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DECODING INTRA-PARTY DISSENT: THE LAWFUL UNDOING OF CONSTITUTIONAL MACHINERY?

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ABSTRACT

The recent political spat between Sachin Pilot and Ashok Gehlot in Rajasthan, and the subsequent legal battle that ensued thereto, has brought about prime focus on the right of intra-party dissent and its permissibility under the Indian Constitution vis-à-vis anti-defection law. The concept of intra-party dissent has barely been discussed and deliberated upon in the Indian context; barring a few media pieces and articles on this topic, the broader Indian legal academic literature has hardly laid any focus on the same. This paper attempts to address this lacuna by analysing various legislative provisions and judicial precedents in India and across the globe. Through this paper, the authors have attempted to discern and unravel the concept of intra-party dissent and showcase the manner in which the concepts of defection and dissent are often wrongly viewed contemporaneously in India. This conceptual intertwining has resulted in the former being used as an apparatus by the political parties to stifle and throttle the latter, resultantly causing the annihilation of intra-party dissent in the Indian democracy. The authors strongly argue that intra-party dissent is an

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intrinsic feature for the survival and growth of an effervescent democracy, purging of which, through extraneous means or otherwise, has a debilitating effect on the Indian democracy. To prevent this, it is extremely vital to clearly delineate the concepts of defection and dissent and put in place adequate mechanisms to safeguard and promote the right to intra-party dissent.

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I. INTRODUCTION

The imbroglio that had engulfed the state of Rajasthan in July 2020, with Mr Sachin Pilot and Mr Ashok Gehlot's camps jousting for power and supremacy, was nothing short of theatrical. Nineteen Members of the Legislative Assembly (MLAs) of the Rajasthan Assembly were on the cusp of disqualification for not attending two meetings of their Party and disobeying the instructions of the Chief Whip of the Indian National Congress ("Congress Party").[1] These actions of the MLAs were succeeded with the Congress Whip filing a disqualification petition against them under paragraph 2(1)(a) of the Tenth Schedule ("Paragraph 2(1)(a)") of the Constitution of India 1950 ("Constitution") before the Speaker of the Rajasthan Legislative Assembly ("Complaint").[2] The Speaker had in turn issued notices to the allegedly delinquent MLAs to show cause against the Complaint within a period of two days.[3]

It was contended by the Gehlot camp that Sachin Pilot and some other MLAs had, by missing party meetings and on the basis of their

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[1] PTI, 'Disqualification Notices against Sachin Pilot, 18 other rebel Congress MLAs: Rajasthan HC likely to pronounce verdict on Tuesday' *The New Indian Express* (Jaipur, 21 July 2020) <https://www.newindianexpress.com/nation/2020/jul/21/disqualification-notices-against-sachin-pilot-18-other-rebel-congress-mlas-rajasthan-hc-likely-to-pr-2172731.html> accessed 13 March 2021.

[2] Outlook Web Bureau, 'As Congress Sends Disqualification Notice to Sachin Pilot, All Eyes set on Leader's Next Move' *Outlook India* (15 July 2020) <https://www.outlookindia.com/website/story/india-news-congress-to-send-disqualification-notices-to-sachin-pilot-other-mlas-for-skipping-clp-meet/356719> accessed 13 March 2021.

[3] Financial Express Online, 'Rajasthan: Sachin Pilot among 19 MLAs to face disqualification from Assembly for defying Congress whip, Speakers issues notices' *Financial Express* (15 July 2020) <https://www.financialexpress.com/india-news/sachin-pilot-disqualification-rajasthan-legislative-assembly-speaker-notice-congress-mlas/2024631/> accessed 13 March 2021.

conduct, voluntarily given up membership of the Congress Party, thus they were liable to disqualification under the anti-defection law, enunciated below.[4] This was strongly opposed by the Pilot camp on the ground that voicing disagreement with certain policies or decisions taken by a party, without any intention to abandon the party and join another political party, does not amount to defection or voluntary giving up the membership of a party.[5] This internal squabble between the Congress Party had also reached the doors of the courts of law, with petitions, *inter alia*, challenging the show cause notice issued by the Speaker filed before the Rajasthan High Court[6] and for stay of proceedings being filed by the Speaker before the Supreme Court of India (SC).[7]

Despite heavily armoured arguments and allegations from both sides, neither the Rajasthan High Court nor the SC conclusively decided the

[4] Harsh Nair, 'Congress To SC: 19 MLAs in collusion with BJP to topple Rajasthan govt, their conduct amounts to defection' *Times Now* (1 August 2020) <https://www.timesnownews.com/india/article/congress-to-sc-19-mlas-in-collusion-with-bjp-to-topple-rajasthan-govt-their-conduct-amounts-to-defection/630401> accessed 13 March 2021.

[5] SNS Web, 'Rajasthan Crisis: HC Verdict on disqualification of Sachin Pilot, 18 rebel MLA's on Friday; no action until then' *The Statesman* (New Delhi, 21 July 2020) <https://www.thestatesman.com/india/rajasthan-crisis-hc-verdict-disqualification-sachin-pilot-18-rebel-mlas-friday-no-action-till-1502910364.html> accessed 13 March 2021.

[6] Scroll Staff, 'Rajasthan crisis: HC to hear Sachin Pilot's plea against his disqualification at 1 pm tomorrow' *Scroll* (16 July 2020) <https://scroll.in/latest/967677/rajasthan-crisis-sachin-pilot-to-file-fresh-plea-against-disqualification-after-hc-grants-time> accessed 13 March 2021.

[7] The Wire Staff, 'Rajasthan Speaker to Move SC over HC's 'Intervention' in Rebel MLA's Disqualification' *The Wire* (Jaipur, 22 July 2020) <https://thewire.in/politics/rajasthan-speaker-supreme-court-mla-disqualification> accessed 13 March 2021.

matter. Subsequently, the two warring factions reached a truce, putting this political scuffle at rest.[8]

The polemic in Rajasthan may *prima facie* seem to be another attempt to topple a democratically elected government through horse-trading and engineered political resignations as in the case of Karnataka in the year 2019[9] and Madhya Pradesh in the year 2020.[10] However, on a closer examination, the Rajasthan constitutional impasse was different. This tussle was not between two rival political parties but between two stalwarts in the Rajasthan political arena belonging to the same political party, *viz.*, the Indian National Congress. The crisis that broke out in Rajasthan has brought to the fore a question fundamental to the basic tenets of the Constitution, i.e., *what are the constitutional contours of intra-party dissent in the Indian democracy?*

Before delving into this question and attempting to decipher it, it would be pertinent to understand the meaning of 'defection' and the law relating to it in India. 'Defection' comes from the Latin word '*defectio*',

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[8] Harsha Kumari Singh, 'Smiles, Handshake as Sachin Pilot, Ashok Gehlot Meet After Congress Truce' *NDTV* (Jaipur, 13 August 2020) <https://www.ndtv.com/india-news/rajasthan-ashok-gehlot-ahead-of-sachin-pilot-meet-spirit-of-forget-and-forgive-2278840> accessed 13 March 2021.

[9] First Post Staff, 'Full timeline of Karnataka Crisis: Congress- JD(S) govt falls as MLAs vote against HD Kumarswamy in delayed trust vote, BJP set to take charge' *First Post* (24 July 2019) <https://www.firstpost.com/politics/full-timeline-of-karnataka-crisis-congress-jds-govt-falls-as-mlas-vote-against-hd-kumaraswamy-in-delayed-trust-vote-bjp-set-to-take-charge-6996101.html> accessed 13 March 2021.

[10] Mukesh Rawat, 'MP govt crisis: Kamal Nath announces resignation, Congress falls and BJP rejoices' *India Today* (New Delhi, 20 March 2020) <www.indiatoday.in/india/story/madhya-pradesh-govt-crisis-floor-test-kamal-nath-congress-bjp-1657768-2020-03-20> accessed 13 March 2021.

meaning conscious abandonment of one's allegiance or duty.[11] Under the Constitution, the law relating to defection has been capsulated in its Tenth Schedule ("Schedule").[12] The Schedule comprises within its fold the following acts which entail disqualification from the House or State Assembly: (i) voluntarily giving up the membership of a party;[13] or (ii) disobeying the directives of the party leadership on a vote.[14]

In the backdrop of the aforesaid provisions, this paper endeavours to decipher the fundamentally intrinsic question pertaining to the scope of intra-party dissent under the Constitution. Through this paper, the authors aim to discern and segregate the concepts of the extant anti-defection regime and the principle of intra-party dissent. Additionally, the authors showcase the manner in which intra-party dissent and anti-defection law, despite being distinct and separate concepts, are often considered as being interlinked, which has a deleterious impact on a democracy such as India. Part II of this paper elucidates upon the meaning and scope of intra-party dissent, delving into the merits thereof. Part III examines the interplay between intra-party dissent and Paragraph 2(1)(a) and 2(1)(b) respectively, showcasing the manner in which dissent is purged in the Indian political arena under the garb of defection. Part IV looks at legislative practice adopted in other democracies of the world, with the view of understanding the nature and extent of intra-party dissent which has been considered viable across the globe. Thereafter, recognising the criticisms that intra-

[11] Law Commission of India, One Hundred Seventh Report on the Electoral Laws (Law Com No 35, 1999) para 5.
[12] The Constitution of India 1950, sch X.
[13] ibid, cl 2(a).
[14] ibid, cl 2(b).

party dissent may potentially face in the Indian parliamentary democracy, the authors put forth their rebuttals to such points of concern as may be raised in Part V hereinbelow, while also providing a suitable approach moving forward, followed by the authors' concluding remarks in Part VI.

II. INTRA-PARTY DISSENT ANALYSED

Dissent is defined to mean "contrariety of opinion"[15] or "differ, especially from the established or official opinion".[16] Justice DY Chandrachud, a sitting Judge of the SC, has recognised dissent as "a symbol of a vibrant democracy".[17] Dissent may take divergent forms; finding expression in the voices of individual citizens who assert their causes against those at the helm of power, or may manifest itself in the form of debate and discussion between disparate political parties on the parliamentary floor. However, there may be times when members belonging to the same political party have differed views on internal party matters, policies, or decisions, which may not fall in line with the opinions expressed by those in the echelons of power.[18] Such variance of opinion among members belonging to the same party or association is termed as 'intra-party dissent'. In many democracies across the world, intra-party dissent is viewed as an extension of the freedom of speech and expression granted to parliamentarians and is recognised as a crucial element that

[15] Henry Campbell Black, 'Dissent', *Black's Law Dictionary* (4th edn, 2011).
[16] Della Thompsom, 'Dissent', *Oxford Dictionary*, (2nd edn, 2011).
[17] *Romila Thapar v Union of India* [2018] AIR 2018 SC 4683 [66] (Chandrachud J).
[18] Christopher Garner and Natalia Letki, 'Party Structure and Backbench Dissent in the Canadian and British Parliaments' (2005) 38(2) Canadian Journal of Political Science 463.

fosters free debate and exchange of ideas in parties,[19] however, the same is not the case in India.

Today, the question of intra-party dissent holds more than mere academic and theoretical importance. In this part, the authors enunciate the multifarious reasons as to why intra-party dissent is vital in theory and in practice. *First*, the authors delve into the advantages of providing intra-party dissent to the party members at an individual level, which is followed by the impact it would have on intraparty relations. *Second*, looking at it from a macro perspective, at the inter-party level, the authors shed light upon the role intra-party dissent plays with regards to improved debates and dialogue in the House, which leads to tabling and formulation of better bills and laws in the country, which in turn has a direct impact on public accountability of party members and on the Indian democratic system in toto.

Moving forward with specific reasons, *first*, encouraging intra-party dissent would progressively impact the role played by individual members in the party. Permitting intra-party dissent gives party members the opportunity to separate their views and opinions from those of the party, giving them an individual voice and allowing them to fearlessly stand for what they believe in. This would, in turn, foster a congenial environment for the promotion of competition, participation, and representation within the party and ultimately in the Houses of the Parliament. Parliamentarians would be more certain that their suggestions, if meritorious, would be

[19] Harsh Nair (n 4).

considered and deliberated upon by their party.[20] Thus, they would be more motivated to engage in the onerous exercise of weighing the relative merits and demerits of alternative strategies and providing carefully calibrated, innovative policies and solutions.

Providing such impetus to members to openly voice their opinion within the party would indirectly counter the menace of largescale fragmentation and polarisation of political parties, as this would create an assurance among members that creating a political party of their own is not the only way in which their voices may be heard, and their vision shared.[21] Often several party members across various parts of the country have felt the need to quit a party which is non-inclusive. A recent example of this can be seen when the Chief of Congress Party in Haryana, Mr Ashok Tanwar, served his resignation letter in 2019, wherein clearly expressed his dissatisfaction over the fact that despite his voice being an expression of the aspirations of millions of staunch Congress Party supporters, voters and local leaders, it had not been paid heed to. This was the case in spite of him exhausting every possible avenue to make himself feel heard, at which point he decided to resign from his responsibilities in various committees of the Congress Party. He also stated that it was excruciating to watch a limited number of individuals within the Congress Party taking all the decisions,

[20] Ruchika Singh, 'Intra-Party Democracy and Indian Political Parties,' (2015) 71, Hindu Centre for Politics and Public Policy 1, 2015.

[21] Pratap Bhanu Mehta, 'Reform political parties first' <https://www.india-seminar.com/2001/497/497%20pratap%20bhanu%20mehta.htm> accessed 13 March 2021.

instead of allowing just, free and fair procedures.[22] Thus, if such members feel heard in the first place, the chances of fragmentation would be minimalized, and members would harness and capitalise on their position in the party itself to achieve their political aspirations.

Second, at the intra-party level, inclusive deliberation on policies could ensure that a larger number of party members being able to contribute to the decision-making or problem-solving process, as opposed to decisions being taken solely by the higher-ups and elites of the party, which are generally smaller, closed groups. When inclusive decision-making is done, it would lead to a greater flow of ideas and perspectives previously not considered. Unlike single-issue pressure groups, political parties are multi-focal, and nuanced divergences are natural within the same ideological frame. Further, diverse and disparate opinions, followed by contemplation and discussions, ensure that balanced and wholistic policies are passed, taking into consideration the needs of all the stakeholders involved.

Third, in addition to the aforesaid, permitting expression of dissent would prevent autocracy from gaining a foothold at the intra-party level. Usually, for the passing of any enactment, the party forming the government depends largely on the majority strength of its own members, rather than on the opposition members. For instance, if a party enjoys the

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[22] PTI, 'Ashok Tiwari resigns from Congress' election committees, says will work as ordinary party worker', *The Economic Times* (New Delhi, 3 October 2019) <economictimes.indiatimes.com/news/politics-and-nation/ashok-tanwar-resigns-from-congress-election-committees-says-will-work-as-ordinary-party-worker/articleshow/71428007.cms?from=mdr> accessed 13 March 2021.

support of more than the halfway mark in the house, they can achieve the simple majority required for passing constitutional amendment bills, finance and ordinary bills at ease, on the strength of their own party members without having to turn to the opposition's support. This effectively eliminates the consequences of external dissent and contrary views. The position is worsened in the absence of intra-party dissent as this leads to laws being passed without any second thought or consideration, with parliamentarians merely adjusting their own preferences to reflect the majority decision they must finally support. On the contrary, intra-party dissent in such circumstances would be crucial, as the ruling party would then have to take into account and satisfactorily address legitimate concerns raised by its members, and even go to the extent of persuading its members on such issues without a misplaced assurance that the law would be passed ultimately without any blockages, as seen in the status quo.

Fourth, it is pertinent to note that inclusivity plays an important role, not merely at the intra-party level, but also at the macro level in a parliamentary setting. One of the foremost reasons for which the Legislature holds primacy and a focal position in a democracy is due to its large size and the varied and divergent interests that it represents.[23] The Legislature is symbolic of the principle that an individual or small group of individuals, no matter how competent or able, are not a substitute for the collective wisdom of hundreds of persons representing multifarious interests, bringing a myriad of experiences to the table. It is for this very

[23] Jeremy Waldron, 'Representative Lawmaking' (2009) 89 Boston University Law Review 335.

reason that the Legislature is entrusted with the task of holding deliberations and formulating enactments for the country. In the absence of intra-party dissent in a country like India, the Lok Sabha even though physically consisting of 543 persons, would effectively consist of only a small-closed group of persons who would have the ability to table and assess all significant decisions being taken, with the remaining legislators acting as mere puppets in the hands of their political party, voting as per the sanction of their party leaders. This essentially reduces the range of problem solvers for the country to a particular category and type of politicians. On the other hand, if intra-party deliberation and crossflow of opinion is encouraged, it would benefit the party, and in turn the Legislature. The party and the Legislature could both draw from the experiences and learnings of a multitude of parliamentarians of varying age, stature, background and ethnicity. This would ensure inclusive deliberation and reflection on a wide spectrum of interests that numerically large legislative chambers were intended to secure.[24] Further, this would largely enhance the quality of debates held in the House, in turn enriching the quality of draft legislations tabled that ultimately form the laws of the country.

Fifth, permitting intra-party dissent would also in the true sense uphold in letter and spirit the primary purpose for which bicameralism has been adopted at the Centre by the Constitution.[25] The bicameral

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[24] Ajay Pandey, 'The Politics of Parliamentary Disruption' *Live Mint* (24 August 2015) <www.livemint.com/Opinion/Vf3anAosbfd9A6TJJiYFHL/The-politics-of-parliamentary-disruption.html> accessed 13 March 2021

[25] Arhend Lijphart, *Democracies: Patterns of majoritarian and consensus government in twenty-one countries* (Yale University Press 1984) 232.

parliamentary system in India aims at securing an additional layer of scrutiny to every bill passed by the Lok Sabha. The Rajya Sabha, even though consisting of only 250 members, plays a vital role as a revising chamber in providing due inputs and recommendations to various bills passed by the Lok Sabha[26] and acts as a check on parties having an absolute majority in the Lok Sabha.[27]

The tangible benefits of having this House will be discernible only if intra-party dissent is permitted to thrive and members of the Rajya Sabha are permitted to effectively fulfil their executive duties and mandate. This protective measure will lose its purpose entirely if members of the Upper House blindly follow, repeat, and reiterate the views and stance of their party leaders. For instance, Udit Bhatia, in his article titled '*Cracking the Whip*',[28] has most succinctly encapsulated this position by stating as follows:

> *"Distinctiveness cannot be simply about the physical presence of two different sets of legislators. If the only permissible view they can voice is the one sanctioned by the party's leadership, and if they lack the capacity to form opinions that differ from that view, then distinctiveness no longer obtains. We, then, lose, what the epistemic case for bicameralism suggests, is the value of having two chambers of parliament."*[29]

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[26] Rajya Sabha Secretariat New Delhi, 'Constitutional Provisions in Respect of the Rajya Sabha' '*Rajya Sabha- Its contribution to Indian Polity'* (Parliament of India, Rajya Sabha, 2018).
[27] Pavan K Verma, 'Why Rajya Sabha is essential: It represents the states and balances an impetuous Lok Sabha' *Times of India Opinion* (India, 26 December 2015) <https://timesofindia.indiatimes.com/blogs/toi-edit-page/why-rajya-sabha-is-essential-it-represents-the-states-and-balances-an-impetuous-lok-sabha/> accessed 13 March 2021.
[28] Udit Bhatia, 'Cracking the whip: The deliberative costs of strict party discipline' (2020) 23 Critical Review of International Social and Political Philosophy 254.
[29] ibid 13.

Sixth, this will bring in more public accountability *vis-à-vis* political parties, as citizens and voters would now be assured that their elected representatives, at the national and local level, are not mere instrumentalities in the hands of their parties but can effectively fulfil their mandate and promote the cause of their constituents, being in tune with public sentiment.[30]

A clear downside of not permitting intra-party dissent was recently witnessed when Dr Shashi Tharoor, Thiruvananthapuram representative to the Lok Sabha, openly opposed the stance taken by his own party, Congress, on the matter of privatisation of construction of an airport in Thiruvananthapuram, an issue riddled with political clout. Tharoor made a public statement clarifying his unwavering position that he will not follow the order issued by his party on this subject, as he staunchly supports privatisation of the airport construction work.[31] The Congress Party leader has faced criticism for not towing the party line on this issue, but he has stuck to his guns, saying his position has been consistent[32] and is in consonance with what is in the best interest of the people of his constituency.[33] Thus, if intra-party dissent is permitted, MLAs will not be

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[30] Stefan Rummens, 'Staging Deliberation: The Role of Representative Institutions in the Deliberative Process' (2012) 20 Journal of Political Philosophy 23.

[31] Fatima Khan, 'Why participate in bidding, then question the game – Tharoor asks Kerala govt on airport' *The Print* (New Delhi, 24 August 2020) < https://theprint.in/politics/why-participate-in-bidding-then-question-the-game-tharoo r-asks-kerala-govt-on-airport-row/487855/> accessed 13 March 2021 .

[32] Nandini Gupta, 'Shashi Tharoor's Reply To Kerala Minister on Centre's Airport Move' *NDTV* (New Delhi, 22 August 2020) <https://www.ndtv.com/india-news/thiruvananthapuram-airport-issue-shashi-tharoors-reply-to-kerala-minister-on-cent res-airport-move-2283584> accessed 13 March 2021.

[33] Express News Service, 'Tharoor embarrasses Congress leaders in Kerala by backing Thiruvananthapuram airport privatisation' *The New Indian Express* (Thiruvananthapuram,

torn between choosing what is best for their constituency and following directions issued by their party, but will in fact be able to harmonise the interest of all the stakeholders involved, while at the same time instilling and retaining public confidence in the party.

Lastly, an inclusive intra-party deliberation on policies could provide for decimation of dynasty politics, a phenomenon commonly observed in the India political arena. Dynasty politics is not specific to any political party in India, as both local and central parties showcase multiple dynasties at various levels of hierarchy. Dynastic politics has a negative impact on party cohesion in particular and the Indian political arena in general. This can be better understood by analysing a recent occurrence of August 2020, where 23 members of the Congress Party wrote a 'dissenting letter' to the Interim President of the party, Sonia Gandhi.[34] In this letter, they expressed strong views against limited members of the party forming a majority, along with their loyalists getting important portfolios and better promotions. It was a cry for internal democracy, honest introspection on issues faced by the party and collective party leadership. The signatories, in various interviews, clarified that their intention was not to target the party or its higher-ups,

20 August 2020) <https://www.newindianexpress.com/states/kerala/2020/aug/20/tharoor-embarrasses-congress-leaders-in-kerala-by-backing-thiruvananthapuram-airport-privatisation-2186080.html> accessed13 March 2021.

[34] OpIndia Staff, 'Read the full text of the letter written by dissenting Congress leaders demanding sweeping changes within the Congress party' *OpIndia* (28 August 2020) <https://www.opindia.com/2020/08/the-full-text-of-congress-letter-written-by-dissenting-leaders-demanding-structural-overhaul-party-leadership> accessed13 March 2021 .

but merely to revive the Congress Party.[35] Amidst this turmoil, a Congress Party meeting was held, wherein the letter was acknowledged, but none of the requests or concerns voiced by these members were actually discussed; in fact, some of these members were also accused of being traitors to their own party.[36] Thus, it is evident that intra-party dissent within such dynastical parties would be greatly beneficial, not just in promoting views of members outside the 'majority within the party', but also in leading to democratic distribution of power and influence within the party, preventing fragmentation of parties.[37]

Thus, it is abundantly clear from the aforesaid that intra-party dissent is the essence of a parliamentary democracy, being indispensable in preventing majoritarianism and authoritarianism, from taking foothold dominance both, within a particular party and in the House. Being a fundamental ethical principle, it can prevent the centralisation of power in the hands of a few people forming the majority. It qualifies as the distinguishing feature of a democratic government and serves as a safety valve for a democracy.

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[35] Rajdeep Sardesai, 'The myth of inner party democracy' *Hindustan Times* (27 August 2020) <hindustantimes.com/columns/the-myth-of-inner-party-democracy/story-xdmcW9Ch0b3CI1wJqpyOCN.html> accessed 13 March 2021.

[36] Manoj C G, 'Kapil Sibal: 'Not one request, concern shown in letter addressed at CWC meet' *Hindustan Times* (New Delhi, 31 August 2020) <https://indianexpress.com/article/india/kapil-sibal-interview-congress-letter-gandhis-6575479/> accessed 13 March 2021.

[37] Swati Chaturvedi, 'As Gandhi Loyalists Are Promoted, Dissenters Say "Told You So' *NDTV* (28 August 2020) <https://www.ndtv.com/opinion/must-fight-for-congress-not-gandhis-say-letter-bomb-signees-2286714> accessed 13 March 2021.

However, the functioning of the Indian parliamentary system, in practicality, has time and again curbed this valuable right of dissent available to its parliamentarians. In the following section, the authors will shed light upon the scope of intra-party dissent under the Constitution, by analysing several significant provisions under the Schedule and judicial pronouncements relating thereto.

III. SYSTEMATIC DISINTEGRATION OF INTRA-PARTY DISSENT IN INDIA

Despite India being the world's largest democracy, intra-party dissent is far from being recognised. Instead, it is seen to be curtailed by various restrictive practices. More often than not, intra-party dissent is stifled under the garb of defection as provided for in the Schedule. The authors aim to deconstruct these practices and provisions at length, by first analysing in Part A, the jurisprudence surrounding Paragraph 2(1)(a) and showcasing the manner in which intra-party dissent and voluntary giving up of membership (encompassed under Paragraph 2(1)(a)) are separate concepts, which are being wrongly entwined by political parties for their benefit. In Part B, the authors assay the loopholes in the Schedule and demonstrate the method by which intra-party dissent is systematically restricted and curbed by the Schedule, despite intra-party dissent escaping the confines of Paragraph 2(1)(a), as shown in Part A. Lastly, in Part C, the authors examine, in light of Paragraph 2(1)(b), the role played by a whip in curtailing intra-party dissent in a parliamentary democracy, and highlight the detrimental impact of providing unrestrained powers to the whip.

A. UNRAVELLING THE NUANCES OF INTRA-PARTY DISSENT IN THE BACKDROP OF PARAGRAPH 2 (1)(A) OF THE CONSTITUTION

Paragraph 2(1)(a) provides that a member of the Lok Sabha or the Rajya Sabha shall be disqualified from being a member of that particular House, if the member voluntarily and/or of his own free will and volition gives up membership of the political party by which he was set up as a candidate for election as a member of the Lok Sabha or the Rajya Sabha, as the case may be. It is pertinent to note that the contours of what amounts to a legitimate avenue of dissent and what amounts to voluntary giving up the membership of a political party under Paragraph 2(1)(a) are extremely blurred. A three-judge bench of the SC in the case of *Ravi S Naik v. Union of India*[38] ("*Ravi Naik*") has explained the scope and ambit of Paragraph 2(1)(a) to mean conduct of any kind by a member of a political party which may lead to an inference that the member has voluntarily given up membership of the party to which he belongs. The act of voluntary giving of membership of a party may be either express or implied, and a formal resignation of membership is not a necessary concomitant thereof. On the basis of the ratio laid down in the *Ravi Naik*, a number of persons including the Speaker of the Rajasthan Legislative Assembly in the Pilot-Gehlot issue have been quick to argue that voicing dissent against one's party or criticising any decisions taken by his party is a scathing attack on the party unity and cohesion and is nothing short of an attempt to challenge the party

[38] AIR 1994 SC 1558.

and government.[39] Thus, as per this school of thought, the conduct of a reprehensible member would rightly amount to voluntary giving up of membership under Paragraph 2(1)(a) and consequently, he should be disqualified from the House.

However, this skewed interpretation of Paragraph 2(1)(a) seems fallacious if jurisprudence surrounding it is delved into. It is true that the term 'voluntary resignation of membership' has been subject to a great amount of judicial scrutiny and discourse. However, most judgments on the subject have dealt with factual matrices involving a member of a political party (explicitly or impliedly) leaving that political party and covertly joining hands with a rival political party.[40]

The facts, *inter alia*, involved in these cases are as follows: In the *Ravi Naik*,[41] two MLAs of the Maharashtra Gomantak Party ("MGP") had met the Governor of Goa in the company of Congress legislators, wherein they had confessed to no longer supporting the MGP, and wishing to extend their support to the Congress Party to form an alternative government. A similar situation had arisen in the case of *Rajendra Singh Rana and Ors v. Swami Prasad Maurya and Ors*,[42] in the Uttar Pradesh Legislative Assembly. Further, in the case of *Jagjit Singh v. State of Haryana*,[43] an MLA of

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[39] ET Bureau, 'Ruling party as opposition' *Economic Times* (28 September 2010) <economictimes.indiatimes.com/opinion/et-editorial/ruling-party-as-opposition/articleshow/6640457.cms> accessed 13 March 2021.

[40] V Venkatesean, 'Why Congress Rebels in Rajasthan are justified in saying dissent is not defection' *The Wire* (25 July 2020) <thewire.in/law/congress-rebel-mlas-rajasthan-dissent-defection-case-law> accessed 13 March 2021.

[41] *Ravi Naik* (n 38).

[42] AIR 2007 SC 1305.

[43] AIR 2007 SC 150.

the Haryana Legislative Assembly, elected on the ticket of the National Congress Party ("NCP"), on the basis of an alleged split in the NCP, joined a political party called Democratic Dal. Shortly after its formation, the party members of the Democratic Dal, including the erstwhile NCP MLA, merged with the Congress Party (the ruling party in the state). In all the aforesaid cases, it is the chicanery tactics of the MLAs that have exposed them to the rigours of Paragraph 2(1)(a) and has ultimately led to courts upholding their disqualification on the ground of defection. The SC has, in all these cases, slammed change of political hues in pursuit of power and pelf, but has not answered the question of whether simple intra-party dissent would amount to the voluntary surrender of membership.

While the SC has failed to give an authoritative finding on this aspect, Justice N. Kumar of the Karnataka High Court, in his dissenting judgment in the case of *Balchandra L Jarkiholi and Ors v. B Yeddyurappa and Ors*,[44] has analysed this question, paving the way for future discourse on this aspect. In this case, 13 MLAs of the Karnataka Legislative Assembly belonging to the Bhartiya Janta Party (BJP) wrote identical letters ("Letters") to the Governor of Karnataka indicating that they had been elected as MLAs on the ticket of the BJP but had become disillusioned with the functioning of the Karnataka Government headed by Shri BS Yeddyurappa, and consequently withdrew their support to his government. Based on the aforesaid Letters, the Governor of Karnataka addressed a letter to Yeddyurappa, requesting him to prove that he continued to command majority support in the House. Subsequently, Yeddyurappa, as

[44] Writ Petition Nos 32660-32670 of 2010 (High Court of Karnataka, 15 November 2010).

the leader of the BJP in the Karnataka Assembly, filed an application before the Speaker seeking disqualification of the 13 MLAs on the ground that they had voluntarily given up their membership of the BJP, and had thus incurred disqualification under the Schedule.[45]

The thirteen MLAs had, all throughout the proceedings before the Speaker, maintained that their intention was not to withdraw their support to the BJP, but only to the Government headed by Yeddyurappa, as they believed his Government to be corrupt. They maintained that withdrawing support to the Yeddyurappa Government did not fall within the scope of defection under Paragraph 2(1)(a), emphasising that *prima facie* 'defection' means leaving one party and joining another party, which was not the case with the MLAs since they had not left the BJP at all. It was repeatedly asserted by them that "*as disciplined soldiers of BJP they would continue to support any Government headed by a clean and efficient person who could provide good governance to the people of Karnataka*".[46] The Speaker of the Karnataka Assembly, however, held that the 13 MLAs had voluntarily given their membership of BJP by withdrawing their support to the Government headed by Yeddyurappa.[47]

Following this, the disgruntled MLAs filed an appeal from this decision before the Karnataka High Court, where a majority of judges upheld the decision of the Speaker.[48] However, Justice N. Kumar, in his dissenting opinion, differed with the views given by the majority bench on

[45] [2011] 10 SCR 877 [3], [4] (Kabir J.).
[46] ibid 10.
[47] ibid 13-18.
[48] ibid 19-23.

interpretation of Paragraph 2(1)(a)[49], holding that the act of the MLAs expressing no confidence in the government formed under a particular leader does not amount to voluntarily giving up party membership. Justice N. Kumar further drew a fine distinction between what amounts to abandoning the leader of political party who has formed a state government, as opposed to acts amounting to deserting the particular political party in its entirety. The two acts are not synonymous in any manner and are in fact starkly different. What constitutes defection under Paragraph 2(1)(a) is deserting the political party as a whole and does not cover within its ambit the act of forsaking the government led by a particular member of that political party.[50] He recognised intra-party dissent as a legitimate exercise of the freedom of free speech and expression granted to parliamentarians and held that the Schedule merely prohibits acts of defection, not genuine and honest dissent. Lastly, it was held that, "*[t]he right to dissent is the essence of democracy, for the success of democracy and democratic institutions honest dissent must be respected by persons in authority.*"[51] In light thereof, Justice N. Kumar held that the order of the Speaker was required to be set aside.

On appeal thereof, the SC held, as regards the question of whether the MLAs had voluntarily given up their BJP membership, that the contents of the Letters clearly showcased that the MLAs had not withdrawn their support to the BJP, but had merely expressed their lack of confidence in the Yeddyurappa government, and were willing to support any BJP

[49] ibid 24.
[50] *Balchandra L Jarkiholi* (n 44) 45-46, (Kumar J).
[51] ibid.

government headed by another leader.[52] The SC went on to recognise that by the actions of the MLAs, the BJP had not been deprived of an opportunity to form a government in the state of Karnataka; they could still by all legitimate means, along with the support of the MLAs, form a BJP led government in Karnataka by changing their chief ministerial candidate.[53] Further, without delving into the nuances of dissent and based only on the material before it, the SC came to the conclusion that the Speaker had acted in a partisan manner and the proceedings conducted by him did not meet the twin tests of natural justice and fair play.[54] In view thereof, the SC quashed the decision of the Speaker disqualifying the 13 MLAs from their membership under Paragraph 2(1)(a). Further, it also set aside the majority judgment passed by the Karnataka High Court.[55]

Balchandra L Jarkiholi and Ors v. B Yeddyurappa and Ors is one of the foremost judgments where a distinction has been drawn between intra-party dissent and defection covered under the Tenth Schedule of the Constitution. Though the SC did not elucidate upon the concept of intra-party dissent in detail, the minority judgment of Justice N. Kumar has lucidly and in a holistic manner reinforced the fact that parliamentarians' right to dissent is sacrosanct in a democracy, denial of which would itself be tantamount to throttling parliamentary democracy. Intra-party dissent, however shrill it may be, cannot solely amount to disqualification under

[52] ibid 74 (Kabir J).
[53] ibid 76.
[54] ibid 91.
[55] ibid 94.

Paragraph (2)(1)(a) unless it is accompanied by other acts such as 'crossing the floor' or 'supporting a rival party'.

The position propounded by Justice N. Kumar that it is vital to draw a distinction between what amounts to permissible dissent and what transcends to become defection had previously been recognised by a five-judge Constitutional bench of the SC in the case of *Kihoto Hollohan v. Zachillu and Ors*[56] ("*Kihoto*") to a great extent. In this case, while deciding on the question of the constitutionality of the Schedule, the Bench stated:

> *"The distinction between what is constitutionally persmissible and what is outside the purview of the tenth schedule is marked by a 'hazy gray-line' and it is the Court's duty to identify, 'darken and deepen' the demarcating line of constitutionality… There is no single litmus test of constitutionality."*

Not stopping at this and staying true to their earlier statement, the SC, though not particularly in the paradigm of Paragraph 2(1)(a), went on to hold that the provisions of Paragraph 2(1)(b) of the Schedule, which deal with disqualification of a member from the House on failure to vote according to party directions, must be construed in such a manner to not unduly impinge on the freedom of speech given to a Member of Parliament by virtue of Article 105[57] of the Constitution. The provisions of Paragraph 2(1)(b) must be construed harmoniously with the other provisions, and its wording must be appropriately confined in its scope by keeping in view the objects and purpose underlying the Schedule, namely, to curb the evil or

[56] AIR 1993 SC 412.
[57] The Constitution of India 1950, art 105.

mischief of political defections motivated by the lure of office or other similar considerations.[58]

Taking a cue from the rationale given for the interpretation of Paragraph 2(1)(b), it would, as an obvious corollary, follow that provisions of Paragraph 2(1)(a) which precede the provisions of Paragraph 2(1)(b) must also be harmoniously construed in order to ensure that the Schedule as a whole does not encroach upon the freedom of speech granted to parliamentarians. Resultantly, the words '*voluntary giving up of membership*' would necessarily require to be construed strictly in order to ensure that it does not cover within its ambit cases of genuine and free dissent which is the hallmark of a true democracy. Thus, *Kihoto* makes it incumbent upon the speaker and the courts of law to distinguish between cases of bona fide dissent and defection camouflaged as dissent, safeguarding the former, while crushing the later with an ironclad hand.

In summation, it can be said that even though the SC has on occasions impliedly indicated that Paragraph 2(1)(a) should not be used as a medium to trample upon intra-party dissent, due to the absence of an authoritative ruling on this aspect, political parties have capitalised on this ambiguity and have time and again viciously used the machinery laid down in this provision to trample upon intra-party dissent, and create fear of disqualification in the minds of their party members. Thus, given the critical role played by intra-party dissent in a democracy, it is absolutely imperative for either the Legislature or the Judiciary to clear the ambiguity surrounding

[58] *Kihoto* (n 56) 49.

the scope of voluntary giving up of membership under Paragraph 2(1)(a), to open the parliamentary and party doors to intra-party dissent, enabling parliamentarians to voice their opinion, either on the floor of the House or within a political party, without any kind of trepidation or fear.

B. DOES BEING SAFEGUARDED FROM DEFECTION UNDER PARAGRAPH 2(1)(A) REALLY ENSURE FREEDOM OF SPEECH?

One may be inclined to believe that if intra-party dissent is determinately held to fall outside the scope of Paragraph 2(1)(a), parliamentarians may be able to exercise and assert their freedom of speech and expression to the fullest, leading to free and fearless discussions on the parliamentary floor and amongst political parties. Unfortunately, this myth would soon be busted if one takes a closer look at the Schedule as it stands today. Under the Schedule, even if a person manages to escape the rigours of Paragraph 2(1)(a), his party may still, by taking benefits of the loopholes in the Schedule, place a furtive finger on the lips exercising unwanted freedom of expression and dissent. This position can be better understood by the means of an illustration to elucidate the provisions under the Schedule.

Assuming, Mr A was elected to the Legislative Assembly of a particular state as a member of X political party for a period of 5 years. During his tenure, Mr A realises that the chief minister of the state, also belonging to political party X, is indulging in corrupt activities. Mr A protests against such corruption and refuses to attend party meetings. The members of party X may first try to get Mr A disqualified from the House on the ground that he has voluntarily resigned from his membership under

Paragraph 2(1)(a). Mr A may be able to escape the rigours of Paragraph 2(1)(a) on the ground that he was only expressing his genuine and honest dissent against the chief minister, and such intra-party dissent does not qualify as a ground for defection under the Schedule. However, this victory of Mr A might be short-lived, as members of party X may avenge their defeat against Mr A by expelling him from the party on the ground that he has violated the rules of party X, *inter alia*, relating to discipline or attendance of meetings. Further, Mr A, despite being expelled from party X, would continue to remain subject to the whims and fancies of the president of party X if he wishes to retain his seat in the Legislative Assembly, due to the deeming provisions contained in explanation (a) to Paragraph 2 of the Schedule of the Constitution ("Explanation") and its subsequent interpretation by the SC in the case of *G Vishwanathan v. Hon'ble Speaker Tamil Nadu Legislative Assembly, Madras and Ors*[59] ("*G Vishwanathan*").

The Explanation, *inter alia*, states that "*an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member*". Basis the deeming fiction contained in this paragraph, the SC in *G Vishwanathan* had held that an elected member would continue to belong to the political party that set him up as a candidate for the election notwithstanding the fact that he or she had been expelled from that party. He will continue to belong to that political party even if he is treated as unattached.[60] The SC has essentially held that a member expelled from his political party, albeit not from the house, would within

[59] (1996) 2 SCC 353.
[60] ibid 11.

the house continue to remain subject to the directions of the party which in fact has debarred him. Moreover, in the event such a member joins another party or disobeys any direction of the whip of the party that expelled him, he will be liable to incur defection under the Schedule.[61]

Thus, in the aforementioned example, Mr A despite being expelled from party X, would continue to be subject to the directions of party X within the House, and would have to comply with their orders and directions even if he strongly objects to the same, as not complying with such orders would entail disqualification from the house. In all, his right to dissent, though probably rescued from the sweep of Paragraph 2(1)(a), has been completely throttled by *G Vishwanathan* and the Explanation.[62]

At this juncture, it is pertinent to refer to the parliamentary debates relating to the Constitution (52nd Amendment) Bill 1985[63] ("Bill") by which the Schedule was introduced in the Constitution. The Bill in addition to Paragraph 2(1)(a) and (b) (which have been incorporated into the Schedule) also consisted of a clause (c), which provided that if a member were expelled from a political party, the said member would be disqualified from the House. Clause (c) was specifically deleted whilst passing the Bill. In such circumstances, the intention of the Parliament is amply clear that no disqualification would attach to a member who has been expelled by his political party and hence, no act of his post expulsion would expose him to

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[61] ibid 12.

[62] Venu Sundaram, 'Amar Singh Expulsion Case: SC Misses Chance to Interpret Anti-Defection Law', *The Wire* (5 August 2016) <https://thewire.in/law/amar-singh-expulsion-case-scs-refusal-interpret-anti-defection-act-missed-opportunity> accessed 13 March 2021.

[63] Constitution (52nd Amendment) Bill 1985, cl 2(c).

disqualification under Paragraph 2(1)(a) or (b). Furthermore, speeches made by eminent parliamentarians, including, by Sharad Dighe make it clear that clause (c), which sought to disqualify persons who were expelled from their party for conduct outside the House, was expressly done away with as the said clause, if left outstanding, would create several practical problems such as making ministers subject to the arbitrary decisions of party leaders.[64] Professor Madhu Dandavate, during the discussion surrounding the Bill, had in support of the deletion of clause (c) stated that "*there are enough instances in this political life of our country where merely for the expression of political dissent from a leader, people have been expelled*".[65]

G Vishwanathan is in the teeth of the aforesaid legislative intent and has in fact brought in, through the back door, that which was explicitly sought to be excluded from the ambit of the Schedule. Furthermore, the Supreme Court in *Kihoto* has, as iterated before, expressly stated that the provisions of the Schedule have to be read in consonance with and in light of the objects and purpose for which the Schedule was enacted, which was never in any manner to engulf expelled members of a party within its ambit.

Moreover, a Division Bench of the SC, in the case of *Amar Singh v. Union of India*[66] shed tremendous doubt on the correctness and applicability of *G Vishwanathan*, having regard to the legislative history of introduction of the Schedule, parliamentary debates in relation thereto and the ultimate exclusion of clause (c) in the Schedule. The SC has gone ahead to observe

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[64] LS Deb 30 January 1985, vol 1 no 11, series 8.
[65] ibid.
[66] (2011) I SCC 201.

that "*what was sought to be excluded by the legislature has now been introduced into the Tenth Schedule by virtue of the said decision*". In light thereof, the judges referred certain questions of law, *inter alia*, including whether the provisions of the Schedule would apply to a member who had been expelled from the party which set him up for election as a candidate and whether the view taken in *G Vishwanathan* concerning the status of expelled members was in harmony with the provisions of the Schedule to a larger bench of the SC. However, a three-judge bench of the SC ultimately declined to rule on these questions, as the petitions had become infructuous at that point of time by virtue of the petitioner having completed his tenure in the Rajya Sabha during the pendency of the matter.

Interestingly, the same matter has once again come up before a Division Bench of the SC,[67] as the petitioner was re-elected to the Rajya Sabha, and this time his tenure being up to 2022. This Bench had also referred the questions raised earlier for consideration to a larger bench of the SC. While an authoritative ruling of the SC in this matter is intently awaited, it is abundantly clear that inflicting punishment on parliamentarians who are bold enough to stand up for what they believe in, even at the expense of inviting expulsion from their party and suffering humiliation and vilification at the hands of their fellow party members, is draconic and disproportionate.

[67] *Amar Singh v Union of India* [2017] SCC Online SC 405.

C. ROLE OF THE WHIP VIS-À-VIS PARAGRAPH 2(1)(B)

In addition to the aforesaid, it would be apposite to study Paragraph 2(1)(b). Under this provision, a member may be disqualified on the grounds of defection if he votes or abstains to vote in the 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 the prior permission of such party. This provision is absolute, with only the exception of prior permission, and even if a member puts forth a meritorious opposing opinion, the same would not be permitted under this Schedule. Here, the '*authorised person*' refers to the party whip.

The term 'whip' refers to an official of a political party who acts as the party's 'enforcer' inside the Legislative Assembly or House of Parliament, who is responsible for the party's discipline and behaviour on the floor of the house.[68] Thus, essentially a whip is the parliamentary functionary who issues orders and instructions that must be mandatorily followed by parliamentarians, and in turn, ensures attendance of members and voting according to party lines. Neither the Rules framed under the Tenth Schedule nor the Rules of Procedure and Conduct of Business in the Lok Sabha/Council of States provide for or regulate the issuance of whip.[69] Paragraph 2(1)(b) is the sole enabling provision for the powers of a whip. The whip is entrusted with paramount powers, but there are no

[68] BS Web Team, 'Explained: What is a whip and what happens if it is disobeyed in the house?' *Business Standard* (27 November 2019) <https://www.business-standard.com/article/politics/explained-what-is-whip-in-indian-politics-and-what-does-it-do-what-happens-if-it-s-disobeyed-119112600362_1.html> accessed 13 March 2021.
[69] Harsh Nair (n 4).

corresponding checks and balances on the use of this authority. This unfettered power conferred on the whip is often used as a means of exercising complete control by the ruling party, curtailing the free will of its members.

There exist innumerable instances in India where the whip has issued a mandate to the parliamentarians to act in a certain way, as directed by the ruling party. This covers instances such as whips to attend meetings, vote in favour of majority opinion, preventing meeting persons from other parties, and so on. While this is aimed to be a disciplinary action, it tends to be used as an authoritarian means of stifling dissent by members. Such whips, as a result of the Explanation and *G Vishwanathan*, can also be issued to expelled members.

Different political parties have often used the whip to satisfy their own political agendas. For example, the Karnataka Assembly provided a sordid instance of the same when certain BJP members were disqualified for defying a party whip directing them to vote in favour of a particular member for the post of Speaker of the Assembly.[70] Mamta Banerjee from the Trinamool Congress had, a few years back, issued an informal whip to her party members to vote in favour of Dinesh Trivedi, the Trinamool candidate for the Rajya Sabha, failing which they would suffer disqualification.[71] The most recent example of the whip being used to curtail freedom of speech, is the whip issued by Mayawati Prabhu Das of

[70] *D Sudhakar v DN Jeevaraju* [2011] 3 Kant LJ 437.

[71] 'Trivedi's Problem' *India Today* (16 March 2002) <https://www.indiatoday.in/india/north/story/dinesh-trivedi-is-bound-to-obey-trinamool-congress-whip-96118-2012-03-16.> accessed 13 March 2021

the Bahujan Samaj Party ("BSP") to 6 expelled MLAs of Rajasthan, who had been elected to the Rajasthan Legislative Assembly on the ticket of the BSP, but had subsequently been expelled from the Party. Despite the expulsion, they were directed to vote against the Gehlot Government in the event of a trust vote being held in the Rajasthan Assembly.[72] Thus, it is evident that while the whip is an essential means of maintaining discipline in the House, it is often used as a medium to exploit constitutional machinery and can undo an essential pillar of democracy, *viz.*, free speech in parliament.

Such exercise of unbridled power by the whip has come under the scanner at multiple occasions. For instance, the 170th Law Commission Report on Electoral Laws[73] has lamented the fact that the whip was being used in the Indian Parliament at every possible stage, leaving no room for dissent. It stated as follows:

> "*It would be appropriate if it is provided that a whip shall be issued only on occasions when the voting is likely to affect the existence or continuance of the government and not on each and every occasion. Such a course would safeguard both the party discipline and the freedom of speech and expression of the members.*"

[72] Abhinav Sahay, 'BSP issues whip to 6 Rajasthan MLAs who merged with Congress, instructs to vote against Gehlot govt' *Hindustan Times* (27 July 2020) <https://www.hindustantimes.com/india-news/bsp-issues-whip-to-6-rajasthan-mlas-who-merged-with-congress-instructs-to-vote-against-gehlot-govt/story-lPJ3edfTlIwp6JnxolHi7L.html> accessed 13 March 2021.

[73] Harsh Nair (n 4).

A similar view was also taken in the Dinesh Goswami Report of 1990.[74] Further, this position received judicial backing in *Kihoto*, where the SC commented that disqualification imposed by Paragraph 2(1)(b) due to non-compliance with the instructions issued by the whip must be permitted only in the following cases: (i) where a change of Government is likely to be brought about or prevented, or (ii) where the motion under consideration relates to a matter which forms an integral policy and programme of the political party. Further, the SC also clarified that, where such a direction is being issued in the form of a whip, the disobedience of which would amount to disqualification, the consequence must be clearly worded to ensure the member has fore-knowledge thereof. However, neither the recommendations of the Law Commission nor the judicial clarification has been incorporated in the Schedule, and the whip continues to enjoy a free hand to quell even the slightest form of dissent expressed by a member.

Thus, a combined and harmonious reading of the aforesaid pronouncements and provisions of the Schedule amount to systematically crippling dissent at every stage and in every form, in the bargain, crumbling democracy and free speech. While the restrictions imposed in Paragraph 2(1) (a), the Explanation and *G Vishwanathan* case have a deleterious impact on dissent, Paragraph 2(1)(b) may very well be the death knell of it.

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[74] Government of India, *Report of Committee on Electoral Reforms* (Ministry of Law and Justice, Legislative Department, 1990) <https://www.legislative.gov.in/reports-on-electoral-reforms> accessed 13 March 2021.

Further, it would also be pertinent to clarify at this point that while the authors recognise the importance of anti-defection law in maintaining parliamentary discipline and party cohesion, they are strictly opposed to it being used an apparatus to stifle and throttle intra-party dissent in the country. It is understandable that the primary intention of enacting this anti-defection law was to tackle hurdles such as maintaining strict party discipline in a time when India was a fairly young democracy, with a recently codified constitution. At that stage, intra-party dissent was not a pressing priority in the larger scheme of things. However, in the thirty-six years since, the political scenario in India has evolved largely. Owing to this, the unintended ramification of such anti-defection law has been the stripping away of individual conscience and discretion of parliamentarians which the authors strongly object to.

IV. LESSONS FROM AROUND THE GLOBE: INTERNATIONAL PERSPECTIVE ON INTRA-PARTY DISSENT

Various countries around the world follow different regimes regarding intra-party dissent in the House. Notably, various countries including, *inter alia*, the US, UK, Malawi and Australia permit intra-party dissent, voting against the party's ideals and floor-crossing.

In the UK, a member of the House has the freedom to vote for any bill without fear of disqualification from either his party or the House.[75] The lack of restrictive regulation on expressing dissent has been beneficial in promoting debate in the House and allowing meaningful discussions at

[75] English Bill of Rights 1869, art 9.

the time of framing policies. For example, at several stages of discussions and voting on Brexit, the UK Parliament saw internal discord. The former Conservative Party Prime Minister, David Cameron, was engaged in a bitter discourse with his party leaders, pre-eminently Boris Johnson and Michael Gove over the Brexit debate.[76] None of these instances was seen as acts of disobedience of the party. Members that were unwilling to support the majority approach could defect and sit as independent parliamentary members. This goes to show the extent of freedom enjoyed by members of the UK Parliament, who cannot be compelled to get in line with the party's stance only due to their political affiliation with it.[77]

Further, in the UK there three types of whips which can be issued, as follow: (i) one-line whip, being merely advisory, (ii) two-line whip, being instructive, and (iii) three-line whip, being mandatory,[78] which is the position loosely followed in India. The three-line whip is only issued sparingly by the parties, on critical issues such as votes of no-confidence, unlike in the case of India, where such a whip is issued by a party at the drop of a hat.

Similarly, the US also follows a relatively liberal political system, with no legal framework on defection. Every member of the House is ensured freedom of speech under the US Constitution, and this right

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[76] Bhopinder Singh, 'Political Dissent' *The Statesman* (29 July 2016) <https://www.thestatesman.com/opinion/political-dissent-157097.html> accessed 13 March 2021.

[77] Joe Marshall, 'The whipping system and free votes' *Institute for Government* (6 March 2019) <https://www.instituteforgovernment.org.uk/explainers/whipping-system-and-free-votes> accessed 13 March 2021.

[78] ibid.

extends to the right to speak or not speak in favour of something and to the right of association or not associating, freely and as per the will of the member.[79] The American judiciary has also played an integral role in ensuring that this right does not remain merely on paper but does in fact see the light of the day. For example, in the landmark ruling of *Julian Bond v. James Floyd,*[80] where a legislator was prevented from taking oath in the House and reprimanded for his reservations on certain US foreign policy implemented by his own party, Supreme Court of the United States (SCOTUS) held that a legislator cannot be disqualified for expressing legitimate concerns about foreign or national policies of the country. In fact, the US Supreme Court went to the extent of holding that legislators had an obligation to take a stance on controversial issue and to freely participate in discussions on policies of governance, ensuring that they best represent the interests of their constituency.

Further, in the case of *Gewertz v. Jackman*,[81] the US District Court held that the right of freedom of expression conferred on a parliamentarian is so eminent that a disqualification in response to criticism or concerns raised in the House would be vindictive and in violation of a parliamentarian's constitutional rights. Taking the aforesaid proposition further, another District Court in the case of *Barley v. Luzerne County Board of Elections,*[82] has specifically clarified that if a legislator chooses to oppose the views of his political party on a matter, he is categorically protected

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[79] *Washington Legal Foundation v Massachusetts Bar Foundation* 993 F2d 962, 976 (1st Circuit, 1993).
[80] 385 US 116 (1966).
[81] 467 F Supp 1047 (DNJ 1979).
[82] 937 F Supp 362 (MD Pa 1995).

from disqualification. He may be excluded from the political party but not the House itself. Thus, through a plethora of legislative enactments and judicial pronunciations in the US, parliamentarians are ensured utmost freedom to express their views in the House, which in turn is beneficial for fostering better discussions and well-analysed policies.

Several examples of expression of internal party dissent have been seen in the USA during the presidential tenure of Former President Donald Trump. For instance, Senator John McCain differed with Trump and his fellow Republicans as much as seventeen percent of the time during votes in the Senate,[83] while Texas Senator Ted Cruz openly refused to endorse fellow Republican Trump as the presidential nominee at the Republican national convention.[84] Furthermore, his radical ideas on the economy, healthcare and foreign policy[85] have not been welcomed with open arms, and in fact several Republican leaders have openly criticised his take on issues like the coronavirus outbreak and 'Black Lives Matter' movement, to the extent of opposing his 2020 bid for re-elections.[86] However, the

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[83] Mohamed Zeeshan, 'India's anti-defection law needs changes to promote party-level dissent on issues like CAA' *The Print* (17 March 2020) <https://theprint.in/opinion/indias-anti-defection-law-needs-changes-to-promote-party-level-dissent-on-issues-like-caa/382505/> accessed 13 March 2021.

[84] Reid J Epstein, 'Despite boos, Ted Cruz Won't Endorse Donald Trump' *The Wall Street Journal* (21 July 2016) <https://www.theguardian.com/us-news/2016/sep/24/ted-cruz-donald-trump-president-endorsement> accessed 13 March 2021.

[85] Leigh Ann Caldwell and Josh Lederman, 'Trump's foreign policy faces growing dissent in Congress' *NBC News* (1 February 2019) https://www.nbcnews.com/politics/congress/trump-s-foreign-policy-faces-growing-dissent-congress-n965641> accessed 13 March 2021.

[86] David Smith, 'Republicans criticism of Trump grows – but will it make a difference at the polls?' *The Guardian* (9 June 2020) <https://www.theguardian.com/us-news/2020/jun/09/republicans-donald-trump-protests-election-2020> accessed 13 March 2021.

dissenting parliamentarians of both Houses have neither had to bear the brunt of expressing a contrary opinion nor have they had to face dire consequences such as disqualification. In all these instances, the dissenting parliamentarians can hold on to their personal positions and their dissent has not translated to disloyalty to their parties.[87]

Likewise, the position in Malawi concerning intra-party dissent is noteworthy. The Constitution of Malawi expressly gives party members an absolute right to exercise a free vote in any and all proceedings of the House, and such member's seat shall not be declared vacant solely on account of his voting in contradiction to the directive of the party.[88] Further, a member expelled from a political party for reasons other than crossing the floor does not lose his seat and can continue independently in the House,[89] in stark contrast to the position followed in India owing to the Explanation and *G Vishwanathan*.

Further, the position that exists in Australia in relation to intra-party dissent is remarkable. Despite there being a lack of a clear legislation pertaining to intra-party dissent, the Australian Government has not only permitted it, but has also tackled the issues arising due to allowance of intra-party dissent through internal policies and practices.[90] In the Australian Parliament, dissent is often ironed out internally in party rooms, at its initial

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[87] Report of Committee on Electoral Reforms (n 74).
[88] Constitution of Malawi 1994, art 65(2).
[89] Lok Sabha Secretariat Mr GC Malhotra *Report of Anti-defection Law in India and the Commonwealth* (2005).
[90] Department of the Senate Occasional Lecture Series at Parliament House *Trends in the Australian Party System* (20 April 2007) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=E75719D0B64F4166A0FFF3E61F0DAC53&_z=z.>accessed 13 March 2021.

stage, and not heard or seen to cause chaos in the House.[91] This helps in presenting a united front and solidarity within the party members in front of the public, and at the same time safeguarding and securing the right of the members of a party to freely express themselves.

Thus, from the aforesaid, it is evident that several countries have dealt with the issue of party cohesion *vis-à-vis* intra-party dissent in a wholistic manner, through legislative or judicial sanctions, customs, and practices. This indicates that there exists an interplay between conceptual intra-party dissent and its practical applicability, which is seen to be supported by the governments of various countries. The political structure and constitutional enshrinements in these countries lay down the gold standard on free speech as a crucial facet of democracy, which is glaringly distinct from the position followed in India, where dissent not only goes unrecognised but is also prevented and censured.

V. TACKLING THE ISSUE

The practical functioning of the Indian Parliament, coupled with the attitude of the political parties and leaders, clearly demonstrates that the concept of intra-party dissent has been resisted consistently in India. In this part, the authors seek to deliberate on the possible defences against permitting intra-party dissent in the Indian parliamentary democracy. Following an analysis of the basic arguments that may be raised against intra-party dissent, the authors seek to rebut the premises of such

[91] ibid.

arguments which may be advanced, with the view of establishing an alternate narrative.

The key potential arguments put forth by the opponents of intra-party dissent are that permitting intra-party dissent would entail the following consequences:

A. POTENTIAL MISUSE OF THE RIGHT TO DISSENT BY PARTY MEMBERS

The right to intra-party dissent in India may face backlash due to the perceived apprehension of it being used to the disadvantage of the party. Those arguing along this line of reasoning may stress that party members may pass a dissenting view or vote with a *mala fide* intention to stall the deliberation process and create deadlocks and chaos within the party or the House. Some may also contend that party members may misuse this right to connivingly hold the party at ransom to accept their terms and conditions.[92]

There is a four-pronged rebuttal which we present against the possible misuse of the right to voice intra-party dissent:

First, just because something can be potentially misused cannot be a reason for rejecting its introduction within the legal framework,[93] especially considering its relevance;

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[92] José Maria Maravall, 'The political consequences of internal party democracy' in José Maria Maravall and Ignacio Sanchez-Cuenca (eds), *Controlling Governments: Voters, Institutions, and Accountability* (Cambridge University Press 2007).

[93] Law Commission of India, *Section 498A IPC* (Report No 243, 2012) para 7.1, wherein it has stated that "*Its object and purpose cannot be stultified by overemphasizing its potentiality for abuse*

Second, at the public level, if a member is seen to dissent frequently on every stance taken by his party, the electorate is likely to see him is an unreliable candidate, lowering the possibility of re-election. Such parliamentarians would also come under the public scanner, coming off as unsuitable representative of the people with low credence.[94] Further, the higher the position occupied by a member in the party hierarchy, the more he is subject to media glare and public opinion. Public accountability of the party members can thus be said to increase at every stage in the party hierarchy and it can safely be assumed that parliamentarians would be mindful and conscientious while expressing dissent, not going overboard and harming party solidity;

Third, it is important to realise that after all, even dissenters within partisan camps remain partisans. Members are attracted to a particular party because they share the vision and perspective of the party on several, if not all, political issues. Thus, on essential issues, such as vote of confidence or no-confidence or integral policies and manifestos on which the party has come to power, which resonate with the party ideology and vision it may be assumed that members would toe the party line in support.[95] Further, in order to have complete certainty on this aspect, parties could enact internal regulations and procedures, laying down key instances, such as the aforementioned, in which they can compel members to vote in favour of the party's stances. However, it is pertinent to remember that such

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or misuse. Misuse by itself cannot be a ground to repeal it or to take away its teeth wholesale. The re-evaluation of §498A merely on the ground of abuse is not warranted".

[94] Brian J. Gaines & Geoffrey Garrett, 'The Calculus of Dissent: Party Discipline in the British Labour Government, 1974-1979' (1993) 15(2) Political Behaviour 113.

[95] Jeremy Waldron (n 23).

regulations should not be akin to unbridled powers exercised by the whip for any issue, irrespective of the magnitude and scale of the issue. Instead, such regulations should be formulated in a streamlined manner to cover only specific instances and must be exercised by the party sparingly and with caution.

Fourth, at the party level, several internal safeguards can be put in place within the party itself, to ensure that the right is not misused. For instance, only recalcitrant members who, according to the opinion of majority party members, are seen to dissent for *mala fide* reasons or for the purpose of maliciously impeding the policies and programs of the party, could be appropriately dealt with. They could face penalties within the parties ranging from lighter sanctions including censure, slower progression in the party or losing party perks such as accommodation and staff, to more severe penalties ranging from providing fewer resources for re-election campaign to withdrawing support for the politician in the next election, depending on the severity of the misuse undertaken by the party member. Hence, procedural safeguards and internal regulations such as the aforesaid can be developed to curb the possibility of misuse of the right to dissent instead of refusing to accord it with legal validity altogether.

B. DEMOLITION OF PARTY COHESION

Opponents of intra-party dissent would be quick to argue that if members of political parties are allowed to publicly voice concerns or vote against the decisions being taken by, or bills tabled by their party in the Parliament, it may signal that the government lacks the support of its own

members and would create doubt amongst the voters as to whether the government is capable of delivering on its promises.[96]

With respect to this potential loss of party cohesion, the authors argue that stifling the right to dissent of the party members is not the optimal means of obtaining party unity. Instead, it is possible for parties to achieve deliberative cohesion, which most voters regard as valuable and look at as a symbol of a truly cohesive party, by permitting and encouraging such dissent.[97] When open debate and discussion is discouraged and quelled within a political party, there is a tendency for disagreements within the party to spill out in the public domain, with each side then making virulent allegations against the other, which actually undermines party cohesion and reputation in the eyes of the public. The Rajasthan fiasco,[98] the unpleasant incident of Yashwant Sinha of the BJP writing an open letter to his fellow party members calling upon them to stand up against their party and its failures,[99] the aforementioned dissenting Letters addressed by Congress leaders to Sonia Gandhi,[100] are all befitting examples of the result which ensue when dissenting opinions in a party are attempted to be suppressed. On the contrary, if free communication and open conversation is practised, members would not feel repressed by their party leaders anymore, but

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[96] Indridason Indridi, 'To Dissent or not to Dissent? Informative Dissent and Parliamentary Governance' (2008) 9(4) Economics of Governance 363.
[97] John Parkinson and Jane Mansbridge, *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press 2012).
[98] SNS Web (n 5).
[99] National Herald Webdesk, 'Yashwant Sinha wins kudos for letter asking BJP to "speak up"' *National Herald* (17 April 2018) <https://www.nationalheraldindia.com/india/yashwant-sinha-wins-kudos-for-letter-asking-bjp-mps-to-speak-up-in-national-interest> accessed 13 March 2021.
[100] *Ruchika Singh* (n 20).

rather would feel valued as an integral part of the party. This kind of inclusive and open atmosphere would make it easier to reach an internal consensus in the party and co-partisans members would be more likely to back a certain position after a mutual give and take of reasons, while also successfully displaying a more stable and long-lasting party unity in the Parliament and in the eyes of the public, as opposed to the current eyewash of party cohesion, which may crumble with the slightest blow of dissent by party members.

C. DISRUPTION AND INFIGHTING IN THE HOUSE OF THE PARLIAMENT

Another possible concern may be that permitting intra-party dissent would create inroads for internal discord between party members to find its way into the house of the parliament.[101] There may be situations where party members may raise their dissent or conflicting opinion for the first time in the house of the parliament, which may then be potentially misapplied by the opposition party to create more roadblocks in reaching a final decision and in the path of the government.

This apprehension and fear can arguably be put to rest by putting in place adequate procedural safeguards and policies which clearly demarcate the timeframe and the procedure for raising dissenting views and concerns, thus providing a structured opportunity to shares one's opinions with his colleagues within the party. This may first be done in internal party meetings, which if not found to be sufficient or fruitful, may be raised in

[101] David Hoffman, 'Intra-party Democracy: A Case Study' (1961) 27(2) Canadian Journal of Economics and Political Science 223.

Parliament, on taking permission from the Speaker, in an orderly fashion. This regulatory framework may be further substantiated with the support of internal policies, such as handbooks laying down the general practice surrounding dissenting opinions and votes, along with the manner of expressing it in the House and the consequences of creating unnecessary interruptions or disruptions. These guidelines may be laid down by parties for their internal meetings and by the Speaker for parliamentary debates.

D. DELAY IN PASSING LEGISLATIONS

Lastly, extended timelines for passing of legislations, delay due to several rounds of debate and contrariety of opinion may be used as arguments against permitting the right of intra-party dissent. This argument is particularly important given the fact that, as per surveys and presentations, the Indian Parliament on an average takes approximately 261 days[102] to pass bills and enact them as laws, in status quo when the right of intra-party dissent is practically absent in the Indian democracy. In these circumstances, intra-party dissent, if permitted, could further impede and slow down the passage of bills and policies in the House.

The concerns with respect to undue delay in passing of bills and on arriving at a consensus both intraparty and within the House can be addressed in a two-fold manner. *First*, the House and the country would immensely benefit from well-calibrated and thought-through policies which would result if intra-party dissent is permitted, as iterated earlier in the

[102] Devanik Shah, '261 days: The time it takes laws approved by Parliament to be enforced' *Hindustan Times* (7 February 2017) <https://www.hindustantimes.com/india-news/261-days-the-time-it-takes-laws-approved-by-parliament-to-be-enforced/story-eZm70hsqRFCTSD84Gisa7K.html> accessed 13 March 2021.

paper. The trade-off between slightly extended timelines and full proof laws needs to be examined in light of the benefits arising, which would greatly outweigh the potential shortcoming of delay. Better planned and scrutinised laws would be more concrete, requiring lesser future amendments, thus enhancing the quality of the legislative product. *Second*, it would act as an effective check on rash and hasty decisions being taken by a small group of parliamentarians, promoting transparency and preventing backdoor dealings.[103]

In all, we recognise the fact that enabling intra-party dissent in the Parliament may come with its own set of apprehensions and issues. However, it is important to remember that these teething issues can be tackled by various measures such as, *inter alia*, enactment of legislative framework and guidelines, as well as judicial promptness on addressing the issue by clearly laying down the instances and broadheads under which intra-party dissent is to be permitted. The aforesaid, coupled with putting in place a harmonious structure consisting of checks and balances on parliamentary powers *versus* duty and responsibility at various levels, would ensure that intra-party dissent be recognised and legitimised in India, while also effectively tackling the accompanying potential concerns. Without prejudice to the aforesaid recommendations, it is also important to keep in mind that this goal may better be achieved if controls and limitations are

[103] Harsh Gupta, 'Defecting from anti-defection' *Live Mint* (7 June 2009) <https://www.livemint.com/Opinion/wtY0yGwCtxQ7URWxrlfXpL/Defecting-from-antidefection.html> accessed 13 March 2021.

imposed on the unbridled powers of party whips, by means of legislative or judicial intervention on the issue.

VI. CONCLUDING REMARKS

During presidential elections, Bernie Sanders of the US Democratic Party had categorically stated "*[i]t is no secret that Hillary Clinton and I disagree on a number of issues; that is what this campaign has been about. That is what democracy is about*".[104] This statement by Bernie Sanders in essence encapsulates what a democracy should espouse: equality, inclusiveness and tolerance towards views differing from one's own. It further propounds two essential facts: *First*, that intra-party dissent is not synonymous with criticism and disruption but is merely the act of bringing about new and fresh perspectives to a given issue.; and *second*, a democracy without the right to dissent and express oneself freely, where a position contrary to that decided by the party leaders is unacceptable, is nothing more than a farcical democracy.

These tenets, when viewed in the context of the Indian political arena, lead one to realise that the Indian political parties in particular and the House *in toto* seem to be lacking on all the aforesaid counts. In fact, in India, the ultra-sensitivities, insecurities and institutionalized intolerance to a view different from the party has virtually eliminated intra-party dissent. Further, from the instances mentioned in this paper, it is apparent that the lines between defection, voluntary giving up membership and dissent in the Indian constitutional regime are unreasonably blurred, which has led to the

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[104] Colleen Elizabeth Kelly, *A Rhetoric of Divisive Partisanship: The 2016 American Presidential Campaign Discourse of Bernie Sanders and Donald Trump* (Lexington Books 2018).

former two being used as a garb to penalise the latter. The Yeddyurappa and Rajasthan fiascos are merely a couple of illustrations of such a phenomenon. The root cause of these cases is largely the ambiguity surrounding the concept of voluntarily giving up membership, due to which most acts of parliamentarians not appreciated by the majority party are hurled under the wide ambit of the Schedule.

Further, one of the most cogent reasons for such instances being problematic is that post media outrage dying out, the petitions alleging disqualification of the member under the Schedule disappear into thin air, either because they become infructuous due to the impugned member completing his tenure in the Parliament, or because of the matter being settled internally between the party members, owing to which legislative and judicial elucidation on this fundamental issue has been extremely limited. Consequently, this gives rise to political parties exploiting constitutional machinery, covertly thwarting intra-party dissent and going to the extent of castigating it. These tactics are not specific to a particular state or political party but are being employed at large as a means to manoeuvre constitutional due procedure. All these events have widely exposed the hollowness of the Indian parliamentary democracy.

Notwithstanding the aforesaid, it is vital to remember that the strength and authenticity of democratic principles world over are defined by the constitutional mandates laid down, read with the events that test the resilience of the democracy. In an age where intra-party dissent is systematically crippled, vital cogs of parliamentary democracy structurally dismantled, principles of freedom, discretion and creative genius of

members stifled, the time could not be riper to effectively recuperate and transform the Indian Parliament from an oligarchy to a true and effective democracy.