



CENTRE- STATE LEGISLATIVE CONFLICTS UNDER ARTICLE 253 OF THE INDIAN CONSTITUTION: AN ANALYSIS

Dr. N. Sathis Gowda¹, K. S. Satisha²

¹Assistant Professor, ²Research Scholar, P.G. Department of Studies & Research in Law, University Law College,
Bangalore University, Bangalore
sathishbmscl@gmail.com¹

INTRODUCTION

The Constitution of India establishes a dual polity. The dual polity consists of Union at the Centre and States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution¹. The distribution of legislative powers between the Union and States is the sine-qua-non of a federal Constitution². The scheme of distribution of powers between the Union and States in India is more elaborate and comprehensive. The Indian Constitution, based on the principle of federalism, has a scheme of two fold distribution of legislative powers respect to territory and subject matter. The Constitutional provisions are spread out over Articles 245 to 255 of Indian Constitution. Article 245 discusses distribution of legislative power between Union and State with respect to territory. In terms of Article 246, The VII Schedule of the Constitution contains 3 lists, The Union List, State List and Concurrent list. Both Union and State Legislatures are having independent and supreme powers to make laws within their respective spheres. Laws enacted by the Parliament and the State Legislature should be within the field assigned to it and not encroach into sphere reserved to the other and a law made by one which trespasses or encroaches upon the field assigned to the other, is not valid.

The Indian Constitution has purported to incorporate the scheme of distribution of legislative powers in a unique way so as to make the Union supremacy not only during emergency but also in normal circumstances. The scheme contains provisions, whereby without a formal amendment of the Constitution, the Union Parliament assumes legislative authority over subjects in the State List. One of such circumstance is the Parliament can make law on State subject, in order to implement International treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body³.

In recent times, Union enacting laws without consulting States to implement international treaties and agreements in respect of the matters in the State list or Concurrent list. While exercising the powers under Article 253, if parliament enacts any law on State subjects, states inevitable loses its right to make law on those subjects.

In this regard, the researchers made an attempt in this paper to analyse the issues arise in case if the Central Legislature legislates on agreements reached at international conferences which is related to the State List and also examine the need of consultation of States by the Parliament before it enacts any legislation under Article 253 on the matters of State List or Concurrent List.

¹O.P. Tiwari, '*Federalism and centre-state relations in India*', Deep and Deep publications Delhi P.80-81

²Subash N.Singh, "*Centre State Relations in India*", H.K. Publishers, Delhi, 1990, P.73

³Article 253 provides: "Legislation for giving effect to international agreements.—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."



HISTORY OF ARTICLE TREATY MAKING POWER

Prior to the commencement of the Constitution, India did not enjoy full external sovereignty. During British rule in India, they adopted executive model of treaty making⁴. The negotiation, signature and ratification of any treaties were prerogative powers of the executive and as far as entering into treaties the Parliament had no role to play. However, execution of any treaty by executive affecting the rights of citizen is subject to obtaining Parliamentary assent⁵.

The Government of India Act, 1935 did not provide any exclusive power on the executive authority of the federation to enter into treaties⁶. However, Section 8 of the Act provided that the executive authority of federation extends to the matters with respect to which the federal legislature has power to make laws⁷. The Implementation of treaties and agreements with other countries was fall under Item 3 of List I of VII Schedule of the Government of India Act, 1935⁸. However, as far as execution of treaties is concerned the 1935 Act imposed stringent condition on the federal government that consent of the province is necessary in order to give effect to the treaty if the subject of the treaty falls within the domain of List II (Provincial List) in the Seventh Schedule⁹.

CONSTITUENT ASSEMBLY DEBATES

Before look into the constitutional provisions dealing the implementation of any agreement or convention with any other country or countries, it is desirable to study the constituent assembly debates as to the original intention of the framers of the Constitution on power to enter and implementation of treaties¹⁰. Item no. 14 and 16 of List I of VII Schedule of the draft constitutional Provisions deals with respect to entering into treaties and Articles 60 and 230 of draft Constitutional provisions provides for implementation of treaties.

The Draft Item No.14¹¹ relates to the "*Participation in international conferences and implementation of decisions taken thereat*". Two Amendments were moved, one by Sir V.T. Krishnamachari and the other by Mr. Nazir Ahmed¹². Sir V.T. Krishnamachari said that, The power to implement the decisions taken at these Conferences, Associations and other bodies must depend on whether the subject matter of that decision is a provincial or a Federal subject. My proposal is that if these decisions relate to provincial subjects, the consent of the province concerned should be taken before the decisions are implemented. In the absence of such a restriction, the powers of provinces and of states will become almost nugatory.

Mr. Nazir Ahmed said that there may be subjects which are entirely Central or it may come within List, No. III, in such case the Centre will also have jurisdiction. But, the subject may also come within List No. II, that is

⁴ Available at <http://shodhganga.inflibnet.ac.in/bitstream/10603/76456/13/chapter%207.pdf> last visited 20/03/2018

⁵ I.A. Shearer, "*Starke's International Law*", 11th ed., Oxford University Press, Oxford, 2009 (3rd impression), p. 71-72.

⁶ Dr. D.D. Basu, "*Introduction to the Constitution of India*", 20th ed., Lexis Nexis-Butterworths Wadhwa, Nagpur, 2012 (Reprint), P.9

⁷ Section 8.-(1) Subject to the provisions of this Act, the executive authority of the Federation extends-

(a) to the matters with respect to which the Federal Legislature has power to make laws ;

Item No.3 External affairs ; the implementing of treaties and agreements with other countries ; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

⁹ Section 106 of the Government of India Act, 1935 provides Provisions as to legislation for giving effect to international agreements

(1) The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the

¹⁰ The Constituent Assembly Debates (CAD) on this aspect contained in Vol. V, VII and VIII that took place on 27th August 1947, 29th & 30th December 1948 and 13th June 1949 respectively. The text of the entire Constituent Assembly Debates is available at Parliament of India website at <http://parliamentofindia.nic.in/ls/debates/>.

¹¹ The Draft Item No.14 currently Item No13 in List 1 of VII Schedule

¹² Vol. VIICAD (13th June 1949)



within the provincial jurisdiction. In that case, it would not be proper to give powers to the Centre, to do anything without the consent of the province¹³.

Opposing the Amendments Sir *B.L. Mitter* aptly pointed out that the matters taken for discussion in the international conferences would be relevant to all nations and any decision taken thereat would be in the interest of all, hence there should not be any apprehension in empowering the central legislature on implementing the decisions¹⁴.

Opposing the Amendment Mr. M. Gopalswami Ayyangar stressed the fact that “...we go to those Conferences not on behalf of the Federation as distinguished from the Units of the Federation”¹⁵. We go to those Conferences as representing India as a whole, i.e. the Federation and the Units combined, and, if we are empowered to subscribe to the decisions arrived at those Conferences, it is only right that we should be in a position to implement those decisions which we agree to at those Conferences.

Both Amendments on Item No.14 were not put to vote and were negatived. Then the Original Item No.14 “Participation in international conferences, associations and other bodies and implementing of decisions made thereat” was put to vote and was adopted. Draft Item No.16¹⁶ was on “entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.” There were two proposals for Amendment on Item No.16, one moved by Sir V.T. Krishnamachari and the other by Mr. Naziruddin Ahmad. Before any debate commences on Item No.16, Sir V.T. Krishnamachari withdrew his proposal since his similar proposal on Item No.14 was negatived. The proposal of Mr. Naziruddin Ahmad is that consent of state is necessary on any matters which are within the legislative competency of province and in other matters affecting a Province or a State.

Shri M. Ananthasayanam Ayyangar speaking on the amendment suggested that only one legislature in the country must accept decisions and given them the sanction or force of law Mr. Alladi Krishnaswami Ayyar also opposed the proposal of Mr. Naziruddin Ahmad¹⁷. The amendment moved by Mr. Naziruddin Ahmed was put to vote and was negatived. Accordingly, the original Draft on Item No.16 (now Item No.14 in List 1 of VII Schedule) was adopted.

The Draft Article 230¹⁸ was added to clarify that, only Parliament has exclusive power to legislate to implement treaties, agreements or any decisions made at international conferences, etc. Dr. B.R. Ambedkar moved an Amendment on the Draft Article 230 which read as: “That in article 230, for the words for any State or part thereof, the words for the whole or any part of the territory of India be substituted”. The Amendment was adopted without any debate¹⁹.

The Draft Article 60²⁰ provided for extension of the Union Executive Power to the matters on which the Parliament has power to make laws. This was strongly opposed saying this would take away the little power of the States over Concurrent List²¹. Accordingly, Mr. K. T. M. Ahmad Ibrahim Sahib Bahadur gave two notices of Amendments to Draft Article 60. The first one read as: “That the proviso to clause (1) of article 60 be deleted.” Mr. K. Santhanam point out that the deletion of the proviso to clause (1) of Article 60 will vest the entire executive power and Concurrent subjects at the Centre²².

The other was: “in sub-clause (a) of clause (1) of Article 60, between the words ‘Parliament has’ and the word ‘power’, the word ‘exclusive’ be inserted.” The learned Member pointed out that the insertion of the word

¹³ Available at [at http://parliamentofindia.nic.in/ls/debates/](http://parliamentofindia.nic.in/ls/debates/).

¹⁴ Ibid

¹⁵ Supra note 13

¹⁶ The Draft Item No.16 currently Item No.14 in List 1 of VII Schedule

¹⁷ Vol. VIII CAD (13th June 1948)

¹⁸ The Draft Article 230 currently now Article 253

¹⁹ Rajeev Dhavan, “*Treaties and People: Indian Reflections*”, 39 J.I.L.I. (1997) at 3

²⁰ The Draft Article 60 currently now Article 73

²¹ Vol. VIII CAD (13th June 1948)

²² Ibid



“exclusive” in Clause (1) (a) of Article 60 as suggested by him will confine the Power of the Union Executive to Union List (List 1) only. In other words, the executive power of the Union shall not extend to matters with respect to which it has no exclusive power to make laws, i.e., matters included in the Concurrent List²³.

Mr. Pandit Kunzru moved an Amendment to draft Article 60 stirred immense debate in the Constituent Assembly. The whole debate centered on whether the proposed Constitution is “Federal” or “Unitary”. This is mainly because the purpose of the amendments moved on Draft Article 60 was to preserve autonomy of the State Executive on subjects mentioned in concurrent list.

Further, Dr. B.R. Ambedkar particularly emphasized that allowing the Central Government to execute the laws made by the Parliament on Concurrent list will reduce the financial burden of Provinces/States in as much as the Central Government will fund the implementation of any such law. The Amendments moved on Article 60 were put to vote and were negative and the Draft Article 60 was adopted which in its current form is Article 73.

TREATY MAKING AND IMPLEMENTATION POWER UNDER THE CONSTITUTION OF INDIA

Entry 14 of List-1 of VII Schedule empowers the Parliament to enact a suitable legislation on the subject of “entering into treaties and agreements with foreign countries and implementing of such treaties, agreements and conventions” even after 67 years of Constitution coming into force, Parliament has not thought it fit to legislate on the subject. In the absence of any specific law occupying the field, viz., who can enter into treaties, conventions and agreements with foreign countries or international organizations? One has to fall back upon provisions of the Constitution to fill the gap created by the Constitution itself.

The absence of specific law and the gaps created in the Constitution allows the Union Executive to exercise its power under Article 73²⁴. This Article confers upon the Government of India executive powers over all subjects in which Parliament has legislative competence. Article 73 clearly indicates that the powers of the Union executive do extend to matters on which the Parliament is competent to legislate and are not confined to matters over which the legislation has been passed already. Executive powers of the Union of India are specifically vested in the President under Article 53 of the Indian Constitution. Apart from vesting the executive power, this provision also provide for the exercise of such executive power either by him directly or through the officers subordinate to him in accordance with the Constitution. The Supreme Court in *Rao v. Union India*²⁵ has observed “executive power is the residue of functions of government, which are neither legislative nor judicial”. Thus the Union Executive exercising its power under Article 73 enters into treaties with other countries and international institutions. the executive power of the Union to “enter into” and “implement” treaties, agreements and conventions is subject to the provisions of the Constitution²⁶.

Whereas law making power of legislatures is concerned, the power of legislating is divided by territorial extent and competence over subject matter²⁷. The Parliament can make laws for the whole of India on subjects

²³Vol. VII *CAD* (29th and 30th December 1948).

²⁴73. Extent of executive power of the Union

(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement: Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect in which the Legislature of the State has also power to make laws

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution Council of Ministers

²⁵AIR 1971 SC 1002,

²⁶ Article 73(1) starts with - “Subject to the provisions of this Constitution, the executive power of the Union shall extend... It means limitation or restriction or exception or yielding to other provisions of the Constitution.

²⁷Article 245 and 246 read with VII schedule of Indian Constitution



specified in List I of Schedule VII and the legislature of the any State can make laws applicable within the territory of that State over the subjects contained in List II. List III is designated as Concurrent List over which the Parliament as well as the legislature of the States can exercise jurisdiction, subject to the overall power of the Parliament. Article 253 confers exclusive power on the Parliament to enact laws to implement international agreements. This power overrides even the other provisions in Chapter 1 of Part XI of the Constitution which deals with the distribution of powers between the Union and the States. The provisions of Article 253, therefore, gives power to the Parliament to enact laws on matters listed in List II of Schedule VII, in order to implement international treaties, agreements, conventions or decisions taken international conference, association or other body. Hence, the power of the Parliament on matters of international law can be stated to be plenary. Further, the residuary power of legislating is also with the Parliament. This enables the Parliament to legislate on matters not listed in Schedule VII.

This Article is in conformity with the object declared by Article 51(c)²⁸. Treaty-making and implementation of treaties, etc. is a subject of Union Legislation, under Entry 14, List I. But it would have been difficult for the Union to implement its obligations under treaties or other international agreements had it not been competent to legislate with respect to State subject in so far as that may be necessary for that purpose. In India, the provisions of treaty once signed do not automatically form part of the law of the land. The doctrine of Monism as prevailing in European countries is not applied in India²⁹, but it is the doctrine of Dualism which is applied in India³⁰. A treaty entered by India cannot become a law of the land and it cannot be implemented unless Parliament passes a law under Article 253. The obligations arising under the agreement or treaties are not by their own force binding on Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the Seventh Schedule. The text of Article 253 assumes that legislation would be required for implementing international treaties, agreements or conventions. India, therefore, follows the dualist approach since it is imperative to pass a law by the Parliament to give effect to any treaty/international convention.

COMPARATIVE STUDY

In United States of America, the Article VI of U.S. Constitution declares that a treaty which is made by the Federal Executive with the assent of the Senate must be supreme even though it trenches upon the normal sphere of the States as outlined by the other provisions of the Constitution³¹. Thus in *Missouri v. Holland*³², the U.S. Supreme Court held the Migratory Bird Treaty Act passed by the Congress, was valid although the States had a constitutional title to migratory birds within them. A treaty made by the U.S. may override private rights created by a State law.

²⁸Article 51(c) in The Constitution Of India 1949

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration PART IVA

²⁹Jatindra Kumar Das, *Law of Copyright*, PHI Learning pvt ltd. New Delhi p-69

³⁰<https://rostrumlegal.com/constitutional-commitment-to-international-obligations/>

³¹Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

³²252 U.S. 416 (1920)<https://supreme.justia.com/cases/federal/us/252/416/case.html>



But in Canada, Section 132 of the British North America Act provides that the Dominion Parliament has exclusive power to implement a treaty when it comes within Section 132 or where the general residuary power under Section 91 is applicable³³. But, the Dominion Parliament cannot legislate to implement the agreement without the consent of the Provinces, if the international convention was signed by Canada as an independent State, not as a member of the British Commonwealth of Nations, and the matter of the Convention relates to the classes of Provincial subjects. It would thus appear, that the Dominion Parliament still lacks the whole of the treaty-making power.

Whereas in Australia, there is no separate treaty-making power in the Constitution for Australia. Section 51 of the Constitution Act of Australia gives the Commonwealth, the power over "External Affairs"³⁴. In *King v. Burgess*³⁵, it was laid down that the external affairs includes agreements entered into by Australia and the Commonwealth. Legislation to give effect to such agreement is valid despite its effect on States.

ROLE OF JUDICIARY IN RESOLVING CONFLICT BETWEEN CENTRE AND STATE UNDER ARTICLE 253

Higher Judiciary in India have played an important role in overcoming the challenges in implementing the provisions of treaty/ international covenants to protect the rights of its citizens. Courts in India, in certain cases, refused to implement treaty provisions in municipal courts without any legislation to that effect. But, at the same time, it has upheld the provisions of human rights treaties and given effect to those provisions where there is no contradictory municipal law. Judiciary has played an important role over the years in realizing certain provisions of international conventions and protecting the rights of its citizens by basing its decisions on international legal principles. It would be worthwhile to discuss a few judicial pronouncements in this regard.

In *Maganbhai Ishwarbhai Patel v. Union of India*³⁶ Justice Shah "The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power; thereby power is conferred upon the Parliament which it may not otherwise possess. But, it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizen or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power."³⁷

In *P.B.Samant v. Union of India*³⁸, Public Interest Litigation (PIL) was filed seeking writ of mandamus restraining the Union of India from entering into final treaty relating to Dunkel Proposals without obtaining sanction of the Parliament and State Legislatures. It was argued that, in exercise of its executive power under Article 73, the Union Government cannot trench upon the subjects in the State List. It was submitted that Dunkel Proposals dealt with the subjects like agriculture, irrigation, cotton and other matters that are within the exclusive domain of the States. It was also submitted that the Dunkel Proposals will also affect the maintenance of roads, bridges, communications etc. which too are in the State List. Based on these premises it was argued that unless the consent of States is obtained, the Union Government cannot enter into any agreement on the Dunkel Proposals which are being discussed as part of Uruguay Round of Trade Negotiations under the auspices of GATT. The Court dismissed the petition by holding that the power under Article 73 was expansive

³³Section 132 of the British North America Act 1867. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries

³⁴Commonwealth of Australia Constitution Act 1900 (Cth) s 51(xxix)

³⁵[1936] HCA 52; 55 CLR 608; (1936) ALR 482 available at <https://jade.io/j/?a=outline&id=63895>

³⁶1969 AIR 783, 1969 (3) SCR 254, 1970 (3) SCC 400

³⁷*Ibid*

³⁸AIR 1994 Bom. 323



enough to enable the Union to negotiate treaties in support of Article 253. It held: "*It is difficult to accede to the contention that though the Parliament has power to enact laws in respect of matters covered by the State list in pursuance of treaty or the agreement entered into with foreign countries, the executive power cannot be exercised by entering into treaty as it is likely to affect the matters in the State list.*"³⁹

In *S. Jagannath v. Union of India & Ors*⁴⁰ the court upheld the Environment (Protection) Act, 1986, enacted to implement decisions taken at the U.N.'s Conference on the Human Environment in 1972. Further, more to the point is *Dada v. State of Maharashtra*⁴¹, in which the Narcotic Drugs and Psychotropic Substances Act, 1985, was upheld as a law which implemented the International Convention of Psychotropic Substances, 1971. Again, in the year 2005, the apex court in the case of *State of West Bengal v. Kesoram Industries Limited*⁴², held that a Treaty entered into by India cannot become law of the land and it cannot be implemented unless Parliament passes a law as mentioned under Article 253.

In a recent judgment of 2014 on recognizing transgender as third gender and enforcing their rights guaranteed in the Constitution as citizens of this country, the Supreme Court in *National Legal Services Authority v. Union of India and others*⁴³, observed that generally, a legislation is required for implementing the international covenants, unlike the position in the USA where the rules of International Law are applied by the municipal courts based on the theory of their implied adoption by the state, as a part of its own municipal law. The court, while interpreting Article 51 read along with Article 253 of the Constitution of India, held that if the Parliament has made any legislation which is in conflict with International Law, then Indian courts are bound to give effect to the Indian law. However, in the absence of contrary legislation, municipal courts in India would respect the rules of International Law. Therefore, the Indian commitment to International Treaty obligations under Constitution of India is defined under Article 51(c); which although is only a Directive Principles of State Policy, yet the power of Parliament under Article 253, to enact laws for implementing the treaty obligations is an important provision in this direction.

PARLIAMENTARY PROPOSALS FOR AMEND ARTICLE 253

The members of the Parliament had made an attempt to amend the Constitution with respect to negotiation and entering into treaties. The first such attempt was made on 5th March, 1993 by Shri George Fernandes, Member of Parliament, Lok Sabha he gave notice of intention to introduce the Constitution (Amendment) Bill, 1993 for amending Article 253 to provide that treaties and conventions be ratified by each House of Parliament by not less than one half of the membership of each House and by a majority of the legislatures of not less than half the States. But the Bill was not listed for consideration during the life of that Lok Sabha⁴⁴.

Shri Satyaprakash Malviya⁴⁵, enquiring whether the Government proposes to introduce any legislation to amend the Constitution to provide for parliamentary approval of international treaties. The question was answered on May 12, 1994 in the negative⁴⁶.

In February, 1992, Shri M.A. Baby, Member of Parliament, Rajya Sabha gave a notice of his intention to introduce the Constitution (Amendment) Bill, 1992 to amend Article 77 of the Constitution of India. Similarly on the same lines as suggested by Shri M.A. Baby Shri Chitta Basu, Member of Parliament, Lok Sabha gave notice of his intention On July 17, 1994, to introduce a Constitution (Amendment) Bill, 1994. but the same had not been taken up for consideration during the life of that Lok Sabha⁴⁷.

³⁹ AIR 1994 Bom 323, 1994 (4) BomCR 491 at para 5 available at <https://indiankanoon.org/doc/983278/>

⁴⁰ (1997) 2 SCC 87 at page 143, AIR 1997 SC 811.

⁴¹ (200) 8 SCC 437

⁴² AIR 1997 SC 811.

⁴³ (2014) 5 SCC 438.

⁴⁴ Report of the Commission on Centre-State Relations 2010, para 3.8.05 page no. 30 at para 3.7.15

⁴⁵ Member, Rajya Sabha tabled a question (No.6856)

⁴⁶ <http://shodhganga.inflibnet.ac.in/bitstream/10603/76456/13/chapter%207.pdf>

⁴⁷ Report of the Commission on Centre-State Relations 2010, para 3.8.05 page no. 30 at para 3.7.17



The Private Member's Bill to amend the Constitution introduced by Shri M.A. Baby came up for discussion in the Rajya Sabha in March, 1997. Shri Pranab Mukherjee, M.P., suggested that there should be an informed debate and discussion on the issue and that one should not rush with Constitutional amendments on the matter. Finally opined that more debate should go into the matter before effecting such an amendment⁴⁸.

RECOMMENDATIONS OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

The Commission was appointed to review the existing arrangements between the Union and States as per the Constitution of India. The NCRWC observed in its report Volume II Constitutional Governance and the Management of Centre-State Relations at Chapter-3 titled Legislative Relations Between the Union and States that "Article 246 (1) read with Entry 14 of List I- Union List of the Seventh Schedule empowers Parliament to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries". As per Article 253, Parliament has, power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. This article overrides the distribution of legislative powers provided for by Article 246 read with Lists in the Seventh Schedule to the Constitution.

Accordingly the NCRWC recommended that the Parliament should make a law on the subject of Entry 14 of List I to streamline the procedures involved. The following aspects may be incorporated in the proposed law to be enacted by the Parliament on the subject of Entry 14 of List I⁴⁹:

1. Agreements relate to defense, foreign relations etc. which have no bearing on individual rights or rights of States of the Indian Union can be put in a separate category on which the Union may act on its own volition independent of prior discussion in Parliament.
2. Other treaties which affect the rights and obligations of citizens as well as those which directly impinge on subjects in State List should be negotiated with greater involvement of States and representatives in Parliament.
3. Treaties or agreements which, when implemented, put obligations on particular States affecting its financial and administrative capacities. In such situations, in principle, the Centre should underwrite the additional liability of concerned States according to an agreed formula between the Centre and States.
4. Financial obligations and its implications on State finances arising out of treaties and agreements should be a permanent term of reference to the Finance Commissions constituted from time to time.

SUGGESTIONS

On the basis of above discussion in order to reduce conflict or friction between States and the Union and for expeditious decision-making on important issues involving States, the researchers have made the following suggestions.

1. The Parliament should make a law on the subject of Entry 14 of List I (treaty making and implementing it through Parliamentary legislation) to streamline the procedures involved. The exercise of the power obviously cannot be absolute.
2. Giving effect to treaties without the consent of Parliament and State Legislature would result in collapse of Indian Federalism. Hence prior consent of the Parliament must be obtained before entering into contract by the President.
3. If the subject matter of treaty falls under State List, Parliament before making any law consent of the states must be obtained.

⁴⁸P.M. Bakshi, 'Treaty Making Power under our Constitution', A Consultation Paper presented to the National Commission to Review the Working of the Constitution-January 8, 2001.

⁴⁹ Report of the Commission on Centre-State Relations 2010, para 3.8.05 page no. 50



4. Prior consultation by the Union Government with the inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.
5. Need to implement the recommendations of NCRWC with respect to legislative powers to overcome from the Centre State legislative conflicts

CONCLUSION

In the absence of any law enacted by the Parliament under Entry 14 of List I of the VII Schedule. The President enjoys the power to conclude treaties with the foreign countries subject to certain limitations and the manner contemplated by the Constitution. Treaties in India do not require the approval of the legislature before they are finally ratified. Every treaty concluded by the President does not unlike in United States, Australia and Switzerland form part of the law of the land unless expressly made so, as in the United Kingdom by legislative authority. Treaties concluded in the international level cannot have binding force in India without enacting a law for implementing. The Parliament has exclusive power to make law for implementing any treaties and that power is exercisable even if the subject matter of the treaty to the State List.

The executive power to enter in to treaties without any checks and balances poses a great threat to Federal Structure of Indian Polity. It is said that the Constitution classified the legislative powers available to the Union and the States on areas that belonged exclusively to the Union and States and also areas over which they have concurrent power and this entire scheme of division of legislative powers between the Union and States which formed the basis of Indian federalism is taken away through Article 73 (1) read with 253. Further, it is argued that giving effect to treaties without the consent of Parliament and State Legislature would result in collapse of Indian Federalism. Theoretically Parliament was to have the final say in determining whether and what laws would be enacted to implement the international obligation arising out of an international treaty. But parliamentary government in India is designed in such a way that by the time Parliament reflects on the desirability of implementing legislation it is already faced with a fait accompli