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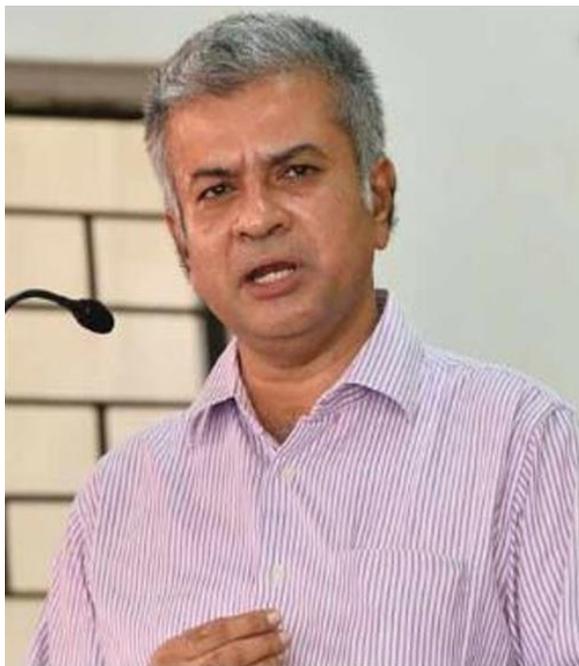
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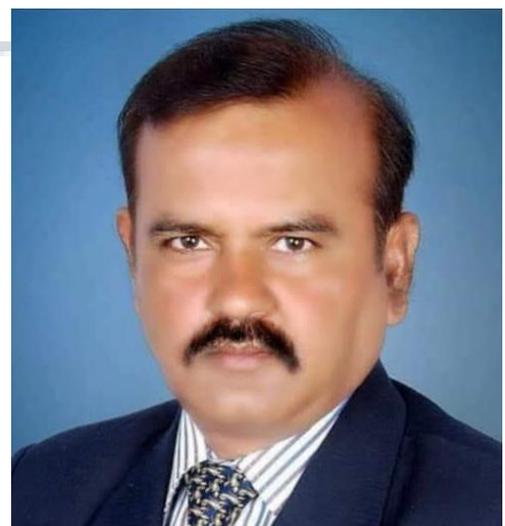
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W H I T E B L A C K
L E G A L

EXAMINING ANTI-DEFECTION LAW: BALANCING DEMOCRACY AND POLITICAL STABILITY

AUTHORED BY - SYED ANWAR ALAM & PRATIBHA PATEL

ABSTRACT

The three distinct domains of corruption are bureaucracy, business, and politics. Combating political corruption should be top focus among these three categories. Destructive and reprehensible phenomena of defections, which had reached huge dimensions following 1967 General Elections, has been our country's most disagreeable type of political corruption. This article emphasizes comprehensive discussion of anti-defection law under Indian Constitution, specifically with regard to judicial powers of constitutional courts and quasi-judicial authority of House's presiding officer, pending House's decision. Additionally, seeming contradiction between judiciary's worry within upholding noble goals of Tenth Schedule of Constitution and "the voice of dissent," which is fundamental democratic principle, is also examined.

Keywords: Tenth Schedule, Speaker and Judiciary Powers, Anti-Defection Law, and Disqualification of Elected Officials.

1. OVERVIEW

The Latin word "defection" which means "an act of abandonment of person or cause to which such person is bound by reason of allegiance or duty or principal or of one's leader or cause to which he has wilfully attached himself," is root of English word within English language. It indicates dissent of person or party. Therefore, term "defection" refers to act of leaving cause, withdrawing from it, or leaving party program. After then, it consists of two parts: giving up one and joining another.

Defection is simplest definition of leaving one political party to join another. At first, there was no mention of political parties within Indian Constitution. Given high rate of desertion from one political party to another, development of multiparty system within Indian parliamentary system has nearly led to collapse of public trust within democratic system of governance. Horse-trading was term used to describe process of changing political parties within order to

gain power. Both political parties and political leaders were heavily involved within corruption and horse-trading. within 1967, surveys were conducted within sixteen states. other majority states were lost when Congress only took control of one state. This signaled beginning of our nation's coalition government period. This election also sparked widespread defections. Approximately 142 MPs and more than 1900 MLAs switched political parties between 1967 and 1971. There was fall of numerous state governments, beginning with Haryana. defectors were given prestigious government ministries, including as Haryan's chief ministership. Due to three party switches of one Haryana lawmaker, "Gaya Lal," all defectors are now commonly referred to as "Aaya Ram-Gaya Ram." However, this defection risk was not immediately addressed. It took an extra 17 years for anti-defection statute to be passed within 1985. within 1985, Constitution's 52nd Amendment included provisions regarding defection-based disqualification to 10th schedule. However, recent events involving coalition administrations at federal level and within several states demonstrated ineffectiveness of such laws. It became very clear that law was upheld to preserve larger political parties' interests at expense of smaller ones. growing number of people are calling for regulations to be made much stricter and for gaps like definition of split to be closed.

1.1 HISTORICAL PERSPECTIVE OF DEFECTION LAW within INDIA

Democracy is thoroughly reliant on mandate of people. It is defined by Abraham Lincoln as “the Government of people, by people and for people”. within democracy like India, WILL of people is transformed through votes which determine party which would run governance of country. political parties field their candidates and whichever party secures majority within election forms Government. There is no problem when single party wins majority of seats within election¹. They only agree to create coalition government based on common minimum program when no party wins majority. coalition does not have to be formed just before elections; it might also be established after results are in. Defection frequently occurs within these kinds of circumstances.

Significant numbers of Indians defected during country's fourth and fifth general elections within 1967 and 1972. Out of 4000 members of Lok Sabha, state legislative legislatures, and union territories, there were about 2000 incidences of defection and counterdefection. As of end of March 1971, about half of Legislative had switched parties, and some of them were so

¹ GC Malhotra (n 1) 3.

daring as to switch parties up to five times.

One MLA was observed to have defected five times within five days. On average, one MLA defected every day, and nearly one state government followed each month as result of member's changes within party applications.

Motivated by political power and financial gain, elected officials switched parties three or four times within month. Due to widespread concern, unanimous resolution passed by Lok Sabha on December 8, 1967, established high-level committee to address defection issues. within response, commission of constitutional experts and representatives from political parties was established within March 1968 to examine defections within political landscape, with Y.B. Chavan serving as its chairman. On May 16, 1973, Constitutional Amendment Bill was presented to Lok Sabha based on findings of high committee chaired by Home Minister Sri Y.B. Chavan. Following extensive debate, bill was approved by both houses of parliament after being referred to joint session.

10th Schedule was included when Act went into effect on March 1st, 1985. lawmaker is considered to have defected if he "voluntarily gives up membership of his party or disobeys directives of party leadership on vote," according to 10th schedule. It stated that lawmaker may potentially be removed from House if he "absstains or votes against party whip on any issue." It applied to both state assemblies and Parliament.

Y.B. Chavan Committee's suggestions

High-Powered Committee on Defections, led by Y. B. Chavan within his capacity as Home Minister and comprising Jayaprakash Narayan, H. N. Kunzru, C. K. Daphtary, Mohan Kumara Mangalam, and M. G. Setalvad, emphasized necessity of an anti-defection law within 1969 within order to combat threat of defections. All of Chief Election Commissioners have since expressed their support for these initiatives.

Chavan, Committee's chairman, had referred to defection problem as national tragedy. "There can be no perfect or infallible deterrent for kind of political defections that are rooted within political irresponsibility and opportunism and create instability, within addition to bringing functioning of democratic institutions within disrepute," Committee's report began. committee believed that issue of defection needed to be addressed concurrently at political, ethical, and

constitutional levels, and that appropriate legislative action should be taken.² Candidates with high degree of loyalty and honesty should be promoted by political parties. Committee suggested that defector be prohibited from serving as Prime Minister, Chief Minister, or any other minister at constitutional level. member of High-Powered Committee, Madhu Limaye, has stated that within addition to punishing individual defectors, punishment should also be meted out to political party or organization that allowed defector. Committee also recommended that size of Council of Ministers be kept to minimum, not to exceed 10% of strength of Lower House within state with unicameral legislature and 11% within state with bicameral legislation. It should be right of Council of Ministers and not PM of CM installation of dissolution of house. Regarding legislation, Committee had suggested that political parties be registered and that defector be barred from serving as member of State Legislature or Parliament, as applicable. lawyer-group, which included Govinda Menon, M.C. Setalvad, Mohan Kumaramangalam, C.K. Daphtery, and N.C. Chatterjee, had proposed disqualifying defector. Rajya Sabha received report for consideration on August 12, 1969. Although everyone expressed concern about threat of defections, differing opinions were voiced regarding remedies.³ draft of legislation on defections that included some of Chavan committee's suggestions was accepted by union cabinet on July 24, 1970. proposed legislation primarily stated that: (a) Prime Minister or Chief Minister who is not member of lower house would not remain so unless elected to lower house within six months of his appointment; (b) strength of Council of Ministers at union and states should be limited to 10% of strength of House within case of unicameral legislature, and 11% within case of bicameral legislature; and (c) defector should not be appointed or elected as minister, Parliamentary Secretary, Speaker, Chairman, Deputy Chairman, Chief Whip, Deputy Whip, or any other office of profit within or under corporation owned or controlled by government for year, unless he resigns from his seat of House and is re-elected. On December 10, 1970, opposition leaders met within Parliament to examine these draft legislation ideas. same disagreements were expressed once more, and no resolution or agreement could be reached. Therefore, fourth Lok Sabha was unable to pass any legislation on defections.

² Paras Diwan, *AYA RAM GAYA RAM : POLITICS OF DEFECTION*, Journal of Indian Law Institute , July-September 1979, Vol. 21, No. 3 (JulySeptember 1979), 291-312.

³ On 10 December 1970, Prime Minister Indira Gandhi called conference of all Opposition leaders within Parliament to discuss measures that could be taken to tackle menace of defection which however did not yield any positive results.

Committee's main recommendations were: ● political party itself should create code of conduct to prevent defectors from joining another party; ● representative should be deemed to be obligated to party whose banner he wins election. This stems from reasonable understanding of nature, character, portrayal, and responsibilities of an elected representative; ● person who was not initially member of lower house cannot be appointed as PM or CM, and fundamental changes made within this way should have planned effects; ● Defectors should be barred from becoming ministers for predetermined amount of time or until they are reelected; ● There should be cap on number of ministers at federal and state levels; ● Recall provisions shouldn't be prudent or feasible.

1.2 SCOPE OF SCHEDULE X⁴

On January 30, 1985, Lok Sabha and Rajya Sabha both approved Constitution 52nd Amendment Bill 1985, which sought to eliminate threat of political defections. bill is unanimously approved by Rajya Sabha and Lok Sabha.

Both Rajya Sabha and Lok Sabha unanimously approved bill. Following an eight-and-a-half-hour, cross-party debate, 418 of 419 Lok Sabha members voted within favor of mandatory division, while one member abstained. bill received 192 votes within Rajya Sabha. following distinctive characteristics of Bill's passage were present:

- (i) Lok Sabha unanimously approved constitutional amendment for first time within Republic's history.
- (ii) That ruling party with sizable majority had made special effort to align itself with viewpoint of feeble opposition.
- (iii) party that did not have to deal with defectors departing its ranks had sponsored and advanced bill within Parliament. Conversely, there were those who wanted to join it but were defectors from other parties.
- (iv) While founding fathers wished to keep party politics out of statute book within order to allow for development and success of healthy democratic conventions within nation's political climate, Amendment had brought party issue inside Constitution.

tenth schedule was added within order to strengthen foundation of Indian parliamentary system by preventing unethical and unprincipled political defection. This law seeks to acknowledge pragmatic necessity of making personal and political behavior proprietary.

⁴The Indian Constitution, 1950

goal of anti-defection law is to acknowledge practical necessity of prioritizing proprieties of political and personal behavior over certain theoretical deductions that, within practice, have resulted within convoluted and perplexing condition of political and personal decline.

Timetable X⁵ cannot be construed independent of Arts. 102 and 191 of Indian Constitution⁶. entire process under Schedule 10 is started when member of house is disqualified through it. hearing before speakers begins on complaint that certain political party member has been disqualified due to desertion. Speaker, acting as Tribunal, must decide disqualifying issue.⁷. within addition to arguing that they have not freely renounced their party membership or disobeyed whip handed to them, members against whom proceedings are begun have raised this argument. Despite being regarded as final, speaker's or chairman's decision is susceptible to judicial review under Articles 226, 32, or 136 of Constitution.

As per majority opinion within **Kihoto Hollohon v Zachilhu**⁸ According to proviso to clause (2) of article, paragraph 7 of Schedule X has been declared invalid for lack of ratification; however, members who have received prior permission or approval from party within 15 days of such voting or abstention will not be disqualified. law does permit legislators to switch parties within specific circumstances, provided that at least two-thirds of legislators support party's merger with another party; within such scenario, neither merging party's members nor those who remain with original party will be subject to disqualification.⁹.

On recommendation of Election Commission, number of expert committees have suggested that President (in case of MPs) or Governor (in case of MLAs) make decision to disqualify member rather than Presiding Officer. procedure used to disqualify someone who has profit-making position within federal or state governments is comparable to this.

According to **Burton's Legal Thesaurus** – “defection maybe defined as abandonment of loyalty, duty or principle or of one's leader or cause. within parliamentary political life, term has come to connote change of any party affiliation or allegiance by member of legislature. traditional term for latter has however been ‘floor crossing’ which had its origins within British

⁵*Ibid.*

⁶ 1950

⁷ Constitution of India, 1950, Tenth Schedule, Para 6.

⁸ 368. (1992)1 SCC 309

⁹ Constitution of India (n 16) Para 4.

House of Commons where legislator was supposed to have changed his party allegiance when he crossed floor and moved from government to Opposition side.”

When members of ruling party defect to opposition and turn it into majority party, government is overthrown, which leads to instability. Such defection becomes undemocratic during an election since it invalidates voter's vote. party with most votes may therefore be unable to form government as result of opposition's efforts to persuade members of majority party.

The major development was amendment to include Tenth Schedule. tenth schedule was added with intention of reducing maliciousness of political defections within country's affairs. On January 24, 1985, Constitution Bill was presented to Lok Sabha, stating that "the evil of political defections has been matter of national concern." It has potential to erode fundamental tenets of our democracy and values that uphold it if it is not addressed.

Four articles of Constitution are altered by Fifty Second Amendment Act. anti-defection law is another name for this amendment. Constitution Fifty Second Amendment Act, popularly known as Anti-Defection Law, amends four provisions of Constitution: 101(3)(a), 102(2), 190(3)(a), and 191(2). It also adds Tenth Schedule.

The first of eight paragraphs within this legislation deals with definitions, while second outlines provisions that disqualify people from serving within State Legislatures or Parliament. The fourth paragraph declares that disqualification will not apply within merger cases; fifth outlines some exemptions; sixth and seventh paragraphs specify who would decide disputes involving defections and courts' barring jurisdiction with regard to disqualification questions; and final paragraph includes provisions allowing Speaker and Chairman to create rules to implement schedule's provisions.

2. IMPACT OF INDIA'S ANTI-DEFECTION LAW

According to law, Anti-Defection Law punishes those who defect from one party to another under certain conditions. As result, individual is no longer eligible to serve as member of state legislative assembly or Parliament.

Grounds for Disqualification

following Grounds of disqualification are applicable to Member of Parliament or State Legislature-

- By voluntary giving up political parties membership by elected member
- By voting for abstaining from voting without prior permission country with direction that political party issues
- After election joining of political party by independent member
- Joining any political party after expiry of six months by nominated member and who is not member of any political party at time of his nomination.

Exemption from Disqualification

There are certain circumstances within which these disqualifications does not apply. within case of merger of legislative party with some other party and such merger should be supported why not less than two third members of political party. person has to sever his connection with his political party and he will not be disqualified provided that he has been elected for office of Speaker or Deputy Speaker of House of People or of Legislative Assembly of State or to office of Deputy Chairman of Council of States or Chairman or Deputy Chairman of Legislative Council of State.

Power of Determination of Disqualification and Rule Making Power

The question as to whether member of House of Parliament or State Legislature has become subject to disqualification will be determined by presiding officer of House. Where question is with reference to presiding officer himself it will be decided by member of House elected by House on that behalf. Apart from that Chairman or Speaker of House has been empowered to make rules for giving effect to provisions of Tenth Schedule. rules shall be laid before House before 30 days and shall be subject to modifications/disapproval by House. If any member of house gives complaint against it, then only Presiding officer can Resort to defection. within latest case of Supreme Court it has been held that complaint can be made to presiding officer about detection by person who is not even member of house. Before final decision it is required by presiding officer to give chance that used to to put his side within front of house.

2.1 ANTI-DEFECTION LAW VIS-A-VIS RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

All Indian citizens have right to free speech and expression under Article 19 (1) (a) of Constitution. However, under Article 19 (2), this right is subject to some reasonable restrictions, such as those pertaining to public order, decency and morality, friendly relations with foreign powers, state security, contempt of court, defamation, and incitement to crime.

According to tenth schedule paragraph, disqualification from serving as member of state legislature or House of Representatives will result from voluntarily renouncing membership within political party within order to vote within house against party's line. This clause violates legislator's right to free speech and expression, which includes right to vote within accordance with one's conscience. Limiting freedom of speech, which can only be exempted under reasonable conditions, results from restricting legislator's ability to vote within accordance with his own convictions or conscience.

legislator has same freedoms as any other citizen. It is declared that limitations on dispatcher's right to speak within Legislature cannot be equated with limitations on fundamental right protected by Article 19(1)(a).

2.2 ISSUE WITH MERGER PROVISIONS

Rule 4 of tenth Schedule enumerates exceptional circumstances where there shall be no disqualification If with consent of two third members of the legislature party and party merges with another party. Flow within this exceptional provision is that it focuses upon number of members who have agreed to change party rather on rationale behind action taken.

The point of contradiction here is that if defection by an individual is not allowed for reason that he might be doing same due to availability of lucrative office or ministerial post with other party, then it can very well be expected that for same reason those 2/3rd members have agreed for merger. So where lays justification for exception? If this exception was based on reason as to why 2/3rd members of party want to merge with other party then it would have been valid exception.

2.3 IMMENSE POWERS VESTED UPON SPEAKER

According to Rule 6 of Tenth Schedule, chairman for speaker has been given great deal of authority to decide whether to disqualify members for defection. Nonetheless, it is important to remember that Speaker or Chairman is still member of party that appointed him. within these situations, it is unrealistic to expect him to behave within nondiscriminatory way when it comes to matters concerning his political party.

If Supreme Court, High Court, or Election Commission have power to decide such cases of disqualification, then Speaker's potential bias issue could be resolved. Only way can

impartiality be maintained. Considering volume of cases still outstanding within court, remedy doesn't appear to make up for current problem.

Time limit within which Presiding Officer has to decide-

The legislation makes no mention of time frame for presiding officer's decision regarding disqualification plea. This is challenge for petitioner seeking disqualification because he is forced to wait for presiding officer's decision before approaching court to request its involvement.

court has become aware of needless delays within decisions regarding number of cases and has voiced its concerns about them.¹⁰ Defectors have occasionally continued to serve as members of house as result of decision-making process being delayed. It has also been observed that opposition lawmakers have been appointed as government ministers while continuing to be members of original party within legislature..¹¹

In recent years, it has been observed that opposition families within certain states, including Andhra Pradesh and Telangana, have progressively joined ruling parties by splitting off from their original party to form smaller groups. within certain instances, it is also seen that over two-thirds of opposition party defect to prevailing party.

MLAs faced disqualification for switching to ruling party within smaller groups. However, clouds of uncertainty remain since it is unclear if they will be disqualified within event that presiding officer declares that over two-thirds of opposition have defected to ruling party. within March 2016, Telangana speaker permitted assassination of TDP legislature party within Telangana by ruling TRS, claiming that 80% of TDP MLAs (i.e., 12 out of 15) had joined..¹²

Recently within Andhra Pradesh entire 12 assembly session was boycotted by the main opposition parties legislator. Over 18 months delay within action against alleged defected

¹⁰ Speaker, Haryana Vidhan Sabha Vs Kuldeep Bishnoi & Ors., 2012, and Mayawati Vs Markandeya Chand & Ors., 1998,

¹¹ Anti-Defection Law Ignored, November 30, 2017, <http://www.news18.com/news/politics/anti-defection-law-ignored-as-mlas-defect-to-tdp-trs-in-andhra-pradesh-and-telangana-1591319.html>

¹² Telangana Legislative Assembly Bulletin, March 10, 2016, <http://www.telanganalegislature.org.in/documents/10656/19317/Assembly+Buletin.PDF/a0d4bb52-9acf-494f-80e7-3a16e3480460>; 12 TDP MLAs merged with TRS, March 11, 2016, <http://www.thehindu.com/news/national/telangana/12-tdp-mlas-merged-with-trs/article8341018.ece>

member of their party to ruling party was stated as reason for this boycott protest. While disqualifying 2 JD (U) members, Vice President has recently stated that within period of three months presiding officer should decide all such petitions.

3. JUDICIAL APPROACH ON ANTI- DEFECTION LAW

There have been various attempts by Legislature within order to to restrict Judiciary is Constitutional power that is not justifiable. cautious examining of legal provisions with special reference to rule 2 of tenth schedule it is stated that there has been bar on Court jurisdiction relating issues of members disqualification from house that essentially confers upon meaning that even Supreme Court and High Court 's jurisdiction along with the speaker's decision reviewing power is ousted.

The milestone judgement of **Kesavanand Bharti and Others vs. State of Kerala and Another**¹³, gave decision that fundamental aspect of constitution is judicial review, and that court's authority cannot be taken away by modifying it since doing so would violate its fundamental framework.

3.1 NO CLEARANCE ON “VOLUNTARILY GIVEN UP”

“The words ‘voluntarily given up his membership’ are not synonymous with ‘resignation’ and have wider connotation. person may voluntarily give up his membership of political party even though he has not tendered his resignation from membership of that party. Even within absence of formal resignation from membership an inference can be drawn from conduct of member that he has voluntarily given up his membership of political party to which he belongs.”

Though it is stated by Rule 2(1) (a) -10th Schedule that talks about disqualification on *voluntarily giving up membership* by party’s member but it does not throw light on what constitutes as “*voluntarily giving up membership*”. Question related to meaning of “voluntarily giving up” arose before Supreme Court within many case laws:

1. **Ravi S Nayak v. Union of India**¹⁴,

In this case question arose whether resignation alone would constitute **voluntarily giving up** membership of political party? It was held that words “voluntarily giving membership” have broader scope. within order to determine whether member has

¹³AIR 1994 SC 1558

¹⁴AIR 1973 4 SCC 225

voluntarily given up his membership, conduct of such member can also be referred to.

2. **G. Vishwanathan v. Speaker, Tamil Nadu Legislative Assembly**¹⁵

In this case, Court had to consider question whether member can be said to voluntarily give up his membership of party if he joins another party after being expelled by his old political party? It was held that once member is expelled, he is treated as an 'unattached' member within House. However, he continues to be member of old party as per Tenth Schedule. So if he joins new party after being expelled, he can be said to have voluntarily given up membership of his old party.

Parliamentary democracy stifles vital cog through confusing of dissent provision for defection.

3. **within Kihoto Hollohon v Zachilhu and others**¹⁶, importance of incentivising debate of parliamentarians was reiterated. This skill attains connotation especially within cases where member might choosees to raise an different opinion contrary to party's line. **Justice MN Venkatachaliah** within **para 43** of judgment point out that:

*“Not unoften views expressed by Members within House have resulted within substantial modification, and even withdrawal, of proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose within functioning of Parliamentary democracy. At times such an expression of views during debate within House may lead to voting or abstinence from voting within House otherwise than on party lines.”*¹⁷

This observation, while correctly emphasizes importance of variety of viewpoints presented within Parliament, emphasizes importance of unique viewpoint within guiding legislative action. Additionally, if there is minimal interaction and lackluster debate on measure, it may introduce unconsidered intricacies.

4. CONCLUSION AND SUGGESTION

4.1 CONCLUSION:

India adopted Anti-defection law with aim of bringing stability within government and reducing money power within political scenario. Nevertheless, basic structure of constitution is changed by law through change within in legislature executive relationship within manner to reduce executive liability towards parliament. constitutional right of freedom of free speech

¹⁵ (1996) 2 SCC 353

¹⁶ AIR 1993 SC 412

¹⁷ *ibid* 43.

and vote which is granted to elected is being curtailed by law. Further it has also minimised elected members accountability towards their respective constituencies which has taken away citizens democratic rights of having representative decision making process.

The no confidence motion of house has become meaningless through and marketing organisation of political parties within constitution system having various vices. Perhaps even after implementing such law or there had still remained crisis of government instability along with use of money power within politics. It is to be stated that fundamentals of democracy cannot be curbed at stake of government stability along with corruption.

Generally laws have been passed permitting and promoting competitive t party politics within the advanced and developed democratic Nations. However it can be stated that that India has witnessed many negative unintended consequences of anti defection law which are not suitable for country. Hence with aim of making India better democracy there must be repealing of schedule 10 of constitution.

4.2 SUGGESTIONS:

- As per recommendation of Dinesh Goswami Committee with regard to power of deciding political party's members disqualification, power should lie with Election commission and not Speaker.
- Provision which state that disqualification will not take place within event of mergers should be removed
- The right of filing petition under 10th article with regard to disqualification of members of defection should be given to voters.
- There must be comprehensive definition for phrase voluntary giving up membership political party.
- There must be clear provision under tenth schedule with regard to expelled members position including restriction such as probation with regard to join another political party e or Hold any office of profit under government.