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THE ANTI-DEFECTION LAW IS FACING CONVULSIONS

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‘The party which can legally issue the whip is the Shiv Sena led by Uddhav Thackeray’ | Photo Credit: ANI

After long years of legislative meanderings, Parliament enacted the anti-defection law (10th Schedule) in 1985 to curb political defection. The volume, intensity, recklessness and uncontrolled venality seen in defections in the 1960s and thereafter almost came to a stop after this. Defections not only caused the frequent fall of governments but also caused great instability in political parties with power-seeking politicians wreaking havoc on political parties. The Supreme Court of India in its first comprehensive judgment in the Kihoto Hollohan case characterised it as a political evil and upheld the right of Parliament to curb this evil through legislative mechanism.

Years have passed and this promise of political stability seems to be ending with the anti-defection law facing convulsions in Indian legislatures, especially in the last five years. The happenings in the State of Maharashtra are an example.

But before dealing with the questions of constitutional importance that have arisen in the Maharashtra Assembly, and which are presently before the Supreme Court, it is necessary to make a few general points about the scheme of the anti-defection law in India. In fact, a closer reading of this law will show that this enactment had a two-point objective. The first was to curb the act of defection by disqualifying the defecting member. The second was to protect political parties from debilitating instability. The fact is that frequent defections from even well-organised political parties leave them weak. They find themselves incapable of keeping their flock together as politicians have a tendency to abandon a sinking ship and move out in search of greener pastures. Indian democracy is based essentially on a party system where stable parties are a sine qua non of a stable democracy. Representatives elected otherwise than as members of parties cannot run a government, which is a very complex institution that demands unity of purpose, ideological clarity and cohesiveness — objectives that can only come from organised, ideologically-driven political parties. This is true of every democratic country in the world.

That this objective is the principal focus of the anti-defection law is clear from two provisions enacted in the 10th Schedule, namely the provision of a split in a political party and that of a merger of two political parties. Although ‘split’ has ceased to be a defence against disqualification with the deletion of paragraph three of the Schedule, a closer look at this erstwhile provision is necessary for a proper understanding of the true objective of this law.

Under this paragraph, if a split occurs in a political party resulting in a faction coming into existence, and one-third of the legislators move out of the party and join that faction, those members could get an exemption from disqualification. The point to note here is that one-third of the legislators would get protection only if there was a split in the original political party. So, the split in the original political party is the pre-condition for exempting one-third of legislators from disqualification.

In other words, if there was no split in the original political party and one-third of the legislators only moved out, all of them would be liable to be disqualified. With the deletion of this paragraph, a split in the original party is no longer a defence against disqualification. Even when a political party has split, the legislators will not get any protection. That would be the impact of the deletion of paragraph three. But the point is that in order for the legislators to claim protection, a split in the original party was always necessary.

In paragraph four which protects defecting members from disqualification, the condition is merger of the original political party with another party and two-thirds of the legislators agreeing to such a merger. Here too, as in split, merger of the political party is the pre-condition to seek exemption from disqualification. One thing that becomes clear from an analysis of the omitted paragraph on split and the paragraph on merger is that the legislators do not have the freedom to bring about a split or merger as they are legally restrained by the anti-defection law. It is the original political party in both cases which takes that decision.

The argument that the Speaker cannot make a roving inquiry into the split or merger is specious as the Speaker takes the decision only after ascertaining the fact of the split. The same applies to the merger. Only a merger of the original political party provides the basis for claiming protection from disqualification under paragraph four. Of course it contains another assertion — namely, the merger will be deemed to have occurred only if two-thirds of the legislators agree to such merger. This simply means that for exempting defecting legislators from disqualification, merger is taken into account only if two-thirds of legislators have agreed to it. A merger of parties can take place outside the legislature but it has no consequence unless two-thirds of the members agree to it.

In the Maharashtra case, interesting constitutional questions have arisen. The first question that should have been decided by the Court was on whose whip is valid. The whole issue could have been settled on that point. It is true that the breakaway group of the Members of the Legislative Assembly chose its own whip, who also reportedly issued whips to all the MLAs of the Shiv Sena. But the question as to whose whip is valid should have been decided on the basis of the explanation (a) to paragraph 2(1)(a), which says that an elected member of a House shall be deemed to belong to the political party by which he was set up as a candidate for election as such member. This explanation makes it unambiguously clear that the party which can legally issue the whip is the Shiv Sena led by Uddhav Thackeray as this is the party which set them up as candidates in the last election. It should not be forgotten that the anti-defection law was enacted to punish defectors, not to facilitate defection.

The Supreme Court by allowing the Election Commission of India to go ahead and decide the petition under paragraph 15 of the symbols order has put the cart before the horse. The 10th Schedule is a constitutional law and the disqualification proceedings under it should have been given primacy over the proceedings under paragraph 15 of the symbols order which is a subordinate legislation. As it happened, the ECI gave a flawed order which has made the operation of the 10th Schedule irrelevant and complicated.

The propositions made in this article can be summed up as follows: legislators have no freedom under the 10th Schedule to split or bring about a merger of their party with another. Only the

original party can do that and the legislators have the choice to agree or not to agree to it. A whip can be legally issued only by the original political party which set them up as candidates in the election. The Court could have settled it as the first and foremost issue which would have done complete justice to the original political party, the Shiv Sena led by Mr. Thackeray, as in the mandate of Article 142 of the Constitution.

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