

UNBOTTLING DISSENT: SCRAPPING THE ANTI- DEFECTION LAW

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Abstract

Defection is a dirty word in Indian politics. It evokes images of bundles of cash being exchanged for cross-voting and a general decay of political morality. The spate of defections before the 1980s forced the hand of the government to enact a law against defection as shocking instances of party-hopping became commonplace. There was a lack of political consensus on the issue which led to the issue being put in cold storage for a decade and a half. The law which finally emerged, soon became more honoured in breach than in observance.

However, it survived judicial review and the Speaker of the Parliament and State Legislatures were given a free hand under the law. The real potential of this law to do long-standing damage became clear with the political consolidation at the federal level in the first half of the current decade. The Supreme Court's confidence that two-thirds threshold for validating a merger soon began

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to shatter in one state after another. The role of the Speaker has once more come under question.

The approach to defection is refreshingly different outside India. This paper argues that India too should adopt a laissez-faire attitude towards defection. It should allow the electorate to flush out instances of corrupt political behaviour while simultaneously preserving the separation of powers, and permitting the legislative branch to correct its course by allowing dissent dictated by personal convictions. This understanding is reached after analysing different forms of censure to defections and finding them wholly inadequate.

“It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. ... But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”
- Edmund Burke, Speech to the Electors of Bristol (1774).¹

¹Edmund Burke, *Speech to the Electors of Bristol*, (Nov. 3, 1774), MISCELLANEOUS WRITINGS (SELECT WORKS VOL. 4), <http://fs2.american.edu/dfagel/www/Philosophers/Burke/SpeechToTheElectorsOfBristol.pdf>.

I. INTRODUCTION

Political parties are the lifeblood of the political system that India has adopted. But before the insertion of the anti-defection law, the Constitution of India contained no references to political parties. This is rather telling because, on the other hand, all other aspects of governance have found meticulous treatment. However, the very nature of government that the Constitution refers to leaves the existence of political parties as a *fait accompli*.² Of late, it is often remarked that democracy does not end with an election but only begins with it. The elections to state legislatures have displayed a similar pattern - hung assemblies followed by questionable decisions by constitutional functionaries. The role of the Governor in government formation has come under immense scrutiny and rightfully so. Despite clear guidelines from the Supreme Court, there has been a tendency to pander to the sensibilities of the ruling dispensation at the Centre. An important link in this chain is the Tenth Schedule of the Constitution of India.

The Tenth Schedule contains the anti-defection law which was inserted by a constitutional amendment to stem the 'evil of political defections' that had become a matter of national concern.³ Defection was said to "*undermine the very foundations of our democracy and the principles which sustain it*".⁴ These were very noble aims. But what was designed as a shield has become a sword that political parties often wield against the spirit of democracy. In this paper, I will argue that the anti-defection law is inadequate and does more harm than good. This paper is divided into five parts. In Section II, the development of the law will be discussed. Section III will elaborate

²Kanhaiya Lal Omar v. RK Trivedi, A.I.R. 1986 S.C. 111, ¶ 10.

³THE CONSTITUTION (FIFTY-SECOND AMENDMENT) ACT, 1985, Statement of Objects and Reasons, <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-fifty-second-amendment-act-1985>.

⁴*Id.*

upon the reforms in the legal framework as a result of judicial pronouncements. Section IV will analyse recent government formations from a constitutional standpoint and bring out the role played by the Tenth Schedule. Section V will analyse the treatment defection receives in foreign jurisdictions. Section VI will conclude the discussion.

II. THE JUSTIFICATIONS FOR AN ANTI-DEFECTION LAW

India is a parliamentary democracy with a written constitution. Its heterogeneity led to the mushrooming of many political parties with political agendas spanning the entire breadth of the ideological spectrum. For most of its existence, India has been ruled by a strong federal government. Till the 1980s, the Indian National Congress (“**INC**”) ruled at the Centre barring the brief period where it was booted out after the Emergency was lifted. From 1990s till 2010, coalition governments ruled the country. Since 2014, the Bharatiya Janata Party (“**BJP**”) led National Democratic Alliance (“**NDA**”) has been in power with a comfortable majority. The anti-defection law’s birth can be traced to a period where the long-ruling dispensation at the Centre was beginning to lose political control.

The constitutional justification notwithstanding, it may be hypothesised that the ruling INC saw a political incentive in tabling the law. In 1967, the fourth general elections were held where the INC managed to cling to power. However, in that year, it lost control of 7 state legislatures due to its legislators crossing the floor in various state capitals.⁵ It is logical to assume that this opened the eyes

⁵Chakshu Roy, *Explained: In Maharashtra Drama, the Key Legal Provision – Anti-defection Law*, INDIAN EXPRESS (Nov. 24, 2019), <https://indianexpress.com/article/explained/explained-in-maharashtra-drama-the-key-legal-provision-anti-defection-law-6133417/>.

of the INC to the ‘evil of political defections’. A Committee on Defections was constituted under the chairmanship of the then Home Minister Y.B. Chavan. In its report, the Y.B. Chavan Committee noted 438 instances of defections in a 12-month period.⁶ Out of 210 defections in 7 northern states, 116 defectors were included in the Council of Ministers in the governments propped up with their support.⁷ This can be reasonably expected to have irked the ruling INC. Interestingly, the discussions in the Rajya Sabha also brought forth instances of INC engineering defections in states.⁸ One Member of Parliament laconically pointed out that political parties had thus far enjoyed the ‘privilege of defection’ when it suited them.⁹

The discussion also captured the snapshot of the two differing philosophical viewpoints. The first viewpoint was that legislators switching political allegiances should be straightaway disqualified. This was justified on the ground that the Parliament is empowered to impose restrictions on an individual standing for elections to the Parliament or state legislatures as it is not a fundamental right but a statutory right. While the Chavan Committee could never reach a consensus on the scope of its recommendation, it clearly rejected this view. It opined that doing so would hinder the organic growth of political parties. This freezing of political parties was considered antithetical to the democratic process. During the course of this paper, I will argue that the Chavan Committee misread the tea leaves as defections allow for ideological correction, and that it is necessary in times of political flux.

⁶Motion re Report of the Committee on Defections, OFFICIAL DEBATES OF RAJYA SABHA (Aug. 12, 1969), http://rsdebate.nic.in/rsdebate56/bitstream/123456789/497265/1/PD_69_12081969_17_p3714_p3800_8.pdf.

⁷*Id.* at 3715.

⁸*Id.* at 3800.

⁹*Id.* at 3793.

It is pertinent to note that the Chavan Committee could not settle on the form of censure for defections. But the need for having such a law was impressed on the Parliament. Two attempts were made before the successful Fifty-Second Amendment Bill – in the form of the Thirty-Second Amendment Bill in 1973, and the Forty-Eighth Amendment Bill in 1978. The first of these attempts lapsed as the Lok Sabha was dissolved. Interestingly the second attempt was met with stiff opposition at its introduction and was withdrawn.¹⁰ The second attempt was made by the Janata Party under the helm of the then Law Minister Mr. Shanti Bhushan. It appears that the INC which was then in opposition had suddenly grown disinterested in the issue of legislators crossing the floor and destabilising governments.

As the Statement of Objects and Reasons of the Fifty-Second Amendment Bill points out, legislative efforts in this direction were aimed to stabilise governments. Principally, the political class saw the need to clean its image. The image of corrupt politicians decreases public trust in the whole political system. From a financial perspective, an anti-defection law stemmed the tide of frequent elections thereby saving the exchequer money.

III. LEGISLATIVE AND JUDICIAL CHANGES

The Tenth Schedule provides that a member shall be disqualified from her membership if she voluntarily gives up her membership.¹¹ The phraseology used is clearly wide enough to cover the meekest dissent. Toeing the party line thus became the law of the land. Going against the party whip also attracts disqualification under the law.¹² A

¹⁰Law Commission of India. *Report No. 255 – Election Reforms*, March 2015, 90, <http://lawcommissionofindia.nic.in/reports/Report255.pdf>.

¹¹Tenth Schedule of the Constitution of India, ¶ 2(1)(a).

¹²*Id.*

nominated member of a legislative body will also face the axe if she joins a political party at any time six months after taking oath.¹³ The six-month window has been utilised by eight out of the twelve nominated members in the current Rajya Sabha.¹⁴

It is telling that there is a huge gap left open in the framework where nomination becomes futile. It only goes on to show how half-hearted the legislation was. It was intended as a stop-gap measure in a nascent parliamentary democracy. After a seven-decade experience and a turn towards a form of government that appears increasingly presidential, anti-defection law is not only unnecessary but aids in power grabs that can hardly be considered constitutionally moral.

This half-heartedness and lack of a long-term shelf-life is perhaps most clearly seen in paragraphs 3 and 4 of the Tenth Schedule. Paragraph 3 dealt with ‘splits’ while paragraph 4 dealt with ‘mergers’. A split or a merger was valid only after crossing a certain threshold in each case.

A. *Splits and Mergers*

The 177th Report of the Law Commission was quick to note that the experience of the country with anti-defection law had not been a happy one.¹⁵ The cause for this worry was paragraph 3 of the Tenth Schedule which effectively allowed a wholesale defection of one-third of elected members of a party while restricting individual defections.¹⁶ The Supreme Court tried to stem the misuse of the split

¹³*Id.* ¶ 2(2), 2(3).

¹⁴Vishwa Mohan, *Only Second Time in 66 Years History of Rajya Sabha: Majority of Nominated Members Joined a Ruling Party*, THE TIMES OF INDIA (Aug. 8, 2018), <https://timesofindia.indiatimes.com/india/only-second-time-in-66-yrs-history-of-rajya-sabha-majority-of-nominated-members-joined-a-ruling-party/articleshow/65316224.cms>.

¹⁵Law Commission of India. *Report No. 177*, May 1999, ¶1.3.3.1, <http://www.lawcommissionofindia.nic.in/lc170.htm>.

¹⁶Roy, *supra* note 5.

provision in *Jagjit Singh v State of Haryana* (“*Jagjit Singh*”). It held that the Speaker needs to satisfy herself of the *prima facie* proof of split in the political party.¹⁷ The Court opined that the split of the Republican Party of India was a mere afterthought to avoid attracting the defection law.

Paragraph 3 was deleted from the Constitution by the Constitution (Ninety-First Amendment) Act, 2003. The Supreme Court noted that defection had been made more difficult by the deletion of the third paragraph.¹⁸ While paragraph 3 has been deleted, paragraph 4 which validates a ‘merger’ where two-thirds or more members defect was retained. In its 170th Report, the Law Commission of India had presciently recommended deletion of both paragraphs 3 and 4. The Parliament thought it wise to delete only paragraph 3. The 255th Report endorsed the Parliament’s view that the requirement of two-thirds members has prevented the misuse of paragraph 4.¹⁹

In the next section, I will document instances where the Law Commission’s wishful thinking has come undone. The idea here is that if mergers can be managed easily, then the law does not serve its purpose anymore. As indicated above, such a law does more harm than good as it provides a cloak of legitimacy to undemocratic and illegal practices.

B. Speaker’s Role

Paragraph 6 of the Tenth Schedule has been especially contentious ever since its inception as it refers the decision on disqualification to the Speaker/Chairman of the House. While adopting the British parliamentary model, among other traditions that India has not been able to emulate is that of a fiercely non-partisan speaker. This places

¹⁷*Jagjit Singh v State of Haryana*, (2006) 11 S.C.C. 1.

¹⁸*Rameshwar Prasad v Union of India & Anr.*, (2006) 2 S.C.C. 1.

¹⁹*Supra* note 10, at ¶ 5.17.

an enormous stress on the constitutional expectations embedded in the Speaker's office. The Speaker is tasked with making an impartial decision on the disqualification of a member who has defected.

This idealism was challenged as being blatantly unconstitutional in *Kihoto Hollohan v Zachillhu* (“*Kihoto Hollohan*”) before a five-judge Constitution Bench of the Supreme Court.²⁰ It was contended before the Court that Paragraph 6 of the Tenth Schedule tasks a speaker with the resolution of an electoral dispute.²¹ Since speakers are nominees of political parties and are not even required to resign from their parties, it was argued that independence, fairness and impartiality of the speaker would always remain shrouded in doubt, which is undeniably not consistent with the principles of a parliamentary democracy. The Supreme Court did not accept this argument.²²

On the other hand, the Attorney General argued that the rights and duties under question are in ‘political thickets’ and courts should refrain from passing judgements on them.²³ The argument essentially revolved around the separation of powers and the Court was requested not to minimise the separation. Separation of powers is a critical pillar of a democracy. The late Justice Antonin Scalia of the United States Supreme Court was fond of remarking that separation of powers is much more important than the Bill of Rights enshrined under the American Constitution.²⁴ The Supreme Court of India has conferred upon the principle of separation of powers its highest recognition – holding it to be a part of the basic structure of the Constitution of India.

²⁰*Kihoto Hollohan v Zachillhu*, (1992) S.C.R. (1) 686.

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴Peter Berkowitz, *The Scalia Lecture: “Liberal Education, Law, and Liberal Democracy”*, YOUTUBE, https://www.youtube.com/watch?v=xANFaqH_PYQ.

In the line of cases starting from *Kihoto Hollohan*, the Supreme Court has consistently opined that “*judicial interference in the democratic processes*” should only be a last resort. I will, in Section IV, attempt to link the need for maintaining separation of powers to striking off the entire Tenth Schedule. For the purposes of the present discussion on the historical role of the Speaker, it suffices to say that the Speakers have not covered themselves in glory while exercising powers vested in them under the Tenth Schedule.

Of late, the Supreme Court has also come to accept that “*there is a growing trend of the Speaker acting against the constitutional duty of being neutral.*”²⁵

IV. STRESS-TESTING THE TENTH SCHEDULE

In this section, I have attempted to trace the recent constitutional crises in states where the electorate returned a hung assembly. What followed has routinely stress-tested the Tenth Schedule.²⁶ The results of these stress-tests are not encouraging. Two conclusions can be drawn from this- first, that a stronger anti-defection law is the need of the hour; and second, that political defection is a way of political life and thus, should not be censured. Section VI will delve deeper into these two possibilities and show why the second conclusion is more apt. This section is descriptive and paints a picture of the ground situation.

A. Maharashtra

²⁵*Shrimanth Balasaheb Patil v Hon’ble Speaker, Karnataka Legislative Assembly, Writ Petition (C) No. 922 of 2019*, ¶152 (i).

²⁶Chakshu Roy, *Explained: The Limits of Anti-Defection*, PRS LEGISLATIVE RESEARCH (Jul. 25, 2019), <https://www.prsindia.org/media/articles-by-prs-team/explained-limits-anti-defection>.

The pre-poll alliance between the Bharatiya Janta Party and the Shiv Sena failed to stake claim to form the government due to differences over the post of the Chief Minister after the results of the fourteenth Maharashtra legislative assembly elections were announced.²⁷ Subsequently, with the alleged support of the Nationalist Congress Party (“NCP”), Mr. Devendra Fadnavis took oath of office. It soon emerged that the legislative party leader of the NCP, Mr. Ajit Pawar did not have the support of his party.²⁸ Thus the task before Mr. Ajit Pawar was cut out. He had to prove that he had a two-thirds majority of the NCP MLAs with him for his alleged revolt to be read as a merger under Paragraph 4 of the Tenth Schedule.

The opposition approached the Supreme Court for an expedited floor test. It is interesting to note here that the very applicability of the anti-defection law to the situation was called into question by some quarters.²⁹ It was argued that the anti-defection law is only applicable to members once they have taken oath. This was forcefully repudiated as a state assembly stand constituted as soon as the Election

²⁷Gyan Varma, *Uddhav-Led Shiv Sena-NCP-Congress Govt Wins Floor Test In Maharashtra Assembly*, LIVEMINT (Nov. 30, 2019), <https://www.livemint.com/politics/news/uddhav-led-shiv-sena-ncp-cong-govt-wins-floor-test-in-maharashtra-assembly-11575106900020.html>.

²⁸Sharad Pawar, *Tweet dated Nov. 23, 2019, 9:27 AM*, TWITTER <https://twitter.com/PawarSpeaks/status/1198088033150500865>; Sharad Pawar, *Tweet dated Nov. 24, 2019, 5:57 PM*, TWITTER, <https://twitter.com/PawarSpeaks/status/1198578943525187585>.

²⁹Press Trust of India, *Maharashtra Govt Formation: Experts Differ Over Timing of Anti-Defection Law Coming Into Force*, HINDU BUSINESS LINE (Nov. 23, 2019), <https://www.thehindubusinessline.com/news/maharashtra-govt-formation-experts-differ-over-timing-of-anti-defection-law-coming-into-force/article30061743.ece>.

Commission of India declares the results.³⁰ The Supreme Court ordered a floor test with a *pro tem* Speaker.³¹

a) *Role of the speaker*

The Speaker has an outsized role in any deliberations regarding defection. This came to the fore in the Maharashtra episode as the Speaker, once elected would have the right to grant legitimacy to one political faction over the other. Had the Supreme Court not ordered an expeditious floor test, it was possible for Mr. Ajit Pawar to have issued a whip before his party brass completed the formalities to dethrone him as the legislature party leader. A floor test in that situation would have been preceded by the election for the Speaker's post. In such an election, the fear of defying Mr. Pawar's whip could possibly have forced the NCP MLAs to toe his line. Those MLAs who voted against the whip could be immediately disqualified by a Speaker partial to Mr. Pawar.

Once the Speaker's office is taken out of the vacuum that the *Kihoto Hollohan* majority believes it resides in, and into the real world, the paths are clear for a strategically engineered defection to work towards the numerical threshold of a merger. While the Speaker's decision will of course be subject to judicial review; by the time it comes to pass, political ground realities might change. It is a real possibility that the courts may find themselves unable to return the parties to the position they were in before the dispute. In the current

³⁰Aditya Sharma, *Political Masterstroke or Risky Plunge*, NEWS18 (Nov. 25, 2019), <https://www.news18.com/news/politics/political-masterstroke-or-risky-plunge-bjp-ajit-pawar-move-comes-laced-with-hurdle-of-anti-defection-test-2397577.html>.

³¹Debayan Roy, *Maharashtra Floor Test Tomorrow, Appoint Pro-Tem Speaker: Supreme Court*, THE PRINT, (Nov. 26, 2019), <https://theprint.in/india/governance/judiciary/maharashtra-floor-test-tomorrow-appoint-pro-tem-speaker-supreme-court/326325/>.

situation, a lot hinges on the election of the Speaker turning it into a *de facto* confidence vote.³²

b) *Sentinel on the qui vive*

In *Union of India v Harish Chandra Rawat*, the Supreme Court described its role as “*sentinel on the qui vive*”, i.e., on alert to ensure that constitutional functionaries imbibe and display constitutional morality.³³ In its judgement on the Maharashtra issue, the Supreme Court noted the possibility of horse trading if the floor test is delayed.³⁴

The Supreme Court relied on its earlier decisions in *Jagadambika Pal v Union of India*³⁵ and *Anil Kumar Jha v Union of India*³⁶ to announce an immediate floor test to be conducted by a *pro tem* speaker. The Court took care to demarcate the agenda of the session and directed the session to be live telecast with no secret ballot. An overview of these judgements of the Court indicates that the Court has had to take an increasingly assertive role to restore public confidence.

B. *Goa*

After the 2017 assembly elections in Goa, the INC had emerged as the single largest party, but the BJP had managed to form government with the support of independents, an ally, and two defections from the INC. The defectors were disqualified but won re-election as BJP candidates. In July 2019, ten out of the fifteen INC MLAs merged their legislature party with the BJP. The Speaker promptly green-lighted this under Paragraph 4 of the Tenth Schedule. This has led to

³²Gaurav Vivek Bhatnagar. *Sharad Pawar's Actions, Speaker's Election Will Now Determine Maharashtra Politics*, THE WIRE (Nov. 23, 2019), <https://thewire.in/politics/maharashtra-sharad-pawar-floor-test-speaker>.

³³*Supra* note 22.

³⁴*Shiv Sena and Ors v Union of India and Ors.*, Writ Petition (C) No. 1393 of 2019.

³⁵*Jagadambika Pal v. Union of India*, (1999) 9 S.C.C. 95.

³⁶*Anil Kumar Jha v. Union of India*, (2005) 3 S.C.C. 150.

the curious situation where there are more ex-INC MLAs than original BJP MLAs in the BJP legislature party.³⁷

The provisions of Paragraph 4 indicate that when a party A merges with a party B, the said merger will be valid in the eyes of law only if two-thirds of members of the said party A agree to the merger. What happened in Goa, and in Telangana before that, is the reverse. Two-thirds of MLAs were willing to defect and this was passed off as a merger.³⁸ In a way, the cart is now before the horse and the Supreme Court has washed its hands off the matter leaving it to the Speaker's wisdom.

There is however ample guidance in the Court's earlier judgements. For instance, in *Rajendra Singh Rana v Swami Prasad Maurya*, the Court was asked to adjudicate whether there had been a split. The numerical threshold had been met. The five-judge Constitution Bench held that the MLAs who claim there has been a split have to make a *prima facie* case by producing relevant materials that there had indeed been a split in the original party.³⁹ The Court was not saying anything radically new. It was merely endorsing its earlier judgement in *Jagjit Singh v State of Haryana* where it had categorically stated that a split in the original party was a pre-condition for recognising a split in the legislature party.⁴⁰ The *Jagjit Singh* judgement does not leave the question at that. It goes on to specify that a split in the national party will be relevant and not a split at the state level.⁴¹ In practice, the law has been turned on its head.

³⁷Devika Sequeira, *Goa's Voters Lose as BJP Deliberately Misreads Anti-Defection Law*, THE WIRE (Jul. 13, 2019), <https://thewire.in/politics/bjp-deliberate-misreading-of-anti-defection-law-goa>.

³⁸*Supra* note 22.

³⁹*Rajendra Singh Rana v Swami Prasad Maurya* (2007) 4 S.C.C. 274.

⁴⁰*Supra* note 17.

⁴¹PDT Achary, *India's Politicians Have Turned the Anti-Defection Law on Its Head*, THE WIRE (Jun. 13, 2019), <https://thewire.in/politics/anti-defection-law-telangana-congress>.

C. Karnataka

The Karnataka Assembly saw a string of defections from the INC-led coalition in 2019. However, the defecting MLAs resigned their posts before the Speaker could disqualify them under the Tenth Schedule. The Speaker belonging to the INC-led coalition pulled out every trick in the book to prevent the MLAs from resigning – at one point even not turning up at his office so he would not have to accept the resignations. In the meantime, disqualification proceedings were initiated by him.

This was prompted by the realisation that resignation of the members would not only inflict a death blow on the government but would also allow the members to immediately join a potential BJP-led government as they would not attract any disqualifications under the Tenth Schedule. A disqualified member cannot accept a ministership or any other remunerative political post during the remaining term of the legislature unless she gets re-elected.⁴² By the time the Supreme Court settled the issue, the INC-led coalition had already fallen. The Court held that disqualification germinates at the earliest instance of defection and “*does not vaporise by tendering a resignation letter to the Speaker*”.⁴³

V. LAISSEZ-FAIRE ON FOREIGN SHORES

India is among the very few countries that have enacted a wide-ranging law to stifle dissent by an elected representative. In the Karnataka judgement, the Supreme Court has noted with satisfaction that Israel and Canada have followed India in legislating an anti-defection law. Given that the Indian law suffers from many infirmities

⁴²The Constitution (Ninety-first Amendment) Act, 2003(India).

⁴³*Supra* note 22.

– it is a worthy endeavour to take another look at the *laissez-faire* approach adopted by the United States and the United Kingdom. These countries are being chosen because the Indian political system is caught between the two.

A. *United Kingdom*

In the United Kingdom, the Amalgamated Society of Railway Servants was in the practice of collecting contributions from its members to support candidates who would lend it a sympathetic ear. Campaign finance in 1910 United Kingdom had advanced to the extent that this registered trade union required all its candidates to agree in writing to submit themselves to the Labour Party's whip. The matter reached the House of Lords which called into question the Society's competence to frame such a rule. Lord Shaw however, answered the question at the heart of the matter. He held that subjecting an elected representative to the decision of her parliamentary party was not "*compatible with the spirit of parliamentary Constitution or with the independence and freedom which...lie at the basis of representative government.*"⁴⁴

While Brexit has been a divisive issue for the British House of Commons, the House has seen multiple instances of MPs defying their party line. A MP defected to the opposition during the Prime Minister's speech and effectively rendered the government as a minority one.⁴⁵ This was despite a widely-reported directive issued a day before which warned that any MP defying the whip would be

⁴⁴Amalgamated Society of Railway Servants v Osborne, 1910 AC 87.

⁴⁵British Broadcasting Corporation, *Brexit: Tory MP Defects Ahead of Crucial No-Deal Vote* (Sept. 3, 2019), <https://www.bbc.com/news/uk-politics-49570682>.

expelled from the party and would therefore be unable to stand in the election as a candidate of the Conservative party.⁴⁶

B. United States of America

Across the proverbial pond, in the United States of America, defection is not an extraordinary political event. The media coverage following any defection usually provides centre-stage to the defector's concerns rather than vilifying her or painting her defection as a stroke of political genius from the side of the floor that she joins. That this happens despite it being a presidential political system stands testimony to the personality cult in Indian politics that distorts our reading of a defection. The impeachment of the incumbent President Donald J. Trump was, by all means, a crucial political event. However, defections by the Democratic members of the House hardly caused a murmur.⁴⁷

There are obviously defections that cause a political storm but these are often seen as an exercise of free choice and political independence. A case in point is the late Senator John McCain's iconic thumbs-down vote against his Republican Party's attempts to paralyse the Affordable Care Act passed by the Democratic President Barack Obama.⁴⁸ The political commentary that followed focused on

⁴⁶British Broadcasting Corporation, *Brexit: Government Wants To Purge Tory Rebels, Says Ex-Minister Gauke*, BBC (Sept. 2, 2019), <https://www.bbc.com/news/uk-politics-49543430>.

⁴⁷Dartunorro Clark and Alex Moe, *2 Democratic Defectors Join GOP In Voting Against Trump Impeachment Resolution*, NEWS BROADCASTING CORPORATION (Oct. 31, 2019), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/2-democratic-defectors-join-gop-voting-against-trump-impeachment-resolution-n107468>.

⁴⁸Peter W Stevenson, *The Iconic Thumbs-Down Vote That Summed Up John McCain's Career*, WASHINGTON POST (Aug. 27, 2018), <https://www.washingtonpost.com/politics/2018/08/27/iconic-thumbs-down-vote-that-summed-up-john-mccains-career>.

the Senator's own cancer diagnosis and his long-standing rhetorical independence from his party.⁴⁹

VI. CONCLUSION

As discussed before, the spectacular failure of the anti-defection law in stemming horse-trading leads to one of two paths – strengthen the law, or ditch it altogether.

The law in its present form has reached its carrying capacity. Strengthening it would make sense in a political ecosystem where it is expected to withstand reasonable pressure. As recent instances have shown, the law is beyond saving. While the Karnataka judgement censures resignations made as an afterthought, it does not engage with the possibility of a resignation that is made without any murmur of defection. In such an instance, a member can resign at will and cross the floor. Nothing in the Constitution prevents her from joining the Council of Ministers on the side she has defected to. The only way of preventing this is enacting legislation to disqualify her from joining the ministership during the remaining term of that legislature. Such a move would clearly go too far as it would curtail the political freedom and the fundamental right of association granted by the Constitution. One may object to this by saying that such a move would only limit the right to association since there is no concomitant fundamental right to ministership. However, such an objection would be deeply flawed as the constitution does not envisage multiple classes of citizens with different degrees of freedom of association. Thus,

⁴⁹Emmarie Huettelman, *McCain Hated Obamacare. He Also Saved It* (Aug. 27, 2018), NEWS BROADCASTING CORPORATION, <https://www.nbcnews.com/health/obamacare/mccain-hated-obamacare-he-also-saved-it-n904106>.

curtailing the exercise of the right to association of the hypothetical defector does not survive that very basic test.

It is also pertinent to point out here that while defection is embedded in the national psyche as an unpardonable offence, the disqualification incurred is washed away by re-election. This is not a far cry from the system in UK where a defector is disqualified from contesting on his old party's ticket in the next election. There is immense public interest in allowing the defector to continue in the House and wait her turn at the hustings. For one, it makes her all the more responsive to the constituency that elected her and faced her defection. In increasingly personality-centric election campaigns, it will ensure that the focus is not lost from local issues.

The American experience also holds an important lesson. In a deeply partisan political environment, cross-voting on important issues builds the public's overall trust in the system. India is witnessing a political consolidation at the federal level that has not been seen for at least three decades. This has led to an erosion of accountability and a tendency to silence all forms of criticism of the government.⁵⁰ In such a political climate, abolishing the anti-defection law will allow legislators a real voice. More importantly, it will allow for course correction from within the legislative branch. The current reliance on judiciary is a worrying trend as political reality moves faster than judicial processes leaving the courts as, more often than not, spectators in a zero-sum political game where the ultimate loss is the public trust in both legislative and judicial systems.

The Indian response to defection is warped due to horse-trading that immediately follows an election. However, the Indian electorate has also matured since the enactment of the anti-defection law and is

⁵⁰Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Part-State Fusion in India*, LAW AND ETHICS OF HUMAN RIGHTS (2020), <https://ssrn.com/abstract=3367266>.

now capable of sensing political opportunism and responding appropriately.⁵¹ The winds of change are not going to start blowing from the government benches as the Tenth Schedule has become an important weapon in its political arsenal. It is incumbent upon the Supreme Court to constitute a seven-judge Constitution Bench at the earliest opportunity to take a fresh look at the law, keeping in mind the state of Indian democracy and the track-record of the constitutional functionaries tasked with protecting it.

⁵¹Karnataka Bureau, *People Pose Tough Questions to Disqualified MLAs Contesting Karnataka Bypolls*, THE HINDU (Nov. 29, 2019), <https://www.thehindu.com/news/national/karnataka/people-pose-some-tough-questions-to-disqualified-mlas-contesting-bypolls/article30109998.ece>.