

CURRENT AFFAIRS

WITH

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ELECTORAL REFORMS PART - I (ANTI-DEFECTION LAW)



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ANTI – DEFECTION LAW

CONTEXT

The Janata Dal (United) in September 2017 sought the disqualification of two MPs on the grounds that they had attended a rally of Opposition parties in Patna in violation of its directions. In response to this, Rajya Sabha Chairman recently expelled Janata Dal (United) leaders Sharad Yadav and Ali Anwar Ansari from membership of the Upper House after finding them guilty of defection.

BASICS OF ANTI-DEFECTION LAW

Before defining anti-defection law, we should understand the meaning of defection. When an elected representative joins another party without resigning his present party for benefits, it is called defection. Thus a defector is the one who is elected from one party and enjoys power in another party.

The word defection is also called as “Floor Crossing” in UK and “Carpet Crossing” in Nigeria. In India, the term used for this is “Defection”. Defection is commonly known as “Horse Trading”. Defectors are also called “Fence Sitters” or “Turn Coats”.

Historical Background

- Immediately following Independence, there was a period of stability in the Centre and the States that were mostly ruled by the Congress Party. However, sooner this euphoria of India’s Independence and the spirit of patriotism fuelled by the freedom struggle got over.
- The period of unprincipled defection and opportunism began to unfold in Indian politics, leading to repeated floor crossings and toppling of Governments, which served as stark reminders to the prophetic words of Winston Churchill about Indian politicians.
- Historians and writers often refer to this period of repeated and endless floor crossings as the “**Aaya Ram, Gaya Ram**” of Indian politics.
- Rajiv Gandhi, the then Prime Minister of India proposed a bill to remove the evils of defection. The Parliament passed the bill as a result of which Anti-Defection act came into force on 1st April 1985 through 52nd Constitutional Amendment.

“The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it.”

- The 52nd Amendment to the Constitution laid down rules and procedures for restricting members of Parliament and State Legislatures from defecting from one party to the other at their sweet will. For

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this purpose a new schedule, known as the Tenth Schedule was incorporated in the Constitution. Through this, the process by which legislators may be disqualified on grounds of defection was laid down in detail.

- **All proceedings in relation to any question on disqualification of a member of a House under this Schedule are deemed to be proceedings in Parliament or in the Legislature of a state.**

MERITS

- Provides stability to the government by preventing shifts of party allegiance.
- Ensures that candidates elected with party support and on the basis of party manifestoes remain loyal to the party policies. Also promotes party discipline.

DEMERITS

- By preventing parliamentarians from changing parties, it reduces the accountability of the government to the Parliament and the people.
- Interferes with the member's freedom of speech and expression by curbing dissent against party policies.

SUBJECT	PROVISION IN THE TENTH SCHEDULE
Disqualification	<ul style="list-style-type: none">• If a member of a house belonging to a political party:<ul style="list-style-type: none">▪ Voluntarily gives up the membership of his political party, or▪ Votes, or does not vote in the legislature, contrary to the directions of his political party. However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.• If an independent candidate joins a political party after the election.• If a nominated member joins a party six months after he becomes a member of the legislature.
Powers to disqualify	<ul style="list-style-type: none">• The Chairman or the Speaker of the House takes the decision to disqualify a member.• b. If a complaint is received with respect to the defection of the Chairman or Speaker, a member of the House elected by that House shall take the decision.
Exception	Merger <ul style="list-style-type: none">• A person shall not be disqualified if his original political party merges with another, and:<ul style="list-style-type: none">▪ He and other members of the old political party become members of the new political party, or▪ He and other members do not accept the merger and opt to function as a separate group.• This exception shall operate only if not less than two-thirds of the members of party in the House have agreed to the merger

Anti-Defection provisions under the Tenth Schedule Subject Provision in the Tenth Schedule

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EXCEPTIONS TO THE LAW

The provisions of anti-defection law as described under Tenth Schedule of the Constitution of India are **not applicable in the elections for the office of President, Vice-President or Rajya Sabha**. According to the clarifications issued by the Election Commission of India, voting or not voting as per free will in the Presidential election by any member of the Electoral College will not come within the ambit of disqualification under the Tenth Schedule of the Constitution of India. Thus, electors are at liberty to vote or not to vote in the Presidential election as per their own free will and choice.

IMPORTANT JUDGEMENTS AND RULINGS ON THE TENTH SCHEDULE IN INDIA

MAIN ISSUE(S) IN THE CASE	JUDGEMENT OF THE COURT AND THE NAME OF THE CASE
Whether the right to freedom of speech and expression is curtailed by the Tenth Schedule.	<ul style="list-style-type: none">The provisions do not subvert the democratic rights of elected members in Parliament and state legislatures. It does not violate their conscience. The provisions do not violate any right or freedom under Articles 105 and 194 of the Constitution. [Kihota Hollohon vs. Zachilhu and Others AIR 1993 SC 412]
Whether only resignation constitutes voluntarily giving up membership of a political party.	<ul style="list-style-type: none">The words “voluntarily giving up membership” have a wider meaning. An inference can also be drawn from the conduct of the member that he has voluntarily given up the membership of his party. [Ravi S Naik v. Union of India AIR 1994 SC 1558]
Whether a member can be said to voluntarily give up his membership of a party if he joins another party after being expelled by his old political party.	<ul style="list-style-type: none">Once a member is expelled, he is treated as an ‘unattached’ member in the house. However, he continues to be a member of the old party as per the Tenth Schedule. So if he joins a new party after being expelled, he can be said to have voluntarily given up membership of his old party. [G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly (1996) 2 SCC 353]
Whether paragraph 7 of the Schedule barring the jurisdiction of courts in cases of disqualification is constitutional.	<ul style="list-style-type: none">The paragraph seeks to change the operation and effect of Articles 136, 226 and 227 of the Constitution which give the High Courts and Supreme Court jurisdiction in such cases. Any such provision is required to be ratified by state legislatures as per Article 368(2). The paragraph was therefore held invalid as it had not been ratified. [Kihota Hollohon vs. Zachilhu and Others AIR 1993 SC 412]
Whether paragraph 6 of the Tenth Schedule granting finality to the decision of the Speaker/ Chairman is valid.	<ul style="list-style-type: none">To the extent that the provisions grant finality to the orders of the Speaker, the provision is valid. However, the High Courts and the Supreme Court can exercise judicial review under the Constitution. Judicial review should not cover any stage prior to the making of a decision by the Speakers/ Chairmen. [Kihota Hollohon vs. Zachilhu and Others AIR 1993 SC 412]

Whether a Speaker can review his own decision to disqualify a member under the Tenth Schedule.

Whether the Speaker of a legislature is bound by the directions of a Court.

Whether judicial review by courts extends to rules framed under the Tenth Schedule.

When can a court review the Speaker's decision making process under the Tenth Schedule.

- The Speaker of a House does not have the power to review his own decisions to disqualify a candidate. Such power is not provided for under the Schedule, and is not implicit in the provisions either. [Dr. Kashinath G Jhalmi v. Speaker, Goa Legislative Assembly (1993) 2 SCC 703]
- The Court cited the case of Kihota Hollohon where it had been said that the Speaker while passing an order under the Tenth Schedule functions as a Tribunal. The order passed by him would therefore be subject to judicial review. [Ravi S Naik v. Union of India AIR 1994 SC 1558]
- Rules under the Tenth Schedule are procedural in nature. Any violation of those would be a procedural irregularity. Procedural irregularity is immune from judicial scrutiny. [Ravi S Naik v. Union of India AIR 1994 SC 1558]
- If the Speaker fails to act on a complaint, or accepts claims of splits or mergers without making a finding, he fails to act as per the Tenth Schedule. The Court said that ignoring a petition for disqualification is not merely an irregularity but a violation of constitutional duties. [Rajendra Singh Rana and Ors. vs. Swami Prasad Maurya and Ors. (2007) 4 SCC 270]

ISSUES FOR CONSIDERATION

Defining 'Voluntary Membership'

Sharad Yadav has maintained that he never gave up his membership of the Janata Dal (United) and that he remains a member of the party. This raises the question: how did Naidu decide that Yadav had "voluntarily given up his membership" of the party when Yadav insists he did no such thing?

In Ravi Naik versus Union of India, 1994, the Supreme Court noted:

"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 membership of that party. Even in the absence of a formal resignation from the 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."

Two years later, in G Viswanathan versus Honourable Speaker, Tamil Nadu Legislative Assembly, the Supreme Court said, "The act of voluntarily giving up the membership of the political party may be either express or implied."

Banning dissent

The decision of Rajya Sabha Chairman raises questions about just how much dissent is permitted in the Indian political system. In his order disqualifying Yadav, he argued that any dissent from the party line has to be internal and behind close doors – disagreement in public is a sign of defection:

“Here, I would like to mention that a political party, which is an essential part of the democratic set up, works through collective decisions. Though one might have differences with the decision of the party, he is ultimately to follow the collective decision of the party. He has every right to air his views in the meetings and forums of the party before a decision is taken and maybe even after that also. But if a member of any political party starts criticising the decisions of his own party publicly, after the decision has been taken, and goes to the extent of attending and addressing the rallies of the rival political parties, it will fall under anti-party activity and in case, the person concerned is a member of the state legislature or Parliament, this amounts to voluntarily giving up the membership of the party, thus incurring disqualification under the Tenth Schedule.”

This ruling is made more troubling by the fact that most political parties in India do not have internal democracy and do not allow internal dissent. So, his decision makes it that much tougher for members to express dissent in public as it would attract charges of defection straightaway.

Therefore, a case may be made for restricting the law to confidence and no-confidence motions. The Dinesh Goswami Committee on electoral reforms (1990) recommended this change while the Law Commission (170th report, 1999) suggested that political parties issue whips only when the government was in danger.

Does it apply to Pre-Poll Alliances?

Sharad Yadav, a former president of the party, has claimed in his defence that his faction is the real Janata Dal (United) and it is the Nitish Kumar faction that has defected from him. In a press release, Yadav argued:

“It is also worth mentioning here that the Nitish faction violated the Constitution of the party by going out of the Mahagathbandhan formation of which was decided in the highest bodies of the Janata Dal (U). Therefore, they have left the party and not our group which is bound by the democratic principles and the Party Constitution.”

However, Naidu’s order strikes down the Mahagathbandhan argument:

“It [the anti-defection law] does not take cognisance of any political alliance made by political parties. The Mahagathbandhan was a political alliance of some political parties formed for the purpose of contesting the 2015 Legislative Assembly elections in Bihar and JD(U) was one of its constituents. As such, leaving or joining of any political alliance by political parties does not fall within the purview of the anti-defection law.”

The anti-defection law does not take into account pre-poll alliances. Thus, there arises a problem here.

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The underlying logic of the law rests on the fact that people vote for a candidate on the basis of his or her party, hence the party controls the actions of the legislator. However, in the case of a pre-poll alliance, voters will also take into account the coalition while voting. For example, if the Mahagathbandhan candidate in a particular constituency happened to be a Janata Dal (United) candidate, then even Rashtriya Janata Dal and Congress supporters would have voted for him – not because he was a member of his party but because he was part of the grand alliance. This puts a strain on the underlying logic of the anti-defection law of limiting defection to the party.

Second Administrative Reforms Commission has recommended that the anti-defection law be amended to protect the sanctity of pre-poll alliances. It has said that coalitions are now the norm and there is need to legally bind pre-poll coalition partners to their alliances.

The Law Commission also proposed that law should apply to pre-poll alliances with the condition that partners of such alliances inform the Election Commission before the elections.

RECOMMENDATIONS OF VARIOUS BODIES ON ANTI-DEFECTION LAW

BODY/COMMITTEE	MAIN REFORMS SUGGESTED/RECOMMENDED
Dinesh Goswami Committee on Electoral Reforms (1990)	<p>Disqualification should be limited to cases where (a) a member voluntarily gives up the membership of his political party, (b) a member abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence.</p> <p>The issue of disqualification should be decided by the President/ Governor on the advice of the Election Commission.</p>
Halim Committee on Anti-Defection law (1998)	<ul style="list-style-type: none">• The words 'voluntarily giving up membership of a political party' be comprehensively defined.• Restrictions like prohibition on joining another party or holding offices in the government be imposed on expelled members.• The term political party should be defined clearly.
Law Commission (170 th Report, 1999)	<ul style="list-style-type: none">• Provisions which exempt splits and mergers from disqualification to be deleted.• Pre-poll electoral fronts should be treated as political parties under anti-defection law.• Political parties should limit issuance of whips to instances only when the government is in danger.
Election Commission	<ul style="list-style-type: none">• Decisions under the Tenth Schedule should be made by the President/ Governor on the binding advice of the Election Commission.
Constitution Review Commission (2002)	<ul style="list-style-type: none">• Defectors should be barred from holding public office or any remunerative political post for the duration of the remaining term.• The vote cast by a defector to topple a government should be treated as invalid.