

(1981) 11 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Writ Petition No's. 319 and 641 of 1980 and Reference No's. 509 of 1980 and 132 of 1981

Mian Bashir Ahmad and etc.

APPELLANT

Vs

State of J. and K. and Others

RESPONDENT

Date of Decision : 13-11-1981

Acts Referred:

Constitution of India, 1950 — Article 105, 14, 19, 19(1), 226

Constitution of Jammu and Kashmir, 1956 — Section 72

Jammu and Kashmir Representation of the People Act, 1957 — Section 24G

Citation : (1981) 11 J&K CK 0002

Hon'ble Judges : Mufti Baha-Ud-Din Farooqi, Acting C.J.; I.K. Kotwal, J; G.M. Mir, J; A.S. Anand, J

Bench : Full Bench

Advocate : O.N. Tickoo, H.L. Bhagotra, L.K. Moza and M.C. Bhandaray, for the Appellant; Soli J. Sorabjee Altaf Ahmad, A.K. Malik, General and P.L. Handoo, for the Respondent

Judgement

Mufti-Baha-Ud-Din, Ag. C.J.

1. At the last general election to the Jammu and Kashmir Legislative Assembly held in July, 1977, the National Conference party was returned with

a large majority. Those returned on the National Conference Ticket included S/ Shri Malik Mohi-ud-Din. and Mian Bashir Ahmad. Thereafter, Shri

Malik Mohi-ud-Din was elected as Speaker of the Assembly on 8-9-1977 and continued to discharge his duties as such till 11-10-1980 when he

was removed from office following a 'No confidence motion' moved against him.

2. On 30-6-1980, Shri Ghulam Mohi-ud-Din, Secretary of the National Conference Legislature party represented to the Speaker that Shri Mian

Bashir Ahmad had voluntarily given up the membership of the National Conference party and joined the Cong-I and that thereby he had incurred

disqualification u/s 24-G of the J. & K. Representation of the People Act, 1957 (shortly 'the Act') for being a member of the Legislative Assembly.

He prayed that appropriate action be taken under law in the matter. The Speaker issued a show cause notice to Sh. Bashir Ahmad. Shri Mian

Bashir Ahmad submitted objections and denied having incurred any disqualification. Thereupon, on 27-10-1980 the Speaker referred the matter

for decision to this Court as required u/s 70 of the Constitution of J. & K. (shortly 'the State Constitution'). The reference has been registered as C.

M. P. No. 509 of 1980. In the meantime, Shri Mian Bashir Ahmad moved a writ petition in this Court under Article 226 of the Constitution of

India (shortly 'the Union Constitution') challenging the constitutional validity of Section 24-G of the Act and the action of the Speaker based

thereon. The said petition has been registered as writ petition No. 319 of 1980.

3. On 2-12-1980, Shri Ghulam Mohi-ud-Din made another representation to the Speaker to the effect that Shri Malik Mohi-ud-Din had also

voluntarily given up the membership of the National Conference party and joined Cong-I party and thereby incurred disqualification for being a

member of the Legislative Assembly. He requested the Speaker to take necessary action as provided by law in the matter. In response to the show

cause notice issued by the Speaker, Shri Malik Mohi-ud-Din submitted objections and refused to admit that he had incurred any disqualification.

On 11-2-1981 the Speaker referred this matter as well for decision of this Court as provided u/s 70 of the State Constitution. The reference has

been registered as C. M. P. No. 132 of 1981. Meanwhile, on 17-12-1980, Shri Malik Mohi-ud-Din also moved a writ petition in this Court and

challenged the constitutional validity of Section 24-G of the Act and the action of the Speaker based thereon. The writ petition has been registered

as Writ Petition No. 641 of 1980. This judgment will govern the disposal of both the writ petitions as also the connected references.

4. Before us, the validity of Section 24-G of the Act was challenged on the following grounds :--

1. That Section 24-G is violative of Article 19(1)(a) and Article 19(1)(c) of the Union Constitution inasmuch as it imposes restrictions on freedom

of speech and expression guaranteed under Article 19(1)(a) and freedom of association guaranteed under Article 19(1)(c) and that these

- restrictions are impermissible under Article 19(2) and Article 19(4) respectively;
2. that Section 24-G, in so far as it imposes re-strictions on the members of the recognized parties only, is violative of the right of equality enshrined in Article 14 of the Union Constitution;
3. that Section 24-G is ultra vires the provisions of Section 69 (1) (c) inasmuch as any disqualification provided by law made u/s 69(1)(e) should have the same genus as the disqualifications provided in Section 69 (1) (a) to (d), but the impugned section does not satisfy this condition;
4. that Section 24-G violates Section 72 of the State, Constitution inasmuch as it interferes with the powers and immunities conferred on the members of the State Legislature under the said section;
5. that Section 24-G is ultra vires and inoperative as it is destructive of the basic structure of the State Constitution.

5. In order to appreciate and determine these points, it will be necessary to refer to the provisions of Section 24-G of the Act. Section 24-G

reads:--

24-G. Disqualification for being a member of either House of Legislature. A person shall be disqualified for being a member of the Legislative

Assembly or the Legislative Council of the State:--

(a) if he, having been elected as such member voluntarily gives up his membership of the political party by which he was set up as a candidate in

such election or of which he becomes a member after such election;

(b) If he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorised

by it in this behalf without obtaining prior permission of such party or person.

Explanation: For the purposes of this section political party means :

(a) A political party classified as a recognised political party under any law or any rule, regulation, order or notification having the force of law with

respect to matters relating to, or in connection with, election to the Legislative Assembly or the Legislative Council of the State;

(ii) Any other political party which is recognised by the Speaker of the Legislative Assembly or, as the case may be, by the Chairman of the

Legislative Council, as a political party.

6. This section was inserted into the Principal Act by the J. & K. Representation of

People (Amendment) Act, 1979 which came into force with effect from 29th Sept., 1979. The Amending Act, as the Statement of Objects and Reasons shows, was enacted ""with a view to disqualifying a defector from being a member of the State Legislature"" and the driving force behind the Act was the ""widespread concern over the problems of Political defections"". This statement, we are told at the bar, has its roots in the post-independence history of political defections and the baneful effect that they had on the functioning of democracy in our country. In this connection, our attention was invited to various writings and reports on the subject, to which I shall presently refer.

7. In his book title 'Politics of Power' by Subash C. Kashyap, the learned author has said:

Significantly, almost every single case of collapse of a State Government during this period was the direct result of change of allegiance by legislators, several other States where Governments did not topple were also affected, to a larger or smaller degree, by the changing of party allegiance by legislators. Defections on such a vast scale and of such great consequence to the country's political system were unprecedented.

According to some commentators, these defections were merely a North Indian phenomenon and stemmed from the backwardness and lack of

political maturity and awareness in the region. However, this is factually incorrect. Viewed in the historical perspective, it would be seen that if in

the pre-independence period lead in this matter was given by U. P., after independence, States like Tamil Nadu, Andhra and Kerala were among

the first bastions of defection politics in India. After the 1967 general elections also, States in the southern parts of India -- or for that matter, in any

other large part -- have not been completely immune from defection politics. The outstanding performers in the earlier stages of the post-1967

period were the State of Har-yana, U. P., Rajasthan, Madhya Pradesh, Punjab, Bihar and West Bengal and the Union Territories of Manipur and

Pondi-cherry. It meant constitutional crisis or near crisis in almost each one of them at one time or the other.

The split of the Congress in November, 1969 added a new dimension to the phenomenon. After the 1971 election to Lok Sabha, the trend

reached its climax when three Governments in Mysore, Uttar Pradesh and

Gujarat fell in quick succession in the last week of March, 1971. The fall of the Veerendra Patil, Ministry of the Congress (O) was followed by the imposition of the President's Rule in the State on March 27. The S. V. D. Ministry in Uttar Pradesh was defeated in the Assembly on March 30 and the Congress (R) leader, Shri Kamalapati Tripathi was invited by the Governor to form a new government. The last of old Congress Governments appeared to be on the way out with Shri Hitendra Desai having submitted the resignation of his Ministry in Gujarat on March 31 even if only as a calculated move to make one last effort for the survival of his leadership and possible revival of Congress (O) majority by inducing some return defections. The resignation was submitted quickly after bulk defections from Congress (O) to the Congress (R) in the wake of the mass support received by the latter in the elections to Lok Sabha. The fate of the S. V. D. Ministry in Bihar appeared to be no better. The coalition was tottering under the mounting pressure of the increasing members in the opposition ranks.

Since the fourth general elections in 1971, from among the 4,000 and odd members of the Lok Sabha and the Legislative Assemblies of the States and the Union Territories there have been some 1969 cases of defections. Thus, by the end of March 1971, approximately 50 per cent legislators changed their affiliations. Several legislators did so more than once. In the case of State Assemblies, as much as 52.5 per cent of the total membership has been involved or, in other words, more than half of the State legislators changed their political affiliations at least once. The percentage would appear much more alarming if we leave out the membership in States like Tamil Nadu, Andhra, Assam, Jammu and Kashmir, Nagaland and Maharashtra where governments, whether Congress or non-Congress, somehow happened to be more stable and changes of political affiliations or defections from parties did not become so very frequent.

With an average of more than one legislator changing his label each day and for some time about one Government falling each month, it is not surprising that the subject came to be discussed rather widely -- even though somewhat loosely -- by intellectuals, legislators, politicians and others. During the last four years, several round-table conferences, symposia and seminars on this subject have been held under the auspices of

learned societies.

The learned author has collected the data and made it a part of his book in a tabular form indicating the gains and losses of the various political

parties through defections; the number of defectors who were rewarded with ministerial offices and the effect that it had on the rise and fall of the

representative Governments in the country. The highlights of the data so collected are that, between the years 1967 and 1972, 60% of the elected

legislators defected at least once and most of the 51 ministries sworn in between March 1967 and December, 1970 fell because of the defections.

For similar reasons three ministries of Mysore, U. P. and Gujarat fell within one week of their formation after 1971 mid-term elections.

8. In his book titled ""Does our Constitution need a second look ?"" by Sh. Paras Dewan, Professor of Law, Punjab University, the learned author

has discussed the problem of political defections under the head ""Anti defection law: Do we need it"" and said:--

The history of virulent politics of defections relates to the 1967 General Elections. Before the 1967 General Elections, the Congress had enjoyed

the luxurious two-thirds majority in the Lok Sabha and in most State Legislative Assemblies, and, therefore, the scope for politics of defection was

not much defections were so few as to attract any notice. But in the 1967 General Elections the Congress was reduced to a bare majority party in

the Lok Sabha. Worst happened in the States, not merely the Congress lost its hegemony, hut it was not in a position to form its Government in

quite a few States. The curious phenomenon that occurred was that in most of the States, no single party was in a position to form a Government

The Congress could not secure absolute majority in West Bengal, Bihar, Uttar Pradesh, Rajasthan and Punjab, and was reduced to the second

position in Kerala, Madras and Orissa. This led to the emergence of coalition, or the so-called united front, governments. The heterogenous

opposition parties which failed to forge an alliance before the elections came together with the only object of wielding power; anti-Congressism

was the only bond that united them. The political parties which fought each other bitterly, the political parties which had rabid ideological

differences, came together. The most united front governments included within their fold the entire political spectrum of all non-Congress political

parties. Some shared the power, some became merely the alliance partners. The ideological cleavage between the political parties continued, but with a view to wielding power, the alliance partners compromised on matters of principle. For instance, in Punjab the Akali Dal (Sant Fateh Singh Group) and the Jan Sangh came together and formed a coalition government on the basis of a common minimum programme. The coalition government was supported by all the other non-congress parties by the Master Tara Singh Akali Group, the CPI, the CPM, the SSP, the Republican Party and the six Independents. In some states the United Front Governments came into existence without any common minimum programme and with the help of the Congress defectors. This is what happened in Uttar Pradesh, Haryana and Bihar. But the cleavage between these heterogeneous groups was very deep-seated. The differences could be shelved, but could not be ironed out. These opportunistic alliances had a very arrow political goal to remain in power.

Based and sustained as these united front governments were on the politics of defections the toppling game was in full swing, adding the most ignominious chapter in the history of the parliamentary institutions. Of these coalition governments -- in the grand experiment in ignominy -- the Jan Sangh, Akali Coalition is, by far, the best case history. With a ministry of five and with a backing of 53 MLA's out of 104, the Gurnam Singh Government came into being. But within a few weeks the Government swelled to twenty ministers. Practically each Congress defector was provided with a berth in the Ministry. The Congress did not lag behind in the game of defection. End justified means. Foulest possible means were adopted to produce defections from each other's rank; no price was too heavy. The differences between Gurnam Singh and Laxman Singh Gill also surfaced. Gill with sixteen MLA's left the United Front government and thus within nine months the Gurnam Singh Government fell. Then came the Gill Govt. with the Congress support, but could not survive beyond nine months. On August 23, 1968 the President's rule was imposed on the State. The story of government-making is much more bleak elsewhere, Bihar presented an extreme example of politics of defections. The governments came into being and were thrown out almost over-night. In Bihar at least 85 MLA's changed sides twice, and some of them even four

times. The same drama was staged in other states with more or less the same fanfare and infamy.

The unattached independents and party defectors held the balance and dictated the terms to whichever side desired to form a Government.

Defections and multiple floor crossing inducted a pattern of flux and instability to the Indian politics in which the government was at the mercy of

floating independents and party defectors who enjoyed powers far greater than their numbers would ordinarily command. The number of defectors

from Congress was 175 and to the Congress was 139 in the States during one year after the 1967 general elections. Between 1967 and 1970

some 800 MLA's were involved in the politics of defections; of the 155 were rewarded with office-84 of them securing cabinet rank.

It became obvious that the common hatred for Congress or bare anti Congression could not be a substitute for policy. And within a span of two

years, one after the other, all the united Front Governments fell, leading to the mid-term poll of 1969.

The politics of defection has put a heavy strain on the functioning of democracy and parliamentary form of Government in India. The so-called

united front governments had neither ideological cohesion nor organisational bond. The people reacted against defectors. They mocked and jeered

at the defectors with the remark of ""Aya Ram Gaya Ram"". It was voiced that an elected representative should not be allowed to change his party's

loyalty without seeking popular approval in a bye-election. A committee against defections was set up with JP as one of its members. The Election

Commission came out with the suggestion that the cure for defection was the reduction of the number of political parties. The Union Home

Ministry's prescription was that a law should be enacted under which the defector would cease to be the member of the legislature.

9. In the report of the Committee on defections appointed by the Lok Sabha on 8th December, 1967 under the Chairmanship of Shri Y. B.

Chavan, the position has been stated thus:--

There have been only few cases of the defector having taken his electors or the general public into confidence as to their reasons for his defection

either before or after the fact. There is only one known instance of a defector resigning his seat following his defection and contesting a bye-

election: this was Shri Hardwari Lal, a Congressman who defected with Rao Birendra Singh. Shri Lal resigned his seat and contested and won the

bye-election from Bahadurgarh Vidhan Sabha Constituency, defeating his nearest rival, Shri Hari Singh Rathi (Congress) by 13,771, votes, (Shri

Lal was Education Minister in Rao's Cabinet and has now joined Swantantra party)

Role of money and other dishonourable inducements.

10. In his report to the President recommending some (issue) of proclamation under Article 356 of the Constitution the Governor of Haryana said:

Allegations have been made by the opposition that the Ministry is continuing in power through corruption, bribery, political victimisation and

distribution of offices, but then the opposition is also apparently securing defections through no better means or through no clearer methods.

Allegations are being openly made by both sides that money is being paid to defectors. While it is difficult to say how far these allegations are true,

there are good reasons to believe that the defections are being secured by not too honourable means.

11. There have been press reports and comments about money being freely used in West Bengal to induce potential defectors to make up their

minds.

Involvement of a large number within a short span of time.

12. It is unnecessary to labour the obvious point that there have been 438 defections within the short period following the General Election

compared to 542 (roughly) in the earlier years.

Multiple acts of defection by the same person or set of persons.

13. This has also been a remarkable characteristic, especially in Haryana where one Congress legislator defected four time in the course of a few

weeks, another Congressman defected thrice and seven legislator twice. On the whole 24 of the legislators who defected from the Congress later

changed their minds and re-defected to it.

Few instances of constituency disapproval of defector's conduct.

14. In a paper on ""Crossing the Floor"", M. Ruthnaswamy, M. P. says :

..... the most depressing feature of these changes of political allegiance is that there is no reaction among the people that ought to be most

concerned. They are the people who elected the political turncoat to the

Legislature. While party executive, Legislators, the Press, the general public are agitated about these changes of party allegiance, the people who are responsible for the political existence of these Legislatures seems to be concerned not at all about their cessation from the party to which they had belonged at the time of election. In other countries the constituencies are agitated about the change of party allegiance of the men they had elected. They either call upon them to seek re-election or acquiesce the change.

Here in India there is no such reaction in the constituencies. Even the party constituency units seem to be unconcerned.

Shri R. K. Khadilkar, Deputy Speaker, not only corroborates this but says that he actually knew of instances in which the defectors were hailed, garlanded and taken out in public processions.

15. For the last few years the state of defections has been reflected in a statement which was produced before us at the time of hearing and is

reproduced below:--

DEFLECTIONS

MPs and MLAs/MLCs who either resigned from one party and joined another, or resigned only.

MPs 1977 1978 1979 1980

41 57 69 74

1. Andhra Pradesh 11 62 37 10

2. Assam 11 3 21 31

3. Arunachal Pradesh 2 14 2

4. Bihar 8 1 79 17

5. Gujarat 2 2 3 2

6. Haryana 2 52 34

7. Himachal Pradesh 2 12 44

8. Jammu & Kashmir 2 19 10 2

9. Karnataka 8 231 102

10. Kerala 4 9 1

11. Madhya Pradesh 13 39 18

12. Mizoram 17 1 1
13. Maharashtra 11 34 16 31
14. Manipur 34 2 17
15. Meghalaya 4 3 6
16. Nagaland 2 1 1 15
17. Orissa 7 12 17
18. Pondicherry 27 7 1
19. Punjab 3 1
20. Rajasthan 10 1 52 15
21. Tamilnadu 1 6 17
22. Sikkim 1 4 4 6
23. Tripura 1 1
24. Uttar Pradesh 43 18 55 68
25. West Bengal 4 2 6 2
26. Goa, Daman, Diu 1 1
27. Andaman Nicobar 1 1 1
28. Delhi 25 1

16. Before I proceed to consider the grounds of challenge urged before us, let me dispose of an argument advanced on behalf of the State by Mr.

Soli Sorabjee. The argument is that the oft-repeated dictum of the Supreme Court, to which the decisions in Naresh Shridhar Mirajkar and Others

Vs. State of Maharashtra and Another, and U.N.A. Rao Vs. Smt. Indira Gandhi, bear ample testimony, is that in dealing with constitutional

matters, the court should confine its decision to those points only which necessarily arise for determination on the facts of the case, and, that acting

on this rule, we should direct ourselves to the determination of the validity of only Clause (a) of the impugned section. For, as the learned counsel

put it, it is nobody's case in the writ petitions that any action has been taken by virtue of Clause (b) thereof. In dealing with the argument, it will be

pertinent to note that the petitioner has challenged the validity of both Clauses (a) and (b) on the ground that they are violative of Articles 14 and

19 of the Union Constitution. The question that inevitably arises is whether it is

possible to challenge the legislation as being violative of any of the fundamental rights guaranteed under Part III of the Union Constitution even when no action has been taken under it.

17. In *The State of West Bengal Vs. Anwar Ali Sarkar*, the argument was that equality rule is not violated simply because the statute confers

unregulated discretion on officers or on administrative agencies. In such cases, it may be possible to attack the legislation on the ground of

improper delegation of authority or the acts of the officers on the ground of wrongful or mala fide exercise of powers but no question of

infringement of Article 14 of the Constitution could possibly arise. The Supreme Court repelled the argument and held that when a statute itself

makes discrimination without any proper or reasonable basis, the Statute would be invalidated for being in conflict with the equal protection clause

and the question as to how it has actually worked out may not necessarily be a material fact for consideration. The point that emerges from the

decision is that if a Statute itself violates any of the fundamental rights enshrined in Part III of the Constitution, the Statute would be invalidated

irrespective of the fact whether any action has been taken under it. Consequently it is possible to challenge the legislation as being violative of any

of the fundamental rights even if no action has been taken under it. In this view, we cannot ignore the challenge to Clause (b) based on Articles 14

and 19, as it is, on the simple ground that no action has been taken under it. We must as well consider and dispose of that challenge on merits.

18. Let me now advert to the impugned Section 24-G of the Act. The statement of objects and reasons shows that the section was enacted with a

view to disqualifying a defector for being a member of the either House of the State legislature. On its terms, this section provides that a person

shall be disqualified for being a member of the Legislative Assembly or Legislative Council of the State either if he voluntarily gives up the

membership of the party by which he was set up as a candidate in the election or of which he became a member after such election or if he votes

or abstains from voting in such House contrary to the directions or whip issued by such political party. While interpreting this section it is necessary

to emphasise that the word 'voluntarily' used in this section denotes willing dissociation and is used in contradistinction to the word 'involuntary'

implying unwilling expulsion from the party. The words 'in such House' qualify the words 'votes or abstains from voting' and are intended to limit

their operation to the voting which takes place when the House is sitting and its business is being transacted. Thus this section would be applicable

and a legislator would incur disqualification if he willingly gives up the party habitat or if he flouts or disobeys the party's whip or direction in the

matter of voting in the course of transaction of its business by the House.

19. It is a settled principle that in dealing with the constitutionality of a legislative enactment with reference to fundamental rights, the Court must

have regard to pith and substance and not merely to the form and appearance and, that the validity of the enactment must be tested by its direct

and immediate effect. *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and Bachan Singh Vs. State of Punjab, .* It is also a settled

principle that in order to determine the true nature and character of a legislative enactment, it is permissible to take into consideration the history

behind the enactment, the evils that it was intended to eradicate and the circumstances under which it was enacted. *Hamdard Dawakhana and*

Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of

India (UOI) and Others, . I have already set out the material which was before the State Legislature and upon which it set out to enact the

impugned section. This material shows that political defections are now an order of the day in this State and, more so, in other States in India and

that they generally take place not because of genuine proddings of conscience but because of personal aggrandisement and rank opportunism.

They have become a pernicious form of political corruption threatening the functioning of the parliamentary democracy contemplated by the

Constitution which has necessitated the legislation. Viewed on this background, it cannot be said that the object of the section is merely to curb

dissent but the object, truly and properly understood, is to eradicate the evil of political defections in the State. In actual operation, however, the

direct and inevitable effect of the section is that the legislators' liberty to vote in the legislature is impaired and, moreover, he will not be able to

leave his party habitat so long as he continues to be a legislator. It is in the light of the background that we have to consider the validity of the

impugned section.

20. First comes the challenge based on Article 19(1). Only two clauses have been relied upon and they are clauses (1) (a) and (1) (c). Articles

19(1)(a) and 19(1)(c) guarantee to all the citizens freedom of speech and expression and freedom of association which are undoubtedly among the

'most precious and necessary freedoms of self governing people'". The petitioners are citizens. They have these freedoms guaranteed to them and

the question is whether Section 24 (G) abridges or takes away these freedoms. The arguments of Mr. Bhandaray, appearing for the petitioners, is

that it does. For this, he has relied upon the direct and immediate consequence flowing from the impugned section that I have spelt out above. His

contention is twofold. Firstly, that freedom to vote is an aspect of freedom of speech and expression and, so considered, the impugned section

abridges the legislator's freedom of speech in the Legislature and that such abridgment is not sustained or saved by Article 19(2). Secondly, that

freedom of association includes freedom to dissociate and, so viewed, the impugned section restricts the petitioners' freedom of association

guaranteed under Article 19(1)(c) and that the restrictions cannot be vindicated under Article 19(4).

21. The question that arises for consideration on the basis of the first contention is: what is the nature of legislator's right of speech in the

Legislature? Is this a right guaranteed under Article 19(1)(a) of the Union Constitution ? This inevitably raises the larger question : what is the

nature and character of the powers claimed by the legislators? In *Stockdale v. Hansard* (1839) 9 Ad&E 11 Lord Denman, C. J. has dealt with this

question with reference to the House of Commons in the following passage :

In all the cases and authorities, from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its

members, in relation to the rest of the community, have been either some privilege properly so called, i. e. an exemption from some duty, burden,

attendance, or liability to which others are subject, or the power of sending for and examining all persons and things and the punishing all contempts

committed against their authority. Both of these powers proceed on the same grounds, viz., the necessity that the House of Commons and the

members thereof should in no way be obstructed in the performance of their high

and important duties, and that, if the House be so obstructed either collectively, or in the persons of the individual members, the remedy should be in its own hands, and immediate without the delay of resorting to the ordinary Tribunals of the country. Hence liberty of speech within the walls of the House, freedom from arrest, and from some other restraints and duties during the sitting of Parliament, and for a reasonable time before and after its sitting (with the exception of treason, felony, and breach of the peace), which, although the privileges, properly so styled, of the individual members, are yet the privileges of the House.

and again as under:--

Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All

the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those

functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the

most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the

rights of others, is a very different thing. It is to be regarded not with tenderness, but with jealousy; and, unless the legality of it be most clearly

established, those who act under it must be answerable for the consequences.

(See cases in Constitutional Law by D. L. Keir and F. H. Lawson, 5th Edition, p. 270 at p. 282.)

21-A. These observations make it clear that the powers claimed by the House of Commons and its members, properly styled, are the privileges of

the House and its members. These privileges are available to a person so long as he remains a member of the House and cannot be regarded as

fundamental rights. This is equally true about the Parliament and its members and the State Legislatures and their members in our country. For, the

Union Constitution and State Constitution are both based on the British Model. In fact, the Supreme Court has expressly laid down in *K. Anandan*

Nambiar and Another Vs. Chief Secretary, Government of Madras and Others, that the totality of the rights claimed by a legislator are privileges

and cannot claim the status of fundamental rights. In that case, the petitioner was a member of the Parliament. He was detained by virtue of an

order passed under Rule 30 (1) (b) and (4) of the Defence of India Rules, 1962 by the Govt. of Madras. The petitioner challenged the order of

detention. It was argued on his behalf by Mr. Setalvad that in so far as Rule 30 (1) (b) permits a member of Parliament to be detained, it

contravenes the constitutional rights of members of Parliament. He urged that a member of Parliament like a member of any other State Legislature

has constitutional rights to function as such member and to participate in the business of the House to which he belongs. He is entitled to attend

every session of the Parliament, to take part in the debates and to record his vote so long as he is qualified to be such member. No law could

validly take away his right of function as such member. He urged that the right to participate in the business of the legislative chamber to which he

belongs is the constitutional right of a legislator and that this constitutional right could be regarded as his fundamental right and that inasmuch as the

relevant rule authorising the detention of a legislator prevents him from exercising such right, the rule was invalid. The Supreme Court dealt with this

argument at length and concluded (at p. 664):--

We are, therefore, satisfied that on a close examination of the articles on which Mr. Setalvad has relied, the whole basis of his argument breaks

down, because the rights which he calls constitutional rights are rights accruing to the members of Parliament after they are elected, but they are not

constitutional rights in the strict sense, and quite clearly, they are not fundamental rights at all. It may be that sometimes in discussing the significance

or importance of the right of freedom of speech guaranteed by Article 105 (1) and (2) it may have been described as a fundamental right, but the

totality of rights on which Mr. Setalvad relies cannot claim the status of fundamental rights at all, and the freedom of speech on which so much

reliance is placed is a part of the privileges falling under Article 105, and a plea that a breach has been committed of any of these privileges cannot,

of course, be raised in view of the decision of the Committee of privileges of the House of Commons to which we have just referred. Besides, the

freedom of speech to which Article 105 (1) and (2) refers, would be available to a Member of Parliament when he attends the sessions of the

Parliament. If the order of detention validly prevents him from attending a session of Parliament, no occasion arises for the exercise of the right of

freedom of speech and no complaint can be made that the said right has been invalidly invaded.

22. The decision turned on Article 105 (1) and (2) of the Union Constitution which applies to Parliament and its members. Article 105 (1) and (2)

is in pari materia with Section 72 (1) and (2) of the State Constitution which applies to our State Legislature and its members. Therefore, it must be

held that the powers claimed by our legislators u/s 72 are the privileges of the Houses of Legislature and its members and cannot be regarded as

fundamental rights. A fortiori the right of speech of a legislator in the Legislature is not a fundamental right.

22-A. For the contrary view, reliance was placed on behalf of the petitioner on the decision of the Supreme Court in *M.S.M. Sharma Vs. Sri*

Krishna Sinha and Others, and the opinion of the Supreme Court in regard to a special reference under Article 143 of the Constitution of India In

the matter of: Under Article 143 of the Constitution of India, . In Sharma's case (supra) the factual position was that the petitioner was the editor of

an English daily newspaper called the 'Searchlight' of Patna. He was called upon by the Secretary of the Patna Legislative Assembly to show cause

before the committee of privileges why action should not be taken against him for the breach of privilege of the Speaker of the Assembly because

he had published a speech delivered in the Assembly by a particular member, portions of which had been directed to be expunged by the Speaker.

The Editor moved the Supreme Court under Article 32 of the Union Constitution. His contention was that the notice and the proposed action

contravened his fundamental right to freedom of speech and expression under Article 19(1)(a). The claim was resisted by the House by relying on

Article 194(3). The question arose as to what is the effect of the inter-action of Article 19(1)(a) and Article 194(3), assuming that the alleged

privilege had been proved and was included in the latter part of Article 194(3). While dealing with the question, the Supreme Court held that the

freedom of speech and expression conferred on a legislator under Article 194(1) stands on a higher pedestal than the freedom of speech and

expression guaranteed to a citizen under Article 19(1)(a) and that the provisions of Article 19(1)(a) which is general must yield to Article 194(1)

and the latter part of its Clause (3) which are special. Thus, the case is an authority for the proposition that the legislator's freedom of speech in the

Legislature is separate and independent of Article 19(1)(a) and cannot be regarded as an integral part of the freedom of speech and expression

guaranteed to him as a citizen under the said Article.

23. In the matter of reference under Article 143 of Union Constitution In the matter of: Under Article 143 of the Constitution of India, , Article

194(3) again fell for consideration by the Supreme Court. While dealing with this question, the Court as well referred to Clause (1) of Article 194

and observed (at p. 760):--

Clause (1) makes it clear that the freedom of speech in the Legislature of every State which it prescribes, is subject to the provisions of the

Constitution, and to the rules and standing orders, regulating the procedure of the Legislature. While interpreting this clause, it is necessary to

emphasise that the provisions of the Constitution subject to which freedom of speech has been conferred on the legislators, are not the general

provisions of the Constitution but only such of them as relate to the regulation of the procedure of the Legislature. The rules and standing orders

may regulate the procedure of the Legislature and some of the provisions of the Constitution may also purport to regulate it; these are, for instance,

Articles 208 and 211. The adjectival clause ""regulating the procedure of the Legislature"" govern both the preceding clauses relating to ""the

provisions of the Constitution"" and ""the rules and standing orders"". Therefore, clause (1) confers on the legislators specifically the right of freedom

of speech subject to the limitation prescribed by its first part. It would thus appear that by making this clause subject only to the specified

provisions of the Constitution, the Constitution-makers wanted to make it clear that they thought it necessary to confer on the legislators freedom

of speech separately, and in a sense, independently of Article 19(1)(a). If all that the legislators were entitled to claim was the freedom of speech

and expression enshrined in Article 19(1)(a), it would have been unnecessary to confer the same right specifically in the manner adopted by Article

194(1), and so, it would be legitimate to conclude that Article 19(1)(a) is not one of the provisions of the Constitution which controls the first part

of clause (1) of Article 194.

24. These observations cannot be treated as an authority, for the proposition that the right of speech conferred on a legislator under Article 194(1)

is a fundamental right merely because the Court says that the freedom of speech enjoyed by a legislator on the floor of the House stands on a

higher pedestal than the right of speech and expression guaranteed to a citizen under Article 19(1)(a).

25. In the circumstances stated above, the decisions in the cases of M.S.M. Sharma Vs. Sri Krishna Sinha and Others, and reference under

Article 143 In the matter of: Under Article 143 of the Constitution of India, cannot be treated as authorities for the view that the legislator's right of

speech in the Legislature is a fundamental right. In any event, the later decision in the case of K. Anandan Nambiar and Another Vs. Chief

Secretary, Government of Madras and Others, has set at rest any speculation that one could make in the matter on the basis of these decisions and

it has been categorically laid down that the totality of the rights claimed by a legislator including the right to speak on the floor of the House are

merely privileges although such privileges may be in the case of right to speak on the floor of the House stand on a higher pedestal than such right

guaranteed under Article 19(1)(a) to the citizens generally. It necessarily follows that the freedom of speech enjoyed by a legislator on the floor of

the House is not a fundamental right much less, a fundamental right guaranteed under Article 19(1)(a) of the Constitution.

26. The conclusion is supportable even on the basis of Article 19(1)(a). The freedom of speech and expression guaranteed under Article 19(1)(a)

is not absolute, that is, it does not give a citizen a right to say anything he chooses, at any time, at any place, regardless of circumstances. Apart

from the reasonable restrictions that the State may impose under Art 19 (1), (2), the right is subject to inherent restraints based upon the principle

that in a civil society the members shall respect the rights of each other and that each member shall so exercise his right that he does not cause any

injury to the right of another. Thus there is no fundamental rights for anyone to use the private premises of another person or public premises

dedicated to a specific use for the exercise of his right of freedom of speech and expression. A fortiori, there is no fundamental right for any one to

speak within the walls of the legislative chamber, being the premises dedicated to the transaction of parliamentary business by the members of the

Legislature. Article 19(1) does not attach any special right or privilege to a legislator as distinguished from the members of the public. The freedom

of the legislator is the freedom of any other citizen and to whatever lengths the other citizens in general may go, so also may the legislator, but apart from anything else, his right is no other and no higher. It necessarily follows that, under Article 19(1)(a) a legislator has no fundamental right of speech in the Legislature. If that be so, the restriction on the legislator's right of speech in the Legislature cannot be treated as a restriction on the fundamental right guaranteed to him under Article 19(1)(a).

27. To the view expressed above, support is lent by the decision of the Supreme Court in *Railway Board Representing The Union of India (UOI)*

Vs. Niranjan Singh, In that case the question arose whether the direction given by the General Manager, Northern Railways to the effect that no meetings shall be held by the employees' union within the railway premises was violative of Article 19(1)(a). The Court replied the question in the negative and held (at p. 970) :--

There is no fundamental right for anyone to hold meetings in government premises. The fact that those who work in a public office can go there does not confer on them the right of holding a meeting at that office even if it be the most convenient place to do so. The fact that the citizens of the country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes. Such a limitation is inherent in the exercise of those rights. The validity of that limitation is not to be judged by the tests prescribed by Sub-articles (1) and (3) of Article 19. In other words the contents of the freedoms guaranteed under Clauses (a), (b) and (c) do not include the right to exercise them in the properties belonging to others.

28. For the contrary view, reliance has been placed on behalf of the petitioner on the decisions of the Supreme Court in *Kameshwar Prasad and*

Others Vs. The State of Bihar and Another, and *O.K. Ghosh and Another Vs. E.X. Joseph*, In these cases the Supreme Court has held that a person does not lose his fundamental right by joining the Govt. service. But that is not the same thing as saying that a Government servant has a fundamental right of speech in the Legislature. Therefore the decisions are not helpful to the petitioners.

29. That takes me to the second contention of the learned counsel that the impugned section violates the fundamental right of the petitioner guaranteed under Article 19(1)(c) which is the right to form association or unions. His argument is that the impugned section abridges the petitioners' right to withdraw his membership of the political party to which he belongs and, so viewed, it restricts his freedom of dissociation which is an integral part of the freedom of association guaranteed under Article 19(1)(c). To me, it appears that the argument is not well conceived. The impugned section does not prevent the petitioner from withdrawing his membership of a political party but it only lays down that he shall not continue as a legislator if he withdraws his membership of the political party to which he is attached. Thus, what the impugned section really does is that it takes away the right to continue as a member of the Legislature. Viewed in this light, the impugned section cannot be invalidated. For, there is no fundamental right in any person to continue as a member of the Legislature. The right to stand as a candidate for the election and the right to continue as a member after such election is a statutory right which can be validly and reasonably taken away by a statute. (A) *Jumuna Prasad Mukhariya and Others Vs. Lachhi Ram and Others*, ; (B) *Sakhawat Ali Vs. The State of Orissa*, ; (C) *Ebrahim Suleiman Sait Vs. M.C. Mohammed and Another*, .

30. Even if it is taken that the impugned section restricts the right of the petitioner to withdraw his membership of a political party, the restriction cannot be treated as a fetter on his right of dissociation assuming that such right is an inalienable part of right of association guaranteed under Article 19(1)(c). I say so both on principle and authority. It will be noticed that the impugned section nowhere compels a person to become a member of any political party. He is entitled to join or not any political party at his choice. If he once joins it, he is also entitled to withdraw his membership at his choice and the only impediment in his way is the fact of being a member of the Legislature. Until he continues to be a member of the Legislature, he cannot resign the membership of his party without being prepared to forgo such membership. This might create a difficulty in the matter of a person being able to resign the membership of a political party, but that does not mean that there is an absolute restriction on his right of

resignation. Accordingly it cannot be said that the impugned section interferes with the right of association guaranteed to the petitioner under Article

19(1)(c).

31. To this view, support is lent by the decision of the Supreme Court in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and

Others, . In that case the U. P. Sugarcane (Purchase and Supply) Act, 1953 and the notifications dated 29-9-1954 and 9-11-1955 issued

thereunder were challenged. The notification dated 27-9-1954, issued in exercise of the powers conferred by Section 16 of the Impugned Act

ordered that where no less than 3/4th of the cane growers of the area of operation of a cane growers co-operative society are members of the

society, the occupier of the factory for which the area is assigned shall not purchase or enter into agreement to purchase cane grown by cane

growers except through such cane growers Co-operative Society. It was contended that the impugned Act and the notification dated 17-9-1954

violated the fundamental rights guaranteed under Article 19(1)(c). It was urged that the cane growers co-operative societies were not voluntary

organisations but the cane grower was compelled to become a member of the society before he could sell his sugarcane to a factory. The Supreme

Court repelled the argument as fallacious. The Court observed (at p. 709):

The whole fallacy in the argument urged on behalf of the petitioners lies in this that it ignores that there is no compulsion at all on any cane grower

to become a member of the Cane Growers' Co-operative Society.

and then again as under (at pp. 710-711):--

There is also another fallacy in their argument and it lies in ignoring that no cane grower is prevented from resigning his membership of a Cane

Growers' Co-operative Society. These are voluntary organisations which a cane grower is entitled to join or not at his choice. If he has once joined

it he is also entitled to resign his membership at his choice and the only obstacle to his right of resignation, as has been laid down in the bye-laws of

the society, is the fact of his being indebted to the society, or the fact of his being a surety for debt due by another member of the society.

Until these debts are discharged and also until the crushing season during which the Cane Growers' Co-operative Society has entered into an

agreement with the occupier of a factory is over, a member of a society cannot

resign his membership. These restrictions do not fetter his right to resign his membership of the society. If he became a member of the society he is bound by the bye-laws of the society and can only resign his membership after fulfilling all the conditions which are laid down in the bye-laws of the society.

The cane grower, moreover, is not prevented absolutely from selling his sugarcane. The only person to whom he cannot sell his sugarcane is the

owner of a factory but that does not prevent him from selling his sugar-cane to any other person or for any other purpose, e. g. the manufacture or

production of gur or rab or khandsari or any variety of product other than sugar.

There may be of course difficulties in the matter of his being able to sell the same in that manner but that does not mean that there is an absolute

restriction on his power of disposal of his goods unless, and until he becomes a member of a Cane Growers' Cooperative Society. He is at perfect

liberty not to become a member of a Cane Growers' Co-operative Society if he chooses not to do so and no power on earth can compel him to

become such a member.

Just as he is not bound to become a member of a Cane Growers' Co-operative Society he is equally not bound to offer his sugar-cane for sale to

the occupier of a factory even if he happens to be a cane grower within the area reserved for that factory. His freedom in that behalf is absolutely

unrestricted and we do not see how it can be urged that the provisions of the impugned Act and the notification dated 27-9-54 are violative of his

fundamental right under Article 19(1)(c) of the Constitution.

32. Applying the principle of this decision in the present case, the restriction placed by the impugned section cannot be treated as a fetter on the

right of dissociation guaranteed under Article 19(1)(c).

33. For the reasons abovementioned, I hold that the impugned section does not violate any of the rights of the petitioner guaranteed under Article

19(1)(a) and 19(1)(c) of the Union Constitution. The first ground of attack fails.

34. Equally untenable is the second ground of attack based on Article 14 of the Union Constitution. Article 14 forbids class legislation but does not

forbid reasonable classification for the purpose of law. In order to pass the test of reasonable classification two things must co-exist, namely (1)

that the classification must be founded upon an intelligible differentia which distinguishes persons or things that are grouped together from those left

out of the group and (2) that the differentia must have rational relation with the object sought to be achieved by the legislation in question.

35. The object and purpose of the impugned section is to curb the evil of political defections which are induced by lure for position, power and

other forms of corruption. The classification is of the legislators who belong to recognised political parties or groups and play this game of defection

either by changing their loyalty or by voting against the policy sponsored by their own party or group in the Legislature. Thus the classification has a

rational and reasonable relation with the object and purpose sought to be achieved by the impugned section. It cannot be said to be arbitrary,

fanciful or irrational.

36. For the petitioner it was contended that the classification is under-inclusive and renders the impugned section discriminatory. It was urged that

this classification excludes independent members irrespective of the fact whether they were returned with or without the support of any political

party. It was further urged that the classification also excludes members belonging to the political parties or groups which are not recognised parties

or groups. In this context it was contended that the impugned section does not treat the similarly situated persons similarly and thus violates the

mandate of Article 14 that like persons must be treated in like manner. The argument might appear to be attractive, but tested on the anvil of the

law laid down by the Supreme Court it cannot hold good. The Supreme Court has said more than once that the classification is a matter of

legislative judgment and unless it is arbitrary and fanciful, the Court cannot intervene. The Legislature is free to recognise the degrees of harm and

confine its restrictions to those cases where the need is deemed to be clearest. There is no doctrinaire requirement that the legislation should be all

embracing. (A) *Sakhawat Ali Vs. The State of Orissa*, ; (B) *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, (G) *The State of*

Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, and (D) *In Re: The Special Courts Bill, 1978*, . The piecemeal

approach to a general problem permitted by under-inclusive classification would be justified when it is considered that legislation dealing with such

problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocation might occur, what

evasions might develop, what new evil might be generated in the attempt

The State of Gujarat and Another Vs. Shri Ambica Mills Ltd.,

Ahmedabad and Another, .

37. It cannot be gainsaid that in enacting the impugned legislation, the State Legislature has taken a pioneering step. The legislation seeks to deal

with political activity and the Legislature could well foresee that this move would evoke a mixed reception, as happened when attempts at a similar

legislation were made at the Centre and, as such if the Legislature did not think it proper to bring within the purview of the impugned section each

and every segment of the legislators, it cannot be said that there was no fair reason for the inclusion of some and the exclusion of others. In any

case it is a matter of common knowledge that the legislators belonging to the category of independents or to the category of unrecognised parties

or groups have never posed any problem in OUT State in so far as political defections are concerned. The State Legislature could ill afford to

refuse to recognise this factor. It is here that the principle that a statute must be presumed to be constitutionally valid until the contrary is proved

assumes importance and the challenger must be put to strict proof of the fact that independent members and members of unrecognised parties or

groups too had indulged in the game of defection in our State. There is, however, no such evidence available on the file. In the circumstances, the

fact that the classification is under-inclusive would not render it arbitrary or unreasonable.

38. It was next contended that the classification also suffers from the vice of over-inclusion which renders it bad in law. It was urged that the

classification purports to take in bona fide dissenters, that is, persons who might decide to oppose their party on grounds of conscience. It was

further urged that classification also includes breakaway parties or groups even where such parties or groups have dissociated themselves from the

parent body for bona fide reasons as for example where the parent body is following undemocratic policies. On this premise it was contended that

the classification takes in categories of persons who do not stand on the same footing as those covered by the impugned section and the result is

that the classification does not only include those who are similarly situated with respect to the purpose of the impugned section but others as well

who are not so situated and that this is what Article 14 does not countenance. Here again the argument might appear to be attractive but it does

not stand scrutiny. It is a well settled principle of law that classification need not be constituted by any exact or scientific exclusion or inclusion of

persons or things. The Courts should not insist on elusive exactness or apply doctrinaire test for determining the validity of classification in a given

case. In *Re: The Special Courts Bill, 1978*, , some hardship is bound to occur peripherally in any mode of classification and a few hard cases

cannot guide the Court in upsetting the legislative compartmentalisation *B. Banerjee Vs. Smt. Anita Pan*, . These principles are applicable with

greater force in the present case. Here, legislation is intended to deal with evils of political defections which pose a peril to the Constitution. Can it

be said with an amount of force that any such legislation can be efficiently enforced without a few genuine dissenters being hit in the process?

Should the Court's attitude be that the State should either leave out all genuine dissenters or else not act at all ? I say, certainly not. In my opinion

any effort to strike at the evil should not be hindered by the consideration that the exercise demands some price because in every crusade for a

cause, there are bound to be martyrs. Perhaps there can be no greater cause than the cause intended to be served by the impugned legislation,

namely, the eradication of the evil of defection. Dealing with the subject of Defections, Sh. H. M. Seervai, a noted jurist, has said:

First in 1971 and then in 1978 the present writer pointed out the grave threat which defections posed to the working of our free democratic

Constitution. At that time defections had not invaded the Union so as to "topple" the Union Ministry. But the defections which brought about the

fall of the Janata Government and, in the end, led to the dissolution of Parliament, have posed the gravest problem which India has faced after the

Emergency. In 1977 the most urgent task was to remove the injuries inflicted on our Constitution by Amendments passed during the Emergency

and to strengthen the barriers against the abuse of power which took place during the Emergency. The Janata Government has accomplished that

task. The most urgent problem to be solved in 1979 is to put an end to 'defections', for otherwise the survival of our free Constitution will be in

peril.

All political parties which are hurt by "'defections' cry out loudly to prevent it by law. Political parties in power, which hope to gain by defections,

have taken no active steps to wipe out defections. The anti-defection Bill introduced by Mrs. Gandhi's Government failed to pass into law. The

anti-defection Bill introduced by the Janata Govt. was dropped. It had been opposed by some of the Government's supporters as 'Anti-democratic'.

Those who by their defection brought down the Janta Party Govt. which they were elected to support do not like to be branded as 'defectors'.

Some of them claim that there is a difference between a defection and a split. Others argue that they are not defectors but defenders of democracy.

The claim to bring down Governments by large scale defections in the name of democracy requires close examination. A detailed discussion of the

problem is outside the scope of this book, and the following brief account must suffice.

Defection"' is defined as "'failing away from a leader, party, religion or duty, desertion, especially to another country etc.'" (Concise Oxford

Dictionary, 6th Edn.). The fact that to serve their own interests, politicians defined defection in defection Bills so as to exclude "'a split"' does not

alter the meaning of the word. Put in plain language the definition of 'defection' given in the Bill means : if a small number of M. Ps. desert their

party they become defectors who must be subjected to pains and penalties; but if a large number of M. Ps. desert their party --say 20 per cent --

this grand scale desertion ceases to be desertion. But ordinarily, Governments are not 'toppled' by a small number of defections but by a large

number of the members of a party leaving it and/or going over to the party to which they had been opposed. This is the evil which must be

eradicated in our country. For in India it is very rare for the members of a party to leave it because of conscientious change of opinion. Defections

in India generally take place because political support is sold for money or for promise of ministership or public office, and the defector may defect

again for more money and promise of more important ministerships or public office. In short, it is an odious form of political corruption.

and again as under:--

The kind of defections which have taken place in India in the States from 1967 to-date and which have taken place in the Union in 1979 have not

the remotest resemblance to loyalty to great causes.

(See Constitutional Law of India, Second Edition, Vol III by H. M. Seervai at pages 1831 to 1835.)

39. These passages and, more so, the material, which I have already adverted to, bear ample testimony to the fact that political defections in our

country pose a serious threat to the functioning of parliamentary democracy and the stability of the representative Govts. in our country and it is not

in dispute that the prevention and eradication of such defection is an objective worth striving for. Our State, acting through its legislative body, has

taken a lead in achieving this objective. Section 24 (G) was written in the election law of the State because our Legislature knew from history that

transfer of allegiance from one party to another tends to destroy the stability in the Government and to degrade public life. They also knew that the

stability was too sacred, too holy, to permit its unhallowed perversion by change of loyalties. That is perhaps why the present petitioners did not

think it proper to oppose the law when it was processed in the Houses of the Legislature of the State. For, there is no evidence to that effect on the

file and, as a matter of fact, the evidence is to the contrary. If for the purpose of achieving the desired objective, which even the petitioners

themselves considered to be sacred, and rightly so, the law has been enacted by the State Legislature which brings within its purview a small

fraction of legislators, that should not have been ordinarily included in it, the law cannot be struck down as discriminatory, particularly so, because

it may not be possible to have a law in any form which would effectively check political defections without causing some hardship. In the

circumstances I am not inclined to agree with the learned counsel for the petitioners that the over-in-elusion should be treated as a circumstance

vitiating the classification contemplated by the impugned section and that the same should accordingly be declared as violative of Article 14.

40. This brings me to the ground of attack based on Section 69 of the State Constitution. Section 69 reads :--

69. (1) A person shall be disqualified for being chosen and for being a member of the Legislative Assembly or Legislative Council.--

- (a) If he holds any office of profit under the Govt. of India or the State Government or any other State Government within the Union of India, other than an office declared by Legislature by law not to disqualify its holder;
- (b) If he is of unsound mind and stands so declared by a competent Court;
- (c) If he is an undischarged insolvent;
- (d) If he is not a permanent resident of the State or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance of adherence to a foreign State;
- (e) If he is so disqualified by or under any law made by the Legislature.

(2) For the purposes of this section, a person shall not be deemed to hold an office of profit under the Government of India, the State Government or any other State Government within the Union of India, by reason only that he is a Minister, or a Deputy Minister.

41. It has been urged that inasmuch as the grounds of disqualification specified in Clauses (a) to (d) of Sub-section (1), all involve, as the learned

counsel put it, "'misconduct or blameworthy conduct of personal nature on the part of the member of the Legislature'", the general words of clause

(e) must, on the principle of ejusdem generis, be restricted to misconduct or blameworthy conduct of which a member of the Legislature has been

guilty in his personal capacity. It was further urged that, so considered, the disqualification prescribed under the impugned section does not fall

within the purview of Section 69 (1) (e). The argument is entirely misconceived. In the case of Rajasthan Naresh Shridhar Mirajkar and Others Vs.

State of Maharashtra and Another, the Supreme Court has held (at p. 1858) :--

To invoke the application of ejusdem generis rule there must be a distinct genus or category. The specific words must apply not to different

objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply.

There is no room for the application of the principle of ejusdem generis. In the absence of any mention of genus, since the mention of a single

specie does not constitute a genus.

42. It is difficult to suggest that there is a common genus running through clauses (a) to (d). Clause (a) is intended to cover infirmities arising out of

a conflict between interest and duty. Clause (b) takes care of mental

incompetence. Clause (c) is founded upon financial incapacity. Clause (d) refers to disability arising out of domicile. Thus, each clause is exhaustive of the kind of infirmity to which it refers and there is hardly any room for the application of rule of ejusdem generis. Clause (e) must have its sway unhampered by anything contained in the preceding clauses. In this view, the impugned section cannot be said to fall outside the purview of Clause (e). The ground of attack based on Section 69 of the State Constitution must necessarily fail.

43. Then comes the challenge based on Section 72 of the State Constitution. The argument is that inasmuch as the impugned section restricts legislator's freedom of speech which includes the right to vote in the Legislature, it is ultra vires the provisions of Section 72 of the State

Constitution. I have already referred to Section 72 above and held that the totality of rights including the right of speech in the Legislature claimed

by a member of the Legislature are privileges of the House and its members. Such privileges accrue to a person after he is elected and so long as

he continues to be the member of the House of the Legislature. If pursuant to a law, which is otherwise valid, he incurs disqualification and, in

consequence is prevented from attending or participating in the proceedings of the House, no complaint can be reasonably made that the said right

has been taken away or abridged in violation of Sec, 72 of the State Constitution. This is equally true about the impugned provision which, we

have found, is otherwise a valid piece of legislation. Therefore, the impugned provision cannot be read as a law taking away or abridging the

privilege of freedom of speech in the Legislature enjoyed by a legislator.

44. Assuming that the impugned provision impinges on the legislator's freedom of speech in the Legislature, then what it actually does is that it

impairs the privilege of freedom of speech in the Legislature enjoyed by a member of the Legislature. The question arises as to what is the remedy

of a legislator who does not like this privilege to be impaired by the Legislature? Can he come to the Court and ask for relief on the ground that the

impugned law impinges on his privileges as a member of the Legislature? In dealing with this question one cannot lose sight of the fact that the

dispute actually would be between the member of the Legislature on one side and his parent body, meaning thereby, the Legislature, on the other

and the controversy would revolve round the question whether the Houses of the Legislature have rightly deprived themselves and their members

of the privilege previously enjoyed by them. Can in such circumstances any Court and, in particular, the High Court under Article 226 take

cognizance of the dispute and grant relief to the member of the Legislature against his parent institution. The reply must obviously be in the negative.

For, if the Legislature denies itself and its members any available privilege, the Court cannot step in and tell the Legislature why it has done so. This

is a domestic matter between the member and his parent House. The Court cannot adjudicate upon the validity of such action at the instance of a

member of the Legislature and tell the Legislature that it had committed an illegality in what it had done. His remedy lies elsewhere. He has no locus

standi to approach the Court for relief in this regard, more so, when he has been a party like the petitioners, as we are told, to the decision

approving the measure on the floor of the House. Therefore, viewed from any angle, the challenge based on Section 72 must fail.

45. Finally comes the challenge that the impugned section is destructive of the basic structure of the State Constitution and consequently void and

ineffectual. Dealing with this item of challenge, learned counsel for the petitioner read out and later on supplied the following written note of

submissions :--

The whole constitutional philosophy contained in our Constitution is that it is the individual citizen who is to be elected as a legislator. It is

significant that our Constitution recognises no party. It recognises an independent citizen and enables him subject to certain well-known heads of

personal disqualifications to contest an election and thereafter enter the legislature. On entering the legislature, he has to take an oath of allegiance

to the Constitution and further that he shall truthfully discharge his functions as a legislator. Thus the whole emphasis is that every legislator who is a

citizen should discharge his duties, as Burke has said, 'according to his conscience and good sense'. The duty of a legislator is to his constituency

and to his country. In the discharge of this duty, the conscience of the individual is supreme. The Constitution thus honours the sanctity of thought

and belief, to say as one chooses, to believe as one wishes to speak and vote what one thinks as right are important attributes of our constitutional

guarantees. Nay they are sine qua non for a free and open society. That is why the constitution gives a legislator the freedom of speech and

expression -- he may utter what he likes -- freedom of association --he may associate or disassociate himself with any one party or parties he

likes. That is the true difference between the free and the open society which we cherish and a dictatorship both on the left and the right.

This provision therefore, cuts at the root of our free and open society. It deprives a legislator of his conscience in the name of a party discipline.

There is no provision in the Act protecting a Legislator who acts according to his conscience, but contrary to the dictates, the mandate and whip of

his party. The Act is thus patently against the basic frame-work of the Constitution which is a democratic, secular and socialist sovereign

Constitution. The Act is both constitutionally and politically immoral.

A party may bring forward a most undemocratic measure, a communal measure and yet he is obliged to vote for it. A member has no right to

dissent. A member cannot vote against it or even abstain from it. Then to provide by law that he should vacate his seat is to kill his conscience. The

Constitution envisages a free atmosphere wherein a legislator can operate freely and without fear. But the Act puts all the fear in a legislator in the

name of the party.

This is thus a battle between dictatorship and democracy. This is a battle between bossism and freedom of the legislator. There is a vast difference

between a genuine Anti-Defection Act and the present Act which is designed and calculated to destroy the liberties and freedoms of the legislators.

In order to sustain the challenge on these grounds, an Act must exclude a vote on the ground of conscience from the disqualification.

The objections on the ground of infringement of equality clause also affect the basic structure of our Constitution.

46. It is well settled that no objection can be taken to the validity of an ordinary law on the ground that it purports to destroy or damage the basic

structure of the Constitu-tion. Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, . Therefore, the objection that the impugned section is

destructive of the basic structure of the State Constitution is not sustainable in law.

47. As none of the grounds of attack has succeeded, I hold that the impugned

Section 24-G is constitutionally valid. Consequently both the writ petitions fail.

48. That takes me to the references made by the Speaker. I shall first deal with the references in respect of Mian Bashir Ahmad. His admitted case in the writ petition is that in the last general election held in the year 1977 he was elected as MLA on the National Conference Ticket and that he has resigned from the National Conference and decided to join Cong-I. His case squarely falls under Clause (a) of Section 24-G. He has incurred disqualification for being a member of the State Legislative Assembly and I hold so.

49. Next comes the case of Shri Malik Mohi-ud-Din. His case is that though he was returned on the National Conference ticket but, after his election as Speaker, he resigned from the National Conference Party and that this happened in the year 1977 whereas the impugned provision was enacted in the year 1979. This raises a question of fact which needs investigation. Consequently no orders can be passed in regard to the Speaker's reference in his case so long as such investigation is not made. The investigation would depend upon the evidence adduced by the parties. Obviously, it will not be possible for this bench to undertake that task. Therefore, the matter should properly be left to be dealt with by an appropriate bench. This also disposes of CMP No. 468/81 whereby Sh. Malik Mohi-ud-Din had prayed that the reference made by the Speaker in his case being CMP No. 132/80 be delinked from the writ petitions and that he should be given a reasonable opportunity to meet the case set out in the reference against him. The application shall be deemed to have been allowed.

50. It was, however, contended that National Conference Party is not a recognised party in the sense contemplated by the impugned section and as such, defection from that party would not attract any disqualification. For this, reliance was placed upon the explanation appended to the said section. The explanation has been reproduced elsewhere in this judgment. For facility of reference, however, I repeat it here as follows:--

For the purposes of this section political party means--

(i) A political party classified as a recognised political party under any law or any rule, regulation, order or notification having the force of law with

respect to matters relating to, or in connection with, election to the Legislative Assembly or the Legislative Council of the State:

(ii) Any other political party which is recognised by the Speaker of the Legislative Assembly or, as the case may be, by the Chairman of the Legislative Council, as a Political party.

51. The argument was that Election Symbols (Reservation and allotment) Order; 1968, under which the National Conference Party was classified

as a recognised party, does not have the force of law. In support of the argument, reliance was placed on the decision of the Calcutta High Court

in Arun Chandra Ghose v. Union of India 71 CWN 799. In that case the controversy turned on the previous symbol order of 1966 which has

been superseded by the present order of 1968. It was contended that Rule 5 of the Conduct of Election Rules, 1961, under which the symbol

order was issued, suffered from excessive delegation of the legislative power to the Election Commission. The Court repelled the argument holding

that conduct of Election rules having been deliberated upon in Parliament as required by Section 169(3) of the Representation of the People Act,

1951, became part and parcel of the Act and as such, it could not be said that the directions issued in the notification were issued in exercise of

any power of delegated legislation. In this view, it is impossible to hold that the notification does not have the force of law. The argument is self-

defeating.

52. In the result, writ petitions Nos. 319 and 641 of 1980 fail and are hereby dismissed. The reference concerning Mian Bashir Ahmad, registered

as C. M. P. No. 509 of 1980, is answered in the affirmative and it is hereby declared that Shri Mian Bashir Ahmad has incurred disqualification for

being a member of the State Legislature. The reference concerning Shri Malik Mohi-ud-Din, registered as C. M. P. No. 132 of 1981, shall be

placed before an appropriate bench for hearing and disposal in the light of the observations made in this judgment The parties shall bear their own

costs.

Dr. Anand, J.

53. The legality and constitutional validity of Section 24-G of the J. & K. Representation of the People Act, 1957 which was introduced by the

Jammu and Kashmir Representation of the People (Amendment) Act, 1979 has

been called in question through these petitions. The said provision reads as under:

24-G. Disqualification for being a member of either House of the Legislature -- A person shall be disqualified for being a member of the

Legislative Assembly or the Legislative Council of the State:

(a) If he, having been elected as such member : voluntarily gives up his membership of the political party by which he was set up as a candidate in

such election or of which he became a member after such election.

(b) If he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorised

by it in this behalf without obtaining prior permission of such party OB person.

Explanation: for the purpose of this section political party means :

(i) a political party classified as a recognized political party under law or any rule, regulation, or notification having the force of law with respect to

matters relating to or in connection with election to the Legislative Assembly or the Legislative Council of the State;

(ii) Any other political party which is recognised fay the Speaker of the Legislative Assembly or as the case may be by the Chairman of the

Legislative Council as a political party.

54. The petitioners have assailed the vires of the aforesaid section principally on the following grounds:

(1) That this section is ultra vires of the Constitution of India as it offends petitioners' fundamental right of freedom of speech and expression

guaranteed under Article 19(1)(a) and is not protected by Article 19(2) of the Constitution.

(2) That it is also unconstitutional as it violates petitioners' fundamental right guaranteed under Article 19(1)(c) of the Constitution of India and is

not protected by Article 19(4).

(3) That Section 24-G is also ultra vires Article 14 of the Constitution of India.

(4) That this section interferes with the rights and privileges of the petitioner as a legislator in violation of Section 72 of the Constitution of Jammu

and Kashmir and is therefore, invalid and inoperative.

(5) That the disqualification introduced by Section 24-G is not of the same genus or species as is given in Section 69 (a) (d) of the J. & K.

Constitution and, therefore, is unconstitutional.

(6) That Section 24-G is ultra vires and void as it destroys the basic structure of the Constitution.

55. The question being legal, the facts pale into insignificance, and in any case would be relevant for deciding the references made by the Speaker

of the Legislative Assembly only. Suffice it to say, that the petitioners are aggrieved of the threat of disqualification on the grounds that they have

voluntarily resigned the membership of the political parties on whose ticket they were elected as members after their election to the Assembly and

have thus incurred the disqualification imposed by the impugned legislation.

56. Before taking up for consideration the challenge on the aforesaid grounds it would be desirable to notice the background in which the aforesaid

provision came to be enacted.

57. Political defections -- leaving one political party and joining another -- usually resorted to topple a Government in power, became order of the

day and posed a grave challenge to the successful functioning of parliamentary democracy in the country. Such defections in some States assumed

such alarming proportions that leaders of public opinion, jurists and parliamentarians felt that if this evil was not checked, it would pose a serious

threat to the survival of parliamentary democracy in the country. The choice was either to prevent defection by law or to insist on the political

parties to agree to a common code of conduct which would make it obligatory for the political parties not to confer any benefit on an individual

defector. It was generally felt that defections were not a legal problem but related to political ethics. There was still another school of thought which

felt that since in a parliamentary democracy political sovereign is the public, it is the public which should have the right to recall a legislator, who

defected and with whose defection the constituency was unhappy. Each of the alternatives had its plus and minus points but no cut and dry formula

which should be in accord with the basic principles of democracy has so far been evolved in rest of the country, except that a beginning has been

made in this State by enacting the impugned legislation to prevent this evil by amending the Representation of the People Act, 1957. In the rest of

the country, Constitution (Thirty Second Amendment) Bill, 1973 which inter alia provided for disqualification of a defector against continuing as a

member of either Houses of Parliament was introduced as a Bill. However, the said bill after discussion, did not mature into an Act.

58. In our State as already said, a beginning has been made by enacting the impugned legislation and the statement of objects and reasons (for

introducing Section 24-G) as published in the J. & K. Government Gazette Part III dated 21-9-1979 reads :

Following the widespread concern over the problem of political defection it is proposed to amend the J. & K. Representation of the People Act,

1957 with a view to disqualifying a defector from being a member of the legislature.

59. Thus, the statement of objects and reasons show that it is aimed at curbing the evil of political defections. Whether or not the Act can be said

to have achieved the desired objective and whether or not the impugned piece of legislation can stand the test of constitutional validity is a different

question. Mr. Soli J. Sorabji, the learned counsel for the respondents has styled it as a "most laudable" piece of legislation, though according to Mr.

Bhandare, the learned counsel for the petitioner Malik Mohi-ud-Din, the laudability of the objective alone cannot clothe the impugned legislation

with constitutionality. According to him the direct consequence of the enactment is to curb and put unreasonable restriction on the exercise of the

fundamental right guaranteed under Article 19(1)(a) and Article 19(1)(c) of the Constitution of India, by the Legislators. It is further urged by him

that the mischief of the legislation also lies in what it permits rather than what it seeks to prevent.

60. The State of Jammu and Kashmir, like any other State of the Indian Union has a parliamentary form of Government though unlike other States

we have our own Constitution, but both in form and substance, its provisions are identical with the Constitution of India. However, the Constitution

of the State is not contained only in "The Constitution of Jammu and Kashmir, 1957" but also in the Constitution of India, in so far as it is

applicable to the State. Since, the residents of the State are citizens of India, they have been guaranteed the fundamental rights contained in Part III

of the Indian Constitution, with the exceptions provided therein.

61. Though a sound party system is essential for the stability of parliamentary democracy or a parliamentary form of Government it is equally

important to preserve the right of dissent, for in a democracy all problems are required to be decided by discussion and adjustment of views. This

right of dissent is essential in a democracy and any anti-defection law which does not take into account the right of conscious dissent would not

only be unconstitutional but would also be unethical and have no place in a democratic set up. It would be in this background that we have to test

the vires of the impugned legislation.

62. It is the extent of freedom of speech, in particular reference to a legislator, as guaranteed by Article 19(1)(a) of the Constitution which would

now require consideration.

63. All citizens of India have the right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India. This right may,

however, be subjected to reasonable restrictions in the interest of the 'security of the State friendly relations with foreign powers, public order,

decency and morality and in relation to contempt of Courts, defamation and incitement to an offence'. The object of the right is to prevent public

authorities assuming control over the mind of the public. Does a citizen lose this right on being elected as a legislator is the first important question

which has a direct bearing on the case?

64. The right to stand as a candidate and to contest an election is undoubtedly not a common law right. It is a statutory right regulated by the

statute itself and can be exercised only on the conditions laid down in the said statute. The fundamental rights guaranteed under the Constitution

have no bearing on the statutory right to contest an election. While contesting the election, the candidate has to conform to the conditions laid down

in the statute which gives him the right to contest elections. These conditions may even impinge on his fundamental rights but their validity, will have

to be seen in the context of the constitutional provisions. The restrictions contained in the statute, for exercising the right of freedom of speech and

expression while contesting an election have been held by the Supreme Court, in more than one cases, to be reasonable within the meaning of

Article 19(2) of the Constitution. The Supreme Court has opined that restrictions contained in the statute (Representation of the People Act) on the

exercise of freedom of speech and expression, during an election, in the matter of making false allegations against rival candidates or making an

appeal in the name of caste and community of the voters were reasonable restrictions within the meaning of Article 19(2) of the Constitution. In

Jumuna Prasad Mukhariya and Others Vs. Lachhi Ram and Others, it was pointedly observed:

Sections 123 (5) and 124 (5) are not ultra vires Article 19(1)(a) of the Constitution. These sections do not interfere with a citizen's fundamental

right to freedom of speech. These laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to

enter Parliament.

The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be

exercised on the conditions laid down by the statute. The fundamental rights Chapter has no bearing on a right like this created by statute. Persons

have no fundamental right to be elected members of Parliament. If they want they must observe the rules. If they prefer to exercise their right of

free speech outside these rules the impugned sections do not stop them. These sections are not ultra vires"".

65. According to Mr. Sorabji the restrictions imposed by the impugned legislation are also of the same nature and must be held to be reasonable.

It is also urged by him that since no citizen has a right to speak or express himself in the legislature, it follows that to speak or express oneself in the

legislature is not a part of the fundamental right guaranteed under Article 19(1) (a) and since the legislator, before his election, did not possess the

fundamental right to speak or express him-self in the legislature, he carried no such right with him, on his election to the legislature and, therefore,

any curb on his right to speak and express himself in the legislature, cannot be treated as any curb on his fundamental right under Article 19(1)(a)

of the Constitution. Reliance is placed by him on Railway Board Representing The Union of India (UOI) Vs. Niranjan Singh, and some other cases

to stress that the legislator does not carry with him his fundamental right of freedom of speech and expression, guaranteed under Article 19(1)(a),

to the legislature, on his election and that the freedom of speech and expression that he enjoys in the legislature is a privilege given to him by the

Constitution. I am afraid I cannot persuade myself to agree with Mr. Sorabji.

66. That a legislator of this State is a citizen of India is not a matter of doubt as

indeed it cannot be. That, as a citizen, he has the guarantee of the freedom of speech and expression under Article 19(1)(a) is also not in doubt. Does his election take away that right? The answer must be 'No': Till his election, in common with the other citizens, he could not exercise that right in the legislature. His election to the Assembly or the Council, as the case may be, removed that fetter and unlike other citizens he acquired the benefit and the privilege of exercising his rights under Article 19(1)(a) of the Constitution inside the House also. It is well settled that the exercise of fundamental rights by a citizen has to be only to the extent, that the exercise of those rights does not infringe the fundamental rights of any other citizen for example a citizen is free to go on speaking everywhere but he shall stop where the exercise of his right offends the right of another and he would have no right of free speech in somebody else's house, without the permission of that person. To put it, differently, 'the right to swing your arm in public comes to an end where another person's nose begins'. It is not that the right gets extinguished -- its exercise only gets restricted. The judgment in *Railway Board Representing The Union of India (UOI) Vs. Niranjan Singh*, on which strong reliance has been placed by Mr. Sorabji does not lay down, what the learned counsel urges this Court to hold. The *Railway Board* case (Supra) only dealt with the bar of exercise of the fundamental right (of association) in the property belonging to the Railway Board even though, the employees of the Railway Board had the right of entry in the premises as they were working there. The prohibition imposed by the Board that no union meeting etc. shall be held in the property of the Railway Board was upheld and the Court opined that the employees could not exercise their right of association in the property belonging to another and to which property their entry was limited to a specific purpose -- viz. to go on work. This judgment does not say that the employees had no right to hold meetings -- it only holds that the restriction to the exercise of that right, where it comes into conflict with the rights of other citizens is a valid restriction. The restriction on the exercise of a fundamental right in a particular place, not open to the citizen, would cease as soon as he acquires the right of entry in that particular place and the privilege of exercising his rights therein. The freedom of speech and expression under Article 19(1)(a) is a fundamental right of a

citizen and remains with him throughout. It inheres in him and he carries it with him wherever he goes. He can exercise it everywhere subject to the

inherent restriction that its exercise does not offend the rights of someone else. A reference to the following observations of the Supreme Court in

Railway Board Representing The Union of India (UOI) Vs. Niranjan Singh, would in this respect be profitable :

There is no fundamental right for anyone to hold meetings in government premises. The fact that those who work in a public office can go there

does not confer on them the right of holding a meeting at that office even if it be the most convenient place to do so. The fact that the citizens of the

country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise

those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his

property intervenes. Such a limitation is inherent in the exercise of those rights. The validity of that limitation is not to be judged by the tests

prescribed by Sub-articles (2) and (3) of Article 19. In other words the contents of the freedom guaranteed under Clauses (a), (b) and (c) do not

include the right to exercise them in the properties belonging to others.

In my opinion a legislator, in common with other citizens, has the freedom of speech and expression under Article 19(1)(a) but whereas in the case

of the other citizens, its exercise, in the legislature; is forbidden, that restriction is removed in the case of a legislator; who by virtue of his election

secures the right to enter the Legislature to perform his duties as a legislator, and for performing those duties he carries with him the right of

freedom of speech and expression inside the House, to be exercised there. This is apparent even from the provisions of Section 72 of the

Constitution of Jammu and Kashmir. The said section provides:

Power, privileges, etc. of the Houses of Legislature and of the members and committee thereof.-- (1) Subject to the provisions of this Constitution

and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature.

(2) No member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the

legislature or any committee thereof and no person shall be so liable in respect

of the publication by or under the authority of a House of the Legislature of any report, paper, votes or proceeding.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature and of the members and the committees of a House of

the Legislature shall be such as may from time to time be defined by Legislature by law, and until so defined, shall be those of the Parliament of

India and of its members and committees.

(4) The provisions of Sub-sections (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in,

and otherwise to take part in the proceedings of a House of the Legislature or any committee thereof as they apply in relation to members of that

Legislature.

67. Plain reading of Section 72 (1) shows that subject to restrictions imposed under the Constitution or the provisions or rules and stand-ing

orders, regulating the procedure in the Legislature, a legislator shall have the freedom of speech and expression inside the House. This section,

therefore, removes the fetter to the exercise of the freedom of speech and expression; in the preserved domain of the legislature, in so far as the

legislators are concerned, while keeping the fetter intact for other citizens to the exercise of their guaranteed rights under Article 19(1)(a). It is for

this reason that the said section enacts that even in that preserved domain there shall be freedom of speech and expression in so far as the

members of the legislatures are concerned. The immunities and privileges u/s 72 (2) of the Constitution of J. & K. are not qualified like the

provisions of Sub-section (1) by the words "'subject to the Constitution'". It shows that the immunities u/s 72 (2) of the Constitution are unfettered.

It would be, therefore, unfair and unrealistic to hold that the legislator as a class when he acts as such is excluded from the guarantee of

fundamental rights, under part III of the Constitution of India. The free exercise of the freedom of speech and expression inside the House, by the

Legislator, is essential for the proper discharge of their duties, since, it is only by a free and frank discussion inside the legislature that proper

decisions can be taken. Thus, in no case can it be held that the fundamental rights of a legislator are abridged during his membership of the House

for that would be doing violence to the plain language of Section 72 of the State

Constitution. The next question that arises for consideration is whether the restrictions imposed by the impugned legislation i. e. Section 24-G can be termed reasonable under Article 19(2) of the Constitution.

68. Sub-clause (b) of Section 24-G (supra) provides that a legislator shall be disqualified for being a member of the legislature, if he votes or abstains from voting in such a House contrary to any direction or whip issued by the political party (of which he is a member) or any person authorised by party or person. On the face of it, the provision, of Sub-clause (b) of Section 24-G places restrictions on the exercise of fundamental right of speech and expression, inasmuch as, the exercise of the right under Article 19(1)(a) is sought to be controlled by the political party or its whip and is not left to the conviction of the individual legislator. The direct effect of the provision is that the political party or its whip assumes control over the minds of the legislators. This undoubtedly is a restriction over the exercise of freedom of speech and expression by a legislator. If this restriction is protected by Article 19(2) of the Constitution, then and only then can it be said that sub-clause is not violative of Article 19(1)(a) of the Constitution. As already pointed out, reasonable restrictions can be imposed in the 'interest of security of the State, friendly relations with foreign powers, public orders, decency and morality and in relation to contempt of court, defamation and incitement to an offence'. The argument of Mr. Sorabji is that the said restriction is reasonable as it has been imposed in the interest of "political and constitutional morality". Referring to the text book on the "Constitutional Law of India" by Mr. Seervai, learned counsel argued that the evil which the legislation seeks to curb could not be curbed only by preventing defections from one political party to another, if the aforesaid provision (S. 24-G (b)) had not been there. He urged that it is not unknown that a Government may not be toppled by open defection, but by adoption of a simple device, by a political defector, by abstaining from voting or by voting contrary to the whip issued by the party and thereby defeat that party in the House. Learned counsel submitted that this was the worst type of political immorality as the legislator was sabotaging the party from within and the restriction on this was not only reasonable but also necessary as it was aimed at achieving 'political and constitutional morality' and would be covered by "decency and morality" in

the interest of which, restrictions can be reasonably imposed under Article 19(2) of the Constitution. On the other hand, according to Mr. M. C.

Bhandare, learned counsel for the petitioner, the restriction contained in Sub-clause (b) of Section 24-G was absolutely unreasonable as it took

away the right of dissent from a legislator, which right, argued the learned counsel is a valuable right and absolutely essential for the functioning of

parliamentary democracy and that the restriction was not protected under Article 19(2) of the Constitution; for it had not been imposed in the

interest of "'decency and morality'" which expression according to him only covered such measures which were necessary to protect the minds of

the society from being corrupted by immoral or indecent acts etc.

69. Freedom of speech and expression includes within its ambit the freedom to vote according to one's conscience because vote is one of the

modes of manifestation of the expression of a person. Anything or mode which conveys the feelings, sentiments, ideas or opinion of an individual or

a group is covered under the expression freedom of speech. Thus, when any restriction is placed on the right of a legislator to vote according to his

own choice, conviction or conscience; it is a restriction of the exercise of the right of freedom of speech, and it would be protected only if it is

reasonable.

70. That the impugned legislation attempt to enforce political morality may not be in doubt. The two relevant questions are (1) whether it can be

enforced in the manner in which the legislature has chosen to do it and (2) whether 'political morality' is covered by the expression "'decency and

morality'". I will take up the second question first. In my opinion the expression "'decency and morality'" seems restricted to sexual morality and

decency, and covers the penal provisions dealing with obscene acts, gestures, writings, indecent exposures and songs etc. It would include all such

acts or modes which have the tendency of corrupting the public moral. Section 292, R. P. C. deals with obscenity and punishes those who indulge

in it. It certainly imposes a restriction on the freedom of speech and expression but as held by the Supreme Court in Sajjan Singh Vs. State of

Rajasthan, , it is a permissible restriction as it is imposed in the interest of 'decency and morality'. Again in K.A. Abbas Vs. The Union of India

(UOI) and Another, , their Lordships opined that censorship of films including pre-

censorship was justified in the interest of society and went on to say that its constitutionality had to be judged by the test of 'reasonableness' within the meaning of Clause (2). The Founding Fathers while providing for the imposition of restrictions in the interest of "'decency and morality'" had in mind, according to my opinion, only such 'decency and morality' which had the effect of corrupting the minds of the public in general and those susceptible to it in particular. 'Political morality' was not under contemplation at that time and the expression "'decency and morality'" was not to cover in its sweep 'political morality' also.

71. Every citizen has the freedom to hold and express his view subject to reasonable restrictions which may be imposed under Article 19(2). The existence of this freedom is even more important for the legislators, who have by the very nature of their duties, to enter into free and frank discussion in the House before the House collectively embarks upon bringing forth any legislation. The House is Supreme in so far as its own proceedings and procedure is concerned and the exercise of the right of free speech and expression in the House can be subject only to the limitations placed by the Constitution or by the rules and standing orders regulating the procedure of the House itself. (Section 72 (1)). An instance of Constitutional restriction is that no discussion is permissible in the legislature on the official conduct of a judge of the Supreme Court or the High Court. This restriction is imposed by the Constitution itself. Where neither the Constitution nor the rules and the standing orders regulating the procedure of the House place any restriction on the exercise of the freedom of speech and expression in the legislature, no ordinary legislation can impose such a restriction which would have the effect of interfering with the performance of their duties by the legislators. Any such restriction would not only impinge upon the fundamental rights of the legislators but also offend Section 72 (1) of the State's Constitution. Clause (b) of Section 24-G read with the explanation thereto has the positive effect of not allowing a free hand to the legislators belonging to recognized political parties to perform their duties effectively. The said clause does incalculable harm to the functioning of parliamentary democracy as the legislators are virtually told that after their elections they would become "'soulless and conscienceless entities'" and would have to be driven like dumb cattle in

whichever direction the political party to which they belong chooses to drive them, irrespective of their own conscience or commitment to the constituency which had returned them to the legislature. It appears to me that by the impugned legislation the interest of the recognised political parties is put above the conscience of a legislator and the interest of the Constituency he represents. Of course, there cannot be any two opinions about the fact that to vote against one's party's direction, may be the worst dereliction from political norms. However, the answer to that lies in taking disciplinary action against the defaulting member under the party's own constitution, which may even amount to the expulsion of the member concerned. The answer is not to enforce party discipline through law. By enacting Clause (b) of Section 24-G, the legislature has virtually made the legislators, belonging to recognised political parties. 'Robots' mechanical devices who act according to the directions, without thinking it is not unimaginable that a legislator may have made a commitment to his constituency to project a particular view in the legislature but the whip of the party wants him to vote in favour of a measure, against that view. There would thus, be a conflict between his commitments to the electorate, who returned him and who in a parliamentary democracy are the political sovereign, and the interests of the recognised political party to which he belongs. Would it be "moral or decent" for him to go back on his commitment to the electorate only to save himself from the disqualification ? Would it be "moral or decent" for him to go against his own conscience? Would it be a moral or decent for him to betray his conviction ? I am of the opinion that answer to these must be in an emphatic 'No'. The morality and decency demands that he should not compromise with his conscience and conviction. In view of the high position of trust that he occupies, he should not compromise with the interests of his constituency either. Any legislation which has the potential of forcing him to betray the trust reposed by the constituency and act against his conscience and conviction cannot be said to be in the interest of 'decency and morality' as envisaged under Article 19(2). The restriction imposed by Clause (b) of Section 24-G would, otherwise, also be unreasonable as it puts the interest of a recognised political party above the interest of the constituency. After his election, a legislator has the right to continue to remain in the Legislature, unless disqualified, for the entire duration of the Legislature, so

as to represent his constituency and if he is disqualified by virtue of some ordinary legislation, as distinct from constitutional amendment, it is the constituency which would ultimately suffer as it would be deprived of its mouthpiece in the Legislature. Of course generally speaking in the present set up, constituency returns a legislator to the Legislature on the policies of the party to which he belongs. But this is not universally true and a member may be returned on his own merits and to project a view held by the constituency. It would be unreasonable restriction on his constitutional right to continue as a member of the Legislature for the entire duration of the Legislature; if he were to be disqualified for projecting the view of his constituency, when it is in conflict with the direction of the whip of the party. Indeed one cannot be unmindful of the fact that more often than not, a Government is defeated on account of sabotage from within, in the sense that its members, in the Legislature, either abstain from voting or vote against the direction of the whip. It is also not uncommon that sometimes they so act not on account of any dictate of conscience but on account of sheer opportunism.

72. However, a legislation which makes the legislators 'conscienceless' is not the answer to solve such a problem. Here the remedy is worse than the disease itself.

73. Now I will take up the first question viz. how should political morality be enforced? The answer, to a large extent, lies in evolving a code of conduct amongst the political parties which should take within its sweep that no defector should be given either a ministerial position or any other lucrative position. That would, to a large extent discourage the 'opportunistic' defector from defecting. The political parties should also agree that a defector shall not be given party ticket at the next General Elections by any of the political parties. That might also help to achieve the desired result such provisions can be incorporated in the Constitution of all the political parties and be included in a 'code of conduct' to be subscribed by all the political parties, recognised or not, at the time of General Elections. In this way, those legislators who defect only for personal gains would think twice before defecting and those who defect on the ground of differences on ideological basis or on the ground of their conscience would also have prior knowledge of the consequences of their action. The impugned legislation

which in fact aims at enforcing party discipline imposes unreasonable restriction on the legislators to exercise their fundamental right guaranteed under Article 19(1)(a) of the Constitution and for what has been said above, the restriction imposed by Section 24-G is not protected by Article 19(2) of the Constitution either. In the proposed 32nd Amendment Bill, a provision similar to the one as contained in Sub-clause (b) of Section 24-G had been proposed. Commenting upon the constitutional validity of such a provision in his work on ""Our Constitution Defaced and Defiled"". Shri N. A. Palkhivala, a noted jurist, observed at pages 67-68 (1974

Edition) :

No greater insult can be imagined to members of Parliament and the State Legislatures than to tell them that once they become members of a political party, apart from any question of the party constitution and any disciplinary action the party may choose to take, the Constitution of India itself expects them to have a right to form judgment and no liberty to think for themselves, but they must become soulless and conscienceless entities who would be driven by their political party in whichever direction the party chooses to push them.

74. There is however, one more aspect of the matter which requires notice. As already noticed Section 72 (1) of the Constitution of J. & K., guarantees to the legislators' freedom of speech and expression subject to the limitations contained therein. According to Mr. Sorabji the right of speaking in the House, as a member, is neither a constitutional right nor a fundamental right. According to him it is only a 'privilege' of the legislator and any infringement, of that privilege would not render Section 24-G (b) unconstitutional. It is argued that the right to speak in the House is available to a member only so long as he is legally present as a member in the House. Precisely what is argued is that if a member has incurred some valid disqualification, he would cease to be a member and thereafter he would have no right to speak in the House and thus, there would be no violation of his privilege to speak in the House after his disqualification. This argument is quite sound but the question which has not been answered by Mr. Sorabji is whether a member can be disqualified for exercising the privilege granted to him u/s 72 (1) and (2). Section 72 of the Constitution of J. & K. guarantees to a member of the Legislature, certain

privileges and immunities. One of the privileges is to have "freedom of speech", subject to the restrictions contained in the Constitution and the rules and the standing orders regulating the procedure of the House itself.

This privilege is so wide that it embraces within its fold anything said or expressed in the House and in fact extends the scope of the exercise of

freedom of speech to a large extent, in so far as a legislator is concerned. Section 72 confers certain privileges which accrue to members of the

Legislature after they are elected and so long as they continue to be members. The object of the section is to make a person's membership of the

House of Legislature effective and meaningful by ensuring complete freedom of debate and discussion in the House so long as he is a member of

the House. The Constitution guarantees complete immunity from legal proceedings, whether civil or criminal in respect of anything said while

participating in the proceedings of the House or in the matter of voting in the House. Whereas the freedom of speech guaranteed u/s 72 (1) is

subject to the provisions of this Constitution", there is no such fetter in respect of the immunities guaranteed by Section 72 (2) of the Constitution.

The parliamentary privileges are explained by Sir Erskine May in his "Parliamentary Practice", 16th Edition at page 42 as :

The sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court or Parliament, and by members of each

House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or persons.

75. It is implicit from this that legislators have additional rights, over the fundamental rights which they enjoy in common with the other citizens, Mr.

Sorabji's argument ignores that it is for exercising his guaranteed right of freedom of speech in the House (under Section 72 (1)), contrary to the

party whip, that makes the member lose his seat. It is not a case where a member stands disqualified and is on account of that disqualification not

permitted to exercise his constitutional rights u/s 72 (1) of the Constitution of the State. Any restriction which penalises a member for exercising his

constitutional privileges cannot be held to be reasonable and that is an additional ground to hold that the restriction imposed by the impugned

section is unreasonable, unrealistic and has the effect of destroying the privileges of the members of the Legislature guaranteed by Section 72 of the

Constitution. Since, the main function of the Legislature is ""to criticise and legislate"" it is of great importance that members of the Legislature should

have all such immunities and privileges as are necessary to enable them to perform their functions without fear. No legislator can be penalised by

any ordinary legislation, for doing something which the Constitution it-self permits him to do. Assuming for the sake of argument, that the right of

free speech in the House, as a member, u/s 72 of the Constitution is a 'privilege' and not a 'fundamental right' as urged by Mr. Sorabji, it cannot be

ignored that it is a constitutional privilege and an important constitutional privilege. The said 'privilege' is an all important privilege, necessary for the

members to perform their functions as legislators and the said 'privilege' cannot be whittled down by any ordinary legislation. Reliance placed by K.

Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others, in this context, (is ?) quite misplaced. The said case

dealt with the detention of a member, under a valid Preventive Detention Law. He was unable to speak in the House on account of that detention.

The right to speak in the House had not been denied to him for anything said in the House. Its exercise had been denied on account of his detention

under a valid and preventive detention law and that restriction was reasonable. His right to speak was taken away, only temporarily, till he was

under detention. The Supreme Court only held that his detention under such a valid law, does not infringe Ms freedom of speech guaranteed under

Article 105 (1), (2) of the Constitution (corresponding to Section 72 of the Constitution). Their Lordships opined (at pp. 664, 65):

If the order of detention validly prevents him from attending a session of Parliament, no occasion arises for the exercise of the right of freedom of

speech and no complaint can be made that the said right has been in validly invaded. Members of Parliament can claim no special status higher than

that of an ordinary citizen in so far as a valid order of detention is concerned and is as such liable to be arrested and detained under it as any other

citizen.

76. The aforesaid judgment is, therefore, no authority for the proposition that the 'right' u/s 72 of the Constitution can be taken away by any

ordinary legislation and the taking away of that right would be a reasonable restriction. On the contrary, this judgment supports the view, that

legislator's right to speech in the house is not conditioned by his party affiliation but is recognised by Part III of the Constitution, and enlarged by

Section 72. Any attempt to circumscribe it, howsoever good the intention may be, would not survive the test of constitutionality. Under a valid

Preventive Detention Law, the freedom of speech of a detained legislator is only put under an eclipse, temporarily, during his detention but under

the impugned legislation it is taken away for all times to come, till he gets re-elected. No ordinary law enacted by the Legislature can override the

constitutional provisions and all such ordinary laws which are inconsistent with the constitutional provisions cannot be upheld. The impugned

legislation is the amendment of the J. & K. Representation of the People Act and is, therefore, a piece of ordinary legislation. The law is well

settled that the right and privileges guaranteed under the Constitution cannot be curtailed except by constitutional amendment. The exercise of the

right of speech on the floor of the House in terms of Section 72 is conditioned only by the Constitution, the rules and standing orders regulating the

procedure of the Legislature and by no other law. Since the impugned legislation does not fall under any of the protections enumerated in Section

72 and penalises a member for exercising the rights and privileges guaranteed by Section 72. So it is violative of Section 72 also and is void and

inoperative.

77. Dealing with the scope and nature of privileges of legislators under Article 194 of the Constitution, of which Section 72 is a reproduction

mutatis mutandis a Bench of five learned Judges of the Supreme Court opined in *M.S.M. Sharma Vs. Sri Krishna Sinha and Others*, :

The provisions of Clause (2) of Article 194 indicate that the freedom of speech referred to in Clause (1) is different from the freedom of speech

and expression guaranteed under Article 19 (1) (a) and cannot be cut down in any way by any law contemplated by Clause (2) of Article 19. It is

true that a law made by Parliament in pursuance of the earlier part of Article 105 (3) or by the State Legislature in pursuance of the earlier part of

Article 194(3) will not be a law made in exercise of constituent power but will be one made in exercise of its ordinary legislative powers under

Article 246 read with the entries and consequently if such a law takes away or abridges any of the fundamental rights it will contravene the

peremptory provisions of Article 13(2) and will be void to the extent of such contravention and it may well be that that is precisely the reason why our Parliament and the State Legislatures have not made any law defining the power, privileges and immunities. It does not, however, follow that if the powers, privileges or immunities conferred by the latter part of those articles are repugnant to the fundamental rights, they must also be void to the extent of such repugnance. It must not be overlooked that the provisions of Article 105(3) and Article 194(3) are constitutional laws and not ordinary laws made by Parliament or the State legislatures and that, therefore, they are as supreme as the provisions of Part III. Further quite conceivably our Constitution makers not knowing what powers, privileges and immunities Parliament or the Legislatures of a State may arrogate and claim for its Houses, members of Committees, thought fit not to take any risk and accordingly made such laws subject to the provisions of Article 13 but that knowing and being satisfied with the reasonableness of the powers, privileges and immunities of the House of Commons at the commencement of the Constitution, they did not, in their wisdom think fit to make such powers, privileges and immunities, subject to the fundamental right conferred by Article 19(1)(a). Article 19(1)(a) and Article 194(3) have to be reconciled and the only way of reconciling the same is to read Article 19(1)(a) as subject to the latter part of Article 194(3). The provisions of Article 19(1)(a), which are general, must yield to Article 194(1) and the later part of its Clause (3) which are special.

(Emphasis mine)

78. Thus, their Lordships put the privilege under Article 194 (1) (2) and (3) in a way, even above the fundamental rights and laid down that the said privileges could not be curtailed by any restriction imposed under Article 19(2). This exposition of law stands intact even till today. I am unable to agree with Mr. Sorabji that K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others, has diluted the law laid down in Sharma's case because it was said in Nambiar's case (Paras 17 and 18) that the totality of these privileges cannot claim the status of fundamental rights. In saying so, the object was not to decrease the importance of the privileges which were recognised as ""important"" in that case also. Again, Nambiar's case is no authority for the proposition that

legislators as a class do not have the guarantee of Article 19(1)(a). All it lays down is that the privileges under Article 194 are not fundamental rights even though the privileged are enjoyed by the legislators apart from their fundamental rights. Moreover, in *K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others*, the judgment in *M.S.M. Sharma Vs. Sri Krishna Sinha and Others*, was not noticed at all, let alone overruled. The law laid down in Sharma's case (*supra*) was relied upon and approved by seven learned Judges in the In the matter of: Under Article 143 of the Constitution of India, , wherein it was observed (at p. 760) :

If all that the legislators were entitled to claim was the freedom of speech and expression enshrined in Article 19(1)(a), it would have been unnecessary to confer the same right specifically in the manner adopted by Article 194(1) and so it would be legitimate to conclude that Article 19(1)(a) is not one of the provisions of the Constitution which control the first part of Clause (1) of Article 194.

79. Their Lordships then opined about the ambit of Clause (1) of Article 194, thus :

Therefore, Clause (1) confers on the legislators specifically the right of freedom of speech subject to the limitations prescribed by its first part. By

making this clause subject only to the specified provisions of the Constitution, the Constitution makers wanted to make it clear that they thought it

necessary to confer on the legislators freedom of speech separately and, in a sense, independently of Article 19(1)(a).

80. Their Lordships thus, treated the privilege granted under Article 194 to be in addition to the fundamental rights which were available to the

legislators under Part III of the Constitution. Thus, it would be reasonable to hold that even after the Five Judges judgment in Nambiar's case

(*supra*), the view in Sharma's case still holds the field of its approval by the seven Judges Bench in the Presidential Reference case of 1965 (*supra*)

The Presidential reference case was also not noticed in Nambiar's case even though it had come out earlier. Even if it be said that Nambiar's case

and Sharma's case are in conflict about the scope, ambit and nature of the privileges under Article 194(3) of the Constitution even then in view of

AIR 1976 SC 2437 and *The State of U.P. Vs. Ram Chandra Trivedi*, the view

expressed in Sharma's case which stands approved by a larger

Bench in *In the matter of: Under Article 143 of the Constitution of India, (Presidential reference case)* has to be preferred to that of the view

expressed in Nambiar's case, which is a decision of a smaller Bench. Mr. Sorabji, then sought to urge that since Nambiar's case had been

approved in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, , which is the latest judgment, it should hold the field in preference to the

view in Sharma's case. I cannot agree. The argument ignores that even *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, is a judgment

by a Bench of five learned Judges and it cannot have preference over the view of a Bench of seven learned Judges, even if earlier in point of time.

81. Leaving these technicalities and the niceties apart, the views expressed in *M.S.M. Sharma Vs. Sri Krishna Sinha and Others*, and *K. Anandan*

Nambiar and Another Vs. Chief Secretary, Government of Madras and Others, are not such which cannot be reconciled. In my opinion, a proper

way to reconcile the two views is to hold that the privileges conferred u/s 72 (1) and (2) on the legislators are constitutional privileges which are in

addition to the fundamental rights guaranteed by Article 19(1)(a) of the Constitution and those supplement the fundamental rights so as to make the

exercise of the fundamental right under Article 19(1)(a), in the case of the legislators, more effective and meaningful so that they can discharge their

duties properly. These privileges, are neither in lieu of nor in derogation of the fundamental rights. These privileges cannot be cut down by any

ordinary legislation. This view is fortified by the following observations of the Supreme Court in Sharma's case (*supra*).

It must not be overlooked that the provisions of Article 105(3) and Article 194(3) are constitutional laws and not ordinary laws made by

Parliament or the State legislatures and that, therefore, they are as Supreme as the provisions of Part III.

Their Lordships then went on to add :

Article 19(1)(a) and Article 194(3) have to be reconciled and the only way of reconciling the same is to read Article 19(1)(a) as subject to the

latter part of Article 194(3) In our judgment the principle of harmonious construction must be adopted and so construed the provision of

Article 19(1)(a) which are general, must yield to Article 194(1) and the latter

part of its Clause (3) which are special.

82. The aforesaid discussion, therefore, leads to the conclusion that in common with other citizens, a legislator has the guaranteed fundamental right

conferred by Article 19(1)(a) and in addition he has also the freedom of speech, uncontrolled by Article 19(2) in the legislature by virtue of the

provisions of Section 72 of the Constitution. These privileges u/s 72 supplement his fundamental rights.

83. Of course, a member of the legislature would continue to enjoy the privileges u/s 72 of the Constitution during the tenure of his membership so

long as he is not disqualified u/s 69 of the Constitution. Section 69 (1) of the Constitution reads :

Disqualification for membership.-- (1) A person shall be disqualified for being chosen and for being, a member of the Legislative Assembly or

Legislative Council.--

(a) if he holds any office of profit under the Government of India or the State Government or any other State Government within the Union of

India, other than an office declared by Legislature by Law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a permanent resident of the State or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of

allegiance of adherence to a foreign State;

(e) if he is so disqualified by or under any law made by the legislature.

(2) For the purposes of this section, a person shall not be deemed to hold an office of profit under the Government of India, the State Government

or any other State Government within the Union of India, by reason only that is a Minister, or a Deputy Minister.

84. Any disqualification created by any law, made u/s 69 (1) (e) of the Constitution (if the impugned legislation be considered to be such a law)

would have to satisfy the dual test of (i) not violating the fundamental rights and (ii) not violating other provisions of the Constitution. If any of the

tests is not satisfied, the disqualification would be void and would not be saved under Article 19(2) of the Constitution. Since, the impugned

legislation violates the constitutional privileges of a legislator guaranteed u/s 72 (1) of the Constitution, besides putting a curb on his fundamental

rights under Article 19(1)(a). It is an unconstitutional piece of legislation. No law enacted u/s 69 (1) (e) of the Constitution can be held valid if it

conflicts with any provision of the Constitution. The impugned legislation aims at disqualifying a member for exercising his privileges u/s 72. As a

matter of fact, Sub-clause (b) of Section 24-G has the direct effect of interfering with the exercise of the privileges u/s 72 (1) of the Constitution

and on that account it must be held to be void and inoperative.

85. Thus, it follows from the above discussion that Clause (b) of Section 24-G of the J. & K-Representation of the People Act 1957 is

unconstitutional being violative of Article 19(1)(a) of the Constitution of India and is not protected by Article 19(2). The said clause is also void

and inoperative as it infringes the constitutional privileges of a legislator guaranteed u/s 72 (1) and (2) of the Constitution of Jammu and Kashmir.

86. I shall now take up for consideration the challenge to the vires of Sub-clause (a) of Section 24-G (Supra).

87. According to this Sub-clause (i) a per-son shall be disqualified for being a member of the Legislative Assembly or the Legislative Council, if he

voluntarily gives up his membership of the political party on whose ticket he was elected as a member and (ii) when he voluntarily gives up the

membership of the political party of which he became a member, after his election as a member. In essence, therefore, this provision aims at

preventing defections simpliciter, though the restrictions are by virtue of the Explanation to the section limited in their operation to disassociation

from a ""recognised"", political party or group only.

88. The rationale behind the legislation, as canvassed by Mr. Sorabji, is that a representative of the people elected on the ticket of a political party,

commits a breach of faith to the electorate when he shifts his political loyalty, after his election, and therefore, for that breach of faith he must be

held disentitled to continue to remain their representative in the legislature. It is argued that if the impugned legislation be treated as a restriction, the

same is a reasonable retraction and is protected by Article 19(4)

89. Article 19(1)(c) of the Constitution provides that all citizens shall have the right to form an association or Union. This right has been held by the

Supreme Court to include within its sweep, the right to disassociate from an association also. In O.K. Ghosh and Another Vs. E.X. Joseph, their

Lordships opined that any restriction to disassociate from an association, would make the guaranteed right under Article 19(1)(c) of the

Constitution ""ineffective and even illusory"". I have already opined that whatever fundamental rights are available to a citizen cannot be denied to a

citizen on his election as a legislator as these rights inhere in every citizen including a legislator. Thus, prima facie when the impugned legislation

provides that if a legislator disassociates from a recognised political party, he shall be disqualified to continue as a member of the legislature, it

implies that a penalty is attracted for exercising the right guaranteed under Article 19(1)(c) in so far as the legislators are concerned, because under

the impugned legislation, they can disassociate from a recognised political party only on the pain of being disqualified to continue as a member of

the legislature. I shall advert to the argument of Mr. Sorabji that the impugned legislation does not at all infringe the fundamental right of association

or disassociation in a latter part of this judgment. For the present, I shall proceed on the assumption that the legislation affects the fundamental right

guaranteed under Article 19(1)(c) and find out if the curb imposed by the impugned legislation is a reasonable restriction within the meaning of

Article 19(4). The said Article provides that reasonable restrictions may be imposed on the exercise of the interest of public order or morality':

Does the restriction contained in Sub-clause (a) of Section 24-G fall within the scope of Article 19(4) of the Constitution requires to be seen ?

90. In adjudging the validity of the impugned restriction on the exercise of the guaranteed right under Article 19(1)(c) the Court has necessarily to

approach it from the point of view of furthering the social interest, which it is the ostensible purpose of the legislation to promote, keeping in view

the situation, which presented itself to the legislature when the impugned legislation was enacted. It is the reasonableness of the restriction and not

the reasonableness of law or the (audibility of the legislation which has to be found out. The restriction has to be reasonable from a substantive

point of view.

91. The restriction which is contained in Sub-clause (a) of Section 24-G is sought to be justified to have been imposed in the interest of 'morality'.

The expression 'morality' occurring in Article 19(4) has the same meaning as this expression in Article 19(2) of the Constitution, which has been discussed above. This expression does not in my opinion take within its sweep 'political morality'. The restriction, therefore, cannot be said to be a reasonable restriction within the meaning of Article 19(4) of the Constitution and the reasons for which I have found the restriction in Clause (b) of Section 24-G to be ultra vires Article 19(1)(a) hold good in this case also. The Chavan Committee on Defections considered the report of the Lawyer Members, on various measures, but failed to evolve any formula for preventing defections by law. The provisions contained in Sub-clause (a) of Section 24-G are similar to the provisions of the first proposal contained in the 32nd Amendment Bill, though with a major difference. In that proposal no disqualification was to be attached to a member who resigned from a recognized political party, which he joined subsequent to his election. The proposal was restricted only to disqualification to be incurred by a legislator, who voluntarily gave up the membership of the party on whose ticket he was returned to the legislature. The proposal of the 32nd Amendment Bill failed to take the form of an Act even in that shape. That apart, jurists and law teachers, have expressed reasonable doubts about the constitutionality or preventing defections by law. Prof. Paras Diwan in his Book ""Does Our Constitution Need a Second Look""; commented upon it after noticing and voicing his concern that political defections had 'become at topic of ridicule and a bane to the political system', thus:

Defection is essentially a question of political morality. And what is objectionable is this, that political immorality is sought to be cured by making defection unlawful, just as in some societies prostitution has been sought to be abolished by making brothel keeping illegal. It is submitted that the cure for defection is not the banning of defection by law (that Law may be held unconstitutional by the Supreme Court being violative of the fundamental rights of freedom of holding any opinion and of freedom of association) but the adoption of a code of conduct on the part of all political parties and politicians that if a legislator wants to shift his loyalty, he should first resign from his membership of the legislature and the political party. Then one should not forget that the proposed law (even if constitutionally valid) will not provide a cure for our malady so long as we

permit them to join and rejoin or enter into alliance with political parties"".

92. I find myself in agreement with his view. In my opinion the remedy for the evil does not lie in infringing fundamental rights of a citizen

guaranteed under Article 19(1) (a) and (c) but in the political process agreeing to evolve and observe a moral code of conduct. No law, however,

well intentioned it may be, can survive the test of constitutionality if it offends any of the guaranteed rights contained in Part III of the Constitution.

Since, I have found that the impugned legislation is not a reasonable restriction within the meaning of Article 19(4), it follows that it cannot be saved

and must be declared unconstitutional.

93. I shall now deal with the problem from another angle and also consider the force of Mr. Sorabji's argument that since the impugned legislation

does not impose any prohibition on a member to join or form any political party or to disassociate from one and only disqualifies him from

continuing as a legislator, there is no violation of the fundamental rights at all. He maintained that since the right to contest election has been held, on

the highest authority, to be a Statutory right only, the continuance of the legislator, as such, is also a statutory right. Mr. Bhandare, on the other

hand argued that whereas to contest election is a statutory right, to continue as a member of the legislature, unless disqualified, is a 'constitutional

right' as the R. P. Act does not deal with the continuation of the legislator as M. L. A. of M. L. C. or M. P.

94. The argument of Mr. Sorabji is attractive but has not much force, for it ignores the direct and inevitable consequence of the impugned

legislation on the fundamental right of legislator. No doubt to continue as a member of the legislature, is not a fundamental right but a duly elected

member has the 'constitutional right' to continue as a member of the House for its complete term, unless he is disqualified by any law. His

membership is co-extensive with the duration of the House itself. Can this ('constitutional right' of a legislator) be taken away as a punishment or

penalty for his exercising his fundamental right guaranteed under Article 19(1) (c)? In my opinion the answer must be in the negative. When the

Constitution guarantees to the citizen, the rights under Article 19(1)(c) those certainly cannot be taken away when the citizen is elected as a

legislator. Legislators, as a class, cannot be denied the enjoyment of the

guaranteed rights under Article 19(1)(c). If a citizen is to be punished for exercising his fundamental rights, then that punishment must have a constitutional sanction. No ordinary legislation can penalise any citizen for exercising his fundamental rights guaranteed under Article 19(1)(c) subject of course to the limitations contained in Act. 19 (4). Section 24-G (a) directly and substantially impinges upon the right guaranteed under Article 19(1)(c) and makes that right "illusory" in so far as the legislators belonging to a 'recognised' political party are concerned.

95. Mr. Sorabji argued that the impugned legislation did not in any event offend Article 19(1)(c). He sought analogy from the Disciplinary Rules relating to Government servants and urged that as in their case it had been held that no question of infringement of the fundamental right of association arises, where the services of a Government servant are terminated on the ground that he is a member of a political party, so also it should be held that the disqualification created by Section 24-G does not infringe the fundamental right of the legislator guaranteed under Article 19(1)(c). He argued that the disqualification u/s 24-G (a) does not prevent a legislator from disassociating himself from a recognised political party, it only disqualifies him from continuing as a member of the Assembly or the Council, as the case may be, and, therefore, does not offend Article 19(1)(c). Reliance in this respect is placed by him on P. Balakotiah Vs. The Union of India (UOI) and Others, .

96. In my opinion that analogy which Mr. Sorabji has drawn is not sound and even Balakotiah's case (Supra) does not lay down What the learned counsel contends. In the first place, so far as a Government servant is concerned, he is subject to the disciplinary rules which are framed under the Constitution. These disciplinary rules are meant to regulate his conduct and when the same provide that a Government servant shall not be a member of a political party, those become a part of his service conditions and have a constitutional sanction behind them. The nature of the service of a Government servant being such that he has to deal with cases of citizens belonging to all shades of public opinion, it is in the interest of the service itself, that the Government servant should belong to no political party. The Constitution itself gives the sanction for framing of Disciplinary Rules for Government servants to ensure proper discipline amongst them (see

Article 309). However, the Constitution provides nowhere that the legislature can frame disciplinary rules governing the 'political conduct' of the legislators. It also does not sanction the framing of any rules for ensuring loyalty of the legislators to their political parties. In the matter of discipline and conduct of the legislators the House is Supreme and it alone, can prescribe a code of conduct for the legislators by its rules or standing orders, regulating the procedure. Secondly the restriction placed on the Government servants under the disciplinary rules not to join a political party, does not imply that the Government servant does not have the fundamental right to join an association or a political party. It only means that the restrictions so placed have to be tested on the touchstone of reasonableness within the meaning of Article 19(4). The Courts have to find whether the restrictions placed on a Government servant regarding his not joining political parties, is a reasonable restriction or not. It would, therefore, not be right to say that the Govt. servant does not have, as a class the guarantee of the fundamental rights contained in Part III of the Constitution. They have all those rights but their exercise is restricted in accordance with the service rules applicable to them.

97. In *O.K. Ghosh and Another Vs. E.X. Joseph*, (at p. 815), it was observed :

It is not disputed that the fundamental rights guaranteed by Article 19 can be claimed by Government servants. Article 33 which confers power on the Parliament to modify the rights in their application to the Armed Forces, clearly brings out the fact that all citizens, including Government servants, are entitled to claim the rights guaranteed by Article 19. Thus, the validity of the impugned rule has to be judged on the basis that the respondent and his co-employees are entitled to form associations or unions. It is clear that Rule 4-B imposes a restriction on this right. It virtually compels a Government servant to withdraw his membership of the Service Association of Government servants as soon as recognition accorded to the said association is withdrawn or if after the association is formed, no recognition is accorded to it within six months. In other words, the right to form an association is conditioned by the existence of the recognition of the said association by the Government. If the association obtains the recognition and continues to enjoy it, Government servant can become members of the said association; if the association does not secure

recognition from the Government, of recognition granted to it is withdrawn Government servants must cease to be the members of the said

association. That is the plain effect of the impugned rule. Can this restriction be said to be in the interests of public order and can it be said to be a

reasonable restriction? In our opinion, the only answer to these questions would be in the negative. It is difficult to see any direct or proximate or

reasonable connection between the recognition by the Government of the association and the discipline amongst, and the efficiency of, the

members of the said association. Similarly, it is difficult to see any connection between recognition and public order.

(Emphasis mine)

98. In this context it would also be profitable to note the following observations of the Supreme Court in *Kameshwar Prasad and Others Vs. The*

State of Bihar and Another, (at p. 1170):

The Constitution of India does not exclude Government servants as a class from the protection of the several rights guaranteed by several articles

in Part III save in those cases where such persons are specifically named. Article 33 of the Constitution having selected the Services, members of

which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits

within which such restrictions or abrogations might take place, other classes of servants of Government in common with other persons and other

citizens of the country cannot be excluded from the protection of the rights guaranteed by Part in by reason merely of their being Government

servants and the nature and incidents of the duties which they have to discharge in that capacity might necessarily involve restrictions of certain

freedom in relation to Article 19 (1)(c) and (g).⁷

(Emphasis mine)

99. Both these judgments, therefore, unmistakably show that Government servants as a class, are not excluded from the guarantee of fundamental

rights contained in Part III of the Constitution. Therefore, those judgments are a complete answer to the argument of Mr. Sorabji that the right of

association guaranteed under Article 19(1)(c) is not available to the legislators, as a class, and that they can be excluded, as a class, from the

guarantee of fundamental rights contained in Part III of the Constitution. P.

Balakotaiah Vs. The Union of India (UOI) and Others, , on which

strong reliance was placed by Mr. Sorabji also in my opinion, does not help him. The following observations make the position clear (at p. 238) :

It is next contended that the impugned orders are in contravention of Article 19(1)(c) and are therefore void. The argument is that action has been

taken against the appellants under the rules, because they are communists and trade unionists, and the orders terminating their services under Rule

3 amount in substance, to a denial to them of 'the freedom to form associations, which is guaranteed under Article 19(1)(c). We have already

observed that that is not the true scope of the charges. But apart from that, we do not see how any right of the appellants under Article 19(1)(c)

has been infringed. The orders do not prevent them from continuing to be communists or trade unionists. Their rights in that behalf remain after the

impugned orders precisely what they were before. The real complaint of the appellant is that their services have been terminated; but that involves,

apart from Article 311, no infringement of any of their constitutional rights. The appellants have no doubt a fundamental right to form associations

under Article 19(1)(c); but they have no fundamental right to be continued in employment by the State and when their services are terminated by

the State they cannot complain of the infringement of any of their constitutional rights, when no question of violation of Article 311 arises. This

contention of the appellants must also be rejected.

(Emphasis mine)

It would also be relevant to note the following observations (at p. 238) :

We are also unable to agree with the argument of the appellants based on the charges made against the appellant in Civil Appeal No 46 of 1956

in the notice dated 6-7-1950, that the expression ""subversive activities"" is wide enough to take in lawful activities as well, and must therefore be

held to be unreasonable for purposes of classification under Article 14. The notice, it is true refers to the appellant being a member of the

Communist Party and to his activities in the trade union. It is also true that it is not unlawful to be either a Communist or a trade unionist. But it is

not the necessary attribute either of a Communist or a trade unionist that he should indulge in subversive activities and when action was taken

against the appellant under the rules. It was not because he was a Communist or

a trade unionist, but because he was engaged in subversive activities.

(Emphasis mine)

100. In my opinion, therefore, it is not possible to hold that the legislators, as a class, do not have the fundamental right of association as is

available to the citizens under Article 19(1)(c). The argument of Mr. Sorabji, therefore, fails.

101. Mr. Sorabji next argued that the impugned legislation could only be struck down if it directly infringed the fundamental right guaranteed under

Article 19(1)(c) and not otherwise. The proposition, in my opinion, is too broadly stated. The legislation can be, of course, struck down if it

directly infringes the fundamental rights of a legislator but it can also be struck down if the inevitable consequences of the legislation is to prevent

the exercise of the fundamental right guaranteed under Article 19(1)(c) or to make the exercise of that right ""ineffective or illusory"".

102. In this connection, it is relevant to bear in mind that it is not the form but the effect of the legislation which is relevant and the Court has to

consider the direct and inevitable effect of the impugned legislation on the fundamental rights. In *Mrs. Maneka Gandhi Vs. Union of India (UOI)*

and *Another*, (at pp. 632, 33), it was opined :

The law on the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right has undergone radical

change since the days of *A.K. Gopalan Vs. The State of Madras*, . In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , the doctrine that the

object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State

action on the fundamental right of the individual is irrelevant as laid down in *Gopalan's* case was finally rejected. This doctrine is in substance and

reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of

legislative powers conferred on Federal and State Legislatures with reference to legislative lists. The test applied since *R. C. Cooper's* case was as

to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that

in a given case the pith and substance of the State action may deal with a

particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right, the pith and substance doctrine looks only at the objection and object matter of the State action, but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise the protection of the fundamental right would be eroded.

Their Lordships explained :

Therefore, the word, 'direct' would go to the quality or character of the effect and not to the subject matter.

and added that the criterion of ""inevitable"" consequence

helps to quantify the extent of direction necessary to constitute infringement of a fundamental right. Now, if the effect of State action on a

fundamental right is direct and inevitable, then a fortiori it must be presumed to have been intended this is the test which must be applied for

the purpose of determining whether the impugned order made under it is violative of Article 19 (1)(a) or (g).

Thus it follows that if the inevitable consequence of the impugned legislation is to curb the fundamental rights, then it must be held to be ultra vires

and unconstitutional. ""Direct and inevitable effect"" as used in the aforesaid judgment does not imply that before an action can be struck down as

unconstitutional, it has to be established that it has both a direct effect as well as inevitable effect on the exercise of fundamental rights. The action

would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their

exercise ""ineffective or illusory"". Since the inevitable effect of Section 24-G (a) is that it makes the exercise of right of association guaranteed under

Article 19(1)(c) ineffective and illusory in so far as the legislators are concerned, it must be held to be unconstitutional.

103. Of course, as already observed, to contest election is only a statutory right but after election, the right to speech in the Legislature is

guaranteed by Section 72 of the Constitution and the right to continue as a member, for the entire duration of the term of the Legislature is also

guaranteed by Section 52 of the Constitution. This constitutional right to

continue as a legislator, after his election, is only subject to the disqualification contained in Section 69 of the Constitution (supra). According to Mr. Sorabji the impugned legislation is covered u/s 69 (1) (e) and has therefore, the constitutional sanction. I cannot agree. No law made under the Section 69 (1) (a) would be valid if it violates the fundamental rights or any other constitutional provision. Any law made u/s 69 (1) (e) to be upheld; must be otherwise, constitutionally valid. The reasoning given by me while holding Clause (b) of Section 24-G as unconstitutional, void and inoperative also holds good so far as the non validity of Clause (a) of the section, is concerned. Apart from infringing the fundamental right under Article 19(1)(c) it also offends Section 52 of the Constitution and a neither protected by Article 19(4) nor by Section 69 (1) (e), and on that account also is void and inoperative. The disqualification which can be prescribed by the Legislature by any law enacted u/s 69 (1) (e) must be read ejusdem generis with the categories contained in Section 69 (1) (a) to (d). The very nature of the disqualifications prescribed, u/s 69 (1) (a) to (d) show that these are the disqualifications which have bearing on some 'personal' conduct of the member. None of them have any concern with the 'political' conduct of a member. None of these disqualifications are incurred by a member for anything he does in his capacity as a member of the Legislature. None of these disqualifications are incurred by the member for exercising any of the guaranteed fundamental rights. The disqualifications prescribed u/s 24-G is not of the same gene as the disqualifications prescribed in Clauses (a) to (d) of Section 69 (1). It is of an altogether different species. The impugned legislation reeks to punish a legislator either for exercising his fundamental rights under Article 19(1)(a) or under Article 19(1)(c). The disqualification prescribed by Section 24-G, thus, makes a mockery of the guaranteed fundamental rights of the legislators as contained in Articles 19(1)(a) and 19(1)(c) and unreasonably restricts their exercise by the legislators. They can exercise those rights only on the pain of suffering disqualification of continuing as members of the Legislature. Thus, even if enacted u/s 69 (1) (e) the impugned section is not only unconstitutional as offending the fundamental rights but also invalid and inoperative as infringing Sections 72 and 52 of the Constitution.

104. In view of what has been said above, the conclusion is irresistible that Clause (a) of Section 24-G is violative of Article 19(1)(c) of the Constitution and is not protected by Article 19(4). The said section also impinges upon Section 52, for the term of the member is co-extensive with the duration of the Legislature.

105. I, therefore, declare both Clauses (a) and (b) of Section 24-G to be unconstitutional and void.

106. I shall now take up for consideration the attack to the validity of Section 24-G which according to Mr. Bhandare's third ground of attack, is ultra vires Article 14 of the Constitution of India.

107. Article 14 of the Constitution of India provides that the State shall not deny to any person equality before law or equal protection of laws

within the territory of India. The expression "equal protection" implies right to equal treatment in the similar circumstances both in the matter of

privileges conferred and liabilities imposed by law. There can be no discrimination between one person and another if as regards the subject matter

of the legislation, their position is the same. This principle, however, does not take away from the State the power of classifying persons for

legitimate purposes. What it prohibits is class legislation and not reasonable classification, for the purpose of legislation. If the Legislature takes

care to reasonably classify persons for legislative purposes and treats persons belonging to a well defined class equal, then it is not open to the

challenge of violation of Article 14. In order to pass the test of permissible classification, it is settled law that two conditions must be fulfilled. Firstly

that classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those left out

and second that differentia must have rational basis and a nexus with the object sought to be achieved by the statute in question. There is, indeed,

always a presumption in favour of the constitutionality of an enactment. It is also assumed that the Legislature understands and correctly

appreciates the need of its own people. However, the presumption is rebuttable and can be rebutted by referring to the contents of the statute itself

or by extraneous evidence. Of course, the presumption would be of no avail when a law is discriminatory on the face of it and it is patent that either

the Legislature made no attempt to make a classification at all or that the

classification made is palpably unreasonable and has no nexus with the object sought to be achieved. As observed in *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, in construing Article 14 we should not adopt such an approach that it would "stultify or choke the beneficial legislation"; but at the same time, if the classification is on the face of it arbitrary, the Court has no option but to declare it violative of Article 14 of the Constitution. In *Sakhawat Ali Vs. The State of Orissa*, it was observed (at p. 169) :

Article 14 forbids class legislation but does not forbid reasonable classification for the purpose of legislation. That classification, however, cannot be arbitrary but must rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classification is made. In other words the classification must have a reasonable relation to the object or the purpose sought to be achieved by the impugned legislation.

Commenting upon the content and reach of Article 14, it was observed in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, at p. 624)

(supra) :

Now, the question immediately arises as to what is the requirement of Article 14. What is the content and reach of the great equalising principle

enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the

foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt

should be made to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic

concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was

pointed out by the majority in *E.P. Royappa Vs. State of Tamil Nadu and Another*, namely that "from a positivistic point of view, equality is

antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other, to the

whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and

constitutional law and is therefore violative of Article 14". Article 14 strikes at

arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive.

108. It is broadly on the touchstone of these principles that I shall examine the challenge to the vires of Section 24-G on the ground that it offends Article 14.

109. The statement of objects and reasons, as reproduced elsewhere in the judgment, shows that the impugned legislation was intended to cover all the defectors. Even the counter filed to the petition of Malik Mohi-Ud-Din on the affidavit of Shri G. A. Khan, Addl. Secretary to Government of Jammu and Kashmir, Law Department also spells out the same "object".

110. It was to combat the evil of "defection", that the impugned legislation was enacted, is stated in categorical terms in the said counter-affidavit.

The rationale of the legislation, according to Mr. Sorabji is that a representative elected on a particular election manifesto commits a breach of faith

to the electorate when, he deviates from the manifesto and changes his party loyalty. He, according to the learned counsel, becomes ineligible to

continue to represent his constituency. Does the impugned legislation achieve that object? It is in this connection that the Explanation to Section 24-

G assumed relevance. According to the Explanation, a political party means a political party recognised under any law or any rule, regulations,

order or notification or recognised by the Speaker of the Assembly or the Chairman of the Legislative Council, as the case may be.

111. Clause (a) of Section 24-G is in two parts. By the first part, the disqualification is attracted when a member voluntarily resigns his membership

from the recognised political party on whose ticket he was elected. By the second part, the disqualification is attracted to a member who joins a

recognised political party (on whose ticket he was not elected) subsequent to his election, and then resigns from that recognised political party. The

objectionable part in Clause (b) also is the same that the disqualification is attracted only in so far as members of "recognised" political parties are

concerned. Both Clauses (a) and (b) limit their operation only in respect of members of recognised political parties and prima facie are

discriminatory. The second part of Clause (a) is more obnoxious than the first. In the second part it is obvious, that the breach of faith, so far as the

electorate is concerned, would be complete the moment a member sheds of his cloak of independence or of a non-recognised party and joins a

recognised political party after his election. This defection under the impugned legislation, does not disqualify him. What disqualifies him is, if he

resigns from that recognised political party, which he had joined subject to his election. It is, thus manifest that this provision has been enacted in

the interest of recognised political parties rather than to curb the evil of defection. In the system of Parliamentary democracy that we have, different

parties field their candidates at elections. Many persons not belonging to any party also contest the election as independents. On their being

elected, each one of them becomes a member of the House, All the members put together constitute a class called the M. L. As., M. L. Cs. or M.

Ps. The mischief of the impugned legislation lies in what it permits rather than what it forbids. The impugned legislation excludes from its purview

many categories, from the same well defined class of legislators, arbitrarily. For example, it excludes an independent candidate elected as such, on

his own. If he gives up the cloak of his independence and joins any other non-recognised political party, he incurs no disqualification at all. He does

not incur any disqualification if he voluntarily resigns from such a non-recognised, though identifiable, political party, which he had joined

subsequent to his election. He also incurs no disqualification if he gives up voluntarily his independence and joins a recognised political party.

However, if he resigns from that recognised political party, which he joined subsequent to his election, he incurs the disqualification. Similarly, a

legislator belonging to a non-recognised political party may voluntarily resign from it and yet he would suffer no disqualification. He is at liberty to

become independent or join any other non-recognised political party and leave that, at his will. He still would not attract any disqualification. He

can also with impunity, voluntarily resign, from the non-recognised political party, on whose ticket he was elected, and join a recognised political

party without any fear of being disqualified. However, if he then voluntarily resigns from that recognised party, he suffers the disqualification u/s 24-

G. All this is indicative of the fact that it is the interest of the recognised political parties which has led to the classification and not the desire to combat the evil of defection"". As a matter of fact, this part of Clause (a) encourages defections in so far as independents and members of unrecognised, political parties are concerned. Even so far as the first part of Clause (a) is concerned, as noticed above, the disqualification is attracted only when a member elected on the ticket of a recognised political party voluntarily resigns his membership of that political party but does not affect an independent or a member elected on the ticket of an unrecognised political party who voluntarily resigns from it. Thus the impugned legislation has been brought forward, in fact, to consolidate the interests of recognised political parties. Since, members after their election, constitute one class, the classification which picks out a category only out of that class, without any rational basis of the objective to be achieved, is not only objectionable but grossly arbitrary. In matters of political right, as argued by Mr. Bhandare, there must be absolute equality and there is no scope for excluding some out of a class, who are all similarly situated or placed. The definition of the political party as contained in the Explanation is unreal, artificial and has no relation to the object sought to be achieved. It is unintelligible, arbitrary and discriminatory. The classification made has no nexus with the object to be achieved by the impugned legislation.

112. That apart, the impugned legislation is also bad as it does not contain any guidelines. It does not even define as to who is a defector. Any law pertaining to defectors, without defining who is a defector, would not only be unworkable but also arbitrary. The defector, within the scope of Section 24-G is only a member of a recognised political party who voluntarily resigns from that political party, irrespective of the fact whether he was elected on the ticket of that party or he joined it after his election. This restrictive scope of 'defector' defeats the very object of the legislation and makes it arbitrary and discriminatory. The impugned legislation does not take into account splits, which take place in a political party on ideological differences. Which of the two grounds of a recognised political party, in the event of a split, would be considered as the defector ? The legislation also does not take into account voluntary resignation of a person on account of force of circumstances. For example, when a recognised

political party, outside the Legislature, merges into another recognised political party, that would require the legislators of the merged party to join

the other political party. Under the impugned legislation, they shall stand disqualified. That would be most unjust and unfair. It also does not

provide for the contingency when a member is forced to resign from the membership of the recognised political party on his election either as the

Speaker of the Assembly or the Chairman of the Council. The legislation presumes that a person voluntarily resigns from one political party only

on the lure of office or some gain. It does not take into account resignation of a legislator from the recognised political party, on ideological

differences. It further fails to take into account that a member may resign from the recognised political party on grounds of his conscience or when

he finds that the said party is going against the manifesto. In such cases, either the member has to compromise with his conscience and go against

his commitment to the electorate or else face disqualification, for parting company with the recognised political party. By not providing for these

situations, and such situations can be multiplied the impugned legislation not only becomes unworkable and illogical but also arbitrary and

discriminatory. The argument of Mr. Sorabji that Article 14 does not require any scientific precision or any exact inclusion or exclusion and that a

statute cannot be struck down as unconstitutional because of hardship caused to a few genuine cases is indeed sound. I agree that legislation

enacted for the achievement of a particular object or purpose need not be all embracing. It is open to the Legislature to determine what categories

it would embrace within the scope of legislation. However, in selecting so, the Legislature cannot pick and choose a category, out of a class,

without a reasonable classification. All persons belonging to the same class and similarly situated have to be treated alike and there can be no

discrimination between them. Class legislation is strictly prohibited by Article 14, and that is exactly what the impugned legislation does. What is

not intelligible is as to why does the impugned legislation put curbs on members of 'recognised' political parties only and not on others. If the

objective of the legislation is to punish a member for going back of his commitment to the electorate it should make no difference whether such a

member belongs to a recognised political party or to an unrecognised political party or even if he is an independent. Independents have, as the

history tells us, often held (he balance and dictated terms, when no political party has a majority in the Legislature, to form the Government. Why

should an independent not suffer the disqualification when he voluntarily gives up his independence to join a recognised political party, whose

candidate for ought you know, he might have defeated at the polls. What holds true for an independent holds equally true for the members returned

to the Legislature on the ticket of an unrecognised political party. He does not incur disqualification, if he voluntarily gives up the membership of

that political party. The impugned legislation thus not only puts the right of recognised political parties on a higher pedestal, it also has the effect of

curbing the fundamental rights of the legislators belonging to 'recognised' political parties from dissociating from that party and in that way as

already observed it impinges upon their fundamental rights. The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, , B.

Banerjee Vs. Smt. Anita Pan, and Fatehchand Himmatlal and Others Vs. State of Maharashtra, in support of his submission that the Legislature

can, without offending Article 14, bring forth a legislation in which certain categories which would stand on the same footing as those which are

covered by the legislation are left out. All these cases are distinguishable as in each one of them, no category out of a class was picked out for

differential treatment besides they do not help Mr. Sorabji at all.

113. In The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, , there was 'over inclusion'. Constitutional validity of

Section 178-A of the Sea Customs Act, 1878, which provided that where any goods to which this section applies are seized under the Act, in the

reasonable belief that they are smuggled goods, the burden, of proving that the goods are not smuggled shall be on the person from whose

possession those are seized. The section was to apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics

and any other goods which the Central Government may notify in that behalf. The challenge to the validity inter alia was on the ground that it was

violative of Article 14 and that the legislation had overstepped its limits. Their Lordships opined (at p 325) :

Where, however, there is guidance and the legislation is challenged on the ground that the law with the definite guidance for which it provides has

outstepped the limits of the Constitution by imposing a restraint; which is either uncalled for or unreasonable in the circumstances, the scope and

content of the enquiry is far removed from the test of conformity to rational classification, adopted for judging whether law had contravened the

requirement of equal protection under Article 14.

114. Their Lordships held that by putting the burden of proof on the person from whose possession, goods are seized, even some innocent

persons who have imported the goods after paying duty would be harassed, but that did not render the provision unconstitutional as they could not

be left out. They opined :

Any severance of the marginal cases and their exclusion from the operation of the provision would greatly reduce its effectiveness and provide

innumerable loopholes for easy evasion.

115. This judgment, therefore, in effect supports the argument of Mr. O. N Tikku that by leaving out category after category from the purview of

the impugned legislation, the effectiveness of the legislation is greatly eroded and its objective frustrated.

116. B. Banerjee Vs. Smt. Anita Pan, related to the challenge to the validity of Section 13 (3A) of the West Bengal Premises Tenancy Act, as

amended by Act of 1969. The challenge to the validity was on the ground that it was violative of Article 14 as certain innocent landlords were also

going to be affected. Their Lordships opined (at pp. 1150, 1151) :

We therefore view the provision impugned through a socially constructive, not legally captious microscope to discover glaring unconstitutional

infirmity, if any and not chase every chance possibility or speculative thought which may vitiate the law. Stray misfortunes when laws affecting large

chunks of the community are enacted are inevitable and the respondents before us may perhaps belong to that category. Social legislation without

tears, affecting vested rights, is impossible and statutory construction as a benignant sensitivity.

117. The authority also is of no avail to Mr. Sorabji as not only was it also , case of 'over inclusion' when the law took within its embrace all

landlords, but also the validity of the legislation in that case was upheld primarily on the ground that it was neither arbitrary nor unreasonable and

that the same was intended to achieve the object. It was in this context that it

was opined that when law is enacted to affect a large chunk of the society, some innocent may get roped in and in the larger interest that cannot be helped.

118. *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, popularly known as the 'Money Lenders' case, which was also a case dealing

with over inclusion also cannot advance the argument of Mr. Sorabji. It was held in that case that law makers can on the basis of socio-economic

facts bring forth a legislation to cover all money lenders and liquidate the existing debts of some class without offending Article 14. In this case it is

pertinent to note that no category of money lenders was left out of the purview of the statute in question and the legislation was found to achieve its

very object. The following observations may be reproduced with advantage, as they are an answer to Mr. Sorabji's argument (at p 1841) :

In this perspective, we see no constitutional flaw in the Act on the score that the sheep have not been divided from the goats. Realism in the

Legislature is a component of reasonableness. It was urged by Shri Chitale that the definitional deficiency in ignoring the movable wealth of debtors

makes the scheme arbitrary and unreasonable. A romantic view of the debtors being considerable owners of costly art pieces and sophisticated

gadgets and yet eligible for relief is good rhetoric but unrealistic. A pathetic picture of the money lender being deprived of his loan assets while

being forced to repay his lender was drawn but that cannot affect the reasonableness of the relief to the grass roots borrower. Nor is it valid to

attack the Act on the score that the whole debit i. e. the very capital of the business, has been dissolved it follows that for the very

survival of Trade, the regulatory measures of relief of indebtedness is required. What form this relief should take is ordinarily for the legislature to

decide. It is not ordinarily for the Court to play the role of Economic Adviser to the Administration. Here ameliorator measures have been laid

down by the legislature so that the socio-economic scene may become more contented, just and orderly. Obviously, this is regulatory in the interest

of trade itself. This policy decision of the House cannot be struck down as perverse by the Court The restrictions under the Debt Act are

reasonable.

119. The impugned legislation, in the case in hand, as already observed, on the

other hand, leaves out category after category out of one class and picks out only one category out of the similarly situated. The classification is as unreal as it is unreasonable. It smacks of discrimination and is an arbitrary mode of dealing with the problem of defection. It has no nexus with the object sought to be achieved. The classification made by the legislature is not based on any intelligible differentia. I agree with Mr. Sorabji that mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of Article 14 but in the instant case it is not the inequality of treatment alone which is objectionable but the fact that the selection or differentiation is un-reasonable and arbitrary and does not rest on any rational basis having regard to the object which the legislature had in view and in the name of classifying members of the recognised political parties on the ground of special feature, the legislature has obviously put the interest of recognised political parties above the object of the legislation. Had Section 24-G brought within its sweep all the legislators and provided for their disqualification in the event of their defection, it could perhaps be said that for the good of the multitude, the interest of a few innocent who change loyalties on grounds of conscience or ideological differences, could be sacrificed but the mischief of the legislation lies in what it permits rather than what it prohibits. By leaving out of the purview of the legislation, members of unrecognised political parties, even though belonging to identifiable political parties and independents, the whole object of the Act goes defeated, as not only such legislators are free to defect but they can defect any number of times, till they join a recognised political party. To achieve the objective of the legislation, disqualification should have been attached to a defector; irrespective of his party affiliations and if that was done perhaps the charge of infringing Article 14 would not have been available. In the present state, the only object, which the impugned legislation perhaps achieves is the enforcement of discipline in recognised political parties. That is objectionable. The impugned legislation seeks to enforce the obligations of legislators belonging to the recognised political parties to those and seeks to ensure their loyalty to their political party by law.

120. As Mr. Seervai puts it in his "Constitutional law of India" Vol. III (p. 1837) that the enactment of such an anti-defection law "is not a

satisfactory way of ensuring compliance with ordinary standard of political morality to force people to do the right thing by compulsion of law." I

agree.

121. It was next urged by Mr. Sorabji that since it is open to the legislature to recognise degree of harm, it was permissible for the legislature to

confine the ambit and scope of the legislation to the legislators belonging to recognised political parties. There cannot indeed be any quarrel with

the proposition that it is open to the legislature to recognise degrees of harm and enact law accordingly but it certainly is not open to the legislature

to enact law by adopting the policy of pick and choose, out of a well defined class. It is wholly unrealistic to assume that the evil of defection is

more rampant with members of recognised political parties only or that they alone shift their loyalties for the lure of office or on account of sheer

opportunism. The history of defection, on the basis of the statistics gathered from the Report of Committee on Defection and the 'Politics of Power'

by Kashyap (1974) shows that independents constitute quite a substantial number in the legislature and more often than not have they defected to

tilt the balance in favour of one or the other political party. For example after the fourth General Election, in Andhra Pradesh 30 independents left

the cloak of independence and joined one or the other political party, while in Bihar their number was 38 and in Haryana 17. In Madhya Pradesh

23, Manipur 9, Himachal Pradesh 5, Uttar Pradesh 15, Punjab 6, Rajasthan and West Bengal 4 each. In Table 3.1, Kashyap in his book 'Politics

of power' discloses that between 1967-1971 as many as 212 defectors were rewarded with ministerial offices in various States and Union

Territories. According to him in Feb. 1968 itself 157 out of a total of 376 independents joined one or the other political party and 116 out of them

got ministership and seven even Chief Ministership in different States in the country. From these figures it is manifest that the degree of harm which

independents can cause to the political stability is in no way less than the degree of harm which can be caused by defection of the members of

recognised political parties. The legislature by leaving out the independents and members of un-recognised political parties, from the purview of the

impugned legislation, has in fact indulged in class legislation, not based on any reasonable classification and that makes the impugned legislation

liable to avoidance not only as a law discriminatory in itself but also on the ground that there is no nexus of the classification made with the object

to be achieved by the legislation.

122. The aforesaid discussion, leads to an irresistible conclusion that Section 24-G of the Jammu and Kashmir Representation of the People Act

1957 is also ultra vires Article 14 of the Constitution.

123. The last argument of Mr. Bhandare on the vires of Section 24-G was that the said section is destructive of the basic structure of the

Constitution. In the view that I have taken that Section 24-G is ultra vires. Articles 14, 19(1)(a) and 19(1)(c) of the Constitution of India, I do not

find it necessary to discuss the last argument of the learned counsel, which even otherwise was faintly argued by him before the Bench. That

question becomes purely an academic question and need not detain me.

124. Article 13(2) of the Constitution of India provides that any law made by the legislature or other authority which contravenes any of the

fundamental rights included in Part III of the Constitution shall, to the extent of the contravention be void.

125. Therefore, Section 24-G of the J. & K. Representation of the People Act, 1957 as introduced by the Jammu and Kashmir Representation of

the People (Amendment) Act, 1979 which has been found to violate and contravene Articles 14, 19(1)(a) and 19(1)(c) of the Constitution of

India, is unconstitutional and void. The same is, accordingly, hereby struck down.

126. In the result both the writ petitions succeed and are hereby allowed.

127. The petitioners, Malik Mohi-ud-Din and Mian Bashir Ahmed, have thus, not incurred any disqualification to continue as members of the

Jammu and Kashmir Legislative Assembly. The references made by the Speaker of Jammu and Kashmir Legislative Assembly u/s 70 of the

Constitution are, under the circumstances, hereby rejected.

128. In view of the intricate questions of law involved, I leave the parties to bear their own costs.

Kotwal, J.

129. Constitutional validity of Section 24-G of the J. & K. Representation of the People Act, 1957, hereinafter to be referred to as the

Representation of the People Act, has been challenged in these writ petitions.

The challenge is based on the grounds : firstly, that the section is violative of Article 19(1)(a) of the Constitution of India, hereinafter to be referred to as the Constitution, inasmuch as it abridges the petitioners' right to freedom of speech and expression; secondly, that it is also violative of Article 19(1)(c) inasmuch as it takes away the petitioners' right to form association; thirdly, that it being discriminatory in character, is violative of Article 14; fourthly, that it takes away the right of freedom of speech and expression guaranteed to the petitioners under Clauses (1) and (2) of Section 72 of the Constitution of Jammu and Kashmir, hereinafter to be referred to as the State Constitution, and the same right being a constitutional right, it could not have been taken away by any legislative enactment save by amending the Constitution itself; fifthly, that Clause (e) of Section 69 of the State Constitution on its plain terms has to be read ejusdem generis to Clauses (a), (b), (c) and (d) of the said section, and the disqualification created by the impugned section not having the same genus as that of the disqualification contemplated by the other clauses of the section, the impugned section is ultra vires of the powers vested to the State Legislature; and sixthly, that it is destructive of the basic structure of the Constitution, inasmuch as it violates the fundamental rights of freedom of speech and expression and equality before law guaranteed to every citizen of India under Articles 19(1) and 14 respectively.

130. The State, however, seeks to uphold the validity of Section 24-G by urging : firstly, that right of speech and expression which a legislator exercises in a house of legislature is not a fundamental right contemplated by Article 19(1)(a) but is only a privilege which a legislator enjoys as a member of the house; secondly, that at best it is a constitutional right guaranteed to a legislator u/s 72 of the State Constitution in contradistinction to fundamental right envisaged by Article 19(1) which every citizen of India enjoys in common with each other and need not, therefore, stand the scrutiny of Articles 14 and 19(1) of the Constitution; thirdly, that in any event what the impugned section seeks to take away is not the fundamental or a constitutional right of the legislator to freedom of speech and expression, but his statutory right of continuing as a member of the house of legislature which need not stand the test of Article 13 of the Constitution; fourthly, that in no case can the impugned section be said to take away or

even abridge the right of freedom of speech or expression of a legislator, or his right to form association, but what is actually sought to take away is

his right to continue as a legislator which is not a fundamental right but is merely a statutory right; fifthly, that the rule of ejusdem generis is not

attracted to the impugned legislation because Clauses (a) to (d) of Section 69 of the State Constitution do not have a common genus and provide

for disqualification arising out of different causes; sixthly, that the impugned section cannot be said to be discriminatory in character merely because

it leaves certain legislators or classes of legislators outside its purview as no law enacted to achieve a particular object need necessarily be all

embracing; and seventhly, that in no case can the impugned section be said to be destructive of the basic structure of the Constitution.

131. Article 13 of the Constitution provides that all laws in force in India immediately before the commencement of the Constitution in so far as

they are inconsistent with the provisions contained in Part III of the Constitution shall be void to the extent of such inconsistency. It forbids the

State from making any law which takes away or abridges the rights conferred by Part III and declares void every post Constitution law which

takes away or abridges any such right. To attract the mischief of this Article it is not necessary to show that the impugned legislation has actually

taken away any of the rights guaranteed to a citizen of India under Part III. It is enough if it has caused even a threat to the exercise of any such

right. Clause (b) of Section 24-G provides that a person shall be disqualified for being a member of the Legislative Assembly or the Legislative

Council of the State if he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any

such person authorised by it in this behalf without obtaining prior permission of such party or person. Obviously therefore, it poses a serious threat

to his right to freedom of speech and expression in the House in case he disobeys the direction or whip issued to him or even abstains from voting

in the House. He cannot say that which he really wants to say, for if he says so and the same would be contrary to the party whip or direction he

has to pay the penalty of losing the membership of the House. The same is true of voting, for it is one of the modes of communicating one's idea or

feeling to others. A legislator may give his assent to a particular motion either by uttering the necessary words from his mouth, or by merely lifting

his hand and each of these forms of demonstration will tantamount to speech or expression. Dealing with the question whether a demonstration is

covered by either or both of the two freedoms guaranteed by Articles 19(1)(a) and 19(1)(b), then: Lordships in *Kameshwar Prasad and Others*

Vs. The State of Bihar and Another, observed as under (at p. 1170) :--

... .. Without going very much into the niceties of language it might be broadly stated that a demonstration is a visible manifestation of the

feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. It is in

effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of

speech

132. There can, therefore, be no manner of doubt that Clause (a) of Section 24-G does imperil the right of a legislator to say whatever he likes to

say in the House or to vote for or against a motion moved in it as he likes. He has to say only that what his party whip wants him to say and to vote

in a manner in which the whip wants him to vote. The provision is so stringent that he cannot also abstain from voting even though for reasons

beyond his control. He can no doubt ignore the party whip or direction, but only at the cost of losing his membership of the House. If, therefore,

this right of speech and expression can be said to be a fundamental right envisaged by Article 19(1)(a), then it can be hardly doubted that the

impugned legislation will not survive the attack of Article 13, unless it can be said that the restriction imposed on the legislator's right to freedom of

speech and expression is reasonably within the meaning of Clause (2) of Article 19.

133. Mr. Sorabji's contention, however, is that a legislator does not possess, as such, any fundamental right to freedom of speech and expression

envisaged by Article 19(1)(a). It is merely a constitutional privilege granted to him u/s 72 of the State Constitution and is co-extensive with his life

as a member of the House. He has based his argument on the authority of a Supreme Court decision, viz., *K. Anandan Nambiar and Another Vs.*

Chief Secretary, Government of Madras and Others, , in particular, to the following observations made therein (at p. 654):

Then as to Article 100(1) : what it provides is the manner in which questions will

be determined; and it is not easy to see how the provision that all questions shall be determined by a majority of votes of Members present and voting, can give rise to a constitutional right as such. The freedom of speech on which Mr. Setalvad lays considerable emphasis by reference to Article 105 (1) and (2), is a part of the privilege of Members of the House. It is no doubt a privilege of very great importance and significance, because the basis of democratic form of Government is that Members of Legislatures must be given absolute freedom of expression when matters brought before the Legislatures are debated. Undoubtedly, the Members of Parliament have the privilege of freedom of speech, but that is only when they attend the session of the House and deliver their speech within the chamber itself. It will be recalled that in Cap. Ramsay's case, what had been urged before the Committee of Privilege was that the detention of Cap. Ramsay had caused a breach of privilege of his freedom of speech, and this plea was rejected by the Committee. We are, therefore, satisfied that on a close examination of the articles on which Mr. Setalvad has relied the whole basis of his argument breaks down because the rights which he calls constitutional rights are rights accruing to the Members of Parliament after they are elected, but they are not constitutional rights in the strict sense, and quite clearly, they are not fundamental rights at all. It may be that sometimes in discussing the significance or importance of the right of freedom of speech guaranteed by Article 105 (1) and (2), it may have been described as a fundamental right; but the totality of rights on which Mr. Setalvad relies cannot claim the status of fundamental rights at all and the freedom of speech on which so much reliance is placed, is a part of the privileges falling under Article 105, and a plea that a breach has been committed of any of these privileges cannot, of course be raised in view of the decision of the Committee of privileges of the House of Commons to which we have just referred. Besides, the freedom of speech to which Article 105 (1) and (2) refer, would be available to a Member of Parliament when he attends the session of the Parliament. If the order of detention validly prevents him from attending a session of Parliament, no occasion arises for the exercise of the right of freedom of speech and no complaint can be made that the said right has been in-validly invaded.

134. In this case the petitioner I. K. Ananda Nambiar, a Member of Parliament, had been detained by Government of Madras under Rule 30 (1)

(b) and (4) of Defence of India Rules, 1962. He had challenged his detention on two grounds; one, that Rule 30 (1) (b) was invalid, and two, that

the order of detention was itself invalid as it was mala fide and otherwise also not justified by the Rules. Validity of Rule 30 (1) (b) was challenged

on the ground that it sought to take away the right of a member of Parliament to address the Parliament and to cast his vote during its proceedings.

An order of detention automatically prevents a member of Parliament from participating in its proceedings and giving his vote which in turn amounts

to violation of his constitutional rights, firstly, to attend the session of Parliament pursuant to a summons issued by the President under Article

85(1), secondly, to hear the address of the President which he delivers in exercise of his powers under Article 86(1), thirdly, to cast his vote in

terms of Article 100(i) and fourthly, freely speak and cast his vote in exercise of his right under Article 105 (i) and (ii) of the Constitution which is

fundamental right of speech and expression contemplated by Article 19(1)(a). The aforesaid observations, it is manifest, were made by the Court

in the background of these contentions raised on behalf of the petitioner. Their Lordships held that strictly speaking no constitutional right of the

petitioner, much less his fundamental right, was involved merely because he had an option to attend the Parliament is obedience to the summons

issued by the President under Article 85(1), or to hear his address and vote for or against the motion of thanks under Article 86(1). He could have

no doubt addressed Parliament and cast his vote in exercise of his powers under Article 105, but that depended upon whether he was qualified for

being a member of the House. To address Parliament was only the privilege of a member of Parliament and if the privilege was lost the right to

address and vote was automatically lost. Treating preventive detention to be of the same impact and consequence as the detention on conviction

for a substantive offence, their Lordships held that the petitioner had incurred the disqualification within the meaning of Section 7 of the

Representation of the People Act, 1951. By being detained under Rule 30 (1) (b) he had incurred a disqualification and had consequently, no

right to address the Parliament or even cast a vote during its proceedings so long as he remained in detention. This is amply borne out from the

following observations made by the Court (at p. 665) :

.. It is true that the conviction of a person at the end of a trial is different from the detention of a person without a trial; but so far as their impact on the alleged constitutional rights of the Members of Parliament is concerned there can be no distinction. If a person who is convicted and sentenced has necessarily to forego his right of participating in the business of the Legislature to which he belongs, because he is convicted and sentenced, it would follow that a person who is detained must likewise forego his right to participate in the business of the Legislature. Therefore, the argument that so long as the Member of Parliament has not incurred any disqualification, he is entitled to exercise his rights as such Member cannot be accepted.

135. It is, therefore, manifest that what the Court was really concerned with was the petitioner's right to enter the Parliament as its member and not his right to address it or cast his vote during its proceedings; the latter right having been presumed to vest in him as a constitutional privilege while he retained his right to enter the Parliament as its member.

136. This inevitably takes us to the coo-notation of the expression ""constitutional privilege"" occurring in the aforesaid judgment. ""Privilege"" has been defined in Webster's Third New International Dictionary as ""a right or immunity granted as a peculiar benefit, advantage or favour; a peculiar or personal advantage or right especially when enjoyed in derogation of common right; a prerogative, a right or immunity attached specifically to a position or an office."" Parliamentary privilege in Sir Thomas Erskine May's Parliamentary Practice, 16th Edn., Ch. III, page 42 is defined as ""the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."" In substance, therefore, what was described by their Lordships in Ananda Nambiar's case as constitutional privilege is the fundamental right to freedom of speech and expression guaranteed to a citizen of India under Article 19(1)(a) which he could not have exercised on the floor of the House except when he was privileged to do so by virtue of his office of a member duly elected to the House. A legislator when he addresses, or

casts his vote during the course of proceedings in a House of Legislature, therefore, does nothing except exercising his fundamental right of speech

and expression guaranteed to every citizen of India which he could not have done had he not been elected to the House.

137. The six fundamental rights of freedom enshrined in Article 19(1) of the Constitution are guaranteed to every citizen of India. It is true that

these rights cannot be exercised by a citizen at all times and places of his choice, but this is so on the principle *Sic Utere Tuo Ut Alienum Non*

Laedas i. e., use your own property in such a manner as not to injure that of another. A citizen can no doubt exercise his fundamental right

guaranteed to him under Article 19(1)(a) but he cannot exercise it at the cost of the rights of other citizens. On the parity of reasoning, every citizen

cannot claim a right to address a House of Legislature on the ground that he has a fundamental right to freedom of speech and expression and

wants to address it in exercise of that right. If his aforesaid right is carried that far, it would be impossible for any House of Legislature to conduct

its normal business and would adversely affect the rights of the legislators guaranteed to them under the Constitution and other laws. It, therefore,

follows that it is wrong to contend that a right of freedom of speech and expression unless it is exercisable at all places of the choice of a citizen

cannot be called a fundamental right. As observed by His Lordship Justice Bhagwati in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and

Another, : ""But these freedoms are not and cannot be absolute, for absolute and unrestricted freedom of one may be destructive of the freedom of

another and in a well ordained civilized society freedom can only be regulated freedom"". A citizen, once he is duly elected to the House of

Legislature carries with him his fundamental right of speech and expression to the legislative chamber also and is free to address the House in

exercise of his aforesaid right. It is impossible to imagine that before entering the portals of the House of Legisla-ture he will have to shed his

fundamental right of speech and expression guaranteed to him in common with every citizen of India under Article 19(1), for that would straightway

pose a serious question : does a legislator who is otherwise a citizen of India cease to be so the moment he enters the legislative chamber? In fact

such a view would be an anithesis of the concept of Section 12 of the Representation of the People Act, which provides that only a citizen of India

can be a voter in a constituency to be elected as a member of a House. The fact that a citizen of India after he is elected to a House of Legislature

acquires the privilege of addressing the House does not necessarily imply that having acquired the right to enter the House, he loses the

fundamental right to freedom of speech and expression guaranteed to him under Article 19(1)(a). On the other hand he acquires a right to exercise

his fundamental right to freedom of speech and expression unfettered by the restrictions contemplated by Clause (2) of Article 19. This is amply

borne out from Clauses (1) and (2) of Section 72 of the State Constitution which corresponds to Clauses (1) and (2) of Article 194 of the

Constitution. This section reads as under :

72. Powers, Privileges, etc. of the Houses of Legislature and of the members and committees thereof-- (1) Subject to the provisions of this

Constitution and to the rules and standing orders regulating the procedure of the Legislature there shall be freedom of speech in the Legislature.

(2) No member of the Legislature shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the

Legislature or any committee thereof and no person shall be to liable in respect of the publication by or under the authority of a House of the

Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature and of the members and the committees of a House of

the Legislature shall be such as may from time to time be defined by Legislature by law, and until so defined, shall be those of the Parliament of

India and of its members and committees.

(4) The provisions of Sub-sections (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in,

and otherwise to take part in the proceedings of, a House of Legislature or any committee thereof as they apply in relation to members of that

Legislature.

138. That the right to freedom of speech and expression which a legislator has stands on a higher pedestal than a similar right which is guaranteed

to any ordinary citizen under Article 19(1)(a) is clearly borne out from the following observations made by Gajendragadkar J. the learned Judge

who delivered the judgment in K. Anandan Nambiar and Another Vs. Chief

Secretary, Government of Madras and Others, also, while giving the opinion of the Court to the President of India who had sought it under Article 143 of the Constitution. This opinion is reported as In the matter of:

Under Article 143 of the Constitution of India, (at pp. 760, 761) :

It will be noticed that the first three material clauses of Article 194 deal with three different topics. Clause (1) makes it clear that the freedom of

speech in the Legislature of every State which it prescribes, is subject to the provisions of the Constitution, and to the rules and standing orders,

regulating the procedure of the Legislature.

While interpreting this clause, it is necessary to emphasise that the provisions of the Constitution subject to which freedom of speech has been

conferred on the legislators, are not the general provisions of the Constitution but only such of them as relate to the regulation of the procedure of

the Legislature. The rules and standing orders may regulate the procedure of the Legislature and some of the provisions of the Constitution may

also purport to regulate it; these are, for instance Articles 203 and 211. The adjectival clause ""regulating the procedure of the Legislature"" governs

both the preceding clauses relating to ""the provisions of the Constitution"" and ""the rules and standing orders"". Therefore, Clause (1) confers on the

legislators specifically the right of freedom of speech subject to the limitation prescribed by its first part. It would thus appear that by making this

clause subject only to the specified provisions of the Constitution, the Constitution makers wanted to make it clear that they thought it necessary to

confer on the Legislators freedom of speech separately and, in a sense, independently of Article 19(1)(a). If all that the legislators were entitled to

claim was the freedom of speech and expression enshrined in Article 19(1)(a), it would have been unnecessary to confer the same right specifically

in the manner adopted by Article 194(1); and so, it would be legitimate to conclude that Article 19(1)(a) is not one of the provisions of the

Constitution which controls the first part of Clause (1) of Article 194.

Having conferred freedom of speech on the legislators, Clause (2) emphasises the fact that the said freedom is intended to be absolute and

unfettered. Similar freedom is guaranteed to the legislators in respect of the votes they may give in the Legislature or any committee thereof. In

other words, even if a legislator exercises his right of freedom of speech in

violation, say of Article 211, he would not be liable for any action in any Court. Similarly, if the legislator by his speech or vote, is alleged to have violated any of the fundamental rights guaranteed by Part III of the Constitution in the Legislative Assembly, he would not be answerable for the said contravention in any Court. If the impugned speech amounts to libel or becomes actionable or indictable under any other provision of the law, immunity has been conferred on him from any action in any Court by this clause. He may be answerable to the House for such a speech and the Speaker may take appropriate action against him in respect of it; but that is another matter. It is plain that the Constitution-makers attached so much importance to the necessity of absolute freedom in debates within the legislative chambers that they thought it necessary to confer complete immunity on the legislators from any action in any Court in respect of their speeches in the legislative chambers in the wide terms prescribed by Clause (2). Thus Clause (1) confers freedom of speech on the legislators within the legislative chamber and Clause (2) makes it plain that the freedom is literally absolute and unfettered.

What Article 19(1)(a) guarantees is the right to freedom of speech and expression. It would retain its attributes and characteristics even if it is abridged by placing reasonable restriction on its exercise under Clause (2) of Article 19 or regains its full glory when exercised by a legislator in the House of Legislature. Placing of any reasonable restrictions on its exercise or ensuring its unfettered exercise will not change its basic character that it is a fundamental right of speech and expression guaranteed to every citizen of India under Article 19(1) which may be exercised by him everywhere, of course not in a way to interfere with the rights of others. The mere fact that a legislator can exercise his right to freedom of speech and expression in a House of Legislature unfettered by any restriction contemplated by Clause (2) of Article 19 does not mean that he is deprived of his fundamental right to freedom of speech and expression guaranteed to him as a citizen of India which he may have to exercise elsewhere subject to the aforesaid restrictions. The effect of Clauses (1) and (2) of Section 72 of the State Constitution is no doubt to place this right on a higher footing but surely not to destroy it altogether. A bigger right can include a smaller one though the converse may not be true. In fact the two

provisions, namely, Article 19(1)(a) and Sub-sections (1) and (2) of Section 72 overlap each other which deal with the same fundamental right to

freedom of speech and expression which a citizen of India may exercise in a House of Legislature through the privilege of being its member but not

otherwise. Any interpretation which would destroy the basic character of this right of a legislator conferred on him under Clauses (1) and (2) of

Section 72 i. e. that it is a right guaranteed under Article 19(1)(a) when exercised on the floor of a House by a legislator, would lead to disastrous

consequences. To quote an example, a legislator can be disqualified by enacting a law that a member of the Legislative Assembly or Legislative

Council shall be disqualified from being a member of the House if he abstains from voting in support of a resolution moved on behalf of the party in

power, or votes against the same. Such a law would successfully stand the challenge of Article 13, for the same would neither be discriminatory in

nature to violate the rule of equality embodied in Article 14, nor would it be violative of Article 19(1)(a): the right of a legislator guaranteed to him

under Sub-sections, (1) and (2) of Section 72 cannot be taken to be a fundamental right. A law under Article 13 can be challenged only on the ground

that it is inconsistent with the rights guaranteed under Part III. No law can be challenged under this Article which is inconsistent with any right

guaranteed under any other part of the Constitution including the right to freedom of speech and expression guaranteed to a legislator under Sub-

sections (1) and (2) of Section 72. That every part of the Constitution is equally sacrosanct and any other constitutional right need not stand the

scrutiny of Article 13 is amply borne out from the following observations made by the Madras High Court in *S. Ananthakrishnan Vs. The State of*

Madras, which have been quoted with approval by the Supreme Court in *M.S.M. Sharma Vs. Sri Krishna Sinha and Others*, (at p. 410):

..... As against this the learned Advocate for the petitioner urges that the fundamental rights are under the Constitution in a paramount position,

that under Article 13 the Legislatures of the country have no power to abrogate or abridge them, that the power to tax is the power to destroy and

that, therefore, Part 12 is inoperative in respect of the rights conferred under Part III. I am unable to agree. Article 13 on which this argument is

mainly founded does not support such a wide contention. It applies in terms only to laws in force before the commencement of the Constitution and

to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III.

It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in

Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to

render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes that they

should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative

should be avoided. For these reasons I must hold that the operation of Part III is not cut down by Part III and that the fundamental rights are

within the powers of the taxation by the State.

139. I am, therefore, unable to accept the proposition propounded by Mr. Sorabji that a legislator when he exercises his right to freedom of

speech and expression in a House of Legislature does not exercise it as a fundamental right guaranteed to him in common with other citizens under

Article 19(1)(a), and that the same right may be taken away by a legislative device under Clause (e) of Section 69 of the State Constitution. All

laws that are made by Parliament or a Legislature in exercise of their powers under Article 246 of the Constitution must necessarily pass through

the gauntlet of various Articles contained in Part III to emerge unhurt. Articles 14 and 19(1) also form part of Part III. Consequently, any law

which impinges on a citizen's right of freedom or equality guaranteed to him under Articles 19(1) and 14 respectively, will have to be struck down

unless it is shown that the restriction placed upon his right is reasonable or he has not been subjected to any hostile discrimination; as the case may

be.

140. This brings me to the next question as to whether or not Clause (b) of Section 24-G which undoubtedly places restriction on the right of a

legislator to freedom of speech and expression places a reasonable restriction within the meaning of Clause (2) of Article 19. Clause (2) of Article

19 provides :

(2). Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as

such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity

of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court,

defamation or incitement to an offence.

141. Restriction before it can be said under this clause to be a reasonable one, has to be in the interests of sovereignty and integrity of India, the

security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or

incitement to an offence. The only question which, therefore, needs to be determined is : under which head this restriction can squarely fall? The

State in its counter-affidavit has taken the specific stand that this restriction belongs to the field of 'morality'. According to Mr. Sorabji, the words

and expressions used in the Constitution have to be given the widest possible meaning, and in that sense the expression 'morality' can include

political morality as well. This argument at once raises two questions; One, whether political morality is included in the expression morality used in

Clause (2); and two, whether the restriction sought to be imposed by Clause (b) of Section 24-G is a reasonable one; assuming that morality

includes political morality as well ?

142. The Constitution does not define the word 'morality'. What the founders of the Constitution, therefore implied by morality has to be

determined on consideration of various facts and circumstances. These may be the legislative practice, the judicial precedents and the political and

social conditions prevailing in the country immediately before the Constitution was enacted. As for the political conditions prevailing in the country

political defections among the elected or nominated members of Legislatures were almost unheard of. The country was freed by the people under

the stewardship of, stalwarts like Mahatma Gandhi, Jawahar Lal Nehru, and Maulana Azad after making innumerable sacrifices. Democracy in the

political system then was extinct and the chances of defecting from one political party to another were extremely remote. Split in political parties

was no doubt there but that would be generated only on ideological grounds and not for any extraneous considerations e. g. lure for power or

money, which, there can be no manner of doubt, is to a significant extent a

cause behind political defections of the post independence era. The founders of our Constitution, when they enacted Clause (2) to Article 19 could not have imagined that legislators or parliamentarians belonging to the posterity would degenerate into selfishness to the extent that they would change sides for lure of power or money or for other similar extraneous considerations and thereby endanger the very foundations of democracy so much cherished and valued by their ancestors which had been won by them for their children after making so many sacrifices. There is some force in Mr, Sorabji's argument that defections in political parties which are rampant these days have assumed alarming proportions and do not always owe their genesis to genuine causes, but this is again begging the question : what did the founders of the Constitution mean by morality ?

143. The word morality does not figure in the Representation of the People Act either. In fact this Act did not speak of political defections at all

and it was for the first time that political defections was made a ground for disqualifying a member from being a member of the Legislative

Assembly or Legislative Council of the State by adding Section 24-G to the Act. Prior to the enactment of the Constitution also, Government of

India Act, 1918, and Government of India Act, 1935, did not define the word morality nor did these Acts or any other law in force then which

dealt with elections define the expression morality. The only sense in which this expression was then understood was one that involved moral

turpitude of such a degree as would be generally though not always punishable under law. It was treated as akin to something that was grossly

indecent, scurrilous or obscene. While interpreting the scope and amplitude of the expression ""decency and morality"" occurring in Clause (2) of

Article 19, the Supreme Court in *Ranjit D. Udeshi Vs. State of Maharashtra*, , approved the test of obscenity laid down by Cockburn, C. J. in

Hicklin's case (1868) 3 QB 360 In the aforesaid case the learned Judge has laid down the test in the following words :--

..... whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences,

and into whose hands a publication of this sort may fall it is quite certain that it would suggest to the minds of the young of either sex, or even

persons of more advanced years, thoughts of a most impure and libidinous character.

144. No judicial decision or even a legislative enactment of any foreign country dealing with political defection or political morality has been

brought to our notice to persuade and enable us to give so wide an interpretation to the expression morality occurring in Clause (2) of Article 19 as

to include even political morality within its ambit. It is common knowledge that political defections in foreign countries are so insignificant that they

proverbially speaking need only a microscopic observation to be taken notice of. In view of this state of affairs regarding the political conditions,

the judicial precedents and the legislative practice, it is legitimate to infer that the founders of our Constitution did not contemplate political morality

when they used the expression "decency or morality" in Clause (2) of Article 19. What they actually meant by this expression was only that

conduct of the citizen of India which involved his moral turpitude; more open than not, punishable under any penal law. In this view political

morality cannot be said to be morality within the meaning of Clause (2) of Article 19 so as to justify the restriction on the fundamental right of

legislator to freedom of speech and expression in the legislative chamber as a reasonable restriction.

145. It is true that political defections can impair the stability of a Government and a stable Government alone can ensure to the citizens of India

which is a sovereign democratic republic, justice, liberty and equality enshrined in our Constitution, but it is not only the end howsoever laudable it

may be, it is also the means employed to achieve that end which too have to be justified under the provisions of the Constitution. Section 24-G, it

is so obvious, creates a blanket bar against the exercise of his right of freedom of speech and expression by a legislator. No legislator howsoever

genuine or bona fide his reasons may be, can defy the direction or whip of the party to which he belongs except at the cost of losing his

membership of the House. It does not make any distinction between a defiance prompted by lure for power and money and the one prompted by

the dictates of the legislator's conscience, but places every defiance on the same plane and seeks to punish the legislator for it in each and every

case. Assuming that a legislator ignoring the party whip or direction is guilty of political immorality, can it be said that he would be guilty of such

immorality even if he were to oppose a legislation moved by the party to which he belongs legalising corruption or communalism ? Will there be any justification for disqualifying that man, legally or even morally, who dictated by his inner sublime conscience opposes such a move against the party whip or direction ? The answer should be necessarily an emphatic No. Mr. Sorabji's answer is that such may be very few cases and that a member disqualified for raising such a voice may only be a martyr for a just cause. This argument even though attractive cannot prevail. Our Constitution assures not only the unity of the Nation but also the dignity of the individual. We are a society in which not only the subject lives for the State but the State also lives for the subject. Liberty of freedom of speech and expression of a citizen is the basic structure of our Constitution which is as sacrosanct as any other right embodied in it. If right to freedom of speech and expression of an individual cannot be abridged except by imposing a restriction which is reasonable within the meaning of Clause (2) of Article 19, much less can such a right of the legislator which in terms of Section 72 is not even fettered by the restrictions contained in Clause (2) of Article 19 be abridged or taken away by such a sweeping legislation as Section 24-G of the Representation of the People Act. A legislator, it cannot be disputed, speaks not only for himself but for all those whom he represents in his constituency. In my opinion, therefore, the restriction imposed on the right of a legislator under Clause (b) of Section 24-G is not a reasonable restriction within the meaning of Clause (2) of Article 19.

146. *Pari ratione* Clause (a) of Section 24-G which declares that a person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of the State if he, having been elected as such member, voluntarily gives up his membership of the political party by which he was set up as a candidate in such election or of which he became a member after such election, is also violative of Article 19(1)(c) as it threatens the right of the legislator to associate with or disassociate from a political party and the restriction which Sub-section (a) seeks to impose on his aforesaid right cannot be said to be a reasonable restriction. More so, because the right to form association not being a right envisaged by Sub-sections (1) and (2) of Section 72, Mr. Sorabji will not be able to place reliance upon Anand Nambiar's case to sustain the constitutional validity of

Clause (a). If Clause (a) goes, then there can be no manner of doubt that Clause (b) will become meaningless even if it otherwise survives.

147. Before testing the vires of Section 24-G on the touchstone of Article 14, I deem it necessary to first dispose of the argument raised by Mr.

Sorabji that what the impugned legislation seeks to take away is not any fundamental right of a legislator guaranteed to him under Article 19(1)(a)

or 19(1)(c) but only his statutory right of continuing as a member of the House. Amplifying his argument the learned counsel has contended that

Section 24-G does not directly take away the right of a legislator to freedom of speech and expression on the floor of the House, even assuming

that it is a fundamental right contemplated by Article 19(1)(a) nor does it take away his right to form association contemplated by Article 19(1)(c).

It is on the other hand his right to continue as a member of the House which he acquires not under the Constitution but under the provisions of the

Representation of the People Act, which is sought to be taken away. There is no provision in Part III of the Constitution, argued the learned

counsel, which specifically says that a citizen of India shall have a right to be elected to Parliament or to any other House of Legislature, adding,

that deprivation of the legislator's right to freedom of speech and expression or freedom to form association is only incidental to the loss of his

membership of the House. He has laid much emphasis on the test of direct and indirect effect, commonly known as the pith and substance test, to

judge the vires of the impugned section. There is much force in the first limb of Mr. Sorabji's contention that right to be elected to any House of

Legislature is not a fundamental right but merely a statutory right. In *Jumuna Prasad Mukhariya and Others Vs. Lachhi Ram and Others*, , the

Election Tribunal had declared void the election of the appellant who had been elected from a double member constituency on account of corrupt

practices as defined by Sections 123 (5) and 124 (5) of the Representation of the People Act, 1951, for publishing false pamphlets and making

systematic appeal to the voters to vote for him on the basis of caste. Constitutional validity of these provisions was challenged on the ground that

they were violative of Article 19(1)(a) as they interfered with a citizen's fundamental right to freedom of speech and expression guaranteed under

the said Article. The Court repelled the contention by holding that right to stand as a candidate and contest election, is not a common law right but

a special right created by a statute which can be exercised only on the fulfilment of the conditions laid down by the Statute, and that the

fundamental rights chapter has no bearing on such a right. To quote the learned Judge *ipsissima verba* (at p. 688) :

The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the Statute and can only be

exercised on the conditions laid down by the Statute. The Fundamental Rights' Chapter has no bearing on a right like this created by Statute. The

appellants have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise

their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are 'intra vires'.

148. The second limb of his argument is, however, based upon the authority of Supreme Court decision in *A.K. Gopalan Vs. The State of*

Madras, , in particular, to the following observations made therein by Kania, C. J. (at p. 35) :

(ii) Judged by the test of direct and indirect effect on the rights referred to in Article 19(1), the Penal Code is not a law imposing restrictions on

these rights. The test is that "the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a

legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms etc., the

question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of

any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of

these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of

the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life.

149. The test of direct and indirect effect applied in *A.K. Gopalan Vs. The State of Madras*, was also applied by the Supreme Court in *Ram Singh*

and *Others Vs. The State of Delhi and Another*, , wherein it was held : "the object and form of State action determine the extent of protection

which may be claimed by an individual and the validity of such action has to be judged by considering whether it is directly in respect of the subject

covered by any particular article of Constitution or touches the said Article only incidentally or directly"". The entire case law on the point was

reviewed in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , and it was held that this principle of direct and indirect effect held field

till the decision given by the Court in *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, , when a

different note was struck and it was held that the real test would not always be the object and form of State action, but its direct and inevitable

consequence affecting the fundamental right of a citizen. If the proximate effect of the legislation was such as to bring it in conflict with the

fundamental right under Article 19(1), it was likely to be struck down. Reference was also made to *Sakal Papers (P) Ltd. and Others Vs. The*

Union of India (UOI), , wherein it was held : ""It is the substance and practical result of the Act of the State that should be considered rather than its

purely legal aspect the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen

and not merely what manner and method has been adopted by the State in placing the restriction."" The following observations made by Shah J. in

Rustom Cavasjee Cooper Vs. Union of India (UOI), , were then quoted with approval (at p. 596) :

.. .. it is not the object of the authority making the law impairing the right of a citizen nor the form of action that determines the protection he can

claim; it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view, and

we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection

against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action but by its direct operation

upon the individual's rights.

We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may

claim is not consistent with the constitutional scheme... ..

150. After reviewing the case law on the subject, his Lordship Justice Bhagwati speaking for the majority ultimately summed up his conclusion in

the following words:

... .. The pith and substance theory was thus negated in the clearest terms and the test applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the State action but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable, consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.

151. Mr. Sorabji still contended that the test of pith and substance laid down in *A.K. Gopalan Vs. The State of Madras*, has not been given a complete go-bye by the Supreme Court in its later decisions referred to in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, , but that test still holds the field and has not become completely irrelevant. To support his argument, he has made a pointed reference to the following observations made in *Bachan Singh Vs. State of Punjab*, (at p. 914) :

From the above conspectus, it is clear that the test of direct and indirect effect was not scrapped. Indeed, there is no dispute that the test of 'pith and substance' of the subject matter and of direct and of incidental effect of legislation is a very useful test to determine the question of legislative competence, i. e., in ascertaining whether an Act falls under one Entry while incidentally encroaching upon another Entry. Even for determining the validity of a legislation on the ground of infringement of fundamental rights, the subject-matter and the object of the legislation are not altogether irrelevant.....

152. In placing reliance on these observations to support his argument that the validity of an Act has to be determined on the principle of pith and substance, Mr. Sorabji appears to have overlooked the following observations occurring after the observations quoted heretofore. ""If the legislation does not directly deal with any of the rights in Article 19(1) that may not conclude the enquiry. It will have to be ascertained further

whether by its direct and immediate operation the impugned legislation abridges any of the rights enumerated in Article 19(1)."" Testing the

constitutional validity of Section 24-G on the principle of direct and inevitable consequence laid down in *Mrs. Maneka Gandhi Vs. Union of India*

(UOI) and Another, , which indeed is the principle that holds field at present, there can be hardly two opinions that the direct and inevitable

consequence of the impugned legislation is to abridge the fundamental rights of a legislator guaranteed to him under Articles 19(1)(a) and 19(1)(c).

The object of the impugned legislation may ostensibly be to curb defection, but its direct and inevitable consequence is the abridgement of the

aforesaid rights of the legislators.

153. Mr. Sorabji then contended that even if the test of direct and inevitable consequence is applied to Clause (b) of Section 24-G it cannot be

said to be violative of Article 19(1)(a). He has referred to the expression ""without obtaining prior permission of such party or person"" occurring in

Clause (b), and argued that violation of the legislator's right would depend upon whether or not such permission would be granted to him. There

would be no violation according to the learned counsel, where a legislator would be permitted to abstain from voting or vote against the whip or

direction of the party to which he belongs. It would be there only when such permission would be refused. The learned counsel further argued that

where constitutional validity of a provision of law depends upon something which may or may not happen, it cannot be said that the provision is

constitutionally invalid. Mr. Sorabji may be right when he propounds the abstract proposition of law that a provision of law cannot be said to be

constitutionally invalid when its invalidity is dependent upon something which may or may not happen at all. But, that is not the case here. The

provision for obtaining prior permission is itself restrictive of the right of the legislator to freedom of speech and expression in the House. The

condition of obtaining prior permission of the party whip or any other person authorised in that behalf would itself impair his aforesaid right. The

remedy prescribed by Mr. Sorabji is, therefore, worse than the disease itself.

154. I am not impressed with the argument of Mr. Bhandare that the right to freedom of speech and expression guaranteed to a legislator in terms

of Sub-sections (1) and (2) of Section 72 of the State Constitution which

corresponds to Article 194 of the Constitution being constitutional right, the same could not have been taken away by a legislative device and required the constitution itself to be amended to bring about the desired result. There would, be no need to amend the Constitution for the power to make a law providing for disqualification of a member is itself traceable to a constitutional provision, namely, Clause (e) of Section 69 of the State Constitution. It is a different matter that such a law may have to satisfy the test of Article 13. If a law made under Clause (e) of Section 69 does not infringe any of the rights guaranteed under Part III of the Constitution, it is not possible to contend that such a law should be struck down because it tends to undo the constitutional provisions contained in Section 72.

155. Assuming that a legislator's right to freedom of speech and expression in a House is not a fundamental right but merely a constitutional right, distinct from the one guaranteed to him under Article 19(1)(a) and 19(1)(c), still Section 24-G has to stand the scrutiny of Article 14. Article 14 which embodies the rule of equality before law, it is well settled, forbids only class legislation but does not forbid reasonable classification. It is equally well settled that legislature understands and appreciates the needs of the people and there is a presumption in favour of constitutionality. "A law will not be declared unconstitutional unless the case is so clear as to be free from doubt and to doubt the constitutionality of a law is to resolve it in favour of its validity." (Constitutional Law of India by H. M. Seervai). A law in order to survive the attack of Article 14 has to satisfy the dual test of reasonable classification and the differentia having a rational nexus with the statutory object. It is in the background of these well established legal principles that we have to see whether the provisions of Section 24-G in any way violate the rule of equality enshrined in Article 14.

156. Mr. Bhandare's contention is that Section 24-G excludes from its operation a legislator not belonging to any political party, a legislator elected on the symbol of a political party, who has not joined any political party, a legislator elected with the support of one or more political parties who has not joined any political party and a Legislator belonging to a party which is not a political party within the meaning of the explanation appended to the section. Political party in terms of this explanation is a party classified as a recognized political party under any law, rule, regulation, order, or

notification having the force of law with respect to matters relating to or in connection with election to the Legislative Assembly or Legislative

Council and any other party which is recognized by the Speaker of the Legislative Assembly or by the Chairman of the Legislative Council as a

political party, as the case may be. Mr. Bhandare is prima facie right in contending that legislators whether they belong to any political party,

recognized or unrecognized, or whether they are independents are a class in themselves and the aforesaid impugned section violates the rule of

equality enshrined in Article 14, in that, it does not apply to all classes of legislators. This inevitably takes us to the question as to whether the

classification of independent legislators, legislators belonging to recognized political parties and legislator belonging to unrecognized political parties

is a permissible classification. Before this classification can be said to be a permissible one it must satisfy two conditions : one, that it must be

founded on an intelligible differentia which distinguishes legislators that are grouped together from others left out of the group, and two, that the

differentia has a rational relation to the object sought to be achieved by the impugned section. The object sought to be achieved by enacting

Section 24-G is stated to be curbing political defections. Assuming, or even granting that it is so, still it cannot be gainsaid that legislators not

belonging to a recognized political party will be free to defect so long as they do not join any recognized political party, and it will be only too

obvious that Section 24-G would apply differently to different legislators even though similarly situated. Mr. Sorabji has, however, tried to meet

this argument by contending that a law made to achieve a particular object need not be all embracing, adding, that Section 24-G will not be struck

down merely because it does not apply to all defectors. In support of his contention he has relied upon the following observations made in

Sakhawat Ali Vs. The State of Orissa, :

The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It

is for the legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which

would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in

any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution.

157. In this case the petitioner a practising lawyer had filed a nomination paper seeking election to Kendar Para Municipality. His nomination

paper was rejected on the ground that he was engaged as a counsel in a case against the Municipality. This order was passed u/s 16 (i) (x) of

Orissa Municipal Act, 1950, which read as under : ""No person shall be qualified for election to a seat in a Municipality if such person is employed

as a paid legal practitioner on behalf of the Municipality or as a legal practitioner against the Municipality."" The petitioner had challenged the

constitutional validity of this section inter alia on the ground that it was violative of Article 14. The Court held that Article 14 forbids class legislation

but not reasonable classification for the purpose of legislation provided the classification has a reasonable nexus with the object sought to be

achieved by the legislation. The classification of legal practitioners had a reasonable nexus with the object sought to be achieved by the Act i. e. to

achieve purity in public life by avoiding conflict between interest and duty. It was then contended on behalf of the petitioner that whereas a person

having himself litigation against Municipality was not debarred from contesting election, a legal practitioner holding only a brief against it was

debarred from doing so, though in both the cases the legislative object was the same i. e. to avoid conflict between interest and duty. It is in this

background that the aforesaid observations were made by their Lordships. What their Lordships, therefore, held was that if some out of persons

belonging to a Particular class were left out of it the Legislative Act would not be rendered unconstitutional as it need not be all embracing. Their

Lordships never held that the legislature was free to put different persons in different groups without there being an intelligible differentia which

distinguishes persons belonging to one group from those belonging to the other groups nor did they mean to say that the differentia need not have a

reasonable nexus with the object sought to be achieved by the legislation. What distinguishes the independents and those belonging to unrecognized

political parties from legislators belonging to recognized political parties to whom the provisions of Section 24-G are attracted is neither clear from

the stand taken by the Government in its counter-affidavit, nor is it clear from the statement of objects and reasons given for enacting Section 24-

G. This statement merely says :

Following the widespread concern over the problem of political defections, it is proposed to amend the Jammu and Kashmir Representation of

the People Act, 1957, with a view to disqualifying a defector from being a member of the Legislature.

158. The legislative object is stated to be curbing defections among legislators as a class. How this assumed intelligible differentia between

legislators belonging to recognized political parties and those not belonging to such parties has a rational relation to this legislative object has also

not been stated in the counter-affidavit by the State, nor is it otherwise understandable. If defection is an evil it is an evil of the same magnitude

when considered vis-a-vis a legislator belonging to a recognized political party and when considered vis-a-vis a legislator belonging to no party at

all or belonging to an unrecognized political party. Courts cannot embark upon making enquiry into such reasons on their own and these reasons

have to be supplied either by the impugned legislation itself or by the State in its counter-affidavit. I say so on the authority of a Supreme Court

decision viz. B. Banerjee Vs. Smt. Anita Pan, wherein Krishna Iyer J. speaking for the majority observed as under (at p. 1148) --

Welfare legislations calculated to benefit weaker classes, when their vires is challenged in Court, cast an obligation on the State, particularly when

notice is given to the Advocate-General to support the law, if necessary by a Brandeis brief and supply of socio-economic circumstances and

statistics inspiring the enactment. Courts cannot on their own, adventure into social research outside the record and if Govt. lets down the

legislature in Court by not illumining the provisions from the angle of the social mischief or economic menace sought to be countered, the victims

will be the class of beneficiaries the State professed to protect. In this case we are unable to compliment the State or the Advocate General from

this point of view. It may happen that when the Court decides against the validity of a measure or order because Government fails to bring the

socially relevant totality of facts, it is used as an alibi by the latter for the misfortune. Courts cannot help cover up the Executive's drowsy default or

half-hearted help in making the socio-economic conspectus available.

159. In a democratic form of Government maintenance of the strength of the

party in power is as important as maintenance of the strength of the opposition. If defections are not to be curbed in a party in power or a recognized party alone, then surely keeping legislators not belonging to the group of re-cognized political parties has no reasonable nexus with the avowed object of curbing defections, for in that case, the object would not be to curb defections but to maintain or even increase the strength of all recognized political parties at the cost of those who do not belong to such parties by encouraging defections among them.

160. There is yet another striking feature of Section 24-G (a). An independent member or a member belonging to an unrecognized political party can join a recognized political party with impunity but if he has joined it he cannot leave it except at the cost of losing his membership of the House.

This discrimination between the members of the same class, namely, the class of independents or those belonging to unrecognized political parties

has also no intelligible differentia which may have a reasonable nexus with the object of curbing defections. It on the other hand supports the

argument that the object of the legislation is not to curb defection but to obviate any impairment in the strength of a recognized political party,

whether it is a party in power or otherwise. Even assuming, therefore, that an independent not being a member of any political party, cannot be

necessarily said to defect, Clause (a) of Section 24-G is so discriminatory in character that it can hardly survive the attack of Article 14 and on the

parity of reasoning Clause (b) of Section 24-G also suffers from the same constitutional vice. I have, therefore, no hesitation in declaring that

Section 24-G should be struck down also on the ground that it infringes Article 14 of the Constitution.

161. Then comes the last contention of Mr. Bhandare which is based upon the rule of ejusdem generis. This argument has to be stated only to be

rejected. Clauses (a) to (d) of Section 69 do not in fact have any common genus which according to Mr. Bhandare is not the genus of the

impugned legislation. Mr. Bhandare has failed to specify what that common genus is. Even otherwise also it is impossible to identify any common

genus. The reason for disqualifying a member under Clauses (a) and (c) is obviously avoiding a conflict between interest and duty. Similarly the

reason for disqualification under Clause (b) is mental infirmity of the legislator

which has nothing to do with conflict between interest and duty.

Likewise the reason for disqualifying a member under Clause (d) is lack of his allegiance to the country and the Constitution. Obviously, therefore,

there is no common genus for Clauses (a) to (d) to sustain the argument of Mr. Bhandare which is accordingly rejected.

162. Section 24-G is not intended to stay on the statute books till today or tomorrow. It is intended to stay there for ever. Its provisions, which

seek to take away the important constitutional rights of legislators by creating blanket bar against their exercise and which are so sweeping in

embrace may not be misused today. But, there is no guarantee that they will not be misused tomorrow. A despot like Hitler or a tyrant like Idi

Amin can misuse these provisions to suit his evil designs. Political defection is no doubt a menace for it can lead to political instability and political

instability can lead to chaos which may eventually rock the very foundations of democracy the bed rock of our political system. But, it has to be

remembered that in a society in which we are living means are as important as the end itself. It is not impossible to enact a law for curbing

defections that may successfully overcome the legal or constitutional hurdles, though the present law, as it stands is clearly indefensible.

163. In the result the writ petitions succeed which are allowed accordingly. Section 24-G of the Representation of the People Act is struck down

as being violative of Articles 19(1)(a), 19(1)(c) and 14 of the Constitution and the references made by the Speaker are rejected. In the peculiar

circumstances of the case, the parties are left to bear their own costs.

Mir, J.

164. The petitions lodged by Mian Bashir Ahmad and Malik Mohi-Ud-Din under Articles 32(2-A) and 26 of the Constitution of India

corresponding to Section 103 of the J. & K. State Constitution, challenging the constitutional validity of Section 24-G of the J. & K.

Representation of the People Act, 1957 as introduced in the Jammu and Kashmir Representation of the People Act by the impugned Act i.e. Act

No. XV of 1979, have been referred to the Full Court for consideration and disposal, as important questions of law relating to the interpretation of

a number of provisions of Constitution were involved in the writ petition as well as in the References made by the Speaker, Legislative Assembly,

Jammu and Kashmir, Srinagar, with regards the disqualifications of those two members of the Assembly, namely Mr. Malik Mohi-Ud-Din and

Mian Bashir Ahmad from the membership of the Assembly.

165. Both the writ petitions as well as the References made by the Speaker shall be dealt with by this single order.

166. In the petition it has been claimed by Mian Bashir Ahmad that he was elected on a popular vote to the J. & K. Assembly in the year 1977 on

the National Conference ticket. Before 1977 he had been elected to the Assembly on Congress ticket, but in view of the promise made and

assurance given by the Chief Minister Sheikh Mohd. Abdullah, he consented to take part in the elections on the National Conference ticket. When

earlier he contested the elections on the Congress ticket he always succeeded and so in 1977 elections also he was returned as a successful

candidate to the Assembly. According to him this was undoubtedly because of his own popularity with the electorate and not because he contested

the election on the ticket of one particular party or the other. When, however, Sheikh Mohd. Abdullah, the Chief Minister, failed to carry out his

promises to the electorate especially to Gujjar community to which the petitioner belonged, he resigned from the National Conference and joined

Congress (1). On his joining the Congress (1) party the Speaker of the J. & K. Assembly by virtue of his letter No.: IA-155/Leg-80 dated 2-7-80

called upon the petitioner to show cause as to why he should not be disqualified from the membership of the Assembly. The letter was based on a

complaint filed by the General Secretary National Conference before the Speaker Legislative Assembly wherein the General Secretary had

informed the Speaker that the petitioner has resigned from the National Conference and joined the Congress (I) party and asked for action to be

taken against him in the matter.

167. The petitioner, having felt instant danger and threat to be, and continue to be, a member of the Legislative Assembly brought the instant writ

petition challenging the vires of the Act No. XV of 1979.

168. By virtue of Act No. XV of 1979, a new section namely, Section 24 (G) came to be introduced in the J. & K. Representation of the People

Act which according to the petitioner was void and inoperative in law as the same directly offended and affected adversely the fundamental rights

of the petitioner under Article 19 (1)(a) and (c) of the Constitution of India as also u/s 11 of the State Constitution. Besides, the petitioner further

alleged, the impugned Act not only violates the preamble of the Constitution of India but also alters the basic democratic structure of the State

Constitution. The restrictions imposed on the petitioner's right of freedom of speech and expression as guaranteed to him as fundamental rights

under the Constitution were unreasonable and in no case could be affected and saved either under the provisions of Clause (2) or those contained

in Clause (4) of Article 19. According to the petitioner the presumption underlined in the impugned enactment was that the party system had a legal

and constitutional foundation in the democratic system prevailing in India, which, however, the petitioner denied vehemently by claiming that the

party system might possess some practical value in terms of the manner in which the elections are fought, but he contended, that to connect the

right of a member to continue as a member of the Assembly irrevocably with the membership of the particular political party was unconstitutional.

169. According to the petitioner he possessed the fundamental right to join or give up the membership of a particular political party as he chooses

in accordance with the conditions prevailing at a particular point of time. The penalty of disqualification sought to be imposed on the continuance of

membership of the Assembly of a particular member was, therefore, an unreasonable restriction on that right. The impugned Act XV was arbitrary

inasmuch as it violates the provisions of several Articles of the Constitution of India, and that of the J. & K. State Constitution. It has been next

stated in the petition that the impugned Act has been declared to apply to recognised parties only and the members belonging to such parties. Its

provisions as such were not applicable to members belonging to unrecognised parties or independents and therefore, the impugned Act, being

discriminatory was void and no action on this score also could be taken against a member of the Assembly under the provisions of Section 24 (g)

introduced in the State Representation of the People Act. The amendment violates the provisions of Article 14 and Article 19 (1)(a), (c) and

Section 72 of the State Constitution and thus the Amending Act was ultra vires the Constitution and null and void.

170. In the end the petitioner has prayed for the issuance of a writ of a mandamus or any other appropriate writ and order or direction for

quashing (1) the impugned Act No. XV of 1979 and (2) notice of the Speaker of the Legislative Assembly to the petitioner dated 2-7-1980, and

(3) for the issuance of the direction to the respondents and others to forebear from giving effect to the said impugned Act. It has also been prayed

that the amended Act XV be declared as ultra vires the Constitution and hence, illegal, null and void.

171. In the Counter-Affidavit, the Law Secretary, Jammu and Kashmir Government, Jammu, has stated on behalf of the respondent No. 1 that in

view of the fact that the petitioner having failed to admit his disqualification a reference has been made to the High Court on 27-10-1980 and was

pending disposal before the Courts. As such, according to the respondent, the present petition was not maintainable. Respondent No. 1 has

contended that no fundamental or legal right of the petitioner has been violated by the enactment of the impugned Act which is sought to be

challenged in the present petition. It has been stated that the right to vote or a right to stand as a candidate in an election was a creature of Statute

namely, J. & K. Representation of the People Act, 1957 and thus was subject to the limitations imposed by the said Statute. The impugned Act of

1979 merely prescribed conditions of behaviour which must be observed by an elected member. As the right to be the member of the Legislative

Assembly was a special right created under a Statute, so the right could be exercised only on the conditions laid down in the Statute itself. The

passing of the impugned Act was within the competence of the Legislative power of the State and the same did not in any manner violate any

provision of the State Constitution or that of the Indian Constitution. It has been further stated that the petitioner was elected to the Legislative

Assembly of the State from Kangan Constituency as a candidate set up by the J. & K. National Conference in the elections held in 1977 and that

he was returned to the Assembly because he was so nominated by the National Conference. According to the reply affidavit none of the rights

guaranteed under the Constitution of the State or that of India have been infringed or denied, in respect of the petitioner. It has been next submitted

that the attempt of the petitioner to refer to the basic constitutional structure of the State Constitution was uncalled for and redundant inasmuch as

the case at hand would not involve any question regarding constitutional validity or otherwise of any amendment to the Constitution, because the

Constitution has not been amended under the impugned Amended Act. The allegation that by introducing Section 24-G in the Act, an attempt has been made to vary or abrogate the basic structure of the Constitution was also incorrect. It has been denied that the petitioner was elected to the Legislative Assembly because of his own merit and popularity. In elections of 1967 and 1972 in view of the fact that the National Conference party did not participate in the same, the Congress obtained a majority and the petitioner being a candidate set up by the Congress was also elected. In 1977 Elections the National Conference participated and the petitioner was put up as a candidate of the party and the party swept the polls. It has next been stated that both the Houses of Legislature enacted the impugned Amended Act to combat and check the evil of defection. In this context it is alleged that it was significant to note that the petitioner himself voted for the anti-defection Bill which has now become the law. At the time the Bill was passed the petitioner was a member of Council of Ministers. It has been denied that the interests of Gujjar and Bakarwal community were not safe in the hands of National Conference and that the petitioner's resignation from the said party has anything to do with the alleged so-called fears of the petitioner that the interests of the community were not safe in the hands of the National Conference. It has been also denied that the rights of the petitioner under Article 19 (1) (a) and (c) were affected in any way in the present case but even if it was assumed, but not admitted, that the provisions of Articles referred to above were affected and applicable in the matter, the action impugned was fully protected within the provisions of Article 19 (2) and (4) of the Constitution of India. The restrictions imposed were necessary and permissible in the interests of political and constitutional morality. The allegation that the impugned Act violates Section 72 of the State Constitution and affects the basic structure of the Constitution was, it has been alleged, completely unfounded and untenable. The impugned Act on the contrary aimed to strengthen the parliamentary forums of democracy contemplated under the Constitution. A political party, it has next been stated, taking part in the elections puts up its candidates to secure the mandate of the electorate for the party and its programmes and not for a candidate in his individual capacity. The candidate put up by a party at an election in effect represents to the electorate that he would support the party and its programme and also

that he would abide by the decisions of the majority of the party once such decisions were taken. A person whose own views about political, social and other matters would be at variance with those of a particular party it need not and would not agree to set him up as a candidate for that party. It has been admitted that a member of a party has a right to canvas for his views within the party but once a decision has been taken by the party the duty of the member concerned was to support the decision. If a member would be disinclined to accept the views of the party on a particular line of action he was entitled to do so, but in that case he had to relinquish his seat from the Assembly and seek fresh election. In reference to para 25 of the petition it has been stated in the Reply Affidavit that the same have no merits and were wholly untenable. Finally it has been contended that the petitioner was not entitled to any relief prayed for and that the writ petition deserves to be dismissed with costs.

172. In the rejoinder affidavit, the petitioner has vehemently opposed the contention that the reference u/s 70 of the Constitution made by the Speaker, Legislative Assembly has foreclosed the rights of the petitioner to challenge the impugned Act. In fact, it has been submitted that the instant petition had been filed before the reference was made and as such in accordance with the provisions contained in Section 10 of the CPC the consideration of the reference could remain stayed pending the disposal of the writ petition. It has next been contended that all laws framed by the Legislature of the State or even by the Parliament have to be consistent with the provisions of Constitution of India and that of the State. Any inconsistency violating any provisions of the Constitution including the provisions contained in Part III of the Constitution of India would be void on that score alone.

173. Before proceeding further it may be mentioned that since it has been directed that the reference u/s 70 of the State Constitution as well as the writ petition be listed together for hearing, the point whether the reference should be heard first or the writ petition, has lost its importance. Both are being dealt with together.

174. It has next been stated in the rejoinder affidavit that the powers of the Legislature of the State were subject to the limitations enumerated in the Constitution of India as well as in the Constitution of the J. & K. State. The

impugned Act it is alleged having transgressed those limitations was void and should be held to be ineffective and illegal and unconstitutional.

175. We have heard the learned counsel appearing for the parties at great length.

176. For the sake of convenience and to follow the arguments advanced at the bar, it may be appropriate to reproduce below the impugned Act:--

The Jammu and Kashmir Representation of the People (Amendment) Act, 1979.

Act No. XV of 1979

(29th Sept., 1979)

An Act to amend the J. and K. Representation of the People Act, 1957 :

Be it enacted by the J. & K. State Legislature in the Thirtieth year of the Republic of India as follows :--

1. Short title.-- This Act may be called the J. & K. Representation of the People (Amendment) Act, 1979.

2. Insertion of Section 24-G in Act IV of 1957,-- After Section 24-F of the J. & K. Representation of the People Act, 1957, the following new

section shall be inserted, namely:--

24-G. Disqualification for being a member of either House of Legislature.-- A person shall be disqualified for being a member of the Legislative

Assembly or the Legislative Council of the State,

(a) if he, having been elected as such member, voluntarily gives up his membership of the political party by which he was set up as a candidate in

such election or of which he became a member after such election;

(b) if he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorised by

it in this behalf without obtaining prior permission of such party or person.

Explanation.-- For the purposes of this section political party means --

(i) a political party classified as a recognised political party under any law or any rule, regulation, order or notification having the force of law with

respect to matters relating to, or in connection with, election to the Legislative Assembly or the Legislative Council of the State;

(ii) any other political party which is recognised by the Speaker of the Legislative Assembly or, as the case may be, by the Chairman of the

Legislative Council, as a political party.

Sd/- P. C. BHARDWAJ

Addl. Secretary, Law Department

177. A number of points have arisen for consideration in this case, such as,

(i) Whether a writ of this nature would fall within the provisions of Article 19 (1) (a) or/and (c) and if it does, whether the impugned Act would be

a valid piece of legislation protected under the provisions of Article 19(2) as being a reasonable restriction; and as such the Legislature was

competent to enact the impugned Act putting restrictions on the right of freedom of speech guaranteed under Article 19(1)(a) of the Constitution;

(ii) As the impugned Act apparently applied only to such of the members of the legislature who have been set up and elected on the ticket of a

particular political party, was or was not such an Act discriminatory so far as the members who have been elected as independents and others

were concerned ?

Is this a discrimination within the meaning of Article 14 of the Constitution of India and whether the impugned Act would be ultra vires the

Constitution, on this ground ?

(iii) Whether the impugned Act was ultra vires on account of the same being contrary to the provisions of Section 72 of the J. & K. State

Constitution.

178. It has been contended on behalf of the petitioner that Section 24-G inserted in the J. & K. Representation of the People Act by virtue of the

impugned Act was ultra vires and therefore, null and void on account of petitioner's fundamental right of freedom of speech and expression of

opinion as guaranteed to him under Article 19(1)(a) of the Constitution of India having been taken away; and that the same was not protected

under the provisions of Article 19(2) of the Constitution, The impugned Act was also ultra vires of the petitioner's fundamental right of association

under Article 19(1)(c) and was not saved under the provisions of Article 19(4) of the Constitution. It has been argued that the impugned Act was

ultra vires of the Article 14 of the Constitution of India. It has been urged that Section 24-G of the Representation of the People Act, violates and

interferes with the rights and privileges conferred on a member of the State Legislature u/s 72 of the State Constitution as Section 24-G of the Act

is destructive of the basic structure of the Constitution. It was next argued that a Legislator is not only entitled to the enjoyment of the fundamental rights guaranteed to every citizen under the Constitution but over and above as a member of the Legislature he possesses additional rights and privileges other than the fundamental rights. The impugned Act unmistakably violates the guarantee for the freedom of speech and expression assured to a citizen under the Constitution. It has been contended that the right of a legislator to speak as freely as he would like was a constitutional right and not a mere statutory right. The right of freedom of expression could, if at all, be taken away only from him through an amendment of the Constitution itself and not otherwise. The learned counsel for the petitioner argued that the only expression or condition appearing in Article 19(2) of the Constitution that might have attracted the provisions of the said Article to the circumstances appearing in the instant matter was the expression mentioning "'decency and morality'", but, it has been submitted, the said expression would apply only so far as public indecencies and public immoralities which deprave morals of the society were concerned. It would not cover in its ambit, according to the argument, the concepts like the concept of political morality and business morality. Nothing indecent or immoral could be said on the floor of the Legislature. The impugned Act, on the other hand would very likely encourage indecent or immoral things being said or done by a member of the Legislature in the House. It has been argued that Section 24-G was ultra vires of Article 14 of the Constitution of India inasmuch as some members of the Legislature were not covered by its provisions and thus were being met with a different treatment. An independent member has not been given equal treatment under the impugned Act with the one elected on the ticket of a recognised political party. It is strange, it is argued, that an independent on defeating a candidate of a political party when joins the same party whose candidate he had defeated, the provisions of the impugned Act would not be applicable nor attracted in his case. The principle of equal treatment under Article 14 of the Constitution would also be forgotten in the case of a member who does not belong to a recognised party but all the same defects from that party and joins a recognized one. It has next been contended that the impugned Act does not take into account and fails to consider splits which usually take place in democratic

parties and when members part as a result of such split, they could not in fairness be labelled as defectors. The argument was that the impugned provision treats equal unequally and unequals as equals which was in substance and in effect clearly discriminatory and violative of Article 14 of the Constitution. A political party is recognised as such if it consists of 20 or more members in the House and a group is recognised as such if it has 10 or more members. Under the impugned Act, obviously, therefore, if a party has less than 20 members say, 19, the members may defect incurring no disqualification under the impugned Act but if the membership of the party is say, 20 or 21, the member who defects, would incur disqualification under the impugned Act. In the matter of qualification or disqualification there must be absolute equality and there must be no scope for inclusion or exclusion of similarly placed members. The classification therefore, was unintelligible, unreal and arbitrary. It has been further argued that no ordinary law enacted by the Legislature can override or be inconsistent with the constitutional provision. It has been alleged that when similar or like measures were brought up for consideration in the Parliament, the same were always brought up through constitutional amendment Bills. But in the present case the amendment has been effected in a Statute. The only solution to effectively meet and deal with the menace of defection was to amend the Constitution, and provide therein an additional clause dealing with disqualification of members who defect. It has been argued that Section 24-G violates the basic structure of the Constitution. The duty of the legislator was to his constituency and to his country and in the performance of such duty he was free to formulate his opinion with regards any action or policy of his party in accordance with his conscience. The Constitution is conscious of the sanctity of law and belief. That is why the Constitution provides a legislator the freedom of speech and expression. Section 24-G of the Representation of the People Act on the other hand cuts at the very roots of free expression and deprives and bars a legislator to act in accordance to his conscience in the name of party discipline. In this regard a number of judgments, were referred to and relied upon by the learned counsel for the petitioner. He has also made reference to a number of Articles of Constitution of India and also to a number of sections of the State Constitution; such as, Articles 74 to 83. of the Indian Constitution and Sections 14, 19, 51, 68, 69,

70, 72, 139 and 140 and other sections of the State Constitution. He has referred to and read extensively from Jumuna Prasad Mukhariya and

Others Vs. Lachhi Ram and Others, ; Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, : O.K. Ghosh and Another Vs. E.X. Joseph, :

Smt. Damyanti Naranga Vs. The Union of India (UOI) and Others, : The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad

and Another, : Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, : P. Balakotaiah Vs. The Union of India (UOI) and Others, and O.K.

Ghosh and Another Vs. E.X. Joseph, .

179. On the other hand the learned counsel for the respondents Shri Soli Sorabji has contended during the arguments and also in the memo of

arguments supplied by him that Article 19(1)(a) was inapplicable to the facts appearing in the case at hand and consequently for upholding the

constitutionality of the impugned Act, the question of satisfying the requirements of Article 19(2) would not arise. Before his election the petitioner

could not be said to possess the fundamental right under Article 19(1)(a) as a citizen of this country to deliver a speech in either of the Houses of

the Legislature. After election, however, the petitioner obtained the right to speak therein but that right was not a fundamental right. This was, it

was contended, only an additional right acquired by him in his capacity as a member of the House by virtue of his election to that House. The right

to be elected to either House of the Legislature was not a fundamental right but a right created under a Statute. The learned counsel contended that

even if it may be assumed that the right to speak in the House was a right that arises under the provisions of Section 72 (1) of the J. & K.

Constitution, even so such a right could not be termed a 'fundamental right' at all as held by the Supreme Court in K. Anandan Nambiar and

Another Vs. Chief Secretary, Government of Madras and Others, . According to Mr. Sorabji, the right to make a speech in either House of the

Legislature was only an additional right acquired by an elected member, and u/s 24-G of the Act what has been prohibited was not the exercise of

the fundamental right of the petitioner of freedom of speech and expression at all, and as such under the circumstances no question of violation or

infringement of Article 19(1)(a) of the Constitution would arise. It was true that a person on election would continue to retain the fundamental right

under Article 19(1)(a) as a citizen and after the election to the House he acquires an additional right to speak therein as a member but the acquisition of such a right would not result in the enlargement of the fundamental right under Article 19(1)(a). The argument of Mr. Sorabji was that having been disqualified from the membership of a House on the grounds mentioned in the impugned Act, the additional non-fundamental right to deliver a speech in the House would no longer be available to the disqualified member. But the right under Article 19(1)(a), the fundamental right of freedom of speech and expression, as a citizen would continue to remain available to him as before. Section 24-G does not, he stressed, impose any restraint whatsoever on a disqualified member's fundamental right of freedom of speech he possessed as a citizen under Article 19(1) of the Constitution. The right of defection as such was not recognised as a fundamental right under the Constitution and therefore, transfer of allegiance by a legislator from one political party to another was not within the purview and protection of Article 19(1)(a). The only consequence that would ensue u/s 24-G was that the member would cease to be a member of the House but his right of freedom of speech and free association was not directly or indirectly abridged as the law impugned does not further provide that such a member would not criticise his party at any time or at any place or that he would not carry on any political activity against the party outside the House. The impugned law also does not enact that as a consequence of his disqualification from the membership of the House, such member shall not be within his rights to join or form any political party of his own or any other organization or Association. It was open to the disqualified member to join any political party or form a party of his own. It has been contended by Shri Sorabji that if at all there was any impact as a result of Section 24-G of the Act on the petitioner's right under Article 19 (1) (a) and (c), the same was indirect, incidental, remote, collateral and problematic. The main aim and pith and substance of the impugned legislation was to put an end to the political defections. It was not a restraint on any fundamental right of the member. Assuming, the learned counsel contended, that under the circumstances the impugned Act was laying down or could be construed to lay some sort of a restriction on the exercise of the fundamental right under Article 19(1)(a), the restriction was reasonable and in the interest of political and constitutional morality and decency

and therefore, such restrictions could be imposed within the provisions of Article 19(2) of the Constitution. The learned counsel next contended,

that there was always a presumption in favour of constitutionality of an enactment and as such the burden always would be upon the challenger to

satisfy the Court that in the instant case the impugned law violated Article 14 or Article 19 of the Constitution or any other provision of the

Constitution and as such was invalid.

180. The reasonableness or otherwise of an impugned law has to be determined from the point of view of the problem before the Legislature and

requires to be considered in the light of the magnitude of the evil sought to be ended or curbed by enacting the impugned Act. If a law necessitated

by forceful considerations in effect operates as a generalisation which hurts a few, it cannot be helped, and on this ground alone I am afraid, the

impugned Act ought not and could not be declared void. In this regard reference be made to *Fatehchand Himmatlal and Others Vs. State of*

Maharashtra, .

181. Section 72 (1). (2) of the Constitution of the J. & K. State could not be described as strictly as constitutional rights. The said section confers

certain privileges that accrue to a member of the House of Legislature and so long as he continues to be the member such privileges are there with

him. The main aim and intention behind this provision of the Constitution was to render a person's membership of a House of Legislature effective

and meaningful by ensuring complete freedom of debate and discussion in the House so long and so long only as the person continued to be a

member of the House of Legislature; but if in pursuance to the passing of a valid law a member incurs disqualification and by virtue of such

disqualification he was prevented from attending or participating in the business of the House, no occasion would arise for the exercise of freedom

of speech and no complaint could legitimately be made that such a right has been invalidly invaded. This Constitution guarantees immunity from

legal proceedings whether civil or criminal in respect of anything said while participating in the proceedings of the House. The Constitution,

however, does not guarantee the membership of the House for every OB that the member was irremovable or that he could not be disqualified. In

fact, on the other hand, Section 69 of the Constitution, specifically under given

circumstances contemplates and provides for disqualification of a member.

182. Further Section 72 (1) of the J. & K. Constitution was subject to other provisions of the Constitution which includes Section 69 as well. The

relevant portions of Section 69 are reproduced below :--

Section 69 (1).-- A person shall be dis-qualified for being chosen and for being, 3 member of the Legislative Assembly or Legislative Council --

(a) if he is so disqualified by or under any law made by the Legislature.

Clause (1) of Section 72 of the Constitution reads as under :--

Subject to the provisions of this Constitution and to title Rules and Standing Orders regulating the procedure of the Legislature, there shall be

freedom of speech in the Legislature.

183. The prohibition contained in Article 13 of the Constitution for a State to enact any law abridging or taking away a right conferred under Part

III of the Constitution clearly was applicable only so far as fundamental rights were concerned. It would not in its stride include any other type or

class of right or rights. The fundamental rights themselves are, as we have seen, subject to reasonable restrictions under Article 19(2) of the

Constitution. Moreover Section 70 of the J. & K. Constitution also provides in clear terms for the disqualification of members within the provisions

of Section 69 of the Constitution.

184. Shri Sorabji's contention that the rationale underlining the impugned legislation being that a representative elected on a particular social,

industrial, economic etc. programme of a certain party would be guilty of committing breach of faith with the electorate of his constituency in

particular, and with the citizens of the country in general, in shifting his party loyalty, has considerable force and requires due consideration. The

impugned legislation was aimed to curb the tendency commonly known now a days as political defection. It was the electorate of a particular

constituency that has to react to an act of defection, as no individual or a group of individuals could by himself or by themselves be considered to

be entitled to determine as to whether a particular defection was good or bad. The matter, therefore, should be left to the judgment of the

electorate. If a member who has been elected to the Legislature as a candidate

of a particular party changes his affiliations, it was only proper and decent that he should call and ask for a fresh mandate from the electorate in support of his action. The impugned Act nowhere debars him from seeking such a vote of confirmation of his action. The person elected has a mandate from the electorate to fulfil which was the duty of the elected one. The representatives of the people should act in a manner that would inspire confidence amongst the electorates in the elected bodies while undoubtedly an act of defection would produce an effect to the contrary. The malady of defections in India has become so common and contagious and has assumed such an alarming proportion that it was on the face of it objectionable and the need of the day was to stop the same, if democratic system in this country was to survive. It has in fact become a pernicious form of political corruption threatening the working and even the very existence of a sound parliamentary democracy.

185. From the arguments advanced at the bar, however, it was obvious that the views of the parties to the petition were at variance in particular with regard to the application of the provisions of Article 19 (1)(a) and (c) to the writ at hand and also as to the application of Sub-clause (2) of Article 19 of the Constitution. It is contended by one side that Section 24-G could not have been enacted as it in effect takes away and offends the freedom of speech guaranteed as a fundamental right under Article 19(1)(a) of the Constitution and that the restrictions imposed on this right through the impugned Act were unreasonable, and as such the impugned Act shall have to be struck down as ultra vires of the Constitution.

186. It was also contended that the impugned Act violates the principle of equality guaranteed under Article 14 of the Constiution inasmuch as it applies only to the members who have been elected as such on the platform of a political party. The impugned Act thus leaves out unaffected the members elected, say, as independents.

187. In most of the cases that have been cited with regard to the right of freedom of speech and expression, no unformidable difficulties have been confronted. The questions have been resolved without difficulty. The question, however, regarding the restrictions to which the rights under Article 19 have been subjected to have constantly engaged the attention of the Courts. The relevant portion of Article 19 is quoted below:--

(1) All citizens shall have the Rights-

(a) to freedom of speech and expression.

(2) Nothing in Sub-clause (a) of Clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as

such law imposes reasonable restrictions on the exercise of the right conferred by the said Sub-clause in the interest of the sovereignty and integrity

of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court,

defamation or incitement to an offence.

188. Even if it is assumed that a particular right falls within the provisions of Article 19(1) it has to be seen further as to whether a legislation

restricting the application of the Article is or is not reasonable in terms of Article 19(2) of the Constitution of India, It has been urged before us that

the right of speech in either House of Legislature of the State or for the matter of that even in the Parliament was not a fundamental right at all,

inasmuch as Article 19(1)(a) confers on a citizen the fundamental right of freedom of speech, but so far as a speech of a member of Parliament or

that of a member of the State Legislature was concerned the same was subject to certain restrictions which were by any standard reasonable. The

pith and substance of the impugned Act and the introduction of Section 24-G in the Act was to curb and end the tendency found amongst the

members of the Legislature to change sides and defect from the party on whose ticket he had been elected to either House of the State Legislature.

It is common knowledge that the menace of defection has become so widespread since last some years that has caused deep concern and alarm in

the minds of those who believe in the genuine democratic norms of political behaviour. The statistics which have been provided to the Court in mis

regard show that in almost all States of India the Legislators in large or small numbers have defected from the party on whose platform they had

been elected and joined other parties; joined even the party whose candidate had been defeated at the elections by the defector himself. It is highly

immoral and indecent for a member who has been elected on a platform of a certain party to change sides in the manner it is being done these

days. The member who defects commits political immorality and the whole action is indecent and in most cases than not it tends to create public

disorder. It hardly needs a telling that members elected to either House of the Legislature are not always elected on account of their personal popularity or because of their own programmes of action that they place before the electorate. A candidate is elected member to either House of the Legislature almost always on account of and in the background of the programme for political, social and developmental activities contained in the platform of the party supporting the candidate and it is because of that social, political and developmental programme and platform if acceptable to the electorate, that the candidate is elected to the House of the Legislature. True, the same could not be said as regards every and each member but an exception here and there would not disprove the rule. It is obviously quite reasonable to demand from such a member who gives up the party on whose support he had been elected to the House and joins a party which opposed the programmes and policies of that party, to resign from the membership of the House and to seek if he so chooses fresh mandate from the electorate on the programmes which he on account of defection would like to own and pursue. This is highly democratic practice and laudable. Even u/s 24-G such a person has not been deprived of from seeking fresh election and obtain confirmation from the electorate to his newly adopted programme and policy. Section 24-G of the Act only disqualifies him from continuing to be a member of either House of the Legislature because of defection. It however, does not stop such a member from seeking a fresh vote of confidence from the Electorate.

189. Sub-clause (2) of Article 19 pointedly and clearly states, amongst other things, that the restriction would be reasonable with regard to the exercise of the right conferred on a citizen under Sub-clause (a) of Clause (1) of Article 19, if the restriction so imposed is in the interest of maintaining decency or morality or public order. The question of decency and morality is always involved in matters of political defection. What has been guaranteed as a right of freedom of speech was not an absolute right but subject to permissible restrictions and the same was obvious from the nature of the right conferred as fundamental right under Article 19(1). The freedom of speech would not mean a freedom to say whatever one likes. It is always subject to laws of libel, sedition and the like. It would be only in a very clear case that the Court may reach a conclusion that the

challenged law was invalid, being the law putting unreasonable restrictions on the fundamental rights enumerated in Article 19. In State of Madras

Vs. V.G. Row, . Patanjali Shastri, the then Chief Justice has observed as follows (at p. 200 of AIR) :--

It is important in this context to bear in mind that the test of reasonableness, where-ever prescribed, should be applied to each individual Statute

impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged

to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the

disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

190. The legislation that arbitrarily or excessively invades the rights of free speech and free association could not, of course, be said to contain the

quality of reasonableness. The right of every citizen to pursue a lawful trade or business is obviously subject to such reasonable conditions as may

be deemed by the authorities essential to the safety, health and morals of the community. The test with regard to the reasonableness or otherwise of

an enactment laying down restrictions is whether a reasonable man would necessarily consider them unreasonable. The reasonableness of a

particular restriction is necessarily to be judged not with reference to the ground on which it had been imposed, but with reference to the

fundamental right the exercise whereof is restricted. May be that a restriction imposed on one of the rights conferred under Article 19(1) would not

ipso facto form a precedent for adjudging the validity of a restriction, imposed on any other right. In considering reasonable restrictions under

Article 19(2) we have not to consider the reasonableness of the law, but only the reasonableness of the restrictions it imposes on a fundamental

right. Any other view if taken may defeat and be contrary to the intention of the Constitution makers when they enacted Sub-clause (2) of Article

19.

191. A number of statutory provisions have been impugned in Courts of law on the grounds that the same violated Article 19(1)(a) and as such

could not be brought under the protective umbrella provided under the provisions of Article 19(2). In Jumuna Prasad Mukhariya and Others Vs.

Lachhi Ram and Others, , the Supreme Court held that Section 123 (5) and Section 124 (5) of the Act did not interfere with the citizens'

fundamental right to the freedom of speech but only prescribed conditions to be observed if one intended to become a member of the Parliament.

It was further laid down in this judgment that the right to contest an election was not a common law right, but a right accorded by Statute to be

exercised on the conditions laid therein. If a person, it was held, wished to exercise his right to freedom of speech, the impugned sections did not

prevent him from doing so; he could exercise that right and not stand for the election as a candidate for the Parliament.

192. In Ramji Lal Modi Vs. The State of U.P., , it was observed by the Supreme Court (at p. 623 of AIR) :--

Clause (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of right to freedom of speech and expression in the

interests of public order

If therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law

imposing reasonable restrictions in the interest of public order, although in some cases those activities may not actually lead to a breach of public

order.

193. It was by now well settled that if two views on interpretation of a constitutional provision were possible, the view ought to be adopted which

would help to validate the provision, in preference to the view which may tend to invalidate the same. So as to sustain the presumption of

constitutionality of a restriction imposed on a fundamental right mentioned in Article 19(1) of the Constitution of India, the Court has to and would

be well within its jurisdiction to take into consideration matters of common knowledge, history of the times and may even presume a state of fact

which could be conceived as existing at the time of legislation. In Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman

Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, , this question has been

dealt with and the view stated above upheld.

194. The background of the facts, the circumstances under which the impugned Act or order was enacted or passed, the nature of the evil sought

to be remedied by such law and the ratio of the harm caused or likely to be caused to individual citizens by the proposed order or amendment, the

beneficial and reasonably expected results that would accrue to the general public are some of the factors which have to be given due

consideration while considering the reasonableness of a restriction imposed through an enactment. The background on account of which the J. &

K. Legislature had to introduce Section 24-G in the Act, was like an open book for anybody to read and see as it was mainly intended to restrict

the spread of malady of defections from one party to another to reach the State of Jammu and Kashmir. It was obvious that such a legislation was

bound to result in beneficial effect not only to the members of Legislature themselves but to the general public as a whole. The freedom of speech

guaranteed by the Constitution is available so long as there is no counter-vailing social interest which takes the speech out of the protection of the

guaranty e.g., where the object of the speech is not the communication of ideas but to defame any other person or to defraud the general public.

Obviously, a member elected on a particular programme issued by a particular political party could not be morally permitted to defraud the public

in general and his electorate in particular by giving up that programme and join a party that may have in its programme factors opposed to the

programme on which the member was elected to either House of the Legislature.

195. There is considerable weight in the argument advanced at the Bar that Article 19(1)(a) is inapplicable to the matter at hand as before his

election the petitioner had no fundamental right under Article 19(1)(a) as a citizen to deliver a speech in the House. The particular or specific right

to speak in the House was acquired by the petitioner additionally in his capacity as a member of the House by virtue of his election. The right to be

elected to a Legislature was not a fundamental right. It was in consequence argued that the question of satisfying the requirements of Article 19(2)

in the present case would not at all arise. Assuming, however, that the right to speak as a member would arise u/s 72 (1) of the Constitution of J. &

K., even so the Supreme Court in a case reported in K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others,

has held that the said right cannot be termed and equated with the fundamental right at all. If in the light of the observations made in the above

referred to judgment of the Supreme Court the impugned Act is taken into consideration it would be apparent that only the additional right of the member concerned has been curtailed vide the impugned Act and limitations imposed are reasonable, as such an additional right not being a fundamental right at all, the question of infringement of Article 19(1)(a) would not therefore, strictly arise. The acquisition of an additional right to speak in either of the Houses of Legislature would not lead to the enlargement of fundamental right under Article 19(1)(a). Once a member is disqualified and he ceases to be a member of either House of the Legislature, the additional right of speaking in the House would be no longer available to him, but in contrast fundamental right under Article 19(1)(a) as a citizen would continue to be available to him in the same manner as it was available to him before his election as a member. It could be safely concluded that Section 24-G does not impose any restraint whatsoever on a member's fundamental right as a citizen under Article 19(1)(a) and as such it was not required to show that the restriction imposed on his freedom of speech had to satisfy the requirements of Article 19(2). Whatever the case, however, may be even if it is assumed that the fundamental right under Article 19(1)(a) was involved and curtailed, it was obvious that the same was still subject to the reasonable restrictions enumerated in Article 19(2). The case at hand on facts would squarely be covered within the expression of 'morality and decency of public order used in that particular provision. The restrictions imposed by virtue of the impugned Amendment were in my view reasonable and in the interest of political and constitutional morality and decency in particular and in the interest of public order in general

196. I agree with Sh. Sorabji that the impugned legislation was aimed to curb the evil of political defection and that it was permissible in law to put restrictions on the exercise of Fundamental Rights according to the needs and exigencies of the society. He was right when he said that a legislation need not be all embracing. It was open to the Legislature to recognize the degrees of the harm and tackle the problem in stages. Article 14 of the Constitution does not require a scientific precision for inclusion or exclusion. A statute could not be struck down as unconstitutional as there may be other ways available for resolving the problem or because of the hardship it was likely to cause in a few cases even genuine.

197. The argument of the learned counsel for the petitioner that the impugned law was discriminatory in so far as it did not take into its ambit the members of the legislature who had been elected as independents or otherwise had, it appears to me, no force in the circumstances appearing in the case. The law could be struck down under Article 14 only if it was established by relevant data and material that classification was administratively perverse, and palpably arbitrary. The independents are almost always elected on account of their own influence which they carry in a particular constituency some times on account of a programme that appears good to the electorate of the constituency. It would have, however, been under the circumstances, worthwhile and effective to keep in line with the aims, and objects of the impugned legislation, had the independent candidates also been brought within the purview of the impugned Act and especially so in cases where such independents gave up their independent positions in the Assembly and joined the party whose candidate the particular independent had defeated at elections. This however, is not provided in the impugned legislation at present. This is an obvious lapse and may require the attention of and consideration by the Legislature but under the circumstances as prevailing now-a-days it could not be said in fairness to the Legislature that because of this probable lapse an intention of discrimination is writ large in the impugned Act so as to attract the application of the provisions of Article 14 of the Constitution. Here it would be pertinent to quote the following from *The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another*, which has been even quoted and relied upon by the petitioner also :--

It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of equality before the law has been applied.

The equal protection of the laws is a pledge of a protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has been taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. See *Joseph Tussman and Jacobus ten Breck*. ""The

Equal Protection of Laws", 37 California Rev. 341.

A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase

'similarly situated' mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable

classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either

the elimination of a public mischief or the achievement of some positive public good.

A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the

classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that

furtheres a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is

over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not situated as well. In

other words this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with

mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring

about his downfall employed such a classification.

198. A particular legislation as I have said above need not be all embracing and this principle of law need not be ignored in the instant case also. It

is still open to the Legislature to take into consideration and tackle the problem in stages.

199. The report of the Lawyer Members of the Committee on Defections appointed at the Centre is revealing with regard to the defections from

one political party to the other. The following extract from its report appearing at page 43 of Appendix may be quoted here with benefit:--

Articles 102(1)(e) and 191(1)(e) of the Constitution empower Parliament to make a law providing for disqualifying a person for being chosen as,

and for being a member of either Houses of Parliament or of the State Legislative Assembly or Legislative Council. As standing for election to

Parliament or State Legislature is only a statutory, as distinguished from a

fundamental right, it is open to Parliament to impose such restrictions or conditions on the exercise and enjoyment of that right as it considers necessary or reasonable' in public interest. On this basis it is possible to provide in a special legislation that a legislator who renounces the membership or repudiates his allegiance to a political party shall be disqualified from continuing as a member of Parliament/State Legislature. He will nevertheless be free to stand for election again if he so wishes, and sit as a member in case he gets elected

200. About the Independents, the Committee, however, was of the view that they be left alone. Following extract from the report may be useful in this regard :--

The most essential pre-requisite for any such provisions is an acceptable decision of what constitutes the Act of Defection. The first question that confronted us was with regard to Independents. We are aware that in numerical strength they form largest single element after congress, that they constitute an anomaly in politics and that not an inconsiderable part of the political instability can be directly or indirectly traced to them. Even so, on a careful consideration of all facts we feel that to include Independents in any formulation that we may attempt would, in practice, create more difficulties than it would solve.

201. With respects, however, I would like to say that the Committee of Lawyers though conceded that the political instability was a great menace and was mainly related to the behaviour of the independents, yet it recommended that the Independents be kept out of the purview of any anti-defection measure. I for one could not bring myself round to accept this proposition as sound and reasonable. But I agree with the report of the Lawyer Members of the Committee when it says that the nature of the problem was admittedly such that in an exercise seeking to plug over conceivable loopholes at one stroke might prove to be counter productive.

202. The defections that have come about in a large number of States in India have in almost all cases resulted in instable political conditions. It has deeply affected the administration and in the result tended to help create public disorder, and instability and all this in consequence has caused tremendous damage to the interests of general public. The restrictions imposed vide Section 24-G of the Act were not only reasonable on the

grounds of morality and decency but were also required to be there for maintaining public order, peace and tranquillity.

203. In Chap. XV of his book entitled ""Does our Constitution need a second look"". Shri Paras Dewan has been categorical in stating that in the

interest of stability, improvement, progress, development, it was necessary that India should be an anti-defection law. Mr. Dewan has affirmed that

in Indian politics the Government was at the mercy of conflicting Independents and party defectors who enjoyed powers far greater than other

members would ordinary command. Number of defectors according to Mr. Dewan, from Congress was 175 and to the Congress was 139 in the

States during one year after 1967 General Elections. Between 1967 and 1970 some 800 MLAs were involved in the politics of defection. Of

these 155 were rewarded with offices, 84 of them securing Cabinet rank. The politics of defection according to him, has put a heavy strain on the

functioning of democracy and parliamentary form of Government in India. The people re-acted against the defectors, marked and jeered with the

remark of 'Aaya Ram Gaya Ram'. It was voiced that an elected representative should not be allowed to change his party loyalty without seeking

popular approval in a by-election.

204. In view of what has been said above it was obvious and therefore, it is held that Mian Bashir Ahmad having changed party affiliations has

rendered himself liable for action to be taken u/s 24-G of the Act and the action taken by the authorities concerned was justified, constitutional and

legal and since tile day he resigned from the party on whose platform he was elected and joined another party he has ceased to be member of the

State Legislature. His writ petition, therefore, is dismissed with costs and the reference disposed of accordingly.

205. I now take up for consideration the reference made by the Speaker of the Legislative Assembly u/s 70 of the Constitution of the State and

also the writ petition filed by Mr. Mohi-Ud-Din Malik in this regard.

206-207. It would be needless to reproduce the enunciation of the principles of law and provisions of the Constitution of India and the State of J.

& K. discussed by me above. The principles of Constitution as are applicable in the case of Mian Bashir Ahmad are applicable also in the case of

Malik Mohi-Ud-Din. But the facts appearing in both cases are not the same and

are different in material particulars. In the different circumstances appearing in this case, it has been alleged by Malik Mohi-Ud-Din that the impugned Act would not apply in his case though he has admitted resignation from the Jammu and Kashmir National Conference party and his subsequent action joining the Congress (I) party. The grounds taken by him, are inter alia, that he was elected Speaker of the Assembly on 8th of Sept., 1979 and has been discharging his duties as such till 11-10-1980. Upon his election as Speaker he resigned from the membership of the National Conference as well as from the membership of its Parliamentary party. According to him, 'thus, when the impugned Act was passed and came into force on 29-9-1979 he no longer belonged to any party or group in the Assembly and as such the provisions of Section 24-G of the Representation of the People Act would not and could not be made applicable to him. The factum of his resignation from the National Conference Parliamentary party is admitted by the other side but it is not admitted that he resigned from the membership of the National Conference party as such also. It was refuted by Malik Mohi-Ud-Din that he has become disqualified from being a member of the legislature while the respondent No. 3 herein contended that he had become so disqualified. Under these circumstances the Speaker made a Reference to this Court u/s 70 of the State Constitution. Mr. Malik Mohi-Ud-Din also filed a writ petition.

208. In support of his contention that he had resigned on having been elected as the Speaker, Mr. Malik has referred to his letter addressed by him to the President of National Conference (respondent No. 2) informing him about his resignation from the National Conference Party and also to his own speech which he delivered in the Assembly on having been, elected as Speaker, The President of the National Conference (respondent No. 2) has not filed any reply or an affidavit either confirming or denying the alleged letter of resignation. Instead respondent No. 3 has in reply alleged that no such letter had been received. The silence in this regard of respondent No. 2 is undoubtedly meaningful. Why he has not himself filed an affidavit contradicting the petitioner on this score as it was alleged by the petitioner that he sent the letter of resignation to the President of the party (respondent No. 2) and not to the respondent No. 3 who was General

Secretary of the party, A copy of the resignation letter has been produced and is on the file. Had this not been a fact, what prevented the respondent No. 2 to come forward and file affidavit denying the existence of such a letter. It would, under the circumstances, be permissible in law to draw an inference in favour of Malik Mohi-Ud-Din and to hold that such a letter had been sent and that he had resigned from the political party i. e. the National Conference on his becoming the Speaker. Moreover, his speech after his election as Speaker shows that he had resigned from the Parliamentary party of the National Conference also. True, in his speech in the Assembly he has referred to his resignation from Parliamentary party only but the speeches delivered by respondent No. 2 and others clearly shown that Mr. Malik had resigned both from Parliamentary wing as well as the other wing of the party on whose ticket he had been elected to the Assembly. Moreover, after his elevation to the Chair he had neither got renewed his membership of the party nor became its member thereafter.

209. On careful consideration of these facts, it is obvious that on the date the impugned Act was passed he no longer belonged to the National Conference Party- He was either independent or a member of Congress (I) party. The impugned Act could not in law be given retrospective effect and accordingly the impugned Act would not apply so far as the case of Malik Mohi-Ud-Din was concerned.

210. The reference regarding Mr. Malik Mohi-Ud-Din is therefore, disallowed and it is held that the impugned Act does not apply to him and that he shall continue to be and remain as a member of the Legislative Assembly as he is.

211. The reference made by the Speaker Legislative Assembly u/s 70 of the Jammu and Kashmir Constitution is accordingly disposed of,

212. To sum up, I hold as follows :--

(1) The introduction of Section 24-G in the Representation of the People Act by virtue of the impugned Act is within the provisions of the Constitution of India as well as the Constitution of the State of Jammu and Kashmir and does not affect adversely the fundamental rights of the petitioners under Article 19 (1)(a) and (c);

(2) Even if, for the sake of argument, it is assumed for a moment that the

impugned Act does, in one manner or the other, adversely affect the Fundamental Right of the freedom of speech of the petitioners, the restriction so imposed was reasonable restriction within the provisions of Article 19(2) of the Constitution and was thus lawful.

(3) The impugned Act was not discriminatory and as such did not violate the principle of equality within the provisions of Articles 14 and 19(1)(a)

(c) of the Act or Section 72 of the Constitution of the State. For the sake of eliminating from the political system that prevails in the State, the evil

of defection, it has been suggested to the Legislature to take up the case of Independents for consideration and if found desirable the Act may be

properly amended to bring within its purview the independents as well as others also.

(4) The provisions of the impugned Act were applicable in the case of Mian Bashir Ahmad and thus he has ceased to be a member of the State

Assembly from the day he joined the Congress (I).

(5) On facts of the case, Shri Malik Mohi-Ud-Din, however, continues to be a member of the State Assembly as at the time the impugned Act

came into force he had resigned from the National Conference Party and was either an independent member of the Assembly or had already

joined the Congress (I).

(6) The respondent No. (2) (The President of the National Conference) not having filed affidavit contradicting Malik Mohi-Ud-Din with regards

the letter of resignation from the membership of the party, the factum of resignation no longer remains a question of fact open for further probe.

(7) In view of what I have stated above, this also disposes of CMP No. 468/81 whereby Sh. Malik Mohi-Ud-Din had prayed that the reference

made by the Speaker in his case being CMP No. 132/81 be delinked from the writ petitions and that he should be given a reasonable opportunity

to meet the case set out in the reference against him. The application shall be deemed to have been allowed.

ORDER

213. In view of the fact that the Bench is evenly divided, Rule 21 of the J. & K. High Court Rules comes into operation and accordingly we hold

that Section 24-G of the Jammu and Kashmir Representation of the People Act, 1957 is constitutionally valid and order as follows :--

1. That Writ Petitions Nos. 319/80 and 641/80 fail and are hereby dismissed.
2. That the Speaker's reference in the case of Mian Bashir Ahmad being CMP No. 509/80 succeeds and is allowed. It is hereby declared that he has incurred disqualification for being a member of the Jammu and Kashmir Legislative Assembly.

Further in accordance with the opinion of the Bench as a whole, the Speaker's reference in the case of Shri Malik Mohi-Ud-Din being CMP No.

132 of 1981 fails and is hereby rejected. It is declared that he has not incurred any disqualification for being a member of the Legislative Assembly.

The parties shall bear their own costs.