



A CRITICAL ANALYSIS OF ANTI-DEFECTION LAW

Kariyanna K.S

Assistant Professor, Saraswathi Law College, Chitradurga, Karnataka
ksachu.kariyanna@gmail.com

Abstract--The evil of political defections has been a matter of national concern. If it is not combated, it is likely to demoralize the very foundations of our democracy and the principles which sustain it. This is the main reason for introducing the Tenth Schedule to the Constitution, popularly known as the Anti-Defection Law. It was introduced with intent to bring stability to structure of political system by preventing the frequent change of parties by members. The intention of the provision also is to check the corruption or horse trading in parliament. However Anti-Defection Law raises a number of questions and challenges. Even though anti defection law is an efficient way to structure political party so that members don't engage in scrupulous activities by supporting opposite party still few issues are needed to be focused. It is high time that a watchdog should be provided to our Parliament and there is need for our constitutional pundits to revisit the issue to combat the menace of corruption and defection which has eroded values of democracy. This law was passed so that it curbs the political defections but ever increasing hunger of our legislatures and with our excellent legal fraternity it was not a difficult task to find some loopholes in this law and they used it to their interest. The current article seeks to provide a brief critical analysis of the grounds of disqualification mentioned in the Tenth Schedule. It also highlights some of issues and challenges of the Anti-defection Law.

Keywords: *Anti-Defection, Constitution, Schedule, Speaker, Parliament, Legislation, Members, Defection.*

INTRODUCTION

Defection means an act of leaving a political party, to go to another political party.ⁱ Originally the Constitution of India had no mention of political parties. But, ever since the multiparty system evolved, the Indian parliamentary system has witnessed defections in large numbers from one political party to another, resulting almost in the breakdown of public confidence in a democratic form of government.ⁱⁱ The practice of switching political sides to grab office was popularly known as Horse-Trading.

There was rampant horse-trading and corruption prevalent amongst the political leaders and political parties. In 1967, some sixteen states had gone to polls. The Congress lost majority in them and was able to form government only in one state. This was the beginning of coalition era in India. This election also set off large scale defections. Between 1967 to 1971, some 142 MPs and over 1900 MLAs migrated their political parties. Governments of many states, beginning from Haryana, collapsed. The defectors were awarded with plum ministries in the governments, including Chief Ministership in Haryana. In Haryana, one legislator "Gaya Lal" changed party for three times and thus, all defectors used to be called "Aaya Ram-Gaya Ram". However, the this issue was not addressed immediately. It took further 17 years to pass the anti-defection law in 1985. The 52nd Amendment of the Constitutionⁱⁱⁱ in 1985 inserted 10th schedule in the Constitution with Provisions as to disqualification on ground of defection. However, the recent experiments with the coalition governments at the Centre as well as in various states have shown the inefficiency of the Anti-defection Law. It became very clear that the law was safe guarding the interests of the bigger political parties at the expense of the smaller parties. There is an ever increasing demand that the law should be made much more stringent, the loopholes such as definition of split etc. should be plugged.

WHAT IS ANTI-DEFECTION LAW

Anti-Defection is the law by which the persons who do defection are punished according to the rules of the law. A person so found doing defection is disqualified to be a Member of Parliament or State Legislature as the case may be.

Grounds for Disqualification: A member of the Parliament or State Legislature can be disqualified on the following grounds.^{iv}

- If an elected member voluntarily gives up his membership of a political party.^v
- If he votes or abstains from voting in such House contrary to any direction issued by his political party or anyone authorised to do so, without obtaining prior permission.^{vi}



- An independent member will also be disqualified if he joins any political party after his election.^{vii}
- A nominated member and who is not a member of a political party at the time of his nomination and who has not become a member of any political party before the expiry of six months from the date on which he takes his seat shall be disqualified if he joins any political party after the expiry of the said period of six months.

Exemption from Disqualification^{viii}

Disqualification provisions do not apply in the following circumstances.

- If a legislature party decides to merge with another party and such decision is supported by not less than two-thirds of its members.^{ix}
- If a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of People or of the Legislative Assembly of a State or to the office of the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of Legislative Council of a State, to sever his connections with his political party without incurring disqualifications.

Power of Determination of Disqualification and Rule Making Power

The question as to whether a member of a House of Parliament or State Legislature has become subject to the disqualification will be determined by the presiding officer of the House. Where the question is with reference to the presiding officer himself it will be decided by a member of the House elected by the House on that behalf. Apart from that the Chairman or the Speaker of a House has been empowered to make rules for giving effect to the provisions of the Tenth Schedule. The rules shall be laid before the House before the 30 days and shall be subject to modifications/disapproval by the House. The presiding officer can resort to defection only if any member of house gives a complaint against it (by new Supreme Court Decision – Any person who is not even the member of the house can complaint to the Presiding officer about the defection). Presiding officer has to give a chance to the accused person to put his side in front of the house before taking the final decision.

Advantages of Anti-Defection Law

- Provides stability to the government by preventing shifts of party allegiance.^x
- It provides for punitive measures against a member who defects from one party to another. Anti-Defection Law, therefore, seeks to provide safety measures to protect both the government and the opposition against the instability that arises due to defection and shift in party allegiance.
- Ensures that candidates elected with party support and on the basis of party manifestoes remain loyal to the party policies.
- It also promotes party discipline.
- It reduces corruption at the political level as well as non-developmental expenditure incurred on irregular elections.
- It gives, for the first time, a clear-cut constitutional recognition to the existence of political parties.

Disadvantages of Anti-Defection Law

- By preventing parliamentarians from changing parties, it reduces the accountability of the government to the Parliament and the people.
- Interferes with the member's freedom of speech and expression by curbing dissent against party policies.^{xi}
- It fails to distinguish between the concept of dissent and defection by limiting the scope of the Parliamentarians' privilege to dissent, which creates a strict order in the party equivalent to dictatorship in the party to keep the flock together instead of maintaining party ethics. It amounts to the breach of Parliamentary privilege if a member inside the House cannot opine against the party whip.^{xii}
- It also allows certain distinction and bias between an independent and nominated member, because of being the former one, he is disqualified on joining a party whereas the latter is not.



CRITICAL ANALYSIS OF ISSUES AND CHALLENGES OF ANTI-DEFECTION LAW

Anti-defection law itself raises number of issues and challenges. First challenge is that whether anti-defection law violates freedom of speech and expression guaranteed under Indian Constitution. This issue was addressed by Supreme Court in *Kihoto Hollohan vs Zachilhu and others*^{xiii} and held that the provisions do not subvert the democratic rights of elected members in Parliament and State Legislatures. It does not violate their conscience. The Supreme Court held that provisions do not violate any right or freedom.

Another issues is can paragraph 2(b) of the Tenth Schedule of Constitution be termed as violative of Article 105 of the Constitution. In a case Panjab and Haryana High court held that right of member guaranteed under Article 105 is not an absolute one and has been made subject to the provisions of the Constitution and rules and standing orders regulating the procedure of Parliament.^{xiv} The framers of the constitution never intended to confer absolute right of freedom of speech on a member of the Parliament and same can be regulated or curtailed by making any constitutional provisions, such as 52nd Amendment. Therefore it cannot be termed as violative of Article 105.^{xv}

According to Paragraph 6 of the Tenth Schedule Speaker's or the Chairperson's decision on questions of disqualification on ground of defection shall be final as all such proceedings shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of article 212. Further, Paragraph 7 said, "Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule." While upholding the Constitutional validity of the Tenth Schedule, a Constitution Bench of the Supreme Court in *Kihoto Hollohan vs Zachillhu and Others*^{xvi} declared paragraph 7 as unconstitutional. Supreme Court said the Speaker's decision was subject to judicial review. The Supreme Court struck down this condition partly and held that no judicial intervention shall be made until the presiding officer gives his order. However, the final decision can be appealed in the High Courts and Supreme Court.^{xvii}

In *Prakash Singh Badal v. Union of India*,^{xviii} a Full Bench of the Punjab and Haryana High Court has struck down paragraph 7 of the Tenth Schedule as "invalid and still-born" on the ground that it affects the powers of the High Courts under article 226 and of the Supreme Court under article 136 of the Constitution and also because it has not been ratified by one half of the states as mandated by clause (2) of article 368 of the Constitution.

Further, the phrase 'voluntarily giving up' is not explained in the Schedule. In a case *G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*^{xix} question arose that - Whether a member can be said to voluntarily give up his membership of a party if he joins another party after being expelled by his old political party? The court ruled that once a member is expelled, he is treated as an 'unattached' member in the house. However, he continues to be a member of the old party as per the Tenth Schedule.

Some criticize its discrimination between an independent member and a nominated member is illogical. If the independent member joins a party, he is disqualified while nominated member is allowed to do the same. A nominated member would not be disqualified if he joins the party within the 1st 6 months of being nominated. This provision is illogical and without any sound basis. Disqualification provision should be only imposed on Legislators when he votes against the stand taken by the party on those matters which are core to the party's manifesto. On Other issues Legislators should be allowed to vote on the basis of their own viewpoint on the issue. No difference has been put about these two terms. Dissent means using one owns opinion in case of voting on some topic in the house. According to Anti-Defection law, a member has to follow his party's decision & he can't use his own opinion while casting a vote. In short, this law makes the political party the boss & hence the high command culture flourishes.

Whether the Speaker has the power to review its own decision on disqualification of a member was answered in the case of *Dr. Kashinath G Jhalmi v. Speaker, Goa Legislative Assembly*.^{xx} The court held that the Speaker of a House does not have the power to review his own decisions, such power has not been provided for under the Schedule, and neither is implicit in the provisions. Constitution 52nd Amendment Act, 1985 provided provisions related to anti-defection in India. In this amendment, articles 101, 102, 190 and 191 were changed. It laid down



the process by which legislators may be disqualified on grounds of defection. The Constitution (52nd Amendment) Act 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. In *Ravi S, Nayak v. Union of India*^{xxi} two issues were raised that whether the Speaker of a legislature is bound by the directions of a Court and Whether judicial review by courts extends to rules framed under the Tenth Schedule, it was held by the Hon'ble Apex Court that "the orders passed by a speaker are subject to judicial review and rules under the Tenth Schedule are procedural in nature. Any violation of those would be a procedural irregularity. Procedural irregularity is immune from judicial scrutiny."

RECOMMENDATIONS OF VARIOUS COMMITTEES ON REFORMING THE ANTI-DEFECTION LAW

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.^{xxii}
- The issue of disqualification should be decided by the President/ Governor on the advice of the Election Commission.

Halim Committee on Anti-Defection Law (1998) f

- The words 'voluntarily giving up membership of a political party' be comprehensively defined. f
- Restrictions like prohibition on joining another party or holding offices in the government be imposed on expelled members.
- The term political party should be defined clearly.

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.

Election Commission

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

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.

RECENT ORDERS ON DISQUALIFICATION BY THE SPEAKER FOR DEFECTION

Shri Rajeev Ranjan Singh "Lalan" vs. Dr. P.P. Koya, JD (U), (January 9, 2009). 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.^{xxiii}

Shri Prabhunath Singh vs. Shri Ram Swaroop Prasad, JD(U), (October 3, 2008). 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.^{xxiv} 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.

Shri Avtar Singh Bhadana vs. Shri Kuldeep Singh, Indian National Congress, (September 10, 2008). 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.

Shri Rajesh Verma vs. Shri Mohammad Shahid Akhlaque, BSP, (January 27, 2008). 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.^{xxv}

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.

CONCLUSION

After critically analyzing issues and challenges of Anti-defection law and analyzing present scenario, it can be concluded that anti defection law needed to be amended to be in consonance with current facts and circumstances. Ever since the passing of the Anti-defection law in 1985, it aimed at curbing political defections and bringing government stability. 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 problem of government instability and money power use in politics still remains prevalent even after implementation of anti-defection law. In any case, the government stability and corruption cannot be used to curtail the fundamental of democracy itself. We can conclude that the decision making power of speaker / chairman needs review, the phrase “voluntarily giving up membership” is too vague and needs comprehensive revision and political parties should limit issuance of whips to instances only when the government is in danger.

ⁱ Political party is a group of dedicated people who come together to win elections, operate the government, and determine public policy.

ⁱⁱ Multi-party system ensures a healthy competition between different parties and prevents dictatorship of a single party. Indian Constitution declares India as a democratic country. Multi-party system fulfils this criteria and provides chance for proper growth of the nation.

ⁱⁱⁱ In this amendment, articles 101, 102, 190 and 191 were changed. It laid down the process by which legislators may be disqualified on grounds of defection.

^{iv} See Rule 2.

^v Paragraph 2 (1) (a).

^{vi} Paragraph 2 (1) (b).

^{vii} Along with the regional parties, there are some who decide to fly solo and win. The support of those independent members will also matter in the coming elections.

^{viii} See Rule 4 & 5.

^{ix} Earlier, a ‘defection’ by one-third of the elected members of a political party was considered a ‘merger’. The 91st Constitutional Amendment Act, 2003, changed this. So now at least two-thirds of the members of a party have to be in favor of a “merger” for it to have validity in the eyes of the law.

^x http://www.prsindia.org/administrator/uploads/general/1370583077_Anti-Defection%20Law.pdf.

^{xi} <https://www.legalindia.com/anti-defection-law/>

^{xii} Debanis Roy Chowdhury Anti-Defection Law In India: Need to Amend? the world journal on juristic polity ISSN 2394 - 5044 August , 2 0 1 7.

^{xiii} AIR 1993 SC 412.

^{xiv} See Kihota Hollohon v. Zachilhu, A.I.R. 1993 S.C. 413 at 436.

^{xv} Ibid.

^{xvi} Ibid.

^{xvii} https://roundtableindia.co.in/index.php?option=com_content&view=article&id=8546:threatening-indian-democratic-system-case-of-anti-defection-law&catid=124&Itemid=140.



Indexed with IJIF
Impact Factor : 1.021
ISSN: 2456 - 608X

International Journal of Legal Research and Studies

An UGC Approved Online Law Journal

^{xviii} A.I.R. 1987 (P.&II.) 263 (F.B.). In this case, the opinion written by Goyal J. expresses the majority view, while the opinion of Tewatia J. with whom Gupta J. agrees, constitutes the minority view.

^{xix} (1996) 2 SCC 353.

^{xx} [1993] 2 S.C.C.

^{xxi} *Ravi S. Naik and Sanjay Bandekar Vs. Union of India* AIR 1994 SC 1558.

^{xxii} In accordance with the Janata Dal's election commitment, the national front govt. announced in the Lok Sabha on May 4, 1990.

^{xxiii} http://www.legalservicesindia.com/article/print.php?art_id=1937.

^{xxiv} http://www.prsindia.org/administrator/uploads/general/1370583077_Anti-Defection%20Law.pdf.

^{xxv} Ibid.