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# THE FREEDOM OF SPEECH AND AN ‘ADOLESCENT INDIA’

Relevant for: Developmental Issues | Topic: Important Aspects of Governance, Transparency & Accountability including Right to Information and Citizen Charter



February 07, 2023 12:16 am | Updated 12:16 am IST



‘the freedom of speech is under threat not only vertically (that is to say, from the state) but also horizontally (that is to say, from other citizens)‘ | Photo Credit: Getty Images/iStockphoto

We hold adults to different standards of behaviour than we do for children. But what about adolescents? We are disappointed when they are unable to behave with maturity but are often not surprised by their lack of it. Maturity, in a human, is the duty to conduct oneself in accordance with social norms, under varying circumstances, irrespective of how the individual feels.

In the context of a nation, Tocqueville defines the maturity of a nation as the capacity of the people of that nation to act responsibly in the face of social flux.

The rapid growth in national power, along with the unbridled freedom of economic power, has given Indians something that our predecessors never had. Simultaneously, the tide of events that has rocked the world has not passed by India. So, has India behaved responsibly in light of all this? Is India mature?

Let us test this from the perspective of the freedom of speech.

The freedom of speech is one of the most cherished freedoms. The Constitution of India, too, declares that Indians possess this freedom, but makes it subject to the interest of public order, or the sovereignty and integrity of India.

We believe that the framers of the Constitution accepted this watering down of this fundamental freedom, simply because the notion of unfettered freedom of speech was foreign to us.

The concept of freedom of speech is a western notion. While some form of freedom may have existed in ancient Greece, the real freedom of speech, as we understand it today, was propounded by Voltaire and Rousseau.

There is nothing in our soil that suggests that this freedom took root here. B.R. Ambedkar, in his Writings and Speeches, notes this in relation to ancient India: “‘As to freedom of speech it exists. But it exists only for those who are in favour of the social order. The freedom is not the freedom

of liberalism which was expressed by Voltaire when he said ‘I wholly disapprove of what you say and will defend to the death your right to say it.”’

There is some evidence that the freedom of expression existed within state-ordained constructs. The content of the debates of Adi Shankara or Saint Thirugnana Sambandar seem remarkably liberal. Yet, this freedom did not extend to criticism of the king or his royal policies. A man who spoke ill of a king did not live long enough to see the effect. Hence, free speech was within state-defined boundaries.

On the other hand, the freedom of speech and thought that sparked the minds of western thinkers was the freedom from such limits. Bertrand Russell’s masterpiece on western philosophy traces the history of free thought, to its culmination, where a man’s right to think freely supersedes his duty of obedience to the state. The right to not just think freely but also to criticise the state is very fundamental to western notions of democracy.

As Justice Holmes said in the celebrated case of Abrams vs United States, in America, “When men have realized that time has upset many fighting faiths, they may come to believe... that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”

This then is the full freedom of thought and expression that has emerged from the West.

The British Raj obviously did not tolerate free speech, and our thoughts remained manacled until 1947. In 1947, our nation was born, and suddenly, in 1950, we were free to express ourselves.

The first 50 years of freedom were spent in framing the contours of this freedom. The gestalt of what this freedom exactly was came to be created through a series of judicial decisions which recognised this freedom in a restricted form, defining more by exception than by rule. This faltering progress is consistent with the infancy of a nation, trying to define its relationship with its citizenry.

The 1990s and 2000s brought with it unprecedented economic progress, and brought us to the last decade — and also the transition from infancy to adolescence. This adolescence has not brought with it free thought, but rather, a strong opposition to it — by other Indians, who disagree.

The muzzling of unpopular opinions is now done through mob power, actions for defamation, social media blackouts and vetoes and the like. Calls for bans and boycotts of films and books are done for the silliest of reasons. Persons perceive insults and commence protests and lawsuits. Banners in film theatres are burnt, art studios are vandalised and the staging of plays are stopped, not because the art is bad, but because they disagree with what is expressed.

Thus, we see for the first time that the freedom of speech is under threat not only vertically (that is to say, from the state) but also horizontally (that is to say, from other citizens).

Free speech is unpopular when it unsettles the existing order. People feel uneasy when someone stands up and says we have been doing things wrong and that things must change.

Therefore, people maintain the status quo by suppressing unpopular speech. This enables the state to step in and define the framework within which speech is free. And when this happens, we have only the illusion of free speech, and real freedom is lost.

Indians seek to shut down the opinions and expressions of others when they feel threatened by it. This sense of insecurity along with aggression is the hallmark of adolescence and runs as a common thread through all the oppressive actions we have noticed above. We seek strength in numbers. The mob provides us the comfort and the anonymity to suppress opinions and views that we disagree with. Once all dissenting thought is suppressed, we will find only views that echo our own.

This trend, if not arrested, can lead to a nation's inhabitants surrendering their independence to a domineering public opinion. This, in turn, yields to persons depending on a doting, parent-like guardian state for all "freedom".

Most recently, the Supreme Court of India in its judgment in Kaushal Kishore's case (rendered on January 3, 2023) declared that the fundamental rights of Indians are exercisable not only vertically but also horizontally. The question before the Court in this case was whether the fundamental rights (including the freedom of speech) can be claimed other than against the state or its instrumentalities. The Court concluded that such fundamental rights can be enforced even against persons other than the state and its instrumentalities.

This judgment holds the key as to how India can emerge from its adolescence. If every citizen enforces their fundamental freedoms not only against the state but against each other, to the fullest extent, we will then seize back the power to define our own freedoms. Our failure to do so will result in us becoming an obedient and bovine citizenry which implicitly obeys the false credo that nothing can be done unless expressly permitted.

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# SHOULD THERE BE ELECTIONS TO THE CONGRESS WORKING COMMITTEE?

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties



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Congress president Mallikarjun Kharge at the Bharat Jodo Yatra in Srinagar. | Photo Credit: ANI

Last October, Mallikarjun Kharge was elected as the national president of the Congress party. The election was historic as the party's top post was, from 1978, occupied by a member of the Nehru-Gandhi family (except for brief spells between 1992 and 1998). Officially, the party says it is now ready to hold a similar election to the Congress Working Committee (CWC), its highest decision-making body, but there are still internal debates going on. The last time the CWC had an election was in 1997, under the presidency of Sitaram Kesri. Should there be an election now to the CWC? **Mridula Mukherjee** and **Praveen Chakravarthy** discuss the question in a conversation moderated by **Sandeep Phukan**. Edited excerpts:

Should there be elections to the CWC?

**Praveen Chakravarty:** Before I start, I want to clarify that all my views are in my personal capacity. I think there should be no dogmatic doctrine about inner party democracy. Let us understand the context of today's situation. We have general elections in 2024. The Congress has just elected a president who will have the responsibility of leading the party in the general elections. In this context, how should the highest decision-making body of the party be constituted?

Now, elections to the decision-making body can have its advantages in terms of bringing in new people. Or perhaps not, because they could also favour people who have been in the party for a long time. Nevertheless, it is important for the party president to be able to have a team that he can rely on to lead the party in the next elections. It was keeping in mind the elections that the Bharatiya Janata Party, in January, extended the tenure of its current president until June 2024. It was signaling that it did not want to disturb the current set-up until the elections. So, should the Congress enter into another experiment with the CWC elections, which could cause disturbances within the party? My answer is no, considering the context.

Second, the president himself has just been elected by a larger body, the electoral college, of nearly 10,000 members. Remember, the AICC [All-India Congress Committee] members will only be one-eighth of the electoral body that elected the president. So, when a larger body has elected that president, perhaps it is only appropriate that we let the president choose his team

that he can rely on to lead the party.

**Mridula Mukherjee:** A certain process has been set in motion with the election of the Congress president and I think there's a logic to that process. There's also a process that has been set forth by the Bharat Jodo Yatra. There is a certain churning, a certain change, in the party, which needed to be introduced because the old system was not delivering in terms of electoral gains. This process of change is happening for the good. I don't think we saw any disaster with the election of the Congress president; it went through quite smoothly. Half the members of the CWC are not elected. The president will anyway have an opportunity to appoint the rest. Allowing an election will be a positive sign. This process of rebuilding the party gives a good signal to people at all levels of the party structure that they have an opportunity for free contest. We have to assume that the party gets strengthened by electing different group representatives or different individuals representing different views or maybe even factions. That curbs dissidents. I appreciate Mr. Chakravarty's argument about stability and elections coming up soon and all that. But there has been a commitment to holding elections at all levels for quite some time now. And going back on that will not send a very good signal.

Those who argue in favour of an elected CWC say it will ensure a sense of collective leadership that is essential for a political party. And, as Professor Mukherjee pointed out, it would allow room for different views. And what better platform than the CWC?

**Praveen Chakravarty:** I would actually contest the premise that elections will yield better representation in the decision-making body within the party than, say, a nominated body. In fact, I would argue that elections do not necessarily yield representation. As I said earlier, this doctrinaire approach that any election in any democracy is a good thing is not something I believe in. Everything has a context in which it is good or bad. The significant change from the past is that we have an elected Congress president today for the first time in more than two and a half decades. Allow the president to lead the party with a decision-making body that will have representations of every section within the party, rather than relying on a certain internal electoral outcome. When facing an election next year, it is perhaps not the time to experiment.

Since 1998, when Sonia Gandhi became party president, it has been a practice to nominate half the CWC members. Recently the change seekers under the banner of G-23 wanted elections at all levels.

**Mridula Mukherjee:** It's precisely to prevent the emergence of dissidence of that kind that you need elections. When you have provided people place in the decision-making bodies through an open process, it becomes far more difficult for them to argue that their point of view is not being heard or that they're not being given an adequate opportunity.

I am aware that often elections reproduce existing structures, because those who are entrenched in positions of power socially, politically and otherwise in society also have a capacity to win elections. Elections are not necessarily pure contests. Nevertheless, given what's happened in the party in the last few years, it is necessary to provide that space within the party structure.

And look at the history of the Congress, especially before Independence. In much more difficult circumstances and with far more contentious issues at stake, with hugely popular leaders from all over the country, the election method worked. And differences did get resolved through open contests. Often, even at the AICC sessions, decisions as important as whether or not to go in for the Non-Cooperation Movement were taken through an open voting. There was no fear of people expressing their opinion, there was confidence that the better argument will win, that the Congress leadership would be able to persuade people from across the country to a point of

view which the top leadership had. Gandhiji, for example, would often urge decisions that were not necessarily popular decisions and win, but it was all done in these open contests.

Today, we are facing a crisis in democracy. And one way that we argue in favour of democracy is by being democratic within.

**Praveen Chakravarty:** First, I appreciate Professor Mukherjee's point about the history of the Congress. But I think it is a different context today. It is probably for the first time in recent decades that the Congress is facing an extremely competitive electoral marketplace. In that context, the first objective is to have a very strong party organisation to be able to compete in this marketplace. Second, the question of what was demanded earlier by a certain group of people and how applicable it is in today's context... I think a lot of it is different now because there was a process to elect the Congress president. Today, there is an elected Congress president and someone from outside the Nehru-Gandhi family. Perhaps if there was no general elections, I would be in favour of holding elections to the CWC. Third, I want to make some empirical points. One, it is not coincidental that there is no political party in India that has a constitutional process to hold elections internally. There's a reason for that. People, at least insiders, place party cohesion and stability at the top as an objective. Two, we have to see what happened to the Conservative Party in the U.K. It just disintegrated [as it was] largely driven by an internal election process. I'm not suggesting that should entirely be applicable here. But it is a lesson in the broader context of inner party democracy when faced with an election that we must consider.

**Mridula Mukherjee:** Well, I think the Conservative Party and the Labour Party have established mechanisms of functioning and they have served British politics in good stead. So, I don't think it's a very good argument in India that other parties don't follow such practices. The only parties we can look at are the Left parties that follow democratic centralism and never really allow genuine internal democracy. The BJP isn't a good example either. I think the Congress has a stellar record of internal democracy that has worked in Indian conditions. And I don't think that's a history and a record that should be thrown by the wayside.

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# THE SPIRIT OF THE LAW LIES IN THIS DISSENTING JUDGMENT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues



February 13, 2023 12:16 am | Updated 12:16 am IST



‘History has repeatedly shown us that discrimination within religious boundaries often breaches those frontiers and tends to impinge on a person’s relationship with the wider world’ | Photo Credit: Getty Images

How must the rights of religious groups be balanced with the rights of its adherents? This question has long plagued India’s courts. When one such clash arose in 1962, the Supreme Court of India, through a 4:1 ruling, firmly placed group rights over individual freedom. There, in Sardar Syedna Taher Saifuddin vs The State Of Bombay, a challenge was mounted by the leader of the Dawoodi Bohra community, the Dai-ul-Mutlaq, to the Bombay Prevention of Excommunication Act, 1949. The law prohibited religious communities from expelling individuals from a group’s membership. The petitioner claimed that he served not only as a trustee of the community’s properties but that he had also been vested with a power to excommunicate from the denomination any member of his choice. In his belief, this power was integral to the Dawoodi Bohras’ collective right to religious freedom.

The Court, with Chief Justice of India B.P. Sinha dissenting, declared the law unconstitutional. It held that the Dai’s power to excommunicate was so essential to the group’s faith that a legislation, in the name of social welfare, cannot be allowed to reform a religion out of its existence. The verdict has long been a subject of critique. On February 10, 2023, the Court, through Justice A.S. Oka’s judgment (Central Board of Dawoodi Bohra Community vs The State Of Maharashtra), agreed that it merited reconsideration, for at least two reasons.

First, the original ruling had failed to examine whether the rights of religious denominations ought to be balanced with other fundamental rights, particularly the rights of its individual members to be treated with equal care and dignity.

Second, in the years since Sardar Syedna, Indian jurisprudence has evolved to a point where any act of excommunication ought to be tested on a touchstone of constitutional morality. Given these failures, the Court believed that the issues involved ought to be resolved by a larger Bench, in this case by a nine-judge Bench, where questions emanating out of the Sabarimala dispute are already pending consideration.

There is, in the words of the former Chief Justice of Canada Beverly McLachlin, no “magic

barometer” to measure limits on religious freedom. But given the inextricable link between religion and social life — especially stark in India — denominational rights invariably come into conflict both with laws of general application and with the individual rights of a group’s adherents.

Resolving one such battle, the Court, in Shirur Mutt (1954) held that it was only those aspects of religion which are “essential” to faith that deserve constitutional protection. Determining what is essential, the Court ruled, would depend on what devotees to the faith deem as integral to that religion. This exercise was meant to be narrowly tailored. But the carefully drawn-out distinction between the religious and the secular soon collapsed, and soon the Court, through a series of rulings, assumed theological authority and interpreted religious scriptures to determine which practices were, in fact, central to faith.

Over time, this “essential practices” doctrine began to border on the absurd. In one instance, the Court found that the Tandava dance practised by the Anandi Margis was inessential to religion even though the sect’s founder expressly mandated the performance of the dance. The upshot was this: judges, quite contrary to deciding when the state must be allowed to legitimately intervene in matters of religion, were sketching out boundaries to determine which rites and rituals were deserving of constitutional protection in the first place.

This approach undermined the elementary rationale behind the guarantee of religious freedom: that members of religious groups must enjoy an ethical autonomy to determine for themselves how best to lead their lives. But equally, as the judgment in Sardar Syedna attested, the essential practices doctrine also meant that the Court was sometimes unwilling to strike down a practice that impinged on individual rights merely because the practice in question as essential to faith. It was for this reason that Justice D.Y. Chandrachud suggested in his concurring opinion in the Sabarimala case that we look towards alternatives.

One choice can be found, as it happens, in Sardar Syedna. There, in a rousing dissent, CJI Sinha held that it was immaterial whether the practice of excommunication was essential to religion. What the Court had to see was the effect that the practice had on the expelled adherent. As the judgment recognised, a person who had been excommunicated would be disentitled from using the communal mosque and burial ground, and would practically be regarded an outcast. What is more, because of the expulsion, no other person from the community could have any contact, social or religious, with the excommunicated member. Thus, the law in question, as the CJI wrote, merely carried out the “strict injunction of Article 17” — through which untouchability in any form stood abolished.

There is a clear logic to this opinion. Religious groups are vested with rights so that independent members can come together to fulfil collective desires. At the heart of this guarantee is the individual. Therefore, howsoever essential a practice might be to faith, it cannot be allowed to undermine the dignity of the individual.

Article 26, which recognises the rights of religious denominations, begins with a dictate that its promise would be “subject to public order, morality and health”. What might morality mean? In referring Sardar Syedna to a larger Bench, Justice Oka makes clear that morality today must be understood to mean “constitutional morality”. It must subsume within it the fundamental values supporting the Constitution: among them, the ideas of liberty, equality, and fraternity. Justice Oka wrote, “Even assuming that the excommunication of members of the Dawoodi Bohra community is always made on religious grounds, the effect and consequences thereof, on the person excommunicated needs to be considered in the context of justiciable constitutional rights.” He found, on the face of things, that excommunication brought with it serious civic consequences, affecting a person’s right to lead a meaningful life.

History has repeatedly shown us that discrimination within religious boundaries often breaches those frontiers and tends to impinge on a person's relationship with the wider world. If autonomy vested in groups over matters of religion is allowed to trump the rights guaranteed to individual members (to be treated with dignity and equal care and concern) the central tenets underlying the Constitution will cave in.

The anti-exclusion principle rests on a further axiom: that power equations within religious denominations mean that rules are often enforced by dominant community leaders. This leaves little scope for what the professor of law, Madhavi Sunder, described as "cultural dissent". In her words, a law that favours autonomy of the group over the autonomy of the individual will have "the harmful effect of favouring the view of the association proffered by the powerful over the views proffered by less powerful members of the group that is, traditionally subordinate members such as women, children, and sexual minorities".

The dissenting judgment in Sardar Syedna rests on similar foundations. When the nine-judge Bench searches for answers to the questions posed to it, it will do well to turn to CJI Sinha's opinion, for in it lies the brooding spirit of the law.

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# HONOUR OF OFFICE: ON NEW GOVERNORS OF STATES APPOINTED BY THE CENTRE

Relevant for: Developmental Issues | Topic: Important Aspects of Governance, Transparency & Accountability including Right to Information and Citizen Charter



February 14, 2023 12:20 am | Updated 10:21 am IST



A former judge of the Supreme Court of India and a former Indian Army commander are among the new Governors of States appointed by the Centre on Sunday. The Governors of several States and the Lieutenant-Governor of a Union Territory were also shuffled. In recent years, Governors have sought to play a political role in States such as Jharkhand, Kerala, Tamil Nadu and West Bengal, creating a train of controversies. For good reasons, the roles of the military and the judiciary too are topics of interest, particularly with regard to their relationship with the political executive. The executive government's eagerness to control judicial appointments, besides the debate on the collegium system of judges appointing judges, is evident. It has selectively delayed and accelerated appointments recommended by the collegium, effectively exercising powers that it does not have in appointing judges. The Bharatiya Janata Party (BJP) has also faced charges of using the armed forces to further its political narratives. Earlier too, retired police and intelligence officers went on to occupy Raj Bhavans, but it was the appointment of a retired Chief Justice of India (CJI) as a Governor in 2014 that created a new precedent. Another retired CJI was nominated to the Rajya Sabha, in 2020, raising eyebrows.

The institution of the Governor is a legacy of the British imperial governance structure. The legitimacy of a nominated Governor in a democracy was the topic of a heated debate in the Constituent Assembly, but it was carried on into the new republic nevertheless. The Governor was to act as a dynamic link between the Centre and the State, but the makers of the Constitution were clear that the posts must remain ornamental, except in very narrowly defined situations in which they were allowed discretion in decision-making. Over the decades, the overreach of Governors has become a serious question in Centre-State relations and democracy in general. The dominance of the BJP at the Centre since 2014 has added fresh tensions with the States. The BJP has a vision of national unity that causes anxiety among regional interest groups. The office of the Governor was to be embellished by the personalities of those who would occupy it. Opening it as a post-retirement possibility for those who are required to stay aloof from partisan politics in their current roles, lowers the dignity of the offices that they leave behind and what they go on to occupy.

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# HOUSE RULES AND THE WEAPON OF EXPUNCTION

Relevant for: Indian Polity | Topic: Parliament - structure, functioning, conduct of business, powers & privileges and issues arising out of these



February 14, 2023 12:16 am | Updated 12:16 am IST



The Lok Sabha Speaker, Om Birla | Photo Credit: KAMAL NARANG

The expunction of portions of the speeches made by some Opposition politicians in Parliament recently is an issue that has sparked off a debate on an action taken by the Speaker (in the speech by Congress leader Rahul Gandhi), and the Chairman of the Rajya Sabha (in the case of the speech made by Congress President and Leader of Opposition in the Rajya Sabha Mallikarjun Kharge). Mr. Gandhi and Mr. Kharge were both speaking on the Motion of Thanks to the President of India for her address to the Members of Parliament of both Houses. This is customary practice although the Constitution does not provide for any such motion, except direct that each House shall discuss the matters contained in the address. This is a practice adopted from the British Parliament.

When such a motion is discussed, MPs are generally permitted to speak on anything under the sun. It is an occasion to point out lapses on the government's part and discuss the gamut of issues that concern the governance of the country. Speeches are generally political and the Chair never insists on relevance. Since the Council of Ministers is collectively responsible to Parliament, MPs have the right to critically scrutinise the performance of the government. Accountability to Parliament requires the government to respond adequately to the questions raised by MPs in the debate. Under the Rules of the House, it is the Prime Minister who replies to the debate in both Houses.

Article 105 of the Constitution confers on members, freedom of speech in the House and immunity from interference by the court for anything said in the House. Thus, freedom of speech in the House is the most important privilege of a Member of Parliament which is subject only to the other provisions of the Constitution relating to the running of the House and the House Rules. Rule 380 of the Rules of procedure of the Lok Sabha and Rule 261 of the Rules of the Rajya Sabha give the power to the presiding officers of these Houses to expunge any words used in the debate which are defamatory, unparliamentary, undignified or indecent. Once expunged they do not remain on record and if anyone publishes them thereafter, they will be liable for breach of privilege of the House.

There are also occasions when an MP may, during his speech, make an allegation against a fellow MP or an outsider. Rule 353 of the Lok Sabha regulates the procedure in that regard. Under this Rule, the MP is required to give "adequate advance notice" to the Speaker as well as the Minister concerned.

It may be noted here that the Rule does not prohibit the making of any allegation. The only requirement is advance notice, on receipt of which the Minister concerned will conduct an inquiry into the allegation and come up with the facts when the MP makes the allegation in the House. In this case, it may be noted that the allegation which necessitates advance notice, etc. is of a defamatory or incriminatory nature. It means that if the allegation is neither defamatory nor incriminatory, the above rule would have no application.

The rule does not obviously apply to an allegation against a Minister in the government. Since the Council of Ministers is accountable to Parliament, the Members of the House have the right to question Ministers and make imputations against their conduct as Ministers. All that is a part of their duty to ensure the government's accountability to Parliament. Article 105 gives them the freedom to discharge their duty fearlessly.

However, a Member of Parliament needs to follow a certain procedure while making an allegation against a Minister. Such a procedure has been laid down by Speakers in the past. Making an allegation against a Minister or the Prime Minister is considered to be a serious matter; therefore, the presiding officers have carefully laid down a stipulation that the MP who makes an imputation against a Minister of the government should be sure about the factual basis of the allegation, and that he must take responsibility for it. If the MP complies with this stipulation, then the allegation will be allowed to remain on record. There have been many instances in the Lok Sabha when MPs have made allegations against Ministers. Here are two rulings made by the Speakers on such occasions.

On September 2, 1965 when Prakash Vir Shastri, MP, made personal allegations against Humayun Kabir, the then Minister for Education, the Minister refuted the allegation but the MP reiterated his allegation and referred to press reports. In his ruling, the Speaker, Sardar Hukam Singh, said, "I wish to inform all the Honourable members with great respect that a mere report in a newspaper about anything does not give you the privilege to raise it in the House. I know that normally the source of information available to members is newspapers. But that is not a sufficient basis for a member to make an allegation against a Minister, member or other dignitaries. It is necessary to probe it further and satisfy oneself about it... Even if the allegation is proved wrong, it will[,] after all, affect the reputation of the person."

On December 21 1981 in the Lok Sabha, Bapusaheb Parulekar, MP, made a reference to an allegation published in the Sunday (a weekly) against the then Railway Minister, Kedar Pande, and his family members in connection with permanent railway card passes. The Deputy Speaker, G. Lakshmanan, who was in the chair gave the following ruling: "The member should, before making an allegation in the House, satisfy himself after making enquiries that there is a basis for the allegation. The member should be prepared to accept the responsibility for the allegation and the member should be prepared to substantiate the allegation."

However, a careful reading of the Rules of the House would reveal that the axe of expunction can be wielded only when the allegations mentioned therein are of defamatory or incriminatory character. Under Section 499 of the Indian Penal Code (Second exception), any statement respecting the conduct of a public servant in the discharge of his public function or his character (so far as his character appears in that conduct) is not defamation. If such a statement is made in the House against a Minister who is a public servant, it does not come within the 'mischief' of Rule 353 or Rule 380.

Therefore, it does not afford an occasion for the presiding officers to expunge words in or portions of a speech on the ground that they are defamatory. It is thus clear that before the weapon of expunction is wielded, it needs to be ascertained whether the speech contains defamatory or incriminatory statements or only critical comments (which a Member of Parliament

has the right to make). It also needs to be ensured that the freedom of speech enjoyed by the Members in the House is not needlessly curtailed.

P.D.T. Achary is former Secretary General, Lok Sabha

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# POST-RETIREMENT APPOINTMENTS: A DANGER TO JUDICIAL INDEPENDENCE

Relevant for: Indian Polity | Topic: Executive: Structure, Organization & Functioning ; Ministries and Departments of the Government



February 16, 2023 01:31 am | Updated 01:33 am IST



Justice S. Abdul Nazeer. | Photo Credit: The Hindu

Within a month of retiring from the Supreme Court of India, Justice S. Abdul Nazeer has been appointed Governor of Andhra Pradesh. Like many others, I believe it is no coincidence that he was a part of the Constitution Bench that decided the Ayodhya Ram Mandir land issue. In the tenure of the Narendra Modi-led government since 2014, he is the third Supreme Court judge who has received a high-profile political appointment soon after retirement, the other two being Justice P. Sathasivam (who was appointed Governor of Kerala), and Justice Ranjan P. Gogoi (who was appointed member of the Rajya Sabha).

These appointments are all signalling on the part of the government, letting the members of the higher judiciary know that they will be suitably rewarded if they issue favourable decisions. Dangling such a proverbial carrot is akin to corrupting the judges, and encouraging a culture of sycophancy even, as we are increasingly seeing among some judges in the apex court. Worse, this also makes the public have less faith in the judiciary itself. In 1980, Justice V. D. Tulzapurkar had said that “if judges start sending bouquets or congratulatory letters to a political leader on his political victory, eulogising him on assumption of high office in adulatory terms, the people’s confidence in the judiciary will be shaken.”

While a Governor’s position may seem largely ceremonial, it is in fact a squarely political appointment. In any event, this appears to be a part of the ruling party’s strategic mission — a long game, if you will — to destabilise the judiciary, chipping away in small and big ways at various aspects of its functioning. If you step back and observe, the judiciary is slowly but surely being subtly weakened.

To be fair, this is not the first government that has ventured so far as to corrupt the judges in this fashion. Congress-led governments, notably under Indira Gandhi and Rajiv Gandhi, have done it too. But it is a cowardly defence that the Opposition party was equally guilty, and past precedent does not justify present transgressions. The larger objective, for any reasonable executive, should be to ensure the independence of the other arms of the governing mechanism, and that democratic values are preserved in all circumstances. However, a conclusively majoritarian mandate can make one heady with power, and compel the exploration of creative ways in which that power can be maintained and consolidated further. This is entirely the case with the Indian

government today.

The government's behaviour is also hypocritical for it is deliberately paying no heed to its own manifesto articulated by its late leader, Arun Jaitley, that such post-retirement judicial appointments should be avoided. In fact, 'inducing the judges' by such appointments was a specific allegation directed by the Bharatiya Janata Party (BJP) against the Congress-led coalition.

The judiciary is no less culpable in this situation. Ideally, I would like to believe that Indian judges are made of stronger stuff, and not ones to be seduced thus. Judges should show moral responsibility and character, as Justice Akil Kureishi most recently did. After being unceremoniously disregarded for elevation, and shoved across the country to various High Courts, upon retirement, he said that the government's stated 'negative perceptions' about him were a 'certificate of independence', and he was leaving the judiciary with 'his pride intact'.

Judges must recognise that handouts from the government, in the form of such political appointments, are not one-way: there is a giver and there is a receiver. The Indian judiciary must distinguish between political favours and other post-retirement employment opportunities.

There needs to be a demarcation between roles where the presence of a judicial authority is clearly valuable and even necessary, such as in a tribunal or a commission, and where it is not. Justice Gogoi, upon his appointment to the Rajya Sabha, had famously proclaimed that he intended to bridge the gap between the judiciary and the legislature, but his attendance record and public participation in parliamentary affairs suggest nothing of the sort. Similarly, Justice Sathasivam had said he had wanted to serve the people in his role as Governor, but surely, he could have achieved the same objective through other appointments, that would be more befitting of someone who had held the office of the Chief Justice of India.

Ideally, the judicial community should take a concerted decision on this, say, in the Chief Justices' conference. The plenary should agree that judges should not take up any appointments upon retirement stemming from political patronage (with the nature of such appointments being clearly defined). Additionally, a cooling period of about two years should be considered a mandatory minimum before a judge agrees to take on any post-retirement adjudicatory role, in any case.

Justice Y.V. Chandrachud had said that the greatest danger to the judiciary lies within. Members of the judiciary cannot compromise judicial independence by trading it for a plum post-retirement sinecure. When one becomes a judge, one signs up to fulfil a promise of ensuring a fair and independent judiciary; this promise cannot be compromised at any cost. Our judges need to be gently reminded of this unwritten contract they have with the Indian people.

*A.P. Shah is former Chief Justice, Delhi High Court and Former Chairperson, Law Commission of India*

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Source : www.thehindu.com Date : 2023-02-17

# CAN INVESTMENTS BE FREE OF RISK?

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues



February 17, 2023 12:15 am | Updated 01:43 am IST



The logo of the Adani group on the facade of one of its buildings in the outskirts of Ahmedabad. | Photo Credit: REUTERS

Recently, a three-judge Bench of the Supreme Court put forth the idea of setting up an expert committee that could recommend ways to protect common investors from market events. The court's recommendation came soon after the stocks of the companies of the Adani Group crashed following a report by Hindenburg Research, a U.S.-based investment research firm. It is estimated that the fall in the Adani Group's stocks has cost investors over $100 billion. Can investments be free of risk? **Jayati Ghosh** and **Anand Srinivasan** discuss the question in a conversation moderated by **Prashanth Perumal J**. Edited excerpts:

What is the fundamental nature of risk in markets, and why do returns vary based on risk? Why, for instance, does the return on a fixed deposit turn out to be lower than the return on stocks?

**Anand Srinivasan:** Economists measure risk differently from the way investors measure risk. Economists think volatility is risk, but volatility is not risk. In fact, volatility is an investor's friend and is not to be worried about at all. Volatility refers to the swings in the price of an asset. In the case of fixed deposit, there is no change in the price of the asset, whereas in the case of a bond or a stock, there is a price swing on both sides (up or down). But an investor is worried only about the permanent loss of capital. It is good for an investor when there is volatility because it gives him an opportunity to make profits.

**Jayati Ghosh:** Typically, in financial markets, investments that are considered risky will require higher returns to attract investors. It holds true for different geographical locations, for example. Investments in some countries in Africa or Asia are considered riskier than investments in the U.S. or Europe. Now, it is true that economists typically look at the variation or change in prices of an asset as an indicator of risk. But that's not the only indicator they look at to measure risk. Investments in particular sectors such as infrastructure are seen as riskier because there's a longer time duration involved and many unexpected forces can come into play.

Do risk-taking investors need to be protected by regulators from losing money in financial markets as suggested by the Supreme Court? Could there be unintended consequences due to such regulations?

**Anand Srinivasan:** I think there are sufficient laws in place to protect small investors. I don't

think we need another committee with a judge sitting on it to tell us what to do. The role of the Supreme Court is not to make laws but enforce them. Had the court enforced existing regulations, this sorry state of affairs wouldn't have come to place. If people are greedy, you cannot protect them. Take the case of cryptocurrencies. China has banned cryptocurrencies because it leads to flight of capital. We should have banned cryptocurrencies a long time ago. The Supreme Court is waiting for the government to respond and the government is waiting for the G-20 to respond. Why is the Supreme Court not talking about this? Genuine investors will feel burdened and leave the country if further regulations are added in the name of protecting investors.

**Jayati Ghosh:** It's quite interesting that the Supreme Court has chosen to take this up because less than 2% of the Indian population is involved in the stock market in retail. Retail investors are typically those who have wealth to spar and are willing to invest in risky assets and bear that risk. I don't think the Supreme Court should be intervening in these matters. What it should be doing is to ensure that regulatory bodies in finance actually do their job, because it's not so much the retail investors we should worry about; we should be worrying about the LIC, the State Bank of India, and other places that hold the bulk of personal savings in India. These [public] institutions have been investing in a problematic stock, one in which, let's say, a mutual fund would not invest. Why did they keep doing this despite various red flags? There is a broader failure of the public financial institutions which seem to have been too responsive to non-economic considerations, possibly political considerations.

Isn't the capture of regulatory bodies by political interests the norm rather than the exception? If you look at the empirical data, aren't independent regulators few and far between?

**Anand Srinivasan:** No. Please look at India from 1991 to 2014. The RBI (Reserve Bank of India) was run by economic professionals during that period. This is the first time a non-economic professional has been made RBI Governor. And show me a person from investment banking who has headed SEBI? None so far. The problem at SEBI is institutional capture. You have not had a proper regulator like Raghuram Rajan; instead, you have somebody from the industry. You cannot make a player in the game the referee. If you want to be a player, you should have had a long career in regulation.

**Jayati Ghosh:** SEBI is actually one of the most empowered regulators in the world. It has got powers of search, seizure, and arrest. It has a surveillance system. It's supposed to catch suspicious trading activity and watch out for price manipulation on a real-time basis. It's beyond comprehension how it could allow this massive increase in the stock price of Adani Enterprises and other stocks for such a long period without noticing it or doing anything about it. And to say now that we've sent some questions to the Adani Group and we are waiting for their response is ridiculous. Furthermore, all the information that Hindenburg Research has released is actually in the public domain. Some of it is even based on written answers in Parliament to Mahua Moitra's questions. So these are all things that SEBI should have been aware of and monitored. It didn't have to take a dramatic collapse of the share prices for SEBI to suddenly sit up and look around. This is an indication of the fact that SEBI has not really been functioning as an independent regulator at all. It is possible that SEBI has instigated various litigations in the past, but it has not taken them forward. So, this is a real comment on the failure of the Indian regulatory process. And even if people in India are scared to speak about all this, foreign investors are noticing that the Indian regulatory system is not really up to the task. This is particularly so in the case of the offshore firms; the regulatory agencies should have been immediately aware of these offshore firms because their purpose is to evade the law.

Should short-selling of stocks be made easier in India, like in the U.S., to keep a check on shady companies?

**Anand Srinivasan:** Short-selling should be made far easier. The whole Indian system is rigged in favour of those going long; it does not encourage people to go short. Securities are not easily available to borrow and sell short. Even in the case of Hindenburg, what the firm has done is it has used credit default swaps to short the Adani bonds that are listed outside India.

**Jayati Ghosh:** Short-sellers do play a role in every financial market, because they often either uncover processes that have been opaque or are problematic, or hasten processes which otherwise would take a long time to unfold. Short-selling is operating on the idea that you can get the market to respond to your behaviour, because you create a kind of 'lemming effect,' where you have some leaders and then everybody else rushes behind them. This has happened in many sectors. Having said that, they also do generate market instability, and they can often operate on rumour rather than on underlying fundamentals. In the case of Hindenburg, short-selling has actually been good for the Indian financial market because it has forced it to confront the reality that the political economy of the country was not letting it confront. Even now, public financial institutions and regulatory bodies are really trying to evade dealing with the problem and are hoping that things will just quiet down. And unfortunately, the political establishment is also trying to present this as an attack on India rather than a genuine attempt to clean up what is a really murky financial and industrial system. This is not in the interest of the Indian people.

*Jayati Ghosh is a professor of economics at the University of Massachusetts, Amherst; Anand Srinivasan is an investor and a personal finance adviser*



**END**

Source : www.thehindu.com Date : 2023-02-18

# EXECUTIVE FIAT: THE HINDU EDITORIAL ON RAHUL GANDHI'S LOK SABHA SPEECH ON ADANI-PM MODI TIES AND BREACH OF PRIVILEGE

Relevant for: Indian Polity | Topic: Parliament - structure, functioning, conduct of business, powers & privileges and issues arising out of these



February 18, 2023 12:10 am | Updated 10:44 am IST



Congress leader Rahul Gandhi has stood by his statements made during his speech in the Lok Sabha on February 7, in his response to a charge of breach of privilege of the House that was raised by a Bharatiya Janata Party member and a Union Minister. It is strange that a Member of Parliament, whose duty it is to hold the executive accountable to Parliament, is being accused of breach of privilege of the House for seeking answers on crucial issues. Portions of Mr. Gandhi's speech, made during a discussion on the 'Motion of Thanks on the President's Address', that referred to Prime Minister Narendra Modi's ties with industrialist Gautam Adani were expunged from the record of the House. When a member's own rights are being curtailed in the name of parliamentary privilege, the very concept is being reduced to an instrument of executive fiat. Mr. Gandhi raised pertinent questions regarding the political patronage received by the Adani Group, which is in the eye of a storm after a short seller based in the United States brought to light dubious patterns in the group's transactions and ownership. The government has not provided any answers. And, on top of it, the sword of privilege is being wielded against the Opposition leader. The expectations from the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha are to protect the majesty of Parliament, particularly in its interactions with other branches of the state, rather than disciplining the members.

The parliamentary discussions on the Adani controversy, which were vitiated by the unreasonable restrictions on Opposition leaders, follow a devious trend of executive imperium over the legislative branch in some States too. Chief Ministers of many States command supreme powers — they control their parties, dominate over the Opposition, and take Assemblies for granted. Assembly sittings have become fewer and debates shallow. The argument that popular leaders now make is that they are answerable to the people directly — Mr. Modi also invoked the 'blessing of 140 crore people,' while speaking in Parliament on February 8, but the range of questions arising out of the Hindenburg report on the Adani Group remained unanswered. People seek accountability from the elected government through their elected representatives, and the legislature is mandated to mediate that interaction. Mr. Gandhi asked questions as he should. Asking him to adhere to parliamentary norms in doing so is par for the course. But more critically, the government should be required to respond to the allegations. It is a sign of erosion of parliamentary authority that it is not happening.

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Source : www.thehindu.com Date : 2023-02-24

# A CASE THAT SCANS THE WORKING OF THE ANTI-DEFECTION LAW

Relevant for: Indian Polity | Topic: Parliament - structure, functioning, conduct of business, powers & privileges and issues arising out of these



February 24, 2023 12:16 am | Updated 02:29 am IST



‘The working of the Tenth Schedule has been patchy’ | Photo Credit: SUSHIL KUMAR VERMA

A five-judge Bench of the Supreme Court of India is presently hearing a set of cases popularly known as the “Maharashtra political controversy cases”. These cases arose out of the events in June last year, when the ruling Maha Vikas Aghadi (MVA) coalition (the Shiv Sena, the Nationalist Congress Party and Congress) lost power after an internal splintering of the Shiv Sena party. A faction led by Eknath Shinde then joined hands with the Bharatiya Janata Party (BJP) to form the new ruling coalition. The disputes between the various parties have been continuing since then, with the most recent development being an Election Commission of India (ECI) order declaring that Eknath Shinde’s faction is entitled to the party name and symbol.

While questions have been raised about whether the situation is now fait accompli, and whether the Court can “turn the clock back” if it wanted to, the judgment of this case will have consequences not merely for State politics in Maharashtra but far beyond as well. This is because the case raises certain fundamental issues about the working of India’s “anti-defection law”.

The anti-defection law was introduced into the Constitution via the Tenth Schedule, in 1985. Its purpose was to check increasingly frequent floor-crossing; lured by money, ministerial berths, threats, or a combination of the three, legislators were regularly switching party affiliations in the house (and bringing down governments with them). The Tenth Schedule sought to put a stop to this by stipulating that if any legislator voted against the party whip, he or she would be disqualified from the house. While on the one hand this empowered party leadership against the legislative backbench, and weakened the prospect of intra-party dissent, the Tenth Schedule viewed this as an acceptable compromise in the interests of checking unprincipled floor-crossing.

Fast-forwarding 40 years to the present day, we find that the working of the Tenth Schedule has been patchy, at best. In the last few years, there have been innumerable instances of governments being “toppled” mid-term after a set of the ruling party or coalition’s own members turn against it. That this is power-politics and no high-minded expression of intra-party dissent is evident from the well-documented rise of “resort-politics”, where party leaders hold their “flock” more or less captive within expensive holiday resorts, so as to prevent the other side from

getting at them.

Indeed, politicians have adopted various stratagems to do an end-run around the anti-defection law. Recent examples involve mass resignations (instead of defections) to force a fresh election, partisan actions by State Governors (who are nominees of the central government) with respect to swearing-in ceremonies and the timing of floor tests, and equally partisan actions by Speakers (in refusing to decide disqualification petitions, or acting in undue haste to do so). The upshot of this is that, in effect, the Tenth Schedule has been reduced to a nullity: governments that do not have clear majorities are vulnerable, at any point, to being “toppled” in this fashion.

This is where the role of the Supreme Court becomes crucial. Disputes over government formation and government toppling invariably end up before the highest court. It must immediately be acknowledged that such cases place the Court in an unenviable position: the Court has to adjudicate the actions of a number of constitutional functionaries: Governors, Speakers, legislative party leaders, elected representatives, many (if not all) of whom, to put it charitably, have acted dubiously. But the Court does not have the liberty of presuming dishonesty: it must maintain an institutional arm’s-length from the political actors, and adjudicate according to legalities, even as political actors in anti-defection cases do their best to undermine legality. This is a challenging task.

But it is a challenge that the Court has, with due respect, not always risen to. This is one of those situations where the proof of the pudding is in the eating: despite the fact that the Court’s intervention has been sought in every one of these cases, and despite the fact that in recent years the Supreme Court has handed down multiple substantive judgments on anti-defection, the toppling of governments remains as frequent as ever. While one may (partially) put this down to wily politicians finding loopholes in Supreme Court judgments, much like they find loopholes in the Tenth Schedule, this is not all there is to the situation: some of these loopholes were easily foreseeable at the time, but were, unfortunately, not addressed by the Court.

An example of this is the Court’s judgment in the Karnataka political controversy, which effectively sanctified resignations as an end-run around the anti-defection clause. But it is the present case (the Maharashtra political controversy) that presents an interesting case study. One will recall that the crisis, so to say, began when a set of legislators from the Shiv Sena rebelled against Uddhav Thackeray, and were soon ensconced in a resort on Guwahati (with allegations of State political intervention). The Deputy Speaker (there was no Speaker at the time) moved to disqualify the “rebels” who in turn moved the Court, arguing that there was a pending no-confidence motion against the Deputy Speaker, and therefore, as per the Supreme Court’s judgment in Nabam Rebia, he was disqualified from deciding on the disqualifications while it was pending.

The Supreme Court’s vacation Bench stayed the Deputy Speaker’s hand, but in what can only be described as a very curious set of orders, also directed a floor test. The upshot of this was that the “rebel MLAs” (who may or may not have subjected themselves to disqualification) were able to vote in this floor test, and voted to bring the government down (in turn altering a fluid political situation and skewing the balance of power). The new government was swiftly sworn in (by the Governor), and appointed its own Speaker, thus effectively creating a fait accompli with respect to the pending disqualification petitions. To top it all, the Supreme Court’s orders were “interim” in nature, and therefore, no reasons were provided.

These orders, the correctness of which is now being considered by the five-judge Bench, albeit in the context of a changed political situation that itself is the consequence of those very orders, reflect how judicial interventions, if not carefully thought through, can hasten the toppling of a government and contribute to turning the Tenth Schedule into a dead letter. If, for example, it is

held that a Speaker cannot decide a disqualification petition while under a notice for removal themselves, and that a floor test can be ordered in the interim (by the Governor or the court), the consequences are obvious: a “rebel MLA” can move a notice for removal, incapacitate the Speaker from taking action, and leave rebel MLAs free to bring down the government without consequence.

Editorial | **The essence of time: On courts and the anti-defection law**

How the Supreme Court will untangle or cut this Gordian knot in the Maharashtra political controversy is anyone’s guess. But ultimately, the Court will be subject to the verdict of history: the use of money and indeed threats and inducements of prosecution or immunities therefrom to “turn” MLAs is a truth that is evident to all with the eyes to see. The Court’s judgment can act as a counterweight to political power, and infuse a dose of constitutionalism into the politics of government formation and toppling. But equally, the Court’s judgment could make toppling governments even easier for those with the means to do so. Only time will tell which of the two it will be.

Gautam Bhatia is a Delhi-based lawyer

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# DOES THE ANTI-DEFECTION LAW NEED CHANGES?

Relevant for: Developmental Issues | Topic: Government policies & interventions for development in various Sectors and issues arising out of their design & implementation incl. Housing



February 24, 2023 12:15 am | Updated 08:12 am IST



File photo of Shiv Sena leaders Eknath Shinde and Uddhav Thackeray during a press conference in Mumbai. | Photo Credit: PTI

On February 17, the Election Commission of India (ECI) allotted the name ‘Shiv Sena’ and the party’s Bow and Arrow symbol to Maharashtra Chief Minister Eknath Shinde’s faction, in effect recognising it as the original party founded by Balasaheb Thackeray. The political crisis in Maharashtra began last year after a group of 40 of the 55 Sena MLAs walked out of the Maha Vikas Aghadi (MVA) alliance under the leadership of Mr. Shinde, which caused a division in the party. Both the Uddhav Thackeray and Shinde sides staked claim to the party name and symbol, each claiming to represent the ‘real’ Shiv Sena. The ECI said that it had based its decision on a “test of majority.” It said the group of MLAs supporting the Shinde faction got nearly 76% of the votes polled for the 55 winning Shiv Sena candidates in the 2019 Maharashtra Assembly elections, while the Uddhav Thackeray faction got 23.5% of votes. The crisis has thrown the spotlight once again on the anti-defection law, whose purpose is to prevent political defections. In a conversation moderated by **Sonam Saigal**, **P.D.T. Achary** and **Ruchi Gupta** discuss whether the law needs changes. Edited excerpts:

The Tenth Schedule of the Constitution, or the anti-defection law, was enacted in 1985. What was the need to have this law then?

**P.D.T. Achary:** Before the law was enacted in 1985, the political class was anxiously trying to work out a measure to curb the regular defections that had been taking place in various parts of India. Defection causes destabilisation, which leads to governments falling and new governments coming up with the help of the defectors. After Rajiv Gandhi came to power with a massive majority, the government prepared the Bill. It was brought before the House and unanimously passed. Some people thought that this measure would curb freedom of speech and affect the free exercise of opinion by the members of the legislature who are elected by the people. But defection was recognised everywhere as an evil. There was a need to curb that evil; therefore, the law was brought in. There is a famous joke which goes, ‘Aaya Ram, Gaya Ram.’ It means Ram came out of a political party in the morning, joined another party by lunchtime, and is set to join yet another after lunch. That is why the law was brought in.

**Ruchi Gupta:** What the law tries to do is to stabilise party systems by consolidating control of the party leadership instead of through ideological cohesion or ownership [by constituent legislators] of the party. By doing this, it is framing democracy not as a system of representation

and accountability, but as a contest between factions which have consolidated power. So, it's one political party in a congealed way against another, as opposed to legislators being elected to represent people and then electing the government. This has effectively done away with the representative system of democracy in our country.

How do you think the law is faring today?

**P.D.T. Achary:** If you look at the scheme of the anti-defection law, you will find that the principal aim was to curb defections. Its most important aspect was that it was seeking to stabilise the party system because in our democracy, political parties are the principal stakeholders; they contest elections. The legislators are members of political parties. The stability of the political system became an imperative. The kinds of defections which used to take place before the passing of this law are not taking place now. But recent events show that this law needs to be tightened.

A little tightening was done earlier by doing away with a split, that is, paragraph three of the Tenth Schedule of the Constitution. It said, if there is a split in a particular party, and one-third of the legislators move along with the breakaway group, they will not be disqualified. So, split was a defence against disqualification. But that was done away with because of the experience which the political class gained. People were misusing that particular provision and breaking up parties.

But now, there is a very disturbing trend, which is to interpret paragraph four (decision on questions as to disqualification on ground of defection) in a particular way, because there is no authoritative declaration of law from the Supreme Court on the exact application of it.

**Ruchi Gupta:** People are principal stakeholders in a democracy; parties are merely the institutional intermediaries. A party's stability is required, but it is unclear why that stability should come on the back of exercising control over the legislators which effectively does away with their representative role in a democracy. Only a handful of countries like Pakistan and Zimbabwe have this law. Otherwise, legislators are well within their right to vote for a measure however they like. And it's not as if the anti-defection law is working as intended either: governments have fallen repeatedly without consequence for the defectors. There are suggestions to fix loopholes such as automatic disqualification, or that the Speaker must address the disqualification petitions in a time-bound manner, but politics of power is too wide to be captured by procedures. The law is trying to use a legal measure to address what is essentially a political problem.

You spoke about a disturbing trend. In Karnataka, some MLAs left the Congress- JD(S) alliance and joined the BJP to form the government. In Maharashtra, the MVA government was toppled as many elected MLAs left the alliance and formed a new government. And in Goa, after elections, the Congress emerged as the single largest party, but many MLAs broke away and the BJP came to power. Do you think political pressure along with monetary gains takes precedence over the anti-defection law?

**P.D.T. Achary:** That is precisely the point. Why do they defect when they are elected? They defect for the lure of office. Ideological defection doesn't take place in India. At least there is no empirical evidence about that. Paragraph four says two things. One is that a member goes to the Speaker and says that the party has merged with another party and me and my friends, two-thirds of the legislative party, agree with the merger. In that case, the Speaker shall not disqualify them. So, this is a defence like the split, which was there earlier. This is a defence which they can put up against the disqualification process. The political class has interpreted this differently. They say that if the legislature party merges with another party, and two-thirds of the

members merge with another party, they will escape disqualification. This is what happened in some of these States.

**Ruchi Gupta:** Politics is always contextual and there's an apprehension that if the anti-defection law is scrapped, it would have a disproportionate impact on the Opposition parties because of how power is consolidated in the ruling party. I think this is a wrong assumption because doing away with the law will also empower legislators within the ruling party to dissent. Even if an MP feels that the law is going against their own constituents and against their own interests, because they would have to face re-election again, they cannot go against the whip. An example is the recent farm laws where members of the ruling party had no option but to side with their party even if they disagreed with the Bill. This has a bigger impact on democratic functioning than party stability alone.

Do you think that the law in its current form is being misused? If yes, would you suggest any changes in it?

**P.D.T. Achary:** It is being misinterpreted as is seen in Maharashtra because there is no authoritative interpretation of the law. Once the Supreme Court lays down the law and says the merger has to take place between two parties and after that, two-third of the members, if they agree with the merger, then they are safe, and if not, they are not safe, must be made clear. In the 10th Schedule currently, there is no timeline fixed for the Speaker to determine the issue and the purpose of this anti-defection law is defeated.

**Ruchi Gupta:** I think the law needs to be scrapped as it is not able to stop defections. Political representatives are smart enough to work their way around loopholes. Talking about party stability, I think that the scope of the statute could be limited to only no confidence motions. If there is freedom of speech [for legislators], there also must be freedom of action.

*P.D.T. Achary is former Secretary General of the Lok Sabha; Ruchi Gupta is Executive Director of the Future of India Foundation*



**END**

Source : www.thehindu.com Date : 2023-02-25

# SINGLE STROKE: ON THE SUPREME COURT RULING IN FAVOUR OF EDAPPADI PALANISWAMI IN THE AIADMK CASE

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues



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The internal crisis in the All India Anna Dravida Munnetra Kazhagam (AIADMK) seems to have blown over after the Supreme Court of India ruled in favour of its interim general secretary, Edappadi K. Palaniswami, leaving his rival O. Panneerselvam and his paltry following isolated. A two-judge Bench found no illegality in the convening of a special General Council meeting on July 11, 2022, at which resolutions were adopted abolishing the ‘dual leadership’ system under a coordinator and a joint Coordinator, reinstating the post of general secretary and removing Mr. Panneerselvam from the party. The Court did not go into the validity of any of these resolutions, but ruled firmly that a single judge of the Madras High Court had no reason to force the estranged leaders to work together, ignoring the realities of the situation and based on technical grounds; and that a Division Bench of the High Court had correctly interfered with it. The verdict effectively ends the Panneerselvam camp’s attempt to exercise equal control over the party’s affairs through a judicial diktat to retain the dual leadership. There is, of course, the possibility of the legality of these decisions being examined in civil suits, but it is unlikely to lead judicial conclusion for a long time. Until then, the AIADMK will be firmly in the control of Mr. Palaniswami, who has outmanoeuvred the rival camp with the help of the overwhelming majority he enjoys at various levels in the organisation.

Mr. Panneerselvam had only recently spoken about “reclaiming the party from a dictator”, but it is now increasingly clear that he will face political oblivion by persisting with his ambition to wrest the party mantle without shoring up his political base. The tactic of keeping himself in the good books of the Centre and the Bharatiya Janata Party (BJP), even while expecting legal processes to bolster his case, is not really working well for him. It was only recently that he had to eat humble pie when he withdrew his faction’s candidate for the Erode East Assembly by-election, claiming that the camp wanted the AIADMK’s ‘Two Leaves’ symbol to succeed. A count ordered by the Supreme Court among the party’s General Council members had resulted in a majority of members backing Mr. Palaniswami’s nominee. Mr. Palaniswami is no less keen on keeping the BJP on his side, but his firm grip on the party apparatus seems to be standing him in good stead in the political arena, even if the electoral scene in the face of a strong DMK-led alliance remains a formidable challenge.

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