

Two judgments and the principle of accountability

Two Constitution Benches of the Supreme Court of India delivered important judgments last week. The first case decided that the Delhi government headed by the Chief Minister – and not the Lieutenant Governor appointed by the central government – will control civil services working for the Delhi government. The second case involved the formation of the current government in Maharashtra following the “split” in the Shiv Sena party.

Contradiction of a core principle

Both judgments, which were unanimous, were authored by the Chief Justice of India; they explain the constitutional position clearly. However, the Maharashtra judgment contradicts the core principle applied in the Delhi case. The problem arises from the fact that the Maharashtra judgment adheres to the Tenth Schedule of the Constitution (the anti-defection law), which, at its heart, is incompatible with the structure underlying parliamentary democracy.

The issue in the Delhi case was to determine whether the civil services in the Delhi government would be accountable to the Delhi cabinet or to the Union government. Delhi is a Union Territory with a legislature, and the demarcation of powers is spelt out in Article 239AA. The Supreme Court stated that parliamentary democracy implied a government accountable to the people. The judgment explains that this entails a triple chain of command: civil service officers are accountable to Ministers; Ministers are accountable to the legislature; and the legislature is accountable to the electorate. Severance of any link of this triple chain would be antithetical to parliamentary democracy. Therefore, the civil services will have to report to the Delhi Cabinet.

The Maharashtra judgment dealt with a sequence of events that included several petitions under the anti-defection law. Two factions of the Shiv Sena had issued contradictory whips, and the Maharashtra Speaker had recognised the whip of one of the factions (which claimed more Members of the Legislative Assembly) as representing the party. One of the questions considered by the Court was to determine which faction had the right to appoint the leader and whip of the legislature party – and, therefore, have the power to issue binding directions on every member of the party in the Assembly.

The Court ruled that the Tenth Schedule makes a differentiation between the legislature party and the political party. The legislature party



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In reinforcing the idea that an MP/MLA is not accountable to the electorate, the Maharashtra verdict breaks the triple chain of accountability, which is an underlying principle of the Delhi judgment that dealt with the control of civil servants

includes all MLAs/Members of Parliament belonging to the political party. It determined that the power to issue directions was with the political party, and not the legislature party. Therefore, the person in charge of the political party (who may not be a member of the legislature) would control every vote of the MLAs/MPs of that party. Failure to adhere to such direction by any MLA/MP would lead to disqualification.

Thus, this judgment further entrenches the power of the party leadership over the legislature. It reinforces the idea that the MP/MLA is not accountable to the electorate but only to the party that fielded them in the election. In doing so, it breaks the triple chain of accountability, which is an underlying principle of the Delhi judgment.

Indeed, the judgment decries the possibility of legislators being elected on the basis of their affiliation to a party, later disconnecting with that party. It goes on to say that the Tenth Schedule guards precisely against this outcome. Again, this position is different from that taken in the Delhi judgment. There, the Court states that the government is assessed daily in the legislature through debates on Bills, questions raised during Question Hour, resolutions, debates and no-confidence motions. If the legislators of the party with a majority in the House have to abide by the directions of the political party, the very idea of a daily assessment by the legislature becomes meaningless. The party leadership controls the vote of its legislators on each issue, and, therefore, the government is guaranteed to win every vote, including a no-confidence motion, unless any legislator is willing to forgo their membership in the House.

The problem lies here

The judges had no choice but to make such contradictory conclusions. In the Delhi judgment, they were clarifying the gaps in the Constitution by using standard interpretation methods. In the Maharashtra judgment, they were bound in their interpretation by the clear language of the Tenth Schedule. The problem lies in the very idea of the anti-defection law, which contradicts the democratic principle of accountability of legislators to their voters.

The anti-defection law is based on the assumption that any vote by an MP/MLA against the party direction is a betrayal of the electoral mandate. This is an incorrect interpretation of representative democracy. While party affiliation is an important element in elections, it is not the

sole criterion for voters. The Supreme Court has recognised this principle in the case where it mandated that all candidates must disclose information related to their criminal record, assets and liabilities, and educational qualifications in order to allow voters to take an informed decision. If voters only cared about party affiliation, why should the other characteristics of candidates matter? Indeed, election results also contradict the assumption that voters look only at the party affiliation of candidates.

For example, in Karnataka, by-elections were triggered due to the defection of several Congress and Janata Dal (Secular) MLAs in 2019, just months after the general election; 13 of the defectors contested on a Bharatiya Janata Party ticket, and 11 of them were re-elected. Similarly, in Madhya Pradesh, 15 of the 22 MLAs who defected won the ensuing by-elections. The electorate thus endorsed the candidate and not the original party that had won a couple of years earlier.

Need for a relook

The constitutional design of a parliamentary democracy envisages a chain of accountability. The accountability of the government to the legislature is on a daily basis, and legislators have to justify their actions to their voters in every election. The anti-defection law upends this design by breaking both links of the chain. Legislators have to obey the party diktat even if that comes in the way of holding the government accountable. In turn, they can easily take refuge in their lack of freedom to make decisions if their constituents question them. This is clearly a violation of the central principle of parliamentary democracy, which is part of the basic structure of the Constitution.

In 1992, a five-judge Bench of the Supreme Court ruled that the anti-defection law did not violate the basic structure. A re-examination of this issue would require a larger Bench.

The Maharashtra judgment has referred one aspect to a seven-judge Bench. The question is whether a Speaker facing a notice of removal can decide on disqualification petitions. Two five-judge Benches have reached opposite conclusions on the Speaker's ability to make independent and impartial decisions. The seven-judge Bench, while hearing that case, must expand the question to examine whether the anti-defection law violates the basic structure. It is time to reclaim the accountability of governments to the people.