ANALYSING THE ‘ANTI-DEFECTION LAW’

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ABSTRACT

The 52nd Constitutional Amendment Act of 1985 added the Tenth Schedule to the Indian Constitution, popularly known as the “Anti-Defection law”. Defecting party members posed a threat to the very foundation of the Indian democracy and the principles that sustained it. The amendment aimed at reducing party defections prevalent amongst the members at that time. The law has succeeded in a reasonable manner and has been able to secure party stability to some extent. The schedule mentions the grounds on which a defecting member stands disqualified from his original political party. The law also contains some exceptions from disqualification, like in the case of a party merger. The current article seeks to provide a brief analysis of the grounds mentioned in the Tenth Schedule. It also highlights some of the merits and demerits of the law. As the law gets older and older, we find that with the corruption prevalent amongst politicians and given their dishonest tactics, they have been able to take advantage of loopholes in the law to suit their personal needs. This is the reason why the law has not been able to achieve the best it can. The current article tries to delve into the loopholes, which render the 52nd Amendment Act somewhat unsuitable and unsuccessful. It also looks at some of the changes required in the law and the way forward.

INTRODUCTION

The original Constitution of India had no mention of political parties. But, ever since the multi-party 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. Defection is defined as “desertion by one member of the party of his loyalty towards his political party, his duty towards his party or to his leader”. The practice of switching political sides to grab office was popularly known as Horse-Trading.¹ There was rampant horse-trading and corruption prevalent amongst the political leaders and political parties. One such incident that left a mark on India’s political history occurred after the 1967

elections when about 142 MPs and 1900 MLAs switched their political parties. In order to curb such a practice and the resulting consequences, the Rajiv Gandhi Government in 1985 introduced anti-defection laws in the Indian Constitution. These were introduced by way of the 52nd Constitutional Amendment, which inserted Tenth Schedule in the Constitution, popularly known as the Anti-Defection law. The amendment put a bar on the elected members of a political party to leave that party or to switch to another party in the Parliament.

THE 52ND CONSTITUTIONAL AMENDMENT

The Fifty-second Constitutional Amendment Act of 1985 amended Articles 101, 102, 190 and 191 of the Indian Constitution and inserted the Tenth Schedule in it. The Statement of Objects and Reasons of the amendment Stated:

“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 which sustain it.”

Articles 101, 102, 190 and 191 were amended to provide the grounds for vacation of seats on disqualification of a member, both in the Union Executive as well as the State Executive, on the basis of the Tenth Schedule of the Constitution.

Rule 2 of the Tenth Schedule mentions the following grounds for disqualification:

(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 abstains from voting in such House, contrary to the directions of his political party.

   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.

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3 INDIA CONST., arts. 101, 102, 190, 191.
(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.4

Rule 4 and Rule 5 highlight the exemptions from disqualification. These are:
A member of a 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:
   (a) have become members of the other political party, or of a new political party formed by such merger
   (b) have not accepted the merger and opted to function as a separate group.5

The original Act of 1985 also provided an exemption from disqualification in the case of splits in the political parties. Rule 3 provided 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 atleast one third members of such a political party was considered as a split which was not actionable.

The Dinesh Goswami Committee on Electoral Reforms (1990) recommended that disqualification should be limited to cases where a member voluntarily gives up the membership of his political party or abstains from voting or votes contrary to the party. The Committee recommended deletion of the provision regarding exemption from disqualification in case of a split.6 Also, the Law Commission in its 170th report of 1999 on "Reform of Electoral Laws" and the National Commission to Review the Working of the Constitution (NCRWC) recommended that provisions which exempt splits and mergers from disqualification must be deleted. Following the recommendations, this provision relating to split in parties was omitted by the Constitution (Ninety-First Amendment) Act enacted in 2003.7 The requirement of atleast one-third defectors of the political party was changed to atleast two-third members. The Schedule mentioned that “the merger of the original political party or a member of a House shall be

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5 Id., Schedule X, ¶ 4.
deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger.’

The Speaker or Deputy Speaker of the House of the People and Chairman or Deputy Chairman of the Council of States or the Legislative Council of a State are allowed to give up their membership of the political party after being elected to the office, without joining another political party or joining such political party after he ceases to hold the office.\(^8\)

**Rule 6** of the Schedule provides for the deciding authority in case of question regarding incurrence of disqualification. It provides immense power to the Chairman or Speaker of the house in case of any question arising as to whether a member of the House has become subject to disqualification or not.\(^9\) The power given to the Speaker is absolute and enormous in the sense that **Rule 7** to the Schedule excludes any jurisdiction of the courts in respect of any matter connected with disqualification of members of a House.\(^10\)

**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.\(^11\)

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

\(^8\) INDIA CONST., supra note 3, Schedule X, ¶ 5.
\(^9\) Id., Schedule X, ¶ 6.
\(^10\) Id., Schedule X, ¶ 7.
\(^11\) G.C. MALHOTRA, ANTI-DEFECATION LAW IN INDIA AND THE COMMONWEALTH (Lok Sabha Secretariat, 2005).
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.\textsuperscript{12}

**LOOPHOLES IN THE LAW**

\begin{itemize}
\item **Wide power to the Speaker**
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As is evident from Rule 6 of the Tenth Schedule, the Chairman or the Speaker of the House is given wide and absolute power in deciding the cases pertaining to disqualification of members on the ground of defection. However, it must be noted that the Speaker still remains the member of the party which nominated him/her for the post of Speaker. In such a scenario, it is difficult to expect that the Speaker will act impartially in cases pertaining to his/ her political party. Mr. K.P. Unnikrishnan, a member of Congress party in the Lok Sabha, said that "by making the Speaker the sole repository of all judgment, you are allowing him to play havoc".\textsuperscript{13} A solution to the problem could be that the power to decide such cases be given to High Court, Supreme Court or the Election Commission. But looking at the current backlog of cases pending in the courts and the controversies surrounding the Commission, the solution seems to be untenable.

Another criticism against the Speaker is that he might lack the legal knowledge and expertise to adjudicate upon these types of matters. In fact, 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.\textsuperscript{14}

The Dinesh Goswami Committee on Electoral Reforms, appointed by the V.P. Singh Government in 1990, and the Election Commission recommended that the power to decide on the issue of disqualification under the Tenth Schedule should be given to the President or the Governor of the State, who shall act on the advice of the Election Commission. However, it can be seen that no amendments have been made in the Act giving effect to these recommendations.

\textsuperscript{12} *Id.*
\textsuperscript{14} *Id.*
and thus, the Speaker continues to exercise undisrupted powers in matters relating to disqualification of members.\textsuperscript{15}

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\item \textit{Scope of judicial review}
\end{itemize}

\textbf{Rule 7} bars the jurisdiction of the courts in respect of any matter connected with disqualification of a member of a House, which means 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. In Keshavananda Bharati and Others v. State of Kerala and Another,\textsuperscript{16} 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. However, it has been held in Ravi S Naik v. Union of India,\textsuperscript{17} that the rules relating to anti-defection laws are merely procedural in nature and any violation of these, being a procedural irregularity, was immune from judicial scrutiny.

The rule barring the jurisdiction of Courts has been challenged multiple times and the Court, in Kihoto Hollohon v. Zachilhu and Others,\textsuperscript{18} held that the law is valid in all respects expect on the matter pertaining to judicial review, which was held to be 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.\textsuperscript{19} On the matter of review of the decision of the Speaker by the Speaker himself, it was held in Dr.

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\textsuperscript{15} R. KOTHANDARAMAN, IDEAS FOR AN ALTERNATIVE ANTI-DEFECTION LAW (2006).
\textsuperscript{16} Keshavananda Bharati and Others v. State of Kerala and Another, AIR (1973) 4 SCC 225.
\textsuperscript{17} Ravi S Naik v. Union of India, AIR 1994 SC 1558.
\textsuperscript{18} Kihoto Hollohon v. Zachilhu and Others, AIR 1993 SC 412.
\textsuperscript{19} M. P. JAIN, INDIAN CONSTITUTIONAL LAW 48 (7th ed. 2016).
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Kashinath G. Jhalmi v. Speaker, Goa Legislative Assembly\textsuperscript{20} that the provision does not provide for any such power on the part of the Speaker and thus, the Speaker cannot review his own decision.

On the question of when a Court can exercise its power to review the Speaker’s decision, it was held in Rajendra Singh Rana and Others v. Swami Prasad Maurya and Others\textsuperscript{21} that under the following circumstances the power of judicial review can be used: (a) when the Speaker fails to act on a complaint of defection, (b) When the Speaker accepts the claim of splits or mergers without any finding and reason, or (c) when the Speaker fails to act as per the Tenth Schedule. The Supreme Court held that ignorance of a petition for disqualification is not a mere irregularity on the part of the Speaker but amounts to violation of a Constitutional duty.\textsuperscript{22}

However, it is pertinent to note that even though there have been several judicial pronouncements favoring the power of judicial review by the Courts, no amendment has been made in the Tenth Schedule in this regard.

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  \item \textbf{No individual stand on part of members}
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On a careful analysis of various provisions of the law, and particularly Rule 2, it can be seen that the anti-defection law puts the party members into a bracket of obedience to the party whip and policies, curbing the legislator’s freedom to oppose the wrong acts of the party, bad policies, leaders and bills. The political party in this sense acts as dictator for its members who are not allowed to dissent. This, in a way, violates the principle of representative democracy wherein the members are forced to obey the high command. In a well-settled representative democratic environment, the wishes of the people of the electorate are taken care of rather than working on the instructions and wishes of the party leaders and as per its policies. With the increased power being given to party whip, 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 fine distinction between defiance on part of members and defection of the members leading to their

\textsuperscript{20} Dr. Kashinath G. Jhalmi v. Speaker, Goa Legislative Assembly, (1993) 2 SCC 703.
\textsuperscript{22} PRS, supra note 7.
disqualification. With this lack of individuality on the part of party members, the anti-defection laws have failed to achieve the desired results.

- What amounts to ‘voluntarily giving up’

Rule 2(1)(a) of the Tenth Schedule mentions that the member of the House is 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 resignation of the member from the party or does it have a wider meaning than that? This question arose before the Supreme Court in Ravi Naik v. Union of India\(^{23}\) and the Court while interpreting the phrase held that it has a wider connotation and can also 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,\(^{24}\) 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\(^{25}\) 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 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.

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\(^{23}\) Ravi S. Naik, *supra* note 17.
\(^{25}\) Rajendra Singh Rana v. Swami Prasad Maurya and Others, 2007 (4) SCC 270.
Another issue is 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. In 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.

- **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-thirds 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 seems 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.

CONCLUDING REMARKS

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:

• 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.

• The law must explicitly set out what it means by the words ‘voluntarily giving up membership’ in order to avoid any confusion.

• 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.

• 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.