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TENTH SCHEDULE: DEMOCRACY FOR SALE

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ABSTRACT

The Tenth Schedule, commonly referred to as Anti-defection Law, aims at reducing rampant political defections in a parliamentary democracy. Being a legislation born in an era which witnessed an unprecedented scale of political defections, the Anti-defection law has fallen well short of its purpose.

The relevance of this paper is visible from the recurring events of political defections through circumventing the law. On that note, this paper seeks to answer the question – ***Whether the Tenth Schedule has been able to achieve its objectives?*** *This paper discusses how the Tenth Schedule while failing on its objectives, has been exploited for furtherance of corrupt ends. The author has scrutinized key issues concerning Article 105(2) of the Constitution, the interpretation of Para 2(1)(a), and the unchannelised powers vested under Para 6 of the Tenth Schedule. The paper concludes that the Anti-defection law is a toothless provision that warrants an immediate and comprehensive overhaul.*

I. INTRODUCTION

The art of defection touched its zenith during the 4th General Election in 1967, where an appalling total of 438 members engaged in defection.[1] Between 1967 and 1971, 142 Members of Parliament and over 1900 M.L.A.s defected from their respective political parties.[2] The deplorable state of affairs can be best explained – *"Aaya Ram, Gaya Ram* (*Ram has come, Ram has gone*)", an epithet which owes its origin to Gaya Lal, former MLA of Haryana, who changed his party allegiance thrice in a fortnight.[3] In such a condition, where legislators were

[1] *Mian Bashir Ahmad* v. *State of J. & K.,* AIR 1982 J&K 26.
[2] Rohit "Politics of defection", *available at*: https://prsindia.org/theprsblog/politics-defection (last visited on December 29, 2019).
[3] *Id.*

eager to sell their political integrity to the highest bidder, the legislature felt the pressing need for some restraints. As a means to that end, the Anti-defection law was formulated.

After two unsuccessful attempts in 1974 and 1979 respectively, the Anti-defection law was finally inserted into the Constitution under the Tenth Schedule by the Fifty-second Constitutional Amendment in 1985. The law aimed to thwart the rampant political defections by legislators in lieu of luring considerations including money and office.

Defection is constituted when a representative of a party repudiates his or her affiliation with the same in order to assimilate with another party. In other words, defection can be defined as the "crossing of the floor" by a member of a Legislature. In order to curb defections, the Tenth Schedule provides for disqualification of a member from the House under multiple grounds. One such ground provides for disqualification when a member votes or abstains from voting in the House contrary to any direction issued by his political party or by any person authorised by it.[4] Promulgation and enforcement of such directions are through the issuance of a "whip".

II. THE WHIP

The usage – "whip" is used to refer both to the voting directions/instructions of the party and the party member who is empowered to do so. The practice of whip is one which India inherited when she was a British colony.[5]

As per our defection laws, a Member will be considered a defector when he disobeys the whip, culminating in disqualification. Such a provision which seeks to attach liability of disqualification on an elected Member for freely expressing his views is a restraint on his freedom of speech.[6] Through such laws, the Constitution is indirectly taking away individual discretion and thereby the sanctity of the vote. In a condition where individual discretion is

[4] The Constitution (52nd Amendment) Act, 1985.
[5] Agozino B "The Whip in the House: Rituals of Social Control in Parliament and in Society" *Social Crimonol* 211 (2015)
[6] *Amalgamated Society for Railway Servants* v. *Osborne* (1910) AC 87.

subjugated by discretion of the party, whims of a small faction of powerful individuals in the forefront prevails. This is a clear derogation of the fundamental tenets of parliamentary democracy.

Nonetheless, the Supreme Court, in its verdict of *Kihoto Hollohon v. Zachilhu & Ors*., held that the contented provision is not violative of Article 19(1)(a).[7] It is rather amusing to note that the *sentinel on the qui vive* deemed honest dissent and conscientious objections as elements which a parliamentary democracy can afford to forgo and justified the elimination of these elements as a "side effect of experimental legislation".[8] Such reasoning is highly flawed as, in a democracy, difference in opinion guided by one's beliefs and conscience is to be deeply valued. Furthermore, when Members are restrained from expressing their honest opinions through votes, true majority on an issue succumbs to a "forced majority" created under the pressure of the party whip. Such practices are violative of the principle of majoritarianism - one of the fundamental canons of democracy.

On that note, a contrary view was taken by the Apex court validating such coerced majority decisions on the basis of 'shared beliefs' of the Member and the party.[9] However, the Hon'ble court failed to acknowledge the possibility of internal differences within a shared belief. For example, when a party believes in the system of reservation, it is not necessary that all its Members unanimously assent to an extension of the aforesaid system for the next hundred years. It is to be noted that in the aforesaid example, the Member and the party conjointly share the same belief, which is the system of reservation. The ideologies of both entities are in harmony. However, the peripheral compatibility in mindset of both the entities should not translate to them having a common opinion on any and every issue emanating from a shared belief. In the absence of individual expression, as envisaged by the Hon'ble court, one could imagine the monumental repercussions of such arbitrary decisions.

While the Constitution, in reality, out-rightly deprives the legislator from his rightful discretion, it acts as a knight in shining armor to purportedly preserve the same. The

[7] 1992 SCR (1) 686.
[8] *Id*. at 115.
[9] *Id.* at 217.

Constitution has incarnated this hypocrisy through Article 105(2), the Parliamentary privileges.

III. ARTICLE 105(2): THE GLARING HYPOCRISY

Article 105(2) ordains that no member of Parliament shall be liable to any proceedings in any court concerning anything said or any vote given by him in the Parliament.[10]

The above provision is nothing but an incarnation of superficial freedom. One understands that when a law takes away the individual discretion from voting, another law granting immunity while casting the same does not safeguard one's right to choose. When this glaring contradiction was challenged in the *Kihoto Hollohan Case*, the Courts recognized that the framers of the Constitution never intended to confer an absolute right on the members of Parliament, as far as freedom of speech was concerned. Therefore, it held that the Tenth Schedule is empowered to curtail the freedom of speech of the Parliamentarians.

Article 105(2) is therefore rendered futile by the Tenth Schedule, insofar as parliamentary debate is concerned. In reality, its existence aggravates the issue at hand by conjuring another evil - corruption. The JMM Bribery Case is standing proof for this assertion.

The JMM Bribery Case took place in 1993, a year reckoned to be the one which institutionalised corruption. The C.B.I, in an investigation, found that the P.V. Narasimha Rao, (erstwhile Prime Minister) had paid hefty bribes to the Members of Parliament (hereafter referred as "M.P.s") from a political party named Jharkhand Mukti Morcha to vote against a no-confidence motion, schemed to topple his minority government.[11] The M.P.s who took bribes was divided into two categories - one which voted in the motion and one which did not. Much to one's amusement, the accused M.P.s brazenly justified their taking of bribes as part of their 'parliamentary privileges'. Further, they claimed that they were not 'public servants'

[10] The Constitution of India, art. 105(2).

[11] Balwant Singh Malik "P.V. Narasimha Rao v. State: A Critique", *available at*: https://www.ebc-india.com/lawyer/articles/9808a1.htm (last visited on December 29, 2019).

and hence would not be subject to the Prevention of Corruption Act, 1988. Hence, there were three glaring issues before the sitting judges -

[1] Whether a Member of Parliament is a public servant?

[2] If so, whether the bribe-taking M.P.s entitled to the immunity provided under Art. 105(2)?

[3] Whether the bribe-givers can be prosecuted under The Prevention of Corruption Act, 1988?

With regard to the first issue, the Hon'ble Court held that Members of Parliament are in fact public servants. They arrived at this decision by equating the Parliament to that of a public office.[12] Since the M.P.s held a public office attached with certain responsibilities and authority which were public in nature, they were to be considered as public servants. As the accused were found to be public servants who received bribes, they fell within the ambit of the Prevention of Corruption Act, 1988. Insofar as the conviction of the accused under this Act was concerned, judicial interpretation of the scope of Article 105(2) became the decisive factor.

The Apex Court by a 3:2 majority decision, found the accused not guilty by a strict interpretation of Article 105(2). The majority was of the view that, in order for Members to participate fearlessly in parliamentary debates, they should not be subjected to civil or criminal proceedings that bear a nexus to their speech or vote.[13] M.P.s who took bribes and voted, enjoyed the unjust immunity that the provision provided. Ironically, the M.P. who did not vote after taking the bribe, was found guilty. The Court found him to be not a beneficiary of the said provision as he did not vote. Albeit this judgment can only be described as a travesty of law, the law itself is far from righteousness. It is indeed high time to change the laws in force, if the loyalty it questions is the one to the briber and not to the electorate.

On top of all this chicanery, the fact that the delinquent could procure a tax - waiver on the bribe is unsettling and counterintuitive. The Income Tax Tribunal blindly swallowed the argument that the bribe amount was a "donation" made in "national interest" for facilitating "cooperation" among two parties. This event makes it clear that by providing immunity to

[12] *P.V. Narasimha Rao* v. *State* (1998) 8 SCC (Jour) 1.
[13] *Id.* at 76.

anything and everything resulting in a vote, the law indirectly embraces corruption. The law, in the first place, aims to protect freedom of speech; a freedom that has ceased to exist in the current paradigm, owing to the Tenth schedule. Adding to that, it provides a breeding ground for immoralities such as corruption and horse trading, since one can take bribes and walk scot-free as long as he votes.

The abysmal plight of the world's largest democracy, with respect to the rights and restraints of its politicians do not end here. The Tenth Schedule has given way to another lamentable discrepancy as far as disqualification of legislative or parliamentary members are concerned. This is with regard to the process of voluntarily giving up of membership by a party member.

IV. VOLUNTARY GIVING UP OF MEMBERSHIP

Para 2(1)(a) of the Tenth Schedule lays down that a member of a House belonging to any political party shall be disqualified if he has voluntarily given up his membership of such political party.[14]

Insofar as the interpretation of the above phrase is concerned, the Apex Court, in *Ravi Naik vs. Union of India*, held that the words – "voluntarily gives up his membership" are not synonymous with formal resignation and have a wider connotation.[15] An inference of voluntary resignation can be drawn from the conduct of the member, even in the absence of a formal resignation.[16]

The law laid down in the above case is a well-settled one, consolidated by the decisions in *G.Viswanathan v. The Hon'ble Speaker, Tamil Nadu Legislative Assembly* and *Rajendra Singh Rana v. Swami Prasad Maurya and Ors.*[17] Albeit the interpretation of the Hon'ble Court in *Ravi Naik Case* principally holds water, it does more harm than good. The precedent has been abused by political parties to curb the freedom of speech and expression of its fellow

[14] The Constitution (52nd Amendment) Act, 1985, Para 2(1)(a).
[15] *Ravi Naik* v. *Union of India* (1994) AIR 1558.
[16] *Id*.
[17] *G.Viswanathan* v. *The Hon'ble Speaker, Tamil Nadu Legislative Assembly, Madras* (1996) AIR 1060; *Rajendra Singh Rana* v. *Swami Prasad Maurya* (2007) 4 SCC 270.

Members. For example, when a party member attended the rally of the opposition party, in order to express dissent concerning his own party's wrongdoings, he was disqualified under the Tenth Schedule, citing such activities as "anti-party" in nature and consequently signifying involuntary resignation.[18]

As we know, expression of dissent against the decision of one's own political party, in any of the Houses, was already prohibited by 2(b) of the Tenth Schedule. Now, with the aid of this precedent, displaying dissent, even outside the bounds of a whip, can be construed as voluntary resignation by a member from a political party. Therefore, a member is rendered incapable of publicly criticizing or questioning his party's decisions, as blatantly arbitrary as it may be. Such a constraint, especially in a paradigm where intra-party dissent is silenced by a Constitutional provision, strikes at the root of representative democracy and freedom of expression. Courts through the aforesaid judgments have essentially closed all doors for elected representatives to fearlessly voice their concerns and dissent. These judgments have consolidated the subjugation of the members by their party, even when the former is voicing dissent as an ordinary citizen.

V. POWERS OF THE SPEAKER/CHAIRMAN

Para 6(1) of the Tenth Schedule pertains to the decision on questions as to disqualification on ground of defection. As per this provision, any question concerning the disqualification of a member of a House under the Tenth Schedule shall be referred for the decision of the Chairman/Speaker of such House and his decision shall be final.[19]

Anti-defection law confers the power to decide a case of defection on the Presiding Officer of the House, that is, the Speaker/Chairman. At the time of framing of the legislation, the framers assumed the post of Speaker to be an independent and impartial one, free from

[18] Press Trust of India "Rebel JD(U) leaders Sharad Yadav, Ali Anwar disqualified as Rajya Sabha members", *available at*: https://indianexpress.com/article/india/rebel-jdu-leaders-sharad-yadav-ali-anwar-disqualified-as-rajya-sabha-members-4968110/ (last visited on December 29, 2019).
[19] The Constitution (52nd Amendment) Act, 1985, Para 6(1).

political affiliations and considerations.[20] However, in the current reality, this assumption does not hold true. Since the Speaker is chosen by the elected members itself, partiality and favouritism to the majority is bound to prevail.

The Speaker has many powers vested in him with respect to cases of disqualification of legislative members. One of the said powers is his authority to scrutinize a voluntary resignation tendered by a Member. In other words, the Speaker has the power to accept or reject a Member's resignation after considering its authenticity.[21] The said power plays a crucial role in hindering horse-trading and defection, especially during a no-confidence motion.

A recent example is that of the Karnataka Speaker K.R. Ramesh Kumar's decision to reject the resignation letters of 14 M.L.A.s from the Congress Party.[22] The submission of resignation letters and ensuing decision of Speaker was in the backdrop of a no-confidence motion raised by BJP against the ruling Congress party of the Karnataka Assembly. The Congress Party issued a whip to all of its M.L.A.s to vote in favor of the party. The 14 M.L.A.s who were disqualified disobeyed the Party whip, wherein they abstained from voting in the no-confidence motion. Through the said resignation letters, the M.L.A.s intended to bypass disqualification, as their resignation would protect them from the consequences of disobeying the whip. However, in light of the rejection of voluntary resignation submitted by these M.L.A.s, they were nonetheless disqualified.

VI. SCOPE OF JUDICIAL REVIEW

The question of finality of the Speaker's decision was extensively discussed in the case of *Kihoto Hollohan v. Zachillhu.* The principal question before the Apex Court was the constitutional validity of Para 7 of the Tenth Schedule which barred the jurisdiction of Courts in matters of disqualification. According to Para 7, no court shall have any jurisdiction in

[20] Volume VIII, Part I, Constituent Assembly Debates, 19 May, 1949.
[21] The Constitution of India, art. 190(3).
[22] Aditya Bharadwaj "Karnataka Speaker disqualifies 14 more rebel M.L.A.s till end of Assembly term" *available at*: https://www.thehindu.com/news/national/karnataka/karnataka-speaker-disqualifies-more-rebel-M.L.A.s-till-end-of-assembly-term/article28737298.ece (last visited on December 29, 2019).

respect of any matter connected with the disqualification of a member of a House under the Tenth Schedule.[23]

Para 7 of the Tenth Schedule made the Speaker not only the sole arbiter on any matter concerning the disqualification of a member of a House under the Schedule, but also made his decision final. In other words, the said provision rendered the Speaker's decision immune from judicial review, including that of the Supreme Court under Article 136, and the High Court under Article 226 and 227. By ousting the jurisdiction of the Courts for judicial review, Para 7 altered these provisions in terms and effect. Consequently, Para 7 being an amendment to the Constitution was required to satisfy the procedure under Art.368(2), that is, to have the President's assent and State ratification.[24] In light of the contended provision not fulfilling the latter criterion, i.e., state ratification**,** it was struck down as unconstitutional. Therefore, the *Kihoto Hollohan Case* laid down that the decision of the Speaker is in fact subject to judicial review.

However, judicial intervention through a review process is possible only after the Speaker has decided on a plea of defection.[25] A Member cannot take the judicial recourse against any of the proceedings prior to the final decision of the speaker. Even though this legality, on a cursory glance does not pose any visible threat to parliamentary democracy, it has huge ramifications on the same. This is because the Speaker is entitled to an indefinite period of time to arrive at his final decision. Therefore, going by the law, the Speaker, if he intends to, can delay the decision making process to the extent of the date of expiry of the Assembly. Reference can be sought to a case wherein certain Members of Opposition in the Andhra Pradesh Legislative Assembly went on to hold ministerial posts for the ruling party without getting disqualified, all the while remaining as members of the opposition party.[26]

[23] The Constitution (52nd Amendment) Act, 1985, Para 7.
[24] The Constitution of India, art. 368(2).
[25] *Keshav Singh v. Speaker, Legislative Assembly, Uttar Pradesh* (1965) 1 SCR 413.
[26] The Hans India "Its Official Minister Talasani is still a TDP member", *available at*: http://www.thehansindia.com/posts/index/Telangana/2015-03-27/Its-Official-Minister-Talasani-is-still-a-TDP-member/140135 (last visited on December 29, 2019).

VII. IMPACT ANALYSIS OF 'KEISHAM MEGHACHANDRA SINGH v. THE HON'BLE SPEAKER, MANIPUR' ON PARA VI OF THE TENTH SCHEDULE.

In this case, one of the respondents was a candidate who contested in the assembly elections through a Congress ticket. However, immediately after winning the election, the said candidate switched his allegiance to BJP, thereby assisting the latter to secure the requisite majority to form the government. Subsequently, the defected member was given the position of Minister in the government. Even though the Congress Party filed petitions for disqualification of the concerned Member multiple times, a decision on the disqualification was not made by the Speaker.

In light of these facts, the Court had to deal with three main issues-
Firstly, whether the Speaker failed his duty endowed by the Tenth Schedule?
Secondly, whether the Court can issue a writ of quo warranto and remove the said member from his post?

As regards the first issue, the Court held that the Speaker failed his duty as he did not decide on the applications filed for disqualification within a reasonable time.
Concerning the second issue, the respondents contended that the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts the immunity under Article 122 and 212 of the Constitution.

Article 122 of the Constitution of India states that

: no officer or member of the Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.[27]

Article 212 lays down an identical provision which corresponds to the State legislature.[28]

[27] The Constitution of India, art. 122.
[28] The Constitution of India, art. 212.

In reply to the above contention, the Apex Court made an interesting observation wherein it characterised the Speaker as a Tribunal. The Court noted that even after the introduction of the Tenth Schedule in 1986, the Constitution did not 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).[29] Furthermore, the provisions of the Tenth Schedule indicate that the disqualification proceedings are in fact before the Speaker and not before the House. The Court also noted that the decision consequent to the proceedings are not subject to the approval of the House and operates independently of the House.

In light of all these factors, the Court held that the Speaker constitutes a Tribunal and disqualification proceedings are predominantly of a judicial complexion. It further held that the Tenth Schedule does not seek to create a non-justiciable constitutional area.[30] Hence, the Speaker while exercising his powers under Para 6(2) of the Tenth Schedule does not enjoy the immunity from judicial review granted by Articles 122 and 212 of the Constitution.

As far as the question of judicial intervention of the Court prior to the Speaker's decision, the Court sought recourse to the ratio laid down in the *Keshav Singh Case* which was further followed in the *Kihoto Hollohan Case*. The Court reiterated that judicial intervention in matters concerning the disqualification of an elected member is allowed only after the Speaker has decided on it.[31] It also noted that there cannot be any intervention prior to such decision either by a way of *quia timet* action or by other interlocutory orders, unless irreparable harm will occur in the given situation. In light of the settled legal position, the Court held that it cannot issue the writ sought and decide on the disqualification of the Member prior to the Speaker's decision.

However, as a positive takeaway, the Court noted that the ratio laid down in the above mentioned cases does not preclude judicial review in aid of the Speaker arriving at a prompt decision as to disqualification under the provisions of the Tenth Schedule. The Court further

[29] *Keisham Meghachandra Singh* v. *The Hon'ble Speaker, Manipur* Civil Appeal No. 547 of 2020.
[30] *Id.* at 13.
[31] *Supra* note 25.

stressed that it is in fact the duty of the Speaker to decide on disqualification petitions within a reasonable period. To that end, the Court held that absent exceptional circumstances, a "three-months period" from the date of filing of petition is the maximum time allotted to the Speaker to decide on a disqualification petition.[32] As regards the case at hand, the Court ordered that the Speaker should decide on the disqualification in four weeks time.

VIII. CONCLUSION

On one side, the Constitution confers unbridled power on legislators through Article 105 and 194. While on the other, they are just reduced to the mouthpiece of a party's will by virtue of the Tenth Schedule. Requisite rights are being denied to legislators while unbridled privileges are being bestowed on the same. Such contradictions give rise to an undemocratic environment where activities such as horse-trading thrive.

The problems which arise from these contradictions are aggravated by the unchannelised power vested on the Presiding officer of the Parliament. The Speaker/Chairman of the House, being a partisan of the majority party, is not an ideal entity to decide on a disqualification petition. The question of bias is highlighted especially in cases where the action taken by such entities determine the confidence in the ruling government. Moreover, the arbitrariness in decision-making and the delay in making the same are important issues, which the Hon'ble Supreme Court has sought to address in the *Keisham Meghachandra Case*.

The inadequacy and inefficiency of the law has been clearly characterized by the rampant horse-trading and floor-crossing that has taken place even after the inception of the Tenth Schedule. All State legislatures, especially Karnataka, have been incessantly ailing from the evil of political defections. At the end of the day, the primary stakeholders of democracy, that is the voters, are the ones who are the worst affected in these times of political instability.

From what we can see from the past, notwithstanding its stringent provisions, the anti defection law has failed to outwit the chicanery of the elected. In fact, it has in many ways

[32] *Supra* note 29 at 27.

given the elected legally justifiable avenues to propagate defection and other undemocratic activities. Therefore, in consideration to the alarming surge of coat turners in our democracy, an expeditious, up-to-the-hilt overhaul of the Tenth Schedule is the need of the hour.

IX. RECOMMENDATIONS

Even though there have been numerous recommendations from the Law Commission of India and various other Committees with respect to this Constitutional anomaly, it never bore fruit. A plethora of committees including the *Law Commission of India* in its *170th Report* (1999) recommended that parties should issue whips only when the government is in danger, such as a no-confidence motion or during the voting concerned with issues of paramount importance.[33] The *Dinesh Goswami Committee on Electoral Reforms* (1990)[34] and the *Constitution Review Commission* headed by *Justice MN Venkatachaliah* (2002)[35] had recommended such a decision be made by the President or the Governor on the Election Commission's advice, as in the case of disqualification on grounds of office of profit.

As regards the issue of voluntary giving up of membership is concerned, only in extreme cases of anti-party activities should the member be disqualified. Healthy dissent should not be categorized as anti-party in nature. Concerning the powers of the Speaker related to anti-defection, it is advisable to transfer such powers to a more neutral entity such as the President or the Election Commission. As an alternative solution, the researcher recommends the constitution of a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court to decide on the matters of disqualification relating to political defections.

[33] Law Commission of India "170th Report on Reform of the Electoral Laws" (May,1999).
[34] Ministry of Law and Justice "Report of the Committee on Electoral Reforms" (May,1990).
[35] The National Commission to Review the Working of the Constitution "Report of the National Commission to Review the Working of the Constitution" (March, 2002).