

EDITION-1 | JANUARY 2022

LEX ERUDITES

AN ANNUAL PEER-REVIEWED E-JOURNAL

INAUGURAL EDITION



LEX ERUDITES

WWW.LEXERUDITES.COM

LEX ERUDITES E-JOURNAL

Inaugural Edition-I

January 2022

INAUGURAL EDITION LAUNCHED BY

Hon'ble Justice V. G Arun
Judge, High Court of Kerala

PATRON

Adv Gajendra Singh Rajpurohit

EDITOR-IN-CHIEF

Adv Akhil George

ADVISORY BOARD

Dr. Bryan Clark
Professor of Law & Civil Justice, Newcastle Law
School, UK

Dr. Dhvani Mehta
Co-Founder & Lead- Health & Medical Law, Vidhi
Centre for Legal Policy

Mr. Sagar Singamsetty
Managing Director- Aerospace and Aviation Lawyers Association of India
& Adjunct Professor CADL, NALSAR

SENIOR EDITORIAL BOARD

Dr. Anuja S
Associate Professor,
MS Ramaiah College of Law

Mrs Aarathi Gopal
Legal Consultant, AMA and Partner
Muscat

EDITORIAL BOARD

Mr Arjun Mohandas
Senior Privacy Research
Analyst, Tsaaro

Adv Amritha Nair
Advocate
Parinam Law Associates

Mr Athul Madhav
St Joseph's College
Bengaluru

Mr David Varghese Thomas
Government Law College
Thiruvananthapuram

Ms Aditha K

Amrita Viswa Vidya Peedom,
Coimbatore

Ms Eilin Maria Baiju

Gujarat National Law University
(GNLU)

Mr Johan Manoj Mathew

Government Law College
Calicut

Mr Karthik Menon

National University of Advanced Legal
Studies (NUALS)

Ms Medha R Lakshmi

National Law University
Bhopal

Ms Mrinal Rajendran

Government Law College
Thrissur

Ms Priyanka Joy

Mount Carmel College
Bengaluru

Ms Anagha Menon C

SASTRA University
Thanjavur

Ms Shreya Subramanian

Symbiosis Law School
Hyderabad

MANAGING BOARD

Ms Aathmaja Menon

SASTRA University
Thanjavur

Ms Amritha A Navada

SDM Law College
Mangalore

Ms Lakshmi Nandana

Government Law College
Ernakulam

Mr N Arun Vaidyanath

SASTRA University
Thanjavur

Mr Sivadath Madhu Menon

Government Law College
Thrissur

Copyright © 2022 by Lex Erudites

All Rights Reserved. Any person desiring to use this journal and the articles for editorial purposes, research or private study can do so with the prior permission of Lex Erudites.

REWORKING DEFECTION - A SCRUTINY ON INTRICACIES OF ANTI-DEFECTION LAW IN INDIA

*Navya P Raviprasad , Nihala Jasmin- Government Law College,
Thrissurs*

Reworking Defection- A Scrutiny on Intricacies of Anti-Defection Law in India

Navya R Raviprasad, Nihala Jasmin

Democracy is a form of government in which the rulers are elected by the people; final decision-making power rest with those elected by the people; couched on free and fair election where those in power have a fair chance of losing; adult suffrage coupled with uniform value for every vote; governed within constitutional limits. Democracy is not restricted to casting of votes and formation of government; it dwells upon the trust of the citizens towards the formation of the government by the political parties with varied ideologies that secures majority in the elections. Therefore, through the exercise of voting the citizens are apparently manifesting their allegiance towards a particular ideology and their desire to be governed by such ideology. Unequivocally, in a democracy the will of the citizens is the underscoring goal and their trust is the indispensable propellant that fuels a democratic structure. Inter-alia, ungainly activities in the nature of horse-trading, floor-crossing etc. are the unruly demons in democracy which lead to the formation of the unholy alliances by undermining the will of the voters. Incidents from 1985 to present shows that the People's elected representatives are condemnably using the democratic fabric for political gambling which frowns at the entire democratic system. These elected representatives tends to mortgage the trust of voters for getting personal financial and other benefits and thereby compromise on the promised vision of the elected government. All these incidents clamor for stringent laws to clog the loopholes in the existing defection law for cementing the base for ensuring the stability of Government and to uphold the real meaning of democracy.

Anti -Defection law struggles to tie down anti -democratic practices

Democracy is a form of government in which the rulers are elected by the people; final decision-making power rest with those elected by the people; couched on free and fair election where those in power have a fair chance of losing; adult suffrage coupled with uniform value for every vote; governed within constitutional limits. Democracy is not restricted to casting of votes and formation of government; it dwells upon the trust of the citizens towards the formation of the government by the political parties with varied ideologies that secures majority in the elections. Therefore, through the exercise of voting the citizens are apparently manifesting their allegiance towards a particular ideology and their desire to be governed by such ideology. Unequivocally, in a democracy the will of the citizens is the underscoring goal and their trust is the indispensable propellant that fuels a democratic structure. Inter-alia, ungainly activities in the nature of horse-trading, floor-crossing etc. are the unruly demons in democracy which lead to the formation of the unholy alliances by undermining the will of the voters. Incidents from 1985 to present shows that the People's elected representatives are condemnably using the democratic fabric for political gambling which frowns at the entire democratic system. These elected representatives tends to mortgage the trust of voters for getting personal financial and other benefits and thereby compromise on the promised vision of the elected government. All these incidents clamors for stringent laws to clog the loopholes in the existing defection law for cementing the base for ensuring the stability of Government and to uphold the real meaning of democracy.

Seeds of defection

The practice of defection started to permeate in our country from the pre-independence era itself, when Shyam Lal Nehru crossed the floor to the British side during Mont-ford Reforms. In 1957-66 about 556 members crossed the floor

and switched to the Congress Party, 275 members who got the ticket of the Congress party switched to other parties. Further, between 1967 and 71 about 142 MPs and 1900 MLAs defected. In Haryana, an MLA named Gaya Lal changed his party thrice in a day that led to the famous phrase " **Aaya Ram Gaya Ram**". In the fourth and fifth general elections and of state assemblies, Lok Sabha, Union territories nearly 2000 members defected. On an average, almost one state government in India collapsed every month due to abrupt changing of political affixations by the legislators. The alarming scale of horse-trading, counter horse-trading and counter-counter horse-trading triggered several rounds of frequent political defection by the serial turn coating politicians resulted in the formation of an unholy alliance, leading to dissolution of many assemblies.

It had trampled democracy and broken the trust of people of India, thereby leading to the need for a strong law to wipe out unethical malpractices in democracy. As a result, the Government of India appointed a committee chaired by Y.B.Chavan in February 1968 to study this national malady eating the vital part of our country's democratic ethos. Committee presented a report on February 18, 1969 stating some recommendations. It took 17 years for Parliament to address the defection and in 1985 Rajiv Gandhi Government the bill was introduced and it became law to curb the defection by The Constitution (fifty second amendment) Act, 1985.

Anti-defection law in a nutshell

The anti-defection law encompassed in the constitution of India through the introduction of the tenth schedule comprises of 8 paragraphs. The purpose, as is obvious, is to curb political defection by all the legislators.

Paragraph 1 deals with the interpretation of Anti-defection law.

Paragraph 2 states the grounds of disqualification.

2.1(a)- provide disqualification of a member if he or she voluntarily gives up the membership of such a political party.

2.1(b)- provide disqualification when a member votes or abstain from any pivotal voting contrary to any direction prescribed by their corresponding political parties.

2.2 states that any member, after being elected as a representative of a certain political party, shall be disqualified if he/she any other political party after the election.

2.3 states that a nominated member shall be disqualified if he/she joins any political party after six months from the date he/she takes his seat.

Paragraph 3, 4, 5 deal with exemptions on disqualification.

Paragraph 3- removed by passing The Constitution (Ninety first amendment) Act, 2003 which exempted disqualifications resulting splits with one third: of the members defecting from a political party.

Paragraph 4- in cases of merger of political parties where not less than two-third of the legislature party members has agreed to same.

Paragraph 5- Exception of the Speaker or Deputy speaker of Lok Sabha or the Deputy Chairman of Rajya Sabha or the Chairman or the Deputy Chairman of Legislative Council of a State or the Speaker or the Deputy Speaker of a state.

Paragraph 6- Chairman /speaker of the respective legislative house to be the final decision maker related to disqualification matters.

Paragraph 7- Bar of justice of courts.

Paragraph 8- Power to frame rules regarding the concerned disqualification matters of the respective house of Legislature.

Exigency for an effective Anti- Defection law

The paramount issue regarding the 10th schedule is that it does not have a defined procedure with definite time limit for completion of the disqualification process of the defecting members. The incongruous scenario arose in Telangana which made a mockery of the outcome of the May 2014 assembly election, on the voluntary giving up of 11 members elected by the ticket of TDP, Congress, YSR Congress and allowing them to subsist as members of the assembly. All resigned members joined the ruling party TRS. Irony is, the speaker didn't initiate any proceedings, Talasani Srinivas Yadav has even been appointed as minister of commercial taxes and cinematography, by overriding the provision of RPP (Remunerative political position) in the 91st amendment⁴. The Speaker, being a constitutional functionary, is generally presumed to have adjudicated with the highest traditions of constitutionalism. It was for this very reason that the constitution has limited the power of the Court to review the Speaker's order under the Tenth Schedule. It is clearly depicted in *Kihoto Hollohan v. Zachillhu and ors*, 1992¹ which upheld the validity of Anti Defection Law. The Constitution Bench in that case reaffirmed the power of judicial review of Constitution Amendments. As a member who entered into the House by winning the ticket of the ruling party, Presiding Officer can have a bias towards the ruling party, which acts as a loophole endangering the system which in turn undermines the provision of the tenth schedule and make capital out of the prescribed provision in paragraph 6, that we witnessed in Karnataka, Madhya Pradesh, Goa and Manipur. Neither the Constitution nor the statutory scheme contemplates disqualification under the tenth schedule operates as a bar for contesting re-elections. But there is an envenom loophole, making democracy at stake, people's elected representatives as untrustworthy. Dramatic instances were held at Karnataka auguring the urgent need to plug this loophole, on the resignation of MLA's,

¹ *Kihoto Hollohan V Zachillhu and Ors* AIR 1992 SC (1)686 India

ruling coalition was reduced to a minority, which making the opposition a single major party. Speaker disqualified members till the end of the term by prohibiting them to contest an election. But the Court's verdict was an antithesis to the Speaker's decision, upheld The Representation of People Act, 1951, S 36, which does not contemplate such disqualification. The evil motive of democracy witnessed at Karnataka is cast in the same mould of Madhya Pradesh, thus resignation with permission to contest election in remaining years till the end of the term is another tool or loophole, making a mockery of democracy and 'tread and grind' the trust of voters like 'bite the hand that feeds one'.

In 2003, when the Ninety third Amendment was incorporated in the Indian Constitution, the terminal intention of it was to bring an end to the frequent defection. It stated that it requires at least 2/3rd members of a legislative party to form a new political group or a merge with another political party, without getting disqualified under the anti-defection law. In 2019, Goa became the venue for gambling on the merger of two of the three MGP party MLAs to BJP. The total strength of the legislators of MGP is 3 and the merge constitutes 2 /3rd of members. 2/3rd of the members of the legislative party merger was deemed to have taken place under the provision of sub clause ;(2) of clause (4) of the tenth schedule. These thespian incidents held in Goa provide, without getting disqualified under anti-defection law requires at least two by third members of the Legislative party to form a new political group. This is precariousness. Breaking the small party by large parties with their potential to bribe any number of legislators with huge money, again satirize democracy and enhancing the trust of voters.

Suggestions: filling the cavities

We have to curb these evil practices which break the trust of the public in the Indian democracy and stop making puppets of common people. To strengthen democracy and to bring stability to Indian politics, we have to fill these loopholes.

For that, the first solution is to define the entire defection procedure and a reasonable time limit. It can be for one month, two months or three months. So, if the legislator defects, the speaker can take decisions within that prescribed time limit, within that time at least and no need for such a long time for answering a simple question whether he should be disqualified or not. Therefore, it is important that the law should prescribe a time limit.

The bias of the presiding officer towards the ruling party and against the opposition party influences the final decision taken by him /her. The same we witnessed in Karnataka, MP, Manipur, Goa and recently in Rajasthan.

In *Rajendra Singh Rana v. Swami Prasad Maurya, 2007²*, the presiding officer of Legislative Assembly, Uttar Pradesh failed to act on the petition for disqualification which is not merely an irregularity but a violation of the constitutional duties. The solution to eliminate this evil procedure is to transfer the power of decision-making analysis regarding disqualification, from the speaker to the Election Commission. Make a report and submit it to the Governor, if it is in the case of the State assembly and to the President, if in case of the Parliament; Hence to take a final decision regarding whether he is disqualified or not, the Governor or the President need not act on his own, but on the basis of the report submitted by the election commission. Thus, we can make defection as a tough task and can plug the major loopholes by making respective changes in paragraph 6 of anti-defection law.

Karnataka's dramatic incidents exposed resignation as another tool or loophole making a mockery of democracy. If their MLAs or MPs are resigning, they have the right to resign, but then don't allow them to join again or to contest election in the remainder of the term and he/she should be disqualified for the remaining term of the house. If this provision comes into force, it will preserve the Indian

² *Rajendra Singh Rana V .Swami Prasad Maurya , AIR 2007 SC 1305 India.*

democracy for a long time by making defection as a tough choice for the legislators.

The provision contained in the Constitution (Ninety first Amendment) Act 2003 is another major loophole which makes Indian politics a vicious one. If it doesn't clog with a pertinent provision, this loophole will become a big question mark in the Indian democracy. The dramas held in Goa Legislative Assembly highlights the need to clog this loophole, because it may be difficult to break 50 MLA's or 100 MLA's, but it is very easy to break the party with three, five or ten MLA's. The party with lots of money in the bank account has the potential to bribe various legislators. Thus 2/3rd merger of the party should also be avoided because the breaking up of small parties is very easy.

Our Judicial system is the key aspect of our democratic way of life. It upholds peace, order and good governance. Citizens look up to the judiciary to uphold their rights whereas the government looks up to the court to interpret laws. India as a country, adopts principal synthesis of both Parliament sovereignty and judicial supremacy in the form of the amendments and judicial review. The interference of the Judiciary into the affairs of other organs is limited, and they are helpless in certain situations because the legislature is the supreme organ of the Constitution. But the mere silence of Judiciary is not good at all when considered their role to uphold good government. The intervention of the Judiciary in Manipur in the legislators' defection is the most worthy example of what the Judiciary can do within its limits regarding the defection of legislators.

Conclusion

To conclude, the law certainly has been able to curb the evil of defection to a great extent. But, recently, a very alarming trend of legislators defecting in groups to another party in search of greener pastures is visible. The recent examples of

defection in state assemblies and even in Rajya Sabha bear this out. This only shows that the law needs a relook in order to plug the loopholes if any. Nevertheless, Political instability caused by the frequent and unholy change of allegiance on the part of the legislators of our country has been contained to a large extent by the Act. Hence it can be rightly said that the introduction of anti defection law is one of the most important steps government has taken so far to uphold the principles of democracy.



LEX ERUDITES

lexerudites.com

info@lexerudites.com