

POLITICS FOR INDIA

LEGISLATURE IN INDIA

Parliamentary democracy

Center of gravity in parliamentary democracy is parliament. It means parliament is a supreme institution to maintain the accountability of the executive. Executive can remain in power so long it retains the confidence of the house. Parliamentarians are the representatives of the people and through parliamentarians the ultimate responsibility towards the people is achieved.

Merits of parliamentary system.

It is considered to be more representative. Because of the concept of plural executive i.e. Prime Minister (PM) and Council of Ministers (CoM). It is also supposed to be more democratic. It ensures the accountability of the govt. on day to day basis.

Why parliamentary democracy has been adopted in India?

Experience in the parliamentary system during British rule. Diversity of the country required representation of different sections.

Though parliamentary system is unstable, yet parliamentary system was found preferable to presidential system because except USA, there is no other country in the world where presidential system retained its democratic character. In all third world countries, it turned dictatorial.

Decline of parliament.

Decline of parliament denotes decline in the respect of the parliament among the people. The decline of parliament also indicates the relative rise of other institutions. Initially decline was due to the overreach of executive and later on because of judicial activism.

Indicators of decline.

The rise of civil society activism, social movements show that people are not satisfied with the functioning of parliamentary democracy. e.g. There has been a consistent failure on the part of parliament to bring Lokpal act. Hence civil society asserted the right to formulate Jan Lokpal Bill. There has been suggestions that India should think about shifting towards direct democracy considering the decline of representative institutions.

Performance of Indian parliament is not satisfactory on the basis of the indicators given by World Bank to measure the performance. World bank has given 6 indicators.

1] Financial – Parliament is a supreme institution of accountability of the govt. hence parliament's financial accountability on cost of the country have to be evaluated.

2] Compliance – Parliament is a supreme institution of law making in the country. There is a need to assess how much parliamentarians comply with the rules of procedure which they make themselves for the conduct of parliament.

3] Efficiency – We have to evaluate the efficiency of parliament in terms of quality of work, time invested and cost involved.

4] Effectiveness – How much presence of the institution is felt in the country.

5] Relevance – How much qualitative improvement the institution is bringing in the life of the people.

6] Sustainability – Is institution in rise or decline?

Factors responsible for decline of parliament.

1] Presence of Criminals. Unfortunately law-breakers are made law-makers in India. Many parliamentarians have been accused of heinous crimes like murder, rape etc. Hence there is a need to take urgent steps and amend Representation of People's Act 1951. So far only judiciary has taken measures.

2] The destructive role of opposition. Opposition is vital for functioning of parliamentary democracy. Hence opposition enjoys lot of rights like right to ask questions, bring resolutions. In Britain, opposition is also known as 'her majesty's opposition'. In India also there is statutory recognition to the post of LoP (Leader of opposition). He enjoys the status at par with the minister of cabinet rank.

In India initially opposition was irrelevant because of Congress system. Later on opposition gained relevance but role has been destructive. After 1990s, because of globalization, parties do not have differences over policies. Hence they try to escape from the debates on policy matters. The focus of opposition in India is more on investigating the scams. Rather than focusing on legislative business. India does not have strong committee system. Ideally the rule of parliamentary system is 'opposition should have its say, government should have its way'. It goes against the convention of parliamentary system if opposition does not allow govt. to work, hijack govt.'s initiative and insist on bringing its own agenda.

3] Globalization has made law making an extremely complicated process. There is a lack of adequate training and capacity building of parliamentarians.

Globalization has also weakened the nation state and its rule making powers. Thus indirectly it has reduced the scope for autonomous policy by national parliaments.

4] Other reasons include

Executive overreach.

Coalition politics.

Defections.

Politicization of the post of speaker.

Should India shift to presidential system?

The factors which were relevant at the time of independence to chose parliamentary system are still relevant. Except USA there is no other example where Presidential system remained democratic.

According to Ambedkar, *howsoever good a constitution is, it will not work if we as a people do not want it to work.* Ambedkar kept on insisting the need to adhere to constitutional morality. There is no guarantee that if presidential system comes, the problems are going to be resolved. Hence change in attitude rather change in institutions is needed.

It is important that necessary steps like capacity building of parliamentarians, depoliticization of the post of speaker is taken to restore the dignity. Parliamentary system is also a part of basic structure of the constitution and to change it, we have to re-write the constitution.

However it is high time, we should take serious steps towards the devolution of powers at the local level and think about introducing some sort of direct democracy along with representative democracy.

Institution of Speaker.

Position of a speaker is position of dignity. He is pivot of parliamentary system. In the words of Pandit Nehru, 'Speaker represents the dignity of the house, freedom of the house. He represents nation, he is a symbol of nation's liberty, dignity. Position should be occupied by men of outstanding ability and impartiality.'

Features of the institution of speaker

Speaker comes next to president, vice-president, prime minister in the order of precedence. His position is extremely powerful in a parliamentary setup. His position is so important that he does not vacate the office on the dissolution of Lok Sabha, continue in office until the first meeting of newly constituted Lok Sabha.

His salaries and allowances are charged on Consolidated Fund of India and not subjected to voting. His conduct cannot be discussed, except on substantive motion for his removal. He does not vote except in case of equality of votes. He has to vote (casting vote) according to the parliamentary conventions. He conducts the business of the house, final interpreter of the constitution in the house. He is ultimate authority with respect to the rules within the house. Anything said by any member cannot go on record without his permission.

He can expunge the text if he finds it unparliamentary. He decides the breach of privilege of the house. He constitutes all parliamentary committees, appoints chairpersons. He is a chairman of 3 committees (RGB) 1) Business advisory committee. 2) Rules committee. 3) General purpose committee. No one can be arrested from the premises of the house without his permission.

Critical evaluation of the role of speaker.

Since India neither modelled the institution neither on purely British system nor American system, there emerged a big gap in theory and practice, inviting controversies.

Opinion of page committee of UK.

Even when speaker is a neutral position in UK, yet committee acknowledged that there can be a possibility of the speaker going partisan. Committee mentions that *if speaker fails to maintain the neutrality, it sounds death knell of parliamentary democracy*. Hence committee recommended that speaker should be made the member of house of Lords after retirement.

Case studies from India

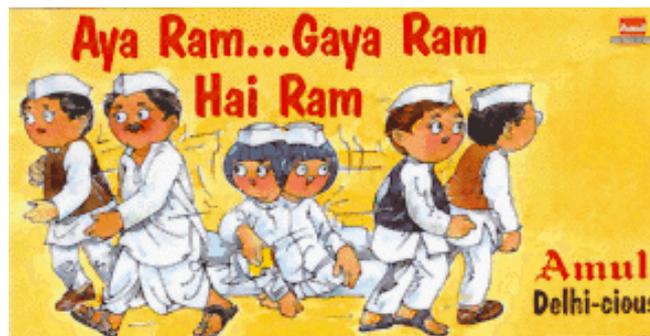
- 1] G. S. Dhillan has served as speaker of Lok Sabha for two terms. In 1975 he was asked to resign and after which he was made union minister for shipping.
- 2] Speaker of Goa, Louis Barboza resigned from the post of speaker, formed his own party, became chief minister by manipulating multiple defections.
- 3] Speaker of Arunachal Pradesh Nabam Rebia disqualified 16 members of the ruling party even when they had not left the party nor defied any of the directives.
- 4] Speaker of Uttarakhand, Govindsingh Kunjwal disqualified 9 MLAs of the ruling party on the ground that they were demanding voting on the budget even when the rules of Uttarakhand assembly permits voting.

Conclusion.

In order to arrest the death knell of parliamentary democracy, India should shift towards the British model.

Anti-defection Law

Defection is a problem in a parliamentary system. It creates political instability. If the members of ruling party defect, party may lose the majority. Defection also leads to corruption as ruling party can push the members of other party to defect in return of ministerial post. Defections are breach of trust with the voters. In India defection is such a huge problem that 'Aaya Ram, Gaya Ram' became the idiom of Indian politics.



Introduction of anti-defection law in India.

52nd AA 1985, introduced anti-defection law. Rajeev Gandhi govt. came to power with absolute majority. However he was unable to provide the leadership and within a short time, MPs started leaving the party. There was a fear that the ruling party will lose the majority. Hence anti-defection law was brought in the interest of the ruling party. Hence anti-defection law contains loopholes which favor the ruling party. e.g. The ultimate power to determine the defection has been invested in the speaker. Speaker's decision was kept beyond the scope of judicial review.

In *Kihoto Hollohan* case Supreme Court has declared paragraph 6 & 7, null and void because it takes away the power of judicial review, which is the basic structure. Supreme court pointed out that in India we cannot consider the post of speaker as neutral. 91st AA 2003 was introduced to address some of the loopholes.

Features of anti-defection law in India.

It applies to the members of both the houses. Anti defection law applies to all members including speaker, deputy speaker, vice chairman. Anti-defection law applies to all the three categories

- A] Members elected on the party seat.
- B] Nominated members.
- C] Independents.

A] Members elected on party seats.

[1] If they vote against the whip issued by the party.

Exemption– members are not disqualified if they have taken prior permission or if they have requested the party to condone their action within 15 days and party has condoned them.

[2] If they voluntarily give up the membership of the party.

Exemptions. 52nd AA banned individual defections but permitted defections in group. It mentions 2 situations where defection is allowed.

1) Split – if 1/3rd of the members come out of the party, it is called split.

2) Merger – if 2/3rd of the members come out of the party. Then it will not be treated as defection.

According to SC, one person can be corrupt but everyone cannot be corrupt. Higher is the number of persons, lesser are the chances of corruption.

91st AA 2003 has ended the exception related to split. However it continued the exception meant for merger.

What does voluntarily denotes?

Ravinayak vs UOI case 1994, If person has not formally resigned, but his actions are such that it can be ascertained that he has resigned i.e. no voluntary resignation yet it will be treated as voluntary resignation based on his actions.

G Vishwanathan vs Speaker – TN Assembly 1996. It protects member of Parliament and gives protection to the freedom of speech and expression which is also the privilege of parliamentarians. Even when party expels, court can decide whether member has voluntarily resigned or not. In case court does not find defection, but party has expelled, such person will be treated as 'unattached member' of the party. But he will continue to be governed by the provisions meant for party members.

B] Defection in case of independents. Independents are not allowed to join any party as it will be fraud on voters.

C] Nominated members. Nominated members are of two types. 1) Members of a party at the time of nomination. Similar rules will apply which apply in case of elected members. 2) Not a member of any party at the time of nomination. Such member has a freedom to join any party within 6 months from the date he assumes the office but not after the expiry.

Case of speaker, vice chairman and deputy speaker.

- 1) They can resign after elected to the post.
- 2) In case they are removed or resigned from the post, they can join only their original party or remain independent.
- 3) They are not allowed to join any other party, it will result into defection.

Who will decide defection?

As per 52nd AA, Speaker. And Speaker's authority cannot be challenged (no more valid).

In *Kihoto Holohan case*, SC held that the decision of the speaker comes within the scope of judicial review. As per Art 122, courts cannot intervene in the legislative proceedings but in above case Speaker's action is not legislative, Speaker acts as a quasi-tribunal. Hence it comes under the scope of judicial review.

SP Maurya case 2007 Speaker's action is subjected to judicial review. 1) If he fails to act on complains. 2) If he acts on complains without finding facts.

When the proceedings against speaker on the grounds of defection are taking place, speaker cannot disqualify the members e.g. case of Arunachal Pradesh. Nabam Rebia disqualified 16 members even when proceedings against him were going on.

View of SC. Speaker has been given power to strengthen democracy and not to stifle democracy.

Ravinayak case Judiciary will not question the rules made by speaker or procedures but judiciary will question on the ground of 'mala-fide' intentions.

Way forward.

Instead of making speaker, it is better if the disqualification is determined by election commission like in case of disqualification of MPs and MLAs in other situations.

Anti defection law contradicts not only fundamental right but privileges of parliamentarians with respect to

freedom of speech and expression. Law commission has suggested to restrict the use only in case of 1) Motion of thanks. 2) No confidence motion. 3) Confidence motion 4) Adjournment motion.

Other provision of 91st AA.

It brought split within the definition of defections.

It made the number of ministerial posts limited. 15% of total number of members.

It added Art 361B : A person disqualified under anti-defection law is also disqualified from being appointed to any office or remunerative post – under any government, Union or State. The disqualification applies till

a) The term of the house for which he is disqualified. b) Or till he gets re-elected.

Office of Profit

Constitution provides for the disqualifications for MPs and MLAs. Art 102. Disqualification on the ground of 'office of profit' is the first disqualification mentioned. This shows the seriousness.

Logic behind it

Separation of powers or to avoid conflict of interest. Parliament is a institution of establishing the accountability of executive. Executive can make inducements to the MPs or MLAs by offering them remunerative posts or such posts which are wielding power. Thus it will destroy the separation of powers and the role of parliamentarians to ensure accountability.

Another logic is that it is not possible for a same person to be present at two places at the same time. Member of Parliament should give ultimate priority to his responsibilities as a parliamentarian. That is why they even have certain privileges e.g. MPs cannot be even arrested 40 days before and after the session of Parliament so that the work of parliament is not be affected.

What is the problem in India?

Executive has been appointing MPs and MLAs on such posts but they are not being disqualified.

Since 91st AA, which limits ministerial posts, it has become a way to bypass 91st AA by offering such posts like parliamentary secretaries which are not technically ministerial posts.

Another problem is, lot of arbitrariness prevails. In context of disqualifying, there is a huge variation from state to state. e.g. Parliamentary secretaries appointed by AAP govt. in Delhi has been made subjected to disqualification whereas many other states continue to have posts but have not been disqualified.

Who decides disqualification?

President who shall act according to the opinion of Election Commission. Implications. The arbitrary manner of exercise put the question-mark on even the independence of the Election Commission.

What is the root cause of the problem?

1] Constitution does not define the office of profit. However constitution exempts certain posts like the ministerial posts from subjected to disqualification on the ground of office of profit. Because in India ministers are chosen from among the members of parliament.

2] The existing law is inadequate.

Pandit Thakurdas Bhargav committee repealed earlier laws (1950, 51 & 53 act) and gave a new act – Prevention of Disqualification Act 1959. This act contains two provisions. 1) It suggests that if any office gives only compensatory allowance, it will not be treated as 'office of profit'. 2) The act mentions number of offices which are exempted.

What is the impact of above situation?

In the absence of clear law, it has created scope for judicial interventions. 2] 1959 Act has been continuously amended, in 1993, 2000, 2006, 2013. By amendments more and more posts are brought under the act.

Now and then the controversy related to office of profit keep on emerging. Governments exempt the office with retrospective effect. It is a paradox that judiciary upheld the validity of putting the offices in the list with retrospective effect.

Almost every office is exempted that the condition of disqualification on this ground, itself has become irrelevant.

There is a need to either bring a comprehensive law and it should not have the implementation with retrospective effect or do away with the provision itself.

Does it make sense in case of India?

The disqualification on the ground makes sense only in presidential form of govt. Because of the principle of separation of powers. Art 1(6) of US constitution strictly prohibits the members of Congress from accepting any inducements.

In India, parliamentary system exists. In parliamentary system, parliament holding executive accountable is a farce. The party which has majority in the house forms the govt. Prime Minister is the strongest elected head in the world. He is a leader of both – legislature and executive. It would be naive to think that the private members of the ruling party (which are not in govt.), and which are offered such offices, will be holding the members of their own party in government, accountable.

Office of profit as a disqualification is also irrelevant in light of anti-defection law. Members of the party cannot vote against the party.

Is the office of profit as a disqualification exists in Britain, which is also a parliamentary system?

Officially yes. But practically no. There is a historical reason to put it as a disqualification in Britain. It emerged as a result of the tussle going on between King and Parliamentarians. When King used to have powers, through inducements King was trying to bring MPs to his side. Now King is just a constitutional head. Even without written constitution Britain follows parliamentary culture. (The parliament act of 1707 put restrictions on MPs accepting any remuneration from the crown.) Hence in case of India also either the number of offices exempted have to be reduced or abolish the provision itself. We should not ignore the practical politics, for theoretical niceties.

How office of profit is determined?

Since law is inadequate, it is determined by judiciary from time to time. Judiciary has adopted 5 broad principles.

1) There has to be an office.

2) It should be office of profit.

- 3) It should be under govt.
- 4) Person should have held the office.
- 5) Office is not exempted by the parliament.

Ashokkumar Bhattacharya vs Ajoy Biswas case 1985. Judiciary will interpret the office based on facts and circumstances in each case. It will take practical approach rather than strict legalistic approach. (Pedantic approach – literal/strict approach).

Shatrucharla Chandrashekhar Raju Vs Vyricharla Pradeepkumar Dev case 1992

Judiciary will see whether appointing authority is govt, govt. has power to terminate, whether govt. determines remuneration, whether source of remuneration is public purse, whether govt. controls the office with respect to the manner in which duties of the office are to be performed, whether the office brings person under the influence of govt. by patronage.

All factors need not to exist simultaneously. Which factor is relevant in which case will be determined by judiciary.

Other imp judgements.

Jaya Bachhan Case – Whether person has actually obtained any monetary compensation does not matter. It is enough if office is capable of yielding remuneration. However a person acquires a contract for the work which govt. ordinarily performs will not be treated as office of profit like acquiring gas agency.

Kanta Kathuria Case – Office should be independent of the holder. Hence the office of public prosecutor will not be office of profit.

Shibu Soren Case – Whether compensation bring person under the influence of govt. will be seen.

Divya Prakash Case – Even when appointment is honorary, it can be a office of profit.

Since the controversies keep on emerging, parliament has set up a joint committee to continuously scrutinize. Committee applies two criteria. 1) Remuneration is more than compensatory allowance. 2) It brings person under influence and patronage.

Parliamentary Privileges.

Privileges are the special rights which are available to few. Privileges are given to the parliamentarians or legislators in all democracies so that they can perform their responsibilities efficiently without fear. Privileges represent the dignity of the house. Hence house is given power to punish the person in case of 'breach of privilege'. It is treated as contempt of the house.

One of the most universally available privilege is freedom of speech and expression. One of the strongest tradition of this privilege is in USA. Filibustering. It is a privilege of senators. It is an extreme example of the privilege of the senator. In India Art 105 and 194 provides for the privileges. It mentions 1) Freedom of speech and expression. 2) Exemption from liability with respect to anything said or any proceedings or any vote given in parliament. e.g. There cannot be any case of defamation against the members for what they said in the house. Similarly nobody will be punished for publishing any report under the authority of the house. 3) Art 122 Prohibits Judiciary from intervention in the proceedings of parliament.

Constitution does not give the exhaustive list, leaves it on the parliament to define its own privileges. Till parliament does not codify, the privileges found in Britain's house of commons will be treated as applicable. Privileges are available to MPs as an individual, houses collectively, committees and its members.

There are certain other privileges under CrPC like freedom from arrest and rules of procedures in the house.

Why codification is needed?

Issues was debated in the constituent assembly and Dr. Rajendra Prasad emphasized on the need to codify as he was skeptical that they will never be codified. Lord Cairns once remarked that 'the most important privilege of the parliamentarians is not to codify privileges'.

It creates huge uncertainty with respect to the exercise of freedom of speech and expression of ordinary persons but specifically over the freedom of press. On number of occasions, journalists have been punished for the breach of privilege in an arbitrary manner just for criticizing the policies of govt. e.g. Recently activist Abhijit-Iyer Mitra was arrested for his derogatory remarks on Odisha, under contempt of Odisha Assembly.

What is the seriousness of the issue?

Press is known as 'fourth estate'. It is absolutely essential that freedom of press exist to protect democracy. Since privileges are not codified, there is no clarity over what journalists can write or cannot. It also results into involvement of the judiciary now and then in the decision of the house because the power is exercised in an arbitrary manner.

It is a big challenge for judiciary because on one hand it is a protector of fundamental rights and on the other hand, it has to give recognition to the provisions of the constitution.

Current status of the relationship between privileges and FRs.

Whenever there is a contradiction between two provisions of the constitution, judiciary goes for 'harmonious construction' approach. Approach of judiciary is changing.

- 1) Searchlight case (aka MSM Sharma Vs SK Sinha case) 1959. SC has upheld the primacy of privileges over FRs.
- 2) Keshavsingh case. Verdict in Searchlight case is not a general norm. FRs can be given primacy. However all rights will not have primacy. Art 21 will have primacy but Art 19 does not have.
- 3) Raja Rampal Vs Loksabha speaker 2007. Art 20 & 21 both will have primacy but not Art 19.

It would be in the interest of democracy if privileges are codified.

- 1_It will achieve balance between FRs and Privileges.
 - 2_It will restore the dignity of house as judiciary will not have scope for intervention. Privileges in India without codification is like following the British principle of sovereignty of parliament whereas in India constitution is supreme.
 - 3_MPs are representatives of the people, and cannot claim more power from the people themselves.
 - 4_In USA privileges are not codified but there is no system of punishment for the breach of privilege whereas in India journalists have been imprisoned for years together.
 - 5_Recently Australia has codified the privileges.
 - 6_Case of Britain: In Britain privileges were introduced with the purpose. The tussle between King and Parliament. Hence parliament asserted 1) Privilege of parliamentarians to speak against the king. 2) It became the privilege that no person will be arrested from the premises of the house without speaker's permission. 3) At present in Britain even uttering defamatory statements against the house is not treated as breach of privilege. The last person to be imprisoned was Charles Bradlaugh in 1880. However even in 2018 in India, journalists are imprisoned.
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Committee system in India

1| In USA it is said that Congress in session is Congress at display whereas Congress in Committee is Congress at work. The real legislative business takes place in the committees.

2| Since parliament meets for limited time whereas committees continue to work throughout the year.

3| Committees can take the specialist view on a particular issue. Political parties will not cooperate on the floor of the house because of political reasons but they can cooperate in the committee because it does not work under the glare of media.

4| Committees can involve the experts, stakeholders for wider consultations.

5| The strongest committee system in practice is in USA. In USA, the bills can go directly to the committees even before introduction in the house. The life of bill can end in the committee itself, there is no need to send the bill back to the house. (Pigeon Hole practice).

6| In India, committee system does exist but it does not work efficiently. In India it is not necessary to refer the bill to the committee. The number of bill referred to the committee have come down considerably. According to the report of PRS legislative research. 1 – In 14th LS, 60% of the bills were referred. 2 – In 15th LS, 71% of bills were referred. 3 – In 16th LS, 27% of bills were referred.

7| Another paradox is that the recommendations are either not tabled and thus not even discussed. Even when discussed, not implemented. The committee system started in India in 1921 when public account committee was setup. Estimate committee was setup in 1950. Since 1993, department related standing committees have been set up. With respect to legislative business, there are 4 types of committees. 1| Financial. 2| Departmental standing committees. 3| Select committees – means ad hoc committees which are meant to scrutinize the bills. (most imp committee). 4| Rules committee.

8| In India there is a considerable decline in the attendance of the members. Some of the weaknesses of committee system have been mentioned by Pratap Bhanu Mehta and Devesh Kapoor as following.

9| They suffer the general weaknesses of parliament in India.

Lack of capacity.

Members are elected only for a year, thus wastage of experience gained.

Members are not given any additional remuneration so they have no motivation.

Lack of qualitative research support.

Recommendations are neither discussed nor implemented.

Ministers are not the part of the committee and so neither involved nor supportive.