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WAKA JUMPING: SCRUTINIZING THE ANTI- DEFECTION LAW IN INDIA

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PART I

I,1 Introduction

"In Democracy, Governments will come and go, parties will form and fall. But our nation must remain united, our democracy must remain eternal". These words were spoken when the then prime minister Atal Bihari Vajpayee, a renowned leader, had lost support to his government by ONE vote in the Lok Sabha. The will of the people in a democratic system is expressed through voting in the general elections. People either vote for their preferred party or candidate and thus, these votes are quintessential to the working of the government system. Political parties give concrete shape to divergent ideologies and are essential for the success of any democracy. However, defections are a matter of concern for the party system and of late, they have specifically been a concern in various states such as Maharashtra, Madhya Pradesh, Assam and Goa.

There have thus been multiple scenarios in India, where Governments, on account of the elected officials, have betrayed their own parties and joined other parties in the house.This process whereby a person abandons or withdraws his allegiance or duty towards his own party is called defection.[1] Customarily, this event has been referred to as 'floor crossing', owing its origin to the House of Commons in Britain, where a legislator changed his party when he crossed the floor and moved from the Government to the opposition side[2]. Although the phenomena of defection are more common to coalition governments, as in such governments no party commands a

[1] https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf

[2]G.C. Malhotra, *Anti Defection in India and the Commonwealth*, PARLIAMENT OF INDIA LOK SABHA DIGITAL LIBRARY (Mar. 2005), https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf.

majority, some parties agree to form a coalition government on the basis of a common minimum programme. Sometimes, political parties even form a pre-poll alliance. In such a situation, defection by a few members reduces the coalition government into a minority. Defection may take place on various grounds, but be that as it may, defection or changing of affiliation is a political reality in a democratic polity and more so, in a parliamentary polity.

The effects of defection are (not limited to) the following:

1. It reduces the confidence of the voters in not only the candidate but the political party on a whole.
2. This in turn affects the entire democratic framework as this brings a situation wherein the faith of the people is shaken and therefore, they would refrain from the fundamental exercise of voting that is the backbone of the country's governance.
3. More often than not, it is unfair to the party from which the candidate defects if it is based on money consideration and not individual decision making.
4. It leads to enhanced corruption and related unfaithful practices which destroy the foundations of democracy.

Thus, the paper aims to understand the anti-defection system in the country and the robustness of the same.

I.2 Research Statement

The paper is an attempt to primarily analyze the effectiveness of the Anti - Defection mechanism present in India. The paper mainly delves upon the contentious constitutional issues pertaining to the law related to combating the problem of defection within the political framework of the country and suggestive modifications in the existing system to deal with the problem effectively by means of analysis of other anti defection models prevalent across the globe.

I.3 Literature Review

Elaborate studies have been made in the field of anti-defection law in India. Some of these studies have limited their scope to identifying problems related to the legislation, problems/ issues arising out of the present law, areas which need to be addressed.[3] The problems have been analyzed at length in various notable works by authors after carefully setting forth judicial pronouncements related to the same as well. Thus, there was sufficient data available by notable authors regarding challenges, constitutional issues, pronouncements and some suggestions in line with those.[4] An extremely elaborate study has been done to cover all aspects pertaining to defection including the global position on the same, instances of defection, statistical data to support it.[5] The present research paper only takes a step ahead in line with all these noteworthy works by authors by covering present instances and dealing with "defection on the rise" and the suggestive remarks of authors to counter this menace which still persists. Some constitutional concepts which have gained prevalence only later in time than the works of these authors above have also been highlighted in the context of the anti-defection law as a means to strengthen the position that the instant paper tries to vouch suggestively, i.e.- *the amendment of the law* suitably.

PART II

II.1 JAMMU KASHMIR- A Paradise on earth where defection law is stringent

[3]Anirudh Barman, *The Anti Defection Law- Intent and Impact Background note for the conference on effective legislatures*, PRS LEGISLATIVE RESEARCH (Nov. 23, 2009),

https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370583077_Anti-Defection%20Law.pdf.

[4]Sakshi Rewaria, *Analysis of Anti Defection Laws in India*, LATESTLAWS (Jul. 2018),

https://www.latestlaws.com/wp-content/uploads/2018/07/The-Anti-Defection-Law-in-India-By-Sakshi-Rewaria.pdf.

[5]G.C. Malhotra, *Anti Defection in India and the Commonwealth*, PARLIAMENT OF INDIA LOK SABHA DIGITAL LIBRARY (Mar. 2005), https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf.

A case study to elucidate an effective functioning of defection law in the country itself can be done by taking into account the state of Jammu & Kashmir, which had its own constitution in place before the repeal of Article 370 of The Constitution of India, 1950, deriving powers pursuant to this, were several legislations, one such being the Jammu & Kashmir Representation of People Act, 1957. An amendment to the said act was made to include provisions associated with defection. Section 24-G in particular deals with the provisions as to political defections at large. The Act thus provides provisions for disqualifications on similar lines as the tenth schedule of the Indian Constitution, clauses similar to the latter in the sense of grounds for disqualification, the schedule being the 7th Schedule has since been added to the Constitution of Jammu and Kashmir, in the year 1987. It is also pertinent to mention that even after deletion of the split provision from the defection law in central legislation[6], it existed for long in defection laws of the state until the 13th amendment to the constitution of Jammu and Kashmir was enacted in 2006, during the tenure of Ghulam Nabi Azad as chief minister, which omitted the provision of a split in legislature parties.[7] The central idea of interest is that in the case of Jammu and Kashmir's defection law if any question arises as to whether a member of the House has become subject to disqualifications within the ambit of the seventh schedule under the provisions of the law, the question shall be referred for the decision of the Leader of the Legislative Party to which such member belongs and his decision shall be final. Where the question which has arisen relates to a member belonging to a political party that has not elected any leader of its Legislative Party, the question shall be within the prerogative of the speaker or the Chairman, as the case may be and his decision shall be final. The benefit of such stringent law in place has simply been predictable- there has been no case of defection reported so far in Jammu and Kashmir. Anti-defection law being dynamic, the efficacy of the law is subject to the condition that it is tested and tried, thereby leaving scope for improvements to carry on with evolution vis-a-vis time.[8]

[6]INDIA CONST. arts. 75 and 164, and sched. 10, *Amended by* The Constitution (Ninety-First Amendment) Act, 2003.

[7]G.C. Malhotra, *Anti Defection in India and the Commonwealth*, PARLIAMENT OF INDIA LOK SABHA DIGITAL LIBRARY (Mar. 2005), https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf.

[8]THE INSTITUTE OF COMPANY SECRETARIES OF INDIA, https://www.icsi.edu/media/webmodules/Jurisprudence%20Interpretation%20and%20General%20Laws.pdf (Lasted Visited Feb.12, 2021)

II.2 VOLUNTARILY GIVING UP-the most controversial and important term in nexus with anti-defection laws

In the year 2008,[9] it was alleged that Shri Bishnoi, a member of the Indian National Congress, often criticized the Congress government publicly and had demanded the dismissal of the Haryana state government. The Speaker held that an individual getting elected as a candidate of a political party also gets elected on the basis of the programs of the party and thus, must return to the electorate.

The above represents a classic example of how a candidate simply goes against his own party, the extents being kept in mind too, the rationale behind having an anti-defection law is very clear from the speaker's point of view herein, the same manifests what masses expect out of a parliamentarian in a popular democratic system- "manifesto politics" and not "individual politics". In this regard, the explanation to part 2(1)(a) of the tenth schedule[10] has always been a matter of deliberation. Part 2 (1) (a) of the said schedule deals with disqualification of a member on the ground of "voluntarily giving up" his membership. A renowned jurist has expressed that anti-defection law has failed to achieve its purpose because of two major reasons in the forefront- firstly, the "erroneous" or insufficient judgements given by the courts in this regard (this has been dealt with in the later part) and secondly the lack of weak ideological commitments in the Indian political system.[11] The massive defections in Indian history imply a lack of adherence to the constitution, manifesto ideologies and only going after selfish political interests and motives.

[9]Anirudh Barman, *The Anti Defection Law- Intent and Impact Background note for the conference on effective legislatures*, PRS LEGISLATIVE RESEARCH (Nov. 23, 2009), https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370583077_Anti-Defection%20Law.pdf.

[10] INDIA CONST. Sched. 10.

[11]Faizan Mustafa*, Rajasthan High Court's interim order in Sachin Pilot case raises serious questions,* THE INDIAN EXPRESS (July 31, 2020)

https://indianexpress.com/article/opinion/columns/rajasthan-govt-political-crisis-ashok-gehlot-sachin-pilot-congress-assembly-session-6531498/.

One of the most integral aspects in relation to this is understanding the term "voluntarily giving up" provided in the tenth schedule. In Vishwanathan's judgment, it has been clearly laid down that the term 'voluntarily giving up' would include both- expressly or impliedly giving up[12]. Thus, it does not necessarily mean giving an express resignation, implied conduct that would suggest that a party member is going against his own party, is sufficient to constitute "giving up" in the sense of the term. Further, it has also been expressed that the term "voluntarily giving up" is in fact, wider than resignation.[13] In another case, it has been held that if a person contests a parliamentary election from a party other than the one from which he got his ticket within the state legislature, it'll be held as "voluntarily giving up" within the clutches of para 2(1)(a) of 10th schedule.[14] It is also very pertinent to note here, that this casts a reverse burden of proof- i.e. the person against whom such disqualification proceedings are initiated shall prove the absence of intention of voluntarily giving up if it is present. The Supreme Court of India has interpreted that the term voluntarily giving up is not synonymous with resignation and thus has a wider meaning.[15] In the Shrimant Balasahib Patil case[16], the interplay between the resignation and disqualification of a member from the legislature was examined, the Supreme Court held that a later act of resignation does not nullify a prior act that attracts disqualification. If disqualification proceedings were to be rendered infructuous by merely resigning, any member on the verge of being disqualified would immediately resign and escape the sanctions of Articles 75(1-B), 164(1-B) and 361-B, thereby defeating the intention of the Tenth Schedule and frustrating the spirit of the 91st Amendment. Inference may be drawn from the conduct of a member that has voluntarily given up his membership of a political party while he has not tendered a formal resignation.[17] Another case[18] expanded the ambit of the phrase 'voluntarily giving up membership', where it was observed that a letter by an elected party member to the Governor

[12]G. Viswanathan & Ors. v. Hon'ble Speaker Tamil Nadu Legislative Assembly & Ors. (1996) SCC 2

[13]Ravi S. Naik vs Union Of India, 1994 AIR 1558.

[14]Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council, (2004) 8 SCC 747.

[15]Ravi S. Naik vs Union Of India, 1994 AIR 1558.

[16]Shrimanth Balasaheb Patil vs Hon'ble Speaker Karnataka,WP (CIVIL) NO. 992 OF 2019.

[17]Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council, (2004) 8 SCC 747.

[18]Rajendra Singh Rana v. Swami Prasad Maurya and Others, 2007 (4) SCC 270.

requesting him to call upon the leader of the opposite party to form a Government, would by itself amount to an act of voluntarily giving up membership of the party of which he is an elected member. Along the same lines, the court held that a speech by a member in a public meeting that belongs to another political party by heart would also be encompassed within the said expression.[19] The Committee of Privileges in the 8th Lok Sabha to which the matter was allocated, in the sense of a preliminary enquiry by the Speaker, carefully elucidated the term "voluntary giving up membership" by expressing the view that the term to connote only resignation would be a very narrow interpretation, thus the conduct of the politician also being notable in this regard. The same was relied upon when the chief whip of CPI (M) submitted a petition against Prof. R.R. Pramanik, MP, whereby it was contended that any overt or covert act in the nature repellant to the directives of the party or abandonment attracts the said provision. An analogy can be drawn from the Company Law where a Director even after resignation is held accountable for his previous acts under Section 168 (2) of the Companies Act.

II.3 SPEAKER- The sole arbitrator?

There is an endless debate as to who is powerful, the King or the King Maker? Some would say King, others say the Kingmaker, whatever the case is there would be a power tussle and differences of views on it surely. The speaker in the house bears resemblance to the king, specifically in the aspect where everyone obeys him and all proceedings are conducted under his directions. He is elected by the representatives of the house on the order of the whip who works on behalf of the Chief Minister who can be considered as the kingmaker. The constitution of India makes provisions for the speakers of the central government and state governments respectively. The issue with the extra powers which even run unfettered in this aspect as regards the speaker also flows from another important article in this regard- Article 19[20].

[19]Shri Avtar Singh Bhadana v. Shri Kuldeep Singh, Indian National Congress, Lok Sabha Bulletin, Sept. 10, 2008.

[20]INDIA CONST. art. 190.

A very interesting but embarrassing issue arose in Goa in the case of Dr Kashinath G Jalmi vs The Speaker[21], the Chief Minister of Goa was disqualified from the house by the speaker of the house on grounds of defection. Later on, the speaker was removed from the office and the deputy speaker started functioning as the speaker who then reviewed the order of the removal of the CM and invalidated the said order. The Supreme Court quashed the order of the deputy speaker on the ground that the schedule has not provided the power of review to the speaker, testimony to the same is rendered by the Congress MLAs defection recently. Since the 22 MLAs resigned, naturally, they ought to be disqualified because the requirement actually comes down to at least 76 MLAs, but the misuse of the Speaker's position is not a less known phenomenon and thus even the purpose for which the 91st amendment[22] was brought in, became futile.

Another criticism against the Speaker is that he might lack the legal knowledge and expertise to adjudicate such matters. In fact, two Speakers of the Lok Sabha, one being Mr Rabi Ray in 1991 and another being Mr Shivraj Patil in 1993 have themselves expressed doubts on their suitability to adjudicate upon the cases related to defections. There arose a very bad case of confrontation between the supreme court and the speaker of the Manipur assembly. There was the disqualification of several MLAs under the anti-defection law. The supreme court invalidated this action of the speaker upon application by a member. The speaker pleaded immunity from the court process being the speaker. A notice of contempt was thus issued and proceedings initiated. After several adjournments at the end of February 5, 1993, the court ultimately directed the central government to produce the speaker before it by using minimum force against him if necessary. The court held that the speaker was totally misconceived, holding himself immune from the court process. The court even expressed discontentment over the fact that the speaker, despite being such a superior constitutional authority in this case had chosen to voluntarily ignore the constitutional mandate as also the principle of article 141 and the rule of law as being superior to everyone.[23]

[21](1993) AIR 1873.

[22]INDIA CONST. arts. 75 and 164, and sched. 10, *Amended by* The Constitution (Ninety-First Amendment) Act, 2003.

[23]MP Jain, Indian constitutional law 71 (6th ed. 2013).

In a case,[24] The court held that the speaker cannot review his own decision on disqualification of any member. In another case,[25]the court opined that no branch is supreme and it is the duty of the court to ensure that all branches conform to the constitution but the manifest defect is that the speaker is nominated by the ruling party due to which he is psychologically biased towards them and thus expressed that it is likely that his decision will be tainted by the colours of his party's will.

Mr K.P. Unnikrishnan also remarked on this aspect by condemning the fact that the speaker, in such cases, becomes the sole repository of all power. The Hon'ble Supreme Court upheld the order of the Speaker on the aspect of the disqualification but set aside the part that said that the disqualified members could not re-contest in elections[26]. The problems manifest themselves when petitions are rendered infructuous as a result of the dissolution of the house or due to the consequential effect of such delays as has happened in the recent instance of the state of Rajasthan. The Court also held that although both resignation and defection end in the vacancy of seat of the Member, the consequences that follow are varied to the effect that mere submission of resignation by a Member does not invalidate the fact that there are disqualification proceedings against him, will not affect or change the course of the already initiated proceedings. The Hon'ble Court also took to shed light on the fact that there indeed is a growing trend of the Speaker not acting impartially which goes against the nature of responsibility bestowed upon him. It also said that the corrupt practices associated with defection deny the citizens of a stable government, and hence there is a need to consider strengthening certain aspects of the concerned laws so that such undemocratic practices are kept in check. These unsavory and unfortunate incidents have occurred after the enactment of the anti-defection law which shows that there is a serious review needed and several loopholes need to be corrected so as to prevent misuse of power and authority by the officials.

[24]Dr. Kashinath G. Jhalmi v Speaker, Goa Legislative Assembly, (1993) AIR 1873.

[25]Powell v McCormack, 395 U.S. 486 (1969).

[26]Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly, WP (CIVIL) NO. 992 of 2019.

A Quia Timet action has been defined in Black's law dictionary as "Quia Timet": because he fears or apprehends. As in the context of anti-defection laws, this action would be any circumstance that prevents the speaker from taking immediate action. This is permissible only in cases of interlocutory disqualifications or suspensions which may have grave, irreversible repercussions and consequences. However, when a quia timet action is not allowed, the consequences are such that the disqualification petitions are kept pending in most of the cases as disqualification of the MLAs would bring down both the total strength of the House, as well as the incumbent government headed by the Chief Minister and a minority government, is allowed to continue to remain in power as the Speaker refused to follow the provisions of the Tenth Schedule and claimed immunity from any judicial order in consonance with Article 212. [27]

II.4 WHIP- the ringmaster in the House & a critical appraisal of The Kihoto Case[28] in this regard

Earlier the term whip was nowhere defined within the Constitution of India or rules of procedure of either of the houses of parliament. However, after the 52nd Amendment Act, 1985 Xth Schedule to the Constitution of India was incorporated, wherein the word 'whip' can be found in para 2(1)(b) of the schedule. Upon bare reading of the para, it states that when a member defies the whips command and doesn't seek requisite permission to do otherwise, then such a member is disqualified for defying the whip. The focus of the provision is on party loyalty rather than on one's individual decisiveness. This makes the position of the whip almost analogous to a ringmaster in a circus who uses a whip to tame all the animals to perform according to his wishes. The whip, therefore, acts as a bilateral channel for information flow between the party leader and its members who act as an officer of the parliamentary party or group responsible for enforcing the attendance of its members, keeping them informed on party issues and from time to

[27] Diva Rai, *Anti-Defection, Role of Speaker and Quia Timet Action,* BLOG IPLEADERS (Feb. 11, 2021, 3:24 AM), https://blog.ipleaders.in/anti-defection-role-of-speaker-and-quia-timet-action/amp/.

[28] Kihoto Hollohan v. Zachillhu, 1992 SCR (1) 686.

time issuing necessary directives or to adhere to party discipline in the matter of voting on particular issues[29].

The outcome of the Kihoto case[30] has made frequent use of whips in parliamentary politics for nearly everything. Under the pretense of integral policy programs, parties have issued directions to their members for inconsequential matters, the non-observance of which continues to attract disqualification under Schedule X. The Karnataka Assembly provides a sordid example of when BJP legislators were disqualified when they defied a party whip directing them to vote in favour of a particular member for the post of the Speaker of the Assembly.[31]It is further pertinent to note that a Whip issued by a political party to vote in favour of a candidate not belonging to it in the Rajya Sabha election is not valid as it is not a matter relating to a proceeding of the House, and the member violating such whip cannot be identified because of secrecy of votes cast in the election, hence it doesn't attract X schedule[32].

Further, the scheme of the section is such that it prevents members to think independently on certain issues important to their constituency which the party necessarily doesn't agree on. The Kihoto case failed to address any mechanism to challenge a whip issued outside the constitutional purview. It failed to issue instructions to Speakers to keep the court's observations in mind while deciding upon a defection petition.

Two harms emerge from this:

1. It does not check the disqualification of members for non-observance of whips in trivial matters. This was reflected recently when Mamata Bannerjee issued an informal whip, directing TMC MLAs to vote for Mr Trivedi, their candidate for the Rajya Sabha.[33] Though the defiance

[29]Kartik Khanna & Dhvani Shah, *Anti-Defection Law: A Death Knell For Parliamentary Dissent?* 5 NUJS L.Rev. 103 (2012).

[30] Supra note 28.

[31]D. Sudhakar v. D.N. Jeevaraju, (2011) 3 Kant LJ 437.

[32]Ananga Udaya Singh Deo v. RangaNath Mishra, AIR 2001 Ori 24.

[33] Kartik Khanna & Dhvani Shah, *Anti-Defection Law: A Death Knell For Parliamentary Dissent?* 5 NUJS L.Rev. 103 (2012).

of such a whip may not attract disqualification proceedings, few would dare to defy such a direction and risk inviting the wrath of the party leaders, who have the sole discretion to invoke the protection under the Tenth Schedule[34] to either initiate the disqualification procedure or condone a member's actions.

2. The lack of formal regulations in the case of whips means that a member can challenge a wrong whip after the disqualification process, on the grounds of unconstitutionality of the law only, thereby frustrating the purpose of the issuance of the whip because such a vague checking mechanism stipulated almost in the nature of an "ex post facto" check disables dissent on the floor of the house. This inability prompted Manish Tewari, Spokesperson of the Congress to initiate a Private Member's Bill in the Parliament.[35] The same has been discussed at greater length in the "Suggestions" part of this paper.

II.5 Issues pertaining to the Anti Defection Law

As is clear from the above paragraphs, there are inherently several aspects wherein the anti-defection law suffers fatally, however, there are issues (ongoing and otherwise) that plague anti-defection law and have formed the part of "challenges to anti-defection law". These have been discussed at length in this part.

II.5.1 HORSE TRADING - Anti-defection law motivating corruption in politics

Horse trading under political ambit means when a very ambitious political party tries to poach people from other political parties to gain a majority in the house to consolidate power. Such attempts are made by making huge financial offers, ministerial positions or anything unethical or unconventional. The benefit that comes is that the members are told to resign or not show up for voting on the motion of confidence in the house, so the number of votes needed to prove a majority is not attained. This practice was corrected by an enactment of legislation; however,

[34] Supra note 9.

[35] The Constitution (Amendment) Bill, 2010, No. 16 Bills of Parliament, 2010 (India).

people have found to subvert the provisions of law by carefully navigating their way through them[36].

A very famous case[37] in depth examines the corruption and bribery issues in nexus with voting. This case concerned a no-confidence motion initiated against the P.V. Narasimha Rao-led coalition government in 1991. The government survived the challenge by a margin of 14 votes. After the voting, it was alleged that bribes had been given to members of Jharkhand Mukti Morcha and supporters of Janta Dal, to help defeat the motion under Art. 105. The said Article provides that no member can be held liable in court in respect of anything said or any vote cast in Parliament. This case is a classic example of how defection leads to corruption and how India's anti-defection law does not meet the needs.

Since the last few years, this practice has become more prevalent in states such as Goa, Maharashtra, Madhya Pradesh, Rajasthan and Karnataka to name a few. It presents a sorry state of affairs when such situations occur as the politicians are taken to hotels and kept isolated from everyone till the day of no confidence. Overall, it portrays a scene similar to a tv soap opera with several twists and turns. It is necessary that a mechanism is put in place as this practice betrays the principles of democracy. The people's trust in democracy is lost as they elect their leaders on the basis of their promises and work done or political affiliation. This changes when they change their position by betraying the mandate they got elected on.

II.5.2 Does the Anti-Defection Law stifle political freedom of speech and dissent?

The right to freedom of speech and expression under Article 19 (1) (a) of the Constitution of India is subject to reasonable restrictions under Article 19 (2). Paragraph 2 of the Schedule[38] provides that a legislator shall be disqualified from being a member of either House of Parliament or State Legislature, inter alia, if a member votes or abstain from voting in such House contrary to any direction or whip issued by the political party. The direct effect of the

[36]Vijay Laxmi, *Law regarding political horse-trading in India*,LEXLIFE INDIA (Jan. 28, 2021, 1:30 PM), https://lexlife.in/2020/04/09/law-regarding-political-horse-trading-in-india/.

[37]P.V. Narasimha Rao v. State(Cbi/Spe), Appeal, (crl.) 1207 of 1997.

[38]INDIA CONST. Sched. 10.

provision is that it violates the freedom of speech and expression of the legislators, which include the freedom to vote according to one's conscience- the backbone of parliamentary functioning or the basis of any deliberation in general. Therefore certain important questions arise pertaining to this aspect- 1. Does a citizen lose this right to being elected as a Legislator into the House? 2. Whether the restriction imposed on such freedom is permissible and is a reasonable restriction under Article 19 (2)?

The Anti-defection Law from the inception itself has been criticized for violation of Article 19(1)(a) and 19(1)(c) of the constitution of India. The issue figured prominently in the Wadala & Others Case (1987) in Punjab. On the question of the validity of the amendment[39] , on the ground that the Act takes away the freedom of speech of a member of a Legislature and is violative of the fundamental rights, the Punjab and Haryana High Court held the provisions of the Act valid except paragraph 7 of the Tenth Schedule. The hampering of parliamentary performance in this regard is another pertinent ramification to be noted. Essentially, in the Indian parliament, 27 per cent of the bills were debated for less than 5 minutes in a session in 2009 [40]. Further,it has been vehemently argued as to how the performance in parliament is already sabotaged by the lack of attendance and several other reasons which has developed almost in the nature of a convention.[41] Further, the role of a legislator is also to be analyzed on the touchstone of the "legitimate expectations" out of such a role- one of the main roles of a legislator is to freely vote in consonance with the ground reality which in turn is determined by the situation prevalent in the grassroot level he/ she is catering to.[42] It is of great relevance to note here that grassroot reality is different for different members falling within the same political party. An aspect very notable in

[39]INDIA CONST. arts.101, 102, 190 and 191, *amended by* Constitution (Fifty- second Amendment) Act,1985.

[40]Rohit Kumar, *Vital Stats: Parliament in 2009*, PRS LEGISLATIVE RESEARCH (Dec. 31, 2009), http://www.prsindia. org/administrator/uploads/general/1262663823~~parliament%20in%202009.pdf.

[41]Kartik Khanna & Dhvani Shah, *Anti-Defection Law: A Death Knell For Parliamentary Dissent?* 5 NUJS L.Rev. 103 (2012).

[42]Edmund Burke, *miscellaneous writings select works of Edmund Burke*, ONLINE LIBRARY OF LIBERTY (Sep.15, 2005, 09:39 AM),

http://fs2.american.edu/dfagel/www/Philosophers/Burke/SpeechToTheElectorsofBristol.pdf.

this regard is that parliamentarians have certain privileges[43] conferred to them under various articles of the constitution. Art. 105 of the Constitution elucidates the nature of the privileges. The scope of these privileges has been tested in courts before. It has been conclusively established that Art. 105(1) and its equivalent Art. 194(1) are parliamentary privileges and not fundamental rights.[44] It has been held that the extent of this privilege is much wider than any right vested in an ordinary person. The same has been opined in *M.S.M. Sharma Vs Shri Krishan Sinha*[45] Thus it is indicative that parliamentarians enjoy greater rights than ordinary citizens - members can, for instance, defame another without fear of censure. [46] Even assuming that voting is not placed on this pedestal; it is undeniable that voting is also a subject of a privilege under Art. 105(2). Further, a central perception as to how voting is tantamount to an expression of this preference[47] also forms a backing for the settled aspect that while the right to vote is a statutory right, the freedom to vote is considered a facet of the fundamental right enshrined in Art. 19(1)(a) of the Constitution of India, 1950- a tool for expression of sentiments, emotions etc.[48]. Extending this finding to voting in Parliament by the virtue of the reasoning that it marks the accomplishment of freedom of speech of the voter- *A restriction in the form of Paragraph 2(1)(b), however, stifles a legitimate avenue of dissent.*[49] Another fundamental issue in this regard is that expressing dissent in voting has been regarded as a sign of political instability and poor cohesion even the *Kihoto Hollohan* judgment cited several scholarly works which elaborate on this issue. An interconnected aspect that arises is the frequent issuance of whips by political parties in order to protect their interests for trivial matters or as a fake display of party cohesion-

[43] "privilege" has been defined in Webster's Third New International Dictionary as "a right or immunity granted as a peculiar benefit, advantage or favour; a peculiar or personal advantage or right especially when enjoyed in derogation of common right; a prerogative, a right or immunity attached specifically to a position or an office

[44]K. Ananda Nambiar v. Chief Secretary to the Govt. of Madras, AIR 1966 SC 657 ¶19.

[45]1959 AIR 395

[46]Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 69

[47]K.N. Subbareddy, Advocate v. Advocates Association represented by the Secretary of the Association, District Registrar of Societies Registration and Karnataka State Bar Council by its Chairman, (2009) ILR KAR 1697

[48]Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 69; People's Union for Civil Liberties. v. Union of India, (2009) 3 SCC 200.

[49]2 SUBASH C. KASHYAP, PARLIAMENTARY PROCEDURE: THE LAW, PRIVILEGES, PRACTICE AND PRECEDENTS (Universal Law Publishing Co. Pvt. Ltd 2000).

often a misuse.[50] His right to dissent is rarely or never exercised during voting. This is one of the reasons why the Law Commission recommended that the issuance of whips should be limited only to situations when the Government is in danger.[51] Unfortunately, the issuance of whips is not regulated in terms of any concrete legal framework and is at the mere discretion of the parties. This trend is disappointing particularly as it means that even those considered qualified to represent the public exercise no individuality and creativity in decision-making.

II.5.3 No judicial review

Article 13 of the constitution of India, 1950 may not necessarily define but clearly confers the quintessential power of judicial review, the same being the power of the judiciary to review and determine the validity of the law in question. The Supreme Court of India is thus vested with the great power wherein it can declare laws, orders, rules, regulations and so on as unconstitutional or constitutional. In the celebrated landmark judgement[52]Judicial review was held to be a basic feature of the Constitution and the Constitution cannot be amended so as to violate its basic structure. The doctrine was established in this case to save the constitution from being amended in such a way that it takes away people's freedoms and renders the judicial system toothless against which would allow the parliament to commit draconian acts harming the democratic values of India. In a notable case of Manipur[53], the position of the Speaker in the determination of disqualification has only been lamented as it does not rule out bias, even suggestion as to the constitution of a tribunal has been fairly stated in the same judgement.

II.5.4 Delays in disqualification (political vendetta of the speaker)

A delay in exercising the powers of the speaker regarding disqualification in accordance with the tenth schedule causes a lot of problems to the extent of frustrating the purpose of even having an anti-defection law in the first place. In a peculiar case in Andhra Pradesh, the defection

[50]Vidya Subrahmaniam, *From roaring lion to timid mouse*, THE HINDU (Dec. 17, 2016, 04:56 AM), http://www.thehindu.com/opinion/lead/article113668.ece.

[51]Law Commission of india, Reform of The Electoral Laws (170th, 1999).

[52]Keshavananda Bharati and Others v. State of Kerala and Another, AIR (1973) 4 SCC 225.

[53]Shri Avtar Singh Bhadana v. Shri Kuldeep Singh, Indian National Congress, Lok Sabha Bulletin, Sept. 10, 2008.

petitions kept on being delayed till the end of the very term in the Assembly in 2019. In a conference, Andhra Pradesh Legislative Assembly Speaker Tammineni Sitaram rightly remarked, "In some States, the presiding officer (Speaker) did not take up petitions filed under the anti-defection law for five years, leading to the natural death of petitions with the dissolution of the House". Failure to decide timely has even led to these 'disqualified' members becoming ministers. Pending disqualified petitions, what if these allegedly disqualified members become ministers, as it usually happens. On the other hand, pending disqualification for a long time, they are at continuous threat of consequences which affects their ability to perform efficiently with freedom if they're eventually given clean chit[54].

PART III

Suggestions & Concluding Remarks

Having elucidated in detail the problems plaguing the anti-defection law, the following are some suggestive measures to counter the menace.

III.1 An alternative mechanism- in light of constitutional morality

Considering the lacuna in the existing defection law, a possible way out can be procedural guidelines to aid the decision making of the speaker in this regard, the position in the Kihoto case[55]must be taken into consideration. The opinion that the speaker is a respectable member as per the parliamentary traditions, in light of the constitutional morality principle the concern can also be reconciled by effective guidelines issued to the speaker- by means of judicial pronouncement which would then be reflected in spirit in an all-encompassing binding parliamentary law. This is even manifested in the way Article 191 functions- for instance, clause 1 postulates a two-fold requirement for disqualification in terms of authorities to ensure fairness, the same should be extended to clause 2, considering the aspect that comparatively clause 1 is

[54]Team @ Law Times Journal, *Meaning and Relevance of Anti- Defection Law,* LAW TIMES JOURNAL (Feb.11, 2021, 12:00 PM), http://lawtimesjournal.in/meaning-and-relevance-of-anti-defection-law/.

[55]Kihoto Hollohan v. Zachillhu, 1992 SCR (1) 686.

more objective inherently- thus the same rationale will ensure objectivity in clause 2. One of the fundamental principles of constitutional morality has been the need to preserve the faith of the people in public institutions- the same must be aptly preserved with changing times.[56] Thus, alternative measures can be to understand that the role of the speaker need not be entirely demolished but assistance and aid in the form of guidelines to effectively discharge the same can definitely be given.

III.2 On the issue of the whip & curbing dissent:

The propositions by Tewari[57] on the "whip" issue are similar to the recommendations made by the Dinesh Goswami Committee on Electoral Reform[58] where it was suggested that disqualification must be imposed only in cases of vote of confidence or no-confidence motions. The solution deals with a constitutional amendment to limit the scope of Paragraph 2(1)(b).To the extent only if a member dissents against a whip issued in the motion

1. expressing confidence or want of confidence in the Council of Ministers,

2. for an adjournment of the business of the House,

3. in respect of financial matters under articles 113 to 116 and articles 203 to 206

4. Money Bill

By circumscribing the ambit of disqualification, this bill seeks to create greater room for political and policy expression in Parliament. Such a law would liberate legislators from arbitrary whip powers which lead to loss of their membership except in cases where the life of the government is threatened by a no-confidence motion, money bills and crucial financial matters.[59]This measure would act as an effective countervailing approach to the flaws in the Kihoto Case.

[56]Naz Foundation vs Govt Of NCT of Delhi, 160 DLT 277.

[57]Vidya Subrahmaniam, *From roaring lion to timid mouse*, THE HINDU (Dec. 17, 2016, 04:56 AM), http://www.thehindu.com/opinion/lead/article113668.ece.

[58]Dinesh Goswami Committee, Report of The Committee on Electoral Reforms (1990)

[59]B. Venkatesh Kumar, *Anti-Defection Law: Welcome Reforms*, 38 EPW 1838 (2003)

The Law Commission of India[60]has suggested an alternate solution that regulations on the issuing of whips be allowed in cases where the existence of the government was under threat.[61] This recommendation is at odds with Tewari's suggestions and observations of the Goswami Committee Report. The difference is that while the Tewari (in line with the Goswami Committee Report too), implicitly allows a whip to be issued in any case, it recommends that penalty by way of disqualification can only be imposed in limited circumstances. However, the Law Commission Report aims to restrict the very issuance of whips. Although, both the measures on a superficial understanding look conducive, the authors opine to the extent of the infringement of parliamentary independence, the Law Commission report fails to put forth a suggestion which deals with that aspect effectively. This can even be explained as the position put forth in the American jurisprudence which states that the associational rights vested in a political organization allow it to formulate its own rules of procedure and impose punishment for violating them.[62]. Any restriction on the issuance of a whip can amount to curtailment of the said rights to administer its own internal affairs. India too should allow political parties to initiate internal disciplinary proceedings for dissenting against a whip. It is more of an internal disciplinary matter and can be changed for the better in a like manner. In the light of this, it is the contention of the authors that Tewari's solution is more tenable and conducive. Drawing a difference between a normal vote of dissent and a dissent in terms of a no-confidence motion is an essential feature of this solution. The different implications of the two actions make it more compelling to deal with them differently. This would effectively counter the menace as well as keep stability intact.

III.3 On the issue of the powers of the speaker:

The speakers do not have to meet any particular educational qualification requirements and this might create problems in understanding the case and they might fail in their decisions. Multiple committees recommended that the power should be vested in the election commission, president

[60]law Commission of india, Reform of The Electoral Laws (170th, 1999).

[61]*Id.* at 56.

[62]Michael Stokes, *When freedoms conflict: Party discipline and the First Amendment*, 11 J. L. & Pol. 751, 753 (1995).

or governor and not speaker as chances of bias are greater. It is also necessary to establish additional qualifications for the speaker in the way of education also. In the case of Keisham Meghachandra Singh v. The Hon'ble Speaker Manipur Legislative Assembly,[63]it was held that the question of whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority while he de facto continues to belong to a particular political party needs to be reconsidered, and the Hon'ble Court suggested that the Parliament consider amending the Constitution to substitute the Speaker as the arbiter with a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, to decide such disputes more swiftly and impartially. This, they emphasized, would give real teeth to the provisions contained in the Tenth Schedule and its vital role in the bonafide functioning of our democracy. It was also suggested that the petitions for disqualifications be decided within a reasonable amount of time and should not be kept pending for long durations. The implementation of this would go a long way in preventing misuse of the powers of the Speaker. Amending the law and providing a time-bound mechanism would definitely enhance the accountability of the speaker in this regard.

IV. SUGGESTIVE MEASURES AND CIRCUMSTANCES OF OTHER NATIONS

It's necessary to curb the issue of political defection in India, solutions can not be only relied from the committee reports, but rather can be considered from other nations and commonwealth countries, as defection is not only a problem native to India.

BANGLADESH

In Bangladesh, for example, the constitutional provisions with regard to political defections are stringent and often called "dispute".[64] If any dispute arises as to whether a member of Parliament

[63]Keisham Meghachandra Singh v. The Hon'ble Speaker Manipur Legislative Assembly, Civil Appeal No. 547 Of 2020.

[64]BANGLADESH CONSTI. arts. 70 and 66(4); The Members of Parliament (Determination of Dispute) Act, 1980, rule 178(1),(2) and (4), No.1, Acts of Parliament, 1981 (Bangladesh).

has become the subject of clutches of condition in Article 70, the dispute is referred to the Election Commission to adjudge it finally and conclusively. The grounds for such reference of the member are either of the two: (a) being present in Parliament abstains from voting or (b) absents himself from any sitting of Parliament, in contravention to the directions of the party to which he actually belonged, he shall be deemed to have voted against that party.[65] It is provided that the Election Commission must give full effect to the provisions of clause (4) of Article 66 of the Constitution.[66] The reference of such a member has to be made by the speaker as suo-moto provisions do not exist. Any person or a member of the House can file a petition for disqualification against another member under the Members of Parliament (Determination of Dispute) Act, 1980 and under article 66(4) of the Constitution. If the decision of the Election Commission (within a fixed period as provided in the act) is that the member has become disqualified or should vacate his seat, as the case may be, the member ceases to be a member of Parliament. Once the decision is given by the Election Commission, it is final and no appeal lies thereafter. The most notable aspect is that even the speaker and deputy speaker receive no exemptions from the rules they are part of the parties they originally belonged to unless a dispute arises and the same is determined by the Election Commission otherwise.

SRI LANKA

The same is well-established in Sri Lanka where similar powers have been given to the Supreme Court. The constitution[67] provides for the Anti-defection Law in a manner that when a member ceases by way of resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper his name appeared at the time of his becoming such member of Parliament, his seat becomes vacant upon the expiration of a period of *one month* from the date of his ceasing to be such a member. However, in case of expulsion of a

[65]BANGLADESH CONSTI. art.70, cl. 1.

[66]The Member of Parliament (Determination of Dispute) Act, 1980, No.1, Acts of Parliament, 1981 (Bangladesh).

[67] SRI LANKA CONSTI. art. 99, cl. 13.

member, his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Supreme Court by petition in writing, and the Supreme Court upon such application determines that such expulsion was invalid. Such petition shall be inquired into by three judges of the Supreme Court who shall make their determination within two months of the filing of such petition. The vacancy shall occur from the date of such determination by the Supreme Court. Thus, the law subtly provides a check by means of the Supreme Court.

Conclusively, the innate efficiency of the system is measured not by "what the mechanisms are" but by how the people respond to it, which in itself is a very essential facet of popular democracy.[68]

UGANDA

Ensuring people also have a role to play in this procedure can be a way out, for instance, in Uganda, political defections in Uganda are not legally allowed. Article 83(1)(g) of the Constitution of the Republic of Uganda, 1995[69] provides that any member of Parliament who leaves the political party of which he stood as a candidate for election to Parliament and vacation of the seat by an independent member. Article 60 of the Constitution of the Republic of Uganda, 1995 further empowers people to adopt a political system by referendum- to ensure fairness in the procedure[70]. But how far is this practicable in India is a question open for deliberation.

UNITED KINGDOM

[68] S.G. Jaisinghani v. Union of India and Ors, (1967) 2 SCR 703.

[69]Constitution of Republic of Uganda, 1995, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf

[70] Constitution of Republic of Uganda, 1995, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf.

Another model that is often followed to deal with the issue of defection is not having an anti-defection law, for instance, in the United Kingdom, there are no laws or Standing Orders requiring members to register the party of which they are members or providing for any consequences if a member changes the party, even if they change party resignation is not required. Similarly, if a member is expelled from his party they would retain their seat. Seating in the House is governed by convention but such a member would normally sit separately from party members. [71]

CANADA

Similarly in Canada, there is no reference to the term 'defection' in the Constitution, the Standing Orders of the House of Commons or the Rules of the Senate. Public accountability and parliamentary spirit are well embedded in the Canadian parliamentary culture. The consequential changes in the seating are made by the Whip with a piece of subsequent information to the speaker. Similarly, if a member is expelled from his party or chooses to leave to sit as an independent, then the Speaker reassigns a new seat to the member. Where a member decides to cross the floor and sit with another party, his new party whip determines the seating arrangement for him. Every time the member announces his decision before the House and Speaker accordingly changes the seating in the appropriate way as possible. A split is deemed to have taken place when members request the Speaker to change the seating arrangements in the House so that they may sit opposite their former party or outside the bloc of seats reserved for it. The Senate is not an elected chamber. therefore,they need not necessarily belong to a political party. They can change their political affiliation after their appointment, and during their tenure in the Senate or remain independent.[72]

[71] https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf

[72] The Rules of the Senate have referred only to 'Government' and 'Opposition' and not distinguished on the basis of political parties. In 2002, the Senate adopted a report to accord official recognition to parties that are registered as parties under the Canada Elections Act at the time that recognition is sought in the Senate and have at least five members in the Senate.

PAKISTAN

One really notable model in this regard is that of Pakistan. The Constitution of Pakistan[73] lays down the grounds of defection on which a member of a Parliamentary Party in a House is disqualified. It provides for two clauses pertaining to a member of a parliamentary party composed of a single political party in a House- the first part postulates resignation while the second clause postulates voting in contravention to directions of the party however the same is limited by three-pointers herein- (i) election of the Prime Minister or the Chief Minister, (ii) a vote of confidence or a vote of No-confidence, or (iii) a Money Bill. It is the head of the political party from which he has defected to forward a copy of the declaration to the Presiding Officer and the member concerned. However, a reasonable opportunity is to be afforded to such a member by the former. The Presiding Officer of the House then refers it to the Chief Election Commissioner, who forwards the declaration before the Election Commission for its decision with a confirmation as a means of acknowledgement within 30 days of receipt. Where the Election Commission confirms such a declaration, the member ceases to continue as a member of the house. An appeal can be filed to the Supreme Court within 30 days of such an order. Therefore, not only is this model effective but is also in line with the suggestions of the authors above in all respects regarding review, having a definite time frame and most importantly the grounds is limited to only a few.

Furthermore, India has a parliamentary model of governance suitably coupled with the principles of federalism and judicial independence to have an all-encompassing *"Checks- and- balances"* system as no organ of governance is supreme. However, the independence of each of these organs should always be granted to an extent that there is no "fear" or "limitation" in the free discharging of obligations. Thus, measures that would absolutely limit parliamentary independence would not go a long way in the country, however, it is equally important to check

[73]PAKISTAN CONST. art. 63, cl. A.

the arbitrary working because power by its very jurisprudential nature is always subject to some responsibilities.[74]

PART 1V

CONCLUDING REMARKS

The defection in political parties is not a stench only in India but all over the world. The people of political parties owe their allegiance to an ideology, ideology based politics thus being the center of a democracy. Causes of defection can be many- one's ideology might not triumph over other ideologies, in terms of mass popularity or one might have serious internal conflicts with others from the party or a rival party might lure a candidate to leave the other party and so on. Whatever be the cause of defection, the answer to such behaviour lies in human psychology and tendencies and can be explained as the simple urge to assert one's dominance and emerge victorious. However, the repercussions are such that it might lead to abandonment of true goals and means. The repercussions of defections might not always be bad, but more often than not, they are. Often, the public is betrayed in terms of confidence it reposes in candidates along with the fellow party members when a candidate defects to another party. Hence, it is important to curb such problems. India being a large democratic nation, and having a large population, the problem of defection is portrayed to be complex in nature due to several people, ideologies, ethnicities,beliefs, and so on. Therefore, it is necessary to have stringent measures in India to curb defection. A compilation of some of the aforementioned suggestive measures into the anti-defection model as prevalent in India will make the system more stringent.

[74]A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th edn. 1985); Kumari Shrilekha Vidyarthi Etc v. State Of U.P. And Ors, 1991 AIR 537,