

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

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Powers of President under Article 254(2) of the Constitution of India: Legal Discourse

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ABSTRACT

Constitution of India (hereinafter 'Constitution') aims to establish quasi-federal system of government (according to Sir K.C. Wheare). It specifically demarcates the legislative competence of the Centre and State in the form of Union list, State List and Concurrent List. Also, the Parliament has powers to make laws on the subjects other than those falls in the Union list by virtue of the residuary powers under article 248 of the Constitution. Article 254 of the Constitution specifically empowers the State legislature to submit a law on the subject/s of Concurrent List for assent to the President. If the President assents, then such law would prevail in the State notwithstanding any legislation on that subject by the Parliament.

This paper endeavours to analyse the effect of Article 74 of the Constitution (as amended by 42nd Constitution Amendment Act, 1976 and 44th Constitution Amendment Act, 1978) on the exercise of powers by the President. It concludes that by virtue of the amended text of article 74(1) of the Constitution, (i) the review of law by the Parliament under proviso to Article 254(2) of the Constitution would be the review of the law approved by Parliament itself; (ii) the powers of President under Article 254(2) of the Constitution to assent the law are of no practical significance and are exercisable completely by the Parliament. Therefore, in order to check the overlapping of powers of Parliament on the one side and that of the President on the other, a review of the provisions of Constitution of India is required in order to preserve the true intent of members of the Constituent Assembly and the spirit of the Constitution.

Keywords: *President, Parliament, Concurrent List, separation of powers, federalism.*

I. INTRODUCTION

Constitution of India (hereinafter 'Constitution') is the law of the land. It comprises of XXII Parts consisting of three hundred and ninety five Articles and XII annexes. Part XI to the Constitution provides for 'Relations between the Union and the States' and consists of two Chapters, namely, Chapter I entitled 'Legislative Relations' and Chapter II entitled

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‘Administrative Relations’.

The Chapter on Legislative Relations provides in Article 254 on inconsistency between laws made by Parliament and laws made by the Legislature of States. Article 254(2) provides that if a law made by the State Legislature on the matter of Concurrent List is contrary to the law made by the Parliament on the same matter in the Concurrent List or to the existing law² made by the Parliament and the State Legislature submits the law made by it for assent to the President, such law would on receipt of assent of the President, prevail in that State. Article 74 of the Constitution provides ‘Council of Ministers to aid and advise President’. So this Article is relevant in interpretation of clause (2) of Article 254 of the Constitution. This research paper would analyse the change in interpretation of Article 254(2) as a whole with its proviso due to amendments in Article 74(1) by forty second Constitution Amendment Act, 1976 and forty fourth Constitution Amendment Act, 1978. It provides the rule of construction to interpret the said clause in order to retain the essence of the said provision.

II. PROCEDURE OF LEGISLATION BY PARLIAMENT

India establishes a Parliamentary system of Government. Parliament of India comprises of the President and two Houses to be known respectively as the Council of States and the House of the People.³ Article 100 of the Constitution provides for voting in Houses, power of Houses to act notwithstanding vacancies and quorum. Article 100(1) of it reads: Save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker. The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes. Article 111 of the Constitution (hereinafter 'Article 100') reads: When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent there from: Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his

² Article 366(10) of the Constitution defines the term 'existing law' as: existing law means any law, Ordinance, order, bye law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye law, rule or regulation; see *In re Adilakshmi Ammal*, AIR 1941 Mad. 533 FB: (1941 (2) MLJ 41; *Namboodripad P.M. Bramadathan v. Cochin Devaswom Board*, AIR 1956 (TC) 23.

³Article 79 of the Constitution of India.

message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent there from.

Article 111 thus provides for assent to Bills. It is not applicable in the interpretation of Article 254(2) because it is with respect to a bill in Parliament; Secondly, the proviso to Article 254(2) confers authority on the Parliament to add to, amend, vary or repeal the law made by the President.

III. ARTICLE 74(1) AND ARTICLE 254(2) OF THE CONSTITUTION: ANALYSIS WITH REFERENCE TO THE 42ND AND 44TH CONSTITUTION AMENDMENT ACTS:

Article 74(1) is related with the application of provisions of Article 254(2) because it deals with the manner of exercise of powers by the President. This section makes an analysis of the effect of application of Article 74(1) to Article 254(2). Article 254(2) of the Constitution reads:

Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Article 74(1) of the Constitution provides for Council of Ministers to aid and advise President. Article 74(1) has been amended by 42nd and 44th Constitution Amendment Acts respectively in 1976 and 1978. The amended version of Article 74(1) of the Constitution reads:

“There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration”.

This amendment applies also to Article 254(2). Article 254(2) has not been amended since the commencement of this Constitution except the 7th Constitution Amendment Act which is out of the purview of this paper.

On the application of Article 74(1) to clause (2) of Article 254, following points would ensue:

1. the reference by State Legislature in Article 254(2) to the President would be directed to the Council of Ministers headed by the Prime Minister,
2. the proviso to Article 74(1) would confer a further opportunity to the President to ask the Council of Ministers to reconsider their advice, and
3. if the President asks the Council of Ministers, it would be bound by the decision tendered to him by them after such reconsideration.

The proviso to Article 254(2) reads: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. It confers authority to the Parliament to add to, amend, vary or repeal the law made by the State Legislature, notwithstanding the assent of such law (of State Legislature) by the President.⁴ So on application of Article 74(1), though President had original authority but such authority would:

1. rest finally on the decision of the Council of Ministers headed by the Prime Minister;
2. be overridden any time by law made by the Parliament under proviso to Article 254(2).⁵

Article 74(1), prior to the 42nd Constitution Amendment Act 1976 read:

“There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.”

The provisions of Government of India Act 1935 on this point read as under:

Section 9(1): There shall be a Council of Ministers ... to aid and advise the Governor General in the exercise of his functions except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion.

Section 50(1): There shall be a Council of Ministers ... to aid and advise the Governor General in the exercise of his functions except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion.

⁴ *Zaverbhai Amaldas v. State of Bombay*, AIR 1954 SC 752 at 756, 757; 1955 (1) SCR 799; *Barai T v. Henry An Hone* AIR 1983 SC 150 at paragraph 15-17, 25; (1983) 1 SCC 177; *Tika Ramji v. State of Uttar Pradesh*, AIR 1956 SC 676; (1956) SCR 393; *Accountant and Secretarial Services Pvt. Ltd. v. Union of India*, AIR 1988 SC 1708 at paragraph 24-25; (1988) 4 SCC 324.

⁵ It has been held (in *Zaverbhai* case, *Supra* note 3) that even though the subsequent law of Parliament does not expressly repeal the State law which was validated under Article 254(2), (of the Constitution) the State law will become void as soon as the subsequent law of Parliament, creating repugnancy, is made, that is to say, if the two cannot stand together. see Dr. Durga Das Basu, *Shorter Constitution of India* 1184 (13th edn., Wadhwa and Company Law Publishers Agra 2001). Also, held in cases *Tika Ramji* and *Henry T.*, see *Supra* note 3.

Article 163(1) of the Constitution of India provides:

There shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion.

The term ‘at his discretion’ in Sections 9(1) and 50(1) of the Government of India Act and Article 163(1) of the Constitution of India provides that the Council of Ministers shall aid and advise the President (or the Governor, in case of a State) in exercise of his functions **but the President or the Governor do not require such aid and advise in matters of their “discretion”**.

Article 254(2) of the Constitution confers discretionary powers on the President which is exclusively vested in him, by express terms. Thus, in my opinion, clause (2) to Article 254 of the Constitution:

1. confers sole discretionary power to the President (which he may exercise with the aid and advise of his executive machinery);
2. should not be interpreted by reading the rule in Article 74(1) in literal terms. It should be read for the purpose of clause (2) to Article 254 to the Constitution in terms of Article 163(1) in order to save the said clause (2) from unconstitutionality. The literal interpretation of clause (2) to Article 254 would virtually vest the power of determining the assent to the State law on the Parliament along with the President. Thus the legislative power gets vested into two different authorities, namely, the Parliament and the President, i.e. the Executive. This proposition is against the doctrine of separation of powers⁶. Constitution of India follows this doctrine by Articles 50⁷ and 256⁸.

In *Municipal Council Palai v. T.J. Joseph*⁹, “The Supreme Court has indicated that the test applied for determining repugnancy under Article 254 of the Constitution, may be applied for solving a question of implied repeal and that it should be seen:

1. Whether there is direct conflict between the two provisions;

⁶ The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. see http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/9/10_chapter%204.pdf (last visited 05. 07. 2018)

⁷ Article 50 of the Constitution provides for separation of judiciary from executive.

⁸ Article 256 of the Constitution provides for obligation of States and the Union. It states the executive power of the State shall be so exercised as to ensure compliance with the laws made by Parliament ... This shows the separation of powers between executive at the State level and the Parliament at the Union.

⁹ AIR 1964 SC 1561.

2. Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law;
3. Whether the two laws occupy the same field.”

Thus by this precedent also it could be interpreted that the doctrine of implied repeal applies to Article 74(1) when it is read with Article 254(2).

IV. CONSTITUTIONAL STATUS OF PRESIDENT

Constitution of India provides in Article 53(1) of the Constitution that 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. Article 77(1) of the Constitution provides that “All executive action of the Government of India shall be expressed to be taken in the name of the President”. Article 73 of the Constitution provides extent of executive power of the Union. Article 73(1)(a) of the Constitution provides that: “Subject to the provisions of this Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws”. Thus the executive power extends by virtue of Article 73(1)(a) of the Constitution to the legislative function.

V. JUDICIAL REVIEW OF POWERS OF PRESIDENT: ANALYSIS WITH REFERENCE TO THE OBLIGATION OF PARLIAMENT TO LEGISLATE

Court in *Common Cause v. Union of India*¹⁰ stated: "as required by Article 77 (1), all executive actions of the Government of India have to be expressed in the name of the President; but this would not make that order an order passed by the President personally. That being so, the order carries with it no immunity. Being essentially an order of the Government of India, passed in exercise of its Executive functions, it would be amenable to judicial scrutiny and, therefore, can constitute a valid basis for exercise of power of judicial review by this Court. The authenticity, validity and correctness of such an order can be examined by this Court in spite of the order having been expressed in the name of the President. The immunity available to the President under Article 361¹¹ of the Constitution cannot be extended to the orders passed in the name of the President under Article 77(1) or Article 77(2) of the Constitution." Thus the Court emphatically stated that the actions done in the name of the President can be judicially reviewed. This decision is also supported by proviso to Article 361(1) which reads: Provided further that nothing in this clause shall be construed as restricting the right of any person to

¹⁰ AIR 1999 SC 2979

¹¹ Article 361 provides for protection of President and Governors and Rajpramukhs.

bring appropriate proceedings against the Government of India or the Government of a State. The proposition in Article 13(2)¹² enables the judiciary to review any law made either by the Legislature or other competent authority (including the executive). In *Keshavanada Bharti v. State of Kerala*¹³, Court held that Parliament could not alter the basic structure or framework of the Constitution by virtue of exercise of its powers under Article 368¹⁴ of the Constitution. Thus the President in exercise of its power under Article 254(2) of the Constitution have to conform to the provisions of the Constitution and his actions could be judicially reviewed in the same manner as an Act or law passed by the Parliament. So, the Parliament is not required to determine the constitutionality of the law passed by the President under Article 254(2) of the Constitution in reference to the provisions of Part III of the Constitution or the basic structure of the Constitution.

VI. QUASI FEDERAL CONSTITUTION AND ARTICLE 254(2) OF THE CONSTITUTION: AN INTERRELATIONSHIP

Our Constitution is quasi federal. ...in Federalism there is decentralization of powers.¹⁵ There is division of powers and States are not mere agents of Central Government but they possess independent constitutional powers.¹⁶ Jurist Dicey stated on federalism: "Unitarianism ... means the concentration of the strength of the State in the hands of one visible sovereign power Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution ...and similarly the Federal Government in its turn, exercises its authority within the spheres defined in the same constitution."¹⁷

Dicey calls it a political contrivance for a body of States which desire Union but not unity.¹⁸ Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity.¹⁹ Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies.²⁰ Thus the

¹² Article 13(2) of the Constitution reads: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

¹³ AIR 1973 SC 1461.

¹⁴ Article 368 provides for power of the Parliament to amend the Constitution and procedure therefor.

¹⁵ http://shodhganga.inflibnet.ac.in/bitstream/10603/117621/8/08_chapter%202.pdf (last visited 04. 07. 2018)

¹⁶ *ibid.*

¹⁷ *Supra* note 14.

¹⁸ *S.R. Bommai v. Union of India*, AIR 1994 SC

¹⁹ *ibid.*

²⁰ *ibid.*

essence of a federation is the existence of the Union and the States and the distribution of powers between them.²¹ Federalism, therefore, essentially implies demarcation of powers in a federal compact.²²

In *S.R. Bommai v. Union of India*²³, Court observed: "In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning- more towards the latter ..."

The following provisions of the Constitution namely, proviso to Article 162²⁴, Articles 248²⁵, 249²⁶, 250, 251, 252²⁷, 256, 257(1), 258(1) and 258A recognizes unitary character.

Article 249 provides that Parliament may legislate in the matter of State List if the States ask it by passing a resolution to that effect. Article 252 provides adoption of such law on the matter of State List by resolution by two or more States. Article 254(2) requires the President to give assent to a State law at his discretion and specifically empowers the Parliament to add to, vary, amend or repeal such State law by proviso to the clause (2) of Article 254. Thus this provision gives precedence to the specific 'interests' of any State.

VII. OFFICE OF PRESIDENT OF INDIA AND ARTICLE 254(2) OF THE CONSTITUTION

Article 254(2) of the Constitution confers jurisdiction on the President to decipher the socio-legal implications of law enacted by the State in exercise of its powers under the Concurrent List, i.e. List III to the Seventh Schedule to the Constitution. It is necessary to note that the matters enlisted in the concurrent list relate to general matters of public importance. These issues are directly related to the regular practice of core institutions like judiciary, executive and concern the quality of life of a common man. President of India is said to be first citizen of the country and is immune from any judicial proceedings during its tenure.²⁸ Article 356 of the Constitution confers power on the President to impose State Emergency on conditions

²¹ *ibid.*

²² *ibid.*

²³ AIR 1994 SC

²⁴ *Mount Corporation v. Director*, AIR 1965 Mys. 143 at 149.

²⁵ *Satpal and Company v. Lt. Governor of Delhi*, AIR 1979 SC 1550 at paragraph 8: (1979) 4 SCC 232; *State of Karnataka v. Union of India*, AIR 1978 SC 68 at paragraph 72: (1977) 4 SCC 608.

²⁶ *State of Karnataka v. Union of India*, AIR 1978 SC 68 at paragraph 72, 76, 79 and 104: (1977) 4 SCC 608.

²⁷ *Union of India v. Basavaiah Chowdhary* AIR 1979 SC 1415: (1979) 3 SCC 324; *R.M.D.C. (Mysore) Pvt. Ltd. v. State of Mysore*, AIR 1962 SC 594.,

²⁸ Article 361(1) to the Constitution.

where he is of the opinion that the State is unable to carry out its governance in accordance with the Constitution. The power to issue ordinance under Article 123 of the Constitution further emphasize that the President is conferred powers to take cognizance of any immediate necessity which may affect basic structure of the Constitution when both the Houses of Parliament are not in session. Similarly, President is the supreme commander of Army, Navy and Air Force of the Government of India. All actions of the Government of India are required to be done in the name of the President by virtue of Article 77 of the Constitution. These provisions articulate the role of President as a watchdog of Constitution. Thus, the President oversees the governance in each of the States and Union Territories.

VIII. CONCLUSION

The provisions for relations between the Union and the States are provided in Part XI of the Constitution. This research paper endeavours to analyse the effect of application of amended Article 74(1) on exercise of powers by the President under Article 254(2) of the Constitution.

Article 254(2) of the Constitution empowers the State Legislature to submit a law in the Concurrent List for assent to the President. The President is bound to act according to the advice tendered to him by the Council of Ministers headed by the Prime Minister.²⁹ He could require the Council of Ministers to reconsider such advice but shall act in accordance with the advice tendered after such reconsideration. The proviso to Article 254(2) of the Constitution empowers the Parliament to add to, amend, vary or repeal the law assented by the President in exercise of its powers. So, the application of Article 74(1) to Article 254(2) of the Constitution virtually vests powers on the Parliament thus violating the doctrine of separation of powers.

Also, Constitution recognizes quasi federal character (there is federalism with a unitary bias). Articles 249³⁰ and 252³¹ further provide that the Parliament could legislate on the matter of State List if the State legislature passes a resolution to that effect. This shows that precedence has been accorded to the 'interests' of the State. This constitutional jurisprudence would apply also in interpretation of Article 254(2). Thus, in case the State's interests requires consideration of the State law in the Concurrent List for assent of the President, the interpretation of the provisions of the Constitution should be made in order to retain the powers of the President.

Article 163(1)³² of the Constitution confers authority to the Governor to exercise the functions

²⁹Article 74(1) of the Constitution.

³⁰ Article 249 of the Constitution provides for power of Parliament to legislate with respect to a matter in the State List in the national interest.

³¹ Article 252 of the Constitution provides Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.

³² Article 163 of the Constitution provides for Council of Ministers to aid and advise Governor.

which are at his discretion without the aid and advise of the Council of Ministers. Therefore, in my view, it is requisite to interpret the text and proviso to Article 74(1) of the Constitution in accordance to the text of Article 163(1) of the Constitution for the purposes of ensuring compliance with the spirit of Article 254(2) of the Constitution. Such an interpretation would entitle the President of India to exercise its powers independently of the directions and/ or interference from the both Houses of Parliament. The interpretation of Article 74(1) with reference to independent exercise of powers by the President in reference to Article 254(2) of the Constitution deserves importance in view of the true intent of the framers of the Constitution. This interpretation is necessary for following reasons, viz. (1) the President is not a dictator but is the final arbiter in legislative, executive and judicial disciplines to a considerable extent; (2) if there is no recourse to the manner of interpretation discussed in this paper, the powers conferred on President by Article 254(2) of the Constitution for the purposes of protection of special interests of the state would be completely redundant because the President would virtually be deprived of exercising those powers. (3) the maintenance of status quo in reference to the interpretation of powers of President would be in defiance of the integrity of office of the President of India; (4) it is highly probable that the law enacted by Union legislature reflects the views of the party in power in Centre and there is ruling party with different ideology or connotation on the subject of enacted law in the State legislature which has reserved its law for decision of the President. But the contemporary constitutional provisions would, in practice, require the States to respect the Union law. This may prejudice the peculiar interests of the State. (5) the similar provision for exercise of power by the Governor in case of States does not require the Governor to act in aid and advise of the Chief Minister of the State or to accept the advice tendered by the State Legislature after reconsideration by them on request of Governor. (6) there is no specific reasoning for deprivation of authority to arbiter in exercise of powers for the President through amendments in the Constitution in the year 1976 and 1978. Therefore, in my view the interpretation of Article 74(1) for conferral of real exercise of powers by the president for the purposes of Article 254(2) of the Constitution would maintain the solemn sacro-sanctity of the conscience of our Constitution.
