
Discussion Paper

The Anti-Defection Law

The Tenth Schedule of the Constitution, also known as the anti-defection law, was added to prevent political defections.¹ The rationale to curb such defections was that they undermine the foundations and principles of Indian democracy.² The law disqualifies legislators for violating the will of their political party. In the 37 years the law has been in place, while individual defections may have reduced, en masse defections continue. However, the presence of the Anti-Defection Law has also undermined democracy by inhibiting legislators from exercising their choice and ability to function independently, and restricted decision making in legislatures to a few who control political parties.

Features of the Anti-Defection Law

- **Disqualification on ground of defection:** A legislator belonging to a political party will be disqualified if he: (i) voluntarily gives up his party membership, or (ii) votes/abstains to vote in the House contrary to the direction issued by his political party. A member is not disqualified if he has taken prior permission of his party, or if the voting or abstention is condoned by the party within 15 days. Independent members will be disqualified if they join a political party after getting elected to the House. Nominated members will be disqualified if they join any political party six months after getting nominated.
- **Exemptions in cases of merger:** Members are exempted from such disqualification when at least two-thirds of the original political party merges with another political party. Further: (i) the members must have become members of the party they have merged with/into, or (ii) they should have not accepted the merger and choose to function as a separate group.
- **Decision making authority:** The decision to disqualify a member from the House rests with the Chairman/Speaker of the House.

Rationale for curbing defections

The Statement of Objects and Reasons of the Bill, which added the Anti-Defection Law to the Constitution, mentioned that the evil of political defections was a matter of national concern and needs to be curbed.² The National Commission to Review the Working of the Constitution (2002) had also noted that since candidates get elected on the basis of the party that gave them the ticket, defecting flouts the very mandate on the basis of which a member was elected.³

The anti-defection law reduces the accountability of the government and legislators

The key problem with a law that penalises legislators for acting independently is that it goes against the idea of a parliamentary democracy. In a parliamentary democracy, the government is accountable to citizens through a two-step process. Elected representatives (MPs and MLAs) hold the government accountable for its actions. In turn, they are accountable to citizens, as they need to renew their mandate every election. The anti-defection law breaks both links in this chain.

Elected representatives are expected to take decisions on proposed legislation and policies by exercising their independent judgement, and factoring in the interests of citizens. They are also expected to hold the government accountable by asking questions and raising matters of importance. In addition, they are to represent their constituents. However, the disqualification provisions of the Anti-Defection Law binds legislators to the official position taken by their party on any issue. Any diversion from that position can make them liable to be disqualified from their membership of the House. This adversely impacts their ability to exercise their independent judgement when evaluating proposals that are brought before the House.

This point was elucidated by Dr. B.R. Ambedkar in the Constituent Assembly.⁴ He explained that the key difference between the presidential and parliamentary systems was the balance sought between the stability of government and its accountability to the people. A presidential system provides greater stability as the president can be removed only through impeachment for a serious crime. This feature automatically reduces the accountability until the next election. In contrast, in the parliamentary system, the government is accountable to parliament on a daily basis through questions, debates and motions. Parliament can even remove the government through a no-confidence motion. The framers of the Indian Constitution chose the parliamentary system as they gave greater importance to an accountable government than its stability. The anti-defection law negates this purpose as the freedom of legislators to question the government and vote on various motions is constrained by the party whip. Indeed, if a party has a majority, it is almost certain to win every motion.

There could be instances when a legislator may have an opinion different from the one taken by his or her party. For instance, in the United Kingdom, MPs in the House of Commons thrice rejected the withdrawal plan which was negotiated by the government for leaving the European Union.⁵ Similarly, in India, when political parties took official position on Bills such as the farm laws, there could be MPs who may disagree with the party line. There could even be instances when a Bill may go against the interests of an MP's constituency but his party has decided to support it. Given the provisions of the Anti-Defection Law in India, legislators cannot vote their conscience or for their constituency interests if such vote is contrary to the stand taken by their party. In other words, MPs can neither exercise their judgement nor go according to the wishes of their electorate. The wishes of the party trump all other considerations.

There have been proposals to limit the Anti-Defection Law to votes which test the stability of the government such as no-confidence motions and money bills. Note that the Anti-Defection Law currently applies to every vote, and even in Rajya Sabha and Legislative Councils of states, where the government's stability is not at stake. The Dinesh Goswami Committee on Electoral Reforms (1990) had recommended that disqualification on grounds of defection should be limited to: (i) an elected member voluntarily giving up membership of his political party, and (ii) voting contrary to the party whip only in respect of vote of confidence/no-confidence, money bill, or motion of vote of thanks to the President's address.⁶ However, this formulation too misses the core point of the parliamentary system – the onus is on the government to retain the support of a majority of MPs, including those from the same party. Only then can the government be held accountable for its actions.

The requirement of abiding by the party direction also reduces the accountability of legislators to their constituency. This accountability is enforced through the election system, as the MPs will have to justify their actions when they seek re-election. But the Anti-Defection Law gives them an easy explanation for their voting behaviour: they had no choice but to vote according to the party's direction.

Voluntarily giving up party membership

Under the Tenth Schedule, voluntarily giving up membership of a political party is also one of the grounds to be disqualified as a defector. However, what constitutes the voluntary giving up of party membership is not defined under the Schedule. The Supreme Court has held that voluntarily giving up membership is not synonymous with only formally resigning from the party, and has a much wider connotation.⁷ A person may voluntarily give up his membership even without resigning from the party. The conduct of a member could be seen to draw an inference of whether he has voluntarily given up the membership of the party, even without tendering a resignation. This possibly implies that an action of legislator both inside and outside the House can be looked into to check if it qualifies as voluntarily giving up party membership. Hence, a legislator could never speak against the party's mandate, or agree with an opposing party's view.

In another case, the Supreme Court held that if a member belonging to a political party is expelled from the party after being elected, he shall continue to belong to that party as an unattached member.⁸ If such a member joins another political party after being expelled from his original party, he will be deemed to have voluntarily given up his membership of the original party.⁸ The Halim Committee Report on the Review of Anti-Defection Law (2003) had recommended that the term 'voluntarily giving up of membership' should be comprehensively defined in the Tenth Schedule.⁹

Defections have continued even after the law was passed in 1985

As discussed earlier, the biggest motivator for Parliament to enact a law to curb defections was to address the 'evil of political defections'. However, since the law was first enacted in 1985, it has not put an end to defections or helped bring the stability in governments it sought to. In its 170th report, the Law Commission of India (1999) had observed that the country's experience with the Tenth Schedule had not been a happy one.¹⁰ The provision exempting splits in political parties from disqualification has been abused the most. Since then, the provision that permitted splits by one-third of the membership has been repealed. However, a merger with another party is permitted if two-thirds of the membership opts for it.

Merger of political parties

The Tenth Schedule exempts elected members from disqualification in cases of mergers between political parties. A merger requires at least two-thirds legislators of the original political party to agree to it. The Bombay High Court has held that the Tenth Schedule provides for two distinct possibilities involving the merger of political parties.¹¹ The first possibility involves the merger of the original political party with another party. Such a merger happens outside the House. The second possibility involves a deemed merger of the parties when at least two-thirds members of the legislature party agree to such a merger. The Court ruled that while both these possibilities are distinct, legislators have the option to agree or not to agree with the merger.

In recent years, there have been several cases where legislators have made use of the merger provision in the Anti-Defection Law to switch between political parties. The Law Commission (1999) had recommended repealing the provision exempting certain mergers from the Tenth Schedule.¹⁰ It argued that a person elected on the ticket of a political party should remain with it during the term of the House. If the person wanted to leave the political party, he must also leave the House. Not only have defections continued by way of mergers, but legislators have also defied party whips and either cross-voted or abstained from voting on important motions/resolutions. For instance, when the United Progressive Alliance government brought a confidence motion in 2008, more than 20 MPs belonging to different political parties cross-voted defying party whips.¹²

Goa (2022): Eight out of 11 MLAs of the Indian National Congress joined the Bharatiya Janata Party in the newly elected Goa Assembly.¹³ This is more than the two-thirds of the members required for being exempted under the merger provision.

Maharashtra (2022): 40 out of 55 MLAs of the Shiv Sena walked out of the coalition government formed by the Shiv Sena, Nationalist Congress Party, and Indian National Congress in Maharashtra. The MLAs that walked out of the coalition then formed the government in the state by entering into a coalition with the primary opposition party, Bharatiya Janata Party. While more than two-thirds of the Shiv Sena MLAs walked out of the earlier coalition, they did not merge with any political party subsequently. Both factions of the party now claim to be the original Shiv Sena. In an interim order, the Election Commission disallowed both factions of the party from only using the name Shiv Sena and the election symbol of the original party.¹⁴

Madhya Pradesh (2020): In March 2020, 22 MLAs of the Indian National Congress resigned from their membership of the legislative assembly which led to the fall of the government in the state.¹⁵ Later several of these MLAs contested and won by-elections on tickets of the Bharatiya Janata Party.

Karnataka (2019): 17 MLAs from the ruling coalition of Indian National Congress and Janata Dal (Secular) resigned from their membership of the Karnataka Legislative Assembly.¹⁶ However, their resignations were not accepted by the Speaker. In the meantime, the government had to prove its majority in the assembly through a confidence motion. The MLAs did not vote in the motion and the government fell. Subsequently, the Speaker rejected the resignation of the MLAs and disqualified them till the end of the assembly's term in 2023. The Supreme Court upheld the Speaker's decision to disqualify the MLAs but set aside the order on the term of their disqualification. Several of the disqualified MLAs joined the Bharatiya Janata Party and contested the bye elections.

Presiding officers have not been impartial when deciding cases of defection

According to the Tenth Schedule, the decision on whether to disqualify a member from the House is taken by the Speaker or the Chairman. In such cases, the presiding officer's decision is final. The Supreme Court has held that the provision granting finality to the order of the speaker/chairman is valid.¹⁷ While functioning under the Tenth Schedule, the presiding officer acts as a tribunal and exercises judicial power. Decisions taken in such capacity are subject to judicial review.¹⁷ However, while judicial review is permissible, it should not cover any stage prior to the presiding officer taking a decision on the question of disqualification.¹⁷ It is important that the decisions taken by the presiding officer under the Tenth Schedule are impartial and independent of political considerations.¹⁸ The role of the presiding officers is such that they are assumed to be impartial. However, in several instances it has been seen that the presiding officers do not disqualify legislators or delay the decisions regarding disqualifications, therefore putting their allegiance into question.

The minority view in *Kihoto Hollohan* had held that the Speaker is dependent on continuous support of the majority in the House.¹⁷ Thus, he does not meet the requirement of an independent adjudicating authority under the Tenth Schedule. The Law Commission (2015) noted that legal challenges against decisions taken by Speakers on disqualification erode the confidence placed in the office of the Speaker.¹⁸ The Commission recommended that the power to decide on questions of disqualification on the ground of defection should be vested with the President or the Governor, who should act on the advice of the Election Commission of India (ECI).¹⁸ However, this solution also is based on the assumption that the ECI acts in an impartial manner.

Another lacuna associated with the decision-making power of the presiding officer under the Tenth Schedule is the absence of a timeline to take decisions. The Anti-Defection Law is silent on the maximum time within which a decision must be taken on questions of disqualification. The Supreme Court (2020) has observed that while acting as a tribunal under the Tenth Schedule, the speaker is bound to decide disqualification petitions within a reasonable period.¹⁹ While what time period is reasonable will depend on the facts of each case, the Court held that disqualification petitions must be decided within three months from when they are filed.¹⁹

Manipur: In the elections for the 11th Manipur Legislative Assembly in 2017, none of the political parties could secure a clear majority. The Bharatiya Janata Party staked a claim to form a government in the state with a support of an MLA who had been elected on the ticket of the Indian National Congress.¹⁹ The MLA was even made a minister in the BJP-led government in Manipur. The speaker of the legislative assembly took no decision on the multiple disqualification petitions filed against the minister for switching parties after being elected to the House. In March 2020, the Supreme Court removed the MLA from the state cabinet and restrained him from entering the legislative assembly.²⁰ About 10 days later, the MLA was disqualified by the speaker.

Telangana: After the Telangana Rashtra Samithi (TRS) formed the government in Telangana in 2014, 26 MLAs defected from opposition parties to join the TRS at different points in time.²¹ However, the speaker of the legislative assembly in the state took no decision on the disqualification petitions until the dissolution of the legislature before elections.

Andhra Pradesh: 23 MLAs from YSR Congress defected to the Telugu Desam Party which was in power in the state. The speaker did not act on the petitions seeking to disqualify these MLAs from their membership of the House. Four of these MLAs were even appointed as ministers in the state government.²²

West Bengal: After elections to the West Bengal legislative assembly in 2021, an MLA who was elected on the ticket of the Bharatiya Janata Party was seen to have joined the ruling All India Trinamool Congress. A petition was filed before the speaker to dismiss him from the House on the grounds of defection. However, the speaker rejected the petition to disqualify the MLA. The Calcutta High Court held that the speaker had ignored some of the evidence which was placed on record to support the disqualification petition against the MLA.²³ On these grounds, the Court found the speaker's orders to be perverse and unsustainable. The Court directed the speaker to take a fresh decision on the petition after giving due regard to all relevant documents. According to news reports, in June 2022, the West Bengal speaker again rejected the petition to disqualify the MLA on grounds of defection.²⁴

International Experience

Most advanced democracies do not disqualify legislators for defecting against their parties. Such members may be subject to internal party discipline including expulsion from the party. The seating arrangement of the person changing his party allegiance may be modified in the House.

Only in five other countries, members can be disqualified from the House for changing political allegiances as well as voting against the party line.²⁵ These are Bangladesh, Guyana, Pakistan, Sierra Leone, and Zimbabwe.²⁵ However, in Pakistan a member can be disqualified from voting against party lines only in certain cases. These include: (i) election of the Prime Minister/Chief Minister, (ii) vote of confidence/no-confidence, and (iii) money Bills or constitution amendment Bills.²⁶

¹ Tenth Schedule, The Constitution of India, https://legislative.gov.in/sites/default/files/COI_English.pdf.

² The Constitution (Fifty-Second) Amendment Bill, 1985, Lok Sabha, January 24, 1985, http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/22_1985_LS_En.pdf.

³ Chapter 4, Electoral Processes and Political Parties, Volume 1, Report of the National Commission to Review the Working of the Constitution, <https://legalaffairs.gov.in/sites/default/files/chapter%204.pdf>.

⁴ Constituent Assembly of India Debates (Proceedings) - Volume VII, as accessed on December 9, 2022, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04.

⁵ “Brexit: PM under fire over new Brexit plan”, BBC, as accessed on December 9, 2022, <https://www.bbc.com/news/uk-politics-48360456>.

⁶ Report of the Committee on Electoral Reforms, May 1990, <https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>.

⁷ Ravi S. Naik and Sanjay Banekar and Anr. v. Union of India and Ors, 1994 AIR 1558, February 9, 1994, <https://main.sci.gov.in/judgment/judis/11632.pdf>.

⁸ G. Viswanathan Vs The Hon’ble Speaker Tamil Nadu Legislative Assembly, 1996 AIR 1060, Supreme Court of India, January 24, 1996, <https://main.sci.gov.in/jonev/judis/16129.pdf>.

⁹ Anti-Defection Law in India and the Commonwealth, G.C. Malhotra, Lok Sabha Secretariat, 2005, https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf.

¹⁰ Report No. 170, Reform of the Electoral Laws, Law Commission of India, 1999, <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082424.pdf>.

¹¹ Girish Chodankar Versus The Speaker, Goa Legislative Assembly, Writ Petition No. 1228 of 2021 High Court of Bombay at Goa, February 24, 2022, https://hcservices.ecourts.gov.in/ecourtindiaHC/cases/display_pdf.php?filename=QnBUxJ6a3gIx%2B5SFrUiAoH9LG%2B9BV1IcvBcqkamqbjcUCMjJXHBBwdJjeH4pfdbO&caseno=WP/1228/2021&cCode=5&appFlag=.

¹² “21 MPs cross-voted during Parliament trust motion”, The Economic Times, as accessed on December 9, 2022, <https://economictimes.indiatimes.com/21-mps-cross-voted-during-parliament-trust-motion/articleshow/3268181.cms>.

¹³ “Congress chodo, BJP ko jodo: Eight of 11 Congress MLAs join BJP in Goa, Financial Express, as accessed on December 10, 2022, <https://www.financialexpress.com/india-news/eight-go-congress-mlas-set-to-join-bjp-today-may-evade-anti-defection-law/2666181/>.

¹⁴ Commission’s Interim Order dated 08.10.2022 in case of Dispute No. 1 of 2022 in regard with Shivsena, Election Commission of India, October 8, 2022, <https://eci.gov.in/files/file/14449-commissions-interim-order-dated-08102022-in-case-of-dispute-no-1-of-2022-in-regard-with-shivsena/>.

¹⁵ MLAs resigning their membership in the 15th legislative assembly, Madhya Pradesh Vidhan Sabha, <https://mpvidhansabha.nic.in/15thvs-bi-election.pdf>.

¹⁶ Shrimanth Balasaheb Patil Versus Hon’ble Speaker, Karnataka Legislative Assembly and Others, Writ Petition (Civil) No. 992 of 2019, Supreme Court of India, November 13, 2019, https://main.sci.gov.in/supremecourt/2019/27353/27353_2019_3_1501_18245_Judgement_13-Nov-2019.pdf.

¹⁷ Kihoto Hollohan Vs. Zachillu and Others, 1992 SCR (1) 686, February 18, 1992, <https://main.sci.gov.in/judgment/judis/12491.pdf>.

¹⁸ Report No. 255, Electoral Reforms, Law Commission of India, March 2015, <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081635.pdf>.

¹⁹ Keisham Meghachandra Singh versus The Hon’ble Speaker Manipur Legislative Assembly & Ors., Civil Appeal No. 547 of 2020, Supreme Court of India, January 21, 2020, https://main.sci.gov.in/supremecourt/2019/27562/27562_2019_4_1501_19772_Judgement_21-Jan-2020.pdf.

²⁰ Keisham Meghachandra Singh versus The Hon’ble Speaker Manipur Legislative Assembly & Ors, Supreme Court of India, March 18, 2020, https://main.sci.gov.in/supremecourt/2020/6705/6705_2020_3_4_21551_Order_18-Mar-2020.pdf.

²¹ “Speaker Stays Silent: KCR Formula to Beat Anti-Defection Law Sets Dangerous Example”, News 18, as accessed on December 3, 2022, <https://www.news18.com/news/opinion/opinion-speaker-stays-silent-kcr-formula-to-beat-anti-defection-law-sets-dangerous-example-1871363.html>.

²² “YSR Congress to boycott Assembly over defection row”, The Times of India, as accessed on December 3, 2022, <https://timesofindia.indiatimes.com/city/vijayawada/andhra-pradesh-ysr-congress-to-boycott-assembly-over-defection-row/articleshow/65690123.cms>.

²³ Ambika Roy Vs The Hon’ble Speaker, West Bengal Legislative Assembly and Ors., WPA(P) 213 of 2021, Calcutta High Court, April 11, 2022, [https://hcservices.ecourts.gov.in/ecourtindiaHC/cases/display_pdf.php?filename=QnBUxJ6a3gIx%2B5SFrUiAoA8oQadVLhVOnNoFwD85K3xL9W%2Fe%2F1G5Apyl0ggDpoH7&caseno=WPA\(P\)/213/2021&cCode=3&appFlag=](https://hcservices.ecourts.gov.in/ecourtindiaHC/cases/display_pdf.php?filename=QnBUxJ6a3gIx%2B5SFrUiAoA8oQadVLhVOnNoFwD85K3xL9W%2Fe%2F1G5Apyl0ggDpoH7&caseno=WPA(P)/213/2021&cCode=3&appFlag=).

²⁴ “Bengal Assembly Speaker rejects plea to disqualify Mukul Roy as MLA”, Business Standard, as accessed on December 5, 2022, https://www.business-standard.com/article/current-affairs/bengal-assembly-speaker-rejects-plea-to-disqualify-mukul-roy-as-mla-122060800884_1.html.

²⁵ Csaba Nikolényi, “Keeping Parties Together? The Evolution of Israel’s Anti-Defection Law?”, Polish Political Science Yearbook, Volume 47(2), 2018, <https://czasopisma.marszalek.com.pl/images/pliki/ppszy/47-2/ppszy2018202.pdf>.

²⁶ Article 63A, Constitution of Pakistan, <https://www.pakistani.org/pakistan/constitution/part3.ch2.html>.

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