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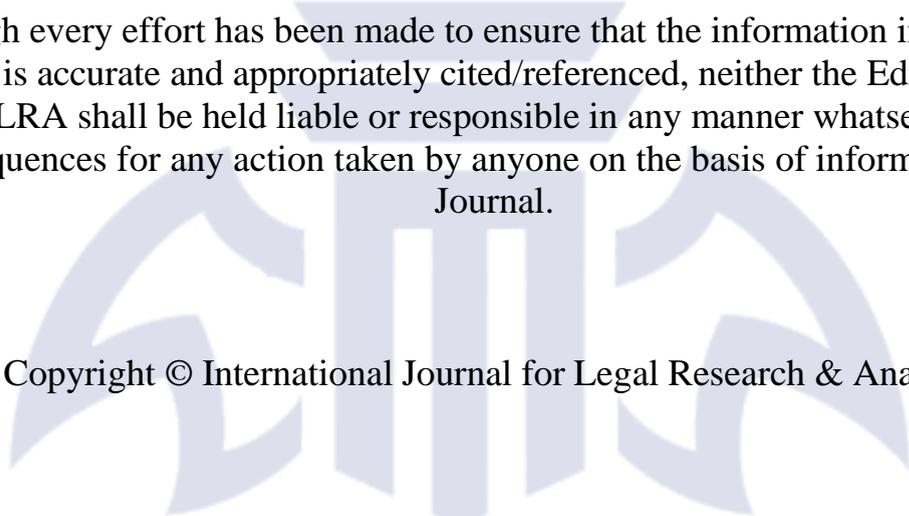
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ARTICLE ON **‘ANALYSIS OF ANTI DEFECTION LAW IN** **INDIA’**

Authored By- Ritvik Joshi

Introduction

The will of the people is expressed through the ballot box. The ballot determines the party which would run the Government. Election is thus a vital component in a democratic system of governance.

In a democracy, emergence of political parties with different and diverse ideologies is but natural. Political parties give concrete shape to divergent ideologies and are essential for the success of any democracy. However, defections are a matter of concern for the party system. To be in power, a party or a combination of parties must have the support of majority of the members of the House. When no party commands majority, some parties agree to form a coalition Government on the basis of a broad common programme.

Sometimes, political parties even form a pre-poll alliance, particularly in the era of coalition governments. It is in such a situation that defection by a few members reduces the coalition government into a minority. Defection may take place on grounds of ideology and principle or otherwise. Be that as it may, defection or changing of affiliation is a political reality in a democratic polity and more so in a parliamentary polity.

The Anti-Defection Law was passed in 1985 through the 52nd Amendment to the Constitution, which added the Tenth Schedule to the Indian Constitution. The main intent of the law was to combat “the evil of political defections”.

This law was passed soon after Late Rajiv Gandhi became the Prime Minister of the country with a massive mandate. This law would not have been passed if there had been no Rajiv Gandhi and his government with an unparalleled massive majority. This law was passed so that it curbs the political defections but the ever increasing hunger of our legislatures and with our excellent legal fraternity it was not a difficult task to find some loopholes in this law and they used it to their interest.

There are several issues in relation to the working of this law which need to be discussed. Does the law, while deterring defections, also lead to suppression of healthy intra-party debate and dissent? 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.

Background

The law was added via the 52nd Amendment Act, 1985, soon after the Rajiv government came to power with a thumping majority in the wake of the assassination of Prime Minister Indira Gandhi. The Congress had won 401 seats in the Lok Sabha.

Between the fourth and the fifth general elections in 1967 and 1972 from among the 4,000 odd members of the Lok Sabha and the Legislative Assemblies in the States and the Union Territories, there were nearly 2,000 cases of defection and counter-defection. By the end of March 1971 approximately 50% of the legislators had changed their party affiliations and several of them did so more than once—some of them as many as five times.

After the commencement of the constitution, however, it did not take long for political functionaries to belie largely the hopes of the framers. Especially after the departure of Nehru, the country witnessed a sharp decline in political morality and propriety and a phenomenal growth of political corruption of varied type. The worst form of corruption that emerged on a massive scale on the Indian Political Scene was defection of legislators with her individually or in groups. The unprincipled floor crossing was nothing but a betrayal of the electorate and undermining of the political organs of the state. The lust for power, position and money was obviously behind such defections. The present day political process is closely linked with socio-economic and cultural processes. Perversion of the former has a devastating impact on the latter. This is what the politics of defection did

The Tenth Schedule of the Indian constitution reads as follows :

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 for 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.

Explanation.—For the purposes of this sub-paragraph,— (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall,—

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188. (4)

Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,—

(i) where he was a member of political party immediately before such commencement, be deemed, for the purposes of sub-paragraph

(1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph

(2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph

(3) of this paragraph.

The grounds for disqualification under the Anti-Defection Law's are as follows,

a) If an elected member voluntarily gives up his membership of a political party;

b) If he votes or abstains from voting in such House contrary to any direction issued by his political party or anyone authorised to do so, without obtaining prior permission.

As a pre-condition for his disqualification, his abstention from voting should not be condoned by his party or the authorised person within 15 days of such incident.

- As per the 1985 Act, a 'defection' by one-third of the elected members of a political party was considered a 'merger'.
- The members so disqualified can stand for elections from any political party for a seat in the same House.
- The decision on questions as to disqualification on ground of defection is referred to the Chairman or the Speaker of such House, and his decision is final.
- All proceedings in relation to any question on disqualification of a member of a House under this Schedule are deemed to be proceedings in Parliament or in the Legislature of a state. No court has any jurisdiction

Power To Disqualify

The Chairman or the Speaker of the House takes the decision to disqualify a member. If a complaint is received with respect to the defection of the Chairman or Speaker, a member of the House elected by that House shall take the decision.

No Legal Protection On Split

Due to the 91st amendment, the anti-defection law created an exception for anti-defection rulings. However, the amendment does not recognise a 'split' in a legislature party and instead recognises a 'merger'.

Subversion Of Electoral Mandates:

Defection is the subversion of electoral mandates by legislators who get elected on the ticket of one party but then find it convenient to shift to another, due to the lure of ministerial berths or financial gains.

Exception

Merger A person shall not be disqualified if his original political party merges with another, he and other members of the old political party become members of the new political party, he and other members do not accept the merger and opt to function as a separate group. This exception shall operate only if not less than two-thirds of the members of party in the House have agreed to the merger.

Bar on Jurisdiction

Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

The constitutionality of the Anti-Defection Law has been upheld by the Hon'ble Supreme Court in a 3:2 decision in the case of *Shri Kihota Hollohon v. Mr. Zachilhu and others*.¹ The Petition challenged the constitutionality of the Para 7 i.e. which puts bar on the Jurisdiction.

The majority consisted of M.N. Venkatachaliah, K.J.Reddy, and S.C. Agrawal, Jj. and the minority was consisted by L.M. Sharma and J.S.Verma, Jj. At the same time as upholding the Constitutional validity of the Anti-Defection law the court has rules that the speaker's orders under the law disqualifying a member of the legislature on the ground of defection is subject to judicial review.

Second issue was the operation and effect of Articles 136, 226 and 227 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.

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.

*Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*², which states that the Speaker has exclusive jurisdiction to decide disqualification questions that are referred to him. In any case, she argued that a Three Judge Bench cannot decide the present case and has to await the judgment of a Five Judge Bench which has been made on a specific reference made by a Two Judge Bench of the Supreme Court.

The Supreme Court in *Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors. (2020)* case made a significant suggestion regarding disqualification powers of the Speaker. The Court was adjudicating upon the matter relating to the disqualification of Members of the Legislative Assembly (MLAs) in the Manipur Legislative Assembly under the Tenth Schedule.

¹ Air 1993 sc 412

² (2016) 8 SCC 1

Court's Recommendations

The Court recommended the Parliament to amend the Constitution regarding the role of Speaker as a quasi-judicial authority while dealing with disqualification petitions under the anti-defection law (when such a Speaker continues to belong to a particular political party either de jure or de facto).

The Court suggested that an independent tribunal can be appointed which will substitute the Speaker of the Lok Sabha and Legislative Assemblies to deal with matters of disqualifications under Tenth Schedule. Currently, disqualification of members of a House/Assembly is referred to the Speaker of the House/Assembly. The Tribunal will be headed by a retired Supreme Court judge or a retired Chief Justice of a High Court. The Court also suggested that some other outside independent mechanism can adjudicate on such matters. This will ensure that such disputes are decided both swiftly and impartially

Another major contention on part of the petitioners is that the 'finality clause' as under the para 6 of the Tenth Schedule excludes the court's jurisdiction rendering the speaker immune from Judicial Review. In India the position is such that whatever authority decides disputes must be vested with judicial authority. In the present case too the power to decide disputed disqualification under para 6(1) is preeminently a judicial complexion. The majority in the present case has held that the Speaker/chairman under the para 6(1) of the Tenth Schedule is Tribunal and that the finality clause does not oust the jurisdiction of the courts under Arts. 136, 226 and 227 but only limits it.³

In *Ravi S Naik v. Union of India*⁴, issues raised were whether only resignation constitutes voluntarily giving up membership of a political party, 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.

The court held in this case that, 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.

G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly⁵

Issue was raised whether a member can be said to voluntarily give up his membership of a party if he joins another party after being expelled by his old political party.

It was held that, once a member is expelled, he is treated as an 'unattached' member in the house. However, he continues to be a member of the old party as per the Tenth Schedule. So if he joins a new party after being expelled, he can be said to have voluntarily given up membership of his old party.

If we go deep into the impact of this law, it curbs the legislators' freedom of opposing the wrong policies, bad leaders and anti-people bills proposed by the 'High Command' in arbitrary and undemocratic manner. This law has given additional dictatorial power to the political party to keep the flock together for an entire term.

"Section 2(b) of the Tenth Schedule puts the Member of Parliament into the straight jacket of obedience to the despotic dictates of the party whips which undermines the democratic spirit. It also violates the principle of representative democracy by empowering the party, and undermining the relationship between elected representatives and their constituents. The anti-defection law makes a mockery of parliamentary democracy by marginalizing debates, as the legislators are not allowed to dissent, without being disqualified by the House. Disruptions, rather than substantive debate, become the only form of opposition possible. The Parliamentary

³ PG 1182, V.N. Shukla, Constitution of India, MP Singh, Twelfth Edition

⁴ AIR 1994 SC 1558

⁵ 1996 2 SCC 353

debate has thus become largely redundant.

Tenth Schedule has laid down certain norms for keeping the flock of legislators of each party together, and the 'whips' in the hands of legislative party leaders reducing the hon'ble leaders and people's representatives into shepherds and sheep. As the political parties invented mechanisms to fail this constitutional legislation, the judiciary played a very significant role in upholding the legality and morality of the law besides expanding its horizons to curb most treacherous practice of sudden political disloyalty. This Tenth Schedule whenever used enhancing the burden of courts.

In *Shri Avtar Singh Bhadana vs. Shri Kuldeep Singh, Indian National Congress*,

the Speaker held that a person getting elected as a candidate of a political party also gets elected because of the programs of the party. If the person leaves the party, he should go back before the electorate.

The political parties, instead of maintaining standards within the party with effective leadership, are resorting to litigation, begging the courts to decide the political issues, which they failed to settle. It is not fair to blame judiciary for taking time to decide this tricky question within the frame work of constitution. Neither the Governor nor the Speaker is bona fide. Their moves are not fair. They desperately try to use Constitutional power to settle political scores and wreck political vengeance. In the process they just do not care the people's will in electing a party to power, for whatever reasons that might be.

Independents And Nominated Members

There are a few nominated seats provided by the Constitution in legislative houses. Unless he is dependent, he cannot be nominated as legislator. Hence he can decide his loyalty. A nominated member of a house will be disqualified if he joins any political party after six months. That means law permits him to be loyal or disloyal to nominating party only for six months

It is wrong to say that there are no provisions for disqualifying independent members for defection from their 'independent' status. If an independent legislator joins a political party he would lose membership. Law mandates an independent legislator to maintain the independent status. He can choose to support any political party but should not attach himself to any. . This decision should be supported by the material placed on record. .

In *Jagjit Singh v State of Haryana* , the legislators were elected as Members of Assembly as independent candidates. Later they joined a political party and news of their joining was reported in print as well as electronic media. That fact was allegedly admitted by members in an interview given to a TV news channel. Thereafter those members were disqualified from being a member of the assembly.

The Supreme Court held: "when an independent member is alleged to have joined a political party the test to be applied is whether the member has given up his independent character on which he was elected. This has to be determined on appreciation of material on record and conduct of the member of the Speaker. No hard and fast rule can be laid down when the answer is dependent on facts of each case. The substance and spirit of anti-defection provisions are the guiding factors". Disqualification of these members by speaker was upheld, despite the allegations that were made regarding the procedural defects in the process.

Supreme Court also clarified one more question: "Where a sole member of a political party in an Assembly joins another political party, he cannot get protection of paragraph 3 of Tenth Schedule of the Constitution and will be disqualified from being member under paragraph 2 of the Tenth Schedule of the Constitution."

There have been instances wherein after the declaration of election results, winning candidates

have resigned from their membership of the House as well as the party from which they got elected. Immediately, they have joined the political party which has formed the government and have again contested from that political party, which appears to be a fraud and goes against the spirit of the democracy and 52nd constitutional amendment. The ingenious human brain invented innovative ideas to obtain resignations and, in effect, made the anti-defection law a cover to hide their heinous crime.

CONCLUSION

The introduction of Schedule X in the Constitution attempted to bring in a comprehensive legislation that would reduce the menace of defection. While the law has succeeded in this aspect to a reasonable degree, there were certain ambiguities. The Courts of the land have done a fair job in expounding the stance by applying the law to particular facts and circumstances. Nevertheless, very few general propositions have been laid down which have a universal application. Thus, there seems to be considerable scope for judicial interpretation, one that may give further clarity on the law and may bring in a wider range of cases within the umbrella of this legislation.

In the present context, corruption is so much linked with power that our politicians have adopted a cynical attitude toward political morality. Overpowering the anti-defection law for electoral politics with the help of both money and muscle power and other unfair means for the sake of power have affected the political morality of all the political parties and as such none of them can claim themselves to be faithful to nation in true sense. It is in this background that the laws relating to defection was enacted in the Tenth Schedule.

Defections and splits in parties have always been a feature of Indian Politics. Every time the National Parliament or State Legislatures return a less-than-certain outcome, outcome the "suitcases" and allegations of horse trading drown out every other public discourse. In the mad circus that follows, parties spirit their legislators away, hide them, suborn them, and then triumphantly parade them before the world

Way Forward

If government stability is an issue due to people defecting from their parties, the answer is for parties to strengthen their internal part of democracy. There is an ardent need for legislation that governs political parties in India. Such a law should bring political parties under RTI, strengthen intra-party democracy, etc. Chairman/Speaker of the house, being the final authority in terms of defection, affects the doctrine of separation of powers. In this context, transferring this power to higher judiciary or to Election Commission may curb the menace of defection.

In order to shield the detrimental effect of the anti-defection law on representative democracy, the scope of the law can be restricted to only those laws, where the defeat of government can lead to loss of confidence.

The Anti-Defection Law was passed in 1985 through the 52nd Amendment to the Constitution, which added the Tenth Schedule to the Indian Constitution. The main intent of the law was to combat "the evil of political defections".

This law was passed soon after Late Rajiv Gandhi became the Prime Minister of the country with a massive mandate. This law would not have been passed if there had been no Rajiv Gandhi and his government with an unparalleled massive majority. This law was passed so that it curbs the political defections but the ever increasing hunger of our legislatures and with our excellent legal fraternity it was not a difficult task to find some loopholes in this law and they used it to their interest.

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