CHAPTER: 5

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

The Constitution (Fifty-Second Amendment) Act, 1985 which has since popularly come to be known as the Anti-Defection law, has been the subject matter of a controversy from the very beginning. It has been questioned on several grounds viz, that it is violative of the basic structure of the Constitution, that it is violative of the fundamental principles of parliamentary democracy, its violate democratic rights of the elected members of parliament and the legislatures of the State, and is destructive of the freedom of speech, right to dissent, freedom of vote and conscience, it violates the freedom under Articles 105 and 194 of the Constitution. The Tenth Schedule penalises and disqualifies a elected legislator from the House for the exercise of these rights and freedoms which are very much essential to the sustenance of the system of Parliamentary democracy.

The preamble to the Constitution of India represents its basic structure and democracy is an integral part of this structure. The liberty of thought, expression, belief, faith and worship are some the salient features of this Democracy. The Anti-defection Law has been criticized on the ground that it denies the fundamental freedom of speech and freedom of action,
which includes the freedom to vote, to a legislator because he is required to abide by the direction issued by his political party. Otherwise, their dissent may be termed as defection and they may be disqualified from membership of the concerned House under the Tenth Schedule, as in the case of Arunachal Pradesh. Dissent should not be considered as defection because a dissenting member or one who does not comply with a particular party directive has neither changed sides, nor crossed the floor; he continues to be a member of his party. Therefore, a difference needs to be made in between ‘defection’ and ‘dissent’, every dissent does not amount to defection.

5.1. Right to freedom of speech and expression

All citizens of India have the right of freedom of speech and expression under Article 19 (1) (a) of the Constitution of India. But it is subject to reasonable restrictions under Article 19 (2) in the interest of the security of the State, friendly relations with foreign powers, public order, decency and morality and in relation to contempt of Courts, defamation and incitement to an offence. Paragraph 2 of the Tenth Schedule provides that a legislator shall be disqualified from being a member of the either House of Parliament or State Legislature, if he voluntarily gives up his membership of the political party or if he votes or abstain from voting in such House contrary to any direction or whip issued by the political party. The direct effect of the provision is that, it violates the freedom of speech
and expression of the legislators, which include the freedom to vote according to one’s conscience. It is pertinent to mention here that, when any restriction is placed on the right of a legislator to vote according to his own choice, conviction or conscience; it is a restriction of the exercise of the right of freedom of speech, and it would be protected only if it is reasonable. Therefore certain important question arise - does a citizen lose this right on being elected as a Legislator in to the House?? Whether the restriction imposed on such freedom is permissible and is a reasonable restriction under Article 19 (2)??

The provisions of the Anti-defection Law was criticised from its inception on the ground that it violates the fundamental rights like freedom of speech and expression, freedom of association under Article 19(1)(a) and 19(1)(c) of the constitution of India. Before the commencement of the Constitution (Fifty-second Amendment) Act, 1985, the State of Jammu & Kashmir incorporated certain provision (Section 24-G) into the Jammu and Kashmir Representation of the People Act, 1957, by the Jammu and Kashmir Representation of the People (Amendment) Act, 1979 to curb the evil of defection. Immediately, after its commencement, the said Act was challenged on the ground that it violates the fundamental right under Article 19 of the Constitution of India along with the other grounds. Similarly, when the Tenth Schedule

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332 Supra note 61
was incorporated into the Constitution of India in the year 1985, validity of the said Schedule was also questioned in various High Courts on the similar grounds.

In *Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors*\(^{333}\) the petitioners namely, Shri Mian Bashir Ahmad and Shri Ghulam Mohi-ud-Din were elected to the Jammu and Kashmir Legislative Assembly as a member of the National Conference Party. Subsequently, these petitioners have voluntarily given up the membership of the National Conference Party and joined the Congress-I Party and for that act they were disqualified under Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957, as a member of the Legislative Assembly.

These petitioners, challenged the validity of Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957 and the order of disqualification inter alia on the following grounds—*Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors.*\(^{334}\)

(i) Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957 is violative of Article 19(1)(a) and Article 19(1)(c) of the Constitution of India because it directly imposes restriction on freedom of speech and expression guaranteed under Article 19(1)(a)

\(^{333}\) *Supra Note 61*

\(^{334}\) *Ibid*
and freedom of association guaranteed under Article 19(1)(c) and these restrictions are not permissible under Article 19(2) and Article 19 (4);

For the convenience of discussion and appreciation, the researcher refer here the provisions of Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957. This Section was inserted into the Principal Act by the Jammu and Kashmir Representation of the People (Amendment) Act, 1979 with a view to disqualify a defector from being a member of the State Legislature and came into force w.e.f. 29th Sep.,1979.

“24-G. Disqualification for being a member of either House of Legislature: A person shall be disqualified for being a member of the Legislative Assembly or the Legislative Council of the State –

(a) if he, having been elected as such member voluntarily gives up his membership of the political party by which he was set up as a candidate in such election or of which he becomes a member after such election;

(b) if he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorised by it in this behalf without obtaining prior permission of such party or person.
(c) Explanation: For the purposes of this section political party means:
a political party classified as a recognised political party under any law or any rule, regulation, order or notification having the force of law with respect to matters relating to, or in connection with, election to the Legislative Assembly or the Legislative Council of the State;

(d) any other political party which is recognised by the Speaker of the Legislative Assembly or, as the case may be, by the Chairman of the Legislative Council, as a political party.»

While deciding the case, Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors the Full Bench of the High Court of Jammu and Kashmir is evenly divided and according to Rule 21 of the Jammu and Kashmir High Court Rules, it is held that Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957 is within the provisions of the Constitution of India as well as the Constitution of the State of Jammu and Kashmir and does not violate the fundamental rights of the petitioners under Article 19 (1)(a) and (c), and the restriction so imposed was reasonable restriction within the provisions of Article 19(2) of the Constitution and was thus lawful and constitutionally valid.

335 Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957
336 Supra Note 61
The freedom of speech and expression guaranteed under Article 19(1) (a) is not absolute, it does not give a citizen right to say anything he chooses, at any time, at any place, regardless of circumstances. Apart from the reasonable restrictions that the State may impose under Art 19 (1), (2), the right is subject to inherent restraints based upon the certain principle of a civil society. Article 19(1) does not confer any special right or privilege to a legislator as distinguished from the members of the public. The freedom of the legislator is the freedom of any other citizen and to whatever lengths the other citizens in general may go, so also may the legislator, but apart from anything else, his right is no other and no higher. Under Article 19(1) (a) a legislator has no fundamental right of speech in the Legislature and therefore, the restriction on the legislator’s right of speech in the Legislature cannot be treated as a restriction on the fundamental right guaranteed to him under Article 19(1)(a). -Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors.\(^ {337}\)

It cannot be said that, Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957, violates the fundamental right under Article 19(1)(c) i.e., right to form association or union. It does not curtail one’s right to withdraw his membership of the political party to which he belongs as well as does not restrict his freedom of dissociation

\(^ {337}\)Supra Note 61
from the political party. The impugned section does not prevent a member from withdrawing his membership of a political party but it only takes away the right to continue as a member of the Legislature if he withdraws his membership of the political party to which he belongs. *Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors.* 338

Though, the law is settled by the Hon’ble Apex Court in *Kihota Hollohon Vs Zachilhu and Others* 339 that, the provisions of Tenth Schedule do not suffer from the vice or subverting democratic rights of elected Legislators, it does not violate their freedom of speech, freedom of vote and conscience, it is pertinent to mention here the decision of the two learned judges of the evenly divided Full Bench decision of the High Court of Jammu and Kashmir in *Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors.* 340 The two learned Judges held that the section 24-G of the Jammu and Kashmir Representation of the People Act, 1957, is violative of Article 19 (1) (a) and (c) of the Constitution of India hence declare unconstitutional and void. In this regard, the learned Judges opined that impugned legislation attempted to enforce political morality may not be in doubt. Regarding the question, whether ‘political morality’ is covered by the expression “decency and morality”; the judges were of the view that “decency and morality” seems restricted to sexual

338 Supra Note 61  
339 Supra Note 78  
340 Supra Note 61
morality and decency, and covers the penal provisions dealing with obscene acts, gestures, writings, indecent exposures and song etc. It would include all such acts or modes which have the tendency of corrupting the public moral. ‘Political morality’ was not under contemplation at time of framing the constitution by the Constitutional framer and thus the expression “decenty and morality” was not to cover in its sweep ‘political morality’ also. The restriction, therefore, cannot be said to be a reasonable restriction within the meaning of Article 19(4) of the Constitution of India.

5.2. Parliamentary Privilege under the Constitution

The word “privilege” has been defined in Webster’s Third New International Dictionary as “a right or immunity granted as a peculiar benefit, advantage or favour; a peculiar or personal advantage or right especially when enjoyed in derogation of common right; a prerogative, a right or immunity attached specifically to a position or an office.”

The parliamentary privileges are explained by Sir Erskine May in his “Parliamentary Practice” that sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court or Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other

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341 Supra Note 61
bodies or persons. In a welfare State, the main function of the Legislature is to “criticise and legislate” which necessitated the importance, that members of the Legislature should have all such immunities and privileges as are necessary to enable them to perform their functions without fear or favour applying their conscience. For that Legislators must have certain additional rights, over and above the fundamental rights which they enjoy in common with the other citizens.

In the Constitution of India, the privileges of the Houses, Committees and members of Parliament or State Legislature have been generally left to be determined by the Parliament or by the concerned State Legislature by law. Until so determined, the privileges of the Houses, Committees and member of Parliament or State Legislature shall be same as those of the British House of Commons on the day of the commencement of the Constitution.

The founding fathers of the Constitution of India attached supreme importance to two basic privileges which they deemed essential for the success of parliamentary democracy and therefore, they enshrined them specifically in the Constitution of India in Article 105(1) and (2) relating to Union Parliament or in Article 194(1) and (2) relating to the Legislature of a State. These privileges of members of Parliament or Legislature of State are those of freedom of speech and freedom of vote.

342 Sir Erskine May, “Parliamentary Practice” 16th Edition, Pg 42
on the floor of the House and in Committees thereof and of full immunity from any proceedings in any court in respect of anything said or any vote given by a member in a House of Parliament or in the House of Legislature of the State or any Committee thereof. Article 105(1) and (2) of the Constitution of India read as follows:

105(1)- Subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

105(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 liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

Similar provisions is found in Article 194(1) and (2), which is applicable to the Legislature of a State and in Section 72 of the Constitution of Jammu and Kashmir which guarantees to a member of the Legislature certain privileges and immunities.

In M.S.M. Sharma Vs Shri Krishan Sinha a Bench of five Judges of the Apex Court while dealing with the nature and scope of privileges of

343 Article 105(1) and (2) of the Constitution of India
344 Supra Note 282
legislators under Article 194 of the Constitution of India, of which Section 72 of the Constitution of Jammu and Kashmir is a reproduction mutatis mutandis opined that, the provisions of Clause (2) of Article 194 indicate that the freedom of speech referred to in Clause (1) is different from the freedom of speech and expression guaranteed under Article 19 (1) (a) and cannot be cut down in any way by any law contemplated by Clause (2) of Article 19.

In \textit{Mian Bashir Ahmad and etc Vs State of Jammu & Kashmir and Ors}^{345} validity of Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957 was challenged before the Full Bench of the High Court of Jammu and Kashmir on the ground that it violates Section 72 of the Constitution of Jammu and Kashmir (which corresponds to Article 194 of the Constitution of India) because it interferes with the powers and immunities conferred on the members of the State Legislature under the said section. The court held that the totality of rights including the right of speech in the Legislature claimed by a member of the Legislature are privileges of the House and its members. Such privileges accrue to a person after he is elected and so long as he continues to be the member of the House of the Legislature. If a member is disqualified under a valid law from the membership of the House and thereby he is prevented from attending or participating in the

\footnote{\textit{Supra Note 61}}
proceedings of the House, no complaint can be made that the said right has been taken away or abridged in violation of Sec 72 of the State Constitution.

The main aim and intention behind the provisions of Section 72 of the Constitution of Jammu & Kashmir was to render a person’s membership of a House of Legislature effective and meaningful by ensuring complete freedom of debate and discussion in the House so long and so long only as the person continues to be a member of the House of Legislature. The Constitution, however, does not guarantee the membership of the House that the member was irremovable or that he could not be disqualified.

In Kihota Hollohon Vs Zachilhu and Others\textsuperscript{346} the Tenth Schedule was challenged on the ground that, it violates the democratic rights of elected members of Parliament and the Legislatures of the States. It violates the freedom of speech, freedom of vote and conscience of a member. Rejecting the plea, the Apex Court held that, the provisions of Tenth Schedule do not suffer from the vice or 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. In India the freedom of speech of a member is not an absolute freedom. The provisions of the Tenth Schedule do not purport to make a member of a House liable in any ‘Court’ for anything said or any

\textsuperscript{346}Supra Note 78
vote given by him in Parliament or State Legislature. It cannot be said that Article 105 or 194 is a source of immunity from the consequences of unprincipled floor crossing. That’s why the provisions of paragraph 2 of the Tenth Schedule do not violate any rights or freedom of elected members of Parliament or State Legislatures under Article 105 or Article 194 of the Constitution, and is thus constitutionally valid.

So far as the right of a member under Art. 105 is concerned, it is not an absolute one and has been made subject to the provisions of the Constitution and the rules and Standing Orders regulating the procedure of Parliament. The right of freedom of speech conferred on a member of the Parliament can be regulated or curtailed by making any constitutional provision, such as the Fifty Second Amendment Act. Therefore, the provision of paragraph 2(1)(b) cannot be termed as violative of the provisions of Art. 105 of the Constitution. - Parkash Singh Badal Vs. Union of India.347

5.3. Grounds of disqualification under the Tenth Schedule

Paragraph 2(1) of the Tenth Schedule provides that a member of the Parliament or State Legislature belonging to any political party shall be disqualified for continuing as such member of the concerned House on the following two grounds -

347 Supra Note 77
(a) If he voluntarily gives up membership of the political party on whose ticket he is elected to the House.\(^{348}\)

(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.\(^{349}\)

**Expression ‘any direction’ – Meaning of**

A member of the House can be disqualified if he voluntarily gives up his membership of the House or if he votes or abstain from voting contrary to any direction given by the political party to which he belongs.

In this chapter researcher sought to discuss the second ground i.e. voting or abstain from voting. The word “any direction” used in paragraph 2 (1) (b) gives wide discretionary power in the hands of the leader of the political party. In a democratic set up like India each legislator is free to exercise his right of franchise. Any direction issued by the leader of the political party or by any authority, to vote for a particular candidate or to vote for a particular policy would not only mean influencing such right

\(^{348}\) Para 2(1)(a) of Schedule Tenth

\(^{349}\) Para 2(1)(b) of Schedule Tenth
but would also amount to a corrupt practice. It curbs the legislators’ freedom of opposing the wrong policies which is not suitable to his constituencies, bad leaders and anti-people Bills proposed by the so called “High Command” in arbitrary and undemocratic manner. The using of the words “any direction” in paragraph 2(1)(b) gives additional dictatorial power to the leader of the political party which is against the principles of parliamentary democracy. If the expression ‘any direction’ is literally interpreted then it includes each and every direction or whip of any kind whatsoever it might be unduly restrictive of the freedom of speech and the right of dissent. Therefore, the present researcher submits that, at the time of interpretation of the expression “any direction” occurring in paragraph 2(1)(b) should be given a meaning limited to the objects and purpose of the Tenth Schedule.

Regarding the interpretation of the expression “any direction” occurring in paragraph 2(1)(b), it is worthwhile to mention here the minority view of the Full Bench decision of Punjab and Haryana High Court taken in Parkash Sing Badal Vs Union of India.350 Mr. Justice Tewatia observed that, if the expression “any direction” is to be literally construed then it would make the people’s representative a wholly political party’s representative, which decidedly he is not. The member would virtually lose his identity and would become a rubber stamp in the

350 Supra note 77
hands of his political party. Such interpretation of this provision would cost it, its constitutionality, for in that sense it would become destructive of democracy/parliamentary democracy, which is the basic feature of the Constitution. Where giving of narrow meaning and reading down of the provision can save it from the vice of unconstitutionality the Court should read it down particularly when it brings the provision in line with the avowed legislative intent. When so interpreted it would leave the members free to vote according to their views in the House in regard to any other matter that comes up before it.

In *Kihoto Hollohon Vs. Zachillhu*[^78] the Hon’ble Supreme Court of India, reversing the majority view of the Full Bench decision of Punjab and Haryana High Court taken in *Parkash Sing Badal Vs Union of India*,[^77] that the expression “any direction” should be given wider meaning, it is held that the words any direction occurring in paragraph 2 (1)(b) would require to be construed harmoniously with the other provisions, so as not to be given wider meaning opposed to the objects and purposes of the Tenth Schedule.

The provision as contained in paragraph 2(1)(b) of the Tenth Schedule, however, recognises two exceptions – one, when the Member obtains from the political party prior permission to vote or abstains from

[^78]: Supra note 78
[^77]: Supra note 77
voting, and the other, when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. - *Kihoto Hollohon Vs. Zachillhu*, 353 Also quoted in the case of *Rameshwar Prasad Vs. Union of India*. 354

The Tenth Schedule itself does not prohibit any member of a Legislature from violating the direction/whip issued by a political party to legislators belonging to that political party. All that paragraph 2 (1) (b) of the Tenth Schedule prescribes is that when such a direction/whip issued by that political party is violated by a legislator either without the prior permission of the political party or without such violation having not been condoned subsequently by the political party, the legislator incurs disqualification for continuing as a member of the House. *Yitachu Vs. Union of India & ors.* 355

While construing Paragraph 2 (1) (b) it cannot be ignored that under the Constitution members of Parliament and the State Legislature enjoy freedom of speech in the House though it is subject to the provisions of the Constitution and the rules, regulation of the concerned House. The disqualification imposed by Paragraph 2(1) (b) must be so construed as

353 *Supra note 78*
354 AIR 2006 SC 980: 2006 (2) SCC 1
355 *Supra note 82*
not to unduly impinge on the freedom of speech of a member, which would be possible if the paragraph is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections. - *Kihoto Hollohon Vs. Zachillhu.*

A direction given by a political party to its members, violation of which may entail disqualification under paragraph 2(1)(b) should be limited to a vote of motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate. - *Kihoto Hollohon Vs. Zachillhu.*

**Whip – Meaning and Functions**

The word ‘Whip’ is no where defined in any Article of the Constitution of India or in the Rules of Procedure of the House. After the passing of the Constitution (Fifty-Second Amendment) Act, 1985, which incorporated Schedule Ten to the Constitution of India, the word ‘whip’ has assumed a very important role in our parliamentary system of democracy. But an inference of the word ‘whip’ is found in paragraph 2(1)(b) of Schedule Tenth to the Constitution of India. Paragraph 2(1)(b)
provides that a member of the House shall be disqualified if he/she votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs without obtaining the prior permission of such political party.

The dictionary meaning of the word “whip” means a lash with a stick or handle used for punishing a person for an offence or in driving a horse-driven carriage for thrashing or beating the horse to urge it to move forward faster.

In the context of political parties and parliamentary democracy, the office of the “Whip” is a vital link in the relationship between the parties and their members. The “Whip” acts as a two-way channel for information flow between party leaders and members. The “Whip” is the officer of the parliamentary party or group responsible for enforcing attendance of its members, keeping them informed of the party line on various issues and from time to time issuing necessary directives or whip for adhering to party discipline in the matter of voting on specific issues coming up on the floor of the House.358

Though it is believed that the term was first used in a parliamentary context in the British House of Commons in the 18th century by Sir Edmund Burke, it is not confined to the Westminster model of

358 Supra Note 2
Parliaments. It exists in countries like the United States where each party in the House of Representatives is served by a member known as the Whip. In the United States, the whip carries out an essential two-way communication, conveying the views of the party membership to the leaders and informing the membership of the views of the leadership.\(^{359}\)

In the Indian parliamentary context, the whip of parliamentary group is the one who has been designed to ensure that members of the party are present in adequate numbers and vote according to the line decided by the party on important questions. It is the responsibility of the Chief Whip of Government party to ensure a quorum throughout the sitting of the House by keeping the members within the sound and range of the division bells and ensure the presence of members particularly when some important business is under consideration. They keep their members informed about the business of the House and the party line on various issues and enforce party discipline.\(^{360}\)

Besides the office of the Whip, the term ‘Whip’ has another connotation. During sessions, Whips of different parties send to their members periodic notices and directives informing them of important debates and divisions, telling them of the probable hour of voting and

\(^{359}\) Supra Note 2  
\(^{360}\) Ibid
demanding their presence at that time. Such notice and/or, directives are also called ‘Whips’.

**Types of Whips**

In their connotation of party directives, whips are said to be of three types – one-line, two-line and three-line whips. These are so called by the number of lines by which their text is underlined. The number of lines is indicative of the importance and urgency attached to a particular measure before the House. One-line Whip considered to be the simplest, merely requires the attendance of the members in the House on a particular date and time and no division being expected. The two-line whip is supposed to be somewhat more obligatory and a stronger party directive. It is issued in case of fairly important business and when division is expected. The three-line whip indicates most important business and a division. A member must obey it and attend the House; it is entirely mandatory and one can disobey it only at one’s peril. Disregard of a three-line whip is almost certainly likely to invite serious disciplinary action.\(^{361}\)

**Issuance of ‘Direction’ or ‘Whips’ – Whether valid**

After the commencement of the Constitution (Fifty-Second Amendment) Act, 1985, political parties got the constitutional recognition and the directives given by party leader assumed great significance. As

\(^{361}\) *Supra Note 2*
per the provision of Tenth Schedule, disobedience of party directives or Whips could result in disqualifying a member and losing his membership. It is pertinent to mention here that in order to incur disqualification under paragraph 2(1) (b) of the Tenth Schedule a member has to vote or absent from voting in the House contrary to any direction given by his political party. It does not apply to acts other than voting, i.e. it does not interfere with a member’s right of freedom of speech in the House.

Whip issued by a political party to vote in favour of a candidate not belonging to it in the Rajya Sabha election is not valid and effective as it is not a matter relating to proceedings of the House, and the member violating such whip cannot be identified because of secrecy of votes cast in the election. Therefore, any alleged defiance of the whip cannot attract the rigour of defection as contemplated in paragraph 2(1) of the Tenth Schedule; nor any fraud can be held to have been committed by the accused member on such ground. -Ananga Udaya Sing Deo Vs. Ranga Nath Mishra.\(^{362}\)

**Direction or Whip – Need for proper wording**

Keeping in view the consequences of the disqualification i.e., termination of the membership of a House it would be appropriate that the direction or whip which results in such disqualification under Para. 2(1)
(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Para. 2(1) (b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction. - *Kihoto Hollohon Vs. Zachillhu.*

5.4 Right to dissent

After the fourth General Election in the year 1967, politics of defection poses a serious threat in to the functioning of our parliamentary democracy and the stability of the representative Government. To curb the evil of political defection Tenth Schedule was incorporated in to the Constitution of India, which took away the right of dissent from a legislator.

In *Kihoto Hollohon Vs. Zachillhu* the Hon’ble Apex Court observed that Paragraph 2(1)(b) deals with a slightly different situation i.e. a variant where dissent becomes defection. If a Member while remaining a Member of the political party which had set him up as a candidate at the election, votes or abstains from voting 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 he incurs the disqualification. In other

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363 Supra Note 78
364 Ibid
words, it deals with a Member who expresses his dissent from the stand of the political party to which he belongs by voting or abstaining from voting in the House contrary to the direction issued by the political party.

Though a sound party system is essential for the stability of parliamentary democracy or a parliamentary form of Government it is equally important to preserve the right of dissent, because in a democracy all problems are required to be decided within the four corner of the House by active participation of its member through the process of discussion, debate, voting and adjustment of views. It is seen that members belonging to the same political party may sometime have different opinions on a matter and expression of such difference of opinion may result in modification or withdrawal of proposals under consideration. Such a result is possible only if members are allowed to express their dissent without the fear of disqualification from the House. It is criticised that this right of dissent is essential in a democracy and any anti-defection law which does not take into account the right of conscious dissent would not only be unconstitutional but would also be unethical and have no place in a democratic set up.365

Voicing dissent is treated as defection in Indian parliamentary democracy. The right to dissent is curtailed by the frequent use of whips by political parties in order to protect their interests. In order to protect

365 Supra Note 61
their interest the political parties often uses whips to their members on trivial issues. This approach is taken only to show party cohesion. In the guise of anti-defection law the party leaders often compel their members to cast vote according to party wish which curtails the right of the members.\textsuperscript{366} A member’s right to dissent is rarely or never exercised during voting. This is one of the reasons why the Law Commission recommended that the Government should restrict issuing whips only to situation when the Government is in danger.\textsuperscript{367}

I. Defection or Dissent – Certain recent cases

The word “defection” is nowhere defined in the Tenth Schedule of the Constitution of India or in the Disqualification on Ground of Defection Rules framed by the Speaker/Chairman of the concerned House or in any Article of the Constitution. In a simple language, defection may be defined as the crossing the floor of the House with a view to joining the opposition group. The two important grounds of defection mention in Paragraph 2 of the Tenth Schedule are voluntarily giving up the membership of the party and voting or abstaining from voting contrary to any direction given by the party. But the meaning of the above mentioned

\textsuperscript{366} The Hindu, From roaring lion to timid mouse, February 26, 2010 available at http://www.thehindu.com/opinion/lead/article113668.ece (Last visited on September 5, 2011)

\textsuperscript{367} Law Commission of India, 170th Report: Reform of the Electoral Laws, Part-II, Chapter-IV, 3.4.2,and quoted by Kartik Khanna & Dhvani Shah, Anti-defection Law: A Death Knell for Parliamentary Dissent. 5 NUJS Law Review.103 (2012), Pg.113
grounds are not so clear, which leads to controversy as to which act or conduct of the legislators amount to defection or a dissent. In this regards, researcher sought to discuss certain important cases.

**Bihar**

In *Gyanendra Kumar Singh Vs The Bihar Legislative Assembly* the main issue before the High Court of Patna was as to whether the petitioners can be disqualified solely on the basis of their conduct in the Rajya Sabha election. Petitioners were the member of the Janata Dal (United) party. In the Rajya Sabha election, Janata Dal (United) party fielded three Candidate namely, Shri Sharad Yadav, Shri Ghulam Rasool and Shri Pawan Kumar Verma as a recognised official candidates. But the name of two candidate (Shri Ghulam Rasool and Shri Pawan Kumar Verma) had not been approved by the Parliamentary Board of the Janata Dal (United) party, the body empowered to take such decision. Therefore question arises as to whether the conduct of these petitioners of supporting the candidature of Shri Sharad Yadav while opposing the candidature of other two candidate fielded by the party and proposing other two independent candidate (Mr. Anil Kumar Sharma and Shri Shabir Ali) and acting as their election agent, amount to voluntary surrender of their membership.

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368 AIR 2015 Pat 42, 2015(1) PLJR582
The Hon’ble High Court of Patna held that, a person cannot be held to be partially loyal to a party or of partially abandoning the party. The conduct of a member is to be adjudged in totality and not in a partial manner. These petitioners supported the candidature of Shri Sharad Yadav and to that extent they remain loyal members of the party but in their opposition to the rest of the two candidates, it has been held to be a voluntary surrender of their membership. In such a situation the act of the petitioners in the same election cannot be treated differently and candidate wise. The moment there is a cloud created, it is sufficient to exonerate the petitioners of the alleged charge of defection when there is no other cogent material evidence available to support the charge.

Appreciating the Court decision, the present research scholar humbly submits that it is a clear case of honest dissent and not of defection. In this case by supporting the candidature of Shri Sharad Yadav petitioners showed their loyalty towards the party. But by opposing the candidature of other two, which has not been approved by the Parliamentary Board of the Janata Dal (United) party, the petitioners showed their dissension towards the party. Such type of honest dissent is healthy for parliamentary democracy and it was not the object of Anti-defection law prohibiting such dissent in the name of defection.

Defection means an ‘abandonment’ of the party to which the legislator concerned belongs; or an act confirming disloyalty to that party,
a positive act of the legislator to join another party or a change in party affiliation or allegiance or an act of floor-crossing. Defection is a malady defacing democracy and if not checked would shake the very foundation of democracy. On the other hand ‘Dissent’ is an integral part of a vibrant democracy and is not the same as ‘defection’. There is a very thin line separating an act of ‘defection’ with an act of ‘dissent’. Whereas all cases of defection would be inclusive of acts of dissent either backed by lure for office or for other similar considerations which strictly may not be called ‘moral’ but the converse is not always true and all cases of ‘dissent’ do not necessarily fall within the meaning of the term ‘defection’.

**Karnataka**

In *Balchandra L. Jarkiholi Vs B.S. Yeddyurappa*\(^{369}\) 13 members of the Karnataka Legislative Assembly belonging to Bharatiya Janata Party (B.J.P.), wrote identical letters to the Governor stating that they got disillusioned with the functioning of the Government headed by Chief Minister Sri B.S. Yeddyurappa. There was allegation of corruption, nepotism, favouritism, abuse of power, misusing of government machinery in the functioning of the government headed by Chief Minister B.S. Yeddyurappa. In the public interest they withdrew their support to the Government headed by Sri B.S. Yeddyurappa and requested the Governor to intervene and institute the constitutional process in the State.

\(^{369}\) *Supra Note263*
On the basis of the aforesaid letters, the Governor requested Sri B.S. Yeddyurappa to prove his majority in the House. Considering the disqualification petition filed by Sri B.S. Yeddyurappa, even before the confidence motion the Speaker disqualified those 11 B.J.P. M.L.A. s who had joined the revolt against Chief Minister Yeddyurappa on the ground of ‘voluntarily given up their membership’ of the political party and the impugned order of the Speaker was challenged before the High Court of Karnataka and the decision of the Speaker has been upheld by the Court.

Delivering the dissenting judgement, Mr. Justice N. Kumar of the High Court set aside the impugned order of the Speaker and held that an act of no confidence in the leader of the legislative party does not amount to his voluntarily giving up the membership of the political party. Similarly, the act of expressing no confidence in the Government formed by the party, with a particular leader as Chief Minister, would not also amount to voluntary act of giving up the membership of the political party. Deserting the leader and deserting the Government is not synonymous with deserting the party. Dissent is not defection and the Tenth Schedule while recognizing dissent prohibits defection. Right to dissent is the essence of democracy, for the success of democracy and democratic institutions honest dissent has to be respected by persons in authority.
The Hon’ble Supreme Court of India, allowing the appeal set aside the disqualification order of the Speaker along with the majority judgment of the High Court of Karnataka.

**Uttarakhand**

In *Kunwar Pranav Singh Champion & Others Vs Speaker Legislative Assembly & Another*\(^{370}\) the petitioners are the members of Indian National Congress party of the Uttarakhand Legislative Assembly, and submitted a joint memorandum before the Governor of the State mentioning their distrust against the Government and the Chief Minister. The memorandum was signed by a group of 35 Members of the House (26 Members of BJP and 9 Members of Indian National Congress/petitioners). The memorandum questioned the status of Appropriation Bill 2016 and it was urged that despite 35 Members requesting for a voting by division, they were ignored by the Speaker. The Speaker on 27.03.2016 disqualified the petitioners’ membership of the House under the provision of the Tenth Schedule.

In this case the Hon’ble Uttarakanchal High Court observed that deserting the leader and deserting the Government is not synonymous with deserting the party. What constitutes defection under Paragraph 2(1)(a) of the Tenth Schedule of the Constitution is deserting the party.

\(^{370}\)Supra note 118
Dissent is not defection and the Tenth Schedule while recognizing dissent prohibits defection. But in this case the petitioners have not only deserted the leader and deserted the Government, but under the garb of dissent, they have, by their conduct, deserted the party, otherwise they would not have said in the joint memorandum that they voted against the Appropriation Bill, the Bill was not passed, the Government is in minority.

The High Court demarcating the difference between the deserting the leader/Government and deserting the party observed that, there is a thin line of difference between deserting the leader/Government and deserting the party. Dissent is permissible only so long as it does not tread into the realm of ‘voluntarily relinquishing the membership of the party’. If dissent is permitted to unfathomable limit, then it will amount to deserting the party and would also tantamount to ‘voluntarily giving up his membership of such political party’ under paragraph 2(1)(a) of the Tenth Schedule.

The researcher has compared *Balchandra L. Jarkiholi and Ors Vs B.S. Yeddyurappa and Ors*\(^\text{371}\) (shortly B.S. Yeddyurappa case) with the *Kunwar Pranav Singh Champion & Others Vs Speaker Legislative Assembly & Another*\(^\text{372}\) (shortly Uttarakhand case), and has found that in

\(^{371}\) *Supra Note 263*  
\(^{372}\) *Supra Note 118*
both the cases rebel legislator wrote identical letter to the Governor of the State withdrawing their support from the Government. But the Uttarakhand case appears to be on different plane. In B.S. Yeddyurappa case, the 13 BJP MLAs were disillusioned with the functioning of the Government headed by B.S. Yeddyurappa on account of widespread corruption, nepotism, favouritism, abuse of power and misuse of Government machinery in the functioning of the Government headed by Chief Minister, Shri B.S. Yeddyurappa. In the Uttarakhand case also, the petitioners are disillusioned with the functioning of the Government headed by Shri Harish Rawat. They are equally disillusioned with the working of the Speaker of the State Assembly. In B.S. Yeddyurappa case, the MLAs withdrew support from the Government headed by Shri B.S. Yeddyurappa with a request to the Governor to intervene and institute the constitutional process as constitutional head of the State. In B.S. Yeddyurappa case, the rebel Legislators did not go to the Governor with the Member of the Opposition; they did not say that they had voted against the Bill; they did not say that the Appropriation Bill could not be passed; and they did not say that the Government is in minority. The MLAs in Yeddyurappa’s case only said that Shri B.S. Yeddyurappa, Chief Minister Yeddyurappa and, as such, they withdrew their support to the Government has forfeited the confidence of the people and, therefore, they expressed their lack of confidence in the Government headed by B.S.
headed by Shri B.S. Yeddyurappa. But in Uttarakhand case, the rebel MLAs of Indian National Congress party submitted a joint memorandum along with the BJP MLAs before the Governor of the State expressing their distrust against the Government and the Chief Minister. In Uttarakhand case the rebel Legislators in the guise of dissent, disserted the party and are liable to be disqualified on the ground of defection.

In the Uttarakhand case if the conduct of the rebel member of the Indian National Congress party is observed in the context of the anti-defection law and the Apex Court ruling in Ravi Naik’s case, it can be concluded that they have voluntarily given up their membership of the party. The conduct of dissent shown by the rebel MLAs is not saved by the provision of the Anti-defection Law.

**Arunachal Pradesh**

In *Pema Khandu Vs The Speaker, Arunachal Pradesh Legislative Assembly* the Speaker of the Arunachal Pradesh Legislative Assembly disqualified 14 dissident Congress MLAs from the membership of Arunachal Pradesh Legislative Assembly, who had joined the revolt against Chief Minister Nabam Tuki on the ground that they had voluntarily given up their membership’ of the Congress party. There were differences among the INC MLAs regarding the leadership of Shri

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373 *Supra Note 330*
Nabam Tuki as the Chief Minister of the States. The dissident MLAs addressed a letters to the Governor, in furtherance of their objective, namely, to change the Chief Minister – Nabam Tuki. This dissident Congress MLA challenged the validity of the Speaker’s order before the Gauhati High Court and the impugned order of the Speaker is stayed by the Court pending the disposal of the case.

In this case notice was not properly served to the dissident Legislator and on the ground of violation of the principle of natural justice the Hon’ble Gauhati High Court set aside the order of disqualification passed on 15-12-2015 and sent back the matter to the Speaker for fresh hearing. The Court has also directed the Speaker to form a Committee to make enquiry into the complaint of disqualification and to decide the issue taking into consideration the report of the Committee.

The researcher submitted that it is a case of honest dissent and not defection. The dissident MLAs of INC were not satisfied with the style of functioning of the Chief Minister Nabam Tuki. Remaining loyal to the party, these legislators voiced their concern within the party within the permissible democratic manner for change of leadership of the party or change of the Chief Minister in order to bring about better socio-economic development of the State. Such type of dissent is healthy for a good governance and sound democracy. These MLAs neither dissented
the party nor they voted against the Government violating party whip and are immune from disqualification under Tenth Schedule.

Tripura

In June, 2016 in the border State of Tripura, Six rebel Congress MLAs lead by former Leader of the Opposition Sudip Roy Burman, submitted a letter to Tripura Assembly Speaker saying they are quitting the party and joining the Trinamool Congress in protest against the Congress-Left tie-up in the last 2016, Assembly election in West Bengal. They were not satisfied with the functioning of high command of the party.\textsuperscript{374}

A balance between right to vote and right to dissent

In \textit{Kihoto Hollohon Vs. Zachillhu}\textsuperscript{375} the Supreme Court of India held that a direction given by a political party to its members, violation of which may entail disqualification under paragraph 2(1)(b) should be limited to a vote of motion of confidence or no confidence in the Govt. Or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate.

\textsuperscript{374} The Assam Tribune, Guwahati, June 8, 2016.

\textsuperscript{375} Supra Note 78
Confidence and no-confidence motions are clearly defined and justified cases of disqualification on grounds of dissenting from party lines. The principle flaws of the solution suggested lies in the third case elucidated that of policies and programmes on the strength of which the member has approached the electorate. It would be difficult to establish that a policy from the manifesto of a political party was not an issue on the basis of which the member and party came to power.

The excessive and ineffectual interpretation of Paragraph 2 (1) (b) of Apex Court has lead to a frequent use of whips by leaders in everyday parliamentary politics. Under the guise of integral policy programmes, parties have issued directions to their members for inconsequential matters, the non-observance of which continues to attract the disqualification under Tenth Schedule. The Karnataka Assembly provided a unpleasant instance of the same when certain BJP members were disqualified when they defied a party whip directing them to vote in favour of a particular member for the post of the speaker of the Assembly.

Despite reading down the scope of Paragraph 2 (1)(b) the Court failed to provides any mechanism to challenge a whip issued by the political party. Two harms have emerged from it – first- this loophole does not prevent the disqualification of members for non-compliance of whips in trivial matters. This would act as a deterrent to free voting in the House. This has been reflected recently when Mamata Bannerjee issued an
informal whip, directing Trinamool Congress MLAs to cast their vote in favour of Mr. Trivedi, the Trinamool candidate for the Rajya Sabha.\footnote{The Statesman (India), Congress rests Rajya Sabha case on cross-vote, March 17, 2002}Though the defiance of such a whip may not attract disqualification proceedings, few would dare to defy such a direction and risk inviting the wrath of the party leaders, who have the sole discretion to invoke Paragraph 2 (1)(b) to either initiate the disqualification procedure or condone a member’s actions.

Secondly- if there is formal regulations then in the case of wrong whips a member can challenge a wrong whip after the disqualification process, on the grounds of unconstitutionality.

The frustration against the inability to dissent on the floor of the House prompted Manish Tewari, Spokesperson of the Congress to initiate a Private Member’s Bill in the Parliament.\footnote{The Constitution (Amendment) Bill, 2010, Bill No. 16 of 2010}

\textbf{Limited Whip versus Curtailed Disqualification}

A proposed solution that had created the controversy was suggested by Manish Tiwari, Member of Parliament, Lok Sabha. The suggestion is relating to constitutional amendment to limit the scope of Paragraph 2
(1)(b). The Bill proposed by Manish Tiwari limits disqualification under Paragraph 2 (1) (b) to be a possible sanction only if the member dissents against a Whip issued in the following instances.

(i) motion expressing confidence or want of confidence in the Council of Ministers,
(ii) motion for an adjournment of the business of the House,
(iii) motion in respect of financial matters as enumerated in Articles 113 to 116 (both inclusive) and Articles 203 to 206 (both inclusive),
(iv) Money Bill”

The propositions made by Constitution (Amendment) Bill, 2010 are similar to the recommendations made by the Dinesh Goswami Committee on Electoral Reform where it was suggested that disqualification must be imposed only in case of vote of confidence or no-confidence motions. By limiting the ambit of disqualification, this bill seeks to make the necessary change of creating greater room for policy expression, fearless debate and discussion in the Parliament. Such a law would liberate legislators from the whip imposing fear of losing their membership except

379 Supra Note 377
in cases where the life of the government is threatened by a no-confidence motion, money bills and some crucial financial matters.\textsuperscript{381}

Again an alternate proposal had been made by the 170\textsuperscript{th} Report of the Law Commission of India. It suggested that there must be a rule and regulation on the issue of whips. It opined that whips should be allowed to be issued only in cases where the existence of the government was at threat.\textsuperscript{382} This recommendation is at odds with the Constitution (Amendment) Bill, 2010 and the observations of the Goswami Committee Report. This situation may be rationalized when it is remembered that the Law Commission Report argues for issuance of whips in limited circumstances. On the contrary, the Constitution (Amendment) Bill, 2010 and the Goswami Committee Report argue for disqualification on limited grounds. The main difference is that while the latter implicitly allow a whip to be issued in any case, it argues that penalty in the form of disqualification can only be imposed in limited circumstances. On the contrary, the former aims to restrict the very issuance of Whip.

The solution envisages by the Constitution (Amendment) Bill, 2010 seems to be more appealing as it better meets the intended objective of anti-defection law when compared against the status quo. Any restriction

\textsuperscript{382} 170th Report of Law Commission of India
on the issuance of a whip can amount to an effective curtailment of the right of political parties to administer its own internal affairs. Political parties should be allowed to initiate internal disciplinary proceedings for dissenting against a whip. It should not, however, curtail freedom of expression of parliamentarians by disqualifying them for dissent, when internal disciplinary methods can easily address the problem.

The researcher sought to maintain a balance between the intended freedom to vote and dissent, and the associational rights vested in political parties. Any restriction on voting in Schedule Ten must be done away with, in the interests of greater and livelier debate in the House, which could lead to better formulated legislations. At the same time, it must be remembered that Schedule Tenth serves to protect the sanctity of a political formulation as well as the life of a government.383

Dissent in other Countries:

The words defection and dissent are not synonymous. They carry separate and distinct meanings. Defiance of party direction or whip may be expression of dissent but not defection. It is well known that in UK, Canada, Australia and New Zealand where Parliamentary democracy similar to India exists, members sometime vote in defiance of the party whip or direction and they are not penalised. In fact, in these countries

dissent has played an important part. There is no question in Britain or in any of the other three countries mentioned above of unseating the dissenting member. Mere non-compliance with a party directive can never be considered to be political defection because such a member has neither changed side nor crossed the floor; he continues to remain a member of his original political party.\textsuperscript{384} In the United States, though there exists presidential system of government, its legislative wing is similar to India, but there is no Anti-Defection Law like India. A member of the US Congress has the freedom to vote for any policy and bill without the fear of disqualification. It is the internal US party structure that provides for sanction to be imposed on legislators who do not vote according to party lines.\textsuperscript{385}

5.5 Review

The Anti-defection Law has been criticized on the ground that it denies the fundamental freedom of speech and freedom of action, which includes the freedom to vote, to a legislator because he is required to abide by the direction issued by his political party. Otherwise, their dissent may be termed as defection and they may be disqualified from membership of the concerned House under the Tenth Schedule, as in the case of Arunachal Pradesh. Dissent should not be considered as defection.

\textsuperscript{384} Supra Note 2, Pg. 9
\textsuperscript{385} Supra Note 383
because a dissenting member or one who does not comply with a particular party directive has neither changed sides, nor crossed the floor; he continues to be a member of his party. Therefore, a difference needs to be made in between ‘defection’ and ‘dissent’. Every dissent does not amount to defection.

One of the grounds of defection under the Tenth Schedule is that voting or abstains from voting contrary to any direction given by the party leader. Besides the freedom of speech and expression, the Constitution of India provides for free voting in parliament. The opinion of the courts is that voting by ordinary citizen is a part of speech on the ground that it is a tool of expressing feelings, sentiments, ideas or opinions of an individual. The right of an individual citizen to cast his vote to any candidate of his choice is nothing but a freedom of voting, which is essential for parliamentary democracy. In India, while the right to vote is a statutory right but the freedom to vote is considered a facet of the fundamental right guaranteed under Article 19 (1) (a) of the Constitution of India. Extending this finding to voting in Parliament, voting becomes an essential element of the freedom under Article 105(1). Therefore, voting by members of Parliament or Legislature of a State should not be

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restricted by Paragraph 2(1) (b) of the Tenth Schedule of the Constitution.\footnote{Supra Note 383}

It is pertinent to mention here that, if votes are not allowed to be altered by arguments and speeches, what is the use of the forum of Parliament? A Parliamentary form of Government can be effective only, if individual legislators have a significant role as law makers and if they can be held accountable for their actions/ non-actions by their electorate. But under the present scenario only the leaders of a political party (Party Bosses) play the significant role and role of an individual Legislator is diminished to just a person who has to follow orders from the party bosses. Any legislator who does not act in accordance with the party direction on any issue may be disqualified from the membership of the legislature. For instance, in 2008 during the confidence motion, 10 MPs were disqualified from the membership of the Parliament when they did not vote as per the direction given by the party leader. The leader of a political party can ensure the support of each of its legislator by issuing a whip.

Defiance of party direction is not punished by unseating the member concerned in countries like U.K., Canada, Australia, and Newzealand where parliamentary democracy similar to India prevails. Therefore, it is suggested that the provision relating to Whip or direction under the Tenth
Schedule should be restricted to confidence votes and Money Bills which are similar to confidence votes.