

Constitutionalizing Political Loyalty: A Critical Examination of the Anti-Defection Law from the Bangladesh's Constitutional Landscape

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Abstract

The anti-defection law, as embodied in Article 70 of the constitution of Bangladesh, is a critical component of the democratic system aimed at maintaining stability in the legislature and promoting accountability among elected representatives. However, the anti-defection law has often been criticized for containing elements that are not in line with the principles of parliamentary democracy. This paper investigates the evolution and necessity of such a law, emphasizing that political defections are frequent events in developing countries like Bangladesh, India, and Pakistan. As a result, these countries have included anti-defection clauses in their constitutions, learning from their turbulent pasts. The author aims to examine the anti-defection law in detail and explore its paradoxical implications on the functioning of both legislative and executive branches of the government. This paper sheds insight into the intricate connection between legal provisions and political dynamics in the context of Bangladesh through an in-depth investigation, which responds to the ongoing discussion on constitutionalizing political loyalty. Additionally, the author has provided a comparative analysis to shed light on how defections are handled in other countries, namely the United States, the United Kingdom, India, and Pakistan. The author aims to demonstrate in the present study how anti-defection provisions undermine the goals of the constitution by violating the principles of parliamentary democracy. Finally, the paper proposes recommendations for reforming Article 70 of the Bangladesh Constitution to address concerns related to defection, striving to strike a balance between political flexibility and the integrity of the democratic institutions.

Keywords

Anti-Defection Law, Parliamentary Democracy, Executive, Political Loyalty, Bangladesh

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1. Introduction

The anti-defection law enshrined in the Constitution of Bangladesh has been a significant aspect of the country's democratic process. Article 70 of the constitution of Bangladesh provides for the provisions relating to anti-defection law that aims to prevent elected representatives from switching political parties, which can lead to instability in the government and undermine the people's mandate. The law was first introduced in 1972, the original Constitution of Bangladesh, and has been amended three times aimed at deterring defection and addressing its efficacy in promoting democratic governance. This topic carries great importance as it highlights the role of the anti-defection law in ensuring political stability and promoting the democratic process in Bangladesh. Though "political defection" is basically connected with some fundamental rights like personal liberty, freedom of expression, freedom of association etc., it has been a growing political disease particularly in third world countries like Pakistan, India, Nepal, Bangladesh, Malaysia etc. threatening their very political development and hampering the institutionalization of democracy in many ways (Halim, 2009: p. 181). This is because politics in third-world countries are rarely based on broad principles and values. Instead, political parties are often defined by the politics of conspiracy, self-interest, greed, and the pursuit of power.

While floor crossing may seem like a legitimate exercise of individual freedom and political expression, it can have adverse impacts on parliamentary democracy. This research paper seeks to explore the negative consequences of floor crossing and its impacts on the democratic process.

The parliamentary form of government is characterized by direct accountability to the legislature, which distinguishes it from the presidential system. In the parliamentary system, the government is formed from within the parliament, and the parliament retains the authority to hold the government accountable if it oversteps its expected limits. The executive in the parliamentary system is not subject to a specific time limit to govern the country, unlike in the presidential system, where the executive is indirectly accountable to the people, and its accountability can only be tested after the expiration of their tenure as per the constitution of the particular country. In a parliamentary form of government, the executive can continue to govern as long as it enjoys the confidence of the majority of members in parliament. This system requires the government to constantly evaluate the pulse of its constituents, as it always runs the risk of being defeated in the house. This responsiveness to the needs of the people makes the parliamentary system more accountable to its citizens. However, in a situation where the government cannot be easily defeated in parliament, it becomes less accountable, increasing the risk of a despotic government. This trend has been observed in parliamentary democracies in Bangladesh, Pakistan, and India, where Article 70 of the Bangladesh constitution tends to make parliamentary government become an elected dictatorship. Hence, article 70 puts restraints on legislative and policy stance of MPs by prohibiting them from voting against their party decision (Chowdhury, 2019: p. 370).

There is a cogent argument as to the fact that while parliamentary democracies must protect individual freedoms and rights, the practice of floor crossing undermines the very foundations of representative government. The negative impacts of floor crossing on parliamentary democracy must be addressed through legal, institutional, and political reforms that ensure the integrity and stability of the democratic process.

2. Historical Overview Necessitating the Incorporation of Anti-defection Law in the Constitution of Bangladesh

The most distinguishing feature of the part 5, the legislature, of the constitution of Bangladesh was Article 70 which read as follows:

“A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in parliament against that party.”

This was a new provision in any other constitution, not even in the constitution of 1962. A section of politicians called it to be contradictory to the principle of democracy and the right of conscience as guaranteed by the constitution (Ahmed, 2017). They claimed that it would encourage the establishment of party dictatorship and lastly, it infringed the sovereignty of parliament (Ahmed, 2017: p. 129).

But the historical background on which this article was incorporated did not make the provision less justified either (Ahmed, 2017). The past experience of the parliamentary system in Pakistan and India both at the centre and the States showed that members once elected tended to cross the floor for their selfish end rendering the parliamentary system unworkable on many occasions (Ahmed, 2017). They would defy party decisions and ignore party commitments made to the electorate and once elected would not subject themselves to any party discipline through which platform he got elected to the parliament-resulting in splitting party and destroying inner cohesion (Ahmed, 2017).

The genesis of the dysfunctional parliamentary system in East Pakistan can be traced back to the provincial elections of March 1954, which was a watershed moment in the political history of East Pakistan (Bari & Dey, 2020: pp. 477-478). A coalition of political parties under the banner of the United Front, a coalition of four political parties, namely, the Awami League, Krishak Sramik Party, Nizam-e-Islam, Ganatantri Dal- and led by A.K Fazlul Hoq, secured an unprecedented victory over the Muslim League, which had been in power since independence from British rule (Bari & Dey, 2020: p. 478). It was a healthy sign to provide a suitable basis for the growth and success of democracy in East Pakistan (Halim, 2009: p. 189). Winning the landslide victory, the United Front formed government in east Bangle under the leadership of A.K. Fazlul Haq (Halim, 2009). However, the United Front failed to maintain its unity due to political defections. It fragmented as each constituent party relentlessly pursued a taste of power. The Awami League, the principal component of the United Front, withdrew from the coalition to

pursue power-sharing at the center. Consequently, the Awami League transitioned to the role of opposition, while Abu Hossain Sarkar of the United Front assumed governance in 1955, led by A.K. Fazlul Haq, the leader of the remaining United Front parties.

However, this coalition government, supported by minor parties such as the Congress Party, Scheduled Castes, and United Progressive Party, proved to be fragile. The absence of a common policy among the coalition members led to significant disagreements on both local and national issues. Eventually, four minor parties withdrew their support for Abu Hossain Sarkar, prompting the government to resign on September 6, 1956.

Following the fall of the Abu Hossain Sarkar government, Aatur Rahman Khan, the leader of the opposition Awami League, formed a new government. A week later, H.S. Suhrawardy assumed the position of Prime Minister of Pakistan. Thus, the Awami League gained power both at the center and in the province. However, due to disagreements over Suhrawardy's foreign policy, Maulana Abdul Hamid Khan Bhashani left the Awami League and established a new party called the NAP. Approximately 28 members of the Awami League joined the NAP and decided to withdraw their support from the provincial government. Consequently, Aatur Rahman Khan's cabinet was dismissed on March 31, 1958.

It should be stressed that the MPs did not defect for ideological convictions but rather in pursuit of ministerial office, monetary benefits, and varied personal interests ranging from a lack of adequate courtesy shown by officials, the non-inclusion of their name in local flood relief committee, and the refusal of the Chief Minister to assist an MP accused of being involved in black market activities (Bari & Dey, 2020: p. 479). Consequently, the lack of respect among the MPs towards parliament as a key democratic institution impeded the nascent nation's journey towards democracy and contributed towards its distinct advance towards praetorianism, as is evident from the abrogation of the 1956 constitution of Pakistan and the banning of all political parties through the declaration of Martial Law on October 7, 1958 (Bari & Dey, 2020).

2.1. Awami Lique's Amendment Bill in 1969 for Incorporation of Anti-Defection Provision by Amending 1962 Constitution of Pakistan

The challenging encounters outlined earlier prompted political parties, especially the Awami League, to embrace the notion of integrating a constitutional provision in Pakistan to counteract defection. It's important to observe that even though the Awami League (AL) experienced a few isolated defections within the East Pakistan legislature, these occurrences did not lead to the provincial government's downfall. But these, specially the role of NAP, left a bitter lesson that politics in our society is based not on principle and ideology, but on selfish needs (Halim, 2009: p. 193). Elected politicians often perceive power as the ultimate objective of politics, and as a result, they are willing to disregard their party's directives and switch

affiliations, consequently rendering the parliamentary process ineffective.

It is with this end in view that the Awami League committed itself since long to stop this possible anarchy within the parliament. As long back as in 1969 when a Constitution Amendment Bill was drafted for the National Assembly of Ayub Khan amending the 1962 Constitution, the Awami League incorporated such a provision. It Provided that:

4(a) If any person, having been elected to a legislature as a candidate or nominee of political party-

- 1) withdraws himself from it; or
- 2) is expelled by his political party for violation of the party's mandate in respect of any matter related to his activities as a member of the legislature;
- 3) votes or abstains from voting against the direction of such political party upon any legislative measures or on any motion put to vote in the legislature, he shall cease to be a member of legislature for the unexpired period of his term unless such member is re-elected at a bye-election occasioned by the vacancy created by such cessation of membership (Ahmed, 2017: pp. 129-130).

The proposed amendment to the constitution of Pakistan was never adopted, as the country became embroiled in a bloody civil war which culminated in the birth of independent nation of Bangladesh (Bari & Dey, 2020: p. 480). However, the previously mentioned proposed amending clause highlights the prolonged consideration of the Awami League leaders along this course. As a result, although with some limited flexibility, the anti-defection clause in the 1972 Constitution represents a continuation of these ideals.

2.2. Incorporation of Anti-Defection Provision for Preventing Defection of Constituent Assembly Members in 1972

Prior to the drafting of the original constitution of Bangladesh, Sheikh Mujibur Rahman, the first President of Bangladesh as per The Proclamation of Independence adopted on 10th April 1971, issued the Provisional Constitution of Bangladesh Order, the interim constitution, on 11th January, 1972, to inaugurate Westminster type parliamentary democracy in Bangladesh. The Provisional Constitution of Bangladesh Order, 1972 provided that there shall be a cabinet of ministers which shall be headed by Prime Minister (The Provisional Constitution of Bangladesh Order, 1972: Clause 5) who will be a member of the Constituent Assembly (The Provisional Constitution of Bangladesh Order, 1972: Clause 7) and that the President shall in exercise of all his functions act in accordance with the advice of the Prime Minister (The Provisional Constitution of Bangladesh Order, 1972: Clause 6). The President also promulgated the Constituent Assembly of Bangladesh Order, 1972, on the 22nd of March, 1972 and under this Order the Constituent Assembly was empowered with only one duty, and that was to make a constitution for Bangladesh. Until the establishment of the first parliament in 1973, the President was vested with the authority to enact laws for the Republic through the Proclamation of Independence and the Provisional Constitution of Bangladesh

Order, stating that the President is invested with all executive and legislative authority and power to appoint a Prime Minister. Thus it is, therefore, very much evident that under the interim constitution, lawmaking powers vested in the executive branch of the government, not in the Assembly. “When K. M. Obaidur Rahman, an Awami League lawmaker, raised a question as to why the constituent assembly was not given legislative powers, Prime Minister Sheikh Mujibur Rahman became annoyed. Subsequently, on the advice of the prime minister, President Abu Sayeed Chowdhury introduced the Bangladesh Constituent Assembly (Cessation of Membership) Order, 1972. The order stipulated that any resolution by a lawmaker without the approval of his/her party would result in expulsion from the assembly. The order inspired Article 70 of the Constitution of Bangladesh, which bans free votes and crossing the floor (Wikipedia, The Free Encyclopedia).” This question raised by Rahman was, indeed, a pertinent one as the Constituent Assemblies constituted for both India and Pakistan following their independence from Britain were not only entrusted with the constituent powers of preparing a constitution, but also with the power to make laws for their nations (Bari & Dey, 2020: p. 482). However, a mere inquiry into the decision to depart the constitutional arrangements followed elsewhere annoyed Mujib (Bari & Dey, 2020). Consequently, Mujib, in his capacity as the Prime Minister, advised the president to issue the Order providing for the anti-defection clause discussed above (Bari & Dey, 2020).

3. Incorporation of Anti-Defection Provision in 1972 Constitution of Bangladesh

The constitution of 1972 inserted provisions relating to anti-defection law in Article 70 for prevention of defection of any MP whose seat is liable to be vacated on some specific grounds by the party which nominated him as candidate in the election. The object of the article is to ensure stability and continuity of government and also to ensure discipline among the members of the political parties so that corruption and instability can be removed from national politics. The spirit is that members elected to the parliament should continue to maintain their allegiance to the party by which they have been nominated (Islam, 2012: p. 472). The original Constitution finally included the provision specifying that a Member of Parliament would lose his parliamentary seat if he lost his party membership as a result of resignation or expulsion from the party, as securing the stability of the government was the primary goal of the drafting process.

This provision later became article 70 in the original Constitution of Bangladesh, established in 1972. The creation of this article can be traced back to the heightened importance placed on stability by the leadership of post-independence Bangladesh. As discussed earlier, this emphasis on stability derived from the historical challenges faced during the period of Pakistani rule.

Article 70 of the Original Constitution, 1972 states that:

A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he:

- 1) resigns from that party; or
 - 2) votes in parliament against that party;
- but shall not thereby be disqualified for subsequent election as a member of parliament.

3.1. Amendments Brought to Article 70 of the Constitution

It is pertinent to mention here that several attempts were taken to bring reforms to the anti-defection provisions as inserted in the original constitution of 1972.

3.1.1. Modifications Introduced to Article 70 By the 4th Amendment

First attempt was taken by 4th Amendment to the constitution in 1975 and another two conditions were added by inserting an explanation of the words “votes in parliament against his party”. They are:

- 1) if a member, being present in the parliament, abstains from voting; or
- 2) if he absents himself from any sitting of parliament, ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party.

Thus the provision was made more rigid to debar members from raising any voice against the party and this provision has become a permanent obstruction for the development of responsible government in Bangladesh (Halim, 2009: p. 120).

3.1.2. Modifications Introduced to Article 70 By the 12th Amendment

Again, another two conditions were inserted by 12th Amendment to the constitution in Article 70 and full amended article is given for better understanding below

“1) A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in parliament against that party.

Explanation. If a member of parliament—

- a) being present in parliament abstains from voting; or
- b) absents himself from any sitting of parliament, ignoring the direction of the party which nominated him at the election as a candidate no to do so, he shall be deemed to have voted against that party.

2) If, at any time, any question as to the leadership of the parliamentary party of a political party arises, the speaker shall, within seven days of being informed of in writing by a person claiming the leadership of the majority of the members of that party in parliament, convene a meeting of all members of parliament of that party in accordance with the Rules of Procedure of parliament and determine its parliamentary leadership by the votes of the majority through division and if, in the matter of voting in parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (1) and shall vacate his seat in the parliament.

3) If a person, after being elected a member of parliament as an independent candidate, joins any political, he shall, for the purpose of this article be deemed to have been elected as a nominee of that party.”

By going through the article 70 as mentioned above, two stringent conditions for vacation of the seat of any member of parliament have been found as follows:

- i) If any member does not comply with the direction of leadership as determined by the speaker following any question as to the leadership of the parliamentary party of a political party, he shall be deemed to have voted against that party under clause 2 of article 70;
- ii) If an independent elected member of parliament joins in a political party he will come under the purview of anti-defection provisions and shall be liable to be vacated his seat in parliament on the conditions arise under article 70.

Upon careful examination of the amended provision, it becomes apparent that a Member of Parliament, despite being elected through a free and fair election by popular vote, can now face expulsion on six grounds following the 12th Amendment to the constitution. This is a significant departure from the original constitution, which only specified two conditions for such action. Thus, this amendment imposes an obligation on Members of Parliament to adhere to any directive from the parliamentary leadership, even if it goes beyond the principles of representative democracy outlined in the constitution. Unfortunately, the amended provision lacks a mechanism to investigate instances of noncompliance by an alleged Member of Parliament with the directives of the parliamentary leadership. Consequently, unchecked authority is granted to political parties, enabling them to potentially unseat an MP for trivial reasons, including personal disputes. Furthermore, the amendment subjects independent members of parliament to the same disciplinary measures as party-nominated MPs. This compels parliamentarians to prioritize party loyalty over ensuring transparency and accountability in the execution of executive functions, ultimately giving the political government unchecked power to control MPs through the iron hand of parliamentary leadership.

3.1.3. Changes Introduced to Article 70 Keeping It in its Original Status by the 15th Amendment

The anti-defection provision in Article 70 was once again amended and substituted in its original form by the 15th Amendment in 2011 following the general election of 2008 when Awami Ligue (AL) led grand alliance assumed power with a three-fourths majority in parliament. The Fifteenth Amendment substituted Article 70 by excluding the explanation (1) and deleting clauses 2 and 3, (*Government of Bangladesh and Others vs. Advocate Asaduzzaman Siddiqi and Others*, 2017: p. 276). As a result, the expression “Vote against that party” cannot be given extended meaning and Article 70 providing for some sort of forfeiture clause is required to be strictly construed and a member of parliament cannot be said to have vacated his seat unless his case falls within the literal meaning of the substituted Article 70 (*Government of Bangladesh and Others vs. Advocate Asaduzzaman Siddiqi and Others*, 2017).

4. Anti-Defection Law in Comparative Perspective

No provision similar to Article 70 of the Bangladesh constitution is found in most

of the parliamentary democracies around the world; instead, members of parliament are given discretion to vote in accordance with their own conscience (Khan, 2018: p. 193). However, recently, restraints on members of parliament, similar to those in Bangladesh, have been included in the constitutions of some countries (Khan, 2018). Therefore, let us draw a comparative analysis of anti-defection laws across different countries to gain insights into how these legal provisions interact with each country's political, legal, and cultural context. In doing so, we emphasize the constitutional perspectives of Pakistan, India, the UK, and the USA. This approach allows for a nuanced understanding of the trade-offs between party discipline and individual legislative independence in various democratic systems. Here are some aspects to consider when examining anti-defection laws in different jurisdictions:

4.1. Anti-Defection Law in Pakistan

The reason why Article 63-A was inserted in the Constitution was that on certain important matters, such as electing a prime minister or a chief minister, or casting vote on a confidence or no-confidence motion or on a money bill or amendment of the Constitution, all elected members of a political party were required to vote on the basis of a joint stand of the parliamentary party to which they belong. Any member voting or abstaining from voting in disregard of the joint stand was to be taken as an act of defection from the party which in turn could lead to his removal from the House (Arab, 2022). A plain reading of Article 63-A of the Constitution of Pakistan is mentioned below which says:

63-A. 1) If a member of Parliamentary Party composed of a single political party in a House

a) resigns from membership of his political party or joins another parliamentary party; or

b) votes or abstains from voting in the House contrary to any direction issued by the parliamentary party to which he belongs, in relation to-

i) election of the Prime Minister or the Chief Minister; or

ii) a vote of confidence or a vote of no-confidence; or

iii) a money Bill or a constitution (Amendment) Bill;

he may be declared in writing by the party Head to have defected from the political party, and the party Head may forward a copy of the declaration to the presiding officer and the Chief Election Commissioner and shall similarly forward a copy thereof to the concerned member: (*The Constitution of the Islamic Republic of Pakistan, 1973: Article 63A*).

Upon a plain reading of the provisions, it is evident that members of parliament in Pakistan shall vacate their seats for transgressing the directions of the party to which they belong under three circumstances: the election of the Prime Minister or Chief Minister, a vote of confidence or no-confidence, or a Money Bill or a (Constitution Amendment) Bill. Therefore, according to the Constitution of Pakistan, except in these three circumstances, a member of parliament can exercise

their voting power in all other cases according to their own conscience (Khan, 2018: p. 193). The party Head is obligated to provide such member with an opportunity to show cause as to why such declaration may not be made against him (The Constitution of the Islamic Republic of Pakistan, 1973: Proviso to Article 63A). Even after confirmation of the declaration by the Election Commission, the aggrieved party may, within thirty days, prefer an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal (The Constitution of the Islamic Republic of Pakistan, 1973: Article 63A, Clause 4 & 5). Thus, the principle of self-defense guaranteeing due process of law is evidently ensured in the Constitution of Pakistan for the Member of Parliament whose seat is vacated for defection, a provision that is absent in the constitution of Bangladesh.

4.2. Anti-Defection Law in India

Schedule X, added to the Constitution by way of the 52nd amendment, sets out the process by which a member of the Parliament or a state legislature, as the case may be, be disqualified from the membership of such house on the ground of defection (Tyagi, 2021: p. 144). This Amendment also added Article 102(2) to the Constitution of India which is known as the anti-defection law. This law provided two main grounds for defection—firstly, if he has voluntarily given up his membership of such political party, and secondly, if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention (The Constitution of India, 1950: Tenth Schedule).

Hence, according to Schedule X of the Constitution of India, floor crossing is not the sole form of defection. Instances may arise where a specific political party issues directives mandating its members to vote in a particular manner on any given subject. In such situations, legislators affiliated with that party must adhere strictly to these instructions. Voting contrary to the specified direction shall also be liable for defection.

4.3. Anti-Defection Law in the UK

The UK is a long-established parliamentary democracy, with a constitutional monarch as the Head of State. In the United Kingdom, changes of party membership do occur from time to time (Malhotra, 2005: p. 68). However, the changes of party cause problems for the political parties concerned rather than for the House of Commons (Malhotra, 2005). There are no laws or standing orders requiring members to register the party of which they are members or providing for any consequences if a member changes the party (Malhotra, 2005). Seating in the House is governed by convention, and not rules, but such a member would

normally sit separately from party members (Malhotra, 2005: p. 69). There are no punitive measures imposed by the House on any member who can change their party affiliation. Similarly, there are no rules to stop independent members of the House (or cross bench Peers) joining a political party at any time (Malhotra, 2005). From the House's point of view, a change of party affiliation is not a problem (Malhotra, 2005). The individual political parties may have methods of trying to stop their members defecting but this is a matter for them not the House (Malhotra, 2005).

Hence, it is apparent from the parliamentary practices in the United Kingdom that a member of the House is not automatically at risk of losing their seat in parliament solely due to party defection. For example, Clare Short, elected by the people of Birmingham Ladywood in 2005 as a Labour MP, left the Labour Party but did not resign from her party. She'll continue to sit through this parliament as an independent (Karim, 2014: p. 127). Another significant example in this regard is the former British Prime Minister, Tony Blair who suffered his first voting defeat in the parliament when as many as 49 MPs from his own party voted against a bill to extend the tenure of the detention of suspected terrorists in November 9, 2005. As soon as the government attempted to introduce the bill in the parliament, civil liberty groups campaigned against the law and lobbied with the MPs. Despite having the overwhelming majority in the parliament, Blair did not manage the bill to pass through. MPs crossed the floor and voted against the proposed draconian law (Karim, 2014).

4.4. Anti-Defection Law in the USA

Like the UK, the Constitution of the USA, does not insert provisions relating to anti-defection law. 'Though, there are no laws governing defection in US but party discipline still remains a very important aspect in the politics of US. All the party members should come to an agreement when laws are discussed in houses and therefore show party cohesion. The self-discipline principle is followed in parties which is not binding by law but is still there. The discussion takes place on a law internally in the parties to which when the law is to put to vote it is seen that all the legislators vote according to parties' higher authorities and vote in cohesion on a bill (Mehta & Bhandari, 2021). However, the Constitution of USA provides for provision that each House may punish its members for disorderly behaviour, and, with the concurrence of two thirds, expel a member (The Constitution of the United States: Article I, Section 5). So far, Fifteen Senators have been expelled in the History of the Senate. The Senate has also passed several resolutions censuring members; censure requires only a simple majority and does not remove a senator from office (Chowdhury, 2022: p. 151).

5. Implications of Anti-Defection Law in Bangladesh

While the anti-defection law may have some benefits in promoting political stability and reducing corruption, it carries the risk of significant negative impacts

on numerous aspects such as the legislative process, democratic values, and making the executive organ of the government not accountable to the legislature among others which are discussed as follows:

5.1. Lack of Fairness

Article 70 of the Bangladesh Constitution treats defection by a member without distinguishing between defection driven by conscience and defection motivated by ill-intentions. It can, undoubtedly, be said that defection based on ill-intentions constitutes a corrupt practice and consequently, to establish such intentions, a member should undergo a due process and fair trial. Only after proving the allegation in such a trial should the individual be subject to anti-corruption laws. 'It is a general impression that floor crossing is mostly due to corruption, lucrative incentives or moral turpitude, which requires to be discouraged. However, it cannot be generalized that every defection is on account of corrupt practices, lucrative incentives or immoral acts. The majority of the Parliamentarians enjoys good character and are mature enough to differentiate between good and bad (*Mandokhail (Judgment/Opinion)*, 2022: p. 10). Until and unless, an ill-intention, immoral or malicious act of crossing the floor by members of the Parliament is proved and declared as such by a competent court of law, assuming a member to be corrupt, would be an injustice (*Mandokhail (Judgment/Opinion)*, 2022).

5.2. Violation of Freedom of Speech and Expression of MPs

The Constitution of Bangladesh establishes a parliamentary system where legislative power is vested in a parliament comprising three hundred elected members (*The Constitution of the People's Republic of Bangladesh: Article 65*). The parliamentary form of government that currently prevails in Bangladesh has to govern the country with a prospective fear of facing defeat in the parliament following no confidence. Because, in the parliamentary system under the constitutional framework of Bangladesh, the executive does not have a specific time limit to govern the country, even though it is elected for a specific period, which is five years from the date of its first meeting (*The Constitution of the People's Republic of Bangladesh, 1972: Article 72*). Consequently, if the prime minister loses the majority confidence in the parliament, he shall either resign his office or advise the president in writing to dissolve parliament (*The Constitution of the People's Republic of Bangladesh, 1972: Article 57*). Moreover, if the prime minister resigns, other ministers shall be deemed also to have resigned (*The Constitution of the People's Republic of Bangladesh, 1972: Article 58*). Thus, this constitutional structure obligates the executive to remain accountable to the will of the parliament reflecting the will of the people through their representatives. However, restrictions on parliament members' freedom of thought, speech and expression guaranteed by the fundamental rights outlined in Part III of the constitution curtail their ability to oppose party decisions or be absent from the house in protest of the party's undemocratic practices. As a result, the governing administration positions itself in

a situation where it is not obliged to be answerable to the parliament. A parliament member, directly elected by the people, is generally expected to function in a democratic manner to ensure that the aspirations of the people in the respective constituency are upheld. The mandate from the people is conferred upon them not to align with undemocratic party policies but rather to speak out against capricious or undemocratic decisions. However, the irony lies in the fact that under Article 70 of the Bangladesh constitution, it is mandatory for Members of Parliament to vote along party lines. This essentially mitigates the need for dialogue and discussion in Parliament by curtailing the power of a parliamentarian when voting (Tyagi, 2021: p. 148). In order for a Member of Parliament to carry out his duties effectively, he must be given the freedom to vote according to his conscience, and not be bound by his party lines (Tyagi, 2021).

5.3. Article 70 Debilitates the Spirit of Responsible Government System

Responsible government system refers to a mechanism in which the executive is drawn from and accountable to the legislative branch. It signifies that the government is responsible to the parliament and can be removed by a vote of no confidence. In a parliamentary democracy, accountability of the executive is upheld through the individual responsibility of ministers and the collective responsibility of the cabinet. It is worth noting that the constitution of Bangladesh lacks a provision for the individual responsibility of ministers, and this concept is also absent in the political culture. However, collective responsibility is outlined in the constitution that “the cabinet shall be collectively responsible to parliament” (*The Constitution of the People’s Republic of Bangladesh, 1972: Article 55*). But Article 70 undermines the concept of collective responsibility by disempowering parliament members, preventing them from raising their voice against decisions made by the party leadership in power. Consequently, the cabinet is granted a blank cheque, ensuring that it cannot be defeated by a motion of no-confidence. So obviously it is easier for the Prime Minister to be dictatorial and hence the lofty idealism with which the parliamentary government was accepted has been negated (Halim, 2009: pp. 186-187). Undoubtedly, it can, therefore, be said that the Bangladesh polity has parliamentary democracy in form, not in essence or culture (Halim, 2009: p. 187). Accountability is the foundation of the republican political system, i.e. those in positions of governmental power must be responsible to those on whom the authority is exercised (Tyagi, 2021: p. 152). In this context, Article 70 operates counter to the desired outcome, as political party leaders are constrained by the whims of their party, significantly limiting their actions and thereby demonstrating limited accountability to the House and the people they represent.

5.4. Article 70 Contradicts the Principle of the Separation of Powers

Separation of powers refers to the division of a state’s government into branches,

each with separate, independent powers and responsibilities, so that the powers of one branch are not in conflict with others. The typical division into three branches of government, sometimes called the trias politica model, includes a legislature, an executive, and a judiciary (Wikipedia, The Free Encyclopedia). The intention behind a system of separated powers is to prevent the concentration of power by providing for checks and balances (Wikipedia, The Free Encyclopedia). The Constitution of Bangladesh includes a provision in this respect stipulating that, “The State shall ensure the separation of the judiciary from the executive organs of the State” (*The Constitution of the People’s Republic of Bangladesh, 1972: Article 22*). However, it is ironic that until 2007, no government in independent Bangladesh had taken steps to effect the separation of the judiciary from the executive branch, as mandated by Article 22 of the constitution. The pivotal moment came in November 2007 when the judiciary was finally separated from the influence of the executive, following a landmark ruling by the Appellate Division in *Secretary, Ministry of Finance v Masdar Hossain (1999) 52 DLR (AD) 82* popularly known as the Masdar Hossain Case during the tenure of the non-elected Caretaker Government led by Dr. Fakhruddin Ahmed. The current reality is that judicial separation is not effective due to the absence of the establishment of a separate secretariat for the judicial branch. Consequently, the same group of members of parliament discharges the functions of both legislation and administration simultaneously. As a result, separation of power is diluted due to anti-defection provision inserted in article 70 of the constitution. Learned Senior Advocates Mr. Hasan Ariff and Mr. Rokonuddin Mahmud in Sixteenth Amendment case submitted that:

“This provision boils down that a political party through the process of election secures majority of the seats in the Parliament i.e. members of Parliament under one banner of a political party becomes majority members. The leader of said political party who commands the support of the majority of the members of Parliament form the Cabinet which runs the government. The theoretical separation of power is completely diluted here, because the members who are in the majority of the Parliament legislate and the Cabinet which is formed from among them discharge the function of the Executive part of the government. Therefore, legislation and administration fall in the hands of the same group of members of Parliament. In that view of the matter, article 70 in any format ensure adherence of members of Parliament belonging to a party to abide by the party instruction” (*Government of Bangladesh and Others vs. Advocate Asaduzzaman Siddiqi and Others, 2017: p. 280*).

6. Recommendations for Reforms

Political defections are a constant phenomenon in developing countries such as Bangladesh, India, and Pakistan. Consequently, these nations have incorporated anti-defection provisions into their constitutions, drawing lessons from their

tumultuous past. Despite its undemocratic nature, the anti-defection law is a political necessity in these countries to ensure a stable and effective government. However, it is essential to argue that, in the pursuit of stability, the fundamental principles of responsible government and the rule of law should not be compromised. The anti-defection law inadvertently hampers legislators from fulfilling their duties effectively, particularly when crucial laws of national importance are swiftly passed without debate or challenge through ordinances. Additionally, this legal framework poses a threat to voters' ability to hold their elected representatives accountable. Hence, in considering modifications or reforms to the anti-defection provisions envisaged in the Constitution of Bangladesh, it is essential to reflect on the following recommendations:

6.1. Reform of the Law

Article 70 should be revised to include the provision allowing Members of Parliament (MPs) to vote in alignment with their conscience, except in cases of critical importance such as when the government faces a motion of no-confidence or confidence, the Finance Bill or the smooth passage of annual budget and sensitive defense matters which may be debated in camera. Apart from these specified instances, MPs should be granted the freedom to express their views openly on any other subject maintaining the decorum of the House to the best extent possible. Hence, a proviso may be incorporated by bringing an amendment to Article 70 to the following effect:

“Provided that the provision of this Article shall not be applied in the cases when the government faces a motion of no-confidence or confidence, Finance Bill and sensitive defense matters that need to be debated in camera.”

6.2. Incorporation of Self-defense Provision

A self-defense provision should be incorporated to fortify the anti-defection clause, addressing the arbitrary and unscrupulous vacation of a Member of Parliament's seat. The current state of Article 70 lacks safeguards against whimsical expulsions from the party. The note of dissent in the Constituent Assembly by Asaduzzaman Khan, one of the members of the Constituent Assembly is mentionable here stating that “if this Article is retained in the constitution, adequate safeguards should be guaranteed against arbitrary and unscrupulous expulsions from the party, by providing that the member concerned, before his expulsion, must be informed of the charges against him, given adequate opportunity to defend himself and the charges against him must be proved. Furthermore, when an application is made by the member concerned to the Election Commissioner under Sub-Article 3, the entire proceedings should be forwarded to the Election Commissioner so that he may fully adjudicate, whether or not requirements have been duly fulfilled” (Halim, 2010: p. 67).

6.3. Enacting Anti-Corruption Law or Code of Conduct for MPs

Instead of constitutional provisions like Article 70, anti-defection cases may be addressed by enacting anti-corruption laws or special code of conduct for MPs incorporating due process and fair trial. In many instances of parliamentary defections in Bangladesh, it is apparent that members of parliament often engage in defection due to factors such as corruption, enticing incentives, or moral turpitude. However, it is crucial to avoid generalizing that every instance of defection is solely driven by corrupt practices, lucrative incentives, or moral turpitude. Defection motivated by malicious intent constitutes a corrupt practice. Nonetheless, establishing such intent necessitates subjecting the member to a fair trial and due process. Upon successfully proving the allegation, the member will then be held accountable under anti-corruption laws or special code of conduct for MPs.

7. Concluding Remarks

In the context of the above discussion, it can be opined that the framers of the constitution of Bangladesh incorporated the anti-defection provision in Article 70 due to the detrimental impact of unprincipled defections by Members of Parliament during Pakistan's regime which significantly undermined the stability of the democratically elected government. It can be argued, however, that the framers of the Constitution overlooked the necessity for a provision that strikes a balance between defection motivated by malice (i.e., MPs defecting for ministerial positions, financial benefits, or engaging in corrupt practices and personal gain) and defection motivated by conscience (i.e., dissent to unfair policies or laws). As a result, Article 70 prohibits all forms of defection in an unfettered manner, compelling MPs to blindly adhere to the directives of the party leader, thereby derogating their core responsibilities in legislative functions. This has adverse impacts on ensuring a responsible government system where MPs should have the freedom to critically examine the unfair exercise of executive functions and present compelling arguments during the enactment of laws, particularly those deemed arbitrary. As per provisions inserted in the part of fundamental rights of the Constitution, the right of every citizen to freedom of speech and expression are guaranteed subject to any reasonable restrictions imposed by law (*The Constitution of the People's Republic of Bangladesh, 1972: Article 39*) in all spheres, which extends even inside the parliament. Furthermore, it is reiterated in the same constitution that "A member of Parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given, by him in Parliament or in any committee thereof" (*The Constitution of the People's Republic of Bangladesh, 1972: Article 78*). Moreover, the preamble of the Constitution emphasizes that—"it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens" (*The Constitution of the People's Republic of Bangladesh, 1972: Paragraph 3 of the preamble*).

Therefore, it is evident by harmonious construction of the Bangladesh Constitution that article 70 conflicts with the democratic character ensured by article 39, 78 and paragraph three of the preamble of the constitution as mentioned earlier. As a result, when a political party attains a two-thirds majority in parliament, it exercises unchecked authority in the legislative process. Unfortunately, this situation prevents the members of parliament from effectively ensuring accountability of the executive, ultimately leading to a violation of the democratic principles enshrined in the constitution, primarily due to Article 70. Hence, it is imperative to amend Article 70 in accordance with the aforementioned recommendations; otherwise, the cherished vision of the framers of the Constitution of Bangladesh will remain unrealized.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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