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Anti-Defection Law in Political and Legal Realms: A Critical Analysis

Tanvi Chhabra

ABSTRACT

This paper makes an attempt to critically analyse one of the most contradictory laws passed by the Indian Parliament, i.e. Anti-Defection Law both from political and legal perspectives. The evolution of various provisions of the 10th Schedule and concerned amendments have been deeply studied from both ends. Insight has been made into the difficulties of its actual implementation through case studies. The study of confrontations between the Speaker's Office and the intervention of the judiciary has been given prime importance. Light has been put on the greater question of power distribution between legislature and judiciary. Conclusively, suitable reforms have been suggested to make this law more effective while keeping in consideration its several criticisms and flaws.

Keywords: Disqualification, Defection, Speaker, Tenth Schedule, Constitution, Contention, Judiciary, Judicial review, Resignation, Political, Voluntary, Merger, Reforms

INTRODUCTION

Anti-Defection Law came into existence through the 52nd Amendment of the Indian Constitution in 1985 during the tenure of Rajiv Gandhi as Indian Prime Minister. The basic principle behind its formulation was to restrain political defections[1] of legislators purely on selfish motives in relation to money and lucrative posts which kept on happening in Indian Democracy since its inception. This law wanted to put a stop on the 'Aaya Ram, Gaya Ram' narrative which became renowned because of Haryana MLA Gaya Lal's three consequent defections. Since then, it has been subjected to various forms of criticism and scepticism because of its fundamental principles and actual implementation.

1 Defection basically refers to a change of allegiance by the legislator from his/her original political party on whose symbol he/she contested election to another political party.

EVALUATION OF LEGAL PROVISIONS OF THE TENTH SCHEDULE

SPLIT PROVISION

Before the **91st amendment of 2003**, the erstwhile Tenth Schedule contained a provision regarding split cases which was later omitted in the aforementioned amendment. *This provision meant that no member will be disqualified from the membership of the house where she/he makes a claim that she/he and any other members of her/his legislature party constitute a group representing a faction which has arisen as a split in her/his original party and such groups consists of not less than one-third of members of legislature party concerned*[2].

This provision was omitted later as it was believed that this particular provision indirectly legitimized the toppling of ruling governments by encouraging factions within parties by luring them through money or muscle power. It was also contemplated that less than one-third of members do not represent the majority opinion of members of a political party. This provision was gravely misused in two particular instances which were the driving factors in the omission of this provision later on. These two instances belong to the fall of governments under then Prime Ministers, Mr. V.P. Singh and scepticism. The National Front government formed by Mr. V.P. Singh was a vigorous response to INC for him being neglected and side-lined in the party. This government was an absurd mixture of liberals, leftists, and right-wingers which once again ascertained the collapse of political ideologies in political groups and strengthened the need for laws such as that of Anti Defection Law. This government was expected to fall later or sooner and it so happened when BJP pulled out its support from the government on the issue of Babri Masjid demolition. Similarly, Mr. Chandrashekhar who was an "unhappy" minister in V.P. Singh's government formed an alliance with INC which was just looking for the accurate time to get back in power and roll the numbers in Parliament. Even after passing of such a law known as anti-defection law, the formation of these unholy alliances and unstable governments represented an utter failure of implementation of this law. Legislators switched parties collectively in the name of the split without any fear of disqualification depicting a major loophole in the law that ought to be corrected.

2 164.100.47.194/loksabha/writeraddata/Abstract/disqualification on ground of defection

MERGER PROVISION

The next provision under consideration in this law is the merger provision which is quite similar to the split provision and has been one of those provisions which have been critically debated throughout.

Paragraph 4 of the 10th Schedule contains this provision of a merger. To simply define it, in brief, *" No member will be disqualified from the membership of the House where her/his original political party merges with another political party and she/he claims that she/he and any other members of her/his original political party have become members of the other political party or of the newly formed political party provided not less than two-thirds of the members of the legislature party concerned have agreed to such merger*[3] *."*

This provision presents a major contradiction in the anti-defection law. This provision in a way establishes that political parties are permitted to defect but an individual legislator representing a dissenting voice can be disqualified. Allowing **2/3rd** members of a political party to become members of a new political party after their elections without taking into consideration the reason for the merger seems superfluous. This also poses a challenge to the existence of small parties in the legislature. Large political parties in opposition always wait for a perfect time to overthrow the ruling government if there is a minimal margin between the two. In this process, larger parties can very easily try to get the majority of members of small parties in the legislature on their side with full immunity as per the exemption mentioned above which may or may not be ideologically correct. It is often criticized on the basis that 'wholesale' defection is permitted but not 'retail' ones in context of split provision.

JUDICIAL REVIEW

Paragraph 7 of Tenth Schedule states that:

Bar of Jurisdiction of Courts*: Notwithstanding anything in this Constitution, no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of the House under this schedule* [4].

3 164.100.47.194/loksabha/writeraddata/Abstract/disqualification on ground of defection

4 Tenth Schedule of The Constitution of India

As very clearly elaborated in this Paragraph, Parliament while making and passing this historic law, wanted to send out a signal to the judiciary of the country that they possess enough calibre and stature to solve their legislative matters on their own and there is no requirement of interference by the judiciary of any sort at any stage. After the Kesavananda Bharati Case[4], this issue once again brought the problem of power-sharing between the judiciary and Parliament. Law like this which involved the question of democratic rights of elected legislators wasn't able to remain out of judicial scrutiny for a long time. It happened and thus a very significant judgment was delivered by **Apex Court in Kihoto Hollohan Case[5]** which is cited to date in various matters and cases related to disputes under Tenth Schedule. In this case, S.C. took up various matters and petitions together regarding several ambiguities in the Anti defection law which were not limited to only judicial review aspects of the law but a lot more than that.

On the matter of judicial review, the Supreme Court stated that *"To the extent that the provision grants finality to the order of the Speaker, the provision is valid. However, the High Courts and the Supreme Court can exercise the judicial review under the Constitution. Judicial Review should not cover any stage prior to the making of a decision by the Speakers/Chairman[6]."*

It clearly meant that the Speaker has full freedom to make decisions by staying under the ambit of the Tenth Schedule and Courts cannot interfere unless and until the decision is finalized. Judicial review can only be exercised after the final decision has been made by the Speaker.

There was a specific basis on which the Court made this judgment. The Apex Court held that, *"The Paragraph seeks to change the operation and the effect of Articles 136,226 and 227 of the Constitution which gives the High Courts and Supreme Court jurisdiction in such cases. Any such provision is required to be ratified by the State Legislatures as per Article 368 (2). The Paragraph was therefore held invalid as it had not been ratified[7]."*

As this was not duly ratified by more than half of the number of States at that time, this interpretation of the Apex Court was completely reasonable.

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5 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

6 Kihoto Hollohan Vs Zachillhu and Others - 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

7 Kihoto Hollohan Vs Zachillhu and Others- 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

SPEAKER'S OFFICE FUNCTIONS AS A TRIBUNAL:

This question was taken up by Supreme Court in **Ravi S Naik Case**[8], Court cited the following part of the Judgement in the Kihoto Hollohan Case which stated that "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." In the same case, the Court also noted any sort of procedural irregularity is immune from judicial scrutiny but in **Rajendra Singh Rana Case**[9] the Court explicitly held that if the Speaker fails to arrive at a decision or act on a complaint regarding any of his duties under Tenth Schedule, it won't be considered as a procedural irregularity but a violation of constitutional duties.

Though judicial review was validated by the Apex Court, Parliament has not made any formal amendment in anti-defection law to amend Paragraph 7. This once again hints at the sensitive balance of division of powers between judiciary and legislature.

SPEAKER'S POWER

The Speaker has the exclusive power and discretion to decide upon the matters relating to disqualifications arising under Para 2 of the Tenth Schedule. Speaker's powers have been elaborated under **Para 6(1)** of the 10th Schedule. Many aspersions regarding the dignity and impartiality of the Speaker's Office in lieu of it being sole authority in matters related to Para 2 have been raised from time to time.

Soon after passing of Anti Defection Law in Indian Parliament in 1985, it was challenged on the basis that it was constitutionally invalid as it violated the basic structure of the Constitution and Kesavananda Bharati Case[10] was cited according to which laws made by the Parliament cannot violate the basic structure of the Constitution. This matter was finally settled by majority judgment in favour of the Speaker under **Kihoto Hollohan Vs Zachillhu and Others[11].**

The majority judgment in this case remarked:

8 Ravi S. Naik vs Union of India- 1994 AIR 1558: 994 SCR (1) 754

9 Sri Rajendra Singh Rana & Ors Vs. Swami Prasad Maurya (2007)- Civil Appeal Nos. 766-771

10 Kesavananda Bharati Case Vs. State of Kerala - 4 SCC 225: AIR 1973 SC 1461

11 Kihoto Hollohan Vs Zachillhu and Others - 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

"The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far-reaching decisions in Parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in them should not be considered exceptionable[12]."

On the question of whether it was violative of principles of the basic structure of the Constitution, honourable Justice M N Venkatachaliah mentioned:

"*In such cases of experimental legislation, what is constitutionally valid and what is constitutionally invalid is marked by a" hazy grey line" and thus there is no litmus test of Constitutionality[13]."*

Paragraph 5 of the Tenth Schedule also grants a very dubious exemption to the Office of Speaker and to the Office of Deputy Speaker or any other office as such as the case maybe. According to this, anything mentioned in the Tenth Schedule in relation to disqualification is not applicable to the above-quoted Offices.

The extent of Judicial review in respect to Speaker's powers has already been discussed in the above section.

12 Kihoto Hollohan Vs Zachillhu and Others - 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

13 Kihoto Hollohan Vs Zachillhu and Others - 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

CASE STUDIES

CASE STUDY 1: KARNATAKA POLITICAL CRISIS (2019)

INTRODUCTION

Political Developments of 2019 which lead to change in power from the incumbent Congress JD(S) coalition to the BJP government in the Vidhana Soudha are one of the best examples to study gravity and use of Anti Defection Law in the realm of politics. Along with existing interpretations and meaning of the basic law underlined in the Tenth Schedule, new interpretations and expansion of judicial authorities' role came to fore. New questions also arose in the context of the Governor's office and his powers, but this study will be confined to the issues which pertained to Anti Defection Law.

In 2018, Congress JD (S) formed a coalition government in Karnataka with the sole motive of keeping BJP at bay even though the latter had the maximum numbers. BJP never digested this defeat and was always looking at perfect timing to overturn the government in place as they knew Congress and JD(S) are not all-weather friends in Indian Politics. In July 2019, BJP sensed that something was wrong and peculiar in the house of the coalition government and devised ways to exploit the situation to its best. Soon after this, resignations of 11 MLAs of JD(s) and Congress followed and two Independent MLAs stepped down as Ministers from the Cabinet. These developments exposed the instability of the incumbent government. All the resignations were submitted to the Speaker to act upon.

WHY RESIGNATIONS?

After the unfolding of all the political events in Karnataka, it was very much clear that why MLAs submitted resignations at that exact time. If BJP was actually able to create a faction amongst the MLAs of the coalition, why didn't they ask those "dissident" MLAs to vote in their favour if they move for a no-confidence motion against the government instead of resignations? There are two reasons in favour of the same. If their resignation would have quickly been accepted by the Speaker, then the total membership of the House would have reduced giving an edge to BJP to turn numbers

in their favour during the floor test. Secondly, in this scenario[14], they were immune from disqualification provisions of the Tenth Schedule. If these dissident MLAs would have publicly voted against, they were bound to be disqualified under the ambit of the Tenth Schedule for defying the whip of the party and voting against them. Moreover, without resignations, Speaker generally doesn't take up the issue of no-confidence motion immediately as soon as he is approached by the opposing party because he has to assure himself that the stability of incumbent government is really vulnerable and secondly Speaker is always aligned in favour of the ruling party.

FIRST CONTENTION: SC'S DIRECTION TO SPEAKER'S OFFICE

After Speaker K R Ramesh received the resignations, he stated that he needs an ample amount of time to scrutinize the resignations and he further mentioned that he has found fault with the 8 resignations submitted. Impatient MLAs who wanted their resignations to be accepted immediately as to minimize the threat of disqualification approached the Supreme Court against delay in scrutinizing resignations by the Speaker's Office. After hearing the MLAs case, the Supreme Court directed the Speaker to meet these MLAs personally and hear their case in regard to their resignations. This is the first issue of contention related to anti-defection law in the Karnataka Crisis. Here, the Supreme Court intervened and told the Speaker's office to speed up the process where the Speaker has sole authority of making decisions as provided by the Tenth Schedule. As mentioned under the section of Judicial review, the Supreme Court while passing the order in **Ravi S Naik Case**[15] said that the Speaker's office functions as a tribunal while acting under Tenth Schedule. Thus, the Supreme Court on these lines has, from time to time intervened and justified their actions. If we try to figure out the actual reason behind Speaker delaying this process in a political context, we find that this was a deliberate action on part of Speaker to some extent so that the ruling coalition gets enough time to get back their dissident MLAs and avoid suspected breakdown of the government.

14 If resignations would have been accepted by Speaker

15 Ravi S. Naik vs Union of India- 1994 AIR 1558: 994 SCR (1) 754

SECOND CONTENTION: CAN WHIP BE ISSUED TO REBELLED MLAS?

Exactly after 6 days of this, MLAs once again knocked the Supreme Court's door to expect some sort of stern direction to the Speaker regarding the same issue of acceptance of their resignations. On July 17 2019, after hearing the case of MLAs, the Apex Court told the Speaker to act in an apt time frame in regard to the decision on resignations which was completely anticipated. What was bewildering is that in addition to this the Supreme Court mentioned that 15 rebel MLAs who have resigned **'ought not to be'**[16] compelled to take part in House proceedings. This was the second issue that involved a new interpretation of provisions laid down under the Tenth Schedule.

According to **Para 2(1)(b),** a legislator will be disqualified on the ground of defection if he votes contrary to the direction given by the political party. If we try to comprehend this statement of the Supreme Court, the author is of opinion that this completely encroached upon the power of political parties to issue whip which was legally granted by Tenth Schedule. In that situation, if the coalition government would have failed to get these rebelled MLAs into their fold, then they were left with only one option: to issue whip to all its members to attend the session of the assembly during the Floor test. Explicitly, there were two possible outcomes of this action of issuance of a whip and perhaps was the best possible way for Congress- JD (S) coalition. Either MLAs could have voted in their favour or could have openly thwarted the whip and faced subsequent disqualification.

This part of the order was nebulous and was completely unwelcomed by the coalition government of Karnataka as they felt this as an obstruction in their political rights.

Among various interpretations of this part of the order, two major interpretations were made, each satisfying both sides. According to Mukul Rohatgi (representative lawyer of the rebelled MLAs), the Supreme Court has made it very clear through the phrase 'ought not to be compelled' that both Congress and JD(s) have no right to issue whip[17]. The second interpretation came from the Congress legislative party leader Siddaramaiah who said that it's their right to issue whip which is granted and laid down in the Constitution and no order can revert it.

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16 Pratap Gauda Patil and Others Vs State of Karnataka-, Civil Petition-872, 2019

17https://www.dnaindia.com/india/photo-gallery-karnataka-crisis-speaker-hails-sc-s-landmark-judgment-whip-will-not-apply-during-trust-vote-say-rebels-lawyer-2772822/will-take-a-decision-that-in-no-way-will-go-contrary-to-constitution-karnataka-speaker-2772825

Congress then approached the Supreme Court to have clarification on this order and they presented their case by saying:

"It whittles down the power of the political party to issue a whip to its legislators would be in the teeth of the provisions of the Tenth Schedule of the Constitution."[18]

Two reasons why this looked like an intrusive act of Supreme Court:

a) According to past precedents and judgments, Supreme Court's intervention in regard to provisions laid down in Tenth Schedule only extends to procedural lapses, judicial review of the final decision made by the Speaker, and failure on part of the Speaker to act in certain conditions as specified under the section of Judicial review above[19].

b) Secondly, this order was in contravention with the basic fundamentals of the Tenth Schedule which has always emphasized the rights and legitimacy of political parties.

THIRD CONTENTION: PROPOSED DISQUALIFICATION OF N MAHESH

The third issue which brought attention to the provisions of the Tenth Schedule once again was the disqualification proposed by BSP of their lone MLA in assembly. BSP asked Speaker's Office to disqualify their lone MLA N.Mahesh on the argument that he went against the party by not following the whip issued by the party high command regarding voting in favour of the Kumaraswmany government. To this MLA replied that he was asked to stay neutral by his party high command and he had no talk with the party's main leadership i.e. Mayawati. He further said that he followed their orders by not attending the confidence motion thereby remaining neutral[20]. Although the Speaker didn't take any action against him as demanded by BSP, he was expelled from party membership. He continued as Independent MLA and never supported BJP proving that supporting BJP was never his

18 https://www.aninews.in/news/national/politics/july-17-order-whittles-down-power-to-issue-whip-cong-tells-sc20190719160351

19 Section named 'Judicial Review' under Evaluation of Legal Provisions of Tenth Schedule

20 https://theprint.in/politics/karnataka-bsp-mla-abstained-from-floor-test-as-he-did-not-want-to-waste-his-vote/267276/

intention. Although this is all about political manoeuvring, two legitimate questions emanate out of this:

a) What is exactly meant by the political party's order to its MLAs to stay neutral during a confidence motion? Does it mean abstention during confidence or not attending the confidence motion altogether?
b) What if there is a difference between the stand of the party's high command in state and the party's national leadership considering the party in question is a national party? As in this case, N Mahesh alleges that he followed what was directed by the party's high command in the state and never had a word with national leadership on the same issue but the demand for disqualification came from Mayawati, the BSP supremo.

FOURTH CONTENTION: SPEAKER'S DECISION ON DISQUALIFICATION OF REBEL MLAS

After the formation of the BJP government in the state, Karnataka's speaker finally acted upon the resignations and he disqualified the 17 rebelled MLAs. He said that they all have incurred disqualification under **Para 2** of the 10th Schedule. He further mentioned that he gave them time to prove their resignations were genuine and voluntary but he didn't find their case to so and thus arrive at this decision[21]. This meant that the Speaker disqualified the MLAs under Para 2(1)(a) and not under the Para 2(1)(b) under which disqualification is incurred for defiance of the party's whip or directions. If this is to be studied with the previous July 17 order of SC indirectly inhibiting the party's right to issue whip on rebelled MLAs, it shows that in spite of Congress & JD(S) affirming that they have every right to do so, that order was enforced and relevant. It is further proved by the Supreme Court itself when MLAs approached SC for judicial review of their disqualification order and sought a remedy. The Supreme Court bench thereby stated that suspicious acts before resignation by any legislator is valid for disqualification and hailed the Speaker's decision as correct[22]. Both these aspects proved that the disqualification, in reality, was incurred on the lack of genuineness in resignations submitted by MLAs, thus clearing uncertainty to some extent on July 17 order of SC.

21 https://www.news18.com/news/politics/resignation-not-genuine-says-speaker-as-he-disqualifies-3-rebel-mlas-till-2023-suspense-looms-over-14-others-2245033.html

22 Shrimanth Balasaheb Patil vs Hon'ble Speaker of Karnataka, Writ Petition- 992 of 2019

It is not to be believed that because the SC hailed the decision of the Speaker's Office in this case, that satisfaction of the Speaker while deciding matters of voluntary resignations cannot be questioned or reviewed under Judicial review. In the same judgment, the bench emphasized that the satisfaction of the Speaker in such cases as this is a valid part of judicial review.

The Bench remarked, *"Determination of whether the resignations were "voluntary" or "genuine" cannot be based on the ipse dixit of the speaker, instead, it has to be based on his "satisfaction". Even though the satisfaction is subjective, it has to be based on objective material showing that resignation is not voluntary or genuine, the bench held. The satisfaction of the speaker is subject to judicial review, it added*[23]*."*

The Bench further noted that as they have already pronounced Speaker's decision was constitutional and the disqualification was based on events prior to resignations, there was no question of debating on whether the resignations were deliberately not accepted by the Speaker in a suitable time frame or not. This whole instance further exposed the ineptitude of the Tenth Schedule to differentiate between legitimate and illegitimate resignation by any legislator.

The inability of the Speaker to take a suitable decision on resignations signified the misuse of the Speaker's Office for purely political motives. The same apprehensions were also cast by rebelled MLAs and order of the same Bench[24] led by Justice N V Ramana, Sanjiv Khanna & Krishna Murari.

The following statements establish the aforementioned:

a) Disqualified MLAs arguments: He is an MLA (while referring to Speaker) first. He didn't care for our stand against the anti-people government.

b) Bench mentioned: *"Parliament should reconsider strengthening certain aspects of the Tenth Schedule so that such undemocratic practices are discouraged. There is a growing trend of Speakers acting against the constitutional duty of being neutral. Additionally, political parties are indulging in horse-trading and corrupt practices, due to which the citizens are denied stable governments."*

23 Shrimanth Balasaheb Patil vs Hon'ble Speaker of Karnataka, Writ Petition- 992 of 2019- Bench of this case is being referred to

24 Shrimanth Balasaheb Patil vs Hon'ble Speaker of Karnataka, Writ Petition- 992 of 2019- Bench of this case is being referred to

Speaker not only disqualified them but also made them **ineligible** to become members of the Karnataka Assembly till the end of the term of Assembly i.e. 2023. This decision is very important to understand in the context of establishing a major difference between voluntarily resigning and being disqualified. There is nothing mentioned in the Tenth Schedule that specifies the term of disqualification of a member disqualified under the Tenth Schedule. This was a controversial decision and was overturned by the same Bench order as mentioned above while making a remark saying **"political morality"** can never be above **"Constitutional morality."** The order stated that "*the Speaker in his exercise of power does not have power under Tenth Schedule to indicate the period of disqualification or debarring them from disqualification."*

Before the advent of the 10th Schedule of the Constitution, Article 191 solely dealt with the disqualification provisions and stated various grounds for disqualification of a legislator apart from the ground of defection. **Article 191(1)** states other grounds apart from defection for disqualification whereas **Article 191(2)** which was added later on states that a person shall be disqualified if he/she has been disqualified under the Tenth Schedule. The only difference between is that in Article 191(1) it has been specified that a person shall be disqualified for being chosen as or being a member of the Legislative Assembly or Legislative Council whereas Article 191(2) only states that a person shall be disqualified for being a member of Legislative Assembly or Legislative Council. This is a major difference because according to the former, the member will cease to be a member of that assembly in the future as well on account of disqualification but according to the latter, i.e. clause 2 disqualification is meant only for being disqualified at that time and can be elected later on.[25]

Though it appears to be very straightforward, it is ambiguous in two ways:

a) Sub-clause (E) of Art. 191(1) mentions that this clause will be applicable if he is so disqualified by or under the law made by Parliament. It means it should be valid for the Tenth Schedule as it is also a law made by Parliament.

25 Article 191 of The Constitution of India

b) In case of disqualification under Article 191(2), it just states that a person shall be disqualified for being a member of the Legislative Assembly or Legislative Council but doesn't specify whether this is applicable for the entire tenure of assembly in session or that disqualified member can seek re-election during bypolls for that same term of assembly/council.

A lot of interpretations have surfaced from time to time but the opinion of SC has been made clear in this context through the aforementioned judgment.

Disqualification powers mentioned in Art. 191 (1) are vested with the Governor who consults his decisions with the Election Commission of India whereas powers under Article 191(2) have to be exercised by the Speaker, thereby emphasizing the perception of the Speaker's Office being exploited for political motives.

After Supreme Court struck down this debarment order of the Speaker, it was observed that there is no distinction between this kind of disqualifications and resignations by a member because disqualified MLAs also have a choice of contesting bypoll, with exception of a member who has resigned can become minister for 6 months without getting elected but a disqualified legislator cannot. This was criticized by many affluent sections of political analysts and activists who termed the Anti Defection Law as useless in real practice. It has been a bone of contention since then.

CASE STUDY 2: RAJASTHAN POLITICAL CRISIS (2020)

INTRODUCTION

Another Congress-ruled state after Madhya Pradesh i.e. Rajasthan witnessed excess of political conflicts which at one point signalled the fall of the incumbent government in the state. Notably this time Congress leadership switched on to active mode, thus indulging in early interventions and negotiations which saved the Congress party from another defeat. Though Congress successfully passed the floor test in Assembly, two very bona fide questions came forward regarding Anti Defection Law which are required to be answered.

ISSUE OF VOLUNTARY RESIGNATION

The first issue pertains to the definition of voluntary resignation. After Sachin Pilot, the Deputy CM, and his flock of 18 MLAs came out in open against their discontentment regarding the leadership of Ashok Gehlot and questioned his style of governance, the political battle began to unfold in the state. A division of opinion as to how to deal with this rebellion amongst the government was clearly visible between the party's leadership at 10 Janpath and Ashok Gehlot, CM of Rajasthan. Senior Leadership of the party wanted a more cautious approach so as to prevent another blow after Jyotiraditya Scindia whereas it became a matter of ego and reputation for Ashok Gehlot who was desperate to teach Sachin Pilot a lesson. This is the main reason which caused the Speaker to issue notices of disqualification to rebel MLAs under **Para 2(1)** of the Tenth Schedule. This clause states that an MLA can also disqualified on account of his voluntary resignation. We have already studied how even voluntary resignations are subject to the satisfaction of the Speaker i.e. whether he considers them to be bona fide or mala fide in the previous case study of Karnataka. However, this scenario is completely different from it as in this case, no resignation has been submitted by rebel MLAs to the Speaker. This can be better understood in light of the judgment delivered by Apex Court in **Ravi S. Naik V. Union of India**[26]. According to this, no MP/MLA need not formally resign from the party to get disqualified under the 10th Schedule. *Court noted, "The expression voluntarily giving up his membership is not synonymous with 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 was the basis on which the Speaker made his case. As anticipated, MLAs moved the High Court against this act of Speaker. They termed it as an act of stifling their voices and they said that they demanded a change of leadership in the most democratic manner. They not only defended themselves on the basis of the argument that they just expressed genuine dissent, but their plea also challenged the constitutional validity of Para 2(1) (a) of the Tenth Schedule while questioning voluntary resignation on the mere expression of disqualification[27]. To what extent this action of the Speaker can be termed correct in a representative democracy like ours is a pertinent concern. Yes, it is absolutely established by facts that these MLAs didn't protest in a closed-door party meeting, it was completely out in the open involving the media and they involved every tactic to target Ashok Gehlot personally.

26 Ravi S. Naik vs Union of India- 1994 AIR 1558: 994 SCR (1) 754

27 https://theprint.in/theprint-essential/heres-what-the-anti-defection-law-challenged-by-sachin-pilot-in-rajasthan-hc-says/467396/

In fact, MLAs justified their actions that this was just a way to get their voices heard to the party's high command as their genuine apprehensions continue to be neglected. Undoubtedly, this was more of a political move as Sachin Pilot always aspired to be Chief Minister since the formation of government in the state but at the same time, it cannot be denied he is also a Congress worker and is within his rights to raise legitimate questions. Still, if the party felt that this should not be conducted by party workers, they could have been expelled rather than being issued notices for disqualification.

The recent trend of judgments made by the Supreme Court involving merits and demerits of Anti defection law, it has been noticed that the credibility of the role of the Speaker's office continues to be questioned. In a case involving a Manipur legislator switching over from Congress to BJP, the top Court recommended:

"It is time Parliament had a rethink on whether disqualification petitions ought to be entrusted to a Speaker as quasi-judicial authority[28]*."*

After the High Court told the Speaker to give more time to MLAs to reply to notices, the Speaker C.P. Joshi moved the Supreme Court challenging HC's order where SC considered the larger question of democracy involved in this issue.

"Can the voice of dissent of MLAs be shut down like this in a democracy? This is not a simple matter. These are people elected by the public. The largest question is about democracy and how it will survive like this. This is for us not about disqualification of some people", Justice Mishra said.

However, Kapil Sibal while putting the stance of Speaker forward said if this was about dissent, they could have expressed it in party meetings. Adding to this, he said putting word in public about the government not having numbers and demanding a floor test, is not dissent rather destabilizing the government.

An antagonistic issue like this needs immediate action and attention. Ultimately, the solution to this issue will be to make a choice between the political party's supremacy and freedom of legislators.

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MERGER OF BSP MLAS

The second issue of disagreement was the merger of 6 MLAs of BSP with INC in Rajasthan. BSP had 6 MLAs in Rajasthan Assembly and all of them announced their merger with Congress. But to the surprise of everyone, BSP's national leadership said that they haven't given any nod to a merger of such sort and this has wiped out their party's presence in the state. In fact, they went on to the extent of terming this merger as the defection of 6 MLAs. Not only BSP, but BJP's MLA Mr. Dilawar also petitioned the Court terming this merger as unlawful. Though this case is in Rajasthan High Court now where the High Court has recently given a 3-month deadline to the Speaker to give a decision on the petition of Mr. Dilawar regarding this merger. It is to be noted that this 3-month deadline came after the Apex Court's judgment in the case[29] relating to alleged defection in the Manipur Assembly where the Court mentioned that the Speaker while acting as a Tribunal is bound to act in a reasonable time frame with the exception in exceptional circumstances.

MLAs argued that they were completely acting under the law while orchestrating this merger as according to **Para 4 (2)** of the 10th Schedule which only demands that 2/3rd MLAs of a party in the legislature are required to give their consent to the merger for the merger to be valid and consistent. Whereas BSP's national leadership refuted these arguments by saying that neither there was a merger of the original party at the national level or state level nor there was any split in the party which would have made this merger effective and legal.

During debate on the same issue in Court, Speaker's representative lawyer mentioned that if arguments of BSP are valid then why they were not valid when Congress itself made the same arguments during the issue of the Goa political crisis when 10 of 15 Congress MLAs said that they have merged with Congress although no national merger of such sort had taken place. It's been a year since this matter is in the Apex Court and no final decision has been delivered yet.

Para 4(2) of 10th Schedule: "For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if,

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not less than two-thirds of the members of the legislature party concerned have agreed to such merger."

The basis of ambiguity is on what is exactly meant by the word original party. One argument is that it just refers to the political party of any legislator and opposing this is the argument according to which it is being referred to party in a whole i.e. national party or state party depending upon the affiliation of the party concerned. If we refer to the explanatory material provided in the Tenth Schedule, we come to know that the original party (used in relation to a member of the House) means that the political party to which he belongs for the purposes of sub-para (1) of para (2). Though, it is not amply proven which argument is valid according to this definition, if we look at the spirit behind this merger provision, we will be able to arrive at a decision. If an explicit distinction has been made between the original party and legislative party, it must have been done so with a reason. In the author's opinion, the original party refers to the national /state party. Because if by mere consent of only 2/3rd members of the legislative party, a merger can be validated without acceptance of the party's national / state leadership, then this law fails to achieve its inherent objectives.

CONCLUSION: THE WAY FORWARD

After an in-depth study of anti-defection law and its actual implementation, the author is of firm belief and opinion that there is an urgent and immediate need for the following reforms to be adopted in Anti defection Law:

- Mergers & Pre-Poll Political Fronts: Merger provision is dubious on three grounds. It is just a revised form of erstwhile split provision, full of ambiguity as highlighted in the case study of Rajasthan, and has been grossly misused to form governments against people's mandate. In the 2019 Maharashtra Elections, we saw how BJP-Shiv Sena contested elections together as a pre-political front but then due to a clash of political motives Shiv Sena formed a government with the NCP-INC combine which was completely against people's mandate. Therefore, the provision of a merger should be deleted and pre-political fronts should be treated as political parties under the anti-defection law. The same recommendations were made by **the 170th report of the Law Commission.**

- Safeguarding dissent power of Legislators: Major criticism of this law comes on the ground that it curbs the right of dissent of an individual legislator. The same issue was addressed by the Apex Court in the **Kihoto Hollohan Case** where the majority judgment of the Court noted that this law does not subvert the rights of elected members and does not violate the right of freedom under **Article 105 & 194.** However, reality has been different in many instances. Though many analysts recommend that it can be solved only by complete revocation of the law but in the author's opinion this issue can be rightly addressed by implementing the following two changes:

a) Voluntary resignation should be limited to those circumstances only when the resignation is actually submitted by the legislator and should not be extended to the Speaker's power to disqualify a legislator on basis of its conduct. Moreover, voluntary resignation should be defined precisely.

b) Whip of a political party should only be limited to situations involving when the stability of government is in jeopardy like no-confidence motion, floor tests and matters pertaining to Money Bill. This will help a legislator to voice his/her genuine dissent regarding any crucial policy. A similar recommendation was made by **Dinesh Goswami Committee on Electoral Reforms (1990).**

- Power of Speaker: The minority view represented by Justice Verma in Kihoto Hollohan Case[30] raised concerns over the Speaker not satisfying the requirement of an independent adjudicatory body who can take decisions pertaining to matters like a disqualification. Not only in this case, but in many other judgments of the Apex Court, Court has recommended Parliament to review powers conferred to the Speaker's Office. **Dinesh Goswami Committee on Electoral Reforms (1990)**, **Election Commission**, and **Law commission's 255th Report** have recommended that matters involving Para2 of the 19th Schedule must be solved by the President/Governor as the case may be on the advice of the Election Commission like Art191(1). The author is of the opinion that instead of the President/Governor being conferred with the powers of Speaker under the Tenth Schedule, a separate independent quasi-judicial body should be made instead. There are three reasons supportive of this view, one that the Governor's office is already known to be misused politically, and allocating these powers to the Governor's office is in confrontation with the idea of federalism. Secondly, an independent quasi-judicial[31] body is more appropriate as we have already seen how the judiciary has constantly been playing an important role in matters relating to the 10th Schedule through its judgments and new interpretations. It would also help to keep a check on unwanted political influence on matters under the 10th Schedule. A crucial factor in this reform will be whether Parliament and political parties would ever come to a consensus on contracting their powers and submitting them to quasi-judicial authorities.

- Term of Disqualification: It has been commonly seen that disqualified legislators after being disqualified seek re-election in bypolls from the opposing party's ticket which leaves no considerable difference between resigning and getting disqualified. It is similar to what happened in the Karnataka political crisis. Therefore, a suitable amendment should be made in Tenth Schedule Para 2 according to which an MLA should be disqualified for at least till

30 Kihoto Hollohan Vs Zachillhu and Others - 1992 SCR (1) 686, 1992 SCC supl. (2) 651, AIR 1993 SC 41

31 Similar recommendation was made by Supreme Court in the case-Keisham Meghachandra Singh vs The Hon'ble Speaker Manipur - Under Civil Appeals 548-550 of 2019

the completion of the ongoing term of Legislative Assembly /Council. A similar recommendation was made by the **Constitution Review Commission of 2002**.

Appeal for reforms in the Tenth Schedule is not a recent or one-time thing. Non-implementation of these recommendations for so many years depict a lack of political will to initiate amendments in Anti Defection Law. All these reforms will make Anti Defection law no longer completely political party-centric. Instead, the implementation of these reforms will increase the rights and prerogatives of an individual legislator. Therefore, even though the idea of reforms in the 10th Schedule enjoys significant support among judicial authorities, activists, and analysts, a strong political will is vital and prerequisite.