

**FOR LAWS MAY COME AND LAWS MAY GO, BUT
DEFECTIONS GO ON FOREVER: A CRITICAL
ANALYSIS OF THE ROLE OF THE SPEAKER IN
INDIAN ANTI-DEFECTION LAWS**

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Abstract

Defections form an indispensable part of parliamentary democracy. However, contrary to the experience of other countries, India has sought to curb the practice by introducing anti-defection laws through the Tenth Schedule of the Indian Constitution. The legislation, however, has several drawbacks and has, consequently, been criticized on all fronts. The call for its repeal stands testament to the severity of the challenges to the effective realization of the law. The issue regarding the shortcomings of the law resurfaced due to widespread defections by Members of Legislative Assembly in Manipur in 2019. This political battle spilt over to the courts; the Supreme Court in the case of Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors. recommended that the role

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of the Speaker as the sole arbiter be reconsidered. The paper seeks to establish that any legal or legislative reform to remedy an inherently political issue such as that of defections would only be a piecemeal solution. In this context, this paper seeks to evaluate the role and function of the Speaker and highlights the paradoxical nature of the office of the Speaker as one of the leading causes for the ineffective realization of the anti-defection law. In light of the recent instances of rampant misuse of powers by the Speaker, the paper analyses the recommendation by the Supreme Court to replace the Speaker with an independent tribunal and other such recommendations that have come to the fore over the brief history of the anti-defection law in India. In this context, the paper then concludes by asserting that given the political environment shrouding the Indian polity, the anti-defection laws are to be retained, at least as an interim measure, while striving towards more holistic changes in the political culture in India.

I. INTRODUCTION

Defections are an indispensable part of parliamentary democracy; however, the levels of tolerance and the regulatory systems have varied greatly across jurisdictions. The wavering perception of defections as a great threat to the very spirit of democracy and the institutionalization of political parties has resulted in a multitude of

laws to regulate defections. Across a wide spectrum of countries-defections have been absolutely prohibited, qualifiedly permitted or given a free hand. Defections in India were marred by unprincipled, inconsistent and opportunistic movements across party lines that exhibited a shocking level of clientelism and democratic immaturity. This alarming trend forced the Indian legislature to come up with a regulatory system to curb this destabilizing movement across party lines. The efficacy of these anti-defection laws under the Tenth Schedule of the Constitution of India has been pondered upon time and again in light of a history of discontent with the laws itself. Recently, the apex court brought this issue to the forefront in *Keisham Meghachandra Singh vs. the Hon'ble Speaker Manipur Legislative Assembly & Ors.*¹ The latest in a long list of judgements criticizing defection laws, it highlighted the role played by the Speaker in the defection process while being critical about the abuse of powers and its adverse impact on the effective realization of the law. The court even suggested the Speaker be replaced by an apolitical and neutral tribunal.

This paper seeks to expound upon this suggestion, by evaluating the role of the Speaker and the importance of anti-defection laws for the Indian democracy. The first part of the paper will explain the anti-defection law and the history of its origin in India. The second part deals with the role of the Speaker, its importance in the parliamentary process, and the allegations of prejudice and partisanship that have been levelled against the role. The third part seeks to critically evaluate and analyse the alternatives to the role of the Speaker while drawing on and commenting upon recommendations from various committees. The paper finally argues that though there is no perfect solution to remedy the shortcoming of the role of the Speaker, there are alternatives that could potentially mitigate the chance for

¹*Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly and Others* 2020 SCC OnLine SC 55.

partisanship and bias to creep into the defection proceedings. The paper also argues that the problem at hand is essentially political in nature and any legislative reform will be rather myopic and will fall short from its desired impact.

II. DEFECTION LAWS IN INDIA

India's fledgling multiparty democracy was threatened by political instability owing to large-scale defections - with almost 542 elected members defecting across party lines by the 4th Lok Sabha Elections in 1967.² This meant that the stability of the government at the national *and* local levels was completely at the mercy of those defecting individuals who moved across party lines at great ease. This political phenomenon gave birth to the infamous phrase "*Aaya Ram, Gaya Ram*" after an MLA from the state of Haryana defected 4 times within a fortnight in 1967.³ The angst and anguish of the public was answered by the 52nd Constitutional Amendment in 1985 which inserted the Tenth Schedule containing anti-defection laws into the Indian Constitution.

The passing of the anti-defection laws in 1985, after repeated failures to do the same, can largely be attributed to the overwhelming majority of 426 seats controlled by the Indian National Congress in the Parliament. Given the circumstances, it was ideal for both the ruling government and the opposition to pass the anti-defection law. The elected members of the ruling party were motivated to pass the anti-defection amendment as it would ensure that members of the opposition would not cross-party lines to join the ruling party. This

²K.T. Thomas, 'Anti-Defection Law' (2009) 3 NUALS Law Journal 1.

³Ankur Bhardwaj, 'Return of Aaya Ram, Gaya Ram: How the Anti-Defection Law is Misinterpreted' (4 July 2019) *Business Standard* <www.business-standard.com/article/politics/return-of-aaya-ram-gaya-ram-how-the-anti-defection-law-is-misinterpreted-119070300387_1.html> accessed 3 July 2020.

would guarantee that the existing members of the party would stay content and not fear any dilution of their power or authority due to the entry of newcomers. This move concretized the loyalty of the existing members to the ruling Congress party.⁴ These reasons for introducing the anti-defection laws are evident from Prime Minister Rajiv Gandhi's speech in the Lok Sabha before the passing of the amendment bill as he laid emphasis on the fact that *the defections are invariably to the Congress Party, and not from the Congress Party*⁵ and that the bill would *help to keep the Congress Party intact, to strengthen the Congress Party*.⁶ Similarly, for the opposition party, passing the anti-defection amendment would ensure that the already scarce power they control in the Parliament is not further diluted due to defections to the ruling government.⁷ The justifications given for the passing of the anti-defection law in Parliament are a testament to the partisan origins of the law.

The primary aim of the anti-defection law was to strengthen political stability and to inculcate a sense of political responsibility.⁸ Anti-defection laws are used to disincentivize, deter and punish members who defect. The decision to penalize defectors stemmed from a history of defections where the elected members moved between parties that were ideologically inconsistent. This unprincipled movement across party lines merely for wealth and power highlighted

⁴Csaba Nikolenyi & Shaul R. Shenhav, 'The Constitutionalisation of Party Unity: The Origins of Anti-Defection Laws in India and Israel' (2015) 21 *Journal of Legislative Studies* 390.

⁵Lok Sabha Debates (30 January, 1985) p. 183.

⁶ibid.

⁷Csaba Nikolenyi & Shaul R. Shenhav, 'The Constitutionalisation of Party Unity: The Origins of Anti-Defection Laws in India and Israel' (2015) 21 *Journal of Legislative Studies* 390.

⁸Valerian Rodrigues, 'Parliamentary Opposition and Government Backbenchers in India' in N. Ahmed (ed), *Inclusive Governance in South Asia* (2018).

the need for a legal regime to restrict such movement.⁹ The rise of coalition governments accentuated the need for anti-defection laws to ensure stability and to maintain a majority in the government. Therefore, these laws were a necessity to ensure governmental, political and ideological stability in an era where free-flowing defections could topple governments.

The other reason that necessitated the need to introduce anti-defection laws was endemic to India - the political party was and is the locus of representation and not the individual candidate contesting with the party ticket.¹⁰ Therefore, the votes garnered by a candidate are usually on account of their affiliation to the respective political party and not on the basis of the candidate's individual prowess. The Supreme Court in *Kihoto Hollohan v. Zachillu & Ors*¹¹ reiterated this by saying that "*A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party.*"¹² This meant that any defection by the elected members in pursuit of power and wealth would be in utter disregard to the will of their constituents who would have "*voted for a particular ideology, some principles, (or) a programme*"¹³ of the political party that the elected member represented. Any defections on ideologically inconsistent and unprincipled grounds would be an affront to the will of the people and in extension- the representative democracy. Therefore, this breach of trust by the elected members

⁹Paras Diwan, 'Aya Ram Gaya Ram: The Politics of Defection' (1979) 21 Journal of the Indian Law Institute 291.

¹⁰Udit Bhatia, 'Cracking the Whip: The Deliberative Costs of Strict Party Discipline' (2020) 23 Critical Review of International Social and Political Philosophy 254.

¹¹*Kihoto Hollohan v. Zachillhu And Others* [1992] SCR (1) 686.

¹²Ibid.

¹³Ibid.

also prompted the urgent need for a stern and uncompromising anti-defection law to regain the faith of the people in the electoral system.

The provisions under the Tenth Schedule of the Constitution clearly exhibit these underlying ideologies and objectives. The quest for party discipline and political stability led to the expansive provision for disqualification under Paragraph 2 of the Tenth Schedule. This paragraph is the crux of the legislation and lays down the conditions for the disqualification of members. While the provision only lists out specific overt acts that could lead to disqualification, the Supreme Court in *Ravi Naik v. Union of India*¹⁴ broadened the scope by interpreting that voluntary giving up of membership could also be *inferred* by the conduct or actions of the member. This led to various awkward scenarios where even the public criticism of the party president's orders and decisions were inferred as defections.¹⁵ The Speaker is tasked with determining the questions of disqualification on the grounds of defection even in nebulous scenarios such as these. This often means that the biases and perceptions of the Speaker play a significant role in the determination of these questions.

The legislature was presented with the choice to either totally prohibit defection or to provide for a qualified freedom to defect.¹⁶ The legislature chose the latter and listed out circumstances under which an elected member could defect without facing any repercussions. Paragraph 4 of the Tenth Schedule excludes party mergers from the ambit of defection disqualification if such merger was approved by at least two-thirds of the members. Under this exception, members joining the merged political party and those members who have disagreed to join the merged party and have opted to start a separate

¹⁴*Ravi S. Naik v. Union of India* [1994] AIR 1558.

¹⁵*Ram Chandra Prasad Singh v. Sharad Yadav*, Rajya Sabha Notification No. RS 46/2017-T.

¹⁶Nico Steytler, 'Parliamentary Democracy - The Anti-Defection Clause' (1997) 1 Law Democracy & Development 221.

political party will not be disqualified. Paragraph 3 of the Tenth Schedule enabled defection if at least one-third of the elected members from a political party wished to defect to another. This exception for *en bloc* defections was eventually omitted by the 91st Constitutional Amendment in 2003 as it had a deleterious impact on political stability.¹⁷

Paragraph 6 of the Tenth Schedule granted the Speaker of the House the power to decide upon the disqualification of members on grounds of defection. However, it does not lay down any procedural structures or temporal limits for the disqualification process.¹⁸ For instance, the Tenth Schedule does not provide for a specific time within which the Speaker must determine the disqualification- it simply states that it needs to be done at the earliest. Speakers often take advantage of these legislative loopholes and have strayed from their constitutional duty.¹⁹

The anti-defection law has received flak from all corners - largely owing to the criticism that it is a black mark on the efforts to build a truly representative democracy as it impairs the deliberative nature of politics. This was further accentuated by the lack of concrete evidence to prove the efficacy of the law to realize the intended object of curbing political impropriety and the indiscriminate movement across party lines.²⁰ Owing to the above-mentioned reasons of redundancy

¹⁷Clemens Spieß and Malte Pehl, 'Floor Crossings and Nascent Democracies - A Neglected Aspect of Electoral Systems? The Current South African Debate in the Light of the Indian Experience' (2004) 37 *Law and Politics in Africa, Asia and Latin America* 195.

¹⁸Vijaya Bhaskar Reddy, 'Sabotage of Anti-Defection Law in Telangana' (2015) 50 *Economic and Political Weekly*.

¹⁹H.R. Saviprasad & Vinay Reddy, 'The Law on Anti-Defection: An Appraisal' (1999) 11 *Student Advocate* 116.

²⁰Shoaib Daniyal, 'The Political Fix: Has the Anti-Defection Law Hollowed out India's Representative Democracy?' *Scroll.in* (22 July 2019) <<https://scroll.in/article/931323/the-political-fix-has-the-anti-defection-law-hollowed-out-india-s-representative-democracy>> accessed on 9 July 2020.

and ineffectiveness of the law there has been a rising demand to repeal the law in its entirety.²¹ The challenges to the law have been centred around the argument that the usage of legal means to remedy a political concern will always remain ineffective. However, the calls for repealing the law on these grounds are rather radical and extreme. Although there is consensus on the ineffectiveness of legal means to remedy political concerns - there is also a need to acknowledge the immaturity and nascence of the Indian political culture. In a study involving 40 Commonwealth countries, it was observed that only the relatively newer democracies such as India and South Africa had established anti-defection laws. On the other hand, more developed political systems such as the United Kingdom, Canada and Australia did not require anti-defection laws owing to a development of practices and conventions that inhibited such defections across party lines.²² In light of this argument, the need to retain the anti-defection laws in India, at least as an interim measure is established. Despite not being a perfect solution, given the political and social context in India, there is a need to retain the laws, at least until a culture of democratic responsibility is instilled in the elected members.

To examine the shortcomings of the law it is imperative to critically analyse the role and importance of the office of the Speaker as it is the most important functionary under the anti-defection law. Therefore, it is essential to understand the role of the Speaker to holistically comprehend the manner in which they deviate from the anti-defection laws and subvert the procedure.

²¹Chakshu Roy, 'What an Indian Law Can Do to MLAs Defecting in Karnataka & Goa - Nothing' (*The Print*, 12 July 2019) <<https://theprint.in/opinion/what-an-indian-law-can-do-to-mlas-defecting-in-karnataka-go-nothing/261920/>> accessed 10 July 2020.

²²GC Malhotra, 'Anti-Defection Law in India and the Commonwealth' (*Lok Sabha Secretariat*, 2005) <https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf> accessed on 10 July 2020.

III. THE ROLE AND IMPORTANCE OF SPEAKER

The role of the Speaker is central to parliamentary democracy. In the Indian context, much like its counterparts such as Australia, Ireland and Canada, the position and functions of the Speaker are inspired by the Westminster model. Being the Chief Officer and the highest authority in the Lower House of the Parliament- the Speaker's office assumes great importance. They are generally elected in the first meeting of the House and their term lasts for five years.²³ Like in Canada, the name of the Speaker is put forth by the Prime Minister (a member of the ruling party) and seconded by another member of the cabinet.²⁴

The Speaker is instrumental to the functioning of the House. The functions of the Speaker can be divided into three broad categories.²⁵ *Firstly*, the Speaker facilitates the discussions and deliberations of the House. While doing so, they are expected to remain apolitical themselves and not actively participate in the business of the House. The Speaker decides upon the permissibility of different motions²⁶ and assists the House in holding the executive accountable.²⁷ By undertaking these tasks, the Speaker facilitates the parliamentary function of representing the electorate. *Secondly*, the Speaker adopts the role of a disciplinarian.²⁸ They are empowered to suspend

²³Anurag Vaishnav, 'First session of 17th Lok Sabha: What to Expect' (*PRS Blog*, 29 May 2019) <<https://www.prsindia.org/theprsblog/first-session-17th-lok-sabha-what-expect>> accessed 10 July 2020.

²⁴Hari Chand, 'Powers of the Speaker' (1974) 16(1) *Journal of the Indian Law Institute* 128, 128.

²⁵Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 *The Hindu Centre for Politics and Public Policy* <<https://www.thehinducentre.com/publications/policy-report/article5137287.ece>> accessed 10 July 2020.

²⁶Rules of Procedure of the Lok Sabha, Rule 56 and Rule 193.

²⁷*ibid.*

²⁸Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 *The Hindu Centre for Politics and Public Policy*

members,²⁹ and it is within their mandate to adjourn the House, in cases of gross misconduct.³⁰ To maintain the decorum of the House they are allowed to interrupt members and ask them to withdraw statements if they can be classified as un-parliamentary.³¹ *Lastly*, they also perform quasi-judicial functions and are required to function as a tribunal. As per Paragraph 6 under the Tenth Schedule, the Presiding Officer alone is empowered to disqualify elected members on grounds of defection, based upon a petition by any other member of the House. Hence, as envisaged by the law, the Speaker must act like a neutral and unbiased party to determine the facts and establish if the members had in fact defected.

It should be noted that the Speaker while undertaking these tasks represents the House as a whole. Hence, maintaining a stance of impartiality is a key requisite for the role. This requirement of impartiality has not been codified in the text of the constitution but exists as a constitutional convention.³² The Speaker must adhere to this convention out of a sense of public duty or simply out of fear of judicial intervention. Hence, neutrality and non-partisanship are key tenets of the Speaker's role.³³

<<https://www.thehinducentre.com/publications/policy-report/article5137287.ece>>
accessed 10 July 2020.

²⁹Rules of Procedure of the Lok Sabha, Rule 374.

³⁰Rules of Procedure of the Lok Sabha, Rule 375.

³¹Rules of Procedure of the Lok Sabha, Rule 352 and 378.

³²Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <<https://www.thehinducentre.com/publications/policy-report/article5137287.ece>> accessed 10 July 2020.

³³Matthew Laban, 'More Westminster than Westminster? The Office of Speaker across the Commonwealth' (2014) 20(2) The Journal of Legislative Studies 143, 143.

IV. ROLE OF THE SPEAKER – INHERENT PARADOX

While the Speaker can technically hail from any party, a rather troubling trend has developed in the recent past wherein the Speaker is elected from the ruling party and the Deputy Speaker from the opposition party.³⁴ These affiliations to the ruling party have resulted in several instances wherein the Speaker had acted in a manner that was beneficial to the ruling party. For example, in several instances, the Speakers have taken an inordinate amount of time to decide on the disqualification of elected members for defecting as it benefited the ruling party.³⁵ The Speakers often torn between their party loyalties and a sense of duty towards the Constitution have often given paramountcy to their partisan ties. Herein lies the paradox - the Speaker, elected by a particular political party, is expected to adjudicate disputes in a neutral fashion.

Developed democracies have taken steps to ensure the position of a Speaker remains apolitical, and untouched by the desire of political gain or fear of loss of office. It is observed that even though commonwealth legislatures have attempted to emulate the Westminster model of Speakership - they have struggled to copy all elements or have clung to traditions discarded by the Westminster model as well.³⁶ For instance, due to well-established conventions, the Speakers in the United Kingdom shed all party affiliations upon election. However, this is not the case in most commonwealth nations, including India. An attempt was made to emulate this in

³⁴Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <<https://www.thehinducentre.com/publications/policy-report/article5137287.ece>> accessed 10 July 2020.

³⁵Vijaya Bhaskar Reddy, 'Sabotage of Anti-Defection Law in Telangana' (2015) 1 Economic and Political Weekly 50.

³⁶Matthew Laban, 'More Westminster than Westminster? The Office of Speaker across the Commonwealth', (2014) 20(2) The Journal of Legislative Studies 143, 143.

Canada, however, it failed.³⁷ In the United Kingdom, the Speakers prove their neutrality by giving up party politics and resigning from their political party upon election.³⁸ Upon retirement, the former Speaker resigns as a Member of Parliament and is awarded the customary peerage.³⁹ Further, they never re-enter party politics and sit as independent crossbenchers in the House of Lords.⁴⁰ If a Speaker seeks re-election, major political parties do not field candidates in the Speaker's constituency. This too, has not been codified and is rather a constitutional convention which is religiously followed. Further, the Speaker does not contest by making any political promises and stands simply as the 'Speaker seeking re-election'.⁴¹ However, the Speakers can deal with their own constituency's problems like a normal Member of Parliament.⁴² This serves the dual purpose of ensuring that the Speaker remains accountable to the public and is given a free rein to preside over the House effectively.

Northern Ireland, which boasts of a parliamentary system akin to ours, also ensures that the Speaker renounces partisan life.⁴³ Speakership is given to individuals who relinquish their political ambitions, which is testamentary to their unbiased nature.

In sharp contrast to these practices, the Speakers in India are not mandated to give up party membership and neither does any such

³⁷ibid 145.

³⁸ibid.

³⁹ibid.

⁴⁰ibid.

⁴¹'Election 2019, Your Questions Answered: What Happens to the Losers?' (*BBC News*, 11 December 2019) <<https://www.bbc.com/news/election-2019-50523682>> accessed 10 July 2020.

⁴²Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 *The Hindu Centre for Politics and Public Policy* <<https://www.thehinducentre.com/publications/policy-report/article5137287.ece>> accessed 10 July 2020.

⁴³Stanley Bach, 'The Office of Speaker in Comparative Perspective' (1999) 5(3) *The Journal of Legislative Studies* 209.

convention exist. Furthermore, they are dependent on the party to get re-elected as well. They can even hold ministerial positions immediately before and after their appointments.⁴⁴ This reliance on a party for re-election and an incentive to hold ministerial positions plays a major role in presenting skewed incentives for Speakers. Hence, it is not surprising that there exists a rampant misuse of powers by the Speaker, especially under defection laws.

Questions regarding the propriety of giving the Speaker unfettered powers have been raised time and again. The Apex court's decision in the case of *Kihoto Hollohan*⁴⁵ is important in this regard. The two questions which gain prominence with regards to the paper are, *firstly*, whether the Speaker, still affiliated with their political party, should be bestowed with this responsibility and *secondly*, whether Paragraph 6(1) which imparts a constitutional "*finality*" to the decision of the Speaker ousts the jurisdiction of the courts.

The petitioners argued that the political connections and affiliations of the Speaker to a political party coupled with the broad powers presented to the Speaker under the Constitution could invariably lead to a reasonable likelihood of bias.⁴⁶ However, the majority judgment in *Kihoto Hollohan* summarily dismissed these concerns. The judges exclaimed that it would be unfair to express such distrust in the office of the Speaker. However, the minority opinion was sceptical of this approach, and rightly so. The minority opinion buttressed its argument by relying on the Constitutional Assembly Debates, specifically the drafting history of Articles 102, 103, and 192. Article 102 lays down the criteria for disqualification for membership. It includes scenarios such as holding any office of profit under the

⁴⁴Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy <<https://www.thehinducentre.com/publications/policy-report/article5137287.ece>> accessed 10 July 2020.

⁴⁵*Kihoto Hollohan v. Zachillhu And Others* [1992] SCR (1) 686.

⁴⁶*ibid.*

Government of India, being an undischarged insolvent, not being a citizen of India or being of unsound mind. Articles 103 and 192 state that these disqualifications must be decided by the President or Governor respectively in accordance with the opinion of the Election Commission. The minority judgment highlighted how during the course of the debates it was suggested that the Speaker be given the power to decide on disqualifications, however, the drafters had specifically refrained from doing so.⁴⁷ Instead, the power was given to the President and the Governors. The minority decision also highlighted that since the tenure of the Speaker was dependent on the will of the majority, the suspicion of bias cannot be ruled out. Further, even the possibility of this bias sneaking into the decisions of the Speaker would potentially violate a basic feature of the constitution: free and fair trials.⁴⁸ Hence, Justice Nariman was right to state in *Keisham Meghachandra Singh* that the fears of the minority judgment in *Kihoto* have come home to roost.

With regard to the second question, it was held that the Speaker acts like a tribunal. The court relied upon its earlier judgments in *Indira Nehru Gandhi v. Raj Narain*⁴⁹ and *Brundaban Nayak v. Election Commission of India and Anr.*,⁵⁰ and stated that the finality clause does not oust the jurisdiction of the courts under Articles 136, 226 and 227. However, it was noted that the power of courts to intervene is limited to when the authority is acting ultra vires, their action is vitiated by mala fides or there is a colourable exercise of their power. Hence, the court stated that in light of the finality clause, judicial review cannot be availed at a stage prior to the making of a decision by the Speaker, or at an interlocutory stage of proceedings. Hence, the courts are barred from interfering into the matter before the Speaker

⁴⁷ibid.

⁴⁸*Indira Nehru Gandhi v. Shri Raj Narain* [1976] 2 SCR 347.

⁴⁹ibid.

⁵⁰*Brundaban Nayak v. Election Commission Of India* [1965] 3 SCR 53.

makes a decision with regard to the disqualification. Further, there exists no timeline within which a Speaker must take decisions on anti-defection matters. These loopholes have helped ruling parties on various occasions.⁵¹

In the recent past, several incongruous situations have arisen due to this position of the law. For instance, in Telangana, the Speaker did not comment on the obvious defection of a member for six months.⁵² While maintaining an uncharacteristic silence on the matter of defection, the Speaker did his best to protect the defected members. Quite appallingly the Speaker even allocated a seat to one of the defected members in the Treasury benches. Similar situations have arisen in the past. In 1990's Keshari Nath Tripathi, the then Speaker of the Uttar Pradesh Assembly and member of the Bhartiya Janata Party ("BJP"), failed to comment on the defection of the 15 Bahujan Samaj Party MLAs to enable the BJP to survive the floor test.⁵³ Other than sitting on cases regarding defection, Speakers have been outrightly partisan in several cases as well. In the case of *Balachandra L. Jarkhioli v. B.S. Yeddyurappa*,⁵⁴ the Speaker was seen to have favoured a member of the parliament unabashedly. The Speaker failed to give members enough time to respond to show cause notices and conducted the enquiry in a hurried manner in

⁵¹Rakesh Mohan, 'Speakers not Time-Bound to Decide on Anti-Defection Cases' (*The Economic Times*, 17 March 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/speakers-not-time-bound-to-decide-on-anti-defection-cases/articleshow/64199077.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 10 July 2020.

⁵²K. Vijaya Bhaskara Reddy, 'Sabotage of Anti-Defection Law in Telangana' (2015) 1(50) *Economic & Political Weekly*.

⁵³Rakesh Mohan, 'Speakers Not Time-Bound to Decide on Anti-Defection Cases' (*The Economic Times* (17 March 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/speakers-not-time-bound-to-decide-on-anti-defection-cases/articleshow/64199077.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 10 July 2020.

⁵⁴*Balachandra L. Jarkhioli v. B.S. Yeddyurappa* (2011) 7 SCC 1.

complete disregard to principles of a fair trial. This trend of the Speaker to act against the constitutional mandate of maintaining a neutral position was highlighted in the case of *Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly*.⁵⁵ This case dealt with the misuse of the discretion given to the Speaker to reject resignations. The court stated that while conferring discretion, the Speaker must decide upon the voluntariness or genuineness of the resignation based upon objective criteria.

Such cases call attention to the rampant misuse of the discretion accorded to the Speaker, indicating that any loophole in the law will be used to the advantage of the majority party. Such misuse is not only the result of the lacuna in the law but also of the structural deficiencies with the role of the Speaker. These deficiencies were also recently highlighted in a decision rendered by the Arunachal Pradesh High Court.⁵⁶ The court noted the paradox and suggested that either the Speaker be replaced by an independent tribunal or the office of the Speaker be made apolitical as is the case in the United Kingdom.

Unless some of these structural gaps are plugged - it is difficult to envisage the Speaker functioning as an efficient adjudicator for anti-defection laws. In light of this observation, the alternatives proposed by the Supreme Court gain great prominence.

⁵⁵*Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly* 2019 SCC OnLine SC 1454.

⁵⁶*Pema Khandu and Ors v. Speaker, Arunachal Pradesh Legislative Assembly and Ors* 2016 SCC OnLine Gau 284.

V. ANALYSIS AND CRITIQUE OF RECOMMENDATIONS

The Speakers have over time exploited the gaping holes in the defection laws and have created a pressing need to push for reforms to tackle the issues of partisanship and abuse of powers. Over time, a few viable recommendations have surfaced, however, none have been adopted.

In *Keisham Meghachandra Singh*⁵⁷ the Supreme Court did two things. *Firstly*, the court curtailed the powers of the Speaker to a great extent by allowing for judicial review prior to the stage of the Speaker having given their decision. The court lifted this bar by jointly reading *Kihoto Hollohan*⁵⁸ and *Rajendra Singh Rana*,⁵⁹ to conclude that the failure to exercise jurisdiction is not covered by the in-built restriction in Paragraph 6. *Secondly*, it implored the Parliament to explore the possibility of an independent tribunal to replace the Speaker.

The Supreme Court suggested an independent tribunal headed by a retired Supreme Court Judge at the national level and a retired Chief Justice of a High Court at the state level. The creation of such a quasi-judicial body headed by a judicial member would wreak havoc on the already debilitating separation of powers. This proposal would effectively approve judicial interference in matters that are inherently political.

Furthermore, there is a high probability that the proposed judicial members would be appointed to the tribunals through a system of appointments that could bear resemblance to the collegium system.⁶⁰

⁵⁷*Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly and Others* 2020 SCC OnLine SC 55.

⁵⁸*Kihoto Hollohan v. Zachillhu And Others* [1992] SCR (1) 686.

⁵⁹*Rajendra Singh Rana and Ors v. Swami Prasad Maurya and Ors* (2007) 4 SCC 270.

⁶⁰Prarthana Kashinath, 'SC Urges Rethink of Speaker's Disqualification Powers: Why Plumping for 'Impartial Tribunal' to Deal with Political Turncoats is No Panacea' (*Firstpost* 26 January 2020) <<https://www.firstpost.com/india/sc-urges->

The collegium has faced scathing attacks in the past for its opacity – a trait that could make the functioning of the tribunal shallow and raise questions of fairness. Similarly, the other possibility would be for the Central Government to have a say in the appointment of judicial members to the tribunal.⁶¹ This could also topple the precarious relationship between the centre and state governments as it would give the central government the power to hold sway over the judicial members and in extension control the movement of elected members across party lines through them. This could lead to situations where the Central Government could potentially orchestrate the movement of candidates across party lines to consolidate power in the ruling party or coalition. Thus, the suggestion to replace the Speaker with an independent tribunal is rather short-sighted and far more dangerous to the constitutional fabric of separation of powers. The other alternative that gained some traction was to grant the role to the Election Commission – a quasi-judicial body consisting of three members. The attractiveness of this alternative can be attributed to the perceived neutrality and independence of the body.⁶² The Election Commission is already tasked with determining the disqualification of members under Section 8A of the Representation of People Act, 1951. Under Section 8A, the Election Commission performs a judicial role as it hears and determines cases on the allegations of corruption which are *automatically referred* to it by the Governor or the President.⁶³ This exhibits the capabilities of the Election Commission to replace the role of the Speaker. However, the Commission, too, has recently been

rethink-of-speakers-disqualification-powers-why-plumping-for-impartial-tribunal-to-deal-with-political-turncoats-is-no-panacea-7958231.html> accessed April 29 2020.

⁶¹ *ibid.*

⁶² Pardeep Sachdeva, 'Combating Political Corruption: A Critique of Anti-Defection Legislation' (1989) 50 *Indian Journal of Political Science* 157.

⁶³ Bhavdeep Kang, 'We Can Rule on Defectors, Instead of the Speaker' (*Outlook*, 30 March 1998) <<https://www.outlookindia.com/magazine/story/we-can-rule-on-defectors-instead-of-the-speaker/205283>> accessed April 25 2020.

accused of partisan behaviour⁶⁴ when it declared Prime Minister Narendra Modi and Minister of Home Affairs Amit Shah as ‘not guilty’ in all five cases accusing them of violating the Model Code of Conduct.⁶⁵ There is an urgent need to insulate the members of the Commission from the influence of the executive branch in terms of the procedure for appointment and term of office. At present even though the Chief Election Commissioner enjoys protection at par with judges of the Supreme Court. This protection does not extend to the two Election Commissioners.⁶⁶ Furthermore, even though Article 324(5) states that the Election Commissioners can only be removed if recommended by the Chief Election Commissioner, the Supreme Court in the *S.S. Dhanoa v. Union of India*⁶⁷ carved an exception to this rule. The court upheld the removal of the Election Commissioner carried out through a presidential notification. Hence, the current framework does not guarantee sufficient safeguards to protect the autonomy and independence of the Election Commissioners from external influences.

With regards to the procedure for appointment of the Election Commissioners, currently, they are appointed by the President on the advice of the Cabinet.⁶⁸ However, this procedure was challenged in

⁶⁴Monobina Gupta, ‘The Legacy of a Different CEC: When J.M. Lyngdoh Stood up to Modi’ (*The Wire*, 6 May 2019) <<https://thewire.in/politics/election-commissioner-jm-lyngdoh-modi-model-code>> accessed 10 July 2020.

⁶⁵Ritika Chopra, ‘Election Commissioner Lavasa Opposed Five Clean Chits to Amit Shah PM Modi’ (*The Indian Express*, 5 May 2019) <<https://indianexpress.com/elections/lok-sabha-elections-lavasa-opposed-five-clean-chits-to-amit-shah-pm-modi-5710773/>> accessed 10 July 2020.

⁶⁶Snehil Kunwar Singh, ‘How Can We Constitute a More Impartial, Non-Partisan Election Commission?’ (*The Wire*, 9 May 2019) <<https://thewire.in/government/election-commission-independence>> accessed 10 July 2020.

⁶⁷*S.S. Dhanoa v. Union of India* [1991] SCR (3) 159.

⁶⁸Snehil Kunwar Singh, ‘How Can We Constitute a More Impartial, Non-Partisan Election Commission?’ (*The Wire*, 9 May 2019) <<https://thewire.in/government/election-commission-independence>> accessed 10 July 2020.

Anoop Baranwal v. Union of India,⁶⁹ which sought to replace it with a system resembling the collegium or an independent selection committee. This matter was referred to a five-judge bench and is pending before the court.⁷⁰ Hence, giving the Election Commission the power to determine matters of defection also poses its own set of challenges ranging from issues of bias to the interference of the executive. Thus, one can only conclusively determine the efficacy of replacing the Speaker with the Election Commission after the Supreme court decides on these issues.

Alternatives which envisage the Election Commission and executive working together have also been put forth. The 170th Law Commission Report on Electoral Reforms seemed to favour the role of the Election Commission in providing advisory assistance to the President and the Governors by giving them its independent advice.⁷¹ It was proposed that the advice would be furnished by the Election Commission after adhering to all the principles of natural justice.⁷² Finally, by leaving the final decision to the discretion of the President or Governor as the case may be, it would keep the matters of disqualification strictly within the realm of political actors. This was proposed to legitimize the opinions of the Election Commission. However, this recommendation, too, is problematic due to the interference of the executive with the legislature owing to the fact that the executive positions such as that of the Prime Minister and the Council of Ministers are filled by members of the legislature. The argument for separation between their functions finds support in the

⁶⁹WP (C) 104/2015.

⁷⁰Mehal Jain, 'SC Refers Plea to Make Independent Collegium to Recommend Names for Appointment of Election Commissioners to Constitution Bench' (*Live Law*, 23 October 2018) <<https://www.livelaw.in/breaking-sc-refers-plea-to-make-independent-collegium-to-recommend-names-for-appointment-of-election-commissioners-to-constitution-bench/>> accessed 10 July 2020.

⁷¹Law Commission, Reform of the Electoral Laws (Law Com No 170, 1999) para 1.3.3.1.

⁷²Law Commission, Electoral Reforms (Law Com No 255, 2015) para 5.19.5.

debates held during the drafting of the Constitution as well. The members of the Constituent Assembly were reluctant to expose the executive to legislative influence. While drafting the Constitution, B.R. Ambedkar summarily rejected the proposal to let the Speaker give his resignation to the President instead of the Deputy Speaker on the grounds of separation of powers. He stated that the aim of the Constitution was to give the President “*as complete and independent a position of the executive as we possibly can*”⁷³ and to avoid any intermingling of the legislature and executive.⁷⁴ Although, India does not follow a strict separation of powers it has time and again been advised to keep the functioning of the two organs of government separate.⁷⁵ Especially in a sensitive political matter such as defection, the intermingling of the two should be avoided to the greatest possible extent. Therefore, the powers to disqualify members on grounds of defection should not be given to the President or Governor in order to protect the sanctity of their office.

Other countries with defection laws follow diverse practices. For example, in Bangladesh, the Speaker refers the case to the Election Commission and in Singapore, the Parliament decides on issues of defection.⁷⁶ However, these alternatives pose the same difficulties as have been discussed earlier. Hence, the least intrusive reform would be to promote neutrality and eradicate the element of bias in the role of the Speaker itself. As discussed previously, Indian Speakers find

⁷³Constituent Assembly of India Debates (Proceedings) - Volume VIII' (*Constitution of India*) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-14> accessed on 10 July 2020.

⁷⁴*ibid.*

⁷⁵Shashank Krishna, 'Separation of Powers in the Indian Constitution; Why the Supreme Court was Right in Intervening in the Jharkhand; Imbroglio' (2006) 18(2) Student Bar Review 13.

⁷⁶Anirudh Burman, 'The Anti-Defection Law – Intent and Impact' (*PRS Blog*, 23 November 2009) <https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370583077_Anti-Defection%20Law.pdf> accessed 10 July 2020.

the positions of their counterparts in other countries to be safeguarded against partisan behaviour. Drawing from the best practices of these more developed democracies, the office of the Speaker demands an immediate overhaul. Drawing inspiration from the model of the United Kingdom and Ireland, the Speakers could be mandated to resign from their political parties to demonstrate their unbiased nature. Further, they could be barred from holding any political office post-retirement as well. While maintaining the position of a neutral arbiter of issues, the Speaker should also be allowed to function like a normal member of parliament, to deal with the issues of their constituency, as is the case in the United Kingdom. Adopting at least some of these measures would bring about a structural change in the role of the Speaker and make it more neutral and hence, an effective adjudicator. However, one must also be wary that mere rules cannot ensure neutrality. These rules would be effective to take the individual out of the party but would not ensure they are freed of ideologies and biases they subscribe to.⁷⁷ What is important is not whether the Speaker has political affiliations but whether they can distinguish them from their duty to the parliament.⁷⁸ Hence, requiring the Speaker to quit their political party or renounce politics is to emphasize form over substance.⁷⁹ These reforms cannot be implemented overnight and would require a holistic change in the political environment. These values of neutrality and non-partisanship can only be inculcated into the system through a change in the political practices themselves.

⁷⁷Stanley Bach, 'The Office of Speaker in Comparative Perspective' (1999) 5(3) *The Journal of Legislative Studies* 209.

⁷⁸*ibid.*

⁷⁹Matthew Laban, 'More Westminster than Westminster? The Office of Speaker Across the Commonwealth', (2014) 20(2) *The Journal of Legislative Studies* 143, 244.

VI. CONCLUSION

The urgent need to overhaul and reform the role of the Speaker in the anti-defection laws is justified as it seeks to prevent the continuing mockery of the electoral mandate. The recent judgement by the apex court in *Keisham Meghachandra Singh*, wherein the Speaker resorted to the time-tested tactic of delaying the disqualification brought this issue to the forefront yet again. Many have suggested taking the rather radical route of doing away with defection laws, however, owing to the political culture in India only being in the nascent stages - it is imperative that we retain the anti-defection laws. Therefore, the usage of anti-defection laws by political parties in India plays the role of a coercive method to retain elected members within the confines of the party. This is however in stark contrast to the party cohesion that is often the defining feature in most advanced democracies in the world such as the United Kingdoms.⁸⁰ Party cohesion is built on a deep-rooted loyalty of the elected members towards the policies, programmes or ideologies of a political party. This is, however, severely lacking in India as is observed from the unprincipled and ideologically inconsistent defections that have been plaguing the Indian polity. Hence, the reliance on anti-defection law can only be reduced upon a successful venture by the Indian polity to inculcate a sense of party cohesion within the party cadre. In the unlikely situation that this succeeds - political parties could maintain party discipline through in-built principles and conventions rather than relying on coercive legislations such as the anti-defection law. Therefore, due to the absence of party cohesion and unwavering loyalty towards amassing riches and power over loyalty towards a political ideology or programme, India will have to pin its hopes on the defection laws to attain the same results.

⁸⁰Kenneth Janda, 'Laws Against Party Switching, Defecting, or Floor Crossing in National Parliaments' (2009) Northwestern University 2/2009 <<http://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf>> accessed 20 June 2020.

As discussed, every recommendation poses unique and significant problems that range from hindering the delicate and precarious separation of powers to the unwanted interference by other politically vested entities. However, while looking for alternatives it is important to grasp the complex nature of the problem which is essentially political. Hence, as reiterated earlier, resorting to legislative and legal reforms to remedy a political issue is often nothing but a piecemeal measure. However, given the difficulty and complexity of instilling the desired political culture, it is evident that it cannot happen overnight. Until such significant political changes take place, India will have to work within the confines of the anti-defection laws that are currently in use. As highlighted earlier the least intrusive method to do so would be to strengthen the role of the Speaker itself. To this end the initiative by the Supreme Court to curb the abuse of powers by the Speaker is to be lauded and is a welcome first step especially in the absence of other meaningful alternatives.