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SUGGESTIONS FOR DECLARING VALID TREATY MAKING PROCEDURE

Final Act of WTO: Abuse of Treaty-Making Power
(by Shiva Kant Jha)

CONCLUSION

(i) Recommendations by the National Commission to Review the Working of the Constitution

The National Commission to Review the Working of the Constitution has made a number of valuable suggestions after considering our Constitutional parameters¹: a few of them are set forth as under:

- (1) 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).
- (2) There is an urgent and real need to democratize the process of treaty making. Under our constitutional system, it is not the prerogative (if we can use that expression) of the Executive. In a democracy like ours, there is no room for non-accountability.
- (3) 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.
- (4) 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 arrived at”.
- (5) We may have already suffered enough by entrusting that power exclusively to the Executive. They do not appear to have been vigilant in safeguarding our interests, at least in some instances.
- (6) Law 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 proposed to be ratified shall be referred.

¹ <http://ncrwc.nic.in/>

<http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm> Accessed 11 July 2006

- (7) 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 entered into, the impact of the treaty/agreement upon our country and upon our citizens, should be clearly and fully set out. 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 equally 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 consistent with the requirements of secrecy.’

The Constitutional Review Commission made two very relevant suggestions:

1. ‘The Parliament may consider enacting suitable legislation to control and regulate the treaty-power of the Union Government whenever appropriate and necessary after consulting the State Governments and Legislatures under article 253 “for giving effect to international agreements’.
2. In order to reduce 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.

(ii) Suggestions on Treaty-Making Procedure given by the People’s Commission

The Peoples’ Commission on Patents Laws for India² made the following suggestions on the Government’s treaty making power:

“In the light of the above, it is recommended:

- (a) Whilst the treaty making power (Article 73 read with List 1 entries 13 and 14) vests in the Union and requires legislation in order to translate the treaty into validly enforceable law (Article 253), the treaty making power cannot be seen as a law unto itself, but must operate within the discipline of the Constitution. This is all the more important because the world is being increasingly governed by treaties, which are being enforced through their own mechanisms, and by intense social, economic and political pressure.
- (b) The discipline of the Constitution requires that the Union government, which is the exclusive repository of the treaty making power, cannot, and should not, enter into treaties which undermine the Constitution. In particular, treaties would be violative

². Chairman: Shri I.K. Gujral, the former Prime Minister of India; and Members: Prof. Yashpal, Prof. Muchkund Dubey, Shri B.L. Das, Dr Yusuf Hamied and Dr. Rajeev Dhavan

of the Constitution if they affect or infringe fundamental rights or affect matters which are in the exclusive concurrent domain of the States (Lists II and III) or affect the secular and socialist dimensions of the Constitution (see Preamble and Articles 38, 39 and 51 of the Constitution amongst other articles of the Directive Principles).

- (c) Procedurally, before a treaty (especially a multilateral treaty) is signed it is imperative that it should be (i) placed for discussion before parliament with full particulars (ii) placed within the public domain for discussion (iii) circulated to the States for their opinion and discussion and (iv) not confirmed until and unless this discussion is over. This exercise necessarily needs to be repeated as further issues arise in respect of any one treaty.
- (d) *Parliament needs to set up a special treaties committee which earmarks treaties for consideration and ensures that the public, federal and parliamentary process is compiled with specially listing areas for confirmatory procedures.*
- (e) There is nothing in the Constitution which forbids this process being regulated by statute which should be enacted.”³[italics supplied].

(iii) This Petitioner’s Suggestions on valid Treaty Making Procedure

This author makes the following suggestions for bringing about changes in our Treaty-making procedure:

- (i) Treaties which modify or override the domestic laws must be ratified only after Parliament’s approval through a legislation, or on a resolution by the *Lok Sabha* (the way a tax treaty is done in the U.K.).
- (ii) Treaties of domestic operations, affecting the areas for legislative operations under the entries in the Seventh Schedule, should be ratified only after Parliamentary approval is accorded or the bill is enacted as an Act.
- (iii) Treaties affecting constitutional provisions, other than those affecting the basic features of the Constitution should be made only after obtaining an advisory opinion of the Supreme Court thereon as to its constitutional validity.
- (iv) Treaties, which affect the basic features of our Constitution, should be subjected to popular referendum, after obtaining the opinion of the Supreme Court thereon, before they are ratified.

The following two comments are also worthwhile:

- (i) If the procedure of reference to the Supreme Court is to be avoided, then a treaty should be ratified after Parliamentary approval accorded in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.
- (ii) Our Constitution does not prescribe recourse to referendum. But people’s claim that such treaties be decided through a referendum emanates from the very fact that ‘We, the people’ have adopted, enacted and given to ourselves the Constitution. Whatever protocol of referendum is chosen it must be an effective plebiscitary device to support the terms of a contemplated treaty. As Chief Justice Marshall could hold in *Marbury v. Madison*⁴ that the power of Judicial Review emanates from the judicial oath taken under a written constitution with entrenched rights, so should our courts and our Parliament see the legitimacy of this procedure in the fact

³. Report of the Peoples’ Commission on Patent Laws for India January , 2003 pp. 111-112.

⁴. (1803) 1 Cranch 137, 177-79, 2 L ed. 60.

that, when all is said, political sovereignty inheres in the people of India.

The adoption of the above-suggested procedure would help our country to withstand the pressures to which it is subjected in handling the international negotiations. If a particular draft treaty is not approved per procedure described above, the government would have no option but not to proceed further. "This would put the onus on the rest of the members of the WTO to accommodate us and modify the take-it-or-leave-it character of the Uruguay Round package."⁵ This would make the process of treaty making transparent, and democratic. This would help our government to answer effectively the predatory international financiers that the executive government of India works under constitutional limitations, which it cannot evade. An idea must be drummed into the ears of all, that obligations under a treaty should neither be created in darkness, nor carried out under an opaque system. This would put every body under notice that ratification as such does not entitle anybody to any legitimate expectation before the treaty's incorporation into domestic law as per procedure suggested. This procedure would inhibit the executive from taking things for granted."

⁵. Dubey, *An Unequal Treaty* p.135.