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# SPEAKER'S DISCRETIONARY JUSTICE IN THE DEFECTION DISQUALIFICATION

Authored by-Ankita Singh

## Abstract

The speaker of the house is responsible for the conduct of the assembly's proceedings as a guardian. The Anti-Defection Act under the Tenth Schedule states unequivocally that the Speaker must prevail on the issue of disqualification or otherwise. It is a well-established procedure that the Speaker, as the Head of the Legislature and constitutional authority, is not subject to the Courts' jurisdiction.

Recently, the Supreme Court has been hearing defection-based disqualification petitions from various state legislative assemblies. The court is currently reviewing the limits of the speaker's discretion. This paper tries to visualize judicial intervention in the Speaker's discretion in anti-defection proceedings and analyze the constitutional position and propriety of the Speaker's position as an impartial adjudicator. The paper aims to solve the question that the speaker being a member of a particular party and an insider in the house should be the sole and final arbiter in the cases of disqualification of a political defector or not.

The paper mainly focuses on the role of the speaker in parliamentary democracy as well as the judicial hand-hold of the speaker's discretion. It also sheds some light on the assumptions about the speaker's constitutional role.

**Keywords:** Speaker, Anti-Defection Act, Disqualification, Discretion, Defector

## Introduction

The Constitution (Fifty-Second Amendment) Act of 1985, which took effect in March 1985, amended various articles of the Constitution regarding the vacancy of seats and disqualification from membership in the Parliament and State Legislature. The amendment also added a new 10th schedule to the Constitution, detailing disqualification on the grounds of defection. A member of Parliament/State Legislature is considered "defected" if he either resigns from his party or refuses to obey the party leadership in any situation involving voting. Defection is defined in the Indian Constitution as "to abandon a position or association, often to join an opposing group," which essentially describes a situation in which a member of a party abandons his loyalty to that party to support another.

The constitutional concept of resignation represents irreconcilable silent dissent, whereas 'disqualification' inflicted as a result of 'defection' represents vociferous or loud dissent that may or may not be genuine, such as based on extraneous considerations. To prevent genuine dissent from drowning out non-genuine dissent, our Constitution limits the Speaker's power to disqualify the political defector only until the date on which his term of office would expire or he is re-elected to the legislature, whichever is earlier. Understanding this defined distinction thus unequivocally defends the democratic political-party-based governance system.

The Speaker of a legislative assembly holds a position of constitutional trust and is given broad powers. One of the defining characteristics of democracy is an adequate system of checks and balances on such powers. However, there have been numerous instances of failure that highlight the need for a system of checks and balances on a speaker's powers. The Speaker is chosen by the majority party and is expected to cut all ties with his political party to act as a non-partisan figure. However, in India, the Speaker's office has always been fraught with controversy due to the Speaker's biased and partisan behaviour. Earlier this year, the Speakers of Madhya Pradesh and Manipur were implicated in controversy for displaying biased behaviour toward their party. The situation deteriorated to the point where the Supreme Court recommended that Parliament create a Tribunal in place of the Speaker to hear anti-defection cases.

## Speaker's Role In Parliamentary Democracy And Partisanship

The Speaker's Office has recently received a lot of criticism for failing to uphold the ideals of parliamentary democracy. Prime Minister Nehru stated that the Speaker represents the House. He represents the dignity, freedom, and liberty of the House. Therefore, it is proper that the position should be honored, free, and occupied by men of exceptional ability and impartiality. Though the Constitution specifies the method of election for the Speaker, a healthy convention has developed in which the Speaker is elected unanimously by the House. On the power of the Speaker, the first Speaker of the Lok Sabha, G. B. Mavalankar, aptly stated that the Speaker is the only autocrat in the entire setup of parliamentary democracy, implying that his exercise of authority requires no prior consultation or concurrence of anyone, and the authority is unchallengeable. The first Speaker's statement implicitly acknowledges the unrestricted power bestowed upon the Office. The Speaker's extensive function is the most plausible reason for unwritten power. The office holder must exercise extreme caution when wielding power. Any exercise of power that would have raised suspicions must be rejected due to the Speaker's responsibility to preserve democracy.

Several conventions and procedural rules ensure the Speaker's independence. The majority of these have also been adopted in India, either in the Constitution or in the House of People's rules of procedure. As a result, the Speaker's salary and allowance are charged from the consolidated fund. Except on a substantive motion or a resolution for removal, his conduct cannot be criticized. He does not vote unless there is a tie. Only by special resolution can he be removed. However, the exercise of power by the Speakers' Office tells a different story.

Partiality has been practiced since the first Lok Sabha when the first Speaker of the House denied an adjournment motion brought in to discuss the lathi-charge by policemen in Manipur. He also refused to resign from the political party to which he belonged after being elected Speaker. Somnath Chatterjee refused to include the name of Railway Minister in a resolution passed by the opposition following a train accident in 2004. Instances of deliberate delay in deciding disqualification cases in Tamil Nadu and Karnataka also called into question the constitutional design of making the Speaker the sole arbiter in the matter of disqualification.<sup>1</sup>

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<sup>1</sup> Shrimanth Balasaheb Patil vs Honble Speaker Karnataka, 2019  
P.Veldurai vs Tamil Nadu Legislative Assembly, 2019

The Speaker's continued affiliation with the political party is at the root of the problem. Partisanship issues arise as a result of structural issues regarding the Speaker's appointment and tenure. Though the Speaker represents the House, he also represents his constituents. Again, he hopes to run for election from the same constituency, subject to permission from the leader of the political party. In India, the convention of Speakers resigning from their party membership has not developed. This is because the Speaker's re-election to the House is not guaranteed. All political parties campaign in the Speaker's constituency. Even after being re-elected to the House, Speakership remains open for election in India. As a result of the lack of an electoral system and conventions that allow the Speaker to renounce his membership, he is obligated to remain a member of the party. After becoming Speaker of the Fourth Lok Sabha, Neelam Sanjiva Reddy was the only parliamentarian to resign from the political party.

During general elections in the United Kingdom, political parties generally do not field candidates against the Speaker. During the election, the Speaker campaigns as a Speaker seeking re-election rather than on a political issue. If re-elected to the House, there is a presumption that he will continue as Speaker, unless he expresses an unwillingness to do so. In addition, in the United Kingdom, the Speaker does not accept the position of Minister after resigning from the position.

The Speaker's broad power and function anticipate fair and reasonable decisions to strengthen parliamentary democracy. The Speaker is the custodian of the practices that give democracy life. With or without the explicit text in the Constitution, the Speaker is bound by all such values that strengthen the people's trust in the functioning of democracy.<sup>2</sup>

## **Jurisdiction On Speaker's Discretion In Defection- Disqualification**

At first glance, the Supreme Court's writ jurisdiction under Article 32 appears to be limited to the protection of fundamental rights enunciated in Part III of the Constitution. Nonetheless, because of its unique position and placement, which makes the remedial right a fundamental right in and of itself, the Supreme Court has examined the various contours of writ jurisdiction as reflected in longstanding judicial precedents. Paragraph 7 of the Tenth Schedule which restricted the jurisdiction of the courts with regards to the disqualification of a member of a House was declared invalid for want of ratification under the proviso to clause (2) of Article

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<sup>2</sup> Uday Shankar, Speaker, Court and the Parliamentary Democracy in India, SCC Online BLOG (May 10, 2022) [https://www.scconline.com/blog/post/2020/08/10/speaker-court-and-the-parliamentary-democracy-in-india/#\\_ftn10](https://www.scconline.com/blog/post/2020/08/10/speaker-court-and-the-parliamentary-democracy-in-india/#_ftn10)

368 as per majority opinion.<sup>3</sup> The five-judge constitutional bench of the Supreme Court ruled that proceedings before the speaker under the Tenth Schedule are akin to tribunals and thus subject to judicial review. The crystallized position on this count is as follows:

1. The proposition that, in light of the hierarchy of appeals, the parties must exhaust all available remedies before resorting to writ jurisdiction of the Supreme Court has been contested, with the observation that it does not represent a Rule of law, but merely a policy of "convenience and discretion," and not of compulsion, and thus, where there is the failure of principles of natural justice or where the orders or proceedings are whole without jurisdiction warrants, this Court may exercise jurisdiction.
2. The scope of writ jurisdiction, which appears to extend beyond fundamental rights, should, however, be limited to jurisdictional errors, namely, infirmities based on violation of constitutional mandate, mala fide, non-compliance with natural justice rules, and perversity.
3. Furthermore, while exercising the power to disqualify, the Speaker acts as a Tribunal, and thus the validity of the orders is subject to judicial review.
4. Even based on fundamental rights, the Supreme Court's writ jurisdiction could be invoked in the instant case, because the allegations of violations of the principles of natural justice and the right to a fair hearing can be traced back to the right to equality and the rule of law enshrined in Article 14 of the Constitution, read in conjunction with other fundamental rights.
5. In a fact matrix similar to the present case, a three-judge bench of the Supreme Court has explicitly held that a challenge to a disqualification order under the Tenth Schedule is available under this Court's writ jurisdiction.
6. According to the Constituent Assembly Debates, Dr. B.R. Ambedkar described Article 32 as the very soul of the Constitution - the very heart of it, and thus the jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India, and no act of Parliament can abrogate or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme are settled propitiously.

The Speaker is empowered to combat political corruption, such as horse-trading and other corrupt practices associated with defection and change of loyalty for the lure of office, under the Tenth Schedule of the Constitution read with relevant provisions.

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<sup>3</sup> Kihoto Hollohon Vs. Zachilhu and others (1992) 1 S.C.C. 309

When it comes to the workings of a legislature, the courts have made certain exceptions. When the speaker has made a decision, the courts can review it on four grounds. The first is if the order is issued without adhering to natural justice principles such as not allowing the opposing party to present their case and the judge acting as the judge in their case. The second is if the decision is unconstitutional. The third is whether the order was made in bad faith. And the fourth is if the order is perverse, which means it was made based on no evidence or evidence that was thoroughly untrustworthy, and no reasonable person would act on it.<sup>4</sup>

## **The Speaker's Role In Adjudicating Disqualifications And Resignation**

Frequent defections by members of political parties harmed national political stability, prompting the Rajiv Gandhi government to enact an anti-defection law in 1985. It was enacted under Schedule 10 of the Constitution to prevent defections and restore political stability in the country. It established two conditions for a member's disqualification: first, when a member voluntarily gives up his political party membership, and second when he violates the party's directives. The law vests the Speaker with broad discretion and precludes any judicial intervention under Articles 122 and 212 of the Constitution by making their decisions final. Following the 33rd constitutional amendment, the Speaker was given additional responsibility. The Speaker would have to 'accept' the resignations of the members for them to take effect. Article 190 requires the Speaker to consider two factors when deciding on a resignation: "voluntariness" and "genuineness." The Supreme Court considered the meaning of these two terms in its decision on the Karnataka legislative assembly controversy in 2020. According to the Court, the term "genuine" means that the resignation application must always come from the concerned person and not from any forged third party, and "voluntariness" means that the resignation must not be based on any coercion, or threat, or force. However, in this case, the Court did not set a deadline for deciding on resignation or disqualification, and the Constitution does not either. This has allowed the Speaker to abuse their discretion, as evidenced by the most recent controversies involving the Speaker's office - in the states of Manipur and M.P.<sup>5</sup> The office of the Speaker has a high constitutional status under the scheme of the Constitution because the Constitution places a lot of confidence in this office. There is a presumption, albeit

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<sup>4</sup> Virendra Kumar, Dissent or Defection: Understanding differentiation between the two is the key to the constitutional democratic political-party-based system of governance, 1 Sambhāṣaṇ, (2020)

<sup>5</sup> Shrimanth Balasaheb Patil v Speaker, Karnataka Legislative Assembly (*Balasaheb*) (2020) 2 SCC 595

rebuttable, in favor of the Speaker's Office having a sense of elevated independence, impeccable objectivity, and, most importantly, absolute impartiality. Because he is the presiding officer of the House, the Speaker is an Officer under Articles 93 and 178 of the Constitution for Articles 122 and 212. As a result, powers exercised by him/her in matters relating to regulating procedure or the conduct of business, or for maintaining order, in a State's Parliament or Legislature are beyond the scope of judicial review. Therefore, the term proceedings in parliament or the legislature of a State refers to all actions taken by the Speaker on matters relating to regulating the procedure, conducting business, or maintaining order.

In the landmark Constitution Bench decision of *Kihoto Hollohan vs. Zachillhu And Ors*<sup>6</sup>, the Supreme Court distinguished between proceedings on the floor of the House and proceedings before the Speaker under the Constitution's Tenth Schedule. It was determined that under the Tenth Schedule, the Speaker's Office is analogous to a "Tribunal" and thus operates independently of the House, making his actions under the anti-defection law subject to judicial review. J. Nariman emphasized this distinction in his seminal decision in *Keisham Meghachadra Singh*. The court identified three instances that merited judicial intervention: mala fide in the exercise of power, violations of natural justice principles, or committing an error of law in the exercise of power. Since the speaker's decision cannot be equivocated with that of the house, he acts in the capacity of a tribunal. His decision is not subject to House approval. The Division Bench of the Calcutta High Court appears to have glossed over this conceptual distinction in its decision.

In *Godavaris Misra vs Nandakisore Das, Speaker, Orissa*<sup>7</sup>, the question before an Orissa High Court Division Bench was whether the giving of notice of questions by members before the start of the actual session and the allowance or disallowance of the same by the Speaker, could be considered part of the "proceedings in Parliament." The High Court, relying on "May's Parliamentary Practice," held that this expression includes not only the proceedings during the actual session of Parliament, but also some preliminary steps such as giving notice of questions or notice of resolutions, and so on.

The court has not heretofore specified the parameters of the permissible level of judicial scrutiny. In *Mayawati v. Markandeya Chand*<sup>8</sup>, twelve BSP MLAs voted in favor of Sh. Kalyan Singh in a motion of confidence against the government, which was directed by Mayawati, the chief whip. She petitioned the speaker of the house for the disqualification of the twelve MLAs

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<sup>6</sup> 1992 SCR (1) 686

<sup>7</sup> AIR 1953 Ori 111

<sup>8</sup> 1998 7 SCC 517

under the tenth schedule, filled with rage. The speaker ruled against her, but the MLAs were not disqualified. As a result, she petitioned the Supreme Court under Article 136, questioning the speaker's decision on the grounds of perversity. By applying the *Wednesbury* principle of reasonableness, the court determined that the level of judicial scrutiny would be minimal. To qualify for judicial intervention, the finding must be so unreasonable or unconscionable that no tribunal should have reached it based on the given materials. In this case, the court determined that there was sufficient evidence to support the speaker's decision, and the special leave was denied.

In *Rajendra Singh Rana v. Swami Prasad Maurya*<sup>9</sup>, in the row before the speaker, there were two batches of petitions pending. The first set of petitions seeks to disqualify 13 BSP MLAs under the tenth schedule and is followed by another batch of 37 MLAs (claiming to represent 40 MLAs) elected on BSP tickers seeking recognition as a split from the BSP. The latter claim, however, was later accepted by the speaker by recognizing a split. The Supreme Court overturned the speaker's decision, reasoning that the speaker can only exercise his discretion when disqualification proceedings are initiated under the tenth schedule. It does not apply to the recognition of splits in general. Before the speaker can speak, there must be a cause of action in the form of defection.

The Court has been allowed to examine the prudence of the speaker's discretion under the tenth schedule on an irregular and unfortunate basis. In the absence of express limitations on the speaker's power under the tenth schedule, the case law body shows that speakers across the states have tried to test the outer limits of the powers that the Court has contained on a case-by-case basis. The speaker's discretionary limits in practice can be studied in various domains. It is difficult to be exhaustive here, but illustrative is sufficient. If the speaker fails to comply with the court's order, he may face contempt charges. A new speaker who takes over the office cannot review the previous speaker's disqualification orders or his own. The Constitutional Courts have the power to overturn disqualification orders based on the defection.

The Supreme Court answered the question of the speaker's discretion to disqualify members under the whip of the tenth schedule while a resolution of his removal is under consideration.

In *Nabam Rebia, and Bamang Felix vs. Deputy Speaker Arunachal Pradesh Legislative Assembly*<sup>10</sup>, Justice Dipak Misra observed the constitutional position of the speaker. The resolution to remove the speaker was in jeopardy. The speaker has fourteen days under the

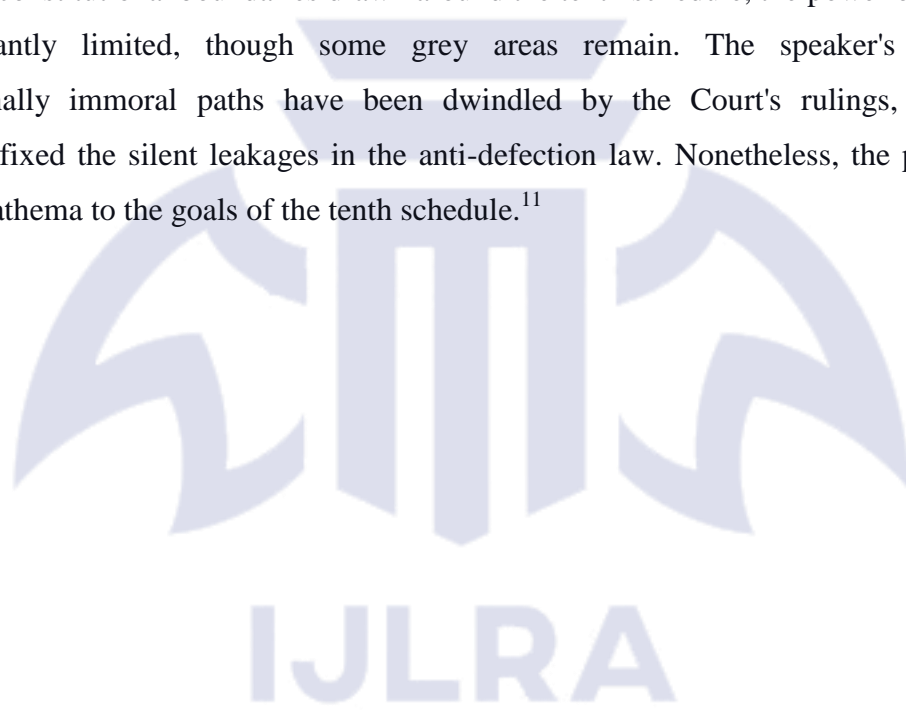
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<sup>9</sup> 2007 4 SCC 270

<sup>10</sup> 2016 8 SCC 1

Constitution to respond to the resolution. There were also defection-disqualification proceedings pending before the speaker in the case. The question remained, can the speaker, in his discretion, disqualify members under the tenth schedule during the fourteen days? After reviewing the Constitutional Scheme, the Court determined that Article 173 (c) required "all the then members" to be present and vote; thus, the continuation of the person in his capacity as speaker takes precedence, and the disqualification petitions can be dismissed accordingly. The fulcrum for our purposes is that the speaker cannot exercise his enormous power under the tenth schedule if the legislative assembly is considering his position as speaker. Acting against would be a violation of the "Constitutional Trust."

With these constitutional boundaries drawn around the tenth schedule, the power of the speaker is significantly limited, though some grey areas remain. The speaker's unruly and constitutionally immoral paths have been dwindled by the Court's rulings, which have effectively fixed the silent leakages in the anti-defection law. Nonetheless, the political ploy remains anathema to the goals of the tenth schedule.<sup>11</sup>



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<sup>11</sup> Himangshu Rathee, Judicial Review Of Speaker's Scale Of Discretionary Justice And The Defection Disqualifications: A Praxical Narration, Live Law, (2022)  
<https://www.livelaw.in/columns/supreme-court-speaker-state-legislative-assemblies-articles-1021-191866>

## Conclusion

India inherited the Speakership from Britain, where the Speaker is required to resign from his political party after being elected. In India, however, the Speaker retains his party membership even after being elected as Speaker. In Manipur's case, the Court recommended that the Speaker be replaced by a separate tribunal for adjudicating disputes under the Tenth Schedule. To ensure impartiality, this tribunal will be presided over by a Supreme Court or High Court judge.

In the *S.R. Bommai case*<sup>12</sup>, the Supreme Court ruled that when a government loses the confidence of the House, the only way to resolve the issue is to hold a floor test. In the case of Madhya Pradesh, however, the Speaker defied the Governor's order to conduct the floor test and attempted to circumvent this mandate to benefit his political party. Thus, while the establishment of a separate tribunal to adjudicate disputes under the Tenth Schedule may ensure impartiality in assessing disqualifications, the possibility of bias will continue to loom over the Speaker's other actions.

The guidelines may include, inter alia, conducting floor tests immediately after the government loses confidence in the House, not deferring floor tests even if the decision on accepting resignation is still pending before the Speaker, and so on. However, the State should exercise caution in defining the parameters of such restrictions. As previously stated, the Supreme Court has set a three-month deadline for adjudicating disqualification petitions but giving such a long period for adjudication may allow the minority government to rule the state in the meantime. Such a rule would be irrational and violate constitutional ethics.

As a result, we believe that the gap can be bridged by limiting the Speaker's discretionary powers at all levels, rather than simply creating a separate tribunal. Such limitations may include imposing shorter deadlines for dealing with cases of resignation, disqualification, or floor tests, as well as establishing a set of guidelines for exercising the Speaker's other powers. We believe it is past time for the State to overhaul the Speaker's office by limiting its discretionary power. It is time to ensure impartiality and transparency in the Speaker's office by imposing a deadline and a set of guidelines for exercising all entrusted powers. Only after such changes are implemented can the revered office of the Speaker be viewed with the highest regard and referred to as the symbol of India's freedom and liberty, as envisaged by Pt. Jawaharlal Nehru.

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<sup>12</sup> 1994 AIR 1918