

ANTI-DEFECTION LAW: A DEATH KNELL FOR PARLIAMENTARY DISSENT?

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*Paragraph 2(1)(b) of Schedule X of the Constitution of India seeks to address defection by preventing parliamentarians from defying the direction of the party whip during times of voting. The wide phraseology of the provision has led to misuse of this power, which has resulted in a chilling effect on the freedom of speech of the members of the house. The provision confuses dissent for defection and thereby, stifles a vital cog of parliamentary democracy. Further, by regulating voting, there is a flagrant curtailment of parliamentary debate, the implication of which has been meagre discussion before the passing of crucial bills. There is no logical link between this provision and the aim of improving party stability. Further, it has not contributed to checking the concomitant evil of corruption in Parliament. Despite the issue being highlighted by the Supreme Court in *Kihoto Hollohan v. Zachillhu*,¹ the solution proposed by it has been largely ineffective and done little to neutralise the harm arising from this provision. The purposive interpretation given to this provision thus mandates a relook to further water down its unintended scope. This paper argues that the appropriate solution is not the repeal of Paragraph 2(1)(b), but a constitutional amendment to restrict the instances where members can be disqualified for defying whips. Such an amendment would not only address the stated harms, but also bring India's defection laws in line with American and English parliamentary principles.*

I. INTRODUCTION

India is closing in on nearly three decades of having an anti-defection law in force. Inserted in the Constitution of India by way of the 52nd Amendment in 1985,² the concerned law is enshrined in the Tenth Schedule ('Schedule X'). India was spurred to introduce this law after witnessing as many defections in one year as it had in the four Lok Sabhas preceding it. The amendment was intended to bring stability to the structure of political parties

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¹ 1992 Supp (2) SCC 651 ('Kihoto Hollohan').

² The Constitution (Fifty Second-Amendment) Act, 1985, available at <http://india.gov.in/govt/documents/amendment/amend52.htm> (Last visited on September 17, 2011).

and strengthen parliamentary practice by banning floor-crossing. The prior failure to deal with this issue had led to rampant horse-trading and corruption in daily parliamentary functioning. Schedule X was thus seen as a tool to cure this malaise.³ The import of this constitutional measure meant that once a member was elected under the symbol of a political party to Parliament, the member could not later opt to leave that party or switch to another party. Independent members of Parliament on the other hand would be liable upon moving to the folds of a political party subsequent to the election.

The most intriguing provision and the subject of this paper, however, lies in Paragraph 2(1)(b) of Schedule X and reads:

“2. Disqualification on ground of defection.- (1) Subject to the provisions of Paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—

[...]

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention[...].”

Floor-crossing, therefore, is not the only form of defection envisaged under Schedule X. In the occasion of a direction being issued by a political party to vote in a particular manner on a matter, the member of the party is mandated to comply with the direction. Anything contrary to this directive is also perceived as an act amounting to defection.

This paper argues for watering down the current formulation of the defection law in order to preclude voting from its ambit. Two arguments are advanced to this effect. First, the right to vote for or against party lines is a genuine exercise of free speech in Parliament. This freedom of expression is vital in Parliament particularly as it can be a source of dissent in governance. We, therefore, conclude that the aforementioned provision of Schedule X mistakes a legitimate avenue of dissent as an act *constituting* defection. By giving every member the opportunity of actually forming an opinion, parliamentary debate can be fostered. This would shift the focus of political parties

³ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 62 (2010).

from merely giving directions to *convincing* members of the merits of a particular vote. Second, the paper argues that anti-defection law is not the optimal means to check bribery in voting in Parliament. That being the case, even the impugned provision, although wide in its phraseology, is inadequate to cure the malaise of cash for votes. This vital check will instead come from correcting the wrong course taken in *P.V. Narasimha Rao v. State*,⁴ which held that even voting tainted by bribery was absolved from judicial scrutiny as per the provisions of the Constitution.

The relaxation of anti-defection law in times of voting will not contravene the intention behind enacting Schedule X. Fostering free and fearless voting shall instead, as in the case of America and Britain, cement the credentials of our Parliament as an impervious pillar of government. To establish a case for the same, we will elucidate in Part-IV, the problems arising out of Paragraph 2(1)(b) that persist in spite of a 'purposive interpretation of the same by the Supreme Court'⁵. Part-III will look at legislative practice in Britain and the United States to glean the wisdom behind allowing members to speak and vote freely with limited restrictions, internal to political parties. In Part-IV, we will conclude with suggestions as to how to reconcile this provision with the Indian ideals of parliamentary democracy.⁶

II. THE HARMS OF AN ENCUMBERED VOTE

Defection law was introduced in the country in order to check the rampant practice of parliamentarians abandoning their original parties to join rival political groups. The need to check this mischief was heightened by the fact that defection was being used as a weapon to engineer the toppling and creation of governments. Anti-defection law was thus seen as a reaffirmation of India's democratic ideals by ensuring that only citizens have a say in government making.

Paradoxically, Schedule X has created profound anti-democratic ramifications in the Indian polity. In our parliamentary system where work should be conducted through debate and discussion, Paragraph 2(1)(b) seems to have curtailed both. It mandates that once the political party or its authorised person has directed voting on a matter in a particular way, a parliamentarian cannot vote in a contrary manner. The authorised person specified in Paragraph 2(1)(b) refers to the whip of a political party, a formulation borrowed from the British Parliament. Whips, as parliamentary functionaries, ensure attendance of party members and enforce voting according to party lines.⁷

⁴ (1998) 4 SCC 626 ('Narasimha Rao').

⁵ See discussion *infra* Part IV.A.

⁶ The discussion contained in this piece will not touch upon floor crossing and its merits thereof.

⁷ SUBASH C. KASHYAP, PARLIAMENTARY PROCEDURE: THE LAW, PRIVILEGES, PRACTICE AND PRECEDENTS, Vol. II, 2345 (2000). The whips issued in parliament can of three types: one-line,

Even if the member sees merit in a contrary opinion, this provision restricts individual decision-making and mandates a faithful adherence to the directions of the party whip. By curtailing a parliamentarian's discretion in voting, this provision has effectively mitigated the need for debate in Parliament. An obvious corollary of encumbered voting is that the law has negated any scope for expressing dissent in the House.⁸ In order for a parliamentarian to effectively fulfil his functions, he must have the right to vote according to his conscience and not be tied to his party lines. Allowing for intra-party dissent on the floor of the house is, therefore, in line with the Parliament's duty of ensuring freedom in action of its members.

In addition to the harms enumerated, this paper argues that the impugned provision fails to meet its objective of checking bribery and corruption on the floor of the House. Seeing as the Committee on Defections established by the Ministry of Home Affairs held that corruption is a major cause of defection,⁹ retaining Paragraph 2(1)(b) can only be justified against the touchstone of preventing corruption. It will be argued that this objective has not been met and to pose an effective check against this ill, efforts are required to nullify the *Narasimha Rao* judgment.¹⁰

A. THE DEATH OF DEBATE

The Parliament forms the legislative cog of the three pillars of government. The Parliament does not merely exercise a check on the functioning of the Executive but also includes discussing matters of public interest and voting on bills. Prior to voting, however, it is expected of Parliament to thoroughly debate the issue being considered. The British Parliament, for instance, uses the tool of debate to discharge its functions. These functions, sourced from a medieval understanding of Parliament, refer to any meeting for a speech or conference.¹¹ This has been affirmed by scholars who regard Parliament to be a body entrusted with the task of discussing the different policies of the Government.¹² This responsive function is exercised through constant scrutiny of all the matters brought forward by the Government.¹³ As is mandated of such an institution, such action ensures that no pillar of the Government is left unregulated.¹⁴

two-line or three-line, which indicates the severity and importance of the mandate.

⁸ V. N. SHUKLA, *THE CONSTITUTION OF INDIA 1064* (M.P. Singh ed., 2008).

⁹ MINISTRY OF HOME AFFAIRS, *REPORT OF COMMITTEE ON DEFECTIONS UNDER THE CHAIRMANSHIP OF SHRI Y. B. CHAVAN* (1969).

¹⁰ *Narasimha Rao*, *supra* note 4.

¹¹ C.H. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 27 (1910).

¹² J.A.G. GRIFFITH, MICHAEL RYLE, *PARLIAMENT: FUNCTIONS, PRACTICE AND PROCEDURES* 6 (1989).

¹³ *Id.*

¹⁴ L.S. AMERY, *THOUGHTS ON THE CONSTITUTION* 12 (1947).

The emphasis on debates and discussions is an intrinsic feature of the Indian legislature as well.¹⁵ Tellingly, Ryle and Griffith argue that discussions must be of a nature such that the government defends its proposals in response to criticism and alternatives proposed by the opposition.¹⁶ Constantly making the Executive defend its position should ordinarily have an impact on the manner in which debate is conducted in the legislature. The operation of Paragraph 2(1)(b) has, however, worked against this theoretical assumption. This is evidenced by the meagre number of debates witnessed in Parliament and the judicial and legislative recognition of the problem.

1. Performance in Parliament

Concerns regarding Parliamentary performance most often relate to the drastic reduction in the level and extent of debate. A detailed appraisal of its work rate reveals the inadequate effort put in by its members in performing their duty. In the entire parliamentary session of 2009, 27 percent of the bills passed were debated less than 5 minutes in the Lok Sabha.¹⁷ Further, the Lower House has the dubious honour of holding discussions for less than an hour in the case of half the bills that were passed.¹⁸ This is not a practice that has developed overnight and had in fact, festered for a while. In 2007 for instance, this trend was stark considering that the Lok Sabha spent a mere 9 percent and Rajya Sabha, only 12 percent of its time on discussions related to Bills other than Finance Bill and Appropriation Bills.¹⁹

In the Monsoon session of 2010, 479 members of the Lok Sabha had an average participation in just three debates. The Congress failed to even muster that average in the session.²⁰ Nearly one-third of the members of both houses, however, failed to participate in any debate.²¹ When seen in context of the fact that the Lok Sabha passed 17 bills while the Rajya Sabha passed 21

¹⁵ S.H. BELAVADI, *THEORY AND PRACTICE OF PARLIAMENTARY PROCEDURE IN INDIA* 174 (1988).

¹⁶ J.A.G. GRIFFITH, MICHAEL RYLE, *supra* note 12, 13.

¹⁷ PRS Legislative Research, *Vital Stats: Parliament in 2009*, available at <http://www.prsindia.org/administrator/uploads/general/1262663823~~parliament%20in%202009.pdf> (Last visited on August 23, 2011).

¹⁸ *Id.*

¹⁹ PRS Legislative Research, *Vital Stats: Legislation in Parliament*, available at <http://www.prsindia.org/administrator/uploads/general/1241757092~~Legislation%20in%20Parliament.pdf> (Last visited on August 23, 2011).

²⁰ PRS Legislative Research, *Vital Stats: M.P. Participation in Monsoon Session 2010*, available at <http://www.prsindia.org/administrator/uploads/general/1283599162~~Vital%20Stats%20-%20MP%20participation%20in%20Monsoon%20Session%202010.pdf> (Last visited on August 23, 2011).

²¹ PRS Legislative Research, *Vital Stats: Parliamentary Monsoon Session 2010*, available at http://www.prsindia.org/print.php?bill_id=1277&category= (Last visited on August 23, 2011). What makes this statistic more astonishing is that PRS has collectively regarded interventions in the form of questions during Zero Hour as well as debates on bills and national issues as 'Debates'.

bills in this period, this inactivity is astonishing.²² This culture has manifested itself to the woeful extent of discussions concerning Private Member Bills, a privilege attached to being a member of parliament.²³ Amidst numerous disturbances in 2011, nearly 40% of the bills were passed within an hour.²⁴ These statistics are actually flattering when compared to the level of debate during the Winter Session of 2009. Nearly half the strength of both houses refrained from participating in any debate whatsoever. Out of the number that actually spoke at all, one-fourth restricted itself to participating in two debates, at most.²⁵ This level of participation is shocking considering that the legislature passed 14 bills in all during this session.²⁶

Legislators respond to the claim of poor performance by referring to the fact that bills are debated in full at Committee stage. It is in fact argued that seeing as these Parliamentary Committees comprise of members across political factions, the discussions usually cover myriad facets. Unfortunately, over 2005 and 2006, the Standing Committees in Lok Sabha have recorded an average attendance of 43.5 percent and only six out of eighteen committees have mustered the ‘magic’ number of 50 percent.²⁷

These figures reflect a Parliament apathetic to the cause of conscientious law making. An ideal Parliament will see the floor debate an issue on its fullest and vote on the merits of the issue. Such are the rigours of anti-defection law that it stifles the precious commodity of exchange. Although it is unclear as to what percentage of the aforementioned inactivity stems from anti-defection law itself, it is clear that its continuance will only aggravate the problem and affect any motivation to deliberate.

2. Defections and Debate

Civil society agents and the media have not been oblivious to the appalling performance by the Indian legislature. They attribute the low attendance and participation to a dwindling interest in legislative affairs on the part of the members of the house. Continued instances of non-engagement in parliamentary affairs, has diminished the value of individual parliamentarians. One

²² *Id.*

²³ PRS Legislative Research, *Vital Stats: Private Member Bills in Lok Sabha*, available at <http://www.prsindia.org/administrator/uploads/general/1265629223~~Vital%20Stats%20-%20Private%20Member%20Bills%2021Jan2010%20v02.pdf> (Last visited on August 23, 2011). Of the 328 bills were introduced in the 14th Lok Sabha, only 14 were discussed.

²⁴ PRS Legislative Research, *Vital Stats: Parliament in 2011*, available at <http://www.prsindia.org/parliamenttrack/vital-stats/parliament-in-2011-2161/> (Last visited on January 25, 2012).

²⁵ PRS Legislative Research, *Vital Stats: Parliament- Winter Session 2009*, available at http://www.prsindia.org/print.php?bill_id=986&category= (Last visited on August 23, 2011).

²⁶ *Id.*

²⁷ National Social Watch, *Citizen's Report on Governance and Development 2010*, available at <http://socialwatchindia.net/publications/citizens-report/citizens-report-on-governance-and-development-2010-executive-summary> (Last visited on September 22, 2011).

of the structural reasons of the same has been attributed to the anti-defection law.²⁸ In this vein, Paragraph 2(1)(b) especially dwindles the need for any debate. Considering that members of a particular political party are effectively ordered to vote in a particular manner, there is little incentive for a parliamentarian to even contemplate discussing a position contrary to that decided upon by the party leaders.²⁹ This issue came to the forefront recently when the Women's Reservation Bill, 2010 was tabled in the Rajya Sabha. It was reported that several parliamentarians had voted in favour, despite being vehemently opposed to the bill, owing to being bound by a whip.³⁰ Such instances reveal the rot in the parliamentary structure in India. To extract the best and most effective performance from our legislature, we must provide all avenues of effective debate. The endeavour must be to facilitate and more importantly, incentivise a member of the house to speak his mind.

The *Kihoto Hollohan* judgment reiterated the importance of incentivising parliamentarians to debate. This ability gains significance especially in cases when a member might choose to raise an opinion, different from the line taken by his party. The benefit of such an instance is that:

“[...] Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines [...]”³¹

This observation highlights the value of a distinct opinion in shaping legislative action, by rightly placing a premium on a multitude of opinions being put forth in Parliament. Further, it may add nuances to a bill that are not contemplated if debate on the same is not lively and there is little engagement.

It must be kept in mind that a bill goes through three readings. There is a window to debate the bill at the end of the second and to some extent, third reading. While at the second reading, all the provisions are gone through and thoroughly discussed; the third reading concerns a final discussion about

²⁸ PRS Legislative Research, *Measuring Effectiveness of the Indian Parliament: Summary of Proceedings from the Conference on Effective Legislatures*, available at <http://www.prsindia.org/uploads/media/conference/ConfereceSummaryMeasuringParliamentEffectiveness.pdf> (Last visited on August 17, 2011).

²⁹ Indian Express, *House for this Debate?*, January 3, 2007, available at <http://www.indianexpress.com/news/house-this-for-debate/19938/0> (Last visited on August 20, 2011).

³⁰ The Telegraph, *Agree to Disagree*, April 21, 2010 available at http://www.telegraphindia.com/1100421/jsp/opinion/story_12362774.jsp (Last visited on August 20, 2011).

³¹ Kihoto Hollohan, *supra* note 1, ¶43.

passing or not rejecting the bill. The third reading cannot repeat the detailed analysis of the second reading. There is thus, scope for debate at the final stage, limited only to the reasons for why the bill should finally be passed or rejected. A debate of limited nature, however, becomes vital seeing as it ideally affects the manner of voting on the bill. The issuance of a whip and concomitant threat of disqualification, however, distorts this regular practice as the purpose of the last two readings is rendered useless by mandating how voting is to be conducted. Even where the bill is tabled before a Committee, it has been previously noted that a bill is not subjected to adequate scrutiny due to low attendance of its members.³² In such a case, the third reading assumes greater significance. This importance when seen with the aforementioned statistics makes the ineptitude of the Parliament stark.

The Parliament is the body representing the length and breadth of India. It is the embodiment of the consciousness of the nation. In this regard, the legislature owes it to the electorate to ensure that it conducts business in the fairest and most efficient manner. It is astonishing that Paragraph 2(1)(b) has curtailed an air of democracy in the intrinsically democratic entity, the Parliament.³³ The effect of this restriction has transcended into the right of conscientious dissent being denied to members of parliament as well.

B. THE CURTAILMENT OF DISSENT

Premised on the actions of debate and discussion, all procedures and rules of functioning of Parliament must be aimed towards facilitating this end. Only when there is free debate, can there be scope for parliamentarians to express dissent. This dissent may manifest itself in the form of discussion and most importantly, through vote as well. The right to vote without encumbrances is tantamount to free speech. Considering that members enjoy a broad privilege concerning speech and expression,³⁴ voting must enjoy the same protection and be exercised free from any restriction. Further, curtailing this privilege by way of Paragraph 2(1)(b) is counter-productive.

1. Voting and Freedom of Speech in Parliament

Parliamentarians are vested with numerous privileges to ensure their effective functioning. Art. 105 of the Constitution elucidates the nature of the privilege in the following words:

³² National Social Watch, *supra* note 27.

³³ Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009).

³⁴ Constitution of India, Art. 105(1).

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

(2) No member of Parliament shall be liable to any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any committee thereof [...]”

This privilege vested in the member of the House, grants a right akin to that enshrined in Art. 19(1)(a), which guarantees a fundamental freedom of speech and expression to all persons. Parliamentarians are provided this freedom only when inside the House. The scope of this privilege has been tested in courts before. It has been conclusively established that Art. 105(1) and its equivalent Art. 194(1) are parliamentary privileges and not fundamental rights.³⁵ It has, however, been held that the extent of this privilege is much wider than any right vested in an ordinary person. While reasonable restrictions apply in the case of Art. 19, no such restrictions have been imposed in case of Art. 105. This is indicative of the greater rights that parliamentarians enjoy. Members can, for instance, defame another without fear of censure unlike citizens under Art. 19.³⁶

Aside from unrestricted speech, the Constitution provides for free voting in Parliament.³⁷ Generally, courts have regarded voting by ordinary citizens to be a part of speech on the grounds that it is a tool of expressing feelings, sentiments, ideas or opinions of an individual.³⁸ The right to vote for the candidate of one’s choice is nothing but freedom of voting, and it is the essence of democratic polity. While the right to vote is a statutory right, the freedom to vote is considered a facet of the fundamental right enshrined in Art. 19(1)(a).³⁹ Every person has the right to form his opinion about any candidate. Casting a vote in favour of one or the other candidate is tantamount to expression of this preference.⁴⁰ This final stage in the exercise of voting marks the accomplishment of freedom of speech of the voter.⁴¹ Extending this finding to voting in Parliament, voting becomes an essential element of the freedom under Art. 105(1). Voting by members must not thus, be restricted by Paragraph 2(1)(b).

³⁵ See *K. Ananda Nambiar v. Chief Secretary to the Govt. of Madras*, AIR 1966 SC 657 ¶19.

³⁶ See MADHAVI DIWAN, FACETS OF MEDIA LAW 102 (2006).

³⁷ Constitution of India, Art. 105(2).

³⁸ *Mian Bashir Ahmad v. State of J&K*, AIR 1982 J&K 26; See also *People’s Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476, ¶55.

³⁹ *Jyoti Basu v. Debi Ghosal*, (1982) 1 SCC 69; (1982) 3 SCR 318, reiterated in *People’s Union for Civil Liberties v. Union of India*, (2009) 3 SCC 200.

⁴⁰ *K.N. Subbareddy, Advocate v. Advocates Association represented by the Secretary of the Association, District Registrar of Societies Registration and Karnataka State Bar Council by its Chairman*, ILR 2009 KAR 1697, ¶21.

⁴¹ *Id.*

Having a restricted right to vote then amounts to an inconsistent situation, seeing as the privilege of unrestricted speech is much wider in the case of parliamentarians. Even assuming that voting is not placed on this pedestal; it is undeniable that voting is also a subject of a privilege under Art. 105(2). This does imply of course, that certain restrictions can be placed on the exercise of this right. Any restriction on the right of a parliamentarian to vote according to his own choice, conviction or conscience is a restriction of the exercise of the right of freedom of speech, and it must be reasonable.⁴² A restriction in the form of Paragraph 2(1)(b), however, stifles a legitimate avenue of dissent.⁴³

2. Voting and Dissent

A common understanding of the freedom of speech would entail that a person has a right to his opinion. This opinion may fall in line with the majority or go against the majority and amount to dissent. Nowhere is this dissent more vital than in the Parliament. This is justified owing to the gradual development of a deliberative democracy. This implies that, in contrast with the earlier understanding of a democracy that encompassed mainly voting and interest aggregation, there is focus on justifying all decisions made to the people subject to the same. Such deliberation mandates a critical assessment of all the predetermined interests in the society.⁴⁴ In Parliament, an inclusive debate is fostered only when parliamentarians can vote freely. If given this right, they should be allowed to vote in any manner they deem fit, even if they go against the whip issued by a party. If decisions are to be made in a deliberative manner, they must be substantiated by the force of reason in Parliament.

Dissent is widely seen as a challenge to the party and the government, violation of party discipline or maverick bellicosity.⁴⁵ The underlying reasons for disallowing dissent are two-fold. First, elections in India are seen as being conducted in order to vote parties into power, and not individual parliamentarians. Therefore, there is little emphasis given to the voting history of a particular parliamentarian. As long as a parliamentarian adhered to the party line and avoids any action inviting censure, there is little threat to losing an election for lacking the imagination of differing from the party view.

⁴² Mian Bashir Ahmad v. State of J&K, AIR 1982 J&K 26 . See also PRS Legislative Research, *supra* note 29.

⁴³ SUBASH C. KASHYAP, PARLIAMENTARY PROCEDURE: THE LAW, PRIVILEGES, PRACTICE AND PRECEDENTS, Vol. II, 2157 (2000).

⁴⁴ JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000).

⁴⁵ Economic Times, *Ruling party as opposition*, September 28, 2010, available at http://articles.economictimes.indiatimes.com/2010-09-28/news/27574743_1_political-party-party-discipline-dissent (Last visited on September 16, 2011).

Second, expressing dissent in voting has been regarded as a sign of political instability and poor cohesion. In this regard, the *Kihoto Hollohan* judgment cited several scholarly works that elucidated the demerits of allowing dissent.⁴⁶

Undoubtedly, every political party would appreciate unflinching support on the mandate of the day. To cement this aspiration into a binding law, however, disregards the pressures on a parliamentarian when he is to make a decision. A parliamentarian's allegiance lies both to his constituency as well as his political party. Allegiance to the party is reflected greatly in the fact that the Member is bound by the directions of the Whip. To balance his interests, however, he cannot ignore the interests of his constituency and must give credence to the same when appropriate. It is fallacious to consider such conduct as being disloyal to the party or as reflecting poorly on the cohesion of the party. Members belonging to the same political party may obviously have different opinions on a matter and expression of such difference of opinion may result in modification or withdrawal of proposals under consideration.⁴⁷ Such a result is possible only if members express dissent. Intra-party dissent or intra-party debates, both a core element of intra-party democracy, are contingent on the willingness of the leaders to allow members to vote against party lines.

Anti-defection law deals with the malaise of floor-crossing, which essentially hampers the functioning of the legislature. Dissent, however, would not pose a similar problem seeing as it is an intrinsic cog of a parliamentary democracy. Disqualification under Paragraph 2(1)(b) then, confuses dissent for defection.

Voicing dissent is still seen as defection in parliamentary politics. The right to dissent is stifled by the frequent use of whips by political parties in order to protect their interests. This results in the unnecessary issuance of whips for trivial matters or as a fake display of party cohesion. The misuse of anti-defection law greatly reduces the authority that a member can exercise when called upon to vote.⁴⁸ His right to dissent is rarely or never exercised during voting. This is one of the reasons why the Law Commission recommended that the Government should restrict issuing whips only to situations when the Government is in danger.⁴⁹ Unfortunately, the issuance of whips is not governed by any law or rules framed under the Tenth Schedule or under Rules of Procedure and Conduct in the Lok Sabha/Rajya Sabha.⁵⁰ It is regulated as

⁴⁶ GRIFFITH & RYLE, ON PARLIAMENT, FUNCTIONS, PRACTICE & PROCEDURE 119 (1989) as cited in *Kihoto Hollohan*, *supra* note 1, ¶19.

⁴⁷ *Kihoto Hollohan*, *supra* note 1, ¶19.

⁴⁸ The Hindu, *From roaring lion to timid mouse*, February 26, 2010, available at <http://www.thehindu.com/opinion/lead/article113668.ece> (Last visited on September 5, 2011).

⁴⁹ LAW COMMISSION OF INDIA, 170th REPORT: REFORM OF THE ELECTORAL LAWS ("170th REPORT"), Part-II, Chapter-IV, ¶3.4.2.

⁵⁰ *Id.*

a matter of party discretion. Controlling party discretion and judgment in this form, by way of a legislation, would be unsuitable. This trend is disappointing particularly as it means that even those considered qualified to represent the public exercise no individuality and creativity in decision-making.

C. PREVENTING CORRUPTION: BARKING UP THE WRONG TREE

As discussed already, anti-defection law was introduced in order to bring about greater party cohesion on the floor of the Parliament. The rampant ‘horse-trading’ and rise in corruption in the house to sway loyalties made the advent of this law greater. While the scope of this paper does not concern itself with the merits of banning floor-crossing, the objective of tackling corruption by way of Schedule X and especially, Paragraph 2(1)(b) is questionable. An analysis of why Paragraph 2(1)(b) is unsuited to dealing with the malaise of corruption in the houses of parliament requires an understanding of the mischief that Schedule X sought to address.

The latter half of 1960 saw thousands of political defections. In fact, the Fourth Lok Sabha saw nearly as many cases of defection as the three preceding it as was noted by the Committee on Defections, created by the Lok Sabha to tackle the said malaise.⁵¹ The Janata government of Morarji Desai, for instance, enjoyed two-third support in the Lower House. This safety net proved transitory when the Government fell owing to the defection of 76 MPs, mostly the supporters of Charan Singh. Defections have resulted in positive consequences for parties as well. The Congress (R) had managed to secure 57 seats in the Karnataka assembly prior to the 1971 elections. After it won the elections, this strength rose to 120, owing to defections from the Congress (O) party.⁵²

Defections are seen as an action subverting the democratic nature of the Parliament. Being disloyal to the party, on the strength of which a member has come to power, was widely seen as an act stemming from corruption and bribery. Consider the case of parliamentarians who aid the toppling of their own government and then jump ship to become ministers in consequent governments. It would surely require a leap of faith to consider that such acts stem from uncoloured dissent and not from an illegal incentive.

In light of this short history, it is clear that Schedule X is seen as a tool of tackling corruption as well. We, however, believe that Paragraph 2(1)(b)

⁵¹ Committee of Defections *as cited in* Kihoto Hollohan, *supra* note 1, ¶6: “Compared to roughly 542 cases in the entire period between the First and Fourth General Election, at least 438 defections occurred in these 12 months alone.”

⁵² See P.M. Kamath, *Politics of Defection in India in the 1980s*, 25(10) ASIAN SURVEY 1039, 1041 (1985).

does not meet this objective and falls short of adequately dealing with bribery in Parliament.

D. P.V. NARASIMHA RAO JUDGMENT

Compelling a member of Parliament to vote in a particular manner to prevent corruption in times of voting amounts to a solution that far exceeds the problem sought to be addressed. As addressed already, not only is Paragraph 2(1)(b) unsuitable to tackle corruption, it also creates more problems for the effective functioning of Parliament.

Contemplate a house of Parliament bereft of an anti-defection law. In such a scenario, it is envisioned that the erstwhile practices of rampant defection will continue unabated. To deal with this issue, not only has anti-defection law banned floor-crossing, it has also prevented voting according to the interests of the individual parliamentarian. Accordingly, owing to the sanction of disqualification attached, the cost of corruption in influencing a vote has increased dramatically.

Importantly, Paragraph 2(1)(b) has not cured the mischief of corruption in voting; it has merely increased the costs attached to it. This is problematic for two reasons. First, to reiterate our argument, voting is not an activity that needs to be regulated by defection law as it falls outside its ambit. *Second*, defection is not the suitable check to corruption in voting. This check must stem from appropriate penal measures that can be utilised to eliminate the problem of corruption from Parliament.

The case of *P.V. Narasimha Rao v. State*⁵³ is the primary reason why corruption in voting will persist. This case concerned a no-confidence motion initiated against the P.V. Narasimha Rao-led coalition government in 1991. The government survived the challenge by a margin of 14 votes. After the voting, it was alleged that bribes had been given to members of Jharkhand Mukti Morcha and supporters of Janta Dal, to help defeat the motion.⁵⁴ An FIR was lodged to that effect as well. The Special Judge of the CBI Court took cognisance of the offences of bribery and criminal conspiracy, allegedly committed while voting. The Delhi High Court affirmed this holding.⁵⁵

The challenge before the Supreme Court concerned the issue of whether a parliamentarian was protected from being prosecuted in a criminal court for voting stemming from a bribe by virtue of the privilege vested in Art. 105(2) of the Indian Constitution. The majority judgment held that a parliamentarian cannot be charged under the Prevention of Corruption Act and Indian

⁵³ Narasimha Rao, *supra* note 4.

⁵⁴ *Id.*, ¶2.

⁵⁵ JAGDISH SWARUP, CONSTITUTION OF INDIA 1840 (L.M. Singhvi ed., 2006).

Penal Code for conspiracy and bribery in light of the privilege given by Art. 105. The said Article provides that no member can be held liable in court in respect of anything said or any vote cast in Parliament.⁵⁶

The Court read this provision extremely broadly to cover *all* cases of voting in Parliament. Clearly, the purpose of this provision was to prevent a situation in which a parliamentarian is admonished by the judiciary owing to a vote he has given in the House. In no way, however, should this provision have been read to absolve parliamentarians of crimes associated with voting a particular way.⁵⁷ The Court made an irrational observation in holding that voting in any form is an activity internal to the functioning of the Parliament. Acts of corruption and bribery are external to this parliamentary functioning and must be dealt with by the penal laws of the country. This conclusion stems from the logical reason that a parliamentarian is absolved of any challenge arising from his speech or vote *in the capacity of being a member of the house*. This privilege obviously will not extend to cases where a parliamentarian provides or accepts a bribe to sway voting on a particular issue.⁵⁸ A vote *legitimately* cast then, will by virtue of Art. 105, be prevented from being challenged before a court of law.

The Court's interpretation poses the greatest threat to checking corruption in the House. A criminal offence is most effectively deterred by the imposition of a penal punishment. Absolving parliamentarians of court action for bribery makes defection in times of voting a viable option. Such actions are truly dis-incentivised when the threat of criminal law looms large. It is unreasonable to leave such a lacuna in the law while expecting Paragraph 2(1) (b) to tackle bribery. Reliance on this provision is tantamount to plugging a circular hole with a square peg. The judgment, however, lays down a caveat that cash-for-votes will leave a member liable to a contempt motion in Parliament.⁵⁹ While the Parliament can order prosecution in a court where the conduct of a member is an offence as well,⁶⁰ as in the case of bribery in voting, mere reliance on Parliament to act as a watchdog is inadequate. The judgment must be neutralized to add a second prong of check against corruption in Parliament and tighten the noose against members indulging in these actions.

Paragraph 2(1)(b) besides exacerbating fresh problems, does nothing more than raising the cost of swaying a vote in Parliament. As we will discuss while suggesting a solution, regulating voting in times when the

⁵⁶ Constitution of India, Art. 105(2): "No Member of Parliament shall be liable to any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any committee thereof [...]"

⁵⁷ D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 5049 (2008).

⁵⁸ See Balwant Singh Mallik, *P.V. Narasimha Rao v. State: A Critique*, (1998) 8 SCC J- 1.

⁵⁹ Narasimha Rao, *supra* note 4, ¶44.

⁶⁰ KRISHNAN VENUGOPAL & V. SUDHISH PAI, RESTATEMENT OF INDIAN LAW: LEGISLATIVE PRIVILEGE IN INDIA 117 (2011).

existence of the government is threatened, might benefit India. It is, however, time to acknowledge that the sweeping terms of Paragraph 2(1)(b) have proven to cause more harm than good.

III. LESSONS FROM ABROAD: UNITED STATES AND UNITED KINGDOM

A. UNITED STATES AND THE FIRST AMENDMENT

The United States legislative structure with respect to party discipline follows a more liberal model. In the US, a member of the House has the freedom to vote for any policy and bill without the fear of disqualification. Though the US follows a presidential system, its legislative arm, like India's, fulfils the mandate of the doctrine of separation of powers and exercises a check on the functioning of the Executive. In terms of voting on the floor of the House, therefore, the US model would be worth considering. Proponents of the anti-defection model should note that not only has the US experienced defections, but also, operated without an anti-defection legislation.⁶¹

Despite the omission of a legal framework to enforce the same, party discipline is emphasised upon. Party discipline in a strict sense, means party cohesion or the ability of the party members in the legislature to come to a consensus on policy matters.⁶² A degree of control is to be exercised by the party leaders to ensure that the legislators who belong to that particular party vote as a bloc on a legislation, important to the achievement of party objectives.⁶³ This control is not a feature of the Constitution. In fact, it is the internal US party structure that provides for sanctions to be imposed on legislators who do not vote according to party lines.

The question of the constitutionality of legal sanctions imposed on legislators who vote contrary to party lines has been discussed in several landmark cases. These sanctions include the removal of a legislator from an important position on a legislative committee,⁶⁴ loss of prospective appointment to

⁶¹ Time, *The Crist Switch: Top 10 Political Defections*, available at <http://www.time.com/time/specials/packages/completelist/0,29569,1894529,00.html> (Last visited on August 14, 2011).

⁶² Michael Stokes, *When freedoms conflict: Party discipline and the First Amendment*, 11 J. L. & Pol. 751, 753 (1995).

⁶³ Jonathan Lemco, *The Fusion of Power, Party Discipline and the Canadian Parliament: A Critical Assessment*, 18 PRESIDENTIAL STUD Q. 283, 284 (1988); See also Sara Brandes Crook & John R. Hibbing, *Congressional Reform and Party Discipline: The Effect of Changes in Seniority System on Party Loyalty in the U.S. House of Representatives*, 15 BRIT. J. POL. SCI. 207 (1985).

⁶⁴ Beth Donovan, *Democrats may punish Chairmen who defied Clinton on Vote*, 51 CONG. WKLY. REP. 1411 (1993).

the same,⁶⁵ or expulsion of the legislator from the party caucus.⁶⁶ Interestingly, the arguments against such sanctions have not been culled from the ideals of democracy that justified the lack of an anti-defection law in the first place. In the US as well, the arguments against sanction stem from the First Amendment to the US Constitution, that prohibits the infringement of the freedom of speech.⁶⁷ The argument involving the practice of political parties imposing sanctions in case of voting, contrary to their directions, involves a two-fold discussion—*firstly*, on the grounds of freedom of speech of the legislator⁶⁸ and *secondly*, on the conflicting freedom of association of a political party.

1. Free Speech for Legislators

The landmark case of *Bond v. Floyd*⁶⁹ was among the first to elucidate upon the rights of a legislator in the House. Although not directly dealing with a vote contrary to a party whip, it concerned a legislator who was censured by the House owing to certain anti-Vietnam remarks. The legislator, Julian Bond was disqualified from the House on the ground that he could no longer fulfil his constitutional oath as a legislator. The Supreme Court overturned this decision of the House on the grounds of it infringing the rights guaranteed by First Amendment.⁷⁰ It opined that legislators had an obligation to take a stand on controversial issues.⁷¹ This right was held to be necessary in order for the legislator to freely participate in discussing policies of governance.⁷² The Court went on to hold that legislative speech on controversial issues was an obligation and extended the First Amendment freedoms to legislators who would otherwise, be subject to disciplinary measure of their political parties.⁷³

Several other decisions developed the link between First Amendment rights and party disciplinary measures, created by *Bond v. Floyd*. This was seen in the matter of *Gewertz v. Jackman*,⁷⁴ which concerned the removal of a legislator from the Assembly Appropriations Committee. The legislator, Kenneth Gewertz alleged that the removal was vindictive in nature and was a response to criticism expressed by him against the Speaker. While he

⁶⁵ Crook & Hibbing, *supra* note 63, 207-211.

⁶⁶ Ammond v. McGahn, 390 F. Supp. 655 (D.N.J. 1975).

⁶⁷ First Amendment, Constitution of the United States of America: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁶⁸ *Bond v. Floyd*, 385 U.S. 116 (1966) (“Bond”).

⁶⁹ *Id.*

⁷⁰ Karen Atkinson, *Constitutional Law - Free Speech - Judicial Review of Qualifications of Legislators – Bond v. Floyd*, 385 U.S. 116: 87 S. Ct. 339 (1966), 9 WM. & MARY L. REV. 245 (1967).

⁷¹ *Id.*, 137.

⁷² *Id.*

⁷³ See L.H.B., Jr. & A.S.C., *The Julian Bond Case*, 52(7) VIRGINIA L. REV. 7 (1966) 1309.

⁷⁴ *Gewertz v. Jackman*, 467 F. Supp. 1047 (D.N.J. 1979) (“Gewertz”).

was unable to conclusively prove any malicious intent in the removal, the case is important as the Court reiterated the staunch protection for a legislator's conduct in the House. Vitally, the Court refused to distinguish between minor curtailment of privileges and substantive restrictions on the rights of a legislator. Both constituted, in its opinion, a violation of freedom of speech as the existence of an individual's constitutional right is not based on nature of the sanction imposed with which that person is threatened for exercising that right.⁷⁵

The principle behind providing this right to legislators is that the courts do not distinguish between the First Amendment rights of an ordinary citizen and a legislator. Therefore, a legislator also enjoys the First Amendment rights that cover free speech as well as the the right to not speak in favour of something.⁷⁶ The First Amendment has even been extended to grant a legislator the right to association or not to do so, freely.⁷⁷ Courts in US have gone on to declare that the First Amendment affords the broadest protection to political expression and that free and uninhibited debate is a concomitant of the Free Speech clause⁷⁸ as well as a democratic government.⁷⁹ The extension of the rights principle is different from the privilege model followed in India. The two systems can, however, still be compared as nearly equivalent restrictions apply on voter rights.

Crucially, free speech, as protected by First Amendment, has been extended by courts to include the right of the legislators to vote freely.⁸⁰ The coercion of members to vote unconstitutionally thus, abridges their free speech rights. The possible criticisms of applying this principle in India, as we have suggested, would stem from the fact that it would preclude any avenue for disciplining legislators for breaking party unity at all. This lacuna too, has been addressed by US courts by elucidating upon the freedom of association of political parties and its allied rights.

2. The Associational Rights of Political Parties

US Courts have declined to merely vest rights in individual legislators. They have also reiterated the right of association of a political party from the First Amendment, which allows complete autonomy in carrying out

⁷⁵ James S. Wrona, L. Francis Cissna, *Switching Sides: Is Party Affiliation a Tie that Binds?*, 28 ARIZ. ST. L.J. 735 (1996).

⁷⁶ Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 976 (1st Cir. 1993) ("The First Amendment protects the right not to speak or associate, as well as the right to speak and associate freely.")

⁷⁷ *Id.*

⁷⁸ Gewertz, *supra* note 74, 1059.

⁷⁹ Bond, *supra* note 68, 137.

⁸⁰ Clarke v. United States, 886 F.2d 404, 406 (D.C. Cir. 1989), Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989).

its internal operations.⁸¹ In light of the same, courts were to enquire whether the party's freedom of association could override an individual member's freedom of speech.⁸² The courts held that between the right to vote and the right to form associations, the latter must necessarily take precedence as the right to organize a party in order to make an effective political structure is at stake in case of political parties.⁸³ This right is clearly respected when associations exclude from the party, those who have incompatible views, despite the individual's right to an opinion.⁸⁴

In the *Bond* and *Gewertz* judgments, the dispute juxtaposed the rights of legislators versus the House or a State entity. The dispute between a political party and its member on the other hand, would fall within the realm of affairs of a private association.⁸⁵ In such a scenario, political parties can exercise their privilege as an association and exclude members with conflicting philosophies.⁸⁶ It is argued that parties cannot determine the membership of the legislator in the House. A party thus cannot discipline a legislator-member by using control over his legislature membership. Nevertheless, this does not preclude parties from expelling members from the party as, it would be unfair to use the powers of the organization with whose policies they disagree, to advance their incompatible personal views.⁸⁷ Thus, a legislator is protected from disqualification in case he opts to oppose his political party on a particular matter. He can be excluded from a party but not the House itself.⁸⁸ It is doubtful whether India can adopt a model, similar to that in the US when it comes to adjudicating upon the legality of a defection.

Even though the defection process is governed internally in the US, while it is dealt with by the Parliament in India, the latter must take lessons from the limited extent of sanctions that can be imposed by a political party upon the member. The imposition of sanctions can be watered down in India to only allow expulsion of a defecting member from his party without costing him his seat in the Parliament.

⁸¹ *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). *See also* Jonathan J. Jessin, *Renewing Intraparty Democracy: Assessing Competition, Deliberation and Associational Rights of Political Parties*, available at http://works.bepress.com/jonathan_thessin/4/ (Last visited on February 13, 2012).

⁸² Michael Stokes, *supra* note 62, 772.

⁸³ *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir 1975).

⁸⁴ *O'Brien v. Brown*, 409 U.S. 1 (1972).

⁸⁵ MICHAEL STOKES, *supra* note 62.

⁸⁶ *Democratic Party v. Wisconsin*, 450 U.S. 107, 121-122.

⁸⁷ MICHAEL STOKES, *supra* note 62, 777.

⁸⁸ *Barley v. Luzerne County Board of Elections*, 937 F. Supp. 362 (M.D. Pa. 1995).

B. UNITED KINGDOM: DISSENT MAKES NO DIFFERENCE

The British Parliament, which provides inspiration for the Westminster model followed in India, is an institution from which great learning can be gleaned. Akin to Art. 105 of the Indian Constitution, Art. 9 of the English Bill of Rights, 1869 provides for freedom of speech in the British Parliament.⁸⁹ Like the US, however, the British Parliament does not provide for a separate anti-defection law. Here too, all matters of defection are governed by internal party rules.⁹⁰

The justification for allowing free speech and voting in Britain stems from a Burkean understanding of a parliamentarian's role. Edmund Burke summed up the duty of the parliamentarian when he said, "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion".⁹¹ This liberalist understanding of representation echoed by Birch⁹² served to explain the member's duty to uphold the interests of the nation, even to the detriment of the constituency. This freedom to diverge from the interests of the constituency extends to differing from the party stance as well. If the member's views on a bill differ thus, he is allowed to dissent from the party stance.

The Burkean justification for this freedom is criticized because, as in India, people vote for parties and not people. The electorate's concern mainly lies with the party one represents and not the individual himself.⁹³ The allegiance of a parliamentarian thus, should lie not with the electorate but with his political party. The 'representative's judgment' espoused by Burke, which allowed him to dissent from his constituents must equally operate to allow dissension from his party. This allows a member to vote conscientiously and dissent on a particular policy of his party, which may or may not affect the interests of his constituency.

⁸⁹ English Bill of Rights, 1869, Art. 9: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

⁹⁰ See The Parliamentary Labour Conscience Clause: While the party recognises the right of members to abstain from voting in the house on matters of deeply held personal conviction, this does not entitle members to vote contrary to a decision of a party meeting, or to abstain from voting on a vote of confidence in a Labour Government as referred to in R.K. Alderman, *The Conscience Clause of the Parliamentary Labour Party*, 19(2) *PARLIAM. AFF.* 224 (1965).

⁹¹ Edmund Burke, *Speech to the Electors of Bristol*, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html> (Last visited on January 23, 2012).

⁹² A. H. Birch, *The Theory and Practice of Modern British Democracy* in *THE CHANGING CONSTITUTION 78 as cited in Philip Cowley, 'Crossing the Floor': Representative Theory and Practice in Britain*, Public Law 214-224 (1996).

⁹³ *Id.*

The UK perspective serves as an important example to assuage fears of allowing dissent in Parliament. This is reflected in empirical research that seeks to throw light on the reasons why parliamentarians dissent from official party view while voting.⁹⁴ It is widely understood that a member of the House functions in order to further his career. This would entail being in the good books of not just the party but also the constituency.⁹⁵ A member who tends to dissent from every position that his party takes up is unlikely to be seen as a reliable candidate by the electorate. The same implication is prevalent in case the member dissents on a matter of importance to the government. Thus, the practice of conscientious dissent is one that would be exercised rarely, in cases where a member cannot but vote according to the call of his conscience.⁹⁶

An analysis of the the cases of dissent during voting on the Nolan Committee Recommendations in the House of Commons reveals that dissent is more often restricted to long-serving backbenchers, members looking to retire at the end of the session and those who have conflicts with the interests of the constituencies.⁹⁷ India must, therefore, not adopt a knee-jerk reaction to any form of dissent in Parliament. The ‘representative’s judgment’ is a principle that should be extended to parliamentary practice in India in order to maintain a balance between meeting the interests of the political party on the one hand, and the constituency on the other.

IV. CONCLUSION

The harms caused by Paragraph 2(1)(b) are an inherent by-product of its wide phraseology and application. Fortunately, this provision has not enjoyed an unblemished constitutional existence. The validity of the said provision was specifically challenged in the *Kihoto Hollohan* judgment.⁹⁸ Here too, the arguments of dissent and debate being stifled were raised and discussed before the Court. The judgment looked at the subversion of the constitutional rights of parliamentarians and aimed at providing a limited contour to the application of the impugned provision. The case, however, while trying to bring about good, fell short of the mark in light of the excessive solution suggested.

⁹⁴ R.J. Johnston *et al.*, *Sleaze, Constituency and Dissent: Voting on Nolan in the House of Commons*, 29 AREA 1, 23 (1997). (The paper looks at voting in the House of Commons in 1995 regarding the Nolan Committee Recommendations concerning the disclosure of Members’ financial interests linked to their Parliamentary position. The Government’s position was rejected by the House owing to certain Members dissenting in favour of a Labour amendment. The article looks at the factors that motivates dissension and concludes that considerations such as reelection, career advancement and appointment within the party organization are prime among them).

⁹⁵ Brian J. Gaines & Geoffrey Garrett, *The Calculus of Dissent: Party Discipline in the British Labour Government*, 15 POLITICAL BEHAVIOUR 2, 115 (1993).

⁹⁶ *Id.*

⁹⁷ R.J. Johnston *et al.*, *supra* note 94.

⁹⁸ *Kihoto Hollohan*, *supra* note 1.

A. INEFFECTIVENESS OF KIHOTO HOLLOHAN JUDGMENT

In *Kihoto Hollohan*, the Supreme Court took into account the comparative understanding of the functioning of parliaments and political parties. It observed that there are several cogent arguments that impress upon the court, the importance of a party maintaining a united stand when laying forth their position and opinion.⁹⁹

Keeping in mind the ideals of a well functioning parliamentary democracy, however, the Supreme Court held that party cohesion must be maintained only in limited cases. The element of parliamentary democracy could not be held to suffer at the altar of mere party stability. While the Court held that the wide phraseology could not justify a constitutional challenge, it did resort to harmonising the provision along with rest of Schedule X.¹⁰⁰ It did so by limiting the very cases in which a member could be disqualified for a vote contrary to the directions of the whip. These cases were extended to vote of confidence or no-confidence as well as all matters concerning policies and programmes on the strength of which the party came to power.¹⁰¹

Confidence and no-confidence motions are clearly defined and justified cases of disqualification on grounds of dissenting from party lines. The principle flaw of the solution suggested lies in the third case elucidated—that of policies and programmes on the strength of which the member has approached the electorate.

This ground implies that if a parliamentarian has been voted to power on the basis of the policies of his party laid before the electorate, dissenting against party lines at times of voting amounts to a breach of confidence. The move to prohibit dissent in such cases is counterproductive. This is so because in an electoral age where tomes are published as manifestos, it is practical for political parties to include a gamut of broadly phrased policies intended to be introduced in order to create a larger vote bank. Every policy that concerns the nation would be enumerated in the manifesto and these would invariably be proposed for deliberation in the Parliament during some stage of the House tenure. For instance, the seeds of the Women's Reservation Bill were sown in the election manifestos of both the Congress and BJP.¹⁰² Despite this, appar-

⁹⁹ *Id.*, ¶¶ 19 and 49

¹⁰⁰ *Id.*, ¶49.

¹⁰¹ *Id.*, ¶9.

¹⁰² *Manifesto of the Indian National Congress* available at <http://aicc.org.in/new/manifesto09-eng.pdf> (Last visited on January 24, 2012), (“The Indian National Congress will ensure that the Bill for reserving 33% of the seats in the Lok Sabha and the State legislatures is passed in the 15th Lok Sabha and that the elections to the 16th Lok Sabha are held on the basis of one-third reservation for women.”), *BJP Manifesto: Lok Sabha Elections 2009* available online at http://www.bjp.org/index.php?option=com_content&view=article&id=137:manif

ently nearly seventy percent of members of the Lok Sabha were conscientiously against this reform and were forced to vote in favour of change due to the issue of a whip.¹⁰³

It would be difficult to establish that a policy from the manifesto was not an issue on the basis of which the member and party came to power. There is every chance thus, that an obscure, unforeseen issue that did not contribute to the party's victory would preclude the parliamentarian's right to vote freely and expose him to the threat of disqualification from the floor of the House. The Court, therefore, by attempting to constrain the instances of disqualification from voting, has unwittingly given too expansive a ground for when dissent is prohibited. Thus, the Court's best intentions are prone to be misconstrued by this inherent flaw seeing as it does not restrict the plethora of issues concerning which whips can be issued.

B. THE DILEMMA OF A BAD WHIP

The excessive and ineffectual interpretation of Paragraph 2(1)(b) by *Kihoto Hillohan* has led to a frequent use of whips by leaders in everyday parliamentary politics. Under the guise of integral policy programmes, parties have issued directions to their members for inconsequential matters, the non-observance of which continues to attract the disqualification under Schedule X. The Karnataka Assembly provided a sordid instance of the same when certain BJP members were disqualified when they defied a party whip directing them to vote in favour of a particular member for the post of the Speaker of the Assembly.¹⁰⁴

Despite reading down the scope of Paragraph 2(1)(b), *Kihoto Hollohan* failed to address any mechanism to challenge a whip issued outside the constitutional boundaries prescribed. It did not even issue any instructions to Speakers to keep the observations of the Court in mind while deciding upon a defection petition. Two harms emerge from this. First, this lacuna does not check the disqualification of members for non-observance of whips in trivial matters. This would act as a deterrent to free voting in the House. This was reflected recently when Mamata Bannerjee issued an informal whip, directing Trinamool Congress MLAs to cast their vote in favour of Mr. Trivedi, the Trinamool candidate for the Rajya Sabha.¹⁰⁵ Though the defiance of such a whip may not attract disqualification proceedings, few would dare to defy such a

esto-lok-sabha-election-2009&catid=50:election-manifestos&Itemid=549 (Last visited on January 25, 2012) ("The BJP remains committed to 33 per cent political representation for women, and shall act on this after coming to power.").

¹⁰³ The Indian Express, *BJP chief whip spills it out: 70% of MPs oppose Women's Bill* available at <http://www.indianexpress.com/news/bjp-chief-whip-spills-it-out-70-of-mps-opp/589444/> (Last visited on January 21, 2012).

¹⁰⁴ D. Sudhakar v. D.N. Jeevaraju, (2011) 3 Kant LJ 437.

¹⁰⁵ The Statesman (India), *Congress rests Rajya Sabha case on cross-vote*, March 17, 2002.

direction and risk inviting the wrath of the party leaders, who have the sole discretion to invoke Paragraph 2(1)(b) to either initiate the disqualification procedure or condone a member's actions.

Second, the lack of formal regulations in the case of whips means that a member can challenge a wrong whip *after* the disqualification process, on the grounds of unconstitutionality. The availability of only an *ex post facto* check implies that parliamentarians will always be unlikely to disagree with the directions of the party in times of voting. The frustration against the inability to dissent on the floor of the House prompted Manish Tewari, Spokesperson of the Congress to initiate a Private Member's Bill in the Parliament.¹⁰⁶

C. LIMITED WHIP VERSUS CURTAILED DISQUALIFICATION

A proposed solution that has picked up steam was suggested by Manish Tewari, Member of Parliament, Lok Sabha. The suggestion deals with a constitutional amendment to limit the scope of Paragraph 2(1)(b).¹⁰⁷ The version of the law proposed by Tewari limits disqualification under Paragraph 2(1)(b) to be a possible sanction only if the member dissents against a whip issued in the following instances:¹⁰⁸

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

The propositions made by Tewari are akin to the recommendations made by the Dinesh Goswami Committee on Electoral Reform¹⁰⁹ where it was suggested that disqualification must be imposed only in cases of vote of confidence or no-confidence motions. By circumscribing the ambit of disqualification, this bill seeks to make the necessary change of creating greater room

¹⁰⁶ The Constitution (Amendment) Bill, 2010, Bill No. 16 of 2010.

¹⁰⁷ Anita Joshua, *Congress MP moves Bill to amend Anti-Defection Law*, available at <http://www.thehindu.com/news/states/article103984.ece> (Last visited on January 24, 2012).

¹⁰⁸ *Id.*

¹⁰⁹ DINESH GOSWAMI COMMITTEE ON ELECTORAL REFORMS (as referred to in PRS Legislative Research), *THE ANTI-DEFECTION LAW-INTENT AND IMPACT*, November 23, 2011, available at <http://www.prsindia.org/uploads/media/Note%20on%20Anti-Defection.pdf> (Last visited on January 20, 2012). (“Goswami Committee Report”).

for political and policy expression in the Parliament. Such a law would liberate legislators from the whip-imposed fear of losing their membership except in cases where the life of the government is threatened by a no-confidence motion, money bills and some crucial financial matters.¹¹⁰ This measure would act as an effective countervailing approach to the flaws in *Kihoto Hollohan*.

An alternate proposal had been discussed by the 170th Report of the Law Commission of India. It suggested that there must be regulation on the issue of whips. It opined that whips should be allowed to be issued solely in cases where the existence of the government was at threat.¹¹¹ This recommendation is at odds with Tewari's Bill and the observations of the Goswami Committee Report. This situation may be rationalized when it is remembered that the Law Commission Report argues for issuance of whips in limited circumstances. On the contrary, Tewari and the Goswami Committee Report argue for disqualification on limited grounds. The difference is that while the latter implicitly allow a whip to be issued in any case, it argues that penalty in the form of disqualification can only be imposed in limited circumstances. On the contrary, the former aims to restrict the very issuance of whips.

Tewari's solution seems to be more appropriate in light of the remedy sought and the comparative instances cited. As the American jurisprudence teaches us, the associational rights vested in a political organisation allow it to formulate its own rules of procedure and impose punishment for violation of the same.¹¹² This includes the issuance of whips and dealing with acting contrary to the directions of the whip. Any restriction on the issuance of a whip can amount to an effective curtailment of the said rights to administer its own internal affairs. India too, should allow political parties to initiate internal disciplinary proceedings for dissenting against a whip. It should not, however, curtail freedom of expression of parliamentarians by disqualifying them for dissent, when internal disciplinary methods can easily address the problem.

Tewari's solution is more appealing as it better meets the intended objective of anti-defection law when compared against the status quo. The aim of maintaining party stability is met, as floor crossing is not being challenged, at least for now. The impugned provision has, however, contributed to the several aforementioned harms to parliamentary democracy. In addition, restricting free voting has not led to less corruption on the floor of the House. In fact, mistakes from *Narasimha Rao* have caused a bigger threat of cash for votes than the unbridled right to vote. The tweaking of the said clause to mandate disqualification in limited cases, while keeping everything else same, would take care of numerous defects from the current formulation.

¹¹⁰ See B. Venkatesh Kumar, *Anti-Defection Law: Welcome Reforms*, 38(19) ECONOMIC & POLITICAL WEEKLY 1838 (2003).

¹¹¹ 170th REPORT, *supra* note 49.

¹¹² Michael Stokes, *supra* note 62, 777.

In any case, collectively dealing with floor-crossing and voting amounts to a mischaracterisation of the two activities. If floor-crossing were to be allowed, the member would cease to be a part of the party and would not be mandated to vote for it in times of a no-confidence motion. In a case of a dissenting vote, however, the member may at most, be expelled from the party. His unattached status on the floor of the House would still mandate that he vote in favour of his party in times of a no-confidence motion. The different implications of the two actions make it more compelling to deal with them differently. If disqualification were to be restricted to the cases suggested by Tewari, party stability would in no way be harmed.

In suggesting the watering down of the present formulation of defection law in India, this paper maintains a balance between the intended freedom to vote and dissent, and the associational rights vested in political parties. Any restriction on voting in Schedule X must be done away with, in the interests of greater and livelier debate in the House, which could lead to better formulated legislations. At the same time, it must be remembered that Schedule X serves to protect the sanctity of a political formation as well as the life of a government. In order to safeguard this function, the principles of responsible and unified political formations cannot be ignored. Therefore, Indian parliamentary practice must adopt the learning from the US and British practices in order to perform its mandate to the fullest. If this cause is taken up, perhaps then, a harmonious atmosphere for Parliamentary democracy, which is not beset with the rigours of Paragraph 2(1)(b), can be fostered. In a time when poor work ethics and commitment in the Legislature has become the norm, the time has never been more ripe for an exceptional measure.

