For Parliamentary approval to treaties, take Entry 14

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On 30 June, 2006, the Left parties demanded a constitutional amendment to make it binding on the Executive to get Parliamentary approval before entering any “bilateral or multi-lateral” agreement.

The catalysts for the demand were the nuclear agreement with the United States and the numerous agreements under the WTO, where the Left has differences with the government.

Removed from this immediate context, however, the demand involves serious questions about the principle of democratic governance that deserves attention irrespective of one’s stand on the merits of these and other cases.

International treaties have not received a detailed treatment in our Constitution, probably because the Constitution makers did not envisage the exponential growth in their number and scope in the decades to come. State sovereignty looks very different today from what it looked like in 1950. The impressive regime of international human rights treaties, WTO agreements and numerous other global, regional and bilateral agreements have affected domains that used to be the sole preserve of the nation-state.

There are three main steps towards becoming a party to an international treaty—negotiation, signature and ratification.

In most democratic countries, negotiation and signature are effected by the Executive, while ratification of all important treaties requires legislative sanction. The underlying rationale, obviously, is one of democratic accountability to people’s representatives for governmental actions.

Strangely, however, India’s democratic Constitution does not expressly vest the power of ratification in the Parliament. In practice, therefore, it is the Union government that exercises all these three powers, including ratification.

While the democratic deficit identified by the Left needs to be addressed, there are two important aspects of the issue that the Left’s critique has missed.

First, the demand for a Constitutional amendment is misplaced. The Constitution does not provide a precise formula for entering a treaty with foreign countries. Instead, it lists the power to enter into international treaties as a subject in Entry 14 of the Union List in the Seventh Schedule. Matters listed in the Union List fall within the exclusive law-making power of the Parliament and the executive jurisdiction of the Union government.

Entry 14 is, therefore, sufficient basis for the Parliament to pass a law prescribing any procedure for entering into treaties, including requiring its sanction for ratification. Why amend the Constitution when an ordinary legislation can serve the purpose as well?

Secondly, another principle, apart from democratic accountability, pulls in the opposite direction from the remedial model of requiring legislative sanction for ratification of all international treaties suggested by the Left—efficiency. Parliamentary time is a valuable and scarce resource, especially in a country as vast and diverse as India. This model might make impossible demands on the same, given the vast number of treaties the government enters into.

A case in point is South Africa. The interim Constitution of the post-apartheid democratic South Africa incorporated the idealist model of legislative ratification in 1993. The National Assembly and Senate were required to agree to the ratification of treaties. The result was that even after South Africa had signed many important international treaties, their ratification remained pending for years.

The final Constitution in 1996 was forced to take a more pragmatic approach, making a distinction between international treaties of “technical, administrative or executive nature” which did not require ratification by the legislature, but had to be laid on the table of the Houses; and others which required legislative ratification.

India can learn from the South African experience. While the distinction between treaties of “technical, administrative or executive nature” and others is ambiguously worded, judicial interpretation over the years should see its meaning settling down. Ultimately, greater Parliamentary scrutiny of substantive treaties with legislative implications is desirable, without wasting Parliamentary time on routine international treaties. The classification should mirror the distinction in domestic law, i.e. between legislative powers vesting in the Parliament and executive powers vesting in the Executive. A similar, though slightly more complicated, model exists in the United States as well.

This pragmatic model can be modified to suit Indian conditions. For the less important “technical, administrative or executive” treaties, the law can provide that the treaty will be deemed to have been ratified after it is laid on the table of both houses of the Parliament, effective retroactively from the date of the signature. For all other, more substantive treaties, the law may require Parliamentary approval for ratification.

However, even for these limited number of treaties, it is possible that the Parliament may not find the time to consider them. Therefore, 45 days after the tabling of the treaty, if the Parliament has not considered or rejected it, the treaty may be deemed to have been ratified.

The Parliament may also be empowered to do away with the application of this deeming clause with respect of a particular treaty by a simple resolution—in case it wants more time to consider the treaty. The rationale behind this pragmatic model therefore places the onus

on the Parliament to discuss the treaty or not. In doing so, democratic accountability is served without making unrealistic demands on Parliamentary time.

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