

## ANTI-DEFECTION LAW IN INDIA: NEED TO AMEND?

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### Abstract

The Indian Legislative Body plays a paramount role in strengthening the political bonding along with the integrity of the Nation. Where the entire political scenario depends upon the legislature and its members, due to the incidents like hopping around from one to another party, a number of dodgy legislators become responsible for the political disaster of the nation. Since after independence, India has experienced a bunch of defection dramas as an instrument of growing self-demands rather than fulfilling public interests, which concerned the then Government and therefore after a continuous struggle with the menace, the anti-defection law came into existence. But now-a-days a lot of issues are arising related to this said law as it is increasing the infection rather than preventing it. Does this law preserve the Parliamentary privilege of the legislators? Is it effective to combat such kind of corruption from India? Or whether there is a need to bring an amendment to this law? An attempt has been made in this article to encounter the loopholes of the act followed by the critical analysis and necessary recommendations in order to answer the arising questions.

**Keywords:** Defection, Constitution, Legislator, Disqualification, Reforms

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## INTRODUCTION

It has already been passed three decades since India has been struggling with the menace of Defection. Defection, derived from the Latin word '*defectio*' denotes the floor-crossing by a member of one political party to another party.<sup>1</sup> From the Constitutional view, it has been defined as "To abandon a position or association, often to join an opposing group."<sup>2</sup> Talking about defection, it has been the bane of Indian Parliamentary System for quite some time now. The vice of defection has been rampant and the trend has been increasing exponentially in the last few decades by destabilizing the Government drastically, for a Government may be tumbled over because of the defected politicians while converting their support from a minority to a majority party. Being in a democracy, the ballot acts as a determinant factor of people's will towards the Government. Where elections play a vital role for securing democracy through the evolution of political parties along with diverse methodologies; the virus like defection creates a big hole in that vibrant system leading to corruption. This malevolent scenario compelled Late Rajiv Gandhi to incorporate the Anti-defection law in order to curb the arising menace in Indian Politics. Finally, in 1985, the Parliament made 52<sup>nd</sup> Amendment to enforce the mandate of Rajiv Gandhi where the Anti-defection Law has been added as the Schedule X in our Constitution. The motive behind the implementation of this Anti-defection Law was to curtail the continuous struggle with this Political malaise. Thus, Schedule X of our Indian Constitution has often been treated as an antidote to strengthen the political parties as well as the Electoral Process. Now, if we delve deeper into the concept of Anti-defection, we have to aptly focus on the purpose of the introduction of Schedule X enshrined by the Parliament through the following Statement: "*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. With this object, an assurance was given in the address by the President to Parliament that the government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.*"<sup>3</sup> As a welfare-nation the steps taken by the Indian Legislature to implement the said Law are undoubtedly reflected as the instruments protecting and protracting the basic structure of our Constitution; but with passing time the question of effectiveness of the law grows louder and louder. Therefore, whether the said law is acting as a tool of Parliamentary disharmony or there is a need of stronger Anti-defection Law is still beyond any justification.

## HISTORICAL DEVELOPMENT<sup>4</sup>

The political drama of 'defection' has been popular since the fourth and fifth Lok Sabha Elections i.e., during the period of 1967-1972 where India faced approximately 2000 defection cases among the 4000 members of the Lower House and the State Legislative

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<sup>1</sup> [http://indialawjournal.com/volume3/issue\\_1/article\\_by\\_jenna.html](http://indialawjournal.com/volume3/issue_1/article_by_jenna.html)

<sup>2</sup> The Constitution (Fifty Second-Amendment) Act, 1985,

<sup>3</sup> The Constitution (Fifty Second-Amendment) Act, 1985,

<sup>4</sup> Subhash C. Kashyap, The Anti-Defection Law-Premises, Provisions and Problems, 11 JPI (1989) 9 at 9.

Assemblies as well. The situation went beyond the control of the Parliament when, half of the members of Lok Sabha shuffled between parties more than once.

**MARCH, 1971:** Among the members, one of them was identified to commit defection only to be a Minister for a limited period of five days. It was collected from the statistics that usually in each day more than one member was absconding and in each month at least one or two State Governments devastating because of the infection spread by defection. *Even 50.5% of the legislators of the State Assemblies itself shifted their political parties in order to affiliate with another party. The fact that 116 out of the total number of 210 defectors of the States were appointed in the Councils of Ministers provides the enough evidence that the bait of the Government contributed a vital role in the malady...*

**DECEMBER 8, 1967:** This vindictive condition became as a matter of concern for the Lok Sabha because of which a non-official proposal regarding the formation of a high level committee was approved.

**MARCH, 1968:** Consequently under the leadership of Y.B. Chavan, the then Home Minister, a High Committee of the political parties' representatives and the experts was established to settle the dispute of frequent floor-crossing by making some recommendations on 21<sup>st</sup> March.

#### **Recommendations by Chavan Committee:<sup>5</sup>**

- i. A code of conduct should be abided by the each and every political party amongst their members.
- ii. While committing the act of defection, the defecting person must be disqualified from exercising his rights as a legislator although he will be permitted to take a stand.
- iii. If defection is committed because of getting pecuniary profits as well as the temptation of his office, then he will additionally be restrained from taking a stand for a particular period along with being disqualified.

But the recommendations given by the Committee were in vain.

**MAY 16, 1973:** After considering all of the attempts being futile, 32<sup>nd</sup> Constitution Amendment Bill referring a Joint Committee for both the houses was introduced by the Government of India in the Lok Sabha itself. But the comical fact is that before starting discussions of the Joint Committee, the Lok Sabha got disbanded, so the bill was lapsed. The drama headed towards a humorous state when another bill was introduced on the ground of defection. After conducting deliberations, the motion for the Bill was reserved by the ruling and opposition parties as well as the other members of the Lower House.

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<sup>5</sup> K. N. Singh, Anti-Defection law and Judicial Review 38 JPI 32 (1992)

**DECEMBER, 1984:** However, the drama reached a climax after Rajiv Gandhi grabbing the position of Prime Minister with a thumping majority vote in the general election conducted where the Congress owned 401 seats in the Lower House.

**JANUARY 17, 1985:** Concerned with this political disorder, the then Government envisioned to introduce a Bill for converting the country into defection-free and accordingly in front of both the Parliament Houses and President of India the 52<sup>nd</sup> Amendment to the Constitution including the said Anti-Defection Bill was passed. But as the time went on, the defection became stronger due to which the demand of deleting the Schedule X has grown gradually and hence the 91<sup>st</sup> Amendment took place in 2003.

### **PROVISIONS UNDER SCHEDULE X:<sup>6</sup>**

The popular Anti-defection Law, as contained under the Schedule X to the Constitution, was introduced through the 52<sup>nd</sup> Constitution Amendment Act (1985) by implementing the provisions relating to defection. The main provisions of this schedule are summarized as follows<sup>7</sup>

- i. An elected member of Union and State Legislature, elected as a candidate representing a specific political party, and a nominated member of Union and State Legislature, also a member of that political party during taking the seat, would be disqualified on the ground of defection provided that if he willingly gives up his membership of that political party or votes or abstains from voting in the Parliament Houses in contrary to any direction from such political party. But if an independent member of the Union or State Legislature joins any political party after the election, he will be disqualified for defection.
- ii. A nominated member of Union or State Legislature, but not a member of any political party during his nomination and also who has not been any political party member before the expiry of the six months from the date of taking his seat will be disqualified if after the expiry of six months he becomes a political party member.
- iii. When a legislative party decides to merge with another party not supported by not less than two-thirds of its members, will not be disqualified.
- iv. A special provision has been implemented for the person elected to the office of the Speaker or the Deputy Speaker<sup>8</sup> of the House of People or the State Legislative Assembly or the Deputy Chairman of the Council of States or the State Legislative Council, in order to disunite the connections with his political party without causing disqualification.
- v. The Chairman or the Speaker of the Union Legislature has been empowered to implement rules-regulations to effect the provisions of the Schedule X, by the approval or disapproval of both the Houses.

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<sup>6</sup> The Constitution (Fifty Second-Amendment) Act, 1985,

<sup>7</sup> M.P. Jain, Indian Constitutional law (2010)

<sup>8</sup> [http://164.100.47.132/LssNew/abstract/disqualification\\_on\\_ground\\_of\\_de.htm](http://164.100.47.132/LssNew/abstract/disqualification_on_ground_of_de.htm)

- vi. The presiding officer of the House will decide whether a member of Union or State Legislature can be a subject to the disqualification and also this question will be determined by an elected member of the House on that behalf.

The changes brought in the Ninety-first Amendment (2003)<sup>9</sup>; act as an active tool to regulate the maximum limit of the structure of the Council of Minister in order to restrain any defecting person from continuing any public office. As per the Amendment, the Prime Minister along with the number of the other Ministers in the Union Council of Ministers shall not cross the maximum limit of 15% of the overall strength of the Lower House. Similarly, in the State Council of Ministers, the overall strength of the members including the chief Minister shall not cross the limit of 15% out of the entire strength of the State Legislative Assembly. Previously, the Schedule X provided that the exemption on the ground of disqualification is granted on the basis of split by 1/3 members of the Central or State Legislature, which have been removed in this amendment in order to make the defectors free from any sort of protection.

### **MERITS & DEMERITS OF THE LAW**

On the basis of various interpretations by the citizens and Bodies, a number of merits and demerits can be cited while examining the effectiveness of the anti-defection law:

#### **MERITS**

The said law acts as a strong weapon to stabilize the Indian Polity by checking the drama of party-switching of the legislators.

- 1) As a protector of uniformity and democracy, the law is considered the creator of a political nexus along with a detrimental motive whenever a coalition of Government by various political parties occurs for snatching the power from the opponent.
- 2) It also aids democratic relocation of parties by merger and it is desirable from the candidate that he should abide by the policies of the party whose support makes him a stand in election. Anti-defection law guarantees the political ethics through disqualification of such corrupt candidates.

#### **DEMERITS**

In spite of being treated as a political vacuum cleaner, it has revealed several loopholes resulting in the failure to prevent the vice.

- 1) It fails to distinguish between the concept of dissent and defection by limiting the scope of the Parliamentarians' privilege to dissent, which creates dictatorship in the party to keep the flock together instead of maintaining party ethics. It amounts to the breach of Parliamentary privilege if a member inside the House cannot opine against the party whip.

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<sup>9</sup> The Constitution(91st Amendment) Act,2003; Article 361B of the constitution of India

- 2) It also allows certain disparity between independent and nominated member that just because of being the former one, he is disqualified on joining a party whereas the latter is not.
- 3) Also this law remains silent when a legislator gets involved in corruption outside the domain of Legislature.
- 4) The issue regarding the impose of decision-making power on the presiding officer can also be criticized on the ground that he may misuse this power due to his lack of legal knowledge and involvement in the corruption.

## COMPARATIVE ANALYSIS WITH OTHER COUNTRIES

Overall, the number of national constitutions throughout the world that adopted a sort of provision of anti-defection is 40. Only the **Israel Constitution** imposes penalties on the offenders committing defection by restraining them to grab their seat in the Union Legislative Body. So, it only warns the defectors through implementing penalties, but does not forbid them to commit Defection, whereas the rest 39 Constitutions only provide the loss or forfeiture of the defectors to obey the Parliamentary command. Where the Indian Constitution considers expulsion as the punishment of defection, but the Constitutions like Fiji, Panama etc. levy some strict mandatory regulations for the parties.

## LESSONS FROM US & UK

Although the phenomenon of defection is not unique in U.S.A politics, but their legislative body adopts a generous approach towards defection by governing the electoral system without having any defection laws in spite of facing a number of defection cases.<sup>10</sup> According to U.S. legislature, a member of the Parliament House can vote any party without being anxious about disqualification in the election. Even though there is no specific law governing the party discipline, but a certain control has been vested in the leading party members as to impose the sanctions over the defectors for maintaining party discipline strictly. Also this control power has protracted its scope by containing the expulsion of a defector from a legislative bloc. The argument formed in contrary to the sanction has been stalked from the 1<sup>st</sup> Amendment (Bill of Rights) to the USA Constitution. The grounds of free speech of any legislator and the variation of right to free coalition of a political party were the basis of the arguments against the sanctions. The *BOND v. FLOYD*<sup>11</sup> case was the first case raising the issue regarding rights of a legislator. The facts herein collected that Julian Bond, a legislator, had been disqualified by the House on the condition that he could not exercise his rights as a legislator. By reversing this decision the U.S. Supreme Court held that the decision of the House was contrary to the 1<sup>st</sup> Amendment to the Constitution and the defected legislators had an onus to take a stand over the controversies instead of being subjected to the disciplinary actions by the party members. Hence, the Court gave this

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<sup>10</sup> Michael Stokes, When freedoms conflict: Party discipline and the First Amendment, 11 J. L. & Pol. 751, 753 (1995)

<sup>11</sup> 385 U.S. 116 (1966)

verdict in order to extend the rights including fair speech, free speech and coalition guaranteed by the 1<sup>st</sup> Amendment over a defected legislator.

India learned a great lesson from the Britain Parliament, where discord does not create any discrimination at all. If we focus on the English Bill of Rights (1869), the Article 105 of the Indian Constitution is found to be stemmed from Article 9 of the English Bill of Rights (1869)<sup>12</sup> providing the right to free speech on the British Parliament. UK law followed the footprints of US laws by implementing no anti-defection law, only the cases of defection are administered by a bunch of rules of the specific party. As per the recommendations of the Nolan Committee, the dissention is either regulated or more in quantity, and it is often used for the long-served legislators who have already come near the retire period or the members having disputes on the community interests. Therefore, such a speedy and thoughtless approach for Parliamentary dissention should not be desirable in a democratic country like India.

Name of the Country	Existence of defection	Existence of defection law	Anti-Defection Law
U.K	Yes	No	
U.S.A	Yes	No	
Australia	Yes	No	
South Africa	Yes	Yes	Section 47 of the Constitution:- A member if ceases to be a member of the party that nominated him loses membership of The Parliament.
Germany	Yes	No	
Bangladesh	Yes	Yes	Article 70:- A member shall vacate his seat if quitting from or votes in contrary to the directions given by his party, then it will be denoted by the Speaker to the Election Commission.
Kenya	Yes	Yes	Section 40:- A member of any party who resigns from his party has to vacate his seat, this will be decided by the Speaker, and it may be appealed by the member

<sup>12</sup> English Bill of Rights, 1869, Art. 9: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament



			before the High Court.
Singapore	Yes	Yes	Article 46:- A member must vacate his seat, if he resigns or if he is expelled from his party. Article 48:- The question related to disqualify a party member will be decided by the Parliament.

## JUDICIAL INTERPRETATIONS

### 1. *Kihoto Hollohon v. Zachillhu and Others*<sup>13</sup>

In the sphere of Indian Legal System, precedents always act as a strong source of law. Hence if we concentrate on the essence of the precedentson defection, we can easily experience several landmark judgments like *Kihoto Hollohon v. Zachillhu and Others* (1992) that has shaken the chair of the judges as well as the Parliamentarians. The main issues that rose in this judgment were: (1) whether the implementation of Schedule X limits the right to free speech and expression or not, (2) Whether on the grounds of disqualification, the proviso of Paragraph 7 of the Schedule X providing the exclusion of the bar of jurisdiction of the courts of constitutionally valid or not, (3) Whether the grant to finalize the decision of the speaker or Chairman of any House mentioned in the Paragraph 6(1) of the Schedule X is constitutionally binding or not.

With regard to these issues, the Court clearly gave the verdict that the Anti-Defection Law cannot infringe the right to freedom of speech or expression or any kind of Parliamentary Privilege as it strives for identifying the practical importance to apply the decorum of the political code of ethics. Also the Court held that the decision making power vests in the Presiding Officer only and the final authority is given to the Indian Judiciary and the process of judicial review once the decision has been passed. The *obiter dicta* of the Court was that the said law strengthen the political parties with control power over the members and as a result sometimes a party can prevent its members to exercise his vote for the minister ship.

### 2. *Ravi S Naik v. Union of India*<sup>14</sup>

Another landmark ruling in this context of Anti-defection law was the case of '*Ravi S Naik v. Union of India*' (1994). The issues raised from this case law were as follows:

- i. Whether resignation amounts to voluntarily giving up or quitting the membership of a specific political party or not,

<sup>13</sup> AIR 1993 SC 412

<sup>14</sup> AIR 1994 SC 1558



- ii. Whether the Speaker of the Lok Sabha or Vidhan Sabha should be bound by the instructions and orders given by the Supreme Court or not.
- iii. Whether the Schedule X can come under the ambit of Judicial Review or not.

With respect to the issues framed, the Supreme Court observed that the phrase 'voluntarily giving up membership of a political party' has a broader scope in the domain of Indian Politics. Also it can be interpreted from the behavior of any member that he was willingly resigned from the membership of his political party. The judgment regarding the second issue was passed by referring the *Kihoto Hollohon* case where it was held that the Speaker would have the power like a Tribunal on passing a judgment; hence the Speaker should be bound by the orders and commands given by the Supreme Court only. Now, addressing the last issue, as the Schedule X is completed an instance of procedural law; so violation of the Schedule X rules would amount as a procedural anomaly, a subject matter of the Judicial Review.

On the grounds of defection, some recent judgments have also been passed in India which was allied with the issue of disqualification by the speaker of Indian Legislative Body. The cases like *Shri Avtar Singh Bhadana v. Shri Kuldeep Singh* (2008) are the exact references for that issue. In case of *Shri Rajesh Verma v. Shri Mohammed Shahid Akhlaque* (2008), the issue was upraised whether the stories published in printed or the electronic media can be treated as the circumstantial evidence of defection or not. The order of the Speaker was that it cannot be claimed for justification why the news in the media would be false.

## RECOMMENDATION

In order to cover the arising question of effectiveness of the said law, a variety of Committees have raised their voices in favor of the reform of anti-defection law. The recommendations given by the Dinesh Goswami Committee (1990) and the Election Commission were that the decision-making power on ground of disqualification should be vested with the President of India or Governor with the assistance of the Election Commission and disqualification should be occurred to the member voluntarily giving up the party membership or abstaining from voting against the party whip in a confidence or no-confidence motion. The Law Commission also in the 170<sup>th</sup> Report (1999) was in opinion that the exemption of splits and mergers from disqualification should not be granted as followed in 91<sup>st</sup> Amendment and the political parties or pre-poll electoral fronts during the danger of the government should abide by the whips.<sup>15</sup>

By considering the approaches proposed by the committees, it can be opined that in order to reconcile the conflicts regarding the efficacy of anti-defection law, there is a strong need to bring an amendment to the Schedule X in which the recommendations can be implemented in realm that

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<sup>15</sup> <http://www.legallyindia.com/Blogs/Entry/schedule-x-of-our-constitution-a-myth-or-a-reality>

- 1) No discrimination between the independent and nominated members should be existed,
- 2) If a legislator gets involved in corruption outside the legislature which indirectly affects the Electoral process and Parliamentary Structure, will be held to be disqualified.
- 3) The decision-making power should be vested with a separate body as a watchdog that is free from political contingency and having sufficient legal knowledge or experience instead of presiding officer.
- 4) Only during the danger or no-confidence motion of the Government, the directions of party whip should be abided by the members of the House; else the disqualification will be occurred.
- 5) Also it should keep in mind that Schedule X preserves the pure political structure and the duration of Government. So, as a safeguard of unified polity, the Indian Governance should adopt the lessons from US and UK practices.

## CONCLUSION

Since the passage of the Anti-defection law in 1985, it envisaged to bring down the entire drama of this malaise by putting the party members in a bunch of rules and regulations as well. But the question rose regarding the achievement of party loyalty is an allegory or veracity was stemmed from the demerits found by the experts, which endangers the Indian Polity rather than strengthening it. In one way it ensures the political ethics and party discipline, but on the other hand, the principles of the parliamentary privileges and democracy get infringed due to implementation of this said law. But the present set-up plays a major role to increase the rampant cases of defection, which creates a haphazard political order in the Contemporary India. Therefore, the issues come on the spotlight that dissent or defection-which is more acceptable? Or following the voters' will v. the commands of the party whip- which one should be considered? Thus in order to balance these demands and obligations, the recommendations should be adopted by bringing a new amendment. Also the other necessary measures like conducting Parliamentary debates, appointing a High Committee to review the balance between the party politics. Also the Schedule X should be amended in such a manner as not to impede the main rules of parliamentary along with the citizen democracy. The adoption of 'Non-violence' and the 'Satyagraha' methods as introduced by Mahatma Gandhi may be also the another justifiable approach in order to eradicate the corruption which was previously used to wipe out the Britishers and form an independent India. Hence, I would like to opine in favor of passing an amendment act by fulfilling the dream that fixes a duty of the Government to convert the law into real existence instead of being a myth.