

Plugging the Loopholes: An Analytical Study on the Need to Strengthen the Anti-Defection Law

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Abstract— Political parties play a crucial role in a parliamentary democracy. The stability of a government in Parliament or a State Legislature depends on the continued majority of the political party or coalition. The current practice of defections due to horse-trading or solely to change the government is a manifestation of unethical political practices that violate the democratic mandate and undermine our democracy. The Anti-Defection Law, the Tenth Schedule, was introduced into the Indian Constitution in 1985 to ensure governance stability. To prevent political defections, the Tenth Schedule included provisions for disqualification from the House. Members of the House ridiculed this, as a disqualified member immediately contests a by-election and becomes an MP or MLA again. Recently, Manipur, Karnataka, Telangana, and Maharashtra have witnessed cases of unnecessary delays in resolving disqualification petitions for defection. This raises questions about the Speaker's impartiality. To what extent is it appropriate to grant a two-thirds exemption for political party mergers? To answer these questions, this research paper has been prepared with the aim of analyzing the loopholes of the Tenth Schedule of the Indian Constitution and presenting appropriate suggestions.

Index Terms— Defection, disqualification, democracy, mandate, merger, split, tenth schedule.

I. INTRODUCTION

"The purpose of the Tenth Schedule is to curb the evil of political defection. If its Loopholes are not addressed through appropriate amendments, this Schedule will become a constitutional travesty." – Justice A.K. Mathur [¹]

Democracy means rule of the people, fulfilled through the electoral mandate of the people. In a large democratic country like India, stability in governance is essential for smooth development and protection of the mandate. Defection by political party members for toppling the government or abandoning their party for personal gain is eroding the very roots of our democracy in India. The recent defections in Manipur, Madhya Pradesh, Karnataka, Arunachal Pradesh, and Maharashtra for the sake of change of power once again raise questions about the provisions of the Anti-Defection Law. The Tenth Schedule. Whether the current law is achieving its objective? Are the provisions in the Tenth Schedule sufficient to prevent defection? Should the Speaker be an Adjudicating authority for defection cases? Is the provision allowing merger of political parties not a violation of the mandate of the people? And does the Tenth Schedule not violate the freedom of speech and expression of MPs and MLAs?

II. REVIEW OF LITERATURE

A. G.C. Malhotra, *Anti-Defection Law in India and Commonwealth* 4(New Delhi, 11th ed., 2015) - The book describes the origin and development of the Anti-Defection Law. It also gives a detailed description of the defection that took place in the Parliament and the State Legislatures. This book helps to understand

committees and commissions recommendations regarding reform of Anti defection Law. The status of defection in various countries of the world is also mentioned in this book.

B. Kashyap, Subhash C., and Shaunak Kashyap. "Anti-Defection Law and Parliamentary Privileges", 4th Edition, Volume 2. New Delhi: Mohan Law House, 2023- The book covers the evolution of anti-defection law in India, the role of the Speaker at present the impact of mergers on the mandate and latest judgements in the same.

III. RESEARCH PROBLEM

The Indian Constitution's theoretical framework for prohibiting defection is proving ineffective, leading to the rise of mass defections in governance.

IV. RESEARCH QUESTION

What are the loopholes of Anti Defection Law and what amendments should be proposed?

V. RESEARCH OBJECTIVE

This research paper aims to highlight the loopholes of Anti Defection Law, including suggesting amendments.

VI. RESEARCH HYPOTHESIS

The Anti Defection Law fails to protect the democratic mandate.

VII. RESEARCH METHODOLOGY

Doctrinal methodology has been used in this research. The research work has been done through primary and secondary data such as Indian Constitution, 10th Schedule Anti-defection Law, magazines, websites, judicial decisions, commission reports etc.

VIII. RESEARCH SCOPE AND RESEARCH LIMITATION

In the presented research, the evaluation of the Anti-Defection Law is limited to the information available on the internet, study of judicial decisions and study of reports of commissions and committees.

IX. HISTORICAL BACKGROUND OF THE TENTH SCHEDULE

In India, the "Aaya Ram Gaya Ram" politics became quite prevalent in the 1960s and 1970s. In 1967, Gayalal, a Haryana MLA, brought the issue of defection to light by switching parties three times within 15 days. The Constitutional Amendment Act, 1985, incorporated the Tenth Schedule into the Indian Constitution as an Anti-Defection Law to address the problem of defection. In 2003, the 91st Constitutional Amendment abolished the exemption for splitting a political party in paragraph 3 of the Tenth Schedule.

X. LOOPHOLES OF ANTI DEFECTION LAW

A. The Tenth Schedule does not define a political party.

B. The lack of a definition of voluntarily giving up the political party

Paragraph 2 of the 10th Schedule specifies two grounds for defection, the first of which is voluntarily giving up from one's political party. However, the Tenth Schedule does not contain any definition of voluntarily giving up the political party. In *Ravi S. Naik vs. Union of India* [2], the Supreme Court held that a member's conduct under Paragraph 2(1) (a) of the Tenth Schedule can be inferred to have voluntarily resigned from his or her membership. The most important question now arises: which conduct or actions of MPs and MLAs constitute defection or dissent? Often, MPs and MLAs are unnecessarily harassed by labeling dissent as defection, forcing them to repeatedly approach the courts.

C. Lack of provisions for determining defection in the event of a split

Although the exemption for a one-third split in a political party was removed by the 91st Constitutional Amendment Act, 2003, by deleting Paragraph 3 of the Tenth Schedule, the Nagaland NPF (Naga People's Front) split case (2017)[3], the Shiv Sena split (Maharashtra) (2022) [4], and the NCP (Nationalist Congress Party) split (Maharashtra) (2023) [5] are recent cases of political party splits where both groups

filed disqualification petitions before the Speaker of the Legislative Assembly on the grounds of defection. However, the Speaker did not disqualify either group even after determining the real political party, and the Shiv Sena split also resulted in the collapse of the government. The Speaker's reason for not disqualifying anyone was that this was neither a voluntary resignation from a political party nor a whip had been issued, so it was not a violation of the whip. The present law does not prohibit the split of a political party nor does it provide any standard for bringing MPs and MLAs under the ambit of defection in case of split, as a result of which split of political parties remains the main reason for instability in governance today.

D. Disparity in provisions regarding independent and nominated members

Under paragraph 2(2) of the Tenth Schedule, the Anti-Defection Law applies immediately after the election of an independent MP or MLA, whereas, under paragraph 2(3) of the Tenth Schedule, in the case of nominated member the anti-defection law applies six months after the member takes oath of office.

The Dinesh Goswami Committee report of May 1990[6] recommended that a nominated member, like an independent member, should be disqualified if he joins any political party at any time.

E. Lack of provision regarding the application of the Anti-Defection Law to expelled members

The anti-defection law is silent on the disqualification of members expelled from a political party. The question to be considered is that if the anti-defection law is not applicable to the expelled member and such member votes in violation of the direction of his former political party, then will the Anti-Defection Law apply to such a member when he is no longer a member of that political party?

F. Violation of MPs' and MLAs' freedom of speech and expression

Under Article 19(1)(a) of the Indian Constitution, Articles 105 and 194, a member of the House is constitutionally guaranteed the right to express both concurring and dissenting opinions. Paragraph 2(1)(b) of the Tenth Schedule provides that any MP or MLA who votes or abstains from voting in violation of the direction of his or her political party and who does not condone such vote within 15 days of such voting is guilty of defection and shall be disqualified from membership of the House. Paragraph 2(1) (b) of the Tenth Schedule clearly lays down the provisions for disqualification for violating the whip on the freedom of speech and expression of MPs and MLAs.

The Dinesh Goswami Committee [7], the 170th Report of the Law Commission in 1999[8], and the 2002 Report of the National Commission to Review the Working of the Constitution [9] have suggested limiting the whip to motions

of confidence or no-confidence and money bills.

In *Kihto Halohal vs. Jachillu* [10], the Supreme Court also called for a harmonious interpretation of the two provisions, which is possible only if the anti-defection law's objective, that is, to maintain stability in governance, is considered.

In the 2010, 2019[11], and 2022 [12] Constitutional Amendment Bills were introduced in the legislature to amend the Tenth Schedule and limit the enforcement of political party directives to merely preserving the existence of the government.

G. Para 4 of the Tenth Schedule, which provides exemption for merger of political parties, violates the democratic mandate

If we look at the cases of mergers that have taken place in various states in the last ten years, in which the Speaker has accepted the merger and rejected the disqualification petitions under Para 4, then in 11 states, a total of 14 mergers have been recognised by the Speaker, which are as follows: Merger of BSP (Bahujan Samajwadi Party) MLAs with Congress in Rajasthan, 2019[13]; Merger of Congress MLAs with BJP (Bartiya Janta Party) in Goa, 2019 and 2022[14]; Merger of Congress MLAs with TRS(Telangana Rashtra Samiti) in Telangana, 2019 [15]; Nagaland (Merger of NCP-NDPP(Nationalist Democratic Progressive Party), 2025) [16], Merger of Congress MLAs with People's Party of Arunachal (PPA) in 2016 [17]; JD(U) (Janata Dal (United)) MLAs with BJP in 2020 [18]. Merger of Congress MLAs into TMC (All India Trimul Congress) in Meghalaya, 2021 [19], Merger of PDF(People's Democratic Front) into NPP (Nationals People's Party) in Meghalaya in 2023 [20], Merger of JVM(P)(Jharkhand Mukti Morcha (Prajatantrik)) MLAs into BJP in Jharkhand, 2019 [21], Merger of JD(U) MLAs into BJP in Manipur, 2022 [22], Merger of SDF(Sikkim Democratic Front) MLAs into BJP in Sikkim in 2019 [23], Merger of Congress MLAs into AITC(All India Trimul Congress) in Tripura in 2016 [24].

Out of the above 14 mergers, six times the government has fallen and government has changed as a result of the merger. Thus, from the study of the cases of merger of the above states, it is known that Para 4 of the Tenth Schedule i.e. the merger clause is being used extensively for toppling the government and for personal interest.

H. Unnecessary Delay and Inaction by the Speaker in Disposing of Disqualification Petitions

Due to the absence of a time limit for disposing of disqualification petitions under Paragraph 6 of the Tenth Schedule, the Speaker has experienced unnecessary delays in disposing of disqualification petitions in most cases, and in some cases, such inaction has been observed, where the term of office has expired, but the Speaker has not taken any decision or action on the defection.

The role of the judiciary in this regard has been commendable, with judicial decisions in *Kiho Sema v.*

Speaker, Nagaland Legislative Assembly [25]; *Girish Chodankar v. Speaker of the Goa State Legislative Assembly and others* [26]; *Subhash Desai v. Governor of Maharashtra* [27]; *K.P. Vivekanand and Padi Kaushik Reddy v. Speaker of the Telangana Legislative Assembly and others* [28]; *Vinay Saxena and others v. Speaker of the Madhya Pradesh Legislative Assembly and others* [29]; reprimanding the Speaker for delaying disqualification petitions and directing that the disqualification petitions be resolved within the prescribed timeframe.

The landmark decision in *Kesham Meghchandra Singh vs. Speaker* [30], Manipur Legislative Assembly, was a landmark decision where the judiciary warned the Speaker that it could initiate suo motu proceedings under Article 142 of the Constitution for inaction and issued strict instructions to resolve the matter within three months.

In the said case, Justice R.F. Nariman suggested that serious consideration should be given to establishing a permanent, independent tribunal to adjudicate disqualification petitions based on defection, headed by a retired Supreme Court judge or a Chief Justice of a High Court.[31]

The Constitution Amendment Bill, 2010 and the Constitution Amendment Bill, 2019 [32] proposed a minimum period of 60 days for the disposal of disqualification petitions, and the Constitution Amendment Bill, 2022 [33] proposed a minimum period of 30 days and a maximum period of three months.

Dinesh Goswami Committee Report, May 1990 [34], Law Commission's 170th Report, 1999 [35], Law Commission's 255th Report, 2015[36] have suggested regarding the deciding authority for disposal of disqualification petition that - "The power to decide on the question of disqualification of a member of the House should be given to the President or the Governor instead of the Speaker or Chairman of the House, who will act on the advice of the Election Commission."

I. Merely disqualifying MPs and MLAs from defecting is not a sufficient deterrent

National Election Watch and the Association for Democratic Reforms (ADR) have presented in their report [37] that analyzed the self-sworn affidavits of 433 MPs and MLAs who defected and contested elections again during the past five years. The findings are as follows:

- A total of 433 MPs and MLAs defected between 2016 and 2020.
- Of the 433 re-elections contested by MPs and MLAs, 225, or 52 percent, won their re-elections and became MPs and MLAs.
- The average assets of MPs and MLAs contesting re-election have increased by ₹5.85 crore since 2016, a 39 per cent increase.
- There is no fear of disqualification from membership of the House mentioned in the Tenth Schedule for

defections.

XI. CONCLUSION AND SUGGESTIONS

The anti-defection law, i.e., the Tenth Schedule of the Indian Constitution, has currently proven ineffective in preventing defection. Amendments to the Anti-Defection Law should be proposed that would preserve the mandate, stabilize the government, and prevent unethical defections. In Amendments Individual rights of political Party members should be interfered with only to the extent necessary for the survival of the government. Here are the suggestions following-

A. A definition of political party should be added to Paragraph 1 of the Tenth Schedule.

B. Voluntary giving up from a political party should be defined

For Paragraph 2 of the Tenth Schedule, voluntary giving up a political party means that a member either expressly renounces his or her membership has been resigned or joins another political party.

C. Limit the scope of the whip

The prohibition of voting or abstention in violation of a political party's directive in paragraph 2 of the Tenth Schedule should be limited to directives issued in connection with a motion of confidence or no-confidence or a money bill, or a financial bill.

D. Post-election alliances or withdrawal of support from a political party should be considered defection

Any change in a political party's alliance after an election, withdrawal of support, or the formation of a new alliance and should also be considered defection under the Tenth Schedule. However, these provisions should be implemented only after the formation of the first government after the election, so that a government can be formed in the national interest. Failure of a pre-announced alliance or political party to secure a majority after the election would lead to a re-election. This situation would increase unnecessary election costs and waste time. Therefore, political parties are permitted to form alliances until the formation of a government.

E. Determination of Defection in the Event of a Political Party Split or Merger

The split or merger of any political party before the completion of the Lok Sabha's term should not be recognized by the House so that such splits or mergers cannot become a weapon for toppling the government. While the suggestion does not propose a complete ban on splits and merger during the government's tenure. The following proposal provides for a window period to validate political party splits and mergers.

F. There should be a window period to validate moral defection

If an MP or MLA leaves their party due to disagreement with the ideology of their political party or in the public interest, they should not be guilty of defection under the anti-defection law. Today, proving the moral or immoral reasons for defection is as difficult as separating milk from water. In South Africa, a window period was introduced through the 2002 amendment, which provided for a window period in Schedule 6A during which a member's membership is not terminated in cases of (1) "change in party membership," (2) "merger between parties," (3) "Split of parties," and (4) merger of parties.[38] However, this provision was abolished in 2009. Such a window period provision can be incorporated in the Anti-Defection Law in India to accommodate moral defection.

G. The rights and duties of an expelled member should be clarified in the Tenth Schedule

The following provisions should be incorporated regarding an expelled member- A member of the House who has been expelled by his political party will continue to be a member of the House. But the vote cast by an expelled member in a confidence or no-confidence motion will be declared invalid. If such a member joins another political party during his tenure, he will be disqualified on the grounds of defection.

H. There should be similar provisions for nominated members and independent members.

I. The provision regarding exemption from merger in paragraph 4 of the Tenth Schedule should be deleted.

J. Proposals for Amendment of Paragraph 6 of the Tenth Schedule

To achieve the objectives of the Tenth Schedule, the following amendments should be made in Paragraph 6 of the Tenth Schedule-

- Disqualification petitions on the ground of defection shall be referred to an independent body, the President in the case of a Member of Parliament, the Governor of that State in the case of a State Legislature, and the President in the case of a Union Territory. The President and the Governor shall decide such questions in accordance with the opinion of the Election Commission.
- A time limit of three months should be fixed for the decision.
- A provision should be added for suo motu cognizance of petitions and for the admission of petitions by non-members of the House.

K. A person declared disqualified on the basis of defection should be barred from contesting elections for a limited period and barred from holding ministerial or other remunerative positions

MPs and MLAs who defect should be disqualified and

disqualified from contesting elections for three years after the expiry of their term. Furthermore, Articles 75 and 164 should prohibit them from becoming ministers at the Centre and in the States, respectively, during this period of disqualification. Article 361B should be amended to include restrictions on holding other public political positions. Necessary amendments should be made to the Representation of the People Act, 1951, and the Indian Constitution for this purpose.

L. A member resigning from the House should be barred from contesting elections for a limited period and barred from holding ministerial or other remunerative positions

It is often observed that defecting members resign their membership to avoid the purview of the Anti-Defection Law. Although the right to resign from office is a fundamental right under Article 19(1)(k) and Article 21 of the Indian Constitution, this right must be restricted when used with the intent to toppling the government. It is suggested that elections be barred until the end of the term, and that ministerial and other political profit positions be barred for an additional three years. To achieve this, necessary amendments should be made to the Representation of the People Act, 1951, and the Indian Constitution.

M. The acts of those involved in horse-trading should be declared a crime under the Indian Penal Code.

N. The internal democracy of political parties should be strengthened.

O. Training programs on political ethics and responsibility in democracy should be organized for political party members.

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