Chapter II

CONSTITUTIONAL PROVISIONS

'A new Constitution does not produce its full effect as long as all its subjects were reared under an old Constitution, as long as its statesmen were trained by that Old Constitution. It is not really tested till it comes to be worked by statesmen and among a people, neither of whom were guided by the old experience.'

-BAGEHOT

I. Parliamentary form of Government

Dr. B.R. Ambedkar, an eminent jurist, compared the position of the President of the Indian Union and that of the President of the United States. He pertinently pointed out during the debates of Constituent Assembly that the President of the Indian Union is a Ceremonial Head. He further observed:-

"Under the Presidential system of America, the President is the Chief head of the Executive. The Administration is vested in him. Under the Draft Constitution, the President occupies the same position as the king under the English Constitution. He is Head of the State but not of the Executive. He represents the nation but does not rule the Nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known."
The Presidential System of America is based upon the separation of the Executive and the Legislature. So that President and his Secretaries cannot be members of the Congress. Whereas, the Constitution of India does not recognise this principle. The Ministers under the Indian Union are members of Parliament. Only members of Parliament can become Ministers. Ministers have the same rights as other members of Parliament, namely, that they can sit in Parliament, take part in debates and vote in its proceedings.

Dr. B. R. Ambedkar has discussed the merits of the Parliamentary Form of Government. He observed.

"A democratic executive must satisfy two conditions -(1) It must be a stable executive, and (2) it must be a responsible executive. Unfortunately, it has not been possible as far to devise a system which can ensure both in equal degree. You can have a system which can give you more stability but less responsibility or you can have a system which gives you more responsibility but less stability. The American and the Swiss systems give more stability but less responsibility. The British system on the other hand gives you more responsibility but less stability. The reason for this is obvious. The American Executive is a non-Parliamentary executive which means that it is not dependent for its Existence upon a majority in the Congress, while the British System is a Parliamentary Executive which means that it is dependent upon a majority in Parliament. Being a non-Parliamentary Executive, the Congress of the United States cannot dismiss the Executive. A Parliamentary Government must resigns the

The Drafting Committee has adopted the phrase "Sovereign Democratic Republic".

The Preamble of the Indian Constitution which was drafted by the Drafting Committee resolve to Constitute India with the above phrase.
In Parliamentary form of Government, the assessment of responsibility of the Executive is daily and every moment. He further said that:

"In England, where the Parliamentary System prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Address. Periodic assessment is done by the Electorate at the time of the Election which may take place every five years or earlier. The Daily Assessment of responsibility which is not available under the American system is felt far more effective than the periodic assessment and for more necessary in a country like India".

"Article 62 other Provisions as to Minister:

1. The Prime Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Prime Minister.

2. The Ministers shall hold office during the pleasure of the President.

3. The Council shall be collectively responsible to the House of the People.

4. Before a Minister enters upon his office, the President shall administer to him the oaths of office and of Secrecy according to the forms set out for the purpose in the Third Schedule.

5. A Minister who, for any period of six consecutive months, is..."
One of the first tasks to which the Constituent Assembly addressed itself was the formulation of the objectives and the guiding principles that were to be the basis of the Constitution and reflect the democratic spirit of the Constitution. The Drafting Committee felt that the Preamble should not contain a specification of the duration of a Minister's term of office. Article 62 of the Draft Constitution states:

(6) The Salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

Clause 3 of Article 62 of the Draft Constitution make it clear that the Drafting Committee has categorically laid down that the Union Executive shall be responsible to the House of the People.

According to the Preamble, as formulated by the Committee and included in its February 1948 Draft of the Constitution, read, as follows:

"We the People of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens:

Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity; and to promote among all;
Fraternity assuring the dignity of the individual and the unity of the Nation;

In our constituent Assembly this...of........day of May 1948 A.D) do hereby adopt,
be restricted to define the essential features of the new State and its basic socio-politic objectives and that the other matters dealt with in the resolution could be more appropriately provided for in the Substantive parts of the Constitution.

II. **Basic Structure**

Every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic Structure may be said to consist of the following features:

1. Supremacy of the Constitution;
2. Republican and Democratic form of Government;
3. Secular character of the Constitution;
4. Separation of powers between the Legislature, the Executive and the judiciary; and

The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of Supreme importance. This cannot by any form of amendment be destroyed.

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See Rao, S. *The Framing of India’s Constitution - A study* (1968) p.128', also see Minutes, February, 6 and 9, and Draft Constitution, Select Documents III, 5 and 6, pp. 484, 489-90, 510, 517-8.

The Constitution of India could not have been ignorant of the teaching of our own ancient jurist, Manu and Perashara who are wrong in the present day social order.

"What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a Democratic constitution, with a socialist bias be framed, so as to allow the nation in the future to become as socialists its citizens desired or as its needs demanded. being in general, imbedded with the goals, the Humanitarian bases, and some of the techniques of social Democratic thought, such was the type of constitution that Constituent Assembly members created".7

If the power of amendment of the Constitution is co-extensive with the power of the judiciary to invalidate laws the Democratic process and the co-ordinate nature of the great departments of the State are maintained. The Democratic process is maintained because the will of the people to secure the necessary power to enact laws by amendment of the Constitution is not defeated. The Democratic process is also respected because when the judiciary strikes down a law on the ground of lack of power, or on the ground of violating a limitation on power, it is the duty of the legislature to accept that position, but if it is desired to pass the same law by acquiring the necessary power, an amendment validly enacted enables the Legislature to do so and the with of the democratically government will be prevail. This process harmonises with the theory of our Constitution that the three, great departments of the State, the Legislature, the judiciary and the executive are coordinate and that none is superior to the other. The normal interaction of enactment of law by the

7 Austin, Granville, 'Indian Constitution: Cornerstone of a Nation' p.43; also see Kesava Nand Bharati v. State of Kerala (1973) Supple SCR 1,871.
Legislation, of interpretation by the Courts, and of the amendment of the Constitution by the legislature, go on as they were intended to go on.

It is said that the frame of the Government cannot be changed or abrogated by amendment of the Constitution. There is no aspect of abrogation of the form of Government of the changes apprehended like the abrogation the judiciary or extending the life of Parliament.

The Constitution has conferred only a limited amending power on Parliament, that it cannot damage or destroy the basic structure of the Constitution and Parliament by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the Limited amending power conferred upon it into an absolute power of amendment then it was meaningless to place a limitation on the original power of amendment.

III. Anti Defection Law and Fundamental Right or Freedom of Speech

It is a settled principle that is dealing with the Constitutionality of a legislative enactment with reference to fundamental rights, the Court must

Minerva Mills Ltd. V.Union of India (1981)1
SCR 206; KesavaNand Bharati V.State of Kerala (1973) Supple SCR 1, 422; also see Khanna, H.R., 'Making of India's constitution (1981); Tripathi, P.K. 'Spotlights' on Constitutional Interpretation', (1972); Conrad, D., 'Constituent Power, Amendment and Basic structure of the Constitution; A critical Reconsideration (1978-79) 6-7 Delhi Law Rev.1.

ibid; p.216; also see KesavaNand Bharati V.State of Kerala (1973) Supple SCR1,166; Smt. Indira Gandhi V.Raj Narain (1976) 2 SCR 347
have regard to Principle of fifth and substance and not merely to the form and appearance and, that the validity of the enactment must be tested by its direct and immediate effect\(^{10}\).

Lord Denman C.J. has dealt with the question:

'What is the nature and character of the powers claimed by the legislators?' with regard to the House of commons:

"The powers which have been claimed by the House of Commons itself and its members in relation to the rest of the Community, have been either some privilege properly so called, i.e., an exemption from some duty, burden, attendance or liability to which others are subject, or the power of sending for and examining all persons and things and the punishing all contempts Committed against their authority. Both of these powers proceed on the same grounds, viz., the necessity that the House of commons and the members thereof should in no way be obstructed in the performance of their high and important duties and that, if the House be so obstructed either Collectively, on in the persons of the individual members, the remedy should be in its own hands, and immediate without delay of resorting to the ordinary Tribunals of the Country. Hence liberty of speech within the walls of the house, freedom from arrest, and from some other restrains and duties during the sitting of Parliament and for a reasonable time before and after its sitting ( with the exception of treason, felony, and breach of the peace), which, although the privileges properly so styled of the individual members, are yet the privileges of the House."\(^{11}\)

\(^{10}\) Maneka Gandhi V.Union of India AIR 1978 SC 597; also see Bachan Singh V.State of Punjab AIR 1980 SC 898; Mian Bashir Ahmad V.State of J&K AIR 1982 J&K 26,34.

He further observed that:

"Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing. It is to be regarded not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences." \(^\text{12}\)

The Supreme Court in *M.S.M. Sharma v. Sri Krishan Sinha* \(^\text{13}\) has laid down that

"It may not be out of place to suggest to the appropriate authority to make a law regulating the powers, privileges and immunities of the Legislature instead of keeping the branch of Law in a nebulous state, with the result that citizen will have to make a research into the Written law of the privileges of the House of the Commons at the risk of being called before the Bar of the Legislature".


\(^{13}\) AIR 1959 S.C. 395, 419
Unfortunately, this significant suggestion made by K.Subba Rao J.as far back as in his dissenting judgement in MSM Sharma case, has gone unheeded and neither the Parliament nor any State Legislature has yet passed a comprehensive law in this field. Article 105 of the Constitution of India \(^{14}\) Which lays down the powers, privileges and immunities of Parliament and its members. Whereas it has been always accepted that any law passed by the Parliament under the first part of Clause (3) of Article 105 in subject to Article 13, and as such, any

\(^{14}\) "105. Powers, Privileges, etc., of the Houses of Parliament and of the members and committees thereof:-

(1) Subject to the provisions of this Constitution and to the rules and standing orders regulation the procedure of Parliament, there shall be freedom of speech in parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, vote or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the Committees of each House, shall be such as may from time to time be defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution, (Forty Fourth Amendment) Act, 1978.

(4) The provisions of clauses (1),(2) and (3) shall apply in relation to persons who by virtue of this constitution have the right to speak, in and otherwise to take part in the proceedings of a House of Parliament or any Committee thereof as they apply in relation to members of Parliament".
encroachment by such law on the fundamental rights guaranteed in part III is void, there has been no such unanimous opinion as to whether the fundamental rights guaranteed by the Constitution overside the unwritten Law of privileges of the House of the Commons, which in the absence of enacted law, has been conferred on the Parliament by virtue of the Second part of Article 105(3) of the Constitution.

In Re Keshav Singh case 15 which was a reference under Article 143 of the Constitution of India, the majority laid down that in MSM Sharma's case (supra)

"The Contravention of only two articles was pleaded and they were Article 19(1)(a) and 21. Strictly speaking, it was, therefore, unnecessary to consider the larger issue as to whether the latter part of Article 194(3) was subject to the fundamental rights in general, and indeed, even on the majority view it could not be said that the said view excluded the application of all fundamental rights, for the obvious and simple reason that Article 21 was held to be applicable and the merits of the petitioner's argument about its alleged contravention in his case were examined and rejected. Therefore, we do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former: 'The majority decision therefore, must be taken to have settled that Article 19(1)(a) would not apply and Article 21 would.'"

The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are absolutely necessary for the

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15 AIR 1965 SC 745, 765; also see MSM Sharma V. Sri Krishna Sinha AIR 1959 SC 395; Uma Devi, Bellary, "Parliamentary Privileges vis a vis Fundamental Rights: Need for a comprehensive Law on Privileges of the Parliament", AIR 1991 Journal 177:
due execution of its power. The Language of Article 194 of the Constitution which lays down the powers; privileges and immunities of State Legislatures and its members, is mutatis mutandis the same as Article 105. The Supreme Court has laid down that the provisions of paragraph 2 of the Tenth Schedule are not violative of article 105(1) or 194(1) of the Constitution. Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience.

The provisions are salutary and are intended to strengthen the fabric and Indian parliamentary democracy by curbing unprincipled and unethical political defections. The anti defection law seeks to recognise the practical need to place the proprieties of political and personal conduct above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation.

IV. Constitution (52nd Amendment) Act 1985

16 May, Erskine, Parliamentary Practice, p.43. see Maxwell, F., The Interpretation of Statutes, 12 Edn. p.28.
By the Constitution (52nd Amendment) Act, 1985, the Constitution of India was amended and 'after some changes constitution was added with a Tenth Schedule'.

Disqualifications for membership:

1.  

[(2) A person shall be disqualified for being a member of either House of Parliament, if he is so disqualified under the Tenth Schedule] 1

Ins. by Section 3 of the Constitution (52nd Amendment Act, 1985, w.e.f.1.3.1985; also see Rao, B, Shiva, 'The Framing of India's Constitution, Select Documents (Vol.III), 1967, p.545 (Article 83- Disqualifications for membership which is reproduced herein below:

"83-Disqualification for membership". (1) A person shall be disqualified for being chosen as, and for being, as member of either House of Parliament:-

(a) if he holds any office of profit under the Government of India or the Government of any state other than an office declared by Parliament by Law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is under any acknowledgement of allegiance or adherence to a foreign power or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; and
Clause 2 of Article 102 which was added by the Fifty Second Amendment to the Constitution of India in 1985, disqualifies a member on ground of defection laid down in the Tenth Schedule to the Constitution.

Similar provision, as regards State Legislatures is being provided under Article 191 which is reproduced hereinbelow:

191. **Disqualification for membership:**

(1) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that:

(a) he is a Minister either for India or for any State for the time being specified in Part I of the First Schedule, or

(b) he is a Minister for any state for the time being specified in Part III of the First Schedule, if he is responsible to the Legislature of the State where these are two Houses of the Legislature of the State to the Lower House of such Legislature and if not less than three fourths of the members of such Legislature or House, as the case may be, are elected.

The above Article 83 was drafted by the Drafting Committee in relation to the disqualification of the Membership of the Parliament.
A person shall be disqualified for being a member of the Legislative Assembly or legislative Council of a State if he is so disqualified under the Tenth Schedule.\(^{19}\)

Sub clause (e) of Clause (1) in Article 102 and 191 which provides for enactment of any law by the Parliament to prescribe any disqualification other than those prescribed in the earlier sub clauses of clause (1), clearly indicates that all disqualifications of members were contemplated within the scope of Article 102 and 191. Accordingly, all disqualifications, including disqualification on the ground of defection, in our constitutional scheme are different species of the same genus, namely, disqualification, and the Constitutional scheme does not contemplate any difference in their basic traits and treatment. It is undisputed that all disqualification on the ground of defection could as well have been prescribed by an ordinary law made by the Parliament under Article 102(1)(e) and 191(1)(e) instead of by resort to the Constituent power of enacting the Tenth Schedule.\(^{20}\)

Article 102 and 191 before being amended by the Constitution (Fifty Second Amendment) Act, 1985 provided for a person being disqualifies for being chosen as and for being a member of Parliament or State assembly or legislative Council, as the case may be, on grounds of holding an office of profit, being of unsound mind, or an

\(^{19}\) S.5 Constitution (52nd Amendment) Act, 1985; also see Annexure 'A' Extract of Relevant Constitutional Provisions.

undischarged insolvent, or not being a citizen of India or
being otherwise disqualified by or under any other law. The
Representation of the People Act, 1951 disqualifies a
person from the membership of the Parliament or State
Legislature for being guilty of electoral offences, corrupt
practices etc¹.

Article 102 and 191 (dealing with disqualification
of members at Central and State level respectively) as
amended by the Act, also lays down that a person shall be
disqualified for being a member of either House of
Parliament or of either or, the sole, House of a State
Legislature, if he is so disqualified under the Tenth
Schedule added by the Act. The Schedule provides for,
inter alia, (1) disqualification on ground of defection, (2)
exemption of split and mergers of groups, (3) decisions by
presiding officers on questions relating to disqualification
and (4) bar of judicial review:²

V. VALIDITY OF CONSTITUTIONAL AMENDMENT
ON DEFECTIONS

¹ Kashyap, Subhash C,'Anti Defection Law and
Mittal, JK, 'Anti Defection Law: A Comment on
its Constitutionality' (1987)3 SCC (J)25
² Mittal J.K, 'Anti Defection Act: A comment on
its constitutionality' (1987)3 SCC (J) 25,27;
also see Kihoto Hollohan V. Zachillhu (1992)
Supple 2 SCC 651; Prakash Singh Badal V.
Union of India AIR 1987 P&H 263; Mian Bashir
KIHOTO HOLLOHAN V. ZACHILLHU, raised questions of grave constitutional import. It involved the challenge to the constitutionality of the Tenth schedule incorporated into the Constitution by the Constitution (Fifty second Amendment) Act, 1985. The instant case related to the disqualification of some members of the Nagaland Legislative Assembly on the ground of defection. The case was heard by the Supreme Court along with other matters relating to other legislative assemblies including those of Manipur, Meghalaya, Madhya Pradesh, Gujarat and Goa which raised similar constitutional issues.

Due to the urgency of resolution of the issues involved therein, the Supreme Court (both majority and minority) pronounced its operative conclusions, followed by detailed judgements later. The Majority judgment was delivered by M.N. Venkatachaliah J. (as he then was), [on behalf of K.Jayachandra Reddy, S.C.Agarwal JJ and himself]. The minority judgment was rendered by J.S.Verma J, [on behalf of L.M.Sharma, J (as he then was) and himself.

The Constitution (Fifty Second Amendment) Bill, 1985 was the culmination of the unsuccessful Thirty Second and Forty Eighth Constitutional Amendment Bills and the recommendations of the Committee on Defections to combat the deadly virus of political defections in the political process of the body politic lured by power and pelf. The remedy put forth was disqualification of the members of either

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See Annexure B: Constitution (52nd Amendment) Act, 1985.
House of Parliament or of the State legislature, who was found to have defected, from continuing as a member of the legislative body.

The constitutional validity of tenth schedule was challenged on many grounds. Firstly, it was contended that the Fifty second amendment was destructive of the basic structure as it violated the fundamental rights of freedom of speech, right of dissent and freedom of conscience, as para 2 of the Tenth schedule penalise and disqualify the elected representatives in the exercise of these rights which were vital to the nurture of parliamentary democracy. It was argued that the tenth schedule and democracy could not coexist. In an erudite judgment marked by scholarship and learning, M.N.Venkatachaliah for the majority, put the problem in a proper perspective saying that one has to take a balanced view of the degradation of Indian democracy in the context of the political evil of defections or floor crossings as popularly called. The Supreme Court pertinently pointed out.

"The argument that the constitutional remedies against the immorality and unprincipled chameleon like changes of

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political hues in pursuit of power and pelf suffer from something violative of some basic features of the Constitution, perhaps; ignores the essential organic and voluntary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of the country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience...This is pre eminently an area where judges should defer to legislative perception of and reaction to the pervasive dangers of unprincipled defections to protect the community.

VI

Defection

Para (2) of the Tenth Schedule of the Constitution of India prohibit defection and the member of the either of the Parliament or either or sole House of State Legislature are disqualified on violation of this para.

2. Disqualification on ground of defection:—

(1) Subject to the provisions of paragraph 3, 4 and 5 a member of a House belonging to any political party shall be disqualified for being a member of the House,—

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

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

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Explanation: For the purposes of this sub paragraph:-

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a House shall -

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

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

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

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

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the Commencement of the Constitution (Fifty Second
The insertion of the Tenth Schedule presupposes the existence of the party system in the Parliamentary form of Government in India. It is true that till recently, the Constitution did not expressly refer to the existence of political parties. But their existence is implicit in the nature of democratic form of Government which our country has adopted. The use of a symbol, be it a donkey or an elephant, does not give rise to an unifying effect amongst the people with a common political and economic programme and ultimately helps in the establishment of a West-Minister type of democracy which we have adopted with a cabinet responsible to the elected representatives of the people who constitute the Lower House. The political parties have to be there, if the present system of government should succeed and the charm dividing the political parties should be so

(Amendment) Act, 1985, is a member of a house (whether elected or nominated as such) shall -
(i) Where he was a member of a political party immediately before such commencement, be deemed for the purposes of sub paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;
(ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub paragraph (2) of this paragraph, or as the case may be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph".
profound that a change of administration would in fact be a revolution disguised under a constitutional procedure. It is no doubt a paradox that while the country as a whole yields to no other in its corporate sense of unity and continuity, the working part of its political system are so organised on party basis in other words "on systematized differences and resolved conflicts".

That is the essence of our system and it facilitates the setting up of a Government by the majority. Although till recently the Constitution has not expressly referred to the existence of political parties, by the amendments made to it by the Constitution (Fifty Second Amendment) Act, 1985. There is, now, a clear recognition of the political parties by the Constitution. The Tenth Schedule to the Constitution which is added by the above amending Act acknowledges the existence of political parties and set out the circumstances when a member of parliament or of the State legislature would be deemed to have defected from his political party and would thereby be disqualified for being a member of the House concerned. Hence, it is difficult to say that the reference to recognition, registration etc. of political parties by the Symbols order is unauthorised and against the political system adopted by our country.

The Tenth schedule set out the circumstances when a member of the Legislature would be deemed to have 'defected' from the political party as a member of which he had been elected to the

Legislature. Upon such defection, he would be disqualified to remain a member of the Legislature and would lose his seat according to the decision of the Speaker or Chairman of the House to which he belonged. The Supreme Court has laid down that:

"Paragraph 2 (1) relates to a member of the House belonging to a political party by which he was set up as a candidate at the election. Under Para 2 (1)(a) such a Member would incur disqualification if he voluntarily gives up his membership of such political party. Under clause (b) of this paragraph, he would incur the disqualification if he votes or abstains from voting in the House contrary to "any direction" issued by the political party to which he belongs, or by any person, or authority authorised by it in this behalf without obtaining, in either case, 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 15 days from the date of such voting or abstention. This sub para would also apply to a nominated Member who is a Member of a political party on the date of his nomination as such Member or who joins a political party within six months of his taking oath."

In sub paragraph (1)(b) of paragraph 2, a slight amendment was sought before the Lok Sabha on the grounds as to whether a member will suffer to disqualify who disobey the mandate of the party or abstaining from voting contrary to the mandate. There may be cases where a man may be ill, or the train may be delayed and he cannot come and obey the

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mandate by voting. In such cases, he cannot be regarded as having abstained from voting. So the Bill was added with following words.

"without prior permission, or subsequent condonation by political party or authority within a month of such voting or abstention"

That will take care of unwilful abstention, where a person is prevented by circumstances beyond his control from coming to the House in time and voting according to the mandate of his party. As this Bill is of such a nature and founded on principles of universal acceptance, then it may have unanimous acceptance. It will have the best impact on the people outside the House, so that not only the people of India, but the people outside, will know what are the firm rocks on which our democracy is founded and what are the principles, which are unanimously accepted by the people in the country.

The majority view in Kihoto Hollohan case\textsuperscript{11} also negatived the challenge that para 2 impinged on the powers, privileges and immunities of the members of legislative bodies. The freedom of speech of a Member is not an absolute freedom. It is difficult to conceive how article 105(2) is a source of immunity from the consequences of unprincipled floor crossing.

VII Provisions regarding Independent and Nominated Members:

Paragraph 2 (2) of the Tenth Schedule deals with a Member who has been elected otherwise than as a candidate set up by any political

\textsuperscript{10} See The Constitution (52nd Amendment) Bill, 1985 LSD January 30, 1985, P. 52.
\textsuperscript{11} Supra, note 3
Thus, independent member would incur the disqualification if he joins any political party after such election. A nominated Member of a House would also incur disqualification under sub para (3) of paragraph 2 if he joins any political party after the expiry of six months from the date on which he takes his seat.12

The Supreme court held that:-

"That the paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provision do not suffer from the vice of subverting democratic rights of elected members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended before the Constitution Bench. The provisions of paragraph 2 do not violate any rights or freedom under Article 105 and 194 of the Constitution."13

If there are independents then tacitly people would try and the independents would become an instrument of horse trading because they will be voting once on this side and at another time, on that side. When there is a crucial movement and when there is a narrower contest between the rival parties in the House, then they would be playing their role and horse trading cannot be eliminated for which the amendment is aimed at. Regarding independent members non permission to join any political party, the Lok Sabha has deliberated:

ibid P.620; also see Prakash Singh Badal V. Union of India AIR 1987 P&H 263
"It is stated that independents elected by the people can not join any political party. I do not understand any rationale behind this. If some change is done here, then five or six independents in a state may tilt the balance this side or that side and there will again be the menace of 'Aya rams and Gaya rams'. Therefore, when a man is elected independently, he has got the verdict of the people on his own account"14.

"If a person is elected as an independent with the tacit or active support of any political party, then he is justified to say that he cannot be allowed to join any political party. But once a person wins independently, then his right to act independently also exists alongwith his position. I think, it would not be proper to curtail or put fetters on the right of an independent person. My humble submission for the consideration is that in the case of independents, we should not put any fetters of their later joining any political party"15.

With a view to discourage the independents and with a view to discourage some small regional or parochial groups to contest and come in the forefront of the democratic forum or arena of this country, some measures ought to have been adopted. Hence the independent have been brought within the provisions of the Tenth Schedule.

VII. Exceptions

Para 3 of the Tenth Schedule which exempt the split in an original Political party provides:

Paragraph 3 of the Tenth Schedule to the Constitution is reproduced as follows:-

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

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

(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party person or authority within fifteen days from the date of such voting or abstention' and
that in the event of split in a party, member belonging to the group representing a faction shall not incur disqualification provided the group consists of not less than one-third of the members of the original legislature party. From the time of split, the faction to which he belongs shall be deemed to be his original political party.\(^\text{17}\)

The Supreme court has also rejected the attack on the constitutional distinction between "defection" and "split" by saying that the courts had to defer to the legislative wisdom and perception in experimental legislation to deal with certain crisis. The Court has no practical criterion to go by except "what the crowd wanted" using Justice Holmes aphorism\(^\text{18}\).

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


The subject covered under paragraph 3 of the Tenth Schedule has been examined in detail in Chapter IV—'Splits, Merger and Anti Defection Law' of the present research work.

(II) Merger

Paragraph 4 of the Tenth Schedule of the Constitution of India provides for the another exception on the basis of merger:"

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

(i) A member of a House shall not be disqualified under sub paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other member of his original political party:-

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

(b) have not accepted the merger and opted to function as a separate group.

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub paragraph.

(2) For the purposes of sub paragraph (1) of this paragraph, the merger of the
Likewise in the event of merger of a political party with another, a member shall not incur disqualification under the Act when he becomes a member of such other political party or a new political party that may be formed by such merger. He shall not incur disqualification also if he happens to be a member of a group in the original political party which does not accept the merger and opts to function as a separate group. The merger shall be deemed to have taken place only if not less than two thirds of the members of the legislature party concerned have agreed to such merger20.

The subject matter covered under paragraph 4 of the Tenth Schedule has been examined in detail in Chapter IV 'Splits, Merger and Anti Defection law' of the present research work.

(III) Exception

original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two thirds of the members of the legislature party concerned have agreed to such merger".

supra note 17 p.120; also Dhankhar, Jagdeep 'How to combat the virus of defections' The Hindustan Times, New Delhi, January 30,1995; p.12; DAS H.B. 'The Speaker and the Judiciary AIR 1991 Journal 147, Noorani A.G.,Lok Sabha Speaker on Janta Dal Defection' Mainstream August, 29,1992 p.7
Paragraph 5 of the Tenth Schedule is exception to the principle of defection enunciated in para of the Schedule belows:

A Speaker or the Deputy Speaker or Chairman or Deputy Chairman as the case may be, shall not be disqualified (a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged or does not, so long as he continues in office, rejoin that political party or become a member of any political party, or (b) if he, having so given up the membership of the political party to which he belonged, rejoins the political party to which he belonged, after he ceases to hold his office.

VIII Speaker/Chairman and Anti Defection law.

The Speaker or the Chairman of the House concerned as the case may be, has been empowered under paragraph 6 to adjudicate upon the


"6. Decision on questions was to disqualification on ground of defection:
(1) if any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be the Speaker of such House and his decision shall be final. Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question
issues involving defections by the Legislators or parliamentary as the case may be,

Any question as to whether a member has become subject to disqualification under this Act has to be referred to the decision of the Chairman or Speaker, as the case may be, and his decision is final⁴.

If the question as to disqualification relates to the Chairman or the Speaker, as the case may be, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final⁵.

This was contended before the Supreme Court⁶, that in so far as para 7 of the tenth Schedule which ousted the jurisdiction of the Supreme Court.

shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212".

⁴ Constitution (52nd Amendment) Act, 1985, Paragraph 6(1) of the Tenth Schedule.
⁶ Hollohan V.Zachillhu (1992) Supple (2) SCC 651

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Court and the High Courts under Article 136, 226 and 227 in adjudicating on the disqualification of defect members, the mandatory requirement of ratification by the State legislatures before Presidential assent had to be complied with under article 368(2). The precedents which are involving the validity of Constitution Amendment Acts vis a vis ratification requirement were examined. But the majority distinguished these decisions, pointing out that the Amendment Acts had extinguished certain rights (right to property) and has not taken away the power of judicial review of the Supreme Court and the High Courts. The majority rightly held that para 7 "in effect" changed the scope of articles 136,226 and 227 which attracted the necessity of ratification requirement and consequently void.

The majority applied the doctrine of severability to uphold the validity of the Amending Act minus para 7 which ousted judicial review. The principle of severability enables the court to separate the valid part of a statute from the invalid part. The test of severability mandates the court to ascertain whether legislature would have enacted the law if the severed part did not form part of the law and whether after severance what remains can stand independently and is workable.

ibid, also see Shankari Prasad V.Union of India AIR 1951 S.C.458; also see Sajjan Singh V. State of Rajasthan AIR 1965 SC 845; also see Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263; Mian Bashir Ahmad Vs. State of J&K, AIR 1982 J&K 26; Rao, PP, 'Judicial Review of Speaker's decisions on Defections' (1992) 24 The Indian Advocate (Jan-June 60); Menon, C.Achutha, 'Defection Legalised'AIR 1987 Journal 149.
The doctrine of severability has been applied by the Supreme Court when the validity of amendment has been challenged on the basis of substantive limitations on the amending power, namely alteration of basic structure. Only the offending part of the amendment was declared void while upholding the rest of the amendment.

IX Exclusion of Judicial Review

Para 7 of the Tenth Schedule of the Constitution which oust the jurisdiction of the Courts has been declared invalid by the Supreme Court as well as Punjab and Haryana High Court.

All proceedings in relation to any question as to disqualification of a member are to be deemed to be proceeding in Parliament (or the State Legislature, as the case may be) within the meaning of Article 122 (or Article 212). And no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House.

It is now well settled that para 7 of this Schedule is invalid on the ground that, though it sought to take away the jurisdiction of the Supreme Court and High Court, to decide the question of qualification of a member of the Legislature, it was not got ratified by the State Legislatures as

9 ibid
10 "7. Bar on jurisdiction of courts:
Notwithstanding anything in this constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

11 supra note 6
12 Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263.
13 Paragraph 6(2) of the Tenth Schedule
required by the Proviso to Cl.(2) of Article 368, but that it is severable from the rest of the provisions of Tenth Schedule\textsuperscript{14}.

The majority\textsuperscript{15} applied the doctrine of severability on the realm of procedural limitations on the amending process imposed by Article 368(2). The majority explained that in a composite Bill seeking amendments of several provisions of the Constitution, some of which may have to be ratified by the majority, those provisions which are invalidated due to the lack of prescribed ratification which could be severed from the rest of the Legislation which is validly enacted by the legislature.

Such an amendment is within the legislative competence of Parliament to the extent that it deals with provisions other than those mentioned in the proviso to article 368(2). The proviso was introduced with a view to safeguarding the federal principle. Consequently its ambit should be confined to the prescribed limits which can not be interpreted in a manner as to take away the power of main part of article 368(2). Thus, it was held that para 7 stood independent and severable of the main provisions of the tenth schedule which were aimed at containing unprincipled and unethical defections. It could not be said that the amending body would not have enacted the other provisions of the tenth schedule if it had known that para 7 was not valid. Having regard to the mandatory language of article 368(2) that "thereupon the Constitution shall stand amended", the operation of the proviso should not be extended to constitutional amendments in a Bill which could stand independently of such ratification.

\textsuperscript{14} supra note 6.

\textsuperscript{15} ibid; also see Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263; Singh, G.P.' Principles of Statutory interpretation,' 5th Edition.
The majority judgement in Kihoto Hollohan case\textsuperscript{16} (supra) also did not hold the ratification procedure as a condition precedent for the presentation of the Bill for Presidential assent. Consequently assent of the President without such ratification did not make the amending Act void in its entirety.

Minority view Represented by Verma\textsuperscript{17}, would not apply the doctrine of severability in the instant case. In their opinion, it was the entire Bill and not merely para 7 therein which required prior ratification. The requirement of prior ratification by the state legislatures was not only a condition precedent for the exercise of amending power and a constitutional limitation thereon but also a requirement forming an exception to the general rule of automatic amendment of the Constitution on Presidential assent to the Bill. The legislative history of the Amending Act clearly showed that para 7 had a pivotal role for exclusion of judicial review of the Speaker's decision by all courts including the Supreme Court. Consequently the question of applying the doctrine of severability to invalidate para 7 alone retaining the rest of tenth schedule did not arise on the assumption that the Constitution stood amended on the assent by the President. It did not apply to a "still born legislation". Thus the minority invalidated the whole tenth schedule.

"The majority further laid down that the "Speaker while exercising his powers under the tenth schedule, functioned as a judicial tribunal exercising judicial power of the state and thus amenable to judicial review. The finality clause in para 6 (1) did not oust judicial control under article 136, 226 and 227. However, in consonance with the well accepted principles of administrative law, the scope of judicial

\textsuperscript{16} supra note 6; also see Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263.

\textsuperscript{17} ibid.
review would be confined to jurisdictional errors only, namely, infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity."\(^{18}\)

Paragraph 6(2) has incorporated a fiction that all proceedings under paragraph 6(1) be deemed to be "proceedings in Parliament" or "proceedings in the Legislature of a state" attracting immunity from judicial scrutiny under Article 122 or Article 212 as the case may be. Consistent with its view on the nature of power under para 6 (2) the majority held that the immunity under articles 122 and 212(1) was only for mere irregularities of procedures".

Further the Judge added\(^{19}\).

"Even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House, but only before the Speaker as a specially designated authority. The decision under paragraph 6 (1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity under Articles 122 and 212.

\(^{18}\) supra note 6 P.710; also see Halsbury's Law of England (3rd End) Vol.XI P.137; Re Gilmore's Application (1957) 1 All ER 796 (CA) pp.801,803; Prakash Singh Badal V. Union of India AIR 1987 P&H 263.

from Judicial scrutiny of the decision of the Speaker or Chairman exercising power under paragraph 6 (1) of the Tenth Schedule.\(^{20}\)

The minority concurred with the above view of the majority on this issue\(^1\).

The majority Judgement pointed out that in the light of the Constitutional scheme in the tenth schedule, Judicial review should not, however, cover any stage prior to the adjudicatory process by the Speaker/Chairman. Consequently no *quia timet* actions be allowed except in case of disqualifications or suspensions which may have "grave, immediate and irreversible repercussions and consequence".

The Supreme Court upheld the conferment of power on Speaker/Chairman to adjudicate on issues as to disqualification of a member against challenge on grounds of political bias and violation of basic feature of the Constitution\(^2\). In the observations of Venkatchaliah J. (as he then was) the majority:


\(^1\) Kihoto Hollhan Vs. Zachillhu (1992) Supple (2) SCC 651; also see Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263.

\(^2\) ibid at 714; also All party Hill Leaders Conference, Shillong Vs. W.A. Sangma AIR 1977 S.C. 2155; JK Steel and Iron Co., Ltd., Vs. Iron and Steel Mazdoor Union AIR 1956 SC 231; Hari Nagar Sugar Mills Ltd. V. Shyam Sundar Jhunjhunwala AIR 1961 S.C.1559; Jawant Sugar Mills Vs. Lakshmi Chand AIR 1963 SC 677; Associated Cement Co., Ltd., V. P. N. Sharma, AIR
"It would indeed, be unfair to the high traditions of that great office to say that the investiture on it of this jurisdiction would be vitiated for violation of a basic feature of democracy....The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions on the functioning of parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in such Constitutional functionaries should not be considered exceptionable".

The minority, however, felt that the entrustment of power on the Speaker violated the basic structure of the Constitution and hence invalid. The majority has taken a view that the Scheme of Constitution is such where the Speaker/Chairman have been conferred important Constitution obligation.

X Rule Making Power

Paragraph 8 of the Tenth Schedule which confer Rule making power on the Presiding Officers of the House concerned:

The Chairman or the Speaker of the House has been empowered to make rules for giving effect to the provisions of the Tenth Schedule. The rules are required to be laid before the House and are subject to modification/disapproval by the House.


ibid, p.742
In exercise of the powers conferred by paragraph 8 of the Tenth Schedule to the Constitution of India, the Speaker, Lok Sabha has made the 'Members of Lok Sabha (Disqualification on ground of Defection) Rules, 1985'.

The Supreme Court in *Dr. Kashi Nath G. Jalmi V. The Speaker* examined the question as to whether the Speaker of the Goa Legislative Assembly, acting as the authority under the Tenth Schedule of the Constitution, have power of review. The Supreme Court observed that:

"There is no scope for reading into the Tenth Schedule any of the powers of the Speaker which he otherwise has while functioning as the speaker in the House, to clothes him with any such power in his capacity as the statutory authority functioning under the Tenth Schedule of the Constitution."  

The Supreme Court further held that the "existence of judicial review against the Speaker's order of disqualification made under para 6 is itself a strong indication to the contrary that there can be no inherent power of review in the Speaker, read in the Tenth Schedule by necessary implication. The need for correction of errors in the speaker's order made under the Tenth Schedule is met by the availability of judicial review against the same."

The Supreme Court held that Rule 7 (7) of the Members of Goa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986 relating to the procedure are not applicable.

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5. See Annexure C Members of Lok Sabha (Disqualification on ground of Defection) Rules, 1985
7. ibid, p. 720
8. ibid, p. 723; also see Kihoto Hollohan Vs. Zachillhu (1992) Supple(2) SCC 651.
The Supreme Court in *Ravi S. Naik v. Union of India* laid down that the:

"Disqualification Rules have been framed to regulate the procedure that is to be followed by the speaker for exercising the power conferred on him under sub paragraph (1) of paragraph 6 of the Tenth Schedule to the Constitution. The disqualification Rules are, therefore, procedure in nature and any violation of the same would amount to an irregularity in procedure which is immune from judicial scrutiny in view of sub paragraph (2) of paragraph 6 as construed by this Court in *Kihoto Hollohan* case".

*B.P. Jeevan Reddy J.* has examined the object of the anti Defection Law and laid down that:

"The very object of Xth Schedule (to the Constitution) is to prevent and discourage 'floor crossing' and defections, which at one time had assumed alarming proportions. Whatever may be his personal predilections, a legislator elected on the ticket of a party is bound to support that party in case of a division or vote of confidence in the House unless he is prepared to forego his membership of the House. The Xth Schedule was designed to precisely to counteract 'horse trading'. Except in the case of a split, a legislator has to support his party willingly. This is the difference between the position obtaining prior to and after the Xth Schedule. Prior to the said amendment, a legislator could shift his loyalty from one party to the other any number of times without imperilling his membership of the House it was as if he had a property in the office".

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The Haryana Legislative Assembly has also enacted the Rules under Para 8 of the Tenth Schedule. The rules which were approved March 10, 1987, are in force and these rules are applied when there is defection under para 2 and if the group so defected claim that they have the requisite number of Legislators then they can be protected under para 3 or para 4 of the Tenth Schedule, as the case may be.

In the last Assembly there have been split in the BJP Legislature party and Haryana Vikas Party and the defection where protected under para 3 or para 4, as the group so defected has the requisite strength for such split or merger.

See Annexure D "Members of Haryana Legislative Assembly (Disqualification on ground of Defection) Rules, 1987."