuring done in the *Vodafone* Case by quoting Pope Innocent IV. Under the rubric 'International Tax Aspects of Holding Structures, the Hon'ble Court held that the International Tax Aspects of Holding Structures, and the operational pattern of the holding Structure of the MNC, were designed in the light of the ideas of the 13th century Pope Innocent IV, and the 19th century decision of the House of Lords in *Salomon v. Salomon* (1897) A.C. 22. This sort of view helps the emergence of corporate *imperium*. I had seen the neoliberals of the USA trying hard to make the MNCs more important than the nation states. The professionals, like those huddled together at the Ugland House in the Cayman Islands, or at the Cathedral Square of Mauritius, and at other dark places, have provided systems under which

[39] *Vodafone International Holdings v. Union of India & Anr (2012) 6 SCC 613*

'corporations ' are hatched in thousands, and made to order. The Rogue Finance and their corporate vehicles resort to the creation of the labyrinthine corporate structures to operate through fog and mist on this planet. True, they tread on the lines that Pope Innocent III and IV prescribed for the Church out to build up its own *imperium.* We all know how an early MNC, the South Sea Company, committed worst frauds, and entrapped many great politicians in power to serve its illegitimate and fraudulent interests. Its deeds are discussed felicitously in Charles Mackey's Extraordinary *Popular Delusions* (1841). The crooks and fraudsters of all the later times have scripted their ways on that model. The East India Company that ruled our country for long, was equally corrupt, and fraudulent. Our world knows no technique of deception the prototype of which cannot be found in their ways.

The MNCs, and their experts, consider 'corporations' virtually mystical and magical structures, which can be erected on the waves, in the thin air, in the ethereal space choosing their span of life, and the points of their birth, and also of their death. They had once reminded me of the monsters, Sund and Upsund portrayed in our classical literature. The pleaders for 'corporations' and 'corporate i*mperium*' drew their light from the ideas in *Mystci Corporis*, (translated into English as 'The Mystical Body') on which Pope Innocent had founded his view. The Church was the mystical body of Christ in the City of God; and the 'corporation' became a foil to the R.C. Church in the City of Man, this world of ours!

The second halves of the 19th century and the 20th century have witnessed strange conspiratorial innovations in structuring 'corporations'. The corporate lawyers and the beneficiaries of the corporations have cast their spell on all realms. They build the impervious 'corporate shell' so that none can know what is being done inside the shell. They have innovated in many other ways to strengthen their powers. They have created the inscrutable financial products in which the Rogue Finance deals , and have created other devices to escape 'taxation' by fragmenting a 'property' into two parts (it can be even more than two): "one, the physical assets of the corporation, operated by its managers; the other, the claim of investors to a share in profits generated by such operation." They have turned 'corporations' into a bundle of rights: one set of rights with the owners of the value that shares represent, and the other set with the owners owning the underlying assets that give value to such 'shares'. Peter d'Errico, who discussed the assertiveness and dominance of 'corporations' in the USA, observed with perceptiveness:

> "The doctrine of full-fledged corporate personality in legal discourse coincided with the historical separation of finance capital from industrial management. Two types of property were presented by an emerging fragmentation of corporate political economy: one, the physical assets of the corporation, operated by its managers; the other, the claim of investors to a share in profits generated by such operation."

Korten aptly observes: " Not surprisingly, the history of corporate-government relations since that day [the history goes back to the 16th century when certain privileges were given through corporate charters granted] has been one of continuing pressure by corporate interests to expand corporate rights *and to limit corporate obligations*." (italics supplied). It was natural in the USA where politics is the "shadow cast on society by big business". The aggressive emergence of 'corporations' in the USA led many thinkers of the West to formulate theories to prove that 'corporate entities exist prior to, and independent of, 'state'. It is even said that as the manifestation of 'group life', it is the 'corporation' that provides the *raison d' etre* for the 'state'. Some experts even went to say that as the human beings, and the 'corporations' are 'persons' only because law considers them the bearers of rights and duties , there exists basically no difference between humans and 'corporations'! And from this follows inevitably that 'corporations' are entitled to human rights no less than the human beings.

It is difficult to understand how our Supreme Court, in the *Vodafone* judgement, considered this sort of 'fragmentation' of corporate political economy permissible under our jurisprudence. In fact, this became the main reason for holding that *Vodafone* was not chargeable to capital gains in India. It is submitted that our Supreme Court failed to frustrate the device

adopted to cause wrongful loss to our country, and wrongful gains to the non-residents operating from the secret jurisdictions and tax havens. There is some wisdom in what Alvin Toffler said in *Power Shift* (at p. 253):

> "Few seem to have considered that if we change the structure of business and leave government unchanged, we create a gaping organizational mismatch that could damage both. An advanced economy requires constant interaction between the two. Thus, like a long-married couple, government and business eventually must take on some of each other's characteristics. If one is restructured, we should expect corresponding changes in the other."

Corporations are interested only in profits, and contrive the systems which ensure such pursuits. The corporations always work to transform a 'nation state' into a sponsored state. This is the inevitable outcome of an *entente* between the government and the Big Business. When this happens, 'a symbiotic relationship' between the state and the corporation' gets established. The corporate structures, involving a split between the power of the shareholders and the professional managers, have produced detrimental psychological effect on the functioning of 'democracy' itself: As the 'corporations' do not possess human consciousness, they have no compunction in doing things even so unfair as these:

- to dispose of their toxic wastes in poor countries, because poor people have both 'shorter life spans and less earning potential than wealthy people';
- to commit all noxious acts to the detriment of humans believing that it is 'a moral duty of the rich countries to export their pollution to poor countries because this provides poor people with economic opportunities of which they would otherwise be deprived.'

The words of David Korten are worth recall (*Where Corporations Rule the World* p. 142) l:

> "Business interests funded the establishment of law and economics programs in leading law schools to support scholarly research advancing the premise that the unregulated marketplace produces the most efficient-and thereby the most just-society. Business funded all-expense-paid seminars at prestigious universities such as George Mason and Yale to introduce sitting judges to these economic principles and their application to jurisprudence.

XIV
ADDRESSING THE COURT, AND THE GOVERNMENT

In the end, this humble citizen of this country has two things to submit by way of most humble apology:

(a) An addressed to our Judiciary:

It is interesting to notice what had led to the overruling of *Anderton v Ryan.* The reason was the response of the House of Lords to the article written by Professor Glanville Williams entitled "The Lords and Impossible Attempts, or *Quis Custodiet Iposos Custodies*? [1986] CLJ 33 criticising *Anderton v Ryan.* It led the House of Lords, in *R v. Shivpuri,* to overrule a decision of the House given only a year back.

. It is submitted that this Hon'ble Court may reconsider *Azadi Bachao* and *Vodafone* precisely as, to say as this Court said in *Ganga Sugar Corporation Ltd. v. State of U.P*. AIR 1980 SC 286 put it, 'it is wiser to be ultimately right rather than to be consistently wrong'. It is worthwhile to do so precisely for the reasons which had led the House of Lords to depart from the recently decided *Anderton v Ryan*[40] in *R v.*

[40] [1985] 2 All ER 355 Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Roskill and Lord Bridge of Harwich.

Shivpuri[41]. The House had decided *Anderton v Ryan* on May 19, 1985. In *R v. Shivpuri* the correctness of *Anderton* was questioned before a palinode composed by one of the original authors of the majority judgment in *Anderton v. Ryan*. Lord Hailsham of St. Marylebone L C in his concurring speech observed:

> "But there is obviously much to be said for the view about to be expressed by my noble and learned friend that "If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better'. This consideration must be of all the greater force when the error is, as in the present case, to be corrected by a palinode composed by one of the original authors of the majority judgment."

(b) An address to our Government:

It is enough to quote a story :[42]

'Women beware of Women tells us about Binaca Capello, an Italian beauty, who was ravished in the background of her husband's house, whilst in the foreground her protector was engrossed playing chess wholly unmindful to what was happening inside. This crime of ravishment was facilitated by Livia, profession-ally a procuress and corruptor, who had become a partner in the game of chess. When the sentinel on the *qui vive,* abandons trust, roguery takes a toll. Middleton came again to the game of chess in his *Game at Chess* in which the characters are chessmen, the white ones being the English (the White King was King James of England, and the White Knight was Prince Charles) and the black ones: the Spaniards: It turned out a political allegory portraying how they played a sort of a geopolitical game of chess totally unmindful of the things getting worse and worse for them in their countries. Their cumulative sins visited King Charles, who had not only received a short shrift from Parliament, but even had his head cut off in 1649. The business lobby, the remote predecessor of the present-day corporate lobby, could not help them to save their souls. Even the dexterous Lionel Cranfield, a business tycoon working for the king with no holds barred, failed to help them out. And they kissed their doom providing lessons for all of us. This is how the world goes. But playing the game of chess can be disastrous when the demands of the hours iis so pressing. . T.S. Eliot, in his *The Waste Land,* composed a section on 'A Game of Chess' where the players come to say:

'..... And we shall play a game of chess,

Pressing lidless eyes and waiting for a knock upon the door.'

[41] [1986] 2 All ER H.L. 334 Lord Hailsham of St. Marylebone L C ,, lord Elwyn-Jones, Lord Scarman, , Lord Bridge of Harwich and Lord Mackay of Clashfern.

[42] Shiva Kant Jha, On the Loom of Time p. 313