Editorial

PARLIAMENTARY DISSENT, DEFECTION AND DEMOCRACY

THE FRAMING of the Indian Constitution was considerably inspired by the way the British Constitution worked. In the first decade or two, the people who manned governments or entered legislatures were reasonably acquainted with the constitutional system which formed the background-motif of Indian constitutionalism. The Constitution, in spite of its length and details, still depends and, for its successful working, will have to depend, on certain unarticulated traditions and conventions. The British Parliament, despite its theoretical sovereignty, has numerous conventions, legally unenforceable but invariably followed. These conventions made its working conform to what may be called constitutional or social morality. One of the conventions relates to difference of opinion. When a sizeable section of the Indian National Congress fell in disagreement with the government headed by the late Pandit Jawaharlal Nehru, they walked out of the party to form the Kisan Mazdoor Praja Party (KMPP) under the leadership of Acharya J.B. Kripalani. All the members of this party who were parliamentarians or state legislators voluntarily resigned; most of them sought re-election to appropriate legislatures from the same constituencies and a fairly large number of contestants were returned to various Houses.

Unfortunately, these conventions were forgotten and the approach of the people and politicians changed. The change in the outlook and approach of persons who mattered, resulted in some uneasiness and imbalance in the working of the Constitution. In later days, Parliament and legislatures became hotbeds of defections; fall of governments; realignments; unsure, fragile and unstable alliances; and change of loyalties or office-baited defections became the new political culture of India. This led to the enactment of the Constitution (Fifty-second Amendment) Act in 1985, providing for some curbs on voting in disregard of the party whip and on defection.

Subhash C. Kashyap, who worked in the House of the People and ultimately retired as its Secretary-General, has produced a work *The Politics of Power*: *Defection and State Politics in India* wayback in 1974. Its first edition appeared under the title *The Politics of Defection*. It contains tables giving details of the relationship of defectors with ministerial offices, the crumbling of governments by manoeuvred defections and the rewards and awards which could be earned by engaging in defections. The traditions set up by old stalwarts like Kripalani lay irretrievably buried in the ragbag of history. The governments became uncertain for fear of defections. The constitutional morality of standing by the party, under whose banner a person went to Parliament or a state legislature, was forgotten.

The time and energy of many legislators was spent in manoeuvring new alliances, rather than in attending to the urgencies of government or running the state.

The Government of India, anxious about the fallout of defections on the working of the state, set up a committee on defections. The committee, in its report dated 7 January 1969, made certain observations which can be quoted here: "Following the Fourth General Election, in the short period between March 1967 and February 1968, the Indian political scene was characterised by numerous instances of change of party allegiance by legislators in several States. Compared with roughly 542 cases in the entire period of First and Fourth General Elections, at least 438 defections occurred in these 12 months alone. Among Independents, 157 out of a total of 376 elected joined various parties in this period. That the lure of office played a dominant part in decisions of legislators to defect was obvious from the fact that out of 210 defecting legislators of the States of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh and West Bengal, 116 were included in the Council of Ministers which they helped to bring into being by these defections."

To call a halt to this malaise, the government introduced a bill for constitutional amendment on 16 May 1973 with the object of introducing curbs on defections. The bill lapsed. Another namesake bill, introduced in 1979, met the same fate. However, ultimately, the Constitution was amended by the Fifty-second Amendment in 1985 by which articles 102 and 191 were amended and the Tenth Schedule inserted. These articles relate to the disqualifications for membership of the Houses of Parliament and state legislatures respectively. The amendment in the articles, identically worded, provided that "a person shall be disqualified from being a member of either House of Parliament [or a state legislature] if he is so disqualified under the Tenth Schedule." This schedule provides, *inter alia*, that a person shall be disqualified from being a member of the House if he has voluntarily given up his membership of such a political party, or if he votes or abstains from voting, contrary to the directions received from the party, that had set him up as a candidate. It also provides that the disqualification provision would not apply if a faction splits from the original party provided that the split members are not less than one-third, as also in cases where two parties merge. It further provides that the question of disqualification, if controverted, would be decided by chairman or speaker, as the case may be. Paragraph 7 of the Tenth Schedule provides for the ouster of the jurisdiction of the courts in matters connected with disqualification (under the Tenth Schedule) of members of a House.

The amendment gave rise to numerous cases in the Supreme Court and various High Courts. All of them were transferred to the Supreme Court and heard together in *Kihoto Hollohan* v. *Zachillhu*, (1992) (1) SCALE 338). In these cases, the constitutionality of the Constitution (Fifty-second) Amendment Act was challenged on numerous grounds; some

of them were as follows: *One*, the assailed amendment had introduced restrictions on the freedom of speech. *Two*, the amendment had resulted in the erosion of the essential features of parliamentary democracy and hence of the basic structure of the Constitution. *Three*, the amendment had not been ratified as required by article 368(2). Such ratification was necessary as it affected the operation of articles 136, 226 and 227, which rendered paragraph 7 of the Tenth Schedule unconstitutional. For want of such ratification, the whole amendment fell to the ground. The matter was heard and decided by a Constitution Bench consisting of Justices Sharma, Venkatachaliah, Verma, Reddy and Agrawal. The justices held unanimously paragraph 7—the ouster clause—void. Three of them held the rest of the schedule to be valid. Justice Verma for himself and for Justice Sharma, however, held that the whole of the Act was void.

One ground on which there seems to be a difference of opinion between the majority and the minority relates to severability. According to the minority, where a constitutional amendment is introduced in Parliament and a portion of it calls for some formality as a condition precedent, then, if the condition precedent is not observed, the whole of the amendment will fall. It may, however, be mentioned that when article 329A was inserted in the Constitution by the Constitution (Thirty-ninth Amendment) Act in 1975 providing some changes in the electoral laws, the question arose before the Supreme Court in *Indira Gandhi* v. *Raj Narain* (A.I.R. 1975 S.C. 2299). The court held that sub-clauses (4) and (5) of the article were void, but the rest of it was valid. The doctrine of severability was articulated by the Supreme Court of the United States long time ago. One view that can be taken is that the principles governing severability are not different in donstitutional amendments and amendments in ordinary legislation, the only test being whether the portion found unconstitutional in the piece of legislation under challenge can be severed without making the otherwise valid portion unworkable or redundant. The test is simple. If we extract the invalid portion from a piece of legislation, will the residuary portion survive independently and serve the purpose for which the legislation came into being? Philip Bobbitt in his work *Constitutional Fate*: *Theory of the Constitution* (1984) has dealt with the constitutional aspects touching upon interpretation. After taking note of historical, textual, doctrinal, prudential, structural and ethical arguments, he has argued that if two interpretations are possible, of which one is likely to frustrate the purpose for which the legislation was made and another (based on social ethics and prudence) will prevent the mischief which the legislation wanted to avoid, the one which would save the legislation from being negatived should be preferred.

Anyway, the result of the above judgment—majority as well as minority—is that paragraph 7 is, in any case, void. This conclusion would prevent the notorious culture of defections which seems to have affected the political health of the country like a virulent epidemic.

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