ANTI-DEFECTION LAW: AN AMELIORATION OR DETERIORATION OF DEMOCRACY

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Historical Backdrop of the Defection Laws in India

In Democratic governance, election of representatives from constituencies is one of the most important and cardinal processes, and so does presence of political parties with either heterogeneous or homogenous ideologies. The said parties set-up their candidates from different constituencies for elections of members to Lok Sabha or the Legislative Assembly.

However, ironically speaking, even being world's largest democracy, party politics has been severely marred by the politics of Aaya Rams and Gaya Rams. Time has been the living testament to the practices of lawmakers upon being elected to the legislature, often lawmakers switch parties and cause political instability with various incentives and enticements offered by the rival party with bewitching posts or simply monetary advantages. The earliest example of such debacle was from Haryana where in 1967, one Gaya Lal switched parties thrice in a just a span of 24 hours. This was a blatant and despicable fraud with the not just with the electors, who elect representative for a period of 5 years but also a deceitful maneuver with the political party under whose symbol and said ideologies the said candidate contested and got elected. Hence to overcome such abysmal democratic murders, the concept of Anti-defection laws came into being to combat such debacles in rear future.

Prior to 1974, it was prescribed that seat of a member of Legislative Assembly shall become vacant, if he resigns by writing to the Speaker[2]. As per this provision, the Speaker had no control over the same and the seat used to become vacant there and then.

There were certain instances of misuse of this provision which led to the introduction of the Constitution (Thirty Third) Amendment Act, 1974. The Statement of Objects and Reasons for such alterations was to ensure that this amendment was incorporated to place a check on the authenticity of the resignation. Post the amendment the seat was to be vacated only upon the acceptance of resignation by the Speaker with a view that he shall apply his mind to satisfy himself that such resignation is voluntary.

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[2] INDIA CONST.A.190 cl.(3)(b).

Furthermore, in attempts to prevent MLAs to join the opposition parties or defying the party whip during voting in the house without tendering actual resignation, the Constitution (52nd Amendment) Act, 19852, was brought to deal with the menace of such open defection. Hence, Article 191(2) along with the Tenth Schedule were inserted in the Constitution of India to deal with the extra-ordinary situations of destabilizing the "constitutionally elected governments" and attacking the democracy, by resorting to unfair means to satiate personal goals and enticements over the will of public.

It is quite comprehensible from both the Constitutional Amendments that the Indian democracy and Constitution had been evolving on the basis of past experiences and challenges coming up. Post the 52nd Constitutional Amendment, no other Constitutional Amendment has been done to deal with the new challenges which kept on plaguing and ravaging the democracy till date. Ant defection law has been challenged many number of times, it has been contended that anti defection law constitutes flagrant violation on the freedom of speech and expression and democratic values. This takes us to the second point of our discussion which is testing the legality of tenth schedule and blunder in tenth schedule.

Testing the Legality of Tenth Schedule

Democracy is sine qua non for country like India which has gone through lot of hardships in its initial years of its inception. Democracy is an integral part of the basic structure and liberty of thought, expression, belief, faith and worship are some of the intrinsic features of democracy. But, due to lure of office and money, many politicians switch their political affiliation within hours and this has resulted in blatant violation of democratic principle on which the pillar of constitution stands firm. The problem of defections has not been new to the functioning of the Indian Parliamentary democracy. Indian politics had seen defections right from the pre-independence Central Legislative Assembly and Provincial autonomy days[3]. And to shield the basic structure of Constitution, anti defection law was introduced rationale behind the incorporation of tenth schedule was to curb the evil of defection. But, since its inception, this law it has been challenged on various grounds and has been misused many number of times, it would be imperative here to mention that the Tenth Schedule itself does not prohibit any member of a Legislature from violating the direction/ whip issued by a political party to legislators belonging to that political party. Paragraph 2 (1) (b) of the Tenth Schedule prescribes that when such a direction/whip issued by that political party is violated by a legislator either without the prior permission of the political party or without such violation having not been condoned

[3] Moolchand Shyam, "Politics of Defections and Democracy," (1979) 13 JCPS at 328, 329.

subsequently by the political party, the legislator incurs disqualification for continuing as a member of the House. It is clear from the wordings of Para 2 (1) (b) that it itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs and that this measure against the defection does not hinder parliamentary democracy but this provision has been misused in various ways to force party members to vote in single direction without defiance and any form of digression from same is considered as the violation of tenth schedule and the member is disqualified from house, this results in the brazen violation of objective of tenth schedule and is the manifest violation of the principles enshrined in Constitution of India.

In present-day situation exploitation of this proviso has led to the conclusion that this provision of tenth schedule constitutes a flagrant violation of fundamental principles and values which are quintessential for the sustenance of parliamentary democracy. Without proper precincts Para 2 (1) (b) has been interpreted in a way which negates the foundational assumption of parliamentary democracy that is freedom of speech, freedom of conscience and right to dissent. The provision which is interpreted as to attach a liability of disqualification of an elected member for freely expressing his views on matter of conscience, faith and political belief are indeed restraint on the freedom of speech and these restraints are opposed to public policy.[4] Freedom of speech and expression in a spirited democracy is a highly treasured value. There are proponents who have set it on a higher pedestal than life and not hesitated to barter death for it.[5] Freedom of speech lays at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular Government, is possible.[6] But the improper handling of this proviso has caused much chaos and has flagrantly violated the fundamental rights of those whose only objective was to foster the democratic values enshrined in Constitution by showing dissent and have vigorous rounds of debate and discussion for formulation of new dimensions and ideologies.

Is Para 2(1) (b) in conflict with the basic structure?

To rule out the aforementioned question it would be imperative here to refer to the judgment of 1973 of SC of India which is the magnificent example of power of judiciary wherein the judges while defining the meaning of amendment circumscribed the boundary in which the constitution can be amended by evolving

[4] Amalgamated Society of Railway Servants v. Osbrone [1910] AC 87.
[5] Subramanian Swamy v. Union of India, (2016) 7 S.C.C. 221.
[6] Romesh Thapar v. State of Madras, A.I.R. 1950 SC. 124.

'doctrine of basic structure' and the meaning of expression "amendment" was ruled out. The true position is that every provision of the Constitution can be amended provided the 'basic foundation and structure of the Constitution remains the same'.[7] Although there is no specific substantive limitation on the power to amend under A. 368 but this power is subjected to substantive limitation in that the basic structure cannot be altered. At the time of giving judgment the SC of India ruled out five basic structure of Constitution, democracy being one amongst those five. India is a constitutional democracy and inserting tenth schedule specifically Para 2 (1) (b) amends the foundational aspect of the India. Hence such an amendment which tries to change the structure of Constitution is forbidden because constituent power cannot manipulate intendment of constituent assembly. Para 2 (1) (b) of tenth schedule quivers the foundational stone and the basic structure of constitution in as much as it restricts the freedom of members to vote independently and voluntarily without the fear of being disqualified for showing bona fide dissent It is therefore submitted that the impugned paragraph is invalid as it subverts democratic rights of elected members of parliament and legislature of state.

Para 2 (1) (b) with reference to parliamentary privileges and freedom of speech and expression

When Para 2 (1) (b) is construed in the light of A. 105 of Constitution which guarantees parliamentary privilege[8]of members of parliament, it is apparent on the face of this provision that These privileges guarantee absolute fundamental of speech to the member of house and stands independent of A.19[9]. This further elucidates the intendment of the constituent assembly which was to uphold parliamentary democracy as the constituent assembly was of view that matters which involve implementation of policies of government should be discussed by the elected representative of people because these discussions and debates paves way for innovative ideas and opinions and thus is of utmost pertinence

The objective behind the insertion of A. 105 was approve of the idea of free and valiant share of ideas and opinion debate and expression on different point of view serves essential and healthy functioning of parliamentary democracy. Article 105(2) is placed on higher pedestal than fundamental right under A. 19 (1) as it comes without restriction and members of house enjoy absolute freedom of speech as held by Apex

[7] Kesavananda Bharati v. State of Kerala (1973) 4 S.C.C. 225.
[8] "A right or immunity granted as a peculiar benefit, advantage or favour; a peculiar or personal advantage or right especially when enjoyed in derogation of common right; a prerogative, a right or immunity attached specifically to a position or an office."
[9] P.V. Narasimha Roy v. State (CBI/SPE) (1998) 4 S.C.C.626.

court in a case wherein while dealing with the nature and scope of privileges the court concluded that these privileges cannot be cut down in any way by law contemplated by clause (2) of A. 19.[10]

In addition to this the expression "any direction" connotes wide discretionary power in the hands of the leader of the political party and this unlimited power results in the hindrance of the interest of honest dissenters as they lose their right of franchise [11]and right to dissent[12]. Hence, the member virtually loses his identity and becomes a rubber stamp in the hands of his political party.[13] Hence it can be concluded that "Any direction" issued by the leader of the political party or by any authority, to vote for a particular candidate or to vote for a particular policy would not only mean influencing such right but would also amount to a corrupt practice. Such arbitrary use of this expression for person's monetary and sentimental interest cost it its constitutionality, for in that sense it become destructive of democracy/parliamentary democracy which is the basic feature of the Constitution.

Does speaker fits in the criterion of independent adjudicator?

Democracy is a part of the basic structure of the Constitution [14]& adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution[15]. Accordingly, independent adjudicatory machinery for resolving disputes relating to the competence of Member of the House is envisaged as an attribute to achieve the ends of justice[16]. The tenure of the Speaker who is the authority in the Tenth Schedule to decide this dispute is dependent on the continuous support of the majority in the House and, therefore the Speaker does not satisfy the requirement of such an independent adjudicatory authority[17]; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature[18]. Attaching much significance to the decision of speaker with an option of appeal in specified cases only gives ample power to speaker to disqualify any

[10] M.S.M Sharma v. Shri Krishna Sinha AIR 1960 S.C. 1186.
[11] Dagdu Vithoba Patil v. The State of Maharashtra 1967(69) Bom L.R. 767.
[12] Anant Janardhan v. M.A. Deshmukh 1965 (68) Bom. L.R. 256: Right to dissent is the very essence of democracy, conformity to accepted norms and belief has always been the enemy of freedom of thought.
[13] Parkash Singh Badal Vs. Union of. India. AIR 1987 P&H 263.
[14] Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225: The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features: (1) Supremacy of the Constitution;
(2) Republican and Democratic form of Government. (3) Secular character of the Constitution; (4) Separation of powers between the Legislature, the executive and the judiciary; (5) Federal character of the Constitution.
[15] S.P. Sampath Kumar v. Union of India (1985) 4 SCC 458, Also see, L. Chandra Kumar v. Union of India (1997) 3 SCC 261 : Power of judicial review over legislative action vested in the High Courts and the Supreme Court under Articles 226 and 32 respectively is the basic structure of the Constitution.
[16] Byrne v. Kinematograph Renters Society Ltd. (1958) 1 WLR 762.
[17] Kuldeep Bishnoi v. Speaker, Haryana Vidhan Sabha 2014 (4) RCR (Civil) 736.
[18] State of Madras v. V.G. Row A.I.R. 1952 SCR 597.

member according to the whims and fancies of majority political party, hence such wide amount of power to the speaker and attaching much significance to the decision of authority which is partisan and where there is reasonable suspicion on the credibility of the decision made by such adjudicator is grave violation of Principle of Natural Justice.[19]

Lacuna in the amendment of tenth schedule

It would be imperative here to mention that the procedure that was adopted by Indian parliament for incorporation of this schedule suffers from vice of irregularity as this amendment came into extant without being ratified from the state assembly. And in the absence of ratification it is not merely specific paragraph but the entire Constitution (Fifty-Second Amendment) Act, 1985 which is rendered unconstitutional, since the constitutional power was not exercised as prescribed in Article 368, and, therefore, the Constitution did not stand amended in accordance with the terms of the Bill providing for amendment. Doctrine of severability cannot be applied to a Bill making a constitutional amendment where any part thereof attracts the proviso to clause (2) of Article 368. This amendment results in making a change in Article 136 in Chapter IV in Part V and Articles 226 and 227 in Chapter V in Part VI of the Constitution and hence it requires ratification from state. In addition to this, such arbitrary incorporation of schedule defying the provision of a. 368(2) results in violation of federalism which is intrinsic feature of our Constitution. Hence for the reasons stated above it is contended that Non-compliance of the special procedure prescribed in Article 368(2) cannot bring about the result of the Constitution standing amended in accordance with the terms of the Bill.

Comparative Study of Defection Laws with Major Democratic Countries of the world

It has been aptly said that democratic form of government is one of the most effective forms of political system that the human genius has so far came up with to ensure the rule of the people for their own benefits and greater good. But for a healthy democracy to exist, the incorporation of political parties is indispensable and simply can't be overlooked upon- be it in the form of bi-party system like Great Britain and America or be it in the form of multi-party system like India and France. However, the most premier and cardinal aspect of democracy is the rule of majority and quite often it becomes a challenging task for political parties to reach, the required numbers and the same results in political bargaining and haggling. In that pretext,

[19] A.K. Kraipak v. Union of India (1969) 2 SCC 262 ; also see, Ashok kumar Yadav v. State of Haryana (1985) 4 SCC 417, 442.

political defection has become synonymous to party democracy in most of the major democracies of the world. However, in the developed countries, the principles of morality, ethics, culture, etc. have been so deeply engraved in the minds of both the electors as well as their elected representatives and also the practice of constitutionalism has made the system of governance so faultless that considerations like the power, insatiable greed for money and lure for the public office find little place in the minds of the political representatives. Therefore, Unlike India the need for a specific law to curb defection has not arisen in developed democracies. Nonetheless, it can't be said that nonexistence of specific Anti-Defection Laws in other democracies of the world, except Kenya, Sri Lanka and Pakistan which received its own defection law prior to India do create a guarantee that there have been no defections of members of the political parties in those countries. Almost all British Prime Ministers during 1940 to 1980 except Clement Attlee and Edward Heath have been dissenters, hence, to combat such shifting allegiances there are various legislative measures adopted in different democracies of the world to check the factors that proliferate defections.

Relative Laws to Check Defection

Provision for Calling Back: It is a common knowledge that in Modern Parliamentary democracies, a member once elected has no responsibility to his constituents and he continues to sit in Parliament till the next election arrives and then he goes to the electorate asking for their votes.

Keeping this thing in mind provisions for recall had been incorporated in the Constitution of Switzerland, erstwhile USSR, Rumania and former Czechoslovakia. It has also been incorporated in the Constitution of the 12 states of USA.[20] The basic principle underlying 'recall' is that the people may have an effective and speedy remedy to remove a functionary who is not giving satisfaction, regardless of whether he is discharging his duty to the best of his ability and as his conscience dictates. Henceforth, the procedure involves admission of petitions signed by a prescribed percentage of qualified voters and accompanied by sworn statements of the sponsors that the signatures were secured according to law and by a statement of the grounds for the recall to the election authorities. On satisfaction of the genuineness and the sufficiency of these petitions, a recall election is held. This arrangement aids in the prevention of the legislators to resort to unprincipled and malicious defections.

[20]The report of the Committee on defections published by the Ministry of Home Affairs, Government of India, p.82.

Imposition of Limitation on the Number of Office of Profit: The underlying thought process of imposing such limitation is that over-ambitious legislators should be denied an incentive to defect and an assurance that the defector should go unrewarded. Instead of directly applying such limitation to the defector, his prospects of office are indirectly restricted by limiting the total number of offices in the Legislature.

In United Kingdom, there is a law which limits the size of the Ministry to a given number. It is effective indirectly in as much as the restriction is laid on the number who can sit and vote in the House of Commons.

Furthermore, In the Indian context, the case of Zaverbhai v. Council of Ministers, held "When a statute takes away a right conferred by the other, even though the right to be one which might be waived or abandoned, without disobeying the statute which conferred the right"[21]

Curbing splinter parties: This type of policy is introduced to curb the mushrooming of parties and the being of unattached individuals. One thing which can be ascertained herein is that, these are not countries where the pure majority system in elections applies but in Countries where there is either one party rule Russia. The broad parallels drawn of the system in these countries is that the seats are distributed among the competing party lists. Only parties can take part in the election and the party lists must contain the names of the candidates in order of preference There has been a vital suggestion that a similar criterion should be used and parties who poll less than the specified percentage of valid votes in the Assembly/Parliament election should be made to forfeit their seats. The principle underlying this thought process is that birth of mushroom parties with narrow allegiances should be discouraged and growth of parties on broader platforms concerning national issues as whole should be encouraged. It is argued that such ameasure will eventually lead to formation of a stable two party system as is obtaining in U.K. but in the present situation it would against Article 19 of the Constitution of India.

Resignation of a Member: In Nigeria, political parties have devised a system of obtaining undated letters of resignation from the candidates, authorizing the leader to place them in the hands of the Speaker in case the Member of Parliament crosses the floor. Contrastingly, in India, Under Article-103 (3) b, resignation becomes effective only when it is delivered by the member himself to the Chairman/Speaker which needs to be changed.

[21]Zaverbhai v. State of Bombay A.I.R.1955 S.C.R. 799.

SUGGESTIONS

The authors would like to suggest some changes that could be made in the current defection law by taking in reference the type of practice that is exercised by other countries which have curbed the evil of defection and have attained transparent democracy.

United States: Internal Management of defection politics: The United States legislative structure with respect to party discipline follows a more liberal centric model. The fear of disqualification does not mar the freedom of legislators with respect to voting for any bills or policy. It is worth noting that not only US experienced defections, but also, operated without an anti-defection legislation. Despite the omission of a legal framework to enforce the same, party discipline carries great emphasis. Strictly speaking, party cohesion or the ability of the party members in the legislature to come to a consensus on policy matters is quintessential. [22] A degree of control is to be exercised by the party leaders to ensure that the legislators who belong to that particular party vote as a bloc on a legislation, important to the achievement of party objectives. US party structure that provides for sanctions to be imposed on legislators who do not vote according to party lines includes the removal of a legislator from an important position on a legislative committee,[23] loss of prospective appointment to the same, or expulsion of the legislator from the party caucus.[24]

India must take lessons from the limited extent of sanctions that can be imposed by a political party upon the member. The imposition of sanctions can be watered down in India to only allow expulsion of a defecting member from his party without costing him his seat in the Parliament.

United Kingdom: Dissent Makes No Difference : The British Parliament system, which provides as the inspiration force for the Westminster model followed in India, is an institution from which great learning can be grasped. Art. 9 of the English Bill of Rights, 1869 provides for freedom of speech in the British Parliament.[25] In UK system, all matters of defection are governed by internal party rules. The freedom of speech and expression is widely scoped in this system and also provides a Member to diverge from the interests of the constituency and also extends to differing from the party stance as well. If the member's views on a bill differ, he is allowed to dissent from the party stance.

[22]Michael Stokes, When freedoms conflict: Party discipline and the First Amendment, 11 J. L. & Pol. 751, 753 (1995)
[23]Beth Donovan, Democrats may punish Chairmen who defied Clinton on Vote, 51 Cong. Wkly. Rep. 1411 (1993).
[24]Ammond v. McGahn, 390 Supp. 655 (D.N.J. 1975).
[25]English Bill of Rights, 1869, Art. 9: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

This concept for justification of freedom however, is criticized because, as in Indian context, people vote for parties and not people. The electorate's concern mainly lies with the party one represents and not the individual himself. The allegiance of a parliamentarian thus, should lie not with the electorate but with his political party. The UK perspective serves as an important example to assuage fears of allowing dissent in Parliament. It can be widely deciphered that a member of the House functions in order to further his career at the primary facie. This would entail being in the good books of not just the party but also the constituency.[26]

A member who tends to dissent from every decision and schemes that his party takes up is unlikely to be seen as a reliable candidate by the electorate. The same is prevalent in case the member dissents on a matter of importance to the government. Thus, the practice of conscientious dissent is one that would be rarely exercised, in cases where a member cannot but vote according the call of his conscience.

Keeping the aforementioned point in consideration, it can be ascertained that India must extend 'representative's judgment' principle, to parliamentary practice in order to maintain a balance between meeting the interests of the political party on the one hand, and the constituency on the other.

CONCLUSION

By going through the various aspects of defection law, it is comprehensible that the foremost problem is lack of prescribed conditions for the disqualification of members and ambiguity regarding the demarcation between dissent and defection which leads to pandemonium in parliament when a person disagrees to a particular whip. This problem can be set aside easily by formulating certain guidelines and specific rules which will act as guidance while demarcating between honest dissent and defection, such guideline would also safeguard the fundamental rights of those having honest opinion. Subsequent, to this the exploitation of power by those under power should be regularly checked and those who act against the democratic values enshrined in our Constitution should be disqualified from the house

The damage caused by Paragraph 2(1) (b) is an inherent by-product of its wide phraseology and application. Fortunately, this provision has not enjoyed an unblemished constitutional existence and has been marred with a fair share of criticism. The validity of the said provision was specifically challenged in the Kihota Hollohan judgment.[27]

[26]Brian J. Gaines & Geoffrey Garrett, the Calculus of Dissent: Party Discipline in the British Labour Government, 15 Political Behavior 2, 115 (1993).
[27]Kihoto Hollohan v. Zachillhu 1992 SCR (1) 686, 1992 SCC Supl. (2) 651.

Here too, the arguments of dissent and debate being suffocated hence were raised and discussed before the Court. The judgment looked at the subversion of the constitutional rights of parliamentarians and aimed at providing a limited scope to the application of the impugned provision. The case, however, while trying to bring about good, fell short of the mark in light of the excessive solutions suggested.

In furtherance to this, there exists a dilemma of a bad whip. The excessive and ineffectual interpretation of Paragraph 2(1)(b)by KihotoHillohan judgment has led to a frequent use of whips by leaders in every day parliamentary politics. Under the guise of integral policy programs, parties have issued directions to their members for inconsequential matters, the non-observance or even the dissent regarding the same continues to attract the disqualification under Schedule X.

Furthermore, what affects the Defection laws the most in Indian context is its constant tussle of trying to be legally relevant in contemporary state of political affairs without any changes. It is thus suggested that to cure the problem of defection Indian legislature should take lessons from the practice that is taking place in countries like U.S. and U.K. wherein the politics is not marred by defections and democratic values are not trampled upon rather are given the foremost importance.