CHAPTER – VII

CONSTITUTIONAL REQUIREMENTS FOR CONCLUSION OF INTERNATIONAL TREATIES IN INDIA

7.1 Introduction:

Power to conclude a treaty is an act of sovereignty. In turn sovereignty has an internal as well as an external aspect. As regards external sovereignty, it has been said that “in consequences of its external sovereignty, a State can, unless restricted by treaty, manage its international affairs according to its discretion; in particular, it can enter into alliances and conclude treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace”. It is thus evident that treaty-making power is an aspect of external sovereignty. Further, there are two aspects of treaty making power, international and internal. On the international plane, treaty-making power is an attribute of sovereignty and international law concedes every sovereign State, the power to conclude treaties. The internal aspect of treaty making power comes into play when the Constitution or a Statute of a state provides treaty-making power to a particular organ of the State.1 This internal aspect of treaty making power of a State is referred to as “constitutional requirements” for concluding a treaty. Once the constitutional requirements for concluding a treaty is fulfilled, that is, capacity to create international obligations, and once created in accordance with the constitutional requirements, a State cannot avoid its obligations thereupon.2

Further, there is a fine distinction between (a) constitutional requirements for conclusion of a treaty and (b) constitutional requirements for the implementation of a treaty. It may so happen that a State may has the capacity to conclude a treaty but may lack the necessary executive or legislative capacity or power to give effect to the treaty. Thus (a) refers to validity of a treaty in terms of capacity to create international obligation under a State’s Constitution (intra virus) and (b) refers to ability to perform

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2 Article 46 of Vienna Convention on the Law of Treaties 1969, reads as “A party may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”
the treaty obligations. They are juridically two different things. A treaty, which a State (Government to be precise) may be unable to implement without the co-operation of the legislature can nevertheless, is internationally valid. At the international level a State cannot adduce its Constitution or Statute as a defense for non-performance of its obligation. When this is so, it can hardly be argued or justified that a State is permitted to avoid performance of its treaty obligations at the domestic level citing Constitutional deficit.

Though a sovereign State is free to enter into a treaty, but when the question of its implementation arises, it is the internal aspect that decides the question. This becomes more and more important in a Federal Constitution, where both center and provinces (states) have exclusive power to legislate on their respective subjects. Further, a treaty cannot be ultra virus of the Constitution or in breach of limitations imposed either by the Constitution or by Statute. Hence a treaty cannot make provision for amending the Constitution or alter or destroy the Constitution.

In this regard the “treaty making power” involving its effective implementation is always a subject matter of internal aspect viz., nature, scope, extent and limitations on the power provided under the Constitution or Statute of a State. Thus one has to fall back upon the provisions of the Constitution or Statute of a State in order to appreciate its “Treaty Making Power” including the “implementation/enforcement of treaty” at the domestic level.

7.2 History of ‘Treaty Making Power’ in India:

During British rule in India, the British adopted their practice of “executive model of treaty making” in India. The British practice as to treaties is conditioned primarily by the constitutional principles governing the relations between the executive (the Crown) and the Parliament. The negotiation, signature and ratification of treaties are matters belonging to prerogative powers of the executive and that the Parliament has no role to play as far as entering into treaties is concerned. However,

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4 Sir Robert Jennings and Sir Arthur Watts (ed), Supra note 1.
execution of treaties by the executive is conditioned by certain constitutional principles in Britain (practice which is called as convention rules in Britain) and that certain treaties such as treaties affecting private rights of citizens, cession of territory and involving modification of common or Statute law, etc., require Parliamentary assent through an enabling Act of Parliament, and, if necessary, any legislation to effect the requisite changes in the law must be passed.  

7.2.1 The Government of India Act, 1935:

There was no specific provision under the Government of India Act, 1935 (hereinafter as 1935 Act), conferring exclusive power on the Executive Authority of the Federation to enter into treaties. Section 8 of 1935 Act provided for, the executive authority of the Federation extends— (a) to the matters with respect to which the Federal Legislature has power to make laws;… The Seventh Schedule of 1935 Act dealt with three lists and List 1 dealt with Federal Legislative List. In that, Item no.3 provided for “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.” Thus, there was nothing in the 1935 Act in relation to the conferment of power on any organ of the Government to enter into treaties. It is submitted that it was a pre gone conclusion during British regime in India that, like in Britain, it was executive that enter into “treaties” with foreign countries- the subject which within the sphere of “external affairs”.

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 Schedule. However, the provisions

6 The 1935 Act was not fully in force. The Part relating to Provincial autonomy was in force since April 1937. The “Federation” envisaged by the Act never came into force because it was optional for the Provinces and no province gave consent to it. The 1935 Act was unique in the sense that all the previous Government of India Acts provided for “unitary” form of Government but this Act introduced “Federation” form of Government but never came into existence. Dr. D.D. Basu, “Introduction to the Constitution of India”, 20th ed., Lexis Nexis-Butterworths Wadhwa, Nagpur, 2012 (Reprint), P.9.
7 The administration of “external affairs” was under the control of the Central Government and Provinces had no say in the “external affairs” matters. Dr. D.D. Basu, Supra note 6, p.9.
8 Section 106: 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
of the 1935 Act concerning the implementation of the treaties by the federal Government did not enter into force before independence.  

7.2.2 Constituent Assembly Debates on the "Power to Conclude (Enter into) and Implement Treaties".  

Before trenching on the constitutional provisions touching the source of power for the Government to enter into treaties, a look at the Constituent Assembly Debates as to the original intentions of the framers of the Constitution on “Power to enter into and implement treaties” is desired.  

The Draft Constitutional Provisions in relation to “entering into treaties” and “implementing of treaties” are Item No.14 and 16 in List 1 of VII Schedule, Article 60 and Article 230.  

The Framers of the Constitution in order to give width and substance to the “treaty making” power, introduced two specific provisions to liberate the treaty making power from the constraints of federalism which limited the executive and legislative power of the Union and States. The first was that the treaty making power should not be confined to those matters, which fell within the legislative competence of the Union List and Concurrent List (the executive power aspect) and the result was Draft Article 60 now Article 73. The second was that the Union Parliament should have the power to implement treaty obligations without depending on the consent of previous consent of the Ruler thereof. (2)So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State. (3)Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.  


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/. Last visited on 08-06-2012 at 8.00 p.m. Further, the discussion in the CAD on “Power to Conclude (Enter into) Treaties” and “Power to Implement Treaties is inseparable and hence dealt with together in this Chapter.  

11 Draft Item No.14 and 16 are currently Item No.13 and 14 in List 1 of VII Schedule of the Constitution respectively.  

12 Draft Article 60 is currently Article 73 of the Constitution.  

13 Draft Article 230 is currently Article 253 of the Constitution.
each Province’s/State’s Legislature (the legislative power aspect) and the result was
the draft Article 230, now Article 253 of the Constitution. The Constitutional
Advisor’s Draft of October 1947 dealt with the first aspect, but not with the latter
except to the extent that it affected treaties and agreements with Indian States in the
aftermath of the partition of India. Some textual revision took place in respect of
treaty making at the behest of the Drafting Committee.14 Further, in the comments and
suggestions received on the draft Constitution, no comments were received on the
executive aspect of the treaty making power, though two changes were proposed on
the legislative aspect. Thus the usual formula that foreign affairs, entering into
treaties, security etc., were included in the Union list.15

The Draft Item No.14 (now Item No13 in List 1 of VII Schedule) 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 Ahmed.

The notice of Amendment moved by Sir V.T. Krishnamachari sought for
insertion of the following Clause in Item No.14: “Provided that the Federation shall
not by reason only of this entry have power to implement such decisions for a
province or a Federated State except with the previous consent of the Province or of
the State.”

The notice of Amendment moved by Mr. Nazir Ahmed sought for insertion of
the following Clause in Item No.14: “on matters within its legislative competence,
and in other matters affecting a Province or a State, with the express consent of such
State”.

Speaking on the Amendment Sir V.T. Krishnamachari said that; “we
participate in all kinds of International Conferences, Associations and other bodies.
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. These Conferences relate to

15 Ibid, P.2-3
matters, like agriculture, food, and largely matters which are within the scope of provincial authority. *Honourable members will remember that we have section 106 in the Government of India Act which makes provision for this. If the intention is to re-enact section 106, my amendment will not be needed. If, however, that is not the intention, I propose that these words be added at the end of item 14.*"^{16}

Speaking on the Amendment Mr. Naziruddin Ahmed said; “The point which I wish to make in this amendment is that there may be subjects which are entirely Central or it may come within List, No. III, in which case the Centre will also have jurisdiction. But the subject may also come within List No. II, that is 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 province. In fact, that would be an indirect encroachment over a thing which is reserved entirely and exclusively to the province. Then, with regard to the States, from the papers which have been circulated amongst us, we find that the States have acceded subject to important reservations. They have acceded with regard to certain subjects which have been clearly defined in the Schedule attached to their Agreement. There may be subjects which are outside the scope of that Schedule. In that case, to ask the Central Government to legislate or to agree to matters coming within the scope of those subjects which are outside the scope of the Agreement that would be allowing that Government to encroach upon spheres which would be prohibited by the Agreement. The Agreement makes it absolutely clear that the States do not accede to anything except those enumerated in the Schedule. In these circumstances, I submit that it would not be proper for the Centre to take powers which may go outside its scope. The principle embodied in my amendment would thus be necessary to prevent confusion and some scrambling for power with regard to certain matters.”^{17}

The apprehension was that conceding to the Draft Item No.14 without the “consent clause” is nothing but conceding the autonomy of Provinces/States over the State List. Opposing the Amendments Mr. *K.M. Munshi* said that, similar amendments have also been proposed on Item No.16 which relates to “entering into and implementing treaties and agreements with foreign countries” and said; “There are various conferences at which India sends out her representatives and she will be

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17 Ibid.
sending them out in much larger measure in the future. At these conferences decisions are taken on the footing that the representatives of India have got the power to implement those decisions; no representative of India will be heard with any weight at all, if he has to keep a reservation that he would come back to this country and ask his 35 unit Governments and if one of them disagrees he would not be able to implement those decisions. In this present world it would be impossible for India in such conditions to take part effectively in any conference, except of course as in a debating society without coming to any decision. Therefore it is highly essential that the central legislature as well as the Central Government should have ample power not only to participate in these conferences but to implement the decisions arrived at there.

The learned Member suggested a safeguard to protect the interest of the Provinces/States that; “Before a decision is implemented it will come before the central legislature; that legislature will fully debate upon it; and it will then decide whether it will implement that decision or not. It is not going to be taken behind the back of the representatives of any member of the Union; it means not only the lower House but the upper House as well,-the House of States. Therefore the representatives of the whole of India—the people as well as the States—will have the right to vote upon it and bring to bear upon it the influence of an all-India opinion. That is the effect of the clause as it stands. Therefore it is not as if something will be done behind the back of any State or province. India as a whole assembled in these two legislatures will consider the point of view of each unit as put forward before it and then come to a conclusion in the interest of the whole of India.”

Sardar K.M. Panikkar noticing the way in which the debate is proceeding, pointed out that the issue is not one whether agreements reached at international conferences should be ratified by the Central Legislature or implemented by the Central Legislature. The issue is whether central legislature should have power to legislate on agreements reached at international conferences that relate to State List. He expressed apprehension that the wording of Item No.14 is unguided one and ambiguous as to what international conferences/association is not defined and hence it is a dangerous proposition to concede to the Item No.14 without the Amendment.

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18 Ibid.
19 Ibid.
Opposing the Amendments Sir B.L. Mitter aptly pointed out to the misunderstanding of the matter with reference to section 106 of the Government of India Act, 1935. The learned Member drew attention of the Assembly on the history of section 106 that it was enacted when India was not an organic entity and was consisted of British India and States and accordingly special provision like section 106 was in place. Now that India is an organic entity no such special treatment is necessary and any reference to the said section is misconceived one. He particularly emphasized 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 decisions. The learned Member said; “Before you implement a decision, you have got to ratify it. The decision will come before the Central Legislature for ratification. Then, at the next stage, if the Central Government so decides that the ratification needs to be further implemented by legislation, then and then only does item No. 14 come into operation”.

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. 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.16 (now Item No.14 in List 1 of VII Schedule) 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

20 Ibid. Emphasis supplied.
21 Ibid.
Krishnamachari withdrew his proposal since his similar proposal on Item No.14 (now Item No.13 in List 1 of VII Schedule) was negatived.

The only proposal for an amendment remained was of Mr. Naziruddin Ahmed, who wanted the following may be added to Item No.16:

“on matters within its legislative competence, and in other matters affecting a Province or a State, with the express consent of such State”.

Speaking on his move for the amendment Mr. Naziruddin Ahmed said: “…the matter has been fully debated and I do not wish to go over the ground covered already. I beg to submit one thing i.e. in the debate on clause 14, Mr. Munshi almost gave away his case when he said that no action would be taken by the Centre without consultation with the units or with the States and that the Centre would never do anything behind their back. That is a very indirect concession that the Provinces and the States are entitled to be consulted.”

Shri M. Ananthasayanam Ayyangar speaking on the amendment suggested that all treaties and agreements that are entered into, except those which are entered into with foreign countries on political matters, the other agreements, trade agreements and decisions by international conferences are all, before implementation, brought before the Central legislature and without its consent, or ratification they are not given the sanction of law. Therefore, there is at least one legislature in this country which accepts these decisions and given them the sanction or force of law. He also suggested that an All India Council, with respect to the various items or matters that come up in these international conferences and which are in the Provincial List, must be established and this council must be consulted in the matter of sending representatives, in the matter of giving directions, and after the decisions are taken, in the matter of implementing them before they are ratified by the Central Legislature.

Mr. Alladi Krishnaswami Ayyar speaking on the amendment pointed out that, there is nothing novel in such a provision and that almost all Federal States have similar powers. The learned Member drew attention of the Assembly of the position in United States and Australia. In Canada though there is difference of opinion in

\[22\text{ Ibid. Emphasis supplied.}\]
\[23\text{ Ibid. Emphasis supplied.}\]
Judicial Committee but he pointed out that national opinion is in favour of the view that Federal Government should have autonomy in implementing the treaties, etc., and accordingly sought for rejection of the proposal for amendment. However the learned Member observed that our statesman must be on the guard in entering into an unconditional treaty and they must make the necessary reservation that until our legislature implements the treaty, it shall not be binding.24

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.25

It is important to note that the text of the Amendment that Mr. Naziruddin Ahmed moved on Draft Item No.14 and 16 were same. The text of the Amendment moved by Sir. V.T Krishnamachari Ayyangar on Item No.14 though worded differently but the content and object was same. Both the Amendments were negatived. The difference between Item No.14 and 16 is that the former dealt with “participation in international conferences etc., and implementing decisions made thereat” and the latter dealt with “entering into treaties etc., with foreign countries and implementing the same”. Further, the former refers to multilateral dealings and the latter refers both bilateral and multilateral. The similarities are that both Items concern international relations (external affairs) and the “subjects” in List 1 of VII Schedule in the Constitution on which the Parliament alone has competence to enact laws.

There was no discussion as to what type of decisions or treaties do really need a law for their implementation in India and what happens if the Parliament do not enact a law in the aftermath of a decision or entering into a treaty. The entire debate on the Amendments on these two Items revolved around seeking a ban on Parliament to usurp the legislative competence of States that they have on the subjects enlisted in List II (State List). Thus, what emerges from the debates is that, Members were keen to protect the autonomy of State Legislatures on List II (State list) and in the result it was conceded during the course of the debate that any decision made at international conferences etc., and treaties and agreement entered with foreign countries will be brought before the Parliament for their implementation so as to afford an opportunity to the representatives of the people to deliberate and pass a law if necessary for their

24 Ibid.
25 Ibid.

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implementation. However, no such provision or clause was added to ensure that any decision made at international conferences etc., and treaties and agreement entered with foreign countries will be brought before the Parliament by the Central Government.

The Framers of the Constitution in order to add more clarity into the legislative aspect of the treaty implementation added a separate provision in the body of the Constitution. The Draft Article 230 (now Article 253) 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 debate.26 What is significant to note here is that, the scope of Draft Article 230 covered both Draft Item No. 14 and 16, that is, the legislative power of the Parliament on “implementation aspect” was extended to cover not only “any treaty, agreement or convention” but also “any decision made at any international conference, association or other body”.27

There was considerable discussion on the general Executive Power of the Union. The Draft Article 60 (now Article 73) 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 List (List III).28

Accordingly, Mr. K. T. M. Ahmad 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.” And in the alternative 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 was of the view that the object of both amendments is to preserve the Executive Powers of the States or Provinces at

26 Vol. VIII CAD (13th June 1948). Emphasis supplied. The Drafting Committee was of the opinion that the words “whole or any part of the territory of India” will better serve the purpose for the words “any State or part thereof” and accordingly approved the Amendment to that effect in the draft Article 230 now Article 253. Rajeev Dhavan, “Treaties and People: Indian Reflections”, 39 J.I.L.I. (1997) at 3.
27 Vol. VIII CAD (13th June 1948).
28 Vol. VII CAD (29th and 30th December 1948).
least in so far as the subjects which are included in the Concurrent List. During the debate Mr. K. Santhanam point out to Mr. K. T. M. Ahmad Ibrahim Sahib Bahadur that the deletion of the proviso to clause (1) of Article 60 will vest the entire executive power and Concurrent subjects at the Centre. On this Mr. K. T. M. Ahmad Ibrahim Sahib Bahadur told the Assembly to consider the second notice of Amendment to Article 60 which if accepted should read as “Clause (1) (a) to the matters with respect to which Parliament has exclusive power to make laws.” The learned Member pointed out that the insertion of the word “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 List.29

Mr. Pandit Kunzru moved an Amendment for the omission of the words “or in any law made by Parliament” in the proviso to Clause 1 of Draft Article 60. The proviso in Draft Article 60 (1) read as: “Provided that the executive power referred to in sub-clause (a) of this clause 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 Learned Member point out to the Assembly that this proviso not only empower the Union Executive in respect of subjects included in the Concurrent List to the extent it is specifically conferred by this Constitution but Parliament may also from time to time make legislation conferring on the Union Executive in regard to subjects included in the Concurrent list, with the result that all the subjects may be removed from the Concurrent List and transferred to the Federal List in course of time.30

These Notices of Amendments 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. Dr. B.R. Ambedkar opposing the Amendments said, the majority who spoke in favour of the Amendments are Muslims and there is history behind this. He reminded the Constituent Assembly that Muslim League

29 Vol. VII CAD (29th and 30th December 1948).
30 Ibid.
opposed the administration of Central Government over Provinces during round table conferences. The learned Member emphasized that the philosophy of the Muslim League was to rule Muslim populated Provinces without any outside interference and now Muslim League is no more relevant in India, they must not oppose the original Draft Article 60. Dr. B.R. Ambedkar sought to distinguish the position under the 1935 Act to which the Muslim Members referred frequently. He pointed out that any reference to Section 126 of 1935 Act, which stated that the authority of the Central Government so far as legislation in the concurrent field was concerned was to be strictly limited to the issue of directions and it should not extend to the actual administration of the matter itself, is misconceived one. The learned Member said: “I remember, during the debates in the Round Table Conference. It is because the Muslim League Governments which came into existence in the provinces where the Muslims formed a majority such as for instance in the North-West Frontier Province, the Punjab, Bengal and to some extent Assam, did not want it in the field which they thought exclusively belonged to them by reason of their majority, that the Secretary of State had to make this concession. I have no doubt about it that this was a concession. It was not an acceptance of the principle that the Centre should have no authority to administer a law passed in the concurrent field. My submission therefore is that the position stated in Section 126 of the Government of India Act, 1935, is not to be justified on principle; it is justified because it was a concession made to the Muslims.”

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. He particularly gave examples of Draft Article 11 (now Article 17) providing for abolition of untouchability and also Child Marriages and Factory laws in this direction and said leaving the execution of laws on the said examples to the Provinces/States will yield different results because of social, cultural and economic conditions prevailing in each Province/State. Hence, it is desired that Union Executive be empowered to execute the laws made by the Parliament on Concurrent List, otherwise the laws will remain paper laws.

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31 Ibid.
He also referred to the Australian Constitution to oppose the Amendments stating that under the Australian Constitution it is open to the Commonwealth Parliament in making any law in the concurrent field to take upon itself the authority to administer. Accordingly the learned Member said: “comparing the position as set out in the proviso with the position as it is found in Australia, I submit that we are not making any violent departure from any federal principle that one may like to quote.”

There were cheers when Dr. B.R. Ambedkar concluded his speech.33

The Amendments moved on Article 60 were put to vote and were negatived and the Draft Article 60 was adopted which in its current form is Article 73.

It is submitted that, in so far as the implementation aspect of treaty making was concerned, the Framers of the Constitution were determined to ensure that the power to implement treaties will not be a fragmented one. They clearly rejected the model existed in the 1935 Act, wherein the consent of the Provinces/States was required to implement a treaty that relates to the subjects in the Provincial List. What is surprising to note here is that, there was no discussion on the point of extension of the executive power “to the exercise of such rights and authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement” which was crucial in the context of execution of treaties. Would this mean that the Union Executive is free to execute the treaties without bringing such treaties before the Parliament for necessary approval or enabling legislation for their execution? It is in this context that the discussion made on Draft Item No.14 and 16 by the Constituent Assembly holds key and must be read with the discussion on Draft Article 60. When read together, it is crystal clear that the Constituent Assembly reposed trust on the Union Executive to place before the Parliament every treaty, agreement and convention that it enters with foreign countries and also the decisions made at international conferences and associations that it participates, for discussion in the Parliament to afford an opportunity to the representatives of the people to know the pros and cons of such international engagement and also the relevancy of its domestic implementation.

32 Ibid.
33 It is recorded at the end of his speech in the text of the Constituent Assembly Debates on Draft Article 60.
7.3 Recommendation of the National Commission to Review the Working of the Constitution on Treaty Making Power:

The National Commission to Review the Working of the Constitution (NCRWC) 2002 in its Report at Chapter-8 titled “Union and State Relations” observed that “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, commerce, economy, communications, environment or ecology. The advent of globalization and the enormous advances made in communication and information technology have rendered independent States more inter-dependent”. The NCRWC further observed 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 the provisions contained in Article 253, Parliament has, notwithstanding anything contained in Article 245 to 252, 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 (Article 253), therefore, 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 “for reducing tension or friction between States and the Union and for expeditious decision-making on important issues involving States, the desirability of 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”.

7.4 Significance of Treaty Making Power:

In the era of globalization and the enormous advances made in science, and technology, no state can isolate itself from the rest of the world whether it be in the matter of foreign relations, trade, environment, communications, ecology, finance or

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34 Final Report available at www.lawmin.nic.in/ncrwc/finalreport.htm. Visited on 16-05-2012 at 05-00 p.m.
36 At para 8.13.2 of the Final Report.
37 At para 8.13.3 of the Final Report.
human rights issues. States are increasingly inter-dependent on each other. In this context, every state entered into and is entering into treaties, be it multilateral or bilateral. International Treaties sometimes will have far reaching impact on the economy, social, political and cultural life of a state. This is because International Treaties do impose obligations, liabilities on a state and are binding. A state cannot escape from its obligation or liability even by pleading its inability under a domestic law. The signing of World Trade Organisation (WTO), Indo-US Nuclear Treaty have far reaching impact on India’s economy, security and the life and livelihood of every citizen, be it beneficial or prejudicial.

Thus there should be no dispute as to the proposition that the power to enter into treaty is a highly potent power. The experience at the time of signing Agreements relating to WTO (or for that matter any treaty) without consulting the Parliament or public, institutions which are likely to be affected adversely, suggest that the treaty making power has received very little attention and we are not serious with it. Whereas in other countries the treaty making power is seriously dealt with either in the Constitution or in a statute. In some countries, agreements relating to W.T.O. were discussed, debated with public institutions, groups that are likely to be affected before signing, thus paving the way for democratizing the treaty making process.

The Indian experience shows that we have ignored potentiality of ‘treaty making power’. The questions we must address therefore are:

1) To whom does this power belong? Whether to the Parliament or the executive?

2) If it is the power of executive, whether it is subject to parliamentary control or supervision?

3) What is the impact of treaty making power conferred by entry 14 of List I of Seventh Schedule on Article 73?

4) What is the object and scope of Article 253 and its impact on Article 73 of the Constitution?{38}

{38} This aspect is dealt in Chapter 8.
7.5 Treaty Making Power under the Constitution of India:

There is no specific provision in the Constitution that deals with treaty making power. Entry 14 of List-1 of VII Schedule empowers the Parliament to enact a suitable legislation on "entering in to treaties". Till date Parliament has not enacted a law on the subject. The absence of specific law and the void created in the Constitution allows the Union Executive to exercise its power under Article 73. The executive power of the union rests with the President of India exercised by him either directly or through subordinate officers to him in accordance with the Constitution.

List-1 of VII Schedule enlists 12 subjects of international concern upon which Parliament can legislate. They are:

Entry 10 - Foreign affairs; all matters, which bring the Union into relation with any foreign country.

Entry 11 - Diplomatic, consular and trade representation.


Entry 13 - Participation in international conferences, associations and other bodies and implementing of decisions made threat.

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

Entry 15 - War and Peace

Entry 16 - Foreign Jurisdiction

Entry 17 - Citizenship, naturalization and aliens.

Entry 18 - Extradition

Entry 19 - Admission into and emigration and expulsion from India, passports and visas.

Entry 20 - Pilgrimages to places outside India.

Entry 21- Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

39 Article 73 reads as; **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 to which the Legislature of the State has also power to make laws.

40 Article 53 reads as; **Executive Power of the Union**- (1) The Executive Power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.”
Entry 14 is the central point for the present study. Entry 14 read with Article 246 stipulates that only Parliament has power to legislate on the subject of “entering into treaties and agreements with foreign countries and implementing of such treaties, agreements and conventions”.

What is shocking is even after 61 years of Constitution coming into force, Parliament has not thought it fit to legislate on the subject of Entry 14 which is all important one, viz., “entering into treaties and mode of implementation”. Who can enter into treaties and what is the nature and scope of such treaty making power and the mode of implementation are all-important matters when a nation enters into treaty with other countries. Nepal, with whom India shares border, has a specific law on the subject of entering into treaties etc., viz., Nepal Treaties Act, 1990.

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, etc, one has to fall back upon provisions of the Constitution to fill the gap created by the Constitution itself.

Under Article 73, 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 agreements. What is executive power, and what activities would legitimately come within its scope are not defined in the Constitution. The Supreme Court in *Rao v. Union India* has observed “executive power is the residue of functions of government, which are neither legislative nor judicial”.

The language of 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. Further, the executive power of the Union is not confined to the execution of the laws passed by the legislature. It extends also to carrying on trade or business without

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41 Article 246 reads as; **Subject matter of laws made by Parliament and the Legislatures of the State** -(1) Notwithstanding anything in clauses (2) and (3), 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)

42 To some extent one can say Parliament also, for not enacting a specific law on the point.

specific legislation.\footnote{Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab, AIR 1954 SC 549.} Thus the Union Executive exercising its power under Article 73 enters into treaties with other countries and international institutions, that is, creates international obligations on India.

It is significant to note that Article 73(1) starts with - “Subject to the provisions of this Constitution, the executive power of the Union shall extend -…”\footnote{Emphasis supplied. See note 17 for full text of Article 73.} Accordingly, the executive power of the Union to “enter into” and “implement” treaties, agreements and conventions is subject to the provisions of the Constitution.

What does the phrase “subject to the provisions of the Constitution” mean/suggest? It means limitation or restriction or exception or yielding to other provisions of the Constitution. As far as “power to enter into” is concerned, it suggests that, the Union executive cannot enter into treaties if any of the provisions of the Constitution expressly prohibits the Union executive from entering into treaty or confers this power on any particular organ of the State. In fact, none of the organs of the State are expressly empowered to enter into treaties by the Constitution. It is by virtue of Article 73(1) (a) read with Entry 14 of List 1 in VII Schedule that the Union executive assumes such a power; otherwise it is only a “subject” enlisted under the said Entry 14 upon which the Parliament has exclusive power to legislate and nothing else. Therefore, the sole limitation expressly provided under the Constitution on the power of the Union executive to enter into treaty is Article 73(1) (b).\footnote{See note 17 for text of Article 73.} It provides that the power of the Union executive to enter into treaties shall not trench upon subjects in List-II of VII Schedule. In effect, the Union executive cannot enter into treaty on State subjects. However the decision of the Bombay High Court in \textit{Samant}’s case nullified this limitation.\footnote{P.B. Samant v. Union of India, AIR 1994 Bom 323.}

\subsection*{7.6 Loka Sabha Debates on the “Treaty Making Power”:}

The treaty making power obviously refers to the act of negotiation, signature and ratification and the Union Executive in India has exclusive power on this aspect (Article 73 (1) (a) read with Entry 14 of List 1 in VII Schedule). Thus, Parliament has no role to play during the process of negotiation, signature and ratification. Soon after commencement of the Constitution, the Ministry of External Affairs made it clear that in the Indian national legal system there was no requirement to ratify. The
assumption that such a requirement existed was due to some misunderstanding with regard to the word ratification. It is also pertinent to mention here what Pandit Jawaharlal Nehru as a Prime Minister said in the Loksabha;

“The treaty making power under the Constitution rests with the executive government, of course to give effect to the treaty, one has to come to Parliament …The Government of India, if it does a wrong thing may be punished for it”.⁴⁸

There is a difference between the ratification of treaties and incorporation of a part or the whole of treaties into the national legal system. In India, there is no system of ratification of a treaty by the legislature. The extent to which ratification rules find its way into parliamentary practice, it was stated by the Speaker of the Lok Sabha in 1960 as follows:

“A number of treaties have been entered into so far, and they have not been brought up for ratification here. It does not prevent the Government from bringing any particular treaty for ratification before signing it, but it is not obligatory upon them to do so… In accordance with previous practice it is not obligatory on the Government to place treaties before this House for ratification unless, as constituent parts of those treaties, the respective Governments have agreed to place them before Parliament and obtain their ratification”.⁴⁹

However, a fact needs to be placed on record here is that, nothing prevents the Central Government to place the draft treaty for discussion in the Parliament and seek its consent for ratification. The comprehensive Treaty on banning the Nuclear Tests (CTBT) is an example where the Parliament did not express its consent. Further, two important treaties were placed before the Parliament for approval: 1) Tashkent Declaration 1966, the Treaty of Peace, Friendship and Cooperation between India and USSR 1971 and 2) Shimla Agreement 1972.⁵⁰

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⁴⁸ Lok Sabha Debates, Col. 6265 (19th Dec.) 1960. Cited in Rajeev Dhavan, Supra note 14, p.17. It is not clear what Nehru meant by ‘punishment’. Rajeev Dhavan opines on the "punishment" aspects of the Nehru statement that it may be no-confidence vote or retaliation permissible to other nation states under international law.

⁴⁹ Lok Sabha Debate, Col. Cited in Rajeev Dhavan, Supra note 14, p.17

However, the most important treaty that created a lot of hue and cry in India, the World Trade Organization Agreements were signed by India without obtaining Parliamentary approval.51

7.7 Attempts to Amend the Constitution on Treaty Making Power:

There have been attempts to amend the Constitution to provide for Parliamentary scrutiny of the treaty making power of the Union Executive. On 5th March, 1993, Shri George Fernandes, Member of Parliament, Lok Sabha 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. The Bill was not listed for consideration during the life of that Lok Sabha. Shri Satyaprakash Malviya, Member, Rajya Sabha tabled a question (No.6856) 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 12.05.1994 in the negative. 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 (Private Member’s Bill) to amend Article 77 of the Constitution of India providing that “every agreement, treaty, memorandum of understanding contract or deal entered into by the Government of India including borrowing under article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament prior to the implementation of such agreement, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament”.52

The Private Member’s Bill to amend the Constitution introduced by Shri M.A. Baby, M.P. in February 1992 came up for discussion in the Rajya Sabha only in

51 At that time a Parliamentary Committee attached to Ministry of Commerce expressed great concern over signing of the WTO Agreements especially the one on Trade Related Aspects of Intellectual Property rights (TRIPS). P.M. Baxi, Supra note 50.
52 On 17th July, 1994, Shri Chitta Basu, Member of Parliament, Lok Sabha gave notice of his intention to introduce a Constitution (Amendment) Bill, 1994 on the same lines as suggested by Shri M.A. Baby. This Bill, however, had not been taken up for consideration during the life of that Lok Sabha. Upendra Baxi, Supra note 50.
March, 1997. Shri Baby spoke passionately in support of the said Bill pointing out in particular the adverse consequences flowing from the several WTO Agreements signed and ratified by the Government in 1994 (Uruguay Round of GATT Negotiations) without reference to the Parliament. Shri Pranab Mukherjee, M.P. spoke at length on the said Bill. He pointed out that there are two sides of the picture. He pointed out that where parliamentary approval is required, it has led to certain complications. He gave the example of the United State’s Senate refusing to ratify the treaty of Versailles concluded at the end of the World War in spite of the fact that President Wilson had played a crucial role in bringing about the said treaty. The Senate yet rejected the treaty. He then referred to the two treaties signed between India and Nepal on harnessing water resources of Mahakali and other rivers and the other with Bangladesh on sharing of the Ganga waters. He submitted that had these agreements been submitted to Parliament for ratification/approval – particularly the treaty with Bangladesh – it would have been extremely difficult to obtain such approval or ratification in the prevailing circumstances. At the same time, he agreed that his intention was not to say that the Parliament should be kept in dark or that the authority of the Parliament in this behalf should be denied. He pointed out that any GATT/WTO Agreements, signed and ratified by the Government of India, can be implemented only by Parliament by making a law in terms of the agreement as provided by Entry 14 of List I of the Seventh Schedule to the Constitution read with article 253. (He then pointed out the impracticality of bringing the borrowing power of the Centre also under the control of Parliament, with which aspect we are not concerned herein). He pointed out further that the Parliament is not so constituted as to discuss the international treaties and agreements in an effective manner. He pointed out that even votes on account and budget demands involving thousands of crores of rupees are being passed without any discussion. In such a situation, he pointed out, entrusting the Parliament with the power to oversee any and every treaty and agreement and convention being entered into or signed by the Government of India would not be practicable and would also not lead to desirable consequences. He also pointed out that one of the reasons for the success of European Union and ASEAN as “economic blocks” is that the decision makers of the constituent countries, i.e. their executive, is by and large free to take decisions in matters of common interest. Ultimately, he suggested that there should be informed debate and discussion on the issue and that one should not rush with such measures. He also pointed out
that under our present system of Parliamentary Government, executive has to render continuous accountability to Parliament and that the Parliament can always question the acts and steps taken by the Government. He finally opined that more debate should go into the matter before effecting such an amendment.53

7.8 Limitations on the Treaty Making Power:

Rajeev Dhavan argues that, the executive power to enter into 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 powers54 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.55 In this context a regime of well-defined limitations on the “power of executive to enter into treaty” is contemplated56 and they are;

1. Like any other limitation on any exercise of the executive power, any international commitment that is entered into would not become enforceable in the Indian national legal system unless its provisions were incorporated in the Indian legal system by implementing legislation.

2. Incorporating legislation may incorporate the international commitment fully or partially. Such commitments would be honoured within the Indian legal system only to the extent of their incorporation, modifying or creating rights within the existing legal system only through enacting legislation.

3. The implementing legislation will be subject to constitutional validity.

53 Upendra Baxi, Supra note 50.
54 Articles 245 to 255 of Constitution of India.
55 Rajeev Dhavan, Supra note 14, p.9.
4. Even though the Indian Constitution permits a partial collapse of federalism to the extent that both the executive and legislative power of the Union can intrude into exclusive power of the States for the purpose of implementing an international obligation arising from a treaty, agreement, convention or decision taken at an international meeting, it is impermissible for the executive power to be used in such a way to disbalance the basic structure of Indian federalism. Equally, no treaty can compromise the sovereign integrity of India and its institutional governance.

5. The view that the treaty making power is part of the conduct of foreign relations and is immune from legal (as opposed to political) constraints is no longer correct. Any obligation imposed by a treaty or its implementation is open to challenge.

7.9 Judicial Observations on Treaty Making Power:

In **Maganabhai Ishwarbhai Patel v. Union of India**, the Five Judge Constitution Bench of Supreme Court observed that;

“A treaty really concerns the political rather than the judicial wing of the State. When a treaty or an award after arbitration comes into existence, it has to be implemented and this can only be if all the three branches Government, to wit, the Legislature, the Executive and the Judiciary or any of them, possess the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the state must equip itself with the necessary power. In some jurisdictions,

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57 AIR 1969 SC 783 at para 23. There were five Writ Petitions filed Under Article 32 and three Appeals from Gujarat and Delhi High Court judgments on common question of law. **Maganabhai**’s case is an Appeal against the dismissal order of Gujarat High Court. All Writ Petitions and Appeals were heard together and a common order was passed. In this case, both India and Pakistan referred their border dispute on the area of Rann of Kutch to Arbitration. According to the Award made by the Arbitrator, 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 cede a portion of the territory of India to a foreign power. The matter was taken to the Supreme Court. Five Judge Constitutional Bench of the Supreme Court held that, it was not a case of cession of territory but was a case of identifying the true border between two countries. However the Court held that cession of territory cannot be effected without amending the Constitution but the case in hand does not require such a course of action. The Court discussed in length the treaty making power of Government of India as it has entered in to an agreement with Pakistan to refer the dispute to third party arbitration. The majority opinion was rendered by M.Hidayatullah, C.J. on his behalf and for V.Ramaswami, G.K.Mitter, and Grover JJ., while J.C.Shah J. delivered separate but concurring Judgment. See also **Re: The Berubari and Exchange of Enclaves Reference under Article 143(1) of Constitution of India**, AIR 1960 SC 845, wherein the Seven Judges Bench of the Supreme Court answered that a law is required to implement an agreement to cede Indian territory to foreign country.
the treaty or the compromise read with the Award acquires full effect automatically in the Municipal Law, the other body of Municipal Law notwithstanding. Such treaties and awards are ‘self-executing’. 58 Legislation may nevertheless be passed in aid of implementation but is usually not necessary.”

The most important decision on the treaty making power of the Executive is delivered by the Bombay High Court in **P.B. Samant v. Union of India**. 59 It deals directly with the issue at hand and needs a closer look. In this case a 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 Sate 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 Dunken Proposals which are being discussed as part of Uruguay Round of Trade Negotiations under the auspices of GATT. The Union of India, in its reply, relied upon Article 253 and the decision of the Supreme Court in **Maganbhai**. It was submitted that not only the Union is entitled to enter in to treaties by virtue of Entry 14 in List-I of VII Schedule, Parliament can alone make law to give effect to such treaties and international agreements. It was particularly relied on the following observations of J.C.Shah J. his lordships’ separate but concurrent judgment 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

58 For the first time in India, the distinction between “self executing and non-self-executing” treaty was recognized, the distinction so widely practiced in U.S.A. after the decision in **Foster & Elam v. Neilson**, 27 U.S. (2 Pet.) 253, (1829) at 314.

59 AIR 1994 Bom. 323.
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
consequences 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 Bombay High Court agreed with the contention of Union of India.
Relying upon the observations of J.C. Shah J. quoted above, the Court held that; “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 matters with the
matters which are in the State List.”

The High Court also clarified that; scope of Executive Power under Article 73
cannot be confined only to Union List and Concurrent List, but extends even to State
List. The petitioners in the Samant’s case relied heavily on the second leg of Article
73(1) (b), which says that the Executive power of the Union shall not extend to maters
with respect to which the Legislature of the State has also power to make laws.60 The
Court held that; “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.”

The Union of India submitted to the Court that the treaty in question is “non
self-executing” one and the treaty provisions can only be given effect to by enacting a
law in terms of the treaty. The Division Bench of the Bombay High Court noted the
same and finally observed that “the issue as to whether the Government should enter

60 Article 73 reads as; 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 to which the Legislature
of the State has also power to make laws. (emphasis to the proviso supplied)
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.”

The above decision in Samant’s case is significant on four counts, firstly, it was a PIL seeking Writ of Mandamus against Union of India not to enter into treaty to which the Court declined to grant such a Writ, secondly it clarifies that the Union Executive can also enter into treaty on subjects mentioned in State List though there is express bar under the second leg of Article 73(1) (b), thirdly it clarifies that Article 253 does not restrict the power of Union Executive to enter into treaty under Article 73, meaning Article 73 is independent of Article 253 and fourthly it approved the contention of Union of India that the treaty in question is “non self executing” paving the way for evolving a distinction between “self executing and non self-executing” which was introduced for the first time by Supreme Court of India in Maganbhai’s case.

In Union of India v. Azadi Bachao Andolan, a division bench of the Supreme Court observed that;

“The power of entering into a treaty is an inherent part of the sovereign power of the state. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our constitution makes no provision for making legislation a condition

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61 AIR 2004 SC 1107 at para 18. = (2004)10 SCC 1 (emphasis supplied). In this case a circular issued by the Central Board of Direct Taxes (CBDT) under section 90 and 119 of Income Tax Act, 1961, was challenged before the Delhi High Court contending that it is ultra virus of sections 90 and 119 of Income Tax Act. The circular was with regard to the assessment of cases in which Indo-Mauritius Double Taxation Avoidance Convention, 1983, (DTAC) applied. Section 90(1) provides that the Central Government may enter into an agreement with any country (b) for the avoidance of double taxation of income under this Act and corresponding law in force in that country. Accordingly DTAC was entered into to avoid double taxation and encourage mutual trade and investment between two countries. The contention was that CBDT being executive body could not have exercised the power of exemption of fiscal statute. Delhi High Court accepted the contention and quashed the circular. On Appeal the Supreme Court reversed the Order of Delhi High Court stating that the circular in question is in accordance with statutory requirements of section 90, which authorises the Central Government to enter into such convention (DTAC in the impugned case) and a Notification dated 6-12-1983 brought into force the DTAC and accordingly the circular cannot be held to be ultra virus. See also State of West Bengal v. Kesoram Industries Ltd., (2004) 10 SCC 201, a five judge Constitution Bench of the Supreme Court observed that; “The executive in India can enter into any treaty be it bilateral or multilateral with any other country or countries.” In this case the Court was dealing with Tea Act, 1953, which was enacted in pursuance of international agreement under Article 253 of the Constitution.
precedent for the entry into force of an International Treaty in time either of war or peace. \textit{The executive power of the union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the state competent to represent the state in all matters international and may by agreement, convention or treaty incur obligations, which in international law are binding upon the state.}’’

\textbf{7.10 Conclusion:}

Thus when we look at the constitutional provisions, case law and the settled practice of the day, the following conclusions can be drawn in respect of the “treaty making power” in India:

1. There is no specific law in India that deal with treaty making power. The result is that the Union Executive enters into international treaties by exercising power under Article 73.

2. Executive’s power to enter in to treaties is absolute. However it is subject to the provisions of the Constitution. Parliament can control the treaty making power of the executive by enacting a law. Till date no law is passed to this effect.

3. Practically speaking Indian Constitution does not specifically entrust treaty making power on the Executive or the President, as has been done in some other Constitution, like Article II Section 2 of U.S. Constitution. Entry 14 of List-I of VII Schedule specifically places it in the domain of Parliament. Infact, Parliament can prohibit Executive from entering in to a treaty or a particular kind of treaty by enacting a law or may disapprove or reject a treaty signed and/or ratified by Executive. However Parliament has chosen not to enact a law on the treaty making power including implementation mechanism till date, leaving the Executive totally free to exercise this power in an unfettered and unguided fashion.

4. All treaties are entered in the name of Republic of India and the President in whom the executive power of the Union is vested by virtue of Article 53, signs the instrument of ratification, accession, with or without reservations, understandings, declarations.
5. It is not necessary to consult the Parliament before signing, ratifying or acceding to international treaties. Unlike American Constitution where under Article II Section 2, consent of Senate is a must for ratification, the Indian Constitution does not stipulate any condition in this regard.

6. Article 73 not only empowers the executive to enter into treaties but also authorizes to exercise such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.\textsuperscript{62}

7. The only limitation imposed on the Union Executive is that its power under Article 73 (1) (a) cannot be extended to matters with respect to which the Legislature of the State has also power to make laws.\textsuperscript{63} That means Union Executive cannot enter into treaties on subjects mentioned in List-II of Seventh Schedule. However, the decision of Bombay High Court in \textit{Samant}'s\textsuperscript{64} case nullified this limitation holding that Union Executive can enter into treaties even on subjects mentioned in State List.

Treaty making power is highly potential and has serious implications. Needless to say an international treaty binds the entire country. The signing of WTO agreement and its ramification on India necessitates immediate attention to the need for a specific law on treaty making. Thus it is high time that the Government of the day must enact a specific law that addresses the key issues like, who can enter into treaties, whether parliamentary approval is necessary before ratification of the treaty, what treaties do require domestic legislation for their enforcement, establish an expert committee to advise the Government before entering into any treaty and also supervise treaty implementation.

\textsuperscript{62} First part of Article 73(1)(b) says, “to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.”

\textsuperscript{63} Second part of Article 73(1) (b) says “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 to which the Legislature of the State has also power to make laws.” Article 162 says that the Executive power of a State extends to the matters with respect to which the Legislature of the State has power to make laws. Further, States in India cannot enter into treaties that pertain to external affairs and matters that belong to federal Government. Thus States in India cannot enter into human rights treaties with other countries since the subject falls under Entry 10, 13 and 14 of List-I of VII Schedule.

\textsuperscript{64} AIR 1994 Bom 323.