Judicial Role in Globalised Economy with a focus on Tax Treaties

BOOK REVIEW

Judicial Role in Globalised Economy with a focus on Tax Treaties (Pax Mercatus) by **Shiva Kant Jha**
, Published by Wadhwa & Co. Nagpur, First Edition 2005, pp 445, Priced Rs. 495/-

The People of India, through their representatives in the Constituent Assembly, enacted and adopted a constitution, which created a sovereign and democratic republic. The Constitution adopted the parliamentary form of Government where the executive was responsible to Parliament. All executive power of the Union Government was vested in the President. The President was required to act on the aid and advice of the Council of Ministers. The Council of ministers was responsible to the House of the People. The extent of executive power of the Union was co-extensive with the legislative powers of Parliament had the exclusive power to legislate with regard to all kinds of international treaties. The Constitution further provided that no tax can be imposed or levied except with the authority of a law enacted by Parliament. This means no exemption from a tax imposed by law can be given without there being express provision in the law. In other words, this cannot be done by an executive order.

In this constitutional background we would like to see as to what this book has attempted to say. The book notes the developments in the economic policies pursued by the government since the adoption of the goal of liberalization and privatization since 1991-92 especially the impact of WTO agreement and the TRIPS mandate in compliance with which a number of laws had to be amended.

Chapter I of the book entitled 'Broad Features of The Sponsored State' sets the stage for a free and frank discussion on the impact of market on the functioning of state. It traces the evolution of the idea of the sponsored state from the policies adopted by the British since the year 1600 when the British East India Company beginning with trade relations took over the administration of the country which in course of time passed on to the British Government. Now we are independent and sovereign, and have our own constitution. But the US is now the super power being a member of United Nations and all its organs and agencies and willingly and voluntarily signing all trade related agreements subjecting our sovereignty to adverse impacts. The author concludes this chapter by making the following observations:

¶If things move the way they do our constitution would become an anachronism. By entering into various agreements under the rubric of the Uruguay Round Final Act, and its sequel, we have already defiled our constitution.¶

Chapter 2 of the book under review entitled, 'An Opaque System' describes in detail the scope of judicial review of state action in India. The Indian Constitution has created a government of limited powers. Powers of the government are limited by express terms of the Constitution. Any law enacted by Parliament which it has no competence to enact can be declared by the High Courts and the Supreme Court as unconstitutional by being ultra vires the Constitution. Similarly, legislature cannot enact a low taking away or abridging a fundamental right or which is otherwise contrary to an express provision of the Constitution. In India, the High Courts and the Supreme Court have power of judicial review of constitutional amendments, legislative action and administrative action. The scope of judicial review of delegated legislation in India is same as in other common law jurisdictions.

In chapter 2 the author discusses the merits of a case highlighting corrupt practices causing huge financial loss to the State. In the context of Indo-Mauritius Double Taxation Avoidance Convention, a number of off-shore companies operating from outside Mauritius were taking advantage of the said convention by simply producing a certificate of residence in Mauritius. A circular issued by the Central Board of Direct taxes gave a cover of legality to manifestly illegal practice. The High Court of Delhi was pleased to quash the said circular as being violative of various provisions of the Constitution discussed in this chapter. The author who had argued the case in person before the High Court had referred to article 19 on right to freedom of information and Article 21 on right to life and personal liberty. According to him it was a case of invalid delegation. The High court called it an opaque system and directed the Union Government to take remedial action.

In chapter 3 entitled 'Not On the Lord Shiva's Trident' the author examines critically the question whether judiciary is 'state' within the meaning of Articles 12 of the Constitution, and after respectfully disagreeing with the view taken by the Supreme Court in several cases including the latest in Rupa Ashok Hurra vs. Ashok Hurra , and asserts that judiciary is 'state' under Article 12 of constitution and as such fundamental rights operate as limits on the power of the State including the judiciary. He cities a number of authorities in support of his view. We hope one day his view becomes the view of the Court and a law declared by the Court under Article 141 of the Constitution of India.

Chapter 4 of the book is entitled ¶The Frontiers of the Doctrine of Ex Debate Justitiae¶. In this chapter the author attempts a critical analysis of the Supreme Court's (2002) judgment in Ashok Rupa Hurra's case in which the Court has invented a new remedy of curative wait petition that can be availed by these

who are aggrieved by the dismissal of a review petition under Article 137 of the constitution and who fulfill the conditions laid down for the purpose in the said judgment. The court observed as follows in this case: -

¶Nevertheless, we think that a petitioner is entitled to relief ex debits justitiac if he establishes (1) violation of principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice and (2) where in the proceedings a learned judge failed to disclose his connection with the subject matter or the parties giving scope for an apprehension of bias and the judgement adversely affects the petitioners.¶

The author of the book had the occasion to avail of this new remedy in Azadi Bachao's case believing that was a fit case for curative writ petition but the Court dismissed the petition on the ground that it did not accord well with the parameters prescribed by the Court. The author is of the opinion that it is not correct to subsume the entire gamut of the Court's inherent power under the conventional rubric of power ex debits justitiae.
His criticism of the Supreme Court's judgement in Azadi Bacho case spreads over several chapters, which makes an interesting reading.

In chapter 7 he states the pragmatics of the Right Judicial Role. But he is surprised to see how the Court chose to narrow the judicial role in the Azadi Bachao case which is not in line with the growing judicial activism of the times. He feels satisfied that a larger Bench of the same Court soon reversed the flawed judicial thesis adopted in Azadi Bachao. But by then the damage had already been done. The fraud highlighted by Azadi Bacho case had gone undetected and the state had suffered the loss of crores of Revenue.

In chapter 8 he finds fault with the decision of the Court in Azadi Bachao for relying on the text of a book prepared by an interested party and thereby upholding the abhorable practice of treaty shopping

In chapter 9 entitled ¶A Corporation Cannot be an Impervious Coverlet of Gross Abuse¶ he feels ¶the tax authorities in India were competent to go behind the certificate of residence granted by the Mauritius tax authorities when they found on investigation that it was sheltering the masqueraders of the third states contrary to the intention of the bilateral tax treaty.¶ But he fails to understand the logic behind the view taken by the court in its observation as follows:-

¶In the situation where the terms of the DTAC have been made applicable by reason of section 90 of the Income Tax Act, 1961, even if they derogate from the provisions of the Income Tax Act, it is not possible to say that this principle of lifting the veil of incorporation should be applied by the Court. As we have already emphasised the whole purpose of the DTAC is to ensure that the benefits thereunder are available even they are inconsistent with the provisions of the Indian Income Tax Act. In our view there force the principle of piercing the veil of incorporation can hardly apply to a situation as the one before us.¶

The author cannot help calling the observation per incuriam. Chapter 10 is most appropriately entitled as 'Fraud unravels everything'. This chapter unravels the misuse of the Indo-Mauritius Double Taxation Avoidance Convention and deprecates the non-performance of duty by those whose duty was to detect and prevent the fraud complained against. Chapter 11 entitled 'Ttreaty Shopping' explains the concept of treaty shopping, suggests counter measures and refers to the Report of the CAG and exhorts members of Parliament to pay heed to it. Chapter 12 criticizes the view taken on treaty shopping by the Supreme Court. While the High Court had held that ¶an abuse of the treaty or treaty shopping is illegal and thus necessarily forbidden¶ the Supreme Court justified it ¶as a necessary evil in a developing economy¶.

Chapter 13 mentions the facts and figures reported by the Comptroller and Auditor General in his Report No. 13 of 2005 submitted to the President and Parliament highlighting developments detrimental to the national economy arising out of the misuse of DTAC.

Chapter 14 puts the problem in proper perspective of general principles of international law and its interpretation, and examines the question of certificate of residence for the purpose of DTAC. Chapter 15 discusses treaty making power, refers to the British practice on the subject, special features of treaty making power under the Indian constitution and makes some valuable suggestions and discommendation.

Chapter 16 poses a very pertinent question as to who will watch the watchman? It deplores the pathetic performance of our diplomatic missions, non-cooperation of the Government with the functions of the Comptroller and Auditor General of India, lack of commitment on the part of bureaucracy, decline of Parliament and the absence of strong and vigilant public opinion. His disappointment is amply reflected in Chapter 17 which narrates a morbid story of the Indo-Mauritius DTAC. This chapter is very well written and conveys a force full plea for consideration of public in general to judge the whole issue for themselves. The conclusions are obvious and irresistible. Chapter 18 is a very strong comment on the Uruguay round Final Act and is called a betrayal of the nation. He examines in detail the constitutionality of the final act and concludes that the federal aspects of our polity were ignored and our sovereignty was compromised. Here also he makes some useful suggestions and gives recommendations. In chapter 19 he attempts to prove the point that a tax treaty cannot derogate from a statute or law declared by the courts. He does so by supporting his view with appropriate authorities. But to his dismay the Division Bench in Azadi Bacho had taken a contrary view.

Chapter 20 succinctly describes the paradigm shift in tax jurisprudence, and states the duty of the court in cases where tax avoidance device is at work. But to the disappointment of the author the welcome approach of the judiciary received a short shift in the Azadi Bachao case.

Chapter 21 examines the scope of CBDT's circular making power with reference to provisions of the Income-tax Act 1961 and concludes that no circular can deviate on the contrary or override the provisions of the parent Act. He expresses a hope that the issue would be considered in wider perspective and resolved once and for all in the reference pending before the Constitution Bench .

In chapter 22 he highlights certain special features of public interest litigation in tax matters. He criticizes the approach adopted by the Court in Azadi Bachao case both on locus standi as well as on substantive questions of law and their interpretation .

Chapter 23 is an epilogue. In this chapter he recapitulates certain points for consideration by the Supreme Court, by Parliament, by the executive, by the civil servants, by the CAG, by the diplomatic missions, by the politicians, by the economists, by the press and media and by the countrymen.

The points highlighted herein are so well considered and worthwhile that one is tempted to reproduce them in extenso. But considering that discretion is better part of valour, we resist the temptation, and refrain from doing so, But we whole heartedly commend the book to all concerned to give it the attention it deserves. We are sure those who read it will enjoy, benefit and will appreciate the ideas thrown in.
The printing and get up of the book is nice and the price within the reach of the common man for which Wadhwa and Company Nagpur deserve rich compliments.

ABOUT THE AUTHOR

Prof. M L Upadhyaya
(Born in 1936) started his career as a Ford Foundation Research Fellow in the Institute of Advanced Legal Studies of the University of London. After taking his Ph.D. from the University of London, he joined the Indian Law Institute, New Delhi. But soon he went on teaching assignments in Australia and New Zealand. On return, he joined the University of Calcutta as Professor of Law, Head of the Department of Law. Dean, Faculty of Law and Principal, University College of Law in 1975. He also held similar position in the University of Jabalpur. He was also Director, Central India Law Institute, Jabalpur. He is a UGC Visiting Professor of Law in the National Law School of India University since 1998.