CASE ANALYSIS OF

KIHOTA HOLLOHAN V. ZACHILHU & ORS.

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**KIHOTAHOLLOHAN CASE AND ITS IMPACT ON INDIAN SOCIETY**

**BACKGROUND OF THE CASE**

A constitution can be defined as a written document containing rules, laws and regulations in order to govern a country. The Indian Constitution is considered as the supreme or “*grundnorm”* law of the land. Its preamble is about the sovereignty of people, democratic polity, justice, liberty, equality and fraternity assuring the dignity of the individual and the unity and integrity of the nation. The Preamble is said to be adopted from Nehru’s principles which became the basis of the formation of the constitution. After the constitution was created, it did not take long for political functionaries to manipulate Indian framers. Following the departure of Nehru, the country witnessed a fall in political morality and an unfortunate growth of varying types of political corruption. The unruly floor crossing was a blow to the electorate system and undermined the three organs of the government.Greed for power, position and money were behind these defections. The observation made was that disturbance of the socio-economic processes has a devastating impact on cultural processes in politics. It was thus discouraged and attempts were made to eradicate this through the Constitutional Amendment Bills of 1973 and 1978. In early 1985, however, the government initiative gaining the opposition support worked and the Parliament enacted the Constitution (Fifty-Second Amendment) Act outlawing defections to maintain democratic structure. The reason the author is writing this paper is to analyse the views expressed by the Supreme Court judges in this case.

**ANTI-DEFECTION LAW**

The Constitution (Fifty-Second Amendment) Act, 1985, which came into force in March 1985, amended different articles of the Constitution with respect to the vacancy of seats and disqualification from membership of the Parliament and State Legislature. The amendment also inserted a new (10th) schedule to the Constitution creating provisions detailing disqualification on the ground of defection. A member of the Parliament/State Legislature will be considered as “defected” if he either resigns from his party or does not obey the orders of the party leadership on any situation which relates to voting matters. Defection as in the Indian Constitution has been defined as “To abandon a position or association, often to join an opposing group” which essentially describes a situation when a member of a particular party abandons his loyalty towards that party and provide his support to another party. The reasons for the amendment of the constitution and creation of the tenth schedule is aptly described in the Statement of Objects and Reasons of the 52nd Amendment to the Constitution.
The anti-defection law brought up questions like 1. Whether the law infringes upon the rights of free speech of the MPs and MLAs?; 2. Should the law only be allowed for those voting situations which determine the firmness of the government like determining confidence after forming the government or no-confidence motion?; Should the final judgement on defection made by the presiding officer?; etc. While upholding the constitutional validity of this amendment, the court observed that the anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct…above certain theoretical assumptions”. The court held that the law does not contravene any rights of free speech or the basic structure of our parliamentary democracy. Another important aspect of this judgment is the final decision making authority on declaring the defection. The court made it clear that the presiding officer is the one to make the decision and it is finally subject to judicial review after the decision is pronounced and effected. The anti-defection law allowed the political parties to have stronger grip on their members which many times has resulted into preventing them to vote by bribing them with the position of ministry. However, it is also resulted into an unintended outcome: reduction in the role of the MP or MLA. It has also resulted in lack of constructive debates on critical policy issues.

**FACTS**

In the case of **Kihota Hollohon v. Zachilhu and Ors.**[[1]](#footnote-2)*,* the constitutional validity of the Tenth Schedule launched by the Constitution (Fifty Second Amendment) Act, 1985, was questioned. The petitioners were brought by a batch of Writ Petitions, Transfer Petitions, Civil Appeals, Special Leave Petitions and other matters raising common questions which were all heard together. The Constitution (Fifty-second Amendment) Act altered four articles of the Constitution, *viz.* 101(3)(a), 102(2), 190(3)(a) and 191(2) and added tenth schedule in place of them. This Amendment is called **Anti-Defection Law**. The constitutional validity of the Anti-Defection Law has been backed by the Hon’ble Supreme Court in a 3:2 decision in the case. The majority constituted of by Justices M.N. Venkatachaliah, K.J. Reddy, and S.C. Agrawal and the minority comprised of by Justices L.M. Sharma and J.S. Verma. At the same time, the Supreme Court had rules that the speaker’s orders under the law that excludes an MLA on the ground of defection is to be subjected to judicial review.

**ISSUES**

1. Whether the changes made by 52ndamendment are legally acceptable?
2. Whether the additions made by 52nd amendment have constitutional validity?

**ARGUMENTS OF THE PETITIONERS**

1. The petitioners contended that every person in the Parliament must have the right to follow his own spirit and sense of judgment and not necessarily with the policy of his political party. This according to the petitioners is deemed to be a fundamental principle of parliamentary democracy, freedom of speech and the right to dissent and the freedom of conscience.
2. The right of a parliamentarian is not an absolute right and is thus can be subjected to reasonable restrictions. The right of a parliamentarian to the freedom of speech is provided for under Article 105(2). This, as contended by Shri Sharma, arguing on the side of the petitioners, is places even above the fundamental right as guaranteed under Article 19(1)(a) of the Constitution. Political defections induced to grab power and money is also a corrupt practice, and therefore does not fall within the immunity granted to a member of the house.
3. Another contention raised by counsel for petitioners is that the distinction between ‘defection’ and ‘split’ in the Tenth Schedule is very minimal. The differences on which the distinction rests are indeed outrageous defiance of logic. In response to the arguments made by the petitioners, the Court gave the opinion that the rule for exemption of split is advocated for because of the fact that 1/3rd members at the same time cannot be driven towards dishonest intentions.
4. The petitioners also referred to paragraph 7 to substantiate the point that in terms and in effect brings about a change in the operation and effect of Articles 136, 226 and 227 thus attracting the clause (2) of the Article 368 needing ratification. The court after looking at it has given an opinion that the words of paragraph 7 have wide interpretations and leave no viable choices. The same idea is reinforced by going through the history of the defection law and the debates in the house which suggests that paragraph 7 was introduced with the very purpose of restricting jurisdiction. The court has distinguished the present case from the cases of **Shankari Prasad Singh Deo v. Union of India and State of Bihar**[[2]](#footnote-3)and **Sajjan Singh v. State of Rajasthan**[[3]](#footnote-4) that were relied upon to urge that there is no relation to the clause (2) of the Article 368.
5. The petitioners claimed that the ‘finality clause’, under the paragraph 6 of the 10th Schedule, excludes the court’s jurisdiction which made the speaker immune from Judicial Review. In India, the position is such that whatever authority resolves disputes must be vested with some sort of judicial authority. Looking at the present case, the authority to decide impugned disqualification under para 6(1) is pre-eminently a judicial complexion. In the present case, the majority has held that the Speaker or the chairman is tribunal and that the finality clause does not oust the jurisdiction of the courts under Articles. 136, 226 and 227. Instead, the finality clause just limits them.

**ARGUMENTS OF THE RESPONDENTS**

1. Being in favour of the constitutionality of the Amendment, the respondents urged that the Tenth Schedule creates a non-justiciable constitutional area dealing with certain complex political issues which have no strict adjudicatory disposition. New rights and obligations are created for the first time inflate by the Constitution and the Constitution itself has envisaged a distinct constitutional machinery for the resolution of those disputes. These rights, obligations and remedieswhich are not amenable to judicial processes and the Tenth Schedule has merely recognised this complex character of the issues and that the non-inclusion of this area is constitutionally upheld by ensuring a sense of finality to the decisions of the Speaker or the Chairman and by deeming the whole proceedings as proceedings within Parliament or within the Houses of Legislature of the States envisaged in Articles 122 and 212, respectively, and also by explicitly excluding the Courts' jurisdiction under Paragraph 7.
2. In constitutional and legal theory, it is observed that there is really no removal of jurisdiction of Courts or of Judicial Review as the subject-matter itself by its inherent character and complexities is not agreeable to and outside judicial power and that the restriction towards jurisdiction under Paragraph 7 is merely a consequential constitutional recognition of the non-amenability of the subject-matter to the judicial power of the State, the analogy of which is that the Speaker or the Chairman, as the case may be, exercising powers under Paragraph 6(1) of the Tenth Schedule function not as a tribunal with statutory backing, but as a section of the State's Legislative branch. It is urged that no question of the discharge of jurisdiction of the Courts would at all arise in the first place, having regard to the political nature of the issues, the subject-matter is itself not amenable to judicial power. It is understood thatthe last pointis about the Constitution, and the fact that the Legislature is entitled to deal with it exclusively.
3. The Tenth Schedule is part of the Constitution and attracts the same canons of construction as are applicable to the expounding of the fundamental law. One constitutional power is necessarily conditioned by the others as the Constitution is one "coherent document". learned Counsel for the petitioners accordingly say that the Tenth Schedule should be read subject to the basic features of the Constitution. The Tenth Schedule and certain inevitable democratic events cannot co-exist. In clarifying the processes of the fundamental law, the Constitution must be valued as a whole. A constitutional document explains only broad and general principles that can be easily subjected to flexible application to adapting circumstances - a distinction which differentiates a statute from a Charter under which all statutes are made. Cooley on "Constitutional Limitations" has said that:“Upon the adoption of an amendment to a constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the Constitution; and it is to be construed accordingly.”
4. The respondents’ counselreferred to the points contended by Shri Ram Jethmalani and Shri Sharma that the provisions of the Tenth Schedule constitute a blatant violation of those fundamental principles and values which are basic to the survival of the systematic uprising of a parliamentary democracy. The Tenth Schedulenegates those very foundational assumptions of Parliamentary democracy; of freedom of speech; of the right to dissent and of the freedom of conscience. It is urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the disease itself, are adopted. The Tenth Schedulemirrors the meanderings of a troubled conscience on issues of political morality and to punish an elected representative for what gives way to an expression of conscience quashesthe very democratic principles which the Tenth Schedule is supposed to preserve and sustain. The advocates also referred to the famous Speech to the Electors of Bristol, 1774, by Edmund Burke to substantiate this point.

**DO ANTI-DEFECTION PROVISIONS HAVECONSTITUTIONAL VALIDITY?**

There are several issues involvedin the function of this anti-defection law which needs to be addressed. 1. Does the law while curbing defection also oppress a MP’s right to the freedom of expression of opinion in theparliamentary proceedings? 2. Does it stifle their opinion which is contrary to the party position? 3. Is the decision of the Speaker in regards to the matter disqualification of a MP final? 4. Does the power of judicial review stretch to the rules framed under the tenth Schedule? By a 3:2 majority, the Court gave the judgement that the provisions of the Tenth Schedule were not violative of the freedom of speech, vote and conscience of the members. Such provisions in the view of the Court are created to strengthen the fabric of Indian Parliamentary democracy by curbing unprincipled and unethical political defections. It has said that the freedom of speech of a Member cannot be granted in an unlimited and absolute sense. The parliamentary advantages as assured under Article 105 are not infringed as the provisions in the Tenth Schedule do not result in any proceeding in any Court thus safeguarding the guaranteed immunities. The author does not agree with the Court’s stance here.

**WHETHER COURTS’ JUDICIAL REVIEW EXTEND TO RULES MADE UNDER TENTH SCHEDULE?**

In **Ravi S. Naik v. Union of India**[[4]](#footnote-5), the Bench said that the types of laws made under the tenth Schedule were procedural. The disqualification rules were decided in order to regulate the procedure that is to be followed by the Speaker for exercising the power conferred on him by Paragraph 6(1) of the Tenth Schedule. Any contravention towards these rules would amount to an flaw in procedure which is free from judicial scrutiny in view of Paragraph 6(2) as declared by the Bench in this case. The Bench in Ravi Naik did not agree with the view that the violation of the disqualification rules amounts to violation of constitutional mandates. They opined that raising the rules to the status of the provisions of the Constitution is to be banned. The disqualification rules cannot be equated to the provisions of the constitution as they have been framed by the Speaker in exercise of his powers under paragraph 8 of the Constitution. The disqualification Rules cannot be considered constitutional mandates. Therefore violation of the disqualification Rules is not a reason for judicial review of the order of the Speaker in view of the final clause in paragraph 6(1) of the Tenth Schedule as was stated in this case.

**COMPARISON OF INDIAN LAW WITH DIFFERENT NATIONS**

In India, unlike other democracies in the world, the vote of each legislator in the House is not taken into consideration. In Israel, when Prime Minister Ariel Sharon wanted a legislative recommendation to pull Israeli troops out of the Gaza strip, he was sustained by members from the Opposition Party while a few members of his own party dissented. In the UK, when Prime Minister Tony Blair wanted Great Britain to assemble in the war in Iraq, more than 150 members of his party voted against him. He had to take the support of members of the Conservative party to put the legislation through. Such debated opinions between members of the same party is encouraged in other democracies. Members of the Labour Party in the UK did not have to leave the party just because they did not agree with the party line or had a different preference. In India, the members of a party are required to follow the direction of their party whips or face disqualification. The anti-defection law terminates debates on matters in the Parliament as the legislators are not allowed to voice dissenting views, without being disqualified by the House. A report of Parliamentary practices and conventions prevalent in other democracies in the world would point out that anti-defection laws are at a primitive stage. Among the Commonwealth countries, anti-defection law is followed in 23 nations. The anti-defection law in Bangladesh, Kenya, South Africa and Singapore excludes a legislator when he ceases to be a member of the party or when he is expelled. The existence of anti-defection laws in countries where democracy is in a growing stage represent that the legislators in those countries are less informed on the principles of democracy, but are more greedy when it comes to gaining more political and monetary dominance. On the contrary, the political ambience in developed democracies gives an impression of legislators with democratic values and freedom of speech equally combined in themselves. The ability to dissent with a political party’s policy to which a legislator owes allegiance is ensured by the “collective conscience” of the electorate, to which alone the legislators are primarily responsible. In the UK Parliament, a member is allowed to freely cross over to the other side, without being threatened by any disqualification law. In the US, Canada, and Australia, there is no limit on legislators shifting sides. In this KihotaHollhan (supra) case, the judgement referred to foreign precedents. Chief Justice Marshall roughly held in the case of **Cohens v. Virginia**[[5]](#footnote-6) that it is true that this Court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, unlike the legislature, avert a measure because it approaches the ambit of the constitution. He said that the courts do not have a right to deny the jurisdiction which is provided, or to seize which isn’t given. He observed that this tribunal was invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. Relevance can be seen in an Indian case by Chief Justice Patanjali Sastri, while comparing the role of this Court in the constitutional scheme with that of the U.S. Supreme Court, pointed out in the **State of Madras v. V.G. Row**[[6]](#footnote-7) that the duty of this Court flows from express provisions in our Constitution while such power in the U.S. Supreme Court has been assumed by the interpretative process giving a wide meaning to "due process" clause. Before going ahead to consider this question, it is right to point out that what is sometimes overlooked. Our Constitution actually contains express provisions for judicial review of legislation according to conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the 5th and 14th Amendments. If the courts in this country have to deal with such an important task, it is not out of any desire to sway towards legislative authority in a patriotic move, but in discharge of a duty laid upon them by the Constitution. The judgement of this case agreed with the statements made by Sastri and wished to add the fact that even though such a clear statement may have been necessary soon after the Constitution came into force and may not be a necessary reminder four decades later at this juncture, yet it appears relevant in the present context to clear the lingering doubts in some minds. We have no hesitation in adding further that while we have no desire to clutch at jurisdiction, at the same time we would not be deterred in the performance of this constitutional duty whenever the need arises. We would also like to observe that unlike England, where there is no written Constitution and Parliament is supreme, in our country there is a written Constitution characterizing the spheres of jurisdiction of the legislature and the judiciary wherein the power to construe the meaning of the provisions in the Constitution and the laws is entrusted to the judiciary with finality attached to the decision of this Court and that Article 144 of the Constitution obliges all authorities in the country to act in aid of this Court. It is not permissible in our constitutional scheme for any other authority to claim that power in exclusivity, or in supersession of this Court's verdict. It is also to be remembered that in our constitutional scheme based on democratic principles which include governance by rules of law, everyone has to act and perform his obligations according to the law of the land and it is the constitutional obligation of this Court to finally say what the law is. We have no doubt that the Speakers and all others sharing their views are alive to this constitutional scheme, which is as much the source of their jurisdiction as it is of this Court and also conscious that the power given to each wing is for the performance of a public duty as a constitutional obligation and not for self-preservation. Once this perception is clear and aware to all, there can be no room for any conflict.

**CASE LAWS/PRECEDENTS FROM INDIAN COURTS**

In case laws such as **Brundaban Nayak v. Election Commission of India**[[7]](#footnote-8), the Court, on an appeal by special leave under Article 136 of The Constitution against the decision of the High Court, examined the “finality” of the Governor’s decision in regards to the matter of disqualification of a MLA (State) after his election. InSupreme Court case of **Union of India v. Jyoti Prakash Mitter**[[8]](#footnote-9), it investigated the finality attached to the order of the President with regard to the determination of the age of a judge of the High Court under Article 217(3) of the Constitution. It was also claimed that the proceedings under Paragraph 6(1) of the tenth Schedule were “proceedings in Parliament” or “Proceeding in the Legislature of a State” and therefore could not be challenged by the Courts under Articles 122 or 212. The Court on the other hand said that since the proceedings under paragraph 6(1) occurred before the Speaker and not before the House, nor did it require the approval of the House, the decision of the Speaker could be judicially scrutinised. The Court also said that a dispute regarding the disqualification of a MP was not to be treated as a matter of privilege but one which is judicial in nature. The bench was of the view that the Speaker passed the “well known and accepted tests” of what constituted a Tribunal. The Court gave the conclusion that the finality clause in paragraph 6(1) does not completely exclude the jurisdiction of the Courts under Article 136,226 and 227 of the Constitution, but it does limit it. This allows the Courts to examine whether the action of the authority is beyond the powers granted to him.It was contended by the respondents in **Mayawati v. Markandeya Chand &Ors.**[[9]](#footnote-10)that the decision of the Speaker isexempt from judicial interference because of two restrictions. They claimed that the Constitution Bench of the KihotoHollohan (supra) case limited the scope of judicial scrutiny with regard to the decision of the Speaker. They also ascertained the “positional height” of the Speaker upon whom power is vested to determine disputes under the 10th Schedule. Moreover, the KihotaHollan (supra) case has been cited in subsequent cases like **Dr. Kashinath G. Jalmi&Anr. v. The Speaker &Ors.**[[10]](#footnote-11), **Dr.Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council &Ors.**[[11]](#footnote-12), **G. Viswanathan v. Honourable Speaker Tamil Nadu Legislative Assembly, Madras & Anr.**[[12]](#footnote-13)

**CRITICAL OVERVIEW OF THE JUDGEMENT**

**Advantages of Anti-defection Law**

* **Corruption**: Law seeks to prevent political defections which may be caused by the lure of office or other similar considerations thus deterrent to reduce political corruption and bribery.
* **Political Stability**: Due to the increasing phenomenon of coalition government, the defection of a few individual legislators can cause a collapse of the government for personal greed.
* **Party discipline**: When these candidates get elected, political propriety demands that they continue to support the party and its policies, promoting party discipline.

**Disadvantages of Anti-defection Law**

* **Against freedom of speech and expression of legislators**: The anti-defection law curbs this right by mandating that all members must vote strictly on party lines, and in complete obedience to party whips. By doing this, it takes away the ability of a legislator to vote according to his conscience.
* P**rohibit dissents**: It further prohibits voicing dissent against his party’s positions and policies, except through intra-party debate. Prohibition against dissent may undermine the role of Parliament as an effective check on the executive. This may have a deleterious impact on government accountability.
* **No accountability of legislators to people**: Legislators can now claim that they voted in a particular manner because their party required them to do so. Their justification can be that they exercise no control over their vote and therefore ought not to be held accountable for it.
* **Role of MPs diminished in Parliament**: The anti-defection law also considerably diminishes the role of an MP in Parliament to that of a person who only follows orders of the party whip.

**CONCLUSION**

In the case of *Kihoto Hollohan vs.Zachillhu* (supra), it was argued that the anti-defection law is against freedom of speech, the right to dissent and the freedom of conscience. Supreme Court ruled that the law is targeted at addressing unprincipled defections, which cannot be protected under freedom of conscience or the right to dissent or intellectual freedom. Therefore, this law has certain dysfunctional consequences however it is necessary in the present era when dealing with political corruption is an important area of electoral reforms.

**SUGGESTIONS**

The phrase ‘voluntarily giving up membership of a political party’ should have a more clarified definition.Agreements under the Tenth Schedule should be made by the President/ Governor on the binding advice of the Election Commission. Disqualification should only be restricted to cases where a member voluntarily gives up the membership of his political party, or a member abstains from voting, or votes contrary to the party whip of a confidence/non-confidence motion. The author believes in the need to provide the Speaker with a timeline i.e. providing them withdefinite number of days for evaluating a resignation. It is not practical to completely repeal the Anti-defection law, but the long term solution lies in keeping a check on the political culture and the legislators who act in contempt or with mala fide intention should be voted out in succeeding elections, as the ultimate agency lies with Indian people in the world’s largest democracy.

**REFERENCES**

* *Kihota Hollohon*v. *Zachilhu and Ors*., AIR 1993 SC 412.
* *Shankari Prasad Singh Deo v. Union of India and State of Bihar,* 1951 AIR 458, 1952 SCR 89.
* *Sajjan Singh v. State of Rajasthan,* 965 AIR 845, 1965 SCR (1) 933.*Ravi S. Naik v. Union of India*, 1994 AIR 1558, 1994 SCR (1) 754.
* *Cohens v. Virginia*, 5 L. Ed. 257, 291 (1821).
* *State of Madras v. V.G. Row*, 1952 SCR 597.
* *Brundaban Nayak v. Election Commission of India*, 1965 AIR 1892, 1965 SCR (3) 53.
* *Union of India v. Jyoti Prakash Mitter*, 1971 AIR 1093, 1971 SCR (3) 483.
* *Mayawati v. Markandeya Chand & Ors.,*1998 INSC 493.
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* *Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council &Ors*., W.P. (C) No. 322 of 2004.
* *G. Viswanathan v. Hon'ble Speaker Tamil Nadu Legislative Assembly*, Madras &Anr., 1996 AIR 1060, 1996 SCC (2) 353.

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# **Are Anti Defection Provisions Constitutionally**

1. *KihotaHollohon*v. *Zachilhu and Ors*., AIR 1993 SC 412. [↑](#footnote-ref-2)
2. *Shankari Prasad Singh Deo v. Union of India and State of Bihar,*1951 AIR 458, 1952 SCR 89. [↑](#footnote-ref-3)
3. *Sajjan Singh v. State of Rajasthan,* 965 AIR 845, 1965 SCR (1) 933. [↑](#footnote-ref-4)
4. *Ravi S. Naik v. Union of India*, 1994 AIR 1558, 1994 SCR (1) 754. [↑](#footnote-ref-5)
5. *Cohens v. Virginia*, 5 L.Ed. 257, 291 (1821). [↑](#footnote-ref-6)
6. *State of Madras v. V.G. Row*, 1952 SCR 597. [↑](#footnote-ref-7)
7. *Brundaban Nayak v. Election Commission of India*, 1965 AIR 1892, 1965 SCR (3) 53. [↑](#footnote-ref-8)
8. *Union of India v. Jyoti Prakash Mitter*,1971 AIR 1093, 1971 SCR (3) 483. [↑](#footnote-ref-9)
9. *Mayawati v. Markandeya Chand & Ors.,*1998 INSC 493. [↑](#footnote-ref-10)
10. D*r. Kashinath G. Jalmi&Anr. v. The Speaker &Ors.,*1993 AIR 1873, 1993 SCR (2) 82. [↑](#footnote-ref-11)
11. #### Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council &Ors., W.P. (C) No. 322 of 2004.

 [↑](#footnote-ref-12)
12. *G. Viswanathan v. Honourable Speaker Tamil Nadu Legislative Assembly*, Madras & Anr.,  1996 AIR 1060, 1996 SCC (2) 353. [↑](#footnote-ref-13)