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Anti-Defection Law of India and its validity in the 21st Century

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Anti-defection law or the 10th schedule of the Indian Constitution¹ was added through a constitutional amendment in the year 1985 in order to curb the menace brought in by the custom of trading elected representatives of different parties to topple the majority government. Although the problems of the law were resolved with time, it has once again become the forefront of discussions as the law made to check horse-trading customs has been facilitating the same in favour of the larger political parties. Since its inception, the country as the largest democracy has gone through different political parties with a good deal of leaders and seen many more policies yet the principles of democracy have stood well and healthy. But in the light of these changing political dynamics of the 21st century, the 10th schedule of the Indian constitution² ought to be changed according to growing political dynamics.

Keywords: *defection, law, constitution.*

INTRODUCTION

Democracy is said to be a mechanism of the people, by the people, and for the people. The right of the public to rule over themselves through their elected representatives. Essentially means the citizens' mandate can make or break a democratic country. But this cannot be much farther from the truth. The practicality of the working of democracy has far been botched by the new

¹ Constitution of India, schedule X

² *Ibid*

advancements in the political sphere. The mandate of the public no longer governs the government. Any mandate is swiftly changed with a resort and a camp. The laws specifically made too have not been successful in mitigating this culture in Indian politics.

Now and again, we see governments falling and rising all over the country, and the old phrase “Aaya ram, Gaya ram” seems to be returning to the field. The recent political turmoil in Maharashtra has put this law back in focus. Rebel Shiv Sena leader Eknath Shinde might have succeeded in toppling the Uddhav Thackeray-led Maha Vikas Aghadi (MVA) government. This makes any prudent person think about whether the Anti-defection laws of India are valid anymore. Is this solid enough to stop the toppling of the governments? What has to be done in lieu to solve this crisis?

WHAT IS ANTI DEFECTION LAW? - AN OVERVIEW

“A defector is a person who gives up allegiance to one state in exchange for allegiance to another, changing sides in a way which is considered illegitimate by the first state.”³

Defection in India is governed under the 10th Schedule of the Constitution of India. It seeks to disqualify or penalise individual party members- MPs and MLAs for leaving a party and joining another. The legislation, brought in response to the toppling of multiple governments by party-hopping MLAs in the 1960s, called defection an evil-natured national concern and sought to outlaw defection and keep the very foundation of our democracy strong. The said law was added to the Indian Constitution under Schedule 10⁴ through the 52nd Constitutional Amendment Act, 1985⁵.

The 10th Schedule lays down the following grounds of defection for disqualification -

1. **Voluntarily Give Up:** If an elected member voluntarily gives up his membership in a political party.

³ ‘Defector’ (Merriam-Webster) <<https://www.merriam-webster.com/dictionary/defector>> accessed 22 July 2022

⁴ Constitution of India, schedule X

⁵ Constitution (Fifty-Second Amendment) Act 1985

2. **Violation of Instructions:** If he votes or abstains from voting in such House contrary to any direction issued by his political party or anyone authorized to do so, without obtaining prior permission.
3. **Elected Member:** If any independently elected member joins any political party.
4. **Nominated Member:** If any nominated member joins any political party after the expiry of six months.⁶

But there are a few exceptions to this law:

- If a party member is elected as the chairman or speaker, once resigned from that position, can rejoin the party.
- A person shall not be disqualified if his original political party merges with another (applicable only if more than two-thirds of the members of the party have agreed to the merger), and:
 - He and other members of the old political party become members of the new political party, or
 - He and other members do not accept the merger and opt to function as a separate group.
- Previously, the parties had the choice to split among themselves, but at present, this has been removed.⁷

HISTORY BEHIND THE LAW

Two main reasons are cited by professionals for the enactment of the anti-defection law. Years presiding the act saw large-scale defections of ministers lured by ministerial posts and money. On average, around 50% of 4000 legislators elected in the period from 1967 to 1971 defected.⁸ In

⁶ Constitution of India, schedule X

⁷ *Ibid*

⁸ Venkatesh Kumar, 'Anti-defection Law: Welcome Reforms' (10 May 2003) 38(19) Economic and Political Weekly

fact, the famous phrase “*Aaya ram, Gaya ram*”, started in this decade, in 1967, with legislator Gaya Lal changing his allegiance three times in a single day.⁹ The situation was exacerbated in the 1967 general elections when, of the 3500 members elected to legislative assemblies from different states and union Territories, more than 550 members defected from their original parties and some of them even crossed the floor more than once.¹⁰ This led to the creation of a committee under the chairmanship of Y. B. Chavan. The committee’s report further led to the tabling of the first-ever bill on anti-defection in the Indian Parliament.¹¹

In spite of the opposition’s support, Indira Gandhi's Government referred the bill to a Joint Select Committee; however, it failed to emerge from the committee before subsequent elections cancelled all other legislation. The coming years saw a massive increase in defections in the State governments, whenever Congress-led Government was at the centre, the State governments fell, again at the courtesy of defection of non-Congress representatives. The then Chief Minister of Karnataka, Virendra Patil, called this trend a ‘gold rush.’ With the raising political turmoil and public opinion against defections, Rajiv Gandhi proposed a new anti-defection bill in Parliament. After prolonged debates, the Lok Sabha and Rajya Sabha passed the bill and after receiving assent from the President, the law came into effect on 18th March 1985.

While there are mass proponents of the law,¹² some academicians, as well as politicians, feel defection to be a part of the rights of Legislators.¹³ They are also of the view that clause 2(1)(a),¹⁴ is ultra vires of the basic structure of the Constitution,¹⁵ and harms the freedom of speech and expression.¹⁶

⁹ *Ibid*

¹⁰ Subhash Kashyap, ‘The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India’ (*Asian Survey*, March 1970) <<https://online.ucpress.edu/as/article-abstract/10/3/195/19683/The-Politics-of-Defection-The-Changing-Contours-of?redirectedFrom=fulltext>> accessed 22 July 2022

¹¹ *Ibid*

¹² P M Kamath, ‘Politics of Defection in India in the 1980s’ (*Asian Survey*, 1985) <<https://online.ucpress.edu/as/article-abstract/25/10/1039/22131/Politics-of-Defection-in-India-in-the-1980s?redirectedFrom=fulltext>> accessed 22 July 2022

¹³ *Ibid*

¹⁴ Constitution of India, schedule X, cl 2(1)(a)

¹⁵ *Ibid*

¹⁶ Constitution of India, s 19(1)(a)

AMENDMENT OF 2003

Prior to 2003, the 10th Schedule contained clause 3,¹⁷ which provided that disqualification on the ground of defection shall not apply in case of a split. This particular clause was seen to be grossly exploited by political parties by splitting a party into multiple factions.¹⁸ This clause was outlawed by the amendment proposed by the Pranab Mukherjee committee. Constitution (Ninety-First Amendment) Act - 2003 excluded the split-authorizing clause from the Schedule.

ISSUE AND THE MOVE FORWARD

Political Imbalance

While the Anti-defection law was introduced to ensure political stability, it has caused more damage to the thread of democracy than improved its quality of it. In the span of five years, six different governments have fallen owing to defection, not only that even in the Centre, 12MPs from Lok Sabha and 16 MPs from Rajya Sabha have defected between 2016-2020.¹⁹ The ADR watchdog has referred to the “absence of value-based politics, lust for money and power, strong nexus between money and muscle and reward of office,” as the reasons behind such defection.²⁰ These changes not only cause uncertainty but also changes the mandate of the public and cast their votes away. Ultimately, promoting the horse trade, and invalidating the democratic setup.

Judicial Intervention

Schedule 10 of the Constitution²¹ was deemed to be out of the scope of Judicial Review until the case of *Kihoto Hollohan v Zachilhu*, 1992²². The case declared Paragraph 7 of the Schedule to be invalid and ultra vires to Constitution on the grounds that it seeks to take away the Supreme Court and High Court’s Jurisdiction. The court made this observation while deciding whether

¹⁷ Constitution of India, schedule X

¹⁸ *Ibid*

¹⁹ ‘Analysis of Re-contesting MPs and MLAs Who Changed Parties-Pan-India Since 2016’ (*Association for Democratic Reforms*, 11 March 2021) <<https://adrindia.org/content/analysis-re-contesting-mps-and-mlas-who-changed-parties-pan-india-2016>> accessed 22 July 2022

²⁰ *Ibid*

²¹ Constitution of India, schedule X

²² *Kihoto Hollohan v Zachilhu* [1992] 1 SCC 309

the presiding officer of the Legislative houses should work as a tribunal. It held that the decisions of the officer would be dealt with in the same manner as that of a tribunal, therefore it was subject to judicial review on the grounds of malafide, perversity, etc. Besides, there is also a downside to this decision. The Court, in the process of the above-mentioned judgement, also stated that there can be no “judicial intervention until the Presiding Officer passes his order.” Upon this, neither the court nor the law provides the time limit within which the Presiding Officer needs to decide on a plea for disqualification.

It has to be noted that in several cases, the courts have expressed concerns about unnecessarily delaying the decision on such petitions. In a few cases, members of opposition parties were appointed ministers in government while still remaining members of their original political parties. There have also been instances where the defecting members continued to serve in the House because the Speaker or Chairman delayed making decisions. Regardless of the Presiding officer’s decision, the officer is usually challenged in court, which further delays the decision. For example, the defection cases of West Bengal MLA Mukul Roy and Jharkhand MLA Babu Lal Marandi.²³ Irrespective of suggestions made by Vice President Venkaiah Naidu and the Supreme Court on deciding defection cases within three months, the cases are piling up year by year. These cases, owing to the clogged judicial system of India, take longer than the government’s tenure to get settled and reached a period where no person would care about the issue.

Apart from the issue of Judicial Review, the judiciary has also interpreted different provisions of the law. The phrase ‘Voluntarily gives up his membership,’ is interpreted by the Court to mean not only voluntary giving up of membership but the conduct of the members can also be considered to recognize the member’s stance with respect to his party.²⁴ To cite an example of this situation, earlier, two Janata Dal leaders were disqualified from Rajya Sabha by the

²³ *Ibid*

²⁴ *Ravi S Naik v Union of India* [1994] SCR (1) 754

Chairman of the House, Venkaiah Naidu, for indulging in anti-party politics, and that they had “voluntarily” given up membership of the party.²⁵

Role of Governor

The Governor has a crucial role when there is political instability in a state. Before 1994, Governors were quick to dismiss a state government, charging that it did not have a majority in the state legislature and recommending the imposition of the President’s rule in the state. But the Supreme Court ended this practice with its judgment in the *S R Bommai case*²⁶ in 1994. In this landmark case, the court ruled that the place for deciding whether a government has lost its majority was in the legislature.²⁷ The problematic role of the Governor in this aspect has come to light once again with the Governor of Rajasthan crossing his Constitutional boundaries and rejecting pleas made by the CM, Ashok Gehlot. Though SC has laid down rules in the case of *S R Bommai*, the Governors still tend to overthrow the Constitutional principles and act according to their wishes. Recently, in the state of Arunachal Pradesh, the governor, without any instruction from the cabinet, advanced the assembly session from January 14, 2016, to December 15, 2015. Like in Rajasthan, the crisis was precipitated by a rebellion of Congress MLAs against their own government.

But the Supreme Court intervened has held that the governor’s actions were illegal. While the “Constitution provides that the Governor shall summon the Legislative Assembly from time to time and may prorogue and dissolve the Legislative Assembly,”, the judgment said, it noted that this act “cannot be performed except on the aid and advice of the Council of Ministers”.²⁸ Any violation of this “would be doing violence to all canons of interpretation if the discretion of the Governor”.²⁹

Stifles Debate

²⁵ *Ibid*

²⁶ *S R Bommai v Union of India* [1994] SCC (3) 1

²⁷ *Ibid*

²⁸ *Nabam Rebia & Etc Etc v Deputy Speaker & Ors* Civil Appeal No 6203-6204 of 2016

²⁹ *Ibid*

The anti-defection law made to lower the defection cases has caused more damage than was envisaged by the lawmakers. The apprehensions of Ashoke Kumar Sen have finally come to light. Anti-defection, along with the whip, has majorly curbed the decision-making powers of the Legislators. In a democracy, representatives are expected to exercise their independent judgement but recent advancements have made it clear that the decision is made by the parties and not the individuals. Members would be deprived of their fundamental freedom of choice if they were required to vote along party lines on every motion or bill. Members are not permitted to vote according to their own opinions even if they disagree with their party leadership. This not only violates the fundamental rights of legislators but also causes damage to our Constitution. It reduces Parliament to a body of leaders unilaterally deciding issues and voting for the sake of none. To win a motion in Parliament, the government is only required to consult with leaders of the major political parties in the House. This number for consensus may further be reduced if a single party has a majority in the House. As a result of the Law, the link between an elected legislator and his elector is broken.

Move Forward

According to a political commentator, Yogendra Yadav, Madhu Limaye had three main objections to the law in the initial stages of its rolling: "One, parliamentary debates would become meaningless because the elected representatives would not be free to follow their conscience. Two, the institution of 'whip' would encourage the dictatorship of party leaders. Three, while this law might curb 'retail' defection, it would keep the doors open for 'wholesale' defections."³⁰ Right now, all these apprehensions and objections have come to be true. Yet, several recommendations have come up regarding Anti-Defection by various committees³¹:

*Dinesh Goswami Committee:*³²

³⁰ Yogendra Yadav, 'One lone, brave voice stood up against anti-defection law in 1985. All his predictions came true' (*The Print*, 2022) <<https://theprint.in/opinion/one-lone-voice-stood-up-against-anti-defection-law-his-predictions-came-true/1027214/>> accessed 22 July 2022

³¹ *Ibid*

³² Law Commission, *Report of the Committee on Electoral Reforms* of India (Election Commission of India 1990)

The committee headed by the former Law Minister has recommended disqualification of members should only be for cases where the:

- Membership is voluntarily given up;
- Member voting or abstaining from voting as opposed to party directions.³³

*170th Law Commission report:*³⁴ The Law Commission has suggested considering pre-poll electoral fronts as one party under the 10th Schedule. Also, that parties should issue whips only in critical situations or votes.³⁵

Election Commission: “Make the President/Governor the decision-maker with respect to disqualification subject to binding advice from the Election Commission on the lines of disqualifications based on the Representation of Peoples Act’s provisions regarding the Office of Profit.”³⁶

Hollohan Judgement: Justice Verma, in this case, referred to establishing an independent authority,³⁷ along the similar lines of a Tribunal, only here to hear and resolve the matters of defection.³⁸ The current decision makes, by the Speaker,³⁹ is widely dependent on the support of the majority in the House, therefore, his choice as an arbitrator violates the essence of Parliamentary Democracy.⁴⁰

CONCLUSION

There is a need for the regulation of the 10th Schedule along with the appropriate working directives that adhere to transparency and accountability in a democratic society. With the rise in defection cases and more and more toppling of governments, it is high time we revisit this

³³ *Ibid*

³⁴ Law Commission, *Reform of Electoral Laws* (Election Commission of India 1999) 170

³⁵ *Ibid*

³⁶ Election Commission of India, ‘Proposed Electoral Forms’ (*Election Commission of India*, 2016)

<<https://eci.gov.in/files/category/53-proposed-election-reforms/>> accessed 22 July 2022

³⁷ *Kihoto Hollohan* (n 22)

³⁸ *Ibid*

³⁹ *Keisham Meghachandra Singh v The Honble Speaker Manipur* 2020 Civil Appeal No 547 of 2020

⁴⁰ *Ibid*

particular law and analyse it in light of the recent developments. However, it has to be ensured that this provision will also help the stability of government, which will, in turn, decrease corruption and direct the attention of lawmakers to governance.