Shri Kihota Hollohon vs Mr. Zachilhu And Others on 18 February, 1992

Equivalent citations: AIR1993SC412, JT1992(1)SC600, 1992(1)SCALE338, 1992SUPP(2)SCC651, [1992]1SCR686, AIR 1993 SUPREME COURT 412, 1992 AIR SCW 3497, (1992) 1 JT 600 (SC), (1992) 1 SCR 686 (SC), 1992 (1) JT 600, 1992 (2) SCC(SUPP) 651, 1992 (1) SCR 686

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Bench: Lalit Mohan Sharma, M.N. Venkatachaliah, J.S. Verma, S.C. Agrawal

ORDER

M.N. Venkatachaliah, J.

1. In these petitions the constitutional validity of the Tenth Schedule of the Constitution introduced by the Constitution (Fifty-Second Amendment) Act, 1985, is assailed. These two cases were amongst a batch of Writ Petitions, Transfer Petitions, Civil Appeals, Special Leave Petitions and other similar and connected matters raising common questions which were all heard together. On 12.11.1991 we made an order pronouncing our findings and conclusions upholding the constitutional validity of the amendment and of the provisions of the Tenth Schedule, except for Paragraph 7 which was declared invalid for want of ratification in terms of and as required by the proviso to Article 368(2) of the Constitution. In the order dated 12.11.1991 our conclusions were set out and we indicated that the reasons for the conclusions would follow later. The reasons for the conclusions are now set out.

2. This order is made in Transfer Petition No. 40 of 1991 and in Writ Petition No. 17 of 1991. We have not gone into the factual controversies raised in the Writ-Petition before the Gauhati High Court in Rule No. 2421 of 1990 from which Transfer Petition No. 40 of 1991 arises. Indeed, in the order of 12th November, 1991 itself the said Writ Petition was remitted to the High Court for its disposal in accordance with law.

3. Shri F.S. Nariman, Shri Shanti Bhushan, Shri M.C. Bhandare, Shri Kapil Sibal, Shri Sharma and Shri Bhim Singh, learned Counsel addressed arguments in support of the petitions. Learned Attorney-General, Shri Soli J. Sorabjee, Shri R.K. Garg and Shri Santhosh Hegde sought to support the constitutional validity of the amendment. Shri Ram Jethmalani has attacked the validity of the amendment for the same reasons as put forward by Shri Sharma.

4. Before we proceed to record our reasons for the conclusions reached in our order dated 12th November, 1991, on the contentions raised and argued, it is necessary to have a brief look at the provisions of the Tenth Schedule. The Statement of Objects and Reasons appended to the Bill which was adopted as the Constitution (Fifty-Second Amendment) Act, 1985 says:

> The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.
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> On December 8, 1967, the Lok Sabha had passed an unanimous Resolution in terms following:
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> a high-level Committee consisting of representatives of political parties and constitutional experts be set up immediately by Government to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard." The said Committee known as the "Committee on Defections" in its report dated January 7, 1969, inter-alia, observed:
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> Following the Fourth General Election, in the short period between March 1967 and February, 1968, the Indian political scene was characterised by numerous instances of change of party allegiance by legislators in several States. Compared to roughly 542 cases in the entire period between the First and Fourth General Election, at least 438 defections occurred in these 12 months alone. Among Independents, 157 out of a total of 376 elected joined various parties in this period. That the lure of office played a dominant part in decisions of legislators to defect was obvious from the fact that out of 210 defecting legislators of the States of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh and West Bengal, 116 were included in the Council of Ministers which they helped to bring into being by defections. The other disturbing features of this phenomenon were: multiple acts of defections by the same person or set of persons (Haryana affording a conspicuous example); few resignations of the membership of the legislature or explanations by individual defectors, indifference on the part of defectors to political proprieties, constituency preference or public opinion; and the belief held by the people and expressed in the press that corruption and bribery were behind some of these defections [Emphasis supplied] The Committee on Defections recommended that a defector should be debarred for a period of one year or till such time as he resigned his seat and got himself re-elected from appointment to the office of a Minister including Deputy Minister or Speaker or Deputy Speaker, or any post carrying salaries or allowances to be paid from the Consolidated Fund of India or of the State or from the funds of Government Undertakings in public sector in addition to those to which the defector might be

entitled as legislator. The Committee on Defections could not, however, reach an agreed conclusion in the matter of disqualifying a defector from continuing to be a Member of Parliament/State Legislator.

Keeping in view the recommendations of the Committee on Defections, the Constitution (Thirty-Second Amendment) Bill, 1973 was introduced in the Lok Sabha on May 16, 1973. It provided for disqualifying a Member from continuing as a Member of either House of Parliament or the State Legislature on his voluntarily giving up his membership of the political party by which he was set up as a candidate at such election or of which he became a Member after such election, or on his voting or abstaining from voting in such House contrary to any direction issued by such political party or by any person or authority authorised by it in this behalf without obtaining prior permission of such party, person or authority. The said Bill, however, lapsed on account of dissolution of the House. Thereafter, the Constitution (Forty-eighth Amendment) Bill, 1979 was introduced in the Lok Sabha which also contained similar provisions for disqualification on the ground of defection. This Bill also lapsed and it was followed by the Bill which was enacted into the Constitution (Fifty-Second Amendment) Act, 1985.

5. This brings to the fore the object underlying the provisions in the Tenth Schedule. The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy. The remedy proposed is to disqualify the Member of either House of Parliament or of the State Legislature who is found to have defected from continuing as a Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule.

Paragraph 2(1) relates to a Member of the House belonging to a political party by which he was set up as a candidate at the election. Under Paragraph 2(1)(a) such a Member would incur disqualification if he voluntarily gives up his membership of such political party. Under Clause (b) he would incur the disqualification if he votes or abstains from voting 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, in either case, prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. This sub para would also apply to a nominated Member who is a Member of a political party on the date of his nomination as such Member or who joins a political party within six months of his taking oath. Paragraph 2(2) deals with a Member who has been elected otherwise than as a candidate set up by any political party and would incur the disqualification if he joins any political party after such election. A nominated Member of a House would incur his disqualification under sub para (3) if he joins any political party after the expiry of six months from the date of which he takes his seat.

6. Paragraphs 3 and 4 of the Tenth Schedule, however, exclude the applicability of the provisions for disqualification under para 2 in cases of "split" in the original political party or merger of the original political party with another political party.

These provisions in the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party. The provisions of Paragraph 2(1)(a) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his Membership of the legislature and go back before the electorate. The same yard stick is applied to a person who is elected as an Independent candidate and wishes to join a political party after the election.

Paragraph 2(1)(b) deals with a slightly different situation i.e., a variant where dissent becomes defection. If a Member while remaining a Member of the political party which had set him up as a candidate at the election, votes or abstains from voting 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 he incurs the disqualification. In other words, it deals with a Member who expresses his dissent from the stand of the political party to which he belongs by voting or abstaining from voting in the House contrary to the direction issued by the political party.

Paragraph 6 of the Tenth Schedule reads:

> 6(1) If any question arises as to whether a Member of a House has become subject to disqualification under this Schedule the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such house and his decision shall be final: Provided that where the question which has arisen is as to whether the Chairman or the . Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such Member of the House as the House may elect in this behalf and his decision shall be final.
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> (2) All proceedings under sub-Paragraph (1) of this Paragraph in relation to any question as to disqualification of a Member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the. meaning of Article 212." Paragraph 7 says:

7. Bar of jurisdiction of courts: Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a Member of a House under this Schedule.

7. The challenge to the constitutional validity of the Amendment which introduces the Tenth Schedule is sought to be sustained on many grounds. It is urged that the constitutional Amendment introducing Paragraph 7 of the Tenth Schedule, in terms and in effect, seeks to make a change in Chapter IV of Part V of the Constitution in that it denudes the jurisdiction of the Supreme Court under Article 136 of the Constitution of India and in Chapter V of Part VI in that it takes away the jurisdiction of the High Courts under Article 226 and that, therefore, the legislative Bill, before

presentation to the President for assent, would require to be ratified by the Legislature of not less than one half of the States by resolution to that effect. In view of the admitted position that no such ratification was obtained for the Bill, it is contended, the whole Amending Bill -- not merely Paragraph 7 - fails and the amendment merely remains an abortive attempt to bring about an amendment. It is further contended that the very concept of disqualification for defection is violative of the fundamental values and principles underlying Parliamentary democracy and violates an elected representative's freedom of speech, right to dissent and freedom of conscience and is, therefore, unconstitutional as destructive of a basic feature of the Indian Constitution. It is also urged that the investiture in the Speaker or the Chairman of the power to adjudicate disputed defections would violate an important incident of another basic feature of the Constitution, viz., Parliamentary democracy. It is contended that an independent, fair and impartial machinery for resolution of electoral disputes is an essential and important incident of democracy and that the vesting of the power of adjudication in the Speaker or the Chairman -- who, in the Indian Parliamentary system are nominees of political parties and are not obliged to resign their party affiliations after election - is violative of this requirement.

It is alternatively contended that if it is to be held that the amendment does not attract the proviso to Article 368(2), then Paragraph 7 in so far as it takes away the power of judicial review, which, in itself, is one of the basic features of the Constitution is liable to be struck down.

8. There are certain other contentions which, upon a closer examination, raise issues more of construction than constitutionality. For instance, some arguments were expended on the exact connotations of a "split" as distinct from a "defection" within the meaning of Paragraph 3. Then again, it was urged that under Paragraph 2(b) the expression "any direction" is so wide that even a direction, which if given effect to and implemented might bring about a result which nay itself be obnoxious to and violative of constitutional ideals and values would be a source of disqualification. These are, indeed, matters of construction as to how, in the context in which the occasion for the introduction of the Tenth Schedule arose and the high purpose it is intended to serve, the expression "any direction" occurring in Paragraph 2(b) is to be understood. Indeed, in one of the decisions cited before us Prakash Singh Badal and Ors. v. Union of India and Ors. this aspect has been considered by the High Court. The decision was relied upon before us. We shall examine it presently.

9. Supporting the constitutionality of the Amendment, respondents urge that the Tenth Schedule creates a non-justiciable constitutional area dealing with certain complex political issues which have no strict adjudicatory disposition. New rights and obligations are created for the first time inflate by the Constitution and the Constitution itself has envisaged a distinct constitutional machinery for the resolution of those disputes. These rights, obligations and remedies, it is urged, which are in their very nature and innate complexities are in political thickets and are not amenable to judicial processes and the Tenth Schedule has merely recognised this complex character of the issues and that the exclusion of this area is constitutionally preserved by imparting a finality to the decisions of the Speaker or the Chairman and by deeming the whole proceedings as proceedings within Parliament or within the Houses of Legislature of the States envisaged in Articles 122 and 212, respectively, and further by expressly excluding the Courts' jurisdiction under Paragraph 7.

Indeed, in constitutional and legal theory, it is urged, there is really no ouster of jurisdiction of Courts or of Judicial Review as the subject-matter itself by its inherent character and complexities is not amenable to but outside judicial power and that the ouster of jurisdiction under Paragraph 7 is merely a consequential constitutional recognition of the non-amenability of the subject-matter to the judicial power of the State, the corollary of which is that the Speaker or the Chairman, as the case may be, exercising powers under Paragraph 6(1) of the Tenth Schedule function not as a statutory Tribunal but as a part of the State's Legislative Department. It is, therefore, urged that no question of the ouster of jurisdiction of Courts would at all arise inasmuch as in the first place, having regard to the political nature of the issues, the subject-matter is itself not amenable to judicial power. It is urged that the question in the last analyses pertains to the Constitution of the House and the Legislature is entitled to deal with it exclusively.

10. It is further urged that Judicial Review -- apart from Judicial Review of the legislation as inherent under a written Constitution - is merely a branch of administrative law remedies and is by no means a basic feature of the Constitution and that, therefore, Paragraph 7, being a constitutional provision cannot be invalidated on some general doctrine not found in the Constitution itself.

11. On the contentions raised and urged at the hearing the questions that fall for consideration are the following:

> (A) The Constitution (Fifty-Second Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule is destructive of the basic structure of the Constitution as it is violative of the fundamental principles of Parliamentary democracy, a basic feature of the Indian constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions of the Tenth Schedule seek to penalize and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of Parliamentary democracy.
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> (B) Having regard to the legislative history and evolution of the principles underlying the Tenth Schedule, Paragraph 7 thereof in terms and in effect, brings about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the Bill introducing the amendment attracts the proviso to Article 368(2) of the Constitution and would require to be ratified by the legislative of the States before the Bill is presented for Presidential assent.
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> (C) In view of the admitted non-compliance with the proviso to Article 368(2) not only Paragraph 7 of the Tenth Schedule, but also the entire Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985, stands vitiated and the purported amendment is abortive and does not in law bring about a valid amendment.

Or whether, the effect of such non-compliance invalidates Paragraph 7 alone and the other provisions which, by themselves, do not attract the proviso do not become invalid.

(D) That even if the effect of non-ratification by the legislature of the States is to invalidate Paragraph 7 alone, the whole of the Tenth Schedule fails for non-severability. Doctrine of severability, as applied to ordinary statutes to promote their constitutionality, is inapplicable to constitutional Amendments.

Even otherwise, having regard to legislative intent and scheme of the Tenth Schedule, the other provisions of the Tenth Schedule, after the severance and excision of Paragraph 7, become truncated, and unworkable and cannot stand and operate independently. The Legislature would not have enacted the Tenth Schedule without Paragraph 7 which forms its heart and core.

(E) That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts the immunity under Articles 122 and 212. The Speaker and the Chairman in relation to the exercise of the powers under the Tenth Schedule shall not be subjected to the jurisdiction of any Court.

The Tenth Schedule seeks to and does create a new and non-justiciable area of rights, obligations and remedies to be resolved in the exclusive manner envisaged by the Constitution and is not amenable to, but constitutionally immune from curial adjudicative processes.

(F) That even if Paragraph 7 erecting a bar on the jurisdiction of Courts is held inoperative, the Courts' jurisdiction is, in any event, barred as Paragraph 6(1) which imparts a constitutional 'finality' to the decision of the Speaker or the Chairman, as the case may be, and that such concept of 'finality' bars examination of the matter by the Courts.

(G) The concept of free and fair elections as a necessary concomitant and attribute of democracy which is a basic feature includes an independent impartial machinery for the adjudication of the electoral disputes. The Speaker and the Chairman do not satisfy these incidents of an independent adjudicatory machinery.

The investiture of the determinative and adjudicative jurisdiction in the Speaker or the Chairman, as the case may be, would, by itself, vitiate the provision on the ground of reasonable likelihood of bias and lack of impartiality and therefore denies the imperative of an independent adjudicatory machinery. The Speaker and Chairman are elected and hold office on the support of the majority party and are not required to resign their Membership of the political party after their election to the office of the Speaker or Chairman.

(H) That even if Paragraph 7 of the Tenth Schedule is held not to bring about a change or affect Articles 136, 226 and 227 of the Constitution, the amendment is unconstitutional as it erodes and destroys judicial review which is one of the basic features of the Constitution.

12. Re: Contention (A):

> The Tenth Schedule is part of the Constitution and attracts the same canons of construction as are applicable to the expounding of the fundamental law. One constitutional power is necessarily conditioned by the others as the Constitution is

one "coherent document". learned Counsel for the petitioners accordingly say that the Tenth Schedule should be read subject to the basic features of the Constitution. The Tenth Schedule and certain essential incidents of democracy, it is urged, cannot co-exist.

In expounding the processes of the fundamental law, the Constitution must be treated as a logical-whole. Westel Woodbury Willoughby in the "Constitutional law of the United States" states:

The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of the other parts.

2nd Edn: Vol. 1 page 65) A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances - a distinction which differentiates a statute from a Charter under which all statutes are made. Cooley on "Constitutional Limitations:" says:

Upon the adoption of an amendment to a constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the Constitution; and it is to be construed accordingly.

[8th Edn. Vol. I page 129]

13. In considering the validity of a constitutional amendment the changing and the changed circumstances that compelled the amendment are important criteria. The observations of the U.S. Supreme Court in Maxwell v. Dow 44 Lawyer's Edition 597 at page 605 are worthy of note:

...to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted....

The Report of the Committee on Defections took note of the unprincipled and unethical defections induced by considerations of personal gains said:

...What was most heartening was the feeling of deep concern over these unhealthy developments in national life on the part of the leaders of political parties themselves. Parliament mirrored this widespread concern....

[page 1]

14. It was strenuously contended by Shri Ram Jethmalani and Shri Sharma that the provisions of the Tenth Schedule constitute a flagrant violation of those fundamental principles and values which

are basic to the sustenance of the very system of Parliamentary democracy. The Tenth Schedule, it is urged, negates those very foundational assumptions of Parliamentary democracy; of freedom of speech; of the right to dissent and of the freedom of conscience. It is urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the disease itself, are adopted. The Tenth Schedule, they say, seeks to throw away the baby with the bath-water. learned Counsel argue that "crossing the floor", as it has come to be called, mirrors the meanderings of a troubled conscience on issues of political morality and to punish an elected representative for what really amounts to an expression of conscience negates the very democratic principles which the Tenth Schedule is supposed to preserve and sustain. learned Counsel referred to the famous Speech to the Electors of Bristol, 1774, where Edmund Burke reportedly said:

> It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unmerited attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs -- and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.
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> [See: Parliament Functions, Practice & Procedures by JAG Griffith and Michael Ryle 1989 Edn. page 70]

15. Shri Jethmalani and Shri Sharma also relied upon certain observations of Lord Shaw in Amalgamated Society of Railway Servants v. Osborne 1910 A.C.87 to contend that a provision which seeks to attach a liability of disqualification of an elected Member for freely expressing his views on matters of conscience, faith and political belief are indeed restraints on the freedom of speech -- restraints opposed to public policy. In that case a registered trade union framed a rule enabling it to levy contributions on the Members to support its efforts to obtain Parliamentary representation by setting up candidates at elections. It also framed a rule requiring all such candidates to sign and accept the conditions of the Labour Party and be subject to its whip. The observations in the case relied upon by learned Counsel are those of Lord Shaw of Dunfermline who observed:

> Take the testing instance: should his view as to right and wrong on a public issue as to the true line of service to the realm, as to the real interests of the constituency which has elected him, or even of the society which pays him, differ from the decision of the parliamentary party and the maintenance by it of its policy, he has come under a contract to place his vote and action into subjection not to his own convictions, but to their decisions. My Lords, I do not think that such a subjection is compatible either with the spirit of our parliamentary Constitution or with that independence and freedom which have hitherto been held to lie at the basis of representative government in the United Kingdom.

> [Page 111] For the people having reserved to themselves the choice of their representatives, as the fence to their properties, could do it for no other end but that they might always be freely chosen, and so chosen freely act and advise, as the necessity of the commonwealth and the public good should upon examination and mature debate be judged to require....
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> [Page 113] Still further, in regard to the Member of Parliament himself, he too is to be free; he is not to be the paid mandatory of any man, or organization of men, nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages, or at the peril of pecuniary loss; and any contract of this character would not be recognized by a Court of law, either for its enforcement or in respect of its breach....
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> [page 115] It is relevant to observe here that the rule impugned in that case was struck down by the Court of Appeal -- whose decision was upheld by the House of Lords -- on grounds of the Society's competence to make the rule. It was held that the rule was beyond its powers. Lord Shaw, however, was of the view that the impugned rule was opposed to those principles of public policy essential to the working of a representative Government. The view expressed by Lord Shaw was not the decision of the House of Lords in that case.
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> But, the real question is whether under the Indian constitutional scheme is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements?

16. The points raised in the petitions are, indeed, far-reaching and of no small importance - invoking the 'sense of relevance of constitutionally stated principles to unfamiliar settings'. On the one hand there is the real and imminent threat to the very fabric of Indian democracy posed by certain levels of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil. On the other hand, there are, as in all political and economic experimentations, certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectOrs. These are the usual plus and minus of all areas of experimental legislation. In these areas the distinction between what is constitutionally permissible and what is outside it is marked by a 'hazy gray-line' and it is the Court's duty to identity, "darken and deepen" the demarcating line of constitutionality -- a task in which some element of Judges' own perceptions of the constitutional ideals inevitably participate. There is no single litmus test of constitutionality. Any suggested sure decisive test, might after all furnish a "transitory delusion of certitude" where the "complexities of the strands in the web of constitutionality which the Judge must alone disentangle" do not lend themselves to easy and sure formulations one way or the other. It is here that it becomes difficult to refute the inevitable legislative element in all constitutional adjudications.

17. All distinctions of law -- even Constitutional law - are, in. the ultimate analyses, "matters of degree". At what line the 'white' fades into the 'black' is essentially a legislatively perceived demarcation.

In his work "Oliver Wendell Holmes - Free Speech and the Living Constitution" (1991 Edition: New York University Publication) Pohlman says:

> All distinctions of law, as Holmes never tired of saying, were therefore "matters of degree." Even in the case of constitutional adjudication, in which the issue was whether a particular exercise of power was within or without the legislature's authority, the judge's decision "will depend on a judgment or intuition more subtle than any articulate major premise." As the particular exertion of legislative power approached the hazy gray line separating individual rights from legislative powers, the judge's assessment of constitutionality became a subtle value judgment. The judge's decision was therefore not deductive, formal, or conceptual in any sense.
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> [page 217] (emphasis supplied) Justice Holmes himself had said:
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> Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determination are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other.
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> [Emphasis supplied] [See: "Theory of Torts" American Law Review 7 (1873)] The argument that the constitutional remedies against the immorality and unprincipled chameleon-like changes of political hues in pursuit of power and pelf suffer from something violative of some basic features of the Constitution, perhaps, ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The onslaughts on their sensibilities by the incessant unethical political defections did not dull their perception of this phenomenon as a canker eating into the vitals of those values that make democracy a living and worth-while faith. This is preeminently an area where judges should defer to legislative perception of and reaction to the . pervasive dangers of unprincipled defections to protect the community.' 'Legislation may begin where an evil begins." Referring to the judicial philosophy of Justice Holems in such areas, Pohlman again says:

> A number of Holme's famous aphorisms point in the direction that judges should defer when the legislature reflected the pervasive and predominant values and interests of the community. He had, for example, no "practical" criterion to go on except "what the crowd wanted." He suggested, in a humorous vein that his epitaph.... No judge ought to interpret a provision of the Constitution in a way that would prevent the American people from doing what it really wanted to do. If the general consensus was that a certain condition was an "evil" that ought to be corrected by certain means, then the government had the power to do it: "Legislation may begin where an evil begins"; "Constitutional law like other mortal contrivances has to take some changes...." "Some play must be allowed to the joints if the machine is to work." All of these rhetorical flourishes suggest that Holmes deferred to the legislature if and when he thought it accurately mirrored the abiding beliefs, interests, and values of the American public.
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> (emphasis supplied) [See: Justice Oliver Wendell Holmes -- Free Speech and the Living Constitution by H.L. Pohlman 1991 Edn. page 233]

18. Shri Sharma contends that the rights and immunities under Article 105(2) of the Constitution which according to him are placed by judicial decisions even higher than the fundamental-right in Article 19(1)(a), have violated the Tenth Schedule. There are at least two objections to the acceptability of this contention. The first is that the Tenth Schedule does not impinge upon the rights or immunities under Article 105(2). Article 105(2) of the Constitution provides:

> 105. Powers, privileges, etc., of the Houses of Parliament and of the Members and committees thereof.- (1) ...

(2) No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of cither House of Parliament of any report, paper, votes or proceedings.

The freedom of speech of a Member is not an absolute freedom. That apart, the provisions of the Tenth Schedule do not purport to make a Member of a House liable in any 'Court' for anything said or any vote given by him in Parliament. It is difficult to conceive how Article 105(2) is a source of immunity from the consequences of unprincipled floor-crossing.

Secondly, on the nature and character of electoral rights this Court in Jyoti Basu and Ors. v. Debi Ghosal and Ors. observed:

> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they arc, and therefore, subject to statutory

limitation.

> [page 326] Democracy is a basic feature of the Constitution. Whether any particular brand or system of Government by itself, has this attribute of a basic feature, as long as the essential characteristics that entitle a system of government to be called democratic are otherwise satisfied is not necessary to be gone into. Election conducted at regular, prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficacy and adequacy of the machinery for resolution of electoral disputes. From that it does not necessarily follow that the rights and immunities under sub-Article (2) of Article 105 of the Constitution, are elevated into fundamental rights and that the Tenth Schedule would have to be struck down for its inconsistency with Article 105(2) as urged by Shri Sharma.

19. Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and persuasion arc, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines.

But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance -- nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on "Parliament, Functions, Practice & Procedure" (1989 Edn. page 119) say;

Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for Members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those Members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy.

(emphasis supplied) Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who voles or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions: one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in Clause (b) of Paragraph 2(1) -- whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately.

20. The working of the modern Parliamentary democracy is complex. The area of the inter-sc relationship between the electoral constituencies and their elected representatives has many complex features and overtones. The citizen as the electorate is said to be the political sovereign. As long as regular general elections occur, the electorate remains the arbiter of the ultimate composition of the representative legislative body to which the Government of the day is responsible. There are, of course, larger issues of theoretical and philosophical objections to the legitimacy of a representative Government which might achieve a majority of the seats but obtains only minority of the electoral votes. It is said that even in England this has been the phenomenon in every general elections in this century except the four in the years 1900, 1918, 1931 and 1935.

But in the area of the inter-relationship between the constituency and its elected representative, it is the avowed endeavour of the latter to requite the expectations of his voters. Occasionally, this might conflict with his political obligations to the political party sponsoring him which expects - and exacts in its own way - loyalty to it. This duality of capacity functions are referred to by a learned author thus:

> The functions of Members are of two kinds and flow from the working of representative government. When a voter at a general election, in that hiatus between parliaments, puts his cross against the name of the candidate he is [most often] consciously performing two functions: seeking to return a particular person to the house of commons as Member for that constituency; and seeking to return to power as the government of the country a group of individuals of the same party as that particular person. The voter votes for a representative and for a government. He may know that the candidate he votes has little chance of being elected....
>
> When a candidate is elected as a Member of the House of Commons, he reflects those two functions of the voter. Whatever other part he may play, he will be a constituency M.P. As such, his job will be to help his constituents as individuals in their dealings with the departments of State. He must listen to their grievances and often seek to

persuade those in authority to provide remedies. He must have no regard to the political leanings of his constituents for he represents those who voted against him or who did not vote at all as much as those who voted for him. Even if he strongly disagrees with their complaint he may still seek to represent it, though the degree of enthusiasm with which he does so is likely to be less great.

[See: Parliament -- Functions, Practice and Procedures by JAG Griffith and Ryle -- 1989 Edn. page 69].

So far as his own personal views on freedom of conscience are concerned, there may be exceptional occasions when the elected representative finds himself compelled to consider more closely how he should act. Referring to these dilemma the authors say;

... The first is that he may feel that the policy of his party whether it is in office or in opposition, on a particular matter is not one of which he approves. He may think this because of his personal opinions or because of its special consequences for his constituents or outside interests or because it reflects a general position within the party with which he cannot agree. On many occasions, he may support the party despite his disapproval. But occasionally the strength of his feeling will be such that he is obliged to express his opposition either by speaking or by abstaining on a vote or even by voting with the other side. Such opposition will not pass unnoticed and, unless the matter is clearly one of conscience, he will not be popular with the party whips.

The second complication is caused by a special aspect of parliamentary conduct which not frequently transcends party lines. Members, who are neither Ministers nor front-bench Opposition spokesmen, do regard as an important part of their function the general scrutiny of Governmental activity. This is particularly the role of select committees which have, as we shall see, gained new prominence since 1979. No doubt, it is superficially paradoxical to see Members on the Government side of the House joining in detailed criticism of the administration and yet voting to maintain that Government in office. But as one prominent critic of government has said, there is nothing inherently contradictory in a Member sustaining the Executive in its power or helping it to overcome opposition at the same time as scrutinising the work of the executive in order both to improve it and to see that power is being exercised in a proper and legitimate fashion.

[pages 69 and 70] Speaking of the claims of the political party on its elected Member Rodney Brazier says: "Once returned to the House of Commons the Member's party expects him to be loyal. This is not entirely unfair or improper, for it is the price of the party's label which secured his election. But the question is whether the balance of a Member's obligations has titled too far in favour of the requirements of party. The nonsense that a Whip -- even a three-line whip -- is no more than a summons to attend the House, and that, once there, the Member is completely free to speak and

vote as he thinks fit, was still being put about, by the Parliamentary Private Secretary to the Prime Minister, as recently as 1986. No one can honestly believe that. Failure to vote with his party on a three-line whip without permission invites a party reaction. This will range (depending on the circumstances and whether the offence is repeated) from a quiet word from a Whip and appeals to future loyalty, to a ticking-off or a formal reprimand (perhaps from the Chief Whip himself), to any one of a number of threats. The armoury of intimidation includes the menaces that the Member will never get ministerial office, or go on overseas trips sponsored by the party, or be nominated by his party for Commons committee Memberships, or that he might be deprived of his party's whip in the House, or that he might be reported to his constituency which might wish to consider his behaviour when reselection comes round again.... Does the Member not enjoy the Parliamentary privilege of freedom of speech? How can his speech be free in the face of such party threats? The answer to the inquiring citizen is that the whip system is part of the conventionally established machinery of political organisation in the house, and has been ruled not to infringe a Member's parliamentary privilege in any way. The political parties are only too aware of the utility of such a system, and would fight in the last ditch to keep it."

[See; Constitutional Reform - Reshaping the British Political System by Rodney Brazier, 1991 Edn. pages 48 and 49].

The learned author, referring to cases in which an elected Member is seriously unrepresentative of the general constituency opinion, or whose personal behaviour falls below standards acceptable to his constituents commends that what is needed is some additional device to ensure that a Member pays heed to constituents' views. Brazier speaks of the efficacy of device where the constituency can recall its representative. Brazier says: "What sort of conduct might attract the operation of the recall power? First, a Member might have misused his Membership of the House, for example to further his personal financial interests in a manner offensive to his constituents. They might consider that the action taken against him by the house (or, indeed, lack of action) was inadequate... Thirdly, the use of a recall power might be particularly apt when a Member changed his party but declined to resign his seat and fight an immediate by-election. It is not unreasonable to expect a Member who crosses the floor of the House, or who joins a new party, to resubmit himself quickly to the electors who had returned him in different colours. Of course, in all those three areas of controversial conduct the ordinary process of reselection might well result in the Member being dropped as his party's candidate (and obviously would definitely have that result in the third case). But that could only occur when the time for reselection came; and in any event the constituency would still have the Member representing them until the next general election. A cleaner and more timely parting of the ways would be preferable. Sometimes a suspended sentence does not meet the case.

> [p. 52 and 53.] Indeed, in a sense an anti-defection law is a statutory variant of its moral principle and justification underlying the power of recall. What might justify a provision for recall would justify a provision for disqualification for defection. Unprincipled defection is a political and social evil. It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exultations that such floor-crossings belong to the sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. The anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct -- whose awkward erosion and grotesque manifestations have been the base of the times -- above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation. We should, we think, defer to this legislature wisdom and perception. The choices in constitutional adjudications quite clearly indicate the need for such deference. "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are adopted to that end..." are constitutional. See Kazurbach v. Morgan: 384 US 641.

21. It was then urged by Shri Jethmalani that the distinction between the conception of "defection" and "split" in the Tenth Schedule is so thin and artificial that the differences on which the distinction rests are indeed an outrageous defiance of logic. Shri Jethmalani used that if floor-crossing by one Member is an evil, then a collective perpetration of it by l/3rd of the elected Members of a party is no better and should be regarded as an aggravated evil both logically and from the part of its aggravated consequences. But the Tenth Schedule, says Shri Jethmalani, employs its own inverse ratiocination and perverse logic to declare that where such evil is perpetrated collectively by an artificially classified group of not less than l/3rd Members of that political party that would not be a "defection" but a permissible "split" or "merger."

This exercise to so hold-up the provision as such crass imperfection is performed by Shri Jethmalani with his wonted forensic skill. But we are afraid what was so attractively articulated, on closer examination, is, perhaps, more attractive than sound. The underlying premise in declaring an individual act of defection as forbidden is that lure of office or money could be presumed to have prevailed. Legislature has made this presumption on its own perception and assessment of the extant standards of political proprieties and morality. At the same time legislature envisaged the need to provide for such "floor-crossing" on the basis of honest dissent. That a particular course of conduct commended itself to a number of elected representatives might, in itself, lend credence and reassurance to a presumption of bona fides. The presumptive impropriety of motives progressively weakens according as the numbers sharing the action and there is nothing capricious and arbitrary in this legislative perception of the distinction between 'defection' and 'split'.

Where is the line to be drawn? What number can be said to generate a presumption of bona fides? Here again the Courts have nothing else to go by except the legislative wisdom and, again, as Justice Holmes said, the Court has no practical criterion to go by except "what the crowd wanted". We find no substance in the attack on the statutory distinction between "defection" and "split".

Accordingly we hold;

that the Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended.

The provisions of Paragraph 2 do not violate any rights or freedom under Articles 105 and 194 of the Constitution.

The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.

The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in that they affect the democratic rights of elected Members and, therefore, of the principles of Parliamentary democracy is unsound and is rejected.

22. Re: Contention (B):

> The thrust of the point is that paragraph 7 brings about a change in the provisions of Chapter IV of Part V and Chapter V of Part VI of the Constitution and that, therefore, the amending Bill falls within proviso to Article 368(2). We might, at the outset, notice Shri Sibal's submissions on a point of construction of Paragraph 7. Shri Sibal urged that Paragraph 7, properly construed, does not seek to oust the jurisdiction of Courts under Article 136, 226 and 227 but merely prevents an interlocutory intervention or a quia-time action. He urged that the words "in respect of any matters connected with the disqualification of a Member" seek to bar jurisdiction only till the matter is finally decided by the Speaker or Chairman, as the case may be, and does not extend beyond that stage and that in dealing with the dimensions of exclusion of the exercise of judicial power the broad considerations are that provisions which seek to exclude Courts' jurisdiction shall be strictly construed. Any construction which results in denying the Courts is, it is urged, not favoured. Shri Sibal relied upon the following observations of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and Ors. v. Union of India :
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> ... The proper forum under our Constitution for determining a legal dispute is the Court which is by training and experience, assisted by properly qualified advocates, fitted to perform that task. A provision which purports to exclude the jurisdiction of the Courts in certain matters and to deprive the aggrieved party of the normal remedy will be strictly construed, for it is a principle not to be whittled down that an aggrieved party will not, unless the jurisdiction of the Courts is by clear enactment or necessary implication barred, be denied his right to seek recourse to the Courts for determination of his rights...." "The Court will avoid imputing to the Legislature an intention to enact a provision which flouts notions of justice and norms of fair-play, unless a contrary intention is manifest from words plain and unambiguous. A provision in a statute will not be construed to defeat its manifest purpose and general

values which animate its structure. In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human rights including the right to property will, unless the contrary mandate be precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of constitutional and statutory provisions alike.

[pages 94 - 95] It is true that the provision which seeks to exclude the jurisdiction of Courts is strictly construed. See also: Mask & Co. v. Secretary of State AIR 1940 P.C. 105.

But the rules of construction are attracted where two or more reasonably possible constructions are open on the language of the statute. But, here both on the language of Paragraph 7 and having regard to the legislative evolution of the provision, the legislative intent is plain and manifest. The words ''no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member'' are of wide import and leave no constructional options. This is reinforced by the legislative history of the anti-defection law. The deliberate and purposed presence of Paragraph 7 is clear from the history of the previous proposed legislations on the subject. A comparison of the provisions of the Constitution (Thirty-second Amendment) Bill, 1973 and the Constitution (Forty-eight Amendment) Bill, 1978, (both of which had lapsed) on the one hand and the Constitution (52nd Amendment) Bill, 1985, would bring-out the avowed and deliberate intent of Paragraph 7 in the Tenth Schedule. The previous Constitution (38th and 48th Amendment) Bills contained similar provisions for disqualification on grounds of defection, but, these Bills did not contain any clause ousting the jurisdiction of the Courts. Determination of disputed disqualifications was left to the Election Commission as in the case of other disqualifications under Articles 102 and 103 in the case of Members of Parliament and Articles 191 and 192 in the case of Members of Legislature of the States. The Constitution (Fifty-second Amendment) Bill for the first time envisaged the investiture of the power to decide disputes on the Speaker or the Chairman. The purpose of the enactment of Paragraph 7, as the debates in the Houses indicate, was to bar the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution of India. Shri Sibal's suggested contention would go against all these over-whelming interpretative criteria apart from its unacceptability on the express language of Paragraph 7.

23. But it was urged that no question of change in Articles 136, 226 and 227 of the Constitution within the meaning of Clause (b) of the proviso to Article 368(2) arises at all in view of the fact that the area of these rights and obligations being constitutionally rendered non-justiciable, there is no judicial review under Articles 136, 226 and 227 at all in the first instance so as, to admit of any idea of its exclusion. Reliance was placed on the decisions of this Court in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar 1952 SCR 89 and Sajjan Singh v. State of Rajasthan .

24. In Sankari Prasad's case, the question was whether the Amendment introducing Articles 31A and 31B in the Constitution required ratification under the said proviso. Repelling this contention it was observed:

> It will be seen that these articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of the Article 13 read with other relevant articles in Part III, while Article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs arc in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases.
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> [1982 SCR 89 at 108] In Sajjan Singh's case, a similar contention was raised against the validity of the Constitution (17th Amendment) Act, 1964 by which Article 31A was again amended and 44 statutes were added to the IX Schedule to the Constitution. The question again was whether the amendment required ratification under the proviso to Article 368. this Court noticed the question thus:
>
> The question which calls for our decision is: what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected?"
>
> [P. 940] Negativing the challenge to the amendment on the ground of non-ratification, it was held: ".... Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socioeconomic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained....
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> [P. 944] The propositions that fell for consideration in Sankari Prasad Singh's and Sajjan Singh's cases are indeed different. There the jurisdiction and power of the

Courts under Articles 136 and 226 were not sought to be taken away nor was there any change brought about in those provisions either "in terms or in effect", since the very rights which could be adjudicated under and enforced by the Courts were themselves taken away by the Constitution. The result was that there was no area for the jurisdiction of the Courts to operate upon. Matters are entirely different in the context of Paragraph 7. Indeed the aforesaid cases, by necessary implication support the point urged for the petitioners. The changes in Chapter IV of Part V and Chapter V of Part VI envisaged by the proviso need not be direct. The change could be either "in terms of or in effect". It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. If in effect these Articles are rendered ineffective and made inapplicable where these articles could otherwise have been invoked or would, but for Paragraph 7, have operated there is 'in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in Sajjan Singh's case where it was observed:

If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise.

[p. 944] In the present cases, though the amendment does not bring in any change directly in the language of Articles 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those Articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Articles 136, 226 and 227 within the meaning of Clause (b) of the proviso to Article 368(2). Paragraph 7, therefore, attracts the proviso and ratification was necessary.

Accordingly on Point B, we hold:

That having regard to the background and evolution of the principles underlying the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-Article (2) of Article 368 of the Constitution of India.

25. Re. Contentions 'C' and 'D':

The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on mode of exercise of the power. Though the amending power in a Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be

> substantive as well as procedural. Substantive limitations are those which restrict the field of exercise of the amending power and exclude some areas from its ambit. Procedural limitations are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations, however, touch and affect the constituent power itself, disregard of which invalidates its exercise.

26. The Constitution provides for amendment in Articles 4, 169, 368, paragraph 7 of Fifth Schedule and paragraph 21 of Sixth Schedule. Article 4 makes provisions for amendment of the First and the Fourth Schedules, Article 169 provides for amendment in the provision of the Constitution which may be necessary for abolition or creation of Legislative Councils in States, paragraph 7 of the Fifth Schedule provides for amendment of the Fifth Schedule and paragraph 21 of the Sixth Schedule provides for amendment of the Sixth Schedule. All these provisions prescribe that the said amendments can be made by a law made by Parliament which can be passed like any other law by a simple majority in the Houses of Parliament. Article 368 confers the power to amend the rest of the provisions of the Constitution. In sub-Article (2) of Article 368, a special majority - two-thirds of the members of each House of Parliament present and voting and majority of total membership of such House - is required to effectuate the amendments. The proviso to sub-Article (2) of Article 368 imposes a further requirement that if any change in the provisions set out in Clauses (a) to (e) of the proviso, is intended it would then be necessary that the amendment be ratified by the legislature of not less than one-half of the States.

Although there is no specific enumerated substantive limitation on the power in Article 368, but as arising from very limitation in the word 'amend', a substantive limitation is inherent on the amending power so that the amendment does not alter the basic structure or destroy the basic features of the Constitution. The amending power under Article 368 is subject to the substantive limitation in that the basic structure cannot be altered or the basic features of the Constitution destroyed. The limitation requiring a special majority is a procedural one. Both these limitations impose a fetter on the competence of Parliament to amend the Constitution and any amendment made in disregard of these limitations would go beyond the amending power.

27. While examining the constitutional validity of laws the principle that is applied is that if it is possible to construe a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part. This is done by applying the doctrine of severability. The rationale of this doctrine has been explained by Cooley in the following words:

> It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to

what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional.

[Cooley's Constitutional Limitations; 8th Edn. Vol. I, p. 359-360] In R.M.D. Chamarbaugwalla v. Union of India 1957 SCR 930, this Court has observed:

The question whether a statute, which is void in part is to be treated as void in toto, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds: It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Section 91 and 92 of the Canadian Constitution, and Section 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that: account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act. (p. 940).

The doctrine of severability has been applied by this Court in cases of challenge to the validity of an amendment on the ground of disregard to the substantive limitations on the amending power, namely, alteration of the basic structure. But only the offending part of the amendment which had the effect of altering the basic structure was struck down while the rest of the amendment was upheld [See: Sri Kesavananda Bharti Sripadagalavaru v. State of Kerala, 1973 Supp. SCR 1; Minerva Mills Ltd. and Ors. v. Union of India and Ors., ; P. Sambhamurthy and Ors. etc v. State of Andhra Pradesh and Anr.]

28. Is there anything in the procedural limitations imposed by sub-Article (2) of Article 368 which excludes the doctrine of severability in respect of a law which violates the said limitations? Such a violation may arise when there is a composite Bill or what is in statutory context or jargon called a 'Rag-Bag' measure seeking amendments to several statutes under one amending measure which seeks to amend various provisions of the Constitution some of which may attract Clauses (a) to (e) of the proviso to Article 368(2) and the Bill, though passed by the requisite majority in both the Houses of Parliament has received the assent of the President without it being sent to States for ratification or having been so sent fails to receive such ratification from not less than half the States before the Bill is presented for assent. Such an Amendment Act is within the competence of Parliament insofar as it relates to provisions other than those mentioned in Clauses (a) to (e) of proviso to Article 368(2) but in respect of the amendments introduced in provisions referred to in Clauses (a) to (e) of proviso to Article 368(2), Parliament alone is not competent to make such amendments on account of some constitutionally recognised federal principle being invoked. If the doctrine of severability can be applied it can be upheld as valid in respect of the amendments within the competence of Parliament and only the amendments which Parliament alone was not competent to make could be declared invalid.

29. Is there anything compelling in the proviso to Article 368(2) requiring it to be construed as excluding the doctrine of severability to such an amendment? It is settled rule of statutory construction that "the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case" and that where "the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms". [See Madras & Southern Mahratta Railway Co. v. Bezwada Municipality, (1944) 71 I.A. 113 at p. 122; Commissioner of Income Tax, Mysore v. Indo-Mercantile Bank Ltd. 1959 Supp. (2) SCR 256 at p. 266].

The proviso to Article 368(2) appears to have been introduced with a view to giving effect to the federal principle. In the matter of amendment of provisions specified in Clauses (a) to (e) relating to legislative and executive powers of the States vis-a-vis the Union, the Judiciary, the election of the President and the amending power itself, which have a bearing on the States, the proviso imposes an additional requirement of ratification of the amendment which seeks to effect a change in those provisions before the Bill is presented for the assent of the President. It is salutary that the scope of the proviso is confined to the limits prescribed therein and is not construed so as to take away the power in the main part of Article 368(2). An amendment which otherwise fulfils the requirements of Article 368(2) and is outside the specified cases which require ratification cannot be denied legitimacy on the ground alone of the company it keeps. The main part of Article 368(2) directs that when a Bill which has been passed by the requisite special majority by both the Houses has received the assent of the President "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso cannot have the effect of interdicting this constitutional declaration and mandate to mean that in a case where the proviso has not been complied -- even the amendments which do not fall within the ambit of the proviso also become abortive. The words "the amendment shall also require to be ratified by the legislature" indicate that what is required to be ratified by the legislatures of the States is the amendment seeking to make the change in the provisions referred to

in Clauses (a) to (e) of the proviso. The need for and the requirement of the ratification is confined to that particular amendment alone and not in respect of amendments outside the ambit of the proviso. The proviso can have, therefore, no bearing on the validity of the amendments which do not fall within its ambit. Indeed the following observations of this Court in Sajjan Singh case (supra) are apposite:

> In our opinion, the two parts of Article 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged.
>
> [p. 940]

30. During the arguments reliance was placed on the words "before the Bill making provision for such amendment is presented to the President for assent" to sustain the argument that these words imply that the ratification of the Bill by not less than one-half of the States is a condition-precedent for the presentation of the Bill for the assent of the President. It is further argued that a Bill which seeks to make a change in the provisions referred to in Clauses (a) to (e) of the proviso cannot be presented before the President for his assent without such ratification and if assent is given by the President in the absence of such ratification, the amending Act would be void and ineffective in its entirety.

A similar situation can arise in the context of the main part of Article 368(2) which provides: "when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting, it shall be presented to the President". Here also a condition is imposed that the Bill shall be presented to the President for his assent only after it has been passed in each House by the prescribed special majority. An amendment in the First and Fourth Schedules referable to Article 4 can be introduced by Parliament by an ordinary law passed by simple majority. There may be a Bill which may contain amendments made in the First and Fourth Schedules as well as amendments in other provisions of the Constitution excluding those referred to in the proviso which can be amended only by a special majority under Article 368(2) and the Bill after having been passed only by an ordinary majority instead of a special majority has received the assent of the President. The amendments which are made in the First and Fourth Schedules by the said amendment Act were validly made in view of Article 4 but the amendments in other provisions were in disregard to Article 368(2) which requires a special majority. Is not the doctrine of severability applicable to such an amendment so that amendments made in the First and Fourth Schedules may be upheld while declaring the amendments in the other provisions as ineffective? A contrary view excluding the doctrine of severability would result in elevating a procedural limitation on the amending power to a level higher than the substantive limitations.

31. In Bribery Commissioner v. Pedrick Ranasinghe 1956 A.C. 172, the Judicial Committee has had to deal with a somewhat similar situation. This was a case from Ceylon under the Ceylon (Constitution) Order of 1946. Clause (4) of Section 29 of the said order in Council contained the amending power in the following terms:

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

[p. 194] In that case, it was found that Section 41 of the Bribery Amendment Act, 1958 made a provision for appointment of a panel by the Governor-General on the advice of the Minister of Justice for selecting members of the Bribery Tribunal while Section 55 of the Constitution vested the appointment, transfer, dismissal and disciplinary control of judicial officers in the Judicial Service Commission. It was held that the legislature had purported to pass a law which, being in conflict with Section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers and could only be made by laws which comply with the special legislative procedure laid down in Section 29(4). Since there was nothing to show that the Bribery Amendment Act, 1951 was passed by the necessary two-thirds majority, it was held that "any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires". Applying the doctrine of severability the Judicial Committee, however, struck down the offending provision, i.e., Section 41 alone. In other words passing of the Bill by a special majority was the condition precedent for presentation of the Bill for the assent. Disregard of such a condition precedent for presenting a Bill for assent did not result in the entire enactment being vitiated and the law being declared invalid in its entirety but it only had the effect of invalidation of a particular provision which offended against the limitation on the amending power. A comparison of the language used in Clause (4) of Section 29 with that of Article 368(2) would show that both the provisions bear a general similarity of purpose and both the provisions require the passing of the Bill by special majority before it was presented for assent. The same principle would, therefore, apply while considering the validity of a composite amendment which makes alterations in the First and Fourth Schedules as well as in other provisions of the Constitution requiring special majority under Article 368(2) and such a law, even though passed by the simple majority and not by special majority, may be upheld in respect of the amendments made in the First and Fourth Schedules. There is really no difference in principle between the condition requiring passing of the Bill by a special majority before its presentation to the President for assent contained in Article 368(2) and the condition for ratification of

> the amendment by the legislatures of not less than one-half of the States before the Bill is presented to the President for assent contained in the proviso. The principle of severability can be equally applied to a composite amendment which contains amendments in provisions which do not require ratification by States as well as amendment in provisions which require such ratification and by application of the doctrine of severability, the amendment can be upheld in respect of the amendments which do not require ratification and which are within the competence of Parliament alone. Only these amendments in provisions which require ratification under the proviso need to be struck down or declared invalid.

32. The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body-politic. The ouster of jurisdiction of Courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions in the Tenth Schedule if it had known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of Paragraph 7 can, therefore, be held to be severable from the rest of the provisions.

We accordingly hold on contentions 'C and 'D':

> That there is nothing in the said proviso to Article 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the Amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that "thereupon the Constitution shall stand amended" the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification.
>
> That, accordingly, the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amenable to the legal-sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (52nd Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Article 368(2) was not so ratified. That Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the

Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7.

33. Re: Contentions 'E' and 'F':

These two contentions have certain over-lapping areas between them and admit of being dealt with together. Paragraph 6(1) of the Tenth Schedule seeks to impart a statutory finality to the decision of the Speaker or the Chairman. The argument is that, this concept of 'finality' by itself, excludes Courts' jurisdiction. Does the word "final'' render the decision of the Speaker immune from Judicial Review? It is now well-accepted that a finality clause is not a legislative magical incantation which has that effect of telling off Judicial Review. Statutory finality of a decision presupposes and is subject to its consonance with the statute. On the meaning and effect of such finality clause, Prof. Wade in 'Administrative Law' 6th Edn. at page 720 says:

Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing but justice is a better.

If a statute says that the decision 'shall be final' or shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal: judicial control of legality is unimpaired. "Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law. This has been the consistent doctrine for three hundred years.

Learned Professor further says:

The normal effect of a finality clause is therefore to prevent any appeal. There is no right of appeal in any case unless it is given by statute. But where there is general provision for appeals, for example, from quarter sessions to the High Court by case stated, a subsequent Act making the decision of quarter session final on some specific matter will prevent an appeal. But in one case the Court of Appeal has deprived a finality clause of part even of this modest content, holding that a question which can be resolved by certiorari. or declaration can equally well be the subject of a case stated, since this is only a matter of machinery. This does not open the door to

appeals generally, but only to appeals by case stated on matters which could equally well be dealt with by certiorari or declaration, i.e., matters subject to judicial review.

A provision for finality may be important in other contexts, for example, when the . question is whether the finding of one tribunal may be reopened before another, or whether an interlocutory order is open to appeal...

[page 721] Lord Devlin had said "Judicial interference with the executive cannot for long greatly exceed what Whitehall will accept" and said that a decision may be made unreviewable "And that puts the lid on". Commenting on this Prof. Wade says: "But the Anisminic case showed just the opposite, when the House of Lords removed the lid and threw it away." [See: Constitutional Fundamental, the Hamlyn Lectures, 1989 Edn. p.88].

In Durga Shankar Mehta v. Raghuraj Singh the order of the Election Tribunal was made final and conclusive by Section 105 of the Representation of the People Act, 1951. The contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court under Article 136. This contention was repelled. It was observed:

...but once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power. cannot be excluded by any parliamentary legislation.

...But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised.

...The powers given by Article 136 of the Constitution, however, are in the nature of special or residuary powers which are exerciseable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land... Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so for as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which this Court can exercise in the matter of granting special leave under Article 136 of the Constitution.

[p.522]

34. Again, in Union of India v. Jyoti Prakash Mitter a similar finality clause in Article 217(3) of the Constitution came up for consideration. this Court said: ...The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed

on collateral considerations or the rules of natural justice were not observed, or that the Presient's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence...

[p.505] Referring to the expression "final" occurring in Article 311(3) of the Constitution this Court in Union of India and Anr. v. Tulsiram Patel and Ors. (1985) Supp.2 SCR 131 at page 274 held:

> ...The finality given by Clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority, made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by Clause (b)....

35. If the intendment is to exclude the jurisdiction of the superior Courts, the language would quite obviously have been different. Even so, where such exclusion is sought to be effected by an amendment the further question whether such an amendment would be destructive of a basic feature of the Constitution would arise. But comparison of the language in Article 363(1) would bring out in contrast the kind of language that may be necessary to achieve any such purpose.

In Brundaban Nayak v. Election Commission of India and Anr. , in spite of finality attached by Article 192 to the decision of the Governor in respect of disqualification incurred by a member of a State Legislature subsequent to the election, the matter was examined by this Court on an appeal by special leave under Article 136 of the Constitution against the decision of the High Court dismissing the writ petition filed under Article 226 of the Constitution. Similarly in Union of India v. Jyoti Prakash Mitter , in spite of finality attached to the order of the President with regard to the determination of age of a Judge of the High Court under Article 217(3) of the Constitution, this Court examined the legality of the order passed by the President during the pendency of an appeal filed under Article 136 of the Constitution.

There is authority against the acceptability of the argument that the word "final'' occurring in Paragraph 6(1) has the effect of excluding the jurisdiction of the Courts in Articles 136, 226 and 227.

36. The cognate questions are whether a dispute of the kind envisaged by Paragraph 6 of the Tenth Schedule is in a non-justiciable area and that, at all events, the fiction in Paragraph 6(2) that all proceedings under Paragraph 6(1) of the Tenth Schedule be deemed to be "proceedings in Parliament" or "Proceedings in the Legislature of a State" attracts immunity from the scrutiny by Courts as under Article 122 or 212, as the case may be.

Implicit in the first of these postulates is the premise that questions of disqualification of members of the House are essentially matters pertaining to the Constitution of the House and, therefore, the Legislature is entitled to exert its exclusive power to the exclusion of the judicial power. This

assumption is based on certain British legislature practices of the past in an area which is an impalpable congeries of legal rules and conventions peculiar to and characteristic of British Parliamentary traditions. Indeed, the idea appears to have started with the proposition that the Constitution of the House was itself a matter of privilege of the House. Halsbury contains this statement:

> 1493. Privilege of the House of Commons in relation to its constitution: In addition to possessing a complete control over the regulation of its own proceedings and the conduct of its members, the House of Commons claims the exclusive right of providing, as it may deem fit, for its own proper constitution.
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> [emphasis supplied] [See: Halsbury's Laws of England, 4th Edn. vol.34 pages 603 & 604] But in the Indian Constitutional dispensation the power to decide, a disputed disqualification of an elected member of the House is not treated as a matter of privilege and the power to resolve such electoral disputes is clearly judicial and not legislative in nature. The fact that election disputes were at some stage decided by the House of Commons itself was not conclusive that even their power was legislative. The controversy, if any, in this area is put at rest by the authoritative earlier pronouncements of this Court.

37. In Indira Nehru Gandhi v. Raj narain Beg J., referring to the historical background relating to the resolution of electoral disputes by the House of Commons said:

> I do not think that it is possible to contend, by resorting to some concept of a succession to the powers of the medieval "High Court of Parliament" in England, that a judicial power also devolved upon our Parliament through the Constituent Assembly, mentioned in Section 8 of the Indian Independence Act of 1947. As already indicated by me, the Constituent Assembly was invested with law making and not judicial powers. Whatever judicial power may have been possessed once by English kings, sitting in Parliament, constituting the highest Court of the realm in medieval England, have devolved solely on the House of Lords as the final court of appeal in England. "King in Parliament" had ceased to exercise judicial powers in any other way long before 1950. And, the House of Commons had certainly not exercised a judicial power as a successor to the one time jurisdiction of the "King in Parliament" with the possible exception of the power to punish for its contempts....
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> [p.627 & 628] In the same case, Justice Mathew made these observations as to the imperative judicial nature of the power to resolve disputes:
>
> The concept of democracy as visualised by the Constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in

connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections...."

[p.504] In whichever body or authority, the jurisdiction is vested, the exercise of the jurisdiction must be judicial in character. this Court has held that in adjudicating an election dispute an authority is performing a judicial function and a petition for leave to appeal under Article 136 of the Constitution would lie to this Court against the decision notwithstanding the provisions of Article 329(b).

[Emphasis supplied] [p.506] It is also useful to recall the following observations of Gajendragadkar J., on the scope of Article 194(3) of the Constitution, which is analogous to Article 105(3) in Special Reference No. 1 of 1964 1965 (1) SCR 413:

This clause requires that the powers, privileges and immunities which are claimed by the House must be shown to have subsisted at the commencement of the Constitution, i.e., on January 26, 1950. It is well-known that out of a large number of privileges and powers which the House of Commons claimed during the days of its bitter struggle for recognition, some were given up in course of time, and some virtually faded out by desuetude; and so, in every case where a power is claimed, it is necessary to enquire whether it was an existing power at the relevant time. It must also appear that the said power was not only claimed by the House of Commons, but was recognised by the English Courts. It would obviously be idle to contend that if a particular power which is claimed by the House was claimed by the House of Commons but was not recognised by the English Courts, it would still be upheld under the latter part of Clause (3) only on the ground that it was in fact claimed by the House of Commons. In other words, the inquiry which is prescribed by this clause is: is the power in question shown or proved to have subsisted in the House of Commons at the relevant time?

See page 442) This question is answered by Beg, J. in Indira Nehru Gandhi's case:

I think, at the time our Constitution was framed, the decision of an election dispute had ceased to be a privilege of the House of Commons in England and therefore, under Article 105(3), it could not be a privilege of Parliament in this country.

[p.505]

38. Indeed, in dealing with the disqualifications and the resolution of disputes relating to them under Articles 191 and 192 or Articles 102 and 103, as the case may be, the Constitution has evinced a clear intention to resolve electoral-disputes by resort to the judicial power of the State. Indeed, Justice Khanna in Indira Nehru Gandhi's case said:

> Not much argument is needed to show that unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices, the provision that a candidate should not resort to malpractices would be in the nature of a mere pious wish without any legal sanction. It is further plain that if the validity of the election declared to be valid only if we provide a forum for going into those grounds and prescribe a law for adjudicating upon those grounds.... (See page 468) It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area. The classic exposition of Justice Issacs J., in Australian Boot Trade Employees Federation v. Whybrow & Co. (1910) 10 CLR 266 at page 317, as to what distinguishes a judicial power from a legislative power was referred to with the approval of this Court in Express Newspaper Ltd. v. Union of India at 611. Issacs J., stated:
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> If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties - in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-conformity then the determination that so prescribes, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorises it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisement or ministerial act.
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> In the present case, the power to decide disputed disqualification under Paragraph 6(1) is preeminently of a judicial complexion.

39. The fiction in Paragraph 6(2), indeed, places it in the first clause of Article 122 or 212, as the case may be. The words "proceedings in Parliament" or "proceedings in the legislature of a State" in Paragraph 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.

That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, ho

immunity under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule.

40. But then is the Speaker or the Chairman acting under Paragraph 6(1) a Tribunal? "All tribunals are not courts, though all Courts are Tribunals". The word "Courts" is used to designate those Tribunals which are set up in an organised State for the Administration of Justice. By Administration of Justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the Courts are there to restore the vinculum juris, which is disturbed. See: Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala and Ors. . In that case Hidayatullah, J. said:

> ...By "courts" is meant courts of civil judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient.
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> [p.362] Where there is a lis -- an affirmation by one party and denial by another -- and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court. In Associated Cement Companies Ltd. v. P.N. Sharma and Anr. , this Court said:
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> ...The main and the basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the Slate's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power.... There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding....
>
> [p.386 and 387] By these well-known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under paragraph 6(1) of the Tenth Schedule is a Tribunal.

41. In the operative conclusions we pronounced on 12th November, 1991 we indicated in Clauses G and H therein that judicial review in the area is limited in the manner indicated. If the adjudicatory authority is a tribunal, as indeed we have held it to be, why, then, should its scope be so limited? The finality clause in paragraph 6 does not completely exclude the jurisdiction of the courts under Articles 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations. While exercising their certiorari jurisdiction, the courts have applied the test whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction. An ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action but precludes challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction. An ouster clause attaching finality to a determination, therefore, does Oust certiorari to some extent and it will be effective in ousting the power of the court to review the decision of an inferior tribunal by certiorari if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not effect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice. [See: Administrative Law by H.W.R. Wade, 6th Edn., pp. 724-726; Anisminic Ltd. v. Foreign Compensation Commission, 1969 (2) AC 147; S.E. Asia Fire Bricks v. Non-Metallic Products 1981 AC. 363] In Makhan Singh v. State of Punjab , while considering the scope of judicial review during the operation of an order passed by the President under Article 359(1) suspending the fundamental right guaranteed under Article 21 of the Constitution, it has been held that the said order did not preclude the High Court entertaining a petition under Article 226 of the Constitution where a detenu had been detained in violation of the mandatory provisions of the detention law or where the detention has been ordered malafide. It was emphasised that the exercise of a power malafide was wholly outside the scope of the Act conferring the power and can always be successfully challenged, (p.828) Similarly in State of Rajasthan v. Union of India , decided by a seven-judge bench, this Court was considering the challenge to the validity of a proclamation issued by the President of India under Article 356 of the Constitution. At the relevant time under Clause (5) of Article 356, the satisfaction of the President mentioned in Clause (1) was final and conclusive and it could not be questioned in any court on any ground. All the learned judges have expressed the view that the proclamation could be open to challenge if it is vitiated by malafides. While taking this view, some of the learned judges have made express reference to the provisions of Clause (5).

In this context, Bhagwati, J (as the learned Chief Justice then was) speaking for himself and A.C. Gupta, J. has staled:

> Of course by reason of Clause (5) of Article 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or

unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself. Take, for example, a case where the President gives the reason for taking action under Article 356, Clause (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so-called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all. (pp. 82-83) Untwalia, J. has held as follows:

I, however, must hasten to add that I cannot persuade myself to subscribe to the view that under no circumstances an order of proclamation made by the President under Article 356 can be challenged in a Court of Law. And, I am saying so notwithstanding the provision contained in Clause (5) of the said Article introduced by the Constitution (38th Amendment) Act, 1975. (p.94) But then, what did I mean by saying that a situation may arise in a given case where the jurisdiction of the Court is not completely ousted? I mean this. If, without entering into the prohibited area, remaining on the fence, almost on the face of the impugned order or the threatened action of the President it is reasonably possible to say that in the eye of law it is no order or action as it is in flagrant violation of the very words of a particular Article, justifying the conclusion that the order is ultra vires, wholly illegal or passed mala fide, in such a situation it will be tantamount in law to be no order at all. Then this Court is not powerless to interfere with such an order and may, rather, must strike it down. (p.95) Similarly, Fazal Ali, J. has held:

Even if an issue is not justiciable, if the circumstances relied upon by the executive authority are absolutely extraneous and irrelevant, the Courts have the undoubted power to scrutinise such an exercise of the executive power. Such a judicial scrutiny is one which comes into operation when the exercise of the executive power is colourable or mala fide and based on extraneous or irrelevant considerations. (p.116) It is true that while an order passed by the President under Article 356 is put beyond judicial scrutiny by Clause (5) of Article 356, but this does not mean that the Court possesses no jurisdiction in the matter at all. Even in respect of Clause (5) of Article 356, the Courts have a limited sphere of operation in that on the reasons given by the President in his order if the Courts find that they are absolutely extraneous and irrelevant and based on personal and illegal considerations the Courts are not powerless to strike down the order on the ground of mala fide if proved. (p.120) In Union of India v. Jyoti Prakash Mitter (supra), dealing with the decision of the President under Article 217(3) on the question as to the age of a judge of the High Court, requiring a judicial approach it was held that the field of judicial review was enlarged to cover violation of rules of natural justice as well as an order based on no evidence because such errors are errors of jurisdiction.

In Union of India and Anr. v. Tulsiram Patel and Ors. (supra) this Court was dealing with Article 311(3) of the Constitution which attaches finality to the order of the disciplinary authority on the question whether it was reasonably practicable to hold an inquiry. It was observed that though the 'finaility' clause did not bar jurisdiction it did indicate that the jurisdiction is limited to certain grades.

In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under paragraph 6, the scope of judicial review under Articles 136, 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

In view of the limited scope of judicial review that is available on account of the finality clause in paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e., Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.

42. In the result, we hold on contentions E and F:

That the Tenth Schedule does not, in providing for an additional grant for disqualification and for adjudication of disputed disqualifications, seek to create a non-justiciable constitutional area. The power to resolve such disputes vested in the Speaker or Chairman as a judicial power.

That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen is valid. But the concept of statutory finality embodied in Paragraph 6(1) docs not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.

That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in Keshav Singh's Case (Spl. Ref. No. 1, 1965 (1) SCR 413 to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regarding to the words "be deemed to be proceedings in Parliament" or, "proceedings in the Legislature of a State" confines the scope of the

fiction accordingly. The speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover; any stage prior to the making of a decision by the Speakers/ Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

43. Re: Contention (G):

The argument is that an independent adjudicatory machinery for resolution of electoral disputes is an essential incident of democracy, which is a basic feature of Indian constitutionalism. It is urged that investiture of the power of resolving such disputes in the Speake or the Chairman does not answer this test of an independent, impartial quality of the adjudicatory machinery. It is therefore, urged that Paragraph 6(1) of the Tenth Schedule is violative of a basic feature.

It is also urged that a Speaker, under the Indian Parliamentary tradition is not required to resign his membership of the political party on whose strength he gets elected and that inevitably the decision of the Speaker is not free from the lugs and pulls of political polarisations. It is urged that the Speaker who has not resigned his membership of the political party cannot be impartial and, at all events, his functioning will not be free from reasonable likelihood of bias.

44. The Tenth Schedule breaks away from the constitutional pattern for resolution disqualifications envisaged in Articles 103 and 192 of the Constitution which vest jurisdiction in this behalf in the President or the Governor acting according to the opinion of Election Commission. The disqualifications for defection could very well have been included in Article 102(1) or 191(1) as a ground, additional to the already existing grounds under Clauses (a) to (e) in which event, the same dispute resolution machinery would have dealt with the disqualifications for defections also. But the Tenth Schedule, apparently, attempted a different experiment in respect of this particular ground of disqualification.

45. The question is, whether the investiture of the determinative jurisdiction in the Speaker would by itself stand vitiated as denying the idea of an independent adjudicatory authority. We are afraid the criticism that the provision incurs the vice of unconstitutionality ignores the high status and importance of the office of the Speaker in a Parliamentary democracy: The office of the Speaker is held in the highest respect and esteem in Parliamentary traditions. The evolution of the institution of Parliamentary democracy has as its pivot the institution of the Speaker. 'The Speaker holds a

high, important and ceremonial office. All questions of the well being of the House are matters of Speaker's concern'. The Speaker is said to be the very embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important functions of a judicial character.

Mavalankar, who was himself a distinguished occupant of that high office, says:

> In parliamentary democracy, the office of the Speaker is held in very high esteem and respect. There are many reasons for this. Some of them are purely historical and some are inherent in the concept of parliamentary democracy and the powers and duties of the Speaker. Once a person is elected Speaker, he is expected to be above parties, above politics. In other words, he belongs to all the members or belongs to none. He holds the scales of justice evenly irrespective of party or person, though no one expects that he will do absolute justice in all matters; because, as a human being he has his human drawbacks and shortcomings. However, everybody knows that he will intentionally do no injustice or show partiality. "Such a person is naturally held in respect by all.
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> [See: G.V. Mavalankar: The Office of Speaker, Journal of Parliamentary Information, April 1956, Vol.2, No. 1, p.33 Pandit Nehru referring to the office of the Speaker said:
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> ...The Speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the nation's freedom and liberty. There fore, it is right that that should be an honoured position, a free position and should be occupied always by men of outstanding ability and impartiality.
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> [See: HOP. Deb. Vol.IX (1954), CC 3447-48] Referring to the Speaker, Erskine May says:
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> The Chief characteristics attaching to the office of Speaker in the House of Commons are authority and impartiality. As a symbol of his authority he is accompanied by the Royal Mace which is borne before him when entering and leaving the chamber and upon state occasions by the Serjeant at Arms attending the House of Commons, and is placed upon the table when he is in the chair. In debate all speeches are addressed to him and he calls upon Members to speak -- a choice which is not open to dispute. When he rises to preserve order or to give a ruling on a doubtful point he must always be heard in silence and no Member may stand when the Speaker is on his feet. Reflections upon the character or actions of the Speaker may be punished as breaches of privilege. His action cannot be criticised incidentally in debate or upon any form of proceeding except a substantive motion. His authority in the chair is fortified by many special powers which are referred to below. Confidence in the impartiality of the Speaker is an indispensable condition of the successful working of procedure, and many conventions exist which have as their object not only to ensure the impartiality

of the Speaker but also to ensure that his impartiality is generally recognised...

[See: Erskine May - Parliamentary Practice - 20th edition p.234 and M.N. Kaul and S.L. Shakdher in 'Practice and Procedure of Parliament' 4th Edition, say: The all important conventional and ceremonial head of Lok Sabha is the Speaker. Within the walls of the House his authority is supreme. This authority is based on the Speaker's absolute and unvarying impartiality -- the main feature of his office, the law of its life. This obligation of impartiality appears in the constitutional provision which ordains that the Speaker is entitled to vote only in the case of equality of votes. Moreover, his impartiality within the House is secured by the fact that he remains above all considerations of party or political career, and to that effect he may also resign from the party to which he belonged.

[p.104]

46. It would, indeed, be unfair to the high traditions of that great office to say that the investiture in it of this jurisdiction would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that high office. The Robes of the Speaker do change and elevate the man inside.

47. Accordingly, we hold that the vesting of adjudicatory functions in the Speakers/. Chairmen would not by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected. The Speaker/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and arc guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the functioning of Parliamentary democracy. Vestiture of power of adjudicate questions under the Tenth Schedule in such a. constitutional functionaries should not be considered exceptionable.

48. Re: Contention H:

In the view we take of the validity of paragraph 7 it is unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and paragraph 7 of the Tenth Schedule violates such basic structure.

49. We may now notice one other contention as to the construction of the expression 'any direction' occurring in paragraph 2(1)(b). It is argued that if the expression really attracts within its sweep every direction or whip of any kind whatsover it might be unduly restrictive of the freedom of speech and the right of dissent and that, therefore, should be given a meaning limited to the objects and purposes of the Tenth Schedule. learned Counsel relied upon and commended to us the view taken by the minority in the Full bench decision of Punjab and Haryana High Court in Parkash Singh Badal and Ors. v. Union of India and Ors. where such a restricted sense was approved. Tewatia J said:

If the expression: "any direction" is to be literally construed then it would make the people's representative a wholly political party's representative, which decidedly he is not. The Member would virtually lose his identity and would become a rubber stamp in the hands of his political party. Such interpretation of this provision would cost it, its constitutionality, for in that sense it would become destructive of democracy/parliamentary democracy, which is the basic feature of the Constitution, Where giving of narrow meaning and reading down of the provision can save it from the vice of unconstitutionality the Court should read it down particularly when it brings the provision in line with the avowed legislative intent....

...the purpose of enacting paragraph 2 could be no other than to insure stability of the democratic system, which in the context of Cabinet/Parliamentary form of Government on the one hand means that a political party or a coalition of political parties which has been voted to power, is entitled to govern till the next election, and on the other, that opposition has a right to censure the functioning of the Government and even overthrow it by voting it out of power if it had lost the confidence of the people, then voting or abstaining from voting by a Member contrary to any direction issued by his party would by necessary implication envisage voting or abstaining from voting in regard to a motion or proposal, which if failed, as a result of lack of requisite support in the House, would result in voting the Government out of power, which consequence necessarily follows due to well established constitutional convention only when either a motion of no confidence is passed by the House or it approves a cut-motion in budgetary grants. Former because of the implications of Article 75(3) of the Constitution and latter because no Government can function without money and when Parliament declines to sanction money, then it amounts to an expression of lack of confidence in the Government. When so interpreted the Clause (b) of sub-paragraph (1) of paragraph 2 would leave the Members free to vote according to their views in the House in regard to any other matter that comes up before it.

[p.313 & 314] The reasoning of the learned judge that a wider meaning of the words "any direction" would cost it its constitutionality' does not commend to us. But we approve the conclusion that these words require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning.

While construing Paragraph 2(1)(b) it cannot be ignored that under the Constitution members of Parliament as well as of the State Legislature enjoy freedom of speech in the House though this freedom is subject to the provisions of the Constitution and the rules and standing orders regulating the Procedure of the House [Article 105(1) and Article 194(1)]. The disqualification imposed by Paragraph 2(1)(b) must be so

construed as not to unduly impinge on the said freedom of speech of a member. This would be possible if Paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the political party to which the member belongs went to the polls. For this purpose the direction given by the political party to a member belonging to it, the violation of which may entail disqualification under Paragraph 2(1)(b), would have to be limited to a vote on motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate. The voting or abstinence from voting by a member against the direction by the political party on such a motion would amount to disapproval of the programme on the basis of which he went before the electorate and got himself elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate.

Keeping in view the consequences of the disqualification i.e., termination of the membership of a House; it would be appropriate that the direction or whip which results in such disqualification under Paragraph 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2(1)(b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction.

50. There are some submissions as to the exact import of a "split" -- whether it is to be understood an instantaneous, one time event or whether a "split" can be said to occur over a period of time. The hypothetical poser was that if one-third of the members of a political party in the legislature broke-away from it on a particular day and a few more members joined the splinter group a couple of days later, would the latter also be a part of the 'split' group. This question of construction cannot be in vaccuo. In the present cases, we have dealt principally with constitutional issues. The meaning to be given to "split" must necessarily be examined in a case in which the question arises in the context of its particular facts. No hypothetical predications can or need be made. We, accordingly, leave this question open to be decided in an appropriate case.

51. Before parting with the case, we should advert to one other circumstance. During the interlocutory stage, the Constitution bench was persuaded to make certain interlocutory orders which, addressed as they were to the Speaker of the House, (though, in a different capacity as an adjudicatory forum under the Tenth Schedule) engendered complaints of disobedience culminating in the filing of petitions for initiation of proceedings of contempt against the Speaker. It was

submitted that when the very question of jurisdiction of the Court to deal with the matter was raised and even before the constitutionality of Paragraph 7 had been pronounced upon, self restraint required that no interlocutory orders in a sensitive area of the relationship between the legislature and the Courts should have been made.

The purpose of interlocutory orders is to preserve in status-quo the rights of the parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. One of the contentions urged was as to the invalidity of the amendment for non-compliance with the proviso to Article 368(2) of the Constitution. It has now been unanimously held that Paragraph 7 attracted the proviso to Article 368(2). The interlocutory orders in this case were necessarily justified so that, no land-slide changes were allowed to occur rendering the proceedings ineffective and infructuous.

52. With the finding and observations as aforesaid W.P.No. 17 of 1991 is dismissed. Writ petition in Rule No. 2421 of 1990 in the High Court of Gauhati is remitted back to the High Court for disposal in accordance with law and not inconsistent with the findings and observations contained in this order.

J.S. Verma, J.

This matter relating to disqualification on the ground of defection of some members of the Nagaland Legislative Assembly under the Tenth Schedule inserted by the Constitution (Fifty-Second Amendment) Act, 1985, was heard along with some other similar matters relating to several Legislative Assemblies including those of Manipur, Meghataya, Madhya Pradesh, Gujarat and Goa, since all of them involved the decision of certain constitutional questions relating to the constitutional validity of para 7 of the Tenth Schedule and consequently the validity of the Constitution (Fifty-Second Amendment) Act, 1985 itself. At the hearing, several learned Counsel addressed us on account of which the hearing obviously took some time. Even during the course of the hearing, the actions of some Speakers tended to alter the status quo, in some cases resulting in irreversible consequences which could not be corrected in the event of para 7 of the Tenth Schedule being held invalid or the impugned orders of the Speakers being found justiciable and, on merits illegal and, therefore, the urgency increased of deciding the questions debated before us at the earliest. For this reason, we indicated during the course of the hearing that we would pronounce our operative conclusions soon after conclusion of the hearing with reasons therefore to follow. Accordingly, on conclusion of the hearing on November 1, 1991, we indicated that the operative conclusions would be pronounced by us at the next sitting of the Bench when it assembled on November 12, 1991 after the Diwali Vaction. The operative conclusions of the majority (Venkatachaliah, Reddy and Agrawal, JJ.) as well as of the minority (Lalit Mohan Sharma and J.S. Verma, JJ.) were thus pronounced on November 12, 1991. We are now indicating herein our reasons for the operative conclusions of the minority view.

54. The unanimous opinion according to the majority as well as the minority is that para 7 of the Tenth Schedule enacts a provision for complete exclusion of judicial review including the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and

227 of the Constitution and, therefore, it makes in terms and in effect a change in Articles 136, 226 and 227 of the Constitution which attracts the proviso to Clause (2) of Article 368 of the Constitution; and, therefore, ratification by the specified number of State Legislatures before the Bill was presented to the President for his assent was necessary, in accordance therewith. The majority view is that in the absence of such ratification by the State Legislatures, it is para 7 alone of the Tenth Schedule which is Unconstitutional; and it being severable from the remaining part of the Tenth Schedule, para 7 alone is liable to be struck down rendering the Speakers' decision under para 6 that of a judicial tribunal amenable to judicial review by the Supreme Court and the High Courts under Articles 136, 226 and 227. The minority opinion is that the effect of invalidity of para 7 of the Tenth Schedule is to invalidate the entire Constitution (Fifty-Second Amendment) Act, 1985 which inserted the. Tenth Schedule since the President's assent to the Bill without prior ratification by the State Legislatures is non est.The minority view also is that para 7 is not severable from the remaining part of the Tenth Schedule and the Speaker not being an independent adjudicatory authority for this purpose as contemplated by a basic feature of democracy, the remaining part of the Tenth Schedule is in excess of the amending powers being violative of a basic feature of the Constitution. In the minority opinion, we have held that the entire Constitution (Fifty-Second Amendment) Act, 1985 is unconstitutional and an abortive attempt to make the Constitutional Amendment indicated therein.

55. Before proceeding to give our detailed reasons, we reproduce the operative conclusions pronounced by us on November 12, 1991 in the minority opinion (Lalit Mohan Sharma and J.S. Verma, JJ.) as under:

> For the reasons to be given in our detailed judgment to follow, our operative conclusions in the minority opinion on the various constitutional issues are as follows:
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> 1. Para 7 of the Tenth Schedule, in clear terms and in effect, excludes the jurisdiction of all courts, including the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 to entertain any challenge to the decision under para 6 on any ground even of illegality or perversity, not only at an interim stage but also after the final decision on the question of disqualification on the ground of defection.
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> 2. Para 7 of the Tenth Schedule, therefore, in terms and in effect, makes a change in Article 136 in Chapter IV of Part V; and Articles 226 and 227 in Chapter V of Part VI of the Constitution attracting the proviso to Clause (2) of Article 368.
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> 3. In view of para 7 in the Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985, it was required to be ratified by the Legislature of not less than one-half of the States as a condition precedent before the Bill could be presented to the President for assent, in accordance with the mandatory special procedure prescribed in the proviso to Clause (2) of Article 368 for exercise of the constituent power. Without ratification by the specified number of State Legislatures, the stage for presenting the Bill for assent of the President did not reach and, therefore, the

so-called assent of the President was non est and did not result in the Constitution standing amended in accordance with the terms of the Bill.

4. In the absence of ratification by the specified number of State Legislatures before presentation of the Bill to the President for his assent, as required by the proviso to Clause (2) of Article 368, it is not merely para 7 but, the entire Constitution (Fifty-Second Amendment) Act, 1985 which is rendered unconstitutional, since the constituent power was not exercised as prescribed in Article 368, and therefore, the Constitution did not stand amended in accordance with the terms of the Bill providing for the amendment.

5. Doctrine of Severability cannot be applied to a Bill making a constitutional amendment where any part thereof attracts the proviso to Clause (2) of Article 368.

6. Doctrine of Severability is not applicable to permit striking down para 7 alone saving the remaining provisions of the Bill making the Constitutional Amendment on the ground that para 7 alone attracts the proviso to Clause (2) of Article 368.

7. Even otherwise, having regard to the provisions of the Tenth Schedule of the Constitution inserted by the Constitution (Fifty-Second Amendment) Act, 1985, the Doctrine of Severability does not apply to it.

8. Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of Members of the House is envisaged as an attribute of this basic feature. The tenure of the Speaker who is the authority in the Tenth Schedule to decide this dispute is dependent on the continuous support of the majority in the House and, therefore, he (the Speaker) does not satisfy the requirement of such an independent adjudicatory authority; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature.

9. Consequently, the entire Constitution (Fifty-Second Amendment) Act, 1985 which inserted the Tenth Schedule together with Clause (2) in Articles 102 and 191, must be declared unconstitutional or an abortive attempt to so amend the Constitution.

10. It follows that all decisions rendered by the several Speakers under the Tenth Schedule must also be declared nullity and liable to be ignored.

11. On the above conclusions, it does not appear necessary or appropriate to decide the remaining questions urged.

56. It is unnecessary in this judgment to detail the facts giving rise to the debate on the constitutional issues relating to the validity of the Tenth Schedule, more particularly para 7 therein, introduced by the Constitution (Fifty-Second Amendment) Act, 1985. Suffice it to say that these matters arise out of certain actions of the Speakers of several Legislative Assemblies under the Tenth Schedule. Arguments on these questions were addressed to us by several learned counsel, namely, the learned Attorney General, S/Shri A.K. Sen, Shanti Bhushan, M.C. Bhandare, F.S. Nariman, Soli J. Sorabjee, R.K. Garg, Kapil Sibal, M.R. Sharma, Ram Jethmalani, N.S. Hegde, O.P. Sharma, Bhim Singh and R.F. Nariman. It may be mentioned that some learned Counsel modified their initial stand to some extent as the hearing progressed by advancing alternative arguments as well. Accordingly, the several faces of each constitutional issue debated before us were fully focussed during the hearing. The main: debate, however, was on the construction of paras 6 and 7 of the Tenth Schedule and the validity of the Constitutional Amendment. Arguments were also addressed on the question of violation, if any, of any basic feature of the Constitution by the provisions of the Tenth Schedule.

57. The points involved in the decisions of the constitutional issues for the purpose of our opinion may be summarised broadly as under:

(A) Construction of para 6 of the Tenth Schedule. Its effect and the extent of exclusion of judicial review thereby.

(B) Construction of para 7 of the Tenth Schedule. Its effect and the extent of exclusion of judical review thereby.

(C) In case of total exclusion of judicial review including the jurisdiction of Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution by the Tenth Schedule, does para 7 make a change in these Articles attracting the proviso to Clause (2) of Article 368 of the Constitution?

(D) The effect of absence of prior ratification by the State Legislatures before the Bill making provisions for such amendment was presented to the President for assent, on the constitutional validity of the Tenth Schedule.

(E) Severability of para 7 from the remaining part of the Tenth Schedule and its effect on the question of constitutional validity of the Tenth Schedule.

(F) Violation of basic feature of the Constitution, if any, by the Tenth Schedule as a whole or any part thereof and its effect on the constitutionality for this reason.

(G) Validity of the Tenth Schedule with reference to the right of dissent of members with particular reference to Article 105.

58. As indicated by us in our operative conclusions pronounced earlier, we need not express our concluded opinion on the points argued before us which are not necessary for supporting the

conclusion reached by us that the entire Tenth Schedule and consequently the Constitution (Fifty-Second Amendment) Act, 1985 is unconstitutional on the view we have taken on the other points. We are, therefore, giving our reasons only in respect of the points decided by us leading to the conclusion we have reached.

59. At this stage, it would be appropriate to mention the specific stand of the Speakers taken at the hearing. The learned Counsel who appeared for the several Speakers clearly stated that they were instructed to apprise us that the Speakers did not accept the jurisdiction of this Court to entertain these matters in view of the complete bar on jurisdiction of the courts enacted in para 7 read with para 6 of the Tenth Schedule. Accordingly, they abstained from addressing us on the merits of the impugned orders which led to these matters being brought in this Court in spite of our repeated invitation to them to also address us on merits in each case, which all the other learned Counsel did. No doubt, this Court's jurisdiction to decide the constitutional validity of the Tenth Schedule was conceded, but no more.

60. It is in these extra-ordinary circumstances that we had to hear these matters. We need not refer herein to the details of any particular case since the merits of each case are dealt separately in the order of that case. Suffice it to say that the unanimous view of the Bench is that the Speakers' decision disqualifying a member under the Tenth Schedule is not immune from judicial scrutiny. According to the majority it is subject to judicial scrutiny on the ground of illegality or perversity while in the minority view, it is a nullity liable to be so declared and ignored.

61. We consider it apposite in this context to recall the duty of the court in such delicate situations. This is best done by quoting Chief Justice Marshall in Cohens v. Virginia, 6 Wheat 264, 404, 5 L.Ed. 257, 291 (1821), wherein he said:

> It is most true, that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one of the other would be reason to the constitution. Questions may occur which we would gladly avoid, but we cannot, avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.
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> xxx xxx xxx ... If the question cannot be brought in a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend....

(emphasis supplied) More recently, Patanjali Sastri, CJ, while comparing the role of this Court in the constitutional scheme with that of the U.S. Supreme Court, pointed out in the State of Madras v. V.G. Row 1952 SCR 597 that the duty of this Court flows from express provisions in our Constitution while such power in the U.S. Supreme Court has been assumed by the interpretative process giving a wide meaning to "due process" clause. Sastri, CJ, at p.605, spoke thus:

Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights', as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.

(emphasis supplied)

62. We are in respectful agreement with the above statement of Sastri, CJ, and wish to add that even though such an obvious statement may have been necessary soon after the Constitution came into force and may not be a necessary reminder four decades later at this juncture, yet it appears apposite in the present context to clear the lingering doubts in some minds. We have no hesitation in adding further that while we have no desire to clutch at jurisdiction, at the same time we would not be deterred in the performance of this constitutional duty whenever the need arises.

63. We would also like to observe that unlike England, where there is no written Constitution and Parliament is supreme, in our country there is a written Constitution delineating the spheres of jurisdiction of the legislature and the judiciary whereunder the power to construe the meaning of the provisions in the Constitution and the laws is entrusted to the judiciary with finality attached to the decision of this Court inter alia by Article 141 about the true meaning of any enacted provision and Article 144 obliges all authorities in the country to act in aid of this Court. It is, therefore, not permissible in our constitutional scheme for any other authority to claim that power in exclusivity, or in supersession of this Court's verdict. Whatever be the controversy prior to this Court entertaining such a matter, it must end when the court is served of the matter for pronouncing its verdict and it is the constitutional obligation of every person and authority to accept its binding effect when the decision is rendered by this Court. It is also to be remembered that in our constitutional scheme based on democratic principles which include governance by rules of law, every one has to act and perform his obligations according to the law of the land and it is the

constitutional obligation of this Court to finally say what the law is. We have no doubt that the Speakers and all others sharing their views are alive to this constitutional scheme, which is as much the source of their jurisdiction as it is of this Court and also conscious that the power given to each wing is for the performance of a public duty as a constitutional obligation and not for self-aggrandisement. Once this perception is clear to all, there can be no room for any conflict.

The Tenth Schedule was inserted in the Constitution of India by the Constitution (Fifty-Second Amendment) Act, 1985 which came into force with effect from 1.3.1985 and is popularly known as the Anti-Defection Law. The Statement of Objects and Reasons says that this amendment in the Constitution was made to combat the evil of political defections which has become a matter of national concern and unless combated, is likely to undermine the very foundations of our democratic system and the principles which sustained it. This amendment is, therefore, for outlawing defection to sustain our democratic principles. The Tenth Schedule contains eight paras. Para 1 is the interpretation clause defining 'House' to mean either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State. The expressions 'legislature party' and 'original political party' which are used in the remaining paras are also defined. Para 2 provides for disqualification on ground of defection. Para 3 provides that disqualification on ground of defection is not to apply in case of split indicating therein the meaning of 'split'. Para 4 provides that disqualification on ground of defection is not to apply in case of merger. Para 5 provides exemption for the Speaker or the Deputy Speaker of the House of the People or of the Legislative Assembly of the State, the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State from the applicability of the provisions of the Tenth Schedule. Para 8 contains the rule making power of the Chairman or the Speaker.

64. For the purpose of deciding the jurisdiction of this Court and the justiciability of the cause, it is paras 6 and 7 which are material and they read as under:

> 6. Decision on questions as to disqualification on ground of defection.--
>
> (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:
>
> Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.
>
> (2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article

212.

7. Bar of jurisdiction on courts.--

Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

We shall now deal with the points involved enumerated earlier.

Points 'A' & 'B' -- Paras 6 & 7 of Tenth Schedule

65. In support of the objection raised to the jurisdiction of this Court and the justiciability of the Speaker's decision relating to disqualification of a member, it has been urged that sub-paragraph (1) of para 6 clearly lays down that the decision of the Chairman or, as the case may be, the Speaker of such House shall be final and sub-paragraph (2) proceeds to say that all proceedings under sub-paragraph (1) 'shall be deemed to be proceedings in Parliament... or, ... proceedings in the Legislature of a State' within the meaning of Article 122 or Article 212, as the case may be. It was urged that the clear provision in para 6 that the decision of the Chairman/Speaker on the subject of disqualification under this Schedule shall be final and the further provision that all such proceedings 'shall be deemed to be proceedings in Parliament ... or,... proceedings in the Legislature of a State', within the meaning of Article 122 or Article 212, as the case may be, clearly manifests the intention that the jurisdiction of all courts including the Supreme Court is ousted in such matters and the decision on this question is not justiciable. Further argument is that para 7 in clear words thereafter reiterates that position by saying that 'notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule. In other words, the argument is that para 6 by itself provides for ouster of the jurisdiction of all courts including the Supreme Court and para 7 is a remanifestation of that clear intent in case of any doubt arising from para 6 alone. On this basis it was urged that the issue raised before us is not justiciable and the Speaker or the Chairman, as the case may be, not being 'Tribunal' within the meaning of that expression used in Article 136 of the Constitution, their decision is not open to judicial review.

66. In reply, it was urged that the finality clause in sub-paragraph (1) of para 6 does not exclude the jurisdiction of the High Courts under Articles 226 and 227 and of this Court under Article 136. Deeming provision in sub-paragraph (2) of para 6, it was urged, has the only effect of making it a 'proceedings in Parliament' or 'proceedings in the Legislature of a State' to bring it within the ambit of Clause (1) of Articles 122 or 212 but not within Clause (2) of these Articles. The expression 'proceedings in Parliament' and 'proceedings in the Legislature of a State' are used only in Clause (1) of Articles 122 and 212 but not in Clause (2) of either of these Articles, on account of which the scope of the fiction cannot be extended beyond the limitation implicit in the specific words used in the legal fiction. This being so, it was argued that immunity extended only to 'irregularity of procedure' but not to illegality as held in Keshav Singh -- (1965) 1 S.C.R. 413. In respect of para 7, the reply is that the expression 'no court' therein must be similarly construed to refer only to courts of ordinary jurisdiction but not the extra-ordinary jurisdiction of the High Courts under Articles 226 & 227 and

the plenary jurisdiction of Supreme Court under Article 136. It was also argued that the Speaker/Chairman while deciding the question of disqualification of member under para 6 exercises a judicial function of the State which otherwise would be vested in the courts and, therefore, in this capacity he acts as 'Tribunal' amenable to the jurisdiction under Articles 136, 226 and 227 of the Constitution. Shri Sibal also contended that the bar in para 7 operates only at the interim stage, like other election disputes, and not after the final decision under para 6.

67. The finality clause in sub-paragraph (1) of para 6 which says that the decision of the Chairman or, as the case may be, the Speaker of such House shall be final is not decisive. It is settled that such a finality clause in a statute by itself is not sufficient to exclude the jurisdiction of the High Courts under Articles 226 and 227 and the Supreme Court under Article 136 of the Constitution, the finality being for the statute alone. This is apart from the decision being vulnerable on the ground of nullity. Accordingly, sub-paragraph (1) alone is insufficient to exclude the extra-ordinary jurisdiction of the High Courts and the plenary jurisdiction of this Court. The legal fiction in sub-paragraph (2) of para 6 can only bring the proceedings under sub-paragraph (1) thereof within the amit of Clause (1) of Article 122 or Clause (1) of Article 212, as the case may be, since the expressions used in sub-paragraph (2) of para 6 of the Tenth Schedule arc 'shall be deemed to be proceedings in Parliament' or 'proceedings in the Legislature of a State': and such expressions find place both in Articles 122 and 212 only in Clause (1) and not Clause (2) thereof. The ambit of the legal fiction must be confined to the limitation implicit in the words used for creating the fiction and it cannot be given an extended meaning to include therein something in addition. It is also settled that a matter falling within the ambit of Clause (1) of either of these two Articles is justiciable on the ground of illegality or perversity in spite of the immunity it enjoys to a challenge on the ground of 'irregularity of procedure'.

68. To overcome this result, it was argued that such matter would fall within the ambit of Clause (2) of both Articles 122 and 212 because the consequence of the order of disqualification by the Speaker/Chairman would relate to the conduct of business of the House. In the first place, the two separate clauses in Articles 122 and 212 clearly imply that the meaning and scope of the two cannot be identical even assuming there be some overlapping area between them. What is to be seen is the direct impact of the action and its true nature and not the further consequences flowing therefrom. It cannot be doubted in view of the clear language of sub-paragraph (2) of para 6 that it relates to Clause (1) of both Articles 122 and 212 and the legal fiction cannot, therefore, be extended beyond the limits of the express words used in the fiction. It construing the fiction it is not to be extended beyond the language of the Section by which it is created and its meaning must be restricted by the plain words used. It cannot also be extended by importing another fiction. The fiction in para 6(2) is a limited one which serves its purpose by confining it to Clause (1) alone of Articles 122 and 212 and, therefore, there is no occasion, to enlarge its scope by reading into it words which are not there and extending it also to Clause (2) of these Articles. See Commissioner of Income-tax v. Ajax Products Ltd.- .

69. Moreover, it does appear to us that the decision relating to disqualification of a member does not relate to regulating procedure or the conduct of business of the House provided for in Clause (2) of Articles 122 and 212 and taking that view would amount to extending the fiction beyond its language

and importing another fiction for this purpose which is not permissible. That being so, the matter falls within the ambit of Clause (1) only of Articles 122 and 212 as a result of which it would be vulnerable on the ground of illegality and perversity and, therefore, justiciable to that extent.

70. It is, therefore, not possible to uphold the objection of jurisdiction on the finality clause or the legal fiction created in para 6 of the Tenth Schedule when justiciability of the cause is based on a ground of illegality or perversity (See Keshav Singh -- (1965) 1 S.C.R. 413). This in our view is the true construction and effect of para 6 of the Tenth Schedule.

We shall now deal with para 7 of the Tenth Schedule.

71. The words in para 7 of the Tenth Schedule are undoubtedly very wide ordinarily mean that this provision supersedes any other provision in the Constitution. This is clear from the use of the non obstante clause 'notwithstanding anything in this Constitution' as the opening words of para 7. The non obstante clause followed by the expression 'no court shall have any jurisdiction' leave no doubt that the bar of jurisdiction of courts contained in para 7 is complete excluding also the jurisdiction of the Supreme Court under Article 136 and that of the High Courts under Articles 226 and 227 of the Constitution relating to matters covered by para 7. The question, therefore, is of the scope of para 7. The scope of para 7 for this purpose is to be determined by the expression 'in respect of any matter connected with the disqualification of a member of a House under this Schedule'.

72. One of the constructions suggested at the hearing was that this expression covers only the intermediate stage of the proceedings relating to disqualification under para 6 and not the end stage when the final order is made under para 6 on the question of disqualification. It was suggested that this construction would be in line with the construction made by this Court in its several decisions relating to exclusion of courts' jurisdiction in election disputes at the intermediate stage under Article 329 of the Constitution. This construction suggested of para 7 does not commend to us since it is contrary to the clear and unambiguous language of the provision. The expression 'in respect of any matter connected with the disqualification of a member of a House under this Schedule' is wide enough to include not merely the intermediate stage of the proceedings relating to disqualification but also the final order on the question of disqualification made under para 6 which is undoubtedly such a matter. There is thus express exclusion of all courts' jurisdiction even in respect of the final order.

73. As earlier indicated by virtue of the finality clause and the deeming provision in para 6, there is exclusion of all courts' jurisdiction to a considerable extent leaving out only the area of justiciability on the ground of illegality or perversity which obviously is relatable only to the final order under para 6. This being so, enactment of para 7 was necessarily made to bar the jurisdiction of courts also in respect of matters falling outside the purview of the exclusion made by para 6. Para 7 by itself and more so when read along with para 6 of the Tenth Schedule, leaves no doubt that exclusion of all courts' jurisdiction by para 7 is total leaving no area within the purview, even of the Supreme Court or the High Courts under Articles 136, 226 and 227. The language of para 7 being explicit, no other aid to construction is needed. Moreover, the speech of the Law Minister who piloted the bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha as well as the debate on this subject

clearly show that these provisions were enacted to keep the entire matter relating to disqualification including the Speakers' final decision under para 6 on the question of disqualification, wholly outside the purview of all courts including the Supreme Court and the High Courts. The legislative history of absence of such a provision excluding the courts' jurisdiction in the two earlier Bills which lapsed also re-enforces the conclusion that enactment of para 7 was clearly to provide for total ouster of all courts' jurisdiction.

74. In the face of this clear language, there is no rule of construction which permits the reading of para 7 in any different manner since there is no ambiguity in the language which is capable of only one construction, namely, total exclusion of the jurisdiction of all courts including that of the Supreme Court and the High Courts under Articles 136, 226 and 227 of the Constitution in respect of every matter connected with the disqualification of a member of a House under the Tenth Schedule including the final decision rendered by the Speaker/ Chairman, as the case may be. Para 7 must, therefore, be read in this manner alone.

75. The question now is of the effect of enacting such a provision in the Tenth Schedule and the applicability of the proviso to Clause (2) of Article 368 of the Constitution.

Point 'C' -- Applicability of Article 368(2) proviso

76. The above construction of para 7 of the Tenth Schedule gives rise to the question whether it thereby makes a change in Article 136 which is in Chapter IV of Part V and Articles 226 and 227 which are in Chapter V of Part VI of the Constitution. If the effect of para 7 is to make such a change in these provisions so that the proviso to Clause (2) of Article 368 is attracted, then the further question which arises is of the effect on the Tenth Schedule of the absence of ratification by the specified number of State Legislatures, it being admitted that no such ratification of the Bill was made by any of the State Legislatures.

77. Prima facie it would appear that para 7 does seek to make a change in Articles 136, 226 and 227 of the Constitution inasmuch as without para 7 in the Tenth Schedule a decision of the Speaker/Chairman would be amenable to the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 as in the case of decisions as to other disqualifications provided in Clause (1) of Article 102 or 191 by the President/Governor under Article 103 or 192 in accordance with the opinion of the Election Commission which was the scheme under the two earlier Bills which lapsed. However, some learned Counsel contended placing reliance on Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar 1952 SCR 89 and Sajjan Singh v. State of Rajasthan that, the effect of such total exclusion of the jurisdiction of the Supreme Court and the High Courts docs not make a change in Articles 136, 226 and 227. A close reading of these decisions indicates that instead of supporting this contention, they do in fact negative it.

78. In Sankari Prasad, the challenge was to Articles 31A and 31B inserted in the Constitution by the Constitution (First Amendment) Act, 1951. One of the objections was based on absence of ratification under Article 368. While rejecting this argument, the Constitution Bench held as under:

> It will be seen that these Articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant articles in Part III, while article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their powers in such cases.
>
> (emphasis supplied)

79. The test applied was whether the impugned provisions inserted by the Constitutional Amendment did 'either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Thus the change may be cither in terms i.e. explicit or in effect in these Articles to require ratification. The ground for rejection of the argument therein was that the remedy in the courts remained unimpaired and unaffected by the change and the change was really by extinction of the right to seek the remedy. In other words, the change was in the right and not the remedy of approaching the court since there was no occasion to invoke the remedy, the right itself being taken away. To the same effect is the decision in Sajjan Singh, wherein Sankari Prasad was followed stating clearly that there was no justification for reconsidering Sankari Prasad.

80. Distinction has to be drawn between the abridgement or extinction of a right and restriction of the remedy for enforcement of the right. If there is an abridgement or extinction of the right which results in the disappearance of the cause of action which enables invoking the remedy and in the absence of which there is no occasion to make a grievance and invoke the subsisting remedy, then the change brought about is in the right and not the remedy. To this situation, Sankari Prasad and Sajjan Singh apply. On the other hand, if the right remains untouched so that a grievance based thereon can arise and, therefore, the cause of action subsists, but the remedy is curtailed or extinguished so that the cause of action cannot be enforced for want of that remedy, then the change made is in the remedy and not in the subsisting right. To this latter category, Sankari Prasad and Sajjan Singh have no application. This is clear from the above-quoted passage in Sankari Prasad which clearly brings out this distinction between a change in the right and a change in the remedy.

The present case, in unequivocal terms, is that of destroying the remedy by enacting para 7 in the Tenth Schedule making a total exclusion of judicial review including that by the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution. But for para 7 which deals with the remedy and not the right, the jurisdiction of the Supreme Court under Article 136 and that of the High Courts under Articles 226 and 227 would remain unimpaired to challenge

the decision under para 6, as in the case of decisions relating to other disqualifications specified in Clause (1) of Articles 102 and 191, which remedy continues to subsist. Thus, this extinction of the remedy alone without curtailing the right, since the question of disqualification of a member the ground of defection under the Tenth Schedule does require adjudication on enacted principles, results in making a change in Article 136 in Chapter IV in Part V and Articles 226 and 227 in Chapter V in Part VI of the Constitution.

81. On this conclusion, it is undisputed that the proviso to Clause (2) of Article 368 is attracted requiring ratification by the specified number of State Legislatures before presentation of the Bill seeking to make the constitutional amendment to the President for his assent.

Point 'D' -- Effect of absence of ratification

82. The material part of Article 368 is as under:

> 368. Power of Parliament to amend the Constitution and procedure therefore. - (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

> Provided that if such amendment seeks to make any change in --
>
> (a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
>
> (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
>
> (c) any of the Lists in the Seventh Schedule, or
>
> (d) the representation of States in Parliament, or
>
> (e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(emphasis suppplied) It is Clause (2) with its proviso which is material. The main part of Clause (2) prescribes that a constitutional amendment can be initiated only by the introduction of a Bill for the purpose and when the Bill is passed by each House by a majority of the total membership of that

House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill. In short, the Bill on being passed by the required majority is presented to the President for his assent to the Bill and on giving of the assent, the Constitution stands amended accordingly. Then comes the proviso which says that 'if such an amendment seeks to make any change' in the specified provisions of the Constitution, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent. In other words, the proviso contains a constitutional limitation on the amending power; and prescribes as a part of the special procedure, prior assent of the State Legislatures before presentation of the Bill to the President for his assent in the case of such Bills. This is a condition interposed by the proviso in between the passing of the Bill by the requisite majority in each House and presentation of the Bill to the President for his assent, which assent results in the Constitution automatically standing amended in accordance with the terms of the Bill. Thus, the Bills governed by the proviso cannot be presented to the President for his assent without the prior ratification by the specified number of State Legislatures or in other words, such ratification is a part of the special procedure or a condition precedent to presentation of the Bill governed by the proviso to the President for his assent. It logically follows that the consequence of the Constitution standing amended in accordance with the terms of the Bill on assent by the President, which is the substantive part of Article 368, results only when the Bill has been presented to the President for his assent in conformity with the special procedure after performance of the conditions precedent, namely, passing of the Bill by each House by the requisite majority in the case of all Bills; and in the case of Bills governed by the proviso, after the Bill has been passed by the requisite majority in each House and it has also been ratified by the Legislature of not less than one-half of the States.

83. The constituent power for amending the Constitution conferred by Article 368 also prescribes the mandatory procedure in Clause (2) including its proviso, for its exercise. The constituent power cannot, therefore, be exercised in any other manner and non-compliance of the special procedure so prescribed in Article 368(2) cannot bring about the result of the Constitution standing amended in accordance with the terms of the Bill since that result ensues only at the end of the prescribed mandatory procedure and not otherwise. The substantive part of Article 368 which provides for the resultant amendment is the consequence of strict compliance of the mandatory special procedure prescribed for exercise of the constituent power and that result does not ensue except in the manner provided.

The true nature and import of the amending power and procedure under Article 368 as distinguished from the ordinary legislative procedure was indicated in Kesavananda Bharati (1973) Supp. S.C.R. 1 at pp.561, 563 & 565:

> ...Under Article 368 however, a different and special procedure is provided for amending the constitution. A Bill has to be introduced in either House of Parliament and must be passed by each House separately by a special majority. It should be passed not only by 2/3rd majority of the members present and voting but also by a

majority of the total strength of the House. No joint sitting of the two Houses is permissible. In the case of certain provisions of the Constitution which directly or indirectly affect interstate relations, the proposed amendment is required to be ratified by the Legislatures which is not a legislative process of not less than one half of the States before the Bill proposing the amendment is presented to the President for his assent. The procedure is special in the sense that it is different and more exacting or restrictive than the one by which ordinary laws are made by Parliament. Secondly in certain matters the State Legislatures are involved in the process of making the amendment. Such partnership between the Parliament and the State Legislatures in making their own laws by the ordinary procedure is not recognised by the Constitution. It follows from the special provision made in Article 368 for the amendment of the Constitution that our Constitution is a "rigid' or "controlled' Constitution because the Constituent Assembly has "left a special direction as to how the Constitution is to be changed." In view of Article 368, when the special procedure is successfully followed, the proposed amendment automatically becomes a part of the Constitution or, in other words, it writes itself into the constitution.

XXX XXX XXX ...But when it comes to the amendment of the constitution, a special procedure has been prescribed in Article 368. Since the result of following the special procedure under the Article is the amendment of the Constitution the process which brings about the result is known as the exercise of constituent power by the bodies associated in the task of the amending the constitution. It is, therefore, obvious, that when the Parliament and the State Legislatures function in accordance with Article 368 with a view to amend the constitution, they exercise constituent power as distinct from their ordinary legislative power under Articles 245 to 248. Article 368 is not entirely procedural. Undoubtedly part of it is procedural. But there is a clear mandate that on the procedure being followed the proposed amendment shall become part of the constitution, which is the substantive part of Article 368. Therefore, the peculiar or special power to amend the Constitution is to be sought in Article 368 only and not elsewhere.

XXX XXX XXX ...The true position is that the alchemy of the special procedure prescribed in Article 368 produces the constituent power which transport the proposed amendment into the Constitution and gives it equal status with the other parts of the constitution."

(emphasis supplied)

84. Apart from the unequivocal language of Clause (2) including the proviso therein indicating the above result of prior ratification being a part of the special procedure or condition precedent for valid assent of the President, the same result is reached even by another route. The ordinary role of a proviso is to carve out an exception from the general rule in the main enacting part. The main enacting part of Clause (2) lays down that on a Bill for a constitutional amendment being passed in each House by a requisite majority, it shall be presented to the President for his assent and on the

assent being given, the Constitution shall stand amended in accordance with the terms of the Bill. The proviso then carves out. the exception in case of Bills seeking to make any change in the specified Articles of the Constitution prescribing that in the case of those Bills, prior ratification by the Legislatures of not less than one-half of the States is also required before the Bill is presented to the President for assent. This means that a Bill falling within the ambit of the proviso is carved out of the main enactment in Clause (2) as an exception on account of which it cannot result in amendment of the Constitution on the President's assent without prior ratification by the specified number of State Legislatures. The proviso in Clause (2) is enacted for and performs the function of a true proviso by qualifying the generality of the main enactment in Clause (2) in providing an exception and taking out of the main enactment in Clause (2) such Bills which but for the proviso would fall within the main part. Not only the language of the main enactment in Clause (2) and the proviso thereunder is unequivocal to give this clear indication but the true role of a proviso, the form in which the requirement of prior ratification of such a Bill by the State Legislatures is enacted in Article 368 lend further assurance that this is the only construction of Clause (2) with its proviso which can be legitimately made. If this be the correct construction of Article 368(2) with the proviso as we think it is, then there is no escape from the logical conclusion that a Bill to which the proviso applies does not result in amending the Constitution in accordance with its terms on assent of the President if it was presented to the President for his assent and the President gave his assent to the Bill without prior ratification by the specified number of the State Legislatures. This is the situation in the present case.

85. Thus the requirement of prior ratification by the State Legislatures is not only a condition precedent forming part of the special mandatory procedure for exercise of the constituent power and a constitutional limitation thereon but also a requirement carving out an exception to the general rule of automatic amendment of the Constitution on the President's assent to the Bill.

86. In other words, Clause (2) with the proviso therein itself lays down that the President's assent does not result in automatic amendment of the Constitution in case of such a Bill if it was not duly ratified before presentation to the President for his assent. Nothing more is needed to show that not only para 7 of the Tenth Schedule but the entire Constitution (Fifty- Second Amendment) Act, 1985 is still born or an abortive attempt to amend the Constitution for want of prior ratification by the State Legislatures of the Bill before its presentation to the President for his assent.

87. The result achieved in each case is the same irrespective of the route taken. If the route chosen is of construing the language of Clause (2) with the proviso merely a part of it, the requirement of prior ratification is a condition precedent forming part of the special mandatory procedure providing that the constituent power in case of such a Bill can be exercised in this manner alone the mode prescribed for other Bills being forbidden. If the route taken is of treating the proviso as carving out an exception from the general rule which is the normal role of a proviso, then the result is that the consequence of the Constitution standing amended in terms of the provisions of the Bill on the President's assent as laid down in the main part of Clause (2) does not ensue without prior ratification in case of a Bill to which the proviso applies.

88. There can thus be no doubt that para 7 of the Tenth Schedule which seeks to make a change in Article 136 which is a part of Chapter IV of Part V and Articles 226 and 227 which form part of Chapter V of Part VI of the Constitution, has not been enacted by incorporation in a Bill seeking to make the Constitutional Amendment in the manner prescribed by Clause (2) read with the proviso therein of Article 368. Para 7 of the Tenth Schedule is, therefore, unconstitutional and to that extent at least the Constitution does not stand amended in accordance with the Bill seeking to make the Constitutional Amendment. The further question now is: its effect on the validity of the remaining part of the Tenth Schedule and consequently the Constitution (Fifty-Second Amendment) Act, 1985 itself.

Point 'E' -- Severability of para 7 of Tenth Schedule

89. The effect of absence of ratification indicated above suggests inapplicability of the Doctrine of Severability. In our opinion, it is not para 7 alone but the entire Tenth Schedule nay the Constitution (Fifty-Second Amendment) Act, 1985 itself which is rendered unconstitutional being an abortive attempt to so amend the Constitution. It is the entire Bill and not merely para 7 of the Tenth Schedule therein which required prior ratification by the State Legislatures before its presentation to the President for his assent, it being a joint exercise by the Parliament and State Legislatures. The stage for presentation of Bill to the President for his assent not having reached, the President's assent was non est and it could not result in amendment of the Constitution in accordance with the terms of the Bill for the reasons given earlier. Severance of para 7 of the Tenth Schedule could not be made for the purpose of ratification or the President's assent and, therefore, no such severance can be made even for the ensuing result. If the President's assent cannot validate para 7 in the absence of prior ratification, the same assent cannot be accepted to bring about a different result with regard to the remaining part of the Bill.

90. On this view, the question of applying the Doctrine of Severability to strike down para 7 alone retaining the remaining part of Tenth Schedule does not arise since it presupposes that the Constitution stood so amended on the President's assent. The doctrine does not apply to a still born legislation.

91. The Doctrine of Severability applies in a case where an otherwise validly enacted legislation contains a provision suffering from a defect of lack of legislative competence and the invalid provision is severable leaving the remaining valid provisions a viable whole. This doctrine has no application where the legislation is not validly enacted due to non-compliance of the mandatory legislative procedure such as the mandatory special procedure prescribed for exercise of the constituent power. It is not possible to infuse life in a still born by any miracle of deft surgery even though it may be possible to continue life by removing a congenitally defective part by surgical skill. Even the highest degree of surgical skill can help only to continue life but it cannot infuse life in the case of still birth.

92. With respect, the contrary view does not give due weight to the effect of a condition precedent forming part of the special procedure and the role of a proviso and results in rewriting the proviso to mean that ratification is not a condition precedent but merely an additional requirement of such a

Bill to make that part effective. This also fouls with the expression 'Constitution shall stand amended ...' on the assent of President which is after the stage when the amendment has been made and ratified by the State Legislatures as provided. The historical background of drafting the proviso also indicates the significance attached to prior ratification as a condition precedent for valid exercise of the constituent power.

93. We are unable to read the Privy Council decision in The Bribery Commissioner v. Pedrick Ranasinghe 1965 AC 172 as an authority to support applicability of the Doctrine of Severability in the present case. In Kesavananda Bharati, the substance of that decision was indicated by Mathew, J., at p.778 of S.C.R., thus:

> ...that though Ceylon Parliament has plenary power of ordinary legislation, in the exercise of its Constitution power it was subject to the special procedure laid down in Section 29(4).... While Section 29(4) of Ceylon (Constitution) Order was entirely procedural with no substantive part therein, Article 368 of the Indian Constitution has also a substantive part as pointed out in Kesavananda Bharati. This distinction also has to be borne in mind.

94. The challenge in Ranasinghe was only to the legality of a conviction made under the Bribery Act, 1954 as amended by The Bribery Amendment Act, 1958 on the ground that the Tribunal which had made the conviction was constituted under Section 41 of the Amending Act which was invalid being in conflict with Section 55 of the Constitution and not being enacted by exercise of constituent power in accordance with Section 29(4) of the Ceylon (Constitution) Order. Supreme Court of Ceylon quashed the conviction holding Section 41 of the Amending Act to be invalid for this reason. The Privy Council affirmed that view and in this context held that Section 41 could be severed from rest of the Amending Act. Ranasinghe was not a case of a Bill passed in exercise of the constituent power without following the special procedure of Section 29(4) but of a Bill passed in exercise of the ordinary legislative power containing other provisions which could be so enacted, and including therein Section 41 which could be made only in accordance with the special procedure of Section 29(4) of the Constitution. The Privy Council made a clear distinction between legislative and constituent powers and reiterated the principle thus:

> ... The effect of Section 5 of the Colonial Laws Validity Act, which is framed in a manner somewhat similar to Section 29(4) of the Ceylon Constitution was that where a legislative power is given subject to certain manner and form that power does not exist unless and until the manner and form is complied with. Lord Sankey L.C. said: "A Bill, within the scope of Sub-section (6) of Section 7A, which received the Royal Assent without having been approved by the electors in accordance with that section, would not be a valid act of the legislature. It would be ultra vires Section 5 of the Act of 1865.

95. The Bribery Amendment Act, 1958, in Ranasinghe, was enacted in exercise of the . ordinary legislative power and therein was inserted Section 41 which could be made only in exercise of the constituent power according to the special procedure prescribed in Section 29(4) of the Ceylon

(Constitution) Order. In this situation, only Section 41 of the Amending Act was held to be invalid and severed because the special procedure for the constituent power was required only for that provision and not the rest. In the instant case the entire Tenth Schedule - is enacted in exercise of the constituent power under Article 368, not merely para 7 therein, and this has been done without following the mandatory special procedure prescribed. It is, therefore, not a case of severing the invalid constituent part from the remaining ordinary legislation. Ranasinghe could have application if in an ordinary legislation outside the ambit of Article 368, a provision which could be made only in exercise of the constituent power- according to Article 368 had been inserted without following the special procedure*, and severance of the invalid constituent part alone was the question. Ranasinghe is, therefore, distinguishable.

96. Apart from inapplicability of the Doctrine of Severability to a Bill to which the proviso to Clause (2) of Article 368 applies, for the reasons given, it does not apply in the present case to strike down para 7 alone retaining the remaining part of the Tenth Schedule. In the first place, the discipline for exercise of the constituent power was consciously and deliberately adopted instead of resorting to the mode of ordinary legislation in accordance with Sub-clause (e) of Clause (1) of Articles 102 and 191, which would render the decision on the question of disqualification on the ground of defection also amenable to judicial review as in the case of decision on questions relating to other disqualifications. Moreover, even the test applicable for applying the Doctrine of Severability to ordinary legislation as summarised in R.M.D. Chamarbaugkwalla v. The Union of India (1957) S.C.R. 930, indicates that para 7 alone is not severable to permit retention of the remaining part of the Tenth Schedule as valid legislation. The settled test whether the enactment would have been made without para 7 indicates that the legislative intent was to make the enactment only with para 7 therein and not without it. This intention is manifest throughout and evident from the fact that but for para 7 the enactment did not require the discipline of Article 368 and exercise of the constituent power. Para 7 follows para 6 the contents of which indicate the importance given to para 7 while enacting the Tenth Schedule. The entire exercise, as reiterated time and again in the debates, particularly the Speech of the Law Minister while piloting the Bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha, was to emphasise that total exclusion of judicial review of the Speaker's decision by all courts including the Supreme Court, was the prime object of enacting the Tenth Schedule. The entire legislative history shows this. How can the Doctrine of Severability be applied in such a situation to retain the Tenth Schedule striking down para 7 alone? This is a further reason for inapplicability of this doctrine.

Point 'F' - Violation of basic features

97. The provisions in the Tenth Schedule minus para 7, assuming para 7 to be severable as held in the majority opinion, can be sustained only if they do not violate the basic structure of the Constitution or damage any of its basic features. This is settled by Kesavananda Bharati - (1973) Supp. S.C.R. 1; The question, therefore, is whether there is violation of any of the basic features of the Constitution by the remaining part of the Tenth Schedule, even assuming the absence of ratification in accordance with the proviso to Clause (2) of Article 368 results in invalidation of para 7 alone.

98. Democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority. It is only by a fair adjudication of such disputes relating to validity of elections and subsequent disqualifications of members that true reflection of the electoral mandate and governance by rule of law essential for democracy can be ensured. In the democratic pattern adopted in our Constitution, not only the resolution of election dispute is entrusted to a judicial tribunal, but even the decision on questions as to disqualification of members under Articles 103 and 192 is by the President/ Governor in accordance with the opinion of the Election Commission. The constitutional scheme, therefore, for decision on questions as to disqualification of members after being duly elected, contemplates adjudication of such disputes by an independent authority outside the House, namely, President/Governor in accordance with the opinion of the Election Commission, all of whom are high constitutional functionaries with security of tenure independent of the will of the House. Sub-clause (e) of Clause (1) in Articles 102 and 191 which provide for enactment of any law by the Parliament to prescribe any disqualification other than those prescribed in the earlier sub-clauses of Clause (1), clearly indicates that all disqualifications of members were contemplated within the scope of Articles 102 and 191. Accordingly, all disqualifications including disqualification on the ground of defection, in our constitutional scheme, are different species of the same genus, namely, disqualification, and the constitutional scheme does not contemplate any difference in their basic traits and treatment. It is undisputed that the disqualification on the ground of defection could as well have been prescribed by an ordinary law made by the Parliament under Articles 102(1)(e) and 191(1)(e) instead of by resort to the constituent power of enacting the Tenth Schedule. This itself indicates that all disqualifications of members according to the constitutional scheme were meant to be decided by an independent authority outside the House such as the President/Governor, in accordance with the opinion of another similar independent constitutional functionary, the Election Commission of India, who enjoys the security of tenure of a Supreme Court Judge with the same terms and conditions of office. Thus, for the purpose of entrusting the decision on the question of disqualification of a member, the constitutional scheme envisages an independent authority outside the House and not within it, which may be dependent on the pleasure of the majority in the House for its tenure.

99. The Speaker's office is undoubtedly high and has considerable aura with the attribute of impartiality. This aura of the office was even greater when the Constitution was framed and yet the farmers of the Constitution did not choose to vest the authority of adjudicating disputes as to disqualification of members to the Speaker; and provision was made in Articles 103 and 192 for decision of such disputes by the President/Governor in accordance with the opinion of the Election Commission. The reason is not far to seek.

100. The Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out. The question as to disqualification of a member has adjudicatory disposition and, therefore, requires the decision to be rendered in consonance with the scheme for adjudication of disputes. Rule of law has in it firmly entrenched, natural justice, of which, Rule against Bias is a necessary concomitant; and basic

postulates of Rule against Bias are: Nemojudex in causa sua - 'A Judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased'; and 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' This appears to be the underlying principle adopted by the framers of the Constitution in not designating the Speaker as the authority to decide election disputes and questions as to disqualification of members under Articles 103, 192 and 329 and opting for an independent authority outside the House. The framers of the Constitution had in this manner kept the office of the Speaker away from this controversy. There is nothing unusual in this scheme if we bear in mind that the final authority for removal of a Judge of the Supreme Court and High Court is outside the judiciary in the Parliament under Article 124(4). On the same principle the authority to decide the question of disqualification of a member of legislature is outside the House as envisaged by Articles 103 and 192.

101. In the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against the Speaker's decision to any independent outside authority. This departure in the Tenth Schedule is a reverse trend and violates a basic feature of the Constitution since the Speaker cannot be treated as an authority contemplated for being entrusted with this function by the basic postulates of the Constitution, notwithstanding the great dignity attaching to that office with the attribute of impartiality.

102. It is the Vice-President of India who is ex-officio Chairman of the Rajya Sabha and his position, being akin to that of the President of India, is different from that of the Speaker. Nothing said herein relating to the office of the Speaker applies to the Chairman of the Rajya Sabha, that is, the Vice-President of India. However, the only authority named for the Lok Sabha and the Legislative Assemblies is the Speaker of the House and entrustment of this adjudicatory function fouls with the constitutional scheme and, therefore, violates a basic feature of the Constitution. Remaining part of the Tenth Schedule also is rendered invalid notwithstanding the fact that this defect would not apply to the Rajya Sabha alone whose Chairman is the Vice-President of India, since the Tenth Schedule becomes unworkable for the Lok Sabha and the State Legislatures. The statutory exception of Doctrine of Necessity has no application since designation of authority in the Tenth Schedule is made by choice while enacting the legislation instead of adopting the other available options.

103. Since the conferment of authority is on the Speaker and that provision cannot be sustained for the reason given, even without para 7, the entire Tenth Schedule is rendered invalid in the absence of any valid authority for decision of the dispute.

104. Thus, even if the entire Tenth Schedule cannot be held unconstitutional merely on the ground of absence of ratification of the Bill, assuming it is permissible to strike down para 7 alone, the remaining part of the Tenth Schedule is rendered unconstitutional also on account of violation of the aforesaid basic feature.

105. Irrespective of the view on the question of effect of absence of ratification, the entire Tenth Schedule must be struck down as unconstitutional.

Point 'G' - Other contentions

106. We have reached the conclusion that para 7 of the Tenth Schedule is unconstitutional; that the entire Tenth Schedule is constitutionally invalid in the absence of prior ratification in accordance with the proviso to Clause (2) of Article 368; that the Doctrine of Severability does not apply in the present case of a constitutional amendment which suffers from the defect of absence of ratification as required by the proviso to Clause (2) of Article 368; that the remaining part of the Tenth Schedule minus para 7 is also unconstitutional for violation of a basic feature of the Constitution; and that the entire Tenth Schedule is, therefore, constitutionally invalid rendering the Constitution (Fifty-Second Amendment) Act, 1985 still born and an abortive attempt to amend the Constitution. In view of this conclusion, it is not necessary for us to express our concluded opinion on the other grounds of challenge to the constitutional validity of the entire Tenth Schedule urged at the hearing on the basis of alleged violation of certain other basic features of the Constitution including the right of members based on Article 105 of the Constitution.

107. These are our detailed reasons for the operative conclusions pronounced by us earlier on November 12, 1991.