



## **The Anti- Defection Laws in India**

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### **ABSTRACT: -**

The Anti-defection law that penalizes the elected and nominated representative of the Parliament and State legislature for changing their Party affiliation after their elections was enacted to curb the evil of defection motivated by extraneous consideration, other than a genuine change of ideologies. Under the Tenth Schedule of the Constitution, the Political Parties for the first time accorded a constitutional recognition to their roles in the political process, and Presiding Officer of the House has been made adjudicator and guardians of rights and privileges of the House on the premises as the embodiment of Constitutional propriety and impartiality. The mandate to inquire and adjudicate upon the issues of disqualification is often visited by the aggressive or swift response or absence of it, on the part of the presiding officer of the House. Such action or inaction on the part of the presiding officer of the house, who has been constitutionally obliged with determinative jurisdiction under the Scheme of Tenth Schedule of the Constitution, has very often frustrated the very object of the Anti-defection law. After the repeal of the provisions relating to split in the original political party under the Tenth Schedule of the Constitution, the recent incidence in the States of Goa, Manipur, Karnataka, and Madhya Pradesh and the recent political commotions in Rajasthan have further complicated the entire Constitutional Jurisprudence of Anti-defection law. In this backdrop, the present paper attempts to present a holistic discussion on the subject of Anti-defection law under the scheme of the Constitution of India, particularly, in reference to the quasi-judicial authority of the presiding officer of the House and the judicial powers of the constitutional courts, pending the decision of the presiding officer of the House. Further, an analysis is also done for the apparent dichotomy between the anxiety on the part of the judiciary, in their attempt to ensure the laudable objectives of the Tenth Schedule of Constitution and 'the voice of dissent' which is one of the essential cardinal principles of democracy

Keywords: -Anti-defection law, Constitution of India, Tenth Schedule, Power of Speaker, Power of Judiciary, Disqualification of an elected representative.

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### **Introduction: -**

IN INDIA from the very beginning, elections to the parliament and the State legislatures have been fought on party basis, and the electorates have always been impressed by the appeal of political parties based on their ideologies and programmes as incorporated in the election manifesto. But since mid-1960s India's experience with democracy witnessed a very unsavoury political development where many of elected representatives of the people in the parliament and State legislatures, in particular, have left the parties on whose party tickets they were elected and joined those very opponent parties. This unscrupulous floor-crossing was nothing else except for selling out of the sentiments of the electorates and thereby undermining of the very basis of democracy. The desire for influence, position, and cash was clearly behind this wonder! rather than based on any common ideological or honest political dissent.

The on-going issues of defection in spite the successful adoption of elaborate provisions in Tenth Schedule of the Constitution and numerous conflicting opinions by the various High Court and the Supreme Court, have witnessed new developments in the form of resignation by some of the elected members of the largest political party in the State and their consequent joining and contesting the by election from the Second largest political party. In this process of reducing the adequate strength of the House, thereby facilitating the Second largest political party to form a government as happened in the State of Goa, Manipur, Karnataka and Madhya Pradesh.

the most important cardinal principle of democracy is sought to be shut down with the threat of show cause notice of disqualification under Para 2(1) of the Tenth Schedule of the Constitution?

In this backdrop the present paper will analyse the followings:

- (i) To examine the meaning and scope of defection and how the law relating to defection has evolved in India?
- ii) To analyse the basic scheme and constitutionality of the Tenth Schedule of the Constitution of India.
- iii) To examine the scope of the power of Speaker/ Chairman of the House in cases of in action or overt action for political exigencies.

- iv) To examine the lesson learned from recent political commotions in the State of Karnataka, Madhya Pradesh, and Rajasthan
- v) Concluding observation and suggestions, if any for Change.

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### **Objectives: -**

The word politics comes from the Greek word "Political" which means "of, for, or relating to citizens". The politicians though make promises to do things for the benefits of citizens but hardly fulfil all of them. The main objective for which The Anti-Defection Laws was introduced in the Constitution was to combat "the evil of political defections". The law was passed after the Late Rajiv Gandhi became the Prime Minister of the country. This law would not have been enacted if there had been no Government of Rajiv Gandhi and the majority to pass it. This law was passed so that it restricts the defections in the politics but the increasing hunger of our legislatures and with our legal fraternity it was not a difficult task to find loopholes in this law; which will be discussed later.

### ***International scenario on Anti Defection Law: -***

Anti- defection law is not only practiced in India but it is prevalent in various other countries like Bangladesh, Kenya, South Africa, etc. Article 70 of the Bangladesh Constitution says a member shall vacate his seat if he resigns from or votes against the directions given by his party. The dispute is referred by the Speaker to the Election Commission. Section 40 of the Kenyan Constitution states that a member who resigns from his party has to vacate his seat. The decision is by the Speaker, and the member may appeal to the High Court. Article 46 of the Singapore Constitution says a member must vacate his seat if he resigns, or is expelled from his party. Article 48 states that Parliament decides on any question relating to the disqualification of a member. Section 47 of the South African Constitution provides that a member loses membership of the Parliament if he ceases to be a member of the party that nominated him.

### ***The 52nd Constitutional Amendment: -***

The 52nd Amendment Act, 1985 lead to amendment in Article 101, 102, 190 and 191 of the Constitution to provide the grounds for vacation of seats for the disqualification of the members; and also inserted Tenth Schedule. The statement of objects and reasons been given for the amendment is: "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundation of our democracy and the principles with sustain it."

### ***Loopholes in the Anti Defection law: -***

#### **1) Power to the Speaker-**

As per Rule 6 of the schedule, the Speaker of the House or the Chairman has been given wide and absolute powers to decide the case related to disqualification of the members on the grounds of defection. The Speaker still remains as the member of the party which had nominated him/her for the post of speaker.

Mr. K.P. Unnikrishnan, a member of Congress party in the Lok Sabha, had said that "by making the speaker the sole repository of all the judgement, you are allowing them to play havoc".

One of the major criticisms of this power is that not necessary the speaker has legal knowledge and expertise to look upon and perform such acts in such cases.

Two Speakers of the Lok Sabha, one being Mr. Rabi Ray in 1991 and another being Mr. Shivraj Patil in 1993 have themselves expressed doubts on their suitability to adjudicate upon the cases related to defections.

#### **2) Judicial Review-**

as per the Rule 7, which bars the jurisdiction of the courts in any matter connected with disqualification of a member of a House, which states that it is outside the jurisdiction of all courts including the Supreme Court under Article 136 and High Courts under Article 226 and 227 of the Constitution to review the decisions made by the Speaker in this regard. This can have terrible consequences in the light of difficulties enumerated above.

The legislature in a way tried to restrict the power of judiciary provided under the Constitution, which is not tenable. The rule barring the jurisdiction of Courts has been challenged multiple times before the courts and the Court, in *Kihoto Hollo on v. Zhuihu and Others*<sup>1</sup>, 5 held that the law is valid in all respects expect on the matter related to the judicial review, which was held as unconstitutional. Any law affecting Articles 136, 226 and 227 of the Constitution is required to be ratified by the States under Article 368(2) of the Constitution. As the required number of State assemblies had not ratified the provision, the Supreme Court declared the rule to be unconstitutional.

#### **3) No individual stand on part of members-**

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<sup>1</sup> *Kihoto Hollohon v. Zachilhu and Others*, AIR 1993 SC 412.

according to the Rule 2 it can be seen that the anti-defection law puts the members of the party into a bracket of obedience in accordance with the rules and policies of the party, restricting the legislator's freedom to oppose the wrong acts of the party, bad policies, leaders and bills.

A political party acts as a dictator for its members who are not allowed to dissent. In this way it violates the principle of representative democracy wherein the members are forced to obey the high command.

#### **4) Problem with merger provision-**

While Rule 4 of the Tenth Schedule seems to provide some exception from disqualification of members in the cases relating to mergers, there seems to be some loophole in the law. The provision tends to safeguard the members of a political party where the original political party merges with another party subject to the condition that at least two-third of the members of the legislature party concerned have agreed to such merger. The flaw seems to be that the exception is based on the number of members rather than the reason behind the defection.

What is the Role of Presiding Officers in Context of Antidetection Law?

The 10th Schedule provides presiding officers of legislatures with the power to decide cases of defection. However, it has been noted that as the Speaker is dependent upon continuous support of the majority in the House, he may not satisfy the requirement of an independent adjudicating authority.

In the past, decisions of the Speakers with regard to disqualifications have been challenged before courts for being biased and partial. Several expert committees and commissions, including the Dinesh Goswami Committee (1998), Commission to Review the Constitution (2002) and the Law Commission (2015) have therefore recommended that defection cases must be decided by the President or Governor for centre and states respectively, who shall act on the advice of the Election Commission. This is the same practice that is followed for deciding questions related to disqualification of legislators on other grounds, such as holding an office of profit or being of unsound mind, under the Constitution.

However, note that the Supreme Court has upheld the provision granting the presiding officer the power to take these decisions on the ground that,

“The Speakers/Chairmen hold a pivotal position in the scheme of parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to take far reaching decisions in the functioning of parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in such constitutional functionaries should not be considered exceptionable.”

#### **Views of some Committees on Anti-Defection Law: -**

##### **1. Dinesh Goswami Committee on Electoral Reforms (1990)**

Disqualification should be limited to cases where (a) a member voluntarily gives up the membership of his political party, (b) a member abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence. The issue of disqualification should be decided by the President/ Governor on the advice of the Election Commission.

##### **2. Law Commission (170th Report, 1999)**

Provisions which exempt splits and mergers from disqualification to be deleted. Pre-poll electoral fronts should be treated as political parties under anti-defection law. Political parties should limit issuance of whips to instances only when the government is in danger.

##### **3. Election Commission**

Decisions under the Tenth Schedule should be made by the President/ Governor on the binding advice of the Election Commission.

##### **4. Constitution Review Commission (2002)**

Defectors should be barred from holding public office or any remunerative political post for the duration of the remaining term. The vote cast by a defector to topple a government should be treated as invalid.

#### **Challenges to Anti-Defection Law:**

The first challenge to the anti-defection law was made in the Punjab and Haryana high court. One of the grounds on which the law was challenged was that paragraph 2(b) of the Tenth Schedule to the Constitution violated Article 105 of the Constitution, wherein the court held:

“So far as the right of a member under Article 105 is concerned, it is not an absolute one and has been made subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament. The framers of the Constitution, therefore, never intended to confer any absolute right of freedom of speech on a member of the Parliament and the same can be regulated or curtailed by making any constitutional provision, such as the 52nd Amendment.

The provisions of Para 2(b) cannot, therefore, be termed as violative of the provisions of Article 105 of the Constitution (Para 28).” The Constitution (32nd Amendment) Bill 1973 and the Constitution (48th Amendment) Bill 1978 had provisions for decision-making by the president and governors of states in relation to questions on disqualification on ground of defection.

The Constitution (52nd Amendment) Bill 1985 suddenly introduced the provision that questions of disqualification on ground of defection shall be decided by chairmen and speakers of the legislative bodies. The intention was to have speedier adjudicative processes under the Tenth Schedule. This provision was a subject matter of serious debate in both Houses of Parliament when the bill was being passed.

The Constitution does not allow the legislature to limit the powers of judiciary. 'The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review', Supreme Court said. Accordingly, the Supreme Court reviewed and struck down the order passed by Speaker of Goa Assembly for disqualifying two members in violation of constitutional mandate contained in paragraph 3 of Tenth Schedule to the Constitution.

The anti-defection law makes a mockery of parliamentary democracy by marginalizing debates, as the legislators are not allowed to dissent, without being disqualified by the House. Disruptions, rather than substantive debate, become the only form of opposition possible. Parliamentary debate has thereby become largely redundant".

The Tenth Schedule has laid down certain norms for keeping the flock of legislators of each party together, and the 'whips' in the hands of legislative party leaders reducing the Hon'ble leaders and people's representatives into shepherds and sheep. As the political parties invented mechanisms to fail this constitutional legislation, the judiciary played a very significant role in upholding the legality and morality of the law besides expanding its horizons to curb most treacherous practice of sudden political disloyalty.

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## **MERITS AND DEMERITS OF THE LAW: -**

Like every other law, anti-defection laws too come with their own merits and demerits. Looking at the positive side, the law aims at providing stability to the Government by punishing members in case of any party shifts on their parts. Also, anti-defection laws try to bring about a sense of loyalty of the members towards their own party. This it tries to achieve by ensuring that the members selected in the name of the party and its support as well as the party manifesto remain loyal to the political party of which he is a member and its policies.

Turning to the downsides, anti-defection laws tend to restrict the freedom of speech and expression of the members by preventing them from expressing any dissenting opinion in relation to party policies. However, it has been held in various judgments that the freedom of speech provided under Article 105 and 194 is not absolute. It is subject to the provisions of the Constitution, the Tenth Schedule being one of them. Another demerit of the law is that it reduces the accountability of the government to the Parliament and to the people by preventing the members of the political parties to change their parties.

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## **Important Case Laws: -**

### **i). In Kihoto Hollohon v. Zachilhu and Others<sup>2</sup>**

held that the law is valid in all respects. expect on the matter pertaining to judicial review, which was held to be unconstitutional the main issue in this case was whether the tenth schedule curtails the freedom of speech and expression and subvert the democratic rights of the elected members in parliament and state legislature? And also, that whether granting finality to the decision of the Speaker/Chairman is valid?

So, it was finally held in this case that the tenth schedule neither impinges upon the freedom of speech and expression nor subverts the democratic right of elected members. The tenth Schedule is constitutionally valid and this provision is valid, However the High Courts and the Supreme Courts can exercise Judicial Review under the constitution. But the Judicial Review should not cover any stage prior to the making of a decision by the speakers/Chairmen.

**2. In Keshavananda Bharati and Others v. State of Kerala and Another<sup>3</sup>,** judicial review was held to be a basic feature of the Constitution and the Constitution cannot be amended so as to violate its basic structure.

### **3. An issue had come up whether public criticism of one's own political party amounts to defection on part of members.?**

This came up for consideration in **Shri Avtar Singh Bhadana v. Shri Kuldeep Singh<sup>4</sup>,** Indian National Congress. 12In this case it was alleged by INC that Shri Bishnoi often criticized the Congress government on a public platform and had demanded the dismissal of the Government in Haryana. The Speaker in this case held that a member gets elected as a candidate of a political party because of the programs and manifestoes of the party, apart from other things.

If the member criticizes his party publicly, he will be deemed to have given up his membership to the political party voluntarily. Also, in **Shri Rajesh Verma v. Shri Mohammad Shahid Akhlaque, BSP (January 27, 2008),** the court held that a speech by a member in a public meeting that he belongs to another political party by heart, would amount to voluntarily giving up the membership of the former party.

### **4. In Mannadi Satyanarayan Reddy v Andhra Pradesh Legislative Assembly and Ors<sup>5</sup>,**

the Andhra Pradesh High Court had to decide, inter alia, the question of whether the Speaker, while exercising jurisdiction, can decide whether or not a Legislator belongs to a particular Legislature party. Holding that a Speaker could indeed decide thus, the Court said that if, in deciding the question of a

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<sup>2</sup> G.C. Malhotra, Anti-Defection Law In India And The Commonwealth (Lok Sabha Secretariat, 2005).

<sup>3</sup> Keshavananda Bharati and Others v. State of Kerala and Another, AIR (1973) 4 SCC 225

<sup>4</sup> Shri Avtar Singh Bhadana v. Shri Kuldeep Singh, Indian National Congress, Lok Sabha Bulletin, Sept. 10, 2008.

<sup>5</sup> Mannadi Satyanarayan Reddy v Andhra Pradesh Legislative Assembly and Ors decided on Apr-08-2009

member's disqualification depended upon an answer to which political party had set such member up and whether or not he belonged to such party, he should be allowed to decide such question. In the words of the Court, "there is nothing in paragraphs 1, 2, and 6 of the Tenth Schedule which fetters exercise of jurisdiction by the Speaker to decide this question."

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### **CONCLUSION: -**

The introduction of the Tenth Schedule in the Indian Constitution was aimed at curbing political defections. Though the law has succeeded in a reasonable way but due to some of its loopholes, it has not been able to achieve the best it can. Corrupt politicians have, through their dishonesty, been able to find the defects in the law to suit their needs in the best possible way. The following changes in the law might help it to develop to the best possible extent:

1. The power to the party whip should be reduced so that the only those members who vote against the party manifesto are subject to disqualification and not those who vote against the party in a not-so-important matter or a matter which is not core to the party manifesto. This will in a way help the members to have some individual viewpoint on various issues.
2. The law must explicitly set out what it means by the words 'voluntarily giving up Membership' in order to avoid any confusion.
3. The provision relating to mergers whereby it exempts members from disqualification if they defect in large numbers i.e. two- third, must be amended to make the reason for defection as the basis for exemption from disqualification rather than mere numbers.
4. The law must be reviewed so as to end any conflicts between the legislature and the judiciary on the basis of Rules 6 and 7 of the Schedule.

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