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The Right to Recall: An Accountability of Parliament and Legislative Members towards Constitutional Democracy

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ABSTRACT

This paper examines the relevance of the right to recall elected representatives of Parliament and the State legislative assemblies as a mechanism for ensuring the accountability of legislators within a constitutional democracy. It argues that legislatures are the principal policy-making institutions in modern democracies and that elected representatives owe their primary loyalty to the electorate rather than to their political parties. Drawing on comparative practice in Western democracies, the recommendations of the 255th Report of the Law Commission of India, and the existing recall provisions at the panchayat and municipal levels in several Indian States, the paper contends that the right to recall would strengthen the vertical accountability of Members of Parliament and Members of Legislative Assemblies. It traces the historical antecedents of recall, situates the demand within the framework of the Indian Constitution and the Representation of the People Act, 1951, and proposes that technology and online voting could make periodic evaluation and de-election of representatives feasible. The paper concludes that supplementing the right to vote with a right to recall would deepen popular participation and reinforce the sovereignty of "we the people".

Keywords: Right to recall, Constitutional democracy, Legislative accountability, Parliament, Electoral reforms, Members of Parliament, Vertical accountability.

I. INTRODUCTION

Legislatures are, formally, the principal policy-making institutions in modern democracies. The most fundamental policy decisions, including budgets, treaties and trade agreements, economic, environmental and social regulation, and the elaboration of individual and collective rights, must all be approved by legislatures. The first research question this paper addresses is whether Members of Parliament and Members of the State legislative assemblies fall within the purview of constitutional democracy. The second question is what forces drive the decisions of legislators.

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These are questions about the kind of representation that citizens can expect from those whom they send to deliberate and to make policy decisions on their behalf. Citizens want a legislature that is decisive, that is, one able to resolve the issues before it without chronic deadlock. They also want accountability, which entails the responsiveness of legislatures to citizens' demands. In modern democratic legislatures, the principal vehicles for delivering decisiveness are strong political parties; yet decisiveness secured through party discipline presents a dilemma as to what kind of accountability remains possible.

Legislative accountability denotes a relation between a legislator and the public. It refers to the principle that any member of a political party who serves in the legislature is accountable to the public. Democracy vests power in the legislature, and that power renders legislators accountable to the country; loyalty on the part of the legislator is therefore essential to the proper functioning of the legislative assemblies. Legislative accountability is genuinely realised when an assembly takes decisions for the welfare of the State; where a decision is made to serve the interest of a political party, it does not amount to legislative accountability towards the State.

Legislative assemblies are answerable to the voters of the State, and not to the political party that has been given the opportunity to form part of those assemblies. Beyond the objectives and functions of political parties, every legislator and every Member of Parliament should work for democracy and for the people. Within every democratic system, elected members should act beyond the dictates of political parties. A political party should not run the assemblies; every legislator and every Member of Parliament should be responsible to the House and not to the objectives of the political party.

In many democratic systems, political parties play a significant role and tend to dominate both legislators and the objectives of democratic institutions. It is therefore necessary for citizens to analyse the working pattern of legislators and legislative assemblies, and to ask whether they are working for the political parties or for the objectives of democracy. In reality, political parties frequently dominate the objectives of Parliament and the legislative assemblies, with the result that political agendas, rather than the welfare of citizens, prevail. Over the years, Members of Parliament and members of the legislative assemblies have been dominated by the political character of party representation. It is this political power operating behind legislative representation that gives rise to the demand for a right to recall Members of Parliament.

For responsible government and genuine legislative accountability, this paper contends that the electorate should possess a right to recall a person elected as a Member of Parliament. The right to recall a Member of Parliament may be regarded as a fundamental entitlement of citizens and

as a component of constitutionalism and constitutional democracy. A comparable position existed in ancient India under the concept of raj dharma and the supremacy of dharma.

This paper examines the relevance of the right to recall the elected representatives of Parliament and of the State assemblies. The recall of elected representatives is widely accepted in Western democracies, and new developments in this area can be observed regularly. It is regarded as one of the reforms in the electoral process aimed at strengthening democracy.

Modern politicians resemble Niccolo Machiavelli's *Prince*. With the cunning of the fox, politicians focus on how to play the game rather than on being morally good.¹ There is little self-righteous approach among the elected representatives of today. Representatives have become adept at beguiling the minds of the people.² The threat to democracy and democratic institutions is posed not by people who take up arms, as in the force theory of State formation or in Cold War coups, but by elected representatives themselves. Such leaders subvert the very process that brought them to power, as exemplified by figures such as Hugo Chavez, Adolf Hitler, Benito Mussolini, Vladimir Putin and Saddam Hussein.³

In the Indian context, gone are the days when Parliament was graced by statesmen such as Pandit Jawaharlal Nehru, Sardar Patel, Babasaheb Ambedkar, Maulana Abul Kalam Azad, Shyama Prasad Mukherjee, Gopalaswami Ayyangar and Atal Bihari Vajpayee, who strengthened the roots of parliamentary democracy in India through their punctuality, righteousness and commitment to truth. In recent times, however, the Indian Parliament has been taken for granted by parliamentarians. Faizan Mustafa observes that they pursue narrow, selfish and short-term political interests, and that leaders are belying the expectations of the people. Parliament now has very few speakers whose speeches are heard without interruption, which is an indication of the weakening of institutions. PRS Legislative Research notes that this is the result of structural issues that constrain the effectiveness of Parliament and of Members of Parliament.⁴

Every democracy requires effective dialogue, and effective dialogue requires effective parliamentarians who can work for the institution. Alfred E. Smith observed that all the ills of democracy can be cured by more democracy. The chosen representatives are afraid of no one and feel free to do whatever they wish. On the floor of the House, members are seen lying,

¹ Niccolo Machiavelli, BBC Documentary (2016), <https://youtu.be/weMs-DuGy10>.

² *Id.*

³ Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (2018).

⁴ PRS Legislative Research, *Rethinking the Functioning of the Indian Parliament*, <https://www.prsindia.org/uploads/media/Conference%20note/Functioning%20of%20the%20Indian%20Parliament.pdf> (last visited Dec. 7, 2020).

misleading and professing hatred, and the House has been plunged into pandemonium on several occasions. The throwing of papers towards the Chair and violent conduct by legislators within the House have turned the institution into a battlefield. Theatrical manoeuvres such as walkouts and frequent interruptions of legislative proceedings by political parties or individual members,⁵ together with the repeated lack of quorum⁶ during sittings of the House, have become the norm. Such conduct betrays the opportunity that elected representatives are given to serve the public interest, as they instead indulge in advancing their own politics. Elected representatives misuse their privilege and power, the will of the electorate is not reflected, and the electorate is left to remain a silent spectator for the next five years. Indian electors have no option other than to wait for a fresh election.

To curb this damage to democratic institutions caused by elected representatives, there should be a reasonable check through democratic means.⁷ There is, therefore, a pressing need for the electorate to have a right to recall or to de-elect elected representatives. Ram Manohar Lohia cautioned that *zinda quam panch saal tak intejar nahin karti* (a living people does not wait for five years). The continuous evaluation of elected representatives should be undertaken so as to ensure their prospective vertical accountability. Recall elections are democratic, increase accountability, offer a safeguard against abuse, and can help restore confidence in, and promote active engagement with, the political process. The prospect of being forced into an early election by the public could provide the stimulus needed for responsible government.⁸

II. DEFINITION OF RECALL

The term recall describes a process whereby the electorate may petition to trigger a vote on the suitability of an existing elected representative to continue in office. Recall is seen as an important, directly democratic tool for the electorate to remove from office those elected representatives who are perceived to be ineffective.⁹ According to the 255th Report of the Law Commission of India, the right to recall (hereinafter "RTR") is one of the facets of direct democracy. It refers to a process whereby an electorate is able to recall an elected representative for underperformance, corruption or mismanagement while still in office, by filing a petition

⁵ *House Interrupted: It's Proving Costly*, INDIAN EXPRESS (June 3, 2007), <http://archive.indianexpress.com/news/house-interrupted-it-s-proving-costly/32627/2> (last visited Dec. 7, 2020).

⁶ *Parliament Proceedings as It Happened: Lack of Quorum Forces Adjournment of Lok Sabha*, THE HINDU (June 28, 2019), <https://www.thehindu.com/news/national/parliament-proceedings-live-jk-to-have-six-more-months-of-presidents-rule/article28195404.ece> (last visited Dec. 7, 2020).

⁷ Vinod Bhanu, *Right to Recall Legislators: The Chhattisgarh Experiment*, ECON. & POL. WKLY. (Oct. 4, 2008).

⁸ A. Clennell, *I'll Back a Recall Bill, Says O'Farrell*, SYDNEY MORNING HERALD (Dec. 11, 2009), <https://www.smh.com.au/national/ill-back-a-recall-bill-says-ofarrell-20091210-kmc5.html>.

⁹ Gareth Griffith & Lenny Roth, *Recall Elections*, NSW Parliamentary Library Research Service (Feb. 2010) (last visited Nov. 24, 2019).

that triggers a re-election, usually after a particular percentage of voters has signed the petition.¹⁰

Vinod Bhanu, writing on the recall of parliamentarians, observes that recall is a democratic method by which citizens have the power to remove, or in effect de-elect, a Member of Parliament before the end of the term of office. This power of removal is an instrument by which constituents may scrutinise the performance and conduct of their representatives, ensure the observance of good practices, and assess the delivery of services that an elected representative is expected to provide. Bhanu further observes that recall is a unique political device exercised by the electorate to remove a particular elected representative from office, and that, in India, this power is granted to citizens neither by the Constitution nor by any statutory provision.¹¹

III. DEMAND FOR RECALL IN INDIA

Through the mechanism of recall, operating as a post-election approval device, the continuation of a representative in office is subjected to scrutiny by the voters even before the next general election. This is the prerogative of the people, which would empower "we the people" to determine whether their elected members should continue in office for a full term. Irresponsible, incompetent or erring Members of Parliament would no longer be able to hold office for the full term at the cost of the public exchequer.¹²

The former Speaker of the Lok Sabha, Somnath Chatterjee, strongly favoured a constitutional amendment to empower the electorate with a right to recall their representative in Parliament or in a State assembly where that representative ignores the interests of the people and is guilty of malfeasance, corruption or criminal activity.¹³ He asked why, when the President can be impeached and the Prime Minister can be removed, the term of an elected representative should be regarded as so sacrosanct.¹⁴

Since the inception of the Constitution, the power to disqualify a Member of Parliament or of a legislative assembly has lain with the Speaker of the House. The former Speaker, however, took the view that, in a contentious political atmosphere, it was high time that the power to disqualify an elected representative be taken away from the Speakers of Parliament and of the State

¹⁰ Law Comm'n of India, *255th Report on Electoral Reforms* (Mar. 2015).

¹¹ Vinod Bhanu, *Recall of Parliamentarians*, *ECON. & POL. WKLY.* (Dec. 29, 2007).

¹² *Id.*

¹³ Ramesh Vinayak, *Somnath Chatterjee Makes Pitch for Right to Recall*, *INDIA TODAY* (Sept. 23, 2008), <https://www.indiatoday.in/latest-headlines/story/somnath-chatterjee-makes-pitch-for-right-to-recall-30367-2008-09-23>.

¹⁴ *Id.*

assemblies and be vested in the Election Commission or some other agency. He added that the decisions of Speakers on the disqualification of Members of Parliament and Members of Legislative Assemblies are increasingly being challenged in the courts, thereby lowering the dignity of the constitutional office.¹⁵ At present, provisions for the right to recall are in force for panchayat elections in Chhattisgarh, Madhya Pradesh, Rajasthan, Bihar, Haryana and Maharashtra.¹⁶

IV. PARLIAMENTARY DEMOCRACY IN INDIA

Parliament is a place where public opinion is reflected. It has evolved over a long history into the institution that exists today. That history began in 1215, when King John of England agreed to the sixty-three rules set out by a group of barons, popularly known as the *Magna Carta*. The affixing of the king's seal to it ensured that no one, not even the king, stood above the law. Later, in 1265, Simon de Montfort, Earl of Leicester, invited representatives to constitute his Parliament. The power to make law and to take decisions for the nation thus passed from the monarch to Parliament. Democracy, by contrast, is the rule of the people. It is a political system with institutions that allow citizens to express their political preferences, that place constraints on the power of the executive, and that guarantee civil liberties.

The opening words of the Preamble to the Constitution of India, "We the People of India", clearly indicate that the people of the country are supreme. The Preamble declares India to be a democratic republic, and democracy is a basic feature of the Indian Constitution.¹⁷ Under the democratic republican structure, it is the privilege of citizens to participate in the electoral process and thereby to place their representatives in the seats of power. Although political parties allot tickets to their preferred candidates, the electorate is left to choose the best from among the options so presented.

Since 1947, India has adopted a parliamentary democracy modelled on that of England. The Indian Parliament is bicameral, with the Lok Sabha as the Lower House and the Rajya Sabha as the Upper House. The Lok Sabha is a democratic chamber elected directly by the people on the basis of adult suffrage, and is thus designed to reflect the popular will, in which its strength lies. The Council of Ministers is answerable to the Lok Sabha.¹⁸ Parliamentary democracy functions in a particular way, the most important feature being the responsibility of the executive to the legislature, and, through the legislature, ultimately to the electorate and to the country. A

¹⁵ *Id.*

¹⁶ Law Comm'n of India, *255th Report on Electoral Reforms* (Mar. 2015).

¹⁷ M.P. Jain, *Indian Constitutional Law* 823 (7th ed. 2014).

¹⁸ *Id.* at 24.

further feature is the peaceful transfer of governmental authority from one party to another, whether as the result of an adverse vote in Parliament or after a general election. It presupposes party government founded on collective responsibility.¹⁹

There are three designated roles for Parliament in a democracy. It is responsible for legislation, the laws of the land by which the people govern themselves. It must ensure the accountability of governments, in respect of their policies and actions, to the people. It should also engage in discourse and debate on issues that concern the nation and its citizens.²⁰

There are two types of accountability under a parliamentary democracy, namely horizontal and vertical accountability. Horizontal accountability is effected by regulatory and other supervisory bodies composed of officials acting on behalf of the public. Vertical accountability is mandated by the public itself, through a variety of mechanisms, including elections, complaint procedures, legal and judicial redress, and the activities of civil society organisations and watchdog groups. In the public sphere, effective accountability is typically secured by a combination of both horizontal and vertical accountability.²¹

Parliament has provided certain means of disqualifying elected representatives in the Representation of the People Act, 1951, and in the Constitution itself. Once legislators are elected, however, the electorate has no power to recall its representative before the expiry of the fixed tenure. Even the President of India may be removed from office, before the expiry of the term, for violation of the Constitution, through the process of impeachment under Articles 56(1) (b) and 61(1). The position of the President in India is comparable to that of the Crown in England. In such circumstances, no harm would arise if elected representatives could likewise be recalled by the electorate before the expiry of their term. The power of the Speaker to determine disqualification in certain situations should be an alternative, and not the sole instrument, of removal.

Parliament has prescribed the necessary disqualifications for Members of Parliament in the Representation of the People Act, 1951. These are as follows: corrupt practice in an election; conviction for an offence resulting in imprisonment for two or more years; failure to lodge an account of election expenses; having a subsisting contract for the supply of goods to, or the execution of any works undertaken by, the Government; being a managing agent, manager or

¹⁹ Aloo J. Dastur, *Parliamentary Democracy in India*, 19 INDIAN J. POL. SCI. 329, 329-34 (1958).

²⁰ Deepak Nayyar, *Vibrant Democracy, Dormant Parliament*, LIVE MINT (July 14, 2017), <https://www.livemint.com/Opinion/Bcy9Eg4aDIqGY8Kw7dKKMK/Vibrant-democracy-dormant-Parliament.html>.

²¹ Vinod Bhanu, *Recall of Parliamentarians*, ECON. & POL. WKLY. (Dec. 29, 2007).

secretary of a corporation in which the Government holds not less than a twenty-five per cent share; and dismissal from government service for corruption or disloyalty to the State.

Further disqualifications of Members of Parliament are set out under Article 102(1) of the Constitution. These arise where a member holds an office of profit under the Central or a State Government, under Article 102(1)(a); where a competent court has declared the member to be of unsound mind, under Article 102(1)(b); where the member is an undischarged insolvent, under Article 102(1)(c); and where the member is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State, under Article 102(1)(d).

V. HISTORY OF RECALL

A survey of the history of recall reveals practices that, while not identical to those known today, are clearly its antecedents. In ancient Athens, the institution of ostracism allowed the free citizens entitled to vote to exile a particular individual from the community for ten years where that individual did not abide by the regulations of the community.²² This removal did not, however, extend to elected officials as such. For a closer analogue to the recall provision, one must turn to other pages of history, crossing the English Channel and reaching the villages of the Alps. In England, the right of petition against the king and the no-confidence motion in the House of Commons served comparable purposes.²³ According to Swiss customary law, the removal of elected officials was permitted, and this later became part of the formal law of many Swiss cantons.²⁴

In India, under the Pitt's India Act, 1784, the Governor-General of Bengal and other officials could be recalled through Parliament. The practice was also followed beyond the Atlantic. In the former American colonies of Britain, State legislatures could appoint their delegates to the United States Congress annually, recall them, and replace them with others if they so chose.²⁵ At present, many democracies, including major ones such as the United States, England and Canada, follow this practice of recall.

VI. CONCLUSION AND SUGGESTIONS

At the time of independence, and while framing the new Constitution, the members of the Constituent Assembly did not hesitate to provide for the right to vote on the basis of adult

²² Anne Twomey, *The Recall and Citizens' Initiated Elections: Options for New South Wales*, Constitutional Reform Unit, Sydney Law School (rev. ed. 2011).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

suffrage from the very first general election. They allowed no scope for discrimination in the right to vote, unlike Europe and other democracies, where the right to vote was secured only after a long struggle for women and for black people. The Indian Constituent Assembly extended the same right to every citizen of India upon attaining the age of majority, namely eighteen years. India's leaders were thus well ahead of their time in comparison with other democracies. They took a considerable risk and conducted an experiment in a country where, at that time, the literacy rate was very low and the country was, in many respects, unaccustomed to democratic practice. This experiment with democracy has been described as the greatest experiment of all time, and India is today the largest democracy in the world.

People are now more literate, educated and rational than ever before, and the election of representatives through the right to vote alone is no longer sufficient. Indian citizens have become accustomed to democracy. They know how to dissent, they carry differing opinions, and they have the ability to judge what is right and wrong with a scientific temperament. In a democracy, dissenters are always heard. Therefore, where reasoned dissent arises on the working of representatives, the de-election of those representatives should also be available as a right. It is the demand of the time that the right to vote be supplemented by a right to recall, so as to engage people in the political process more seriously and diligently. This would strengthen "we the people" of India.

It is not true that India is wholly unfamiliar with this instrument. The right to recall already exists at local levels, such as the panchayats and municipalities of certain States. It is now time to extend the right to the electorate in State and general elections, because the larger interests of the people are bound up with Members of Parliament and Members of Legislative Assemblies, whose activities and decisions matter most to the constituency and to the country at large. Other democracies have included recall in their constitutions or in other statutes. England, the country from which India derived its parliamentary democracy, also has provision to recall its Members of Parliament. There is, accordingly, no reason why India should not do likewise.

This instrument of recall ensures accountability, more democracy and discipline on the part of elected representatives. It is one of the fundamentals of the social contract propounded by Hobbes, Locke, Rousseau and Kant. This process can be more effective than impeachment. The Constitution of India provides for the impeachment of judges and of the President, but impeachment is carried out only by Members of Parliament, who are of the same level as the persons concerned. The people, however, are placed far above elected representatives in status, since the Constitution rests sovereignty in "we the people". This shows that elected

representatives are answerable to the people, who are in the best position to judge. It is therefore preferable to assign the right to recall to the people, for this would strengthen the power in their hands and act as a deterrent for elected representatives.

Rebecca Solnit observes that change is the measure of time, while Richard Susskind argues, in his book *Online Courts and the Future of Justice*, that technology is an inseparable adjunct of the rule of law. Joining these two arguments with the judgment of the Supreme Court in *Anuradha Bhasin v. Union of India*, it may be said that Indian society is increasingly recognising the power and importance of technology, artificial intelligence and the internet in governance. In the modern world, technology and artificial intelligence perform wonders daily through great inventions that make life easier. The outbreak of the COVID-19 pandemic spread rapidly, and the internet demonstrated its capacity as the world moved to working online.

There is no reason why the power of the internet should not be applied to the electoral process. Just as humans have advanced from the ballot box to the electronic voting machine, internet-based online voting could be adopted for recall elections as well. Applications and service providers are rated, and, in the corporate world, credit rating agencies rate companies and thereby help to determine their ranking. There is no reason why a similar system could not be made applicable to elected representatives, by rating them against a defined standard, so that a politician scoring below the required standard would be liable to recall. This would be an engaging method that would attract greater participation, including the involvement of a large body of youth in the political process. It would also save cost and reduce the burden on the public exchequer, while controlling the need for physical force, labour and large-scale mobilisation. There is considerable scope for innovation in politics, and this reform appears increasingly feasible with each passing day.
