

DISCERNING THE WORKING OF THE CONSTITUTIONAL PROTECTION ON POLITICAL DEFECTIONS IN INDIA

ADITYA KUMAR

RESEARCH SCHOLAR, NATIONAL UNIVERSITY OF STUDY AND RESEARCH IN LAW, RANCHI, JHARKHAND

ABSTRACT

Political parties in India have seen a number of defections from its elected members since the inception of the democratic process in the country and in many cases these defection have resulted in change of governments too. But why has the situation reached this point since India has a law on Defection which is thirty-seven years old and has seen changes and revision. The paper evaluates the provisions of the Anti-defection law and observes that the law has had serious misgivings since its beginning and things have been made more difficult for it through improper application in different cases and these instances also suggest that the law was drafted in such a way that defections would favour the ruling party. The paper also provides for instances where the Anti-defection law and its provisions has been found to be lacking any teeth to prevent defection and cases where through the mechanism under the law it has been purposely made to fail in its objectives of combating anti-defection, provide stability of elected government and commitment to party allegiance. An attempt has also been made to study the trends around anti-defection law in other democracies and suggest methods for improvement in India.

Keywords: Anti-defection, democracy, disqualification, elected government, merger, para, party affiliation, political affiliation, Speaker, Stability, tenth Schedule.

I. INTRODUCTION

1.1 Political Defection

“Defection is essentially a question of political morality”¹ or “When an elected representative joins another party without resigning from his present party for benefits”. Also Defection means change of political affiliation by legislator by crossing the floor. The phenomenon of defection is inevitable concomitant of the party system and rampant in multi-party system like in India. Defection has been known across the world through different nomenclatures such as “carpet-crossing”, “floor-crossing”, “party-hopping,” “dispute” and “waka [canoe] jumping”. Floor crossing has its origin in the British House of Commons. History of defection in India can be traced back to the days of Montford Reforms when Shri ShyamLal Nehru, a Member of Central Legislature changed his allegiance from Congress Party to British side². The practice of elected members changing political sides post election is often referred to as Horse-Trading.

India is a multi-party democracy where the executive power is vested with the President of India who acts and aids on the advice of the Prime minister. So even though the president is the De-jure head of the Union of India it's the Prime minister who actually is the real head of Government. The prime minister of India is not directly elected but appointed by the President³ who commands majority in the House of the people because our constitutional makers visualised a cabinet form of government or a responsible government which would be collectively responsible to the Lok sabha⁴. This particular provision of responsible government has led to the problem of defections in our democracy. As already mentioned the Prime minister at the centre and chief minister at the state is appointed by President and governor respectively and this appointment is based on who enjoys majority in Lok sabha at the central level and majority at the state level. Now there are many instances where no party in the elected house has the majority and in that case the question is who becomes the leader and it's that moment where defection starts within and outside parties, ideologies, pre poll alliances, promises and accusation etc and everything else is forgotten and everybody is motivated by one common ideology which is coming to power.

II. LAW ON POLITICAL DEFECTION IN INDIA

2.1 Historical evolution of Anti-Defection law

It was in 1967 when the Indian political scene saw a large number of political defections across states and a number of State governments were brought down across the country and a number of MP's raised the issue in the parliament⁵. This issue came to the forefront even more after the general elections of various state assemblies held in 1967 which saw a number changes in India's political and parliamentary scene as for the first time a number of coalition governments were formed across states

¹PARAS DIWAN, ABROGATION OF FORTY-SECOND AMENDMENT: DOES OUR CONSTITUTION NEED A SECOND LOOK (Sterling Publishers Pvt. Ltd, New Delhi, 1978).

² Ministry of Parliamentary Affairs 1985, R & C Brochure on Various Aspects of Defections.

³ Constitution of India 1950, Article 75.

⁴ Constitution of India 1950, Article 75(3).

⁵ Nalini Sharma, Explained: The anti-defection law and why it still remains a toothless tiger, INDIA TODAY, (accessed on 21 July 2023, 9.34 pm), <https://www.indiatoday.in/law/story/explained-anti-defection-law-toothless-tiger-1965067-2022-06-21>.

which subsequently saw a series of defection from members hankering for ministries and plum political posts¹. Out of the sixteen states that went to poll in 1967 the Indian National Congress which was a dominant force at that time having the halo of being the party which led India's Independence movement could not get majority in eight states and in states where it did get a majority its numbers will severely depleted². This fragmentation of the polity gave the opposition its first sniff of getting power in places where the Congress could not form government on its own and the opposition ignored their ideological differences and joined together to form governments through what was at that time called "minimum common programme". But unfortunately many of these governments formed could run barely for a few months and the political defection phenomenon was responsible for the collapse of seventeen governments in a period of few months. Nearly 3,500 members of assemblies in states and the Union Territories that were elected in 1967, 550 changed their political affiliations indulging in the politics of defection including some members who were seen to defect more than once from one party to another and then back to the original party and in effect almost 25 per cent of the total membership of state assemblies were involved³. Also why 1967 marks a tectonic shift in India's political defection game is because between 1957-1967 there were about 562 defections whereas during the years post 1967 India saw 438 political defections.

A committee was formed under the chairmanship of YB Chavan in 1969⁴ to examine the need for an anti-defection law found that 116 out of 210 defecting legislators in various states in India were given ministerial positions in the new government. This was a clear indication that defections were fuelled by monetary gains or through luring of political office and only way to curb and deter the defectors would be barring them from political office immediately and also barring them from standing in future elections for a prescribed time period⁵. It almost took 18 years for parliament to actually legislate on the subject but finally India got a law on disqualifying Member of parliaments and state legislatures for political defection. In 1985 to curb the evil of political defection the then government at the centre carried out the 52nd amendment act in the constitution which set out to introduce the 10th Schedule in the Constitution along with clause 2 in Article 102 and 191 of the Indian constitution⁶ which set out a clear mechanism of how members would be disqualified on account of their political defection. Though, unlike the disputes that arises under Article 102(1) which is adjudicated by the Election commission the power of adjudication for political defection under 102(2) was given to speaker and chairman respectively. According to statement of object and reasons of the amendment the evil of political defections has been a matter of national concern and if it is not combated, it will undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given by the President in his address to Parliament that the Government intended to introduce anti-defection bill in the current session of Parliament which would outlaw defection and fulfil the above assurance given by the President⁷.

What the new amendment intended to do was to act as a deterrent against members who were habitual defectors or who intended to defect in order to protect commitment towards political parties on whose symbols members were elected and also enhance stability of state and central governments. This measure was based on the premise that if a member is elected on a party ticket or member elected on a party ticket votes against or abstains from voting against the party whip or he or she voluntarily relinquishes from the membership of the party to which he has been elected or is expelled from that party or if he or she is a nominated member joins a political party within 6 months of his nomination tries to join another political party shall be disqualified from his or her membership of the house to which he is elected. The amendment act also made provisions for conditions of merger of political parties and legislative parties inside the legislatures. The question as to whether a member of Parliament or State Legislature has become subject to disqualification will be determined by the presiding officer/Speaker of the House and where the question is with reference to the Speaker/presiding officer himself, it will be decided by a member of the House elected by the House in that behalf.

2.2 Provisions as to disqualification on ground of defection

If we get into the details of the provision of the 10th schedule of the Indian constitution it talks of disqualification on the ground of defection in four different ways:

- a. **An elected member voluntarily gives up membership of political party on whose ticket he is elected-** It's a pretty straight forward provision with little left to any doubt. You fight an election on the ticket of party 'A' you cannot then midway quit the membership of the party and if you do then this would disqualify you from your membership of the house⁸.
- b. **If the elected member votes or abstains from voting in the House contrary to any direction issued by the political party to which he belongs-** Under this provision the member of the house elected on a party ticket has to vote on party lines and cannot vote on his own whims and fancy and if does the party has the right to take away his membership. The political parties have the right to issue whips before any voting takes place and all members are bound by the whip but if a member violates that whip it gives the party to which the member belongs the right to disqualify the member who disobeys the whip from the membership of the house but the party also under this provision has the right to condone the violation of the whip within fifteen days of the vote or abstention and if the party does not condone then the member will lose the membership automatically⁹.

¹Subhash C. Kashyap, *The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India*, 10(3) Asian Survey, 195 (1970).

² *Ibid*, pg 195.

³ *Ibid*, pg 196.

⁴ Y.B Chavan, Report of Committee on Defections (Ministry of Home Affairs 1969).

⁵ R. KOTHANDARAMAN, IDEAS FOR AN ALTERNATIVE ANTI-DEFECTION LAW (1st edn Parliamentary Research Cell, Government of Nagaland 2006).

⁶ Constitution of India 1950, Article 102(2).

⁷ 52nd Amendment Bill 1985, Statement of Objects and Reasons.

⁸ Constitution of India 1950, Schedule 10 para 2(1)(a).

⁹ Constitution of India 1950, Schedule 10 para 2(1)(b).

- c. **Disqualified for being a member of the House if he joins any political party after such election-** The elected member is also barred from joining any other political party besides the party on whose ticket he has been elected¹.
- d. **Disqualification of a nominated member-** 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 conditions under article 99 or article 188².

There are exemptions given under the anti-defection law for members who defect post election.

1. The member will not be disqualified if his original party on whose ticket he has been elected on merges into a new political party and they make a separate political party and the member claims to be a party to the merger and in this case he along with his other members will be recognised as a separate political party belonging to the membership of that particular party and they would continue to be members³. Also the member has the option to not accept the merger and opt to function as a separate group⁴.
2. But this merger with a new political outfit by the political party members of the political party will only be recognised if and only if the merger is done by not less than two-thirds of the members of the legislature party concerned to have agreed to such merger⁵.
3. There is also an exemption for the speaker or deputy speaker of the house. Both these people have the option of voluntary giving up membership of the political party to which they belonged immediately prior to the election by reason of his election to such office and this exemption will continue so long as he continues to hold such office thereafter rejoin that political party or become a member of another political party⁶.

2.3 Decision on questions as to disqualification on ground of defection

All question arising on whether a member of a House has become subject to disqualification under the 10th Schedule shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final and where the question is with reference to the Speaker/presiding officer himself, it will be decided by a member of the House elected by the House in that behalf. No court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule⁷.

Consequent to its power under Para 8 of the schedule The Lok Sabha framed the (Disqualification on Ground of Defection) Rules 1985 which gave a detailed framework of how disqualification of members are to be carried out. According to the rules all disqualification petitions will be addressed to the Secretary General of Lok Sabha along with a brief statement of the material facts against the alleged Member of Parliament against whom the petition has been moved. The speaker will subsequently seek a reply from the member within seven days and then give his judgement which would be published in the official gazette and forwarded to the Election Commission of India and the Central Government. Likewise, the states Governments have also framed similar rules and regulations for the application of the disqualification against members of the legislator.

2.4 Anti-defection laws: The Pitfalls

1. No debate on the act

The 52nd amendment act, 1985 was carried out without any discussion on its specific provision nor was any attempt made by the Rajiv Gandhi Government to seek any sought of consensus between political parties in favour of the act. It was enacted hurriedly to benefit the ruling party at that time⁸.

2. It compromises the role of a legislator

The purpose of the anti-defection law was to curb political defections and ensure stability of government and commitment to the party system of governance but what the anti-defection law has done is that it has restricted legislators from effectively carrying out their functions in democracy. Any legislator holding an office in a vibrant democracy should be able to exercise its independent judgement on policies of the government and exercise his free will on the floor of the parliament. The choice of the member should be based on public interest, constituency interests and not on party affiliation. The anti-defection law strips the law makers from this fundamental freedom of choice by mandating them to vote along the party lines on every Bill or policy decision. Even if the member has a contrary opinion that differs from the party leadership it is seen as anti-party and his/her political party has the right to disqualify the member from the house.

3. Anti-defection law undermines legislator's duty to hold the executive accountable

Under our parliamentary democracy the union government is accountable to the lok sabha. If the government loses the confidence of the lok sabha the government falls and it's the duty of the lok sabha to hold the elected government accountable through its members. The members of the house have the right to question hour, censure motion, adjournment motion, discussion followed by voting etc and all these rights are equally enjoyed by members of the treasury benches and the opposition members. But the anti-defection law is a big road block on the members exercising these rights as it acts as a deterrent against demanding all these rights in the house as it would embarrass there party. It's highly unlikely that members of the political party that range from different parts of the country would have the same opinion on matters of national policy and laws. There is a legitimate argument to some extent which is made that if everybody votes on his whims and fancy then the political party would not be able to function and since they are elected on a party ticket they should tow the party line. This

¹ Constitution of India 1950, Schedule 10 para 2(2).

² Constitution of India 1950, Schedule 10 para 2(3).

³ Constitution of India 1950, Schedule 10 para 4(1)(a).

⁴ Constitution of India 1950, Schedule 10 para 4(1)(b).

⁵ Constitution of India 1950, Schedule 10 para 4(2).

⁶ Constitution of India 1950, Schedule 10 para 5.

⁷ Constitution of India 1950, Schedule 10 para 6

⁸ N. S. Gehlot, *The Anti-Defection Act, 1985 And The Role Of The Speaker*, 52(3) THE INDIAN JOURNAL OF POLITICAL SCIENCE. 327, 340, (1991).

argument does not cut any ice for a simple reason that we live in a democracy and people should have an opinion which is contrary to the opinion of others and also from 1947 to 1985 India saw two of the most longest serving prime ministers in history providing a stable government so to say that this differing opinion would break down the party system does not make any sense.

4. Anti defection law leads to concentration of power

As the whip is issued by people who are in-charge of the political party the decision making at the legislative level is made by a handful of people or in some case by only one person which goes against the principles of democracy which abhors concentration of power. It also undermines the institution of parliament as the highest deliberative body in the country as party affiliations dictates opinions. This further leads to reduction in deliberation with opposition if the government has an overwhelming majority as it can easily bulldoze its opinion on the entire house.

5. Anti-defection law undermines citizen's ability to hold his elected representative accountable

The members of parliament and legislature are elected to represent the members in their constituency but if you go by the provision of the anti-defection law the members are only bound by what the party whip says. If the constituency that the member represents is against any government policy people cannot force their representative to vote against such a policy as the member has a very easy excuse called the anti-defection law. The accountability of the people's representatives has shifted from the people to the party in world's largest democracy.

2.5 How has the Anti-defection law of India come to be nothing?

Why is India's anti-defection law has been a complete and utter failure? To say it in as many words as possible is because the anti-defection law has failed to achieve its objective that it set out to achieve in 1985. According to the Statement of Objects and Reasons of the Bill in 1985 it was introduced to combat anti-defection, provide stability of elected government and commitment to party allegiance. Lets through examples in recent years see whether any of these well intended purpose have been achieved over the years. According to the report by National Election Watch and Association for Democratic Reforms (ADR)¹ around 222 elected members of the Indian National Congress which is 20 per cent of its elected members left the party to join another party during the general elections to national and state assemblies held between 2014-2021. Also nearly 153 (14per cent) candidates left Bahujan Samaj Party to join a different party to contest elections during this period. Between 2014-2021, 253 (22 per cent) out of the total of 1133 recontesting candidates who switched political parties joined the BJP followed by 115 (10 per cent) candidates who joined the INC and 65 (6per cent) candidates who joined BSP.

Highest number of MPs/MLAs, 177(35per cent), left The Congress to join another party during the elections held between 2014-2021. While 33 (7per cent) MPs/MLAs left BJP to join a different party to contest elections during this period. Between 2014-2021, 173 (35per cent) out of 500 recontesting MPs/MLAs who switched political parties joined the BJP followed by 61 (12per cent) MPs/MLAs who joined INC and 31(6per cent) MPs/MLAs who joined AITC. The report also notes that governments in Madhya Pradesh, Manipur, Goa, Arunachal Pradesh and Karnataka fell during these five years due to the defection of MLAs.

Between 2016 and 2020, a total of 12 Lok Sabha MPs also defected to recontest the polls. 16 Rajya Sabha members defected between the period 2016-2020. The data though showed that none of the 12 Lok Sabha MPs who defected to contest the polls won but all who defected in the Rajya Sabha were re-elected. ADR also said that of the 357 MLAs who defected to contest fresh assembly elections, 170 (48%) were re-elected. In bye-elections to assemblies, the success rate of defectors was much higher, with 39 (81%) of the 48 defectors getting re-elected. On the whole, 52% of the 433 MLAs and MPs who defected were able to get re-elected.

III. RECENT POLITICAL DEFECTIONS IN INDIA

3.1 Cases In Point

1. Confidence Motion in Lok Sabha (2008)

In the 2008 Confidence Motion in the Parliament 21 MPs defied the whips issued by their party while voting on the confidence motion. These MP's belonged to different political outfits namely the BJP, SP, INC, BJD, JD(U). This confidence motion also saw allegations by the opposition against the ruling government for offering of cash for vote in the Confidence motion².

2. Telangana and Andhra Pradesh(2013-2018)

Nine MLA's voted along with the opposition in 2016 for voting held on the appropriation bill, 20 Indian National Congress MLA's defected in Andhra Pradesh by passing a no-confidence motion in 2013, 23 YSR Congress Party MLAs defected to the TDP between 2015-2018 in Andhra. Further, four of these legislators were appointed as Ministers in the TDP government. 26 MLAs in Telangana defected from opposition parties to Telangana Rashtriya Samiti from 2014-18. The speaker did not take any action against these defectors and on the contrary 12 of the defectors were made Ministers³.

¹ADR, ANALYSIS OF RE-CONTESTING MPS AND MLAS WHO CHANGED PARTIES-PAN-INDIA SINCE 2016 (Combined Report National Election Watch 2021).

² IANS, *Timeline of cash-for-vote scam case*, BUSINESS STANDARD (accessed on 22 July 2023, 9.45 pm) https://www.business-standard.com/article/news-ians/timeline-of-cash-for-vote-scam-case-113112201174_1.html Accessed 29 August 2022

³ ROSHNI SINHA AND PRACHI KAUR, 'THE ANTI-DEFECTION LAW: INTENT AND IMPACT' (Research Report PRS Legislative Research 2019)

3. Karnataka in 2008 and 2019

In 2008 20 MLAs defected from JD(S) and the Congress post election. They resigned from the respective parties on whose ticket they were elected and re-contested the election¹. This was done because the BJP which was the single largest party did not have the requisite numbers to form the government and therefore its broke MLA's from the opposition so that they would have the requisite numbers. The same happened a decade later in 2019 when 13 Congress MLAs in Karnataka along with three JD(s) and one KPJP MLArebelled and joined the BJP in the hope of becoming a part of the ruling BJP government, but were later disqualified by the speaker . Supreme Court upheld their disqualification but the rebels were were allowed to contest the bypolls.

4. Arunachal Pradesh(2016)

The Congress in 2016 lost its government in Arunachal Pradesh when its entire Legislature Party except Chief Minister Nabam Tuki defected and joined the People's Party of Arunachal (PPA) which later became part of the BJP-led North East Democratic Alliance². The Arunachal assemble has 60 members and the Congress won 44 seats out of 60 which is more than 2/3rd majority and yet it lost the government and its entire legislative party defected and merged in the PPA. What can be a bigger proof that the anti-defection law is no deterrent to any political defection as aparty having 2/3rd majority in the legislature could not save its government.

5. Goa(2017)

Goa alone has seen 13 chief ministers in 10 years between 1990-2000 when the anti-defection law was in force³. In the stae election of 2017 the Congress had emerged as the single largest legislative unit with 17 seats but by the time 2022 came 15 of its MLAs had quit to join the (BJP) in batches.

6. Manipur (2017)

In the state assembly election of 2017 Congress won 28 seats and the BJP had won 21. However, the BJP and its allies in the Naga People's Front (NGF) and National People's Party (NPP) were able get the support of almost 30 MLA's. To reach the magic mark of 31 in the 60-member assembly, BJP got a single Congress MLA to support them as they staked their claim to form the government but that one Congress MLA never resigned from Congress and later even became a minister⁴.

7. Maharashtra 2019 and 2020

The BJP-Shiv Sena alliance in 2019 state assembly election got majority but due to disputes over who gets to be Chief Minister the Shiv Sena broke the alliance and formed a new coalition with the opposition and got its Chief Minster appointed. In 2022 more than 2/3rd of the Sena MLA's revolted and broke the party declaring itself the new Shiv Sena and walked out of the government and formed the government with the BJP. All this happened in the state where a BJP-SS alliance was a pre-poll alliance and declared CM face who could not become CM and party that has only 40 seats in a legislature of 288 gets its own CM and the party with the largest number of MLA's having to accept only a deputy CM post.

8. Madhya Pradesh 2020

In the 2018 election to the legislative assembly neither the BJP nor the Congress got any majority but the seat difference between both parties was very less. Since the Congress emerged as the single largest party it formed the government with support of independents but in 2020 22 elected members of the Congress including six ministers resigned from their membership of the assembly which brought down the majority mark in the assembly which gave the BJP the requisite numbers to form the government. By-polls were conducted for 28 vacated seats and BJP won 19 out of it and formed the government with absolute majority. MP saw 32 defections in the 230-seated in a period of two years and the middle of the covid pandemic⁵.

3.2 Political Defections- The trends in India and around the world

3.2.1 How do other democracies deal with political defection?

If you read literature on subjects related to anti-defection practices in other countries you will find that in some countries this is treated as a serious issue as this can be seen as a measure that threatens stability of government but there are countries where this is seen as a very serious issue⁶. In Malhotra's research that reviews and analyses the established rules, laws, practices, procedures and conventions on matters of defection in forty Commonwealth countries along with laws in twenty five other nations shows that laws in twenty three of the Commonwealth countries (58%) penalize deputies with parliamentary expulsion for changing parties and that 7 of the 23 also prescribed expulsion simply for voting against their parties. Only 7 of the 25 non-Commonwealth nations (28%) had anti-defection laws and none cost members their seats for voting against their parties⁷. According to Janda⁸ laws on defection or whatever they are called in respective countries are present in 33 percent of nations that can be termed as semi-democracies while only 9 percent of non-democratic nations ban defections. Very surprising

¹ Varun Ramesh Balan, *Aaya Ram, Gaya Ram: A contemporary history of defections to the BJP*, THE WEEK, (accessed on 12 March 2023, 5.06 pm), <https://www.theweek.in/news/india/2020/03/12/aaya-ram-gaya-ram-a-contemporary-history-of-defections-to-the-bjp.html>.

² Samudra Gupta Kashyap, *Congress loses Arunachal two months after it got it, 43 of 44 MLAs defect*, THE INDIAN EXPRESS (accessed on 26 June 2023, 6.07 pm), <https://indianexpress.com/article/india/india-news-india/cong-loses-arunachal-2-months-after-it-got-it-43-of-44-mlas-defect-3034803>.

³ Mayabhushan Nagvenkar, *Does India's Anti-Defection Law Work In The Era Of Uneasy Coalitions?* *Outlook*, (accessed on 10 July, 2023, 7.08 pm), <https://www.outlookindia.com/national/the-failure-of-india-anti-defection-laws-and-emergence-of-uneasy-coalitions-news-208175>.

⁴ Special Correspondent, *Manipur political crisis Nine MLAs, including three from BJP pull out of Biren Singh government*, THE HINDU (accessed on 17 June 2023, 6.07 pm), <https://www.thehindu.com/news/national/other-states/manipur-political-crisis-several-mlas-including-ones-from-bjp-pull-out-of-biren-singh-government/article31854878.ecc>.

⁵ Kakvi, kashiv, *MP: Three Sitting MLAs Join BJP, 32nd Defection Since March 2020*, *NEWS CLICK* (accessed on 14th June 2023, 6.08 pm), <https://www.newsclick.in/MP-three-sitting-MLA-join-BJP-36-defection-since-march-2020>> accessed 22 August 2022

⁶ G.C MALHOTRA, *ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH* (11th edn, Metropolitan Book Co. Pvt. Ltd 2006)

⁷ *Ibid*, pg 76-110.

⁸ KENNETH JANDA, *LAWS AGAINST PARTY SWITCHING, DEFECTING, OR FLOOR-CROSSING IN NATIONAL PARLIAMENTS* (World Congress of the International Political Science Association, Santiago, Chile July 2009)

absences from these lists are established democracies in Western Europe which suggests that laws that ban party defections are more common in nascent democracies than in established democracies.

Anti-defection law is not only practiced in India but it is prevalent in various other countries like Bangladesh, South Africa, etc. Under the Bangladesh Constitution a member will have to vacate his seat if he resigns from or votes against the directions of the party on whose ticket he or she has been elected. The dispute is referred by the Speaker to the Election Commission¹. The Singapore Constitution says a member must vacate his seat if he resigns, or is expelled from his party². Article 48 states that Parliament decides on any question relating to the disqualification of a member. In South Africa a member loses membership of the Parliament if he ceases to be a member of the party which nominates him or her³. Currently out of the forty countries having an anti-defection law, only six countries have a law that forces legislators to vote according to party whip. The remaining countries only disqualify legislators if they resign from their party or are expelled from it. Countries that disqualify members for defying the party whip include India, Pakistan, Bangladesh, Guyana, Sierra Leone and Zimbabwe⁴.

3.2.2 Why do people defect from parties?

The other aspect of defection or what may be termed as the most important aspect of political defection is why a member switches his/her party. The most obvious explanation is personal incentive in case where siding with his own party does not give him or her the same return as standing with the opposition would give. This personal incentive can be described in various ways because when we talk about incentives it's not always financial, there is also constituency related pressure like if in that particular constituency people are just more inclined towards the opposition party, caste or class pressure forcing him to change parties or even bad policy initiatives backed by his party leadership forcing the legislator to change his party affiliations. According to Heller and Mershon⁵ four factors guide legislator's motives in switching parties which is "some function of his or her ideal policy, his or her party's policy position, his or her party's ability to influence outcomes, and his or her contribution to that influence". Subramniun⁶ came out with a concept of "legislator's dilemma" explaining political defection which is 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 in return of their loyalty.

3.2.3 Why Politicians Legislate Against Party Defections?

One could argue that for a working of a political party what is necessary is that there is efficiency and discipline in the workers of the party. The question of discipline is dealt with internal rules created by parties in the party but these rules only go so far as expulsion and in many cases are not deterrent enough to stop indiscipline and therefore politicians get together to use the machinery of the state and one of its wings which is the legislature to deny that particular member from holding his post in the legislature. Also besides disciplining members it also helps in centralising power in the party structure and this could work wonders for parties that is structurally weak and is far more decentralised.

3.2.4 Do anti-defection laws discourage party defections?

Subramanian⁷ study in countries with and without laws on anti-defection and used several methods to assess the effect of those laws on party fragmentation found that there is no evidence that anti-defection laws "consistently increase or decrease legislative party fragmentation".

3.3 Political Defection in India: Attempts at Reform

There have been many reports and committees which have recommended several measures that need to be carried out to fix political defections. These committees include;

- (i) Report of Committee on Defections under the Chairmanship of Shri Y. B. Chavan⁸
- (ii) Report of the Committee on Electoral Reforms⁹
- (iii) Halim Committee On Anti-Defection Law (1998)
- (iv) 170th Report on 'Reform of Electoral Laws' of the Law Commission (1999)¹⁰
- (v) Report of the National Commission to Review the Working of the Constitution (NCRWC)¹¹
- (vi) Law commission of India Report No.255 Electoral Reforms March 2015¹²
- (vii) Department-Related Parliamentary Standing Committee On Home Affairs¹³
- (viii) The Supreme Court Judgement in Kihota Hollohon vs. Zachilhu and others¹⁴

¹ Bangladesh Constitution 1972, Article 70.

² Singapore Constitution 1965, Article 46

³ South Africa Constitution 1997, Article 47

⁴ Csaba Nikolenyi, 'Keeping Parties Together? The Evolution of Israel's Anti-Defection Law?', 2018 47(2) Polish Political Science Yearbook

⁵ Heller, William B. and Carol Mershon, 'Dealing in Discipline: Party Switching and Legislative Voting in the Italian Chamber of Deputies, 1988- 2000' 2008 52 American Journal of Political Science

⁶Subramanian, Rajen, "Developing and Testing a Theory of Legislative Party Fragmentation" (PhD Dissertation, Wisconsin-Madison University 2008.

⁷ Ibid, pg-103.

⁸ Y.B. CHAVAN, REPORT OF COMMITTEE ON DEFECTION (Parliamentary Committee Report Ministry of Home Affairs 1969)

⁹ DINESH GOSWAMI, REPORT OF THE COMMITTEE ON ELECTORAL REFORMS (Committee Report Legislative Department Ministry of Law and Justice 1990)

¹⁰ LAW COMMISSION OF INDIA, REFORM OF ELECTORAL LAWS (Law Com No. 170 of 1999).

¹¹ JUSTICE MANEPALLI NARAYANA RAO VENKATACHALIAH, 'THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION (Parliamentary Report 2000).

¹² LAW COMMISSION OF INDIA, REPORT ON ELECTORAL REFORMS (Law Com No. 255 of 2015).

¹³ Standing Committee On Home Affairs, The Constitution (Ninety-Seventh Amendment) Bill, 2003, Standing Com No. 104 of 2003)

¹⁴ Kihota Hollohon vs. Zachilhu and others, AIR 1993 SC 415.

All the above reports and Judgments have given some very important recommendations to fix the problem of defections but unfortunately the governments irrespective of party lines have failed to implement these recommendations in letter and spirit and that's why the number of defections continue to soar over the years and there is nothing to suggest that things are going to improve in the near future.

IV. PROPOSITION FOR IMPROVEMENT

Reading the above reports gives you some very common issue that plague the anti-defection law in India and if fixed could really do wonders in fixing the problem of political defection. The government can in future focus on the following issues to fix political defection once and for all.

4.1 Removal of exception to disqualification on defection (Para 4)

The National Commission to Review the Working of the Constitution (NCRWC), Department-Related Parliamentary Standing Committee on Home Affairs and the 2015 Law commission unanimously recommended in their report the provisions of the 10th Schedule of the Constitution should be amended to provide that all persons defecting whether individually or in groups from the party or the alliance of parties, on whose ticket they had been elected, must resign from their parliamentary or assembly seats and must contest fresh elections. In other words what this means is the protection of 2/3rd merger exceptions needs to be removed and people defecting should lose their membership in all circumstances. The defectors should be debarred from holding any cabinet level post or any other remunerative political post for the duration of the remaining term of the existing legislature or until the next general elections to the state or centre. Also the vote cast by a defector to topple a government should be treated as invalid.

The 170th Report of the Law Commission made the following observation about the Tenth Schedule:

“The experience of the country with the Tenth Schedule since its introduction has not been happy. It has led to innumerable abuses and undesirable practices. While the idea of disqualifications on the basis of defection was a right one, the provision relating to ‘split’ has been abused beyond recall”.

The report further had recommended deletion of Paragraph 4 which provides for exception to defection as well as Paragraph 3¹ in the ‘interest of maintenance of proper political standards in the House and minimise the complications arising on that account.’² However, the 91st Amendment Act of 2003 did not delete para 4 on merger and it continues as an exception to the law on disqualification upon defection.

4.2 Evaluation of the role of the Speaker/Chairman

The second aspect of the problem with law and the ambiguity that was talked about earlier was the role and authority of the speaker. The anti-defection law as mentioned in the judgments above faces a serious issue of assigning total authority to the speaker to decide questions relating to defection. All political parties have used the speaker as the weapon to delay, expedite matters relating to disqualification petitions. As per convention MLA or MP, after being elected as speaker ceases to be partisan but this is hardly seen in practice in practice because at the end of the term of the legislature the speaker has to go back to the party on whose ticket he got elected for re-election so he cannot be expected to be non-partisan. All the ruling parties wants the speaker from their own party who they can trust and especially if the ruling party does not have an absolute majority in the legislature to sit over the disqualification petition or expedite the petition depending what is favourable to the ruling party at that time. Nobody can question the speaker legally for being completely partial. Even the judiciary has little elbow room in matters of decisions of the speaker, because the law does not allow it to interfere with the case prior to the making of the decision by the speaker or based on violation of constitutional mandate, mala fides noncompliance with rules of natural justice and perversity³.

The Election Commission has also proposed that like in cases of office of profit and other cases of post-election disqualification of sitting MPs, MLAs, and MLAs under the Constitution⁴, disqualification on the ground of defection should also be made by the President and Governors on recommendations of the Election commission of India. The Election Commission recommended that it would give its opinion to the President/Governor in the matters of post-election disqualification after giving the member a fair and reasonable right to defend him or her. The Election Commission of India premised such a recommendation thinking that decisions made by the President/Governor on the opinion of the Election Commission would be more credible and acceptable among the people⁵. The same recommendation has been endorsed by Report of the National Commission to Review the Working of the Constitution (NCRWC) and the Law commission of India Report No.255 on Electoral Reforms which was published in March 2015.

Presently the speaker is the sole arbiter of the decisions of disqualification of members of parliament and assemblies. Also the decision of the speaker on such disqualifications attracts very limited judicial review. It's important here to discuss what the judiciary sees as the extent of judicial review in matters of decision of speaker or chairman against a decision given by them in disqualification petition because para 7 of the 10th Schedule bars jurisdiction of courts in respect of any matter connected with the disqualification of a member of the House under the tenth Schedule. In *Kihoto Hollohan v. Zachillhu* the court said that:

¹ Ninety-first Amendment Act, 2003, s. 5, omitted Para 3 Schedule 10

² LAW COMMISSION OF INDIA, REFORM OF ELECTORAL LAWS (Law Com No. 170 of 1999) chapter 4

³ *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 415, Para 41.

⁴ Constitution of India 1950, Article 103, 192.

⁵ Election Commission of India, ‘Proposed Electoral Reforms’ (Elec Com D.O. No. 3/ER/2004).

“in view of the limited scope of judicial review that is available on account of the finality clause in para six of the tenth Schedule and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power of the Speaker or Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker or Chairman. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will have to be made in respect of cases where disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence”¹.

What this meant was that the courts have judicial review on matters of decision made by the speaker but only after the speaker takes any decision on the matter and not prior to it. The decision is based on the principle of separation of power between legislature and judiciary as interim relief given by courts without any decision by the speaker would tantamount to judicial overreach. The minority judgement in *Kihoto Hollohan* held that the Speaker ability to hold office is dependent on the support of the majority party in the lower House of the parliament and therefore a speaker cannot qualify as an independent adjudicating authority. The decision of the speaker over the years been seen as partisan and therefore he cannot be a sole arbitrator in dispute between the ruling party and the opposition on the question of disqualification of members. In *D. Sudhakar v. DN Jeevaraju and Ors*², the order of the Speaker was held to be vitiated by mala fides because the disqualification petition was decided by him in haste and revealed a partisan attitude in his approach. In *Mayawati v. Markandeya Chand and Ors*³ the Speaker’s decision was questioned because the Speaker delayed the proceedings of disqualification unduly for no proper reasons. The Supreme Court in *Balchandra L. Jarkiholi and Ors. v. BS Yeddyurappa*⁴ also affirmed that the Speaker functions in a quasi-judicial capacity, which makes orders passed by him subject to judicial review. Therefore the court has recognised that there is limited judicial review in decisions of speaker but not until the speaker takes any decision except in cases which smack of grave, immediate and irreversible repercussions and consequences if not intervened..

The other aspect on power of the speaker regarding disqualification is does the speaker get an unlimited time to decide on the question of disqualification? The Supreme Court of India in some of the decisions while upholding the *Kihoto judgment* laid down in two cases time limits for the speaker to decide on the question of disqualification. In *Haryana Vidhan Sabha v. Kuldeep Bishnoi*⁵ the Supreme Court directed the Speaker to dispose of the pending petitions within a specific time-frame of four months and in *Orissa Legislative Assembly v. Utkal Keshari Parida*⁶ where again it set out timeline for the Speaker to decide the petitions. But it seems there is no uniformity on the decisions on the matter whether the speaker is time bound to make decisions relating to disqualifications as these judgments have been case specific and there are many High court decisions and observations on the matter.

Further the Supreme Court in *Shrimanth Balasaheb Patil vs Honble Speaker Karnataka*⁷ said that “When the express provisions of the Constitution provide for a specific eventuality, it is not appropriate to read an “inherent” power to confer additional penal consequences. To do so would be against the express provisions of the Constitution”. Therefore it’s very difficult to assume that the speaker can be directed to decide a disqualification petition in a particular time limit as nowhere in the tenth Schedule is there any provision that mentions about time limit of deciding on disqualification petition and the language of para 6 which limits judicial review on account of it being in the form of a finality clause and the status of the Speaker in the house and the amount of adjudicatory power that he holds in respect of what happens in the house it’s difficult to accept that there is anything inherent in the provisions that would limit the power of the speaker to decide the matter in a specific time-frame. Also the former Chief Justice of India NV Ramana recently made an observation while putting on hold a petition to frame guidelines for fixing time limits within which the Speakers of Parliament and state Assemblies should decide defection petitions against MLAs and said that “It is the prerogative of the House... We cannot fix time limits.”

V. CONCLUSION

As is often said that democracy is not the best form of governance but the best available. In a democracy we get to elect our representatives who indirectly elect our government. A democracy gives freedom of choice, expression; equality etc but with democracy also comes corrupt practices like political defections for personal incentive. The Constitution’s Tenth Schedule, inserted in 1985 and amended in 2003, hasn’t really fixed what it intended to do. On the contrary it has made the problem more enlarged. Coming to the other aspect of the objective of having the 10th schedule and whether it has lived up to those. The article discussed the example of states from north to south to west coast of India and looking at all these examples mentioned above can anyone in their right mind claim that the anti-defection law has succeeded in combating anti-defection, provide stability of elected government and commitment to party allegiance. The legislation has failed in achieving all of its objective and is essential that changes are carried out at the earliest. The sad part in fixing problem of defection is not that there are no solutions to what needs to be done but lack of political will to carry out these solutions.

Many arguments are made for and against the law, while some want the laws to be tougher while others say the law kills intra-party debate and hence needs to go. Many MPs complain that due to the provisions of the 10th Schedule they cannot have any principled dissent from the party line because of the disqualification threat. The point being put across is that there are both sides of the argument on whether we need a law on defection or not but since we already have a law on defection for 37 years what’s more important is to understand why the law hasn’t worked. The solution is to make the law simpler or unambiguous than what it is in my opinion. It’s the ambiguity in the law and the discretion in the law is what is making the problem pressing

¹ *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 415, para 42.

² *D. Sudhakar v. DN Jeevaraju and Ors*, 2012 (1) SCALE 704.

³ *Mayawati v. Markandeya Chand and Ors*, AIR 1998 SC 3340.

⁴ *Balchandra L. Jarkiholi and Ors. v. BS Yeddyurappa*, (2011) 7 SCC 1.

⁵ *Vidhan Sabha v. Kuldeep Bishnoi*, (2015) 12 SCC 381.

⁶ *Orissa Legislative Assembly v. Utkal Keshari Parida*, (2013) 11 SCC 794.

⁷ *Shrimanth Balasaheb Patil vs Honble Speaker Karnataka*, 2019 SCC online SC 1454.

rather than the law itself. If we have a law which is claimed to be anti-defection then why is there an exception to any form of defection. The legislature in my opinion has made a big mistake in allowing justification for a defection if its 2/3rd. There is an argument that if such large number of people leave then in a democracy it cannot be suppressed but the issue is you have to look at the motivation of such a split to and not just the number. Does the government have any data to justify that the splits over the years which are above the requisite numbers are motivated on account of some national issue or some principle opposition of policy etc rather than just plain and simple personal incentive or political office.

What we have seen always is that defection is motivated in India by only personal incentives and nothing else. The person defecting gets a ticket or ministerial berth in return of switching or if he is unable to secure ministerial berth then some cabinet rank berth outside the government or chairmanship in public sector enterprises etc are all available to sweeten the pot. If we have a law on defection then all defection should be unacceptable and no requisite number can justify it. The other question is of the role of the speaker and whether he can be non-partisan in decision making. The speaker is presumed to be non-partisan but in reality he is elected on a party ticket, he has his constituency, he needs funds for his constituency which comes from the government, he has to get a ticket from the party for getting re-elected so can we really say that a person who can be made vulnerable in so many ways by the government is an objective adjudicator of issues that comes to him or her. The answer is also in the situation where every time there is a change in government there is a change in the speaker. Why does a new government need to change the speaker if he is so objective and non-partisan? We all know the answer to this question. Hence the anti-defection law needs two timely fix at the earliest, firstly remove any exception given to political defection and secondly take away the power of disqualification from the speaker and give it to the election commission of India and you will see how the graph of political defection descends to oblivion.

At the end there are two things at play in the debate relating to defection, one should a democracy have a law on defection as it strangles freedom of speech and the other whether the law on defection is an adequate tool to counter defections. The paper has not gone into the detail on the first question but it's very clear that on the second question the answer is in the negative. The positive thing in all this is that the solution to this problem that seems to have taken strong roots in our democratic set up is quite simple, the law does not need any significant change but all it needs is little tweaks to make it simpler and unambiguous to what it is already so that the democratic set-up is not robbed of its objective and we don't become a democracy where what people stand for depends on where they sit.

REFERENCES

Books

1. G.C MALHOTRA, ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH' (11th edn, Metropolitan Book Co. Pvt. Ltd 2006).
2. PARAS DIWAN, ABROGATION OF FORTY-SECOND AMENDMENT: DOES OUR CONSTITUTION NEED A SECOND LOOK, (Sterling Publishers Pvt. Ltd, New Delhi, 1978).
3. R. KOTHANDARAMAN, IDEAS FOR AN ALTERNATIVE ANTI-DEFECTION LAW, (1st edn Parliamentary Research Cell, Government of Nagaland 2006).

Journal paper

1. Csaba Nikolenyi, *Keeping Parties Together? The Evolution of Israel's Anti-Defection Law?*, 47(2), POLISH POLITICAL SCIENCE YEARBOOK, (2018).
2. Heller, William B. and Carol Mershon, *Dealing in Discipline: Party Switching and Legislative Voting in the Italian Chamber of Deputies, 1988- 2000*, 52 AMERICAN JOURNAL OF POLITICAL SCIENCE, (2008).
3. Kenneth Janda, *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments*, (World Congress of the International Political Science Association, Santiago, Chile July 2009).
4. N. S. Gehlot, *The Anti-Defection Act, 1985 And The Role Of The Speaker?*, 52(3) THE INDIAN JOURNAL OF POLITICAL SCIENCE 327, 340, (1991).
5. Subhash C. Kashyap, *The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India*, 10(3) ASIAN SURVEY 195, (1970).
6. Subramanian, Rajen, *Developing and Testing a Theory of Legislative Party Fragmentation*, University of Wisconsin-Madison: Unpublished PhD Dissertation, (2008).

Newspaper Articles

1. IANS, Timeline of cash-for-vote scam case, BUSINESS STANDARD (New Delhi, 22 November 2013).
2. Kakvi, Kashiv, MP: Three Sitting MLAs Join BJP, 32nd Defection Since March 2020, NEWS CLICK (New Delhi, 14th June 2020).
3. Legal Correspondent, Cannot fix time limit in defection pleas, says Supreme Court, THE HINDU (Chennai, 1 July 2021).
4. Mayabhushan Nagvenkar, Does India's Anti-Defection Law Work in The Era Of Uneasy Coalitions? OUTLOOK, (New Delhi, 10 July, 2022).
5. Nalini Sharma, Explained: The anti-defection law and why it still remains a toothless tiger, INDIA TODAY (Noida, 21st June 2022).
6. Samudra Gupta Kashyap, Congress loses Arunachal two months after it got it, 43 of 44 MLAs defect, THE INDIAN EXPRESS (New Delhi, 26 October 2016).
7. Special Correspondent, Manipur political crisis Nine MLAs, including three from BJP, pull out of Biren Singh government' THE HINDU (Chennai, 17 June 2020).

8. Varun Ramesh Balan, Aaya Ram, Gaya Ram: A contemporary history of defections to the BJP, THE WEEK, (Delhi, 12 March 2020).

Statutes

1. Constitution of Bangladesh 1972.
2. Constitution of India 1950.
3. Constitution of Singapore 1965.
4. Constitution of South Africa 1997.
5. (Disqualification on Ground of Defection) Rules 1985.

Cases

1. Balchandra L. Jarkiholi and ors. v. BS Yeddyurappa, (2011) 7 SCC 1.
2. Kihoto Hollohan v. Zachillhu, AIR 1993 SC 415.
3. Mayawati v. Markandeya Chand and ors, AIR 1998 SC 3340.
4. Orissa Legislative Assembly v. Utkal Keshari Parida, (2013) 11 SCC 794.
5. Shrimanth Balasaheb Patil vs Honble Speaker Karnataka, 2019 SCC online SC 1454.
6. D. Sudhakar v. D.N Jeevaraju and Ors, 2012 (1) SCALE 704.
7. Vidhan Sabha v. Kuldeep Bishnoi, 2015) 12 SCC 381.

Reports

1. ADR, 'Analysis of Re-contesting MPs and MLAs Who Changed Parties-Pan-India Since 2016' (Combined Report National Election Watch 2021)
2. Department-Related Parliamentary Standing Committee on Home Affairs (2003).
3. Dinesh Goswami, 'Report of the Committee on Electoral Reforms' (Committee Report Legislative Department Ministry of Law and Justice 1990).
4. ECI, Proposed Electoral Reforms, D.O. No. 3/ER/2004 (2004).
5. Halim Committee on Anti-Defection Law (1998).
6. Law commission of India Report No.255 Electoral Reforms (March 2015)
7. Report of Committee on Defections under the Chairmanship of Shri Y. B. Chavan(1969)
8. Report of the National Commission to Review the Working of the Constitution (NCRWC)-Justice MNR Venkatachaliah Report(2000).
9. Roshni Sinha and Prachi Kaur, 'The Anti-Defection Law: Intent and Impact' (Research Report PRS Legislative Research 2019)
10. 170th Report on 'Reform of Electoral Laws' of the Law Commission (1999).