

Treaty-making powers of Executive : Need for legislation and enforcement of constitutional limitations

By TIOL News Service

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our expressed keenness to become a global power in the years to come, India has been busy signing all sorts of political and economic treaties, bilateral or multilateral, virtually across all the continents. Talks are being held to conclude dozens of economic treaties. Signing of Double Taxation Avoidance Agreements (DTAAs) has become a monthly affair. The Indo-US nuclear treaty is in its final leg. Even as the Union Govt which alone has the constitutional power to enter into any sort of treaty at international plane, a seminar was last Saturday organised by the ASSOCHAM to debate the treaty-making power of the Executive and the constitutional limitations. A large number of legal and political luminaries participated in this highly enlightening debate and freely aired their views.

Even as different speakers had their own set of views, the conclusive remark made by the former Chief Justice of India, Justice J S Verma, was that a time has come for the country

to legislate on this issue like many other matured democracies and clip the wings of the Executive within the constitutional limitations. The Executive has got no 'hip-pocket' of unbridled powers to compromise with either the sovereignty of the nation or the fundamental rights or features of the Constitution.

Articles 73 and Article 253 make it expressly clear that the Executive can enter into any treaty provided that does not impinge on any of the basic rights guaranteed by our constitution.

In this context, the former Chairman of the Atomic Energy Regulatory Board, Mr A R Gopalakrishnan, said that the Indian industry and NRIs sitting outside have substantial interests in pushing the nuclear deal, and US has enough friends in this Indian segment who either don't understand or are not bothered of its implications on national security.

He further added that this deal is not an isolated phenomenon but a part of a well thought out and well engineered policy change of USA towards India **to bring India within its fold**

. Initially the deal was jumped onto because it looked all rosy and very inviting but later when discussions started it was realised it wasn't what it was shown to be and it was followed by separating 14 reactors for inspection by international watchdogs. The Hyde Act, an India specific law, was passed to govern the nuclear relations with India which is going to continue to do the same unless its amended some day. A close analysis of this Act reveals that **India has surrendered its freedom to undertake independent scientific research in these areas and has also compromised with its future energy plans.**

Former Chief Commissioner of Income Tax and now a senior advocate in Supreme Court Shiva Kant Jha said that treaty-making power does not involve any sovereign function - Constitution makers have shown great insight and there is clear control of legislature and constitutional organs over treaty making power. Article 53 states powers of President are to be exercised subject to constitutional limitations;

Art.73 says that treaty making power is to be exercised subject to constitutional limitations; treaty making power under Art.366 is subject to judicial review.

He further underlined that the entire constitutional scheme nowhere gives any exclusive treaty making power to the Executive, and in fact, Entry 14 of Union List, which consists of matters on which the Parliament can legislate, gives power to the Union Parliament to legislate on treaties. Formation at international plane is very much subject to the provisions of the constitution and it's a completely erroneous view that treaty making is the Executive domain and legislature only can make treaty implementing laws because only if there is a valid treaty can it be implemented and if it's in violation of provisions of the constitution, then it can't be a valid treaty and there is no question of invoking Art.253. This issue has till date not been exclusively dealt by the courts and there is no concrete finding of the courts on it. He also referred to a PIL which he has recently filed before the Delhi High Court where India signing WTO Treaty has been challenged as violative of basic rights guaranteed by the Constitution.

Noted intellectual Dr Rajeev Dhawan, said that the US today is at the helm of a largely unipolar world. From 1987 this process of predatory treaties started with a view to subjugate the world, primarily the markets of other nations. The Hyde Act contains provisions which

call upon India to behave responsively and to have policies in conformity to them

- though Mr Bush made a statement that his approval of the Act doesn't mean a approval of the Statement of Policy as incorporated in the Act. But Mr Bush is not going to be around for all times and subsequent incumbents may go back on such assurance. The crux is that this Act which is going to govern the two

country's nuclear relations is heavily worded in favour of USA.

Moreover, he further argued that the nuclear energy is to be looked through the Energy policy that we are pursuing and not in vacuum, and our efforts towards nuclear energy should be in conformity with the policy and as a part of it instead of a distinct energy source.

Any executive power exercised without legislation is a pure executive power and its established law that exercise of executive power can't take away the rights of the citizens.

These treaties are indirectly affecting the rights of the citizens though a view may be taken that the nexus between the treaty and infringement of rights is too remote but nevertheless there is no doubt that these treaties affect the rights of the citizens and in a substantial manner, whether in health, food or energy sector. Just because exercise of this executive power i.e. treaty making is foreign in nature can't be given free flow even when it affects the rights of the people of the country because in essence its a executive power being exercised which is subject to constitutional limitations. Legislation is to keep a check on the executive and if the executive refuses to be checked as far as treaty making power (TMP) is concerned, then there is serious flaw in the Constitution. TMP is a 19 th century power that we are trying to fit into the 21 st century mould, and we clearly see parliamentary accountability incorporated in exercise of this power by the constitution framers. There has to be some framework to discipline the executive with regard to their treaty making power, and there is nothing in the Union List that prevents the parliament to legislate to bring a framework to ratify all treaties before they are given effect to so that no treaty can be implemented unless ratified by the parliament.

The CPI ideologue, Mr D Raja, said that the CPI has always taken a stand that as far as the nuclear deal is concerned people of the country should be taken into confidence, and whatever treaty is signed it should be approved by the parliament. There should be a constitutional amendment to make it mandatory that all treaties should be approved by the parliament.

The way the whole nuclear deal has been negotiated has been very disturbing and the parliament has been kept in dark, he added.

To sum up this legalistic debate in simple words, one may say that what is the need of the hour is a clear display of disciplined behaviour and democratic behaviour from the Executive which needs to remind itself of the fact that these

treaties are no longer a pure diplomatic events, generally 'organised' to embellish the foreign relations with certain countries. Treaties in modern times directly impact the bread and butter of citizenry in third world countries, and it would be wiser if greater participation of all constitutional institutions are encouraged.

Before committing or tying down the future of more than 1200 million people, it has to be a national decision by the Parliament rather than the upbeat dialogue of a few career diplomats and arrogant politicians, claiming copyright to wisdom and foreign relations foresights!