



ANTI-DEFECTION LAW; GUARD OR EVIL FOR DEMOCRACY

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Abstract

Out of 192 countries in the world, 123 countries follow democracy and among which Indian democracy once was considered as the most vibrant democracies based on modern principles. But now a day's Indian democracy has gradually slipped to a chaotic governance system and for this, not only one, all the Indian political parties are responsible. This may be due to the past legacy of British laws resulting in sharp differences between caste, region and religion as the divisive principles. However, the Indian constitution was built on modern principles to unite the diverse peoples for solving problems of the poverty stricken population. Thus to remove the illness from the Indian democracy anti-defection law was introduced to the Indian constitution in the year 1985 i.e. 52nd amendment act. One of the most important reasons presented, to bring the anti-defection law, was to curb the power of money after election within the house. The horse trading and unstable government caused by money power and bribery was said to be rampant in the cross voting. Now the question is, in the 32 years of this law, whether this law has achieved its goal or Politicians has found loopholes in this law and used it for their own benefit and made this law an evil for Indian democracy?

Does it restrict representatives from voicing the concerns of their voters in opposition to the official party position? Should the decision on defections be judged by the Speaker who is usually a member of the ruling party or coalition, or should it be decided by an external neutral body such as the Election Commission? Thus, this paper provides detailed evaluation of the anti-defection law and how it is against or in favour of the fundamental principles of modern democracy.

Defection is defined as “desertion by one member of the party of his loyalty towards his political party, his duty towards his party or to his leader”. The original Constitution of India had no mention of political parties. But, ever since the multiparty system evolved, the Indian parliamentary system has witnessed defections in large numbers from one political party to another, resulting almost in the breakdown of public confidence in a democratic form of government. The Rajiv Gandhi Government in 1985 introduced anti-defection laws in the Indian Constitution. These were introduced by way of the 52nd Constitutional Amendment, which inserted Tenth Schedule in the Constitution, popularly known as the Anti-Defection law. The amendment put a bar on the elected members of a political party to leave that party or to switch to another party in the Parliament. The Fifty-second Constitutional Amendment Act of 1985 amended Articles 101, 102, 190 and 191 of the Indian Constitution and inserted the Tenth Schedule in it. The Statement of Objects and Reasons of the amendment Stated: “The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very



foundation of our democracy and the principles which sustain it.”¹ The schedule mentions the grounds on which a defecting member stands disqualified from his original political party. The law also contains some exceptions from disqualification, like in the case of a party merger.

Evolution of the law:

The 70s era marked floor crossing as a common problem facing all parties, wherein any member changes his/her stance abruptly just before the voting inside the parliament, probably many times due to monetary allurements. After many cases of floor crossing on crucial voting, the term “Aaya Ram Gaya Ram” was coined to describe this phenomenon in the mass media. Mrs. Indira Gandhi introduced the constitution amendment bill against defection in May 1973; but the proposal could not be passed in the next two years. Finally, the bill was overtaken by imposition of Emergency. But later on this practice of switching political sides to grab office was popularly known as Horse-Trading. There was rampant horse-trading and corruption prevalent amongst the political leaders and political parties. One such incident that left a mark on India’s political history occurred after the 1967 elections when about 142 MPs and 1900 MLAs switched their political parties. In order to curb such a practice and the resulting consequences, the Rajiv Gandhi Government in 1985 introduced anti-defection law bill also known as “daal badal kannon” in the parliament and the bill enjoyed three - fourths majority in parliament. The law was amended once by the 91st Amendment in 2003 under Atal Bihari Vajpayee's NDA Govt.

Functioning of law:

The 52nd amendment, containing the anti-defection law, of the Constitution added the Tenth Schedule which laid down the process by which legislators may be disqualified on grounds of defection. An elected Member of Parliament (MP) or state legislature (MLA) is considered to have defected, in case he either voluntarily resigned from his party or disobeyed the directives, in the form of whip issued by the party, on a vote. Hence, the elected members must not vote or abstain on any issue in the parliament against the party's whip. This whip issuance needs profound probing in terms of freedom of expression and liberty. Independent members elected without any party ticket, are also disqualified if they joined a political party after election. A nominated member can be disqualified if the person joins any political party after the expiry of six months from the date of nomination ¹.

Disqualification on ground of defection.—
(1) Subject to the provisions of [Paragraphs 4 and 5], a member of a House belonging to any political party shall be disqualified from being a member of the House—
(a) if he has voluntarily given up his membership of such political party ; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or



abstention.

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Against disqualification

The law also made a few exceptions. The law initially permitted splitting of parties with a faction claiming minimum one third members as a separate group, but that has now been outlawed with the constitutional amendment in 2003. Also, a party could be merged with minimum two third members into another political party. The members may decide to join the newly formed party or function as a separate group. Further, any member elected as speaker or chairman can resign from his party, and rejoin the party after demitting that post.

No. Of disqualification	violating party
whip 23	133

On the grounds of	voluntarily
resigning 19	26

	Others
-	13

Merger	
26	81

Merits:

- Provides stability to the government by preventing shifts of party allegiance.
- Ensures that candidates elected with party support stand on the basis of party manifestoes remain loyal to the party policies. Also promotes party discipline.

Demerits:

- By preventing parliamentarians from changing parties, it reduces the accountability of the government to the Parliament and the people.
- Interferes with the member's freedom of speech and expression by curbing dissent against party policies.

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The law states that only the presiding officer i.e., Chairman or the Speaker of a House, can make decisions on disqualification of a member under this Schedule, and his/her decision is final. If a question arises on the presiding officer on the subject of disqualification, then the decision shall be made by a newly elected presiding officer. The law states that the Presiding officer's decision is final and not subject to judicial review. "The Supreme Court struck down this condition partly and held that no judicial intervention shall be made until the presiding officer gives his order. However, the final decision can be appealed in the High Courts and Supreme Court."¹

Disqualifications from 1985 to 2009:¹

PARLIAMNET
LEGISLATURE

STATE

Person
88

complained

268

Challenges to anti-defection law:



• The very first challenge to the anti-defection law was made in the Punjab and Haryana high court. One of the ground on which law was challenged was that whether the right to freedom of speech and expression is curtailed by the paragraph 2(b) of the Tenth Schedule. Wherein the court held: “So far as the right of a member under Article 105 is concerned, it is not an absolute one and has been made subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament. The framers of the Constitution, therefore, never intended to confer any absolute right of freedom of speech on a member of the Parliament and the same can be regulated or curtailed by making any constitutional provision, such as the 52nd Amendment. Therefore the provisions of Para 2(b) cannot be termed as violative of the provisions of Article 105 of the Constitution”.¹

• The another ground on which anti-defection law was challenged was that whether paragraph 7 of the Schedule barring the jurisdiction of courts in cases of disqualification is constitutional. The court held that “the paragraph seeks to change the operation and effect of Articles 136(special leave to apply by the Supreme Court), 226(writ jurisdiction of High Court) and 227(power of superintendence over all courts by the high court) of the Constitution which give the High Courts and Supreme Court jurisdiction in such cases. Any such provision is required to be ratified by state legislatures as per Article 368(2). The paragraph was therefore held invalid as it had not been ratified.”¹

• The another important ground was that whether paragraph 6 of the Tenth Schedule granting finality to the decision of the Speaker/ Chairman is constitutionally valid. The court held that “To the extent that the provisions grant finality to the orders of the Speaker, the provision is valid. However, the High Courts and the Supreme Court can exercise judicial review under the Constitution. Judicial review should not cover any stage prior to the making of a decision by the Speakers/ Chairmen. Any law cannot take away the power of the courts to be the final adjudicator of any matter. Therefore paragraph 6 was held to be unconstitutional on the grounds that it violates the basic structure of the constitution.”¹

• Following the Kihota Hollohon case some other ground were also challenged in the court of law. Whether only resignation constitutes voluntarily giving up membership of a political party, Whether the Speaker of a legislature is bound by the directions of a Court and whether judicial review by courts extends to rules framed under the Tenth Schedule. The Supreme Court held that “The words “voluntarily giving up membership” have a wider meaning. An inference can also be drawn from the conduct of the member that he has voluntarily given up the membership of his party. Also The Court cited the case of Kihota Hollohon where it had been said that the Speaker while passing an order under the Tenth Schedule functions as a Tribunal. The order passed by him would therefore be subject to judicial review and Rules under the Tenth Schedule are procedural in nature. Any violation of those would be a procedural irregularity. Procedural



irregularity is immune from judicial scrutiny.”¹

- When can a court review the Speaker’s decision making process under the Tenth Schedule? The Supreme Court held the “If the Speaker fails to act on a complaint, or accepts claims of splits or mergers without making a finding, he fails to act as per the Tenth Schedule. The Court said that ignoring a petition for disqualification is not merely an irregularity but a violation of constitutional duties.”¹

- The Constitution (32nd Amendment) Bill 1973 and the Constitution (48th Amendment) Bill 1978 had provisions for decision-making by the president and governors of states in relation to questions on disqualification on ground of defection.

- “The 91st Amendment to the Constitution was enacted in 2003 to tighten the anti-defection provisions of the Tenth Schedule, enacted earlier in 1985. This amendment makes it mandatory for all those switching political sides — whether singly or in groups — to resign their legislative membership. They now have to seek re-election if they defect and cannot continue in office by engineering a “split” of one-third of members, or in the guise of a “continuing split of a party”. The amendment also bars legislators from holding, post-defection, any office of profit”.¹

International experience with anti-defection law:

Most of the developed nation including USA, UK, Canada, France and Germany does not have anti-defection law under the

rule of parliament and floor-crossing along with dissent is integral part of democratic system. The consequences of defections are left to the parties, to take care of their intra party discipline, and the individual elected representatives are expected to defend their decision to the party and in the respective constituency. The constituency will take necessary action, elect, reject or re-election. According to USA courts “dispute between the political party and its member would fall under the private affair and the political party has the privilege to expel the member with conflicting philosophy. It was argued that the parties have not elected the legislative member and hence, the party has no control over legislature membership”.¹ However, the political party has the right to expel the member from party membership to maintain discipline. “Further, the US District Court of Pennsylvania judgement upheld the legislator's right to change its political Party membership; different from the party ticket he contested elections, after the election process.”¹

“Two democracies i.e., New Zealand and South Africa, have abandoned their anti-defection law. In South Africa, the anti-defection law was passed in 1996 and it was abandoned in 2002 after dispassionate evaluation, despite public emotional opposition to floor crossing. Further, Booyesen supporting the end of anti-defection law in South Africa states that, international literature indicates that there are numerous struggles to limit defection on the basis of likely contravention of the mandate of original election and equally comparative studies shows that restricting defection frequently end in travesty. In New Zealand, the bill was passed in 2001 with



sunset clause resulting in expiry after two elections in 2005. The Solicitor General of New Zealand commented that the bill provided wide discretion to party and party leader and it does not protect the legitimate dissent by an individual member against the party the direction.”¹

Many underdeveloped countries, which have adopted democracy during second half of last century, including Bangladesh, Kenya etc., have made anti-defection laws. These early stage democracies have less developed political systems and their political party systems are unstable, due to corruption and personalistic political systems. This is specifically relevant in Indian political system where caste, family, gender and religion are used at the election time to get electorate support.

Diminishing accountability to constituency destroying the citizens' right to have representative:

Indian democracy is based on the quote – “by the people, for the people, of the people”. This means that every eligible voter has the right to participate in decision making through his/her representative. But the right of individual citizens to have their representatives participating in the decision making process through discussion and voting in parliamentary process is infringed upon by the anti-defection law. The individual citizen's right to have a representative, in the form of member of the house elected from the respective constituency, to work in the interest of constituency is infringed upon by the forceful anti-defection law, as they become legally accountable to the political party.

"Legislators face the following options when voting on policy decisions. First, they can choose to support their voters and stand a good chance of re-election. Second, they can consistently support their party and vote with their party on policy issues, thereby ensuring their ability to rise in power in the party, attain nomination for the next election and seek other benefits as a virtue of their loyalty and status in the party".¹ Also a Rajya Sabha member had once stated that due to anti defection law "A member may be unable to express his actual belief or the interests of his constituents"¹

Social scientist Mr. Yogendra Yadav has opined that the anti-defection law has "left little discretion with an MP or an MLA who does not wish to risk losing her or his seat. Hence, much of the derivative expectation on the mandate and role of an individual legislator is now redundant in our context." This is due to the fact that the legal accountability of an elected member towards the party is powerful, due to anti-defection law, leading to loss of membership in the house. In comparison, the accountability of elected member is weak towards the people of respective constituency, because answerability of the actions in parliament will be evaluated only at the re-election time after every 5 years.

Recommendations of various bodies on reforming the Anti-defection law:

• Dinesh Goswami Committee on electoral reforms (1990):

1. Disqualification should be limited to cases where (a) a member voluntarily gives up the membership of his political party, (b) a member



abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence.

2. The issue of disqualification should be decided by the President/ Governor on the advice of the Election Commission.

• **Halim Committee on anti-defection law (1998):**

1. The word ‘voluntarily giving up membership of a political party’ should be comprehensively defined.
2. Restrictions like prohibition on joining another party or holding offices in the government should be imposed on expelled members.
3. The term political party should be defined clearly.

• **Law Commission (170th Report, 1999):**

1. Provisions which exempt splits and mergers from disqualification to be deleted.
2. Pre-poll electoral fronts should be treated as political parties under anti-defection law
3. Political parties should limit issuance of whips to instances only when the government is in danger.

• **Election Commission:**

1. Decisions under the Tenth Schedule should be made by the President/ Governor on the binding advice of the Election Commission.

• **Constitution Review Commission (2002):**

1. Defectors should be barred from holding public office or any remunerative political post for the duration of the remaining term.
2. The vote cast by a defector to topple a government should be treated as invalid.

Conclusion:

Anti-defection law was introduced in the Indian constitution with a view to bring government stability and reduce money power in parliamentary politics. Though the law has succeeded in a reasonable way but on the other hand it somehow violates the basic principle of the Indian democracy. The law diminished the freedom of speech and vote, thereby curtailing the constitutional right granted to the elected members. The anti-defection law has minimised the accountability of elected member towards respective constituencies, thereby taking away the democratic right of the citizen to have representatives in the decision making process. Thus for the better working of the government this law should be amended. Different committees have given different suggestions for reforming anti-defection law and this is the high time that a look should be given to those recommendations. Anti-defection law is not an evil till date, but necessary steps should be taken towards it, otherwise it will become one.
