ANTI DEFECTION LAW IN INDIA: EMERGING ISSUES AND CHALLENGES

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Abstract

The Anti-defection law that penalizes the elected and nominated representative of the Parliament and State legislature for changing their Party affiliation after their elections was enacted to curb the evil of defection motivated by extraneous consideration, other than a genuine change of ideologies. Under the Tenth Schedule of the Constitution, the Political Parties for the first time accorded a constitutional recognition to their roles in the political process, and Presiding Officer of the House has been made adjudicator and guardians of rights and privileges of the House on the premises as the embodiment of Constitutional propriety and impartiality. The mandate to inquire and adjudicate upon the issues of disqualification is often visited by the aggressive or swift response or absence of it, on the part of the presiding officer of the House. Such action or inaction on the part of the presiding officer of the house, who has been constitutionally obliged with determinative jurisdiction under the Scheme of Tenth Schedule of the Constitution, has very often frustrated the very object of the Anti-defection law. After the repeal of the provisions relating to split in the original political party under the Tenth Schedule of the Constitution, the recent incidence in the States of Goa, Manipur, Karnataka, and Madhya Pradesh and the recent political commotions in Rajasthan have further complicated the entire Constitutional Jurisprudence of Anti-defection law. In this backdrop, the present paper attempts to present a holistic discussion on the subject of Anti-defection law under the scheme of the Constitution of India, particularly, in reference to the quasi-judicial authority of the presiding officer of the House and the judicial powers of the constitutional courts, pending the decision of the presiding officer of the House. Further, an analysis is also done for the apparent dichotomy between the anxiety on the part of the judiciary, in their attempt to ensure the laudable objectives of the Tenth Schedule of Constitution and 'the voice of dissent' which is one of the essential cardinal principle of democracy.

Keywords: *Anti-defection law, Constitution of India, Tenth Schedule, Power of Speaker, Power of Judiciary, Disqualification of an elected representative.*

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I. Introduction

IN INDIA from the very beginning, elections to the parliament and the State legislatures have been fought on party basis, and the electorates have always been impressed by the appeal of political parties based on their ideologies and programmes as incorporated in the election manifesto. But since mid-1960s India's experience with democracy witnessed a very unsavoury political development where many of elected representatives of the people in the parliament and State legislatures, in particular, have left the parties on whose party tickets they were elected and joined those very opponent parties. This unscrupulous floor-crossing was nothing else except for selling out of the sentiments of the electorates and thereby undermining of the very basis of democracy. The desire for influence, position, and cash was clearly behind this wonder[1] rather than based on any common ideological or honest political dissent.

The on-going issues of defection in spite the successful adoption of elaborate provisions in Tenth Schedule of the Constitution and numerous conflicting opinions by the various High Court and the Supreme Court, have witnessed new developments in the form of resignation by some of the elected members of the largest political party in the State and their consequent joining and contesting the by election from the Second largest political party. In this process of reducing the adequate strength of the House, thereby facilitating the Second largest political party to form a government as happened in the State of Goa, Manipur, Karnataka and Madhya Pradesh.

The recent issues in the State of Rajasthan have further complicated the entire Constitutional Jurisprudence of defection law regarding the power of the High Court to intervent especially when the matter is sub-judice before the Speaker of the House of the Court and more importantly, 'the voice of dissent' which is one of the most important cardinal principle of democracy is sought to be shut down with the threat of show cause notice of disqualification under Para 2(1) of the Tenth Schedule of the Constitution?

[1] J.K. Mittal: "Anti-Defection Constitution Amendment: A Critique", Vol. II *Corporate Law Review* 61 (1985) ; Soli J. Sorabjee : "The Remedy Should not Be Worse than the Disease" *The Times of India*, February 3, 1985.

In this backdrop the present paper will analyse the followings:

(i) To examine the meaning and scope of defection and how the law relating to defection has evolved in India?

(ii) To analyse the basic scheme and constitutionality of the Tenth Schedule of the Constitution of India.

(iii) To examine the scope of the power of Speaker/ Chairman of the House in cases of inaction or overt action for political exigencies.

(iv) To examine the lesson learned from recent political commotions in the State of Karnataka, Madhya Pradesh, and Rajasthan

(v) Concluding observation and suggestions, if any for Change.

II. Meaning and Evolution of Anti-Defection Law in India

The term defection has its genesis in the Latin word *'defectio'* meaning "an act of abandonment of a person or a cause to which such person is bound by reason of allegiance or duty, or to which he has wilfully attached himself[2]." Defection thus connotes as an abandonment of loyalty, duty or principle of one's leader or cause. It is simply "leaving the party and joining another."[3]In different parts of the world the phenomenon of defecting from a political party is known by different nomenclature- such as "floor crossing", "carpet-crossing", "party-hopping", "dispute", and "waka- jumping".[4] Thus, in parliamentary political life, it denotes a change of party affiliation or allegiance by a member of the legislature.

In Modern Indian politics has never been immune from the evil of defection. During British time, Shyam Lal Nehru[5] and Shri Hafeez Ibrahim, defected to join Britisher and Congress[6] respectively. During the First to Fourth General Election, approximately 542 instances of change of allegiance by elected representatives have been reported.[7]After the demise of Jawahar Lal Nehru and poor performance by the Indian National Congress at the national level since 1967, it led to a massive wave of defection at national and state levels. In this context,

[2] G.C Malhotra, *Anti-Defection law in India and the Commonwealth* (Metropolitan Book Co. Pvt. Ltd, 1st edn., 2005).
[3] *Balchandra L. Jarkiholi* v. *B.S. Yeddyurappa*, (2011) 7 SCC 1.
[4] Janda Kenneth, "Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments" 3 *The Legal Regulation of Political Parties,* Working Paper 2, This paper was prepared for delivery at the 2009 World Congress of the International Political Science Association held in Santiago, Chile, July 12-16, 2009, *available at*: http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf. (last visited on Sep. 22, 2020).
[5] Sudarshan Aggarwal, "Anti-Defection law in India", LXVII No. 1 *The Parliamentarian,* 22 (January, 1986).
[6] *Supra* note 2 at 4-5.
[7] *Md. Fajur Rahim* v. *Manipur Legislative Assembly*, 2019 SCC Online Mani 127 at 132 (para 17).

Handgrave and Kochanek noted that, during 1967-1983, there were more than 2700 recorded cases of defection in State Assembly, and Congress Party had been a major beneficiary as many as 1900 defection to Congress. The more disturbing fact was that as many as 16 State Government was brought down by defection in the year 1968.[8]

Undoubtedly, the lure of holding power played a dominant part in this 'political horse-trading' and the same was evident from the fact that "out of 438 defecting legislators from various states during 1968, 210 were rewarded with ministership."[9]

The Parliament has taken serious note of this type of 'horse-trading' and set up high-level committee in the year 1967, consisting of constitutional experts as well as the representative of political parties under Shri Y. B. Chauhan, to consider the issues of floor-crossing while describing defection as a "national malady which was eating into the very vitals of our democracy."[10]

The Committee on defection pointed out that, "The lure of office played a significant role in the decision of legislators to defect as the majority of them were included in the Council of Minister, which facilitated the frequent defection."[11] The committee recommended various measures incorporating ethical, political, Constitutional, and legislative options. The recommendations inter alia included that "the defectors may be prohibited from appointment as a minister at least for a period of one year or till such time as he resigned that seat from the house and got re-elected."[12]

To give effect to the recommendation of the Committee made for Defection, the two unsuccessful attempts was being made by the Constitution 32nd Amendment Bill, 1973 and the Constitution 48th Amendment Bill in 1979.The Election Commission in its "Report on the Mid-Term General Election in India" in 1968-1969 had expressed, "its anguish at the unethical practice of Defection which adversely affected the stability of the Government and sought

[8] Csaba Nikolenyi, "The Adoption of Anti-Defection Laws in Parliamentary Democracies" 15 No.1 *Election Law Journal*, 101 (2016).
[9] Subhash C. Kashyap, *Anti-Defection Law and Parliamentary Privileges* 2 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2nd ed., 2003).
[10] V.S. Ramadevi & S.K. Mendiratta, *How India votes: Election Laws. Practice and Procedure* (Lexis Nexis, 2nd edn, New Delhi, 2008).
[11] Arvind P. Datar, *Commentary on the Constitution of India* 2253 (Lexis Nexis Publication, Vol. 2, 2nd edn. 2010); Reference made to: Shri Y.B. Chavan Committee, *Report on Political Defections* (Ministry of Home Affairs, 1969).
[12] Gulab Gupta, "Anti-Defection law-An Introspection" 30 (IX) *CILQ* 127 (1966).

suitable amendments in the law"[13].[14] The President of India while addressing the joint session of the Parliament on seventeenth day of January 1985 stated that the Government intended to introduce a Bill to outlaw defection.[15] Fulfilling this promise, the Government introduced the Constitution (Fifty-second Amendment) Bill in 1985.

The Statements of Objects and Reasons appended to the Bill stated: [16]

"*The evil of defection has been a matter of national concern, and if it is not combated, it is likely to undermine the very foundation of our democracy and the principle which sustain it."*

The Constitution 52nd Amendments Act, 1985 amended articles 101, 102, 190 and 191 of the Constitution of India providing for vacation of seats and consequent disqualification from membership of the House and added Tenth Schedule to the Constitution providing for disqualification on the grounds of defection.

III. Basic Scheme of Tenth Schedule of the Constitution and Its Constitutionality

Articles 102(2) and 191(2) read with Tenth Schedule of the Constitution provides that any members of the Parliament and State legislature shall be disqualified from being members of the House in the following contingencies.

(i) "If elected members, who have been set up as a candidate by a political party or nominated members, who is a member of political parties at times he[17]takes his seat, voluntarily given up his membership of such political parties.

(ii) If he votes or abstain from voting in the House against any direction or whip of that political parties unless it has not been condoned by the party within 15th days from the date of voting or abstention."[18] Para 2(1)(b).

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[13] Election Commission of India, "Report on general mid-term elections" (1968-69), *available at*: https://eci.gov.in/files/file/7450-mid-term-general-elections-in-india-vol-i-1968-69/ (last visited on March 4, 2021).

[14] Sumit Mitra, Sumanta Sen, *et.al.,* "Congress Gears up for 1985 General Election" *India Today Magazine*, Jan. 31, 1984, *available at*: https://www.indiatoday.in/magazine/cover-story/story/19840131-congressi-gears-up-for-1985-general-elections-802717-1984-01-31 (last visited on Nov. 4, 2020).

[15] *Supra* note 2 at 9 (para 2).

[16] The Constitution of India (Fifty-Second Amendment) Act, 1985, Statement of Objects and Reasons, *available at:* https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-fifty-second-amendment-act-1985 (last visited on March 4, 2021).

[17] *Supra* note 19.

[18] The Constitution of India, 1950, Tenth Schedule, Para 2(1)(b):-

"2.Disqualification on ground of defection.—(1) Subject to the provisions of paragraphs{ * *} 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—*

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either

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

(iv) A nominated member of the house shall be disqualified for being member of the house if he joins any political parties after expiry of Six Months from the date on which he takes his seat in the House. Para 2(3).

However, the disqualification on the ground of defection shall not be applicable in the following cases.

(i) Split in Political Party: "If a member of the Parliament or State legislature goes out of his party as a result of a split in the party provided such groups consist of not less than 1/3rd of the total membership of that party in the House.

This provision became boon for mass defection in cases of smaller political parties and ultimately repealed by the Constitution (Ninety-first Amendment) Act, 2003.[19] ".
Subsequently, the Supreme Court in *Rameshwar Prasad* v. *Union of India,*[20]remarked as thus:[21]

> By the 91st Amendment, defection was made more difficult by deleting the provision which did not treat mass shifting of loyalty by one-third members as defection and by making defection altogether impermissible and only permitting the merger of the parties in the manner provided in the Tenth Schedule

(ii) Merger of Political Parties: If original political party merges with another political party, provided not less than 2/3rd of the members of the legislative parties concerned have agreed to such mergers. (Para 4)

The provisions relating to merger hereby recognizing the scope of a genuine shift in political ideologies or alignment of smaller political parties, which may provide much-needed stability to the government of the days. In this way, it is clear that conjoint reading of Para 2(1) with

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case, the prior permission of such political party, person or authority, and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention."

[19] The Constitution (Ninety-First Amendment) Act, 2003, *available at*: https://www.india.gov.in/sites/upload_files/npi/files/amend91.pdf (last visited on July 14, 2020).

[20] (2006) 2 SCC 1 at 87 (para 76).

[21] *Id*., at 87 (para 76).

Para 4, the Parliament expected that *"Legislative party must be dealt with independently from the political party to see whether there is a merger."*[22]

Para 4(2) uses the expression that the mergers of the original political group of an individual from the House "will be deemed to have occurred." The words "will be deemed to have occurred" make a lawful fiction by consolidating a considering arrangement.

Speaker Responsibility in contested claim of voluntarily given up membership and merge with other political party:

In interpreting the Scope of Para 4 and Para 2 of Tenth Schedule, the very significant Constitutional issues have arisen as to how the Presiding officer of the House will exercise their power, when there is a counterclaim of 'voluntarily given up membership' of the Political Parties and claim of merger under Para 4 was presented to Presiding officer of the House simultaneously?

In *Rajendra Singh Rana* v. *Swami Prasad Maurya*[23] case 13/109 members of *Bahujan Samaj Party (BSP)*requested the Governor to invite *Samajwadi Party(SP)* to form the Government after BSP Government requested dissolution of assembly. BSP filed petition seeking disqualification of said thirteen members under Para 2(1)(a) of Tenth Schedule of the Constitution on the ground that they have voluntarily given up membership of their original political party[24]. Thereafter, 37 members including these 13 members of BSP claimed split in BSP comprising of 1/3rd of total members of BSP legislative party[25].

The issues before Court was whether the Speaker could keep petitions for disqualifications under Para 2 at abeyance and firstly decide the claims under Para 3 or 4, both arising out of the same political exigency? Incidentally, the Speaker of the Assembly took an unprecedented turn by accepting the claim of 37 members under Para 3 while keeping petitions under Para 2 pending[26].

Petitioners contended that Tenth Schedule does not contemplate a separate adjudication of claims under Para 2 and Para 3 or 4. The claim of the split was only in the nature of defense

[22] *Baljit Singh Bhullar* v. *Speaker Punjab Vidhan Sabha*, 1997 SCC Online P&H 788.
[23] (2007) 4 SCC 270.
[24] *Id.,* at 286 (para 14).
[25] *Ibid.*
[26] *Id.,* at 288.

while adjudication of petitions for disqualification under Para 2.[27] On the contrary, the respondents stand was that the Speaker was absolutely correct in keeping the petitions under Para 2 as pending and accepting the claim under Para 3 for the reason that the Tenth Schedule nowhere limits the power of independent exercise of mind under provisions of split and merger.[28]

The Constitution Bench of the Supreme Court comprising of Five Judges through Justice P. K. Bala Subramanyan convincingly favoured the claims of the petitioners and pointed out that the real intention behind the Tenth Schedule cannot be construed independent and free from the article 102 and 191 of the Constitution pertaining to disqualification of a member. The Speaker sits as a quasi-judicial institution and enjoy qualified immunity under Para 6(1) and is required to decide whether a member rendered himself for disqualification finally, and while acting likewise, the defected member has right to show that he is saved by Para 3 or 4 hence Para 2(1) not attracted. *One may call it a defence or whatever,* but it is certainly open for him to plead that he is entitled to have the benefit of the provisions of split or merger[29]. Further, if we accept the submissions of the Respondents, it would lead us to an untenable position as the move to accept a claim under Para 3 or 4 would result into, petitions for disqualifications being rendered as in fructuous, and therefore cannot be said as kept at abeyance or pending adjudication.

Thus, under the scheme of articles 102 and 191 and Tenth Schedule of the Constitution, the whole proceedings gets initiated as a part of disqualification proceedings and hence determination of the question of split or merger cannot be divorced from the application before presiding officer of the House seeking disqualification of members from the House[30].

Therefore, it is submitted that, the presiding officer of the house acting as tribunal is not having independent power to decide the question of split or merger independent of plea seeking disqualification under Para 2(1)(a). Any such approach would defeat the very purpose of anti-defection law and Tenth Schedule of the Constitution. It would be appropriate to proceeds that Para 2, [3][31], and 4 have to be given a conjoint reading, wherein, Para 2 retains the driving force, and Para [3] and 4 shall act as the brakes while Para 2 is being driven to.

[27] *Id.,* at 291 (para 23).
[28] *Id.,* at 291 (para 24).
[29] (2007) 4 SCC 270 at 292 (para 25 & 26).
[30] *Id.,* at 292 (para 25).
[31] Para 3 of 10th Schedule was repealed by the Constitution (Ninety-First) Amendment Act, 2003.

In *Shri Kihoto Hollohan* v. *Shri Zachillhu,*[32] the Constitutional validity of The Constitution (Fifty-second Amendment) Act, 1985 , which inserted Tenth Schedule under the Constitution of India was assailed. The five-judge bench of the Supreme Court by the majority of 3/2 upheld the Constitutional validity of the 10th Schedule except Para 7, which was struck down for the non-compliance of both substantive and procedural limitations. Substantive - Basic Structure and Procedural - non-compliance of the mandatory procedure of ratification under article 368(2) of the Constitution of India.

In this regard, Justice M.N. Venkatachaliah, on behalf (K.J. Reddy, and S.C. Agrawal, JJ.), the Court provided the following reasoning:

(i) "*The Para 7 of the Tenth Schedule which contains 'the non-obstante clause' a provision which is independent of and severable from the main provisions of the Tenth Schedule which is intended to provide a remedy for the evil of dishonest and unethical political defection. The remaining parts are complete in themselves.*[33]

(ii) *The Para 2 of the Tenth Schedule is not violative of the democratic right of elected members of freedom of speech, freedom of vote, right to dissent, and conscience of members of Parliament and State legislature. These provisions are salutary and intended to strengthen the fabric if Indian parliamentary democracy by curbing unprincipled and unethical political defection.*[34]

(iii) *The speaker/Chairman, while exercising power and discharging functions, acts as Tribunal adjudicating rights and obligations, and their decision is amenable to judicial review. The concept of statutorily finality embodied in Para 6(1) does not abrogate judicial review under articles 136, 226 and 227 of the Constitution.*[35] *However, the decision of the Speaker/ Chairman of House can be called in question and scope of judicial review will be confined to jurisdictional errors such as, infirmities based on violation of constitutional mandate, mala-fides, non-compliance with rules of natural justice and perversity.*[36]

(iv) *In view of the finality clause in Para 6 and constitutional intendment, judicial review would not be permissible, at the stage prior to the decision of the presiding*

[32] 1992 Supp (2) SCC 651.
[33] *Id.,* at 699.
[34] *Id.,* at 688.
[35] *Id.,* at 711 (para 111).
[36] *Id.,* at 710 (para 109).

officer of the House on the principle of quia timet action unless such disqualification or suspension is likely to have grave, immediate and irreversible repercussion.[37]

(v) The Speaker/Chairman hold a pivotal position in Scheme of Parliamentary democracy and are guardians of the right and privileges of the House. They are expected to take a far-reaching decision in the functioning of parliamentary democracy. Hence, conferment of such power should not be considered unacceptable."[38]

On the contrary, Justice J.S. Verma, on behalf of the minority anticipated the threat and hence was of the opinion that "Speaker being an authority within the House and his tenure being subject to the will of the majority, the likelihood of suspicion of bias could not be ruled out."[39] However, in the opinion of the majority, the position of the Speaker is of utmost integrity. The Speaker/Chairman holds a pivotal position in the scheme of parliamentary democracy and is guardians of the rights and privileges of the House.

It is submitted that on this point apprehension expressed by Justice J.S. Verma in his minority opinion is quite understandable and under the existing Constitutional arrangement this very existence of the Speaker/Chairman of the House depends on subjective satisfaction of the political party in power and any adjudication by the presiding officer will always be under the suspicion of biasness by affected legislature or by public at large and it require due consideration by the Parliament under the scheme of Tenth Schedule of the Constitution.

IV. Expression voluntarily giving membership of the House

The expression "voluntarily given up his membership" used in Para 2 (1)(a) of the Schedule. The problem with regard to this expression arises when any member of the House does not give express resignation to give up membership of that political party. The expressions, "voluntarily giving up his membership" has been interpreted broadly and therefore, the scope is not only confined to resignation.

In *Ravi Naik* v. *Union of India,*[40] the Division Bench of the Supreme Court held that, "a person may voluntarily give up membership of political party even though he had not tendered

[37] *Id.,* 711 (para 110).
[38] *Id.,* at 714 (para 119).
[39] *Id.,* at 742 (para 181).
[40] 1994 Supp. (2) SCC 641.

resignation from the party. Even in the absence of formal resignation, an inference can be drawn from the conduct of the members that he has voluntarily given up membership of political parties to which he belongs"[41]. The act of voluntarily giving up membership may be express or implied.

Para 2(1)(a) of the Tenth Schedule of the Constitution of India and the Conduct of the Member of the Political Party

In *Dr. Mahachandra Prasad Singh* v. *Chairman, Bihar Legislative Council*[42]*,* the Petitioner, a Member of Legislative Council of Bihar from Indian National Congress contested the parliamentary election from *Maharajganj* parliamentary constituencies in the year 2004 as an independent candidate. On a complaint by a member of the legislative council, he was disqualified under the Tenth Schedule by the Chairman after giving personal hearings.

He challenged the decision of the Chairman on two grounds. Firstly, there was violation of principle of natural justice as the materials relied upon by the Chairman were not disclosed to him, and no proper opportunity of personal hearing was accorded to him. Secondly, he had not voluntarily given up membership of political parties by contesting the *Lok Sabha* election as an independent candidate and he had not incurred any disqualification under article 191(2) read with Para 2(1)(a) of the Tenth Schedule of the Constitution of India.

The Supreme Court rejected the petition and held that he had been elected to the legislative council, on the tickets of Indian National Congress but contested the parliamentary election as an independent candidate, so an inference can be drawn from his conduct that, he had voluntarily given up membership of Indian National Congress, the political party, on whose tickets he was elected as members of the legislative council. Therefore, he has incurred disqualification under article 191(2) read with Para 2(1)(a) of the Constitution of India.[43] Further, there was no violation of principle of natural justice because he was given a personal hearing by the Chairman after serving show-cause notice and it is admitted the fact that he had contested parliamentary election as an independent candidate.

Thus, in view of Explanation (a) to Para 2(1) of Tenth Schedule of the Constitution, a member belonging to a political party (The Indian National Congress) in the legislative council of the

[41] *Id.,* at 649.
[42] (2004) 8 SCC747.
[43] *Id.,* at 759.

State of Bihar is said to have voluntarily given up his membership, when , he contested the parliamentary election as an independent candidate. Here, the conduct of the member is taken into account to construe the meaning of the term 'voluntarily give up' as used under Para 2 (1) (a) of the Tenth Schedule of the Constitution of India.

Status of Expelled member and the application of Para 2(1)(a) of the Tenth Schedule of Constitution of India

In *G. Viswanathan* v. *Hon'ble Speaker, Tamil Nadu Legislative Assembly*[44], the appellant elected as a member of AIADMK[45] in the year 1991, and he was expelled from the party in the year 1994. Thereafter, he joined MDMK[46]. After the expulsion, the Speaker first declared him as unattached members and after a complaint from the AIADMK party that he has joined MDMK, disqualified from membership of the House under article 191(2) read with Para 2(1)(a) of the Constitution of India.[47]

The petitioner challenged the finding of the Speaker on the ground that article 191(2) and Para 2(1)(a) would be applicable when he has voluntarily given up membership of the political party and not in the case where he has been expelled and declared as unattached members of that party.[48]

It was held by the Supreme Court that Para2 (1) read with explanation points out that an elected member shall continue to belong to that political party by which he was set up as a candidate for election notwithstanding that he was expelled or thrown out from that party[49]. Throwing out or expulsion is a matter between the member and his party and has nothing to do so far as deeming provision of Tenth Schedule is concerned. The action of the political party *qua* its member has no significance and cannot impinge on the fiction of law under the Tenth Schedule[50].

Chief Justice Ahmadi pointed out that, "if a person belonging to a political party that had set him up as a candidate get elected to the house and thereafter joins another political party for

[44] (1996) 2SCC 353.
[45] All India Anna Dravida Munnetra Kazhagam.
[46] Marumalarchi Dravida Munnetra Khazhagam.
[47] *Supra* note 45 at *355*.
[48] *Id.,* at 361 (para 11).
[49] *Ibid.*
[50] *Id.,* at 362.

whatsoever reason either because of expulsion or otherwise, he voluntarily gives up his membership of the political party and incurs disqualification"[51].

The Lordship further remarked, "being treated as 'unattached' is a matter of convenience outside the Tenth Schedule and does not alter the fact to be assumed under explanation to Para 2(1). Such arrangements and levelling have no legal bearing so far as the Tenth Schedule is concerned. The deeming provision of Explanation (a) in Para 2(1) must be given full effect for, otherwise, the expelled members, would escape the rigor of law, which is intended to curb the evil of defection which had polluted our democratic polity"[52].

After the repeal of the provisions relating to split in Para 3 of the Tenth Schedule and practical difficulty in forging the merger of a political party, new challenges have emerged in form of resignation of a requisite number of the legislatures of ruling alliance or the largest political group so on the basis of reduced strength of the House, new political party has been assumed power in the State in total disregard to Constitutional objectives of anti-defection law and in utter disregard to the mandate and sentiments of the electorate.

V. Role of Speaker in the alleged case of Defection or Resignation

In *Kihoto Hollohan* v. *Zachillhu,*[53] the Hon'ble Supreme Court remarked that, "the office of the Speaker is held in highest respect and esteem in parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to take far-reaching decision in the functioning of parliamentary democracy and vestiture of power to adjudicate under the Tenth Schedule in such constitutional functionaries should not be considered exceptionable".**[54]**

The high status and significance of the office of the Speaker/Chairman of the House of the legislature was given due recognition in Scheme of the Tenth Schedule of the Constitution, and it was provided that, "If member occupying the office of Speaker/ Chairman of Parliament or State Legislature including Deputy Speaker/ Deputy Chairman gives up membership of the political party to which he belongs, rejoin that party or becomes members of another party in such cases he/she will not be subject to disqualification under para 5(a) and (b) of Tenth Schedule of the Constitution of India.[55]

[51] *Id.,* at 361.
[52] *Supra* note 50.
[53] 1992 Supp (2) SCC 651.
[54] *Id.,* at 713-714 (para 115 and 119).
[55] The Constitution of India, 1950, Tenth Schedule (para 4 & 5).

This provision was incorporated to maintain dignity, image, and impartiality of the office of the presiding officer of the august house. Placing reliance on these objectives, the Supreme Court in *Dr. Luis Proto Barbosa* v. *Union of India*[56] upheld the disqualification of the Speaker of Goa Legislative Assembly under article 191(2) read with Para 6(1) *Proviso* of Tenth Schedule of the Constitution because he resigned from his political party and joined a new political party with some other members of the legislative assemblies, while still exercising his function as Speaker of the House otherwise than under circumstances which would attract the exemption under Para 5 of the Tenth Schedule of the Constitution.

Para 6 of Tenth Schedule Provides that, if any question arises as to whether a member of a house has been subjects to disqualification under the Schedule, the question shall be referred to Speaker/Chairman of such House whose decision shall be final.

However, the decision of the Presiding officer of the House may be subject to judicial scrutiny on limited grounds such as violation of the mandates of the Constitution, *malafide*, violation of the principles of natural justice, perversity *i.e.,* unreasonable and irrational behaviour. But, if the question relates to Chairman/Speaker, it will be decided by a member of the concerned elected by the House on that behalf Para 6 *proviso.*[57]

Para 7 of the Tenth Schedule provides that No Court shall have any jurisdiction in respect of any matters connected with the disqualification of members of the House in this Schedule.[58]

Para 8 of the Tenth Schedule empowers the Chairman or the Speaker of the House to make rules for giving effect to the provisions of the Schedule. These rules are required to be laid before the House and may be subject to modification and disapproval by the House.

Para 8(3) further provide that all proceeding relating to any question as to disqualification of members of a house will be deemed to be proceedings in Parliament within the meanings of article 122[59] or proceedings in the legislature of State within the meanings of article 212[60] of

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[56] 1992 Supp (2) SCC 644.

[57] *Proviso* to Para 6 of Tenth Schedule provides that, "*where the question has arisen as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for decision of such member of the House as the House may elect in this behalf and his decision shall be final*."

[58] Para 7 of Tenth Schedule was declared invalid by the Supreme Court for want of ratification in accordance with *proviso* to clause(2) of article 368 by majority opinion in *Kihoto* v. *Zachilhu.*

[59] The Constitution of India, art. 122 (1) provide -
"*Courts not to enquire into proceedings of Parliament- Parliament: The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure."*

[60] The Constitution of India, art. 212(1) provide -

the Constitution.[61] It implies that any contravention of these rules may be dealt with as a breach of the privilege of the House.[62]

The members of the Lok Sabha (Disqualification on the grounds of Defection) Rules, 1985[63] framed by the Speaker under Para 8 of the Tenth Schedule and approved by Parliament impose the followings obligations:

(i) It imposes a responsibility on the leaders of legislative parties or where legislature party consist of only one member, such member is also required to furnish a copy of the rules and regulations of her/ his political party to the Speaker within thirty days after the first sittings of the House or where one has become member of the House after the first sittings, within thirty days after she/he has taken seat in the House or in either case within such further period as the speaker may for sufficient cause allow of the formation of such legislature party, a statement, containing names of the members of such legislature party, a copy of the rules and regulations, constitution, a copy of such rules and regulations/constitution. This information is required to be given in Form-1 as prescribed in Disqualification Rules.

(ii) They are also required to inform the Speaker about the changes that takes place in strength, its rules and regulations, constitution etc.

(iii) They are also required to inform Speaker, any instances of members voting or abstain from voting or abstain from voting, contrary to direction or whip issued by such political parties without the permission of party. Such communication is required to be furnished in Form-II as prescribed in Disqualification Rules.

(iv) The duty is also imposed on individual members to furnish information regarding party affiliation as on date of election/ nomination in Form III as prescribed in Disqualification Rules.

Effects of non-compliance of disqualification rules framed under Para 8 of the Tenth Schedule of the Constitution of India.

"The validity of any proceedings in legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure."

[61] A.G. Noorani, *Constitutional Questions & Citizens Rights,* 157 (Oxford University Press, 1st edn., 2006).

[62] *Supra* note 53.

[63] Lok Sabha, "DISQUALIFICATION ON GROUND OF DEFECTION", *available at*: http://164.100.47.194/loksabha/writereaddata/Abstract/disqualification_on_ground_of_de.pdf (last visited on Nov 5, 2020).

The effect of violation of disqualification rules was considered by the Supreme Court in *Ravi Nayak* v. *Union of India*.[64] The appellant challenged the Speaker order disqualifying him from being a member of the House on the ground that the Speaker had given him 2 days' time instead of 7 days to reply before disqualifying him, and he relied on materials like his photograph in a newspaper with MLA of other parties meeting the Governor to form new Government.

The Supreme Court laid down the following principles where there is an alleged violation of procedural rules framed by the Speaker in the exercise of its power conferred by Para 8 of 10th Schedule to regulate the procedure under Para 6(1).

(i) "The disqualification rules are procedural in nature, and any violation of the same would merely amount to irregularities in procedure which is immune from judicial scrutiny in view of Para 6(2)"[65].

(ii) "The judicial review in respect of order passed by Speaker under Para 6(2) is confined to breach of Constitutional mandate, *malafide*, non-compliance with rules of natural justice. The violation of the disqualification rule cannot amount to a violation of constitutional mandate"[66].

(iii) "Since the disqualification rules have been frame by the Speaker under Para 8, these rules have status subordinates to the Constitution and cannot be equated with the provisions of the Constitution"[67].

Thus, any violation of disqualification rules does not afford a ground for judicial review of the Speaker order in view of the finality clause contained in Para 6(1) of the Tenth Schedule. Since, in Ravi S Naik case , it has been alleged that the grant of two days' time instead of seven days as contemplated in the Disqualification rules framed under Para 8 of the Tenth Schedule of the Constitution amounts to violation of the mandate of principle of natural justice . And it is one of the grounds on which the decision of the speaker can be called in question.

This provision has to be construed in the context of scope of judicial review carved out on the ground of "breaches of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity"[68].

[64] (1994) 2 SCC 641.
[65] *Id.,* at 652 (para 18).
[66] *Id.,* at 653.
[67] *Ibid.*
[68] *Id*., at 653 (para 18).

Scope of article 226 of the Constitution *vis-a vis* Power of Speaker under Para 6 of Tenth Schedule

In this context, the obvious question arises as to, "what is the sweep of the powers of the High Court under article 226 dealing with disqualification petition in case the Speaker fails to discharge the Constitutional duty bestowed upon him by not finally deciding the same within a reasonable time."?

The above question naturally of much Constitutional significance as it has the potentiality to render the entire objective of the Tenth Schedule as a dead letter. But apart from it, the workability of the law, as it exists today, is also of much significance for the ruling political parties, who during their government ordinarily enjoy the privilege of having the Speaker of their choice due to fact of possessing majority in House, either independently or with the help of their coalition partner. In this way, the political party in power having potentiality to place constitutional morality and propriety at the peril of destruction by controlling and strangulating, the independence of the presiding officer of the august House, *i.e.,* Parliament or State legislature, as the case may be.

It is submitted that anyone can easily recall the precedent when disqualification petition(s) is filed against any supporting member of the ruling party, and it is not unusual to witness that the Speaker of the House or an Assembly, being the very embodiment of propriety and impartiality[69] turns deaf ears to the said happening and comfortably pretends to forget about the obligation, he is required to discharge under Para 6 of the Tenth Schedule. Similarly, if any member of the House resigned voluntarily and without coercion, the Speaker as an independent and impartial adjudicator under the Scheme of Tenth Schedule is not willing to accept the resignation. One is not expected to be perplexed in guessing reasons for this purported act or omission on the part of such presiding officer of the House. It may be the pressure from the top-notch party leadership or Speaker's attempt to save his ruling party from losing confidence of the House during "Floor Test."

Although, Para 7 of the Schedule was struck down by the Supreme Court way back in 1992, it may be said without any hesitation that the Speaker still enjoys finality and unlimited powers under the Tenth Schedule. One may counter the aforesaid statement by putting forth a contention that it cannot be the case because the decision of the Speaker under the Tenth

[69] *Jagjit Singh* v. *State of Haryana*, 2006(11) SCC 1 (para 85).

Schedule can always be assailed before the judiciary under articles 226 and 136 of the Constitution on the limited ground of "breaches of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity". What needs to be remembered hitherto is that the law allows "judicial review" of the matter and not simpliciter adjudication upon knocking the doors of the Court without any order of the Speaker as to disqualification. In fact, such an argument loses its flair with an added menace of no timeline set out for the Speaker to adjudicate the petitions before him, in spite the feeble attempts made by the Court in some cases asking the Speaker to adjudicate the matters within specified time[70]frame which effectively leaves the very object and purpose of the Anti-defection law, captive to the whims and fancies of the Speaker.

VI. Emerging Challenges to Anti Defection Law from Karnataka, Madhya Pradesh, Manipur, and Rajasthan episode

After the repeal of the provisions relating to split in Para 3 of the Tenth Schedule and practical difficulty in forging the merger of a political party, new challenges have emerged in form of resignation of a requisite number of the legislatures of ruling alliance or the other political group so on the basis of reduced strength of the House, new political party has assumed power in the State in total disregard to Constitutional objectives of anti-defection law and in utter disregard to the mandate and sentiments of the electorate.

The recent political development in various states such as Goa, Manipur, Karnataka, Madhya Pradesh, and calculated attempts in the State of Rajasthan have put a very serious question mark on the entire edifice of anti-defection law as well as working of parliamentary democracy in sovereign, socialist secular democratic republic of India.

In *Srimanth Balasaheb Patil* v. *Speaker, Karnataka Legislative Assembly*[71]*,* the issue before the Court was, whether the Speaker of the House will have the power to debar the defecting members; from contesting the election till the tenure of the House and refused to accept the resignation, if tendered voluntarily?

Three judge bench of the Supreme Court held that under the Tenth Schedule of the Constitution the Speaker will have the power to disqualify the members under Para 2(1) but will have no

[70] *Supra* note 7.
[71] (2020) 2 SCC 595.

jurisdiction to debarred from contesting election till the current tenure of the House. Secondly, the members of the House have unqualified right to resign from the House and Speaker's jurisdiction is confined only to inquiry to ascertain whether such resignation was tendered voluntarily and genuinely. It is constitutionally impermissible for the Speaker to take into account any extraneous factors while considering the resignation. The satisfaction of the Speaker is subjects to judicial review. Thirdly, the disqualification proceedings initiated by the Speaker would not become redundant in view of resignation by members of the House.

This issue also appeared in the Madhya Pradesh Legislative Assembly, wherein, 16 MLAs absconded, and their resignations were not accepted at first instance by the Speaker of the House. Later on, under the direction of the Supreme Court, the floor test was conducted at midnight and Shri Kamal Nath Government was defeated on the floor of the House. Immediately, thereafter, the Speaker accepted the resignation of these MLA, which he was not willing to accept. These elected members were disqualified and joined the opposition political party and assured tickets to contest the forthcoming by-election.[72]

This directly takes us to a question of law that may be described as whether the High Court is competent to dwell into the disqualification matters of the State Legislature, in the absence of any decision on the subject by the Speaker in terms of article 191(2) read with Tenth Schedule of the Constitution. This question assumes exponential significance in view of the Rajasthan High Court move to admit the petition filed by *Sachin Pilot* Group against Speaker issuance of purported show-cause notice to *Sachin Pilot* and their supporter Member of Legislature.[73]

Just like every coin has two sides, the constitutional experts too share a difference of opinion. The first batch of judgments preaches that on a careful reading of the judicial precedents available on defection law, it has been made clear by the Constitution Bench of the Supreme Court in what can be called as the most authoritative precedent that, although the High Court does not sit in an appeal against the order of the Speaker but only has a limited judicial review over the decision of the Speaker in such cases.[74] Here, the matter involves no such decision made by the Speaker, and hence, there arises no question for judicial review. To sail further on

[72] *Shivraj Singh Chouhan* v. *Speaker, Madhya Pradesh Legislative Assembly*, (2020) SCC Online 363.
[73] Apoorva Mandhani, "Here's what the anti-defection law challenged by Sachin Pilot in Rajasthan HC says" *The Print,* July 24, 2020, *available at*: https://theprint.in/theprint-essential/heres-what-the-anti-defection-law-challenged-by-sachin-pilot-in-rajasthan-hc-says/467396/ (last visited on Sept. 25, 2020).
[74] *Supra* note 62.

this view, it is imperative to quote Para 110 of the *Kihoto Hollohan Case*, which runs as follows:[75]

> In view of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e., Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quiatimet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. The exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions, and consequence.

It can be easily inferred that not only the final adjudication but the Courts cannot be even permitted to exercise *quia timet* action. The term *quia timet*[76] literally means "because he fears or apprehends."[77] It is synonymous with pre-emptive or precautionary measure[78]and, it would not be the correct approach because there is no decision made by the designated authority within the Schedule, not even interlocutory. The latter half of the quoted passage simply provides for an exception to the said pre-emptive relief only in case of the Speaker disqualifying members as an interim measure and not the other way around. If the above situation is allowed to prevail, it will get hit by the well settled principle of our Constitution namely, the Separation of Powers and functional autonomy of each institution of the Government. This would tantamount to by-passing of powers granted by the Constitution itself and would add to the accusation of judicial activism. The seeds of this particular thought matured in *Speaker, Haryana Vidhan Sabha* v. *Kuldip Bishnoi*[79] the Division Bench of the Supreme Court comprising of Altamus Kabir and Justice Chelmeswar, JJ.reiterated on the basis of *Kihoto Hollohan* and *Rajendra Singh Rana* case that, in the exercise of its power of judicial

[75] (1992) Supp. (2) SCC 651 at 711 (para 110).
[76] *Quia Timet*: "*In equity practice, the technical name of a bill by a party who seeks the aid of the Court of equity, because he fears some future probable injury to his rights or interests, and relief granted must depend on circumstances."*
[77] Black's Law Dictionary, 2nd ed., (1910), *available at*: https://www.freelawdictionary.org/ (last visited on April 18, 2021).
[78] *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1; *Kuldip Singh* v. *Subhash Chander Jain,* (2000) 4 SCC 50.
[79] (2015) 12 SCC 381.

review under articles 226 and 227, particularly, when the disqualification proceedings matter is pending before the Speaker, the High Court cannot assume jurisdiction under its review power unless decision is taken by the Speaker of the House. In proceedings under Para 6 of the Tenth Schedule, the Speaker is having the power to pass quasi-judicial order, which may be amenable to writ jurisdiction of the High Court. Accordingly, restraining the Speaker from taking any decision under Para 6 of the Tenth Schedule is beyond the jurisdiction of the High Court, since the Constitution itself has accorded finality to Speaker order. It is only thereafter; the High Court assumes jurisdiction to examine Speaker's order[80].

Therefore, according to this view, the Courts can neither finally decide the petitions by assuming itself as the competent authority under the Schedule nor can pass an interim order in the nature of disqualifying the accused member(s) till the time their petitions are considered and decided by the Speaker.

The present admission of the writ by the Rajasthan High Court, it is submitted, is clearly contrary to law evolved by the Supreme Court in *Kihoto Hollohan* and *Rajendra Singh Rana* and *Kuldip Bishnoi* cases. In *Prithviraj Meena* v. *The Hon'ble Speaker, Rajasthan Legislative Assembly*[81] the Division Bench of the Rajasthan High Court stayed the disqualification notice issued by the Speaker of the Rajasthan Legislative Assembly against the alleged supporters of Shri Sachin Pilot without any reasoned decision while formulating thirteen question to re-examine the constitutionality of the Tenth Schedule of the Constitution of India. The question formulated after hearing both parties to the petition, *inter alia* includes some of the followings

(1) "*Whether the scope of 'defection' or 'crossing over' under Para 2(1)(a) of the Tenth Schedule also includes intra- Party dissent?*.
(2) *Whether Para 2(1)(a) of the Tenth Schedule violative of the basic structure of the Constitution including the Fundamental Rights of freedom of Speech and Expression guaranteed by article 19(1)(a) of the Constitution of India.?*
(3) *Whether the expression of dissatisfaction or disillusionment and strongly worded opinion against party leadership can be called conduct falling within the scope of Para 2(1)(a) of the Tenth Schedule of the Constitution of India.?*

[80] *Id.,* at 400 (para 44).
[81] W.P No. 7451/2020.

(4) *Whether the notice issued by the Speaker ex-facie violative of the essence of democracy and aims at throttling dissent against person in power?*

(5) *Whether the expression 'voluntarily giving up membership of such Political Party in Para 2(1)(c) of the Tenth Schedule take within its ambit a criticism of Chief Minister or manner of functioning of the State unit of the Party, by an Member of Legislative Assembly, outside the House?*

(6) *Whether the Speaker action of issuance of notice is mala fide, abuse of power and in breach of natural justice?*

(7) *Whether, Kihoto Hollohan case can be understood as bar for the High Court to examine the above issues along with others?"*[82]

Thus, the Rajasthan High Court by the interim order restrained the Speaker of the Rajasthan Legislative Assembly from proceeding further in the disqualification proceedings under Para 2(1)(a) of the Tenth Schedule and directed to maintain '*status quo*' without assigning any reasoned order and declined to give fresh date to hear the challenge to the constitutionality of the Tenth Schedule. Further, Special Leave Petition was filed by the Chief Whip and the Speaker of the Rajasthan Legislative Assembly against the interim order of the Rajasthan High Court but the same was withdrawn when the matter was listed before the Hon'ble Supreme Court. On the contrary, the other group opines that the Speaker is duty-bound to decide the disqualification petitions within a reasonable time despite the fact there are no set of timelines provided in the Tenth Schedule or the rules thereof. The expression 'reasonable time' cannot be construed at any time before the completion of the life span of the House or the Assembly. The only decision to substantiate this view is by the High Court of Manipur[83], although very recently it has been partly reversed by the Supreme Court in *Keisham Meghchandra Singh* v. *Hon'ble Speaker, Manipur Legislative Assembly*[84]. Further it is most respectfully submitted that, it is time that Parliament to have a rethink on whether disqualification petition ought to be entrusted to a Speaker as a quasi- judicial authority when such speaker continues to belong to a particular political party either *de jure* or *de facto*. Parliament may seriously consider amending the Constitution to substitute the Speaker of the *Lok Sabha* and Legislative assembly as arbiter of disputes concerning disqualification which arises under the Tenth Schedule with a permanent tribunal headed by a retired Supreme Court Judge or a retired chief justice of a

[82] *Id.,* at 30-31 (para 48).
[83] *Supra* note 7.
[84] 2020 SCC OnLine SC 55.

High Court, or some other outside independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy.

In order to understand the aforesaid, it is important to backtrack and discern what transpired in Haryana Assembly Case and thereafter in several such cases, including the Manipur Assembly Case (both High Court verdict and Supreme Court judgment). However, at the threshold, it is relevant to first throw light upon what happened in *Md. Fajur Rahim* v. *Hon'ble Speaker, Manipur Legislative Assembly*[85] the Court while strangely relying upon a Constitutional Bench verdict,[86] wherein it was held that when the Speaker fails to discharge his Constitutional obligation due to deliberate inaction and the members are found to have incurred *prima facie* disqualification under the Schedule, the Court cannot be expected to sit as a mere spectator and ought to come to the rescue of the intention of the lawmakers, and perhaps, protect the ultimate goal of the law. It would be most relevant to mention that this judgment had compelled the legal fraternity to ponder over certain questions touching both merit and constitutional propriety.

In *Speaker, Haryana Vidhan Sabha* v. *Kuldeep Bishnoi*,[87] The Court was called upon to deal with the inordinate delay caused by the Speaker in considering the disqualification petitions against five Members of Legislative Assembly, who were neither the ones upon whom the survival of the government depended nor the State Assembly elections were set to take place soon. At the same time, it was also true that the Court inferred *mala fide* conduct of the Speaker, who was keeping interests of his faction above his Constitutional duty. Consequently, the Court examined all the authorities available on the subject and came to the conclusion that *Kihoto Hollohan Case* carves out a solitary exception on the grounds of *mala fide,* perversity, want of rules of natural justice or violation of the Constitution are only available after a final decision made by the Speaker. Therefore, howsoever peculiar facts may arise, if the Speaker has not passed any order disposing of the petitions, no occasion for the Court arise to assume powers of judicial review. Here, it would not be out of context to point out that the bench of two judges indeed took cognizance of the insignificant role of these five Members of Legislative Assembly in the formation of the Government and remaining period for next State elections, but restricted

[85] 2020 (4) GLT 1036.
[86] *Supra* note 23.
[87] *Supra*note 70.

their conscience to carve out another exception qua cases where the circumstances emerge *per contra*.

The Court nevertheless, devised an unprecedented measure by directing the Speaker to dispose of the pending petitions within a specific time-frame of four months[88]. This was clearly in the nature of issuing mandamus. This method is certainly not devoid of intrinsic problems. Till then, this problem had found deep roots in the democratic soil of India. Considering another matter, the Supreme Court, while again sitting in a division bench of two judges, referred this matter for consideration by a Constitutional Bench to finally decide whether the High Court can frame such timelines under prevailing scheme of things.[89]

Amidst its pendency before the Supreme Court, few High Courts dealt with the same problem. A Division Bench of the High Court of Bombay in *Indian National Congress* v. *The State of Goa*[90] held that *"Courts cannot interfere in a proceeding under Tenth Schedule before the Speaker gives a decision as a remedy under Para 6 of the Tenth Schedule is not an alternative remedy but the sole remedy available."* Another Division Bench of the same High Court has observed that the power to formulate a timeline for the Speaker cannot be gleaned from the Schedule or the rules framed by the Speaker there under.[91] Similarly, a Division Bench of the High Court of Madras in *R. Sakkarapani (Whip)* v. *Tamil Nadu State Legislative Assembly,*[92] dismissed the writ petition on the preliminary ground of judicial restraint to take up the matter while these impugned questions are pending before the Hon'ble Supreme Court. It is pertinent to mention that all these judgments followed the same pattern of not adjudicating the *lis* between the parties as determination of the law by the Supreme Court was much awaited. Nor was any interim relief granted in favour of the writ petitioners.

Out of the lot, the case of Manipur Legislative Assembly is a little different. A Writ Petition[93] was filed before the High Court seeking direction for disposal of disqualification proceedings within a reasonable period. However, initially noting that the impugned issue was pending adjudication, the High Court kept the matter at abeyance till the passing of any substantial

[88] *Id.,* at 401 (para 47).
[89] *S.A. Sampath Kumar* v. *Kale Yadaiah.*, (2016) 6 ALT 44.
[90] 2017 SCC OnLine Bom 8817.
[91] *Vijay Namdeorao Wadettiwar* v. *State of Maharashtra,* 2019 SCC OnLine Bom 2100.
[92] 2018 SCC Online Mad 1247 (para 9).
[93] *T N Haokip* v. *Speaker, Manipur Legislative Assembly*, 2017 SCC OnLine Mani 137.

orders from the Supreme Court. Subsequently, another writ was filed seeking for final adjudication of disqualification petition without any order of disposal from the Speaker. Notably, the petitioner had extensively relied upon *Rajender Singh Rana* Case. The High Court, in an unexpected turn of events, finally disposed of the writ petition and by noting that the power of the Speaker is that of a tribunal and the remedy provided under Para 6 of the Schedule is nothing but discretionary before approaching the High Courts.[94]This matter in the appeal came up for consideration before a three judges of the Supreme Court, the verdict of which has been pronounced lately, setting aside the High Court's view and partly allowing the petitions so far as the question of approaching the High Court in case of deliberate inaction of the Speaker is concerned. The Court differed on the point of deciding the petition itself but held that the maximum that can be granted is direction setting out a reasonable timeline. Switching back to the focal point, it is essential to highlight that only those questions pertaining to the merit of the Supreme Court judgment need discussion and not those of practice and procedure. Further, this decision was in a way in conflict with the relevant portion of the law laid down in *Kihoto Hollohan* Case which has been affirmed by another Constitutional Bench in *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha,*[95] where the Supreme Court reiterated that Speaker is specially designated authority to decide about the rights and privilege of the members of the House including issues related to disqualification and any such decision are not subject to approval of the House. [96]Above all, if it were allowed to stand on its footing, it would have led to the practice of "forum jumping," meaning thereby, that the faction feeling aggrieved even by reasonable deference of the Speaker would have opted the alternate remedy before the High Court which was not the true objective of Para 6 of the Schedule.

When the Supreme Court faced this challenge in the appeal, it was expected that the Court would tag the matter with the pending case and try to dispose them of as expeditiously as possible. The second reason is that the matter referred to the Constitutional Bench of five judges involved a specific question of "*whether the High Courts, in the absence of a final decision by the Speaker, have power under article 226 of the Constitution to direct to dispose of the disqualification petitions within a restricted period of time*." The law has become settled on the impugned proposition of law by the Supreme Court judgment of the Manipur Legislative Assembly. Under the existing law and circumstances, the practice of directing the Speaker to

[94] *Keisham Meghachandra Singh* v. *Manipur Legislative Assembly*, 2020 SCC Online SC 55.
[95] (2007) 3 SCC 184.
[96] *Ibid*.

decide the disqualification petition within a specific time frame seems to be the need of the hour in the absence of any provision to safeguard the Constitutional mandate. It seems impractical for the Courts to sit over and witness the defeat at the hands of such subterfuge. The failure to exercise jurisdiction vested in a Speaker cannot be covered by the Shield contained in Para 6 of Tenth Schedule of the Constitution, and that when a Speaker refrains from deciding a petition within reasonable time, there was clearly an error which attracted jurisdiction of the High Court in exercise of power of judicial review.[97]However, this too has not remained immune from criticism as some argue that the Constitution Bench of the Supreme Court by majority of 3/2 clearly defined the scope of judicial review by saying that finality clause under Para 6(1) of Tenth Schedule protects the exclusive jurisdiction that vest in Speaker to decide the disqualification petition except in case of grave, immediate, and irreversible repercussion.[98]

However, one might read sufficient literature on judicial activism and judicial adventurism but it is submitted that judicial activism is a by-product of mischief rule of interpretation. It becomes adventurism when it is exercised excessively.[99] In the present scenario, although the answers to all our scepticisms can be found in an effective amendment to Para 6 of the Schedule[100]but as of now the current measure seems workable as it does not touch the merits of the petitions but is a directive given after taking into account all the objective considerations of deliberate inaction, the requirement of expedient decision and consequences that could ensue if a final decision is not passed within a reasonable time. The judiciary believes that this was the minimal and, at the same time, maximal that could have been done to sub-serve the broader objective of the Anti-defection law. Having said all this, there are still a few elementary problems haunting this method of directing the Speaker to act in a time-bound manner. The foremost arises where the Speaker does not conform to the timeline set out by the High Court.[101] Whether any plenary steps could be taken by the High Court in such cases to ensure compliance? More importantly, what role would the parliamentary privileges play in safeguarding the Speaker's non-compliance? These questions certainly need to be addressed

[97] *Supra* note 94 at para 22.
[98] *Id*., at 64 (para 23).
[99] Bimal Kumar Chatterjee, "Judicial Activism — Is It a Boon or a Bane" J-6 (3 SCC J-4 2014).
[100] K. Vijaya Bhaskar Reddy, "Sabotage of Anti-defection Law in Telangana" *Economic & Political Weekly*, December 12, 2015.
[101] *Supra* note 70 [The Supreme Court termed the act of the High Court as illegal in calling all the records from the Speaker and itself deciding the petitions for disqualification after noticing non-compliance of the timeline set out].

without delay in making the method of setting out a timeline for the Speaker an adequate remedy.

VII. Concluding Observation and Agenda for Change

The Tenth Schedule of the Constitution has provided a distinct constitutional identity to the Political Party. The elected members of the House belong to party, which has set him up as candidates for that election and party policy and program weigh in minds of the electorate sentiments before exercising his/her franchise. Under the existing scheme of the Tenth schedule, the leader of that political party or even any elected member of the House have right to draw the attention of the Presiding officers of the House regarding the alleged incidents of the defection and leader of the Political Party has full liberty to take appropriate disciplinary action, including recommending disqualification under Para 2(1) of the Tenth Schedule.

The position of the Speaker/Chairman as an adjudicator under Para 6 of the Schedule has been sufficiently crystallized as the sole adjudicator under the law, but the Courts can exercise powers of judicial review over the decision of the Speaker. The problem with the existing framework is that the High Courts are only allowed a review of the decision rendered by the Speaker, which is not possible in cases where the Speaker acts with unreasonable delays or, for that matter do not work. In different words, judicial review is available over the actions of the Speaker and not the inaction. As the issues in the Supreme Court judgment in *Keisham Meghchandra Singh* v. *Hon'ble Speaker, Manipur Legislative Assembly*[102], are still open for consideration by the larger bench, it implies that even the judiciary has found it perplexing and sensitive to conclusively determine these questions occupying immense constitutional importance. Even assuming without admitting that the Supreme Court in the said judgment has established the law, it would anyway be difficult to say that the prevailing method of setting out timelines for the Speaker to decide the petitions is immune to any practical ramifications. However, as the saying goes that something is better than nothing; in the similar way, this transitory measure adopted by the judiciary is something and everything the judiciary is empowered to supervise and thus protect the democratic edifice.

Under the existing Constitutional set up, it cannot be denied that the parliament has failed to recognize that time is of the essence in issues pertaining to defection as each ruling party forming the government has to partake in the elections every five years. It has empowered the

[102] 2020 SCC OnLine SC 55.

Speaker to the extent that it started acting like the master of the Constitution instead of just the Assembly. It must have paid heed to the fact that delayed adjudication by the Speaker is an apparent injustice to the democratic ethos of the country.

But, at the same time, it must also be kept in mind that, right to legitimate dissent against the arbitrary manner of functioning of the top leadership of the political party should not be brushed aside in the name of indiscipline or rebellion. The endeavour to be made to ascertain, as to it is the case where the elected members intend to breach the *Laxman Rekha* in total disregard to the political ideologies or principle of the Parties or merely raising question on the style of functioning of top leadership and echoing the concerns and aspiration of the people as their representatives in House.

The perpetual remedy to this disease is only to carry out an effective amendment to the Schedule. To give teeth and sub serve the objectives of the Tenth Schedule of the Constitution may be amended in the following ways:

i. To find out the alternate possibilities of the Speaker/Chairman as the adjudicator for the purpose of issues arising under the Tenth Schedule and entrust this responsibility to the committee of members constituting the President as an integral constituent of the Parliament or the Governor, as the case may be, or the Election Commission of India, as the practice followed in Bangladesh Constitutional Scheme or to the President or the Governor, as the case may be, acting with consultation and advice of the Election Commission of India[103], or;

ii. To substitute the Speaker/Chairman as the adjudicator for the purpose of issues arising under the Tenth Schedule and entrust this task to the tribunal of three members constituting former Supreme Court judges or the retired Chief Justices of the High Courts. To clarify this formation, both the parties to the petition may be permitted to appoint their respective adjudicator and the Chairperson of the tribunal may be appointed by the President or the Governor, as the case may be[104], or;

[103] Law Commission of India*, 255th Report on the Electoral Reforms* (March 2015)*;* Second Administrative Reforms Commission, "Fourth Report on Ethics in Governance" (2007), *available at*: http://arc.gov.in/4threport.pdf (last visited on April 22, 2021); National Commission to Review the Working of the Constitution (NCRWC), "Report on Electoral Processes and Political Parties" (2001), *available at*: http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm (last visited on April 22, 2021).

[104] 2020 SCC Online SC 55 (para 31) [A note of caution has been given by the Supreme Court pointing out that it is high time to bring a change in the law by constituting a tribunal including the retired judges of the Supreme Court].

iii. In the alternative, the legislature may amend Para 6 of the Schedule to include a sub-clause to take away this discretion of the Speaker/Chairman and thereby mandating him to decide the petitions in a time-bound manner preferably within 15th days of receipt of the complaint by the chief whip of the political parties, failing which the High Court will assume jurisdiction under article 226 of the Constitution over the disqualification petitions and;

iv. Though the primacy has been accorded to the political parties under the Scheme of the Tenth Schedule of the Constitution, right to legitimate dissent against the Party leadership or disillusionment over the style of functioning of the Chief Minister contrary to concerns of the electorate should not be dubbed as intra party dissent or rebellion inviting the penal consequence under the Tenth Schedule of the Constitution and scope of whip to be confined only to confidence or non-confidence motion, Money Bill or other significant legislative business which will have direct bearing on the survival of the Government and not for throttling dissent against Party leadership for making India a vibrant democracy both in practice and on paper.