

THE CONSTITUTIONAL CONUNDRUM OF THE TENTH SCHEDULE: A CRITIQUE

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ABSTRACT

The Tenth Schedule was added to the Constitution of India with an onerous aim to thwart political defections for the protection of political parties which are central to any parliamentary democracy, however, the effectiveness of the anti-defection law which was introduced by the said Schedule continues to be a great source of academic debate. The Tenth Schedule under Paragraph 2 provides for the disqualification of a member of the House if he votes or abstains from voting in contradiction to the “direction” of the party to which he belongs. The Hon’ble Supreme Court in *Kihoto Hollohon v. Zachilhu* has delimited the scope of term direction to mean the motions of confidence or no-confidence against the government and the motions that involve the policy which was projected by the political party while contesting the elections. However, the effect of the interpretation of the term direction given by the Apex Court has not completely addressed the issue of freedom of speech of the members and the constitutional threat that the anti-defection law is still capable of posing.

BURNISHED LAW JOURNAL

This paper discusses the impact of wide interpretation which can be afforded to the policies on which a political party contests an election about the Tenth Schedule. It highlights the undoing of the legislative checks on the executive because of the provisions of the Tenth Schedule and the paradoxical role of the Speaker in the disqualification proceedings as he fails to satisfy the test of independent judicial authority. The paper concludes with recommendations for the creation of a separate adjudicatory body which will be empowered to decide on disqualifications under the Tenth Schedule, restricting the scope of direction to only include motions of confidence or no-confidence against the government and ensuring the functionality of the Tenth Schedule even before an individual has officially taken oath as the member of the House, for protecting the members from undue usage of the Tenth Schedule and strengthening democratic debate.

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I. INTRODUCTION

The Constitutional Fifty-second Amendment Act was a historic amendment to the Indian Constitution, which sealed the fate of several political entities throughout the Indian state. The roots of the Indian polity were polluted by the defections which were happening intermittently and causing detriment to the democratic setup of the Indian polity, the political crises led to the insertion of the most debated Tenth Schedule to the Constitution of India. It was the first time that political parties were recognised under the Indian constitutional reign.¹

In the case of *Ram Jawaya Kapur v. State of Punjab*,² the Indian Supreme Court held the Indian polity to be a mirror image of the Westminster Model with the President to be a Ceremonial Head, affirming the view of Indian parliamentary system to be that of Britain's model of polity, long ago the constitution makers had expressed their intention of there being political parties, however, this was the Amendment in which the Constitution acknowledged it. The Indian Parliament passed this constitutional amendment while floor-crossing became a routine practice in various State Legislatures, threatening the stability of state government machinery and also weakening the federal structure of the Indian State.

The Tenth Schedule to the Constitution lays down the *anti-defection law*, which operatively was an amendment to Articles 101 and 191 which were the constitutional provisions relating to the disqualifications of the members of the Union Parliament and the State Legislative Assemblies.³ The anti-defection law was seen as an amendment to the Constitution to ensure stability in the tenures of democratically elected state and union government.⁴ However, another perspective to the amendment is that it exposed the legislators and they had to be at the behest of the chief of the political party which they belonged and it is a powerful tool in the hands of the Union Government to organize manipulations in the state legislative assemblies.⁵ Further, if the defected parliamentarians or state legislators had the blessing of the party chief, they were exempted from the wrath of the defection law.

Furthermore, another aspect of this amendment was a blow to the doctrine of rule of law which provides for the predominance of legal spirit as the amendment excluded the element of judicial

¹ IX DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 10339 (9th ed. 2017).

² *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

³ Jeena Narayan, *Defect-Shun: Understanding Schedule X to the Constitution of India*, INDIA LAW JOURNAL (January, 2011), https://www.indialawjournal.org/archives/volume3/issue_1/article_by_jenna.html.

⁴ S. Sanal Kumar, *Anti-Defection Laws in India: Its flaws and its falls*, BAR AND BENCH (August, 2019), <https://www.barandbench.com/columns/anti-defection-laws-in-india-its-flaws-and-its-falls>.

⁵ I M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 71 (6th ed. 2003).

review which was, however, later checked by the Hon'ble Supreme Court in the landmark case of *Kihoto Hollohon v. Zachilhu*,⁶ whereby the Court was pleased to strike down Paragraph 7 of the Tenth Schedule as it was not ratified by the states, violating the procedure provided under Clause 2 of Article 368 and to bar the original jurisdiction of the Supreme Court and the High Court,⁷ ratification of half of the Indian states was required.

This paper examines the issues surrounding the nature of direction which is issued within the purview of Paragraph 2 of the Tenth Schedule and the delirious impact that it can pose on constitutional debates in parliamentary democracy. It also delves into the role of the Speaker in a disqualification proceeding and finally makes recommendations for the reform of the anti-defection law in India.

II. THE LAW OF DEFECTION

The Schedule specifies the “house” to be the Indian parliament or the State Legislative Assembly for disqualification proceedings and “original party” to be the party on whose ticket the member contested the election.⁸ The ground of defections are specified under Paragraph 2, which are subject to the provisions of paragraphs 4 and 5,⁹ the first being the voluntarily giving up of the membership of the party under whose he was elected as a parliamentarian or state legislator, which in our opinion is logical because it can be said that the people voted for the party and not the person so support the political regime of a specific party and not the individual, and the individual won the election at the behest of the political party and hence, resignation from the party is absurd and is not democratic, further it curbs horse-trading and stabilizes democracy.

The next sub-clause is, however, rather problematic because it compels the elected person to act under the influence of the party head which promotes an authoritarian regime of an elected government, the clause reads as:

If he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been

⁶ *Kihoto Hollohon v. Zachilhu*, 1992 Supp (2) SCC 651.

⁷ INDIA CONST. art 368, cl. 2.

⁸ INDIA CONST. schedule X, para 1.

⁹ INDIA CONST. schedule X, amended by The Constitutional (Ninety first Amendment) Act, 2003.

*condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.*¹⁰

The Indian Constitution is a liberal constitution but the defection law, itself imposes on every elected member an undue influence to act according to the whims and fancies of the political chief of the party.¹¹ To understand the problem of this provision of the Indian constitution we need to assume that a Bill is introduced in either Houses of the Parliament or a State Legislative Assembly, which is blatantly illegal and unconstitutional but the party chief issues a whip and directs the members of the party to vote in favour of the Bill, the members have now no choice to differ, the political identity of the party is the identity of the elected democratic members, they cannot vote upon law on their conscience. The above-stated proposition poses a threat of single-party authoritarianism and the concept of limited government.

This whip has been elemental for the party Chiefs and works against the members of the Indian democracy, who are reduced to a mere puppet pulled by strings, it is to be understood that in the original constitutional scheme it was the member of the Parliament who chose the Council of Ministers to run the government and not the party but after the birth of the anti-defection law it is a single party which holds the parliament, runs the state.

The Tenth Schedule in itself provides an exemption from disqualification under certain circumstances, the first being that, the Speaker of the house or the Deputy Speaker for obvious reasons can opt-out of a political party and the laws of defection shall not be applicable on him.¹² Another special case is in the case of defection of two-thirds of a parties elected members or more, paragraph 4 deals with it which allows two-thirds members to leave the party and form a new party or merge in another party or stay independent, the rationale of this provision might be, that if the party has gone contrary to the political ideology on which they won elections, or doing something too horrific the elected members if united can stand against the party, however, it is to be understood that a two-thirds majority is quite a challenging majority to achieve, technically to gather sixty-six percent of the members of the party is very difficult.¹³ A few of other exemptions is that the nominated members to the house, as applicable in the case of the twelve members nominated by the president to the Rajya Sabha or Anglo-Indians in the

¹⁰ INDIA CONST. schedule X, para 2, cl b.

¹¹ Nandini Sundar, *The Constitution as a Living Document*, THE WIRE (Nov. 26, 2019), <https://thewire.in/government/constitution-living-document>.

¹² Pradeep Sachdeva, *Combating Political Corruption: A Critique of Anti-defection Legislation*, 50 INDIAN J.P.S. 157, 162-163 (1989).

¹³ S. Sanal Kumar, *Anti-Defection Laws in India: Its flaws and its falls*, BAR AND BENCH (August, 2019), <https://www.barandbench.com/columns/anti-defection-laws-in-india-its-flaws-and-its-falls>.

Lok Sabha and one in the state by the governor, are allowed to choose a party within six months of their joining to the house.

III. CONSTITUTIONAL CONFLICT IN THE APPLICATION OF THE TENTH SCHEDULE

1. THE CONTRADICTION TO THE DOCTRINE OF PARLIAMENTARY DEMOCRACY

The defection law provides for the issuance of a whip¹⁴ to the ruling party, who is instrumental to curb parliamentary dissent, while the freedom of speech in the Parliament which was said to be taken as the most widely possible proposition¹⁵, the right to vote on a parliamentarian's conscience is snatched away, and to analyze that how this provision has disturbed the constitutional harmony, the authors would like to point out that certain constitutional provisions where everything was in the hands of the – member of parliaments and especially Lok Sabha, however the Tenth Schedule lead to what we would like to refer to as an attempt to deceive under the garb of a constitutional amendment, a transfer of power from the Parliament to the ruling political party.

The notion of Parliament is the supreme law-making body¹⁶, consisting of the representatives of people in the lower house¹⁷ and the state representatives in the upper house. When a law is passed, it is passed by the Parliament, when motion is raised it is raised by the Parliament, when a constitutional amendment is done, it is by the elected members of the Parliament, however, the fact that how the Tenth Schedule, drastically changed this notion into a party ruled union was ignored by the majority during its constitutional evaluation, the elites saw it as a tool to stabilize the democratic structure, and only some could have foreseen the hammer it blew on the independence on parliamentarians and parliamentary structure of democracy.

2. THE UNDOING OF LEGISLATIVE CHECKS ON THE EXECUTIVE

The provision for the direction of the whip nullifies the legislative check on a national emergency, which the constituent assembly intended to place in the safe hands of the House of People, clause 7 of Article 352 reads as:

Notwithstanding anything contained in the foregoing clauses, the President shall revoke a Proclamation issued under clause (1) or a Proclamation varying such

¹⁴ INDIA CONST. schedule X, para 2, cl b.

¹⁵ Justice (Retd.) Markandey Katju v. The Lok Sabha, (2017) 2 SCC 384.

¹⁶ Regina v. Lyons and others, [2002] UKHL 44.

¹⁷ Nirmalendu Bikash Rakshit, *Power and Position of the Lok Sabha*, 39(40) E.P.W. 4402, 4410-4412 (2004).

*Proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such Proclamation.*¹⁸

The duty to check a national emergency proclaimed by the President, which by extension, means the union government was placed in the hands of the Lok Sabha, however, due to the insertion of the Tenth Schedule, it is more than obvious that such checks are not available anymore against the government as the will of the government, which is ultimately a political party who has the power to issue a whip, which can be issued in case such motions are put forward in the Lok Sabha, claiming the emergency to be a policy decision and as a matter of fact, the decision is taken by the Speaker who is also a member of the political party.

The position of our democracy was never to put power in the hands of political bodies, it was always to be held in the hands of parliamentarians and members of state legislative assemblies who represent their constituency, however, because of the dubious nature of the Tenth Schedule, national interest became secondary and the manifesto of the political party and its policy decisions became supreme than parliamentary privileges of freedom of speech. The constituent assembly members knew that the majority, would form the government at the union, and still, they gave a provision to check executive power to the House of People, believing parliamentarians to be more loyal to the democracy, but the insertion of the draconic Schedule, transferred their loyalties to their political leaders.

3. THE DEFIANCE OF DELIBERATION IN CONSTITUTIONAL AMENDMENTS AND UNCONSTITUTIONAL LEGISLATIONS

It is a matter of fact, that every motion, bill, a report which was to be placed at the floor of either house of the Parliament was intended to be discussed and deliberated, there was a duty on the individual members of the Parliament to question the acts of the government¹⁹ by the members of the House of Commons,²⁰ irrespective of their political ideologies, political affiliations, there were certain duties on the leader of oppositions and even the members of the ruling party, the Union was to be constructed on the supports of the House of People and the direction of political party leaders. The Tenth Schedule, however, lead to the dilution of the democracy in the hands of the ruling party high command.²¹

¹⁸ INDIA CONST. art 352, cl. 7.

¹⁹ U.N.R Rao v. Indra Gandhi, (1971) 2 SCC 63.

²⁰ INDIA CONST. art 75, cl. 3.

²¹ PRS Legislative Research, *The Anti-Defection Law: Intent and Impact* (No. 23, 2009), <https://www.prsindia.org/parliamenttrack/discussion-papers/anti-defection-law-intent-and-impact>.

The Constitution gave the power to the legislature to make laws.²² Parliamentary legislation(s) were subject to the voice of the people, protected by their members elected from their respective constituencies, however, the reach of the whip was extended to the manifesto supported legislation(s) in the garb of the fact that people voted for the party. But the issues become even more grave when the manifesto of the political party is itself contrary to the scheme of the Constitution. The fact that the Supreme Court has now and then declared legislations to be invalid, but the questions are – didn't the parliament know of its unconstitutionality? What if a manifesto supporting legislation is in contradiction with the constitutional direction under Article 13 to the Parliament to not make laws in contradiction with the fundamental rights guaranteed under Part III of the Constitution.²³ The legislators under such situations have no choice, their dissent is seen as an act of deviation against the party ideology, and a violation of the whip results in disqualification.²⁴

The constituent power of the Parliament²⁵ under Article 368 of the Constitution is also not immune from the wrath of the Tenth Schedule if the policies of a political party are against the fundamentals of the Constitution and it attempts to amend the Constitution per such policies, then also, the issuance of whip forcing the parliamentarians to vote in favour of such a constitutional amendment will lead to a divergence from constitutional morals. This was never the standard that the constituent assembly constructed for the nation. The notion of amendments to the Constitution, created by the Constituent Assembly has been misplaced after the insertion of the Tenth Schedule as the legislators are no more independent to vote in favour or against a Constitutional Amendment Bill and although it can be argued that a final review in such cases is in the hands of the independent judiciary i.e. the Supreme Court and the High Court, what is needed to be understood is that, if a constitutional amendment, violative of constitutional morality, is stopped in the Parliament itself, then there will not be any need for judicial intervention.

The argument that is bought in favour of the anti-defection law is the fact that if the representatives of the House of People differed with the opinion of the government then the implementation of the policies of the political party in power would be stalled, in situations when a bill such as a Financial bill is placed at the floor of the house, by Article 110 or a motion placed against the government to prove its confidence in the house, the issuance of whips

²² I. C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

²³ Bhikaji Narain Dhakras v. State of Madhya Pradesh, AIR 1955 SC 781.

²⁴ J.K. Mittal, *Parliamentary Dissent, Defection and Democracy*, 33 J.I.L.I. 7, 7-9 (1991).

²⁵ Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.

makes sense to a scholar of constitutional law, however, there are examples when even such provisions are subject to abuse by the Union such as the passing of the Aadhar Act as a money bill, although it was held to be constitutional in the case of *Justice K.S. Puttaswamy*,²⁶ a phenomenal dissent of Justice Chandrachud declaring it to be a fraud on the Constitution,²⁷ led the Supreme court to finally reconsider it.²⁸ In such situations if the parliamentarians had the right to vote in accordance of their conscience out this legislation saying that it is not a money bill and the disagreement was put forward by every parliamentarian on speakers certification, the situation would never have arisen, but as the paper has argued the individual opinion of the legislators is circumscribed by the provisions of the Tenth Schedule and they no option but to follow the dictates of the political parties that they belong to.

4. THE PARADOXICAL ROLE OF SPEAKER

The position of the Speaker under the Constitution is interpreted in terms of the “high tradition” of the “high position” of his office and it is presumed that the Speaker would discharge his constitutional duties in an unbiased manner, above all political and factional considerations.²⁹ Accordingly, very wide powers are entrusted upon the Speaker under the Constitution. The role of the Speaker provided under the Constitution is administrative, executive, and even adjudicatory. He sits as an impartial adjudicatory body in the disqualification proceedings against a member of the House on the grounds of defection under the Tenth Schedule to the Constitution of India.³⁰

The Tenth Schedule under paragraph 6(1) imparts that the decision of the Speaker in disqualification proceedings is final and the same has been upheld.³¹ However, it has been held that the said prescription of finality under the Tenth Schedule is only for proceedings in the House and does not detract judicial review under Articles 32, 226 and 136 of the Constitution on the grounds of violation of constitutional mandates, *malafides*, breach of principles of natural justice and perversity.³² Moreover, paragraph 7 of the Tenth Schedule was decided to

²⁶ Justice K.S Puttaswamy v. Union of India, (2017) 10 SCC 1.

²⁷ Rohini Singh, *Aadhaar Act is Unconstitutional: The Fiery Dissent of Justice D.Y. Chandrachud*, THE WIRE (Sept. 26, 2018), <https://thewire.in/law/aadhaar-supreme-court-verdict-justice-chandrachud>.

²⁸ Rojer Mather v. South Indian Bank, 2019 SCC OnLine SC 1456.

²⁹ Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council, (2004) 8 SCC 747.

³⁰ Balchandra Jarkholi v. B.S. Yeddyurappa, (2011) 7 SCC 1.

³¹ Kihoto Hollohon v. Zachilhu, 1992 Supp (2) SCC 651.

³² G.S. Iqbal v. K.M. Khader, (2009) 11 SCC 398.

be invalid as it took away the jurisdiction of the Supreme Court and High Courts from reviewing the decision of the disqualification proceedings.³³

4.1. Fairness in Defection Proceedings

The entire facet of fair and just decisions by any judicial or quasi-judicial body is based on the central premise of impartiality. However, under the Tenth Schedule to the Constitution, this idea of impartiality is sometimes misplaced because of the political and factional affiliations of the Speaker of the House, who is also under a constitutional duty to act in a just and reasonable manner while taking decisions under the Tenth Schedule.³⁴

It is true that the Tenth Schedule recognises the indispensable position of political parties under a parliamentary constitutionally limited democracy and accordingly provides for the disqualification of members who defect from their original political parties but it is also true that the authority which is placed upon the Speaker of the House, who himself is a member of the ruling party or alliance, to decide upon the question of disqualification of the members thereof is also self-nugatory to the aspect of protection of fundamental constitutional principles which can be compromised because of unabated power to the Speaker in a disqualification proceeding. Time and again, what is seen is that the provisions of the Tenth Schedule and the decisions taken by the Speaker in pursuance of the powers given under the said Schedule are politically motivated and aimed at destabilising rival factions in the House.³⁵ The effect of such biased decisions on account of political considerations is that the trust of the people on the democratic process of the country is shaken and the objective of the Tenth Schedule i.e., to prevent the breach of faith in the electoral process is also defeated. Accordingly, valid questions about the impartiality of decisions of the Speaker under the Tenth Schedule are rightly asked.³⁶

4.2. Independent Adjudicatory Authority

The majority view in *Kihota Hollohon* rejected the contentions regarding the political bias and violation of the basic structure of the Constitution in the decision-making process under the Tenth Schedule but the minority view had rightly pointed out the existence of political influence on the Speaker for favourable decisions in disqualification proceedings as the Speaker himself is dependent upon the majority of the legislatures for the successful

³³ *Kihoto Hollohon v. Zachilhu*, 1992 Supp (2) SCC 651.

³⁴ S.S. Visweswaraiiah, *Deplorable Defections: In Search of a Panacea*, 30 J.I.L.I. 47, 55-56 (1997).

³⁵ See: *D. Sudhakar v. D.N. Jeevaraju & Ors.*, 2012 (1) SCALE 3340.

³⁶ J.K. Mittal, *Parliamentary Dissent, Defection and Democracy*, 33 J.I.L.I. 7, 7-9 (1991).

completion of his tenure.³⁷ Therefore, one of the fundamental principles of fair and just judicial proceedings i.e., the presence of an independent judicial authority is not satisfied in the disqualification proceedings under the Tenth Schedule. The effect of Speaker being the sole arbitrator in the decisions on defection under the Tenth Schedule is that a member of the ruling political party or alliance in power who does not vote in the manner prescribed under “direction” issued by his party chief or if there is a dispute on the question of his voluntary giving up of membership under paragraph 2,³⁸ has to defend himself in a disqualification proceeding before the Speaker, who as mentioned above acts under the duress of the majority of legislatures.³⁹ Accordingly, it can be rightly presumed that Tenth Schedule is a powerful weapon in the hands of the ruling political powers to curb even slightest of deviation and dissent from the official line taken by the ruling political faction on any specific political/non-political issue.

The Hon’ble Supreme Court has recognised the importance of freedom speech which is guaranteed to the members inside the House under Articles 105 and 194 of the Constitution.⁴⁰ However, the restriction so imposed upon the choice of a member to vote according to her/his conscience inside the House can be seen as an encroachment upon the said freedom to speech which is regulated by the provisions of the Tenth Schedule and the Speaker is a tool for giving effect to such unreasonable regulation.

IV. LINKING PROBLEMS TO SOLUTION- THE WAY FORWARD

The anti-defection law in its present form requires suitable changes upon its formulation and implementation. It is suggested that the scheme of law under the Tenth Schedule to the Constitution which prescribes for disqualification of members of the House on the ground of non-conformity to “direction” given by his political party under Paragraph 2 is diluted to meet the requirements of the contemporary times and the members get an opportunity to exercise their vote according to their conscience and not because of the dictates of their political bosses. In the following, we will list the recommendations for legal reforms necessitated under the Tenth Schedule.

1. DELIMITING THE SCOPE OF DIRECTIONS

³⁷ Kihota Hollohon v. Zachillhu, 1992 Supp (2) SCC 651.

³⁸ INDIA CONST. schedule X, para 2.

³⁹ I M.P. JAIN, INDIAN CONSTITUTIONAL LAW 71-72 (6th ed. 2003).

⁴⁰ See: Kihota Hollohon v. Zachillhu, 1992 Supp (2) SCC 651.

The Hon'ble Supreme Court in the matter of *Kihoto Hollohon* had delimited the scope of directions under Paragraph 2 of the Tenth Schedule to mean motions of confidence or no-confidence in the Government and the motions in which the policy on which the political party contested the elections are involved.⁴¹ The latter part of the scope of directions under the Tenth Schedule provided a strong pass in the hands of the political parties to ensure conformity to the centrally decided uniform party line and the members are left with no option but to abide by the said direction. The effect is that the members are debarred from exercising their freedom of speech inside the House which is guaranteed under Articles 105(1) and 194(1). It is accepted that the objectives which a political party set for itself and project in front of the citizens is essential and the citizens vote based on the said objectives but at the same time, the importance of the manifesto and the objectives projected thereof cannot outweigh the responsibility of individuals members to act in consonance with the duties placed upon them under the Constitution.

Given the aforesaid, it is suggested that the scope of the term 'direction' under the Tenth Schedule shall be further reduced to only include motions of confidence or no-confidence in the Government. Amendments to the Constitution and the vote for the election of the President and the Vice President must be essentially brought outside the ambit of direction under the Tenth Schedule as these matters have more to do with the inner conscience of the individual members than to do with the policies of a particular political party. The same will ensure that the members can act based on their conscience and ethics.

2. REFORMING THE NATURE OF ANTI-DEFECTION PROCEEDINGS

The susceptibility of political influence on the decisions of the Speaker has been long felt and accordingly it has been suggested that the power of deciding disqualifications under the Tenth Schedule should not be entrusted upon him.⁴² The 255th Law Commission Report had recommended that the power for deciding upon disqualification should be entrusted upon the President or the Governors as the case may be and they should under such proceedings act per the opinion of the Election Commission.⁴³ Therefore, it is suggested that the Election Commission while sitting in the disqualification proceedings must provide a reasonable opportunity to the member(s) in question in consonance with the rules of natural justice.

⁴¹ *Kihoto Hollohon v. Zachilhu*, 1992 Supp (2) SCC 651.

⁴² I M.P. JAIN, *INDIAN CONSTITUTIONAL LAW*, 71 (6th ed. 2003).

⁴³ Law Commission of India, *Electoral Reforms: Report No. 255*, (2015)
<http://lawcommissionofindia.nic.in/reports/Report255.pdf>.

Further, a uniform formal Rules of Procedure is also required to be drafted and implemented in the proceedings under the Tenth Schedule. It is seen that access to time in politics has proven to pave way for corrupt practices such as horse-trading and other unethical practices. Accordingly, we suggest that proceedings under the Tenth Schedule before the Election Commission must be decided within the time frame of 3 months. Furthermore, the member during the period in which the decision on his disqualification is pending must be allowed to take part in the proceedings of the House but not allowed to vote until there a decision is taken upon his disqualification by the Election Commission.

3. NON-INTERFERENCE BY GOVERNORS

The position of Governors under the Constitution is that of a bridge between the Union and State governments.⁴⁴ Moreover, the Constitution under Article 159 envisages that the Governor shall perform his functions in furtherance of his oath to protect and defend the Constitution and the Law.⁴⁵ Accordingly, the office of the Governor being a constitutional position is untouched from party politics. The only mandate that a Governor is supposed to follow is the mandate of the Constitution and where the Constitution is silent then he shall follow the Conventions of his high office.⁴⁶ Infelicitously, the office of Governor has been time and again used as a tool to curb dissent in States through the mandate of Article 356 of the Constitution.

As discussed in the above section of the role of Governor and Art. 356, the provisions of the Tenth Schedule become operational only after a Government is formed and the members have taken oath as the Member(s) of Parliament or the Members of Legislative Assembly.⁴⁷ This is because disqualification proceeding under the Tenth Schedule can only be started before the Speaker of the House on a complaint that a certain member has defected from his original political party and therefore disqualified from being a member of the House. It is accordingly suggested that the power to decide upon disqualifications under the Tenth Schedule is vested upon the President or Governors who shall function according to the advice of the Election Commission. The same shall ensure that there is no horse-trading to reach the majority mark in case of a hung assembly and at the same time the misuse of the position of the Governor by the Union Government will also be curbed in case of a hung assembly.

⁴⁴ Santosh Paul, *Brewing Constitutional Crisis in Maharashtra*, LIVE LAW (Mar. 29, 2020)

<https://www.livelaw.in/columns/brewing-constitutional-crisis-in-maharashtra>.

⁴⁵ INDIA CONST. art. 159.

⁴⁶ See: Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.

⁴⁷ Pradeep Sachdeva, *Combating Political Corruption: A Critique of Anti-defection Legislation*, 50 INDIAN J.P.S. 157, 162-163 (1989).

V. CONCLUSION

The Indian Constitution is a liberal document based on the Lockean notion of a social contract, it promotes individualism, and self-determination, however, the Tenth Schedule which was placed through and a constitutional amendment is itself problematic to the conscience of the members of Parliament and the members of State Legislative Assemblies, the rule of defection is simple, you do not agree to the whim and fancies of the party you cannot be a part of the legislature, essentially and it gives the power in the hands of the respective party chiefs thereby curbing the individual thought and parliamentary debate.

The Tenth Schedule should therefore only be applicable in a motion of non-confidence against the government, not more than that, and exemption during a constitutional amendment should also specifically be excluded as it is the constituent power of the Parliament and not any political party. The powers conferred by the Tenth Schedule have been abused by the parties and the history is filled with examples citing its abuse, the schedule accordingly should be amended and be made amenable to the practice of parliamentary debate and discussion.

“Dissent Is the Safety Valve of Democracy”

HON'BLE JUSTICE D. Y CHANDRACHUD

JUDGE SUPREME COURT OF INDIA

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