

Anti-Defection Law: Curbing Dissent Along with Defection

Dawinder Kaur
Assistant Professor
Department of Political Science
School of Humanities,
Lovely Professional University,
Phagwara, Punjab-India.

Abstract

Parliament is based on the principles of deliberations, consent and dissent etc. Working of Indian parliamentary system has been crippled by the menace of defections. Some anti defection provisions were inserted in the Constitution of India by two amendments. These provisions have provided that a member of a house will stand disqualified from his membership, if he defected from his party. It is a salutary provision to control the menace of horse trading. But under these provisions the definition of defection has been constructed so widely as to erode the legitimate rights of the members to express freely in the house. This article argues that in cases of real floor-crossing, the anti defection provisions should be made more severe. But the definition of defection should be kept limited to the instances only of floor-crossing, and the right to dissent should be precluded from its purview.

Key words: anti defection law, tenth schedule, horse trading, floor-crossing, 52nd amendment.

Anti-defection law in India:

Anti-defection law in India is referred to the following provisions in the Constitution of India, inserted by 52nd Amendment Act, 1985, and 91st Amendment Act, 2003:

- (a) Article 75 (1A) and (1B); and
- (b) Article 164 (1A) and (1B); and
- (c) Article 361B; and
- (d) Tenth Schedule.

The Tenth Schedule is the basis of the anti defection law, which was inserted in the Constitution by 52nd amendment in 1985, and was amended by the 91st amendment in 2003. All the other provisions were added to the Constitution by the 91st amendment.

Why political parties?

Political parties are necessary evils to run a democracy. Now a day's taking into account the territorial expansion of states, it is next to impossible that they can be run on democratic lines without the existence of political parties. Warren Miller's International Survey *the Comparative Study of Electoral Systems* (CSES), contains a question on the necessity of political parties. There were differences of per cent ages of voters in different countries who think that political parties are necessary to run their country. But in neither of the countries the majority has voted against the necessity of political parties (Holmberg, 2003). To maintain the faith of the people in democratic institutions, their identification with political parties is regarded as a

yardstick. A decline of party identifications among the people is regarded as a sign of erosion of faith among the people for their democratic institutions (Dalton, 1999, p.66). Further, in a parliamentary democracy political parties have a more responsible role to play because of the principle of indefinite term of the Council of Ministers. Defections in a parliamentary system often led to political instability and midterm elections. Muller has considered the existence of perfect political parties as the most important means to insure accountability in parliamentary systems (2000).

What is defection:

At an election when a person was put as a candidate by a particular political party and he changes his party affiliations after being elected at such elections, is regarded as a defector. The defection is a fraud on the faith both of electors and his party.

Problem of defections in India:

After independence political defections have become one of the prominent signs of unmoral politics in India. The incidences of political defections have seen a rapid growth in the 1960s, particularly in the State Legislatures. Initially the academic circles and even the Governors of defection affected States have taken it as a temporary phenomenon, but this notion was proved wrong by the number of incidences of defections in the next decade (Kamath, 1985). Initially the defections were mainly backed by ideological differences of different personalities or factions within a party. But soon after that, it turned into the immoral practice of horse trading in the form of financial or political gains. In the second decade of the commencement of the Constitution, there was a time when the Chief Ministers of all the defection affected States were the defectors (Kamath, 1985). Congress under Mrs. Indira Gandhi had promoted the defections. In 1971 elections, when Mrs. Gandhi came to power in the Union, it created a wave for the legislators of other parties in the States to join Congress (R), as Mrs. Gandhi led Congress was known at that time. In Karnataka Legislative Assembly its strength rises from 57 to 120 members due to defections (Kamath, 1985). In 1967 the House of the People has constituted The Committee on Defections¹ under the chairmanship of Sh. Y. B. Chavan, the then Home Minister. The committee consists of representatives of different parties and constitutional experts. It has submitted its report in 1969². The Law Commission³ and the Dinesh Goswami Committee⁴ have also made some recommendations on the issue of defections.

Constitutional Amendments:

"Stability of a Government is more important even than the form of the Government (Khatra, 2018 p.287)". So the Constitution of India has been amended twice to control the menace of defections. In 1985 the Tenth Schedule was added to the Constitution, which contains the anti-defection penalties, in the form of disqualifications from membership of the house by the defectors. In this Schedule and in the relevant articles of the Constitution, it was provided that a person shall be disqualified for being a member of either house of Parliament or of a house of the legislature of a State, if he is so disqualified under Tenth Schedule. The anti-defection provisions were considered as "less effective" due to some loopholes therein. The provisions were

¹ Lok Sabha has constituted this 19-member committee through a resolution DT. 8/12/1967.

² Report submitted on 18/02/1969.

³ 170th Report on 'Reform of Electoral Laws' 1999.

⁴ Report of the Committee on Electoral Reforms (Legislative Department, Ministry of Law and Justice) 1990.

further strengthened by Ninety-First amendment. It provided that even in case of split of a party, the defectors will have to lose their membership of the house⁵. The defectors were also barred from being appointed as ministers⁶ or to any other remunerative political post⁷.

Who is a defector under anti-defection law in India?

The Committee on Defections has recommended that if a member of a legislature, who has been elected on the election symbol of a political party, voluntarily renounces allegiance or association with that party, he shall be considered as a defector. As per the provisions of Tenth Schedule, a legislator is considered as defected in following cases:

voluntarily giving up membership of his political party;

a member votes or abstains from voting in the house against the directions of his party;

Explanation: aforementioned provisions also apply to a nominated member if he was a member of a political party at the time of his nomination, or has acquired the membership of a party within a period of six months of nomination.

A nominated member who joins any political party after the expiry of six months from his nomination.

Joining any political party by a member who was elected as an independent candidate.

These grounds for disqualifications are so vast that a member of a house became a property of the party having little chance to represent his constituency. Dinesh Goswami Committee has suggested that a nominated member should not be allowed to join a party even during first six months⁸. But in other respects the Committee has recommended to balance the party discipline with the rights of a member to represent himself freely. In this respect the Committee has recommended that the disqualifications should be specifically limited:

- (a) to the cases where a member of a house has voluntarily given up the membership of his political party; and
- (b) To the cases where a member votes or abstains from voting contrary to the directions of his party only in respect of a no-confidence motion or a money bill or on a vote of thanks on the Presidential address.

Judicial Decisions:

The anti-defection law has brought a number of cases to the courts. Prominent amongst those are *Kihota Hollohon v. Zachilhu and Others*, *Dr. Kashinath G. Jhalmi v. Speaker, Goa Legislative Assembly*, *G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*, *Ravi Singh Naik v. Union of India* etc. Following were the main issues raised in these cases:

Exclusion of judiciary:

The Tenth Schedule has authorized the Chairman or the Speaker of a house, as the case may be, to decide the matters of defection⁹. The decision of a Chairman/Speaker was declared as final, and a bar was imposed on the jurisdiction of courts from the matters connected with defections¹⁰. But this provision was

⁵ Originally para. 3 of Tenth Schedule has provided that the disqualifications shall not be applicable in the cases where 1/3 legislators of a political party have left the party on the pretext of split in the party.

⁶ Article 75(1A, 1B) and article 164 (1A, 1B).

⁷ Article 361B.

⁸ Chapter X, Report of the Committee on Electoral Reforms, May, 1990.

⁹ Clause (1) of para. 6, Tenth Schedule, Constitution of India.

¹⁰ Para. 7, Tenth Schedule.

struck down by the Supreme Court, and the courts were allowed to hear appeals against the decisions of Chairman/Speaker (Kihota Hollohon v. Zachilhu and Others, 1993).

Power of a Chairman/Speaker: proceedings of house or judicial powers?

The proceedings of Parliament and the state legislatures are immunized from judicial scrutiny on the grounds of any alleged irregularity of procedure¹¹. Making a decision on the disqualification of a member was also declared as "proceedings of Parliament/State Legislature"¹²; hence also immunized from judicial scrutiny. But the court held that while exercising of the power of making a decision on the disqualification of a member, the Chairman/Speaker acts as tribunal. So his decision is amenable to judicial review (Kihota Hollohon v. Zachilhu and Others, 1993). But the scope the judicial review is to be limited only to jurisdictional errors like a dishonest decision or violation of constitutional mandate etc. on the part of the Chairman/Speaker.

Curtailment of freedom of speech:

The anti-defection law was also challenged on the ground of curtailing the right to freedom of speech in the House. But the Supreme Court has set aside this challenge. It held that the anti-defection law does not affect the freedom of a member to express himself freely. It does not make a member to be 'liable' in any court for *anything said or any vote given by him* in a house.

To whom to represent: Voters or Party?

The anti-defection law puts the cart before the horse. In a democracy the voters are important then their representatives or their parties. But as per this law the political parties are conferred the place of primacy, followed by the legislators, with the voters at the lowest ebb. A party can command its legislators to vote or not to vote. A legislator, who is a representative of the people, is obliged to bow before that command, unless he has any other "profitable" option. If he has a more profitable option, he can violate the party whip and opt for that option. This profitable option is joining the ruling party; consequently, losing his seat; contesting the bye election as a candidate of ruling party. In such a case the defector has little chances of being defeated by the opposition parties, as the bye elections mostly goes to the ruling party. In such a compromise the defector is successful not only to secure his seat in the House, but sometimes also to get rid of criminal cases registered against him¹³. But it is a betrayal to both the voters and his party.

Anti-defection law- An Annihilation of Dissent:

The anti-defection law is an encroachment on the rights of voters, as well as their representatives to vote freely, the right which is guaranteed under article 105(2) and article 194(2). These articles have provided that a member of a house of Parliament or of a house of the Legislature of a state shall not be liable to any proceedings in any court for anything said or any vote given by him in the house. But the anti-defection law has made the members liable to the jurisdiction of the political elected Chairman/Speaker, a position which is even worse than making them liable to the courts of law.

¹¹ Articles 122 & 212, Constitution of India.

¹² Clause (2) of para 6, Tenth Schedule, Constitution of India.

¹³ "Ex-Cong MLA Joginder Pal Jain wins Moga for Akalis" *Hindustan Times*, (Chandigarh) March, 01, 2013.

Suggestions:

For the sake of stability of governments the legislators should be restricted from defection, but the meaning of defection should be limited only to the instances of leaving the party or joining any other party, voting or abstaining from voting against the party whip only in those matters when the life of the ministry is at stake. On ordinary matters the legislators should have a right to express their opinion on the behalf of those, to whom they are representing. In case of their deceitful conduct, the real defection in the form of changing his political party or making an unholy alliance to support or to destabilize the government, the punishment should be more severe. Such legislators should be banned from contesting any election, at least till the duration of the house, of which he was a member. The objective of anti-defection law is to deal with floor-crossing. But dissent is an intrinsic cog of parliamentary democracy; hence, should not be considered as an instance of defection (Khanna & Shah, 2012).

Conclusion:

The anti-defection law in India is a positive step against the opportunistic political behavior and the tendency of horse trading. But as far as the right to represent a constituency is concerned, the legislators should be given more freedom to express their views and to vote. In case a legislator is deceiving the voters, or destabilizing the government he should be punished more severely.

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