

**Speaker: Administrative Role or Quasi-Judicial Authority?****Sanjana S Jain and Vishnu Mangalvedkar**

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**Abstract**

The idea of 'Constitutionalism' is based on the principle that the supreme text of the land does not stay a dead letter. For the idea of Constitutionalism, it is essential to limit the powers of those who can otherwise make the constitution ineffective via the doctrine of separation of powers. This paper aims to study the impact of the tenth schedule on the essence of the Constitution. The provision which allows a Speaker to disqualify those members of the house who act in violation of the whip issued by the political party forms the subject matter of the literature. The usage of a whip by the political parties as a tool to stifle the expression of dissent in the legislative assembly has challenged the idea of constitutionalism by challenging the basic structure doctrine. Such an administrative act of the speaker can pose a threat to the Basic Structure of the Constitution such as the Rule of Law, Separation of Powers, Parliamentary Democracy and Representative form of government. An outbreak of events in various states across India has made the public ponder about the 'apolitical' nature of the Speaker's post. The authors would examine the same after an analysis of various cases beginning with the case of Kihoto Hollohan until the recent case of Pratap Gouda Patil & Ors v. State of Karnataka. The authors would conclude by indicating the changes that could be brought about in pursuance of the ideals of justice, equality and liberty as enumerated under the concept of Transformative Constitutionalism.

**Key Words:** Constitutionalism, Disqualification, Speaker, Separation of powers, Whip

**Introduction**

The frequent change in the political affiliations of the members, affecting change in the power dynamics was witnessed during the fourth and fifth elections in the year 1967 and 1972.<sup>170</sup> According to the Ministry of Home Affairs, defection refers to the transfer of allegiance by a legislator from one party to another political party or identifiable political group.<sup>171</sup> Committee on Defections in its report noted the occurrence of 438 defections between the first and fourth general elections. The fact that out of 210 defecting legislators from the State of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh, West Bengal, 116 were offered berths, points out that the lure of the office makes them political opportunists.<sup>172</sup> Subsequently, two bills outlawing defections tabled before the House of Parliament failed. Acknowledging the potential consequences that might result in the fabric of the democracy in case of continued defections, the President while introducing the Anti-Defection Law enunciated the object of the bill which was to outlaw defections.<sup>173</sup> Amidst the debates and deliberations by the members over the issue of Anti-Defection law, curtailing the freedom of speech and expression of the parliamentarians, the bill was passed in the year 1985 with the hope of better political health.<sup>174</sup>

The constitutional morality which requires the members to continue representing the ideals of the party, from which they obtained the mandate of the voters, is reflected in the amendment of Articles 102<sup>175</sup> and 191<sup>176</sup>. These articles provide that "a person shall be disqualified from being a member of either House of Parliament or State Legislature if disqualified under the Tenth Schedule of the Constitution of

<sup>170</sup> B Venkatesh Kumar, *Anti-Defection Law: Welcome Reforms*, 38 ECONOMIC AND POLITICAL WEEKLY (2003).

<sup>171</sup> P M Kamath, *Politics of Defection in India in the 1980s*, 25 ASIAN SURVEY 1039 (1985).

<sup>172</sup> H S DOABIA, DOABIA & DOABIA LAW OF ELECTIONS AND ELECTION PETITIONS (5<sup>th</sup>ed. Lexis Nexis 2016).

<sup>173</sup> D J DE, THE CONSTITUTION OF INDIA, (3ed. 2008).

<sup>174</sup> Chakshu Roy, *Explained: The Limits of Anti-Defection*, PRS (May. 30, 2022, 11:00 AM), <https://prsindia.org/articles-by-prs-team/explained-the-limits-of-anti-defection>.

<sup>175</sup> INDIAN CONST. art 102.

<sup>176</sup> INDIAN CONST. art 197.

India.”<sup>177</sup> The introduction of the Anti-Defection Law by the 52nd Amendment vested speaker with the power of deciding on the question of disqualification of a member, bringing the questions of partisan nature of the speaker, higher probability of biased decisions and discussions on the possible misuse into the forefront.<sup>178</sup> From the instance of Speaker's delay in deciding on the resignation tendered by the members of the Karnataka Legislative Assembly<sup>179</sup>, it can be construed that the aura of the office of the speaker has been questioned multiple times. Whether the thin line difference between dissent and defection requires reconsideration and demarcation to uphold the democratic fabric of the country has remained unanswered. This should be answered in the backdrop of changing party structure.

On 11/02/2019 the disqualification petition was instituted against some of the members with the allegations that they had acted in defiance of the party whip by not attending the meetings of party and assembly proceedings. Subsequently, some of the members from the ruling party tendered their resignations. The Speaker instead of deciding on the issue of whether the resignations were forged, chose not to take any decision in spite of the order of the Court. The Court acknowledged that the necessity at this juncture was to permit the speaker to decide on the resignation tendered. At the same time, the court ordered that the members ought not to be compelled to attend the proceedings of the house. In the subsequent trust vote, INC-JD(S) Coalition Government collapsed. And the speaker rejected the resignations and disqualified the petitioners.

The court in this case of *Shrimanth Balasaheb Case*<sup>180</sup> while deciding on Karnataka MLA Disqualification case held that though 33rd Constitutional Amendment amended Art 190(3) and (6) and added a clause which allows the Speaker to reject resignation on the ground of it being involuntary or not genuine, such determination has to be based on the

speaker's satisfaction, backed by objective material. Further, the apex court's demystified position of law has led to speculations about the issue of the appropriateness of vesting speaker with the decision of disqualification of members.<sup>181</sup>

### Basic Structure

#### Concept of Basic Structure in the Constitution

The idea of Basic Structure is an inherent part of the Constitution of India which ensures the existence of Constitutionalism. This principle was first explicitly promulgated in the case of *Kesavananda Bharati v. State of Kerala*<sup>182</sup>, wherein the judgement running over thousand pages protected the integrity of the Constitution of India. The concept of the Basic Structure doctrine arises to ensure the supremacy of the Constitution. It ensures that none shall be powerful enough to override the *Grundnorm* which acts as a basic set of fundamental principles which lay down the foundation to civil society.<sup>183</sup> As rightly pointed in the case of *Sajjan Singh Case*<sup>184</sup>, the intentions of the Constituent Assembly and the structure proposed by them are such that, the constitution shall be given some form of permanency by ensuring the continuing existence of a basic feature of the Constitution.

The Doctrine of Basic Structure through its series of applications in constitutional adjudications and assertions by the judiciary has become an essential part of Constitutional jurisprudence. The threat of democratic subversion, authoritarian and anti-democratic practices furthered by the political leaders<sup>185</sup>, the need to point out the extent to which the amending power of the Parliament can be extended, the necessity to address the conflict between the social interest and individual rights, resulted in carving out the doctrine by the judiciary.<sup>186</sup>

<sup>177</sup> J K Mittal, *Parliamentary Dissent, Defection and Democracy*, 33 JOURNAL OF INDIAN LAW INSTITUTE (1991).

<sup>178</sup> *Id.*

<sup>179</sup> *SC Judgement on Disqualified MLAs Could Further Weaken the Anti Defection Act*, THE WIRE (May. 30, 2022, 11:41 AM), <https://thewire.in/law/supreme-court-karnataka-mlas-defection>.

<sup>180</sup> *Shrimanth Balasaheb Patel v. Hon'ble Speaker of Karnataka*, 2020 (15) SCALE 533.

<sup>181</sup> *Id.*

<sup>182</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>183</sup> Massey I. P, *The Process of Amendment and the Constitution a Study in Comparatives*, 14 JOURNAL OF THE INDIAN LAW INSTITUTE 407 (1972).

<sup>184</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>185</sup> Christopher J Beshara, *Basic Structure Doctrines and The Problem of Democratic Subversion: Notes from India*, 48 LAW AND POLITICS IN ASIA, AFRICA AND LATIN AMERICA 99 (2015).

<sup>186</sup> Ramesh D. Garg, *Phantom of Basic Structure of the Constitution*, 16 JOURNAL OF INDIAN LAW INSTITUTE 243, (1974).

One of the initial references to the Basic features of the Constitution was witnessed in the case of *Sankari Prasad Case*,<sup>187</sup> followed by *Sajjan Singh Case*.<sup>188</sup> The issues raised were concerning the existence of express and implied limitations to the power of the Parliament to amend. Subsequently, the judiciary invoked the implied limitation on the Parliament to amend and acknowledged the permanence of Fundamental Rights.<sup>189</sup> A G Noorani, one of the Constitutional experts, by referring to the above pronouncement, opined that the doctrine laid down is neither an exercise of judicial activism nor a defeat of progressive legislation.<sup>190</sup>

The first set of features which constituted the "basic foundation and structure" of the Constitution included Supremacy of Constitution, Democratic form of Government, Separation of Powers, Fundamental Rights and Parliamentary Democracy.<sup>191</sup> In yet another judgement, the apex court while dealing with the political party system vis-a-vis democracy observed that the parliamentary democracy and multi-party system are an inherent part of the basic structure.<sup>192</sup> Thus the significance of basic structure can be emphasised by terming it as the substantive canon of construction.

It can be put forth that the wide ambit of powers granted to the speaker under the tenth schedule of the Constitution of India can stray to affect the doctrine of basic structure in a negative manner. On this note, while analysing this wider ambit of powers, reliance can be placed on *I C Golaknath v. State of Punjab*, which held that no authority should be given excessive powers as they might exploit the same. Nevertheless, the role played by the speaker and his inherent link to a political party shall inevitably influence his acts while acting as a quasi-judicial authority with such wide

powers.<sup>193</sup> Henceforth, the wide and ambiguous powers of the speaker may pose a threat to the basic structures such as Separation of Powers, Rule of Law, Judicial Review and Parliamentary Democracy.

### Separation of Powers

According to the theory of separation of powers, powers and functions of the Government must, always be kept separate and exercised by separate organs of the Government.<sup>194</sup> The origin of the doctrine can be traced back to John Locke's distinctions between the discontinuous legislative power, discontinuous executive power and federative power.<sup>195</sup> Subsequently, Montesquieu who coined the term Separation of Powers in his publication *Spirit of Law* envisioned that such an arrangement is devised with the objective of promoting liberty. The recent trends have made one realise the difficulty in maintaining absolute compartmentalisation because of the persistent complications.<sup>196</sup> In the Indian context, it is Article 50 of the Constitution<sup>197</sup>, which referred to the ideals of this doctrine.

It is pertinent to note that the aura of the Speaker's office was even greater when the Constitution was framed and yet the framers of the Constitution did not choose to vest speaker with the authority of adjudicating disputes regarding disqualification of members. And provision was made under Articles 103<sup>198</sup> and 192<sup>199</sup> providing for the President/Governor to decide the dispute in accordance with the opinion of the Election Commission. The Constitution-makers undoubtedly provided such a provision by considering the principle of separation of powers. Considering this rationale in the concluding note, it can be

<sup>187</sup> *Sankari Prasad Singh v. Union of India*, AIR 1951 SC 458.

<sup>188</sup> *Supra* 15.

<sup>189</sup> Gandhi, Feroze Varun, *Political and Partisan*, THE HINDU (May. 30, 2022, 18:34 PM), <https://www.thehindu.com/opinion/op-ed/political-and-partisan/article19877777.ece>.

<sup>190</sup> Madhav Khosla, *The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure*, 42 ECONOMIC AND POLITICAL WEEKLY 3203 (2007).

<sup>191</sup> *Supra* 13.

<sup>192</sup> *Kuldip Nayar v. Union of India*, AIR 2006 SC 3127.

<sup>193</sup> *Supra* 20.

<sup>194</sup> C K TAKWANI, LECTURES ON ADMINISTRATIVE LAW, (7 ed. Eastern Book Company 2021).

<sup>195</sup> Bani Mahajan, *Doctrine of Separation of Powers*, ACADEMIKE (May. 30, 2022, 20:54 PM), <https://www.lawctopus.com/academike/doctrine-of-separation-of-powers/#:~:text=The%20theory%20of%20separation%20of,should%20not%20sit%20in%20Parliament.>

<sup>196</sup> *Separation of Powers-An Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May.30, 2022, 20:58 PM), <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>.

<sup>197</sup> INDIAN CONST. art 50.

<sup>198</sup> INDIAN CONST. art 103.

<sup>199</sup> INDIAN CONST. art 194.

ascertained that vesting the adjudicatory authority to the speaker is in contravention to the above doctrine.

### **Rule of Law**

The Rule of Law is quintessential for constitutionalism. Kelson's Grundnorm theory highlights the importance of rule of law by calling it the factor that ensures governance by law and not by the minds of the ruler or his representatives. The phrase "Government by Law and not by men" captures the essence of the doctrine. Dicey and Joseph Raz have contrasted the Rule of Law with that of the arbitrary power.<sup>200</sup> "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land" is the first principle recognised and penned down by Dicey.<sup>201</sup>

This legal doctrine which has guided the functioning of the legal systems across the globe was defined by A V Dicey as a predominance of regular law, excluding the exercise of discretionary authority. Further, the emphasis is on the equality before law or equal subjection of individuals, irrespective of their classes, to the ordinary law of the land, which finds its enforcement in the ordinary courts of law.<sup>202</sup> However, a certain amount of discretion at the hands of executive authorities becomes inevitable, but the concept of rule of law answers this challenge by placing defined limitations to confine such exercise.<sup>203</sup> The deliberations in 1959 International Congress of Jurists' meeting in New Delhi,<sup>204</sup> by countries professing this doctrine, yet again establishes its significance.<sup>205</sup>

<sup>200</sup> Devi Venkatasamy, *Sceptical About the Rule of Law*, 14 STUDENT BAR REVIEW 68 (2002).

<sup>201</sup> *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May. 30, 2022, 21:06 PM), <https://plato.stanford.edu/entries/rule-of-law/>.

<sup>202</sup> Joseph Raz, *The Rule of Law and its Virtue*, OXFORD SCHOLARSHIP ONLINE (May. 30, 2022, 21:07 PM), <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253457.001.0001/acprof-9780198253457-chapter-11>.

<sup>203</sup> MAHENDRA PAL SINGH, V N SHUKLA'S CONSTITUTION OF INDIA, (13 ed. Eastern Book Company 2017).

<sup>204</sup> *Rule of Law in Free Society: A Report on The International Congress of Jurists, New Delhi, India*, INTERNATIONAL COMMISSION OF JURISTS (May. 30, 2022, 21:31 PM), <https://www.icj.org/rule-of-law-in-a-free-society-a-report-on-the-international-congress-of-jurists-new-delhi-india-january-5-10-1959/>.

<sup>205</sup> Michael L. Principe, *Albert Venn Dicey and The Principles of The Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and*

In the Indian Scenario, the Supreme Court in a plethora of cases including the case of *Indira Gandhi Case*<sup>206</sup> and *SP Gupta Case*<sup>207</sup> has reaffirmed that the Rule of Law forms a part of the Basic Structure of the Constitution. Further, the tenth schedule shall be analysed in connection with the three postulates of AV Dicey's Rule of Law<sup>208</sup> which includes Supremacy of Law, Equality before Law and predominance of Legal Spirit, all of which has been violated due to the nature of the tenth schedule. The law of the land ensures that the ideal forum for determining a legal dispute shall be in a courtroom where the adjudicator shall be trained and experienced, assisted by qualified advocates while performing their tasks.<sup>209</sup>

The point to be noted is that Paragraph 6 of the Tenth Schedule in contradiction to the law of the land, laid down that in case of any question on disqualification of a member, the matter would be referred to the Speaker who shall render his final decision. The Speaker who is not barred from contesting elections after he serves his term as a speaker is more inclined towards pleasing the ruling party, therefore, cannot act without bias. The speaker often acts as a partisan member and this can even be seen when the speaker votes without detachments in cases of ties in the house. Hence, the biased opinions of the speaker may essentially be arbitrary and against the spirit of the Rule of Law.

### **Issuance of Whip**

In the light of incidents of questioning the speaker's decision over the matter of disqualification of a member who had voted in defiance to whip, the author analyses the issuance of the whip in light of Art. 19(1)(a). Freedom of expression has four social purposes to it. One of the purposes is that it strengthens the capacity of an individual to participate in decision making.<sup>210</sup> With the introduction of the Anti-Defection Law, there arose speculations over the issue of curtailment of the freedom of speech and

*Great Britain*, 22 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW 357 (2000).

<sup>206</sup> *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2295.

<sup>207</sup> *SP Gupta v. Union of India*, AIR 1982 SC 149.

<sup>208</sup> IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* (University of London Press 1963).

<sup>209</sup> *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur & Ors. v. Union of India*, (1971)1 SCC 85.

<sup>210</sup> *PUCL v. Union of India*, AIR 2003 SC 2363.

expression. The Anti-Defection Law prohibited the legislators from casting vote against their party whip on any legislation. The fear of disqualification might compel the legislators to vote in favour of the legislation proposed by their party. The problem lies in the fact that predetermined votes stifle the expression of opinion and the strict party discipline puts a restriction on the autonomy of the legislators.

Recently, in the month of February 2022, by issuing Whip, Congress mandated legislators to sleep in the Legislative Assembly and Council. The said sleepover was called for in an attempt to get Minister K S Eshwarappa removed from his position.<sup>211</sup> In the month of April, 2022, BJP issued whip, mandating the presence of Rajyasabha members when important bills were to be tabled before the house.<sup>212</sup> Where the first instance discussed above can be seen as an attempt to excessively control the members of the party, the second instance shows the vitality of whips especially when important bills are tabled before the house. Such instances raises questions as to whether there is a need to curtail by laying down limited grounds on which parties can invoke their power to issue whips.

True democracy requires the party to outline its position in detail and to convince the members by answering and countering the criticisms of the opposition and their party members.<sup>213</sup> By using the whip, the ruling party proposing the bill would have the guarantee that their party members would vote in favour of the motion. Hence the party would adopt the practice of passing expeditious legislations based on the decisions of a few political leaders, which is ultimately detrimental to the public or which is in

contravention of the constitutional principles.<sup>214</sup> In a democratic system, as per checks and balances in place, the executive is accountable to the Parliament. The accountability is snapped at the instance of the issuance of the whip to control the voting results of the party members.<sup>215</sup> The MPs considering the local demands, understanding the local conditions, might want to vote against the ruling party's proposition. But if the fear of losing the berth or the party membership compels to vote otherwise, in contravention of the demands of the people, the ideals of representative democracy would fail to materialise.<sup>216</sup>

In *R B Surendranath Case*,<sup>217</sup> a question arose that is whether by issuing whip on the day of election, directing the members to cast their preference in a particular order, the undue influence was exercised by the party. The court answered in negative.<sup>218</sup> From the above ratio, it is clear that the members are not allowed to exercise their wisdom to elect a suitable candidate who has the calibre to discharge the duties, thus revealing the ramifications of the issuance of whip.

The recent developments have brought the rationale behind the issuance of a whip to compel the members to act as per the will of the people in cases of a post-poll alliance, to the limelight. First of all, the formation of the government based on post-poll alliance is not as per the will of the people. Hence the reasoning that the anti-defection law and the whip are put in place to ensure that they do not breach the trust reposed in the electorate,<sup>219</sup> fails to sustain. In a Consultation Paper, National Commission to Review the Functioning of the Constitution concluded by emphasizing

<sup>211</sup> Akram Mohammed, Shruthi H M Sastry, *Congress issues Whip, Sleepover to continue till February 21*, DECCAN HERALD (May. 31, 2022, 11:30 AM), <https://www.deccanherald.com/state/top-karnataka-stories/congress-issues-whip-sleepover-to-continue-till-february-21-1082933.html>

<sup>212</sup> *BJP issues whip to Rajya Sabha members*, NEW INDIAN EXPRESS (May. 30, 2022, 21:52 PM), <https://www.newindianexpress.com/nation/2022/apr/04/bjp-issues-whip-to-its-rajya-sabha-members-2437869.html>.

<sup>213</sup> Udit Bhatia, *Cracking the whip The Deliberative costs of strict party discipline*, GOVERNANCE INSTITUTE (May. 30, 2022, 21:42 PM), <https://www.governanceinstitute.edu.au/events/centre-for-deliberative-democracy-and-global-governance-seminar/496/cracking-the-whip-the-deliberative-costs-of-strict-party-discipline>.

<sup>214</sup> *Executive- Its Accountability to Parliament*, RAJYASABHA (May. 30, 2022, 21:52 PM), [https://rajyasabha.nic.in/rsnew/practice\\_procedure/naccount.asp](https://rajyasabha.nic.in/rsnew/practice_procedure/naccount.asp).

<sup>215</sup> Trina Roy, *Anti Defection Law Must Be Curbed to Empower Legislature, Promote Deliberative Democracy*, PRS (May. 30, 2022, 21:45 PM), <https://prsindia.org/media/articles-by-prs-team/parliament-logjam-part-8-anti-defection-law-must-be-curbed-empower>.

<sup>216</sup> *Anti-Defection Law- Intent and Impact*, PRS (May. 30, 2022, 21:45 PM), [https://prsindia.org/files/parliament/discussion\\_papers/1370583077\\_Anti-Defection%20Law.pdf](https://prsindia.org/files/parliament/discussion_papers/1370583077_Anti-Defection%20Law.pdf).

<sup>217</sup> *R. B. Surendra Narayana Sinha v. Amulyadhane Roy*, 1940 IC 30.

<sup>218</sup> *Krishna Moorthy v. Shivkumar*, (2015) 3 SCC 467.

<sup>219</sup> *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 412.

the need for legislation with a provision for registering parties and mandating registration to all those parties who contest elections. Pre-poll alliances were required to be registered as well. In the light of the instances of political parties with ideological differences forming an unstable government, the National Commission found it viable to recommend exclusion of post-poll alliances,<sup>220</sup> which clarifies that it is unnecessary to use whips to protect such unstable alliances.

Those who justify the issuance of whip have admitted that the candidates have been voted to power with the expectation that the elected members collectively would bring into action the manifesto propagated by the party leaders.<sup>221</sup> In the book *Cabinet Government*, Ivor Jennings while giving insights on the parliamentary system of government stated that the successful candidates who appeal to the masses on his party's policy are not returned to the Parliament, solely because of his personality.<sup>222</sup> The previous performance of the party, ideologies propagated are some determinants that play an important role in the decision making of the voters and which were relied upon to justify the importance of political parties, provision of a whip and the disqualification of members in the democratic set up of India.

Further justifications were put forward by referring to the concept of Parliamentary Democracy, which is one of the basic features. In the case of *S.R Chaudhari Case*,<sup>223</sup> the Supreme Court observed that "Parliamentary democracy envisages representation of people and responsible government. The essence of this is to draw a direct line of authority from the people through the legislature to the executive." The very concept of responsible government and representative democracy signifies government by the

people. In Constitutional terms, it denotes that the sovereign power resides in the people, this is exercised on their behalf by their chosen representatives; the representatives are necessarily accountable to the people for what they do. If Whip was not put in place, then there would not have been any mechanism to ensure that the elected representatives work under the will of the people. As mentioned in *Kihoto Case*<sup>224</sup>, one of the underlying reasons for disallowing the expression of dissent is that it is viewed as a potential threat to the stability of the government in power.<sup>225</sup>

The Inner Party Democracy was eluded as one of the remedies to tackle the challenges faced by the issuance of a whip. It was reported in the Consultation Paper on, 'Review of the Working of Political Parties, especially in relation to Elections and Reform Options' that over the last few years, none of the political parties have been able to observe inner-party democracy. To ensure transparency and to materialise the democratic principles enunciated by the Constitutional framers, internal democracy is essential, which would replace the practice of issuing whip. While articulating this in the 170th Law Commission Report, the rationale put forward was that as democracy and accountability constitutes core concepts of the constitutional system, there is a need to make the political parties bound by the same ideals, which could be achieved by adopting the methods of promoting internal democracy.

By relying on the recommendations of the Law Commission, it can be stated that as the political party representatives form part of Parliament and its decision-making process, the democratic culture of the country must formulate rules regulating the functioning of the parties, providing an avenue for discussions over the bills to be tabled in the house.<sup>226</sup> These measures would further prevent

<sup>220</sup> A Consultation Paper on Review of Working of Political Parties specially in relation to Election and reform Options, LEGAL AFFAIRS (May. 31, 2022, 11:30AM), [https://legalaffairs.gov.in/sites/default/files/\(VI\)Review%20of%20the%20Working%20of%20Political%20Parties%20specially%20in%20relation%20to%20Elections%20and%20Reform%20Options.pdf](https://legalaffairs.gov.in/sites/default/files/(VI)Review%20of%20the%20Working%20of%20Political%20Parties%20specially%20in%20relation%20to%20Elections%20and%20Reform%20Options.pdf).

<sup>221</sup> Prakash Singh Badal and Ors v. Union of India and Ors, AIR 1987 P and H 263.

<sup>222</sup> IVORY JENNINGS, CABINET GOVERNMENT, (3rd ed. Cambridge University Press 1959).

<sup>223</sup> S.R. Chaudhuri v. State of Punjab and Ors., AIR 2001 SC 2707.

<sup>224</sup> *Supra* 49.

<sup>225</sup> Kartik Khanna & Dhvani Shah, *Anti-Defection Law: A Death Knell to Parliamentary Dissent*, MANUPATRA (May. 30, 2022, 21:56 PM), <http://docs.manupatra.in/newsline/articles/Upload/54DB1904-34F0-4A20-A40F-0D968ABD5446.pdf>.

<sup>226</sup> 170<sup>th</sup> Law Commission of India Report, *Reform of The Electoral Laws*, (May. 30, 2022, 12:44 PM), <http://legislative.gov.in/reports-on-electoral-reforms>.

the centralised decision making by the high commands.<sup>227</sup> The recommendations and the suggestions made in the Law Commission Report No. 255 and 'ARC's 2008 Ethics and Governance Report' were on similar lines.<sup>228</sup> It puts forth a proposition that the whip could continue to be issued by the political parties without affecting the representative form of democracy, provided a system has been put in place to facilitate the participation of the members of the political party in decision making and the process of formulation of the policies.<sup>229</sup> Another possible remedy is to empower the parties to issue whips and allow disqualifications only when the position of the government is at stake.<sup>230</sup>

By taking note of the transformations, developments in society and the evolution of law, the concept of whip could be viewed from the perspective of the concept of Transformative Constitutionalism. Transformative Constitutionalism can be better understood as the ability of the Constitution to adapt and transform according to the needs of society.<sup>231</sup> This concept aims at transforming society to embrace the ideals of justice, liberty and equality. Former CJI Deepak Mishra further emphasized that this concept strives to steer the country and its institutions in a democratic and egalitarian direction.<sup>232</sup> By giving the legislators freedom to dissent and to put forth their perspectives in the legislature, the aim of moving towards the egalitarian and democratic direction can be achieved.

By taking the recent developments in society, it is pertinent to note that there has been an emerging trend emphasizing the significance of one's freedom to express their opinion and one's freedom to dissent. Hence, in the backdrop of these issues, it would be highly undesirable to continue with the archaic practice of imposing party discipline through whips. For the last 50 years, the court has interpreted articles

<sup>227</sup> Bhopinder Singh, *Internal Democracy*, THE STATESMEN (May. 30, 2022, 21:59 PM), <https://www.thestatesman.com/opinion/internal-democracy-1502731447.html>.

<sup>228</sup> *Law Commission Report No. 255*, (May. 30, 2022, 21:59 PM), <http://lawcommissionofindia.nic.in/reports/Report255.pdf>.

<sup>229</sup> Hallberg, *Methods of Promoting Internal Democracy in Political Parties*, ACE PROJECT (May. 30, 2022, 22:04 PM), <http://aceproject.org/electoral-advice/archive/questions/replies/110615365>

<sup>230</sup> *Id.*

<sup>231</sup> Alisha Dhingra, *Indian Constitutionalism: A Case for Transformative Constitutionalism*, 2 AJMS (2014).

<sup>232</sup> Navtej Singh Johar and Ors. v. Union of India, AIR 2018 SC 432.

14<sup>233</sup>, 19<sup>234</sup> and 21<sup>235</sup> of the Constitution intending to transform the society into a true republic and democratic society.<sup>236</sup> Further, as the fundamental rights don't have any fixed content, it is imperative that every generation should fill it with the content.<sup>237</sup> In light of the above pronouncements by the judiciary, it can be construed and asserted that the time is ripe for expanding the content of the freedom of expression to include the right to dissent. Further, to extend the same to the members of the Parliament and legislative assemblies so that the will of the people gets due consideration and voice through their representatives.

The prominence of the issue at hand can be ascertained by further relying on the Doctrine of Proportionality. The courts while reviewing the legislative and administrative actions by taking the purpose, the authority intended to serve into consideration, shall analyse whether a balance between adverse effects which the legislative or administrative action may have on the rights, liberties, interests of the persons and the purpose have been maintained or not.<sup>238</sup> By examining the Anti-defection law which provides for disqualification of members as per Paragraph 2(1)(b), in the light of the doctrine of proportionality, it can be emphasised that it does more harm to the constituency than to the member.

#### *Current Scenario for Justiciability*

The Current Position of law needs to be looked into before referring to the way forward. The question which arose is whether the speaker's decisions on disqualifications of the members can be judicially reviewed. The current position of law could be examined by making references to Article 136. Art. 136 empowers the Supreme Court to grant in discretion Special leave to Appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of

<sup>233</sup> INDIAN CONST. art 14.

<sup>234</sup> INDIAN CONST. art 19.

<sup>235</sup> INDIAN CONST. art 21.

<sup>236</sup> *People's Union for Civil Liberties and Ors v. Union of India*, AIR 2003 SC 2363.

<sup>237</sup> *Supra 13*.

<sup>238</sup> *Omkar and Ors v. Union of India*, AIR 2000 SC 3689.

India.<sup>239</sup> The plenitude of powers under Art. 136 are unfettered as it cannot be curtailed by the statutory provision,<sup>240</sup> or by the original constitutional provision.

Therefore, the Supreme Court does have the jurisdiction to look into the Parliamentary Procedure involved in the decisions regarding the tenth schedule and the disqualification of MLAs. The presence of both substantial question of law and substantive illegality which affects public interest at large shall help in invoking judicial review. The courts have earlier unequivocally upheld the power of the judiciary to scrutinise the actions of the speaker.<sup>241</sup>

The immunity often enjoyed by the state legislature or even the Parliament as per Art 212 is confined to matters involving procedural irregularity and not substantive illegality. There would be no immunity when the proceedings held are in defiance to the mandatory provisions of the constitution or in cases of the legislature exercising powers beyond the scope of the Constitution.<sup>242</sup> This exception has further adjudicated upon in the case of *Re under Art 143 of the Constitution of India*. Thus, the Speaker cannot act contrary to the law.<sup>243</sup>

The Hon'ble Court in previous instances while deciding upon judicial intervention concerning the exercise of speaker's power, in the case of *Kihoto Case*<sup>244</sup>, held that even though the speaker of the house holds an essential position in a parliamentary democracy, the decision of the Speaker is subject to judicial review that may look into the correctness of the decision. The political tone should not be taken as a reason to decline examination of the issue especially when the matter involves possibilities of constitutional violations by the executive. Thus the Supreme

Court should not shy away from performing their duty merely because of a political ticket.<sup>245</sup>

Under Paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India, the speaker who functions in a quasi-judicial capacity, decides the disqualification of members. The order passed under this paragraph in particular has also been subjected to judicial review in several cases, *Balachandra Jarkihole Case* being one such case.<sup>246</sup> Though Para 6(1) of the Tenth Schedule imparting finality to the decision of the speaker, is held to be valid, it does not provide for a non-justiciable constitutional area.<sup>247</sup> At the time of discharging of the duties, the speaker who adjudicates on the rights and obligations of the members acts as the tribunal, over which the courts can exercise jurisdiction as there is no complete bar on the same.<sup>248</sup>

Further, in the recent past, *Shrimanth Balasaheb Case* has been added to the list of cases which tried to demystify the issues regarding finality. The unprecedented turn of events in the Karnataka Legislative Assembly, which compromised the political stability, raised questions about the point of difference between the dissent and. The court in this case<sup>249</sup> decided against ruling out the disqualification proceedings as infructuous upon resignation being tendered, which would result in all the members trying to escape the consequences. Thus defeating the purpose of the Anti-Defection Law. The Para 2 and 6 holds that the speaker should decide the question of disqualification concerning the date on which it was incurred.<sup>250</sup> Additionally, the Court summarized the position of law as 'the Speaker's order is final but not conclusive', as jurisdictional errors, infirmities based on the violation of constitutional mandate, malafide intention, non-compliance with the principles of natural justice, perversity forms the grounds for challenge. In totality, Art 191(2), 164(1B), 361 B, S. 36 of RPA, 1951 provides no bar on re-election, thus the settled position of law is that the

<sup>239</sup> INDIAN CONST. art 136

<sup>240</sup> Durga Shankar Mehta v. Thakur Raghuraj Singh and Ors., AIR 1954 SC 520; Associated Cement Companies Ltd v. P.N. Sharma, (1965) 2 SCR 366; Jose Da Costa and Anr. v. BascoraSadasiva Sinai Narcornim and Ors., (1976) 2 SCC 917; Arunachalam v. P.S.R. Sadhanantham and Anr.,(1979) 2 SCC 297; Union Carbide Corporation and Ors. v. Union of India and Ors., (1991) 4 SCC 584.

<sup>241</sup> Keshav Singh v. Speaker, Legislative Assembly, AIR 1965 SC 745.

<sup>242</sup> Anand v. Ram Sahay, A.I.R. 1952 MB 31.

<sup>243</sup> State of Punjab v. Satpal Dang, A.I.R. 1969 SC 903.

<sup>244</sup> *Supra* 49.

<sup>245</sup> People's Union for Civil Liberties v. Union of India, (2003) 4 S.C.C. 399.

<sup>246</sup> Balachandra L Jarkihole v. B S Yedyurappa, 2011 (7) SCC 1.

<sup>247</sup> H S DOABIA, DOABIA & DOABIA LAW OF ELECTIONS AND ELECTION PETITIONS, (5<sup>th</sup>ed. Lexis Nexis 2016).

<sup>248</sup> Ravi S Naik v. Union of India, AIR 1994 SC 1558.

<sup>249</sup> *Supra* 11.

<sup>250</sup> Rajendra Singh Rana v. Swami Prasad Maurya, (2007) 4 SCC 270.



disqualified member remains disqualified till the end of the term of the house or till getting re-elected, whichever is earlier.

However, there is an immediate need to curb the problem at the base. Since the prima facie problem arises when the speaker acts as an adjudicating authority while deciding matters of disqualification, the need of the hour is a solution striking at this problem. Thus ensuring that a different forum which is trained and experienced to dispense such issues may be appointed. The Supreme Court in the case of *Kesham Megachandra Case*<sup>251</sup> favoured the constitution of a tribunal consisting of retired Supreme Court Judges to decide disputes under the tenth schedule, which would replace the Speaker vested with the power to adjudicate, who belongs to the party de facto or de jure. But the Tenth Schedule attempted a different experiment by giving discretionary power to the Speaker which in turn leads to arbitrariness. It cannot be justified that the Speaker who was a member of the house belonging to a particular political party, whose term in office depends upon the majority support in the house is an independent authority and his decision is non-arbitrary.

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<sup>251</sup> *Kesham Megachandra Singh v. The Hon'ble Speaker Manipur Legislative Assembly*, Civil Appeal No. 547 of 2020 (Supreme Court, 21/01/2020).