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REMOVING THE VEIL OF THE ANTI- DEFECTION LAW IN INDIA

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Abstract

The purpose behind the enactment of the anti-defection law was to curb the rising cases of defection but unfortunately, it has done nothing but even opened a new way of defection such as Collective defection, which allows defection legally without facing any arbitrary action. In this paper, we are going to deal with all the loopholes that have been smartly inserted by the lawmakers knowingly or unknowingly which have made our country merely a namesake biggest democracy in the world last will give the possible measures that should be considered by the lawmakers to rectify these issues.

Introduction

The term 'defection' is here related to an act where a Member of Parliament or a State Legislature defect or leave his political party after winning the election, earlier this practice used to be done due to conflict of interest or ideology but nowadays it is mostly due to other reasons such as bribe, posts etc. The defection occurs in every democratic country and in India where we follow the indirect form of democracy where people are represented by the elected representatives. The Indian government after 3 decades of independence came up with the anti-defection law in 1985 through the 52nd Constitutional amendment which inserted new Schedule X, during the Rajiv Gandhi tenure, which was passed unanimously to remove the defector from the house and put many restrictions on him but, after all, the government knew the fact that this law was being made for the member of Parliament and the State Legislature which the government would also be subjected therefore they very smartly made loopholes in the law in the name of exception or collective defection which have been the reason of many political clashes in the center as well as a state such as Eknath Shinde defected Shiv Sena with the reason that his demand for separation of Maha Vikas Aghadi due to ideological difference was nothing but just his excuse to hide his

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main agenda. The loopholes in the defection law have made this law nothing but fool the citizens, which we will see in this article. Party politics has been severely undermined by the politics of the Aaya Rams and Gaya Rams. It has been Time and again experienced that upon being elected to the legislature, lawmakers switch parties and cause political instability - often enticed by the rival party with plum public posts or, simply, money.

When was the anti-discrimination law's seed sown?

India attained independence on August 15, 1947, and on January 26, 1950, the Indian Constitution went into effect. As there was no provision mentioned in the original constitution. The reason could be that it was the only single largest party ruling at the center as well as the states at the time of independence and during the making of the constitution. So, they might have thought that they would also be in power. From the general election till 1967, there were about 500 instances of defection mostly from states which strengthened the need for defection in the country after almost 3 decades of independence.³ It was in 1967 when one Gaya Lal from Haryana, switched parties three times within the same day which was nothing but a fraud with the citizens who chose him to represent their needs in the house. The process of changing parties after getting elected continued recklessly. From 1967 to 1972 more than 50% of the legislators switched sides at least once.⁴ The first attempt was made by Lok Sabha in 1967 to curb defection by appointing a high-level committee to look at the problem and give recommendations. The committee was chaired by Y.B. Chavan and consisted of other legal and political luminaries such as M.C. Setalvad, Jay Prakash Narayan, and H.N. Kunzru among others. The committee submitted its report in 1969 with the following recommendations-

- i) There should be a code of conduct in a party for its members
- ii) In cases of defection for ideological reasons, the defector should be disqualified from the legislator but should be allowed for the by-election
- iii) If the defection is for the lure of office or pecuniary gains the defector should abstain from contesting election for some period.⁵

After 4 years of recommendation of the Y.B. Chavan committee, the parliament on 16th May 1973 introduced the Constitution (32nd Amendment) 1973. The was became a matter of public debate and was referred to a joint committee of 2 Houses. However, the Indira Gandhi government lost

³ K.N. Singh, Anti-Defection law and Judicial Review 38 JPI 31 (1992).

⁴ J.K. Mittal, Anti-Defection Act: A comment on its Constitutionality (1987) 3 SCC(J) 25 at 26.

⁵ Gulab Gupta, Anti-Defection law-An Introspection, 1966 (IX) CILQ 127 at 130.

power and the bill lapsed. The second attempt was made by the Janta Party on 28th August 1978 to bring forward a Bill on defection but was opposed at the stage of introduction and was withdrawn. During this time in 1957, the J&K assembly made law on defection as the J&K Representation of Peoples Act, 1957⁶. The Constitutionality of this section 24- G Act was upheld by the J&K HC in the case of *Mian Bashir v. State of J&K*⁷. Finally, the bill was introduced and the law was passed in Rajiv Gandhi's tenure. Provision was introduced by way of 10th schedule-52nd Amendment Act, 1985. Provisions of Schedule X are as follows-

- Disqualification in case, where the member voluntarily given up his membership of his political, and if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs without obtaining the prior permission of such political party within 15 days from the date of such voting or abstention⁸. These provisions will be questioned in the coming para.
- An independent member of a House would be disqualified if he joins any political party after such an election⁹. This provision is also going to be dealt with in the coming paragraph.
- A nominated member of a party would be disqualified if he joins any other party after six months from the date on which he takes his seat after complying with the requirements of Article 99¹⁰ or Article 188¹¹, as the case may be¹².
- The disqualification would not apply in case of the split of the party by 1/3rd or more of the members of a party defect¹³. This para 3 was repealed by the 91st Constitutional (Amendment) Act, 2003 by the Atal Vihari Government on the advice of the Venkat Chalaya Review Committee.
- The disqualification is not applicable if a 2/3rd member goes out as a result of a merger of his original political party with another. Also, if a member, after being elected as the presiding officer (Speaker or Dep. Speaker), gives up membership of a party he belonged, to or does not rejoin that party or becomes a member of another party¹⁴.

⁶ The J&K Representation of Peoples Act, 1957 (Act No. IV of 1957), Sec. 24- G.

⁷ on 13 November, 1981.

⁸ The Constitution of India, Schedule X, Para. 2 & 1 (a), (b).

⁹ The Constitution of India, Schedule X, Para. 2 (2).

¹⁰ The Constitution of India, art. 99.

¹¹ The Constitution of India, art. 188.

¹² The Constitution of India, Schedule X, Para. 2 (3).

¹³ The Constitution of India, Schedule X, Para. 3.

¹⁴ The Constitution of India, Schedule X, Para 4 & 5.

- The power to make decisions on disqualification matters would be in the hands of the Chairman or the Speaker and his decision shall be final. And if the Chairman and the Speaker itself are subject to disqualification then in that case matter would be referred to a person appointed by the house and his decision would be final¹⁵. This provision is also a subject of criticism.
- The decision of the Speaker or the Chairman or any person appointed by the House on the matter of disqualification of a member shall be final and courts can not interfere¹⁶. The apex court in the case of *Kihoto Hollohan v. Zachillu*¹⁷, while declaring para 7 of the 10th schedule as unconstitutional, the SC held “the function of the speaker, while applying the Anti-defection law is subject to judicial review because it is similar to a tribunal's decision.”

The abovementioned provision shows the smartness of the lawmakers and how cunningly they fooled the citizens of this country by leaving loopholes in every provision that they could use when they needed. We are going to deal with all the criticism in the upcoming paragraph.

Role of the Judiciary on matters related to Anti Defection law

- According to Para 7 of the 10th Schedule there was a Bar of the jurisdiction of the court that means Notwithstanding anything in this Constitution, no court shall have any jurisdiction on any matter related to a disqualification of a member. But this para 7 was declared unconstitutional by the Supreme Court in the case of *Kihoto Hollohan v. Zachilu*, 1992, SC held – “The function of a speaker, while applying the Anti defection law is like of a Tribunal and therefore is open to judicial review”.¹⁸ After this judgment court has started reviewing the cases related to defection and has made several statements from time to time. A few examples of it are-
- The word ‘voluntarily given up his membership of such political party’ is not synonymous with ‘recognition’ as observed in the case of *Ravi S. Naik v. UOI*, 1994¹⁹.
- The SC court in the case of *G. Vishwanathan v. Hon’ble Speaker Tamil Nadu Legislative Assembly*, 1996²⁰, Court said- “Even though a member has been expelled by the party he

¹⁵ The Constitution of India, Schedule X, Para. 6

¹⁶ The Constitution of India, Schedule X, Para. 7

¹⁷ 1992 SCR (1) 686

¹⁸ (1992) SCC 309

¹⁹ 1994 AIR 1558

²⁰

will not cease to be a member of that party and will continue to belong that party as an unattached member”.

- SC further observed “Speaker has no power to review his/her own decision on the question of disqualification and same can only be corrected by judicial review” held in the case of *Kashinath G. Jalmai v. Hon’ble Speaker, 1993*²¹.
- “Speaker cannot disqualify members when a motion of removal is pending against him” held by SC in the landmark case of *Nabam Rebia Bamang Felix v. Hon’ble Speaker, 2015*²².
- The court observed “No, the Speaker has no power to take sue moto cognizance under 10th Schedule.
- In the *Chandan Kumar v. UOI, 2022*²³ case, SC held while dismissing the petition that “post-poll alliance subject to certain conditions is permissible.”

Therefore, the judiciary after striking down para 7 has been playing an active role from time to time and has opened the gate of judicial review of the speaker’s decision on the matter of disqualification.

Criticism of Anti - defection Law

- i) Para 2 (1) (a)²⁴ is violative of an individual member's freedom of choice. There can be cases where there can be a reason for giving up a member due to a change in the ideology of a party and therefore disqualifying is not a reasonable step.
- ii) Para 2 (1) (b) of the 10th Schedule²⁵ which restrains a party member from acting or voting against the party even if his act is reasonable and for the interest of the people who elected him. This is misleading and violates the party member’s Fundamental right of Freedom of Choice given under Article 19 of the Indian Constitution and the Parliamentary Privileges (Article 105)²⁶. It restrains the members to speak as their party will issue a whip and disqualify him in response. The whole functioning of a parliament as a consequence of it would not be just and fair because the members

²¹ 1993 AIR 1873

²² (2017) 13 SCC 332

²³ 2022 LiveLaw (SC) 947

²⁴ The Constitution of India, Schedule X, Para. 2 (1) (a).

²⁵ The Constitution of India, Schedule X, Para. 2 (1) (b).

²⁶ The Constitution of India, arts. 19 & 105.

sitting there are not speaking from their minds but have been seated there to just nod their heads when their leader speaks something.

- iii) Para 2 (2) of the 10th Schedule says an independent candidate can be disqualified if he joins any political party after the election²⁷. People who are in Favor of this provision might argue that a member has been elected by the citizens for its ideology and the member joining the party with a different ideology would be injustice to them. But what if the joining independent member is facing difficulty in raising the issue related to its constituency alone?
- iv) Para 2 (3) disqualifies a nominated member of a party if he joins any other political party after the expiry of 6 months²⁸ is baseless. Why 6-month gap and how this gap has been decided by the lawmakers? What if the nominated member betrays the party before the expiry of the six months?
- v) Para 4 of the 10th Schedule exempts those members from defection who defect in a group that is, if the 2/3rd member of any party members leaves the party and joins any other party or chooses to remain independent²⁹. What is the rationale behind 2/3rd and how it has been decided? Isn't it a promotion of collective defection? Is it not a loophole for a party to topple any government in the center as well as state legislature by shifting the majority?
- vi) Para 6 says that the decision related to the disqualification of a member under schedule 10th would be given by the Speaker or the chairman or any member appointed by the House in case of proceeding is against the Speaker or the Chairman itself, shall be final³⁰. Why the power to decide the case of disqualification of a member is given to a person appointed by the majority government? Will the Speaker or Chairman belonging to the ruling party act without any bias if a defected member joins their party?

We are going to see some measures to cope with these above-mentioned issues in the

²⁷ The Constitution of India, Schedule X, Para. 2 (2).

²⁸ The Constitution of India, Schedule X, Para. 2 (3)

²⁹ The Constitution of India, Schedule X, Para. 4

³⁰ The Constitution of India, Schedule X, Para. 6.

upcoming para.

Conclusion: Some Suggestions

- i) A party member should not be disqualified merely in case of voluntarily giving up the membership. Instead, he must be given a chance to explain the reason for leaving the party and if the reason is reasonable then he should not be disqualified.
- ii) Para 2 (1) (b) should be repealed. It provides disqualification in case members do not vote or abstain as per the order of the party. This provision tries to muffle the voice of the citizens who have chosen the member to represent their problems and speak for them in the House. Further, this provision violates member's Fundamental right to speak under Article 19 of the Indian Constitution.
- iii) Para 2 (2) of the 10th Schedule needs for an amendment. The present provision disqualifies an independent member if he joins any party after the elections. The election should be conducted again after the waiting period of at least 6 months to give a chance to the defected member of a party to show its voters that even after his joining another party he has still the same ideology on which he has been elected. Further court also observed in the case of *M.P. Singh v. Chairman Bihar Legislative Council, 2005*³¹, Court said- "When you contest election against the party, you are willing to give up the party."
- iv) Para 2 (3) of the 10th Schedule also needs an amendment. The present provision bars the nominated member of a party from leaving the party after the expiry of 6 months. If he leaves after 6 months he would be disqualified. Amendment should be that the 6 months bar should be removed and a member can at any time defect the party after giving satisfactory reason to the House and at least 50% of both the ruling and the biggest opposition party members accept the reason.
- v) Para 4 of the 10th Schedule needs to be abolished. This para exempts the practice of collective defection that at least 2/3rd members of a political party. By this provision, only members started defection legally without facing any action by leaving the party

³¹ AIR 2005 SC 69

in the herd. Recent examples of government topple are such in the Karnataka assembly election 2018 where BJP formed a coalition and toppled the Congress government and in the Maharashtra assembly election 2019 where a pre-poll alliance of BJP and Shiv Sena broke out after the election due to the seat of Chief Minister and Shiv Sena joined the opposite ideology party of National Congress Party (NCP) which had not liked by the many members which resulted in rebellion in the Shiv Sena party where its member Eknath Shinde left the Shiv Sena along with other members to form a government with BJP. The same was done in the case of the BJP taking power in Madhya Pradesh. So, to avoid such clashes pre poll alliances should produce their agreement related to the roles of each party after gaining power and it should be propagated to the public and the election commission if any party works against the agreement should not be allowed to rule till the next election.

- vi) Para 6 of the 10th Schedule in amendment in the power to make decisions on the issues related to defection. Presently, this provision gives the power to give decisions on the matters under schedule 10th merely to the Speaker (in case of Lok Sabha) the Chairman (in case of Rajya Sabha), or any member appointed on behalf of the above two if the defection proceedings are going against them. This provision gives a tool to the ruling government to act in bias and due to not any time limit there have been instances where the speaker has delayed the anti-defection in cases where defected members joined the ruling party. The Supreme Court in the case of *Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly, 2020*³², “matter related to defection under 10th Schedule of the Constitution should be decided within a period of 3 months in absence of exceptional reasons”. It was merely the suggestion by the court to the Speaker and hence the situation remained the same. Further, it has been observed by the courts in many cases where the Speaker acted unfairly or unsatisfactory such as in the case of *Balchandra Jarkiholi v. B.S. Yeddyurappa, 2011*³³, SC said “Speaker while deciding the case of disqualification is bound to follow principles of natural justice and cannot extraneously give decisions”.

Currently, the present government attitude is not in favor of any amendment in the 10th Schedule of the Constitution even after the Law Commission suggests that the question of disqualification

³² W.P. (c) No. 223 of 2020

³³ (2011) 10 S.C.R. 877

of a member should be adjudicated by the President on the recommendations of the Election Commission and not by the speaker. The rationale behind this is that the legislators should not be free to ditch the voters who vote for the individual and opt for a particular party based on its manifesto³⁴. Further, the National Commission to Review the Working of the Constitution has also made certain recommendations for substituting the post of speaker or Chairman to adjudicate on issues related to the disqualification of members on grounds of defection into the hand of Election as an adjudicatory tribunal.

However, the attitude of the present government towards any amendment in the 10th Schedule can be seen from the reply given by the Ministry of Law and Justice to a question raised by the Shri G.C. Chandrashekhar (MP) on 15/12/2022. Further, no attempt was made by the current government to amend the 10th Schedule even after the recommendation given by the SC in the case of *Kesham Meghachndra v. Manipur Leg. Assembly, 2020*,³⁵ where SC suggested- “The Parliament should amend the Constitution to provide for an independent mechanism such as Permanent Tribunals headed by the retired judged to decides disputes under 10th Schedule”. Therefore, even after many suggestions given by various scholars and the apex courts, the present government does not seem in any mood to amend the Schedule. Therefore, we appeal to the government to consider the above-given criticism and their possible suggestions and if they have any which are more beneficial in ensuring justice to the voters and preserving the essence of democracy in the country.

³⁴ Law Commission of India, 170th Report on Reform of Electoral Laws, available at, <http://www.lawcommissionofindia.nic.in/lc170.htm> - last visited on April 8, 2010

³⁵ (2020) SCC OnLine SC 55