

Anti defection law: A Critical Reappraisal**Saurabh kumar,****B.A.LL.B., Indore Institute of Law, Indore****Shrinkhla Chaurasia****B.A.LL.B., Indore Institute of Law, Indore****INTRODUCTION**

Defection is defined as "conscious abandonment of allegiance or duty"¹. Generally defection refers to leaving a association to join an opposing party. In political scenario it is a situation when a member of a political party leaves his party and joins hands with other parties. It is not incorrect to state that we all witness a politically unstable government in our country. India has around 1866 registered political parties in our country out of which around 56 are recognized as national or state parties.² And since India became an independent democratic country we have been witnessing this evil. And this evil which is known as defection is now become a national evil in the country.

As quoted by Shashi Tharoor: "The Anti-Defection law has a negative impact on the democracy. A people's representative does not have a right to vote according to his conscience. He has to vote on what his party says."

M.L.Fotedar: "The anti-defection law strengthening of the panchayati Raj institutions, lowering of the voting age and introduction of information technology were the conspicuous ones. However, the opposition's propaganda appeared to have prevailed over the genuine one."

¹ < www.merriam-webster.com > (accessed 10th Dec, 2017).

² *Political Parties: EC*, THE TIMES OF INDIA (10th Dec), <https://timesofindia.indiatimes.com>.

Our research work has been carried on with the following objectives:

- Understanding the Anti-Defection Bill and to have a complete and adequate information on the topic.
- To understand different provisions under the tenth scheduled.
- To have a look at lacunas in the Anti-Defection Bill and to overcome them with certain measures.
- And to understand the future prospect of such Bill.

The following hypothesis has been developed in this research paper:

1. The Speaker or the Chairman act arbitrarily in deciding cases of disqualification
2. The Anti-Defection law does not completely sort to resolve the issue of defection in present scenario.

In accordance with the following objectives we have opted for the doctrinal method of research. We have been through several online journals, articles, blogs and above all we have referred to the books for the articles such as the Indian Constitution of India.

Historical perspective

The history of defection goes back to the times of central legislature when Shri shyam lal Nehru of central legislature changed his party from congress to British side. Another incidence was of Hafiz Mohammad who was elected to Uttar Pradesh legislature on Muslim League Ticket defected to join the congress.

But this phenomenon of changing political parties emerged during the sixties. The 1967 election was the time when this defection of politicians took place at a large number. During the fourth general election period between 1967 to 1968 saw a great shift in political parties by the legislators in several states. Out 542 cases of defection between the first and the fourth general elections, 438 cases occurred in the twelve month period between 1967 to 1968.

The idea of bringing in an anti-defection law in India was brewing in the minds for many years before it was ultimately enacted in the first two months of 1985, just after Rajiv Gandhi became the prime minister of the country with a majority. All governments that followed did not have a majority of their own and any proposal for enactment of an anti-defection law or any bill through an amendment of the Constitution by those governments faced great trouble in its enactment. Thus ,if there had been no Rajiv Gandhi and his government with an unparalleled massive majority, there would not have been any anti-defection law in the country. The Constitution (52nd Amendment) Act 1985, otherwise known as the anti-defection law, is deeply rooted in history. Since 1967, proposals were being presented in one form or the other to curb defections. But it was only after P. Venkatasubbaiah, a private member, moved a resolution for constituting a committee to study and report on defections. The resolution was moved in the fourth Lok Sabha on august 11, 1967 and discussed on november 11,1967 and on december 8,1967 the resolution was adopted by Lok Sabha.³

32nd Amendment Bill, 1973

As the Chavan committee did not provide any adequate grounds for disqualification the Thirty-second Amendment Bill was proposed in the fifth lok sabha.

The Bill provides for the disqualification of a member if he voluntarily gives up his membership of the party or if he abstains from voting in the voting. The Bill provides that members will not be disqualified if he gave up his membership by a reason of split. The Bill apply to independent member, nominated members or unrecognized political parties.

84th Amendment Bill, 1978

On August 28th another attempt was made in this direction. Some important features of this Bill was:

1. Independent and nominated members were allowed to join the party once.
2. A member could be disqualified if he voluntarily gave up his membership or voted against the direction of the party.

³ Committee on Defections report, 1967, New Delhi , Ministry of Home Affairs,1969.

3. In case of one-fourth of the legislative party where the strength was less than 20 but not less than 5 formed a party registered under the election commission would not be disqualified.

Anti-Defection Law or The Tenth Schedule

The Tenth Schedule of Indian Constitution is known as Anti-Defection Law. When the constitution was written it did not contain such provisions, it was only inserted by Rajiv Gandhi in 1985.. It laid down provisions regarding defection. Anti-Defection Law or the 10th schedule lays down provisions regarding disqualification on the grounds of defection. This schedule was brought through the 52nd amendment and changes were also made in article 102 (2)⁴ and 191(2)⁵.

Grounds of disqualification on the grounds of defection:

Paragraph 2 of the tenth schedule provides that a member of a political party would be disqualified to be the member of the party:

- If he voluntarily relinquishes or gives up his membership of such political party
- If he votes or abstains from voting in such House contrary to any direction of such party or is expelled from such party.
- A nominated member of Parliament or a State Legislature who is not a member of a political party at the time of his nomination and who has not become a member of any political party before the expiry of six months from the date on which he takes his seat shall be disqualified if he joins any political party after the expiry of the said period of six months.

Exceptions (Paragraph 4 and 5)

The Bill also makes suitable provisions with respect to splits and mergers of political parties.

Para 4 of the Tenth Schedule provides that a person shall not be disqualified if his original party merged with the other party and he and any other member of his party:

⁴ A person shall be disqualified for being the member of either of the house if he is so disqualified under the tenth schedule.

⁵ A person shall be disqualified for being the member of the state legislative council if he is so disqualified under the tenth schedule.

- Have become member of such other political party or of a new political party formed by such mergers.
- Have not accepted the merger and decided to function separately.

Para 5 relates to exemption of Officers of the House. It provides that the member of the House who has been elected as an officer shall not be disqualified if:

- By reason of election to such office, he voluntarily gives up the membership and does not join the party until he holds the office
- He rejoins the party after he stops or ceases to hold such office

91st Amendment Act, 2003

The 91st amendment was made in the year 2003 and it lays down certain changes in Article 75, Article 164, insertion of new Article 361-B, amendment of the tenth schedule.

- A member of either House of Parliament belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to either House of Parliament before the expiry of such period, till the date on which he is declared elected, whichever is earlier.”⁶
- A member of Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier.”⁷

⁶ INDIA CONST. art .75, cl. 1(b).

⁷ Ibid. art. 164, cl. 1(b).

- A member of a House belonging to any political party who is disqualified for being a member of the House under paragraph 2 of the Tenth Schedule shall also be disqualified to hold any remunerative political post⁸ for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or till the date on which he contests an election to a House and is declared elected, whichever is earlier.⁹

The above changes made through the 91st amendment clearly states that the representatives cannot hold any public office nor he can be a minister during this period.

1. The Speaker or the Chairman act arbitrarily in deciding cases of disqualification

One of the biggest issue of the anti-defection law is whether the speaker acts arbitrarily. The speaker or the chairman decides whether a member of a house is subject to disqualification on the grounds of defection.¹⁰ This has been so assumed because in case the defection takes place in a smaller party rather than a majority party than the impartial adjudication on the defecting member's disqualification becomes improbable.

- In 1988, the Speaker of the Mizoram Assembly found that one of the nine legislators constituting the 'one-third' defection was abroad and thus without any confirmation it held the remaining eight as defectors. This was enough for the Governor to dismiss the Ministry and for President's rule to be imposed with the dissolution of the Assembly. The group also claimed that they were nine members but the speaker did not take any necessary steps to penetrate into the same. Later it was found that the ninth member has not defected instead he went abroad. Therefore the speaker did not characterize it as a split instead imposed defection upon them.¹¹
- In 1988 Congress won elections in Nagaland for the first time in the history. The party won with a clear majority in the assembly elections. It responded by bringing into the chief minister's chair the reputed Naga leader, Hokishe Sema. But Unfortunately the

⁸ Salary paid through the revenue of the government.

⁹ Ibid. art. 361, cl(b).

¹⁰ Ibid, 10th sch. para 6, cl(1).

¹¹ Rajeev Dhawan, *Defective Politics*, THE HINDU <

<http://www.thehindu.com/2003/12/26/stories/2003122602851000.html>> accessed 13 Dec, 2017.

party fell and the Governor General K.V. Krishna Rao, recommended dissolution of the Assembly. In the meanwhile 13 out of 40 legislators (in a House of 60) handed in a joint letter of resignation to the Speaker C. Chongsen, saying they were unhappy with the chief minister's leadership. The 13 MLAs - including four key ministers and the deputy speaker - announced that they had joined hands with the Naga National Democratic Party (NNDP), which has 17 assembly seats. But the biggest blow to the Congress was the speaker's decision to recognise the opposition coalition-the Joint Regional Legislature Party - as a new political party, thereby allowing the dissidents to bypass the Anti-Defection Law, and clearing the decks for a change in government.¹²

- One of the biggest disturbing case of defection was of Goa where defection reached its zeneath . In Goa the speaker himself defected to become the chief minister of the state. It gave rise to two Supreme Court decisions in 1993 and 1994. His successor as Speaker refused to adjudicate the matter.¹³
- Another very controversial confrontation between the speaker and the supreme court of India was when the speaker of the Manipur assembly disqualified several MLA's on the ground of defection. One of the speaker filed a petition and the supreme court invalidated the speaker's order.
- The Speaker refused to obey the Supreme Court's order stating that they are exempted from the processes of Supreme Court. Initially it amounted to contempt of court. The court gave him notice to appear before the court but the speaker refused. After several adjournment the court at last on 3rd February 1993 directed the central government to present the speaker even by using minimal amount of force.¹⁴ It is really very surprising to see that the person who is holding such a prestigious post is not adhering to constitutional mandate.

¹² Ramesh Menon, *President's Rule imposed in Nagaland under the questionable circumstances*, INDIA TODAY < <https://www.indiatoday.in/magazine/indiascope/story/19880831-presidents-rule-imposed-in-nagaland-under-questionable-circumstances-797609-1988-08-31>> accessed 13 Dec, 2017.

¹³ Ibid n(13)

¹⁴ Rajeev Dhawan, *A crisis made to measure*, THE HINDU < <http://www.thehindu.com/2005/02/18/stories/2005021802021000.htm>> accessed 13 Dec, 2017

Bar of Jurisdiction of court

Paragraph 7 states that the court shall not have any jurisdiction in respect of any matter connected with the disqualification of a member of a house. Earlier before the *Kihota Hollohon vs Zachilhu*¹⁵ case the speaker's decision was subject to no judicial review as the court could not interfere in the matter of disqualification. But the Supreme court in 1991 declared paragraph 7 unconstitutional. It also stated that the speaker's decision would be subject to judicial review.

2. Incidents of Defection in India since the 52nd Amendment¹⁶

- Under the guidance of Yashwantrao Chawan, Sharad Pawar became an MLA from Baramati, Maharashtra on a Congress Party ticket in 1967. He then left the Congress party in 1980 to form a coalition with the Janata Party in 1978 and later he became the leader of opposition in Maharashtra during the 80s. He later rejoined Congress under Rajiv Gandhi in 1987 to "save Congress culture in Maharashtra", and soon became Chief Minister of Maharashtra. After serving for a short period as defence minister and failure to become president of the Congress party, he broke away and formed the Nationalist Congress Party (NCP) along with Tariq Anwar in 1999.
- One another incident is of Yogendra Yadav who is also said to be the founding member of the Aam Aadmi Party. He was voted out of the party in 2015 and was later expelled on the charges of 'anti party activities'. And after that he formed another party called Swaraj Abhiyan.
- Mamata Banerjee the aggressive of Trinamool Congress, started off as the angry young woman of Indian National Congress in West Bengal, and grew to prominence by defeating CPI-M veteran Somnath Chatterjee in 1984 general elections. She served the party till 1997 and that she decided to form the Trinamool Congress which proved to be a tough contender for CPI-M in Bengal. Later, Mamata Banerjee joined the BJP

¹⁵ A.I.R 1993 S.C 412.

¹⁶ Ayub Dawood, *Political Defection that left a lasting impact on India*, SCOOP WHOOP
<<https://www.scoopwhoop.com/political-defections-india-jinnah-bose-jp/#.ls5qolvi3>> accessed 14 Dec, 2017

led NDA in 1999 and became Railway Minister, only to leave the coalition in 2001 and unite with Congress. She then returned to NDA in 2004, and then again allied with the UPA in 2009, when CPI-M left the coalition.

- Although the defector from the Shiv Sena has not achieved much success, but Raj Thackeray's revolt was remarkable as he stood against his own family that is his uncle and mentor Bal Thackeray. Raj's resignation from the Sena and formation of the MNS brought the succession row out in the open, as cousin Uddhav was announced Bal Thackeray's heir.

Apart from his infamous aggressive stance against north Indians, Raj was also able to trouble Shiv Sena by rising as a challenger for the post of the top regional party in Maharashtra. Like the Shiv Sena, the MNS has also been known for strong arm tactics.

- Building names among the political leaders Jethmalani formed his own party in 1995 and later served as Law minister in the Atal Bihari Vajpayee-led government in 1996, he again served as law minister from 1999, but was forced to resign by Vajpayee, with whom he had differences and even contested against him in 2004 general elections.

This was the condition of defection among the renowned leaders of our country. The fifty-second amendment act was introduced to put a halt on the huge amount of defection taking place and also to stop the disbalance in the political parties. But to a greater extent the Anti-Defection Bill proves to be a failure as it does not completely serve its purpose. The above mentioned incidents are example of such a failure where eminent leaders have switched to different parties a number of times, but in spite of that they continue to remain as the member of the party without being disqualified.

The reason being the different provisions which have been laid down in the tenth schedule. Though this amendment was made to stop defection but its provisions on the other hand act as a safeguard for the members of the political parties.

The provisions being:

Split and mergers

- The ground for criticism of such provision is that though this bill prohibits individual defection but on the other hand allows collective defection in terms of splits and mergers.
- Since the coming of the tenth schedule there have 10 claims of splits and 14 claims of mergers in Rajya Sabha.
- In Lok Sabha there has been 22 claims of splits and 13 of mergers.
- The thirteen and the tenth Lok Sabha amounts to greatest number of claims regarding splits and mergers.
- In state legislatures there have been 75 claims of splits and 100 claims of mergers.
- Basically it is difficult to garner the support of two-third of members for merger so it basically uses the tactics of split in the party. Later merge the splinter groups in bloc.¹⁷

Efforts made for removal of lacunae in the Law

Dinesh Goswami Committee

There is a need for an amendment to the anti-defection law so as to restrict disqualification only to those cases particularly, where an elected member voluntarily gives up his membership of the political party, or when he votes or abstain from voting contrary to party whips, directions etc. only in respect of motion of vote of confidence. The question of disqualification of members should not be decided by the speaker or the Chairman of the concerned House.

¹⁷ Prof. Madhu Dandavate, *Conclusion and suggestions*, SHODH GANGA <
<http://shodhganga.inflibnet.ac.in/>> accessed 21, Dec, 2017.

Jeevan Reddy Committee

1. The Commission proposed for a total ban on splits and mergers of political parties during the term of the Lok Sabha or Legislative Assembly.
2. Whips may be used only when the voting in the house affects on the continuance of the government and not on each and every occasion.

National Commission to review the workin of the Constitution

1. Provisions to be made in the tenth schedule that any person who defects must resign and seek fresh mandate.
2. Vote cast by a defector to overthrow the government would amount to be inavalid.
3. Defectors should be debarred from holding any office of profit during the ongoing term.
4. Power to decide question regarding the disqualification of membership should vest with the Election Commission instead of the Speaker or the chairman.

Halim Committee

The committee explored the possibility of entrusting the power to decide the cases under the law to a judicial body without involving the Speaker or the Chairman.

1. The speaker may decide the case but any appeal against the decision will lie in the Supreme court of India
2. The concerned speaker may decide the case and any appeal against the decision may lie jointly with the President and the vice-President if the case relates to Rajya Sabha and also along with the speaker in the case of lok sabha.

Suggestions

- The power to decide questions related to the disqualification of member of political parties should be with the Election Commission instead of the Speaker as also stated in the Dinesh Goswami Committee

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- Provision stating that mergers would not amount to disqualification should be removed
 - The voter should have a right to file petition under the tenth article for the disqualification of members of defection.
 - Defining the word 'voluntarily giving up membership' of a political party should be comprehensively defined.
 - Position of expelled members should be clearly defined in the tenth schedule and also restriction like prohibiting them on joining another political party or holding any office of profit under the government.

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