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Regd. Office:-A-53, 3rd Floor Prashant Vihar Rohini Sector 14 , New Delhi-110085

9971053929,7275253434,info@prismaticinstitute.com, www.prismaticinstitute.com

Anti - Defection Law

Anti - Defection Law

- The practice of legislators from changing political parties during their term continues unabated in Indian legislatures despite the **Tenth Schedule** having been inserted into the **Constitution** in 1985.
- Commonly known as the 'Anti - Defection Law', it was meant to arrest the practice of legislators from changing political affiliations during their term in office.
- The political crisis in Maharashtra, and many others before it, is grim reminders of what the Tenth Schedule can and cannot do.
- The anti-defection law punishes individual Members of **Parliament** (MPs)/MLAs for leaving one party for another.
- Parliament added it to the Constitution as the **Tenth Schedule in 1985**. Its purpose was to bring stability to governments by discouraging legislators from changing parties.
- The Tenth Schedule - popularly known as the **Anti-Defection Act** - was included in the Constitution via the **52nd Amendment Act, 1985**.
- It sets the provisions for disqualification of elected members on the grounds of defection to another political party.
- It was a response to the toppling of multiple state governments by party-hopping MLAs after the general elections of 1967.

- However, **it allows a group of MP/MLAs to join** (i.e., merge with) another political party without inviting the penalty for defection. And it does not penalize political parties for encouraging or accepting defecting legislators.
- As per the 1985 Act, a '**defection' by one-third of the elected members of a political party was considered a 'merger'**.
- But the **91st Constitutional Amendment Act, 2003**, changed this and now **at least two-thirds of the members of a party must be in Favour** of a "merger" for it to have validity in the eyes of the law.
- The members disqualified under the law can stand for elections from any political party for a seat in the same House.
- The decision on questions as to disqualification on ground of defection is referred to the **Chairman** or the **Speaker** of such House, **which is subject to 'Judicial review'**.
- However, the law does not provide a timeframe within which the presiding officer has to decide a defection case.

Grounds for Defection

- **Voluntary Give Up:**
 - If an elected member voluntarily gives up his membership of a political party.
- **Violation of Instructions:**
 - If he votes or abstains from voting in such House contrary to any direction issued by his political party or anyone authorized to do so, without obtaining prior permission.
 - As a pre-condition for his disqualification, his abstention from voting should not be condoned by his party or the authorized person within 15 days of such incident.
- **Elected Member:**
 - If any independently elected member joins any political party.
- **Nominated Member:**
 - If any nominated member joins any political party after the expiry of six months.

Challenges with Anti - Defection Law

- **Paragraph 4 of the law:**
 - Paragraph 4 of the Anti - Defection Law creates an exception for mergers between political parties by introducing three crucial concepts:
 - **Original Party:**
 - The political party to which a member belongs (this can refer to the party generally, outside of the House).

- **Legislature Party:**
 - Consisting of all elected members of a House for the time being belonging to one political party.
- **Deemed Merger**
 - Paragraph 4 **does not clarify whether the original political party refers to the party at the national level or the regional level**, despite the fact that that is how the **Election Commission** of India recognises political parties.
 - **Paragraph 4 states that:**
 - A merger can take place only when an original party merges with another political party, and at least two thirds of the members of the legislature party have agreed to this merger.
 - Paragraph 4 seems to be creating a “legal fiction” so as to indicate that a merger of two third members of a legislature party can be deemed to be a merger of political parties, even if there is no actual merger of the original political party with another party.
- **Undermining Representative & Parliamentary Democracy:**
 - After enactment of the Anti-defection law, the MP or MLA has to follow the party’s direction blindly and has no freedom to vote in their judgment.
 - Due to Anti-Defection law, the chain of accountability has been broken by making legislators accountable primarily to the political party.
- **Controversial Role of Speaker:**
 - There is no clarity in the law about the timeframe for the action of the House Chairperson or Speaker in the anti-defection cases.
 - Some cases take six months and some even three years. There are cases that are disposed - off after the term is over.
- **No Recognition of Split:**
 - Due to the **91st Constitutional Amendment Act, 2003**, the anti-defection law created an exception for anti-defection rulings.
 - However, the amendment does not recognize a ‘split’ in a legislature party and instead recognizes a ‘merger’.
- **Allows only Wholesale Defection:**
 - It allows wholesale defection, but retail defection is not allowed. Amendments are required to plug the loopholes.
 - He raised concern that if a politician is leaving a party, s/he may do so, but they should not be given a post in the new party.

▪ **Affects the debate and discussion:**

- The Anti-Defection Law has created a democracy of parties and numbers in India, rather than a democracy of debate and discussion.
 - In this way, it does not make a differentiation between dissent and defection and weaken the Parliamentary deliberations on any law.

10th Schedule – Provisions under Anti-Defection Law

The Tenth Schedule includes the following provisions with regard to the disqualification of MPs and MLAs on the grounds of defection:

Grounds for disqualification:

- If an elected member gives up his membership of a political party voluntarily.
- If he votes or abstains from voting in the House, contrary to any direction issued by his political party.
- If any member who is independently elected joins any party.
- If any nominated member joins any political party after the end of 6 months.
- The decision on disqualification questions on the ground of defection is referred to the Speaker or the Chairman of the House, and his/her decision is final.
- All proceedings in relation to disqualification under this Schedule are considered to be proceedings in Parliament or the Legislature of a state as is the case.

Exceptions under the Anti Defection Law

- In the situation where two-thirds of the legislators of a political party decide to merge into another party, neither the members who decide to join nor the ones who stay with the original party will face disqualification.
- Any person elected as chairman or speaker can resign from his party, and rejoin the party if he demits that post.
- Earlier, the law allowed parties to be split, but at present, this has been outlawed.

Deciding Authority

- Any question regarding disqualification arising out of defection is to be decided by the presiding officer of the House.

Is the decision of the Presiding Officer subject to judicial review?

- Originally, the Act provided that the presiding officer's decision was final and could not be questioned in any court of law. But, in Kihoto Hollohan case (1992), the Supreme Court declared this provision as unconstitutional on the ground that it seeks to take away the jurisdiction of the SC and the high courts.

- The court held that while deciding a question under the 10th Schedule, the presiding officer should function as a tribunal. Hence, his/her decision (like that of any other tribunal) was subject to judicial review on the grounds of malafides, perversity, etc. But, the court rejected the argument that the vesting of adjudicatory powers in the presiding officer is by itself invalid on the ground of political bias.
- However, it held that there might not be any judicial intervention until the Presiding Officer gives his order. A good example to quote in this respect was from 2015 when the Hyderabad High Court declined to intervene after hearing a petition which alleged that there had been a delay by the Telangana Assembly Speaker in taking action against a member under the anti-defection law.

Is there a time limit within which the Presiding Officer should decide?

- **There is no time limit** as per the law within which the Presiding Officers should decide on a plea for disqualification. The courts also can intervene only after the officer has made a decision, and so the only option for the petitioner is to wait until the decision is made.
- There have been several cases where the Courts have expressed concern about the unnecessary delay in deciding such petitions.
- In a few cases, there have been situations where members who had defected from their political parties continued to be House members, because of the delay in decision-making by the Speaker or Chairman.
- There have also been instances where opposition members have been appointed ministers in the government while still being members of their original political parties in the state legislature.

How have the Courts interpreted the law while deciding on related matters?

- The SC has interpreted different provisions of the law.
- The phrase 'Voluntarily gives up his membership' has a wider suggestion than resignation.
- The law says that a member can be disqualified if he 'voluntarily gives up his membership'. However, the SC has interpreted that without a formal resignation by the member, the giving up of membership can be inferred by his conduct.
- In other judgments, members who have publicly expressed opposition to their party or support for another party were considered as having resigned. Recently, the Chairman of the Upper House of Parliament disqualified two Janata Dal leaders from the house based on the allegation that was indulging in anti-party politics, and they had "voluntarily" given up their membership of the party (which is not synonymous to resignation as per the SC orders).

Does the anti-defection law affect legislators' ability to make decisions?

- The anti-defection law aims to maintain a stable government by ensuring that the legislators do not switch sides. However, this law also limits a legislator from voting according to his conscience, judgement and electorate's interests.
- This kind of a situation hinders the oversight functions of the legislature over the government, by making sure that members vote based on the decisions taken by the party leadership, and not based on what their constituents would like them to vote for.

- Political parties issue directions to MPs on how to vote on most issues, irrespective of the nature of the issue.
- Anti-defection does not provide sufficient incentive to an MP or MLA to examine an issue in-depth and ponder over it to participate in the debate.
- The Law breaks the link between the elected legislator and his elector.
- Importantly, several experts have suggested that the law should be valid only for those votes that determine the stability of the government (passage of the annual budget or no-confidence motions).

Several recommendations have come up regarding Anti-Defection:

- **Dinesh Goswami Committee:** Recommendations include that disqualification should be only for cases such as:
 - Member giving up the membership of his political party voluntarily.
 - Member voting or abstaining from voting opposed to party directions.
- **Law Commission 170th Report:**
 - Delete the exemption in case of splits and mergers.
 - Consider the pre-poll electoral fronts as one party under the 10th Schedule.
 - Parties should issue whips only on critical situations or votes.
- **Election Commission:**
 - Make the President/Governor the decision-maker with respect to disqualification subject to binding advice from the Election Commission on the lines of disqualifications based on the Representation of Peoples Act's provisions regarding the Office of Profit.

To conclude, regulation of the 10th Schedule along with the correct working directives that adhere to transparency and accountability in a democracy is the need of the hour. However, this provision should also aid stability in the government, which would, in turn, decrease corruption and steer the focus of the parliamentarians/legislators towards governance.

Source :TOI