



An Extensive Evaluation of The Anti-Defection Clause In Pakistan: A Curative Strategy

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ABSTRACT

In a democratic country like Pakistan, the elected representatives of the political party with the most electoral support often form the government. Defection, on the other hand, frequently brings the will of the electorate into question. In addition to weakening democratic norms, the process of immoral and unprincipled defection also reduces public confidence in democracy. There is no distinct law in Pakistan that serves only to protect political mandates. The Constitution only contains one clause that safeguards political parties' rights. However, the law is not without flaws. The primary goals and objectives of the researcher in conducting research on this topic are to ascertain whether there is a pressing need to enact anti-defection laws in Pakistan, what steps can be taken to make them sufficiently effective in preventing defections, and whether Article 63-A has any built-in loopholes that have neutralized the beneficial effects of the law. In order to evaluate the implications and repercussions of defection in Pakistan, the researcher has made an effort to identify and explain the legislation relevant to defection under the Pakistani Constitution, how other nation deals with it, and finally, analyze the various Judicial Pronouncements on Article 63-A.

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1. Introduction

The phrase "defection" has been derived from the Latin term "defectio," which denotes an act of abandoning a person or a cause to whom such person is obliged by allegiance or duty, or to which he has deliberately devoted himself, as the dictionary definition says. Defection is described as abandoning one's devotion, duty, or principle, as well as one's leader or cause (Malthora, 2005). The phrase now denotes a change in a legislator's party loyalty or affiliation in legislative politics. The term "floor-crossing," which has become widely used to describe the latter, was first used in the British House of Commons, when a lawmaker was said to have switched parties when he crossed the floor from the Government to the Opposition side or vice versa. In summary, defection is the act of a member of one political party disavowing his loyalty to that party and pledging support to another. This is referred to as 'crossing the floor' by the Law Lexicon(Pandey, 2021).

In a democracy like Pakistan, the elected representatives of the political party with the most electoral support normally form the government. However, abandonment typically erodes the mandate of the electorate. In addition to weakening democratic standards, the process of unethical and unprincipled defection also reduces public confidence in democracy.

It is done to get rid of the defector's wickedness. The 14th amendment to the Pakistani Constitution added Article 63-A, also referred to as the "Anti-defection Law." The word "defection" is not defined in the text. Further application of the Anti-defection Act has shown that the law fails to achieve its goals and, as a result, fails to safeguard the true spirit of democracy due to a number of fundamental weaknesses in the legislation. Undoubtedly, the anti-defection legislation was passed to eliminate the politics of defection; nevertheless, due to some inherent weaknesses in the law, it is unable to adequately control the scourge of defection.

Because the motivation for defection is usually personal benefit rather than a conscientious change of heart on the part of the legislator, it is not only anti-democratic but also a kind of corruption. Based on the party to which a candidate is currently affiliated when they run for office, voters choose that candidate. If a legislator decides to switch parties after being elected, he or she must resign from the legislature and run again on the newly chosen platform. Defection is a bad thing that is not just present in Pakistan; it can also be found in other countries with parliamentary systems of government. Because a government can be overthrown when some of its supporters defect to the opposition party, turning it from a minority to a majority party, defection results in political instability. Defection is therefore undemocratic because it invalidates the results of the election.

The constitutional provision allows members of a state's House of Parliament, Legislative Assembly, or Legislative Council to be disqualified for desertion. The Statement of Objects and Reasons accompanying the Constitution (fourteen Amendment) Act explains why the 63-A was added to the Constitution as follows: (i) It explicitly preserved political mandate by granting the party head the authority to resign if any member defected, whether by voting against its party or departing with malice intents. (ii) It not only gave a harsh remedy to the party's leader but also to the member who claimed to be offended. He can also submit an appeal to the Supreme Court, which is the last controlling authority, based on acceptable grounds (Rasool, 2014). Political defections have long been a source of national anxiety. If it is not addressed, it has the potential to destroy the fundamental underpinnings of our democracy and the philosophy that underpins it.

Political instability and electoral volatility have been exacerbated by the defection process. The legislation, as written in Article 63-A, is riddled with difficulties, and has failed to accomplish its intended purposes because politicians and political parties are abusing the law to carry out defections. This study tries to identify flaws in existing anti-defection legislation by examining its provisions in light of numerous defection instances and court rulings.

2. Literature Review

Sardar Lohit's thesis extensively explained every aspect of anti-defection laws in India, which has a similar parliamentary system, and the author also discusses the changes required and amendments made by the parliament regularly by investigating the experience of world parliaments, particularly the Commonwealth. It is a detailed examination of anti-defection legislation in India, with a focus on reform. The thesis text also explores several episodes of desertion, focusing on occurrences from India's parliament and state legislatures (Kashyap and Kashyap (2011). Nm. Tripathi Pvt. Ltd., Bom: Subhash C. Kashyap Subhash C. Kashyap's book is an excellent treatise that aims to research and decode the provisions of the tenth schedule to analyze the operation of the anti-defection law; it also reveals the fundamental weaknesses in the existing law. A Bane on democracy: anti-defection law by Isha's elaborative thesis described the dynamic of anti-defection legislation. For further, the supreme court verdict on recent presidential reference regarding anti-defection laws. There is a lot of study on anti-defection legislation in India, but there isn't much in Pakistan.

Furthermore, the literature on party switching is distinct from studies on anti-defection laws, and the majority of it is (understandably) produced about nations that do not have anti-defection laws. Studies on party flipping are challenging to find and have not yet achieved legitimacy as a subfield in party politics, in part because the political act of switching parliamentary parties is known by so many distinct names (McElroy (2003) writes, "As a phenomenon party switching has received surprisingly little attention in the canon of political

parties," and Desposato (2006) says, "One oft-overlooked window on party systems is switching by politicians."

Party switching is only a problem in developing, non-Western, or newly formed democracies, according to certain academics. In contrasting the party systems in Finland, Ireland, and Italy with those in Brazil and Chile, Mainwaring (1991) observes: "In these European countries, relatively few politicians change parties. This situation creates stronger bonds between politicians and parties, for the fate of politicians depends to a greater extent upon the success of their parties."

Other authors, however, see a good deal of party switching in some European countries—including Italy (Mainwaring notwithstanding). Heller and Mershon (2005) found that "Almost one-fourth of the members of the lower house in Italy, the Chamber of Deputies, switched parties at least once between 1996 and 2001." Traditionally, according to McElroy, party switching was "generally viewed as an aberration or an indicator of a weak, ill-formed party system, a phenomenon associated with newly emerging democracies or unstable ones," but "recent research has challenged the conventional wisdom that switching is an exceptional occurrence," for it is relatively common in many democracies. In fact, according to McElroy's analysis of the Third European Parliament (1989–1994), 71 MPs (or over 15%) switched to a different party after being elected. Even in the United States, which has a stable two-party system, Nokken (2000) found 20 members of the House and Senate who switched parties while in office from 1947 to 1994, with 16 of them moving from the Democratic to the Republican party. The Republicans, who were the clear minority party in Congress after World War II, grew stronger until they took over in the 1994 election as a result of the progressive decline of Democratic representation. When the Senate was evenly divided between the parties in 2001, one moderate Republican senator (Jim Jeffords of Vermont) decided to become an independent, marking a well-publicized reversal of the norm. When it came time to elect the Senate's leaders, he cast a vote in favor of the Democrats, giving them control of the body under Republican President George W. Bush. Several high-ranking Socialists—not all of them deputies—left their party to join Nicolas Sarkozy's center-right administration, which is run by his Union for a Popular Movement, after Sarkozy defeated the Socialist candidate in the country's spring 2007 presidential election (UMP). Even listings of British and Canadian lawmakers who have crossed the floors throughout history are available on the Internet encyclopedia Wikipedia (Wikipedia, 2009).

3. Research Question

The following are the research questions:

1. To determine and define the reasons for defection under Pakistan's Constitution.
2. To determine and explain the articles of the Pakistani Constitution pertaining to defection.
3. To investigate the impact and consequences of defection in Pakistani parliamentary democracy.
4. Is the legislation limiting political parties' internal democracy, such as freedom of expression and the ability to dissent?
5. To investigate the historical context of Pakistan's anti-defection law.

4. Methodology

The study employs doctrinal research, which entails interpreting relevant primary and secondary legal sources and synthesizing those sources to indicate how the law might evolve. The researcher gathered information and data from secondary sources such as books, websites, papers, journals, court decisions, and internet sources.

5. Analysis of the Anti-Defection Clause

The 1973 constitution's original draft omitted an anti-defection clause. Desertion was made unlawful by the constitution's fourteenth amendment, which was pushed through by the second Nawaz Sharif administration in 1997 and is represented by Article 63-A. "Avoid instability in the establishment and operation of the government" was the objective. A lawmaker or member of a provincial assembly elected on the ticket of a political party was

considered to defect if he (a) broke party discipline, (b) voted contrary to his parliamentary party's directives, or (c) refrained from voting on any measure against party orders.

The political party's leader was responsible for determining whether any of his MPs had left for any of the aforementioned causes. Depending on the situation, the party leader would inform the Chairman, Senate, or "Speaker of the National" or Provincial Assembly (the presiding officer) of their choice. The latter had two days to inform the "Chief Election Commissioner" (CEC) of the ruling, and the CEC had seven days to declare the member ineligible and vacate his seat.

Therefore, under the fourteenth amendment, the party leader effectively had the power to dismiss a lawmaker, and the CEC and presiding officers essentially served as post offices. Furthermore, the reasons for desertion were such that a member could be shown the door most simply.

In the *Wukala Mahaz Barai Tahafooz Dastoor* case, which was reported at **PLD 1998 SC 1263**, Article 63A was challenged, shortly after it was promulgated, in the Supreme Court. The notion that compelling members to vote along party lines infringes on their basic freedom to reflect the opinions of their constituents was rejected by the Supreme Court's seven-member bench. The court categorically concluded in favor of Article 63A that refusing to follow party orders causes citizens to question the political system's openness. But then-Pakistani Chief Justice Ajmal Mian noted that the defection provision applies penalties when talking about how far it goes (penal in nature). Therefore, Article 63A must be read narrowly, in regards to the widely held idea that the Constitution is to be broadly interpreted, taking future changes in social attitudes into account.

Multiple constitutional amendments were made by General Pervez Musharraf, including the addition of Article 63A, which parliament ratified with the seventeenth amendment. The justification for defection was significantly reduced by the new Article 63A.

Defection would be deemed to have occurred on two grounds: (a) when a member resigned from his political party or joined another parliamentary party; or (b) when a member voted or abstained from voting contrary to the directions of his parliamentary party in the case of the election of the speaker, a vote of confidence or no-confidence, or a money bill.

As a result, a member might vote against the instructions of his parliamentary party on a non-money issue or a constitutional amendment bill without activating the defection clause. That was a significant divergence from the previous provisions.

Furthermore, the seventeenth amendment did not bind the Election Commission, which might reject or confirm a recommendation made by the leader of a parliamentary party about a member's defection within thirty days. The Supreme Court would rule within three months on any appeals of the EC's decision. To get back to the topic at hand, two factors have mainly divided legal opinion. One is that the majority of PML-Q lawmakers in the Punjab Assembly—not just a select few—have sided with the PML-N. Second, the parliamentary party leader, not the political party, shall submit the recommendation against defecting members under Article 63A, if applicable. The legislative party is now separate from the political party in question, although being an offspring of it. Before the fourteenth amendment, it was commonly assumed that the absence of suitable constitutional provisions was the primary reason for floor-crossing. However, subsequent occurrences have debunked this theory. Here are a couple of such examples: (i) In 2002, the PML-Q persuaded several PPP members in the National Assembly to form a coalition. Members of the PPP were awarded significant ministries such as defense and interior. Surprisingly, the PPP never filed a referral against any of its defectors. (ii) In 2008, the entire parliamentary party of the PML-Q in the Balochistan Assembly, the house's single largest party, voted with the PPP, allowing the latter to become the government.

Our political history reveals that political parties always find a way to cross the floor. For instance, anti-corruption laws have not prevented political or administrative corruption. Similar to how subversion of the fundamental law is defined in Article 6 of the constitution as an act of high treason, this has not stopped the generals from seizing power. There is a need to discuss, why Politicians legislate anti-defection clauses generally.

6. Why Politicians Legislate Against Party Defections

Typically, political parties develop internal party regulations to influence the conduct of their members. Expulsion from the party is, arguably, the harshest rule. Internal party regulations are ineffectual in fostering parliamentary cohesion when members are inclined to defect rather than subject to party discipline since this punishment has little impact on a person who threatens to leave the party anyhow. In this situation, politicians can turn to the state for support by passing legislation outlawing switching parties. Such regulations typically result in the defector or switcher losing their parliamentary seat after "crossing the floor" and defecting from the party.

State-based party laws enact the entire enforcement authority of the government, including fines, injunctions, and even imprisonment, in contrast to internal party regulations, which are enforced by and within the party itself. Party law has been defined as any governmental regulations (whether in constitutions, statutes, or administrative rulings) that govern "the definition, composition, structure, and activities of political parties," a topic of growing interest in comparative party politics (Kenneth, 2005; Muller, 2006). State-based laws can be effectively used to mold parties (Müller, 1993). Working directly on party legislation offers the chance to affect all the parties at once by addressing some of the governing mechanisms that dictate the shape of parties, according to (Carothers, 2006).

The protection model of party law is generally served by prohibiting parliamentary members from leaving by consolidating power within the current parties. According to Muller (2006), "Party law might offer extra incentives that bond people elected under a party label to that party. Enforcing the automatic resignation of defectors from parliament is the most extreme strategy to achieve this.

Anti-defection laws may match the protection model, but they may benefit the political system by consolidating power in the weak, dispersed parties that already exist. Such ineffective party systems are what Montinola (1999) laments in the Philippines, what Pottie (2001) discusses in South Africa, what Levitsky and Cameron (2003) criticize in Peru, what Rakner and Svasand (2004) note in Zambia, what (Fraenkel, 2005) opposes in the Pacific Islands, and what Salih and Nordlund (2007) fret about in Africa. However, other academics assert that these regulations might make matters worse (Booyesen, 2006; Joubert, 2006; Kreuzer & Pettai, 2003; Mershon & Heller, 2003; Rahman, 2005) are some of the works in that corner.

7. States that did away with Anti-Deflection Clauses

Is leaving your elected party a violation of democracy? Do anti-defection measures in and of themselves violate democracy? Miskin (2003) evaluates the main pro and con arguments objectively and without taking a position. Both points of view can be supported with valid arguments. Two democracies, South Africa and New Zealand abandoned their anti-defection laws. Both situations demand more consideration. The 2002 legislation that reduced the strong anti-defection rules of South Africa's 1996 constitution has received a generally positive scholarly appraisal, notwithstanding the vehement opposition to parliamentary defections that was stated above at the public floor-crossing debate in that country.

Take Joubert (2006) 219-page thesis on representation and floor crossing in South Africa as an example. It states that "Seen from a historical perspective floor-crossing has had more positive than negative results, and in its present form it has a tempering effect on the stronghold political parties have over their members. In his article regarding the constitutional amendment that forbade floor-crossing, Booyesen (2006) offers the following evidence in support of his claim: Thus began a time when South African political parties joined many of their foreign counterparts in the struggle between the right to defy authority and the necessity of a mandate. According to comparative literature, there are numerous and ongoing battles to stop defection based on the likelihood that the original election's mandate will be violated.

Additionally, comparative research shows that attempts to limit defection frequently result in travesties. Before adopting an anti-defection statute in 2001 that would "sunset" after two elections, New Zealand, unlike South Africa, had none. It was an "unworkable" law

that "failed within a few months of it being enacted," according to Miskin (2003), who wrote about it before the law's expiration.

The law expired after the second election in 2005, and the New Zealand Solicitor-General warned against passing a bill to reinstate it because it would violate the freedoms of speech and association guaranteed by the constitution. In conclusion, the Bill does not defend what I have referred to as a member's "legitimate disagreement" in the House in regard to his or her party's policy. Instead, it gives the party and its leader a great deal of discretion. If so, would that imply that Bill's rights restrictions are not "proportionate" and are consequently in violation of the BORA [Bill of Rights Act]? (Arnold, 2005).

Do anti-defection laws deter party defections? Other than the studies by (Malthora, 2006) and Subramanian, there is little comprehensive cross-national research on the effectiveness of anti-defection laws (2008). Based on questionnaires distributed to representatives of Commonwealth parliaments and representatives at the Inter-Parliamentary Union Conference in Mexico in 2004, Malthora (2006) studied anti-defection rules in 65 parliaments (2005: xi). He does not republish the questionnaire, but he does categorize parliaments based on their responses as to whether or not they have "experience with political defections." In place of Malhotra's "experience with defections," Subramanian's more empirical study used legislative party fragmentation as calculated by the (Laakso & Taagepera, 1979) formula (1979). In order to evaluate the impact of anti-defection legislation on party fragmentation, Subramanian researched nations with and without such laws. Subramanian also found no evidence that anti-defection legislation "consistently enhances or decreases legislative party fragmentation," which is consistent with the statistics given in (Malthora, 2006). These studies demonstrate that it is challenging to determine the causative relationships between the variables, much as research on the relationship between the number of city police and the volume of urban crime. Do anti-defection laws prevent parliamentary party defections (or party fragmentation), or do they increase the likelihood of party defections?

8. Conclusion and Suggestions

Most developed democracies consider switching parties after an election differently than most developing democracies. Established democracies place a high significance on a legislator's ability to change parties. They perceive anti-defection legislation as restrictions on political freedoms and see party switching as acceptable with democratic principles. Democratic countries typically enact legislation that allows for or encourages competitive party politics (Janda, 2006).

Anti-defection laws are suspicious in established democracies since they protect incumbent parties, yet some democracies do favor existing parties through other legislation. For instance, the United States facilitates the placement of candidates from its two major parties, the Democrats and Republicans, on election ballots (Bennett, 2008). However, there is almost any support for prohibiting Congressmen from switching parties even within the United States.

However, developing democracies have (by definition) less sophisticated political structures. Their party structures and expectations for legislative conduct are frequently in upheaval. Additionally, their electorates are less familiar with political parties and frequently owe their political allegiance to clans, organizations, or local leaders. These elements result in extremely varied political structures. Anti-defection laws may be an example of a law that does not match party dynamics in developed democracies but does in emerging democracies.

The goal of representatives in a parliamentary framework is to achieve the conceivable interest of their constituency through effective deliberation and compromise, and with this in mind, intra-party dissent and democracy become critical, which is seeing a precarious decline in our framework across parties. A party that does not win a majority in the House through elections may nevertheless be able to wrest control of the House and the government by enticing defections from other parties. Thus, a party that may win a majority in an election and gets a mandate from the people to form a government may nonetheless fail to do so if a few of its members defect. Governments have failed in the past as a result of defections or splits within political parties. In Sri Lanka, for example, the government fell due to defection

on two occasions, in 1964 and 2001. Governments have also toppled owing to defection or a split in a political party elsewhere in the world, notably in the United Kingdom, where there is no Anti-defection Law.

Anti-defection legislation, on the other hand, has been criticized for infringing on members' essential powers, rights, and immunities in exercising their freedom of speech and expression, as well as their freedom of action, which includes the right to vote. There is also a school of thought that believes anti-defection laws discourage politicians from switching parties, reducing the government's accountability to Parliament and, eventually, to the people. Numbers are vital in a Parliamentary democracy, but democracy is much more than a game of numbers. Defections and counter-defections from one political party to another are common in India, where politicians are guided only by their desire for power. To meet their demands, they transitioned from one political party to the next. The never-ending game of defections and government overthrows is possibly the most visible manifestation of the deterioration of democratic and moral principles in Pakistan's legislative life.

Here is a quick comparison of Pakistan's anti-defection statute with the floor crossing laws of other nations. A member of the Pakistani Parliament or State Legislative Assembly who voluntarily gives up his membership in a political party is disqualified under Article 63-A of the Pakistani Constitution. A similar clause may be found in Bangladesh's Constitution, which states that if a member resigns from the political party on whose platform he ran for office, he must quit his position. The Indian Constitution specifies the reasons for disqualification of a member of a parliamentary party in a House if he resigns from his political party or joins another parliamentary party.

Laws are created for two complimentary reasons: to set guidelines for people's behavior and to provide a framework for how state institutions must operate. If a specific task needs to be carried out by state institutions in a particular way, it must be done strictly within the parameters allowed. This idea's central tenet is that government officials can only act in ways that are permitted by the law. People are fundamentally free to act unless prohibited by law, whereas certain courses of action are restricted until expressly permitted by law. A constitution is only a set of rules on paper unless it is fervently and assiduously upheld; our political class must revere it for it to endure and be upheld. Sadly, Pakistan's history is filled with heinous, abhorrent, unlawful, and extra-constitutional deeds that have corrupted our political culture and seriously damaged the safeguards of our Constitution. The spirit of our Constitution must not be destroyed during the process, regardless of any individual will.

Following are the suggestions put forward by various groups of society; **(i)** Some critics have stated that the law has failed and that it should be repealed. Former Vice President Hamid Ansari has proposed that it only apply to administrations that are facing no-confidence moves. The Election Commission has proposed that it be the determining authority in situations of defection. Others have suggested that defection petitions should be heard by the President and Governors. Last year, the Supreme Court recommended that Parliament establish an independent panel led by a retired judge from the higher judiciary to adjudicate defection cases quickly and fairly (Heller & Mershon, 2005). **(ii)** The statute does not stipulate a time limit for the presiding officer to decide in a defection case. Many times, an election commissioner has delayed ruling on the matter of a defecting MLA until the end of the legislative session. Defecting MLAs have even been known to become ministers when a defection petition against them was pending (Nokken, 2000). **(iii)** Both political protection and democratic government should be explicitly protected by the legislature. In its purest form, anti-defection legislation prevents the system from becoming unstable. It establishes a framework that holds party members accountable to the party they are a member of, preventing them from merely looking out for their profits or gains. In comparison to defection, when the primary benefactor becomes a party member alone, it also promotes political party mergers for the development of parts of society, resulting in better decision-making in the system. **(iv)** In Pakistan, the court played a role in interpreting the law while explicitly stating that legislation and lawmaking are not within the jurisdiction of the judiciary. The defection was a crucial factor in the collapse of a strong developing government in favor of corrupt leaders. There is a pressing need to either make some changes to the law's strictness to avoid the public mandate from taking precedence above political protection. **(v)** There should be

strict adherence to offers of the opposite party. It is unfair to punish one member if he violates the anti-defection laws because when there is an element of bribery then there should be expressed provision as a sanction for both evils. **(vi)** A vote cast by a defector to overthrow a government should be considered void. **(vii)** Our laws lack clarity as to the distinction between dissent and defection, one should not be punished on the mere basis of opinions.

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