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I. ABSTRACT:

“The phrase: ‘Aya Ram, Gaya Ram’ became synonymous in the Indian Politics after an MLA from the State of Haryana- Gaya Prasad changed his political party twice within a few hours and after than thrice within a fortnight in the year- 1967. The paragraph 2(1)(b) of Schedule Ten of the Constitution of India seeks to address defection by preventing the members of the legislature from ridiculing the direction of the whip of the political parties during times of voting in the parliament. The long parlance of this law provision has led to abuse of this power, which has caused a restraining effect on the very important right- freedom of speech of the parliamentarians.

The provision at a lot of times, confuses dissent for defection and thereby, suffocate the vital pillar of parliamentary democracy. Furthermore, by regulating voting, there is an atrocious curbing of parliamentary debate, the result of which has been minimum discussion before the passing of crucial bills in the parliament. There is no concrete link between the provision of anti-defection and the aim of improving stability within the political party.

*Further, this provision has not addressed the concomitant evil of corruption in the Parliament. Despite the issue being discussed in the Honourable Supreme Court of India in the case: **Kihoto Hollohan v. Zachillhu**¹, the solution proposed by the Honourable Supreme Court has been technically fruitless and has done very little to subdue the harm arising from this law. The purposive interpretation given to the provision of anti-defection thus mandates a relook to further water down its unintended scope. This paper would like to elaborately discuss whether the Anti-Defection law has been able to fulfil its purpose of checking bribery and corruption on the floor of the parliament.*

And this paper would also highlight some loopholes in the provisions of this Law.”

¹ 1922 Supp (2) SCC 651.

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II. HISTORY:

The Anti-Defection law came into existence to combat with the then prevailing trend of 'Ayaram-Gayaram' in the political arena. This development affected the stability of the governments at the union as well as the state level. This practice of floor-crossing in India goes back to the pre-independence era. *Mr. Hafiz Mohd. Ibrahim* was chosen under the banner of *Muslim League* but after election, he joined the *Congress Legislature Party in 1937* where he was rewarded with the place in *Cabinet Ministry of Pt. Gobind Vallabh Pant* in the state of *Uttar Pradesh*. The government in Bengal was destabilised in the year 1945 when *Muslim League Ministry, led by Khwaza Nazimuddin*, was voted out of office as a result of defection by *Nawab Bahadur of Dhaka* along with his 15 friends².

Post-independence too, the defections remained common. As observed by a scholar, "*during the period between 1967-1972, from amongst 4000 members which included members of Lok Sabha and the legislative assemblies of the states as well as union territories, around 2000 cases of 'defection and then counter defection'*" were reported. Towards the end of March 1971, around 50% of the legislation had changed their loyalties to parties. A number of legislators changed their fidelity more than once³."

Though the Bill to introduce Anti-Defection Act into the Constitution was introduced several times in the Houses, it was either rejected or the bill lapsed every time. It was only in the year 1985 under the regime of *Rajiv Gandhi's* government that the bill could be made an Act through the *52nd Constitutional Amendment Act, 1985*. The statement of objects of the bill provided that the Act was intended to "*curb the evil of political defection*". But the Act failed totally in its purpose to a large extent. It could not put an end to the acts of defection. It was noted that "*on an average, more defections per year took place after the Anti-Defection law*

² D.N. Panigarhi, *India's Partition* Routledge Publications (2004), p.193.

³ B Venkatesh Kumar, *Anti Defection Law: Welcome Reforms of 1985*, Economic and Political Weekly, May 10-16 (2003).

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came into force." Even recently, there have been a lot of cases of defection proving that the Act has no deterrent effect on the defecting person.

This Act has been questioned several times since its inclusion in the Constitution. Its constitutionality was challenged in the famous case of *Kihoto Hollohan v. Zachilhu⁴ and others*, where the Honourable Supreme Court struck down *Para 77 of the Tenth Schedule* for want of ratification. This para provided for the exclusion of the judicial review of the decision of the Speaker with regard to disqualification on the grounds of defection. *Paragraph 3 of the Tenth Schedule to the Constitution* was omitted through the *91st Amendment to the Constitution, 2003* which talks about the provision of exempting split by 1/3rd or more of the legislative party members after *Election Commission (2002 Report)* commenced for the same.

III. CURRENT SCENARIO:

The current legislation prohibits a member of the legislature from acting contrary to the dictates of the political party to which he belongs. He is bound by the party whip and his non-compliance in this case renders him disqualified as the member of that house. Another prohibition is with regard to change of party allegiance after his election in the capacity of a representative of one political party.

In other words, a person will be disqualified from the house if he is chosen for the house under the banner of one party and he changes his affiliation to another one post his election to the house. Certain exceptions have been provided to these general prohibitions. Firstly, if his party is merging with another party and he has become the member of that other party, it won't be counted as change of affiliation.' also if a substantial number of members of a party deviate from the party, they will be exempted from this prohibition. Decision pertaining to the impugned disqualification on the ground of defection as per the provisos of the Tenth Schedule

⁴ 1922 Supp (2) SCC 651.

are decided by the Speaker/Chairman', as the case may be whose decision shall be final and binding.

IV. MEANING OF DEFECTION:

The word defection has been derived from a Latin word, '*defectio*' meaning "*an act of abandonment of a person or a cause to which that person is bound by reasons of allegiance or duty, or to which he has wilfully attached himself*." Therefore, one can say that the act of defection contains two parts:

1. Giving up of one allegiance,
2. Joining another.

As per the Constitution of India, the defection can be divided into four types:

- 1) When the person leaves the party from which he was nominated/elected to the House before next elections take place⁶;
- 2) Where the person defies party whip⁷;
- 3) Where large groups shift to another party (en-bloc migration)⁸ and;
- 4) Where the member of the legislature leaves the party after being chosen from that party towards ruling party.

While the third case is now exempted from the prohibition list, the fourth one seems to be the most notorious form of defection. The first category usually reflects the likely dominance of one party over another where the candidates believe that they have better chances of winning if they join the other party. The pre-election period provides them sufficient time to garner support as a representative of the party they have recently joined and the exercise of disqualifying them from the concerned House becomes futile since their disqualifications are often nearer to the date of next elections, thereby mitigating their loss of seat. The second category symbolises the true nature of politics as it exists in India. While the independent

⁵ G.C. Malhotra Anti Defection Law in India & Commonwealth, Lok Sabha Secretariat, Metropolitan Book Pvt. Ltd., (2005), p.3.

⁶ Para 2(1)(a) of the Tenth Schedule.

⁷ Para 2(1)(a) of the Tenth Schedule.

⁸ Part 4 of the Schedule.

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candidates aren't uncommon to any house of the legislature, it is the party system that actually flourishes in the country. The party is represented through its representatives who have won elections and the said candidates are therefore not only members of the house of legislature but they also represent their respective parties in the concerned house. Hence, the members ought to vote in alignment of their party's strategy when a vote is taken in the House. Defiance of any kind by abstaining, absenting oneself from the vote or voting against the party's strategy amounts to defection under the Constitution and is punished with disqualification.

The third category of defection is when a party is merging with another party and majority of the candidates (2/3) switch to that another party. Such shifting as a result of merger has been exempted from the list of prohibitive activities under the Schedule. The fourth category of defection is in which the member of the party shifts from his original political party to another party after he has been elected from that party banner and this shift is most often towards the ruling party.

V. CRITIQUING THE SCHEDULE:

The Schedule came at a time when changing of party affiliations was becoming common, causing the toppling of the governments (*at the state level and at the union level*). The schedule might have addressed the problem of often changing majority but it curtailed a very fundamental privilege which will be debated hereinafter. Many scholars believe that defection is undemocratic because it goes against the electoral verdict, esp. where dominant party system exists. In a case where the majority has been won by a party, the other party can lure the candidates of that party who have been elected to the House in order to create a majority for itself, thereby destabilising the government.

Most defections are driven by selfish motives of gaining seat in the council of ministers and the cases of conscientious defection are rarely found. As was commented by *Soli Sorabjee that "in essence, defection is disloyalty, abandonment of duty or principle. The defector is disloyal not only to the party on whose ticket he or she has been elected but also commits a breach of faith with the electorate whose votes were secured on the basis of his or her electoral*

*affiliation and promises*⁹”. In the year 1997, there were mass defections in Uttar Pradesh which resulted in the formation of a *Bhartiya Janta Party Government* with the help and support of defectors from *Bahujan Samaj Party and Congress* with the conferment on all those defectors ministerial-ship.

VI. DRAWBACKS AND LOOPHOLES OF THE LAW:

The Tenth Schedule, which is an enactment on its own, suffers from various serious drawbacks in its present form. Some of these drawbacks are given as follows: Against the Ideals of Democracy: India is a democratic republic. In the celebrated case of *R.C. Poudyal v. Union of India*¹⁰, (the Hon'ble Supreme Court observed that “So far the Indian Constitution is concerned, 'democratic republic' refers to the political participation of the people in running the administration of the Government. It conveys the state of affairs in which each citizen is assured of the right of equal participation in the polity. Since, India is a democratic republic whereby the citizens are governed through their representatives by the rules laid down by them. And these representatives have been given the freedom of speech and expression so that they can represent the citizens in the parliament/state legislature.

That being the case, Paragraph 2 (1) (b) of the Tenth Schedule to the Constitution of India states that any member of the parliament/state legislature acting against the will of the party is liable for disqualification on the ground of defection. It clearly binds the member by the order or whip issued by the party and makes him a puppet in the hands of the party. Hence the concept of directed voting curtails the freedom of speech and expression of the member. Even if the member leaves the party or gives up the membership of the party, his act amounts to defection under para 2 (1) (a) of the Tenth Schedule. Thus, there is no option left for the candidate but to act on the directions of the party. This clearly shows that the freedom of speech and expression is being curtailed. Since each member of the house is elected by the voters of a constituency,

⁹ K.P.S. Mahalwar: “Disqualification on the basis of Defection- A Need for Strengthening Anti-Defection Law.” NALSAR Law Review, Vol.4(1), 2008-2009.

¹⁰ AIR 1993 SC 1804.

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he represents the constituency which elects him. His voice is the voice of the people of his constituency. Hence denying the freedom of speech and expression to one member means denying the freedom of speech and expression to several thousands of people forming the constituency which has elected that member. Thus, the member being denied to express his views and opinions and hence the right to represent his constituency in a particular matter in the house, the people under his constituency are being denied the right to equal participation.

Further, as has been famously pointed out by *Edmund Blake in his speech: "Representative who is chosen to represent must apply his mind and use his capabilities of reasoning for which he has been chosen. He observes, thus, "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."*

He further advocates that if a party candidate is chosen to the parliament, he becomes the member of the parliament, not a representative of the party to the parliament. Many scholars support his idea of looking at the chosen member as a 'delegate' of the constituency, instead of a trustee or a puppet of the party under the banner of which he was elected. Thus, there is clear and prima facie violation of the very basis of the democracy in India. Hence the Anti-Defection Law is clearly against the ideals of democracy.

En Bloc Defections are Allowed While Single Ones are Not: The Para 4 of the Tenth Schedule to the Constitution of India allows the merger of 2/3rd members of a party with another party. If one assumes that the Act is constitutional, the only requirement under this para is that there should not be less than 2/3rd members of the party who agree for the merger. Merger includes the act of leaving the identity of one party, and the allegiance is thereafter attached to another party. Therefore, this act fits into the definition of defection very well. Thus, en bloc defections or mass defections are allowed under this para. This is a loophole which has kept the doors of defection open for those who want to commit the act. It is not a big issue for any political party to convince the members of another political party to join their party and hence such defections

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are committed constitutionally according to the *para 4 of the Tenth Schedule*. Further, it's not necessary that just because the legislators are more in number, their reason for defection will be reasonable and bona fide in good faith) and not backed by greed of money or power. *Can a number be made the criteria to decide evil intention behind any act?* If an act is being committed by one person, the same amounts to defection and if the same act is being committed by 2/3rd members of a party, it does not amount to defection merely because the number of defectors is not less than 2/3rd of the total number of members of the party.

Individual defections are punished while mass defections are not. *Can an individual not change his party and associate with another without having good intention? Can there be no genuine reason for change of party by an individual?* All these questions remain unanswered because of the provisions of the Anti-Defection Law.

*Law Commission in its 170th Report, 1999*¹¹, strongly recommended that the provisions which exempt splits and mergers from disqualification should be deleted. In 2003, through the *91st Amendment Act to the Constitution of India*, the provisions related to split were omitted but not the provisions related to merger, thus, leaving a loophole for the commitment of the act of defection in large numbers. This is one of major drawbacks of the Act.

Speaker as the Sole Authority is not a Democratic Structure: Speaker is chosen from amongst the members of the house. Hence, he is not an independent authority. Although he has to give up the membership of the party after being chosen as the speaker, he is very likely to be biased. The principle of no one can be a judge in his own case' (*nemo iudex in causa sua*) is violated by the provision that provides for the Speaker as the sole authority to decide on the matters relating to disqualification on the ground of defection. There should be an independent authority to decide the matters of defection and speaker being a part of the house is not an

¹¹ Report on the Reforms of the Electoral Laws, 1999.

independent authority. This was pointed out in the report of *National Commission to Review the Working of the Constitution (NCRWC)*¹².

There is also a pressure on the speaker to decide in favour of those who chose him as the speaker (*which is in most cases, the ruling party*) as it is only on the basis of the majority of votes of the members of the House that the member is chosen as the Speaker of the house. In this context, it has been rightly pointed out by politician and former speaker *G. V. Mavalankar*, *that the speaker "...holds the scales of justice evenly irrespective of party or person, though no one expects that he will do justice in all the matters; because, as a human being he has his human drawbacks and shortcomings."* Various cases have exposed scenarios wherein Speaker has failed to be objective in his approach or his order has been challenged as arbitrary. Also, unlike the Articles- 103 and 192 where the Election Commission is to be consulted, the Speaker has been given the sole power to decide under the Tenth Schedule and there exists no check on his power to decide the cases of defection. Therefore, his powers are violative of Article 14 as it is arbitrary. The Election Commission of India has suggested that, instead of the speaker, the decisions under the Tenth Schedule should be made by the Governor or the President on the binding advice of the Election Commission.

Contradictory Opinion of the Apex Court in this Regard: Adding to the above- mentioned main drawbacks of the Act, is the judgment in the leading case in this respect. In *Kihoto Hollohan v. Zachillhu's case*¹³, the Supreme Court gave very contradictory judgement. On one side, it said (Para 19), *"...Members belonging to the same political party may also have and may give expression to the difference of opinion on a matter. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functions of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines."* However,

¹² Available at https://www.thehinducentre.com/multimedia/archive/03091/ncrwc_3091109a.pdf (accessed on 09.10.2020).

¹³ 1992 Supp (2) SCC 651.

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contradicting their own opinion on the matter, the Supreme Court, in the very same para (19), justified the provision of "*directed voting*" by saying that "*any freedom of members to vote as they please independently of the political party's declared policies will embarrass its public image and popularity...*" Here, one can see that the Supreme Court has tried to justify the disqualification for the act of defection by saying that the representative's freedom of speech is subject to political party's image and popularity. It implies that the Hon'ble Court considered the popularity of the political party at the same stature as that of the fundamental rights of the people, which was a grave mistake as the judgment defies the very basis of the democracy. Thus, on the basis of the above discussion, it becomes evident that the law suffers from drawbacks that stab the fundamental principles of democracy on which Indian political system is based.

VII. COURT'S POSITION ON ANTI-DEFECTION LAW:

In the case: *Kihoto Hollohan v. Zachillhu & Ors*¹⁴, it was contended that the provisions of the Tenth Schedule constitute a '*flagrant violation*' of the fundamental principles and values which are very crude to the existence of the Parliamentary democracy. It violates the freedom of speech, right to dissent and freedom of conscience of our legislators¹⁵. They also contended that the Tenth Schedule infringes the rights or immunities provided to the legislators under Article 105(2). The court said "*there are certain side effects and fall out which might affect and hurt even honest dissenters and conscientious objectors, but these are the usual plus and minus of all areas of experimental legislation. In these areas, the distinction between what is constitutionally permissible and what is outside it is marked by a 'hazy grey line' and it is the Court's duty to identify, 'darken and deepen' the demarcating line of constitutionality...*" By the majority of 3:2, the Honbl. Court decided that the provisions of the 10th Schedule of the Indian Constitution do not violate of the freedom of speech, voting and conscience of the members. In the view of the Court, these provisions intend strengthening of the fabric of Indian Parliamentary democracy by prohibiting unprincipled and unethical

¹⁴ AIR 1993 SC 412.

¹⁵ Supra note 13, paragraph 7.

political defections. It said that the freedom of speech of a Member is not an absolute freedom guaranteed by the Constitution of India. The freedom is subject to the provisions of the Constitution of India and the rules and standing orders which help in regulation of the Procedure of the Houses [*Article 105(1) and Article 194(1)*]¹⁶.

Secondly, the parliamentary privileges which are guaranteed under Article 105¹⁷, are not violated, as the provisions in the Tenth Schedule do not give rise to any proceeding in any Court, thus it safeguards the guaranteed immunities. The reason behind such strict interpretation of what constitutes a defection, by the Court, has been done to prevent a legislator from staying with a party while frequently opposing its decisions¹⁸. But then this might have a serious effect of curbing a politician's freedom to exercise his or her judgement and act against party policies and procedures. Some believe that dissent within a party on the floor of the Legislature, shows a lacuna in the discipline of the party¹⁹. Political parties cannot achieve their objectives if politicians frequently choose to pursue their independent goals. A party where the members do not take a united stance in the Legislature may appear to the electorate as an unruly and divided party. The legislators may choose to refrain from voting for the party.

Thus, dissent from the party leadership may damage the reputation of the party with voters. *Academics Shawn Bawler, Richard Katz and David Farrell* stress the importance of party cohesion to parliamentary systems, arguing that: "*Cohesion and discipline matter in the daily running of parliaments. The maintenance of a cohesive voting bloc inside a legislative body is a crucially important feature of parliamentary life. Without the existence of a readily*

¹⁶ Supra note 13, paragraph 122.

¹⁷ Article 105(2) of the Indian Constitution provides: No member of the Parliament shall be held liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

¹⁸ Sarah Miskin, Politician Overboard: Jumping the Party Ship, Information and Research Services, Research Paper No. 4,2002-03, available at www.aph.gov.au/library/pubs/rp/2002-03/03RP04.pdf [Last accessed on 25th September,2020].

¹⁹ Scott Ashworth, Ethan Bueno de Mesquita, Party Discipline with Electoral and Institutional Variation, Institute of Governmental Studies, UC Berkeley, available at www.escholarship.org/uc/item/3z37g7md [Last accessed on 25th September, 2020].

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identifiable bloc of governing politicians, the accountability of the executive to both legislatures and voters falls flat. Thus, it can be understood as a necessary condition for the existence of a responsible government²⁰.” In a party comprised of a large number of people, each person can have their own independent view and different sets of priorities, which may not coincide from that of the party. This makes it hard to maintain unity in parties. One way the political parties maintain unity is through enforcing party discipline. In India the members of a particular party are bound to follow the direction issued by their party whips or face disqualification.

VIII. EFFECT OF ANTI-DEFECTION LAW ON DEBATES IN PARLIAMENT:

Parliament forms a legislative wing of the three pillars of the Indian Democracy. Parliament not only evaluates the functioning of the Executive but also includes discussing matters of public interest as well voting for the bills to be passed in the parliament. Prior to the vote, however, it was expected that Parliament would address the issue further in detail. The British Parliament, for example, uses extensive debating to perform its functions²¹. These functions, found from a past understanding of Parliament, refer to any sittings or conference. This has been proven by academics watching Parliament be a body tasked with discussing the various policies of Government²². This responsive function is used by constant observation and scrutiny of all matters brought the Government before the parliament. As authorized such an institution, such an act of parliament ensures that no wing of Government remains unchecked²³. Emphasis on arguments and debates is an internal aspect of the Indian legislature also²⁴. *According to Ryle and Griffith, they argued that the talks should be in the form of a way for*

²⁰ Shawn Bawler, Devid Farrell and Richard Katz, 'Party Cohesion, Party Discipline, and Parliaments', Ohio State University Press, Columbus, 1999, p. 6. As cited in Sarah Miskin, Politician Overboard: Jumping the Party Ship, Information and Research Services, Research Paper No. 4,2002-03, available at www.aph.gov.au/library/pubs/rp/2002-03/03RP04.pdf [Last accessed on 25th September, 2020].

²¹ C.H. McIlwain, The High Court of Parliament and its Supremacy 27 (1910).

²² J.A.G. Griffith, Michael Ryle, Parliament: Functions, Practice and Procedures 6 (1989).

²³ L.S Amery, Thoughts on the Constitution 12 (1947).

²⁴ S.H. Belavadi, Theory and practice of Parliamentary Procedure in India 174 (1988).

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the government to protect its proposals response to criticism and other methods suggested by opposition²⁵. Constantly making the Authority defend its position have an impact on it the manner in which the debate is conducted in the parliament. Effectiveness of Paragraph 2 (1) (b), however, operates in opposition to this theory. This is evidenced by the small number of debates that have been held in Parliament and scrutiny and recognition of the problem.

IX. ISSUES BEFORE US:

The aforesaid discussion, cases and statistics force us to ponder over the significance of the Tenth Schedule. Few questions are hereby raised as follows:

1. Whether party relations should be given recognition and protection under the Constitution?

No part of the Constitution of India provides for a party system in India. Actually, party system was formed and practiced for the mere convenience of running the government and for the convenience of the Parliamentary proceedings. Only the fact that the party system has been in practice in India since pre-independence period, does not validate the constitutionality of the system. Prior to independence, the only party existing at the national level was the *INC (Indian National Congress)* and it was not formed for satiating the hunger for power. Rather, it was a confluence of different ideologies for the noble objective of governing India and making it into a sovereign democratic republic. The party system, as present today is nothing more than a political system and for achieving political goals alone without any ethics.

Thus, in no sense can the constitutionality of the party system be brought into question as it has not been provided in the Constitution of India. As regards the intention of the Constituent Assembly in context of democracy in the country, *Pt. Jawaharlal Nehru, on December 13, 1946*, while introducing the *Objective Resolution* which was unanimously adopted by the assembly, clearly stated that it is very much the intention

²⁵ J.A.G. Griffith, Michael Ryle, supra note 12, 13.

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of the Assembly to establish a democracy in India, but what kind of democracy will be established is another matter which is to be decided at a later stage. He further said that although the contents of the constitution are being adopted from various other constitutions, the provisions related to kind of democracy are not being adopted and it is being left to the people of India to transform and evolve a new form of democracy and not get bound by the norms of the Constitution. Thus, at that time too, there was no such concept of a political party. Hence, the party relations are not to be recognised and protected under the Constitution as the Constitution does not provide for it.

It is to be noted here that had it been the intention of the fathers of the Constitution to include party system, they would have done it explicitly. Also, there were defections before independence too. So, the Constitution makers were aware of the acts of defection and had they wanted party system for India, they would have definitely included the ground of defection for disqualification at that time itself. Therefore, party system and party relations are neither recognised nor protected under the Constitution.

2. **Which relationship should be constitutionally recognised and answers the ideals of democracy: relationship of the member with the party or with the people of the constituency/voters?**

India is a democratic republic. The country being the world's second largest population holder cannot opt for public voting for every policy or decision that it needs to make. Every citizen cannot participate in the legislative process. Therefore, for the representation of the people in voting for the policies and decisions, there are elections through which people choose a date of their choice. Such elected candidate, in turn, represents such constituency in the house in all the policy related matters as well as at the time of decision making. Such chosen representative becomes the voice of the people and thus the indirect vote of the people is casted through him in the house while deciding on various matters. The party being a mere convenience cannot by any means be placed at an equal stature as the citizens of India. Citizens have been guaranteed the

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right to equal representation under the Indian Constitution and it forms the basic part of the Constitution as it is one of the fundamental elements of democracy. So long the representative is serving the people whom he represents; the relationship with the party should be of no concern. It is ultimately the people whom he has to serve and not the party. Therefore, in any case, the relationship of the member with the voters always supersedes the relationship with the party.

3. Is the Speaker the appropriate authority to decide the question of disqualification?

The Speaker, under para 6 (1) (a) of the Tenth Schedule to the Constitution of India, has been made the sole authority to decide the cases of disqualification falling under the purview of Anti-Defection Act. Initially, para 7 of the Tenth Schedule to the Constitution of India, which was subsequently declared ultra-vires by the Supreme Court in the case of Kihoto Hollohan, powers have excluded the judicial review of the decision of the Speaker under the Tenth Schedule. In other cases of disqualification as under article 103 and 192 of the Constitution of India, the Election Commission is to be consulted. But under the Tenth Schedule no such provision is there. All this has been vested in the Speaker alone. The Speaker is from amongst the members of the house. Hence, the Speaker deciding the matters of the house (where an impartial authority is needed) violates the principle that no one can be the judge in his own case.

The judge must be a neutral party. Although after being elected as the Speaker, he gives up the membership of the party for the time being, yet the possibility of bias cannot be ruled out under any circumstances. There is clear possibility of the Speaker to make arbitrary use of his powers as there is no check on his decision-making powers. Hence it is also violative of Article 14 of the Indian Constitution. Therefore, the Speaker is not the appropriate authority to decide the cases of defection alone. Why individual defection is punished but en bloc defection is not? There is a big question mark on the fact that individual defection is punished but the en bloc defection is not. Merely

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because the number of legislators is more, their act of defection becomes valid and if the same act is committed by an individual, it amounts to defection. Number is the only criterion at present on the basis of which the act of defection has been exempted in cases of merger.

The mere fact that the number of defectors is more does not mean that their acts are not backed by the greed of power and money. Even the intention of several members can be evil and that of one member be good. Therefore, the exemption of the act of merger from the purview of disqualification becomes arbitrary and cannot be allowed.

4. Whether the provisions of the Act violate the fundamental freedoms of speech, expression and association?

The Act clearly provides under para 2 (1) (b) that if any member of a political party defies or votes against the will of the party without the permission of the party, such member shall be held liable for disqualification under the Anti-Defection Act. Thus, the aforesaid provision is binding the member by the will of the party and depriving him the fundamental right of freedom of speech and expression. Merely for the sake of quicker processes and unnecessary delays, the members are bound by the will of the parties to which they belong and their freedom of speech and expression is curtailed.

They are not allowed to express their individual views. Similarly, according to para 2 (2) of the Tenth Schedule, if an independent member joins any party after getting elected, he shall be liable for disqualification on the ground of defection. This provision clearly violates the freedom of association of the independent member.

His freedom to associate with any other party is being curtailed through the above provision. Thus, the provisions of the Anti-Defection Law are both violative of freedom of speech and expression as well as freedom of association.

X. PRACTICE IN OTHER DEMOCRATIC COUNTRIES:

In India, unlike other democratic countries in the world, the vote of every legislature in the house is not it is important. For example, in Israel when Prime Minister Ariel Sharon demanded legislation permission to withdraw Israeli troops from the Gaza Strip, he got the support of members from the opposition party, while a few members of his own party refused. Even in the UK when Prime Minister Tony Blair wanted Great Britain to join the war in Iraq, more than 150 members of his own party voted in dissent. He had to take the support of the members of conservative party to pass the motion²⁶.

Such differences of opinion in between members of the same party are allowed in other democracies. Members of the Labor Party in the UK didn't have to quit their party, simply because they did not agree with the party line. They just made their will known and continued to stay at the party²⁷.

In India, members of a particular political party have to abide by the direction of their team's whip or face disqualification from the party. So, debates have become just a formality now. The anti-defection provisions make a mockery of parliamentary democracy by putting down debates, as legislators are not allowed to debate, otherwise they get disqualified from the House²⁸. Causing disruption, rather than debating have become the only possible way to oppose now. Instead of letting Indian Politics to deteriorate like this, we must allow our politicians to debate publicly, the important political views, negotiating the hope of elections and persuasion of ideas²⁹. While acknowledging that divisions within the political parties can interfere with the functioning of the government, but it will not be in line with the spirit of democracy to

²⁶ Subramaniam Vincent, Dissent isn't Defection available online at www.indiatogether.org/2005/apr/edtdissent.htm [Last accessed on 25th August, 2020].

²⁷ Ashwin Mahesh, Democracy without Dissent? Available online at www.rediff.com/news/2003/jul/29ash.htm [Last accessed on 25th August, 2020].

²⁸ Harsh Gupta, Defecting from Anti Defection, available online at www.livemint.com/articles/2009/.../Defecting-from-antidefection.html [Last accessed on 25th August, 2020].

²⁹ Barun Mitra, Anti- Defection: A Law Endangering Democracy, Mint, August 21st, 2008, available at www.miracleofdemocracy.org/story.aspx?id=1890&pubid=2038 [Last accessed on 25th August, 2010].

provide for democratic rule through the binding character of the whip supported by the threat of disqualification³⁰. In the absence of strong political parties, or a political party system, a system that has led the whips binding Britain, has failed have the same effect in our country. However, to make members of to obey orders governed by party politicians, it can only reduce the spirit of democracy.

XI. RECENT INSTANCES WHEREIN THE PROVISIONS OF TENTH SCHEDULE WERE INVOKED:

1. Arunachal Pradesh crisis (2016)³¹:

- I. In the Arunachal Pradesh state legislature, the discontent in Congress party against the leadership of *Arunachal Pradesh Chief Minister Nabam Tuki* led to the support of the motion by 20 Congress MLAs along with 11 MLAs from BJP and 2 independent members for the impeachment of Speaker.
- II. The Speaker initiated Anti Defection Law proceedings against them then the Governor advanced the session of the state assembly by nearly a month. This step was taken without taking consultation of the Council of Ministers. State governor asked the house to take up a motion to remove the Speaker as the first item on the agenda.
- III. This led to the cessation of the state legislature at the direction of the Chief Minister and the Speaker, and the dissidents held a parallel session at a substitute venue, where the Speaker was removed' and a 'no-confidence' motion against the government was passed.
- IV. The Speaker under the provisions of Anti Defection Law disqualified the dissenting MPs of Congress. This decision was challenged in Gauhati High Court which, later on, provided relief to the disqualified MPs.

³⁰ Attar Chand, *The Long March: Profile of Prime Minister Chandra Shekhar*, Pg 119, Mittal Publications, New Delhi, First Edition, 1991.

³¹ 2015–2016 Arunachal Pradesh political crisis, available at https://en.wikipedia.org/wiki/2015%E2%80%932016_Arunachal_Pradesh_political_crisis.

- V. Constitutional Bench of the Honbl. Supreme Court reversed President rule, and ordered the dismissal of BJP led govt and asked Nabam Tuki to prove his majority in a floor test.

2. Uttarakhand Political Crisis³²:

- I. Uttarakhand political crisis started when the Speaker passed the Appropriation bill which was voted against by 35 legislatures.
- II. These legislators included 27 BJP MLAs while the rest were rebel Congress leaders. The nine rebel Congress MLAs along with the BJP legislators met with the Governor of Uttarakhand, K.K. Paul to ask the Governor to dissolve the assembly and call for fresh elections.
- III. In another meeting with the Governor, former Chief Minister Harish Rawat assured him that the Congress party along with six members of the Progressive Democratic Front still enjoyed a majority in the house.
- IV. Governor Paul asked Harish Rawat to prove his majority through a floor test and gave him a deadline of nine days. Immediately after the Governor's deadline, the Congress party also expelled Vijay Bahuguna's son, Saket Bahuguna on the grounds of "anti-party" activities.
- V. A day before the floor test, the President's rule was declared in the State of Uttarakhand. Also, on that day, the nine rebel legislators were disqualified under the anti-defection law by Speaker of the assembly, Gobind Singh Kunjwal. The law, passed by the Parliament in 1985, ruled that lawmakers in a legislative body can be disqualified if; (a) they voluntarily resign from the party or (b) they vote against the directives given by the leadership of the party.
- VI. Eventually, Supreme Court asked for the floor test and said that the rebel Congress MLAs are not allowed to cast their vote if they are disqualified at the time of voting.

³² Understanding the Uttarakhand Crisis, available at <https://www.thehindu.com/specials/in-depth/understanding-the-uttarakhand-crisis/article8406025.ece>.

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VII. The Supreme Court also asked the central government to ascertain its intent for imposing President rule. It asked whether a solitary matter of passing an important bill through a voice vote in a divided assembly a reason strong enough to impose President's rule. Also, why didn't the Governor, who is non-partisan, under Article 175 (2) ask the ruling government in the state to prove his majority.

XII. CONCLUSION:

Thus, after thorough research on this topic, it may be concluded that,

The Anti-Defection Law has many advantages and disadvantages as well. The Anti Defection Law provides provide stability to the Government by preventing parliamentarians from shifting their allegiance to a party, it ensures that candidates are elected with party support and on the basis of party manifestoes remain loyal to the party policies. It also promotes party discipline. and provides for punitive measures against a member who defects from one party to another. Therefore, the law seeks to provide safety measures to protect both the Government and the opposition parties against the instability that may arise due to defection by the parliamentarians. It also facilitates the democratic realignment of Parties in the legislature by way of merger of parties.

But there are many disadvantages of the Anti-Defection Law, which can be summarized as follows- by preventing parliamentarians from changing parties, it reduces the accountability of the Government to the Parliament and the people. It also interferes with the member's freedom of speech and expression by curbing dissent against party policies and the law puts party bossism on a pedestal and sanctions tyranny of the party in the name of party discipline.

The anti-defection law in India is a very important step against the opportunistic political actions and the tendency of horse trading. But as far as the right to represent a constituency is concerned, the legislators should be given more freedom to express their views and to vote. In case a legislator is deceiving the voters, or destabilizing the government he should be punished more severely.

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The Anti Defection law has not been able to address the elephant in the room- bribery and corruption on the parliament floor. By using the loopholes, some parliamentarians still abuse their powers and defect to other parties. Many provisions of this law also violate fundamental rights and freedom of the members and also do not serve the purpose of curbing defection, thus this law should be amended or replaced by a more competent legislation.

XIII.SUGGESTIONS:

For securing the stability of the Government, the parliamentarians should be restricted from defection, but the scope of defection should be changed and should be limited only to the instances of leaving their party or joining any other political party, voting or abstaining from voting against the party whip only in those matters when the stability of the Government is at stake. In other ordinary matters, the parliamentarians should have right to express their opinion on behalf of the public who they are represent in the parliament.

In case of their deceitful conduct, the real defection in the form of changing the political party or making an unholy alliance to support or to destabilize the government, the punishment should be made more severe. Such legislators should be banned from contesting any election, till the duration of the house, of which he was a member. The objective of anti-defection law is to prevent floor-crossing. But dissent is an intrinsic part of parliamentary democracy; hence, should not be considered as an instance of defection.

Tenth Schedule be amended to state that “A member shall incur loss of his membership only when he votes or abstains from voting in the House with regard to a Confidence Motion, No-confidence Motion, Adjournment Motion, Money Bill or financial matters contrary to any direction issued in this behalf by the party to which he belongs to, and in no other case³³.”

³³ Private Member’s Bill introduced by Manish Tiwari In Lok Sabha recently, available at www.telegraphindia.com/1100421/jsp/opinion/story_12362774.jsp [Last accessed on 25th August, 2020].