Anti-defection law & Issues

(GS Paper 2, Polity and Governance)

Why in news?

- The ongoing political crisis in Maharashtra has again brought into focus the issue of defection.
- Many ruling Shiv Sena legislators who seem to have revolted against the leadership of Chief Minister Uddhav Thackeray are now holed up in a hotel in distant Guwahati to keep out of the reach of party leaders.
- All indications are that there is a planned mass defection underway so that an alternative regime is formed in the State.

Isn't there a law against such defection?

- The **Tenth Schedule of the Constitution**, commonly known as the anti-defection law, was introduced in 1985 with a view to curb the tendency among legislators to switch loyalties from one party to another and facilitate the toppling of regimes and formation of new ones.
- It provides for the **Presiding Officer of the legislature to disqualify any defector on a petition by another member.**

The law contemplates two kinds of defection:

a) by a member voluntarily giving up membership of the party on whose symbol he got elected
b) by a member violating a direction (whip) issued by his party to vote in a particular way or to abstain from voting.

- While voting contrary to the party's whip is quite a straightforward instance of defection, the other mode of defection has proved to be a source of dispute and litigation.
- A member 'voluntarily giving up membership' does not refer to a simple resignation letter and formally joining another party.
- It is often an inference drawn by the party that loses a member to another based on the legislator's conduct. The Supreme Court has also ruled that 'voluntarily giving up membership' can be inferred from the conduct of a person.

How do the MLAs plan to avoid disqualification?

- The Shiv Sena has **55 members in the Maharashtra Assembly**. Eknath Shinde, who leads the rebel group, claims that he has 40 MLAs with him, but the figure may include Independents.
- The group may claim to be the 'real Shiv Sena' and seek to 'expel' the current leadership.
- **Under Paragraph 4 of the Tenth Schedule**, disqualification on account of defection will not apply in case of a merger of one party with another. However, there is a rider. There is **a deemed merger only if two-thirds of the party's total strength agrees to the merger.**
- In Maharashtra, the rebel group will need to have 37 MLAs to make the claim that they constitute two-thirds of the legislature party. However, **it remains to be seen if the Deputy Speaker** (the Speaker's office is vacant), initially, and **then the law courts will recognise such a 'merger'**. Disqualification proceedings have already been initiated against some of them.

Split to avoid disqualification for defection:

- Originally, the **10th Schedule had spoken of a 'split' in a legislature party as an exception** to the disqualification rule. That is if one-thirds of a legislature party leaves it or joins another party, it amounts to a 'split' and such members would not attract disqualification.
- This proved to be an escape clause for legislators to form a group that amounted to one-third of the legislature party's total strength and then cross over.
- **Paragraph 3,** which allowed the use of a split to avoid disqualification for defection, was **deleted by the Constitution (91st Amendment) Act, 2003.**

How foolproof is this plan?

- It remains to be seen if the defectors will get away by using the 'merger' argument.

Case of Goa:

- In a recent instance, the Bombay High Court at Goa ruled in favour of MLAs who had defected from the Congress to the BJP in Goa.
- The court noted that they satisfied the two-thirds requirement for a deemed merger and ruled that they were exempted from disqualification. The Congress has appealed to the Supreme Court.
- The main ground of appeal is that the Court should not have accepted the existence of a merger, as the merger envisaged in Para 4 of the 10th Schedule is a two-step process under which one political party first merges with another, and then the legislators accept the merger.
- In the absence of a merger of the parties, the mere fact that two-thirds of the MLAs cross over to the other party does not save them from disqualification.

Case of Meghalaya:

- In a similar case in Meghalaya, the Speaker recognised as a 'merger' the crossover of 12 Congress MLAs out of a total of 17 to the Trinamool Congress and refused to disqualify them.
- The Supreme Court may have to adjudicate whether an actual merger is a condition precedent for bringing into play the 'deemed fiction' of a merger after two-thirds of a party's legislators cross over.

Relevance of the 10th Schedule:

- This brings to the question whether the anti-defection law has been rendered meaningless by various events. What was introduced as a panacea for the menace of floor-crossing and toppling of elected regimes by engineering defections has proved largely ineffective in many cases.
- Recent instances give an idea of the various ploys adopted by parties, legislators and Speakers to either evade the law against defection or to achieve partisan political ends.
- The most common these days is for a ruling party with a big majority to poach the main Opposition parties without any regard for the anti-defection law. When the aggrieved party moves for disqualification, Speakers choose not to act, thus formalising the defection.

Invocation by Supreme Court in Manipur:

- In Manipur, for instance, seven Congress MLAs joined the BJP shortly after the 2017 Assembly election and one of them became a Minister too. However, the Speaker did not act on petitions to disqualify the Minister for over two years.

- In January 2020, the Supreme Court directed the Speaker to dispose of the matter within four weeks. As the Speaker passed no order even long after the deadline, the C**ourt invoked its extraordinary powers to remove T. Shyamkumar Singh, th**e Minister concerned, from the Cabinet and barred him from entering the Assembly.
- Opposition members have crossed over to the ruling party in Andhra Pradesh and Telangana in large numbers in recent years, but did not suffer disqualification.

Supreme Court intervention in case of Karnataka in 2010:

- In Karnataka, in 2010, a group of BJP rebels against then Chief Minister B. S. Yeddyurappa met the Governor to express their resentment against his continuance in office and sought a 'constitutional process' to be initiated.

- The Speaker subsequently disqualified them on the ground that their action in meeting the Governor amounted to voluntarily giving up their membership.
- However, the **Supreme Court ultimately set aside their disqualification on procedural grounds**, they were not given sufficient time to file their replies and were not given advance copies of material relied upon by the Speaker.

Case of Tamil Nadu 2017:

- In an attempt to capitalise on this precedent, a group of AIADMK MLAs revolted against Chief Minister Edappadi K. Palaniswami in 2017 and met the Governor seeking a similar 'constitutional process' against him.
- The Speaker disqualified 18 MLAs for 'voluntarily giving up membership' of the party which had fielded them as candidates.
- However, the Madras High Court by a 2:1 majority, upheld the disqualification. Though facts were similar to the developments in Karnataka, the High Court was of the view that there was nothing unreasonable or perverse in the Speaker coming to the conclusion from the MLAs' conduct that they were seeking to topple the regime.

Defection through resignation:

- In 2019, one saw the spectacle of some **members submitting resignation letters to escape disqualification** proceedings, while the Speaker questioned the voluntariness and motive behind the resignations.
- 'Defection through resignation' became a thing suddenly. The Supreme Court ultimately ruled that the Speaker has the authority to verify if a resignation is voluntary and genuine, but it is constitutionally impermissible for the Speaker to take into account extraneous factors while considering the resignation.
- In other words, once it is clear that a member is resigning out of free will, the Speaker is bound to accept it.

Way Forward:

- As defections continue unabated and **Speakers refrain from acting on these developments** based on their political loyalties, there is a strong case to reform the anti-defection law.
- Redefining the merger clause, shifting the adjudicatory power from the Speaker to some other credible authority and even dispensing wholly with the law are measures that jurists have suggested.
- Some believe that the anti-defection law should be scrapped as it enslaves members to their party line, prevents them from representing their constituents and the people, and violates their freedom of expression.