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**DECODING ANTI-DEFECTION LAW IN AN ERA OF POLITICAL
OPPORTUNISM AND AFFILIATIONS**- Mohd Bilal¹**ABSTRACT**

India as the world's largest democracy has a complex yet fragile political system. In contrast to USA or UK, it has a flourishing multi-party party system where political parties with contrasting ideologies are in a continuous battle to seek people's mandate and install their governments either at the national or state level. This lust for power often results in unnatural political affiliations and alignments, wherein elected representatives switch political parties, deliberately abusing the mandate they have received. Defections are a sombre truth of our parliamentary system. Elections are fought on promises often compiled in the form of manifestos by political parties. Candidates of political parties seek their election or re-election based on the manifesto of the party to which they belong. Their election is based on the ideology and rationale of their respective parties and therefore it is their duty to remain with the party to which they belong. When an elected representative switches sides after the election result, he not only abandons his party but also relinquishes the voters who voted for him. Defections in the case of Indian political system are a common phenomenon where legislators desert their parties in search of greener pastures. The Tenth Schedule which sought to curb the practice of defection has faced convulsions recently in the wake of large-scale defections, bringing down elected governments. This paper seeks to analyze the objective of Anti defection Law and its effectiveness in curbing the malpractice of defection.

KEYWORDS

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Defection, Manifesto, Mandate, Split, Merger

INTRODUCTION

Defection has been a scourge of politics in India. One of the recent trends visible in Indian politics is that stronger governments are formed at the centre. As a result, there are fewer instances of defection at the national level. The problem of defection is more widespread at the state level. In layman's terms, defection means desertion of one's group or community. In parliamentary politics, defection means floor-crossing i.e. when elected representatives change their political affiliations in the House to which they are elected. It is against democratic principles as it nullifies electoral verdicts. Even when a party falls short of the requisite majority to form a government, it is able to come to power by engineering defections from other parties. The party which was elected has to sit in the opposition benches making a mockery of the democratic process. The Constitution (Fifty-second Amendment) Act 1985 which introduced anti-defection law disqualifies a member of the House either parliament or state legislative assembly upon defection subject to conditions laid down under Paragraph 2 and Paragraph 4 of the Act.

HISTORICAL BACKGROUND

Following the General Elections of 1967, the defecting congress legislators were instrumental in the formation of opposition governments in the states of Haryana, Uttar Pradesh, and Madhya Pradesh. The constant making and unmaking of governments was captured in the phrase 'Aya Ram, Gaya Ram'. The expression signified shifting of loyalties by way of defection and became popular in Indian politics. An MLA of the Haryana Legislative Assembly named Gaya Lal who belonged to the Congress party deserted his party and joined the United Front government. He then left the United Front government and rejoined the Congress party and within nine hours again defected to the United Front. It is said that when Gaya Lal re-joined Congress, Congress leader Rao Birendra Singh brought him to Chandigarh Press and announced that 'Gaya Ram was now Aya Ram'.

The period starting from 1967 was one of coalition politics in which elections often resulted in fractured mandates leaving scope for political maneuvers where elected representatives switched to the party which offered them the best deal. In the backdrop of such political opportunism, the Rajiv Gandhi Government finally enacted the anti-defection law (10th Schedule) after years of political procrastination as defections suited every political

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which had the means to engineer them. The rampant disregard for the democratic process came to a halt after this. However, the unpredictable political system of India and numerous loopholes in the anti-defection law facilitated large-scale defections after a certain period of calm. The promise of political steadiness seems to be coming to an end in the wake of recent developments in Indian politics.

OBJECTIVES OF ANTI-DEFECTION LAW

Articles 101(3)(a)², 102(2)³, 190(3)(a)⁴ and 191(2)⁵ were amended by the Constitution (Fifty-second Amendment) Act which also added the Tenth Schedule thereto. This Amendment had a couple of objectives firstly, to stop the practice of defection by disqualification of the defecting member, and secondly to maintain stability in political parties as well as elected governments. Article 102 lays down the conditions under which a member of parliament will be disqualified. A new clause was added in Article 102 which states that a person shall be disqualified for being a member of either house of parliament if he is so disqualified under the tenth Schedule. A similar clause was also added to Article 191 which lays down the conditions for disqualification of a member of state legislature. To understand the clauses added to Article 102 and Article 191 respectively a comprehensive understanding of the Tenth schedule is required.

Under Paragraph 2⁶ of the Tenth Schedule 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 without obtaining prior permission of such party and such act has not been condoned by the concerned political party within 15 days from the date of such voting.
- c) 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.

²INDIA CONST. art.101, amended by the Constitution (Fifty-second Amendment) Act, 1985.

³INDIA CONST. art.102, amended by the Constitution (Fifty-second Amendment) Act, 1985.

⁴INDIA CONST. art. 190, amended by the Constitution (Fifty-second Amendment) Act, 1985

⁵INDIA CONST. art. 191, amended by the Constitution (Fifty-second Amendment) Act, 1985

⁶LEGISLATIVE DEPARTMENT, [THE CONSTITUTION \(FIFTY-SECOND AMENDMENT\) ACT, 1985](#) | Legislative Department | Ministry of Law and Justice | GoI (last visited on Mar.9, 2023)

Paragraph 2 clearly states that an elected member will be disqualified as soon as he defects to another party after an election or deliberately violates the whip issued by his party. One of the exceptions to the conditions for disqualification laid down under the Paragraph was the rule of the split in the original party. The deletion of Paragraph 3 by the Constitution (ninety-first Amendment) Act 2003 means that 'split' is no longer a defense against disqualification under Tenth Schedule. However, for a better understanding of the actual purpose of anti-defection law, an analysis of this defunct provision is necessary. Under this Paragraph, those members who are part of the faction resulting from one-third of the legislators moving out of the primary political party will be exempted from disqualification under the tenth Schedule. The important point here is that these one-third legislators will get protection only if there is a 'split' in the original party. In other words, if one-third of the legislators only defected and there is no split then they will be disqualified. The removal of Paragraph 3 rendered the defense of the split no longer applicable. This was the result of the deletion of Paragraph 3. Although a split in the original party was always essential to claim protection.

PARAGRAPH 4 AND THE MERGER ISSUE

Under Paragraph 4⁷ there is an exemption to sub-Paragraph (1) of Paragraph 2 whereby a member won't be disqualified if two-thirds of the members of his party merge with another party. As in split, a merger is also a pre-requisite to obtaining immunity from disqualification. However, it is important to note that legislators do not have the power to bring about a merger or split, it is the original political party that decides. Now the question which arises is that in a party which has both national and state who decides the issue of merger. If two-thirds of the legislators at the state level decide to merge with another party against the wish of the national party then whether this is a valid merger. The answer to this discrepancy is not available in the anti-defection law⁸.

The conundrum of Meghalaya Congress's merger with Trinamool Congress revolves around this point. In Meghalaya 12 of the 17 MLAs, s of Congress decided to merge with the TMC. Due to the merger of 12 MLAs of Congress with TMC, a party with a meagre presence in the state, became the principal opposition party. The party which was chosen to represent the people as an opposition party was relegated to the third position in an astonishing disregard

⁷ *Id*

⁸ MP JAIN, INDIAN CONSTITUTIONAL LAW 1802 (8th ed. 2018)

of the people's mandate. The merger was held valid by the Speaker on the grounds that it satisfied the conditions stated under Paragraph 4 of the tenth Schedule⁹. The fact of the question remains the same who decided the merger. It was neither the decision of the Congress party at the National level nor the decision of the Congress Legislative party leader in Meghalaya, rather 12 MLAs, decided to join another political party in flagrant disregard of the mandate vested in them by the people. It should have been the original party to consider the issue of merger.

CONSTITUTIONAL VALIDITY OF ANTI-DEFECTION LAW

The Hon'ble Supreme Court while explaining the reasoning behind Tenth Schedule had stated that the provisions of the Tenth Schedule acknowledge the role of political parties in the democratic process. The programme adopted by each political party gives recognition to the candidate of that party based on which the candidate is elected. The fundamental principle of anti-defection law is that if a member of a House, defects to another party, he should also resign from membership of the House. The member morally as well as according to democratic principles loses his right to continue in office as he no longer represents the programme based on which he was elected. He should again contest the elections from the party to which he has defected in order to regain the mandate.

In *Kihota Holothon v. Zachilhu*¹⁰ the Supreme Court in a 3:2 judgment upheld the Constitutional validity of the Anti-Defection law. At the same time, Paragraph 7 which restricted the scope of Judicial Review was declared invalid by the Hon'ble Supreme Court. In this case, the majority view held that the purpose of Schedule Tenth is to provide a “remedy for the evil of unprincipled and unethical political defections”. Paragraph 7 which puts restriction on the power of judicial review is violative of Articles 136, 226, and 227 of the Constitution and therefore under Article 368(2) ratification by half the state legislatures is required. Since Paragraph 7 has not been ratified it stands constitutionally invalid. Since Paragraph 7 contained provisions independent of other main provisions of the tenth Schedule, it can be severed from the rest of the schedule by applying the doctrine of severability.

⁹ DECCAN HERALD, [Meghalaya Speaker allows merger of 12 Congress MLAs with TMC | Deccan Herald](#) – (last visited Mar. 10, 2023)

¹⁰ *Kihota Holothon v Zachilhu*, AIR 1993 SC 412

The majority view in Sundaram's case also held that Paragraph 2 of the Tenth Schedule is constitutionally valid. The provisions given under Paragraph do not violate any rights or prerogative of a member under Articles 105 and 194 of the constitution. In the words of judges¹¹:

"The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections."

The Hon'ble Supreme Court rejected the argument that the whole 10th Schedule is violative of the Basic structure of the Constitution even after Paragraph 7 is severed from it. The court held that the Speaker/Chairman acts as a tribunal and his decision in a defection case would be subject to judicial review under Articles 136, 226, and 227. However judicial review will not cover any process preceding the decision of the Speaker/Chairman. The only exception for any interlocutory interference include cases of interlocutory disqualifications or suspensions which may have grave, immediate, and irreversible repercussions and consequences.

ROLE OF SPEAKER/CHAIRMAN

Paragraph 6 of the Tenth Schedule defines the role of the Speaker/Chairman in disqualification proceedings. The Speaker/Chairman is the final decision maker in case of disqualification proceedings under the Tenth schedule. If the Speaker/Chairman is himself subject to such disqualification the question should be referred to the adjudication of the member as the House elects in his place and his decision shall be final.

Under Paragraph 6 the proceedings should only be concluded after final adjudication by the Speaker. The court has the authority to restrain the legislator from discharging his duties as a member of the house during the pendency of the disqualification proceedings. The court can also issue orders to expedite the disqualification proceedings.

The speaker or chairman is elected by the majority party in the Legislature and usually belongs to the majority party. Therefore, it is common to raise questions about the adjudicating fairness of the Speaker/Chairman. A three-judge bench led by the then Chief Justice of India had held in Karnataka MLA's disqualification case¹² that Speaker who cannot

¹¹ Ms. Sundaram Finance Ltd. v Regional Transport Officer, AIR 1993 SC 436

¹² Shrimanth Balasaheb Patil v Hon'ble Speaker, Karnataka Legislative Assembly, (2020) 2 SCC 595

remain aloof from the interference of his party shall not be entitled to remain in his office. This judgment recommended the government to consider strengthening certain aspects of the Tenth Schedule. The fact that the Speaker belongs to a political party and is part of the House itself gives reasons why he shouldn't be the sole and final arbiter in disqualification proceedings. In political circles, it is often said that it is wrong to question the impartiality of Constitutional posts but when the decision has grave and permanent repercussions on the democracy and election process it is better to let someone take that decision who is absolutely fair and impartial or at least who doesn't belong to a political party.

In *Rajendra Singh Rana v Swami Prasad Maurya*¹³ the Speaker had decided that certain legislators were not subject to disqualification due to defection. The Hon'ble Supreme Court held the decision of the speaker as unconstitutional and set aside the order. The court did not even send the matter back to the speaker for reconsideration, instead, the issue was decided by the Supreme Court because the term of the Assembly was about to end and it was held that the concerned members stood disqualified.

The dissenting opinion in the *Kihota Hollohon* case held that the Speaker is not an independent authority as it depends upon the legislature for his tenure. The high ethical and moral benchmark which was set by the judgment, in this case, is rarely followed by the Speakers. "High traditions" and "high office of Speaker" have remained only phrases and more often than not are proved to be misconceptions.

The question of impartiality has taken center stage, particularly in scenarios where a new political party comes to power due to defections. The new party elects its speaker and when disqualification proceedings start under this Speaker obvious questions are raised about the fairness of the process. As it is said that "justice is impartiality and only strangers are impartial" therefore the adjudicating authority should be from outside the House.

SUBSEQUENT DEVELOPMENTS

In its 170th report on 'Reform of Electoral Laws' the Law Commission in 1999 recommended the omission of Paragraph 3 of the Tenth Schedule. The National Commission to Review the Working of the Constitution (NCRWC) also recommended the same. The NCRWC also recommended that a defector must be barred from occupying a public office as a Minister or

¹³ *Rajendra Singh Rana v Swami Prasad Maurya*, AIR 2007 SC 1305

any remunerative post for the period of the existing Legislature or till the next elections. All these recommendations were accepted by the Parliament. The Constitution (91st Amendment) Act removed Paragraph 3 of the Tenth Schedule. In Art. 164¹⁴ a new clause (1B) was added by way of amendment which disqualified defecting members from holding the post of Minister for the period recommended by NCRWC. The Ninety-first Amendment also added Article 361B¹⁵ that disqualified Defectors from occupying any influential post in the government.

As for an independent member who fought the election independently without joining any political party but after the election decides to join some party the conditions will be pretty much the same.

There is no special provision under the anti-defection law for the defection of independent members. The speaker will assess whether the member has compromised his independent member by considering the provisions given under anti-defection. The inquiry will be based on the relevant material and individual conduct of the member. It will also depend upon the facts of each case.

CONCLUSION

The objective of anti-defection law is to control the menace of defection, but at the same time, it doesn't restrict democratic realignment which is also an important feature of Parliamentary democracy and must be respected. The anti-defection law has been lauded as a bold step to clean the political process in India but in due course of time, certain defects have become apparent due to which the law has failed to achieve its true purpose. Paragraph 4 also needs changes to stop bulk defections and it needs to specify who decides on the merger. The role of the speaker in disqualification proceedings needs to be curtailed to bring transparency to the process. A separate commission headed by a retired Judge of Supreme Court judge must be established to deal with disqualification proceedings under the anti-defection law.

The general public also needs to play an important role in penalizing defecting members. Although barring defectors from contesting elections will be against the principles of natural justice but people need to stop supporting defectors. People who are not loyal to their own party cannot be trusted to serve the public truthfully. If people will hold their representatives

¹⁴INDIA CONST. art. 164, amended by The Constitution (Ninety-first Amendment) Act, 2003

¹⁵INDIA CONST. art. 361, amended by The Constitution (Ninety-first Amendment) Act, 2003

accountable, it will act as the most important deterrent in preventing defections. For the smooth functioning of democracy, the era of “Aya Ram, Gaya Ram needs to end”.



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