Whose representative?

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THE current debate on electoral reforms acquires significance only when viewed within the larger discussions on political reforms that seek to make representative democracy in India more substantial. Seen in this light electoral reforms can be considered as a necessary initiative for improving the representative fibre of the political system.

This improvement is measured in two ways: (*i*) in terms of the 'process' by which representatives are chosen, i.e. through a fine-tuning of the various aspects of the selection process, and (*ii*) in terms of the 'outcomes' of this process of selection, i.e. through attempts at improving the representative character of the result. Electoral reforms should therefore be regarded as an ongoing exercise since there will always be scope for improvement in both the 'process' and 'outcomes' of the way in which a representative democracy comes into being. This is especially true of representative democracy in India.

The debate on electoral reforms in India can be disaggregated into three distinct sets of issues.[1] The first set involves measures that can be met administratively within the powers conferred by Article 324 of the Constitution. All it requires is an imaginative Election Commission, one that has the clarity and political will to initiate and enforce administrative directives. To this group of reforms belong directives of the Election Commission on issues such as (*i*) use of official vehicles, (*ii*) use of loudspeakers, (*iii*) ban on transfer of government officials, (*iv*) disbursement from discretionary funds, (*v*) poll-eve bonanzas, (*vi*) counting arrangements, (*vii*) preparation of electoral rolls, (*viii*) intimidation, (*ix*) impersonation, (*x*) election petitions and so on.[2]

This group of electoral reforms are concerned only with good management. They seek merely to improve the efficiency of the process, ensure a climate of fairness, free from fear and intimidation in the selection exercise for both voters and candidates. This set of administrative reforms does not require the Election Commission to rely on any authority outside its own, i.e., that conferred by Article 324.

The second set of electoral reforms requires the help of the legislature. The ability of the Election Commission to pursue these will only emerge if its powers are extended by legislation. To this group of reforms belong recommendations such as those that argue that there should be (*a*) statutory backing for the Model Code of Conduct, and

(*b*) statutory status for Commission's observers. This suggestion, to give the Model Code of Conduct statutory backing, will go a long way in disciplining political parties, particularly the party that is in power.

Many of the distortions (viewed normatively) in the practice of democracy in India can be attributed to the way political parties have consistently subverted political institutions. Since they are the brokers between the state and the people they practice a politics of populism which produces a *jugar* political culture. This 'fix-it temporarily' attitude to political problems has become the dominant feature of our political practice, the cumulative result of which is the weakening of the capacity of democracy to develop a rule of law[3] from which it can benefit.

Such a jugar political culture results in an expansion of the arbitrary character of the system. This arbitrariness is clearly evident in the electoral process where managing elections through jugar becomes the primary political ethic. Hence any statutory initiative to strengthen the Election Commission's capacity to penalize such 'errant' behaviour of parties can be seen as a move in the right direction.

The third set of electoral reforms belongs to the group of what can be called structural reforms. This concerns reforms that cannot be met by either effective 'administrative' or 'legislative' measures, but require a fundamental redesign of political institutions. The following reforms belong to this group. The first is the suggestion of reservation of one-third seats for women in Parliament to give them greater political representation in the context of a patriarchal society and state. This empowerment, it is argued, will enhance their capacity to bargain for resources from the state. It will strengthen their struggle for 'equal citizenship'.

The second is to bring the State Election Commissioner (henceforth SEC), whose mandate it is to conduct elections to panchayati raj and nagarpalika institutions under the umbrella of the Election Commission (henceforth EC) so that the integrity of the office of the SEC gets strengthened. Elections to the third tier of the government have always suffered from manipulation, delay, deferment and intimidation by political parties. In some states, prior to the 73rd and 74th Amendments, elections were postponed for 15-20 years. Having an SEC that functions as a department of the EC would improve the independence of the SECs. This would require a constitutional amendment.

The third is to endorse the insistence of the Election Commission that parties regularly, and in a free and fair manner, conduct internal elections before they can earn the recognition of the Election Commission.[4] This insistence on inner-party democracy is based on the argument that parties should be bound by democratic constitutions and that autocratic parties, such as the Shiv Sena, should be debarred from participating in elections. Since parties are so central to the democratic system some policing of their internal process of selecting leaders and representatives should definitely take place. This ensures that the exercise of authority within the party is based on a democratic culture and not an authoritarian one. The fourth suggestion, like the third, is concerned with the expanded jurisdiction of the Election Commission. The area where it is advocated the Election Commission should play a role is that of defections.

In advocating an expanded jurisdiction for the Election Commission there is a risk that one may, in the process of solving the problem of authoritarianism within parties, or the problem of collusive behaviour in legislatures producing an elite not a democratic polity, be endorsing the authoritarianism of the Election Commission. This dilemma of 'who will police the policeman' is a perennial dilemma of democracy. The answer must lie in developing a combination of 'self-regulating' and 'other regulating' mechanisms.

In the case of defections the 'self-regulating' mechanism, of the legislature and Speaker, constituted under the 52nd Amendment, has proved to be ineffective. Hence the 'other-regulating' mechanism of the Election Commission is required. The Dinesh Goswami Committee on Electoral Reforms suggested that: 'The power of deciding the legal issue of disqualification should not be left to the Speaker or Chairman of the House but to the President or the Governor, as the case may be, who shall act on the advice of the Election Commission, to whom the question should be referred for determination as in the case of any other post-election disqualification of a member.'[5]

In this essay I shall look at the grounds that can be advanced for this expanded jurisdiction of the Election Commission to adjudicate on the issue of defections. This shift in the locus of the adjudicatory authority, from the 'legislature' to the 'non-elected' executive, however, needs to be justified. Implicit in the recommendations of the Goswami Committee and others, is the argument that giving the Election Commission the powers of adjudication will result in a 'better working of the penalty system.' While this, in itself, is a good reason for shifting the domain from the legislature to the Election Commission, it is not by itself a sufficient argument since

one may advance the counter argument that such a move constitutes an encroachment on the jurisdiction of the legislature.

Moving the decision authority from legislature to executive can be seen as a serious violation of the fundamental principle of the 'separation of powers'. Additional reasons, therefore, have to be given. This must involve not just the consequentialist arguments of 'better working of the penalty system' but also ones that refer to the constitutive character of the democracy, e.g. the shift is required by the 'representative' nature of the polity. These arguments of constitutive character should be weighty and seen to occupy the moral high ground in the ensuing contest over principles.

The area of democratic theory from which these weighty normative arguments are going to be drawn is that of the nature and substance of 'representation'. Today a broad consensus has emerged that the only democracy that is possible is one that is built on the bedrock of 'representation'. All others are mere embellishments of this 'representative' core. They refer to a 'representative democracy plus', with much of the contemporary discussion being concerned about the 'extent' of this plus, or of its 'features', or of its 'sustainability'. Extending the scope of this additional domain of the 'plus' is seen to make the polity more democratic. Having recognized these embellishments one should not, however, forget the 'core' without which there is no 'plus'.

In this brief essay I want to return to debating the core, to see how far the practice of democracy in India has strayed from the matrix of a representative democracy. I want to approach this issue of deviation from the ideal of 'representation' through the route of defections, i.e. by focusing on the post-election scenario instead of the pre-election scenario where most of the discussion on electoral reforms is located.

This engagement with the pre-election process, with trying to improve the process of choosing representatives and with the representative character of the outcomes, is so widespread that attention to the representative dynamics of the post election world of politics is largely absent. This produces a sort of intellectual anti-climax since much of the erosion of the practices of representative democracy takes place in this later theatre of politics. Defections is one such drama.

The statement of objectives to the 52nd Amendment Act of 1985 referred to defections as an 'evil' which if not 'combated – is likely to undermine the very foundations of our democracy and the principles which sustain it.'[6] This drama of representatives shifting allegiances, sometimes on the one side sometimes on the opposite side, without resigning from the group on whose platform they contested the election, needs to be assessed in terms of whether it is significant for representative democracy, and if so, how?

Do defections undermine representation or strengthen it? As identity politics becomes more assertive, and as party politics enters the period of coalition formation, defections will only grow in frequency in India. As long as the capacity of the system to penalize defections is weak, and as long as the state is a rent-seeking state and politicians bounty hunters, defections will be an attractive route for the political behaviour of representatives in India.

The justification of bringing defections into the discussion on electoral reform, of empowering the Election Commission to function as an adjudicatory authority in the case of defections, is that electoral reforms are concerned not just with improving the process of selecting representatives but also with improving the capacity of the Election Commission to produce a fair representative outcome.

The goal of the Election Commission, its raison d'etre, is with producing a representative democracy. It seems disingenuous therefore to allow it full play to pursue this goal in the pre-election period and to then exclude it from pursuing the goal in the post-election period. If prospective representatives are to be policed by the Election Commission in the pre-election period, then surely elected representatives can be policed by the Election Commission in the post election period. This is particularly so since the only other policing institution, that of the legislature, has failed to do the job.

A brief review of defections would show that very few have been penalized for their defections in spite of the 52nd Amendment. This can be illustrated by the politics of Goa for the last 15 years. In Goa, Speakers have delayed ruling on petitions to change the calculus of power in the legislature.[7]

Here defectors have been rewarded with ministerial office. Cabinets have been expanded to accommodate them thereby placing a huge burden on the exchequer. In this entire period governments have become unstable, changing several times in each assembly period.

Speakers' judgements have always been in favour of the party of which they are members.[8] This shows the inability of the Speaker and the legislature to function as effective tribunals in the case of defections. At this juncture three questions need to be asked: (*i*) Why should defections be seen as a malady necessitating reform; (*ii*) Why should the adjudicatory authority be shifted from the Speaker to the Election Commission and Governor or President; and (*iii*) How should the Election Commission adjudicate and what should be its jurisdiction.

To answer the first question one needs to enter the debates on representation. Historically the idea of 'representation' has produced a large literature covering a range of views from the one that 'all governments represent' to the one that 'representation is impossible'.[9] For the purposes of our discussion on defections we need to develop the argument by reflecting on (*a*) the normative baggage of the ascription act which authorizes the representation, (*b*) the substance of what constitutes representation, and (*c*) to whom is the representative obligated.[10] The act of defection must be measured against these yardsticks for us to determine whether it should be regarded as a malady and how we should respond to it.

The ascriptive act which authorizes representation takes place during the casting of the ballot when the voter, evaluating the different options on offer, chooses one. In doing so the voter enters into an implicit contract with the candidate, buying into the package that is offered. As a result of this transaction, this implicit contract, the candidate becomes a representative and thus acquires the authority to use the institutions of the state to deliver on the promises made in the party manifesto. The relationship between voter and representative is akin to that between a promisee and promisor since both enter the implicit contract voluntarily. The 'promisor is under an obligation to the promisee to do what (s)he has promised.'[11]

What has she promised? The substance of the promise can be found in the manifesto and in the political baggage, i.e. the history and culture of the party from which the candidate has stood for election. To this national manifesto if we add the subsidiary manifesto of locality one gets the details and substance of the promise. It is on the basis of this agenda (promise) that the promisee authorizes the promisor to represent her.

When the promisor, the representative, then changes the composition of the promise by adopting another agenda, i.e. defecting from one party to another and accepting a

competing manifesto, she violates the terms of the promise and thereby loses the moral authority to represent the promisee. She must therefore return the authority that comes from being an elected representative, i.e. from that contract, and resign, or she must enter into a fresh contract, i.e. offer herself for re-election.

Defectors in India do not resign. They just change parties and in the process improve their positional goods in the assembly by either becoming ministers or by becoming chairpersons of corporations. Defections, by snapping the essential link between citizen choice and government formation, displace the demos from the centre of the democracy and replace it by the legislator who by this displacement, can be seen to convert a representative democracy into a representative oligarchy.

The above argument is based on the Mandate theory of representation which stresses the representative's obligation to her constituents, an obligation which emerges from the initial ascriptive act which requires her to 'stand for' or to 'act for' others, i.e. to act on their behalf, place, or as they would have acted, or in pursuit of their welfare or interest.[12]

This last justification of acting in pursuit of the constituent's welfare slips into the independence theory of representation whereby the representative is guided by the public good to act and hence is not bound by the wishes of the voter who may be unable to appreciate the larger public good which only the representative can appreciate. The representative must, therefore, exercise her own judgement on what matters most, i.e. loyalty to the party, the interests of the locality, or the public interest.

Defectors often invoke the independence theory of representation to justify their action. Here there is still a promisor – promisee relationship but what has changed is that the promisor now becomes the interpreter of what is promised in contrast to the promisee who was the interpreter in the mandate theory. Independence theory therefore can be argued to sanction defections. The issue now becomes which of the two interpretations – mandate theory or independence theory – is valid. To determine this an external authority is required. Enter the 52nd Amendment.

In the 52nd Amendment, seeing the risk that defections pose for democracy, a distinction is made between 'split' and 'defection'. The first is regarded as normatively acceptable, the other as normatively condemnable. The authority to

decide on whether a 'split' or 'defection' has occurred has been vested in the office of the Speaker. The experience of the states of Goa, Manipur, Haryana, U.P., and so on, however, shows that the adjudicatory authority of the Speaker has failed to meet the need of deciding impartially whether a 'split' or 'defection' has occurred. A new authority is therefore required. The Election Commission seems the best candidate to perform this adjudicatory task. All cases of defections should therefore be filed before the Election Commission. An impartial decision is required since the strengthening of the representative core is dependent on it.

There have been discussions in the Supreme Court on the moral validity of defections with the one side arguing that what is at stake is the right of the representatives to act as they deem fit, an argument which draws on the independence theory, and the other side countering by referring to the right of the represented who is kept out of the decision frame. These debates have largely been on the disciplinary authority of the party through such instruments as whips. There has been little discussion on the partiality or impartiality of the Speaker. Yet it is in the Speaker's chamber where a 'jugar' politics is brewed and the impartiality of the Speaker compromised. Speaker's have mostly decided in favour of the party to which they belong. Hence the case of shifting the adjudicatory authority from Speaker to the Election Commission gets strengthened.

To ensure that the Election Commission too decides impartially, a set of procedures should be specified which constrain the scope for arbitrariness. These concern (*a*) the time-frame within which the Election Commission will forward its advice to the Governor/President, (*b*) the time-frame within which the Governor/President will act on the advice, (*c*) the conditions under which the Governor/President may not accept the advice, (*d*) the penalties that can be imposed on the legislators who have defected/split, especially with reference to holding office, and (*e*) the avenues for appeal.

A study of the manner in which Speaker's have decided in Goa shows that the most crucial element in the decision process is time, a delay allowing the defectors to improve their positional goods in the assembly, while an undue haste in the decision penalizing them. Decisions in Goa have, in some cases, been taken in four days while in others they have taken as long as two and a half years. Shifting the adjudicatory authority from the Speaker to the Election Commission and Governor or President would require an amendment to the 52nd Constitutional Amendment.

The political reform suggested above needs to be debated urgently since politics in the last decade has entered a new phase of assertiveness by groups that has coalesced around the pole of an identity politics. This politics is itself going through a period of search where there is oscillation between (*i*) confrontation, based on the desire to re-define the terms of the inegalitarian society, and (*ii*) compromise, based on the desire to govern and access the resources of the state.

This oscillation produces a politics of temporary coalitions by groups within a segmented polity. Such groups are able to leverage representation within the legislature through which they extend this phenomenon of temporary coalitions to the legislature itself. Defections result. We need to respond to them. The structure of penalty and rewards in the polity is dependent on this response.

TABLE 1

Speaker's Decision and Defections (1990-2000)

Date of defection	*Time taken for ruling (approx.)*
24/3/90	9 1/2 months
24/3/90	9 1/2 months
24/3/90	2 1/2 months
24/3/90	2 1/2 months
3/1/91	22 days
Review petition	4 days
Review petition	4 days
24/3/91	2 1/2 years
24/3/91	2 1/2 years
27/7/98	(i) Interim 24 hours, (ii) Final 48 hours
27/7/98	18 days
27/7/98	Assembly dissolved
4/2/99	Assembly dissolved
20/10/2000	Ruling awaited after 10 months

TABLE 2

Defections and Government Instability (1990-2000)

Chief Minister	*Period*	*Duration (approx.)*
Churchill Alemao	March - April 1990	17 days
Luis P. Barbosa	April - Dec 1990	9 months
Ravi Naik	Jan 1991 - May 1993	28 months
Wilfred D'Souza	May 1993 - April 1994	16 months
Ravi Naik	April - April 1994	2 days
Wilfred D'Souza	April - Dec 1994	8 months
Pratapsingh Rane	Dec 1994 - July 1998	48 months
Wilfred D'Souza	July 1998 - Nov 1998	4 months
Luizinho Faleiro	Nov 1998 - Feb 1999	3 months
Luizinho Faleiro	June 1999 - Nov 1999	5 months
Francisco Sardinha	Nov 1999 - Oct 2000	11 months
Manohar Parrikar	Since Oct 2000	till date

Footnotes:

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2. Refer to T.N. Seshan's list of 150 maladies of election management in India.
3. S. Saberwal and Heiko Sievers (eds), *Rules, Laws, Constitutions*, Sage, New Delhi, 1998.
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