CRITICAL ANALYSIS OF ANTI-DEFECTION LAW IN INDIA WITH REGARD TO PARLIAMENTARY DISSENT

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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 identity 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 dissent.

Introduction

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 witnessed a legislator defect thrice within a span of fifteen days and subsequently led to the coinage of the colloquial term 'Aaya Ram, Gaya Ram' to describe the practice of defection. The menace of defection continued in the 1970s as well and the Union Government led by Moraji Desai of Janata Party as the Prime Minister collapsed due to the defection by numerous members to join Bharitiya Lok Dal, a party headed by Charan Singh. It was in 1967 when the Parliament recognized the problem to defection and went on to pass a resolution and subsequently the Union Government constituted a committee headed by the then Union Home Minister Y.B. Chavan along with other eminent people such as C.K. Daphtary, M.C. Setalvad etc, to suggest solutions to this problem. The Committee made recommendations such as formulation of a code of conduct by political parties discouraging defection, disqualification from contesting polls for a specific period apart from loss of membership in case of defection motivated by lure of money or ministerial positions and mere disqualification of membership without bar on contesting polls if the defection was due to ideological differences. The Constitution (Thirty Second Amendment) Bill was introduced in the Lok Sabha to implement the reforms suggested by the Chavan Committee but the House was dissolved before the bill could be passed. In 1978, the Constitution (Forty Eighth Amendment) Bill was introduced proposing methods to check defection, but the bill was withdrawn due to widespread protest against the bill by members of the ruling party and
the opposition. It was only in 1985 that a constitutional amendment was successfully made incorporating into the Constitution, provisions pertaining to defection. The Constitution (Fifty Second Amendment) Act, 1985 was passed within a short span of time after the then President in his Presidential Address announced in the Parliament, the Government’s intention to bring in a law to tackle defection. The statement of reasons and object began stating “The evil of political defection has been a matter of national concern. If not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it”. The Amendment incorporated the Tenth Schedule to the Constitution of India apart from amending Articles 101, 102, 190 and 191 of the Constitution. This article analyses the implication of anti-defection law on dissent and freedom of voting and expression of legislators and suggests certain reforms. The scope of the article has not been extended to other aspects of anti-defection law which have drawbacks and need reform.

**Paragraph 2 of the Tenth Schedule and its Impact on Dissent and Freedom to Vote**

Paragraph 2 of the Tenth Schedule contains the bedrock of anti-defection law. It primarily lays down actions which can attract disqualification under the Tenth Schedule. With regard to members of a House belonging to a political party, there are two main grounds of defection which are:

a) Voluntarily giving up membership of such political party.

b) Voting or abstaining from voting in the House contrary to any direction issued by the political party without obtaining prior permission and when such voting or abstention has not been condoned by the party within fifteen days from the date of voting or abstention.

The term ‘voluntarily given up membership’ is not synonymous with the tendering of formal resignation by the member. It is a wider term and inference can be drawn by conduct and actions of the members. This was laid down by the Supreme Court in its judgement in the case of *Ravi S. Naik v. Union of India* where it was held that:

“The words ‘voluntarily given up his membership’ are not synonymous with resignation and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of that party. Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs.”

This judgement serves as a short in the arm for the Speaker to disqualify members who indulge in activities contrary to the party’s interest without tendering resignation. However, there have been instances of misuse of power by the Speaker at the behest of political parties, by interpreting the term ‘voluntarily given up membership’ in order to curb even mild forms of dissent. One such instance was the disqualification of eleven Members of

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Legislative Assembly of Karnataka in 2010 by the Speaker. Initially thirteen legislators wrote to the Governor expressing lack of confidence in the Government headed by B.S. Yedyurappa as the Chief Minister as they felt that there was widespread corruption and nepotism in the functioning of the Government. They requested the Governor to 'intervene and institute constitutional process'. The Governor wrote to the Chief Minister and asked him to prove majority and confidence in the House. The Chief Minister sought disqualification of the thirteen legislators under the Tenth Schedule by presenting an application to the Speaker. The Speaker issued show cause notice on 07/10/2010 to the concerned legislators and sought their reply within 10/10/2010. The floor test was to be conducted before 12/10/2010. In their reply to the notice, eleven legislators categorically stated that they were only opposed to present Government headed by B.S. Yedyurappa and not did not intend to withdraw support to B.J.P. party or indulge in floor crossing and will remain 'disciplined soldiers' of the party. Two legislators however replied stating that they had never written to the Governor and the letters were not signed by them. The Speaker subsequently disqualified the eleven legislators opining that the act of writing to the letter expressing lack of confidence in B.S. Yedyurappa amounted to 'voluntarily giving up membership' of the party in light of the interpretation of the term by the Supreme Court in Ravi S Naik v. Union of India. The Speaker also relied on certain media reports which suggested that the eleven legislators met leaders of opposition with regard to joining the opposition. It was also alleged that principles of natural justice were not followed as the Speaker acted hastily to disqualify the legislators before the floor test and with this intention, the legislators were given less than three days to reply to the show cause notice and moreover, the show cause notice was affixed on the doors of the legislators' official residences in Bangalore despite knowing well that these residences were not used as the session was not going on. The disqualified legislators approached the High Court of Karnataka by way of a Writ Petition and challenged the order of the Speaker. The matter was heard by a division bench and the judges did not concur with each other. While the Chief Justice upheld the order of the Speaker, Justice N. Kumar was of the opinion that the dissent expressed by the legislators was dissent within the party and this ought not attract disqualification under the Tenth Schedule unless they disobeyed the whip subsequently when the Floor test was to be conducted. Justice Kumar also opined that expressing lack of confidence in a particular individual as the Chief Minister does not amount to 'voluntarily giving up membership of the party'. To resolve the deadlock, the matter was referred to a third judge who concurred with the Chief Justice and hence the Karnataka High Court upheld the order of the Speaker. When the matter was heard by the Supreme Court on appeal, the Supreme Court held that expressing lack of confidence in the Government headed by B.S. Yedyurappa due to alleged corruption and nepotism did not amount to voluntarily giving up membership of the party, especially when the legislators have categorically stated that they shall continue to be loyal to the party. The Supreme Court criticized the Speaker for acting hastily and in such a manner which clearly

2 Ibid.
suggested that his intention was to help the Chief Minister win the floor test by ensuring that the eleven legislators do not participate in the floor test. The Court also held that the Speaker was wrong in inferring that the request made to the Governor by the legislators to institute 'constitutional process' is the same as request for facilitating imposition of President’s Rule.

What is evident is that anti-defection law is being misused to curb dissent within the party though this is not the objective of the legislation. It is alarming that dissent against the Government headed by the Chief Minister accused of corruption and nepotism was sought to be suppressed by invoking the anti-defection law. It is equally alarming that the office of the Speaker which is of paramount significance in a parliamentary democracy at times seems to tow the political party's line by flouting well established principles of law. Though this cannot be solely attributed to the Tenth Schedule, it sheds light on the high possibility of misuse. There is also a debate prevailing on status of a legislator who has been expelled by the political party he belongs to. While the Tenth Schedule does not expressly mention the implications of a legislator getting expelled from the party, the Supreme Court in its judgement in the case of G. Vishwanathan v. Honourable Speaker, Tamil Nadu Legislative Assembly⁴, held that after expulsion from a the party if a legislator goes on to join another party, it amounts to voluntary giving up of membership of the party. The Supreme Court went on to observe:

"Paragraph 2(1) read with the explanation clearly points out that an elected member shall continue to belong to that political party by which he was set up as a candidate for election as such member. This is so notwithstanding that he was thrown out or expelled from that party. That is a matter between the member and his party and has nothing to do so far as deeming clause in the Tenth Schedule is concerned. The action of a political party qua its member has no significance and cannot impinge on the fiction of law under the Tenth Schedule."

This view taken by the Supreme Court has created an anomalous situation to a certain extent. When a legislator is expelled from the party, as per convention the Speaker declares him as an ‘unattached member’ though this does not find recognition in the Constitution. At the same time, he is considered to be member of the political party for purposes of the Tenth Schedule though he has been expelled by the political party. Thus, though the party no longer considers a legislator to be its member, anti-defection law refuses to recognize the severing of ties and prevents the legislator from joining another party or act in any way which attracts disqualification under Paragraph 2. This position diminishes the individual identity of a legislator. There also exists a view that when a member cannot voluntarily tender resignation to the party without incurring disqualification, expulsion from the party for activities outside the House and according to the internal rules of the party ought not lead to disqualification if the expelled member goes on to join another party or disobey the

whip after being expelled. A division bench of the Supreme Court recognized the need for the Court to review the position of law laid down by it in the G. Vishwanathan case and requested the Chief Justice of India to constitute a larger bench. However, in 2016 a three judge bench refused to answer the questions referred to it by the division bench as the petitioners who were members of the Rajya Sabha had already completed their term.

Another flaw in the anti-defection law is the restraint it imposes on freedom of voting. As mentioned earlier, Paragraph 2 of the Tenth Schedule recognizes abstaining from voting or voting against any direction issued by the political party without prior permission or subsequent condonation as a ground for disqualification. It is true that a political party is an institution which stands for a particular ideology and endorses certain principles. However, it is unjust to cripple freedom of dissent and voting among members by subjecting them to anti-defection law. The Supreme Court recognized the crippling effect the Tenth Schedule had on freedom of voting in its landmark judgement in the case of Kihoto Hollohan v. Zachillhu. Although the Court upheld the validity of Paragraph 2 of the Tenth Schedule, made it clear that it was only in matters pertaining to confidence motion/ no confidence motion and matters integral to party’s policy based on which it enjoys support of the electorate, that a legislator is bound by direction issued by the party. The reason for this view was that otherwise the trust of the electorate would be breached.

It is pertinent to note that Parliament and state legislatures are institutions where there ought to prevail a culture of healthy debate and discussion. These institutions ought to serve as a platform for free exchange of ideas and this is also protected by certain privileges conferred on members of the Parliament and members of state legislature under Article 105 and Article 194 of the Constitution. However, this culture is not prevalent in its vibrant form partly due to curb on dissent and freedom of voting imposed in the Tenth Schedule. In other words, legislators find it unnecessary to raise their individual opinion especially when it is against the party’s stance, as they will be bound to vote according to the direction of the party when it comes to the stage of voting. If the Government intends to ensure that the bill is passed, all it has to do is convince leaders of parties instead of legislators. The recent Taxation Laws(Second Amendment) Bill,2016 was passed in the Lok Sabha within an hour of its introduction. It is also disheartening to know that legislators who are opposed to a particular bill and have expressed concerns regarding implications of certain bills, are forced to obey the direction of the party. The harsh reality is that the party high command and Whip which have no constitutional recognition binds legislators to vote in a particular way. There also arises a question regarding to whom the legislators are accountable. While the Constitution and principles of democracy mandates accountability to the electorate, anti-defection law in its present form has made legislators accountable only to the party leadership and not the electorate especially in the absence of the right to

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5 Amar Singh v. Union of India with Jaya Prada v. Union of India, Writ Petition (Civil) No. 317 of 2010(Supreme Court,15 /11/2010).
recall a legislator. A legislator may have to vote against the interest of the electorate merely to tow the party’s line and save himself from disqualification as not all legislators possess the calibre to disobey the party leadership in order to represent the voice of the electorate. A legislator is also unable to express dissent and protest within the party as it may lead to expulsion and yet be forced to follow Whips issued in order to avoid disqualification. It is true that a party’s manifesto and Prime Ministerial/Chief Ministerial candidate influences voters, but it has to be borne in mind that ultimately it is the elected legislators who by way of support facilitate the formation of the Government. Had supremacy of the party high command been envisioned and intended by the Constitution, the system in place would be one in which voters choose among parties and then the party allots representatives to each constituency!

While the Kihoto Hollohon judgement did impose restrictions on powers of the party to issue Whips, there are certain ambiguities. While the Supreme Court has held that whips can be issued only pertaining to matters which are an integral part of the party’s policies, there is no definition or explanation as to what matters are integral. Also, while Paragraph 2 allows the party to condone voting contrary to direction of the party, parties rarely condone such acts as dissent is viewed as indiscipline. It might lead to expulsion of the member and cripple the member as he is still deemed to belong to the party for the purpose of anti-defection law. It is pertinent to note that U.S.A. and U.K. have adopted a model in which dissent and defection is viewed as an internal matter of the party and not a matter which warrants legal intervention by the State. In 2013, the House of Commons by majority defeated the Government’s motion to bomb Syria. The members who voted against the motion included cabinet ministers apart from numerous members who belonged to the ruling party.

Anti-defection law is the wrong remedy to tackle the problem of corruption in voting by legislators. It is true that votes ought not be casted by legislators after accepting illegal gratification. However, the more appropriate remedy will be to punish such legislators for corruption and remove immunity from criminal prosecution when they indulge in corrupt practices. This essentially requires negation of the ruling of the Supreme Court in the case P.V. Narasimha Rao v. State where it was held that Article 105 (2) of the Constitution grants immunity to legislators from criminal prosecution though they voted in a particular manner after receiving illegal gratification for the same. The judgement recognizes Parliament’s power to punish such legislators for contempt but this is not an effective deterrent. By adopting anti-defection law to tackle the malaise of votes being bought, dissent, debate and individuality of the legislators have severely been compromised.

**Conclusion**

There exist other drawbacks and flaws in the current anti-defection law but the scope of the article has been confined to dissent and freedom of voting and expression. 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 judgements like Kihoto Hollohan. Paragraph 2 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.

Certain committees have rendered its opinion on anti-defection law. The Dinesh Goswami Committee on Electoral Reform,1990 has suggested that anti-defection law must apply only in context of confidence motions and financial bills. The 170th Law Commission Report on 'Reform of Electoral Law',1999 had suggested that Whips must be issued only when the Government's survival is on the line and not regarding other matters. Congress legislator Manish Tewari had introduced a private member's bill in 2010 to reform anti-defection law to restrict disqualification to violation of whip only in matters pertaining to confidence motions, money bills, adjournment motions and financial matters enumerated in Articles 113-116 and Articles 203-206. The reforms suggested by this bill is extremely convincing as there seems to be a balance struck between stability of the government and freedom of dissent. The National Commission to Review the Working of the Constitution headed by Justice Venkatachalaiah among other things suggested in its report of 2002 that defectors must be barred from holding public office and ministerial positions for the remaining term so as to prevent switching political parties with the intention of occupying ministerial positions and public office. The Commission also suggested that the vote cast by the defector to topple the Government during a confidence motion must not be counted.

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 interpretation of certain terms, effect of expulsion of a legislator by a political party, etc. With these reforms, the Parliament and legislatures will to a large extent reflect certain essential elements of democracy which include healthy debate and dissent.