
DISSENT VERSUS DEFECTION: A CRITICAL ANALYSIS

M. N. Kaushika & M. S. Arun Prabhu, The Tamilnadu Dr. Ambedkar Law University,
School of Excellence in Law

ABSTRACT

The shifting of allegiance by a legislator from one political party to another in the lure of monetary consideration or political office is termed as defection or floor crossing. It has been one of the main reasons for governmental instability. There has been a multifarious incidence of defection since independence, which has demanded exigent attention. In this regard, the then government of India enacted the anti-defection law through the Constitution (52nd Amendment Act), 1985, which incorporated the tenth schedule in the Constitution of India. The amendment intends to strengthen parliamentary democracy by forbidding defection. Latterly, it is perceived that the chief whip of the political parties fragrantly misuses the said tenth schedule as an instrument of reprisal against the legitimate intra-party dissent of the legislators. This has a deterrent effect on the freedom of speech and expression that is conferred on legislators on the floor of the House through articles 105(1) and 194(1). Legitimate dissent is intrinsic to free expression. The broad objective of this article is to explore the evolution of anti-defection law in India, comprehend the constitutional provisions intending to deter defection, and critically assess the distinction between legitimate dissent and defection.

Keywords: Anti- Defection, Dissent, Defection, Freedom of expression, Whip

INTRODUCTION

Over the past decades, the evil of unbridled and unethical political defection has eroded the strength and endurance of parliamentary democracy in India. The defection has been a bane to the parliamentary democracy of India. 'Defection' also known as floor-crossing means the 'shifting of allegiance by an elected member of a legislature from one political party to another political party or an identifiable political group'¹. If a legislator who stands on the reserved symbol of a political party, after being elected on that symbol as a member of the legislative assembly of a state or both houses of parliament, voluntarily renounces his allegiance to such a political party or acts against the direction of the said political party, the legislator shall be deemed to have defected². Since independence, there has been a multifarious incidence of political defection. Defection being one of the prime causes of governmental instability has become a matter of national concern³. Thus, to forbid this, the then government enacted an anti-defection law by way of the Constitution (52nd Amendment Act), 1985, which incorporated the tenth schedule to the Constitution of India. The amendment also inserted articles 101(3)(a), 102(2), 190(3)(a), and 191(2) which disqualify defectors from holding membership in parliament or the state legislature, respectively. The main reasons behind this is to dissuade defectors of political parties with retribution. Alternatively, parliamentary democracy enunciates the free flow of expression, viewpoint, and legitimate dissent among its citizens. The freedom of speech and expression for the same is conferred on legislators through articles 105(1) and 194(1). Accordingly, the legislators casting their vote along party lines or against them is a legitimate exercise of that free speech. 'Legitimate dissent' is intrinsic to free speech and expression. Yet, of late, the chief whip of the political parties arbitrarily misuse Paragraphs 2(1)(a) and 2(1)(b) of the tenth Schedule of the constitution of India as an instrument of reprisal against legitimate intra-party dissent and initiate disqualification proceedings against legislators, thus transgressing the freedom of speech of the legislators. In this regard, this article aims to analyse the distinction between legitimate dissent as an expression of free speech and defection to destabilise the government and cause political instability.

¹ Kamath, P. M, 'Politics of Defection in India in the 1980s', 25, *Asian Survey*, pp. 1039–54 (1985) JSTOR, <https://doi.org/10.2307/2644180>, accessed 28 Dec. 2022.

² Ashish K Aushik, 'End of an Era of Debate: An Analysis of Anti-defection Laws in India', Vol. 3 Issue 4, *International Journal of Law Management & Humanities* (1959), accessed on 28 Dec. 2022.

³ Chavan Y. B, Report of The Committee on Defections, <https://Indianculture.Gov.In/Reports Proceedings/Report Committee-Defections>, accessed on 22/12/2022

EVOLUTION OF THE ANTI-DEFECTION LAW IN INDIA

The Constitution of India enshrines the parliamentary form of government. The primary characteristic of this type of government is the executive's obligation to the legislature⁴. The council of ministers shall remain in office so long as the confidence of the lower house is reposed in them, which is indicated by continuance of majority support.⁵ The government has to abdicate when it loses the support of the majority of legislators on the floor of the house⁶. This transpires when the legislators deceitfully shift their allegiance. This act of legislators has become acute during the period of the fourth general election⁷. Between the first and fourth general elections, there were roughly 542 cases of defection, of which 438 turned out between March 1967 and February 1968⁸. The position of minister was awarded to the defectors in the government they assisted in forming. On October 30, 1967, Haryana Legislator Gaya Lal defected thrice back and forth to the United Front political party, thus giving rise to the famous 'Aya Ram Gaya Ram slogan'⁹. Thus, to extinguish the evil of unbridled acts of defection, the then Government of India in 1978, established the Committee on Defections, which was presided over by Shri Y.B. Chavan, the then Union Home Minister¹⁰. The Committee's main recommendations were incorporated in the Constitution (Thirty-Second Amendment) Bill, 1973, which was presented during the fifth Lok Sabha on 16th May 1973 by the Congress government. Due to the dissolution of the parliament, the bill did not see the light of the day¹¹. In 1978, the Janata Government made one more endeavour towards this path by presenting the Constitution (Forty-Eighth Amendment) Bill, 1978, in the Lok Sabha. However, the bill itself was heavily criticised at its preliminary stage¹². Lastly, in the year 1984, the Rajiv Gandhi government took a firm, decisive step and enacted the anti-defection law through the constitution (fifty-second amendment) act, 1985¹³.

⁴ H.M. Seervai, *The constitutional law of India*, 4th edition, Universal Law Publishing Co (2013).

⁵ The Constitution of India, 1950. article 75 clause 3.

⁶ S.R. Bommai v Union of India, 1994 AIR 1918, <http://www.indiankanoon.com>.

⁷ G.C. Malhotra, *Anti-Defection Law In India And The Commonwealth*, Metropolitan Book Co. Pvt. Ltd, http://Bitstream/Anti_Defection_L... accessed on 20/12/2022.

⁸ *Supra* at 7.

⁹ Kamath, P. M. 'Politics of Defection in India in the 1980s'²⁵, *Asian Survey*, pp. 1039–54 (1985). JSTOR, <https://doi.org/10.2307/2644180>, accessed 28 Dec. 2022.

¹⁰ Chavan Y. B, Report of The Committee on Defections, <https://Indiaculture.Gov.In/Reports/Proceedings/Report/Committee-Defections>, accessed on 22/12/2022.

¹¹ Diwan, Paras. "Aya Ram Gaya Ram: The Politics Of Defection." vol. 21, no. 3, *Journal of the Indian Law Institute*, pp. 291–312 (1979), JSTOR, <http://www.jstor.org/stable/43950639>, accessed on 28/12/2022.

¹² *Id.*

¹³ The constitution (52nd amendment act), 1985, <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-fifty-second-amendment-act-1985>.

THE CONSTITUTIONAL PROVISIONS RELATING TO THE ANTI-DEFECTION LAW IN INDIA

The shifting of allegiance by legislators between political parties and the creation of factions within the same political party by subverting the will of the electorate is primarily done to acquire political office¹⁴. Also, a powerful political party that was incompetent to form a constitutional government by securing majority seats in the election, often paid legislators to overthrow the government in power. Rather than political ideologies or principles, the allure of political office has been the prime cause of political defection.¹⁵

Thus, to proscribe defections, the Constitution (Fifty-second amendment) Act, 1985, was adopted by the government of India, which incorporated the tenth schedule to the constitution of India and also amended Articles 101, 102, 190 and 191, of the Constitution viz., article 101(3)(a), article 102(2), article 190(3)(a), and article 191(2). The amendment enumerates the acts that constitute defection and proscribes defection by disqualifying the legislators who perform the act of defection from the membership of parliament or the state legislature.¹⁶

Clause (2) of Article 102 and clause (2) of Article 191 of the Constitution of India enunciate that if a legislator is disqualified under the Tenth Schedule, he shall be so disqualified from being a member of either the House of Parliament or state legislatures, respectively.¹⁷ Thus, the Tenth Schedule shall be read as a corollary to Articles 102(2) and 191(2) of the Indian Constitution.

Paragraph 2(1)(a) of the tenth schedule articulates direct floor crossing by the legislators i.e., voluntarily giving up membership in the political party on whose symbol the legislator stands for election,¹⁸ as the act that constitutes defection. Paragraph 2(1) (b) of the said tenth schedule enunciates acting against the direction of the party's chief whip, i.e. if an elected representative votes or abstains from voting against the direction of the party's whip, he shall be deemed to have committed the act of defection¹⁹. When the chief whip of a political party issues a

¹⁴ Pardeep Sachdeva, *Combating Political Corruption : A Critique Of Anti-Defection Legislation* , Vol. 50, No. 2 *The Indian Journal Of Political Science* , Pp. 157-168, (April - June 1989), <https://www.Jstor.Org/Stable/41855903>, accessed on 22/12/2022.

¹⁵ Id

¹⁶ Roshni Sinha, Prachi Kaur, *Anti-Defection Law, Intenti and Impact*, PRS India, <http://prsindia.org>> accessed on 22/12/2022

¹⁷ M.P.Jain, *Indian Constitutional law*, 7th Edition, Lexis Nexis.

¹⁸ The Constitution of India, 1950. Paragraph 2(1)(a) of the tenth schedule.

¹⁹ The Constitution of India, 1950. Paragraph 2(1)(b) of the tenth schedule.

direction to its party members to vote in a particular manner for policies or acts, the member of the party is mandated to comply with the direction, anything contrary to this directive is perceived as an act of defection²⁰. Also, if an independent candidate, after being elected to the house, joins any political party, he shall be deemed to have defected²¹. A nominated member of a house, who joins any other political party after the expiration of six months from the date on which he takes his seat shall be deemed to have defected²². The reparation for defection is the disqualification of legislators from membership in parliament or the state legislature.

Legitimate differences and disapproval of ideologies are at the heart of democracy, and such differences may lead to splits in the political parties, the same is protected to a reasonable extent by the constitution of India. Paragraph 4 of the Tenth Schedule protects the legislators from disqualification if there is a merger of political parties and the same is supported by not less than two-third of the members of the merging party²³. Also, when the legislator defies the direction of the party whip either after obtaining the prior permission of such a political party or after his act has been condoned by such a political party within a period of fifteen days from the date of defiance, the legislator shall be protected from disqualification²⁴.

Dissent As A Facet Of Freedom Of Speech And Expression Versus Defection As A Ground For Disqualification

The Constitution of India attaches prime importance to two basic privileges of legislators, which are specifically enshrined under Article 105(1) and (2) and Article 194(1) and (2) of the Constitution of India. The essence of any parliamentary democracy is the free flow of expression, ideas, dissent, and debate on the floor of the house and in the committees thereof. The legislators, while determining their position on any issue of national importance, are expected to exercise their right with objective satisfaction on the basis of the public interests, interests of their constituency, and party affiliations. The right to vote for or against party lines concerning any policy is a genuine exercise of free speech in Parliament, and the same is protected.²⁵ Legitimate dissent is imperative in any democracy²⁶. However, this right of

²⁰ Id.

²¹ The Constitution of India, 1950. Paragraph 2(2) of the tenth schedule.

²² The Constitution of India, 1950. Paragraph 2(3) of the tenth schedule.

²³ The Constitution of India, 1950. paragraph 4 of the tenth schedule.

²⁴ The Constitution of India, 1950. paragraph 2(1)(b) of the tenth schedule.

²⁵ M.P.Jain, Indian Constitutional Law, 7th Edition, Lexis Nexis.

²⁶ Kartik Khanna & Dhvani Shah, Anti-Defection Law: A Death Knell For Parliamentary Dissent? Manupatra.in, <http://docs.manupatra.in/articles/uploadpdf>, accessed on 25/10/2022.

legislators is jeopardized by political parties. The anti-defection law, which was introduced to ensure the stability of government by prohibiting defection, was blatantly misused by political parties to forbid legitimate dissent and hinder legislators from effectively performing their functions in a democratic country²⁷.

DEFECTION UNDER PARAGRAPH 2(1) (a) OF THE TENTH SCHEDULE

The overarching goal of this paragraph is to proscribe legislators from defecting to a political party. Yet, the political parties wilfully invoke this provision to prohibit legitimate intra-party dissent when the legislators exercise their freedom of expression against any of the policies or programmes of their own political party.

In the case of **Zachilhu Khusantho vs. State of Nagaland**²⁸, it is held that no clause in the tenth Schedule of the Constitution of India mandates a specific, formal, or informal way for giving up the membership of a political party. When a legislator formally tenders his resignation to his political party in writing, or if he acts in such a manner that it can reasonably be inferred from his conduct that he has done so, it is assumed that the legislator has given up his membership in the political party to which he formerly belonged. Furthermore, if the party splits, it can be assumed that the members have renounced their membership.

Also, in the case of **Ravi S. Naik Vs. Union of India**²⁹, it is held that voluntary renunciation of membership in the political party is not equivalent to resignation and has a wider connotation. Thus the absence of formal resignation doesn't preclude the conclusion that the member has not voluntarily renounced his membership. If he conducts himself in such a manner, reasonable inference can be drawn from the same .

In the year 2020, a tussle arose in the Rajasthan state legislative assembly between Mr. Ashok Gehlot and Mr. Sachin Pilot's partisan of the Indian National Congress. The Nineteen MLAs of the Indian National Congress flagrantly disregarded the directives issued by the Chief of the Indian National Congress and failed to attend two party meetings. Accordingly, the Congress whip documented a disqualification petition against them under para 2(1)(a) of the tenth schedule of the constitution before the speaker of the Rajasthan legislative assembly. The

²⁷ Ashish K Aushik, End of An Era of Debate: An Analysis Of Anti-defection Laws In India, Vol. 3 Issue 4 International Journal Of Law Management & Humanities (1959), accessed on 26/10/2022.

²⁸ Zachilhu Khusantho vs. State of Nagaland ,<http://www.casemine.com>> accessed on 20/12/2022

²⁹ Ravi S. Naik Vs. Union of India, AIR 1994 SC 1558, <http://www.indiankanoon.com>, accessed on 20/12/2022.

partisans of Mr. Ashok Gehlot argued that, from the conduct of Sachin Pilot and his supporting MLAs, it can reasonably be inferred that they had voluntarily renounced their membership of the Indian National Congress, hence are liable to be disqualified under the anti-defection law, as envisaged in the tenth schedule. This was averted by the Sachin Pilot partisan on the ground that voicing different opinions on some of the decisions or policies made by the party, with no intention to relinquish the political party or to form another political party, doesn't amount to voluntarily giving up the membership of a party or defection. In this regard, the case was brought before the court, but over time, the two sides reconciled their political confront, hence, the question of intra-party dissent wasn't resolved by the court.³⁰

In the case of **Balchandra L. Jarkiholi Vs B.S. Yeddyurappa**³¹, the thirteen MLAs of the Bhartiya Janta Party (hereinafter referred to as BJP) in the Karnataka state legislative assembly addressed a letter to the Governor of the state, stating their intention to withhold their support for the government headed by Shri BS Yeddyurappa as they believe that government to be corrupt. Subsequently, Yeddyurappa, the then Chief Minister of the Karnataka legislative Assembly and the leader of the BJP, filed a disqualification petition against those thirteen MLAs under paragraph 2(1) (a) of the tenth schedule. However, the thirteen MLAs asserted that their intention was not to withdraw their support from the BJP, but only from the Government headed by Yeddyurappa, as they were displeased with the functioning of the government. They claimed that they would continue to support the BJP formed government in the state of Karnataka, provided it is headed by a genuine and efficient person who could provide good governance to the people. Nevertheless, the Speaker of the Karnataka legislative Assembly disqualified the said MLAs, asserting that by withdrawing their support for the government they had voluntarily renounced their membership in the BJP. In this regard, an appeal was filed before the Karnataka High Court, whereby a majority of judges upheld the decision of the Speaker.

There is a delicate line between actions that amount to deserting the political party leader who has established a state government and those that constitute deserting the specific political party as a whole. The two actions are in no way interchangeable. Defection under paragraph 2(1)(a) is defined as leaving the political party as a whole, and it does not include leaving the

³⁰ Rajasthan HC directs 'status quo' in disqualification notice ...<http://scconline.com>, accessed on 22/10/2022

³¹ Balchandra L. Jarkiholi Vs B.S. Yeddyurappa, Writ Petition Nos 32660-32670 of 2010 (High Court of Karnataka, 15 November 2010), accessed on 20/10/2022

government led by a specific political party member. The Justice acknowledged intra-party disagreement as a proper use of the right to free speech and expression accorded to

However, Justice N. Kumar, in his dissenting opinion, on intra-party dissent held that the act of the MLAs expressing their lack of confidence in the government formed under a particular leader is not the same as voluntarily renouncing their party membership. There is a delicate distinction between deserting the government formed by a particular leader of the political party, as opposed to deserting the political party as a whole. The two acts are not synonymous. What constitutes defection under Paragraph 2(1)(a) of the tenth schedule of the Indian Constitution is deserting the political party in its entirety, and it does not cover within its ambit the act of forsaking the government led by a particular member of that political party. The Justice recognised intra-party dissent as a legitimate exercise of the freedom of speech and expression conferred to legislators and asserted that the tenth schedule merely proscribes the act of defection, not legitimate dissent. In light thereof, Justice N. Kumar held that the order of the Speaker was required to be set aside.

On appeal, the apex court upheld the minority judgement passed by Justice N. Kumar. The court held that from the contents of the letters addressed to the Governor, it is comprehensible that the dissenting MLAs had merely expressed their lack of confidence in the Yeddyurappa government, they had not withdrawn their support for the BJP political party and were willing to support the BJP party in the event the government is formed by another leader. The Apex Court also discerned that, by the actions of the MLAs, the BJP had not been disadvantaged in their opportunity to establish a government in Karnataka; they could still by all legitimate means, with the assistance of the dissenting MLAs, form a BJP led government in the state of Karnataka by merely transposing their chief ministerial candidate. In view thereof, the Apex Court quashed the decision of the Speaker disqualifying the 13 MLAs from their membership under Paragraph 2(1)(a).

In the case of **Kunwar Pranav Singh Champion & Others Vs Speaker Legislative Assembly & Another**³², the petitioners are the members of the Indian National Congress of the Uttarakhand Legislative Assembly who submitted a joint memorandum before the Governor of the State asserting their distrust against the Chief Minister. The memorandum was

³² Kunwar Pranav Singh Champion & Others Vs Speaker Legislative Assembly & Anoter, Writ Petition No.826 of 2016, accessed on 21/10/2022

signed by a group of 35 members of the House (26 members of the BJP and 9 members of the Indian National Congress/petitioners). The memorandum questioned the status of Appropriation Bill, 2016, and it was claimed that despite 35 members of the house requested for voting by division, the request was denied by the Speaker. The membership of those MLAs was disqualified by the Speaker as defectors under the provisions of the Tenth Schedule.

The Honble Uttarakhand High Court observed that deserting the leader and deserting the government are 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. Legitimate dissent does not fall under the ambit of defection and the tenth schedule prohibits only defection. But in this case, the petitioners have not only deserted the leader and 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, of voting against the Appropriation Bill on the floor of the house. The High Court, demarcating the difference between deserting the leader or government, and deserting the party observed that there is a delicate line of difference between the same. Dissent is permissible only so long as it does not unfold into the realm of voluntarily giving up membership in the party. If dissent is allowed to an inconceivable limit, then it will lead to deserting the party and would also be tantamount to voluntarily relinquishing the membership of such a political party under paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India.

Therefore, it can be asserted that, the act of deserting the leader and deserting the political party is not the same, voicing different opinions on some of the decisions or policies made by the party, or withdrawing their support from the Chief Minister amounts to legitimate dissent, which is intrinsic to the free flow of expression of legislators, and it may not, in itself, attract disqualification under Paragraph 2(1)(a) of the Tenth Schedule if it does not prejudicially affect the interest of the party as a whole³³.

DEFECTION UNDER PARAGRAPH 2 (1) (b) OF THE TENTH SCHEDULE -

Paragraph 2(1)(b) of the tenth schedule elucidates that if an elected representative of the political party votes or abstains from voting against the direction of the party's whip, they shall

³³ Balchandra L. Jarkiholi Vs B.S. Yeddurappa, Writ Petition Nos 32660-32670 of 2010 (High Court of Karnataka, 15 November 2010), accessed on 22/10/2022

be disqualified on the ground of defection. The Party's chief whip³⁴ shall issue a three-line whip³⁵, thereby directing its legislators to vote in conformity with the party line on every policy of national concern on the floor of the house. If the legislators disown the direction, disqualification proceedings are initiated against them under Paragraph 2 (1) (b) of the tenth schedule. It thus mandates that once the leader or authorised person of the political party has directed voting in a particular way on the floor of the house, the legislators cannot vote in a contrary manner. Thus, the paragraph under the guise of promoting the strength of political party, acts as a deterrent to freedom of expression on the floor of the house³⁶.

In June 2022, in the state of Maharashtra, there was an internal revolt in the Shiv Sena political party wherein 39 MLAs of the Shiv Sena led by Eknath Shinde revolted against the Uddhav Thackeray-led government, leading to the collapse of the ministry. Accordingly, on June 30, Eknath Shinde was sworn in as the chief minister of Maharashtra with the BJP's support. The two factions of the party - one led by party president Uddhav Thackeray and the other by Chief Minister Mr. Eknath Shinde issued separate whips to the other faction concerning the impending Speaker's election. Thackeray faction's chief Ajay Choudhari had issued a whip to all MLAs of Shiv Sena asking them to vote for their assembly speaker candidate Rajan Salvi, whereas, the Shinde faction's chief whip, Bharat Gogawale, had issued a whip to all MLAs to vote in favour of their assembly speaker candidate BJP's Rahul Narvekar. Thus, the two groups also initiated disqualification proceedings against each other for disowning the respective faction's whip.³⁷ This incident divulges the blatant misuse of the anti-defection law by political parties to prohibit intra-party dissent.

³⁴ The term 'whip' refers to an official of a political party who acts as the party's 'enforcer' inside the legislative assembly or house of parliament, who is responsible for the party's discipline and behaviour on the floor of the house. Thus, essentially a whip is the parliamentary functionary who issues orders and instructions that must be mandatorily followed by parliamentarians, and in turn, ensures attendance of members and voting according to party lines. Neither the rules framed under the tenth schedule nor the rules of procedure and conduct of business in the lok sabha/council of states provide for or regulate the issuance of whip. paragraph 2(1)(b) is the sole enabling provision for the powers of a whip- Explained: What is a whip and what happens if it is disobeyed in the house? Business Standard, <http://www.business-standard.com>national>, accessed on 22/10/2022.

³⁵ Three-line whip is issued to members directing them to vote as per the party line - Explained: What is a whip and what happens if it is disobeyed in the house? Business Standard, <http://www.business-standard.com>national>, accessed on 22/10/2022

³⁶ Nitika Bagaria and Vedika Shah, 'Decoding Intra-Party Dissent: The Lawful Undoing of Constitutional Machinery?' 7(2) *NLUJ L Rev* 115(2021), accessed on 23/10/2022

³⁷ Tale of 2 whips of 2 Sena factions, both accuse each other of disobeying them <https://indianexpress.com/article/cities/mumbai/tale-of-2-whips-of-2-sena-factions-both-accuse-each-other-of-disobeying-them-8007080/>, accessed on 24/12/2022.

In the case of *Gyanendra Kumar Singh Vs The Bihar Legislative Assembly*³⁸ the Petitioners were members of the Janata Dal (United) party of the Bihar Legislative assembly. In the Rajya Sabha election, the Janata Dal (United) party nominated three candidates, namely, Mr. Sharad Yadav, Mr. Ghulam Rasool and Mr. Pawan Kumar Verma as their official candidates. But the name of only one candidate, Mr. Sharad Yadav had been approved by the Parliamentary Board of the Janata Dal (United) party. Therefore, the question arises as to whether the conduct of these petitioners, supporting the candidature of Shri Sharad Yadav while opposing the candidature of others filed by the party and proposing two other independent candidates (Mr. Anil Kumar Sharma and Shri Shabir Ali) and acting as their election agent, amounts to voluntary giving up of their membership and whether the members can be disqualified solely based on this conduct.

The Hon'ble High Court of Patna asserted that a member cannot be held to be partially abandoning the political party and partially loyal to the same. The conduct of a member is to be adjudged in its entirety. Thus, in this case, by supporting the candidature of Shri Sharad Yadav, the petitioners revealed their loyalty towards the party. But by opposing the candidature of two others, the petitioners showed their dissension towards the party. Such a type of dissent is legitimate in parliamentary democracy, and it was not the object of the anti-defection law to proscribe such legitimate dissent under the aegis of defection³⁹.

In the case of *Kihoto Hollohon Vs Zachilhu and others*⁴⁰ the constitutional validity of the tenth schedule of the constitution of India was challenged for violating the democratic right of freedom of expression of the legislators on the floor of the house under articles 105 or 194 of the Constitution. The apex court asserted that the freedom of speech conferred on a legislator is a subjective freedom. It cannot be said that Article 105 or 194 is a source of immunity from the consequences of defection. Thus, the provisions of paragraph 2 of the Tenth Schedule do not transgress any rights of parliamentarians under articles 105 or 194 of the Constitution and are thus constitutionally valid. The disqualification imposed by Paragraph 2(1)(b) must be so construed as not to impinge unduly on the freedom of speech of the legislator. The court held that the words 'any direction' occurring in paragraph 2 (1) (b) should be construed harmoniously with the other provisions, by confining its scope to the object underlying the

³⁸ *Gyanendra Kumar Singh Vs The Bihar Legislative Assembly*, Civil Writ Jurisdiction Case No.18807 of 2014, <https://indiankanoon.org/doc/52128413>, accessed on 24/12/2022.

³⁹Id.

⁴⁰ *Kihoto Hollohon vs. Zachillhu* AIR 1993 SC 412, <http://www.indiankanoon.com>.

incorporation of the tenth schedule namely, to curb the mischief of political defections.. A direction given by a political party to its members, whose violation 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 that was an integral policy and programme of the political party based on which it approached the electorate⁴¹.

Thus, the act of defection amounts to confirming disloyalty to the political party, by voluntarily abandoning the political party to which the legislator concerned belongs. It is a threat defacing democracy, and if not checked, would undermine the very foundation of democracy.

Alternatively, ‘dissent’ is intrinsic to democracy. A dissenting member who disagrees with a chief whip of a political party has neither crossed the floor, nor has shifted his allegiance; rather, he exercises his right to express his legitimate opinion, and continues to be a member of his own political party.⁴² The right to legitimate dissent is pivotal for the free flow of discussion on matters of national importance on the floor of the house.

Therefore, every legitimate dissent does not necessarily fall within the horizon of ‘defection’. Contrarily, all cases of defection would include the acts of dissent backed by lure for monetary consideration or political office⁴³. Thus, mere intra-party dissent cannot lead to disqualification of legislator either under Paragraphs 2(1)(a) or 2(1)(b) of the tenth schedule of the constitution of India unless it is accompanied by other acts such as direct floor crossing or backing a rival party with the intention to destabilize the government.

CONCLUSION

The law as contained in the tenth schedule has fallen short of its intended objectives as the same law is being arbitrarily misused by politicians and political parties. The anti-defection law, which was passed to repress political defections and secure the stability of the government, concomitantly constrains legislators from exercising their legitimate freedom of expression. There is a vast misuse of power to negate legitimate intra-party dissent, and this has the

⁴¹ Id

⁴²Virendra Kumar, Dissent or Defection: Understanding differentiation between the two is the key to the Constitutional democratic political-party-based system of governance, <https://mu.ac.in/wp-content/uploads/2021/05/93-120-Dissent-or-Defection.pdf>, accessed on 22/12/2022.

⁴³ Nitika Bagaria and Vedika Shah, ‘Decoding Intra-Party Dissent: The Lawful Undoing of Constitutional Machinery?’ (2021) 7(2) *NLUJ L Rev* 115, accessed on 22/12/2022.

potential to create a party dictatorship. In a parliamentary democracy, freedom of expression within the floor of the house is preeminent which is conferred by way of articles 105(1) and 194(1) of the constitution of India. Voting for or against the party lines is a legitimate exercise of free speech. Thus, as examined by various judgements, legitimate dissent as an expression of free speech contradicts defection to destabilize the government. Yet, the chief whip of the political parties arbitrarily invoke paragraphs 2(1) (a) and 2(1) (b) of the tenth Schedule of the constitution of India as an instrument of reprisal against legitimate intra-party dissent and transgress the freedom of expression. Thus, the issue of whip shall be restricted to confidence or no-confidence motions. Every legitimate dissent does not constitute an act of defection. The words 'voluntarily giving up membership and acting against any direction of the party's chief whip' should be exhaustively defined to discern legitimate dissent from defection.