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The Infructuous Nature of Anti Defection Law

Piyush

The recent fiasco of the Rajasthan assembly has established the fact that how defections in Indian politics has become an anathema among the masses but still professed rigorously by some rapacious or perhaps disenchanted politicians. However, the real problem is not with its mischievous invocations but an oblivious attitude by the ruling dispensation and judiciary. The pattern evolved to subvert the applicability of Anti Defection law is axiomatic. Therefore, it seems paramount to take action but not in a form of punishment, instead of mending and fixing the lacuna of existing laws. Moreover, the problem is not with disenchanted politicians as, they should have an option to seek an alternative in other parties but, the real matter of concern is the temptation of illegal gratification by those acquisitive legislators. Who is flocking in other parties on a mere pittance? This abominable practice needs to be denounced by every member of society. As no legislation in the world could change this draconian practice except a collective deprecation by the common people. Besides, the denunciation should manifest in a substantial form and should not be confined in abstract philosophy. Therefore, bearing this in mind this article endeavors to provide certain recourse to this malady and desiderates that, better sense will prevail and legislators will get back into their senses.

The amendment to the constitution to insert the 10th schedule was essentially to inculcate deterrence among politicians, who used to defect from one party to another in some inducements. The infamous incident of 1967, was an MLA, namely Gaya Lal has switched his party thrice within the same day, which led to this infamous phrase, "Ayya Ram Gaya Ram" which, essentially means, "switching allegiance".

HISTORICAL BACKGROUND OF ANTI DEFECTION LAW

The need for robust legislation was felt in the 1960s when switching allegiance by politicians had become a norm. It was ubiquitous in almost every party. The virulent practice had become so contagious then, that ministry was offered to any ambitious MLA and any number of minster could be there in a cabinet. Opposition party with an aspiration to come into power used to entice MLA's by offering them various ministry birth. Leading to various Faustian bargaining between a politician and political party.

Therefore, to stop this sordid infirmity to the system, the then government thought of bringing some legislation that will curb this practice and regulate it to an extent. Thereafter, when this legislation was passed and brought into effect, initially there was a sense of deterrence among the politicians. However, legislation without varying interpretation and loopholes cannot be considered a dynamic law. Nevertheless, it also leads to variegated circumvention by different vested interest groups. By that time, the political party was already in search of some alternative method to save themselves from this robust legislation.

Finally, with the advent of the new government, they found a new mechanism for defenestrating governments.

CONTENTS OF ANTI DEFECTION LAW

The Anti defection Law was passed in the year 1985 through the 52nd amendment to the constitution. It lays down the circumstances which will attract disqualification for a legislator. There are two grounds on which a legislator can be disqualified.

Firstly, if a member voluntarily gives up the membership of the party, he shall be disqualified. However, voluntarily giving up the membership is subjected to variegated interpretation. In which, voluntarily giving up the membership is not the same as resigning from the party. The manifold of the judgment delivered by the Hon'ble Supreme Court has explicitly reiterated that *"voluntarily giving up should not be construed in its literal sense. Therefore, though, a legislator has not resigned, the presiding officer/ speaker has been conferred with the power to make a reasonable inference as to what constitutes voluntary resignation through the conduct of the legislators"*. Hence, even without resigning, a legislator can be disqualified if by his conduct the Speaker/Chairman of the concerned House draws a reasonable inference that the member has voluntarily given up the membership of his party[1].

Secondly, if a legislator votes in the house against the direction of his party and his action is not condoned by the said party, he can be disqualified. However, there are certain exemptions accorded to the legislators such as, if they merge with or into another party then in that case they will be exempted from disqualification, provided that at least two-thirds of its legislators are in favor of the merger. In such a scenario, neither the members who decide to merge nor the ones who stay with the original party will face disqualification.

SUBVERSION OF ANTI DEFECTION LAW AND THE RECOURSE LYING AHEAD

Anti defection law states that a legislator is said to have given up his membership if he/she voluntarily renounces it or a legislator is deemed to have defected if he either voluntarily gives up the membership of his party or disobeys the directives of the party leadership on a vote. This implies that a legislator defying (abstaining or voting against) the party whip on any issue can lose his membership of the House.

[1]Ravi S. Naik Vs. Union of India ,1994 AIR SC 1558

The law applies to both Parliament and state assemblies.[2] As a consequence, in case any legislator abstains or cast his vote to other parties in a trust vote then he could be deemed to have resigned and the speaker could disqualify him, which means that he seizes to be a member of that party and once disqualified, he will be barred from contesting the election in the remaining period of the assembly.

The pattern developed by the political parties to evade this law was to make the legislator resign from its post and then after the trust vote, they will seek by-election and subsequently, by honoring the commitment, respective political parties will give them the ministerial birth as promised.

Needless to say, the above-mentioned pattern has come to public glare and now everyone understands this maneuver well. Nevertheless, whenever a law has been ostensibly circumvented by some vested group, the judiciary has come to the rescue. Whereas, in this issue, the Hon'ble court has done nothing but to juggle around at different positions. There are manifold of instances, where the Hon'ble Court on the same circumstances has taken different positions. In which, initially they asked the speaker to decide on the disqualification issue early in a time-bound fashion and later on they scorned the speaker on showing such expediency on deciding the matter. The only similarity in this entire fiasco was, at different times, with different states, with different government, only one party had the benefit. At the end of the day, only the current ruling dispensation was able to save the government.

Notwithstanding the facts, the nexus of underscoring this anomaly is not to cast an indictment on one political party but to ensconce the reluctance usually judiciary carries to attribute any malignity to the ruling dispensation. With extensive scrutiny, it will become evident as to how different governments at times have resorted to this sinister move and how the Honourable court has shown sheer acquiescence to the ruling incumbent.

Therefore, it leads us to the point that how new legislation is required to deal with this menace and stop these nefarious legislators to shift their allegiance from one party to another because of some gratification. This renegade needs to be punished but not in a conventional way otherwise, in no time that law will be repealed on the pretext of the law, having a draconian texture. Hence, the very force or allurement that drives these legislators to shift their allegiance, needs to be abrogated. The first of that kind is a promise of ministerial birth, once this is out of their purview they will fall in line. So, the first stipulation for this turncoats would be that if they defect from one to another they cannot become a minister in that term of assembly. Nevertheless, if they are forming their own party then they can become minster, provided,

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[2] Vibhor Relhan, The Anti-Defection Law Explained, PRS Legislative Research, December 6, 2017, https://www.prsindia.org/theprsblog/anti-defection-law-explained

they are not forging an alliance with other parties to overthrow the existing government. Secondly, although they could contest the by-election, if not disqualified. However, they should submit their entire financial transaction in the public domain for the time being so as to ascertain that no illegal gratification in the form of inducements has been received by the defecting legislator. Lastly, the legislator should be allowed to vote against the wishes of their party, if the matters are policy-related and do not have any bearing to the party stability. Therefore, legislators across India should be conferred the power of working according to their conscience and shall only be obligated to vote according to their party, when their survival is in question or at the time of passage of the annual budget or no-confidence motions. As, the biggest grievance, legislators have these days, is that they are not able to work according to their conscience, judgment, and interests of his electorate. It should be borne in mind that all the above-mentioned points are not immune from constitutional scrutiny and thus if questioned, may manifest some dichotomy emanating from it. Therefore, the future course of action cannot be determined on the premise of constitutional rectitude but rather on expediency. There are times when various legislation was passed on the principle of pragmatism, such as preventive detention laws, land laws, etc.

Furthermore, the need of the hour is to deal with the arbitrary power vested in the hands of the presiding officers. The real reason of this chaos could be traced from him. Various expert committees have recommended that rather than the Presiding Officer, the decision to disqualify a member should be made by the President (in case of MPs) or the Governor (in case of MLAs) on the advice of the Election Commission[3]. This would be similar to the process followed for disqualification in case the person holds an office of profit (i.e., the person holds an office under the central or state government which carries a remuneration, and has not been excluded in a list made by the legislature)[4]. If they cannot shift the power to the aforesaid person then they should lay down a mechanism for the speaker to decide the matter in a time-bound fashion.

Moreover, when a legislator is found to have colluded with other political parties then a blanket ban should be imposed on him, for not contesting election for consecutively five years irrespective of whether an election is approaching ahead or has already commenced. The aforesaid measures may seem rigid from the outset but the kind of atmosphere we are in and the kind of events unfolding almost every year makes it quintessential. As this is the only way of adding deterrence among the mischievous wicked politicians willing to sell their soul.

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[3] Anirudh Burman, The Anti-Defection Law – Intent and Impact Background, PRS Legislative ResearchNovember 23, 2009, https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370583077_Anti-Defection%20Law.pdf

[4] Vibhor Relhan, The Anti-Defection Law Explained, PRS Legislative Research, December 6, 2017, https://www.prsindia.org/theprsblog/anti-defection-law-explained

Consequently, the court has held that they will not intervene in the domain of speaker/chairman while they are deciding the disqualification proceeding and only after the disqualification matter is decided, the aggrieved party can approach the court. However, the Hon'ble Court at least drawing inspiration from its recent judgment should start directing speakers to decide this matter in a time-bound fashion.

SUCCESSFUL EXECUTION IN PAST

Many states like Karnataka, Madhya Pradesh, Goa, etc, have recently borne the brunt of this new ploy. Whereas, in Maharashtra, a more audacious subterfuge was used, which was quite unprecedented and historic in its own way. These three states has seen a defection which was in no way surreptitious, rather, it was conspicuous and apprehended by every establishment that a horse-trading of this sort might happen to defenestrate the government to forge an unscrupulous alliance. This iniquitous conduct was only possible in our system due to this inept repugnant law. Time and again, committees have recommended making substantial reform in the law but, the government of that day could ill-afford those changes as, it will vitiate their future sinister plan. Therefore, various government at times have unleashed this kind of abhorrent practices to our system and has left an indelible blemish to our democracy.

PARADOXICAL JUDGEMENT OF RAJASTHAN HIGH COURT

The judgment rendered by Rajasthan high court has created a digression to a quiet punctilious system. It seems to be a classic case of judicial impropriety form the outset and a judicial overreach from the core. In the case of, ***Kihoto Hollohan Vs Zachilhu***, it was held that "though the jurisdiction of courts under Articles 136, 226 and 227 is not completely taken away in view of the finality clause in Para 6 of the Tenth Schedule, the scope of judicial review does get limited and excluded in respect of an act committed by the Speaker within his jurisdiction. In other words, if the Speaker has acted in the exercise of and within the confines of his jurisdiction under the Tenth Schedule, Constitutional Courts will not interfere with it in the exercise of their powers of judicial review. It was made clear that judicial review is not available at a stage before the final decision of the Speaker in the form of any *quia timet* relief at an interlocutory stage"[5].

[5]Kihoto Hollohan Vs Zachilhu, (1992) Supp 2 SCC 651 at para 110

Moreover, the issue relating to the jurisdiction of a high court to pass interim orders prior to the final decision of the Speaker has already been settled by the Supreme Court in the case of, ***"Speaker, Haryana Vidhan Sabha v. Kuldeep Bishnoi".***[6] It was held that in view of the constitutional scheme of the Tenth Schedule "normally judicial review could not cover any stage prior to the making of the decision by the Speaker or the Chairman of the House, nor was any quia timet action contemplated or permissible[7]." It was further stated that ***"restraining the Speaker from taking any decision under Para 6 of Schedule X is, in our view, beyond the jurisdiction of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under Para 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order.[8]"***

Therefore, the decision taken by the Rajasthan High Court is unprecedented and has completely disregarded the law laid down by the Supreme Court. The aforesaid judgment explicitly states that the Court does not have the power to entertain any plea prior to the making of the decision of speaker or chairman. The Rajasthan High Court has defied the precedent laid down by the Supreme Court and thus the only probable rationality in these circumstances ought to be to hold the judgment erroneous and rescind it. Though, this will not result in the reinstatement of past development and could be set aside for its infructuous nature. Nonetheless, the fact that this judgment was bad in law and sets a bad precedent is sufficient for repudiating it.

CONCLUSION

Defection has become a ubiquitous subject in the democratic corridor. It is believed these days that the ruling dispensation has a monopoly over state government and irrespective of the outcome of the election, ultimately, at the end of the day, the result is going to be in the favour of the ruling party's side. As they are in power and has all the maneuvering skills for defenestrating any government. Defection is a facet of every political party and therefore shall not be seen as an exclusive prerogative of any one party. Moreover, the mechanism devised by the current ruling dispensation manifests the conspicuous lacunae in our existing structure. It should be borne in mind that every problem has a solution, provided it is addressed and acknowledged properly. The need of the hour for our political parties per se is that they should rise to an occasion and consider this imbroglio as a prodigious impediment in nations' development. It has led to chaos and uncertainty which resulted in shambolic handling of the States economy.

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[6] Speaker, Haryana Vidhan Sabha Vs Kuldeep Bishnoi & Ors,(2015) 12 SCC 381

[7] Ibid at para 39

[8] Ibid at para 44

The time has come when the Centre has to understand that they are sabotaging the state's development in lieu of unscrupulous transitory power.