



**ANTI-DEFECTION LAW:  
ANNIHILATION OF DISSENT  
VERSUS CONSTITUTIONAL ETHICS**

*By Pritika Negi and Sampada Pande  
From Gujarat National Law University*

**ABSTRACT**

Relative studies on the topic of anti-defection are expanding, and generating essential theoretical debate in the context of its constitutional ethics. Its provisions are criticised for its undemocratic ideals. The major issue prevailing in contemporary world remains about the unconstitutionality of the anti-defection laws. However, measures have been taken to bring clarity of the law's validity. The aim of the research article is to contribute to this debate through critically analysing the 'Anti-defection law' and its flaws and strength. Scilicet, to bring a picture based on arguments and judgements, and not simply based on certain rhetoric. Through this research the concept of anti-defection, present issues and the effectiveness and loop holes of law would be cleared out. The study widens the scope of understanding the concept with the help of other recommended reforms and critical analysis of anti-defection law in other States.

**Key Words:** Anti-defection law, constitution, democracy, fundamental freedom, reforms.

**ANTI-DEFECTION LAW:  
ANNIHILATION OF DISSENT VERSUS  
CONSTITUTIONAL ETHICS**

**1. AN OVERVIEW**

India, along with several other Democratic Sovereign Nations have seen long history of unstable government. The shifting of political allegiance by the members of one political party to another, in the desire of gaining political powers by occupying the position of Cabinet Minister, has resulted into grave problems and subsequently into, political corruption. On one hand, where shifting of allegiance caused simply minor problems like shift of majority during voting for important resolution, on the other hand, such shift at times led to shift in complete government majority, resulting into re-elections. One of the popular incidents of defection was seen in the year 1967, when the phrase "Gaya Ram, Aya Ram" became famous in order to limn the situation of legislator Gaya Ram, who crossed the floor three times in a row. This wasn't the only instance of defection, stats indicate that in a span of 10 years, i.e., in early 1960s, Congress saw defection of nearly 500 legislators. Such betrayal of people's mandate had to be stopped or at-least, limited. Thus, an attempt was made in the year 1967 to end this evil of defection. However, the bill saw no day light. Then again in the year 1984, the anti-defection bill was proposed before the Parliament, which was then approved by both the Houses and the President in following year. Subsequently, under the name of, "The Constitution (Fifty-second Amendment) Act, 1985", the anti-defection bill came into effect from March 18, 1985. It categorized defectors into four categories<sup>1</sup>: first, when the legislators resign<sup>2</sup>. Second, when they

<sup>1</sup> The Constitution (Fifty-Second Amendment) Act, 1985

<sup>2</sup> Rajendra Singh Rana v. Swami Prasad Maurya and Others [1992] SCR (1) 686, voluntarily given up membership; Shri Rajesh Verma v. Shri Mohammad



defy party leadership. Third, when they are found absent on for an important vote. Lastly, when an independent member joins political party. The aim was to punish such defectors, by disqualifying them for the rest of the term and from contesting next elections<sup>3</sup>. Undoubtedly, the restriction it imposed to safeguard people's mandate was at the cost of the constitutional rights afforded to Indian citizens. Thus, at many instances the provisions of this rule were questioned before the court of law. In this article ahead, we shall read about all such cases where the objective behind making such provisions will be clear and how, those provisions turn out to be a barrier in today's scenario.

## 2. REASONS BEHIND THE ENACTMENT/ OBJECTIVES

India is a democratic country run by the rule of people. The government so established is – by the people, of the people and for the people. As a result, the vote of each citizen is important and the candidate so elected shall respect it and work for the progress of the nation selflessly. However, when the intent of the representatives shifts towards gaining power and other selfish motives, problems like defection arise. The main victims to this fashion are the citizens. Thus, to end this practice of political defections, an anti-defection bill was passed under the leadership of late Rajiv Gandhi. The objectives behind passing the bill are listed below:

- ✚ To end/limit the political defection<sup>4</sup>

- ✚ To take the first and major step towards ending of political corruption
- ✚ To ensure stability of the political system and credibility of the democracy
- ✚ To ensure party allegiance and loyalty, which is the foundation stone of a successful government, and further enforce accountability on those part of this 'crossing the floor'.

Further, in order to supplement this law, the legislation drafted another sub-clause under, The Constitution (Ninety-first Amendment act), 2003, with the object of strengthening the anti-defection law by ruling out the exemption that were being misused by the members of party, especially defectors. Hence, the objective of the Committee was fourfold, as mentioned above with the overall aim of safeguarding people's mandate and credibility of democracy. The intent was clear at the time, however with time people found out loop-holes and debated it to be unconstitutional and unethical. No such official statement has been delivered as of now, however, a number of pending cases before the court on such issue might bring some changes in the original draft.

## 3. ANTI-DEFECTION PROVISIONS UNDER INDIAN CONSTITUTION

After the 1967 case, when legislator Gaya Ram defected three times in a day and apart from it also huge chaos was seen during the elections, a great need of anti-defection laws was felt. As a result, the tenth schedule was added to the Indian Constitution, which not

Shahid Akhlaque, BSP (Jan 27, 2008), publicly opposes his original party.

<sup>3</sup> Roshni Sinha and Prachi Kaur, 'Anti-Defection Law Intent and Impact' (2019) PRS

<[https://www.prsindia.org/sites/default/files/parliament\\_or\\_policy\\_pdfs/AntiDefection%20Law%20Intent%20and%20Impact\\_0.pdf](https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/AntiDefection%20Law%20Intent%20and%20Impact_0.pdf)> accessed 8 March 2021

<sup>4</sup> Sakshi Rewaria, 'Analysis of Anti-Defection Laws in India' (2018) Latest Law

<<https://www.latestlaws.com/articles/analysis-of-anti-defection-laws-in-india-by-sakshi-rewaria/>> accessed 5 March 2021



only penalizes defection, but also lays down the grounds for disqualification (which have been mentioned above). The original law inserted in the year 1985 under the Constitution (Fifty-Second Amendment) Act, exempted five categories from disqualification arising out of defection, namely:

- Para 3: Members defecting as a result of split of the party in a ratio of at-least 1:3.
- Para 4: When 2/3<sup>rd</sup> members of a political party consent to merge with another political party and remaining members either agree to it or function as separate group.
- Para 5: The Speaker, Chairman and Deputy-Chairman of various legislative Houses.

However, in the year 2003, under The Constitution (Ninety-First Amendment) Act, para 3 of the 10<sup>th</sup> schedule was omitted and the exemption was taken away, with the aim of strengthening the Bill. This was a result of the over-exploitation of this clause by the members of the political party, who used it for their personal gain. Then again in the year 1992, an amendment was brought in the law. The Supreme Court of India, in the case of “*Kihoto Hollohon vs. Zachilhu and Others*”<sup>5</sup> struck down certain aspects of para 7 of the 10<sup>th</sup> schedule stating that decision of the Presiding Officer isn’t final and an appeal can be made to High Court or the Supreme Court against the order of the Presiding Officer. However, for this law to apply, the Presiding Officer must first give some order.

<sup>5</sup> *Kihoto Hollohon vs. Zachilhu and Others* [1992] SCR (1) 686

<sup>6</sup> N. Rahul, ‘12 TDP MLAs merged with TRS’ The Hindu (Telangana, 11 March 2016) <<https://www.thehindu.com/news/national/telangana/12-tdp-mlas-merged-with-trs/article8341018.ece>> accessed 8 March 2021

Undoubtedly, the delay in judgement of defection by the Presiding officer has been condemned many times<sup>6</sup>, however, no stringent law has been created for the same. By the researchers account it is understood that laws must be made to enhance the mechanism of speedy justice by punishing those responsible for creating an unstable government. Any delay would simply help the defectors evade their punishment, as was seen in the Telangana<sup>7</sup>.

#### 4. ANTI-DEFECTION: GLOBAL PERSPECTIVE

The practise of Anti-defection is prevalent among different countries across the globe. Terms such as ‘floor-crossing’, ‘carpet-crossing’, ‘partyhopping’, ‘dispute’ and ‘waka-jumping’ are the most commonly used nomenclatures for defining Anti-defection. In the South Asia there are four countries to pass the Anti Defection Law: India (1985), Pakistan (1997), Sri Lanka (1998), Nepal (1997).

##### 4.1. COMPARISON WITH UNITED STATES

In U.S. there is no particular legislation for anti-defection although the country has witnessed several defection related cases. “Party Discipline Approach” is something that is prevalent in United States which means ‘ability of representatives of a political party in the legislature to reach an agreement on policy issues.’ It is the duty of party leaders to ascertain that the entire party votes as a bloc on a particular legislation in order to

<sup>7</sup> N. Rahul, ‘12 TDP MLAs merged with TRS’ The Hindu (Telangana, 11 March 2016) <<https://www.thehindu.com/news/national/telangana/12-tdp-mlas-merged-with-trs/article8341018.ece>> accessed 8 March 2021



attain a party objective. The legislators who vote against have to face legal sanctions such as:

- a. “removal of a legislator from an important position on a legislative committee,
- b. loss of prospective appointment to the same,
- c. or expulsion of the legislator from the party caucus.”<sup>8</sup>

These sanctions are nowhere mentioned in the Constitution of U.S. and therefore their constitutionality has been challenged on the grounds of (a) Freedom of Speech of legislators and (b) Conflicting freedom of association of a political party.

#### 4.1.1. Landmark Cases:

##### (a) *Bond V. Floyd*<sup>9</sup>

In this case, Julian bond, one of the legislators was castigated by the House on the grounds that he passed Anti-Vietnam remarks. He was later disqualified and was not allowed to take oath as a legislator. Supreme Court condemned the decision of the House believing it to be a violation of rights granted under First Amendment i.e. Right to freedom of speech on controversial issues.

##### (b) *Gewertz v. Jackman*<sup>10</sup>

In this case, Kenneth Gewertz was removed from the position of legislator when he expressed criticism against the Speaker. The Court held that there is no difference between minor curtailment of privileges and substantive restrictions on the rights of a legislator and that both constitute infringement of Right to freedom of Speech and Expressions.

Thus, the Party disciplinary Approach is an indication that the process of defection in internalized in U.S. while in India the same is dealt by the Parliament of India.

#### 4.2. COMPARISON WITH OTHER COUNTRIES

Similar to United States, **United Kingdom** follows an internalized model rather than having Anti-defection laws i.e., matters of defection are governed by internal party rules. In **Papua New Guinea**, however penalties are imposed on the legislators if they switch parties. Any member who wishes to dodge between parties has to face the ‘leadership tribunal’ (the Ombudsman Commission), which shall be responsible for validating the reasons presented by these legislators. Only under two cases, the resignations are granted (a) When the party has infringed its own Constitution (b) When the party has been declared insolvent. Under the Constitution of **South Africa**, two 15-day window periods are provided during five-year period of the government in which Assembly members can change their parties by giving written notification to the Speaker. As in India, a disqualification petition can only be filed against by a member of the House. However, in **Bangladesh** “any person” or “any member” can do so. Similarly, in India, the deciding authority is Speaker however, the decision passed by the speaker can be appealed in the Court. However, in Bangladesh the final decision-making authority is the Election Commission and the decision passed by EC is non-appealable. In **Pakistan**, the decision is referred to the Chief Election Commissioner

<sup>8</sup> Kartik Khanna and Dhvani Shah, ‘Anti-Defection law: A Death Knell for Parliamentary Dissent’ (2012) <<http://docs.manupatra.in/newline/articles/Upload/5>

4DB1904-34F0-4A20-A40F-0D968ABD5446.pdf> accessed 7 March 2021

<sup>9</sup> Bond v. Floyd, (1966) 385 U.S. 116

<sup>10</sup> Gewertz v. Jackman, (1979) 467 F Supp.1047



by the Presiding officer within two days of his decision and it is only on the decision of EC, a member ceases to be a member of the House.

Thus, the procedures to curb defection is different in different countries. Indian jurists and legislators must take into consideration the system followed in countries such as USA and UK and the parties should lay down their own disciplinary approach and make a stringent Anti-defection law to refer during exigencies.

### 5. HOLLOWED DEMOCRACY

After centuries of domination, it was in the year 1947 that India received its freedom and subsequently a Constitution to determine rights and duties of Indian citizens. All these measures were taken in order to end supremacy and create democracy to ensure better life. Thus, the primary concern of Indian drafters unlike those of US drafters was to create fundamental rights for the citizens, so that they could not be exploited. Hence, Part III of the Indian Constitution was solely created for mentioning the Fundamental Rights granted to citizens and non-citizens (in some cases). Any legislation violating these fundamental rights shall be considered void-ab initio<sup>11</sup>.

Hence, it is a highly debated topic whether anti-defection law should be considered void as it violates Article 19(1) of the Indian Constitution due to its restrictive nature which bars the political party members from

swapping their party, i.e., freedom of association of a political party. Also, freedom of voting and dissenting too are constitutional freedoms granted under Article 19 and 105 of the Indian Constitution, thus, restricting someone from voting according to their personal will and showing dissent [under paragraph 2(b) of the 10<sup>th</sup> schedule] is again a violation of such rights<sup>12</sup>. However, in the case of “*Kihoto Hollohon vs. Zachilhu & Ors*”<sup>13</sup> Supreme Court held that the aim of 10<sup>th</sup> Schedule was simply to end unethical political defection and strengthen the democracy. It never intended to, nor is in any manner violating constitutional rights granted to the citizens. This judgement was further upheld in majority of cases.

Another point of debate questioning the validity of anti-defection laws arose upon the issue of judicial review. It was believed that granting absolute immunity to the Speaker would be violative of Article 32, 136, 226 and 227 of the Indian Constitution. However, this immunity was quashed in the *Kihoto Hollohon case*, where the court held, that order of the Presiding Officer isn't final and is appealable. Further in the case of “*Rajendra Singh Rana v. Swami Prasad Maurya and Ors.*”<sup>14</sup> the court held that the Speaker is not absolutely immune to judicial review. The court went on stating that violation of constitutional duties by the Speaker cannot be ignored, and hence, not making an inquiry or ignoring a petition by the Speaker will have consequences. Further in the case of “*Shrimanth Balasaheb Patil vs*

<sup>11</sup> Keshavan madhavan menon v state of Bombay  
1951 AIR 128

<sup>12</sup> Kartik Khanna and Dhvani Shah, ‘Anti-Defection law: A Dearth Knell for Parliamentary Dissent’ (2012)

<<http://docs.manupatra.in/newslines/articles/Upload/5>

4DB1904-34F0-4A20-A40F-0D968ABD5446.pdf>  
accessed 7 March 2021

<sup>13</sup> *Kihoto Hollohon vs. Zachilhu and Others* [1992] SCR (1) 686

<sup>14</sup> *Rajendra Singh Rana v. Swami Prasad Maurya and Ors.* Appeal (civil) 765 of 2007



*Honble Speaker Karnataka*<sup>15</sup>, the Supreme Court laid down four grounds for reviewing the Speaker's decision (paragraph 21).

In the opinion of the researchers, it is submitted that anti-defection laws were legislated not to demean but to uphold constitutional and democratic principles. We in no manner preclude that all provisions of the original draft were perfectly fine and required no amendment. All we contend is that the contemporary position of anti-defection law is most suited and there is no room for any authentic debate. In simple words, anti-defection laws are constitutionally valid and rightly punishes the defectors without prejudicing the fundamental guarantees.

#### 6. RECOMMENDED REFORMS: PATHWAY TO A BETTER DEMOCRACY

When the Anti-defection law came into force several defects were pointed out by various legislators and jurists. Several Committees were set up under the supervision of renowned Jurists to fill the lacunae and certain reforms were suggested.

(a) Dinesh Goswami Committee on Electoral Reforms (1990):

It was suggested by this Committee that disqualification should only be practiced in cases where a member 'voluntarily gives up' the membership, absents himself from voting or betrays the party by voting against the party whip or money bill or motion of vote of thanks to the President's address. It was

recommended that the decision of disqualification must be decided by President/Governor and not by the Speaker.

(b) Law Commission recommendation on Anti-Defection Law (170th report)<sup>16</sup>  
It was suggested by this commission that whip must be issued only when voting affects the duration of governance and not on any other occasion. Provisions relating to splits and mergers under paragraph 3 and 4 of the Tenth Schedule which exempted a member from disqualification on the ground of defection should be deleted. Pre-poll electoral fronts must be equated with political parties.

(b) National Commission to Review the Working of the Constitution Report (2002)<sup>17</sup>

It was recommended that any person who defects must not be allowed to hold any paid public office. Further, their votes must be considered invalid. Also, the decisions relating to violation of Anti-defection law must be heard and disposed by the Election Commissioner and not by the presiding officer.

(d) Election Commission Report on Proposed Electoral Reforms (2004)<sup>18</sup>

If the issues pertaining to the of disqualification of candidates due to defection is decided by President/Governor then it will receive more respect and validation from the citizens.

(e) Parliamentary Standing Committee 61st Report on Anti-defection Law- (2013)

<sup>15</sup> Shrimanth Balasaheb Patil vs Honble Speaker Karnataka W.P. (CIVIL) NO. 992 OF 2019

<sup>16</sup> Law Commission, *Anti-defection Law* (Law Com No 170, 1999) paras 84-89

<sup>17</sup> R.L. Meena, *Working of the Constitution*, vol. 2 (Ministry of Law, Justice and Company Affairs 2/04, 2002)

<sup>18</sup> T. S. Krishna Murthy, *Proposed Electoral Reforms*, (Election Commission of India, 2004)



It was recommended that provisions of Anti-defection law must also be extended to Autonomous District Councils in North-East. Further, no exemptions shall be granted to parties which merge with other political parties.

The recommendations by these committees must be adhered to particularly the one relating to fixing the time period of an appeal and the indiscriminate powers of Speaker.

### 7. CONTEMPORARY FRAMEWORK

Since, the time anti-defection law has been passed it has failed to attain the purpose it was meant to serve. Rather than aiding the legislative process it has done more destruction to it.

The recent incidences are the evidence of the same. Anti-defection law was brought back into picture during the recent Rajasthan power struggle for the position of CM between Mr. Ashok Gehlot and Mr. Sachin Pilot. Apart from that recently, in the year 2019 when BJP was running short of three seats for a simple majority, certain congress members resigned. These members then contested for BJP. In Madhya Pradesh also, due to the resignation of Jyotiraditya Scindia and almost 12 other MLAs from the Congress party, the government toppled and BJP won the majority again. Even in Telangana 18 congress MLA joined TRS and left their party. In 2016, several legislators resigned from their party including the Chief Minister of Arunachal Pradesh Pema Khandu. Situation worsened when even single members of Rajya Sabha defected to other parties. The Anti-defection law leaves the parliamentarians with two possible options either to blindly follow the opinion of their

party or raise their voice and lose their seat in Parliament.

If there is no such law then the members can freely vote as per their choice. Thus, there is a need to either amend or declare this law null and void as in other countries such as USA or UK. As recently, in USA seven candidates voted against their party to convict President Trump or in UK where 55 members from the PM's party voted against him for stricter lockdown impositions.

### 8. CONCLUSION

The opening line of the preamble clearly reads "We the people of India" which means we ourselves have enshrined the rights vested in the Constitution upon ourselves. And hence the fundamental rights constitute the most essential element of any democracy. One such right is the right to dissent which comes under Article 19(1)(a) of the Constitution. But just for the sake that these rights are fundamental they cannot be misused and thus it can only come into picture when the legislator defects for valid reasons as reasonable restrictions can always be imposed on Fundamental Rights. The present Anti-defection law has certain lacunae which needs to be filled at the earliest. There is an urgent need to amend certain provisions of this law. A legal Mandate is the need of the hour so that populist actions around election can be avoided. The WHIP system must only be applied under extreme circumstances and a separate tribunal must be formed which can particularly focus on the cases related to defection. This law has often faced criticism due to the debate between Right to Dissent and Rule of Law. However, if these loopholes are filled it can turn out to be an effective legal framework to curb political corruption.

\*\*\*\*\*