CHAPTER –3

CONSTITUTIONAL PROVISIONS RELATING TO
ANTI-DEFECTION LAW – AN ANALYSIS

The Tenth Schedule to the Constitution of India, which is popularly known as the “Anti-defection Law” was inserted through the Constitution (Fifty-second Amendment)Act, 1985. The main intent of the law was to combat “the evil of political defections.” The Act, provided for the disqualification of the members of both Houses of Parliament and the State Legislatures on the ground of defection from one political party to another. For this purpose, Constitution (Fifty-second Amendment)Act, 1985 amended Articles 101, 102, 190 and 191 of the Constitution regarding vacation of the seats and disqualification from membership of Parliament and the State Legislatures and added a new Schedule i.e. the Tenth Schedule to the Constitution setting out certain provisions for disqualification on the ground of defection. Later, Constitution (Ninety-first Amendment)Act, 2003 made one change in the provisions of the Tenth Schedule. It omitted an exception provision i.e., disqualification on ground of defection not to apply in case of Split. Constitutional provisions relating to Anti-defection law are given below:
3.1. Article 102(2) and 191(2) of the Constitution of India

Clause (2) of Article 102 of the Constitution of India provides that a person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

Before the Constitution (Fifty-second Amendment) Act, 1985, Article 102 had provided for disqualification of a person for being a member of parliament on grounds of holding an office of profit, being of unsound mind or, an un-discharged insolvent or, not being a citizen of India or, being disqualified by or under any other law. The Representation of Peoples Act, 1951 disqualifies a person from the membership of a legislature for being guilty of electoral offences, like corrupt practices etc.

Corresponding to Article 102 (2) a similar provision has also been made in Article 191 (2), which provides that a person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

Therefore, Article 102(2) and Article 191 (2) make a similar provision with reference to disqualification of a member of a State Legislature under the Tenth Schedule i.e. on ground of defection from one party to another party. The Tenth Schedule cannot be read or construed independent of
Articles 102 and 191 of the Constitution and the object of those Articles. - Rajendra Singh Rana & ors Vs Swami Prasad Maurya & ors. 76

3.2 Object of the Tenth Schedule

The statement of Object and Reasons accompanying the Constitution (Fifty-Second Amendment) Act, 1985 makes the object behind introduction of the Tenth Schedule to the Constitution clear as follows:

“The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it with this object; an assurance was given in the Address by the President to Parliament that the government intended to introduce in the current session of Parliament an anti-defection Bill. The Bill is meant for outlawing defection and fulfilling the above assurance.”

The main purpose for enacting the Constitution (Fifty-Second Amendment) Act, 1985 i.e. incorporation of the Tenth Schedule and other amendments which is made to the Constitution was not only to stabilise the legally elected Governments and to prevent the political immorality and corruption, but also to make them effective. If the provisions are read

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76 AIR 2007 SC 1305
down, the main purpose would be defeated. *Prakash Singh Badal Vs Union of India.* 77

The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy. *Kihoto Hollohon Vs Zachilhu.* 78

The objects and purposes of the Tenth Schedule would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the political party to which the member belongs went the polls. *Kihoto Hollohon Vs Zachilhu.* 79

The object is to preserve democratic structure of the Legislature and safeguard political morality in legislators. *Banjak Phom Vs Thenucho.* 80

The objects and reasons for enacting the Constitution (Fifty-Second Amendment) Act, 1985 and the Maharashtra Local Authority Members’ Disqualification Act, 1986 are clear. The same seek to prevent defection. The same further prevents independent members from losing their

77 AIR 1987 P&H.263
78 AIR 1993 SC 412: 1992 Supp. (2) SCC 651
79 *Ibid*
80 (1992) 1 Gau LR 356 (372)
character as such and prohibits them from joining a political party or front. 

-Pandurang Dagadu Parte Vs Ramchandra Baburao Hirve. \(^{81}\)

The object sought to be achieved by the Tenth Schedule is to ensure loyalty of the legislators to a political party which sponsored the candidature of such a legislator at the election.-Yitachu Vs Union of India & Ors. \(^{82}\)

### 3.3 Scope of the Tenth Schedule

The provisions of the Tenth Schedule are salutary and are intended to strengthen the fabric of Indian Parliamentary democracy by curbing unprincipled and unethical political defections. Kihoto Hollohon Vs Zachilhu. \(^{83}\)

The anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct, whose awkward erosion and grotesque manifestations have been the base of the times, above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation. Kihoto Hollohon Vs Zachilhu. \(^{84}\)

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\(^{81}\) AIR 1997 Bom. 387  
\(^{82}\) AIR 2008 Gau 103 (Spl. Bench)  
\(^{83}\) Supra Note. 78  
\(^{84}\) Supra Note. 78
Although originally the Constitution had not expressly referred to the existence of political parties, by the amendments made to it by the Constitution (Fifty-Second Amendment) Act, 1985, there is now a clear recognition of the political parties by the Constitution. The Tenth Schedule to the Constitution, which is added by the above Amending Act, acknowledges the existence of political parties and sets out the circumstances when a member of Parliament or of the State Legislature would be deemed to have defected from the political party and would thereby be disqualified from being a member of the House concerned. - *Kanhiya Lal Omar Vs R.K. Trivedi.*\(^{85}\)

The question of disqualification of a Member on the ground of defection and the Speaker’s order thereon rendered under the Tenth Schedule are not based on the result of an election, which can be challenged only by an election-petition in accordance with the provisions of Representation of the People Act, 1951. - *Dr. Kashinath G. Jalmi Vs. The Speaker, Legislative Assembly of Goa.*\(^{86}\)

Tenth Schedule to the Constitution is applicable to the transaction of business inside the House of Legislature. The anti-defection activity

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\(^{85}\) AIR 1986 SC 111  
\(^{86}\) AIR 1993 SC 1873
outside the House is not penalised in any manner by the Tenth Schedule. -

*S.R.Bommai vs. Union of India.*

3.4 Provision as to disqualification on the ground of defection under Tenth Schedule:

The researcher is now going to discuss the various provisions of the Tenth Schedule of the Constitution.

(i) Paragraph –1 Interpretation

The Tenth Schedule of the Constitution of India which lays down provision of disqualification on the ground of defection of the members of Parliament and of the State Legislature begins with the interpretation clause. Paragraph 1 which states that in this Schedule, unless the context otherwise requires,-

a) "House” means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State;

b) “Legislature Party”, in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or (*****)

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87 AIR 1994 SC 1918
88 The words "Paragraph 3, or as the case may be" omitted by the Constitution (Ninety-first Amendment) Act, 2003 w.e.f. 1-1-2004.
the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

c) Original political party”, in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2;

d) Paragraph” means a paragraph of this Schedule.

This definition clause (paragraph 1 of the Tenth Schedule) suffers from a serious lacuna inasmuch as it defines the term “House”, “Legislature Party” and “Original Political Party” but fails to define a “Political Party”. This was particularly important as by the Fifty-second Amendment the concept of political parties was finding a mention in the Constitution of India for the first time. With this the political parties were coming to have a constitutional recognition. Thus so far, the Election Commission recognised political parties but it was only for purposes of allocation of election symbols.

“Legislature Party” in paragraph 1(b) – meaning of:

The expression “Legislature Party”, as defined in paragraph 1(b) includes the group consisting of all members of the House for the time being belonging to that political party formed in accordance with
paragraph 3, and applies, inter alia, to the faction formed as envisaged in paragraph 3. *Mayawati Vs Markandeya Chand.*

“Original political party” as in para 1(c) and “Political party” as in para 2(1) (b): -

‘Political party’ in clause (b) of sub-paragraph (1) of paragraph 2 is none other than “Original political party” mentioned in paragraph 3. - *Mayawati Vs. Markandeya Chand.*

The argument that the context in paragraph 2(1) (b) requires to equate ‘political party’ with ‘legislature party’ even though the definition clause in paragraph 1 reads differently is not acceptable. A reading of sub-paragraph (b) and the Explanation in paragraph 2(1) places the matter beyond doubt that the ‘political party’ in sub-paragraph (1) (b) refers to the ‘original political party’ only and not to the Legislature Party. - *Mayawati vs. Markandeya Chand.*

**Political Party – Meaning of:**

The Tenth Schedule to the Constitution of India is criticised on the ground that it fails to define the term “political party” although it is used in paragraph 2 of the Schedule. Generally speaking, a political party is an unincorporated voluntary association of a number of persons, more or less numerous, sponsoring ideas of government or maintaining certain political

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89 AIR 1998 SC 3340
90 Ibid
91 Supra Note 89
principles or ideologies or beliefs in public policies of the government, having a political organisation. - W.K. Singh Vs Speaker, Manipur Legislative Assembly 92

(ii) Paragraph 2 - Disqualification on ground of defection

The Paragraph 2 of the Tenth Schedule provides for disqualification on the ground of defection and states that-

(1) Subject to the provisions of [paragraph 4, and 5] 93 a member of a House belonging to any political party shall be disqualified for being a member of the House -

(a) If he has voluntarily given up his membership of such political party; or

(b) If he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation- For the purposes of this sub-paragraph,

92 (1986) 2 Gau LR 91
93 Substituted by the Constitution (Ninety-first Amendment) Act, 2003, sec. 5(b), for “paragraph 3, 4, and 5” w.e.f. 1-1-2004.
(a) An elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member.

(b) A nominated member of a House shall,—

(i) Where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) In any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying
with the requirements of article 99 or, as the case may be, article 188.

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,—

(i) whether he was a member of political party immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.

**Paragraph 2 – Scope of:**

The deeming fiction in explanation (a) in paragraph 2(1) of Schedule 10 must be given full effect, for, otherwise the expelled member would
escape the rigour of law which was intended to curb the evil of defections. -
*G. Viswanathan Vs. The Hon’ble Speaker, T.N. Legislative Assembly*.\(^{94}\)

Paragraph 2(1) read with the Explanation clearly points out that an
elected member shall continue to belong to that political party by which he
was set up as a candidate for election as such member. This is so,
notwithstanding that he was thrown out or expelled from that party. -*G.
Viswanathan Vs. The Hon’ble Speaker, T.N. Legislative Assembly*.\(^{95}\)

The action of a political party qua its member has no significance and
cannot impinge on the fiction of law under the Tenth Schedule. -*G.
Viswanathan Vs. The Hon’ble Speaker, T.N. Legislative Assembly*.\(^{96}\)

The conditions are sine qua non for avoiding the disqualification when
any member of the House voluntarily gives up membership of his original
political party. First is that the member concerned should have made a
claim that the split in the original political party has arisen resulting in the
constitution of a group in its Legislature Party representing a faction
thereof. Second is that such group should consist of not less than one-third
of the members of such Legislature Party. -*Mayawati Vs Markandeya
Chand*\(^{97}\)

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\(^{94}\)AIR 1996 SC 1060

\(^{95}\)Ibid

\(^{96}\)Supra Note 94

\(^{97}\)Supra Note 89
The Tenth Schedule itself does not prohibit any member of a Legislature from violating the direction/whip issued by a political party to belong to that political party. All that paragraph 2 (1) (b) of the Tenth Schedule prescribes is that when such a direction/whip issued by that political party is violated by a legislator either without the prior permission of the political party or without such violation having not been condoned subsequently by the political party, the legislator incurs disqualification for continuing as a member of the House. *Yitachu vs. Union of India & ors*\(^98\)

**Constitutional Validity of Paragraph 2:**

The provisions of paragraph 2 of the Tenth Schedule do not violate any rights or freedom of elected members of Parliament or State Legislatures under Art. 105 or Art. 194 of the Constitution, and is thus constitutionally valid. *Kihoto Hollohan vs. Zachillhu*\(^99\)

It cannot be said that the provisions of Paragraph 2(1)(b) would be destructive of the democratic set up, the basic feature of the Constitution, unless read down. *Parkash Singh Badal Vs. Union of India*\(^100\)

So far as the right of a member under Art. 105 is concerned, it is not an absolute one and have been made subject to the provisions of the Constitution and the rules and Standing Orders regulating the procedure of

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\(^98\) Supra Note 82  
\(^99\) Supra Note 78  
\(^100\) Supra Note 77
Parliament. The right of freedom of speech conferred on a member of the Parliament can be regulated or curtailed by making any constitutional provision, such as the Fifty Second Amendment Act. Therefore, the provision of paragraph 2(1)(b) cannot be termed as violative of the provisions of Art. 105 of the Constitution *Parkash Singh Badal Vs. Union of India*\(^\text{101}\)

**Paragraph-2 and Role of the Leader of Legislature Party:**

There can be no doubt that leader of a Legislature Party occupies an important position in the legislative scheme of things. He has an important role to play under the Rules. He has to convey relevant and necessary information to the Speaker. He has a right to receive copies of the petition with annexure submitted by any member to the Speaker, seeking disqualification of any other member and to furnish written comments thereon to the Speaker. In a case of disqualification under paragraph 2(1)(b) of Tenth Schedule, the involvement of the leader assumes importance in as much as condition of violation of whips arises for consideration. In a case which attracts Paragraph 2(1)(a) or Paragraph 3 of the Tenth Schedule, his role does not assume such crucial significance. *Zachilhu Khusantho Vs State of Nagaland*\(^\text{102}\)

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\(^{101}\) *Supra Note 77*

**Status and position of an ‘expelled’ or ‘unattached’ member**—

The anti-defection law has been criticised on the ground that it does not state the position and status of members who are expelled from their political parties. Such a member, however, continues to be a member of the House and is seated separately from the bloc of seats earmarked for his original political party.

Expelling a member from a political party and disqualification from membership of the concerned House are two different matters. A member of a political party may be expelled because of anti-party activities or for an act of dissent committed by such member under the party disciplinary rules or code of conduct of such party. Under the Tenth Schedule the question of disqualification on the ground of defection arises only on two situations—voluntarily given up his membership and voting or abstains from voting against the party direction. Now question arise as to whether expulsion from political party can be the basis for disqualification from membership of the House? Whether the party whip lies against such expelled members? What shall be the status of such expelled members?

Being treated as unattached is a matter of convenience outside the Tenth Schedule and does not alter the fact to be assumed under the Explanation to Paragraph 2(1) of the Schedule. Such an arrangement and labelling would be of no legal assistance in saving such member from the alleged disqualification, as the same is not recognised in the constitutional
scheme underlying the Tenth Schedule. *G. Viswanathan Vs. The Hon’ble Speaker, T.N. Legislative Assembly.*

Where the speaker ordered the MLAs to be treated as ‘unattached Members’ of the House, they having been expelled from the primary membership of the original political party on whose tickets they had won the election, and the legality of labelling them as ‘unattached’ was challenged, it is held that there is no “unattached” category of members of the House under the provisions of the constitution. *Wahangbam Nipamacha Singh & ors vs. Speaker, Manipur Legislative Assembly & Anr.*

In *G.Vishwanathan vs. Speaker T.N. Legislative Assembly* the Hon’ble Supreme Court held that an expelled member was bound by the party’s whip even after expulsion and failure to adhere to such whip would result in disqualification of the expelled member from the House.

But considering the same question the Apex Court in *Amar Singh Vs Union of India*, referred the matter to a larger Bench and held that, the decision of the G.Viswanathan case shall not be applied to the two writ petitioners Amar Singh and Jaya Prada who were expelled from the Samajwadi Party.

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103 *Supra Note 94*
104 2001 (2) Gau LT 130 AIR 2002 Gau.58
105 *Supra Note 94*
106 (2011) 1 SCC 210
In Vinod Kumar Binny Vs. Speaker, Delhi Legislative Assembly\textsuperscript{107}V.K. Binny an AAP MLA, was expelled by the AAP disciplinary committee and the High Court of Delhi had stayed the operation of Speaker’s latter dated 11/02/2014 which said that V.K. Binny continued to be a member of the AAP despite his expulsion from the AAP.

However, finally the larger Bench of the Apex Court of India in Amar Singh Vs. Union of India\textsuperscript{108} disposed of both the writ petitions without answering the questions commenting that both the writ petitioners have completed their term and therefore it would be more appropriate to not to answer the questions. Thus the important questions raised in Amar Singh vs. Union of India\textsuperscript{109} remained unanswered and the decision of G. Viswanathan case\textsuperscript{110} remains prevailed. However, this approach of the Apex Court kept an area of Tenth Schedule vague and dark. In view of the present scenario the present research scholar begs to state that it is a time to probe into the questions raised in Amar Singh case.

**Voluntarily giving up of membership of Political Party under clause (a) of paragraph2 (1) and scope of:**

Where an individual member voluntarily gives up the membership of his political party, he is subject to disqualification under paragraph 2(1)(a).

\textsuperscript{107} WP(C) No. 1154/2014
\textsuperscript{108} WPC (C) No. 240/2017
\textsuperscript{109} Supra Note 106
\textsuperscript{110} Supra note 94
On the other hand, where a group of members belonging to a political party, but whose strength is less than one-third of the members of the Legislature Party concerned voluntarily give up the membership of their political party, they are not entitled to protection under paragraph 3 and they are subject to disqualification under paragraph 2(1)(a). This is the logical interpretation of paragraph 2(1)(a) and 3 of the X-th Schedule. *Banjak Phom vs. Thenucho*\(^{111}\)

A member can voluntarily give up his membership in a variety of ways. He may formally tender his resignation in writing to his political party or he may so conduct himself that the necessary inference from the conduct is that he has voluntarily given up his membership of the party to which he belonged. *Zachilhu Khusantho vs. State of Nagaland*\(^{112}\)

No provision in the Tenth Schedule requires that the act of voluntarily giving up membership of the party must be expressed or performed in any particular manner, formal or otherwise. To require such a formality in the act of voluntarily giving up membership of party would amount to adding a non-existent qualification or condition in paragraph 2(1)(a). *Zachilhu Khusantho vs. State of Nagaland*\(^{113}\)

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\(^{111}\) *Supra note 80*  
\(^{112}\) *Supra note 102*  
\(^{113}\) *Supra note 102*
Whether a member has voluntarily given up membership of his political party is a matter of inference from admitted or proved circumstances. *Zachilhu Khusantho vs. State of Nagaland*114

The writ-petitioner-Member of the Bihar Legislative Council was disqualified by the Chairman of the Council under paragraph 2(1)(a) of the 10th Schedule on the ground that though he had been elected to the Legislative Council on the ticket of the Indian National Congress, he subsequently contested the Parliamentary election as an independent candidate. As the said fact was admitted by the writ-petitioner, so the plea of non-supply of the copy of the letter of the Congress Legislative Party to him would be of no help; nor were the principles of Natural Justice found by the Court as violated by the Chairman. Held that the order of the Chairman that the said member had given up the membership of the Congress Party and thus incurred disqualification within the meaning of paragraph 2(1)(a) of the Tenth Schedule was proper. *Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council*115

‘Voluntarily given up his membership’ – Inference of:

Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has

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114 *Supra note 102*

115 *AIR 2005 SC 69*
voluntarily given up his membership of the political party to which he belongs. *Ravi S. Naik Vs. Union of India.*\(^{116}\)

If a person belonging to a political party that had set him up as a candidate, gets elected to the House and thereafter joins another political party for whatever reasons, either because of his expulsion from the party or otherwise, he voluntarily gives up his membership of the political party and incurs disqualification under Art. 191(2) of the Constitution. *G Viswanthan Vs. The Hon’ble Speaker, T.N. Legislative Assembly*\(^{117}\)

In *Kunwar Pranav Singh Champion Vs Speaker, Uttarakhand Legislative Assembly*\(^{118}\) the Hon’ble Uttarakhad High Court held that defection under Paragraph 2(1) (a) of the Tenth Schedule of the Constitution constitutes deserting the party. Dissent is not defection and the Tenth Schedule while permits dissent prohibits defection. Dissent is permissible only so long as it does not tread into the realm of ‘voluntarily relinquishing the membership of the party’. If dissent is permitted to unfathomable limit, then it will amount to deserting the party and would also tantamount to ‘voluntarily giving up his membership of such political party’ under paragraph 2(1)(a) of the Tenth Schedule.” In this case the petitioners have not only deserted the leader and deserted the Government, but under the garb of dissent, they have, by their conduct, deserted the

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\(^{117}\) Supra note 94

\(^{118}\) AIR 2016 (NOC517) 252
party, otherwise they would not have said in the joint memorandum that they voted against the Appropriation Bill, it was not passed, the Government is in minority and, therefore, the Cabinet of Shri Harish Rawat be dismissed.

**Word “join” – Meaning of:**

The term ‘Join’ has a wider connotation and the same would include constitution of a group by various individuals getting together for the purposes of forming an Aghadi or front. *Pandurang Dagadu Parte vs. Ramchandra Baburao Hirve*119

**Whether resignation wipes out the stain of disqualification:**

The contention that as the appellant, after the filling of a petition alleging his disqualification, had demitted office of the Speaker, so the enquiry into the alleged disqualification could not be proceeded with, is held to have no substance. The disqualification, if incurred any, is from the membership of the House and the subsequent resignation from the office of the Speaker does not bestow immunity from the liability for disqualification. *- Luis Proto Barbosa Vs. Union of India.*120

The words voluntarily given up his membership occurring in Paragraph 2(1) (a) of the Tenth Schedule are not synonymous with resignation and

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119 Supra note 81
120 AIR 1992 SC 181: 1992 Supp.(2) SCC 651
have a wider connotation in as much as a person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of that party. - Ravi S. Naik vs. Union of India\textsuperscript{121}

**Paragraph 2(1)(b) – Scope of:**

The disqualification imposed by Paragraph 2(1)(b) must be so construed as not to unduly impinge on the freedom of speech of a member, which would be possible if the paragraph is confined to its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections. - Kihoto Hollohon vs. Zachillhu\textsuperscript{122}

To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side snacks of conspiracy. Held that clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to ‘any directions’ issued by the political party. Kihoto Hollohon vs. Zachillhu\textsuperscript{123}

\textsuperscript{121}Supra Note 116
\textsuperscript{122}Supra Note 78
\textsuperscript{123}Ibid
The provision as contained in paragraph 2(1)(b) of the Tenth Schedule, however, recognises two exceptions – one, when the Member obtains from the political party prior permission to vote or abstains from voting, and the other, when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs.- *Kihoto Hollohon Vs. Zachillhu* 124

**Words ‘any direction’ – meaning of:**

Reversing the decision in *Prakash Singh Badal vs. Union of India* 125 that the expression should be given wider meaning, it is held that the words any direction occurring in paragraph 2 (1) (b) would require to be construed harmoniously with the other provisions, so as not to be given wider meaning opposed to the objects and purposes of the Tenth Schedule. *Kihoto Hollohon vs. Zachillhu* 126

**Expression ‘any direction’ – Scope of:**

A direction given by a political party to its members, violation of which may entail disqualification under paragraph 2(1)(b) should be limited to a vote of motion of confidence or no confidence in the Govt. Or

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124Ibid
125Supra Note 77
126Supra Note 78
where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate. - *Kihoto Hollohon Vs. Zachillhu* \(^{127}\)

**‘Political Party’ in paragraph 2 – Meaning of:**

‘Political Party’ in clause (b) of sub-para (1) of paragraph 2 is none other than ‘original political party’ mentioned in paragraph 3 and defined in Para 1(c). - *Mayawati Vs. Markandeya Chand* \(^{128}\)

A reading of sub-para (b) and the Explanation in para 2 (1) places the matter beyond doubt that the ‘Political Party’ in sub-para (b) refers to the ‘Original political party’ only and not to the Legislature Party. - *Mayawati Vs. Markandeya Chand.* \(^{129}\)

**Direction or Whip – Need for proper wording of:**

Keeping in view the consequences of the disqualification i.e. termination of the membership of a House, it would be appropriate that the direction or whip which results in such disqualification under Para 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Para 2(1)(b) of the Tenth Schedule, so that the member concerned has the fore-knowledge of the consequences flowing from his conduct in

\(^{127}\)Ibid  
\(^{128}\)Supra Note 89  
\(^{129}\)Ibid
voting or abstaining from voting contrary to such direction. - *Kihoto Hollohon Vs. Zachillhu.*

**Whip – Whether valid:**

Whip issued by a political party to vote in favour of a candidate not belonging to it in the Rajya Sabha election is not valid and effective as it is not a matter relating to proceedings of the House, and the member violating such whip cannot be identified because of secrecy of votes cast in the election. Therefore, any alleged defiance of the whip cannot attract the rigour of defection as contemplated in paragraph 2(1) of the Tenth Schedule; nor any fraud can be held to have been committed by the accused member on such ground. - *Ananga Udaya Sing Deo vs. Ranga Nath Mishra.*

**Independent Member & Nominated Member – Distinction between:**

It was argued that the Anti-defection Law has created an unreasonable discrimination between the elected independent member and a nominated member of a House. The sub-paragraph 2 of Paragraph 2 of the Tenth Schedule deals with an independent member who has not been set up by a political party. Under this sub-paragraph an independent member will be disqualified if he joins any political party after his election as a member of

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130 Supra Note 78
131 AIR 2001 Orissa 24
legislature. But under sub-paragraph 3 of paragraph 2 of the said Schedule, a nominated member is allowed to join any political party within six months of his nomination as a member. An independent member’s freedom to join a party is fettered although he is master of himself and owes his election to no political party. But the Gauhati High Court in *Imkong Imchen Vs. Union of India & ors.*\(^{132}\) held that the distinction made between the elected Independent members and nominated members are based on sound reasoning. The distinction stands judicial test of reasonable classification and does not offend Article 14 of the Constitution of India. Therefore, paragraph 2(2) of the Tenth Schedule of the Constitution is intra-vires and constitutionally valid.

**Independent Members & other Members – Distinction between:**

In *Jagjit Singh Vs. State of Haryana*\(^{133}\) the Supreme Court of India observed that there is a fundamental difference between an independent elected member and the one who contests and wins on ticket given by a political party. This difference is recognised by various provisions of the Tenth Schedule

The embargo as contained in paragraph 2(2) of the Tenth Schedule prohibiting an independent candidate from joining any political party after his election as an independent candidate has been put for a simple reason

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132 2008 (1) GLT 682 (DB)
that an independent member is elected by the people’s popular mandate on the basis of the voters’ sole conviction that he would function as non-party man to demonstrate the fact that they are averse to the political parties due to very many a reason. Should this independent elected member be allowed to join a political party, it will amount to betraying the trust and confidence reposed upon him by his electorate from the particular constituency, and allowing the same would adversely affect the democratic set up.- *Imkong Imchen & ors. Vs. Union of India & ors.* 134

Paragraph 2(2) of the Tenth Schedule is not discriminatory and violative of basic structure of the Constitution of India.- *Imkong Imchen & ors. Vs. Union of India & ors.* 135

**Defection of an Independent MLA – Whether outside support implies:**

To determine whether an independent member has joined a political party the test is not whether he has fulfilled the formalities for joining a political party but that whether he has given up his independent character on which he was elected by the electorate. A mere outside support would not lead to an implication of a member joining a political party.- *Jagjit Singh Vs. State of Haryana.* 136

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134 *Supra Note 132*
135 *Ibid*
136 *Supra Note 133*
Alleged Defection by an independent member – Considerations for decision:

The substance and spirit of law as well as the conduct of the member together with the material available are the guiding factors to decide whether an elected independent member has joined or not a political party after his election. It would not be a valid plea for a person who may have otherwise joined a political party to contend that he has not filled up to the requisite membership form necessary to join a political party or has not paid requisite fee for such membership. The completion of such formalities would be inconsequential if the facts otherwise show that the independent member has joined a political party. - *Jagjit Singh Vs. State of Haryana Haryana* 137

Giving outside support – whether amounts to joining the political party given support:

Giving of outside support by an independent elected member is not the same thing as joining any political party after election. To find out whether an independent member has extended only outside support, or, in fact, has joined a political party, materials available and also the conduct of the

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137 Supra Note 133
Member are to be examined by the Speaker.- *Jagjit Singh Vs. State of Haryana.*

In *D.Sudhakar & Ors Vs. Jeevanraju & Ors* the Hon’ble Apex Court held that even independent candidates, can extend support to a government formed by a political party and can become a Minister in such government. Therefore, the act and conduct of the Appellants of extending support or joining the B.S. Yeddyurappa government as Minister does not by itself mean that they have joined the Bharaiya Janata Party which formed the Government.

### iii. Paragraph 3- Disqualification on ground of defection not to apply in case of Split.

3. Disqualification on ground of defection not to apply in case of Split – Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of the split in his original political party and such group consists of not less than one-third of the members of such legislature party,

(a) he shall not be disqualified under su-paragraph (1) of paragraph 2 on the ground

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138 Supra Note 133
139 2012 (1) SCALE 704
(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) From the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of subparagraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

Scope:

The concept of split as contemplated in Paragraph 3 relates to an original political party and not to its legislature party at the first instance. Question obviously arises as to how such a split can be reckoned, when and by whom? Any split in a recognised/registered political party needs to be reported to and accepted by the Election Commission first, as it gives rise to a new political party. Unless it is done, can there be any scope for its legislature party wing to claim any benefit of such split in the
legislature? Most important aspects of a split are the time, reflection of and authority to recognise such split.

Where a group of members belonging to a political party but whose strength is less than one-third of the members of the Legislature Party concerned, voluntarily give up the membership of their political party, they are not entitled to protection under Paragraph 3 and they are subject to disqualification under Paragraph 2(1) (a). This is the logical interpretation of paragraph 2(1)(a) and 3 of the Tenth Schedule.- *Banjak Phom Vs. Thenuco.*

Paragraph 3 speaks of two requirements – firstly, a split in the original party and secondly, a group comprising of one-third of the Legislators separating from the Legislature Party. It would not be proper to say that as the Legislators are wearing two hats – one as members of the original political party and the other as members of the Legislature, so it is evident that one-third of the Legislatures have formed a separate group to infer the split or to postulate a split in the original party. – *Rajendra Singh Rana Vs. Swami Prasad Maurya.*

**Paragraph 3 - Legislative intention behind:**

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140Supra Note 80
141Supra Note 76
The object of the Tenth Schedule on the whole is to discourage defection. Paragraph 3 is intended to protect a large group which, as a result of split in a political party which had set up the candidates walks off from that party and does not treat it as defection for the purposes of paragraph 2 of the Tenth Schedule. The intention of the Parliament was to curb defection by a small number of members. – *Jagjit Singh Vs. State of Haryana.*

**Split – Various aspect of:**

A group of members cannot create a split while continuing to retain membership of the party. – *Zachilhu Khusantho Vs. State of Nagaland.*

A split can be caused only by some members voluntarily giving up membership of the party. A member who agrees to cause a split in a party along with certain other members and is prepared to affirm the same in writing cannot turn round and say that it was only in the realm of intention or preparation and that he has not effectuated the intention. – *Zachilhu Khusantho Vs. State of Nagaland.*

Where twelve MLAs of Nagaland People’s Council(NPC) decided to split and form a new party, and to request the Speaker to recognise the split and allot separate seats to them, but before receipt of the aforesaid letter,

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142Supra Note 133  
143Supra Note 102  
144Supra Note 102
the Speaker received a letter from the Party-President of the NPC expelling two MLAs of the splinter group from the Party and a request to treat them unattached, and the Speaker passed an order declaring the two MLAs unattached, it was held that since the two out of the 12MLAs had been expelled before they split the NPC and formed a separate political party within the knowledge of the Speaker or before they could inform the Speaker in writing about the new formation, they cannot be reckoned for the purpose of deciding whether the splinter group constituted one-third or more of the strength of the Legislature Party. – *Banjak Phom Vs. Thenucho*.145

A declaration signed by some MLAs belonging to a party declaring that they had formed a separate group, and produced during the course of hearing before the Speaker, was held to have established the split and formation of the group. – *Ravi S. Naik Vs. Union of India*.146

Before a claim is made by a member of the House under Paragraph 3 of the Tenth Schedule, a split in the political party should have arisen, such a split must have caused its reaction in the Legislature Party also by formation of a group consisting of not less than one-third of the members of the Legislature Party. – *Mayawati Vs. Markandeya Chand*.147

145 Supra Note 80  
146 Supra Note 116  
147 Supra Note 89
Any claim by the leader of the splinter or breakaway group that he has been elected leader of such group can be disposed of by the Speaker, only after the question of disqualification of the members of that group has been settled and their defence under Paragraph 3 has been upheld. – *Parkash Singh Badal Vs. Union of India*.\(^\text{148}\)

Mere making a claim as to split is not sufficient. The prima facie proof of such a split is necessary to be produced before the Speaker so as to satisfy him that such a split has taken place. – *Jagjit Singh Vs. State of Haryana*.\(^\text{149}\)

The very act of the members of the ruling party, like giving a letter to the Governor to invite the leader of the opposition to form the Government with their support and meeting with the Governor to hand over the letter etc. amount to an act of voluntarily giving up the membership of the party, and an irresistible inference arises that the members have clearly given up their membership of the BSP. No further evidence or enquiry is needed to find that their action comes within paragraph 2(1) (a) of the 10\(^{th}\) Schedule. *Rajendra Singh Rana Vs. Swami Prasad Maury*.\(^\text{150}\)

\(^{148}\) Supra Note 77

\(^{149}\) Supra Note 133

\(^{150}\) Supra Note 76
**Split & burden of proof:**

The burden to prove that the requirements of Paragraph 2 has been fulfilled is on the person who claims that a member has incurred the disqualification and the burden to prove that the requirements of Paragraph 3 has been fulfilled is on the member who claims that there has been a split in his original political party and by virtue of the said split the disqualification under Paragraph 2 is not attracted. *Ravi S. Naik Vs. Union of India.¹⁵¹*

**Legislature Party after a split:**

The faction consisting of not less than one-third members of the parent legislature party which was constituted as a sequel to the split arisen there from is also deemed to be a legislature party. *Mayawati vs. Markandeya Chand.¹⁵²*

**Original Political Party – Meaning of:**

Political Party in clause (b) of sub-paragraph (1) of Paragraph 2 is none other than the ‘Original Political Party’ mentioned in Paragraph 3 and defined in Paragraph 1 (c). *Mayawati Vs. Markandeya Chand.¹⁵³*

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¹⁵¹ Supra Note 116
¹⁵² Supra Note 89
¹⁵³ Ibid
The definitions of “legislature party” and the deeming provisions in paragraph 3 & 4 of the Tenth Schedule are only legal fictions created for the limited purpose of disqualification provisions in the Tenth Schedule of the Constitution. *G. Viswanathan Vs. The Hon’ble Speaker, Tamil Nadu Assembly.*

**Leader of Legislature Party – Role of:**

In a case of disqualification under Paragraph 2(1)(b) of the Tenth Schedule, the involvement of the leader assumes importance in as much as condonation of violation of whips arises for consideration. In a case which attacts Paragraph 2(1)(a) of Paragraph 3 of the Tenth Schedule, his role does not assume such crucial significance. –*Zachilhu Khusantho vs. State of Nagaland.*

**Protection for disqualification on the ground of split – Scope:**

Protection from disqualification on the ground of split would be available if the split is in the original Political Party as defined Paragraph 1 (c) of the Tenth Schedule read with the Explanation to Paragraph 2(1). A split in state wing or local wing of the original political party is not sufficient. Held that the Full Bench decision of the Punjab High Court in

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154 *Supra Note 94*

155 *Supra Note 102*
the case of Madan Mohan Mettal, MLA Vs. The Speaker, Punjab Vidhan Sabha\textsuperscript{156}, is no longer a good law. – Jagjit Singh Vs. State of Haryana.\textsuperscript{157}

The words ‘he and any other person’ and the words ‘the group’ occurring in paragraph 3 clearly show that the benefit of paragraph 3 is not available to a single member legislature party. Jagjit Singh Vs. State of Haryana.\textsuperscript{158}

**Protection from Disqualification on the ground of split – Scope of:**

It is for the Speaker to decide on the materials placed before him as to whether there has been a split of a political party or not, or whether there has been a merger of two political parties or not. Ravi S. Naik Vs. Union of India & ors.\textsuperscript{159}

In the case at hand, out of total four MLAs of original party, three members formed a new party which later gets merged with another party. The Speaker while recognising the split and merger, disqualified the said three MLAs. Held that the case being one of split and not defection, the speaker’s order of disqualification of the three MLAs was illegal. -KH. Amutombi Singh Vs. Thangminlien Kipgen.\textsuperscript{160}

\textsuperscript{156} 1997 (117) Pun. LR 374 (FB)
\textsuperscript{157} Supra note 133
\textsuperscript{158} Supra note 133
\textsuperscript{159} Supra note 116
\textsuperscript{160} 2003(3) Gau. LT 579.
For protection from disqualification for defection, on the ground of split, mere making a claim of split is held not sufficient. At least a prima facie proof of split is required before the Speaker. - *Jagjit Singh Vs. State of Haryana*.\(^{161}\)

It is not enough that before the Speaker or the Chairman simply a claim is made of a split in the party. In addition to showing that one-third of the members of the Legislature Party have come out of the party, it is necessary to show at least prima facie by relevant materials that there has been a split in the original party. - *Rajendra Singh Rana Vs. Swami Prasad Maury*.\(^{162}\)

**Paragraph 3 and Scope of Art. 226:**

Question as to when a split can be said to have taken place, whether it is a one time transaction occurring at a fixed point of time or whether the expression can take within its ambit a series of connected or correlated events depend on the fact situation of each case, and can be well examined by the High Court under Art. 226 of the Constitution of India. - *Laxman Jaidev Satpathey Vs. Union of India*.\(^{163}\)

The effect of the Court’s stay of operation of the order of disqualification dated December 13, 1990 in respect of two MLAs of M.G.

\(^{161}\) *Supra note 133*  
\(^{162}\) *Supra note 76*  
\(^{163}\) 1992 Supp. (2) SCC 744.
Party viz. Bandekar and Chopdekar was that with effect from December 14, 1990 the declaration that they were disqualified from being the members of Goa Legislative Assembly under the Speakers order dated December 13, 1990 was not operative, and on 24th December, 1990 i.e. on the date of the alleged split, it could not be said that they were not members of Goa Legislative Assembly. - Ravi S. Naik Vs. Union of India & ors. 164

The action of the Speaker in ignoring the stay-order passed by the High Court, while passing his order dated 15th February, 1991 cannot be condoned on the plea that in the absence of decision of the Supreme Court declaring Paragraph 7 as invalid, it was open for the Speaker to proceed on his own interpretation of paragraphs 6 and 7 of the Tenth Schedule and ignore the stay-order passed by the High Court. - Ravi S. Naik Vs. Union of India. 165

The Speaker was bound by the stay-order passed by the High Court on 14th December, 1990 and any action taken by him in disregard of the said stay order would be a nullity. In the instant case, the Speakers order dated 15th February, 1991 treating Bandekar and Chopdekar as disqualified members in total disregard of the High Courts stay order dated 14th

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164 Supra note 116
165 Supra note 116
December, 1990 was, therefore, held as null and void. -Ravi S. Naik Vs. Union of India.\textsuperscript{166}

The Committee on Electoral Reforms (Dinesh Goswami Committee) in its Report of May, 1990, the Law Commission of India in its 170\textsuperscript{th} Report on “Reform of Electoral Laws” (1999) and the National Commission to Review the Working of the Constitution (NCRWC) in its report of March 31, 2002 have, inter alia, recommended for omission of paragraph 3 of the Tenth Schedule to the Constitution of India pertaining to exemption from disqualification in case of splits. Accepting the recommendations of various Committees and Commissions, paragraph 3 of the Tenth Schedule had been omitted by the Constitution (Ninety-first Amendment) Act, 2003, w.e.f. 1-1-2004.\textsuperscript{167}

\textbf{iv. Paragraph 4- Disqualification on ground of defection not to apply in case of merger}

4. Disqualification on ground of defection not to apply in case of merger.—

(1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2, where his original political party

\textsuperscript{166} Supra note 116
\textsuperscript{167} Sec 5 (c) of the Constitution (Ninety-first Amendment) Act, 2003
merges with another political party and he claims that he and any other members of his original political party,

(a) have become members of such other political party, or as the case may be, of a new political party formed by such merger; or

(b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the Legislature party concerned have agreed to such merger.

Scope of Merger:

The expression ‘merger’ has not been defined in this Paragraph nor in Paragraph 1. Paragraph 4, like Paragraph 3, qualifies Paragraph 2 and may be read as a Proviso to the Paragraph 2. Though the expression merger has not been defined in express terms, still the Paragraph prescribes the
occasion when merger of two original political parties can take place. A situation may appear where a decision of two-third members of the Legislature party i.e. Legislative wing of a political party is to merge with another political party, even though original Political Parties themselves might not have agreed outside the House.

It is not clear whether two-thirds of M.P.s/ M.L.A.s of both the Political Parties should agree or what will happen when two – thirds of a Legislature Party already agreed to merge with another Legislature Party inside the House, but the Political Parties outside the House could not formalise, or required time, or one of them did not ultimately agree. Such a confusion is going to be manifest more and more in near future. The paragraph has used different expressions like “original political party” and “another political party” in the same line. Another political party may not necessarily mean another original political party. The confusion may be conveniently exploited in a given situation.

Paragraph 4 does not expressly provide for any direct nexus between the original political party and the Speaker. In so far as the Legislative Assembly is concerned, the corresponding legislature party represents the original political party and hence the requirement of agreement of two-
thirds of the members. *W.K.Singh Vs. Speaker, Manipur Legislative Assembly*. 168

There may be different eventualities in respect of merger of a party. If a political party decided to merge with another political party, and the legislature party also abided by the decision and the members of the legislature party claimed to have become members of the political party into which their party merged, there would be no difficulty in holding the merger to have taken place under sub-para (1) of para 4 of the Schedule. If the political party took a decision to merge but the legislature-party or at least two-third of the MLAs of the party did not agree to such merger, the political party cannot be deemed to have merged. But what will happen when the political party itself claims to have taken no decision for merger, but the legislature party or not less than two-thirds of its members agree to merge? *W.K.Singh Vs. Speaker, Manipur Legislative Assembly*. 169

When not less than two-thirds of the members of a legislature party have agreed to a merger, the question whether their original political party should also be deemed to have so merged may be pertinent. In the instant case, if the merger is held to have taken place, the four MLAs will not be

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168*Supra Note 92*
169*Supra Note 92*
visited with any disqualification; otherwise, they may be so visited. 

W.K. Singh Vs. Speaker, Manipur Legislative Assembly.\textsuperscript{170}

Paragraph 1(b) in referring to the Legislative Party in relation to a member of a House belonging to any political party refers to the provisions of Paragraph 2, 3 or 4, as the case may be, to mean the group consisting of all members of that House for the time being belonging to that political party in accordance with the said provisions, namely, paragraphs 2, 3 or 4, as the case may be. G. Viswanathan Vs. The Hon’ble Speaker, Tamil Nadu Legislative Assembly.\textsuperscript{171}

Merger of two political parties:

A political party does not only comprises of its leaders but also all those people who constitute its membership. Therefore, a mere understanding between the leaders of two political parties does not result in a merger unless the cadres of the two political parties also merge with each other. All Party Hill Leaders Conference, Shillong Vs. Capt. W.A. Sangma.\textsuperscript{172}

Expression having agreed to such merger – Import of:

The expression “having agreed to such merger” occurring in Paragraph 4(2) implies that the merger is to take place first at the party-level, to

\textsuperscript{170}Ibid
\textsuperscript{171}Supra Note 94
\textsuperscript{172}AIR 1977 SC 2155
which two-thirds of the members of the legislature party concerned are also required to agree, for such merger to be effective in so far as they are concerned. *W.K.Singh Vs. Speaker, Manipur Legislative Assembly*.\textsuperscript{173}

While paragraph 3 with the exception on split has been deleted by the Constitution (Ninety-first Amendment) Act, 2003, another exception to disqualification on the ground of defection exists in the case of merger of a political party with another political party, as provided under paragraph 4 of the Tenth Schedule.

The Tenth Schedule while prohibited individual defection but at the same time allowed group defections in the name of merger. The game of merger is more easily played in smaller states like Meghalaya, Manipur, Nagaland, Goa, Mizoram, have all witnessed the bizarre drama of defections involving a minimum of two-third or more of the party members defecting to the opposition in order to topple the popular Government for self-serving ends. Therefore the researcher would like suggest that the paragraph 4 should be deleted from the Tenth Schedule.

**V. Paragraph - 5Exemption**

“\textit{Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the}

\textsuperscript{173} Supra Note 92
Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule,

(a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or

(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office."

Exemption under Para 5 – Scope of:

The exemption under Paragraph 5 would be available where the Speaker, in view of the high office of the Speaker on a question of propriety and to sustain the image of impartiality of that office, resigns from the membership of the political party to which he might have belonged prior to his election as Speaker. The circumstances in this case
are such that the appellant cannot avail of that exemption.-*Luis Proto Barbosa Vs. Union of India.*

**Position of the Speaker under Tenth Schedule:**

It is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that high office.-*Kihoto Hollohan Vs. Zachilhu.*

**VI. Paragraph -6**

**Decision on questions as to disqualification on ground of defection:**

(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

\(^{174}\text{Supra Note 120}\)
\(^{175}\text{Supra Note 78}\)
(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of article 212.

Constitutional Validity of paragraph 6

The provisions of Para 6(1) of the Tenth Schedule do not have the effect of excluding the jurisdiction of the High Court under Art. 226 or of the Supreme Court under Art. 136 of the Constitution, and, therefore, the paragraph did not require ratification under proviso to Art. 368(2) of the Constitution. -Parkash Singh Badal Vs. Union of India.176

Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen, is valid. The finality clause in paragraph 6 does not completely exclude the jurisdiction of the courts under Arts. 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of jurisdiction. -Kihoto Hollohan Vs. Zachilhu.177

176 Supra Note 77
177 Supra Note 78
The contention that vesting of adjudicatory functions in the Speaker would vitiate the provision of paragraph 6, on the ground of likelihood of political bias is not tenable. -Mayawati Vs. Markandeya Chand. 178

Scope of Paragraph 6

A decision under paragraph 6(1) is not a decision of the House, nor is subject to the approval by the House. Therefore, a proceeding under para 6(1) before the Speaker or the Chairperson cannot be construed as a proceeding in the Parliament or the Legislature of a State. -Kihoto Hollohan Vs. Zachilhu. 179

The power to resolve any dispute relating to disqualification, as vested in the Speaker or Chairman under the Tenth Schedule is a judicial power. The Speakers and Chairpersons, while exercising powers and discharging functions under the Tenth Schedule, act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are subjected to judicial review by High Court and Supreme Court. -Kihoto Hollohan Vs. Zachilhu. 180

The use of the word final qua any order passed by any authority under a provision of the Constitution or other statutes has always been understood to imply that no appeal, revision or review lies against that

178 Supra Note 89
179 Supra Note 78
180 Ibid
order and not that it overrides the power of judicial review, either of the High Court or of the Supreme Court under Art. 226 or Art. 136 of the Constitution, as the case may be. -Parkash Singh Badal Vs. Union of India.\footnote{Supra Note 77}

The concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review under Arts. 136, 226 and 227 of the Constitution in so far as infirmities based on violations of Constitutional mandates, malafides, non-compliance with Rules of Natural Justice and perversity are concerned. - Kihoto Hollohan Vs. Zachilhu.\footnote{Supra Note 78}

The Speaker of Legislative Assembly has no power of review under the Tenth Schedule, and an order of disqualification made by him under Para 6 is subject to correction only by judicial review. -Dr. Kashinath G. Jalmi Vs. The Speaker, Legislative Assembly of Goa.\footnote{Supra Note 86}

**Power and Position of Speaker:**

The Speakers/Chairpersons hold a pivotal position in the Scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. It would indeed be unfair to the high tradition of that great office to say that the investiture in it of determinative jurisdiction under

\footnote{Supra Note 77}{Supra Note 77} \footnote{Supra Note 78}{Supra Note 78} \footnote{Supra Note 86}{Supra Note 86}
the Tenth Schedule would vitiate the basic feature of democracy. - *Kihoto Hollohon Vs Zachillhu*.184

Under the Tenth Schedule, the Speaker does not have an independent power to decide that there has been a split or merger of a political party as contemplated by paragraphs 3 and 4 of the Tenth Schedule to the Constitution. The power to recognise separate group in Parliament or Assembly may rest with the Speaker under the respective Rules of Business of the House, but that is different from saying that the power is available to him under the Tenth Schedule to the Constitution, independent of a claim being determined by him that a member or a number of members forming such separate group had incurred disqualification by defection. - *Rajendra Singh Rana Vs. Swami Prasad Maurya*.185

**Speaker's Order – Validity of:**

Where an application was filed by a splinter group of the Shiromoni Akali Dal Legislature Party, to consider and recognise it as a separate group, and the Speaker before passing his order recognising the splinter or breakaway group as a separate party, did not hear the original political party i.e. the Shiromoni Akali Dal Legislature Party or any other would

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184 Supra Note 78  
185 Supra Note 76
bind none, and in that sense the same was void ab initio.—Prakash Singh Badal Vs. Union of India.\textsuperscript{186}

Where more than one M.L.A. belonging to a particular political party were expelled from the party for defying the party whip, only the petitioner/M.L.A was declared disqualified by the Speaker, but not the others, it was held that their cases being different on facts on records, the decision of the Speaker was not violative of Art.14 of the Constitution.—Mahtab Lal Singh Vs. State of Bihar.\textsuperscript{187}

The petitioner—M.L.A defied his Party’s whip by remaining absent in the House on the plea of illness, but when asked to show as to why he should not be declared disqualified on the ground of defection and given personal hearing by the Speaker, he failed to produce any evidence or medical certificate in support of his claim. Held that his challenge to the order of disqualification as violative.—Mahtab Lal Singh Vs. State of Bihar.\textsuperscript{188}

Having regard to the contents of the declaration, the failure of the petitioners to give any explanation before the Speaker, and their failure to take a definite stand before the Speaker that they thereby had not voluntarily given up membership of their political party, it is held that the

\textsuperscript{186} Supra Note 77
\textsuperscript{187} AIR 1993 Pat. 96: 1993 (2) BJLR 1453
\textsuperscript{188} Ibid
order of disqualification passed by the Speaker cannot be regarded as perverse. -Zachilhu Khusantho Vs. State of Nagaland.\textsuperscript{189}

On the question of giving reasonable opportunity to a member to lead evidence in a proceeding for disqualification on the ground of defection, it is held that the question of sufficiency of time granted by the speaker would depend on facts of each case. On the facts and circumstances of the present case, held that the refusal by the Speaker to grant more time to the petitioners to adduce evidence was not improper. - \textit{Jagit Singh Vs. State of Haryana}.\textsuperscript{190}

The Speaker acting under the 10\textsuperscript{th} Schedule cannot say that he will first decide whether there has been a split or merger as an authority and thereafter to decide the question whether disqualification has been incurred by the members. - \textit{Rajendra Singh Rama vs. Swami Prasad Maurya}.\textsuperscript{191}

The role of the Speaker as an adjudicatory authority has also been called in question. The Speaker of the Legislature is a political creature and therefore, he is not impartial. Most of the times Speaker takes a view which is in the interest of the party to which he belongs. Therefore, the researcher submits that, the power to decide alleged question of

\textsuperscript{189} Supra Note 102
\textsuperscript{190} Supra Note 133
\textsuperscript{191} Supra Note 76
disqualification on the ground of defection should be conferred to an independent authority like election commission.

viii. Paragraph 7- Bar of jurisdiction of courts.

7. Bar of jurisdiction of courts.—notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule

Constitutional Validity

Para 7 of the Tenth Schedule to the Constitution of India has the effect of excluding the jurisdiction of the Supreme Court as well as the High Court under Art 136 and 226 respectively in regard to any matter connected with the disqualification of a member of a House under the said schedule. *Parkash Singh Badal Vs. Union of India.*

As the Constitution (52\textsuperscript{nd} Amendment) Act introducing Para 7 of the Tenth Schedule was not got ratified by one half of the State in terms of the Proviso to clause 2 of Art 368, the same is ultra vires and unconstitutional. However, the whole of the Constitution (52\textsuperscript{nd} Amendment) Act,1985 would not be liable to be struck down because of

\footnote{Supra Note 77}
Para 7 having been declared unconstitutional.- *Parkash Singh Badal Vs. Union of India.*

Even if the provisions of Para 7 are omitted having been held ultra vires the Constitution, it would not affect the working of the other provisions of the Tenth Schedule and the only effect would be that the order of the Speaker would become amenable to the jurisdiction of the Supreme Court and the High Court under Art 136 and 226. - *Parkash Singh Badal Vs. Union of India.*

In view of non complains with the Proviso to Art 368(2), it is not correct to say that not only Para 7 but also the entire Bill resulting in the Constitution (52\textsuperscript{nd} Amendment) Act,1985 stands vitiated and becomes invalid, as because, the Doctrine of Severability would apply to such case.*Kihoto Hollohon Vs.Zachillhu.*

Para 7 of the Tenth Schedule requiring ratification under Proviso to Art 368(2) of the Constitution was not ratified. However, by applying the Doctrine of Severability, it may be said that Para 7 of the Schedule contains a provision which is independent of, and stands apart from the main Provisions of the Tenth Schedule, which are intended to provide a

\[193\textit{Ibid}\]
\[194\textit{Supra Note 77}\]
\[195\textit{Supra Note 78}\]
remedy for the evil of unprincipled and unethical political defections, and, therefore, is a severable part. - *Kihoto Hollohon Vs.Zachillhu*.196

The remaining Provisions of the Tenth Schedule, other than Para 7, can and do stand independently of the Para 7 and are complete in themselves, workable and are not truncated by the excision of Para 7. Therefore, the remaining provisions of the Tenth Schedule are held not unconstitutional due to non-ratification of Para 7. The effect of non-compliance with the Proviso to Art 368 (2) invalidates Para 7 alone, and the other provisions which by themselves do not attract the Proviso, do not become invalid. *Kihoto Hollohon Vs.Zachillhu*.197

The decision of the Supreme Court in *Kihoto Hollohon Vs.Zachillhu*.198 declares the law i.e. invalidity of Para 7, inter alia, as it was on the date of the coming into force of the Constitution (52nd Amendment) Act 1985. - Ravi S. Naik Vs. Union of India.199

**ix. Paragraph 8- Rules**

(1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the provisions of this Schedule, and in

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196 *Ibid*
197 *Ibid*
198 *Ibid*
199 *Supra Note 116*
particular, and without prejudice to the generality of the foregoing, such rules may provide for—

(a) the maintenance of registers or other records as to the political parties, if any, to which different members of the House belong;

(b) the report which the leader of a legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragraph 2 in respect of such member, the time within which and the authority to whom such report shall be furnished;

(c) the reports which a political party shall furnish with regard to admission to such political party of any members of the House and the officer of the House to whom such reports shall be furnished; and

(d) the procedure for deciding any question referred to in subparagraph (1) of paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question.

(2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of
thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect.

(3) The Chairman or the Speaker of a House may, without prejudice to the provisions of article 105 or, as the case may be, article 194, and to any other power which he may have under this Constitution direct that any wilful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House.

Scope of Paragraph – 8

Under paragraph 8 of the 10th Schedule, the Chairman or the Speaker of the House was empowered to make rules for giving effect to the provisions of the Schedule. The rules were required to be laid before the House and were subject to the modification/disapproval by the House. The Members of Lok Sabha (Disqualification on Ground of Defection) Rules, 1985 were duly made and laid on the Table of the House on 16
December, 1985. Lok Sabha having made no change, these Rules came into force with effect from 18 March, 1986. House of State Legislatures have made their own rules as has the Rajya Sabha. These are all largely on the lines of the Lok Sabha rules.

In *Mayawati Vs. Markandeya Chand*., the Supreme Court of India held that the Disqualification Rules made by the Speaker/Chairman of the House under paragraph 8 of the Tenth Schedule to the Constitution cannot be read in isolation from the provision of the Tenth Schedule; instead they must be read as part of it.

Again the Apex Court in *Mayawati Vs. Markandeya Chand*. observed that it is desirable that every Speaker should fix a time schedule in the relevant Rules for disposal of the proceedings for disqualification of MLAs or MPs. All such proceedings should be concluded and orders should be passed within a period of three weeks from the date on which the petitions are taken to file.

The Supreme Court of India in *Ravi S. Naik Vs. Union of India* held that the contention that violation of Disqualification Rules framed by the Speaker under Para 8 of the Tenth Schedule amounts to violation of Constitutional mandate is not tenable.

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200 Supra Note 89  
201 Ibid  
202 Supra Note 116
Mere violation of any provision of a Disqualification Rules is not enough to constitute violation of the provisions of the Tenth Schedule.- *Mayawati Vs. Markandeya Chand*.203

However, by virtue of sub-paragraph (3), any wilful violation of any provisions of such Rules would amount to a breach of privilege of the House and would be dealt in the similar manner.

### 3.5 Defection Rules of States

**On the Members of Assam Legislative Assembly (Disqualification on the Ground of Defection) Rules, 1986 – Procedure of:**

Before making a petition against any member under 10th Schedule to the Constitution, the person making such petition shall have to satisfy himself that a question has arisen as to whether such member has become subject to disqualification under the 10th Schedule. If the person is satisfied, he may file a petition as provided under sub-rules (1) and (2) of Rule 6 of the Members of Assam Legislative Assembly (Disqualification on the Ground of Defection) Rules, 1986. -*Keshab Gogoi Vs. Speaker, Assam Legislative Assembly*.204

**Rule 6:**

The concise statement as contemplated in Rule 6 of the Members of Assam Legislative Assembly (Disqualification on the Ground of Defection) Rules, 1986 and supporting documents and gist of statement of

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203 Supra Note 89
204 (1995) 1 Gau LR 53
witness should show prima facie that the member concerned has voted or abstained from voting in the House contrary to any direction issued by the Political Party to which he belongs without obtaining prior permission of the political party. Of course, if such voting or abstention has been condoned by any political party within 15 days from the date of such voting or abstention, no action can be taken. - Keshab Gogoi Vs. Speaker, Assam Legislative Assembly. 205

A petition seeking disqualification of any member under 10th Schedule should strictly comply with requirements of Rule 6(5) of the Members of Assam Legislative Assembly (Disqualification on the Ground of Defection) Rules, 1986 i.e. must contain a concise statement of material facts on which the petitioner relies and must be accompanied with copies of documentary evidence, if any, and the information, if received, by the petitioner from any other person, a statement containing name and address of such person and gist of such information as furnished by each such person. - Keshab Gogoi Vs. Speaker, Assam Legislative Assembly. 206

On receipt of a petition under rule 6, the Speaker shall consider whether the petition complies with the requirements of that rule viz, rule 6. Such consideration means that Speaker has to apply his mind and think over the matter. While doing so, the first consideration is whether the

205 Supra Note 204
206 Ibid
concise statement of material facts in the petition as mentioned in clause (a) of sub-rule (5) of rule 6 disclose a case under clause (b) of sub-para (1) of Para 2 of the 10th Schedule. - *Keshab Gogoi Vs. Speaker, Assam Legislative Assembly.*

**On the Members of Nagaland Legislative Assembly (Disqualification on the Ground of Defection) Rules, 1986**

No Rule-making authority can make Rules in derogation of the provisions of the statute which confers power on the authority. Rules cannot override the statute. The duty of the court is always to endeavour to bring about a harmony between the provisions of the statute and the provisions of the Rules and if that is not possible, the Rules must give way to the provisions of the statute. - *Banjak Phom Vs. Thenucho.*

**Rule 6 – Scope**

Rule 6 does not and cannot have the effect of taking away the suo motu power of the Speaker. Rule 6 and the succeeding Rules referring to petition being filed by a Member of the House lay down procedure where a member of a House seeks to invoke the jurisdiction of the Speaker and cannot detract from the suo motu power of the Speaker. - *Banjak Phom Vs. Thenucho.*

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*Supra Note 204
Supra Note 80
Ibid*
**Rules 6(6) and 6(7)**

Signing and verification of the petition seeking for disqualification, with annexure required under sub-rules (6) and (7) of Rule 6 of the Rules are to be done in the manner as laid down in the Code of Civil Procedure. - *Zachilhu Khusantho Vs. State of Nagaland.*

A careful reading of Rule 7(3) would show that the Speaker is not compelled to issue any notice at all. All that is required to do is to forward a copy of the petition with annexures. Thereupon it is open to the member to submit comments within seven days of the receipt of the copy of the petition with annexures. - *Zachilhu Khusantho Vs. State of Nagaland.*

**Rule 7(4):**

The Rules do not contain any provision requiring the Speaker to conduct an enquiry into the petition for disqualification. He is required to determine the question of disqualification after considering the comments, if any, received by him and after affording a reasonable opportunity to the member to present his case and to be heard in person. Other than this, the Rule 7(4) does not contemplate any enquiry as such. - *Banjak Phom Vs. Thenucho.*

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210 Supra Note 102  
211 Ibid  
212 Supra Note 80
Rule 7(7):

No person can be deprived of a valuable status or right unless he is informed of the grounds on which he is sought to be so deprived and given an opportunity to defend himself. This basic principles of natural justice must necessarily apply even in a case where the Speaker proceeds suo motu. *Banjak Phom Vs. Thenuco.*

**On the Nagaland Legislative Assembly (Disqualification on the Ground of Defection) Rules, 2003: Rule 9:**

Without deciding the issue whether the independent members really incurred the disqualification, any interim order of the Speaker under Rule 9 of the Nagaland Legislative Assembly (Disqualification on the Ground of Defection) Rules, 2003 prohibiting them from participating in the No Confidence Motion would be highly detrimental to the working of the democratic process and the rights of such independent members, under Art. 194, to participate in the legislative process.-*Yitachu Vs. Union of India & ors.*

Again, the Gauhati High Court in *Yitachu Vs. Union of India & ors.* held that the decision of the Speaker not to count the votes of those MLAs who had voted against the whip of their respective political party or parties and thus allegedly had incurred disqualification, on the ground

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213 Supra Note 80  
214 Supra Note 82  
215 Ibid
that their disqualification dates back to the occurrence of their act which renders them disqualified is held not legal. The Court further held that such dating back of disqualification does not invalidate the vote given by such a member subsequent to the alleged act but prior to the ultimate order of disqualifying them. Rule 9 of the Nagaland Rules of 2003 does not authorise the Speaker to reject the votes cast by an MLA against the whip issued by his Political Party. Held that said Rules do not contemplate regulation of freedom of speech or right to vote.


The Constitution (Fifty-second Amendment) Act, 1985 gave the much awaited birth to the anti-defection law as contained in the Tenth Schedule to the Constitution. However, hardly the illness of political defections could be cured to the desirable extent, though controlled to a large extent. The Tenth Schedule continued to be a subject-matter of controversy both before the judiciary and the legislature. Right from the time of its enactment, the Anti-Defection Law was subjected to severe criticism and many loopholes were pointed out. Therefore, to remove lacunae and shortcomings of the law various committee/commissions were constituted and their recommendations were discussed below:
I. Dinesh Goswami Committee on Electoral Reforms (1990)\textsuperscript{216}

The Commission recommended that

1. Disqualification provision should be limited to cases where a member voluntarily gives up the membership of his political party.
2. A member abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence or money Bill or motion of vote of thanks to the President’s address.
3. The issue of disqualification should be decided by the President/Governor on the advice of the Election Commission and should not be left to the Speaker or Chairman of the House.
4. The nominated members of the House should be disqualified if he joins any political party at any period of time.

II. Halim Committee on Anti-Defection law (1994)\textsuperscript{217}

1. The words ‘voluntarily giving up membership of a political party’ be comprehensively defined;
2. Restrictions like prohibition on joining another party or holding offices in the Government be imposed on expelled members;
3. The term ‘political party’ should be defined clearly.

III. Law Commission recommendation on Anti-Defection Law (170th report)

\textsuperscript{216} Submitted to the government of India on 4\textsuperscript{th} May, 1990
\textsuperscript{217} Report on “Measures to Promote Harmonious Relation between the Legislatures and Judiciary” submitted to the Government of India on January 1994
Considering the working of the Anti-defection Laws, the Law Commission of India in its 170th Report on “Reform of Electoral Laws” submitted in May, 1999 made following suggestions for amendments to the Anti-defection laws\textsuperscript{218}

1. Provisions relating to splits and mergers under paragraph 3 and 4 of the Tenth Schedule which exempted a member from disqualification on the ground of defection should be deleted.

2. Power to decide the question of disqualification under the Tenth Schedule should be entrusted to the President in the case of parliament and to the Governor in the case of State Legislature, who shall act on the advice of the Election Commission.

3. Regarding the issuance of Whip, the Commission suggested that, whip may be issued only when the voting in the House affects the continuance of the Government and not on each and every occasion. It would safeguard both the party discipline and the freedom of speech and expression of the members.

4. Pre-poll electoral fronts should be treated as political parties under anti-defection law.

5. The definition of the expression “Original Political Party” may be dropped and in its place definition of “political party” should be inserted.

\textsuperscript{218} Law Commission,170th Report, 1999 under the Chairmanship of Justice BP Jeevan Reddy submitted on may 199, Pg.84-89
6. “Political Party” in relation to a member of a House, means the political party on whose ticket that member was elected and where such political party is a part of a front or a coalition formed before a general election for contesting such election, such front or coalition, provided that the Election Commission is informed in writing by all the constituent parties in the front/coalition before the commencement of the poll that such a front/coalition has been formed”.


The National Commission to Review the Working of the Constitution under the Chairmanship of Justice M.N. Venkatachaliah in its report submitted to the Government of India in March 2002 noted that more defections had taken place after the Anti-defection law in the Tenth Schedule and has made the following recommendations in respect of amendments to the Anti-defection law:\textsuperscript{220}

1. All defections whether singly or in groups (under the so called splits or mergers) should be disqualified from membership forthwith. The provisions of the Tenth Schedule of the

\textsuperscript{219} Set up by Govt. Of India Resolution dated 22nd February, 2000, submitted Report on 31st March 2002

\textsuperscript{220} Volume 1, Chapter 4, National Commission to Review the Working of the Constitution Report, 2002
Constitution should be amended specifically to provide that all persons defecting – whether individually or in groups – from the party or the alliance of parties, on whose ticket they had been elected, must resign from their Parliamentary or Assembly seats and must contest fresh elections.\textsuperscript{221}

2. All defectors should be debarred from becoming ministers or holding any other paid public office. The defectors should also be debarred from holding any public office as ministers and any other remunerative political post for at least the duration of the remaining of the existing legislature or until, the next fresh election whichever is earlier.

3. The vote cast by a defector to topple a government should not be counted or treated as invalid;

4. Petitions under the anti-defection law should be heard and disposed of not by the presiding officer of the house but by the Election Commission.

5. The size of Council of Ministers should be restricted to 10 percent of the popular House and the practice of having oversized Council of Ministers should be prohibited by law.\textsuperscript{222}

6. Independent candidates should be discouraged.

\textsuperscript{221} Chapter 4, Para 4.18.2 of the National Commission to Review the Working of the Constitution Report (2002)

\textsuperscript{222} Chapter 4, Para 4.19 of the National Commission to Review the Working of the Constitution Report (2002)
V. Report of the Conference of Presiding Officers of the Legislative Bodies

On 13th October, 1998, Shri G.M.C. Balayogi, the then Speaker of the 11th Lok Sabha and the Chairman of the 62nd Conference of Presiding Officers, constituted a Committee of Presiding Officers of the Legislative Bodies to examine the need to review the Anti-defection Law. The Committee under the Chairmanship of Shri Hashim Abdul Halim, submitted its report at the 66th Conference of Presiding Officers of the Legislative Bodies held in Mumbai on 5 February 2003. The Committee in their Report “A Review of Anti-defection Law” recommended for Amendment of the Tenth Schedule to the Constitution on the following lines:-

1. Provision relating to splits and mergers which exempted a member from disqualification on the ground of defection should be deleted from the Tenth Schedule.

2. The term ‘voluntarily giving up membership’ should be comprehensively defined in the Tenth Schedule

3. Anti-defection law is silent regarding the consequences, status, right and position of member who is expelled from the party, therefore, it should be clearly defined in the Tenth Schedule
4. An expelled member should not be victimized by the political party which expelled him and at the same time he should be prohibited to join any other political party or holding any minister ship or any other office of the Government.

5. The term “Political Party” may be defined in the Tenth Schedule.

6. Power to decide question of disqualification may be removed from the Speaker/Chairman and should be vested with the Election Commission of India in case of member of Parliament and the concerned State Election Commission in case of member of State Legislature and the Supreme Court and the High Court may be made the respective appellate authority. Nominated members should be treated at per with independent member.

VI. Election Commission Report on Proposed Electoral Reforms (2004)\textsuperscript{223}

The Election Commission of India, in its Report on Proposed Electoral Reforms observed that –

“All political parties are aware of some of the decisions of the Hon’ble Speakers, leading to controversies and further litigations in courts of law. The Commission sees substance in the (above) suggestion that the legal issues of disqualifications under the Tenth Schedule should also be left to the President and the

Governors of the States concerned, as in the case of all other post-election disqualifications of sitting MPs, MLAs and MLCs, under Articles 103 and 192 of the Constitution. In the case of disqualifications under the Tenth Schedule also, the President or the Governor may act on the opinion given by the Election Commission.”

i. Therefore, the Election Commission of India proposed that the power to decide alleged question of disqualification on the ground of defection should be vested to the President of India and Governors of the concerned States. The President or the Governor as the case may be act on the advice of the Election Commission.

ii. The Election Commission recommended that, after giving full opportunity of being heard to the parties concerned in the matter of disqualification on the ground of defection it would give its opinion to the President/Governor. Election Commission made such recommendation on the ground that if the question of disqualification on the ground of defection is decided by the President/Governor, on the opinion of the Election Commission, it would receive more respect and acceptability from the common people.

The Second Administrative Reforms Commission in its 4th Report on “Ethics in Governance” submitted to the Government of India on January, 2007, had observed that the defection is a malaise of Indian political life and it represents manipulation of the political system for furthering private interests, a potent source of political corruption. The Tenth Schedule while prohibiting individual defection allowed group defection in the name of merger and provided opportunities for transgressing political ethics and opportunism. The 91st Constitutional Amendment Act 2003, tighten the anti-defection provisions of the Tenth Schedule and thus made defection virtually impossible and is an important step towards the cleaning of Indian politics. The important recommendation of the Commission –

i. The issue of disqualification of members on the grounds of defection should be decided by the President/Governor on the advice of the Election Commission.²²⁵

VIII. Parliamentary Standing Committee 61<sup>st</sup> Report on Anti-defection Law- (2013)<sup>226</sup>

The Department-Related Parliamentary Standing Committee on Personal, Public Grievances, Law and Justice in its 61<sup>st</sup> Report on “Electoral Reforms-Code of Conduct for Political Parties & Anti-defection Law” presented to the Rajya Sabha on 26<sup>th</sup> August, 2013, made the following suggestions concerning the Anti-defection laws:-

i. Merger of political parties with another political party should not be exempted.

ii. Provision of Anti-defection Law to be made applicable to Autonomous District Councils in North Eastern Region.

iii. The nominated members joining political party within the period of six months should also be disqualified as has been the case of independent members.<sup>227</sup>

iv. The Committee was not satisfied with the provisions of the Tenth Schedule which provide different norms for disqualification of

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Independent member and Nominated member. The Committee noted that six months time has been given to a nominated member to join a political party, whereas an independent candidate cannot join a political party at all. Therefore, the Committee recommended for revision of existing provision so as to enable independent members to join a political parties in the same manner as in the cases of nominated member.

v. The committee further observed that the Judiciary should not violate the theory of separation of power by interfering the adjudicatory power of the Presiding Officer under the Tenth Schedule. The matter falling within the domain of the Presiding Officer within the four corner of the House should have been left to the House itself and not to affect the supremacy of the Legislature.

IX. Law Commission recommendation on Electoral Reforms (Report No. 255)\textsuperscript{228}

The Law Commission of India under the Chairmanship of Justice Ajit Prakash Shah in its 255\textsuperscript{th} Report on “Electoral Reforms” submitted in March, 2015 made recommendation and suggestions for amendments to the Anti-defection law:-

i. The Law Commission recommended a suitable amendment to the Tenth Schedule of the Constitution vesting the power to decide alleged questions of disqualification on the ground of defection, with the President or the Governor as the case may be who shall act on the advice of the Election Commission.

ii. Vesting the power to decide alleged questions of disqualification on the ground of defection with the President or the Governor, as the case may be, acting on the advice of the Election Commission would also help in preserving the integrity of the Speaker’s office.

iii. The Law Commission has recommended that paragraph 6 of the Tenth Schedule of the Constitution should be amended to read as under:

“6. Decision on questions as to disqualification on ground of defection.—

(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the:

a) President, in case of disqualification of a member of either House of Parliament;

b) Governor, in case of disqualification of a member of a House of the Legislature of a State.”
Provided that the decision of the President or the Governor as to whether a member of a House has become subject to disqualification under this Schedule shall be final.

(2) Before giving any decision on any such question, the President or the Governor, as the case may be, shall obtain the opinion of the Election Commission and shall act according to such opinion.

Provided that no member of a House shall be disqualified under this Schedule, unless he has been given a reasonable opportunity of being heard by the Commission in the matter.”


Demands have been made from time to time in certain quarters for strengthening and amending the Anti-defection Law as contained in the Tenth Schedule to the Constitution of India, on the ground that these provisions have not been able to achieve the desired goal of checking defections. The Tenth Schedule has also been criticised on the ground that it allows bulk defections while declaring individual defections as illegal. The provision for exemption from disqualification in case of splits as provided in paragraph 3 of the Tenth Schedule to the Constitution of India

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has, in particular, come under severe criticism on account of its destabilising effect on the Government.  

The Committee on Electoral Reforms (Dinesh Goswami Committee) in its report of My, 1990, the Law Commission of India in its 170th Report on “Reform of Electoral Laws” (1999) and the National Commission to Review the Working of the Constitution (NCRWC) in its report of March 31, 2002 have, inter alia, recommended for omission of paragraph 3 of the Tenth Schedule to the Constitution of India pertaining to exemption from disqualification in case of splits. The Constitution (Ninety-first Amendment) Act, 2003 accepted and implemented many of these recommendations of the Commission even if only partially. Thus, a new Article 361 B was inserted into the constitution of India and Articles 75 and 164 were amended. The Constitution (Ninety-first Amendment) Act, 2003 provides that-

i. The total number of Ministers in the Council of Ministers both at the Union and the State level shall not be more than 15% of the number of Members in the House of the People, provided that the number of ministers in a state shall not be less than twelve;  

ii. Provides that a member of either House of Parliament or of a State Legislature belonging to any political party who is disqualified

\footnotesize
\begin{itemize}
  \item [230] Statement of Objects and Reasons to the Constitution (Ninety-first Amendment) Act, 2003
  \item [231] Section 3, The Constitution (Ninety-first Amendment) Act, 2003
\end{itemize}
under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a minister or hold a remunerative political post for the duration of the period commencing from the date of disqualification till the date on which term of his office as such member expire or where he contests an election to either House of Parliament or Legislature of a State, before the expiry of such period till the date on which he declared elected, whichever is earlier;\textsuperscript{232}

iii. The Act omitted the provision regarding splits from the Tenth Schedule to the Constitution of India.\textsuperscript{233}

3.8. Review

The Constitution (Fifty-second Amendment) Act changed four Articles of the Constitution, 101(3) (a), 102(2), 190(3) (a) and 191(2), and added the Tenth Schedule thereto. This Amendment is often referred to as the Anti-defection law. Right from the time of its enactment, the Anti-defection Law has been subjected to severe criticism and many loopholes have been pointed out. Certain provisions of the Tenth Schedule were found to be amenable to entirely different interpretations by different Speakers created terrible uncertainty in the application of the law.

\textsuperscript{232} Section 4, The Constitution (Ninety-first Amendment) Act, 2003
\textsuperscript{233} Section 5, The Constitution (Ninety-first Amendment) Act, 2003
The Tenth Schedule of the Constitution of India, which lays down provision of disqualification on the ground of defection begins with the Interpretation clause in paragraph 1. This definition clause (paragraph 1) suffers from a serious lacuna inasmuch as it defines the expression “House”, “Legislature Party” and “Original Political Party” but fails to define a “Political Party”. This was particularly important as by the Fifty-second Amendment the concept of political parties was finding a mention in the Constitution of India for the first time. Without a specific definition of ‘Political Party’, it is difficult to understand the provisions of the Tenth Schedule.

Under Sub-paragraph 1 of Paragraph 2 of the Tenth Schedule, if a member voluntarily gives up his membership of his political party, or votes, or abstains from voting, in the House against the direction issued by the party on whose symbol he or she was elected, then he or she would be liable to be disqualified from the membership of the House.

Where an individual member voluntarily gives up the membership of his political party, he is subject to disqualification under paragraph 2(1)(a). But under the Tenth Schedule the word ‘voluntarily giving up his membership’ is not comprehensively defined and it creates lots of confusion. No provision in the Tenth Schedule requires that the act of voluntarily giving up membership of the party must be expressed or performed in any particular manner, formal or otherwise. A member can
voluntarily give up his membership in a variety of ways. He may formally
tender his resignation in writing to his political party or he may so
count himself that the necessary inference from the conduct is that he
has voluntarily given up his membership of the party to which he
belonged. A pertinent question arise as to what type of conduct would
amount to ‘voluntarily giving up his membership’.

A member of the House can also be disqualified if he votes or
abstains from voting contrary to any direction given by the political party
to which he belongs. The word “any direction” used in paragraph 2 (1)
b) gives wide discretionary power in the hands of the leader of the
political party. If the expression ‘any direction’ literally interpreted then
it include each and every direction or whip of any kind whatsoever it
might be unduly restrictive of the freedom of speech and the right of
dissent. It is argued that it restricts the freedom of a legislator to vote
according to his/her conscience and freedom of opposing the wrong
policies which is not suitable to his constituencies, and marginalize
parliamentary debate, as the legislators are not allowed to dissent, without
being disqualified from the House. A member may be unable to express
his actual belief or the interests of his constituents. Therefore, the present
researcher submitted that, at the time of interpretation of the expression
“any direction” occurring in paragraph 2(1) (b) it should be given a
meaning limited to the objects and purpose of the Tenth Schedule.
The Anti-defection Law has been criticised on the ground that it creates an unreasonable discrimination between the elected independent member and a nominated member of a House. Under sub-paragraph 2 of paragraph 2, an independent member will be disqualified if he joins any political party after his election as a member of the House. But under sub-paragraph 3 of paragraph 2 of the said Schedule, a nominated member is allowed to join any political party within six months of his nomination as a member. An independent member’s freedom to join any political party is fettered although he is master of himself and owes his election to no political party. On the contrary, the ruling party picks and chooses person for nomination and in a way puts them under obligation. Such members are, therefore, likely to join the ruling party.

Under Paragraph 3, no disqualification is incurred in cases of split in the party. In the event of a split, at least one-third of its members must decide to quit or break away. The Committee on Electoral Reforms (Dinesh Goswami Committee) in its report of May, 1990, the Law Commission of India in its 170th Report on “Reform of Electoral Laws” (1999) and the National Commission to Review the Working of the Constitution (NCRWC) in its report of March 31, 2002 have, inter alia, recommended omission of paragraph 3 of the Tenth Schedule to the Constitution of India pertaining to exemption from disqualification in case of splits. Accepting the recommendations of the Commission,
paragraph 3 has been omitted by the Constitution (Ninety-first Amendment) Act, 2003, w.e.f. 1-1-2004.\textsuperscript{234}

While Paragraph 3 with the exception on split has been deleted by the Constitution (Ninety-first Amendment) Act, 2003, another exception to disqualification on the ground of defection exists in the case of merger of a political party with another political party, as provided under paragraph 4 of the Tenth Schedule. A party shall be deemed to have merged with another political party if not less than two-thirds of the members of the legislature party concerned have agreed to such merger. If any such merger takes place, those who do not agree to such merger and opt to function as a separate group in the House are also exempted from disqualification.

It is criticised that the Tenth Schedule while prohibited individual defection but at the same time allowed group defections in the name of merger. The game of merger is more easily played in smaller states like Meghalaya, Manipur, Nagaland, Goa, Mizoram, have all witnessed the bizarre drama of defections involving a minimum of two-third or more of the party members defecting to the opposition in order to topple the popular government for self-serving ends.

Under paragraph 5 exemptions from disqualification have been granted to a person who has been elected as a Speaker/Deputy Speaker or

\textsuperscript{234} Sec 5 (c) of the Constitution (Ninety-first Amendment) Act, 2003
Chairman/Deputy Chairman of the concerned House, if he by reason of his election, voluntarily gives up the membership of the political party or rejoin such political party after expiration his term.

The question of disqualification under Schedule X is to be determined by the Speaker or Chairman of the both Houses of Parliament or Legislature of the States, as the case may be, but he is to take notice of an alleged defection not supinely, but only when a petition in writing is received from a member. Para 6 of the Xth Schedule renders the decision of the Speaker as final.

The role of the Speaker as an adjudicatory authority has also been called in question. The Speaker of the Legislature is a political creature and therefore, he is not impartial. Most of the times the Speaker takes a view which is in the interest of the party to which he belongs.

Paragraph 7 of the Schedule provides that no Court has jurisdiction to decide the question of disqualification of a member of a House under Schedule X. Therefore it has the effect of excluding the jurisdiction of the Supreme Court and High Courts. Hence the Apex Court struck down it on the ground that the paragraph 7 is ultra vires and unconstitutional.

Para 8 authorizes the Chairman/ Speaker of a House to make rules for “giving effect to the provisions of Schedule X. Rule 7(7) provides that the procedure to be followed by the Speaker shall be the same as adopted in privilege cases by the Committee of Privileges. A reasonable opportunity
must be allowed to the member against whom a complaint has been made to represent his case, and to be heard in person. At times, the Speaker may refer a case of defection to the Committee of Privileges for inquiry. This process takes quite some time and, therefore, defection does not have any immediate effect.

The anti-defection law as contained in the Tenth Schedule to the Constitution failed to curb the evil of defections to a desired extent, though controlled to a large extent. The Tenth Schedule continued to be a subject-matter of controversy both before the judiciary and the legislature. Therefore, to remove lacunae and shortcomings of the law, various Committee/Commissions were constituted. Certain recommendations of the Committee/Commissions have all ready been implemented and certain recommendations are yet to implement. One of the recommendations which is given by most of the Committee/Commissions is that the adjudicatory power should not be left to the Speaker, it should be vested to an independent authority like Election Commission.