

“Anti-Defection Laws in India- An Appraisal of the Effectiveness of the Law”

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ABSTRACT

India is one of the few nations in the world to have enacted an anti-defection law as part of its parliamentary democracy. This makes it one of the 23 Commonwealth nations to have such a law to prevent the crossing over of legislators to other political affiliations or parties. In India, the law finds genesis in the X Schedule, which came about in response to the dynamic political profile of the nation in the late 1970s, which were the years immediately after the emergency. Political Parties in the country became conscious and cautious about the outrageous disregard for the mandate of the electorate and this is where the debate originated. While the law was aimed to inculcate parliamentary discipline and decorum in parliamentarians, a growing faction of commentators claim that the law created more complexity rather than plugging the waterholes. While the legal framework was the first of its kind and hence lauded widely, the same has seen multiple instances of exploitation, which has often left the law as a toothless tiger and hence ineffective in situations calling for expeditious action. While the law introduced in 1985 harboured good intentions, these seem to be lost and as politics seem to become murkier with each passing day, it becomes imperative to have a relook at what the law is and what it can and perhaps should be.

Keywords: Defection, Legislative Assembly, Speaker, Voting

I. INTRODUCTION

The practice of ‘defection’ in Indian politics has always been the breeding ground of political instability and uncertainty in the country, often tending to shift the focus from ‘governance’ to ‘governments’. Defection may be defined as the practice of floor-crossing by a member of one political outfit to another.¹ Literally, it may be defined as the act of leaving a country or a political party to go to another one.²

The Indian Constitution, as far as the formation of legislatures is concerned, runs along the lines of the Westminster System of representative democracy, as practised in the United Kingdom. The short essence of such system is that he or she, who enjoys the majority support of the Legislature is chosen as the head of the government, which sums up the whole idea behind the concept of a representative democracy.

In India, the politics of defection have been the primary vices of the parliamentary system.³ The political landscape in India is a volatile one when it comes to the formation of

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¹ Nico Steytler, *Parliamentary Democracy - The Anti-Defection Clause*, 1 *Law Democracy & Dev.* 221 (1997).

² *Defection*, CAMBRIDGE ENGLISH DICTIONARY (2008).

³ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 338 (Justice Jasti Chelameswar, 8th ed. 2018).

governments, making Members of Parliament (or MPs) something more than servants of the electorate. Due to the rampant practice of MPs abandoning ship and joining rival camps, it often tends to put politics in the forefront rather than sincere service to the electorate. The practice of defection tends to destabilize governments and disregards the verdict of the people, which is why it is touted as an undemocratic practice. It must also be understood that a member of the Parliament, either of the Lok Sabha (Lower House) or the Rajya Sabha (Upper House) may change political inclination out of actual conviction when he or she genuinely disagrees with the party's line of thinking, in which case, he or she ought to resign from membership of the house and seek re-election thereto. However, in daylight, what happens is by a far stretch not half as principled as it ought to be. Defections are often the result of lust for money or power and are often done in exchange for guaranteed appointment to ministership or other high portfolios.

Hence, a law on anti-defection was regarded as a move in the right direction to uphold the ideals of democracy in India. The law aimed to put out a simple and clear message that only the electorate have a voice in forming the government and it should be the utmost priority of a democracy to make sure that their voice is respected.

II. THE HISTORY OF DEFECTIONS IN INDIA

The very conception of the idea of an anti-defection law for the Indian Parliamentary Democracy originated from the events as they unfolded around the Fourth General Elections of India in February 1967. The elections of 1967 were a water-shed moment in Indian political history, in that they led to the introduction of coalition governments in India. The 1967 General Elections were perhaps the last known experience of India going to polls at the Union and at the States, simultaneously. Hitherto, the Indian National Congress (referred as '*Congress*') had dominated the landscape of Indian politics, but the results of the 1967 polls saw them lose as many as nine states in which they had earlier been in power. Their majority in the Lok Sabha had also been diluted greatly. Amongst this one of the states in which the Congress was expected to retain power was Haryana. However, this did not happen due to the formation of United Front governments in various states including Haryana. One MLA Gaya Ram, an independent in Haryana, had parted ways with the Congress before the polls and had won from Hassanpur, Haryana. Despite the Congress winning majority in Haryana, multiple defections did not help the stability of the government. Amongst all the permutations, Mr. Gaya Ram having joined the United Front in Haryana, defected to the Congress party on the alleged resolution of leadership issues and returned to the United Front on being dissatisfied with the Congress leadership in Haryana. This led to the popular phrase, '*Aaya Ram Gaya Ram*' (Ram came and Ram went), which captured the essence of the volatile political landscape of the country with legislators shifting camps with astonishing frequency.

Before the 1967 fiasco, India had witnessed only about 500 defections, mostly seen in the States.⁴ However, in 1967, almost 550 out of approximately 3500 elected state legislators

⁴ H. R. Saviprasad & Vinay Reddy, *The Law on Anti-Defection: An Appraisal*, 11 STUDENT ADVOC. 116 (1999).

jumped camp⁵ and between 1967 and 1972, more than half of the legislators switched sides at least once.⁶ As a result of these large scale defections, political instability loomed large in multiple state governments, with the Congress facing the brunt of frequent defections from the party. A staggering number of independent candidates also added to the casual floor-crossing by such candidates who were being lured either by power or by money, which later came to be known as ‘Horse-Trading’.⁷

For the very first time had this problem plagued the Indian Parliament and State Legislatures and this led to the appointment of high-level committee by the Lok Sabha, to assess the situation. The committee, which comprised of legal and political stalwarts like M.C. Setalvad, J.P. Narayan and Madhu Limaye among others, sadly failed to lay the concrete framework to tackle defections and left the groundwork incomplete. It was after this that attempts were made to amend the Constitution to give shape and effect to the recommendations of that committee. In 1973, the government tabled the Constitution (32nd Amendment) Bill for the said purpose, which ultimately lapsed. After the failure of another attempt in 1978 by the Janta Dal government, the Congress government, backed by a significant majority in Parliament, took the task upon itself. The Constitution (52nd Amendment) Act, 1985 came into being and with it came Schedule X of the Constitution.

III. THE TENTH SCHEDULE OF THE INDIAN CONSTITUTION

Schedule X of the Constitution is a short schedule of eight paragraphs inserted in 1985 by means of the 52nd Constitution (Amendment) Act.⁸ Besides adding the Tenth Schedule, the Amendment also amended articles 101,⁹ 102,¹⁰ 190¹¹ and 191¹² of the Constitution. Popularly also known as the Anti-Defection Act, it lays down the procedure of disqualification of legislators if in case they defect to political parties other than the one on whose ticket they were elected. The Schedule also slates disqualification criteria for independent candidates. The Schedule has also gone through changes by means of the 91st Constitutional Amendment as well as interpretation by the Supreme Court. The provisions of the Schedule are discussed herein.

1. DISQUALIFICATION OF MEMBERS

➤ Members of a Political Party (Elected to the House)

The second paragraph of the Schedule¹³ lays down the fundamental reason why the law came into existence, and that is, the disqualification of the members of a House on account of

⁵ Subhash C. Kashyap, *The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India*, 10 ASIAN SURVEY 195-208 (1970).

⁶ H. R. Saviprasad & Vinay Reddy, *The Law on Anti-Defection: An Appraisal*, 11 STUDENT ADVOC. 116 (1999).

⁷ J.K. Mittal, *Parliamentary Dissent, Defection and Democracy*, 35 J.I.L.I. (1991).

⁸ Constitution (Amendment) Act, 1985, No. 22, Acts of Parliament, 1985 (India).

⁹ INDIA CONST. art. 101.

¹⁰ INDIA CONST. art. 102.

¹¹ INDIA CONST. art. 190.

¹² INDIA CONST. art. 191.

¹³ INDIA CONST. Schedule X, ¶2

their defection. In **sub-paragraph (1)**, it is clearly stated that if a member of a political party, who has been so elected in an election as a candidate of that political party, voluntarily gives up his membership of such political party, he shall stand to be disqualified from the membership of such House.

Paragraph 2(1)(b)¹⁴ then talks about disqualification of a member of a political party if such member votes or refuses to vote in a House, contrary to the directions issued by such political party in that regard, unless he obtains prior permission from the leadership of the political party or the voting of such member has been condoned by the party's leadership within 15 days of such vote.

➤ **Members/Non-Members of a Political Party (Nominated to the House)**

Paragraph 2(1)(b)(i)¹⁵ outlines the political affiliations for members of a Political Party nominated to the House. A nominated member, if already a member of a Political Party on the date of his or her nomination, shall be deemed to belong to such party and if not a member of any party on the date of nomination, the member shall be deemed to be a member of such party within six months of nomination.

Paragraph 2(3) lays down the grounds for disqualification of nominated members wherein it states that if a nominated member joins any political party after the expiry of six months from nomination, subject to Articles 99¹⁶ and 188¹⁷ of the Constitution, such member shall stand to be disqualified.

➤ **Independent Candidates**

Paragraph 2(2)¹⁸ lays down the disqualification criteria for independent candidates who have been elected to the house, not being set up as a candidate for any political party and such candidates shall stand to be disqualified if they become a part of any political party after their election to the House.

2. EXEMPTION FROM DISQUALIFICATION

While the general rule of disqualification shall operate if in case the members are indeed liable to be disqualified under **Paragraph 2** of the Tenth Schedule, there are certain members of each House, who are exempt from disqualification and certain scenarios wherein disqualification on ground of defection would be inapplicable.

Paragraph 4 of the Schedule talks about two outcomes of a merger of one political party with another. A merger under this paragraph, must be with agreement of not less than two-third members of the members of such political party, who are part of the House.¹⁹ As far as

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ INDIA CONST. art. 99.

¹⁷ INDIA CONST. art. 188.

¹⁸ INDIA CONST. Schedule X, ¶2

¹⁹ INDIA CONST. Schedule X, ¶4

the outcomes are concerned, **sub-paragraph (1)** states that a member does not stand to be disqualified if after a merger of his or her erstwhile original party with another party, such member claims to now be a member of the new political party so formed. Further, the members are also saved from disqualification, if after such merger, the members refuse to recognise the merger and prefer to function as a distinct faction altogether. In any of the above cases, members of the House are immune from disqualification and from the date of such merger, they become members of such new party or group, whichever outfit they opt to remain with.

Paragraph 5 of the Schedule speaks about exemption from the applicability of the Tenth Schedule for persons who have been elected to the House as the Speaker or Deputy Speaker of either the House of the People or any of the Legislative Assemblies of States or have been elected as the Deputy Chairman of Council of States or the Deputy Chairman or Chairman of the Legislative Council of a State. If in case any person is elected to any of the above-mentioned office, and by reason of such election, they give up membership of a political party which they were part of, immediately preceding the election and do not re-join the same party or join another party during the tenure of their office, they shall be exempt from disqualification. Such person shall also be exempt from disqualification if after the completion of such tenure, he re-joins the political party, whose membership he surrendered before assuming office.

3. DECISION MAKING

Paragraph 6 of the Schedule confers power on the Speaker or the Chairman of a House, before which the question of disqualification of a member has arisen, to answer on the question of disqualification of such member, with the decision of such Chairman or Speaker being final. If the question pertains to the disqualification of the Speaker or Chairman themselves, then the House may be called upon to elect a member of the House to decide on the disqualification and the decision of such member shall be final.

4. RULE-MAKING

Lastly, **Paragraph 8** of the Schedule confers power on the Chairman or Speaker of a House to make rules for giving effect to the provisions of the Tenth Schedule, followed by a laying procedure for a minimum period of thirty days.

IV. THE LOOPHOLES IN THE ANTI-DEFECTION LAW

Having discussed the provisions of the Tenth Schedule in detail above, it is of utmost importance to evaluate the performance of the law since its inception. The law has come under severe criticism at times of moral turpitude wherein a member is bound by the party whip issued by the political party's leadership. There are further criticisms about other multiple issues, relating to the decision-making authority, certain contradictions in the Schedule itself as well as the exigency of decision-making under the Schedule. Most of the multiple loopholes of the law have been elaborated below.

1. DISSENT- A GROUND FOR DISQUALIFICATION

One of the foremost criticisms of the law lies against Paragraph 2(1)(b) of the Schedule, which allows disqualification if any member votes contrary to the directives issued by the leadership of a political party or in fact, refuses to vote at all. This often opens up the debate of the morality of decisions and votes in a House conferred with the legislative duties of State. It is a question on the essence of a representative democracy, where the basic relationship exists between the member of the legislature and the people who elect him or her, rather than the member and his political party.²⁰ The essence of a representative democracy lies in the accountability of the elected to the electors.²¹ In such a background, if non-observance of voting on the lines of political whips leads to a the suppression of the voice of individual legislators, it carries a threat of undermining the spirit of a representative democracy. Not only does this restrict a legislator from voting against his or her conscience, but the ramifications of such a situation are such that it impedes the true nature of the responsibilities of an elected representative.²² It is also worth noting, that even the rules framed under the Representation of People Act,²³ recognise political parties merely for allotment of symbols, disclosure of accounts and registration with the Election Commission.²⁴ In essence, disqualification on grounds of defection, which may actually be a valid dissent, blurs the distinction between the defection and dissent. It is also to be seen how a parliamentary system based on debate and discussion is virtually contained by Paragraph 2(1)(b), which does not allow legislators to challenge the part whip if it conflicts with the wishes of the electorate.

2. ADJUDICATION BY THE SPEAKER/CHAIRMAN

Central to the disqualification of members, lies the adjudicating authority tasked with making the decision. The Speaker or the Chairman of a House are empowered with making a decision in this regard and until and unless a decision comes from the aforementioned, there lies no opening for disqualifying members.²⁵ This tends to bring into picture certain issues with regard to firstly, the neutrality of the adjudicator and secondly, the pressing need for expedient decision-making.

Further, as per Article 93 of the Indian Constitution, which talks about the Speaker of a House, there appears no requirement for a Speaker to relinquish his or her political ties on assuming office. This makes the Speaker of a House a political personality and also carries a probability of adjudication of defection matters with a political agenda. This raises strong

²⁰ Subhash C. Kashyap, *The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India*, 10 ASIAN SURVEY 195-208 (1970).

²¹ GLENN PATMORE ET AL., *LAW AND DEMOCRACY* 3 (Glenn Patmore et al. eds., 1st ed. 2014).

²² Vibhor Relhan, *The Anti-Defection Law Explained*, PRS LEGISLATIVE RESEARCH (DEC. 26, 2017), <https://www.prsindia.org/theprsblog/anti-defection-law-explained>.

²³ The Representation of People Act, No. 43 of 1951, INDIA CODE.

²⁴ Subhash C. Kashyap, *The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India*, 10 ASIAN SURVEY 195-208 (1970).

²⁵ NS Gehlot, *The Anti-defection Act, 1985 and the role of the Speaker*, 52 INDIAN J. POL. SCIENCE 327 (1991).

presumptions against the fairness of decisions made, with a Speaker having power to manipulate the situation to suit the political party he favours.²⁶

It therefore comes as no surprise when one considers the report of the 170th Law Commission of India, which suggests that the responsibility to decide as to disqualification should vest with a non-partisan official, such as the President or the Governor, based on enquiries conducted by the Election Commissioner. This has also been one of the grounds on the basis of which the anti-defection law had been challenged earlier in the *Kihoto Hollohan case*²⁷ which has been discussed elaborately later.

As far as the expediency of decision-making is concerned, it is vital to note that the Schedule does not stipulate any specific time period within which the Speaker or Chairman has to arrive at a decision with regard to disqualification. This leaves the petitioner with not much of a recourse except for waiting for the Presiding Officer of a House to arrive at a decision, which as explained above, might come after due political considerations. This presents a peculiar privilege to defecting MLAs, such that they may continue to remain members of the House despite having defected to other parties under the Schedule. The judiciary has also been vocal about its concerns with such delays in decision making.²⁸ In such cases, while members may be subject to disqualification on account of their defection, there may actually be a situation where the defections may occur in fragments and ultimately lead to defection of more than two-thirds of the members, but they shall continue to be members of the House as long as there is no decision from the Presiding Officer.

3. HERD DEFECTIONS AND EXPULSION

Individual defections are punishable under the law with disqualification from the House. However, the same standards do not apply when more than two-third members of a party defect to the opposite camp. Not only is this a glaring contradiction but also seems absurd, given the fact that the law seeks to prevent an evil but immunises the wrongdoers if the evil is done by a majority of the party. As may very well be the case, the rationale behind an individual and a mass defection might be the same, but the latter is protected on account of the larger number of members involved. Herd defections do not in any way uphold the spirit with which the law was supposed to operate and is as responsible for undermining the essence of Indian democracy as are individual defections.²⁹

Another interesting situation arises when the members of a party do not voluntarily give up their membership, rather they are expelled from the party. As far as India is concerned, the Schedule focuses on voluntary defection. The Schedule is silent about expulsion of a member from the party. In the Indian Parliament, this distinction becomes important as an expulsion

²⁶ H. R. Saviprasad & Vinay Reddy, *The Law on Anti-Defection: An Appraisal*, 11 STUDENT ADVOC. 116 (1999).

²⁷ *Kihoto Hollohan v. Zachillhu & Ors.*, 1992 SCR (1) 686 (India).

²⁸ *Speaker, Haryana Vidhan Sabha v. Kuldeep Bishnoi and Ors.*, (2015) 12 SCC 381 (India); *See also Mayawati v. Markandeya Chand and Ors.*, AIR 1998 SC 3340 (India).

²⁹ H. R. Saviprasad & Vinay Reddy, *The Law on Anti-Defection: An Appraisal*, 11 STUDENT ADVOC. 116 (1999).

does not attract disqualification from the House.³⁰ For a defection, it is well understood that a member no longer adheres to the political ideology of the party and therefore is voluntarily moving away from the party. On the other hand, an expulsion has an entirely different logic, the stark difference being that an expulsion is involuntary and therefore, it is reasonable to infer that such a member continues to subscribe to the principles of the party and is hence loyal to the mandate received by the voters. However, this may present a practical problem, wherein members may try to create a situation where the party may be forced to expel him or her. In that case, the member may not officially defect and still be shown out of the party, all while continuing to hold his or her place in the cabinet. Once expelled, such a member would then be an independent in the House, with an option of joining another party, which presents a highly bizarre but equally possible exploitation of the Schedule, something which the Supreme Court had an opportunity of examining in *G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*³¹ which has been discussed later.

4. BAR OF COURTS

The erstwhile Paragraph 7 of the Schedule, which barred judicial review of the decision of the Presiding Officer of a House, was later struck down by the Supreme Court in 1992 in the landmark judgment of *Kihoto Hollohan v. Zachilhu & Ors.*³² wherein the decision of the Presiding Officer was made subject to judicial review in the High Courts and the Supreme Court. What it continued to maintain however, is that there lies no scope for intervention until and unless there has been a decision by the Presiding Officer, which again reopens the debate about the expediency of decision-making and whether the power has been entrusted with the right office in the first place.

V. JUDICIAL DEVELOPMENTS

The Tenth Schedule of the Constitution has been flung as a threat, cure and warning on multiple occasions where members of political parties have parted ways with their camps to join the others. However, as far as the practical experience is concerned, there is no uniformity in the decisions of different legislatures, owing primarily to the fact that the Presiding Officers of each House have different criteria, different parameters and most importantly, different political opinions, which make uniformity a distant achievement. It would thus be interesting to look at some historical verdicts as well as recent examples of defection in Indian politics to understand the landscape better.

1. KIHOTO HOLLOHAN V. ZACHILHU & ORS.³³ - THE FREEDOM OF SPEECH AND TENTH SCHEDULE

As far as the judiciary is concerned, the landmark judgment rendered by the Supreme Court in the *Kihoto Hollohan* case³⁴ was the first one to examine the constitutionality of the law. In

³⁰ Nico Steytler, *Parliamentary Democracy - The Anti-Defection Clause*, 1 LAW DEMOCRACY & DEV. 221 (1997).

³¹ *G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly*, (1996) 2 SCC 353 (India).

³² *Kihoto Hollohan v. Zachillhu & Ors.*, 1992 SCR (1) 686 (India).

³³ *Kihoto Hollohan v. Zachillhu & Ors.*, 1992 SCR (1) 686 (India).

that case, the Tenth Schedule had been challenged on the grounds of violation of the right of free speech of legislators guaranteed under Articles 105³⁵ and 194³⁶ of the Indian Constitution and further on the ground of the fact that Paragraph 7 of the Schedule ousted the jurisdiction of the Courts and was thus unconstitutional. As far as the argument concerning the freedom of speech of legislators was concerned, the majority was of the opinion that the freedom of speech of a legislator is a qualified one and the Schedule does not make any legislator liable in Court for any statement made in a House. The majority was further unable to reconcile the privilege of Article 105 with that of unprincipled floor-crossing. As far as the question of conscience was concerned, the Court recognised the potential moral crisis that legislators may often be faced with. However, the Court was clear in its understanding that the said Paragraph did not violate the freedom of conscience of the legislators. The majority opinion held that a political party functions on the strength of shared beliefs and its own stability depends on these beliefs and the concerted action of the members of such parties. Independent voting between members of the same party would therefore carry the potential of embarrassing the public image and popularity of the political party. Hence, the majority stressed on the importance of having internal party debates as well as rigorous debates in the House as well. Further, the Court restricted the directions whose violation may entail disqualification to either a vote on motion of confidence or no confidence or a vote which relates to an integral policy and programme of the party on the basis of which it approached the electorate. As far as the jurisdiction of courts was concerned, the Court interpreting the same in light of Article 368 of the Indian Constitution, held that Paragraph 7 was invalid for want of ratification in accordance with the proviso to clause (2) of Article 368.

2. RAVI S. NAIK V. UNION OF INDIA³⁷ - DEFINING 'VOLUNTARILY GIVING UP OF MEMBERSHIP'

The second paragraph of the Schedule stipulates disqualification of members of the House on account of 'voluntarily giving up his membership of such political party'. While it may be inferred that the situation refers merely to the tender of voluntary resignation, it has a much wider connotation than mere resignation. The Supreme Court in *Ravi Naik v. Union of India*, held that even if there is no formal resignation from a member, the voluntary surrender of membership may be inferred from the conduct of the legislator. In that case, the fact that two MLAs had approached the Governor against their erstwhile party, Maharashtra Gomantak Party and had been repeatedly publicly seen with leaders of rival parties without having formally resigned. Thus, the Speaker of the Assembly, on the basis of their conduct, had ruled that the two MLAs were deemed to have voluntarily resigned from their party. Further, the judgment rendered in this case also addressed the issue of whether the rules framed under the Schedule were open to judicial scrutiny. To this, the court answered that

³⁴ *Id.*

³⁵ INDIA CONST. art. 105.

³⁶ INDIA CONST. art. 194.

³⁷ *Ravi S. Naik v. Union of India*, AIR 1994 SC 1558 (India).

rules framed under the Schedule were purely procedural in nature and any contravention of the rules would be a procedural irregularity, which is immune from judicial scrutiny.

3. G. VISHWANATHAN V. SPEAKER, TAMIL NADU LEGISLATIVE ASSEMBLY³⁸ - THE CURIOUS CASE OF AN EXPULSION

As discussed earlier, the expulsion of a member from a political party throws up an interesting question, which was up for the Apex court's consideration in the present case, which was whether a member could be said to have voluntarily given up his membership of a party if he joined another party after being expelled from the previous one. To this, the Court held that post expulsion, a member of a party elected to the House, continued to be an 'unattached' member of the party and therefore still a member under the Tenth Schedule. However, if after expulsion, this member was to join another party, he would then have 'voluntarily given up the membership' of his earlier party, which would then attract disqualification. Recognising that an 'unattached' member had no place in the Tenth Schedule, the Court reasoned that as per the Tenth Schedule, there exist only three ways for a member to be elected to the House and therefore, regardless of whether a member resigned or was expelled from his party, he would continue to be a member as long as he does not join another party, in which case he would be liable to be disqualified.

VI. RECENT EXPERIENCES

There have been multiple experiences of politicians defecting to other political parties in India after the unprecedented scenario experienced in the General Elections of 1967. In recent times, regardless of the invocation of the Schedule, the experience has been nothing short of stupefying as India witnessed multiple defections almost each time any State went to polls. The most interesting and notable experiences of the past decade have been mentioned herein.

1. GOA, 2019

The Assembly Elections in 2017 in the state of Goa saw a peculiar hung assembly, with no party having garnered enough seats to form the government in the State. The Indian National Congress having emerged as the single-largest party, was touted to take charge, however, having formed a coalition with independent candidates and other smaller regional parties, the BJP led coalition garnered majority and came to power. Ever since, there has been a fiercely volatile atmosphere in the political scenario in Goa, particularly with the demise of erstwhile Chief Minister Manohar Parrikar. In these circumstances, two Congress MLAs defected to the BJP and were re-elected in by-polls along with another candidate from the BJP due to death of the incumbent MLA. Post these additions, as many as 10 out of the 15 remaining Congress members, forming two-third majority, defected to the BJP, including the leader of the opposition. Since the numbers were as prescribed by the Schedule, the MLAs were immune from disqualification.

2. KARNATAKA, 2019

³⁸ G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly, (1996) 2 SCC 353 (India).

One of the better-known political dramas of the year sprang up in the Karnataka Legislative Assembly, post polls in 2018, where the Congress and the Janta Dal (Secular) formed a coalition government. However, 17 legislators from the Congress and the JD(S) resigned from their respective parties, only to have joined the BJP later. The Speaker of the Assembly, K.R. Ramesh Kumar, taking into account the sequence of events, disqualified the 17 MLAs under the Tenth Schedule, as the Supreme Court kept a keen eye on the situation. The disqualified MLAs had approached the Apex court against the non-acceptance of resignations. With the Supreme Court ordering the maintenance of status quo, the Speaker ultimately disqualified 17 MLAs, which was the Supreme Court further upheld, while simultaneously ascertaining that the MLAs could be re-elected in the by-polls in December, 2019 and except for three, they were re-elected, now as members of the BJP, with the party now staking claim in the State.

3. MAHARASHTRA, 2019

High-octane political drama also ensued in Maharashtra, in November 2019, where the age-old coalition between the Shiv Sena and the BJP came to an end over power-sharing disagreements. As the BJP was unable to form the government despite being the single-largest party in the State. As the Shiv Sena's request to the governor to form the government was rejected, a President's rule was imposed in the state. During the stalemate, three parties, namely, the Shiv Sena, the Congress and the Nationalist Congress Party combined to get themselves a total of 162 seats in the seat naming Shiv Sena chief Uddhav Thackeray as the Chief Minister. However, before that could happen, the BJP, with the pledged support of Ajit Pawar, who was the legislature chief of the NCP in Maharashtra, staked claim to the government thus ending the President Rule. It was in these circumstances, that senior leader of the NCP, Sharad Pawar threatened to invoke anti-defection laws against Ajit Pawar, who had been sworn-in as the Deputy Chief Minister of Maharashtra. After a long political battle, a floor test conducted in the Assembly, saw the coalition of the three parties coming together, with Ajit Pawar also returning to the coalition and a resignation by the BJP-led government of three days.

4. MADHYA PRADESH, 2020

The most recent example of political crossing over came in March 2020, when renowned Congress leader, Jyotiraditya Scindia resigned from the party along with 22 other legislators, who then joined the BJP, leaving the incumbent Congress government in the state on thin ice. This prompted the Congress to then file petitions under the Tenth Schedule, with the Speaker of the Vidhan Sabha on which a decision is yet to be taken. However, as things stand, the members have now resigned, erstwhile Chief Minister Kamal Nath has tendered his resignation and BJP's Shivraj Chouhan has taken oath as the Chief Minister of Madhya Pradesh.

VII. CONCLUSION

On revisiting the *Kihoto Hollohan* judgment rendered by the Supreme Court, it is essential to reconsider the minority dissenting judgment rendered by Justice LM Sharma and Justice JS Verma. Both the judges declared the anti-defection law unconstitutional in separate verdicts. The judges found a great likelihood of bias in conferring decision-making power on the Speaker. The Court recognised that the office of a Speaker depends significantly on the political majority in a House and therefore when it comes to adjudication, a Speaker can not be expected to maintain impartiality in all circumstances. This is one of the many problems that continue to plague the law worded in the Tenth Schedule. In fact, the *Dinesh Goswami Committee on Electoral Reforms*,³⁹ was of the concerted opinion that the decision-making power should vest with the President or the Governor, who shall act on the advice of the Election Commission.

As far as whips are concerned, the 170th Report of the Law Commission of India⁴⁰ has suggested the importance of a check on political whips and argued for the issuance of whips only in cases where the government is at risk of collapsing. An alternate solution however was presented by Manish Tewari, a Congress Party Spokesperson in a Private Member's Bill in the Parliament.⁴¹ As per the latter, it is the disqualification of members which must be based on limited grounds rather than restrict the issuance of whips. A similar tune is recited by the *Dinesh Goswami Committee on Electoral Reforms*, which also recommends the limitation of cases of disqualification rather than concentrating on party whips. Objectively, there is good reason to think that the latter's solution is much more appropriate considering the aim of the law and further also preserves the integrity of the associational rights of political parties, as understood from American jurisprudence.⁴²

What also must be considered while disqualifying a member, is that any decision being taken by the member to vote against the directives of the party, should come only for the betterment of the electorate which has elected such member. If that is the case, the member should not be disqualified. For this purpose, it would work in the interests of the law, if amendments were made to the scheme of the law, to foster debate and discussion within the political party to promote strong intra-party democracy before the House actually goes to vote. In the absence of such a provision, what actually happens is, that the observation concerning 'whips' is open to misinterpretation, with the party having the option of calling each decision as an integral policy matter, leaving very little scope for the legislator to vote on conscience.

Since the Apex court has already ruled about the conscientious voting debate in *Kihoto Hollohan*, the larger picture as it emerges today, is the ineffectiveness of the law because of the very absurdity it presents with regard to herd defections. As has already been seen in the cases of Goa, there is very little to fight for, if legislators flock away in a larger number than individually. Not only does this show the ineffectiveness of the law but also renders it

³⁹ DINESH GOSWAMI, *Committee on Electoral Reforms* 47 (1990).

⁴⁰ JUSTICE B.P. JEEVAN REDDY, *170TH LAW COMMISSION OF INDIA, Report on Reform on Electoral Laws* (1999)

⁴¹ The Constitution (Amendment) Bill, 2010, Bill No. 16 of 2010, INDIA CODE.

⁴² S. Sanal Kumar, *Anti-Defection Laws in India: Its flaws and its falls*, BAR AND BENCH (Aug 1, 2019), <https://www.barandbench.com/columns/anti-defection-laws-in-india-its-flaws-and-its-falls>.

helpless as the evil it sought to prevent, continues to flourish. This is further doubled by some glaring absurdities in the Schedule, such as the unsubstantiated difference between an independent elected member and a nominated member. While the former is barred from joining any party after his or her election, a nominated member is given a window of six months to join a party otherwise the same would lead to disqualification. This distinction is arbitrary and is of no real consequence as it is very obvious that an independent member owes his or her election to no particular affiliation and must be free to join a party; while on the other hand, a nominated member is inducted into a House on nomination by a ruling party and is certain to join it.

Past experiences have often shown how the anti-defection law has been unavailing and rather counterproductive as what it sought to prevent at individual level, it now promotes at a group level. The fundamentals of democracy lie in furthering the interests of the electorate. In India, it is an accepted facet of representative democracy, that unlike the UK or the USA, the electorate tends to vote for the party rather than the legislator. Nonetheless, it is to be understood that the loyalty of the legislators is not first to the party that fielded them but to the people who elected them. For that to happen, the anti-defection law of India must have a serious re-consideration with a pressing need for a more efficient adjudication system and a push for intra-party democracy, or else, the whole purpose of the law would continue to be shelved, just like it is in the modern day.