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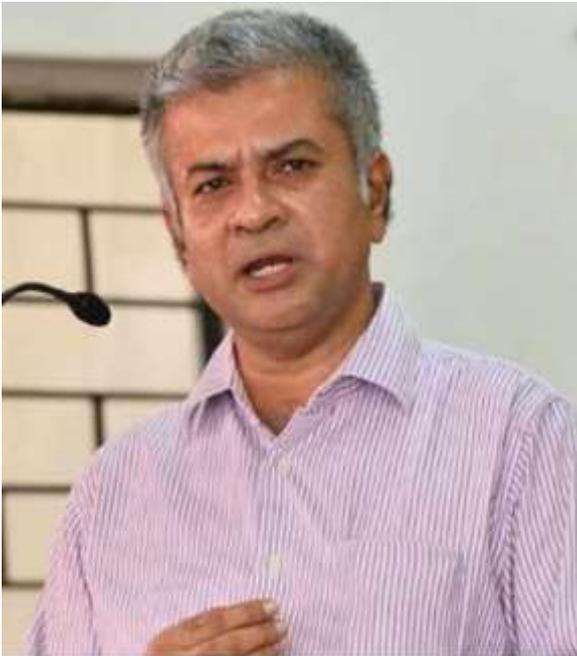
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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ANTI- DEFECTION LAW AND POLITICAL MORALITY: JUDICIAL INSIGHTS

AUTHORED BY – POOJA KUMARI

Abstract

The present study focuses on operation of Anti- Defection law in Indian polity. How lack of political morality has reduced such a well-conceived legislation to nullity. Stifling of voice of dissent by virtue of provisions of anti- defection law has raised questions about efficacy of law to ensure freedom of speech and expression of legislatures which requires urgent attention to bring the reforms in. For that we need a political consensus which can only be arrived at when electorate shun away the greed infused jumping of ship politics of legislatures.

Keywords: Defection, Morality, Constitutional Morality

Introduction

“It is my firm conviction that it is not the Constitution which has failed the people but it is our chosen representatives who have failed the Constitution.”

-Nani Palkhivala

Year 2020 apart from the year of outbreak of infamous corona epidemic was highlighted by high voltage drama and nail-biting episodes akin to thriller movie plot in Indian politics. Madhya Pradesh and then in Rajasthan saw wavering of political loyalties and jumping of ships. Tale is similar in these two states however outcome was different. In Madhya Pradesh Congress MLA Jyotiraditya Scindiya led faction resigned from the party and helped BJP in toppling of Congress govt. However, in Rajasthan Sachin Pilot led faction voiced for change in leadership and defied the whip of Congress party to convene for meeting of Congress party MLAs and consequently disqualified on account of Defection by the speaker. It was challenged in Jodhpur High Court which stayed the disqualification as it was contended by the petitioner MLAs that such disqualification amounts to stifling of voices thereby undermine the basic principle of democracy which thrives on ideas and dissent. These two episodes mirrors the problem of Indian politic i.e., lack of political morality among Indian politicians and failure of anti-defection law in giving the space for dissent within the party and in preventing the political

malaise of Defections.

Defection in literal terms means conscious abandonment of allegiance or duty (as to a person, cause, or doctrine), as per Merriam Webster dictionaryⁱ. In politics, it refers to deserting a political party and joining another party for political gains. Originally, Indian constitution didn't have provision related to the law of defection. Maybe our forefathers assumed that politics will continue to be a form of public service as opposed to a means to wield power for private gains. Clearly, our polity has proved them wrong time and again. As time progressed with regionalization of politics post -1967 and era of coalition govt started, egregious form of lust for power become conspicuous by 90s. And between this period the phenomenon of defection took its hideous form which prompted an amendment to the constitution. In 1967, Mr Gaya Ram, MLA of Haryana legislative assembly changed his party thrice in a fortnight. And "Aaya Ram Gaya Ram" phrase became popular to explain this phenomenon.

Moralityⁱⁱ is related to what is right and wrong or in other words "what ought to be". These principles guide the human code of conduct in a society. Political moralityⁱⁱⁱ thereby refers to ethical principles which are sine qua non to ensure healthy functioning of a democracy. Myopic vision and self-centred politics are anathema to a vibrant governance system. Sad is the reality that "number game" politics of India has subverted the ethical principles and most driven by greed and lure for power where social consideration has not only taken a back seat rather crushed under the wheels of dynamics of politics resulting in the cold-blooded murder of ethical principles of politics.

With the **constitutional amendment (fifty-second) Act 1985**, 10th schedule was consequently added to the Constitution of India to check the menace of defection. Some of the key provisions are as follows:

1) A member of the legislature shall be disqualified if he voluntarily gives up his membership from a political party.

It is to be noted that "voluntary giving up membership" does not merely connote formal resignation rather conduct of the legislature both inside and outside the house as held in **Ravi S. Nayak** case.

2) If he votes or abstains from voting which is contrary to the direction of the whip.

3) Any independent MP/MLA joins a political party

4) If a nominated member joins a political party after 6 months

Exception: if 2/3rd member of a legislative party joins the other party. Its shall not be deemed as defection.

Deciding authority

Speaker of the house shall be the final authority. However, originally it was laid down that decision of the speaker shall not be subject to the judicial review. But in *Kihoto Hollohon vs. Zachilhu and Others* case^{iv}, Supreme Court held that since judicial review is the basic structure of the constitution therefore the decision of the speaker is subject to judicial review. However, Supreme court has only limited judicial review limiting to jurisdictional errors viz. infirmities based on the violation of constitutional mandate, malafides, non-compliance with rules of natural justice and perversity (it is a situation where finding is based on unreliable evidence or there is no evidence at all, which no reasonable man would have deduced.)

Recent constitutional Amendment:

In 2003 an amendment was brought in Indian Constitution to check the issue of "retail defection". Originally law stipulated that if 1/3rd member of legislative party splits then also they will be protected from disqualification. This provision was deleted as it led to the large-scale defections in the lure of green pastures.

Efficacy of Anti-Defection law in achieving it objectives

Anti- defection law was added to the constitution to revive the principled politics in Indian democracy. But Indian legislature has been able to find one way or the other to circumvent the law in ingenious manner. And what transpired in Madhya Pradesh, Karnataka and Manipur is an example of how such a well-conceived law has been reduced to a joke by Indian legislatures.^v

The Karnataka assembly defection episode is a clear indication of insatiable greed for power, an abdication of ideological values and most importantly the integrity as political representatives of the world's largest democracy. In 2018 state assembly elections in Karnataka congress party and JD(S) formed a coalition govt. Turning of political table took place during 2019 general elections with BJP led NDA winning 26 out 28 seats in Karnataka. 17 MLAs (14 members of INC and 3 JD(S) MLAs) resigned from their membership however their resignation was not accepted by the speaker.

It is important to remember that the **Constitution (Thirty-Third) Amendment Act, 1974** introduced a provision that the speaker shall be the final authority to accept the resignation to ensure that it is not a coercive resignation. The Rationale behind this move was to check the invasive and dirty politics to garner power. Since a single election involves crores being spent by the election machinery to ensure a free and fair election and also electorate repose their faith in the representatives so it was considered wise to have a check and balance system in place.

It's a mind-boggling question why those MLAs wanted their resignation to get accepted rather than being disqualified under anti-defection law?

The answer is simple^{vi} to avoid the negative consequence of being disqualified under the 10th schedule of the constitution. A member who gets disqualified can't hold a public office until re-elected to the house. Whereas on tendering resignation they can be appointed as ministers under Art 164 and Art 75 w.r.t legislative assembly and parliament respectively. As under these provisions a non- member of the house can become a member of council of minister for six months and in meanwhile has to get elected to the either house of parliament (Art.75) or state legislature (Art. 164).

Speaker of the Karnataka legislative assembly disqualified 17 MLAs^{vii} under anti-defection law and also put a restriction on re-contesting the election for next 6 yrs. It was challenged before the supreme court by filing a writ petition.

Supreme court (*Shrimanth Balasaheb Patil v. Speaker, Karnataka assembly and ors.*)^{viii} held that voluntarily giving up membership is more than resignation. So, defection doesn't start from the date you join the other party. Any act covert or overt which leads to an inference that a member is indulging in anti-party activities it will be assumed that defection has taken place. SC observed that in this particular case defection took place even before the rendering of resignation.

However, the court held that there is no bar on re-contesting of the election under the 10th schedule of the Indian Constitution. Therefore, it's an exercise of power beyond the jurisdiction. Citing the provisions of the constitution Supreme court pointed out that under **art. 191(1)** a member is disqualified from **being chosen and being a member** of the house of the legislature on the specific grounds viz. insolvency, unsoundness of mind, giving up citizenship or disqualification under any other law made by parliament. Whereas under **art 191(2)** a member

disqualified under anti-defection law shall be disqualified for **being the member** of the house. Therefore, it is pertinent to note that art 191(2) is only limited to from being disqualified from being a member not from getting elected to house. Also, **art 164(1B)** clearly mentions that a person disqualified under anti-defection law shall not become the member of the house till the expiry period of legislative assembly or re-election to the house, whichever is earlier. Therefore, keeping in mind of the constitutional provisions in place it's easy to deduce that the speaker has acted outside the jurisdiction available to him.

KM Singh v. Speaker, (Manipur legislative assembly)^{ix} case is important for the clarification on a crucial point of law what if a speaker doesn't take any action with respect to disqualification proceeding pending before him under 10th schedule. In this case, 7 MLAs of Congress party defected to BJP and one of them was appointed as ministers in the new govt (BJP led coalition). Congress (INC) party asked the speaker to disqualify them under anti – defections law. However, the speaker didn't to take action.

Since no action was being taken by the speaker a writ petition was filed in High Court to pass quo warranto writ as the inaction of the speaker had resulted into misappropriation of public office by defected MLAs. However, High court refused to pass an order as the matter was already in the SC on the question of whether High court is eligible to pass the order when there is an inaction on the part of the speaker. It is pertinent to mention that High court/ Supreme court has the right of judicial review of the decision taken by the speaker. But the law was unclear what is the remedy in case of inaction by the speaker? Hence appeal was filed before the Supreme court.

Supreme court observed that objective of the anti-defection law was to prevent the jumping of the ship for political and financial gains. Failure on the part of the speaker to take the cognizance of disqualification plea by Congress was against the spirit of the law and facilitative of abrogation of tenets of democratic principles.

However, court pointed out that the speaker is not the alternative avenue rather 10th schedule conspicuously mentions that the speaker is not only the sole but final arbiter on such matters. Hence Supreme court can't take a decision on its own w.r.t disqualification of a member of the legislature.

Since in this case facts clearly establish that speaker deliberately choose not to act on the disqualification of MLAs is a condemned act. And it was ordered that speakers have to take action within three months filling of a plea for disqualification.

It is pertinent to mention that Supreme Court also discussed the minority judgement of **Justice Verma. J** in *Kihoto Holohan* case. Justice Verma opined in that case that "**nemo judex in causa sua**" doctrine (no one should be a judge of their own case) is the basic tenet of the principle of natural justice. Speaker of the house belongs to the ruling party invariably ipso facto/ipso jure. Vesting of this quasi-judicial power in speaker in itself is contradictory to rule of law of which principle of natural justice is the essence. In fact, "rule of free from bias" lies in the core of the spirit of the constitution therefore, constitution maker did not make the speaker arbiter of the election of the members of the house and placed this duty to act as arbiter on the dispute related to the election for MLAs & MPs on High Courts and of president & vice president's elections on Supreme Court.

Drawing inspiration from Justice Verma's opinion, 3judge bench of Supreme court in **obiter dicta** observed that parliament should consider creation of an independent forum to decide the defection cases. It recommended the creation of a tribunal headed by retired SC judge or retired Chief justice of the High court or any other independent mechanism to ensure the swift and impartial decision making in the sacred temple of democracy i.e., parliament and state legislature.

However, critics such as **Chakshu Roy^x**, are of the opinion that this is a political problem and you can't solve it through legal intervention. Defection is an externally manifested symptom of a political malaise. Treatment of symptom will not root out the problem therefore what needs to be done is to bring a paradigm shift in approach from punishment based legal approach to political solution. As politicians have always managed to circumvent the law in the furtherance of their hideous designs. The lasting solution can be provided by the political parties only by adhering to the set of code of conduct and moral obligations and putting them on the pedestal of scared conventions.

But we cannot ignore the trend in the mainstream media hailing engineering of these wholesale defections as "Chanakya Neeti". Such a trend is unhealthy as it leads to facilitation of unscrupulous political morality which is anathema in achieving constitutional morality.

When the constituent assembly was almost finished with the task of drafting the constitution someone asked **Dr B.R Ambedkar** how good is our constitution? Then he replied that "it doesn't matter how good a constitution is being drafted. What matters is whether the constitutional functionaries are acting in the spirit of the constitution or not. If people are unscrupulous then constitution can't save the nation or the democratic system. It is "we the people of India" who will determine the destiny of the nation by upholding the constitutional values, therefore, it's futile to pass any judgement on the nature of constitution without referring to the people who will govern and the political parties."

Dr Rajendra prasad while addressing the constituent assembly said "the question of whether the constitution will be able to ensure the welfare of the country or not doesn't not really depend on the text of the constitution rather on the people who govern it. People with integrity and commitment towards their nation will not only ensure the welfare of people at large rather they make even the most defective constitution work. A constitution is like a non-living machine whose efficacy depends on the person who runs it."

Now comes the question, can we really leave this matter to the conscience of our political representatives? Given the fact that criminalization of politics is no more a hypothesis rather a dark reality. According to the **ADR report**^{xi} in the 17th Lok Sabha 43% members have criminal charges against them and 29% of them are facing charges of grave offences such as rape, murder and kidnapping. This finding casts a doubt on leaving such an important issue to political class for self-restraint. Our politicians haven't shied away from exploiting the loopholes of the system in place. Also, it makes us ponder what are shortcomings of the existing law that has not been able to prevent the leapfrogging by members of the legislature.

Suggestions:

As we see that 52nd amendment 1985, laid down that if a member of legislative assembly acts or votes contrary to the direction of party whip, it shall be considered as an act amounting to defection. This provision was put in place to ensure the discipline among the members of the legislative party and dedication towards the ideology of the party. However, it has been noticed that it has resulted in high command culture or bossism where freedom of speech and expression stands curtailed. It leaves the members who are supposed to be representing the electorate of the constituency on key matters toeing with the order of high command. This

provision has the potential to create the sycophancy culture which is nothing but poison for democracy which thrives on the idea of debate & discussion and at times dissent. The idea of dissent should not be frowned upon rather be taken as an opportunity to look within, that's how intra party democracy thrives. Therefore, its high time that the recommendations **Dinesh Goswami committee**^{xii} should not only be taken into consideration rather be acted upon. A member should only be disqualified when he votes contrary to the direction issued by whip only in the case of a no-confidence motion, money bill or motion of vote of thanks to the president's address.

Now comes the question what if a member of legislature resigns or defects to other political party owing to political and financial gains. Whether they should really get a chance to get re-elected? Most political analysts^{xiii} are of the view that they should be barred from contesting election at least for a period of five years or till the present assembly/ house's tenure gets over whichever is later to ensure that that particular member remains outside the house for minimum five years. That will act as a deterrent against crossing the floor.

Last, not the least which has proved to be a major embarrassing point in the overall working of Anti-Defection is the role of the speaker. As we all know that speaker is the final authority on the case related to anti-defection. Invariably, speaker belongs to the party in power therefore he/she acts in a partisan manner as shown in past. In Manipur assembly case where the speaker did not take action against the erring member for almost a year despite complaint against them of defection was the new low achieved by the constitutional office of the speaker. Speaker is supposed to be the political neutral while holding the office and especially discharging the function as the final arbiter on anti-defection cases. Given the political affiliations of the speaker, it's hard to be free from bias. It's not for without reason that *nemo iudex causa sua* is the basic doctrine of natural justice. And this fact weighs in the favour of the recommendation made by the three judges in Manipur assembly case^{xivxv} for the **creation of an independent tribunal** headed by retire judges of SC or Retired chief justice of high courts or creation of panel consisting of independent members to ensure that the decision-making process is transparent and free from ill-will.

Conclusion

Lord Bryce says that 'where the people don't show a high degree of moral rectitude, democracy becomes corrupt and corrupt democracy is the worst form of the govt.' Therefore, upholding the political morality is imperative to ensure that democracy not only survives (by relegating it to conduction of the election regularly) but successfully runs and achieve the ultimate aim to "secure it citizen justice, equality, liberty, promote brotherhood and ensure unity and integrity of the nation". Its trite to say that politicians are face of the nation and aspirations of people lies on their shoulders. They have a responsibility to erase the social evils from the society for which they have to shun away from the callous politics of greed and selfish interest.

Former prime minister **Atal Bihari Vajpayee Ji** remarked that "*There are facilities available even for a heart transplant, but this syndrome of political defections is yet to find a remedy*".^{xvi} The aforementioned suggestions will be in a direction towards performing open-heart surgery of political defections. Without a doubt, successful operation depends on maintaining the ethical standards guided by the norm of integrity, honesty and public welfare inter-se. **Benjamin Constant**, a prominent Swiss-French political writer also remarked that time and experience are the two reforming powers it will direct you to what needs to be done and how. Therefore, learning from the experiences, we must take urgent actions in the right direction and ensure scrupulous political morality sustains in the Indian political system and ultimately enable thriving of constitutional morality.

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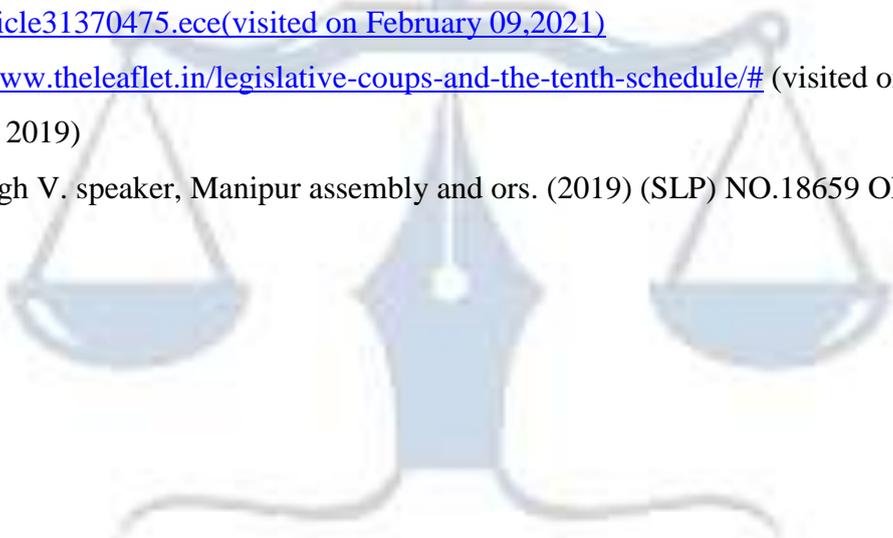
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