JUSTICE KONDA MADHAVA REDDY FOUNDATION

THIRD MEMORIAL LECTURE

"TREATY-MAKING POWER UNDER OUR CONSTITUTION"

DELIVERED BY
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TREATY-MAKING POWER UNDER OUR CONSTITUTION

By
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Justice Madhava Reddy, in whose memory this lecture is arranged by KONDA MADHAVA REDDY MEMORIAL TRUST, was a man of many parts. A leading and a highly competent advocate, a preceptive and excellent Judge, a committed educationist and an affectionate, lovable and pleasant individual - he excelled in every field he entered . The law reports amply bear out his contribution to law, both as an advocate and as a Judge in Andhra Pradesh, Bombay and finally in the Supreme Court. A large number of educational institutions in Hyderabad owe their existence and continuance to him. He took active interest in the administration of R.B.V.R. Reddy Hostel for boys and the hostel for girls. His father K.V. Ranga Reddy was one of the foremost leaders of the freedom struggle waged by the Hyderabad Congress against the despotic rule of the Nizam and later contributed immensely to the upliftment of the State of Hyderabad and in particular the rural poor among them, as a Minister in the Hyderabad State and later as the Dy. Chief Minister in the State of Andhra Pradesh. Justice Madhava Reddy proved himself to be the worthy son of a worthy father. My association with Justice Madhava Reddy goes back to forties, when he and some others used to come to Reddy Hostel to play ;hockey. After I was enrolled as an advocate, I appeared with him in some cases and against him in some other cases. I appeared before him as a

counsel after he was elevated as a Judge and after my appointment as a Judge, we had several occasions to sit together in a Bench. After my appointment as a Judge of the Supreme Court, he appeared as a Counsel in many cases before the Benches of which I was a member. In a short period, he earned an excellent reputation in the Supreme Court Bar as a soft-spoken and competent advocate. His clientele came from all over India and in all fields of law. Indeed, the last dinner given by Mr. Madhava Reddy before he fell ill was one arranged on my retirement from the Supreme Court. He had actually postponed, by a few days, his hospitalisation to arrange the dinner. This gesture of his shows the kind and generous nature of the man that he was. It is befitting that his memory is sought to be perpetuated by arranging these annual lectures.

TREATY-MAKING POWER UNDER OUR CONSTITUTION

JUSTICE B.P. JEEVAN REDDY

Entering into treaties and agreements with foreign powers is one of the attributes of State sovereignty. No State can insulate itself from the rest of the world whether it be in the matter of foreign relations, trade, environment, communications, ecology or finance. This is more true since the end of the World War II. The advent of globalization and the enormous advances made in communication and the enormous advances made in communication and information technology have rendered independent States inter-dependent. Every State has entered into and is entering into treaties - be it multi-lateral or bilateral - which have a serious impact upon the economy and the social and political life of its society. In spite of the fundamental importance of the treaty-making power, it has unfortunately received very little attention in our Country, though in many other Countries, good amount of research and debate has gone into it. We in India cannot afford to ignore this subject any longer, particularly because of the experience of W.T.O. treaties signed by our Government without consulting or without taking into confidence either the Parliament or the public or, for that matter, groups and institutions likely to be affected adversely thereby. The Agreements signed on Intellectual Property Rights, trade, agriculture and services are so far-reaching that there is a body of opinion which honestly thinks that some of the provisions of these Agreements are adverse to our national interest - so much so that the HDR 1999 has called for a review - a roll back - of the TRIPs Agreement, to protect the health of the people and economies

of the developing countries. At page 10, the Report says "Intellectual property rights under TRIPs Agreement need comprehensive review to redress their perverse effects undermining food security, indigenous knowledge, bio-safety and access to health care." The questions we must address ourselves are: to whom does this power belong - whether to the Executive or to the Parliament ? and if it is the power of the Executive, whether it is subject to Parliamentary control or supervision? What is the impact of treaty-making power conferred by entry 14 of List of the Seventh Schedule and Article 253 of the Constitution upon the federal structure which we have adopted for ourselves? We may have to incidentally examine what is the position in other countries, whether common law countries or others, and how they are grappling with issues arising in this behalf.

It would be appropriate to examine, in the first instance, the legal background to our constitutional scheme. It is well known that British India had been following the British practice in the matter of treaty-making. What the British practice is can better be set out in the words of Privy Council in its celebrated decision in ATTORNEY GENERAL FOR CANADA Vs. ATTORNEY GENERAL FOR ONTARIO (1937 A.C. 326 = AIR 1937 P.C.....). It said :

> It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more

sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other Countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law..

Parliament, no doubt, has a constitutional control over the Executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers, the problem is simple. Parliament will either fulfill, or not, treaty obligations imposed upon the State by its Executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. "

It would be equally relevant to notice the context in which the said observations were made. The question before the Privy Council concerned the limitation of the Federal power to implement international obligations in areas of provincial jurisdiction without provincial cooperation. (It may be remembered that Canada is a federal State with a distribution of

powers between the Centre and the Provinces). The Privy Council held that the federation had no power to legislate in respect of the matters which fell within the exclusive jurisdiction of the Provinces. This was so held in the light of S.92 of the British North America Act, 1867.

It would be legitimate to presume that our Founding Fathers were acutely aware of this decision and have deliberately provided; for a departure therefrom in two respects. Firstly,; they expressly included the treaty-making power within the legislative competence of the Parliament (as I will explain presently) and secondly they incorporated Article 253 in Part XI of the Constitution. I may elaborate :

Article 246 effects a distribution of legislative power between the Union and the States. Article 246 (1) says:

> "... Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List")."

The Seventh Schedule to the Constitution (which is referable to Article 246) contains, as you all know, three Lists : Union, State and Concurrent. Entries 13, 14, 15 and 16 in the Union List are relevant, particularly Entry 14. They read as follows :

> "13. Participation in international conferences, Associations and other bodies and implementing of decisions made threat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

15. War and peace.

16. Foreign jurisdiction."

From a reading of Article 246 alongwith the said Entries, it is obvious that the Parliament is competent to make a law with respect to the several matters mentioned in the above entries. In other words, treaty-making is not within the exclusive competence of the Executive. It is squarely placed within the legislative competence of the Parliament. By virtue of Article 73 of the Constitution, the Executive power of the Union extends, in the absence of parliamentary legislation, to the matters with respect to which the Parliament has power to make laws subject, of course, to constitutional limitations. It is well known that the Parliament has not so far made any law regulating the procedure concerning the entering into treaties and agreements nor with respect to their implementation. Equally clearly, no law has been made regulating the manner in which the Government shall sign or ratify the international conventions and covenants. The resulting situation, unfortunately, is that it is left totally to the Executive to not only enter into treaties and agreements but also to decide the manner in which they should be implemented, except where such implementation requires making of a law by Parliament. And the fact of the matter is that once the Executive Government enters into a treaty, it would be, ordinarily

speaking, quite embarrassing for the Parliament to reject the treaty - more so in view of the provisions of the Vienna Convention on the making of Treaties which though not yet ratified by India (according to the information given by the concerned Ministries) indicates certain consequences flowing from the conclusion of a treaty.

Now to; Article 253. Article 253 is one of those set of Articles which provide situations in which the Parliament can legislate with respect to matters in the State List. Article 253 reads :-

> " 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 any treaty, agreement or convention with any other country or countries or any decision made at any international conference, associated or other body. "

This Article empowers the Parliament 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, associated or other body. " Conferment or this power on the Parliament is evidently in line ;with the power conferred upon it by Entries 13 and 14 of List I. The opening words of the Article "Notwithstanding anything in the foregoing provisions of this Chapter" mean that this power is available to Parliament notwithstanding the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule.

In the light of this Article, it is evident, the situation similar to the one arising in Canada by virtue of the 1937 decision aforementioned, may not arise.

After the commencement of the Constitution, quite a few cases have arisen where the Supreme Court had to interpret Entries 14 and 15 of List I of the Seventh Schedule and Articles 73 and 253. While it would not be necessary to refer to all of them, it would be enough if we refer to the decision of the Constitution Bench in MAGANBHAI ISHWARBHAI PATEL Vs. UNION OF INDIA (1970) 3 SEC 400 = AIR 1969 SC 783). In view of a border dispute between India and Pakistan in the area of the Rann of Kutch, the matter was referred by both the countries to Arbitration. According to the award made by the Arbitrators, Kanjarkot and a few other villages fell to Pakistan. When this award was sought to be given effect to by the Government of India, certain persons approached the Gujarat High Court questioning the power of the Central Government to, what they called, ceding a portion of the territory of India to a foreign power. The matter was ultimately carried to the Supreme Court. The majority opinion was rendered by M. Hidayatullah, Chief Justice, on behalf of himself, V. Ramaswami, G.K. Mitter and Grover, JJ while J.C. Shah, J delivered a separate but concurring opinion. The Court held in the first instance that it was not a case of cession of territory, but a case of identifying the true border between two States. While agreeing that cession of territory cannot be effected without amending the Constitution, the Court held that such a course was not necessary in that case. In the course of the Judgment, however, the Court went into and

discussed the treaty-making power in view of the fact that Government of India had entered into an agreement with Pakistan to refer the dispute to third party arbitration.

Shah J. who delivered a separate but concurring judgment dealt specifically with Article 253 and made certain observations which are relevant and which constitute the basis for the judgment of the Bombay High Court in P.B.Samant v. Union of India (1994 Bombay 323). The facts and the ratio of the judgment of the Bombay High Court deserve a closer look in as much as it deals directly with the issue discussed herein.

It was a petition filed by certain public spirited individuals seeking the issuance of a writ of mandamus restraining the Union of India from entering into a final treaty relating to Dunkel proposals# without obtaining sanction of the Parliament and State Legislatures. The contention was that in exercise of its executive power, the Union Government cannot trench upon the matters in the State list. It was submitted that Dunkel proposals dealt with subjects like agriculture, irrigation, cotton and other matters which are within the exclusive domain of the States. It was submitted that the said proposals will also affect the maintenance of roads, bridges, communication etc. which too are in the State list. It was, therefore, contended that unless the consent of the states is obtained, the Union Government cannot enter into any agreement on the said proposals which are being discussed as part of Uruguay Round

Authur Dunkel was the chairman of the Uruguay Round of GATT negotiations until he was replaced in 1993-94.

of Trade Negotiations under the auspices of GATT. In reply to these submissions, the Union of India relied upon article 253 of the Constitution and the decision of the Supreme Court in Maganbhai. It was submitted that not only the Union is entitled to enter into treaties by virtue of Entry 14 in list 1 of the seventh Scheduled to the Constitution, Parliament alone can alone make law to give effect to such treaties and international agreements. Reliance was placed particularly upon the following observations of Shah J. in his separate but concurrent opinion in Maganbhai : " 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."

The High Court agreed with the Respondents. Relying upon the observations of Shah J. quoted above, the High Court held : " The observations made by the learned Judge establish that the executive power conferred under Article 73 is to be

read along with ;the power conferred under Article 253 of the Constitution of India. The observation leave no manner of doubt that in case the Government enters into treaty or agreement, then in respect of implementation thereof, it is open for the Parliament to pass a law which deals with the matters which are in the State list. In case the Parliament is entitled to pass laws in respect of matter in the State list in pursuance of the treaty or the agreement, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State list."

The Division Bench also dealt with the further submission of the learned counsel for the Petitioners to the effect that the decision of the Supreme Court in Maganbhai on Article 73 and 253 should be understood as limited only to those cases where the treaty or agreement covers matters which are in the Union List. In particular they relied upon the proviso to Article 73 which says that the executive power referred to in sub-clause (a) of clause 1 of that article "shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any state to matters with respect to which the legislature of the state has also power to make laws."# The submission was that the executive power of the Union Government cannot extend to matters in the State list. This argument of the learned counsel was rejected holding, "it is difficult to accede to the contention that though

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Indeed, the use of the word 'also' in the said proviso indicates that the executive power of the Union may not be available even with respect to matters within the Concurrent List.

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. "

The Division Bench noted the submission of the learned counsel for the Union of India that the treaty in question was not a self-executing treaty and that the provisions of the treaty can be given effect to only by making a law in terms of the agreement/treaty. The Court finally observed: " the issue as to whether the Government should enter into a treaty or agreement is a policy decision and it is not appropriate for the Courts in exercise of jurisdiction under Article 226 of the Constitution of India to disturb such decisions."

It is not known whether the decision has been questioned in appeal and if so, what is its result. Be that as it may, the holding of the High Court on Article 73 read with Article 253 appears to be of doubtful validity. It is true that by virtue of Article 253, Parliament is competent to enact a law to give effect to a treaty or international agreement but it does not follow therefrom that the Union's executive power also extends to matters in State list when the proviso to Article 73(1) expressly says that the executive power of the Union does not extend to matters within the State list (or for that matter, to the matters in the Concurrent List),. The correct position appears to be that the executive power of the Union cannot extend to matters in State List. It cannot also extend to matters in Concurrent List for the reason that the Legislature of the State

is "also" competent to make laws with the respect to the matters therein. The High Court has, unfortunately not given any meaning to the word "also" in the pvoviso it has ignored it altogether. It is true that the proviso to Clause (1) of Article 73 provides that the rule stated therein is subject to a rider viz., "save as expressly provide that in this Constitution or in any law made by Parliament". It may be that the Parliament may by law provide expressly that the executive power of the Union shall also extend to matters in the Concurrent List. We may also assume for the sake of argument that by making a law, the Parliament can also extend the executive power of the Union to matters within the State List too. But in as much as no such law has been made - nor does any other provision of the Constitution say so - the position as on today is that the executive power of Union extends only to matters in the Union List and the nothing beyond. If so, how can it be said that the Union Executive can enter into a treaty affecting the matters within the State List? Parliament, perhaps may do it but Union Executive cannot and Union Executive is not a substitute for Parliament.

Part II

Treaties are of two kinds: first category treaties are those which become binding as a result of signatures affixed at the completion of the negotiations. Examples of this kind of treaties are simple bilateral agreements. Then there are treaties which require a further step to be taken after the text has been established by signature before the treaty will take effect, whether by way of ratification or by legislation, as the case

may be. Examples of this kind of treaties are the multi-lateral treaties which are generally far more important than the simple bilateral agreements. As has happened in the case of Uruguay Round of Trade negotiations held under the auspices of GATT, a Final Act is prepared, at the end of the negotiations, recording the result of the several multi-lateral treaty negotiations, which is signed by the delegations of the participating Countries. The signature of the treaty, which is usually subject to sibsequent ratifications, follows later. As a matter of fact, multi-lateral treaties routinely provide for ratification in case of those who have signed the treaty and for accession in case of those who have not signed the treaty.

Since 1980 - that is in the year in which the Vienna Convention on the Law of Treaties, 1969 entered into force, as contemplated by Article 84 thereof - all aspects of treaty-making are regulated by the said Convention. Of course, it is stated that India has not yet ratified the same. Even so, its provisions do deserve notice. Article 27 of the Convention stipulates that the States cannot be excused or be relieved from compliance with the treaty entered into by them on the basis of or by reference to inadequate national law. This rule is however subject to Article 46 which says that such a plea is available in case the violation of domestic law "was manifest and concerned a rule of its (State's) internal law of fundamental importance." This would mean that if the Union Executive signs any treaty which violates any of the provisions of our Constitution, it will be a good defence to the binding nature of that treaty. It is thus evident that any treaty or international agreement entered into by the Union Executive beyond its

power (i.e. power conferred by Article 73) or in violation of the constitutional limitation indicated hereinbefore, is not only not binding on India, it is unconstitutional and inoperative. To be more specific, any treaty signed by the Union Executive concerning or affecting the entries in the State List or the Concurrent List in the Seventh Schedule to the Constitution would be incompetent and unenforceable since its executive power does not extend to matters in State or Concurrent List. Also because, no law has been made by the Parliament, as contemplated by the proviso to Article 73(1), extending the executive power to State or Concurrent List in the matter of treaty-making, assuming that Parliament can do so even in respect of matters in State List.

Do we know the number of treaties, conventions and covenants which have been entered into since Ward War II - leave aside the earlier period ? According to former Australian Governor General, Air, Ninian Stephen, it is not less than fifty thousand. True it4 is, this is an inescapable - if not an inevitable - process, as pointed out by the Prime Minister of New Zealand Mr. Bolger, who said on 6th June, 1997 :

> "We live in a globalised world economy .... Individual countries, no matter how large or powerful, cannot themselves deal with such transnational issues as climate change, capital flows, resource conservation and drug trafficking.... The role of Government in international relations is increasingly one of identifying and aligning self-interet with the values most of its electorate hold to be important, and then protecting and

projecting those values into its dealings with other Governments and international organizations.... In an inter-dependent world, pure sovereignty - the complete control of one's own affairs - is not possible."

The core issue in our system of Government, as on today, is not whether the State Sovereignty is restricted by these treaties, but whether the exercise of State Sovereignty (i.e. treaty-making) by the Executive Government restricts the Parliamentary sovereignty to an unacceptable extent. It is my respectful submission that it does. Many of these treaties particularly multilateral treaties concerning trade, investment, patents, services and agriculture are bound to have pervasive and significant implications on our legal and administrative system, our economy and on the individual rights of the citizen - indeed on our constitutional ethos as such. This, no doubt, is happening in ;many other Countries too. And it is precisely for this reason that there is concern all over the world that the practice whereunder the treaties are entered into by the Executive without significant Parliamentary or public involvement is not only undemocratic but also dangerous. It is being felt generally by jurists all over the world that the Parliament and the public must be involved more and more in the process of treaty-making because it is ultimately the people whose rights and entitlements are going to be affected by these treaties. Indeed, in New Zealand, a Bill called New Zealand International Legal Obligations Bill, 1997 was introduced which seeks to provide for parliamentary approval of treaties and requires the Ministry of Foreign Affairs and Trade further to inform the House on the progress of the treaty negotiations,

particularly the multi-lateral treaties. But, then the question arises: is it possible for the Parliament, having regard to its manner of functioning, to look into and approve or ratify each of the treaties and agreements which the Executive has to enter into in the course of its international dealings. To elaborate the core issue, the several questions that arise in this behalf are: (1) Which treaties are deemed to be sufficiently important to be referred to the Parliament? 2) Who is to determine the importance of a particular treaty for being referred to the Parliament? (3) At what stage should the Parliament come into the picture - whether before entering into the treaty or after it is signed but before it is ratified or only when a legislation is required to be made to give effect to the treaty? (4) What form should the reference to Parliament be - should it be subjected to a positive resolution of approval or should it be provided that the treaty be laid before the House for a particular period, on the expiry of which the Parliament must be deemed to have approved it by default and so on ? Some jurists have suggested a middle ground which seeks to balance the power of Executive to freely make and execute an international agreement with other nation States and the requirement of an increasing Parliamentary involvement.

In this connection, we must take note of a practical problem - what I have referred to just now as the manner of functioning of Parliament - that the Members of Parliament are exceedingly busy - in any event, busy with matters of momentary or local concern and that it is extremely difficult to persuade them to read and absorb, let alone evaluate, the contents of all the treaties with which our Country may be

concerned. Do we not know that even such extremely important matters as the budget proposals are very often approved by applying the guillotine because most of the time of Parliament is consumed by less important and sometimes topics of no relevance to Parliament - apart from frequent shut-downs.

Before proceeding to examine the issue further, it would be appropriate to notice the practice obtaining under several country-jurisdictions in the world.

AUSTRALIA

It would be appropriate to begin with Australia since it is not only a common law Country but also a federation. The Australian Constitution Act, 1900 provides for distribution of powers between the Federal Government and the States. Under Section 61 of ;the Constitution, the power to enter into treaties is an Executive power. Even so, the Prime Minister of Australia announced in the Parliament in the year 1961 that henceforward the Government will lay on the table of both Houses texts of the treaties signed for Australia, whether or not ratification is required, as well as the texts of those treaties to which the Government is contemplating accession. It was stated that the Government would not, as a general rule, proceed to ratify or accede to a treaty until it has been laid on the table of both the Houses for atleast 12 sitting days. Be that as it may, a practice has developed in that Country whereunder Australia would not ratify a treaty or accept an obligation under the treaty until appropriate domestic legislation

is in place in respect of treaties where legislation is necessary to give effect to the treaty obligations. Several proposals have been made by groups of parliamentarians to provide for greater overview by Parliament of the treaty-making power and also to identify and consult the groups which may be affected by the treaty. All of them are strongly critical of the fact of transparency in the treaty-making process. One of the NGOs in that Country, namely, National Farmers Federation has suggested that not only the treaties should be laid on the table of the House before they are finalized but the text of the treaty should be accompanied by a statement clearly setting out the important treaty obligations being undertaken by the Country thereunder, what effect the treaty will have on the Australian national interests, including economic, social and environmental; and the extent of consultation already held by affected groups and so on - impact assessment statement, if one can call it, for short.

FRANCE :

The power to ;conclude treaties is vested in the President of the Republic by virtue of Article 52 of the French Constitution. The President not only negotiates but also ratifies the treaties on his own. The role of the Parliament appears to be quite restricted. According to the said article, the Parliament comes into picture restricted. According to the said article, the Parliament comes into picture only in the case of certain types of treaties and that too after the terms of the treaty have been decided upon. Even then, the Parliament's power is only to approve or reject its ratification. The types of

treaties contemplated in Article 52 include peace treaties, trade treaties, human rights treaties and treaties ceding, exchanging or adding territories. Article 55 of the French Constitution indeed provides that concluded treaties do not require implementing legislation in order to be enforceable. Once a treaty has come into force, it over rides any conflicting domestic legislation even if such legislation happens to be passed subsequent to the ratification of the treaty.

UNITED STATES OF AMERICA:

Article II, Section 2 of the U.S. Constitution, which deals with the powers of the President, states, inter alia, that the President is empowered "by and with the Advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur ..." The President initiates and conducts negotiations of the treaties and after signing them, places them before Senate for its "Advice and Consent". The two famous instances in which Senate refused to ratify or approve the treaty signed by the President are (a) the Treaty of Versailles concluded at the end of World War I and (b) Comprehensive Test Ban treaty on nuclear tests... President Wilson, who was indeed the moving spirit behind the Versailles treaty, signed the treaty together with allied nations but when it was presented to the Senate, it rejected the same - effectively withdrawing U.S.A. from European affairs until the developments in Germany under Hitler brought it back into it. Even the Comprehensive Test Ban on nuclear tests (CTBT) was the handiwork of the President Clinton and his predecessors. In view of this constitutional position, a practice has developed

in that Country according to which the Senators i.e. important persons among them, are associated with treaty making from the very beginning so that it may be easier for the President to get the treaty ratified later by the Senate.

In so far as the trade agreements are concerned, a different procedure is evolved. Since the Congress has the constitutional authority to regulate commerce with foreign nations under Article 1 of the Constitution, such treaties are subject to ratification by both Houses but only by a simple majority.

With respect to the effect of the treaties, Article VI Section 2 of the Constitution expressly provides that "All treaties made or which shall be made with 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." This is a fundamental departure from the British practice. The treaty not only over rides any federal law of the Country but also over rides any provision in the Constitution, or the laws made by any State Congress to the contrary.

Argentina and Mexico, it appears, follow the United States pattern.

CANADA

The Canadian Constitution Act, 1982 (British North-American Act, 1867) does not contain a specific provision with

reference to external affairs. However, following the British practice and particularly the decision of Privy Council in ATTORNEY GENERAL FOR CANADA Vs. ATTORNEY GENERAL FOR ONTARIO referred to hereinbefore, the Federal Government exercises the exclusive power to enter into treaties on behalf of Canada.

UNITED KINGDOM :

The legal position in U.K. has been succinctly set out in the decision of the Privy Council aforementioned. Indeed the ratio of the said decision has been recently affirmed by the House of Lords in J.H. RAYNER LIMITED Vs. DEPT. OF TRADE AND INDUSTRY (1990 (2) A.C. 418) wherein has been observed :

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The Courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty."

So far as the effect of concluded treaties on the domestic law is concerned, the English law is at variance with the law in the United States. Generally accepted principle in English law is that in case of conflict between the British statutes and the provisions of a treaty, the former prevails. Since 1974, the English Courts have consistently taken the view that in so far as

the provisions of International Conventions of Human Rights are concerned, they can be taken into account in the course of interpreting and applying British statutes.

OECD COUNTRIES :

In a majority of 24 OECD Countries, Parliamentary approval lis required at least in case of certain categories of treaties, excluding of course the self-executing treaties.

The effect of Treaties on Indian Domestic Law :

As would be evident from the decision of the Supreme Court in MAGANBHAI, India has been following, even after the advent of the Constitution, the British practice in the matter of treaty-making. In other words, the law enunciated by the Privy Council in ATTORNEY GENERAL FOR CANADA is being followed here. According to these decisions, the treaties entered into by the Union of India do not become enforceable at the hands of our Courts and they do not become part of our domestic law. In some recent decisions, however, a slightly different note has been struck.

The Government of India had acceded to and ratified the International Convention on Civil and Political Rights, 1966. Article 9(5) of the said Convention declares that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". The Government of India had, made a reservation to this clause while ratifying the said Convention saying that Indian law does not recognize any such right. The Supreme Court has opined in D.K. BASU

VS. STATE OF WEST BENGAL (1997) 1 SCC 416 (at page 438) that "That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right of citizen. (See with advantage Radul Sah v. State of Bihar; Sebastian M. Hongray v. Union of India; Bhim Singh v. Ste of J & K; Saheli, A Women's Resources Centre v. Commr. Of Police.) There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life; nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. (See Nilabatai Berhera v. State)." This decision indicates not only a recognition of an International Covenant ratified by India but also a readiness to ignore the reservations appended by our Country while ratifying the Convention, no doubt in the light of the law developed by the Supreme Court.

In PEOPLE'S UNION FOR ;CIVIL LIBERTIES v. UNION OF INDIA (1997) 3 SCC 433), the question to what extent the conventions and covenants signed by the Government of India can be enforced through Courts was specifically gone into. After noticing the decision of the Australian High Court in MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v. TOEH (1995) 69 Aus LJ 423), the Court observed:

"The main criticism against reading such conventions and covenents into national laws is one pointed out by Mason, C.J.

himself, viz., the ratification of these conventions and covenants is done, in most of the Countries by the Executive act alone and that the prerogative of making the law is that of Parliament alone; unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Indeed, it appears that at the time of ratification of the said Covenant in 1979, the Government of India had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention. This reservation has, of course, been held to be of little relevance now in view of the decision in Nilabati Behera (See Page 313, Para 43 (SCC p.438, para 42) in D.K.Basu). Assuming that it has, the questions may yet arise whether such approval can be equated to legislation and invests the Covenant with the sanctity of a law made by Parliament. As pointed out by this Court in S.R.Bommai v. Union of India, every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such."

The question was again considered by the Supreme Court in Visakha vs. State of Rajasthan (1997) 6 SCC 241).

The Court was concerned in that case with the protection to be afforded to working women from sexual harassment at workplace so as to make their fundamental rights meaningful. Relying upon Articles 14, 15, 19 (1) (g) of the Constitution, the Court observed that "any international convention not inconsistent with the fundamental rights and in harmony with this spirit must be read into these provisions to enlarge the meaning and content thereof to promote the object of the constitutional guarantee. This is implicit from Article 51© and the enabling power of Parliament to enact law for implementing international conventions and norms by virtue of article 253 read with entry 14 of the Union List in the Seventh Schedule to the Constitution. Article 73 is also relevant. It provides that the executive power of the Union shall extend to matters with respect to which Parliament has power to make laws. The executive power of the Union, is therefore, available till Parliament enacts legislation to explicitly provide the measures needed to curb the evil." The Court relied upon the Convention on Elimination of all Forms of Discrimination Against Women (which Convention has been ratified by the Government of India on 25.06.1993 though with certain reservations) and upon the Beijing Statement of Principles of Independence of the Judiciary in the Law Asia Region.

Absence of consultation with Parliament in the matter of treaty-making - the Indian experience.

Taking advantage of the fact that Parliament has chosen not to make any law regulating the treaty-making power, the Union Government has been, taking advantage of Article 73 of

the Constitution, freely entering into treaties on its own without reference to the Parliament. Only where legislation is required to give effect to the terms of a treaty or a convention or a covenant has the Central Government been approaching the Parliament to make laws in those terms. By way of example, it would be instructive to notice what happened in the case of TRIPs agreement. The draft Agreement (on TRIPs) - which according to the HDR 1999, published by UNDP, was being pushed mainly by the multi-national drug companies - ran counter to almost each and every major premise of the "Background" paper submitted by India to the Negotiating Committee on July 27, 1989. India was evidently rattled by the draft Agreement on TRIPs produced by the Conference. The Government probably thought it would be appropriate to bring the matter to the notice of Parliament. Accordingly, the Standing Committee of Parliament attached to the Commerce Ministry consisting of forty Members of Parliament drawn from all political parties, considered the draft Agreement and submitted a Report on November 13, 1993. The Standing Committee opposed all the major stipulations and terms contained in the draft agreement. It opined that product patent system should not be imposed on India since it would result in steep increase in prices of medicines. It said that it should be left to the Indian state to determine whether it will go in for product patent or not. The Parliamentary Committee also opposed the 20 year period for the patents and the provision of the draft agreement which entitled the patent holder not to manufacture drugs and medicines within India while at the same time enjoying the benefits of patent in India. It

also apposed the onerous conditions attached for permitting transition period to countries like India (which were not only developing countries but also did not recognize product patent till then). What is relevant to mention, however, is that the Government of India signed the TRIPs agreement in 1994, practically in the same shape as the draft agreement, without again approaching the Parliamentary Committee or the Parliament. The question that arises in such a situation is what was the relevance of consulting the Standing Committee of Parliament and then signing the agreement in total disregard of the Report and recommendations of the Parliamentary Committee. It is obvious that had there been a law regulating the treaty-making power of the Government and if such law had provided for either prior approval, ratification, consideration or discussion of the treaty before it comes into force, such a thing could not have happened. It needs to be emphasized that TRIPs agreement is not the only agreement signed by the Government of India in the course of Final Round of Uruguay negotiations. We have signed several agreements concerning trade, services, agriculture and so on - all of which seriously impinge upon our economy, upon our agriculturists, businessmen and industrialists. The results of these agreements are already becoming evident to us. Cheap agricultural, industrial and engineering goods from South-east Asia and China are flooding our markets driving out local producers. We do not know what is going to happen ;after 1.4.2001 when the existing quota and other restrictions will disappear, leaving the field free for free trade in goods, services, agricultural products and what not. It is a matter of common knowledge that neither the parliament nor the people of this country were

taken into confidence before signing these agreements having such serious repercussions upon the life and the lives of the citizens of this country. It, therefore, becomes essential to think of subjecting the treaty-making power of the Central Government to appropriate checks and controls, as is sought to be done in several Countries all over the world.

Role of Judiciary in Treaty-making :

Judiciary has no specific role in treaty-making as such; but if and when a question arises whether a treaty concluded by the Union violates any of the Constitutional provisions, judiciary comes into the picture. It needs no emphasis that whether it is the Union Executive or the Parliament, they cannot enter into any treaty or take any action towards its implementation which transgresses any of the constitutional limitations. I have already recorded my views on the judgement of the Bombay High Court in P.B.Samant. I am sure that if and when any such question is considered by the Supreme Court, it will be considered in greater depth.

Recommendations :

The first thing that should be done by Parliament is to make a law on the subject of "entering into treaties and agreements with foreign Countries and implementing of treaties, agreements and conventions with foreign countries" as contemplated by Entry 14 of List 1 of the seventh Schedule to the constitution. The law should regulate the `treaty-making power' (which expression shall, for the purpose of this discussion, include the power to enter into agreements and the

implementation of treaties, agreements and conventions). There is an urgent and real need to democratize the process of treaty making. Under our constitutional system, it is not the prerogative (if I can use that expression) of the Executive. It is a matter within the competence of Parliament and it should exercise that power in the interest of the State and its citizens. In a democracy like ours, there is no room for non-accountability. The power of treaty-making is so important and has such far-reaching consequences to the people and to our polity that the element of accountability should be introduced into the process. Besides accountability, the exercise of power must be open and transparent except where secrecy is called for in national interest - what was called by President Wilson of USA, "open covenants openly entered into". We have already suffered enough by entrusting that power exclusively to the Executive. They have not always been vigilant in safeguarding our interests. The said power can, no doubt, be given only to the Union Executive and none else but then the law must clearly delineate the exercise of the power. In particular, it must provide for clear and meaningful involvement of Parliament in treaty-making. As has been done in some countries, there must be constituted a committee of Parliament to whom every treaty /agreement /convention proposed to be signed and / or ratified shall be referred. While placing the draft/signed treaty before such committee, a statement setting out the important features of the treaty/agreement, reasons for which such treaty/agreement is proposed to be signed, the impact of the treaty/agreement upon our Country and upon our citizens, should clearly and fully set out. The committee

must decide within four weeks of such reference whether the treaty should be allowed to be signed by the Union Executive without referring the matter for consideration to Parliament or whether it should be referred to Parliament for further consideration. It is obvious that such a decision shall have to be taken having regard to the nature of the particular treaty/ agreement and its impact upon our Country or on the rights of our citizens. The committee should not have too many members. About 10 to 15 would be adequate but they must be drawn from all political parties in Parliament. They must be elected by both the Houses separately, or jointly, as the case may be. The members once elected shall continue in the committee for the duration of the life of the House or the cessation of their membership, as the case may be. The committee would be a statutory committee clothed, of course, with all the powers of a Parliamentary Committee.

As a matter of fact, it would be desirable if the law made by the Parliament categories the treaties/agreements/ conventions/covenants viz., (a) those that the executive can negotiate and conclude on its own and then place the same before both Houses of Parliament by way of information. In this category may be included simple bilateral treaties and agreements which do not affect the economy or the rights of the citizens; (b) those treaties etc. which the executive can negotiate and sign but shall not ratify until they are approved by the Parliament. Here again, a sub-categorisation can be attempted: Some treaties may be made subject to approval by default (laying on the table of the House for a particular period) and others which must be made subject to a positive approval

by way of a resolution; (c) important, multi-lateral treaties concerning trade, services, investment, etc. (e.g. recent Uruguay round of treaties/agreements signed in 1994 at Marrakesh), where the parliament must be involved even at the stage of negotiation. Of course, where a treaty etc. calls for secrecy, or has to be concluded urgently, a special procedure may be provided, subject to subsequent Parliamentary approval constituent with the requirements of secrecy.

The law made by Parliament must also provide for consultation with affected group of persons, organizations and stake-holders, in general. This would go to democratize further the process of treaty making.