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CONSTITUTIONAL AND ADMINISTRATIVE LAW

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ANTI DEFECTION LAW: A BANE ON DEMOCRACY

Under the Guidance and Supervision of

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CERTIFICATE

This is to certify that Ms. Isha (Reg. No. LM0120019) has prepared and submitted the dissertation titled, " **Anti Defection Law: A Bane On Democracy**" in partial fulfillment of the requirement for the award of the Degree of Master of Laws in Constitutional and Administrative Law, to the National University of Advanced Legal Studies, Kochi, under my guidance and supervision. It is also affirmed that the dissertation submitted by her is original, bona-fide and genuine.

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DECLARATION

I, ISHA (LM0120019), pursuing Masters in Constitutional and Administrative Law do hereby declare that the Dissertation word titled **'Anti Defection Law: A Bane On Democracy ',** submitted for the award of L.L.M Degree in the National University of Advanced Legal Studies, Kochi, during the academic year 2020-21, is my original, bona-fide and legitimate research work, carried out under the guidance and supervision of Mr. Abhayachandran K . This work has not formed the basis for the award of any degree, diploma, or fellowship either in this university or other similar institutions of higher learning.

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CONTENTS

List of Abbreviations

ADL- Anti Defection Law

BJP- Bharatiya Janata Party

BSP- Bahujan Samaj Party

C.J- Chief justice

CBI- Central Bureau of Investigation

CLP- Congress legislature party

FIR- First Information Report

INC- Indian National Congress

INC- Indian National Congress

J.D(S)- Janta Dal Secular

M.P- Member of Parliament

MGP -Maharashtrawadi Gomantak Party

MLA- Member of Legislative Assembly

MLC- Members of Legislative Council

NCP- National Congress Party

NCRWC- National Commission to Review the Working of the Constitution of India

PSP- The Praja Socialist Party

Pt- Pandit

SC- Supreme Court of India

TPCC -Telangana-Pradesh Congress Committee

TRS- Telangana Rashtra Samithi

W.P – Writ Petition

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Chapter 1

INTRODUCTION

1.1 Introduction

The politics of defection is considered to be a bane of parliamentary democracy in India. The instances of defections have been on the rise in India for quite a time, especially at the state level. Defection is also commonly known as floor-crossing, which involves a change of allegiance of a member of a political party to another party. Defection is the main reason for government instability. A functioning government may break down due to defections of its supporters to the other side or another political party which might leave the active government with a minority leading to its defeat. Defection defies election mandates and is thereby rightly described as an undemocratic practice. A party that could not come to power through elections fairly can use such means to maneuver the majority in the house to form the government against the election results defying the very purpose of holding periodic elections, which are considered a benchmark for democracy.[1]

The term defection seems to owe its roots to the Latin word 'defectio,' which means a demonstration of relinquishment of an individual or a reason to which such individual is bound by the bond of loyalty or obligation, or to which he is wholly connected himself. It, correspondingly, refers to an act of revolt, dissent, and insubordination by an individual or a party. Defection in this sense indicates the abandoning of a reason or pulling out from it or from a party or program. From one perspective, it has a component of surrendering one and, on the other, a component of joining another. When this process of deserting one side and joining others is complete, then a person is named a deserter. Defection is, thus, a process by which a person changes his allegiance from one party to another and abandons his duty. Generally, this marvel is known as 'floor crossing,' which had its starting point in the British house of Commons, where a lawmaker changed his faithfulness when he crossed the floor and moved from the government to the resistance side vice-versa.[2]

1.2 Defections in the United Kingdom

[1] Prashant Pandey, Anti-Defection Law : A Critical Analysis, Anti-Defection Law in India, (Feb.23, 2021, 4:30 PM), https:// vbook.pub/documents/anti-defection-law-in-indian-mo80p0nz7gwn.
[2] Id., at 12.

In this context, it could be referenced that in the beginning phases of their parliamentary battles for political force in the United Kingdom, members turned to defection most of the time and surprisingly in huge numbers. William Gladstone, viewed as the " Great Old Man" of British progressivism, started his parliamentary vocation as a Conservative member when he was duly elected to parliament in December 1832. During Peel's subsequent Ministry (1841 - 46), he moved over to the Liberal Side and was made vice-president of the board and later secretary of state for the colonies. In 1886, there was a mass defection from the Liberal Party. Joseph Chamberlain was emphatically against the Irish Home Rule Bill and crossed the floor alongside 93 other Liberal and Whig MPs. The deserters formed an autonomous party called the Liberal Unionists, but they voted alongside the Conservatives. The Home Rule Bill was crushed at the subsequent reading stage when the Gladstone ministry had to resign. Winston Churchill's political profession was set apart by rehashed floor crossing. Churchill started his parliamentary life as a Conservative. In 1904 he deserted from the Conservative Party and moved over to the Liberal Party. From 1904 to 1922, Churchill stayed a Liberal. In 1922, he contested the election polls as a "Lloyd George Liberal.[3]

1.3 Defection in India

The historical origin of defection in governmental issues in India can be traced back to Rama's times in ancient India. Indeed, even in Ramayana, the same incident of defection can be tracked down, Vibhishana, the sibling of Ravana, abandoned him and joined Rama.[4]

In the 20th century, During Montford Reforms, Shyam Lal Nehru, an individual from the Central legislature who was chosen on the Congress ticket; however, he crossed the floor and joined the British Side. Around then, Pt. Moti Lal Nehru, who was head of the assembly party, emphatically reprimanded and denounced him, and Mr. Shyam Lal Nehru was ousted from the party. [5]

Political defections have been a part of the Indian political defection even before the 1967 general elections. In 1948, the Congress Socialist Party left the Congress party and guided every one of its individuals to leave their seats in the assembly and look for re- election. However, this incident did not turn into a precedent. Later, In 1950, 23 MLAs left the Congress Party and established the Jana Congress in Uttar Pradesh, Again in 1958, some ninety-eight members of legislative assembly (MLAs) straightforwardly resisted the public

[3] G.C. Malhotra, Anti-Defection Law in India and the Commonwealth, 3 (Metropolitan Book Co. Pvt. Ltd., 2005).
[4] Supra note 1.
[5] Moolchand Shyam, Politics of Defections and Democracy, 13 JCPS 328, 329 (1979).

authority, which prompted the fall of the Sampurnanand Cabinet. The Praja Socialist Party (PSP) also provides a good study on defections. In 1953, the PSP pioneer Prakasam defected from the PSP and joined the Congress party to establish the government in Andhra Pradesh[6]. Thanu Pillai, a Chief Minister of the state of the Travancore-Cochin, is one more example of defection from that party. Pretty much a few defections were occurring in every one of the states however didn't prevail to make in excess of a wave. For example, during 1957-1967, 97 members abandoned the Congress party, and 419 joined it. While in 1967-68 (one-year time frame), 175 absconded from it, and 139 joined it.[7]

1.3.1 Fourth General Election

In the fourth general election, the Congress party secured majority seats in the Lok Sabha by winning 283 seats out of 520 seats but lost an outright majority in eight of the sixteen states of the union that went to the polls. Even in states where the party held control, its solidarity was much depleted. However, in the eight states where congress failed to get outright majority seats, no single party could take its place. As an outcome of the fourth general election, the political force displayed by the Congress party so far was broken away. The opposition parties viewed this as an opportunity to get hold of the power. The political parties which contested neck to neck against each other at the polls kept their ideological differences aside and came together to share power on the basis of what was named as an agreed minimum program. Along these lines, the significant advancement post fourth election period was the formation of coalition governments of widely heterogeneous components in some states.[8]

The other remarkable change that happened post fourth general election was the large migration of legislators in various states, to and fro, from one political party to another. Predominantly to acquire profit office or other personal benefits, if necessary, by assisting the bringing down of progressive governments and framing others in their places. The incidents of defection became more intense and clear after the fourth general elections in 1967 with regards to which the figures represent themselves. Up to the fourth election in 1967, there were only about 400 defections, and within a year from the election of 1967, there were alone 500 odd defections, of whom, the figures also say, 118 went on to become ministers or

[6] Paras Diwan, Aya Ram Gaya Ram: The Politics of Defection, Vol.21, JILI, (1979).
[7] Id.
[8] Supra note 5.

ministers of state. The issue turned out to be so significant from the perspective of saving the practices in a democracy and laying down certain standard guidelines of political behaviour.[9]

1.3.2 ***Committees and Bills***

Committee on Defection: On August, 11,1967, a conspicuous Congress legislator from the Lok Sabha, P.Venkatasubbaiah, a secretary of the Congress Party in parliament, moved a resolution for the formation of a committee on defections. The Lok Sabha examined the matter in detail, and finally, on 18th February 1969, the report of the committee was laid for discussion on the table of Lok Sabha. The committee suggested that a committee of the delegates of the various political parties in parliament and state assemblies be comprised to draw up a set of principles for the political parties to follow with specific reference to the issue of defection and to carry out its implementation via an agreement among themselves. It also suggested that no individual who was not a duly elected member of the lower house ought to be designated as minister/chief minister. The committee further suggested a constitutional amendment without influencing the current office holders in Office. The committee further suggested that a defector ought to be prohibited for one year or till such time he resigns his seat and seeks re-election, from holding any office of a minister, speaker, deputy speaker or any such post conveying profit and salary to be debited from the consolidated fund of the union or the states or other government undertaking funds.[10]

The constitution (thirty-second amendment) bill, 1973 : As the YB Chavan committee's suggestions couldn't give a sufficient solution to the issue of defection, the constitution (thirty-second amendment) bill, 1973 was presented during the fifth Lok Sabha on 16th May 1973, which sought to frame constitutional regulations for the issue of defection. The Bill provided that a member shall be disqualified from holding his seat as the member of either house of parliament if he voluntarily gives up the membership of the political party on whose tickets he contested elections or if he votes or abstains from voting according to his party directions, without seeking prior approval for the same. The bill also provided an exception from disqualification in case the defection happened because of a split in the political party. The minimum strength for a split was, however, not made clear in the Bill. The provisions of the Bill were not to make applicable to members of unrecognized political parties, nominated members, and independents.

[9] Diwan Id., at 3.
[10] Subhash C Kashyap, The Politics of Power, Defections and State Politics in India,89 (3rd ed., 1985)

The bill vested the power to adjudicate the question of disqualification on a reference made by the political party or any member so authorized by it, in the president for members of the central legislature, and in the governor for members of the state legislature. On 13th December 1973, a motion was passed in Lok Sabha to refer the constitution (thirty-second amendment) bill, 1973 to a joint- committee of the houses of parliament. On 17th December 1973, a similar motion in this regard was passed in the Rajya Sabha. However, the committee of the houses of parliament became non -operational upon the dissolution of the fifth Lok Sabha session on 18th January 1977.

On 28th August 1978, one more endeavor was made toward this path by presenting the constitution (forty-eighth amendment) bill, 1978 in Lok Sabha. The bill received severe criticism at the introductory stage itself from the ruling and the opposition sides. The members disagreed with the supposed distortion of realities in the statement of objects and reasons because the members were not counseled over the provisions of the bill, though the statement of objectives and reasons of the bill stated: the issue cuts across all political parties. It has been analyzed in consultation with the chiefs of the political party. Some striking provisions of the bill were as follows:

1. After the elections, independent and nominated members would have the opportunity to join the political party for one single time.

2. The bill provided two situations for disqualification. First being, voluntary giving up of membership of the political party to which the member belonged, and second being casting a vote not in accordance with the party directives, without taking prior permission from the party and subject to the condition that the member was expelled within 30 days from the party to which he belonged.

3. The bill carved out an exception that in case one-fourth of members of the political party or where the political party is comprised of 20 members than not less than 5 members form a new party and if such party receives recognition from the presiding officer and is enrolled with the election commission, then such members can not be disqualified.

4. This bill was supposed to be applicable to the recognized political party. However, even this bill failed to see the light of the day as it faced stiff opposition, following which the minister withdrew the motion to introduce the bill.[11]

[11] G.C.Malhotra, Anti Defection In India And The Common Wealth, Metropolitan Book Co.Pvt Ltd (2005).

Finally, after the general elections in 1984, The anti defection law was introduced. The president of India said in his address to the two houses of parliament gathered in one place on 17th January 1985 that the government expected to present in that session a bill to ban defections. In furtherance of the address, the government presented the constitution (fifty-second amendment) bill in the Lok Sabha on 24th January 1985.

The statement of objects and reasons affixed to the bill expressed: The evil of political defection is a matter of public concern. In case it isn't fought, it is probably going to sabotage the actual pillars on which our democratic setup is based.The Bill intended to outlaw defection and satisfying the above confirmation. To achieve a national consensus on the bill, the prime minister held detailed conversations with the heads of opposition parties/gatherings. The government consented to the demand of removing the provision from the bill about the expulsion of a member from his political party on the ground of his conduct outside the house. The bill was approved in Lok Sabha and Rajya Sabha on 30 and 31 January 1985, respectively. It got the president's consent on 15th February 1985. The act, which came into power with effect from 1st March 1985 after the issue of the important notice in the Official Gazette, added the tenth schedule to the constitution.[12]

1.4 Provisions of the tenth schedule[13]

The constitution 52nd amendment act introduced amendments in four articles of the constitution viz article 101(3)(a), article 102(2), article 190(3)(a), and article 191(2), and inserted the tenth schedule thereto. This amendment act is called the anti-defection law. Under article102(2) and article 191(2), a member is disqualified from either house of the parliament or state legislatures, respectively, if he or she is disqualified under the tenth schedule .

This schedule has eight paragraphs- the first paragraph sets out the definitions of the terms used in the schedule . paragraph two of the schedule sets out two grounds for disqualification of the members of the legislature. It states that a member would be liable to be disqualified from the membership if they voluntarily give up his or her membership or votes or abstains from voting in the house against the direction issued by the chief of the party under whose banner he or she was elected, and the political party has not condoned such an abstention or voting within 15 days counted from the date of voting or abstention. It further provides for

[12] Id.at 10

[13] The Constitution of India, 1950, Tenth Schedule, inserted via the constitution (fifty-second amendment) act, 1985 (w.e.f March 3rd, 1985).

the disqualification of an independent candidate who joins any political party after getting elected to the legislature. However, it gives a window period of six months for the nominated members to join any political party. Following this, any change in the membership would be seen as defection.

Paragraph three of the tenth schedule as it originally stood stated that in cases where there is a split in the original party, and at least one-third of members of the original party is in favor of the split, then no disqualification would be incurred. This entire paragraph was omitted from the tenth schedule by the constitution 91st amendment act 2003.

Paragraph four provides protection from disqualification under paragraph 2, where the original political party merges with another political party and the members claim that they have become members of such political party formed out of such merger or have not accepted the merger and have opted to function as a separate group. In such cases, the members would not incur disqualification.

The fifth paragraph sets out exemptions for the speaker, deputy speaker, chairman, and deputy chairman of a house as they are allowed to give up the membership of their respective parties after being elected to the office of the speaker.

Paragraph six of the schedule provides that the chairman or the speaker shall be the final authority to decide the question of disqualification of a particular member of the house. The duty of the chairman or the speaker is to find out the relevant facts. Once the facts have been collected, or it can be inferred from such facts that the act committed by the alleged members fall within the ambit of para 2(1), (2), (3) of the tenth schedule , then disqualification will become applicable, and the speaker or the chairman as the case may be will have to take a decision to that effect.

Paragraph seven of the tenth schedule is a finality clause that excludes the jurisdiction of courts in respect of any matter coming under the tenth schedule .

Since the speaker or the chairman acts as a quasi-judicial authority under paragraph 6, the fairness rule dictates that the member who is guilty of defection should be given an opportunity to put across his stand. However, where a member has not suffered any prejudice, the claim of violation of the natural justice principle will not be maintained.

In *Maha Chandra Prasad Singh versus chairman Bihar legislative council*[14], the member who belonged to Indian National Congress (INC) was alleged to have incurred disqualification under paragraph 2(1)(a) of the tenth schedule by contesting elections as an independent candidate. The chairman, in this case, relied on the letter given by the chief of the Indian National Congress (INC) in the council, which stated that that the particular member had stopped being a member of their party for going against the party and contesting the election as an independent candidate thereby breaking the party code of conduct. The petitioner admitted these facts in his writ petition and did not dispute the same. In the light of the facts in the above case, the non-supply of the copy of the letter to the member seemed not to cause any prejudice to him and was therefore not held to be violative of the principle of natural justice.

In *Kihoto Holohan's case*[15], the constitutional validity of the act was challenged. While explaining the objectives behind the tenth schedule , the supreme court high lighted the roles of political parties in the political process. The court explained that when elections are held, a party goes before the electorate with their manifesto, which enlists their programs and policies. It sets up its eligible candidates to contest elections and deals with all the expenses incurred in the process; therefore, such candidates can be rightly set to be elected on the basis of the party manifesto. The political propriety and morality underlying tent schedule , therefore, demands that if such a candidate, who gets elected as a member of a political party subsequently changes his party and joins another party after the election, then such candidate should lose his original seat in the legislature and contest by-election again under the banner of the new party adopted by him. The court by 3:2 majority upheld the constitutional validity of the law but at the same time held that the speaker's decision to disqualify the member under the tenth schedule cannot escape judicial review and will be subjected to it whenever needed. The majority stated that the tenth schedule 's main objective is to curb the evil of the unprincipled and unethical practice of political defection. paragraph seven of anti-defection law, which bars judicial review, directly affects articles 136, 226, and 227 of the constitution. Thus, in accordance with article 368(2) of the constitution, for such a law to be valid, it should be ratified by half of the state legislature. As it has not been so ratified, it is invalid.

[14] (2004) 8 SCC 747

[15] Kihoto Hollohan v. Zachillhu & Ors, AIR 1993 SC 412.

The court, through its majority, further explained that paragraph seven contains provisions that are independent and can stand separate from the main provision included therein. paragraph seven should be severed from the remaining provisions, which are complete in themselves and should stand valid. The majority judges ruled that the speaker under paragraph six acts as a tribunal while deciding on the rights and liabilities and therefore, their decision would be subject to judicial review under article 136, 226, and 227 and that the jurisdiction of courts cannot be taken away by the finality clause included in the schedule . However, the majority also made it clear that judicial review shall not arise prior to the final decision of the speaker or the chairman. "The only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequences." Thus, prior to the final adjudication by the speaker or the chairman, judicial review is possible on two grounds a) speaker suspending or taking action during the pendency of disqualification proceeding, and b) grave immediate irreversible repercussions. The majority has also affirmed that the speaker's decision can be questioned in judicial review on the grounds of

A. Jurisdictional error based on violation of constitutional mandate,

B. Mala fides

C. Non-compliance with rules of natural justice

D. Perversity.

On the other hand, the minority judges' view was that the consent of the president to the 52nd amendment was void and non-est as the bill was required to be ratified by half of the state legislatures, and that had not been done. The bill was supposed to be presented to the president only after such ratification by the state legislatures, and as the constitution was amended not in accordance with article 368(2), the doctrine of severability could not apply to the 52nd amendment act. Further, it was observed that the speaker could not be given the sole responsibility of an arbiter in the defection cases as it would go against the basic structure of the constitution. As the speaker functions continuously on the support of the majority party in the house, so he cannot be regarded as an independent authority, and making him the sole arbiter in defection cases would amount to a violation of the principle of natural justice.

"The minority judges observed democracy forms a part of the basic structure of the constitution and free and fair elections with provisions for resolution of disputes relating to

the same and those relating to subsequent disqualification by an autonomous body outside the house are essential features of the democratic system in our constitution. Accordingly, independent adjudicatory machinery for resolving disputes relating to the competence of members of the house is envisaged as an attribute of this basic feature." [16]

The apex court has, in various cases, interpreted different provisions of the law in different ways in different cases. For example, the law provides a member to be disqualified if he or she voluntarily gives up his or her membership; however, in *Ravi s Naik v. Union of India*[17], the apex court interpreted that in the absence of formal resignation by the member, the giving up of membership can be inferred by his conduct. In *G. Viswanath v. Honorable speaker Tamil Nadu legislative assembly*[18] *and Rajendra Singh Rana v. Swami Prashad Maurya & Ors*,[19] the supreme court ruled that members who publicly express opposition to their own party or publicly demonstrate support for another party shall be deemed to have resigned.

In the wake of recent past years, incidents in Karnataka, Goa, Telangana, Madhya Pradesh, and several other states where extensive horse-trading toppled the democratically elected governments in these states; display a blatant abuse of the law by the political parties for their greed. Ironically, changes in the government have also, in some cases, involved a change of speaker, thereby indicating a blatantly partisan manner as regards the issue of testing the legality or illegality of defection, dictated largely by whether the defectors were changing over to the speaker's party. This biased conduct has raised questions on the dignity of the office, which is precisely the reason why their decisions are challenged in the court of law. Apart from this, the law does not mention a time frame for the presiding officer to finally decide on a disqualification petition. As the courts cannot intervene before the presiding officer has given the final decision on the matter, the petitioner seeking disqualification has no other option but to wait for the final adjudication by the speaker. There have been many cases in this regard where the courts have expressed concern about the unreasonable delay in deciding such petitions. In this context, it becomes imperative to critically analyze the tenth schedule , its objectives, and to what extent they stand fulfilled.

1.5 Research problem

[16] Kihoto Hollohan v. Zachillhu & Ors, AIR 1993 SC 412.

[17] 1994 Supp. (2) SCC 641: AIR 1994 SC 1558.
[18] (1996) 2 SCC 353.
[19] AIR 2007 SC 1305.

The working out of the law in recent years clearly suggests the law has failed to achieve its purpose. The anti-defection Law, when it was passed, it had aimed at bringing down the unethical political defections, but due to ever-increasing political dishonesty and power-hungry legislator, this law failed to achieve its desired goals. Politicians found loopholes in this law and used it for their own personal benefit.

The law and its subsequent interpretation by the supreme court have made the provisions too wide. It considers the expression of dissatisfaction and strongly worded opinions against the party leadership as defection. It restricts the internal democracy within political parties, which prevents a member from expressing dissatisfaction against party leadership and policies. This law also indirectly stops a legislator from voting in line with his conscience, judgment, and interests of his electorate which impedes the oversight function of the legislature over the government by ensuring that members cast votes based on the decisions taken by the party chiefs and not what their electorate would like them to vote for, this weakens the vertical accountability of the legislators to their constituencies.

1.6 Scope of the study

The process of defection has continued to formant political instability and electoral volatility. The law, as contained in the tenth schedule , is replete with challenges and has failed to achieve its desired goals as the same law is being misused by the politicians and political parties to carry out defections. This research seeks to find out the defects in the existing anti-defection law by analyzing its provisions in the light of various incidents of defections and various judicial decisions.

Political parties are considered to be drivers of engineering defections and destabilizing the elected governments. The study, therefore, in addition to focussing on the immediate, palpable concern of defection, also deals with a deeper analysis of the dissent within a political party, which is necessary to unravel the fundamental factors that create breeding grounds for defection. The study also suggests changes to revamp the anti-defection legislation to make it more effective and stringent without eroding the democratic fabric of the country.

1.7 The objective of the study

The objectives of the research are :

1. To identify and study the emerging issues and challenges faced by anti defection law.

2. To study anti defection laws in other countries and identify if provisions could be drawn upon, with or without modifications.
3. To suggest recommendations to make the law efficient in curbing defection and establishing political democracy.

1.8 Hypothesis

1. The law has failed to keep a check on the rampant defection.

2. There is gradual erosion of democracy at the hands of the provisons of tenth schedule of the constitution.

1.9 Research Questions

1. Is the current anti-defection law effectively preventing horse-trading in India and other similar anti-democratic experiences?
2. What is the extent of judicial review of the speaker's decision?
3. Does the law restrict the internal democracy of political parties, such as freedom of expression and right to dissent?
4. Are there any changes in the anti defection law to ensure the internal democratic practices of political parties?

1.12 Methodology

The method used in the study is doctrinal research involving the interpretation of relevant primary and secondary sources of law and synthesizing those sources to suggest ways in which the law should develop. The researcher has collected information and data through secondary sources like books, websites, articles, journals, judgments, and internet sources.

1.11 Chapters

The first chapter, titled ‘Introduction’ , gives an introduction to the whole study. It gives a succinct introduction to the topic, statement of the problem, the scope of study of the topic,

research questions, objectives of the study, study hypothesis, and methodology adopted for the study.

The second chapter, titled ‘Anti Defection law And Horse Trading’, deals with the definition and in-depth analysis of the causes of horse trading. It further examines the provisions of anti-defection law in the light of increasing horse-trading incidents. It explains how the provisions of law can be misused by political parties and politicians to achieve selfish goals.

The third chapter, titled ‘Anti Defection Law And Curtailment Of Dissent’, analyses how anti-defection law provisions suppress descent and erode the working of internal democracy within the political parties by giving unlimited power to party bosses to issue whips, thus going against the ideals envisaged in our constitution.

The fourth chapter, titled ‘Anti Defection Law In Other Countries ‘, deals with a comparative study and analyses the anti-defection law prevalent in advanced democracies, neighboring developing countries, and other undeveloped countries.

The fifth chapter deals with conclusions, findings, and suggestions drawn by the researcher.

1.12 Survey of Literature

Anti-Defection Law And Parliamentary Privileges (1993). By Subhash C. Kashyap. Nm. Tripathi Pvt. Ltd., Bom: The book is an excellent treatise by Subhash C. Kashyap and seeks to investigate and decipher the provisions of the tenth schedule to assess the working of the anti-defection law; and also identifies the basic flaws in the current law. The author defines defection as indicating the "relinquishment of reliability, obligation or rule or of one's leader or cause." Chapter I succinctly describes earlier ways of checking defection. Chapter II is essentially dedicated to an analysis of the supreme court's decision in *Kihoto-Holloon versus Zachillu*. Chapter III and IV give exceptionally helpful data about the occurrences of political defections in different state councils and the Lok Sabha. The author accommodatingly clarifies how in specific states like Nagaland, Mizoram, Tamil Nadu, Manipur, Goa, and Meghalaya, the legislatures were brought down through defections and how in some cases, the speakers acted in a sectarian and impartial way. Chapter V named "The Case of the Twenty in the Lok Sabha speaker’ deals with the provisions of split and merger. In Chapter VI, named ‘Improving the Law: A case for Amending the tenth schedule’, the author brings out a few ideas for transforming the anti-defection law, which as indicated by him was

carelessly raced through the two houses when the ruling party had a greater majority in the Lok Sabha.[20]

G.C Malhotra in his treatise *Anti-defection Law in India and the Commonwealth*,[21] has very elaborately made a comparison of anti-defection laws in different countries. The treatise in the beginning very succinctly explains the definition, history, and development of the law. The author has dealt with the law in 65 countries, out of which 40 are Commonwealth countries. The author additionally discusses the changes required and amendments made by the parliament every now and then by investigating the experience of the world parliaments, especially the Commonwealth. The book also discusses various cases on defection, drawing incidents from parliament and state legislatures in India.

Dharmadan N, climate choice of the speaker of the lawmaking body justiciable, AIR, March 2004, Issue No.03, pp.81-85. This article discusses the various provisions of the anti-defection law in detail and discusses the various decisions rendered by the apex court in this regard. The speaker of the house is a constitutional authority, and whether his decision on disqualification is amenable to the judicial review of the supreme court and various high courts has been explicitly dealt with in this article.[22]

Karthick Khanna and Dhvani shah, Anti-Defection law: a Death toll for parliamentary Dissent: The article contends that constitutional amendment is required to paragraph 2(1)(b), which should only allow members who defy party whip to be disqualified very restrictively. The article argues that the wide terminologies used in the provisions pave the way for power to be misused by higher echelons of the party by overlooking the freedom of speech and conscience of members which are totally influenced and not permitting them to work in light of a legitimate concern for individuals who got them elected. Thus, it is undemocratic.[23]

Nitika Bagaria and Vedika Shah, 'Decoding Intra-Party Dissent: The Lawful Undoing of constitutional Machinery: This article discusses in detail how the provisions of the tenth schedule impede intra-party dissent and takes away the right to conscience of members to represent the will of their constituency, and reduce their role to a mere rubber stamp in the

[20] Kashyap S.C., Anti-defection Law and Parliamentary Privileges, NM Tripathi Pvt. Ltd., Bombay, ISBN: 81-7118-054-X.(1993).
[21] G.C.Malhotra, Anti Defection In India And The Common Wealth, Metropolitan Book Co.Pvt Ltd (2005).
[22] Dharmadan N, climate choice of the speaker of the lawmaking body justiciable, 81 AIR Issue No.03 85 (2004).
[23] Karthick Khanna and Dhvani shah, Anti-Defection law: a Death toll for parliamentary Dissent? , NUJS Law Rev. Vol.103,.103-112 (2012).

hands of political parties. The authors have also discussed in this article how to improve the law by digging into the practices followed in other countries in this regard.[24]

[24] Nitika Bagaria and Vedika Shah, 'Decoding Intra-Party Dissent: The Lawful Undoing of constitutional Machinery? 7(2) NLUJ L Rev 115 (2021).

Chapter 2

Anti Defection law And Horse Trading

2.1 Horse Trading

The term horse-trading was brought into use in the early 1800s. It owes its roots to the infamous tactics of horse traders who purchased and sold horses.[25] Macmillan English Dictionary defines it as a troublesome and sometimes unscrupulous negotiation between two people trying to reach an agreement. In political terminology, it is a long process involving negotiations portrayed by hard bargaining and settlements. It is often practiced in democratic institutions like legislatures when a parliamentarian or lawmaker upholds some Bill or trust vote for his personal gains.

Representative democracy, which is consistently thought of as an appropriate type of government for exceptionally populous-cum-diverse nations like India, is essentially embraced to ensure proper representation based on popular sovereignty and secure an equitable and relentless voice of the electorate in the government. The quintessence of any democracy lies in having different political parties having their separate set of ideologies. The presence of one single party might lead to autocracy, which is the antithesis of democracy. However, the haste with which parties in opposition seek to capture the power is a serious problem which the Indian political system has been experiencing for quite a long time. This issue of political defection, propelled by political and financial bait offered by opposition parties popularly called 'Horse Trading,' before the completion of the tenure of the ruling party, is representing an imposing obstacle before the democratic system of India.[26]

Once the election process is complete and the results have been declared, the formation of government takes the form of a game of manipulation of public opinion. It occurs more often in the case of a coalition government as well as a government that has secured a very less majority. Only that party can form the government, which is able to prevent any type of political defection, resignation, etc. For this purpose, parties nowadays commonly turn to

[25] VK Handa, What Is The Origin Of Horse Trading, T.O.I, (May.22nd , 2021, 10:00 PM), https://timesofindia.indiatimes/ what-is-the-origin-of-the-term-horse-trading/3286161.cms.
[26] Hardik Batra, Defection And Horse Trading In Indian Politics: Constitutional Framework And Challenges, H.Y.D.R.A, (May.22nd , 2021, 10:00 PM), https:// hydratrust.in/defection-and-horse-trading-in-indian-politics-constitutional-framework-and-challenges/.

'Resort Politics,' where the party keeps its members at a hotel or resort under tight security to prevent any manipulation.

The tenth schedule [27] under paragraph 3 and paragraph 4 provided an exception to disqualification on the grounds of defection by incorporating the concept of split and merger of political parties in the following words-

" 3. ***Disqualification on the ground of defection is not to apply in case of a split.***[28]***-*** *Where a member of a house makes a claim that he and any other members of his legislature party constitute the group representing as a faction which has arisen as a result of a 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 sub-paragraph (1) of paragraph 2 on the ground-

(i) that he has voluntarily given up the 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 authorized 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 sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

4. ***Disqualification on the ground of defection is not to apply in case of a merger****.-(1) A member of a house shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party 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

[27] The Constitution of India, 1950, Tenth Schedule, inserted via the constitution (fifty-second amendment) act, 1985 (w.e.f March 3rd, 1985).
[28] Paragraph 3 omitted by the constitution (ninety-first amendment) act, 2003, sec. 5(c) (w.e.f. Jan 1, 2004).

(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."

Though earlier anti-defection law was successful in curbing individual defections, but because of the provision of exemption from disqualification in case of split as provided in paragraphs 3, it failed to check upon bulk defections. On account of this destabilizing effect on the government, paragraph 3 received severe criticisms, and therefore the parliament, following the recommendations of experts committees and commission, omitted paragraph 3[29] from the tenth schedule by the constitution (ninety-first amendment) act, 2003. It also accepted the recommendations that a turncoat ought to be punished for his defection by suspending him from holding any open office as a minister or some other gainful political post for at least the remaining tenure of current legislature or until the following fresh election, whichever is prior.[30] The parliament, through the same amendment, also introduced that the absolute number of ministers, forming the council of ministers combining the chief minister in a state shall not surpass fifteen percent, thereby amended articles 75 and 164 of the Indian constitution. This was done to curb the practice of Horse trading on account of profitable gains and remunerative posts.

Despite the law, unbridled political defection characterized by horse-trading and acquiescence of members of the ruling coalition or ruling party is lamentably an ordinary action in India. members of the ruling party are lured by offering a gigantic measure of cash and relatively high er post in exchange for them deserting their political party.

[29]Dinesh Goswami Committee , The Committee on Electoral Reforms (1990), 170th Report of the Law Commission of India, Reform of Electoral Laws (1999), and the National Commission to Review the Working of the Constitution of India (NCRWC) in its report of 2002, recommended abolition of said paragraph 3 of the tenth schedule relating to exemption from disqualification in cases pf split from the constitution.

[30]The NCRWC was of the view that a defector should be punished for his action by prohibiting him from taking charge as a Minister of any public office or any other profitable political post for at a minimum period that is the remaining term of the existing Legislature or until the time of next fresh elections whichever is earlier

Some politicians who enter politics merely for gaining money and become representatives with the help of muscle powers accompanied by the criminalization of politics and politicization of crooks are easily swayed because of the satisfaction of their craving for profitable posts and getting a major measure of cash. Thus the dread of cancellation of membership of the concerned legislature has no impact on such representatives.

The defectors have devised new and unique methods of bypassing the anti-defection law over time. Rather than casting a ballot against their political party in the confidence motion or officially crossing the floor, the legislators nowadays essentially leave the party membership, which cuts down the complete strength of the house, and in this manner, disturbs the ruling government. Whenever the next by-elections are held, the same MLAs are set up as candidates on the tickets of opposition parties and return to the assembly. This technique has to a great extent, been effective in toppling state governments in the recent past.

Horse- Trading though difficult to be proved as such, is significant cause running behind the political defections and can be inferred from the breaking down of governments carried on by the opposition parties by taking in the members of the ruling party into their party. Such incidents which happened in Indian states in the recent past are explained below.

2.1.1 Karnataka

In the 15th Karnataka legislative assembly, though the Bharatiya Janata Party (BJP) was the single largest party, its attempt to form the government was not successful. A coalition government of Indian National Congress (INC) and Janta Dal Secular (J.D. (S)) was formed under the leadership of Mr. Kumaraswamy. [31]This Congress-JD(S) government in Karnataka led by H.D. Kumaraswamy was brought down in July 2019 as 17 of their MLAs resigned and joined the BJP. The crisis started on July 1st with the resignations tendered by Vijayanagara MLA Anand Singh and Gokak MLA Ramesh Jarkiholi. Ramesh was already suspended from Congress for alleged anti-party activities. Within a week, about thirteen more MLAs from Congress and J.D. (S) resigned. They were reportedly camping in Mumbai in the security of the BJP-led government in the state. However, the speaker of the assembly did not take any decision on the resignation of the above persons. In a counter-offensive move after the MLAs resigned, striking a blow to the 13-months-old government, a group of Congress leaders

[31] Shrimanth Balasaheb Patil v Hon'ble Speaker, Karnataka Legislative Assembly and others,W.P (CIVIL) NO. 992 of (2019).

approached speaker K R Ramesh Kumar and presented the petition seeking, under the tenth schedule , disqualification of the rebel legislators. As the resignations of aggrieved MLAs were not accepted, and the trust vote was impending, most of the MLAs approached the apex court alleging that the speaker has failed in his constitutional duty and is intentionally procrastinating the acceptance of their resignations. The bench headed by then Ranjan Gogoi, C.J., issued a direction to the speaker to take a decision in the matter of resignations forthwith and further directed the same to be laid before this court. The speaker, on his part, refused to be pushed around by the court's direction, and argued that he had the constitutional duty under article 190(3)(b) to ensure that the resignations were voluntary and genuine, and that the rebel MLAs are not attempting to avoid disqualification by giving in resignations and that the speaker has to enquire on whether they have incurred disqualification as per anti-defection clauses under tenth schedule of the constitution, which cannot be done in a hurried fashion. Later, a whip was issued by the INC and the J.D. (S) on 12.07.2019, directing their members to attend proceedings, and cautioning the members of disqualification if they failed to attend the same. After an extensive hearing, the court had on July 17th directed the speaker of the house to decide on the applications of resignations by the fifteen members of the house "within such time period as the hon'ble speaker may consider adequate". The speaker thereupon issued urgent notices between 18.07.2019 to 20.07.2019 to all the MLAs regarding the pending disqualification petitions to stand before him on the date of hearing fixed (23.07.2019 and 24.07.2019). Later, the INC on 20.07.2019 again issued a whip requiring their members of the legislative assembly to attend the proceedings of the house on 22.07.2019. The trust vote was finally taken up for consideration on 23.07.2019. The rebel MLAs did not attend the house. As a result, the INC and J.D. (S) coalition government, under the leadership of Mr. Kumaraswamy, was in the minority, resulting in the resignation of Mr. Kumaraswamy as chief minister. Following the trust vote, the then speaker disqualified the MLAs, ruling that they ceasde to be the members with immediate effect till the expiry of the term of the assembly (in 2023). [32]

The supreme court seconded the decision of the former Karnataka assembly speaker to disqualify 17 rebel MLAs on the ground of defection. However, it also held that the duration

[32] Shrimanth Balasaheb Patil v Hon’ble Speaker, Karnataka Legislative Assembly and others,W.P (CIVIL) NO. 992 of (2019).

of disqualification could not be till the end of the term of the house and permitted the MLAs to file nominations for the by-polls.[33]

2.1.2 Manipur

The election for the eleventh Manipur legislative assembly was conducted in March 2017. The said assembly election results delivered an uncertain outcome as none of the political parties won a clear majority with 31 seats in a legislative assembly of 60 seats to form the government. The Indian National Congress (INC) arose as the single biggest political party with 28 seats. The Bharatiya Janata Party (BJP) came next with 21 seats. Thounaojam Shyamkumar contested election as a candidate on the ticket of Congress party and was duly elected from his constituency representing the congress party. On 12.03.2017, following the declaration of results, Thounaojam Shyamkumar, alongside other BJP representatives, met the governor of the state of Manipur to stake a claim for forming a BJP-led government. On 15.03.2017, the governor welcomed the group lead by the BJP to form the government in the State. Around the same time, the chief minister-designate sent out a letter to the governor for regulating oath as ministers to eight chosen MLAs, including Thounaojam Shyamkumar, and on the same day, he was appointed as a minister in the BJP-led government. Between April and July 2017, as many as thirteen petitions for his disqualification were sent before the speaker of the Manipur legislative assembly expressing that he was excluded under passage 2(1)(a) of the tenth schedule . Thereafter, no action was taken by the speaker on the above petitions. Due to this inaction of the hon'able speaker, the aggrieved party filed a writ petition in the high court of Manipur and asked the high court to direct the hon'able speaker to decide on the disqualification within a reasonable time period. On 08.09.2017, the high court refused to interfere in the matter, stating that the issue regarding whether the high court can direct a speaker to decide disqualification petition within a certain time span is forthcoming before a bench of 5 hon'ble judges of the supreme court, and till then the high court can't pass any order.[34]

Later, The supreme court held that the high court erred in holding that the issue in regard to the court's ability to give direction to speaker was forthcoming. The bench said that the issue was explicitly answered in 2007 in *Rajendra Singh Rana v. Swamy Prasad Maurya*[35],

[33] Shrimanth Balasaheb Patil v Hon’ble Speaker, Karnataka Legislative Assembly and others, 2019 SCC OnLine SC 1454.
[34] Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors, SLP (CIVIL) NO.18659 (2019)
[35] AIR 2007 SC 1305.

wherein it was held that the inability on the part of the speaker to exercise his jurisdiction would attract the court's power of judicial review. The court further explained that the speaker is a quasi-judicial authority who is bound by law to take a final decision within a reasonable time; and such reasonable time should obviously be a time should be less than five years since the tenure of the house is five years.On 21.01.2020, a three-judge supreme court bench headed by Justice Nariman opined that the act of voluntary giving up of the membership of a political party may be expressed or implied by conduct,[36] and that the unequivocal conduct of Thounaojam Shyamkumar of becoming a minister in a BJP-ruled government after winning the election on the ticket of the Congress Party would make it clear that the disqualification contained in paragraph 2(1)(a) of the tenth schedule is clearly attracted. The bench further held that the speaker of the legislative assembly should give final decision on the petition seeking disqualification of a member under the tenth schedule of the constitution within a reasonable period of three months, in the absence of exceptional reasons and on this note directed the speaker to decide the disqualification petitions within four weeks. On 18.03.2020, when the hon'able speaker failed to comply with the deadlines given one after the other, the apex court, in its rare move, invoked its plenary power under article 142 and ordered forthwith removal of Thounaojam Shyamkumar from the cabinet and restrained him from entering the assembly till further orders. Following this order, the speaker disqualified him on the grounds of defection.[37]

2.1.3 Telangana

A few months after elections were conducted for the Telangana assembly in December 2018, 12 of the Congress party's 19 MLAs and four members of legislative Council (MLCs) announced the merging of the political party into the ruling Telangana Rashtra Samithi (TRS), which had won 88 out of the 119 assembly seats. This merging of the Congress legislature party (CLP) with the state's ruling Telangana Rashtra Samithi (TRS) gave a major setback to the national Congress party and robbed it of its opposition status in the state. Following the notification, the legislature secretariat in June 2019, on behalf of the assembly speaker, issued a bulletin recognizing the merger without acting on a petition filed by Congress seeking to disqualify those members.[38]

[36] Ravi.S.Nayak V. Union of India, 1994 Supp. (2) SCC 641: AIR 1994 SC 1558.

[37] Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors, 2020 SCC Online SC 55.

[38] C.R.Sukumar, Telangana Speaker Okays 12 Congress MLAS'plea For A Tie-Up With TRS, ET Bureau, (Jun.7th , 2019), https://economictimes.indiatimes.com news/politics-and-nation/telangana-speaker-okays-12-congress-mlas-plea-for-tie-up-with-trs/articleshow/69684784.cms.

Later, the constitutional validity of this bulletin issued by the speaker allowing the merger of 12 legislators with the ruling TRS was challenged by Telangana-Pradesh Congress Committee (TPCC) president N Uttam Kumar Reddy and CLP leader Mallu Bhatti Vikramarka before the Telangana high court. Subsequently, the court served notices on the Telangana state assembly speaker Pocharam Srinivas Reddy for assenting to the "merger" of a group of 12 Congress MLAs with the TRS. The court further served notices on the assembly secretary, the election commission of India, and the 12 MLAs who had announced that they had merged the CLP with the TRS legislature party, as they constituted two-thirds of the party strength in the assembly. On 13.03.2021, as the court did not receive any counter-affidavits to two notices served in June 2019, a division bench, comprising Chief Justice Hima Kohli and Justice B. Vijaysen Reddy again served notices on the state legislative assembly and council, demanding an explanation within four weeks on how 12 MLAs and four MLCs elected on Congress tickets were allowed to join the ruling Telangana Rashtra Samithi without relinquishing their legislator posts[39]. Following this, nothing has been done in this case up till now.

2.1.4 Uttarakhand

In 2019, the Central Bureau of Investigation (CBI) had recorded an First Information Report (FIR) against former Uttarakhand chief minister Harish Rawat and his then cabinet minister Harak Singh Rawat, who is currently a member of the state's BJP-led government, for alleged attempts at engaging in horse-trading in 2016, which got recorded on a tape by an editor of a news channel[40].

The agency had conducted a preliminary investigation into the alleged horse-trading attempt on March 23rd, 2016, when the state was put under the president's rule. It sent the recorded tape to the Forensic Science Laboratory, Gandhinagar in Gujarat, for examination, which reported that the tape was "certified" and there was no proof of any "expansion/cancellation/addition/altering/transforming" in the video documents.The video

[39] Srinivasan Rao Apparasu, High Court Notice To Telangana Speaker, 12 Congress Mlas On Merger With TRS, India News,(June.12th , 2019), https://hindustantimes.com/ india-news/high -court-notice-to-telangana-speaker-12-congress-mlas-on-merger-with-trs/story-RAfA4sq4jyd83fYnWlmguM.html.

[40]Vineet Upadhyay, CBI books former Uttarakhand CM Harish Rawat in horse-trading case, The New Indian Express, (Oct.23rd, 2019), https:// www.newindianexpress.com/nation/2019/oct/23/cbi-books-former-uttarakhand-cm-harish-rawat-in-horse-trading-case-2051910.html

purportedly showed the Congress chief talking about cash to win back the support of disgruntled MLAs who had moved over to the BJP so that he could get back to power. Later, the Uttarakhand high court gave its consent to the CBI to proceed further with its investigation in the case and file an FIR against Rawat after the agency furnished a report in a sealed cover on the preliminary investigation. Besides Harish Rawat and Harak Singh Rawat, who joined the BJP later and is presently a minister in the Trivender Singh Rawat-led cabinet, the CBI also booked editor-in-chief of Noida-based Samachar Plus channel Umesh Sharma, who had purportedly carried out the sting operation in the airport lounge. The CBI slapped the Indian Penal Code section pertaining to criminal conspiracy and bribery provisions of the Prevention of Corruption Act on the trio.[41]

Over the past decade, new challenges have been coming up. For the lure of offices and different contemplations known to all, MLAs have begun jumping on to a trip to some distant hotel where they are held under close security even from their relatives and afterward made to send in resignations "voluntarily." These resignations are essentially to avoid the tenth schedule , which otherwise would have been drawn in the event of group non-attendance. However, such truancy doesn't draw in the tenth schedule in the event of the election of Rajya Sabha. Such a circumstance may likewise bring forth the notorious act of kidnappings or political homicides as found in history across the jurisdictions to compel truancy.

It is interesting to note that the MLAs who resign contest by-elections on the political party ticket, which profits by the resignations from their earlier connection. Truth be told, a ton of such leaving MLAs are granted imperative services in the recently shaped government, at times promptly and in some cases on the off chance that they effectively win the by-polls as its candidate. Such practices have made resignations an incredible asset for elected legislators to carry out remuneration bargains within their political party and, if the need be, with the party in opposition which is already power-hungry[42].

Such practices mock the current democratic constitutional setup and deride the mandate of the general public. They seriously tend to play a fraud by bringing in a lost party to power, as

[41] Special Correspondent, CBI books ex-Uttarakhand CM Harish Rawat, others on graft charge, The Hindu, (Oct.23rd , 2019 17:11 IST), https://www.thehindu.comnews/national/other-states/harish-rawat-case/ article29777590.ece.

[42] Ajay Gupta & Aryan Gupta,Defecating The Defection Law: A Tale Of Strategic Resignations, The SCC Online Blog,(May,26th , 2021, 8:30 PM), https:// www.scconline.com/blog/post/2020/07/25/defecating-the-defection-law-a-tale-of-strategic-resignations/.

against the desires of the governed. One may contend that there isn't anything amiss with such practices since, supposing that the rebel MLA is re-elected in the by-poll under an alternate party, it would be automated endorsement of the defection. However, this is a fraudulent contention; dissident MLA, previously having been a part of a successful campaign, has a reasonable advantage as against any other applicant which the defected party will set up for that electorate. In this way, defection in any case via resignation is a misrepresentation of the trust of the public, which places such a candidate in power by the righteousness of his association to a specific political party.[43]

Pundits may likewise contend that individuals vote in favor of the up-and-comer, in light of his individual merits as a public figure rather than on the basis of the political party to which he/she is associated. Anyway, this holds great only in principle. It is notable that in every political election, a symbol is allocated to each candidate according to the provisions included in Election Symbols (Reservation and Allotment) Order, 1968. Such symbols might be either reserved or free. 'Reserved Symbol' is reserved for a recognized political party and can only be allotted to candidates set up by that political party, and 'Free Symbol' is a symbol for up-and-comers other than those representing the political parties. A recognized political party implies either a national party or a state party. A definite technique is given in law for the acknowledgment of a national and state party. Thus, a person can contest election under the 'Reserved Symbol' only when he is set up as a candidate by a 'Recognised Party.' Thus, it can be perceived from the above that a candidate of a recognized party gets the privilege of contesting an election under the symbol of a recognized party[44].

In our parliamentary democracy, political parties play an important role. The tenth schedule to the constitution perceives the significance of the political parties in a democratic based setup. It is open for the parliament to provide that the members of the political party elected under the party banner act according to the directions issued by the party and not against it.

It is, in fact, an advantage for a candidate set up by a recognized political party that he gets votes dependent on the popularity of his party, including the altruism of star campaigners of the political party who solicited votes in favor of that competitor. The political party incurs huge expenditures on account of election campaigns for the candidate. The candidates are additionally profited by the philosophy of the political groups, which is reflected in their

[43] Id.
[44] Id.

election manifesto that plays a crucial role in soliciting votes in elections. Hence, it is not just the candidate, but it is also the political party that is put to the vote of electors. In the event that the opposite views were to be accepted, there would not be any distinction in the achievement rate between the candidates put up by political parties and independent competitors.

Throughout the entire existence of parliamentary elections in India preceding the 2019 Lok Sabha elections, a sum of 44,962 independent candidates have contested polls; however, just 222 of them have won to become member of parliament (M.P.), delivering a simple 0.49% possibility of accomplishment[45]. In the first political elections in 1951, where 37 independent candidates won, the number has tumbled down to 3 in the 2014 elections. These always declining figures even incited the election commission and law commission to suggest that independent candidates should be suspended from contesting elections by and large.[46] Therefore, it is very evident that people do vote for the symbol of political parties, and there is not really any uncertainty concerning the imperative role political parties play in the success of any candidate from any electorate. The supreme court has additionally observed that political parties are sine qua non of parliamentary form government.[47]

Hence, recognized political parties are at a high er standing than an independent candidate, due to which the claims of recognized political parties must be recognized upon the seat of the concerned MLA, even in the event of a vacancy of the seat under any circumstance (resignation, death, etc.), until the results of the by-polls are declared.

2.2 Role of the speaker in Augmenting Defection

The office of the speaker in legislatures occupies a pivotal role in our parliamentary democracy. It has been believed of the speaker's office that even as the legislature members represent separate constituencies, the speaker represents the absolute authority of the house itself. He symbolizes the honor and strength of the house over which he is presiding. Consequently, it's far predicted that the holder of this office of excessive dignity must be a person who can fairly represent the house in all its manifestations[48].

[45] Ghazanfar Abbas, Since the 1st Elections, Only 0.49% of Independent Candidates Have Managed to Enter Lok Sabha (news18.com).
[46] Law Commission Of India, Electoral Reforms, (Report No- 255, 2015) Chapter XVI.
[47] Kuldip Nayar V. Union Of India, (2006) 7 SCC 1.
[48] Correspondent,Office Of The Speaker Of Lok Sabha, (Jun.21st , 2021, 2:00 AM)),https://speakerloksabha.nic.in/roleofspeaker.

The responsibility vested in the speaker is so laborious that he cannot afford to neglect any issue of parliamentary existence. His actions can be brought under scrutiny within the house and extensively reported in the mass media. With the broadcasting of proceedings of the legislature, the small screen brings to tens of millions of families in the country the daily trends in the house, making the speaker's undertakings all the more critical.

Even though the speaker rarely speaks within the house, while he does, he speaks for the house as a whole. The speaker is regarded as the natural guardian of the traditions of parliamentary democracy. In India, broad powers are entrusted to the office of the speaker to help him carry out smooth functioning of the parliamentary proceedings and for protecting the independence and impartiality of the office via the constitution of the land, the rules of procedure and conduct of business in legislatures and through the practices and conventions.[49]

Independence and impartiality of the speaker sine qua non of the speaker's office as it is vested with great prestige, position, and authority. However, the office of the speaker has been criticized over and over for being an agent of partisan politics. The supreme court raised a similar allegation on the lack of confidence in the role of the speaker in matters of impartiality in *Jagjit Singh versus State of Haryana*.[50]

In *Kihoto Hollohan's case*[51], one of the judges observed that the doubt of predisposition on the speaker's job couldn't be precluded as their election and tenure depends on the will of the majority members of the house (or specifically of the ruling party). The speaker is considered an impartial arbiter. But the conduct of speakers in the recent past has left much to be desired. A lawmaker elected as speaker/chairman is permitted to resign from their party and rejoin the party on the off chance that they might demit office. Be that as it may, speakers have perpetually permitted themselves to be utilized for gain by their party or leader.

It appears from the recent toppling down of various governments in the past that defections have become an easy affair. Lately, the legislators with the speaker are misusing the merger clause enunciated in paragraph 4 of the tenth schedule [52] to give effect to their ulterior motives. To repeat the provision for reference - para 4 talks about an exemption from disqualification on the ground of merger. It provides that where an original party merges with

[49] Rishi Mishra, Power Of Speaker Of State Legislature In India, Legal Desire, (Jun.21st ,2021, 2:00 AM), https://legaldesire.com/power-of-speaker-of -state-legislature-in-india/.
[50] (2006) 2 SCC 1.
[51] Kihoto Hollohan V. Zachillhu & Ors, AIR 1993 SC 412.
[52] Supra note 3.

another political party and a member claims that he and any other member of his original political party have become members of such other political party formed after the merger or of a new political party or; have refused to accept the merger and opted to function as a separate group; then such member would not be liable for disqualification under sub-paragraph (1) of paragraph (2).Such a merger of the political parties is considered valid only and only if two-thirds or more members of the political party concerned have assented to such a merger.

2.2.1 Detailing The 'Merger' Clause

It can be implied from the above reading of paragraph 4 that the provision was not to sanction splits of the political party and regard such split as a merger of political parties. This provision also does not express an independent standard for the valid merger of the political party.

The provision aims to protect the elected representatives from disqualification if the original political party to which they belonged merged with another political party and provides them the freedom either to be a part of such merger or to operated separately from their group in the house. If the MLAs or M.P.s choose to become part of the merger, then it is imperative that the merger be valid only if it is supported by not less than two-thirds of such political parties. The essential condition for a valid merger to get immunity from the anti-defection law is the merger of the original political party into another political party[53]. Not less than two-thirds canon is the adequate condition for the merger of the legislature party. The merger of less than two-thirds of a political party into any other political party or the establishment of a new political party on such ground has no legal standing without the necessary condition being satisfied.

It would be wrong to presume that the original political party on whose election symbol the candidate contested and got elected as the representative has given an unlimited free pass to their MLA to encash it with some other political party. It is awful to infer that a political party stands merged into any other political party on the unrivaled premise that their chosen MLAs have consented to something similar. Such a perusing isn't just outlandish and is even impermissible as it humiliates the public picture and fame of the political party alongside subverting public trust in it.

[53] Shah Faruq Shabbir & Ors V. Govindrao Vasve & Ors, 2016 (5) MahLJ 436.

The first incident in Goa happened in March 2019, where two MLAs out of the three of the Maharashtrawadi Gomantak Party (MGP) revolted and merged the MGP into the BJP. Both were granted ministerships, and one was even raised as deputy chief minister. The speaker opened the chamber at midnight and acknowledged the split as merger. A disqualification petition is forthcoming and gathering dust before the speaker.[54]

Recently, ten Congress MLAs gave a one-page correspondence to the speaker of the Goa state assembly that their political party has merged with the BJP. In practically no time, under the bearings of the speaker, the legislature department furnished seating arrangements to the ten MLAs as was provided for the prior two MGP MLAs professing to have merged along with the treasury benches. In other words, the speaker decided from the conduct of these ten MLAs in the assembly that they belong to a political party other than the one who gave them the ticket to contest the election and set them up as its candidates. This decision taken by the speaker ought to be coming in the area of the quasi-judicial function exercised by the speaker as is the plan set down under the tenth schedule of the constitution. In the event that the speaker had made some other separate seating arrangements for the gathering of ten MLAs, it could have been inferred as an impending determination, pending the use of mind on whether the Congress Political party has merged and whether the same establish a legitimate merger. In the current issue, the speaker offered a new identification to these ten MLAs and recognized them as MLAs of the BJP on the declaration made by them. This was carried out against the due process of law without even conducting a minimal fair hearing. The non-application of mind is precisely illustrated in this case. It was evident from the direction issued by the speaker that he assented to the merger. This decision by the speaker stems from the quasi-judicial power vested in him by the provisions of the anti-defection law. Thus, as such, these decisions of the speaker ought to be open for legal review by the court and can't be covered as coming within a non-justiciable legislative region.[55]

It is a well-established precedent that the speaker as the head of legislature and being a constitutional authority is not amenable to judicial review exercised by the courts. However, such an interpretation is only limited to the area where the speaker is acting regarding the authoritative business of the house, where the speaker is preeminent and last authority, but in areas wherein the speaker is relied upon to work as a quasi-judicial authority such as under

[54] Prabhakar Timble, Anti-Defection Law: A Tunnel of Darkness, Live law.in (Jun.5th , 2021, 10:00 PM). https://www.livelaw.in in/columns/anti-defection-law-a-tunnel-of-darkness-146522?infinitescroll=1.

[55] Ibid.

the tenth schedule , it would welcome judicial review and the office of the speaker can not be granted any special privilege in this regard. The pith and substance in these issues fall in the domain of the tenth schedule , and the direction of the speaker making the seating arrangement along with the treasury benches is per se a determination that the MGP and the Congress party has merged into the BJP and that the merger is valid. The speaker might not have expressed it explicitly in exact words. The implied decision is unambiguous and clear, and nothing else could be construed from the same.[56]

The anti-defection law clearly states that the issue concerning disqualification or otherwise under the tenth schedule is to be adjudicated by the speaker or the chairman. The courts can exercise power of judicial review only after the final decision of the speaker, and any a priori intervention is precluded[57]. The petition for disqualification of the two MGP MLAs is forthcoming before the speaker. The inquiry which needs a new look is whether the speaker has effectively settled on the issue by a series of actions and hearings and stamped that the MLAs have not brought about any disqualification.

Taking a different circumstance, if it is assumed that at a similar pace, the speaker doesn't consider the correspondence of merger from the revolutionary MLAs as valid and disqualifies them from being members of the house in the absence of any pending petition for disqualification. Under such a circumstance, almost certainly, the courts would allow interim stay on the order of the speaker, awaiting the final disposal of the appeals by the aggrieved members. Going by the same logic, it should be considered that the speaker has given his decision consenting of the merger and that the questioned MLAs have been qualified as BJP MLAs, and they cease to be the MLAs of their original political party under which they got elected.[58]

Through his outright conduct, the speaker consented to the altered composition of the house, which means there is nothing left to be called interim. Under this setting, the courts need to accept the petition of the aggrieved from such an order of the speaker, as the same acts as a conclusive 'unspeaking' order without following the standards of equity as needed from any official acting judicially. On the off chance that the speaker had embraced some other choice, presumably, it might have been regarded as an interim order.

[56] Ibid.
[57] Kihoto Hollohan V. Zachillhu & Ors, AIR 1993 SC 412.
[58] Supra note 27.

The hands-off approach of the supreme court and high court under the guise of the supremacy of the speaker being an established constitutional authority is altogether in regard to all legislative process and work. Legal infringement would be ultra vires the constitution. In any case, the same can't be valued in issues wherein the speaker deals with legal issues where the judicial intervention is required. The political predisposition and party interests can't be completely disassociated from the speaker. It is here wherein the courts are required to step in on the case-to-case premise to keep up with the aims and objectives of the anti-defection law in letter and soul. The current issue of the anti-defection law through the abuse of the provision of a merger, which specifically talks about the merger of the 'Original political party' and not a few members of that political party without having any legitimate dissent within the party, calls for the immediate intervention of the courts. The object behind the provision was not for MLAs to engineer defections for the greed of power and office and continue to be protected under the merger clause. It was to protect the MLAs from disqualification in case they wished not to join the merger of their original political party and decide to split from such merger. Unless the high er judiciary intervenes and sets down guidelines for the quasi-judicial authority, the speaker's activity or inaction will cultivate illegality and misrepresentation on the tenth schedule .[59]

With the office of the speaker turning out to be sectarian, the dutifulness to the anti-defection law is demonstrating bad and defiance pulls in benefits for the MLAs. With the emanation of being a protected position and the 'sovereign' of the legislature, the speaker sits in the authority with the false teeth given by the ruling political party to whom he belongs.

2.2.2 Judicial Review of speaker's decision

Just as a coin has two sides, distinguished jurists also have their distinguished views on this subject. The first type is of the view that on careful analysis of the judicial decisions on the anti-defection law, it has been made explicit by the supreme court in what is known as its authoritative precedents that although the high court doesn't usually sit to review the decision of the speaker, in some exceptional cases such as those involving malice, it can.[60] However, in cases where no final decision has been taken by the speaker, the question of judicial review does not arise. To cruise further on this view, para 110 of the *case Kihoto Hollohan v. Zachillhu* is stated:

[59] Id.

[60] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651; Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council, (2004) 8 SCC 747.

110. Considering the restricted extent of judicial review that is available because of the ouster clause included in para 6 and furthermore having respect to the constitutional intendment and the provision which vests the adjudicatory power in the speaker/chairman, judicial review can not be used at a phase before the final decision of the speaker/chairman and a quia timet action would not be passable. Nor would any interference be admissible at an interlocutory phase of the procedures. However, an exception must be made in regard to situations where expulsion or suspension is ordered during the pendency of the procedures, and such preclusion or suspension is probably going to have grave, prompt and irreversible repercussions, and consequences.[61]

It can be induced from the above that the final adjudication, as well as quia timet actions, are not allowed to be exercised by the courts. The term quia timet in a real sense signifies "in light of the fact that he fears or apprehends."[62] It is equivalent to pre-emptive or prudent action and, it would not be the right methodology given that no decision has been taken by the appropriate authority under the schedule , not even interlocutory. The last part of the passage essentially talks about an exemption for the said pre-emptive relief to be given in the event the speaker disqualifies members as an interim measure, and no reverse way around is possible. In the event that the opposite view is permitted, whereby the high court begins conceding interim relief without there being a final decision by the speaker, then that action would be hit by the settled rule of our constitution, in particular, separation of power that is the autonomy of every organ of the government from each other. This would commensurate to bypassing constitutional principles and would further add to the allegation of judicial overreach, which the Indian courts are confronting today. The seeds of this specific idea developed in *Haryana Vidhan Sabha v. Kuldeep Bishnoi*[63] (referred herein as the Haryana assembly case). Adding further to the above contention, this school of thought states that there could be some factual inquiries needed to be determined via oral evidence, which the high courts are not competent to exercise under article 226 of the constitution[64]. Albeit this bone of contention appears to be interesting however is simply procedural in nature and, along these lines, warrants no further discussion. Hence, as per this view, the courts can neither decide the petitions finally by usurping the authority under the schedule nor can give an interim relief disqualifying the accused till the time the speaker considers their petitions.

[61] (1992) Supp (2) SCC 651, 711.
[62] Black's Law Dictionary, 2nd Edn., (1910)
[63] Haryana Vidhan Sabha v. Kuldeep Bishnoi , (2015) 12 SCC 381
[64] R. Sakkarapani Whip v. T.N. Legislative Assembly, 2018 SCC OnLine Mad 1247.

On the contrary, the other set of jurists think that the speaker has a solemn obligation to decide the issue of disqualification petitions within a reasonable amount of time regardless of the fact that no such time limit has been provided in the tenth schedule or the rules thereof. The expression " reasonable time" should be understood as any time much before the completion of the tenure of the house or the assembly. This class advocates that to ensure constitutional and democratic ethos, it is essential for the judiciary to treat the decision of the speaker as a simple "alternate forum" in such cases. The main legal precedent to validate this view is the prima facie observation made by the high court of Manipur to the fundamental issue of jurisdiction of the high court.[65]

However, recently it was partly reversed by the supreme court in *Keisham Meghachandra Singh v. Manipur legislative assembly*[66]. Even this proclamation of the supreme court is not liberated from antagonistic issues because it took a sharp turn by relying upon a constitutional bench judgment named *Rajendra Singh Rana v. Master Prasad Maurya*,[67] (herein referred to as constitutional bench judgment), which came before the decision in the Haryana assembly case. The Haryana assembly case experienced this exceptional set of facts for the first time. The court was approached to decide the delay caused by the speaker in deciding disqualification petition against five (5) members from the legislative assembly (MLAs) who were neither the ones upon whom the sustenance of the government depended nor the state assembly elections were soon to be held. The court derived mala fide on the part of the speaker, who was keeping interests of his group ahead of his constitutional obligation. Therefore, the court inspected all of the authorities regarding the matter and reached the decision that the *Kihoto Hollohan case*[68] cuts out alone exemption in the event of suspension made by the speaker of the house on the grounds of mala fide, perversity, rules of natural justice which are accessible after the official decision is made by the speaker. Accordingly, whatever may be the facts, if the speaker has not passed any decision discarding the petitions, the power of judicial review does not arise. Here, it would not be outside the subject at hand to call attention to the view of the bench of two judges who without a doubt took into consideration the insignificance of those five MLAs in the stability of the government and remaining period for the next state election, however, limited their inner voice to cut out

[65] Mohd. Fajur Rahim v. Manipur Legislative Assembly, 2019 SCC OnLine Mani 127.
[66] 2020 SCC Online SC 55.

[67] (2007) 4 SCC 270
[68] Kihoto Hollohan V. Zachillhu & Ors, AIR 1993 SC 412.

another special case qua situations where the conditions may arise per contra. The court, however, set a phenomenal measure by guiding the speaker to discard the forthcoming petitions within a time span of four months. This was plainly in the nature of issuing mandamus. This strategy is surely not without inherent issues, which are discussed later here. Then onwards, the supreme court experienced this issue, among different cases, in *Orissa legislative assembly v. Utkal Keshari Parida*,[69] where again it gave a timeline to the speaker to finally decide the petitions. By that time, the issue had found profound roots in the democratic soil of India. Considering another matter, a two-judge bench of the supreme court referred this issue to be decided by a constitutional bench to lay down finally whether such timelines can be outlined by the high court under the prevailing scheme, alongside the bigger question of setting out the judicial review power of high courts over the speaker under the tenth schedule [70]. The warrant to refer the matter emerged when the speaker questioned the actual authority of the supreme court to engage in such issues.

In the midst of the pendency of the issue under the watchful eye of the supreme court, Few high courts came across the same issue. A division bench (two judges) of the *High court of Bombay in Indian National Congress v. Province of Goa*,[71] held that "courts can't meddle in a procedure under tenth schedule before the speaker gives his final decision under para 6 of the tenth schedule which is certainly not a substitute forum but the only legitimate forum. One more division bench of a similar high court observed that the power of the high court to give timelines to the speaker couldn't be inferred from the schedule or the rules outlined by the speaker thereunder.[72] Similarly, a division bench of the high court of Madras *in R. Sakkarapani Whip v. T.N. State legislative assembly*[73] dismissed the petition on the fundamental ground of judicial restraint to take up the matter while the decision on these questions was forthcoming before the supreme court. It is appropriate to mention that most of these decisions followed a similar path of not settling the lis between the aggrieved parties as the final determination of the law by the supreme court was awaited, nor was any kind of relief granted to the applicants (not even, guiding the speaker to decide the petitions in a specific time span).

[69] (2013) 11 SCC 794.
[70] S.A. Sampath Kumar v. Kale Yadaiah, 2016 SCC OnLine SC 1875.
[71] 2017 SCC OnLine Bom 8817.
[72] Vijay Namdeorao Wadettiwar v. State of Maharashtra, 2019 SCC OnLine Bom 2100.
[73] 2018 SCC OnLine Mad 1247.

Out of these cases, the Manipur legislative assembly case is somewhat unique. A writ petition seeking direction to the speaker to decide the disqualification petition within a reasonable time frame[74] was filed before the high court. At first, noticing that the issue was pending a decision before the supreme court, the high court kept the matter on hold till any significant orders were passed by the supreme court. Later, another writ was filed praying for final adjudication of the dispute without any orders from the speaker. The petitioner broadly relied upon the constitutional Bench judgment. The high court, in a surprising new development, though ceased from giving any relief to the parties, but recorded a solid observation that prima facie, provisions of the para 6 of the schedule , indicate that the power so vested in the speaker is that of a tribunal and the remedy thus available is discretionary, which can also be availed by approaching the high courts. It proceeded to observe that " where the members are found to have incurred disqualification under the tenth schedule , the court can't be anticipated to sit as simple onlooker and ought to come to save the intention of the lawmakers, and perhaps, protect the ultimate goal of the law." [75]

This matter came up in appeal before a bench of three judges of the supreme court; the decision was given recently. It set aside the high court's Opinion and partly allowed the petitions concerning the issue of directing the speaker to decide the disqualification petition within a reasonable time. The court differed on the stand of adjudicating the matter itself but held that a direction to decide the petition within the reasonable time frame could be issued. The court further dropped the reference made to the constitutional Bench by categorically mentioning that the issue was well settled in the *Swami Prasad Maurya case*[76] (constitutional Bench judgment). It appropriately quoted paras 40 and 41 of the same, the precepts of which are as follows:

40." In the case at hand, clearly the speaker, in the original order, did not decide the question of disqualification. Therefore he has neglected the constitutional obligation bestowed upon him by Para 6 of the tenth schedule . Such an inability to decide the issue can't be held to be covered by the provision of Para 6 of the schedule . He has additionally acknowledged the case of a split based on a mere claim in that regard … it must be held that the speaker has

[74] T.N. Haokip v. Speaker, Manipur Legislative Assembly, 2017 SCC OnLine Mani 137.
[75] T.N. Haokip v. Speaker, Manipur Legislative Assembly, 2017 SCC OnLine Mani 137.

[76] Rajendra Singh Rana v. Swami Prashad Maurya & Ors, AIR 2007 SC 1305.

made a mistake that goes to the foundation of the matter or a blunder of such an extent that even under the restricted power of judicial review, the decision of the speaker must be meddled with… "

41. … It is unquestionable that in the order that was initially subjected to the challenge under the writ petition, the speaker explicitly ceased from coming to a final decision regarding the disqualification of the 13 MLAs. According to our reasoning as above, obviously, there was a mistake attached to the jurisdiction of High court while exercising review in this matter".[77]

Analysis of Keisham Meghachandra Singh v. Manipur legislative assembly case[78].

With such importance being appended to the constitutional Bench judgment, it is imperative to look into its factual findings to better understand this issue. In this case, a disqualification petition was filed against 13 MLAs of the ruling party who approached the governor and requested him to invite the opposition party to form the government. It was contended that the MLAs formed a part of (37) members, and together they comprise a genuine split as per para 3 of the tenth schedule and hence can't be disqualified. The speaker, while keeping the petitions (placed prior to the contention of the split) under para 2 of the tenth schedule waiting, acknowledged the necessities of Para 3 and held that the liability of disqualification couldn't be enforced on these members. This decision of the speaker was challenged before the high court. The speaker, at the outset, deferred the adjudication on the pending petitions till the time procedures were held before the high court by specific order; however, after over a year, the speaker, at last, dismissed the petitions for reasons well known to him. Taking into consideration this turn of events, an application to alter the writ petition was presented, which had a harsh spell at the high court. The writ was at last decided by a full bench of the high court, whereby it guided the speaker to consider the disqualification petitions against those thirteen individuals. This decision of the high court was appealed in the supreme court, wherein the bench of five judges held that para 3 (split), as well as para 4 (merger), are defenses available to the accused under the tenth schedule while the disqualification procedures are conducted. Any endeavor to decide such cases of split or merger separately goes to the foundation of the matter and, in this way, is unlawful. The court proceeded to disqualify the accused members on the ground that they couldn't demonstrate the case of split

[77] (2007) 4 SCC 270.
[78] 2020 SCC Online SC 55.

prima-facie before the court and furthermore, the assembly was at the last part of its life, which didn't give a lot of time to dispatching the petitions for fresh consideration by the speaker.

The question whether in the absence of final adjudication by the speaker, the high court under article 226 of the constitution has the power to direct the speaker to dispose of the disqualification petitions within a reasonable period of time was neither under consideration for the constitutional bench *in Swami Prasad Maurya case* nor any contention to reject or support the said issue was at any point raised before the court. The issue from the beginning was whether paras 3 and 4 could be said to work freely of para 2 of the schedule , which the speaker assumed as affirmative and immediately passed a decision under para 3 recognizing the split. Therefore, in the light of these facts, any comments, coincidental or co-accidental, upon the current issue can simply be said as passing observation by the court and, in this way, can't be declared as conclusive.

Lastly, non-determination of the issue on merit may potentially prompt uncertainty in the future. The court in the constitutional Bench judgment recognized the right course yet proceeded to decide the petitions without remitting it to the speaker to protect them from being declared infructuous because of nearing end term of the assembly, and in this way cut out an exemption for the overall law. The supreme court judgment in the last section of the Manipur assembly case explicitly mentioned that the assembly was not approaching its end, and subsequently, no direction of such nature can be allowed as was conceded in the Swami Prasad Maurya case. If this view is permitted, it would not be astounding if high courts start to accept charges and decide the petitions where the assemblies are going to reach their end. Thus, such a view would be at loggerheads with the decision in the *Kihoto Hollohan case*[79], which has additionally been asserted in various decisions and is the main authority of the subject. Therefore, clarity on the issue is the need of the hour.

The anti-defection act is entangled in this quagmire of a speaker whose first priority is his party interests and the higher judiciary using the hands-off approach citing precedents and conventions. Unless the courts expressly clear out the provisions of the anti-defection law on the issue of the merger of the political party, the law will keep on being a sword with level dull, sharp edges. The speaker has put the law in the tunnel shrouded in darkness. Without the intervention of the higher judiciary, there is by all accounts no promising end to current

[79]AIR 1993 SC 412.

circumstances. However, the supreme court *in Keisham Meghachandra Singh vs. the Hon'ble speaker Manipur legislative assembly & Ors*.[80] case gave significant insight into the disqualification powers of the speaker and gave the following recommendation: The court recommended the parliament to review the constitutional position regarding the duty of speaker as a quasi-judicial authority while deciding the disqualification petitions under the anti-defection law (when such a speaker does not sever his ties and continues to belong to a particular political party either de jure or de facto). The court prescribed that an independent and impartial tribunal be established, which will be the substitute of speaker of the Lok Sabha and legislative assemblies and shall specifically deal with disqualifications under the tenth schedule . The court further observed that the tribunal could be headed by a retired supreme court judge or by a retired chief justice of a high courts. The court also proposed that some other external independent system can arbitrate on such matters. This will guarantee that such questions are decided both swiftly and impartially.

Chapter 3

Anti-Defection Law and Dissent

The quandary that had immersed the state of Rajasthan in July 2020, with Mr. Ashok Gehlot and Mr. Sachin Pilot's camps jousting for supremacy and power, was out and out dramatic. Nineteen members from the legislative assembly (MLAs) of the Rajasthan state assembly were on the verge of disqualification for not going to two meetings of their party and ignoring

[80] 2020 SCC Online SC 55.

the guidelines issued by the Chief of the Indian National ("Congress Party").[81] These activities of the MLAs resulted in the Congress Whip documenting a disqualification appeal against them under para 2(1)(a) included in the tenth schedule of the constitution before the speaker of the Rajasthan legislative assembly.[82] The speaker after that gave notice to the supposedly delinquent MLAs to show cause against the complaint within a time of two days.[83]

It was argued by the Gehlot camp that Sachin Pilot and a few other MLAs had, by not attending party meetings and based on their conduct, voluntarily given up membership of the Congress Party. Subsequently, they were liable to be disqualified under the anti-defection law, as envisaged in the tenth schedule . This was emphatically opposed by the Pilot camp on the ground that voicing different opinions on some of the policies or decisions are taken by a party whip, with no intention to relinquish the political party to form a part of another political party, doesn't add up to defection or willingly giving up of the membership of a party.[84]

This interior quarrel between the Congress Party had additionally reached the doors of the court of law, with petitions, inter-alia, questioning the show cause notice issued by the speaker was filed under the jurisdiction of the Rajasthan high court. Furthermore, for the stay of procedures petition was filed by the speaker before the hon'able supreme court of India (SC).[85]

In spite of vigorously defensively covered contentions and charges from both sides, neither the Rajasthan high court nor the SC decisively solved the matter. Hence, the two fighting groups decided to stop fighting, putting this political fight at rest.[86]

[81] Co., Disqualification Notices against Sachin Pilot, 18 other rebel Congress MLAs: Rajasthan HC likely to pronounce verdict on Tuesday, The New Indian Express,(Jul.7th , 2021, 10:00PM),https://www.newindianexpress.com/nation/2020/jul/21 /disqualification notices against Sachin Pilot, 18 other rebel Congress MLAs: Rajasthan HC likely to- The New Indian Express.

[82] Outlook Web , As Congress Sends Disqualification Notice to Sachin Pilot, All Eyes set on Leader's Next Move, Outlook India,(Jul.7th , 2021, 10:PM), https://www.outloo kindia.com/website/story/india-news-congress-to-send-disqualification-notices-to-sachin-pilot-other-mlas-for-skipping-clp-meet/356719.

[83] F.E, Rajasthan: Sachin Pilot among 19 MLAs to face disqualification from Assembly for defying Congress whip, Speakers issues notices , Financial Express,(Jul,7th , 2021,10:00PM),https://financialexpress.com/india-news /sachin-pilot-disqualification-rajasthan-legislative-assembly-speaker-notice-congress-mlas/2024631/

[84] SNS Web, Rajasthan Issue: HC Verdict on disqualification of Sachin Pilot, 18 rebel MLA's on Friday; no action until then, The Statesman (Jul.7th ,2021,10:00PM), https://www.thestatesman.com/india/rajasthan-crisis-hc-verdict-disqualification-sachin-pilot-18-rebel-mlas-friday-no-action-till-1502910364.html.

[85] The Wire, Rajasthan Speaker to Move SC over HC's 'Intervention' in Rebel MLA's Disqualification, The Wire,(Jul.7th ,2021, 10:00PM),https:// /thewire.in/politics/rajasthan-speaker-supreme-court-mla-disqualification.

[86] Harsha Singh, Smiles, Handshake as Sachin Pilot, Ashok Gehlot Meet After Congress Truce, NDTV,(Jul. 9th ,2021, 6:00PM) ,https://www.ndtv.com/ /india-news/rajasthan-ashok-gehlot-ahead-of-sachin-pilot-meet-spirit-of-forget-and-forgive-2278840.

The questioning in Rajasthan may by all appearances appear to be another endeavor to overturn a fairly chosen government through horse-trading and designed political defection as have happened in various other states in India. However, on a nearer assessment, the Rajasthan constitutional impasse was extraordinary. This tussle was not between two opponent political groups but rather between two stalwarts in the Rajasthan political field belonging to the same political party, viz., the Indian National Congress. The emergency that broke out in Rajasthan has brought to the front an inquiry into the essential precepts of the constitution, i.e., what are the established corners of intra-party dissent in the Indian democratic government?[87] An effort has been made in this chapter to dig into this inquiry and to interpret the law dealing with it.

'Defection' comes from the latin word 'defectio,' which means conscious deserting of one's loyalty or duty.[88] Under the constitution, the law dealing with defection has been capsulated in its tenth schedule [89] which contains within itself the following acts which lead to disqualification from the house of parliament or State legislative assembly :

1) voluntarily giving up the membership of a party;[90] or

2) defying the orders of the Party whip on a vote.[91]

In the background of the aforementioned arrangements, this chapter tries to interpret the essentially inborn inquiry relating to the extent of intra-party dissent under the constitution. The intent is to recognize and segregate the concepts which are intrinsic to anti-defection law and the principle of intra-party dissent. Furthermore, the aim is to show that despite being distinct and separate concepts, intra-party dissent and anti-defection law are frequently considered as being interlinked, which harmfully affects a democratic form of government operative in India. This chapter explains the significance and extent of intra-party dissent, diving into the benefits thereof and analyzes the transaction between intra-party dissent and paragraph 2(1)(a) and 2(1)(b) individually, exhibiting the way where dissent is cleansed in the Indian political field under the attire of defection.

3.1 Analysis Of Intra-Party Dissent

[87] Nitika Bagaria &Vedika shah, Decoding Intra-Party Dissent: The Lawful Undoing Of Constitutional Machinery, 7(2) NLUJ L Rev 115(2021).
[88] Ibid.
[89] India.Const. sch. X.
[90] Id., cl 2(a).
[91] Id., cl 2(b).

Dissent is often defined to mean “contrariety of opinion” or “ to differ from the established or official opinion” Justice DY Chandrachud, a sitting Judge of the SC, has perceived dissent as "a symbol of a vibrant democracy."[92] Dissent may take various forms; it may find expression in the voices of individuals who put across their causes against those at the helm of power in the government or may show itself as discussion and conversation between different political parties on the parliamentary floor. Be that as it is, there might be times when members belonging to the same political party host contrasted views on internal party matters, arrangements, or choices, which may not conform to the views held by those in the echelons of power.[93] Such difference of opinion among members belonging to the same party or association is popularly termed as 'intra-party dissent.'

In numerous democratic systems across the world, intra-party disagreement is seen as an augmentation of the fundamental freedom of speech and expression allowed to parliamentarians and is perceived as a pivotal component that fosters free discussion and trade of ideas in parties; however, the same is not the situation allowed in India. Today, the topic of intra-party dissent holds more than simple scholastic and hypothetical significance. There are multifarious reasons as to why intra-party dissent is imperative in principle and in practice. To begin with, the benefits of giving intra-party dissent to the party members at an individual level have a huge impact on intra-party relations. Second, taking a gander at its anything but a full-scale viewpoint, intra-party dissent plays an important role with regards to improved debates and dialogue in the assembly, which leads to discussion and formulation of better laws and enactments in the country, which in turn improves public accountability of the political party members and also improves the Indian democratic system in toto.[94]

Pushing ahead with explicit reasons, first, promising intra-party dissent would dynamically affect the role played by individual members in their political party. Allowing intra-party dissent gives party members the freedom to isolate their perspectives and assessments from those of their political party, giving them an individual voice and permitting them to bravely represent what they have confidence in, this would encourage a suitable climate for the advancement of fair and equal participation of the representatives within the party and ultimately in the houses of the parliament and state assemblies. Representatives would be more sure that their ideas, if commendable, would be considered and pondered upon by their

[92] Romila Thappar v.Union Of India, AIR 2018 SC 4683.
[93] Christopher Garner & Natalia Letki, Party Structure and Backbench Dissent in the Canadian and British Parliaments, 38(2) C.J.P.S ,463(2005).
[94] Id.

party.[95] Thus, they would be more spurred to participate in the onerous exercise of gauging the relative advantages and disadvantages of alternative strategies and providing carefully considered innovative policies and solutions.

Giving such stimulus to members of the party to transparently voice their assessment within their political party would, by implication, counter the danger of largescale fragmentation and polarization of various political parties, as this would make an affirmation among the members that making their very own ideological party isn't the solitary manner by which their voices might be heard, and their vision shared.[96]

Frequently a few members belonging to political parties across different parts of the nation have felt the need to stop being a part of the party, which is non-inclusive. An illustration of this can be seen when the chief of Congress Party in Haryana, Mr. Ashok Tanwar, tendered his resignation letter in 2019, wherein unequivocally communicated his disappointment over the way that regardless of his voice being a statement of the yearnings of millions of ardent Congress Party allies, citizens and neighborhood pioneers, it had not been paid regard to. This was the case despite him using each conceivable road to cause himself to feel heard, so, all in all, he chose to leave his duties in different boards of committees of the Congress Party. He additionally expressed that it was horrendous to watch a limited number of members within the Congress Party taking all the decisions instead of allowing simply, free and fair procedures.[97] Thus, if such members feel that their voice is being heard in the first place, the probability of fragmentation would decrease enormously, and members would make optimum use of the position in their party itself to attain their political aspirations and goals. Second, at the intra-party level, extensive discussion on elements of policies could ensure that a larger contribution of the party members in the entire approach of decision making, contrary to a decision being taken exclusively by the higher-ups' elites and echelons of the party, which are by and large a smaller group of people. When all member's views are included in the process, it will lead to a larger exchange of ideas and perspectives that were earlier not considered. Unlike single-issue pressure groups, Indian political parties are multi-layered, and nuanced divergences are naturally bound to arise within a similar ideological

[95] Ruchi Singh, Intra-Party Democracy and Indian Political Parties, 71 Hindu Centre for Politics and Public Policy (2015)

[96] P. Bhanu Mehta, Reform political parties first, (Jul.10th 2021, 10:30PM),https://www. india-seminar.com/2001/497/497%20pratap%20bhanu%20mehta.htm.

[97] PTI Correspondent, Ashok Tiwari resigns from Congress' election committees, says will work as ordinary party worker, The Economic Times, (Jul.10th ,2021, 10:30PM),https://economictimes.indiatimes.com/news/politics-and-nation/ashok-tanwar-resigns-from-congress-election-committees-says-will-work-as-ordinary-party-worker/articleshow/71428007.cms?from=mdr.

frame. Further, different and unique opinions, trailed by examination and discussion, ensure that fair and wholistic policies are passed, taking into consideration the multitude of stakeholders included.[98]

Third, in addition to the aforesaid, allowing members to express dissent would prevent dictatorship from acquiring a foothold at the intra-party level. Usually, for the passage of any enactment or law, the party which establishes the government depends mostly on the majority strength of its own individual members rather than on the members of the opposition party. For instance, if a party is able to gather the support of more than half of the members in the house, they can have the simple majority which is needed for the passing of various bills such as finance bills, constitutional simple amendment bills, and ordinary bills with ease, on the basis of the votes cast by their own party members without asking for the support of opposition members. This adequately removes the consequences of external dissent and contrary views.[99]

The position deteriorates where there is no intra-party dissent as this leads to laws being passed without any thorough discussion or consideration, with the members merely adjusting their own preferences to mirror the majority decision, which they are bound to support. Therefore, intra-party dissent in such circumstances would prove helpful, as the ruling party would then have to ensure to take into consideration and satisfactorily address all the valid concerns raised by its own party members, and surprisingly go to the degree of convincing its individuals on such issues without a wrong assurance that the law would be passed at last with no blockages, as found in the norm.[100]

Fourth, it is important to note that inclusivity plays a crucial role, not simply at the intra-party level but also at the larger level in a parliamentary setting. One of the chief purposes behind which the legislature stands firm as a supreme and holds a central place in a democratic system is because of its huge size and the varied interests that it represents.[101] The legislature is living proof of the principle that an individual member or small group of members, no matter how competent or abled, can not be a substitute for the aggregate

[98]Supra note 73.

[99] Id.

[100] Id.

[101] Jeremy Waldron, Representative Lawmaking , 89 B.U. L. Rev., 335 (2009).

wisdom of hundreds of members representing varied interests, bringing a multitude of experiences to the table.

It is for this very basic reason that the legislature is made responsible for the task of holding debates and discussions and passing laws and acts for the country. When there is an absence of intra-party dissent in a large nation like India, the Lok Sabha, even though physically composed of 543 persons, would effectively be working with only a small-closed group of members who would have all the power to discuss and assess all important decisions being taken, with the remaining members of the legislature acting as a mere dummy in the hands of their political party, voting only in accordance with the direction issued by their party leaders. This basically diminishes the range of problem solvers for the country to a specific class and kind of legislators. On the other hand, if intra-party discussions and trade of the opinions are encouraged, then it would benefit not only the party but also the legislature. The party and the legislature could both benefit by drawing from the experiences and lessons of a considerable number of parliamentarians of differing ages, stature, foundation, and identity. This would ensure comprehensive deliberation and reflection on a broad spectrum of varied interests that numerically large legislative houses intended to achieve.[102] Further; this would to a great extent upgrade the nature of discussions held in the house, in turn advancing the nature of draft legislation tabled that ultimately become the law of the land.

Fifth, allowing intra-party dissent would also, in the real sense, uphold in letter and spirit the primary purpose for which bicameralism has been embraced at the Centre by the constitution.[103] The bicameral parliamentary framework in India targets getting an extra layer of investigation to each bill passed via the Lok Sabha or the lower house. The Rajya Sabha or the Upper house, even though it consists of only 250 individuals, assumes an indispensable part as a reconsidering chamber in giving due recommendations and proposals to different bills passed by the Lok Sabha[104] and acts as a check on political parties having an absolute majority in the Lok Sabha.[105]

The substantial advantages of having this house will be perceptible only if intra-party dissent is allowed to flourish and members of the Rajya Sabha are allowed to viably satisfy their

[102] Ajay P., The Politics of Parliamentary Disruption, Live Mint, (Jul.10th ,2021, 10:30PM),https:// www.livemint.com/Opinion/Vf3anAosbfd9A6TJJiYFHL/The-politics-of-parliamentary-disruption.html.
[103]Supra note 73.
[104] Id.
[105] Pavan Kumar Verma, Why Rajya Sabha is essential: It represents the states and balances an impetuous Lok Sabha, Times of India Opinion,(Jul.10th ,2021, 10:30),https://timesofindia. indiatimes.com/blogs/toi-edit-page/why-rajya-sabha-is-essential-it-represents-the-states-and-balances-an-impetuous-lok-sabha/.

executive obligations and mandate. This protective measure will lose its motivation totally if members of the upper house indiscriminately follow, rehash, and repeat the perspectives and position of their party leaders. For example, Udit Bhatia, in his article named 'Cracking the Whip',[106] has most compactly embodied this situation by expressing as follows:

"Distinctiveness cannot be merely about the physical presence of two different sets of legislators. If the only allowable view they can voice is the one directed by the party's leadership, and if they lack the ability to form views that are different from that opinion, then distinctiveness no longer remains. We, then, miss out on what the epistemic case for bicameralism suggests, is the value of having two chambers of parliament."

Sixth, this will bring about more responsibility on the political parties, as residents and electors would now be sure that their chosen delegates, at the national and local level, are not simple instrumentalities in possession of their party leaders but can efficiently deliver on their mandate and can successfully advance the cause of their constituents, being in line with public sentiment.[107]

A clear disadvantage of not allowing intra-party dissent was recently witnessed when Dr. Shashi Tharoor, Thiruvananthapuram agent to the Lok Sabha, transparently went on to oppose the position taken by his own Party, Congress, on the question of privatization of development of an air terminal in Thiruvananthapuram, an issue filled with political clout. Tharoor made a public articulation explaining his enduring position that he would not follow the direction given by his political party regarding this matter, as he ardently upholds privatization of the air terminal development work[108]. The Congress Party leader faced a lot of criticism for not following his party on this issue, yet he stood firm, saying his position has been consistent and is in consonance with what is to the greatest advantage of the residents of his constituency.[109] Thus, if intra-party dissent is allowed, MLAs won't be conflicted between picking what is best for their body electorate and following directives of their party heads, but will, in fact, they would be able to harmonize the interest of all the individuals involved while at the same time instilling and furthering public trust in the party.

[106] U. Bhatia, Cracking the whip: The deliberative costs of strict party discipline, 23 CRISPP,254 (2020).
[107] Stefan Rumens, Staging Deliberation: The Role of Representative Institutions in the Deliberative Process, , 20 J Polit Philos, 23 (2012).
[108] Fatima K. , Why participate in bidding, then question the game – Tharoor asks Kerala govt on airport, The Print, (Jul.11th ,2021,5:00PM),https:// theprint.in/politics/why-participate-in-bidding-then-question-the-game-tharoor-asks-kerala-govt-on-airport-row/487855/.
[109] Express News Correspondent, Tharoor embarrasses Congress leaders in Kerala by backing Thiruvananthapuram airport privatization, The New Indian Express,(Jul.11th , 2021, 5:00 PM), https://www.indianexpress.com/states/kerala/2020/aug/20/t.

A completely inclusive intra-party deliberation on policies could mark the end of dynasty politics, a phenomenon that is very commonly observed in the Indian political arena. Dynasty politics is not peculiar to any political party specifically, as both local and central parties manifest varied dynasties at different levels of hierarchy. Dynastic governmental issues host an adverse consequence on the Indian political arena in general. This can be better comprehended by analyzing a recent occurrence of August 2020, where 23 members of the Congress Party wrote a dissenting letter to the Interim Leader of the party, Sonia Gandhi.[110] In this letter, they communicated solid sees against limited members of the party forming a majority, along with their loyalists ending up getting important portfolios and better promotional posts. The article was a cry for internal democracy, genuine contemplation on issues faced by the party members, and collective party leadership. The signatories, in different meetings, explained that their aim was not to attack the political party or its higher-ups but was simply to resuscitate the Congress Party. Amidst this unrest, a Congress Party meeting was held, wherein the letter was recognized, yet none of the solicitations or concerns voiced by these individuals were really talked about; indeed, a majority of these members were additionally blamed for being double-crossers to their own party.[111] Thus, it is obvious that intra-party dissent within such dynastical political parties would be significantly useful, not simply in advancing perspectives of members outside the 'majority within the party, but would also contribute to the democratic distribution of power and influence within the party, preventing separation of parties.

In this way, it is crystal clear from the aforementioned that intra-party dissent is the substance of a parliamentary democratic government, being irreplaceable in forestalling majoritarianism and authoritarianism, from taking traction and strength both within the political party and in the house. Being a basic moral guideline, it can forestall the centralization of force in the hands of a couple of individuals framing the majority. It is recognized as a distinguishing feature intrinsic to a democratic government and works as a safety valve for democracy.

3.2 Intra-Party Dissent In India

[110] OpIndia Correspondent , Read the full text of the letter written by dissenting Congress leaders demanding sweeping changes within the Congress party, OpIndia, (Jul 11th ,2021,5:00PM),https://www.opindia.com/2020/08/the-full-text-of-congress-letter-written-by-dissenting-leaders-demanding-structural-overhaul-party-leadership/.

[111] Rajdep Sardsai, The myth of inner party democracy, Hindustan Times, (Jul.11th , 2021, 5:00PM), https://www. .hindustantimes.com/columns/the-myth-of-inner-party-democracy/story-xdmcW9Ch0b3CI1wJqpyOCN.html.

The working of the Indian parliamentary framework, in practice, has on several occasions curbed this valuable right of dissent available to the members. Despite India being renowned as the world's largest democracy, intra-party dissent is far from being recognized in the country. Instead, it is seen to be hampered by several restrictive practices. Usually, intra-party dissent is smothered under the clothing of defection as engrafted in the tenth schedule . In this context, it is pertinent to take into consideration the jurisprudence surrounding paragraph 2(1)(a) of voluntary giving up of membership and intra-party dissent as separate concepts, which are being nowadays wrongly entwined by political parties for their benefit. In addition to this, there are certain loopholes in the schedule which systematically restrict and curb intraparty dissent.

3.2.1 Understanding Dissent in the Light of Pragaraph2(1)(a)

Pragaraph2(1)(a) of the schedule states that a member from the Lok Sabha or the Rajya Sabha will be precluded from being a member of that specific house if the member willfully and out of his volition decides to give up membership of the political party by which he got the ticket and was set up as a candidate for election as a member of the lower house or the Rajya Sabha, as the case might be. It is imperative to note that the contours of what is considered as a legitimate avenue of dissent and what sums up to voluntary giving up the membership of a political party under paragraph 2(1)(a) are patently blurred. A three-judge bench of the hon'able supreme court in the case of *Ravi S Naik v. Union of India*[112] ("Ravi Naik") has clarified the ambit and scope of paragraph 2(1)(a) to mean conduct of any kind of a member of a political party which may cause to infer that the member has voluntarily given up membership of the political party to which he belongs. The conduct of voluntary giving of membership of a political party may be either expressed or implied, and a formal resignation of membership is not a hidebound necessity thereof.

On the premise of the ratio given in the Ravi Naik, various personalities, including the honorable speaker of the Rajasthan assembly in the Rajasthan political issue, have rushed to contend that voicing questions against one's own political party or condemning any choices taken by the political party is a searing assault on the party solidarity and cohesion and is nothing less than an attempt to challenge the party and government.[113] Thus, according to this school, the conduct of such a delinquent member would rightly be said to be voluntary giving

[112] AIR 1994 SC 1558.

[113] ET Correspondent , 'Ruling party as opposition' Economic Times, (Jul.11th , 2021, 5:00 PM), https:// economictimes.indiatimes.com/opinion/et-editorial/ruling-party-as-opposition/articleshow/6640457.cms.

up of membership under paragraph 2(1)(a), and consequently, he should be disqualified from the house.

Nonetheless, this slanted understanding of paragraph 2(1)(a) appears misleading if the statute encompassing it is dug into. The fact is true that the term 'voluntary resignation of membership' has been subjected to an extraordinary measure of legal investigation and talk. However, most of the judgments on the subject dealt with factual matrices which involved a member of a political party, whether explicitly or impliedly, leaving the membership of that political party and clandestinely joining hands with a rival or an opposite political party.[114]

The facts, inter alia, engaged with these cases are following: In the Ravi Naik, two MLAs of the Maharashtra Gomantak Party ("MGP") had met the Governor of Goa in the organization of Congress officials, wherein they had admitted to not supporting the MGP, and wishing to stretch out their help to the Congress Party to shape another alternative government.

A similar circumstance had emerged in the case of *Rajendra Singh Rana & Ors v. Swamy Prasad Maurya and Ors*,[115] in the Uttar Pradesh legislative assembly. and again, in the case of *Jagjit Singh v. the State of Haryana*,[116] an MLA of the Haryana legislative assembly, chosen on the ticket of the National Congress Party ("NCP"), based on a supposed split in the NCP, joined an ideological group called Democratic Dal. Soon after its inception, the party members of the Democratic Dal, including the earlier NCP MLA, joined hands with the Congress Party (the ruling party in the state).

In all the above-mentioned cases, it is the dishonest strategies of the MLAs that have exposed them to the afflictions of paragraph 2(1)(a) and has, at last, prompted the courts to uphold their disqualification on the ground of defection. The SC has, in all these cases, hammered change of political hues in a quest for power and pelf; however, it has not addressed whether or not basic intra-party dissent would add up to the voluntary surrender of membership.

While the SC has neglected to give a legitimate finding on this angle, Justice N. Kumar of the Karnataka high court, in his contradicting judgment in the case of *Balchandra L Jarkiholi & Ors v. B Yeddyurappa and Ors*,[117] has discussed this question, paving the way for future

[114] V Venkatsean, 'Why Congress Rebels in Rajasthan are justified in saying dissent is not defection' The Wire, (Jul.11th , 2021, 5:00PM),https:// thewire.in/law/congress-rebel-mlas-rajasthan-dissent-defection-case-law.
[115] AIR 2007 SC 1305.
[116] AIR 2007 SC 150.
[117] Writ petition. No 3260-32670 of 2010 (high court of Karnataka, 15 November 2010).

discourse on this aspect. In this situation, 13 MLAs of the karnataka legislative assembly having a place with the Bhartiya Janta Party (BJP) composed indistinguishable letters ("Letters") to the governor of Karnataka demonstrating that they had been chosen as MLAs on the ticket of the BJP however had gotten disappointed with the working of the Karnataka government headed by Shri BS Yeddyurappa, and therefore pulled out their aid to his administration. In view of the aforementioned Letters, the governor of Karnataka tendered a letter to Yeddyurappa, asking him to demonstrate that he continued to command majority support in the house.

Consequently, Yeddyurappa, as the head of the BJP in the Karnataka assembly, sent a petition to the speaker praying disqualification of the 13 MLAs on the ground that they had voluntarily given up membership of the BJP, and hence had incurred disqualification under the schedule .[118] The thirteen MLAs had, all through the procedures before the speaker kept up with their contention that their intention was not to pull out their support to the BJP, but just to the government headed by Yeddyurappa, as they considered his style of governance to be bad. They contended that pulling out backing only to the Yeddyurappa government didn't fall within the scope of defection under paragraph 2(1)(a), stressing that prima facie 'defection' means leaving one's original party and joining another political party, which was not the situation. with the MLAs since they had not left the BJP by any means. It was over and again asserted by them that "as focused soldiers of BJP, they would keep on supporting any government headed by a spotless and proficient individual who could give great administration to individuals of Karnataka. The speaker of the Karnataka assembly, notwithstanding, held that the 13 MLAs had intentionally given up their membership of BJP by pulling out their support to the government headed by Yeddyurappa.[119] Subsequent to this, the aggrieved MLAs filed an appeal against this decision before the Karnataka high court, where the majority of judges, in this case, upheld the decision of the speaker. However, Justice N. Kumar, in his dissenting judgment, contrasted with the perspectives given by the majority bench on the understanding of paragraph 2(1)(a), holding that the demonstration of the MLAs communicating no trust in the government framed under a specific leader doesn't amount to voluntarily giving up party membership. Justice N. Kumar further drew a fine differentiation between what adds up to leaving the head of the political party who has framed a state government, as opposed to acts adding up to abandoning a particular political party completely. The two demonstrations are not equivalent in any way and are, in fact, very

[118] (2011) 10 SCR 877.
[119] Id. at 10-15.

different from one another. What establishes defection under paragraph 2(1)(a) is abandoning the political group in its entirety and doesn't cover within its ambit the conduct of forsaking the government led by a particular member of that political party.[120] He perceived intra-party dissent as a real exercise of the opportunity of free discourse and articulation conceded to parliamentarians and held that the schedule simply denies acts of defection, not genuine and honest dissent. In conclusion, it was held that "the right to dissent is the foundation of democracy, for the vibrant and efficient working of democracy and democratic institutions honest dissent must be protected and respected by Individuals in authority".[121]

In light thereof, N. Kumar,j., held that the directions of the speaker were needed to be set aside. On appeal thereof, the SC held, with respect to the question of whether the MLAs had voluntarily given up their membership of BJP, that the substance of the letters obviously displayed that the MLAs had not removed their support to the BJP, however, had just communicated their absence of trust in the Yeddyurappa government, and were willing to help any BJP government led by another leader. The SC further went on to recognize that by the actions of the MLAs, the BJP had not been bereft of an opportunity to establish a government within the state of Karnataka; they could still by all valid means, together with the support of the MLAs, form a BJP headed government within the state of Karnataka by changing their chief ministerial candidate.[122]

Further, without dealing in depth with the technicalities of dissent and based only on the material present before it, the SC arrived at a conclusion that the speaker had acted in a biased manner and therefore, the proceedings conducted by him failed to meet the twin tests of natural justice and fair play. Following the above reason, the SC set aside the decision of the speaker sanctioning disqualification of the 13 MLAs under paragraph 2(1)(a). Further, it also quashed the majority judgment passed by the Karnataka high court.[123]

Balachandran L Jarkiholi and Ors v. B Yeddyurappa and Ors is one of the important judgments where clarity has been given with regard to between intraparty dissent and defection covered under the tenth schedule of the constitution. Though the SC did not explain in detail the concept of intraparty dissent, the minority judgment of Justice N. Kumar has clearly and in a comprehensive way reinforced the fact that parliamentarians' right to

[120] Balchandra L Jarkiholi, supra note 104, 45-46.
[121] Id.
[122] G.O.I, Report of Committee on Electoral Reforms (Ministry of Law and Justice, Legislative Department, 1990).
[123] Supra note 73.

dissent is sacred in a democracy, denial of which would itself be equivalent to choking parliamentary democracy. Intra-party dissent, however sharp it may be, cannot solely result in disqualification under paragraph (2)(1)(a) unless it is accompanied by other conduct such as ‘crossing the floor’ or ‘giving support to a rival party. The position taken by N. Kumar,j., was that it is vital to draw out a distinction between what constitutes a permissible dissent and what goes on to become defection had previously been discussed by a five-judge constitutional bench of the SC in the *Kihoto Hollohan v. Zachillu and Ors*[124] (“Kihoto") to a great extent. In this case, while settling down the question of the constitutionality of the schedule , the Bench expressed: Not halting at this and staying consistent to their earlier statement, the SC, though not exactly in the paradigm of paragraph 2(1)(a), went on to observe that the provisions included under paragraph 2(1)(b) of the schedule , which provides for disqualification of a member from the house on inability to cast a vote according to party directions, must be interpreted in such a manner to not unduly encroach on the freedom of speech given to the members of parliament by virtue of article 105[125] of the constitution. The provisions of paragraph 2(1)(b) should be interpreted harmoniously with the other provisions, and its phrasing must be appropriately contained in its scope by keeping in view the objects and purpose of the schedule , i.e., namely, to curb the evil or mischief of political defections because of the lure of office or other similar profitable considerations.[126]

Following the reasoning given for the interpretation of paragraph 2(1)(b), it would, as an undeniable corollary, follow that provisions of paragraph 2(1)(a), which come before the provisions of paragraph 2(1)(b), should likewise be harmoniously construed in order to ensure that the schedule as a whole does not violate the freedom of speech guaranteed to members of the parliament. Thus, the words 'voluntary giving up of membership’ would fundamentally require to be interpreted strictly in a manner to ensure that it does not cover within its ambit cases of genuine and free dissent, which is the sign of a true democracy. Thus, Kihoto has made it incumbent upon the speaker and the courts of law to distinguish between cases of genuine dissent and defection camouflaged as dissent, Protecting the former while squashing the latter with an ironclad hand.[127]

In summation, one might say that even though the SC has on multiple occasions impliedly indicated that paragraph 2(1)(a) ought not to be utilized as a medium to stomp the intra-party

[124] AIR 1993 SC 412
[125] India Const., art 105.
[126] Kihoto, Id. at 49.
[127] Supra note 73.

dissent. In the absence of an explanatory judgment on this aspect, political parties have tried to benefit from this ambiguity and have time and again viciously used the arrangement laid down in this provision to stomp upon intra-party dissent, and drive fear of being disqualified in the minds of their own party members. Thus, given the crucial role played by intra-party dissent in a democracy, it is absolutely necessary for the legislature or the Judiciary to clear out the area of ambiguity surrounding the extent of voluntary giving up of membership which is a ground under paragraph 2(1)(a), to open the parliamentary gateway and party doors to intra-party dissent, empowering parliamentarians to voice their opinions on the floor of the house and also within a political party, without any kind of anxiety or fear.[128]

3.2.2 Paragraph 2(1)(a) and Freedom of Speech

One may be slanted to accept that if intra-party dissent is determinately held to fall outside the extent of paragraph 2(1)(a), parliamentarians might have the option to practice and assert their right of speech and expression to the fullest, which would eventually lead to free and fearless debates on the parliamentary floor and amongst political parties. Tragically, this myth would soon be busted if one investigates the schedule as it stands today. Under the tenth schedule , even if a person manages to escape the bounds of paragraph 2(1)(a), his party may still win by taking advantage of the loopholes in the schedule , put a quick finger on the lips exercising unwanted freedom of expression and dissent. This position can be better perceived by way of an illustration to explain the provisions included in the schedule .

Assuming Mr. B was elected to the legislative assembly of any particular state as a member of Z political party for a period of 5 years. During his term, Mr. B realizes that the chief minister of the state, also belonging to political party Z, is involved in corrupt activities. Mr. B raises his voice against such corruption and refuses to attend party meetings. The other members of party Z may first try to get Mr. B disqualified from the house, framing him on the ground that he has voluntarily given up his membership under paragraph 2(1)(a). Mr. B may be able to escape the rigors of paragraph 2(1)(a) on the ground that he was only putting forth his genuine and honest views against the chief minister, and such intra-party dissent does not amount to a ground for defection under the schedule . However, this escape of Mr. B might be short-lived, as members of party Z will try to counter their defeat against Mr. B by expelling him from the party on the ground that he has violated the guidelines of the party Z, inter alia, relating to discipline or attendance of meetings. Further, Mr. A, regardless of

[128] Id.

being expelled from party Z, would continue to remain bound by the wishes and fancies of the president of party Z if he wishes to protect his seat and his tenure in the legislative assembly because of the provisions contained in the explanation (a) to paragraph 2 of the X schedule of the constitution ("Explanation") and its subsequent construction by the SC in the famous case of *G Vishwanathan vs. Hon'ble speaker Tamil Nadu legislative assembly, Madras, and Ors*[129] ("G Vishwanathan").

The explanation, therein, states that "an elected member of a house shall be considered to be the member of the political party, if any, by which he got the ticket and was set up as a candidate in the elections." Based on the deeming fiction contained in this paragraph, the SC in G Vishwanathan had held that an elected member would continue to be a member of the political party that offered him the ticket to contest as a candidate for the election despite the fact that he or she had been expelled from that political party. He will continue to be a member of that political party regardless of the fact that he is treated as unattached.[130] The SC has basically held that a member expelled from his political party, albeit not from the house, would within the house continue to be subject to the directions and orders of the party, which in fact has removed him. In addition to this, if such an expelled member, in any event, tries to join another party or ignores any direction or whips issued by the party that removed him, he will become liable to incur disqualification under the tenth schedule .

Thus, along these lines, in the previously mentioned example, Mr. B, despite the fact that he was expelled from party Z, would continue to remain subject to the directions and whips issued by party Z within the house and would have to comply with their orders and directions even if he strongly resents the same, as not following such orders would mean disqualification from the house. Taking all things together, his right to dissent, however likely protected from the compass of paragraph 2(1)(a), has been totally choked by G Vishwanathan and the Explanation[131] attached to it.

At this point, it is appropriate to allude to the parliamentary debates regarding the constitution (52ndamendment) bill 1985("Bill") by which the tenth schedule was added in the constitution. The bill, along with paragraph 2(1)(a) and (b) (which have been fused into the schedule), additionally comprised of a clause (c), which said that if a member were ousted from his

[129] (1996) 2 SCC 353.
[130] Supra note 47.
[131] V. Sundaram, 'Amar Singh Expulsion Case: SC Misses Chance to Interpret Anti-defection law, the wire, (Jul.11th, 2021, 5:00PM),https://thewire.in/law/amar-singh-expulsion-case-scs-refusal-interpret-anti-defection-act-missed-opportunity.

political party, that member would be disqualified from the house. Clause (c) was explicitly erased while passing the bill. In such conditions, the expectation of the parliament is sufficiently certain that no disqualification would connect to a member who has been ousted by his political party, and consequently, no act of his post-removal would open him to disqualification under paragraph 2(1)(a) or (b). Moreover, addresses made by prominent parliamentarians, including Sharad Dighe, make it amply clear that clause (c), which aimed to disqualify persons who were expelled from their party for their conduct outside the house was explicitly done away with as the said clause, if left to operate, would create several practical difficulties such as making ministers subject to the arbitrary decisions of the party echelon.[132]

Prof. Madhu Dandavate, during the conversation encompassing the bill, had in support of the deletion of clause (c) expressed that "there are sufficient occurrences in this political life of our nation were only for expressing political dissent from a leader, Individuals have been removed.[133] G Vishwanathan case is in the teeth of the previously mentioned authoritative goal and has indeed brought in through indirect method, what was unequivocally excluded from the ambit of the schedule . Moreover, the high court in Kihoto has, as iterated previously, explicitly expressed that the provisions of the schedule must be perused in consonance with and in light of the objectives and reason for which the schedule was initially enacted, which was never in any way to take in its ambit the expelled members of a party. Additionally, a division bench of the SC, on account of *Amar Singh v. Association of India*[134] shed enormous uncertainty on the accuracy and relevance of G Vishwanathan, keeping in mind the legislative history of surrounding the enactment of the schedule , parliamentary discussions in connection thereto and explicit deletion of clause (c) in the tenth schedule, the SC has gone on to observe that "what was tried to be avoided by the law making body has now been brought into the tenth schedule by virtue of the said decision".

In light thereof, the judges referred to the questions of law, inter alia, including whether the provisions of the tenth schedule would include in its ambit a member who had been expelled from the party which put him up as a candidate to contest the election and whether the stance taken in G Vishwanathan regarding the status of expelled members was in consonance with the provisions of the tenth schedule to a larger bench of the SC. However, a three-judge seat of the SC, at last, declined to decide on these issues, as the petitions had become invalid at

[132] LS Debates 30 January 1985, vol 1 no 11, series 8.
[133] Id.
[134] (2011) I SCC 201.

that point of time because the petitioner had completed his tenure in the Rajya Sabha during the matter being sub-judice.

Interestingly, a similar matter has indeed come up before a division bench of the SC,[135] as the petitioner was elected again to the Rajya Sabha seat, for a tenure up to 2022. This bench had also referred the questions of law raised previously for consideration to a larger bench of the SC. While an authoritative ruling of the SC on this issue is eagerly anticipated, it is abundantly clear that imposing punishment on parliamentarians who are strong enough to stand up for what they believe in, even at the chance of incurring expulsion from their party and suffering embarrassment and attack at the hands of their fellow party members, is draconic and unbalanced.

3.3 Role of Whip Under Paragraph 2(1)(b)

In addition to the aforementioned, it is suitable to consider paragraph 2(1)(b). According to this provision, a member may incur disqualification on the ground of defection in the event if they vote or avoid to cast a vote in the house in opposition to the directive or whip issued by their political party, or by any other individual or entity authorized by the party in this regard, without getting any prior allowance of such party.This ground is considered absolute , with only the exemption being of a prior permission. Thus even if a member has a legit meritorious views on any matter which is contrary to his party's views, he can not be permitted to go put forth the same under this provision. Here, the person issuing the directions is referred as party whip.

The term 'whip' refers to the chief of the political group who goes about as the party's 'master' inside the legislative assembly or house of parliament, who is answerable for the party's discipline and conduct on the floor of the house.[136] Thus, basically a whip is the parliamentary functionary who issues directions and orders that should be obligatorily followed by the party members in the parliament, and thus ,looks after the attendance of members also, ensures that the voting is done according to the party loyalties. Neither the rules outlined under the tenth schedule nor the rules of procedure and conduct of business in the parliament accommodate or manage the issuance of whip.[137]

[135] Amar Singh v UOI (2017) SCC Online SC 405.
[136] BS Web, Explained: What is a whip and what happens if it is disobeyed in the house?, Business Standard, (Jul.12th , 2021, 6:00PM),https:// www.business-standard.com/article/politics/explained-what-is-whip-in-indian-politics-and-what-does-it-do-what-happens-if-it-s-disobeyed-119112600362_1.html.
[137] Supra not 73.

Para 2(1)(b) is the sole empowering provision providing for a whip. The whip is endowed with foremost powers, however there are no relating governing rules on the utilization of this position. This unchecked power bestowed on the whip is often used as a means of establishing complete control by the ruling party over its members, impeding their free will completely. There are multitude of occurrences in India where the whip has given a command to the parliamentarians to act with a specific goal in mind, as coordinated by the decision of the party. This covers occasions like whips to go to political party meetings, vote for majority part, prevent meeting people from other parties, etc. While this is expected to be a disciplinary activity, it tends to be utilized as a tyrant method for smothering dissent by members. Such whips, because of the explanation and G Vishwanathan, can likewise be given to expelled members of the party.

Various political parties have time and again utilized the whip to fulfil their own political plans. For instance, the Karnataka assembly gave an ignoble example of the same when certain BJP members were excluded for challenging a party whip guiding them to cast a vote for a specific member for the postion of speaker of the assembly.[138] Mamta Banerjee chief of the Trinamool Congress had, a couple of years back, issuedd a casual whip to her party individuals to cast a vote for Dinesh Trivedi, the Trinamool contender for the Rajya Sabha, failing to do the same would cause disqualification.[139] The latest illustration of the whip being utilized to curb the right to speak freely of discourse, is the whip given by Mayawati Prabhu Das of the Bahujan Samaj Party ("BSP") to 6 ousted MLAs of Rajasthan, who had been chosen for the Rajasthan legislative assembly on the ticket of the BSP, yet had been subsequently removed from the Party. In spite of the expulsion, they were ordered to cast their votes against the Gehlot government in the occasion of a trust vote being held in the Rajasthan assembly.[140] Thus, it is obvious that while the whip is a fundamental method for keeping up with discipline in the house, it is normal utilized as a medium to take advantage of the constitutional machinery and can damage our democratic system.

Such callous exercise of the power by the whip has been questioned on numerous events. For example, the 170th Law commission Report on Electoral Laws has highlighted the way that the whip was being utilized in the Indian parliament at each conceivable stage, ruling out dissent. It expressed as follows:

[138] D Sudhakar v. DN Jeevaraju (2011)3 K.LJ 437.
[139] Supra note 73.
[140] Sahay Abhinav, BSP issues whip to 6 Rajasthan MLAs who merged with Congress, instructs to vote against Gehlot govt, Hindustan Times,(Jul.12th , 2021 6:00PM),https:// www.hindustantimes.com/india-news/bsp-issues-whip-to-6-rajasthan-mlas-wh.

A comparative view was likewise taken in the Dinesh Goswami Report of 1990.[141] Further, this position got legal support in Kihoto, where the SC remarked that disqualification forced by paragraph 2(1)(b) due to rebelliousness with the directions given by the whip should be allowed just in the accompanying cases: (I) where a change of government is probably going to be achieved or forestalled, or (ii) where the motion under consideration identifies with a matter which frames a fundamental approach and program of the political party . Further, the SC also explained that, where such instructions are being given as a whip, the defiance of which would lead to disqualification, the outcome should be plainly phrased and read to the members to enable them to choose wisely.

Although neither the suggestions of the Law commission nor the legal explanation has been consolidated in the schedule , and the whip proceeds to partake in a free hand to suppress even the slightest difference of opinions expressed by the members. Thus, reading the pronouncements and provisions of the schedule aforesaid in cohesion and harmonious manner amount to systematically impeding dissent at every stage and in every form, in the process, destroying democracy and free speech.

While the limitations contained in paragraph 2(1) (a), the explanation and G Vishwanathan case have a malicious effect on dissent, paragraph 2(1)(b) may in all likelihood be the demise of it. Further, it would likewise be relevant to explain now that while the researcher perceive the significance of ant defection law in keeping up with parliamentary discipline and party union, she is completely against it being utilized a device to smother and choke intra-party contradict in the country. It is justifiable that the essential intention of enacting this anti defection law was to handle obstacles, for example, keeping up with severe party discipline during the time when India was newly formed democracy, with a newly written constitution. During those times, intra-party dissent was not a pressing priority in the bigger plan. However, more than thirty-six years since, the political scenario in India has advanced to a larger extent . owing to this, such blatant use of anti-defection law has been the stripping away of individual inner voice and circumspection of parliamentarians which the researcher objects.

[141] GoI., Report of Committee on Electoral Reforms (Ministry of Law and Justice, Legislative Department, 1990)

Chapter 4

Anti-Defection Law In Other Countries

Party law varies efficiently amongst well-established and nascent democratic governments. Perhaps the most unconventional difference lies in the existence of laws against party changing, abandoning, or floor-crossing in nations' governance. Laws that disqualify representatives who change parties are commonly called "Anti-defection" laws; however, they have different names. G.C Malhotra's, in his 1,200-page composition on the point, said that in various Commonwealth countries, the law against political defection from a parliamentary party is known by multiple terminologies, for example, 'floor-crossing, 'carpet crossing, 'party-hopping, 'dispute' and 'waka jumping'-[142]. While in some of the countries, defections are not considered as an issue and not seen as a problem, at the same time, in some nations, defections have now and again compromised the actual stability of the government. Accordingly, while a few nations manage instances of defection with the assistance of

[142] G.C.Malhotra, Anti Defection In India And The Common Wealth, Metropolitan Book Co.Pvt Ltd (2005).

grounded customs, conventions, and parliamentary practices and strategies, others have outlined well-defined laws and rules to handle this issue.

An independent research conducted in 2009 utilising a 2007 data on party defection in 41 out of 193 Nation brings this issue to the light of the day. Findings of the research reveals that several countries have enacted laws with the intention of either controlling or prohibiting defection of members. A note-worthy finding is that the more politically advanced democracies have less stringent anti-defection laws.

Table 1: Nations with Laws against parliamentary Party Defections[143]

Type of democracy, 2007	Number of nations	Those with Floor - crossing laws	Nations with floor-crossing laws
Older democracies	36	5(14%)	India, Israel, Portugal, Trinidad & Tobago
Newer democracies	54	13(24%)	Belize, Bulgaria, Ghana, Guyana, Hungary, Lesotho, Mexico, Namibia, Romania, Samoa, Senegal, Suriname, Ukraine
Semi- democracies	58	19(33%)	Armenia, Bangladesh, Fiji, Gabon, Kenya, Macedonia, Malawi, Mozambique, Nepal, Niger, Nigeria, Papua New Guinea, Seychelles, Sierra Leone, Singapore,

[143] Kenneth Janda, Laws Against Party Switching, Defecting, or Floor Crossing in National Parliaments, The Legal Regulation of Political Parties in Modern Democracies, (Aug.1st, 2021, 10:00PM), http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf

			Sri Lanka, Tanzania, Uganda, Zambia
Non democratic	45	4(9%)	Congo (Democratic Republic), Pakistan, Thailand, Zimbabwe
Total	193	41	

The above data reflects that party switching laws are not very popular practice in most of the developed democracies. The data reveals that none of the countries that are considered as advanced democracies have laws against defections. These include the UK, USA, Canada, Belgium ,Germany etc. This position is backed by research that shows that anti-defection laws are rather traits of bad democracy than ideals of good democracy. This is reflected from the words used to describe countries with defection laws as newer democracies, semi democracies and non democracies

4.1 Countries Dealing With Defections Without Legislation[144]

In the United Kingdom, there is no practice to stop individual members from changing their party affiliations. A member who switches is not needed to resign. Seating in the house of Commons is determined by established practices and not rules, but a member who defects usually sits independently from his original party members. Occurrences of fence-sitting legislators, the absolute most eminent public men and parliamentarians abandoning their political affiliations, and the entire group of lawmakers changing their political loyalties are not obscure in British parliamentary history. Pioneers like "Edmund Burke, William Gladstone, Joseph Chamberlain, Winston Churchill[145], and Ramsay MacDonald" also defected from their own political parties.

In the Australian parliament, too, there are no laws or rules to oversee defection other than inside party arrangements and procedures. On similar lines, the parliament of Canada also has no restriction - whether statutory or constitutional - against the act of party switching or floor crossing. The member's right to sit inside the house as a member does not depend upon his

[144] Malhotra, Supra note 128.

[145]Churchill switched his party thrice in his entire political career: from the Conservatives to the Liberals in 1904 in support of free trade, from the Liberals to an independent candidacy in 1922, and back to the Conservatives in 1924. He claimed to make these shifts on an ideological basis.

political affiliation. The Whip makes the provision for seating arrangements of a member or members within their party and communicates it to the speaker. Where a member makes a decision to switch the floor and sit with another party member, then his new Party Whip would determine the seating arrangement for him.

In Malaysia, likewise, there is no law to deal with instances of floor-crossing; however, there have been instances of defection, and there has been an interest to establish enactment in such a manner. Truth be told, there a Private member's Bill was introduced in 1978 to check defections of duly elected members by requiring the member of parliament to vacate his seat within the period of 30 days of his defection or removal from the party on whose list he was initially chosen.

Aside from these, various other countries like Namibia, Seychelles, Bermuda, Tuvalu, Botswana, Grenada, Cameroon, Jamaica, Cyprus, Dominica, and Anguilla, where there are no laws or rules to manage the instances of defection.

4.2 Countries Dealing the Issue with Legislation[146]

Turning to the nations, which have instituted enactments or outlined principles to manage party switching or defection, an endeavour has been made in this section to give succinct information in brief under specific parameters and thereby draw out the position prevalent in various countries comparatively. The position of the law in India is taken as the reference point to bring out a comparison.

4.2.1 Voluntarily giving up membership of the party.

In India, when a member of the parliament or state legislature voluntarily gives up the membership of his political party, then he shall incur disqualification under the tenth schedule of the constitution. A similar sort of situation is found in the constitution of Bangladesh, which says that a member shall be disqualified and vacate his seat if he resigns from the political party on whose tickets he had contested the elections. Under article 70 of the constitution of Bangladesh[147], a person who is elected as a member of parliament on the ticket given by the political party who set him up as a candidate at the election shall be disqualified and would consequently have to vacate his seat if he decides to resign from his original party or casts a vote in parliament against the direction of his party. After the introduction of the 12th Amendment, a member of parliament can incur disqualification on six grounds under

[146] Supra note 128.
[147] Bangladesh Const. art 70, pt.V.

this article.[148] This article which initially had only seven lines in the original constitution now spreads over an entire page.

The constitution of Ghana under article 97(1) inter-alia states that a member of parliament would lose the seat in the parliament if he or she resigns from the party on whose list he was a member when he got elected to the parliament, to join a different party or to function as an independent member in the parliament.[149]

In Nigeria, the term 'Carpet-Crossing' is used to denote defection. A representative in the house of Representatives or the Senate will vacate his seat if his membership to the house was supported by one political party, and he joins another party before the termination of the period for which that house was supposed to operate.[150] The constitution of Sierra Leone also states that a representative in parliament would have to vacate his seat in parliament if he stops being a member of the party on whose list he contested to become a member of the parliament.[151] Similarly, article 46(2)(b) of the constitution of the Republic of Singapore states that the seat of a member will become vacant if he ceases to be a member of or is removed or resigns his membership of the political party for which sponsored his election.[152]

[148] Article 70 has been incorporated in the Constitution of Bangladesh as an anti-defection law and has been designed in a manner to prevent party-switching of the members of the Parliament. In the original Constitution of 1972, there were only two conditions under which a member could be disqualified: 1) If a member resigns from his party; or 2) If he votes in Parliament against his party. By the 4th Amendment, another two conditions were added by inserting an explanation of the words 'votes in Parliament against his party'; These are: 1) If a member, being physically present in the Parliament, abstains from voting; or 2)If the member, ignoring the declaration of his party, absents himself from any sitting of the Parliament. Again, by the 12th Amendment, two more conditions were inserted. The effects of these conditions are: 1) Formation of a group within the Parliamentary party was made impossible due to provision in Article 70(2). 2) If an independent elected Member of Parliament joins any political party, he will come under the purview of anti-defection provisions.

[149] Ghana Const. art 97, "a member of parliament shall vacate his seat in the parliament-
(f) if he resigns from office as a member of parliament by writing under his hand addressed to the speaker; or
(g) if he leaves the party of which he was a member at the time of his election to parliament to join another party or seeks to remain in parliament as an independent member; or
(h) if he was elected a member of parliament as an independent candidate and joins a political party.
(2) Not withstanding paragraph (g) of clause (1) of this article a merger of parties at the national level sanctioned by parties constitutions or membership of a coalition government of which his original party forms part shall not affect the status of any member of parliament

[150] Nigeria Const. art 68, cl.(g).
(1) A member of the Senate or of the House of Representatives shall vacate his seat in the House of which he is a member if - (g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected; Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored;

[151] Sierra Leone Const. art 70.

[152] Republic of Singapore Const. art 46, cl.(1)
(1) Every Member of Parliament shall cease to be a Member at the next dissolution of Parliament after he has been elected or appointed, or previously thereto if his seat becomes vacant, under the provisions of this

In Samoa, Section 15F of the principal Act, which was inserted by the Electoral Amendment Act, 2005 to Part IIA, which came into operation from the first of April 2005, provides that where a ballot form of a member who is elected to the legislative assembly clearly states his membership of a political party, then he shall sit in the legislative assembly as a duly elected member of that political party for the entire term for which he was so chosen. Where the ballot form of a candidate shows that he belongs to a particular political party and upon election, it is found that his party has not secured the minimum seats required to be recognized as a political party, then according to the Standing Orders, that candidate will have a choice to join another political party or to function as an independent member as per the provision of the standing order, and from that point, the chosen up-and-comer will sit in the legislative assembly as a member of the new party which he joined or as an independent, as the case might be, during the term for which the up-and-comer was so chosen. However, if such a member subsequently leaves the new party or becomes an independent member before completion of his tenure, then the seat of such turncoat will become vacant, and such a member will be disqualified from holding such a seat.[153]

4.2.2 Split/Merger

the anti-defection law in India as included in the tenth schedule [154] in the constitution stated that there would be no disqualification in cases where split within a party or merger of a party with the other party was asserted provided that in the case of split in the political party at least one-third of its members decided to resign from the membership of that political party[155] and in the event of a merger, the decision was upheld by not less than two-thirds members of the political party concerned. However, later the Split Provision was deleted in India as it was severely criticized in India on the ground that while on the one hand, it tries to curb individual defection, on the other hand, it supports mass defection. Therefore, the provision regarding split was omitted by the constitution (Ninety-first Amendment) Act 2003.

In Bangladesh, there is no particular arrangement for split and consolidations in the constitution or any other law or Rules of Procedure. In Ghana, if the merger of parties at a

Constitution.(b) if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election.

[153] See Also, Western Samoa Const. art 46 cl.(3).46. Tenure of office of members: (3) Despite Articles 13 and 15, an Act may provide that the seat of a Member of Parliament becomes vacant during his or her term of office: (a) where in certain circumstances the Member - (i) resigns or withdraws from or changes his or her political party;(ii) joins a political party if he or she is not a member of the political party;.

[154] Added by the Constitution (fifty-second amendment) act, 1985, s. 6 (w.e.f. 1-3-1985).

[155] Paragraph 3 omitted by the Constitution (Nienty-first Amendment) Act, 2003, s. 5.

national level is endorsed by the constitution or by a coalition government of which his original party is also a part shall not in any manner influence the seat of a member of parliament.[156]

Section 47 of the constitution of South Africa, as was amended by Act No.2 of 2003, states inter-alia that a member loses his participatory seat in the National assembly if he resigns from the membership of the political party which supported his election to the assembly, except if that person becomes a member of another political party in accordance with schedule 6A. Likewise, Section 106 mutatis mutandis with section 46 states inter-alia that a member loses his participatory seat in the Provincial assembly if he ceases to be a member of the political party which supported his election to the assembly, except if that person becomes a member of another political party as per schedule 6A. Schedule 6A formulates a mechanism of window period which provides for saving of membership of provincial legislature or National assembly, in the cases of 1) "change of party membership," 2) "merger between parties," 3) "subdivision of parties, 4) subdivision and merger of parties." The terms of the legislation allow the member to defect from the time of the 15-day window periods which starts from the first of September to the fifteenth day of September in the second year following the date of election to the legislature and from the first of September to the fifteenth day of September in the fourth year following the date of election to the legislature. The Act also has a provision for the members to change their party affiliation within the first 15 days immediately following the election. Nonetheless, it must be noted that in order to save the seat in the legislature in the case of change of membership of the party, merger, subdivision and subdivision and merger of parties, a member of the legislature who joins the membership of a new party other than the party which supported that person as a member also called as the nominating party, irrespective of whether the new party took part in an election or not, continues to be a member of that legislature provided that such member, whether by himself or herself or together with one or more than one members who, during the window period left the membership of the nominating party, represents at least 10 percent of the total number of seats owned by the nominating party in that legislature.[157]

[156] Supra note 136.

[157] Floor crossing was abolished in South Africa via fourteenth and fifteenth amendment bills in 2009 (https:// ullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-10-issue-5-november-2008/vol-10-no-5-the-end-of-an-era-the-abolition-of-floor-crossing.pdf.

In Nigeria, exceptions have been provided in cases of splits and mergers. However, there is no water-tight limit as to what constitutes a split or a merger.[158] In Sierra Leone, both types of defection, whether collective or individual, is penalized.[159]

In Guyana[160], New Zealand[161], Sri Lanka[162] and Tobago[163], there are no legitimate rules governing splits and mergers. In Mozambique, the law doesn't officially sanction splits within the party or parliamentary alliances. In Zambia,[164] a split adds up to an adjustment of party composition and is managed as such under the provision of law. In Zimbabwe,[165] no exception is made in cases of splits and mergers.

4.2.3 Independent and Nominated members

Another significant element of anti-defection law relates to the situation with nominated and independent members in the event of them becoming a member of a political party. In India, an independent candidate elected to the parliament or a state legislature incurs disqualification if they join a political party after they were duly elected as an independent candidate. A candidate who becomes a member of parliament or a State legislature through Nomination and who does not hold a membership of any political party at the hour of their election and who does not turn into a member of any political party before the expiry of a half year from the date on which they sit down in the house, incurs disqualification in the event if they join any political party after the expiry of the fixed time of a half year.[166]

In Bangladesh, if a candidate subsequent to being elected as a member of parliament as an independent candidate joins any political group, then he is deemed to have been chosen as a candidate of that party. There is no provision for the nomination of members to the parliament in Bangladesh.[167] In Sierra Leone, the law is similar as in India that is a member elected as an independent candidate to the legislature would incur disqualification if, subsequent to their election as an independent candidate, they join a political party. In Sri Lanka, an individual cannot contest an election independently. However, they can contest and

[158] Supra note 135.
[159] Supra note 136.
[160] Guyana Const. art 156, para 3.
[161] New Zealand ,Electoral (Integrity) amendment act,2001,www.
nzlii.org/nz/legis/hist_act/eaa20012001n105328.pdf
[162] Sri Lanka Const. art 99(13).
[163]Tobago Const. Sec 49A vide amendment act No. 15/1978.
[164] Zambia Const. art 70.
[165] Zimbabwe Const. sec 41(e) vide constitutional amendment No.9,1989.
[166] India Const. sch X.
[167] Supra note 133

participate in the election under the symbol of an independent group, and consequently, they would be subject to the law against party switching. In Trinidad and Tobago, there is no provision governing independent and nominated members. In Uganda,[168] any member of parliament who leaves the political party on whose list they contested the election to the parliament and joins another political group or stays in parliament as an independent member would incur disqualification. In Zambia, if an independent candidate joins a political party after their election, they automatically lose their seat. In Zimbabwe, independent members of the parliament do not get disqualified if they join a political party after the election.

4.2.4 Expelled members

The situation concerning members who have been ousted from their political party varies from one country to another. The anti-defection law in India does not clearly express the position and status of individuals who are expelled from their political party. Nonetheless, such a member continues to be a member of the house and is made to sit separately from the bloc of seats reserved for the members of his original party.[169] In Bangladesh, if a member is to be removed from a political party, the 'question' alludes to the election commission, whose decision is conclusive, and no appeal can be preferred against it.

In New Zealand, if a member is expelled from his political party, then his seat becomes vacant. The practice followed in Sierra Leone is that when a member has to be removed from the party, the speaker sets up an advisory group that enquires into the matter and reports to the speaker depending upon which the speaker takes a view in the matter. The speaker's choice is, nonetheless, appealable in a court of law. In Sri Lanka and Singapore, if a member is removed from his party, he will lose his seat in parliament. In Zambia, where the speaker gets insinuation from a political party regarding the expulsion of a member from the party, in such a circumstance, the mandate of the law requires him to inform the president and electoral commission that there is a vacancy of the seat in the National assembly. In Zimbabwe, the situation under which a member is deemed to have ceased to be a member of his party is not well-defined, which implies that it can be through resignation, expulsion, or via defection. Thus there is a lot of discretion between the parties and their members. In the event, if the seat of a particular member is declared vacant, then an election has to be organized to fill such vacancy.

[168] Republic of Uganda Const. art 83(1) (g).
[169] Refer G.Vishwannthan case.

4.2.5 Excluding the Presiding Officer

In order to ensure the efficiency of the working of presiding officer, they should be absolved from the thoroughness of the law if they cut off their political association with their political party after being appointed to such a post. Under the anti-defection law in India, a unique arrangement has been made concerning presiding officer and the Deputy presiding officer, which empowers them to cut off their associations with their original political party without incurring any disqualification. They can re-join their political party subsequent to laying down the post. [170]

Under the significant law in Guyana, Singapore, Bangladesh, Nigeria, and Sri Lanka, no such provision for an exception is accessible to the speaker or the Deputy speaker. In Belize, the speaker is also liable to incur disqualification as a member from the house of Representatives in the event if they cross the floor. In Kenya,[171] an exception is given to a member who is appointed as speaker, and he does not attract the law relating to the disqualification in this regard. In Mozambique, the speaker and the Deputy speaker of the assembly are not required to act in unprejudiced nature or discord with their political party. Further, they reserve the option to cast a ballot, which on a fundamental level, has to be consistent with the party through which they were chosen.[172]

In New Zealand, presiding officer (except if initially elected as an independent candidate) are not treated uniquely in contrast to other members of their parliamentary party. In Pakistan, like in India, the law as established in article 63A of the constitution is not applicable to the hon'able chairman or the speaker of a house[173]. In Zimbabwe, the topic of defection or change of party alliance in the case of the speaker doesn't emerge on the grounds that the speaker is not considered a member of the assembly. article 69(I) of the constitution of Zimbabwe states that there will be a speaker of the National assembly who the members of

[170] India Const. sch X par(5).
[171] Kenya Const. sec 40.
[172] Supra note 128.
[173] Pakistan Const. art 63A, "If a member of a Parliamentary Party composed of a single political party in a House : (1) resigns from membership of his political party or joins another Parliamentary party;(2) votes or abstains from voting in the House contrary to any direction issued by Parliamentary Party to which he belongs, in relations to Election of Prime Minister or Chief Minister, vote of confidence or no confidence, a money bill or constitutional amendment bill. He may be declared in writing by the Party Head to have defected from the political party, and the Head of the Parliamentary Party may forward a copy of the declaration to the Presiding Officer, and shall similarly forward a copy thereof to the member concerned:
Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why declaration may not be made against him."

the assembly will choose from among people who are entitled and qualified to be chosen as a member of the assembly however are not actual members of the assembly[174].

4.2.6 Presiding Officer as Deciding Authority

While in a few parliaments, presiding officers are considered as competent and final authority to make a decision in cases concerning defection, in certain nations, an appeal can be preferred against such decision to the court or the election commission or some different bodies. The situation in India is that the chairman or the speaker of the particular house decides the inquiry concerning whether a member of the house of parliament or a state legislature has become subject to disqualification. The presiding officer, be that as it may, can't take any action suo moto. It must be based on a request or a petition filed by the members. Where the inquiry is regarding the chairman or the speaker himself, a member from the concerned house, chosen by the speaker or the chairman, for that case would decide the matter. Although anti-defection law in India provided a finality clause that no court shall have any jurisdiction regarding any matter related to the disqualification of a member of a house under the law. But, the hon'ble supreme court of India has held the provision, which bars the jurisdiction of courts in such cases, as ultra vires the constitution.[175] Hence, members on several occasions have moved to the concerned courts in appeal challenging the orders issued by the speaker. The court's judgments in some cases have also been implemented. In Bangladesh, the election commission takes all decisions concerning disqualification and is conclusive, and no arrangement for appeal against such provision has been made. Whereas in India, a petition for disqualification can be brought only by a member of the house, in Bangladesh, any individual or member can carry the petition of disqualification to the speaker. The speaker then prepares an assertion containing all the statements and sends it to the election commission. In Malawi, the speaker's decision is followed after a motion from another member. The Presiding Officer cannot take any action unless there is a resolution moved for the removal of a member.[176] In Mozambique, a decision regarding disqualification is taken by the Standing Committee, a body which is chaired by the speaker, which ought to be reported and published in the government Gazette. The discretion is given to the Standing Committee to decide upon the sanctions in consultation with the chief whip of that party to which such member belongs to. Further, there is also an option to appeal against the sanctions imposed by the committee to the plenary within eight days of such notification. In

[174] Zimbabwe Const. art 69.
[175] Kihoto Hollohan vs Zachillhu And Others, 1992 SCR (1) 686, 1992 SCC Supl. (2) 651.
[176] Malwai Const. sec 65.

Singapore, the constitution completely vests in the parliament the power to make a decision on any question pertaining to the disqualification of a member.[177] The decision of the parliament in such matters is considered to be final. In South Africa, a member can resign from his original party during the window period to form a part of another party by writing an application to the speaker of the legislature. A new party within the legislature that had not been enlisted according to the law is expected to apply for enrolment within the window time frame officially provided. Such registration of the new party should be affirmed by the appropriate authority (for example, the Independent Electoral commission) within four months after the expiry of the window time frame. Seven days after the expiry of the window time frame, the speaker would report in the official Gazette the details of the adjusted composition of the legislature. Where relevant, a party should submit to the secretary of the legislature the new list of members within seven days after the window time frame.

In Sri Lanka, there is no provision for a member to file a petition or complaint about disqualification against another member. Similarly, the Presiding Officer does not have the authority to take up a matter relating to defection. However, in a case involving the expulsion of a member, his seat would not be declared vacant if he moves to the supreme court by petition in writing before the expiration of one month. The supreme court, upon such petition, decides that such expulsion was invalid. Nonetheless, If the court holds such expulsion to be valid, the vacancy shall occur from such decision date.

4.2.7 Time Limit

Under the anti-defection law in India, no cap on the time limit has been specified as such for deciding the pertaining to defection. There is an inclination in certain quarters that there ought to be a time period fixed within which a decision under the anti-defection law ought to be given. In Bangladesh, unlike in India, the speaker should set up a statement within thirty days after a question has first emerged and send it to the election commission to hear and decide the matter. Where a such a matter has been referred to the election commission via the speaker for conducting hearing and investigation, the commission shall, unless it is of the view that a reference on any point relating to the matter is needed to be made to the speaker, convey, within the completion of 14 days of the receipt of the statement, to the aggrieved parties to the dispute requesting them to submit their claims in hard copy, if any, on the matter within such time as may be directed by it. The election commission is supposed to

[177] Singapore Const. sec 46.

give a decision on the case and communicate the same within a time period of one hundred and twenty days of receipt of the statement. The decision of the election commission is conclusive, and no appeal can be preferred against such a decision. In New Zealand, when a member is ousted, he is given 21 working days time to file his response, and after having a discussion on the response (if any), a minimum of two-thirds of the member of parliament of that party should support that the leader of the party should give a notice in writing to the speaker that such a member has been removed from the party. In Pakistan, upon receiving the intimation from the chief of the Political Party addressed to the Presiding Officer relating to the defection of a member, the Presiding Officer of the house has to within two days of the receipt of such intimation refer the matter to the chief election commissioner, who shall then lay the matter further before the election commission for its determination which shall, in turn, give a decision within 30 days from the date of receiving such intimation by the chief election commissioner. A party not satisfied with the decision of the election commission has an option to raise an appeal in the supreme court within thirty days of such decision, and the court is further bound to decide the matter within three months. [178]

In Sri Lanka, where an individual ceases to be a member either via expulsion or resignation or otherwise of a recognized political which supported them and on whose list they became an elected member, shall lose their seat upon the expiration of a period of one month from the date of them ceasing to be such a member. As already mentioned, in Trinidad and Tobago, a member who has been pronounced as having resigned or been ousted by the party has the privilege to initiate legal actions challenging his renunciation or expulsion. However, if within 14 days of such a declaration by the speaker, the concerned member does not challenge the allegation of his resignation or expulsion. In that case, he shall vacate his seat at the end of the said period of 14 days. And if within the given period of 14 days, the aggrieved member initiates legal proceedings questioning his resignation or expulsion. In that case, their seat shall not be declared vacant until the proceedings initiated by him are taken back or the question raised has been finally answered by a judgment upholding their resignation or expulsion.[179]

4.3 Intra-Party Dissent in Other Countries [180]

[178] Supra note 128.
[179] Id.
[180] Nikita Bagaria & Vedika shah, Decoding Intra-Party Dissent: The Lawful Undoing Of Constitutional Machinery, 7(2) NLUJ L Rev 115 (2021).

Different nations throughout the globe follow various systems for intra-party dissent in the house. Many nations, including the US, Australia, UK, and Malawi, grant intra-party dissent, casting a ballot against the party's beliefs and floor-crossing.

In the UK, a member of the house is allowed the freedom to vote in favor of any bill unafraid of incurring disqualification from either his political party or the house.[181] The absence of prohibitive guidelines on expressing dissent has been helpful in advancing the discussions in the house and permitting significant debates at the hour of policy formulations. For instance, at a few phases of discussion and deciding on Brexit, the UK parliament saw interior conflict. The previous Conservative Party Prime Minister, David Cameron, was involved in bitter talks with his party chiefs, famously Boris Johnson and Michael Gove, over the Brexit debate.[182] None of these occurrences was viewed as demonstrations of disobedience towards the party. members who were reluctant to lend support to the majority approach could desert and sit as independent members of parliament. This demonstrates the degree of freedom enjoyed by members of the UK parliament, who can't be constrained to fall in accordance with the party's position simply because of their political association with it.[183] Further, in the UK, there are three sorts of whips which can be given, as follow: (I) one-line whip, which is advisory in nature, (ii) two-line whip, which is directional in nature, and (iii) three-line whip, which is mandatory in nature,[184] which is the position approximately followed in India. The three-line whip is only issued cautiously by the parties on important issues such as those pertaining to votes of no-confidence, unlike in the situation in India, where such whips are used by the political parties at the drop of a hat. Likewise, the US also practices a relatively liberal political framework, with no specific legislation on the defection. Each member of the house is guaranteed the freedom of speech under their constitution, and this right encompasses the right to speak or not to speak in support of any matter and to the right of forming associations freely and without fear as per the wishes of the member.[185] The American legal experts have likewise assumed a vital part in guaranteeing that this right doesn't remain only on paper however does indeed see the light of the day. For instance, in the milestone judgment of *Julian Bond v. James Floyd*,[186] where the member was prevented from taking a vow in the

[181] Id.
[182] Bhopindar Singh, Political Dissent, The Statesman,(Jul.27th , 10:00 PM), https://www. thestatesman.com/opinion/political-dissent-157097.html
[183] J. Marshall, The whipping system and free votes, Institute for Government,(Jul.27th , 10:00PM) https://www. instituteforgovernment.org.uk/explainers/whipping-system-and-free-votes.
[184] Id.
[185] Washington Legal Foundation v Massachusets Bar Foundation 993 F2d 962, 976.
[186] 385 US 116 (1966).

house and censured for his reservations on certain US international strategies executed by his own party, supreme court of the United States (SCOTUS) held that a lawmaker couldn't be precluded for communicating authentic opinions about foreign or public approaches of the country. The US supreme court further held that members had a commitment to take a position on disputable issues and to unreservedly take part in the debates on strategies of governance, given that they are considered to be the best judge of the interests of their electorate. Further, in another case of *Gewertz v. Jackman,*[187]the US District court held that the right to freedom of speech and articulation conferred upon parliamentarians is so sacrosanct that ordering disqualification in the face of debates and discussion brought up in the house would be malicious and infringing upon a parliamentarian's established rights. Taking the aforementioned recommendation further, one more District court in the case of *Barley v. Luzerne County Board of Elections*,[188] explicitly explained that if a member decides to go against the perspectives of his political party on a matter, he is completely protected from disqualification. He might be removed from the political party however can not be removed from the house. Thus, through a multitude of legislative acts and judicial decisions in the US, parliamentarians are guaranteed complete freedom to express their views within the walls of the house, which thusly is helpful for encouraging better conversations and well-framed enactments. A few instances of intraparty dissent have been witnessed in the USA history during the official residency of Former President Donald Trump. For example, Senator John McCain clashed with Trump and his kindred Republicans as much as seventeen percent of the time during voting in the Senate,[189] while Texas Senator Ted Cruz openly rejected the nomination of fellow Republican Trump as the presidential candidate at the Republican public convention.[190] Furthermore, his extreme thoughts on the economy, medical care, and especially foreign policy was not greeted wholeheartedly, and indeed a few Republican pioneers straightforwardly condemned his interpretation of issues like the Covid episode and 'Black lives matter movement, to the degree of restricting his 2020 bid for re-elections.[191] However, the disagreeing parliamentarians of the two houses have neither needed to endure the worst part of offering an opposite viewpoint nor have they needed to confront

[187] 467 F Supp 1047 (DNJ 1979).
[188] 937 F Supp 362 (MD Pa 1995).
[189]M. Zeeshan, India’s anti-defection law needs changes to promote party-level dissent on issues like CAA, The Print, (Jul.27th, 2021, 10:00 PM), https:// theprint.in/opinion/indias-anti-defection-law-needs-changes-to-promote-party-level-dissent-on-issues-like-caa/382505/.
[190] Ried J Epstein, Despite boos, Ted Cruz Won’t Endorse Donald Trump, The Wall Street Journal,(Jul.27th , 10:00PM), https:// /www.theguardian.com/us-news/2016/sep/24/ted-cruz-donald-trump-president-endorsement.
[191] Leigh Ann Caldwell and Josh Lederman, Trump's foreign policy faces growing dissent in Congress, NBC News,(Jul.27th ,2021, 10:00PM), https:// www.nbcnews.com/politics/.

critical outcomes like exclusion. In these cases, the disagreeing parliamentarians can hold their own positions and views, and their difference was not translated into showing disobedience towards their party. Likewise, the situation in Malawi concerning intra-party dissent is note-worthy. The constitution of Malawi explicitly gives party individuals a flat outright to practice a free vote in any procedures of the house, and such member's seats will not be declared vacant solely on the ground of their inconsistencies to follow the orders of their parties. Further, a member ousted from his party for reasons other than switching sides doesn't lose his membership and can proceed as an independent member in the house,[192] unlike the position continued in India attributable to the Explanation and G Vishwanathan. Further, the position that exists in Australia relating to intra-party contradict is noteworthy. Notwithstanding an absence of a reasonable enactment relating to intra-party dissent, the Australian government has allowed it, yet has also handled the issues emerging because of intraparty dissent through inner arrangements and practices. In the Australian parliament, disagreement is frequently resolved within the party rooms, at its underlying stage, and not heard or seen to cause disarray in the house.[193]

This helps in putting across a united front and fortitude within the party members in front of the public, and at the same time guaranteeing and ensuring the right of the members of a party to openly express themselves in the political domain. Thus, from the above-mentioned examples, it can be concluded that several nations have dealt with the matter of party cohesion vis-à-vis intra-party dissent in a wholesome manner, through various tools such as judicial sanctions, legislative enactments, customs, and practices. This demonstrates that there exists a transaction between conceptual intra-party dissent and its pragmatic applicability, which is fairly allowed by the governments of various states. The political design and legislative enactments in these nations set out the high est quality level on free discourse as a significant feature of popular government, which is incredibly different from the position followed in India, where dissent goes unnoticed as well as forestalled and rebuffed.

[192] Lok Sabha Secretariat Mr GC Malhotra Report of Anti-defection Law in India and the Commonwealth (2005).
[193] Supra note 166.

Chapter 5

Conclusion and Suggestions

The anti-defection law (ADL) was included as a schedule in the constitution in the year 1985. Since then, around thirty- six years have passed; however, the law has failed to keep a check on the evil of political defection to its desired extent because of certain inbuilt loopholes in the law. The primary plan of the law was to battle "the evil of political defection." The objective behind the law was to save the democratic structure of our legislature and to defend the political morality of its officials.

The tenth schedule governing the law has 8 paragraphs. The First para sets out the definitions of various terms used in the schedule ; the second para talks about the grounds of disqualifications; the third para was about split, which was erased in the year 2003, the fourth para accommodates an exception from disqualification on the grounds of a merger of the original party. The fifth para makes an exception for the speaker, Deputy speaker, chairman and deputy chairman of a house, and permits them to surrender their membership of the political party to which they belong in the wake of being chosen for that office; Para six names the people who might adjudicate on the issues within the under the schedule ; para 7 is a finality clause which bars the courts to exercise jurisdiction in regards to the supposed

inquiry of disqualification of any member, and the last para 8 enables the speaker/the chairman to make rules for a house to execute the provisions of tenth schedule .

Provisions of the tenth schedule have been questioned before the hon'ble apex court, and in high courts over and over for its interpretation and application, the different high courts just as apex court have discussed and examined the matter and gave wide interpretation to the meaning of different provisions of the tenth schedule to the constitution.

5.1 Findings of the Study

The anti-defection law was supposed to be the means to stop the evil of unscrupulous political defections. However, since the hour of its inception, the anti- defection law has been exposed to various criticism and analysis, and many loopholes have been found to exist after this process. The researcher has, on the basis of the analysis carried out in previous chapters, carved out the following issues:

Voluntarily giving up membership: When an individual member of the political party voluntarily gives up the membership of that political party, then he is liable for defection under para 2(1)(a). However, the term 'Voluntarily giving up membership' has not been explicitly defined, which creates disarray regarding its application under the Act. According to the supreme court, the term has a more extensive meaning and isn't limited to "resignation." Even in the absence of formal resignation, a member may be deemed to have voluntarily given up his membership if the same can be inferred from his conduct.

Whip: After the introduction of the fifty-second constitutional amendment act, 1985, which incorporated schedule tenth to the constitution of India, the word 'whip' has gained a vital role in our parliamentary democratic system. The use of the words "any direction" under para 2(1)(b) gives extra tyrannical authority to the heads of the political party, which is contrary to the standards of parliamentary democracy followed in our country. If the term "any direction" was deciphered in its literal sense, then it would make members who are representatives of the people agents of the political parties to which they belong, reducing their role to mere rubber stamps in possession of the political parties. Such translation would disrupt parliamentary democracy, which is the essential element of the constitution. Thus, any such directions issued by the political parties to its members, contradiction of which might involve disqualification under para 2(1)(b), ought to be restricted to a vote of confidence or no trust in the Government or where the motion identifies with any monetary or finance bill.

Adjudication of disputes: Under the tenth schedule , the speaker/chairman is trusted with the adjudicatory duty to determine questions emerging under the said Act. However, whether the speaker is a suitable authority and meets the essential criteria of being impartial and unprejudiced to act as a tribunal under the act is a question that is still doubtful given the recent roles played by the speaker in state assemblies. With due regard to the high office of the speaker in the nation and after going through some of the occasions in the recent past, different doubts have been raised with regards to unbiasedness and neutrality of the speaker in his ability to act as a Tribunal under the tenth schedule of the constitution. The speakers are seen acting in a hardliner way which is regularly reflected in their working as a court, for example, in Goa, Manipur, and Karnataka. The speaker in the Indian setting is the delegate of the political party who is not needed to leave their party connection after becoming the speaker. speakers being political characters and being candidates of the political parties don't meet the necessities of an impartial arbiter to act as a tribunal. There is sufficient force in the decision given by the minority *in Kihoto Hollohan case* that vesting of adjudicatory powers in the speaker is violative of the Principle of Natural Justice, and the speakers being political characters can't be anticipated to discharge duties and functions of the quasi-judicial tribunal. Previous Lok Sabha speaker Somnath Chateerjee observed that 'the need to decide the issues arising under the tenth schedule need not keep on being exercised by the presiding officer and the power ought to be presented on some other authority like an autonomous tribunal containing members knowledgeable in law or authority like the election commission'. When we investigate the authentic foundation of the anti-defection Law, it is discovered that though the constitution (52nd amendment) act 1985 gave the dynamic force on the topic of defection to the speaker/chairman of the house. The preceding bills had vested such authority with the election commission. Thus, according to the researcher, the time has arrived for parliament to think for an alternate adjudicatory forum to decide the question of disqualification on the ground of defection under the tenth schedule.

Merger: Para 4 talks about an exemption from disqualification on the ground of merger. It provides that where an original party merges with another political party and a member claims that he and any other member of his original political party have become members of such other political party formed after the merger or of a new political party or; have refused to accept the merger and opted to function as a separate group; then such members would not be liable for disqualification under sub-paragraph (1) of paragraph (2). Such a merger of the political parties is considered valid only and only if two-thirds or more members of the

political party concerned have assented to such a merger. Lately, the legislators with the speaker are misusing the merger clause enunciated in paragraph 4 of the tenth schedule to give effect to their ulterior motives. The provision has been wrongly assumed that the original political party on whose election symbol the candidate contested and got elected as the representative has given an unlimited free pass to their MLA to encash it with some other political party. It is awful to infer that a political party stands merged into any other political party on the unrivaled premise that their chosen MLAs have consented to something similar. Such a perusing isn't just outlandish and is even impermissible as it humiliates the public picture and fame of the political party alongside subverting public trust in it.

Expelled members:The anti-defection law is quiet in regard to the position and status of individual members who are ousted or expelled from their political party. Such a member continues to be a member of the house and, however, sits independently from the alliance of seats reserved for his political party. The question that emerges is whether removal from the political party can be the reason for disqualification from membership of the house. Whether the party whip would be applicable against such ousted or expelled members? What will be the situation with such individual members? In this regard, the view of the Apex court in *G. Viswanathan Vs. speaker T.N. Authoritative assembly*[194] was that an expelled member is limited by the party's whip even after removal from the political party, and inability to abide by such whip would bring about disqualification of the member from the house. The important question – can anti-defection law be summoned only against the members who defect or resist its whip while still in the party or will it also apply to those members who have been removed from the party again came into consideration for the supreme court when Amar Singh and Jaya Prada were removed from the Samajwadi Party? In *Amar Singh Vs. Union of India* though the court at first held that the decision of the G.Viswanathan case will not be applied to their case[195] yet the larger bench of the apex court refused to re-examine the law set down in G. Viswanathan case and the decision of G. Viswanathan case still holds the ground[196]. This methodology of the apex court has made the provision of the tenth schedule obscure and dim. Considering the current situation, the researcher begs to submit that it is time to enquire into the questions raised in the Amar Singh case.

[194] (1996) 2 SCC 353
[195] Amar Singh vs. Union of India, 2010 (12) SC 451
[196] Amar Singh v UOI (2017) SCC Online SC 405

Dissent and defection: 'dissent' is a hallmark of vibrant democracy and isn't equivalent to 'defection.' There is an exceptionally thin line between an act of 'defection' and an act of 'dissent.' While all instances of defection would also include acts of dissent either sponsored by lure for office or for different contemplations which may not be called 'moral', however , the opposite isn't true for every case and all instances of 'dissent' don't really fall in line with the meaning of the term 'defection.' Under the current anti-defection law, an official can practice his dissent just in two circumstances – if the member takes approval from his party, or when the activity is condoned by the party within a time period of 15 days from the date of such conduct or voting. In such cases, he won't be viewed as a turncoat. Otherwise, even their valid dissent might be named as defection, and they might be disqualified from the participation of the concerned house. The ADL, which was carried out to check defection, has completely reduced the scope and importance of considerations and discussions in the house, particularly when a single party has a larger number of members in the house. A Bill can easily be passed in the house regardless of individual views of members of the ruling party and interests of their constituencies since abstention or casting a ballot against party's (whip) will be classified as defection. This also unfavorably influences participation in the house and increases interruptions and walkouts.

In a parliamentary framework, the objective of the representatives is to accomplish the conceivable interest of his/her constituency through effective deliberations and compromise, and with this in mind, intra-party dissent and democracy become urgent, which is seeing a precarious decrease in our framework across parties. Abraham Lincoln said that the "***government is of the people, by the people, and for the people," and since political parties form the core of the government so it can rightly be said that "political party is of the people, by the people, and for the people.***" The anti-defection law shifts the centrality of democracy from people to party and to the high authorities within the party. Thus, in essence, it is a yellow flag on democracy and has failed to check defections.

5.2 Suggestions

In the wake of considering the above study on the researcher begs to present the following suggestions:

1) Adjudicatory Power under tenth schedule : The researcher prescribes an amendment to the tenth schedule of the constitution which will vest the ability to settle the

question of disqualification under the tenth schedule , in the president or the governor (as the case may be) who would act on the advice of the election commission. This change of vesting the ability to decide the matters dealing with defection in the president/governor would also help in safeguarding the integrity of the speaker's office.

2) Definition of words "Voluntarily giving up membership": The words Voluntarily giving up membership of political party should be exhaustively defined in the explanation.
3) Issuance of Whip or Direction under tenth schedule ought to be restricted to decisions on which the stability of the government depends such as confidence motion, finance bill and not in every other case. It will reduce the interference with the member's freedom to vote in the house. However, to prevent corruption in voting, a provision should be made that where a member of the political party decides to vote against the party, he must have valid reasons, and he should give the reasons in writing to the chairman or the speaker as the case may be.
4) Specific time limit for decision: The tenth schedule ought to be revised, and arrangement ought to be made that any disqualification petition under the tenth schedule on the ground of defection ought to be heard and decided within a reasonable period and shall in no case exceed one year.
5) If a member decides to voluntarily give up his membership, then instead of conducting the by-polls, the other candidate who got the highest number of votes next to such a member at the elections should be declared elected automatically. This measure would act both as a check as well as punishment and would deter members from taking their membership for granted and encashing it for money and other material gains.

The issue of defection should not be seen in isolation. It is not an issue that can be resolved with single legislation; it requires perpetual measures from the government and people's careful vigilance. Defection is a problem that requires a systematic and long-term solution. The undemocratic functioning of political parties is the root cause behind defections. It is suggested that the logic that applies to the system of democracy should also apply to the internal affairs of the political party organizations themselves.

The NCRWC, in its Report on “Electoral Processes and Political Parties”[197] and the 1999 Law commission Report,[198] strongly recommended institutionalizing and making of a regulatory framework governing the internal structures and inner democracy of parties. These suggestions were made on the premise that a political party "can't be an autocratic inside, and democratic in its working outside. Aside from the reasons given before, the NCRWC suggested: "The standards and by-laws of the political parties looking for enrollment ought to incorporate arrangements for (a) A declaration of adherence to democratic values and norms of the constitution in their inner party organizations."

Inspiration can be taken from the law operational in Germany in this regard**.** With the inception of the German constitution (the Basic Law) in 1949, Germany turned into the principal European country with a constitution that regulated its political party to safeguard democracy. article 21 of the Basic Law works with the guideline to organize the political parties to adhere to democratic standards and states:

"(1) Political party will take part in the development of the political will of individuals. They shall be freely established. Their inner association should conform to democratic based standards. They should openly account for their resources and the utilization of their assets.

(2) Parties that, by reason of their behavior or the conduct of their followers, look to subvert or abolish the democratic-based order to jeopardize the existence of the Federal Republic of Germany will be unlawful. The Federal constitutional court will be the authority to rule on unconstitutionality.”[199]

It is open to India to follow Germany's example and to formulate a law ensuring internal democracy within political parties, which includes provisions governing internal elections, candidate selection, secret ballots, and provisions ensuring that valid dissent is not hampered. Where the members within the party are not discriminated against and the organization as a whole functions in adherence to a democratic standard. Such a step would, in the long run, help in reducing the problem of defections which is a bane of democracy.

[197] Supra note 5.
[198] Supra note 5.
[199] Electoral law reforms 2015 (https:// lawcommissionofindia.nic.in/reports/report255.pdf).

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