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E-Mail:- [blindfoldjournal@gmail.com](mailto:blindfoldjournal@gmail.com)

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## **Anti – Defection Laws In India: A Critical Analysis**

Author: Chandni Kishore

### **Abstract –**

The term "Aaya Ram Gaya Ram" dates back to 1967, when Gaya Lal, a congress leader back then fortnight changed from congress to Janata Party and then changed back to congress and then back to Janata Party again. The provision regarding Anti-Defection was inserted into the constitution by the Tenth Schedule of the Indian constitution by the 52nd Amendment in 1985. Article 102(2) provides for the disqualification of Member of Parliament and Member of Legislative Assembly under Article 191(2). The practice of defection has been quite a debatable issue in India since independence. According to the committee's report on defection in 1967, A defector is defined as a person "who is the elected member of the legislature and has been assigned a symbol of any political parties. He shall be said to have defected, only after he is elected as member of either the house of Parliament or in legislature council or legislative assembly of union territory or state and he who will voluntarily reject his association with that political party if it was provided that his action is not by result of the decision of party concerned. The tenth schedule was incorporated into the Indian Constitution by the 52nd Amendment and served the purpose of curbing unethical political defections. In addition, a brief overview of the schedule is given before analysis. There are eight paragraphs in all, and the first paragraph deals with various definitions that are important for understanding the law. The second paragraph contains the disqualification of asylum. The third paragraph, removed as a result of the 2003 amendment, deals with divisions within the party, and the fourth paragraph deals with exclusions that do not apply in the case of a merger. The fifth paragraph highlights various exceptions, and the sixth and seventh paragraphs deal with who decides on issues related to court relocation and jurisdiction. The defectors shouldn't be allowed to hold any post in public office of minister or any political post for a minimum duration of the term remaining of the current legislature or until the upcoming elections whichever is happening soon. So, the defector's vote in order to topple the government must be taken as invalid. In addition to that, the power to decide questions regarding disqualification on the ground of defection should be vested on the Election Commission of India and not the speaker or chairman of the concerned House. The purpose of this law is to ensure political stability and prevent lawmakers from

accepting bribes, violating them and crossing the floor. It is observed that as the law gets older and older, we can just see that with the corruption prevalent amongst politicians and considering their malpractices, they have just been able to take undue advantage of these loopholes present in the law for their personal needs. This paper will be discussing whether the anti-defection laws of the country have been able to fulfil its purpose or not. This paper also seeks to look into the loopholes, which proves the 52nd Amendment Act to be kind of unsuccessful and unsuitable.

*Keywords - Defection, tenth schedule, parliament, political, loopholes*

### **Introduction –**

Defection Laws have been a major issue in recent years as a result of the leaders' full disregard for the country's defection laws. Since the country's independence, defection has been a sensitive issue in India. Anti-defection law has been in place in India for about three decades. The concerned law is codified in the Tenth Schedule ('Schedule X') of the Indian Constitution, which was included by the 52nd Amendment in 1985. By the 52nd Amendment to the Constitution in 1985, the Anti-Defection provision was inserted to the constitution via the Tenth Schedule. Article 102(2) and Article 191(2) provides for the disqualification of Member Parliaments and Member Legislative Assemblies Legislators can be disqualified under these articles of the constitution if they have been disqualified under the Tenth Schedule. After experiencing as many defections in a single year as it had in the previous four Lok Sabhas, India was compelled to enact this law. By prohibiting floor-crossing, the amendment aimed to bring stability to political party structures and strengthen parliamentary practise. As a result, Schedule X was viewed as a method for curing this ailment. The significance of this constitutional provision was that once a member was elected to Parliament under the symbol of a political party, he or she could not afterwards opt out. The significance of this constitutional provision was that once a member was elected to Parliament under the symbol of a political party, he or she could not afterwards leave that party or switch to another. On the other hand, independent members of Parliament would be responsible if they joined a political party after the election. Political parties were not mentioned in India's newly drafted Constitution. In any case, the Indian parliamentary framework has seen massive rebellions, beginning with one

political party and then moving on to the next, nearly resulting in the breakdown of open trust in a just sort of government as far back as the multiparty framework has advanced. Defection is defined as a person's abandonment of his or her political party, his or her commitment to his or her party, or his or its pioneer. Horse-trading was the practise of switching political parties in order to gain political power. Among the political pioneers and political groups, there was extensive steed trading and debasement. Members of the Legislative Assembly switched political parties. The Rajiv Gandhi government introduced Anti-Defection legislation into the Indian Constitution in 1985 with the particular objective of monitoring such training and its outcomes. The rationale for enacting this Anti-Defection Law was to abbreviate the never-ending war with political unrest. Consider the Madhya Pradesh Government's crisis in March 2020, when Jyotiraditya Scindia and 22 other Members of Legislative Assembly ("MLA's") resigned to the Speaker of the Assembly, causing the Congress to lose the floor test, and the BJP, which had the most seats, came to power, and Shivraj Singh Chauhan was elected as Madhya Pradesh CM. On the grounds of defection, the Deputy Chief Minister of Rajasthan (Sachin Pilot) and 18 other dissident leaders of the Congress party received notices. The letters sought their disqualification from the state assembly, claiming that they had all disobeyed the party whip by missing two parliamentary meetings. The case is currently ongoing at the Rajasthan High Court.

### **The History and Need for Anti – Defection Laws** -

'Aaya Ram Gaya Ram' is a popular saying that refers to Haryana MLA Gaya Lal, who switched parties thrice in one day in 1967. As a result, it was in 1967 that the government decided to take action against this threat and passed a resolution. The Union Government created a committee under the presidency of then-Union Home Minister Shri Y.B. Chavan, which included M.C. Setalvad, Jayaprakash Narayan, H.N. Kunzru, M. Kumaramangalam, and Madhu Limaye, among others. Their suggestions included things like political parties having a code of conduct among themselves, if the defection was for ideological reasons, the defector would be disqualified from continuing as a legislator but could run again, and if the defection was for financial reasons, the defector would not only be disqualified from office but would also be barred from running for a certain period of time. Between 1967 to 1969, more than 1500 party defections and 313 independent candidate defections happened in the country's 12 states, according to the Indian Law Institute's article "Aya Ram Gaya Ram- the Politics of Defection," published in 1979. Up until

1971, it's estimated that more than half of the legislature switched parties. The Chavan Committee's recommendations were intended to be enacted through the Constitution (Thirty-second Amendment) bill, but it was unsuccessful due to the House's dissolution before the bill could be passed. Furthermore, following another failed attempt to curb defection through the Constitution (Forty-Eighth Amendment) bill, the abolition of this farce of the democratic process was eventually implemented in 1985. When we read about defection, we often hear the term "Horse Trading," which simply implies transferring legislators from one party to another for monetary reasons. Changing political parties can happen for a number of reasons. All of these circumstances pushed the government to enact a statutory clause in the constitution that would subject those found guilty of such behaviour to serious punishment.

In 1985, the parliament passed the long-awaited anti-defection legislation. The Constitution's 52nd amendment included the Tenth Schedule and changed numerous Articles such as 101, 102, 190, and 191, with the goal of incorporating a process by which parliamentarians might be removed in the event of defection. It was critical to prevent members from switching parties frequently since it jeopardised the political system's stability. The Rajiv Gandhi government took a significant step in this direction, as mentioned in the justifications for the amendment.

### **Reasons for the Defection** –

Defection can be caused by a variety of factors, including:

1. Legislators usually defect when they are given a good designation in exchange for leaving their current party and joining a new one.
2. When compared to the benefits granted to a regular MLA, the emoluments and status attached to the post of a minister are sometimes insignificant.
3. If a Ministership is offered or pledged to an MLA.
4. Differences in ideology with the party.
5. In some cases, pressure groups are to blame for the defection.
6. In the party, there is a lack of energetic leadership.

There are certain exceptions as well. In case of a split/merger of 1/3rd or more of a party's members to another party, disqualification under the Anti-Defection provisions will not apply. It also won't

apply if a third or more of the members combine with another party. This exception of 1/3rd members was altered by the 91st amendment to the constitution, after which the clause of split was deleted, and now it takes 2/3rds of a party's members to merge with another party.

As a result huge number of legislators defected, his plan changed the party's membership standards from one-third to two-thirds, as well as removing the option of splitting from the party. All of these circumstances pushed the government to enact a statutory clause in the constitution that would subject those found guilty of such behaviour to serious punishment.

### **Merits and Demerits –**

Anti-defection legislation, like every other legislation, has benefits and drawbacks. On the plus side, the law seeks to maintain government stability by penalising members who change their party's affiliation. Anti-defection law also tries to instill a sense of loyalty to one's own political party. This can be done by ensuring that members chosen in the name of the party, its support, and its platform stay loyal to the political party to which he belongs and party's policies.

Anti-defection laws have the unfortunate side effect of curtailing members' freedom of speech and expression by prohibiting them from expressing any dissident views on party policies. Anti-defection laws have the unfortunate side effect of curtailing members' freedom of speech and expression by prohibiting them from expressing any dissident views on party policies. However, various courts have concluded that the guarantee of freedom of speech provided by Articles 105 and 194 is not absolute. The provisions of the Constitution, including the Tenth Schedule, bind it. Another problem with the law is that it limits the government's accountability to Parliament and the public by banning members of political parties from switching parties.

### **Jurisdiction of the courts under defection laws -**

The court's jurisdiction over the disqualification of a member of the house is limited by paragraph 7 of the Tenth Schedule.

This was against the Supreme Court's basic structure concept, which established the fundamental characteristics of the Constitution in the "Kesavananda Bharati case." The parliament was unable

to make any amendments to doctrine of basic structure, hence it should be preserved. Among these characteristics, the feature of Judicial Review was changed under the tenth schedule, and clarity was needed. The courts had to adopt a liberal approach to interpret so that the Supreme Court and High Courts have review jurisdiction in such matters involving the review of a speaker's decision. To lift the embargo which was imposed by the Tenth Schedule, which stripped the Courts of their review jurisdiction, the power of review was required. The power of review is essential because, without it, the courts would never have questioned the veracity of the disqualification imposed by the speaker's decision due to their inability to do it.

In the 1992 case of *Kihoto Hollohan v Zachillu*<sup>1</sup>, the issues surrounding the bar on the court's jurisdiction were raised. It is known as the case in which the Supreme Court's constitution bench examined in depth the numerous provisions of the 52nd Amendment to the Constitution, which inserted the Tenth Schedule. The Supreme Court was asked whether the Speaker's dominant role breached the idea of Basic Structure, which states that certain basic characteristics of the Constitution cannot be changed by legislative changes, as stated in the landmark case of *Kesavananda Bharati vs State Of Kerala*<sup>2</sup>. The Supreme Court concluded that paragraph 7 of the Tenth Schedule essentially barred all remedies under Article 136, Article 226 and Article 227 of the Constitution, which was being addressed by applying Article 368 subclause 2. The Chairman's and Speaker's judgments on member disqualification were found to be legal, but they were subject to judicial review by the court. As a result, this decision implied that the actions of the Speaker of the House were legal and binding, but that they may be contested in court.

In another case, *Rajendra Singh Rana v. Swami Prasad Maurya and Others*<sup>3</sup>, broadened the meaning of the words "voluntarily giving up membership." It was decided that a letter from a chosen party member to the Governor requesting that he summon the pioneer of the opposing party to form a Legislature amounted to a demonstration of purposefully renouncing enrollment in the party of which he is a chosen component.

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<sup>1</sup> *Kihoto Hollohan vs Zachillhu And Others* AIR 1993 SC 412

<sup>2</sup> *Kesavananda Bharati vs State Of Kerala* AIR 1973 SC 1461

<sup>3</sup> *Rajendra Singh Rana v. Swami Prasad Maurya and Others*, (2007) 4 SCC 270

### **Impact of Anti – Defection Law -**

Several controversies over how the legislation works have emerged over the years. Does the law, while discouraging defections, limit a legislator's ability to vote according to his or her conscience, eroding his or her independence? Is the law stifling healthy intra-party dissent and debate? Is it preventing elected officials from addressing their constituents' concerns in opposition to the official party line? Should Speaker, who is usually a member of the ruling party or coalition, decide on defections, or should it be decided by an independent authority like the Election Commission?

The anti-defection law's flaws and inadequacies have been highlighted by India's nearly 35-year experience with it. Defections which harmed political stability and were fueled by the attraction of political office and other financial benefits, therefore the anti-defection statute was enacted. The bill, on the other hand, runs against key democratic norms such as a legislator's representational duty, his ability to hold the government accountable, and the House's deliberative decision-making process. There have also been instances where this law has failed to prevent defections, and in some circumstances, defecting members have been appointed to government ministerial positions.

If a legislator votes against the party whip<sup>4</sup>, he is disqualified under the anti-defection law. As a result, members are obligated to follow the party whip in order to keep their House seat. The bill raises concerns about the legislator's position. For starters, it prevents legislators from speaking their minds in the House. Two, it severs the link between the voter and the elected official in terms of accountability. Three, it skews the power balance between the administration and the legislative by limiting a member's ability to hold the government responsible. Four, it permits party leaders to compel MPs to vote according to their orders, resulting in significant decisions in the House being made by a few party leaders.

While the anti-defection law was enacted to prevent political defections and maintain government stability, it also prevents legislators from carrying out their duties properly. In a parliamentary system, legislators are supposed to make their own decisions when deciding on a position on a topic. A member's decision may be influenced by a combination of public interest, constituency

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<sup>4</sup> Roshni Sinha and Prachi Kaur, Anti – Defection Law: Intent and Impact, PRS India, 4-8, (2019)



interests, and political party ties. If a member is required to vote along party lines on every Bill or motion, this fundamental freedom of choice may be jeopardised. Even if a member's perspective differs from that of his party's leadership, he does not have the right to vote as he sees fit. For example, in a debate over river water sharing between states, MPs representing constituencies from various states may be required to vote in unison, although having opposing opinions, in order to avoid being removed from office.

Because of the anti-defection rule, most legislative decisions are made by a few party leaders rather than the entire legislature. Political parties in India routinely issue whips on issues that are up for a vote in Parliament. This means that whomever controls the party leadership has the authority to provide orders to all legislators. As a result, rather than voting based on the beliefs of all MPs, the House will vote based on the wishes of a few party leaders. This transforms Parliament from a deliberative body to one in which party leaders can decide on a vote on an issue unilaterally, without consulting members of their political party. As a result, the government just needs to consult with the leaders of the major political parties in Parliament in order to win a resolution in Parliament. If a single party has a majority in the House, this number for consensus may be cut further. If ruling party has majority in the House and the party leader issues a whip during a vote on an issue, the government's policy can be preserved without the need to gain support from other MPs inside or outside the party.

The anti-defection statute also severs the link between elected officials and voters. Citizens in India elect their representatives for a five-year period. They can assess the member's performance based on his parliamentary record during this period. A citizen might have strong feelings about land acquisition, for example. He may share his thoughts with the legislator and request that he vote in a certain way. If the legislator disagrees with this viewpoint, he must justify his decision. Citizens have the option to have their voices heard in the legislature, and if they believe the politician has failed to do so, they can express their discontent or vote the legislator out in the next election. This accountability process, however, is broken by the anti-defection law. Every member is obligated to vote in accordance with their party's instructions. By claiming that the party whip forced him to vote a certain way, he may easily defend his voting actions and acquit himself of this representational responsibility to his constituents. If a party whip is given, an MP representing a coastal seat where large-scale fish trawling supports the local economy may be forced to vote in

favour of a Bill. If a constituent from his constituency questions his support for the subject, the MP may claim that he didn't have an option because of the anti-defection law. He would lose his position and be unable to advocate for the citizens' interests on other matters if he deviated from the party line. This limit elected officials' accountability to citizens even further.

Political defections aren't just a problem in India. Anti-defection legislation does not exist in mature democracies such as the United States, the United Kingdom, or Canada. If a member deviates from the party line, the party may issue orders or impose pressure. Legislators, on the other hand, are not disqualified for disobeying their party's directions. Whips, for example, are frequently issued by political parties in the United Kingdom. Individual MPs and MLAs who defy the whip keep their membership in the legislature (but their party may initiate disciplinary action against them). Only six countries, out of the forty that have an anti-defection statute, have one that requires legislators to vote according to party directives. The remaining countries only disqualify MPs if they are discovered to have resigned or been expelled from their political party. India, Pakistan, Bangladesh, Guyana, Sierra Leone, and Zimbabwe are the six countries that disqualify legislators who violate the party whip.

### **Loopholes in the Law –**

#### **1. Speaker's Power –**

As Rule 6 of the Tenth Schedule shows, the Chairman or Speaker of the House is given broad and total authority in deciding matters involving the disqualification of members for defection. It should be remembered, however, that the Speaker is still a member of the party that nominated him or her for Speaker. It is not possible to expect the Speaker to behave impartially in situations involving his or her political party in such a given scenario. Mr. K.P. Unnikrishnan, was a member of Congress party in the Lok Sabha, remarked, "By making the Speaker the solitary repository of all judgement, you are asking him to cause havoc." The ability to determine such matters could be handed to the High Court, Supreme Court, or the Election Commission as a remedy to the problem. However, given the existing backlog of court cases and the difficulties surrounding the Commission, the solution appears to be unworkable.

The election commission and the Dinesh Goswami committee on electoral reforms, appointed by the V.P. Singh government in 1990, recommended that the President or the Governor of the States be given the power to decide on the issue regarding disqualification given under the Tenth Schedule, acting on the advice of the Election Commission. However, no revisions to the Act have been enacted to give effect to these proposals, and as a result, the Speaker's powers in matters relating to member disqualification remain unaffected.

2. What constitutes 'voluntarily giving up'- Rule 2(1)(a) of the Tenth Schedule states that if a member of the House voluntarily gives up his political party membership, he will be disqualified from the party.
3. When no individual stand on the part of members- The anti-defection law, according to Rule 2, categorises party members as loyal to the party's rules and policies, restricting the legislator's capacity to criticise the party's wrongdoings, bad policies, leaders, and laws.
4. Issue with merger provision - Rule 4 of the Tenth Schedule appears to have a legal gap that exempts members from disqualification in merger procedures. The clause is intended to protect members of a political party if their original political party merges with another, as long as at it has atleast two-thirds of the legislature party in question agrees to the merger. The fault appears to be that the exception is created based on the number of defections rather than their cause.
5. Judicial Review - It is outside the jurisdiction of all courts, including the Supreme Court under Article 136 and High Courts under Articles 226 and 227 of the Constitution, to examine the Speaker's decisions in this regard, according to Rule 7.

### **Conclusion** –

The anti-defection law failed to achieve its goal of preventing political defections and maintaining political stability. Furthermore, the law has unintended implications that prevent legislators from carrying out their responsibilities properly. The legislator is unable to act on his own conscience and judgement, and hence cannot fulfil his constitutional obligation to hold the government accountable. The law has also hampered voters' capacity to hold their elected officials responsible.

For these reasons, it might be worth it to propose repealing the anti-defection statute. Several changes have been introduced over the years to modify various areas of the statute. One of the key goals of the law's introduction, for example, was to ensure the government's stability. As a result, some organisations have suggested that the law's application be limited to votes that influence the government's stability, such as no-confidence resolutions and money measures. This would also rule out the upper houses of parliament, such as the Rajya Sabha and state legislatures. In 2010, a Member of Parliament submitted a private member's bill that included this provision. Another area of reform has been the establishment of an independent adjudicating authority to decide on legal disqualifications. Several experts have stated that the Speaker's office may not be able to achieve this criteria. As a result, it had been proposed that defection cases be decided by the President (for the federal government) or the Governor (for the states), based on the Election Commission's binding advice. This is comparable to how questions about legislators' eligibility on other grounds, such as holding a profit-making office, are decided under the Constitution.

When the anti-defection law was introduced, it was intended to reduce political defection. Rule 4 of the Tenth Schedule appears to have a legal gap that exempts members from disqualification in merger procedures. The fault appears to be that the exception is created based on the number of defections rather than their cause.