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DEFECTION AND LAW WITH SPECIAL REFERENCE TO TENTH SCHEDULE OF THE INDIAN CONSTITUTION

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ABSTRACT

According to Shri. Subhash C. Kashyap, Former Secretary General of Lok Sabha, between the Fourth and Fifth General Election in 1967 and 1972, There were nearly 2000 cases of defections and counter defections¹. Many scholars may be surprised to learn that parliamentary members who switch parties during the session may be expelled from parliament because they violate the law in the country. This paper studies such “anti-defection Law in India. It investigates the extent of such legislation; why and how often legislators switch parties: why some scholars favour banning party switching; why politicians have legislated against party defections. In order to combat political defections, the Tenth Schedule was inserted into the Constitution of India in 1985. The Tenth Schedule introduced the anti-defection law in India by laying down that legislators who voluntarily give up membership of the party they belong to and legislators who disobey the whip issued by the party with regard to voting, shall incur disqualification. The intention of this law is to ensure political stability and prevent legislators from being bribed to defect and indulge in floor crossing. While the law was introduced at a time when defections were rampant and needed stringent measures to prevent it, it has imposed an unreasonable restriction on dissent, debate and freedom to vote. The individual identify of legislators has diminished and has led to the rise of political parties as extra constitutional authorities. This article critically analyses the anti-defection law with regard to its effect on parliamentary dissent². Despite the issue being highlighted by the Supreme Court in Kihoto-Hollahan Vs. Zachillhu³.

KEYWORDS

Indian constitution and Tenth schedule.

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INTRODUCTION

Defection means the Member of the Legislature or the parliament has changed the party on whose ticket and symbol he was elected and joined another party or he/she has completely cut off all the connections from the party on whose ticket the person was elected as the member of the House. The phenomenon of defection is not something that is peculiar to India. It is prevalent in democracies all

over the world, which have adopted the party system⁴. These defections occurred mainly due to ideological differences and not because of want of office. These defections further bound the fabric of Indian democracy and restriction such defection would have led to undermining and eroding the freedom required set up⁵.

After the fourth general election the defections took an alarming turn, many legislators switched sides for the want of office and further abruptly switched back when the promises were not fulfilled between 1967 and 1972 more than 50% of the legislators switched sides at least once⁶. This practice of switching sides to gain office came to be known as 'Horse Trading'⁷. Political defection is viewed as an evil in a democracy and is considered to be a instance of breach of trust of voters by the elected representative. India began to witness rampant defection by legislators in the late 1960s which resulted in collapse of newly formed State governments frequently. The State of Haryana witnesses a legislator defect thrice within.

Span of fifteen days and subsequently led to the coining of the colloquial term 'Aya Ram, Gaya Ram' to describe the practice of defecting.

The lure of office played a dominant part in this "Political Horse-Trading" was obvious from the fact that out of 210 defecting legislators of various states during the first year of "defection politics", 116 were incorporated in the list of council of ministers in the government which they helped to form⁸ Inserted in the constitution of India by way of the 52nd Amendment in 1985⁹. The Law is cherished in the Tenth Schedule of the Constitution. Defection may be defined as desertion of loyalty, Principle or duty, or of his leader or clause¹⁰. The traditional term that has been used for it is floor crossing when he crosses the floor and shifts from government to opposition or the other way around. The falling to deal with this situation had led to horse trading and corruption in day to-day functioning of the parliament. Thus schedule X was seen as a device to cure this malaise¹¹. Chavan Committee on Defection defines as an elected member of a legislature said to have defected, if after being elected as a member of either house of parliament or legislative council or the

legislative assembly has voluntarily renounces allegiance to or Association with such a political party provided that his action is not in consequence of a decision of the party concerned.

REASONS FOR THE DEFECTION

There are number of causes for defection, they are:

1. Usually the legislators defect when they are offered a good designation as a consideration for joining a new party by leaving the existing party.
2. Sometimes the emoluments and status attached to the office of a minister is negligible when compared to the benefits given to an ordinary MLA.
3. If the MLA is offered or promised to give Ministership.
4. Ideological differences with the party.
5. Sometime Pressure groups will also be responsible for the defection.
6. Absence of dynamic leadership in the party.

EFFECTS OF DEFECITON

Universal adult franchise (Election) is one of the essential ingredients of Democracy. But if such electors become defectors, it is a big hole to the democracy, because due to defection.

1. Sometimes in States, the Government itself is thrown out of power and the minority (Opposition) party will become the majority (ruling) party and vice versa. Therefore, a party, which has won a majority through election, and got the mandate from the people to form the Government, may yet fail to do so because a few of its members defect from the party.
2. A lot of inconvenience to the bureaucracy is created and in turn the bureaucracy becomes strong and powerful.
3. Devaluation of the Office of the Chief Minister.
4. Increase in the political corruption.
5. Moreover they cheat the voters of their constituencies who have voted them in the name and symbol of party.

MEASURES TAKEN TO CURB DEFECTION

It was realized that if the evil of defection was not curtailed, it would remove the very pillar of Democracy from India. Therefore, attempts were made to enact a law to remove defection, which is called Anti-defection law.

The first attempt was made on Feb. 1968 by appointing a committee under the Chairmanship of Sri. Y.B. Chavan to consider the problems of Legislators changing their allegiance from one party to another¹².

The Committee placed its report before the parliament in February 1969. The main recommendations by the Committee were as follows:

1. Political defectors should be debarred from occupying any office, such as Minister, Speaker, Deputy Speaker or Chairman of any statutory corporation for a period of one year from the date of defection. But also be prevented from standing for a specified period¹³.
2. The size of a Minister in a State should be ten percent of the strength of the Assembly where there was bicameral legislature and eleven percent where there was a unicameral legislature.
3. Defectors should be barred from becoming minister's up to one year from the date of defection unless they got re-elected after resigning.
4. The Chief Minister should be made competent to seek dissolution of the House, even if reduced to minority, after his party is reduced to minority on account of political defection.
5. The electorate should be educated and made to realize the problems created by independent legislators, so that they do not return them.
6. No one, who belonged to the Upper House, should be elected as Prime Minister or the Chief Minister of a State. If necessary, the Constitution should be amended accordingly.
7. Every elected legislator should bind himself in the party discipline and should not violate that.

8. The political parties themselves should arrive at a code of conduct inter alia providing against a defector being taken into the fold of another party.

To give effect to the recommendations of the Committee concrete steps could be emerged out of it, it was suppose to regulate defection and that to only certain type of defection were only prohibited, it was in May 1973 that the Government Introduced Constitutional (32nd Amendment) Bill, 1973 to give effect to the recommendation of the Committee, however it was opposed vehemently then was debated and later referred to the Joint Committee of two houses. However the Loksabha dissolved before the Committee could complete its work and the bill lapsed¹⁴.

Five years later the Janata Party came to power in 1978 and an attempt was made to bring forward the bill. However it was opposed not only by members of the opposition party but also by members of the ruling party and then the motion for the bill was withdrawn¹⁵.

Seven years later Rajiv Gandhi Government came to power and a more was made in his direction. It began from 17th January 1985 when a Presidential address was made to both the houses of parliament in which he said that the Government wanted to bring in a bill relating to the following topic and then the Government introduced the Constitution (52nd amendment) bill in Lok Sabha just a week later on 24th January¹⁶. The act came into force effect from 1st March after receiving the Presidential asset on 15th February, the Constitutional Act and 1985 amended articles 101, 102, 190 and 191 of the Constitution.

PROVISIONS AND SALIENT FEATURES OF TENTH SCHEDULE OF THE CONSTITUTION

1. It changed four articles [Art. 101 (3) (a), Art. 102 (2), Art. 190 (3) (a) and Art. 191 (2)]
2. The seat of a Member of Parliament of the State Legislature shall fall vacant.
 - If the voluntarily gives up his membership of such political party; or

- If the voters or abstains from voting in such House contrary to any direction issued by the political party¹⁷ to which he belongs.
 - Thus disqualification shall not apply in case of split i.e., 1/3 (1 or more of the members of a party deficit. It shall also not apply in the event of a merger i.e., 2/3rd of the Members or more merge with any other party¹⁸.
 - The Speaker, Deputy Speaker and Deputy Chairman are allowed to give up their membership after elected to the office¹⁹.
 - The Speaker or Chairman is the person to decide the question of disqualification²⁰.
 - The Jurisdiction of the Courts regarding the disqualification of any members has been barred²¹. However the Supreme Court in 1993²². Has struck down this part of the schedule as unconstitutional.
1. A member of the House shall not be disqualified where his original political party merges with another political party and he claims that he and any other members of his original political party.
 - Have become members of such other political party or, as the case may be, of a new political party formed by such merger; or
 - Have not accepted the merger and opted to function as a separate group.
 1. Exemption: a person who have been elected to the office of the Speaker or the Deputy Speaker of the Lok Sabha or the Deputy Chairman of the Rajya Sabha or Chairman or Deputy Chairman of the Legislative Council of the State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule
 - If he, by reasons of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or
 - If he, having given up by reason of his election to such office his membership of the political party to which he belongs immediately before such election, rejoins such political party after he ceases to hold such office.
 1. The question, as to disqualification on grounds of defection, shall be determined by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha as the Case may be and the decision of such officer shall be final.
 2. No courts have jurisdiction in respect of any matter connected with the disqualification of a member of a House under this schedule.

CRITICISM OF THE LAW

On Splits and Mergers

In this aspect the exempting has been given only constructed on the number of people defecting therefore if the required number defect, they are not affected by the law. There seems to be no rationale that backs this exemption there as 2/3rd of a party might merge due to the lure of office and ministerial posts, so should this defection be acceptable only because of the larger number involved and such defection too portend to undermine the notions of democracy which the law is suppose to guard²³. Thus, this provisions seem rather unreasonable as the basic motivation behind an individual defection and a mass split could well be the same. The aim of this law could have been better served if the law was to differentiate on the basis of the reasons behind the split. This would make sure that a member does not breach the trust that is envisaged in him by his members of electorate.

Defection V. Dissent

In this context a difference is necessary between “defection” and dissent²⁴ every dissent does not amount to defection. Hence under this, a member should be free and allowed to vote as per his wishes and not as the party instructs him to do this would guarantee that the democratic spirit is attained, that in the intended meaning of representative democracy by which the needs of the people of the electorate are taken into account and not the wishes of the part of

leaders. By failing to consider this in mind the Anti-Defection Law appears of not achieving its desired results that were expected out of it.

Another irregularity in the Law is that, one assumes that parliament is required to maintain certain quasi-judicial powers under the constitution. For example Article 61 takes about impeachment of the president²⁵. Article 124 provides for the removal of Supreme Court Judges. Etc²⁶. One obvious contradiction occurs in a paragraph which states that, an Independent members is disqualified if he line with any political party after his elections.

A Glaring Contradiction

The whole concept of Parliamentary democracy is day today answerable of the Government to parliament which is applied through joint responsibility, parliamentary privileges etc²⁷. This is all lost as the ruling party issues a whip and all the members have to vote according to that irrespective of the way they feel. Thus the party in power has Xth Schedule as tool for Clarence of all its policies even if most of its members disagree with it²⁸. This abuse of Xth Schedule would out its advantages.

Speakers's powers and Decision of Speakers

The Speaker in India is a political person duel to his active involvement even after his appointments it does not severe his political connections. Hence keeping this probability in mind there is no justification in Xth Schedule. It can be based by the Speaker to Manipulate the given situation and use it accordingly to favour political parties of his ideology. One of the basic problems of Xth Schedule in the lack of uniformity among the Speakers of defferent states. This leads to choose and confusions and leads to great deal of uncertainly. This is not intended by the Xth Schedule and it undermines its spirit and objective²⁹.

The Supreme Court Judgments and Tenth Schedule of the Constitution of India

In Kihoto- Hollohon V Zachilhu³⁰ matters relating to disqualification of some members of the Nagaland assembly on the ground of defection under the Tenth Schedule of the constitution came up for consideration. Matters of several other legislative assemblies like Goa, Gujarat, Madhya Pradesh, Manipur and Meghalaya were also hears along with

as they also involved questions of constitutional validity of para 7 of the Tenth Schedule and the 52nd Amendment.

The Supreme Court found legal infirmities in the passage of the anti-defection as the constitutional amendment bill had not been ratified by required number of states assemblies before it being presented to the president for his assent.

The Supreme court struck down the para 7 of the schedule which barred the jurisdiction of the supreme court and declared that the speaker was in position as a tribunal and like other tribunals this would also be subject to judicial review.

In regard to the contentions that were raised before the honorable court and urged the court held as follows:

1. Para 2 of the X Schedule is valid, its provisions do not suffer from the vice of subverting democratic rights of members of parliament and the members of legislative assemblies. It doesn't violate their freedom of speech, expression as being contended. The provisions of para 2 do not violate any right or freedom under articles 105 and 194 of the constitution³¹.
2. The provisions of paragraph 7 of the tenth schedule of the constitution brings about a change in operation and effect of articles 136, 226 and 227³². Therefore an amendment is required according to the provisions to clause (2) of article 368 of the constitution.
3. That paragraph 7 of the X schedule is which is independent of and stands apart, from the main provisions of the schedule, the main provisions of the schedule provide or an remedy to the unprincipled and unethical political defections and therefore it is a severable part capable of standing independently³³.
4. It would be unfair to the High office of the speaker by expressing distrust, mrely due to some speakers who are alleged, or found, to have discharged their duties not keeping the dignity of the great office³⁴.
5. The expression "any direction" occurring in para 2(1) (6) of the tenth schedule requires to

be harmoniously construed with the other provisions and then appropriately be confined to the objects and purposes of the X Schedule³⁵.

The disqualification as imposed accordingly by paragraph 2(1) (b) must be constructed as not to excessively impose on freedom of speech and expression of a member. The direction given by a political party to its member be restricted only to a vote on motion of confidence or no confidence in the government or when the motion relates to the internal policy or programme of the party on the basis of which it approached the electorate.

In *Ravi S. Naik V. Union of India*³⁶ that (1) the burden of proof for proving the requirements of the contents of para 2 is on the person who claims that a member is incurred disqualification; (2) the burden to prove para 3 is on the member who claims that there is a split in the party (4) the requirements of a split are: (a) the member claiming the split should represent the faction of the party that is arising from a split in the original party and (b). Such group should not be less than 1/3 of the members of such legislature party.

In *G. Vishwanathan V. The Speaker, Tamil Nadu legislative assembly*³⁷ the Supreme Court clearly laid down that only the elected member shall belong to a political party, by which he is set up as a candidate. He would not cease to be a member of that party in the house for the purpose of the X schedule. There is no provision of any unattached member in the X schedule and even if a member is shown unattached that would not change his constitutional status as a member of the party that had set him up as candidate sent if such a member joined another party he will certainly incur disqualification on the ground of voluntarily giving up the membership of his party.

In *Jagjit Singh v. State of Haryana*³⁸. The SC, inter alia affirmed that the test of an independent participant joining a party is to establish whether he has given up his independent personality on which he was selected. A mere appearance of outside support would not suggest joining a party. Each case has to be definite on the basis of material on record. Also, paragraph 3 which talks of split as a guard to

defection cannot be availed of by a member of a one-man party. The court left it to parliament to consider whether the power to decide on disqualification on ground of defection should be entrusted to an authority other than the speaker/chairman.

CONCLUSION

Let us conclude with a sound but an imperative caveat that we must be ever mindful of that evil of defection is not confined to India only. It is rampant, perpetuating and flourishing in other countries having parliamentary form of Government.

In order to combat political defection, the Tenth Schedule was inserted into the constitution of India in 1985. The Tenth Schedule introduced the Anti-Defection Law in India by laying down that legislators who voluntarily give up membership of the party they belong to and legislators who disobey the whip issued by the party with regard to voting shall incur disqualifications. The intention of the law is to ensure political stability.

While the law has succeeded in assailing the menace of defection to a reasonable degree, there are certain ambiguities. The courts of a land have done a fair job in expounding the stance by applying the law to particular facts and circumstances. Thus, there seems to be considerable scope for judicial interpretation which may give further clarity of the law and may bring in wider range of cases within the umbrella of Anti-defection.

There exist other drawbacks and flaws in the current anti-defection law but the scope of the article has been confined to strength and weakness of Tenth Schedule of the constitution of India.

One of the much needed reforms is to amend the Tenth Schedule to incorporate the changes made to anti-defection law by the Supreme court in judgments like *Kihoto Hollohan*. Paragraph 2 of Tenth Schedule must be amended to restrict the power of the party to issue directions only regarding financial bills and confidence motions. There ought to be a parliamentary committee set up which oversees dissents so that legislators who intend to dissent from the party's view give notice well in advance regarding intention to dissent and reasons for it to the committee. The normative reform would

be conferring of right to recall a legislator by the electorate instead of disqualification directly as this would be in tune with both the delegate model and trusteeship model of representation. While this may not be pragmatic at present, this is the best way to ensure accountability of the legislator to the electorate and not the party leadership alone.

There are several issues in relation to the working of this law which requires serious considerations. Does the law while deterring defections. Also lead to suppression of healthy intraparty debate and dissent? Does it restrict representatives from voicing the concerns of their voters in opposition to the official party position? Should the decision on defections be judged by the Speaker who is usually a member of the ruling party or coalition, or should it be decided by an external neutral body such as the Election Commission? These questions stand wide open for academic and constitutional discussions.

The Anti-defection Law was enacted to put a check on the Member of the parliament and controlling the defection and switching loyalties from party to another and to maintain the polity. Political discipline in the party is maintained through the establishment of the party whips, but by this the parliamentary democracy was affected.

In the present scenario, will a member be disqualified if he followed the will of his voters, who may disagree with a specific national party? Is dissent acceptable in the present case. Member of the legislature carry multiple responsibilities, but being responsible to their voters and that their party, the greater good and their own consequences.

It is about time that the Law is reformed to protect the individuality of each legislator who derives power from the constitution and who is considered as the trustee of the interest of the electorate. An end must be put to the emergence and flourishing of leadership of political parties as extra constitutional authorities who dictate terms and decide how a legislator ought to vote and express himself. Amendment to the Tenth Schedule is required not only for the above mentioned reasons but to also remove anomalies which exist regarding interpretations of certain terms, effect of expulsion of a legislator by a political party, etc. with these

reforms the parliament and legislator will to a large extent reflect certain essential elements of a democracy which include healthy debate and dissent. Thus it is very important to amend the Tenth Schedule to state that "A member shall incur loss of his membership only when he votes or abstains from voting in the House with regard to a confidence motion. No confidence motion, Adjournment motion money bill or Financial matters contrary to any directions issued in this behalf by the party to which he belongs to and in no other case"³⁹.

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CONFLICT OF INTEREST

We declare that we have no conflict of interest.

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