

The Anti- Defection Laws in India

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Introduction:-

Initially, the Constitution of India did not have any mention about the political parties. But, gradually when the multi-party system evolved, there had have been defections in the Indian Parliamentary System where there have been shift of people from one political party to another which resulted in breaking down of public confidence in a democratic form of Government.

Defection is “desertion by one member of the party of his loyalty towards his political party” or basically it means “When an elected representative joins another party without resigning his present party for benefits”.

This practice of elected members switching the political sides to get office is also known as Horse- Trading. It is also known as “Floor Crossing” in U.K. and “Carpet Crossing” in Nigeria. The person who does such act of been elected from one party and enjoys benefits from other party is known as “Defector” or “Fence Sitters” or “Turn Coats”.

There was uncontrolled Horse- Trading and corruption been prevailed in the political parties. One of the major incidents in the India’s Political History occurred after 1967 elections; where about 142 MP’s and 1900 MLA’s had switched their respective political parties. So, in order to restrain such practice, the Rajiv Gandhi Government in 1985 introduced Anti-Defection laws in the Indian Constitution. It was introduced by way of the 52nd Amendment in the Constitution, which inserted tenth Schedule in the Constitution; which is known as the Anti –Defection law. This amendment helped to restrict the elected members belonging to a political party to leave that party and switch to another party in Parliament.

Objectives:-

The word politics comes from the Greek word “*Politika*” 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.”*¹

Rule 2- tenth schedule lays the grounds for disqualification of the member’s i.e.:

1. If a member of a house belonging to a political party:
 - a. Has voluntarily given up his membership of such political party, or
 - b. Votes, or abstain from voting in such House, contrary to the direction of his political party.

¹ Jenna Narayan, ‘Defect-Shun’: Understanding Schedule X to the Constitution of India, INDIA LAW JOURNAL (2007), http://www.indialawjournal.org/archives/volume3/issue_1/article_by_jenna.html.

However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.

2. If an independent candidate joins a political party after the election.
3. If a nominated member of a house joins any political party after the expiry of six months from the date when he becomes a member of the legislature.²

Rule 4 and 5- states the exemption from disqualifications i.e.:-

A member of the house shall not be disqualified where his original political party merges with another political party, and he and any other member of his political party:-

1. Have become members of the other political party, or of a new political party formed by such merge
2. Have not accepted the merger and opted to function as a separate group.³

Rule 3- state that there will be no disqualification of members if they represent a faction of the original political party, which has arisen as a result of a split in the party. A defection by at least one-third members of such a political party was considered as a split which was not actionable.

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”.⁴

² *Id.*, Schedule X, ¶ 2.

³ *d.*, Schedule X, ¶ 4.

⁴ Javed M. Ansari, *Anti-defection law: The great divide*, INDIA TODAY (Jun. 20, 2013), <http://indiatoday.intoday.in/story/controversy-over-anti-defection-law-interpretation-puts-judiciary-and-executiveon-collision-course/1/306142.html>.

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 Hollohon v. Zachilhu and Others*,⁵ held that the law is valid in all respects except 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.

The Court also held that the Speaker, while deciding cases pertaining to defection of party members, acts as a tribunal and nothing more than that, and that his/ her decisions are subject to the review power of the High Courts and the Supreme Court. Mentioning a rule of caution, the Supreme Court warned against the exercise of power of judicial review prior to making of any decision by the Speaker.

3. **No individual stand on part of members-** 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.

⁵ Kihoto Hollohon v. Zachilhu and Others, AIR 1993 SC 412.

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.

In a well-settled representative democratic environment, people wish for that the electorate are taken care of their acts rather than working on the instructions and wishes of the party leaders and their policies. With the increasing powers being given to a party member, the members are not allowed to vote on any issue independently whether they are a part of party manifesto or not. The law tends to blur the distinction between defiance on part of members and defection of the members leading to their disqualification. With the lack of individuality on the part of members belonging to their parties, the anti-defection laws have failed to achieve the desired results.

4. **What amounts to ‘voluntarily giving up’-** Rule 2(1)(a) of the Tenth Schedule mentions that the member of the House would be disqualified from the party if he voluntarily gives up his membership of the political party.

But the Schedule does not clarify what “voluntarily giving up” means? Does it only cover the resignation of party member or does it have a wider meaning than that?

This question had arise before the Supreme Court in *Ravi Naik v. Union of India*⁶ and the Court while interpreting the phrase held that it has a wider connotation and can be inferred from the conduct of the members. The words ‘voluntarily gives up his membership’ were not held synonymous with ‘resignation’. It was held that a person may voluntarily give up his membership of a political party even without tendering his resignation from the membership of that party.

In *G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*,⁷ a question arose whether joining another political party after being expelled from the original party would amount to voluntarily giving up the membership or not. It was held in this case that on being expelled from the party, the member, though considered ‘unattached’, still remains the member of the old party for the purpose of the Tenth Schedule. However, if the expelled member joins another political party after expulsion, he is considered to have voluntarily given up the membership of his old political party.

Rajendra Singh Rana v. Swami Prasad Maurya and Others,⁸ is yet another case which expanded the meaning to the words ‘voluntarily giving up of the membership.’ It was held in the case that a letter by an elected party member to the Governor

⁶ Ravi S Naik v. Union of India, AIR 1994 SC 1558.

⁷ G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly, (1996) SCC 353.

⁸ Rajendra Singh Rana v. Swami Prasad Maurya and Others, 2007 (4) SCC 270.

requesting him to call upon the leader of the opposite party to form a Government would by itself amount to an act of voluntarily giving up membership of the party of which he is an elected member.

5. **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 atleast 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.

The common reasons for defection of individual members seem to be availability of lucrative office or ministerial posts with the other party. It can very well be expected that the very same reason might be available with those two-third members who have agreed to the merger. If defection by an individual member is not acceptable, it is very much difficult to assert that the same would be valid in case of mergers only because a large number of people are involved.

This tends to undermine the democracy of the nation and thus the provision seems to be flawed. The provision could have been more useful if it had taken into consideration the real reason for merger rather than the number of members involved.

What is the Role of Presiding Officers in Context of Anti-Defection 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.”

Judicial view on Disqualification by the Speaker for Defection:-

- Dr. Koya defied a party whip requiring him to be present in the House and vote against the Motion of Confidence for the government. He claimed he was too ill to be present in the House. The Speaker concluded that Dr. Koya abstained from voting by remaining absent, and the evidence of the ‘illness’ is not sufficient to conclude that he was so ill that he could not be present in the House.
- Shri Prasad defied a party whip requiring him to be present in the House. In his defence, he denied that any whip was issued or served. The Speaker held that in view of the fact that there is evidence to show that the whip had been delivered to Shri Prasad’s house, and had been duly received, it cannot be said that Shri Prasad had no knowledge of the whip.
- The INC alleged that Shri Bishnoi often dissented from, and criticized the Congress government publicly, and had demanded the dismissal of the government in Haryana. The Speaker held that a person getting elected as a candidate of a political party also gets elected because of the programs of the party. If the person leaves the party, he should go back before the electorate.
- It was alleged that Shri Akhlaque joined the Samajwadi Party in a public meeting. It was alleged that at this meeting, Shri Akhlaque had said that at heart, he had always been a member of the SP. The Speaker reasoned that there is no reason why news clippings and stories in the media would be untruthful. The Speaker therefore held Shri Akhlaque disqualified for having voluntarily given up membership of the BSP.
- The most recent case relating to anti-defection is from the Karnataka State Legislature where B.J.P. is the ruling party and 14 members of B.J.P. and 5 independent members sent a letter of discontent against the Chief Minister.

A complaint was made against them and speaker disqualified them from their membership. The case is pending in the S.C.

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 91st Amendment to the Constitution was enacted in 2003 to tighten the anti-defection provisions of the Tenth Schedule, enacted earlier in 1985. This amendment makes it mandatory for all those switching political sides — whether singly or in groups — to resign their legislative membership.

They now have to seek re-election if they defect and cannot continue in office by engineering a “split” of one-third of members, or in the guise of a “continuing split of a party”. The amendment also bars legislators from holding, post-defection, any office of profit. This amendment has thus made defections virtually impossible and is an important step forward in cleansing politics. Irony of the situation today is that the events have nullified the real intent of the dream of Rajiv Gandhi.

There have been instances wherein after the declaration of election results, winning candidates have resigned from their membership of the House as well as the party from which they got elected. Immediately, they have joined the political party which has formed the government and have again contested from that political party, which appears to be a fraud and goes against the spirit of the democracy and 52nd constitutional amendment. The ingenious human brain invented innovative ideas to obtain resignations and, in effect, made the anti-defection law a cover to hide their heinous crime.

This law excluded the jurisdiction of judiciary from reviewing the decisions of Speakers. This part was held to be unconstitutional by Supreme Court, while it upheld

the rest of the law. The Supreme Court was unanimous in holding that paragraph 7 of tenth schedule completely excluded jurisdiction of all courts including the Supreme Court under Article 136 and High Courts under Articles 226 and 227 in respect of any matter connected with the disqualification of the member of a House.

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.

If we go deep into the impact of this law, it curbs the legislators’ freedom of opposing the wrong policies, bad leaders and anti-people bills proposed by the ‘High Command’ in arbitrary and undemocratic manner. This law has given additional dictatorial power to the political party to keep the flock together for an entire term.

“Section 2(b) of the Tenth Schedule puts the Member of Parliament into the straight jacket of obedience to the despotic dictates of the party whips which undermines the democratic spirit. It also violates the principle of representative democracy by empowering the party, and undermining the relationship between elected representatives and their constituents.

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.

This Tenth Schedule whenever used enhancing the burden of courts. The political parties, instead of maintaining standards within the party with effective leadership, are resorting to litigation, begging the courts to decide the political issues, which they failed to settle. It is not fair to blame judiciary for taking time to decide this tricky question within the frame work of constitution. Neither the Governor nor the Speaker

is bona fide. Their moves are not fair. They desperately try to use Constitutional power to settle political scores and wreck political vengeance. In the process they just do not care the people's will in electing a party to power, for whatever reasons that might be.⁹

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.¹⁰

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.

Important Case Laws:-

1. *In Kihoto Hollohon v. Zachilhu and Others*,¹⁸ 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.

¹⁰ G.C. Malhotra, Anti-Defection Law In India And The Commonwealth (Lok Sabha Secretariat, 2005).

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*, 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.¹¹
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, 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** ¹³, 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 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.*"

CONCLUSION

¹¹ Keshavananda Bharati and Others v. State of Kerala and Another, AIR (1973) 4 SCC 225.

¹² Shri Avtar Singh Bhadana v. Shri Kuldeep Singh, Indian National Congress, Lok Sabha Bulletin, Sept. 10, 2008.

¹³ Mannadi Satyanarayan Reddy v Andhra Pradesh Legislative Assembly and Ors decided on Apr-08-2009

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.