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Anatomy of India's Anti-Defection Law

Identifying Problems, Suggesting Solutions



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Ritwika Sharma
Mayuri Gupta

About the Authors

Ritwika Sharma is a Senior Resident Fellow at the Vidhi Centre for Legal Policy and leads Charkha, Vidhi's Constitutional Law Centre.

Mayuri Gupta is the Milon K. Banerji Research Fellow at the Vidhi Centre for Legal Policy, working in Charkha.

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Introduction

India's anti-defection law has been the subject of as much scrutiny as the act of political defection itself. While the law managed to survive a challenge to its constitutionality,¹ its purported need and efficacy continues to be questioned. The anti-defection law, found in the Tenth Schedule to the Constitution of India, was enacted to arrest the practice of rampant floor-crossing by elected legislators, both in Parliament as well as state legislatures. In a way, the law was enacted to preserve the sanctity of the electoral promise between the legislator and the voter. It was expected to do so by penalising legislators who were elected to a House of Parliament or a state legislative assembly as a candidate of a particular party, but who later switched over to another party for unprincipled reasons, after their election.

The anti-defection law, however, has done very little of what it intended to do. In its working, the Tenth Schedule has magnified the problems which it was meant to solve. It is widely acknowledged that the anti-defection law has paved the way for bulk defections, primarily because of the exemption it gives to mergers between political parties.² The perverse impact of the merger exception has become apparent because of several instances where governments have unravelled themselves on account of wholesale floor crossing by legislators. In 2018, for instance, Arunachal Pradesh witnessed the falling of the ruling Indian National Congress ('INC' or 'Congress') government, when 43 Members of Legislative Assembly ('MLAs') moved across to the People's Party of Arunachal ('PPA').³ These 43 MLAs, led by the then Chief Minister Pema Khandu, caused the merger of the INC with the PPA (in Arunachal Pradesh). 33 of these 43 MLAs joined the Bharatiya Janata Party ('BJP'), which eventually mustered the required strength to form government in Arunachal Pradesh.⁴ Given that the defecting legislators fell squarely within the exemptions under the Tenth Schedule, they could escape disqualification.⁵

Since 2022 in particular, political developments in the state of Maharashtra have brought the anti-defection law into sharp focus. Maharashtra witnessed a political crisis in June 2022, when the ruling alliance, called the Maha Vikas Aghadi ('MVA') faced the prospect of coming undone. A faction of more than nearly 30 MLAs led by now Maharashtra Chief Minister Eknath Shinde withdrew support from the ruling government, and caused a split in the political party by claiming to be the "real Shiv Sena". Several disqualification petitions have been filed in the entire turn of events, some of which are currently being heard by the Speaker of the Maharashtra Legislative Assembly.⁶ It is worth mentioning that even one year on, hearings in any of these petitions are yet to come through much to the annoyance of even the Supreme Court.⁷

¹ The constitutionality of the Tenth Schedule was challenged and upheld in *Kihoto Hollohan v. Zachillhu*, 1992 Supp (2) SCC 651.

² The Hindu Bureau, 'Vice President Venkaiah Naidu bats for reform of anti-defection law' *The Hindu* (Bengaluru, 24 April 2022) <<https://www.thehindu.com/news/national/vice-president-m-venkaiah-naidu-bats-for-amending-anti-defection-law-to-plug-loopholes/article65351005.ece>> accessed 11 October 2023.

³ 'With mass defection, Cong loses govt in Arunachal' *The Hindu Business Line* (Itanagar, 16 January 2018) <<https://www.thehindubusinessline.com/news/national/with-mass-defection-cong-loses-govt-in-arunachal/article64322736.ece>> accessed 11 October 2023.

⁴ TNN & Agencies 'BJP forms new government in Arunachal Pradesh after Pema Khandu, 32 other MLAs join it' *The Times of India* (Itanagar, 31 December 2016) <<https://timesofindia.indiatimes.com/india/bjp-forms-new-government-in-arunachal-pradesh-after-pema-khandu-32-other-mlas-join-it/articleshow/56271768.cms>> accessed 6 October 2023.

⁵ Editorial 'A mandate eclipsed' *The Indian Express* (20 September 2016) <<https://indianexpress.com/article/opinion/editorials/arunachal-pradesh-congress-bjp-pema-khandu-north-east-democratic-alliance-peoples-party-of-arunachal-3039611/>> accessed 6 October 2023.

⁶ 'Maharashtra Speaker to club all Shiv Sena disqualification petitions; next hearing on Oct 26' *Deccan Herald* (20 October 2023) <<https://deccanherald.com/india/maharashtra/maharashtra-speaker-to-club-all-shiv-sena-disqualification-petitions-next-hearing-on-oct-26-2735826>> accessed 6 October 2023.

⁷ Padmakshi Sharma, 'Speaker Giving Interviews, Not Doing His Job: Supreme Court Gives "Final Opportunity" to Maharashtra Speaker on Disqualification Pleas' *LiveLaw*, 17 October 2023) <www.livelaw.in/top-stories/speaker-giving-interviews-not-doing-his-job-supreme-court-gives-final-opportunity-to-maharashtra-speaker-on-disqualification-pleas-240386?infinite-scroll=1> accessed 6 October 2023.

Against this backdrop, this report is an addition to the body of literature which focuses on the deficiencies inflicting India's anti-defection law. **Part A** of this report contextualises both the act of political defections as well as the anti-defection law. It charts the history of political defections in India, and how defections predated the anti-defection law by several decades. After spelling out the problem, this part shifts focus to what was offered as the solution – the anti-defection law. The latter sub-part delves into the perceived function of anti-defection laws generally, the legislative proposals mooted in India for confronting defections, and the text of the Tenth Schedule to understand what it outlaws and what it exempts. In terms of a timeline, **Part A** commences in the mid-late 1960s, and culminates in 1985, which is when India's anti-defection came into effect.

Ultimately, the proof of the pudding is in the eating. **Part B** looks into the specific exemption under the Tenth Schedule given to mergers between political parties. Speakers and Chairpersons are the deciding authority in disqualification petitions under the Tenth Schedule, which makes it important to understand how they have interpreted and implemented this law. This part lays bare the experience of provisions condoning defections in groups by looking at fact situations and decisions given by Speakers of certain legislatures when disqualification petitions (under the Tenth Schedule) are filed before them. Decisions of Speakers from the following legislatures have been surveyed – the Lok Sabha, and certain select state legislative assemblies, namely those of Goa, Haryana, Meghalaya, and Uttar Pradesh. Most findings from the above survey have been used to point out to how the Tenth Schedule facilitates bulk defections in India. The aim of this part is to reveal the intensity of the problem and the extent to which the Tenth Schedule has, ironically, eased defections. As also stated later in this report, decisions of any other relevant authority (such as appellate courts) are not the primary subject of this study.

Part C situates the anti-defection law in the context of how the Constitution envisages the relationship between three key players of Indian representative democracy – the voter, the elected legislator, and the political party. While doing so, **Part C** also gives a sneak peek into how the framers of the Constitution imagined India's electoral democracy and voting system. The Tenth Schedule offers formal recognition to the “political party”, and it is worth exploring how that interacts with India's electoral system and form of government. The act of political defection upends the relationship established between the elected and the elector. This part argues that the working of the anti-defection law does pretty much the same by giving precedence to the political party over the individual legislator. Together, in their practical application, defections and the anti-defection law in India offend political party discipline, cause instability in governments, and eventually ridicule democracy.

Part D reiterates many of the older recommendations for reform of the anti-defection law, primarily because much of what needed to be said about reforming this law forms part of existing research and literature. This part advocates for more holistic reform of political party functioning in India – a package of reforms to that end could, hopefully, bring within its sway the Tenth Schedule as well. After all, the anti-defection law must not be viewed in isolation from how political parties generally work and behave.

A. Contextualising Defections and Anti-Defection Laws

1. Crossing of the legislative floor – The Ailment

Broadly, political defection signifies the act of abandoning the party to which a legislator belongs, and on whose candidature, they are elected to a legislature. It is characterised as the willful abandonment of party affiliation and allegiance by a member of a legislature⁸ to either join a different political party or to form a new party. In some jurisdictions, such as India, voting against the party line is also considered to be an act of political defection and is penalised with disqualification.

Across countries, defections have come to be known by different names, such as floor crossing (in India and Pakistan), carpet crossing (in Nigeria), waka jumping (in New Zealand), and party hopping (in Malaysia).⁹ The term “floor-crossing” has its origins in the British House of Commons, where members were historically seated on separate benches based on their affiliation with the government or the opposition, facing each other.¹⁰ Thus, every time a legislator changed party allegiance, they literally crossed the floor to move from one bench to another. The term “floor crossing” became prevalent in numerous Westminster democracies, where defections emerged as a common phenomenon.

Defecting legislators are believed to be prompted by the allure of coveted appointments or monetary benefits in the political party they join after crossing the legislative floor, though it might be difficult to confidently ascertain the motivations prompting defection in each case.¹¹ Legislators may be tempted to defect from their party with the hope of securing lucrative appointments in another party.¹² Driven by personal interests, this movement of legislators across the floor breaks the “basic electoral pact” between voters and politicians.¹³ Irrespective of the electoral system a democracy follows (with first-past-the-post and proportional representation¹⁴ identified as two broad systems), parties are considered to be the mechanism which link the voters and politicians. When a legislator switches their party, the route to hold them accountable for the promises they made to the electorate may be broken. Scholars have alluded to how defections target “the very roots of democracy in India.”¹⁵ In the context of the Philippines in the 1960s, defections are said to have hampered “party loyalty, meaningful electoral choice, and democratic accountability”.¹⁶

The phenomenon of political defections in India is far from recent, but instead a practice that has been observed since pre-independence times. Subhash C. Kashyap, former Secretary General of the Lok Sabha, has recorded several instances of legislators changing party allegiance during colonial rule and afterwards.¹⁷ One of the first instances of party switching mentioned by Kashyap is of Mr. Shamlal Nehru, a Congressman elected from the

⁸ In this report, the word ‘legislature’ refers to the Parliament and state legislatures collectively, unless a state legislature is specifically mentioned.

⁹ GC Malhotra, *Anti-Defection Law in India and the Commonwealth* (1st ed, Metropolitan Book Co. Pvt. Ltd. 2005) 15 (‘Malhotra’).

¹⁰ For a discussion on the vocabulary used to refer to political defections, see Subhash C. Kashyap, *The Politics of Power-Defections and State Politics in India* (National Publishing House 1974) 41 (‘Kashyap 1974’).

¹¹ Kenneth Janda, ‘Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments’ (The Legal Regulation of Political Parties, Working Paper 2, August 2009) 8-9 (‘Janda’).

¹² Janda (n 11) 8.

¹³ Scott W Desposato, ‘Parties for Rent? Ambition, Ideology, and Party Switching in Brazil’s Chamber of Deputies’ (2006) 50(1) *American Journal of Political Science* 62, 70.

¹⁴ The proportional representation system has many variants, the ‘list system’ being the most common one. In this system, political parties present lists of candidates in advance, who are awarded seats in proportion to their party’s vote share, usually with some minimum prescribed thresholds. See, Law Commission of India, *Report on Electoral Reforms* (255th Report, Ministry of Law and Justice, Government of India 2015) 80, para 4.3 <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081635.pdf>> accessed 6 November 2023 (‘255th LCI Report’).

¹⁵ P.M. Kamath, ‘Politics of Defection in India in the 1980s’ (1985) 25(10) *Asian Survey* 1039, 1044.

¹⁶ Gabriella R. Montinola, ‘Parties and Accountability in the Philippines’ (1999) 10(1) *Journal of Democracy* 126, 128.

¹⁷ Kashyap 1974 (n 10) 57.

Central Legislature, who crossed the floor to join the British side which led to his expulsion from Congress.¹⁸ Kashyap also recorded how the massive success of the INC in the United Provinces in the 1937 provincial elections witnessed several members of the Muslim League crossing over to join it.¹⁹

Defections continued to surge even after India gained independence in 1947. In 1948, soon after independence, all members of the Congress Socialist Party ('CSP'), a socialist caucus of the INC, resigned from their seats in the legislative assemblies.²⁰ The breakaway CSP then fused with the Bolshevik-Leninist Party of India, Ceylon and Burma ('BLPI'), to form the Socialist Party of India in 1948. Post-independence, political defections continued in the Parliament as well as the state assemblies in some form or other, with a notable increase after the fourth general election in 1967. The year 1967 marked the commencement of an era of political instability and horse-trading, both before and after the formation of coalition governments in states.²¹ As a direct consequence of this, a number of state governments fell in close succession. In most cases, this downfall was caused by dissatisfied legislators who switched sides in the desire of ministerial positions or other benefits.²² This gave rise to an unhealthy trend of political defections where legislators were lured away from their party of affiliation towards the highest bidder, with a view to toppling the incumbent government and forming a new one.²³

In 1967, for instance, assembly elections were held in the state of Haryana, which had been freshly carved out of Punjab in 1966. Congress won the election with a narrow margin of 48 out of 81 seats compared to the BJP's 12, Swatantra Party's 3, and Republican Party's 2. The remaining 16 seats went to independent candidates. In less than a week of coming to power, the Congress-led government fell, leaving Haryana in a political limbo. As legend now has it, one independent legislator by the name of Gaya Lal managed to switch parties four times within a day's time: from the Congress to the Janata Party, back to the Congress, then again to the Janata Party after nine hours, and then once again back to the Congress.²⁴ Within two weeks of that, he moved to the United Front. Arya Sabha, Bharatiya Lok Dal, and the Janata Party were just a few of the other political parties he hopped to in between.²⁵ In fact, in the period spanning across general elections from 1967 to 1972, the number of defections and counter defections are pegged at nearly 2000.²⁶ This number is in the context of around 4,000 legislators serving in both state legislatures and the Parliament.²⁷

Besides breaking the chain of accountability between the electorate and the elected legislators, political parties themselves are also significantly impacted by the business of defections.²⁸ Well-orchestrated defections have always been used to strengthen or weaken incumbent governments. The developments after the fourth general elections in 1967 are illustrative of this trend. The Congress saw a decline in several states after the 1967 elections making way for other political parties to assume power and significance. Of the 16 states that went to polls in 1967, Congress could not form government in seven.²⁹ Resultantly, a number of diverse coalition

¹⁸ Kashyap 1974 (n 10) 57.

¹⁹ Kashyap 1974 (n 10) 57.

²⁰ Kashyap 1974 (n 10) 58.

²¹ Dr. Subhash C. Kashyap, *Anti-Defection Law and Parliamentary Privileges* (Universal Law Publishing Company 2011) 2 ('Kashyap 2011').

²² Kashyap 2011 (n 21) 2.

²³ Kashyap 2011 (n 21) 2. See, Kashyap 1974 (n 10) 68.

²⁴ Jagdeep S Chhokar, 'Three Desperate Measures to Cull the 'Aaya Ram, Gaya Ram' Phenomenon' (*The Wire*, 19 September 2022) <<https://thewire.in/politics/desperate-measures-aaya-ram-gaya-ram-phenomenon-defections>> accessed 17 September 2023.

²⁵ Pradeep Kaushal, 'History headline: Gaya Lal, and Haryana art of defection' *The Indian Express* (4 August 2019) <<https://indianexpress.com/article/opinion/columns/gaya-lal-and-haryana-art-of-defection-5875942/>> accessed 16 September 2019.

²⁶ Kashyap 2011 (n 21) 2.

²⁷ Kashyap 2011 (n 21) 2. See also, Kaushiki Sanyal, 'The Anti-Defection Law: Intent and Outcome' in Sudha Pai and Avinash Kumar (eds) *The Indian Parliament: A Critical Appraisal* (Orient Blackswan 2014) ('Sanyal').

²⁸ Jagdeep S Chhokar, 'Three Desperate Measures to Cull the 'Aaya Ram, Gaya Ram' Phenomenon' (*The Wire*, 19 September 2022) <<https://thewire.in/politics/desperate-measures-aaya-ram-gaya-ram-phenomenon-defections>> accessed 17 September 2023.

²⁹ Subhash C. Kashyap, 'The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India' (1970) 10(3) *Asian Survey* 195, 195 ('Kashyap 1970').

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governments were formed in the states of Odisha (formerly, Orissa), Kerala, Bihar, Punjab, Rajasthan, Uttar Pradesh, and West Bengal.³⁰ Soon enough the incumbent governments in Uttar Pradesh, Bihar, West Bengal, Punjab, and Madhya Pradesh were ousted by Congress-led opposition parties.³¹ Defectors from the incumbent governments aided the INC in forming new governments in some states, such as West Bengal, Punjab, and Bihar.³² Later, President's rule was imposed in states like Haryana, West Bengal, Uttar Pradesh, Bihar and Punjab.³³ What followed was the collapse of as many as 32 governments in quick succession as a clear consequence of unchecked changes of allegiance by legislators.³⁴ Kashyap has estimated that by the end of March 1971, nearly 50% legislators across state legislative assemblies changed their party allegiances, and several of them did so more than once.³⁵

In fact, Congress itself faced several splits after 1967. Instead of joining other existing parties, legislators defecting from the Congress formed splinter parties.³⁶ For instance, in 1967, Chaudhary Charan Singh moved out of the Congress with 17 supporters and formed the "Jan Congress" in Uttar Pradesh. Later he merged the Jan Congress with the existing opposition in Uttar Pradesh and a pre-poll alliance, called the Samyukta Vidhayak Dal, was formed. In 1968, he formed a new party called the Bharatiya Kranti Dal.³⁷ Similarly, defections led to the formation of Jana Kranti Dal in Bihar, Bangla Congress in West Bengal, Janta Party in Rajasthan, Janta Congress in Punjab, Jana Congress in Madhya Pradesh, and Kerala Congress in Kerala.³⁸

INC is but one illustration of this trend.³⁹ The rampant political defections in India have been responsible for the establishment of new political parties as well as the dissolution of several others. A number of legislators who departed from a political party that refused them candidature subsequently ran as independent candidates in the next election, and became victorious against the official candidate fielded by said party.⁴⁰ These independents were willing to exchange their affiliations for political and monetary gains, thereby exerting a significant influence in the overthrow of the incumbent government and the establishment of a new one. **Part B** of this report which deals with the implementation of the merger exception gives practical insights into the mushrooming of smaller parties and fragmentation of bigger ones brought about by the Tenth Schedule.

Simultaneously, the actions and behaviour of political parties can incentivise and spur defections. It is important to emphasise that political parties have, on their own, been a major factor in determining the direction that defection politics takes in the country. In India and elsewhere, the allure of ministerial positions as well as financial benefits have been a primary factor that push legislators to defect.⁴¹ Parties have promoted defections by rewarding political defectors with ministerial positions. For instance, during 1967-1968, around 116 out of 210 defecting legislators from various state assemblies were inducted into the Council of Ministers of the governments they helped form.⁴²

³⁰ Paras Diwan, 'Aya Ram Gaya Ram: The Politics of Defection' (1979) 21(3) *Journal of the Indian Law Institute* 291, 298-299 ('Diwan').

³¹ Kashyap 1970 (n 29) 196.

³² Kashyap 1970 (n 29) 196.

³³ Kashyap 1970 (n 29) 196.

³⁴ Kashyap 1974 (n 10) 13.

³⁵ Kashyap 2011 (n 21) 2.

³⁶ The current research has not addressed the rationale behind party members opting to establish new political parties instead of joining pre-existing ones. Kashyap 1974 (n 10) 16.

³⁷ 'Chaudhary Charan Singh' (New Delhi, Lok Sabha Secretariat 2018) <https://loksabhadocs.nic.in/Refinput/eprofiles/English/21122021_162418_1021206200.pdf> accessed 10 October 2023.

³⁸ Kashyap 1974 (n 10) 16.

³⁹ Csaba Nikolenyi and Shaul Shenhav, 'In Search of Party Cohesion: The Emergence of Anti-Defection Legislation in Israel and India' (2009) APSA, Toronto Meeting Paper, 16 <<https://ssrn.com/abstract=1450630>> accessed 16 October 2023; Major splits in the Lok Sabha between 1952 and 1985 include those in the Praja Socialist Party (1955), Communist Party of India (1964), Praja Socialist Party (1969), Indian National Congress (1969), Indian National Congress (1978), Janata Party (1979), Janata Party (1980), and Janata Party (Secular) (1981).

⁴⁰ Kashyap 1974 (n 10) 17.

⁴¹ Kashyap 1970 (n 29) 196.

⁴² Kashyap 2011 (n 21) 2.

In certain situations, ruling parties possess a distinct advantage in engineering defections. Unsurprisingly, the political party that forms the government is generally the principal beneficiary of defections. For instance, before 1967, most political defections witnessed the movement of legislators towards the Congress.⁴³ Similarly, a study conducted in 2021 by the Association for Democratic Reforms showed that since the 2014 general elections, the ruling BJP has been the clear choice of defectors.⁴⁴ Out of the 452 defections between 2016-2020, 182 defecting legislators (or 44.92%) joined the BJP.⁴⁵ Interestingly, the dominant parties that command the support of the majority not only accept incoming defectors but also play an active role in engineering defections to expand their support base and weaken the opposition.⁴⁶ Simultaneously, instances of legislators defecting from the government to the opposition, in a bid to topple the incumbent government, are also not unknown to India. For instance, in March 2020, Jyotiraditya Scindia and 22 other Congress MLAs resigned from the party citing ideological differences, causing a collapse of the Kamal Nath-led government in Madhya Pradesh. Soon afterwards, these MLAs joined the BJP and were rewarded with tickets in the Madhya Pradesh Assembly bye-elections in November 2020.⁴⁷

As evident from above, defections are a two-way street – while individual floor-crossing by legislators causes fragmentation in political parties, the behaviour of parties themselves prompts defections. Having set out this brief context about defections, the following sub-part of this report will spell out the legislative interventions put in place for tackling the problem.

2. Outlawing Defections – The Antidote

a. *Expectations from anti-defection laws*

While the act of party switching is prevalent across several jurisdictions, laws penalising it are not. Studies from recent years have pegged the number of Commonwealth nations with some version of an anti-defection law at not more than 40.⁴⁸ An oft-repeated argument is that laws banning defections are more prevalent in nascent democracies, and not in established ones.⁴⁹ Despite frequent floor-crossing by legislators, anti-defection laws remain absent in jurisdictions of Western Europe. In nascent democracies, however, party systems can be weak and volatile, and anti-defection laws can be instrumental in ensuring stability in governments. For instance, in the micro-jurisdictions of Tuvalu and Nauru, legislation banning defections is couched as a “solution to governmental instability”.⁵⁰ In states in the South Pacific, the enactment of anti-defection laws is meant to reduce the risk of political instability that can hamper the government’s ability to govern.⁵¹

Promotion of party stability is a predominant reason for countries to have an anti-defection law. Enactment of the anti-defection law in India was spurred by a spate of defections in several state assemblies. The fourth general elections witnessed the advent of coalition politics in India and the coming together of political parties

⁴³ Kashyap 1970 (n 29) 197.

⁴⁴ The Wire Staff, ‘Nearly 45% of MLAs Who Defected Between 2016 and 2020 Joined the BJP’ (*The Wire*, 12 March 2021) <<https://thewire.in/politics/mlas-defection-2016-2020-bjp-congress-adr>> accessed 12 September 2023.

⁴⁵ ‘Analysis of Re-contesting MPs and MLAs Who Changed Parties-Pan-India Since 2016’ *Association for Democratic Reforms* (11 March 2021) <https://docs.google.com/viewerng/viewer?url=https://adrindia.org/sites/default/files/Analysis_of_Re-contesting_MPs_and_MLAs_Who_Changed_Parties_Pan_India_Since_2016_english.pdf> accessed 17 October 2023.

⁴⁶ Sayak Basu, ‘Turncoat troublemakers: A history of ‘Operation Kamala’ *Deccan Herald* (Karnataka, 19 April 2023) <www.deccanherald.com/elections/karnataka/turncoat-troublemakers-a-history-of-operation-kamala-1210848.html> accessed 1 October 2023.

⁴⁷ Anando Bhakto, ‘Poaching for power in Madhya Pradesh’ (*Frontline*, 10 March 2021) <<https://frontline.thehindu.com/cover-story/poaching-for-power-in-madhya-pradesh-as-bjp-operation-lotus-unseated-kamal-nath-congress-state-government-with-jyotiraditya-scindia-switching-sides/article34006430.ece>> accessed 6 October 2023.

⁴⁸ Janda (n 11) 2. See also, Malhotra (n 9) 33-74.

⁴⁹ Janda (n 11) 5.

⁵⁰ Caroline Morris, ‘Anti-defection laws in three small South Pacific parliaments: A cautionary tale’ (2022) 20(3) *International Journal of Constitutional Law* 1188, 1189 (‘Morris’).

⁵¹ Morris (n 50) 1192.

with vastly different political ideologies.⁵² Defections were rampant across Haryana, Uttar Pradesh, Bihar, Punjab and West Bengal, with each of these states witnessing multiple floor crossings and subsequent instability in Indian politics.⁵³ An account of the political developments in India which prompted the enactment of the Tenth Schedule can be found in the previous sub-part.

As mentioned above, defections also hamper governance. Consider, again, the case of Madhya Pradesh in 2020, when a group of 22 MLAs from the INC led by Jyotiraditya Scindia, rebelled against the then Chief Minister Kamal Nath, and moved to the BJP. As it so happened, these political developments coincided with the beginning of the COVID-19 pandemic. While the number of patients testing positive and hospitalisations rose, the state remained bereft of a cabinet, as well as a Health Minister, for almost a month after the first national lockdown was imposed.⁵⁴ In essence, the downfall of the ruling government, which was prompted by the movement of MLAs across the floor, brought governance to a halt at a time when the state needed it the most.

In nascent democracies, laws banning party defections may also be a possible means to secure party discipline. Laws prohibiting parliamentary members from defecting can be considered part of a larger scheme of regulation of parties and their activities.⁵⁵ In and of themselves, anti-defection laws have the effect of centralising power within existing parties, by punishing those legislators who do not adhere to the party's position.⁵⁶ In jurisdictions which have such laws, elected legislators remain duty-bound to their respective parties – both in terms of membership of their party as well as with respect to their legislative actions.⁵⁷ The tenets of representative democracy expect an elected representative to act on the basis of their ideology and constituency interests, but the anti-defection law compels them to abide by the instructions of political party leadership.⁵⁸

Anti-defection laws have often been criticised for stepping on the toes of legislators' freedom of expression. However, uncontrolled defections can create a negative perception of legislators being driven solely by personal gains in associating themselves with a particular party. In some cases, they may also not shy away from manufacturing defections in a way that can topple incumbent governments and cause political crises. In this context, anti-defection laws can be used as legal instruments aimed at regulating both the political party as well as the individual legislator.⁵⁹ Such regulation is meant to secure "the legitimacy and integrity of the political system",⁶⁰ and should not be viewed as an affront to a legislator's freedom of speech.⁶¹ It is this understanding of anti-defection laws, one which views it as a measure to enforce discipline, which is employed to justify its enactment and continued existence in some parliamentary democracies.

Considered to be a form of post-election constraint on political parties,⁶² anti-defection laws have simultaneously been at the receiving end of both criticism and adulation. In some cases, laws preventing defection have been

⁵² Diwan (n 30) 299.

⁵³ Diwan (n 30) 298.

⁵⁴ Renu Agal, 'In Covid crisis, Madhya Pradesh deserves better than a CM acting as health minister' (*The Print*, 19 April 2020) <<https://theprint.in/opinion/covid-crisis-madhya-pradesh-doesnt-deserve-cm-as-health-minister/404839/>> accessed 04 September 2023.

⁵⁵ Janda notes that party law can follow different policy models, based on whether nations want to proscribe, permit, promote, protect or prescribe parties and party activities. See, Janda (n 11) 14.

⁵⁶ Janda (n 11) 8-9.

⁵⁷ Udit Bhatia, 'What's the Party Like: The Status of the Political Party in Anti-Defection Jurisdictions' (2021) 40(3) *Law and Philosophy* 305, 308 ('Bhatia').

⁵⁸ MR Madhavan, 'Empowering Parliamentarians' (*Livemint.com*, 18 March 2014) <www.livemint.com/Opinion/Fd4Pqk6MPsXsSbd9vepKWJ/Empowering-parliamentarians.html> accessed 8 November 2023.

⁵⁹ Csaba Nikolenyi, 'The Adoption of Anti-Defection Laws in Parliamentary Democracies' (2016) 15 (1) *Election Law Journal* 96, 97 ('Nikolenyi 2016').

⁶⁰ Nikolenyi 2016 (n 59) 97.

⁶¹ Nikolenyi 2016 97.

⁶² Morris (n 50) 1192.

characterised as “problematic” and “unworkable”.⁶³ In fact, on due consideration of the anti-defection laws of Papua New Guinea, India, South Africa and New Zealand, Australia has been advised against adopting an anti-defection legislation.⁶⁴

b. Attempts at outlawing defections in India

Originally, the Constitution of India did not prohibit floor-crossing or change of party allegiance by legislators. A plausible reason for non-inclusion of a provision banning defections could be the presence of the Congress as the only dominant political party at the time of framing of the Constitution.⁶⁵ The Constituent Assembly may not have anticipated the widespread emergence of political parties and the subsequent formation of coalition governments in India.

The phenomenon of frequent party-switching and change of party loyalty for perverse reasons prompted the enactment of a law penalising unprincipled defections in India. The Tenth Schedule of the Constitution, also known as the anti-defection law, was incorporated into the Constitution by the Constitution (Fifty-second Amendment) Act, 1985.

Although Indian legislators were quick to condemn every act of unprincipled change of party allegiance, political defections continued unabated. Given how defections took within their sweep all political parties throughout the ideological spectrum, constructive discourse on the need to regulate rampant defections started to emerge.⁶⁶ In August 1967, Congress legislator P. Venkatasubbaiah moved a resolution seeking appointment of a committee to look into the menace of defections. The resolution⁶⁷ was thoroughly discussed in the Lok Sabha, and eventually adopted after some amendments.⁶⁸ Subsequently, in 1968, a committee was set up to “*consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard.*”⁶⁹

This High-level Committee on Defections constituted under the chairmanship of Late Mr. Y. B. Chavan (the ‘Chavan Committee’), then Union Home Minister of India, suggested various measures for addressing the problem of defections.⁷⁰ For instance, the Committee was of the view that a lasting solution to the problem of defections could come from adherence by the political parties to a certain code of conduct. Significantly, the Committee deemed a legislator bound to the party on whose ticket they won an election. It also advocated debarring the appointment of a defecting legislator as a minister for a prescribed period or till their resignation

⁶³ Sarah Miskin, ‘Politician Overboard: Jumping the Party Ship’ (Research Paper No. 4 (2002-03), Information and Research Services, Department of the Parliamentary Library, Commonwealth of Australia, 2003) 3 <<https://apo.org.au/sites/default/files/resource-files/2003-04/apo-nid7189.pdf>> accessed 6 November 2023 (‘Miskin’).

⁶⁴ Miskin notes that “...At this point, anti-defection legislation is not a sensible option for Australia...”. See, Miskin (n 63) 34.

⁶⁵ Sushil Chandra Singh, ‘Role of Political Parties’ (1950) 11(2) *The Indian Journal of Political Science* 20, 22; A. Avasthi, ‘Political Parties in India’ (1951) 12(1) *The Indian Journal of Political Science* 6, 6-7.

⁶⁶ Some of the forums where this was discussed included the Sixth All India Whip’s Conference at Shimla (1967), Presiding Officers’ Conference in Delhi (1967), the colloquium organised by the Institute of Constitutional and Parliamentary Studies (1968), the Round Table organised by the Centre of Applied Politics (1967), etc. See, Kashyap 1974 (n 10) 43.

⁶⁷ Lok Sabha Debates, vol. X, no. 19 (Parliament Secretariat) 8 December 1967 <https://eparlib.nic.in/bitstream/123456789/2398/1/lzd_04_03_08-12-1967.pdf> accessed 6 November 2023. The Lok Sabha resolution read as: “*This House is of opinion that a high level committee consisting of representatives of political parties and constitutional experts be set up immediately by Government to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard.*”

⁶⁸ Lok Sabha Debates, vol. X, no. 19 (Parliament Secretariat) 8 December 1967 <https://eparlib.nic.in/bitstream/123456789/2398/1/lzd_04_03_08-12-1967.pdf> accessed 6 November 2023. Madhu Limaye proposed to omit the concluding portion of the original resolution which read as: “*...evolving of a special machinery and the taking of effective measures by suitable legislation to arrest this growing phenomenon which is assuming alarming proportions so that the country can function on sound and healthy lines of parliamentary democracy.*”

⁶⁹ The Committee on Defections 1967 (Ministry of Home Affairs, Government of India) <<https://indianculture.gov.in/flipbook/2558>> accessed 19 August 2023 (‘Committee on Defections 1967’).

⁷⁰ Committee on Defections 1967 (n 69).

or re-election as well as disqualifying a defector from continuing as a member of the Parliament or state legislature.⁷¹

The first step towards a legislation was made when the Union Cabinet approved a draft legislation on defection in 1970, in line with the Chavan Committee recommendations. One of the key proposals was that a defecting legislator should not be appointed or elected as Minister or Parliamentary Secretary, or as Speaker or Chairman or Deputy Chairman, or Chief Whip or Deputy Whip, or to any other office of profit in or under a corporation owned or controlled by the government for a period of one year unless within that period they resign from their seat of the House and are re-elected.⁷² These draft legislative proposals were discussed on 10 December 1970 in a Conference of Opposition Leaders in Parliament. However, due to differences of opinion among the MPs, no consensus could be reached, and the Bill could not move to the Lok Sabha.⁷³

A brief discussion of legislative proposals banning defections – both the unsuccessful and the successful ones – are outlined below:

▪ *The Constitution (Thirty-second Amendment) Bill, 1973*

On 16 May 1973, the Constitution (Thirty-second Amendment) Bill, 1973 was introduced in the Lok Sabha to constitutionally provide for disqualification on the ground of defection. The Statement of Objects and Reasons of the Bill indicated that on consideration of the report of the Chavan Committee, it was felt that a constitutional amendment was imperative to curb political defections in India.⁷⁴

The Bill proposed to forfeit the seat of a MP or MLA in case they (a) defected from the political party on whose ticket they were sent to the Parliament or the state assembly; or (b) voted or abstained from voting in line with the direction of the political party without prior consent of the party or the person authorised by the party.⁷⁵ Further, the Bill proposed an exemption from disqualification in case there was a split in the political party. However, no exact quorum was provided to ascertain the split, and any number of legislators were allowed to split from the party and avail the exemption.⁷⁶ Despite the fact that independent legislators were prominent players of defection politics at that time, both the Chavan Committee report⁷⁷ and this Bill did not account for defections by them. This Bill was referred to a Joint Committee of the Lok Sabha and the Rajya Sabha. However, the Lok Sabha was dissolved on 18 January 1977, and the Joint Committee became defunct before it could submit its report.⁷⁸

In the meanwhile, the Constitution (Thirty-third Amendment) Bill, 1974 was passed to check political defections of a particular kind – those where resignations were obtained without free consent of the legislators. This Bill, which eventually became law, amended Articles 101(3)(b) and 190(3)(b) to allow the presiding officer of the House to reject the resignation of a legislator where they found that the resignation was not voluntary or genuine.⁷⁹

⁷¹ Committee on Defections 1967 (n 69).

⁷² Diwan (n 30) 307.

⁷³ Diwan (n 30) 307.

⁷⁴ The Constitution (Thirty-second Amendment) Bill 1973, Statement of Objects and Reasons.

⁷⁵ The Constitution (Thirty-second Amendment) Bill 1973, paras 4(2) & 8(2) proposing amendments to Articles 102 and 191.

⁷⁶ The Constitution (Thirty-second Amendment) Bill 1973, paras 4(4) & 8(4).

⁷⁷ The Chavan Committee defined a 'defector' as: "[A]n elected member of a legislature who had been allotted the reserved symbol of any political party can be said to have defected, if, after being elected as a member of either House of Parliament or of the Legislative Council or the Legislative Assembly of a State or Union Territory, he voluntarily renounces allegiance to, or association with such political party provided his action is not in consequence of a decision of the party concerned." See, Committee on Defections 1967 (n 69).

⁷⁸ Kashyap 2011 (n 21) 4.

⁷⁹ This Bill was eventually passed as The Constitution (Thirty-third Amendment) Act, 1974.

▪ *The Constitution (Forty-eighth Amendment) Bill, 1978*

The next attempt at an anti-defection law was made by the Janata Party-led government in 1978. The Constitution (Forty-eighth Amendment) Bill, 1978 was introduced in the Lok Sabha on 28 August 1978.⁸⁰ This Bill proposed the following:⁸¹

- (a) Inclusion of defection as a ground for disqualification of a MP or MLA under Articles 102 and 91 of the Constitution;⁸²
- (b) Insertion of a Tenth Schedule in the Constitution. This Schedule defined defections and laid down 'voluntary floor-crossing' and 'cross-voting' against the party's direction as grounds for disqualification;
- (c) An exemption from disqualification of defecting legislators in case of *en masse* floor-crossing or cross-voting by 25% members of the party within the House to form a new political party or a separate group.

The Bill was opposed at the introduction stage by some members of the ruling and the opposition parties alike. One of the primary grounds for opposition was that the proposed provision was violative of the individual legislators' freedoms of speech and association under Article 19(1)(a) and Article 19(1)(c) of the Constitution. As a result, after preliminary discussion, the Bill was withdrawn by leave of the House.⁸³

▪ *The Constitution (Fifty-second Amendment) Bill, 1985*

After the eighth general elections held in December 1984, the Congress returned to power with Rajiv Gandhi as the Prime Minister of India. On the one hand, the Prime Minister had a significant legislative majority to enact new legislation, but on the other, he had to deal with the pressure of intra-party rebellion and defections.

On 17 January 1985, the then President Giani Zail Singh, while addressing both Houses of Parliament said that "in consonance with the objective of a healthy political system, [the] Government intend[s] to bring forward in this session of Parliament an anti-defection Bill."⁸⁴ Soon afterwards, the Constitution (Fifty-second Amendment) Bill, 1985 was introduced in the Lok Sabha on 24 January 1985 by A.K. Sen, the then Minister of Law and Justice.⁸⁵ Essentially, the Bill sought to insert the Tenth Schedule in the Constitution incorporating provisions as to disqualification for a member of either House of Parliament or of a legislative assembly or legislative council of a State, on the ground of defection.

The motive behind introduction of the Bill was called in question. It was said that the introduction of this Bill was an attempt to 'save Congress'⁸⁶ from frequent change of party allegiance by its members. As mentioned earlier, in the years following the 1967 general elections, the Congress faced numerous splits with several members of the party leaving to form new ones. Most opposition parties that were formed during this time were led by former members of the Congress.⁸⁷ The new Prime Minister, through the newly formed Parliament, intended to bring a legislative measure to curb defections that had, by then, severely damaged the Congress.⁸⁸

⁸⁰ 'Anti-defection law in India' (*Parliament Library and Reference, Research, Documentation and Information Service*, July 2022) <https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/15072022_111659_1021205175.pdf> accessed 14 September 2023.

⁸¹ Diwan (n 30) 309.

⁸² These provisions disqualify a legislator from being chosen as or from being a member of the legislature. Thus, the Bill proposed the forfeiture of the seat of a defecting MP or MLA.

⁸³ Kashyap 2011 (n 21) 4.

⁸⁴ *Rajya Sabha Debates* (Parliament Secretariat) 17 January 1985 <https://rsdebate.nic.in/bitstream/123456789/346667/1/PD_132_17011985_1_p1_p22_2.pdf> accessed 6 October 2023.

⁸⁵ *Lok Sabha Debates*, vol. I, no. 8 (Parliament Secretariat) 24 January 1985 <https://eparlib.nic.in/bitstream/123456789/3283/1/lzd_08_1_24-01-1985.pdf> accessed 6 October 2023.

⁸⁶ The Opposition suggested that the proposal by Congress MP P Venkatasubbaiah to set up a High-level Committee to recommend ways to tackle defections in India should be termed as a "Save Congress" proposal. See, Chakshu Roy, 'Explained: The limits of anti-defection' *The Indian Express* (25 July 2019) <<https://indianexpress.com/article/explained/explained-the-limits-of-anti-defection-karnataka-5849316/>> accessed 26 September 2023.

⁸⁷ Diwan (n 30) 294.

⁸⁸ Diwan (n 30) 294.

The Bill was considered by the Lok Sabha on 30 January 1985 and passed with some modifications on the same day.⁸⁹ It was then tabled in the Rajya Sabha where it was discussed and passed on 31 January 1985.⁹⁰ The Tenth Schedule was finally inserted into the Constitution in 1985, to address frequent floor-crossing by legislators.

The Tenth Schedule enshrines the constitutional provisions to prevent and punish political defections among elected members of a political party. As an accompanying measure, the Constitution (Fifty-second Amendment) Bill, 1985 also amended Articles 102 and 191 of the Constitution to provide that a person shall be disqualified for being a member of either House of Parliament or a State Legislature if they are so disqualified under the Tenth Schedule.⁹¹

3. The Tenth Schedule – As we know it

Paragraph 2 of the Tenth Schedule lays down the specifics regarding disqualification of elected legislators on the ground of defection.

2. Disqualification on ground of defection.—

- (1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—
- (a) if he has voluntarily given up his membership of such political party; or
- (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation.—For the purposes of this sub-paragraph,—

- (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;
- (b) a nominated member of a House shall,—
 - (i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;
 - (ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.
- (2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.
- (3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.
- (4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,—
 - (i) where he was a member of political party immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

⁸⁹ Lok Sabha Debates, vol. I, no. 11 (Parliament Secretariat) 30 January 1985 <https://eparlib.nic.in/bitstream/123456789/319/1/lsd_08_1_30-01-1985.pdf> accessed 6 October 2023.

⁹⁰ Rajya Sabha Debates (Parliament Secretariat) 31 January 1985 <https://rsdebate.nic.in/bitstream/123456789/346938/1/PD_132_31011985_9_p20_p170_27.pdf> accessed 6 October 2023.

⁹¹ Amendments were also made to Articles 101 and 190 of the Constitution. Article 101 concerns vacation of seats in both the Houses of Parliament, while Article 190 deals with vacation of seats in both Houses of the legislature of a State.

(ii) *in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.*

Paragraph 2 of the Tenth Schedule

According to Paragraph 2 of the Tenth Schedule, a member of the House (either House of Parliament or a state legislature) may be disqualified in case they cross the floor in one of the following ways:

- *first*, if an elected member of a House belonging to any political party voluntarily gives up membership of such party, or if they vote in the House against such party's whip [Paragraphs 2(1)(a) and 2(1)(b)];
- *second*, if a member elected as an independent candidate joins any political party after the election [Paragraph 2(2)];
- *third*, if a nominated member of a House joins any political party after the expiry of six months from their nomination [Paragraph 2(3)].

Disqualification on the ground of defection, however, is not attracted in case of "merger" between political parties. Till 2003, disqualification was also not attracted in case of "splits" in political parties. As will be indicated in later parts of this report, the exemption given to splits was done away with by the Constitution (Ninety-first Amendment) Act, 2003.

The procedure to be followed to put the Tenth Schedule into practice is prescribed under the Members of Rajya Sabha/Lok Sabha (Disqualification on Grounds of Defection) Rules, 1985,⁹² as well as state-specific rules. A summation of the provisions concerning grounds for disqualification under the Tenth Schedule is as follows:

Elected Legislators		Nominated legislators
Paragraph 2(1)(a) & (b)	Paragraph 2(2)	Paragraph 2(3)
if such member of a House belonging to any political party <ul style="list-style-type: none"> ● voluntarily gives up membership of such party, or ● if they vote in the House against such party's whip/direction. 	if such member has been elected as an independent candidate, and they join any political party after the election.	if such member of a House joins any political party after the expiry of six months from their nomination.
Exceptions (Paragraphs 3 & 4) <ul style="list-style-type: none"> ● Merger between parties - can take place only when an original party merges with another party, and at least $\frac{2}{3}$ of the members of the legislature party have agreed to this merger. ● Split in a party - exempted members from disqualification from a political party if at least $\frac{1}{3}$ of the members of that party formed a separate group (deleted in 2003) 		

The fact that the anti-defection law was incorporated into the Constitution is significant, and can be seen as an indication of the relevance given to defections in political parties. The insertion of the Tenth Schedule into the Constitution has also lent the anti-defection law both considerably greater authority and potential durability as

⁹² Sanyal (n 27).

compared to other election law statutes.⁹³ The anti-defection law not only laid down a set of provisions to curb political defections but also institutionalised political parties into the Constitution.⁹⁴ Prior to the insertion of the Tenth Schedule, electoral laws in India governed political parties at the pre-electoral stage.⁹⁵ For instance, the Representation of the People Act, 1950 and the Election Symbols (Reservation and Allotment) Order, 1968 regulate the recognition of parties and the allocation of electoral symbols to them. The Tenth Schedule has, however, incorporated regulation pertaining to alterations in the structure of a political party occurring between two elections.⁹⁶ Such alterations may be caused by splits and mergers in political parties. Furthermore, cross-voting is officially acknowledged as an act of defection under the Tenth Schedule, which gives political parties the constitutional backing to take legislative action on behalf of their legislators, and tethers individual legislators to their respective political parties.⁹⁷

Exceptions under the Tenth Schedule – given to splits and mergers in political parties – were meant to protect instances of principled defections (where legislators switched parties because of principled differences in ideologies). Given its perverse use, the split exception was deleted in 2003. It is doubtful how useful the merger exception has been – while it is used quite rampantly, it might be difficult to say how many such uses are for principled causes. As evidence from preceding decades has shown, the working of the anti-defection law has belied all expectations. **Part B** sheds light on the challenges associated with the effective implementation of the Tenth Schedule in the specific context of the exemption given to mergers between political parties.

B. Implementation of Tenth Schedule – The Merger Exception

The implementation of India's anti-defection law is, in fact, characterised by the exceptions to Paragraph 2 of the Tenth Schedule. As early as 2002, the National Commission to Review the Working of the Constitution ('NCRWC') had pointed out that India witnessed a higher number of defections after the coming into force of the anti-defection law.⁹⁸ This was merely 17 years after the Tenth Schedule was inserted into the Constitution.

With the objective of understanding how India's anti-defection law works in practice, this part carries a study of decisions given by Speakers of certain legislatures, namely, the Lok Sabha, and the legislative assemblies of Goa, Haryana, Meghalaya and Uttar Pradesh. This study is aimed at understanding how Speakers, who are the deciding authority, have interpreted provisions of the Tenth Schedule in petitions filed before them, and discerning trends in movement of legislators across the floor. This exercise is aimed at highlighting how effective the Tenth Schedule has been, and the deficiencies that currently ail this law. The sample for this study consists of the following:

⁹³ Csaba Nikolenyi, *Minority Governments in India - The Puzzle of Elusive Majorities* (Routledge Contemporary South Asia Series, Routledge 2010) 75 ('Nikolenyi 2010').

⁹⁴ Aradhya Sethia, 'Where's the Party? Towards a Constitutional Biography of Political Parties' (2019) 3(1) *Indian Law Review* 1, 28 ('Sethia').

⁹⁵ Nikolenyi 2010 (n 93) 75.

⁹⁶ Nikolenyi 2010 (n 93) 75.

⁹⁷ Bhatia (n 57) 310.

⁹⁸ National Commission to Review the Working of the Constitution, *Report of the National Commission to Review the Working of the Constitution: Vol. I* (Ministry of Law and Justice, Government of India 2002) para 4.18.1 <<https://legalaffairs.gov.in/sites/default/files/chapter%204.pdf>> accessed 6 October 2023 ('NCRWC Report').

Overview of Speaker decisions surveyed

House of Parliament/State Assembly	Number of decisions surveyed	Time period	Instances of disqualification
Lok Sabha	55	1986-2004	6
Goa	9	1990-1998	5
Haryana	39	1989-2011	12
Meghalaya	18	1988-2009	7
Uttar Pradesh	68	1990-2008	2

Before proceeding further, it is important to point out the following caveats for the purpose of this study:

- The analysis encompasses decisions given by Speakers only, and not by any authority who may have heard an appeal from such decision. Consequently, decisions given by any High Court or the Supreme Court, who may have heard a challenge to the decision of the Speaker, have not been included or analysed in this study. In some cases, a decision of the appellate court has been referred to only when the context requires. Also, this analysis is limited to floor crossing by only elected legislators, and not nominated ones.
- For the purpose of this study, Speaker decisions have been sourced from treatises authored by two former Secretaries General of the Lok Sabha – G.C. Malhotra⁹⁹ and Subhash Kashyap.¹⁰⁰ While more decisions could have been sourced from elsewhere, such as materials available on the official websites of the Lok Sabha and other state legislative assemblies or Right to Information ('RTI') requests filed before appropriate authorities, constraints of time and person-power precluded the authors from doing so. To sum up, at this point, this report comprises a study of all decisions which have been cited in these two treatises.
- The choice of state assemblies for this survey is premised on two broad factors – *first*, the intention to roughly represent the various geographical regions of India, and *second*, the availability of data/information on disqualification petitions filed under the Tenth Schedule from across state legislative assemblies.

One of the preceding sections of this report pointed out how political defections violate the electoral pact between the voter and politicians. Interestingly, and with good reason, it can and has been argued that not just the act of defection, but the working of the anti-defection law also causes this pact to break!¹⁰¹ There are several aspects of the anti-defection law, most prominently the exemption given to mergers between political parties, that causes this to happen. This part will discuss certain aspects concerning the implementation of the anti-defection law which cause an affront to democratic accountability within the constitutional scheme.

⁹⁹ Malhotra (n 9).

¹⁰⁰ Kashyap 2011 (n 21).

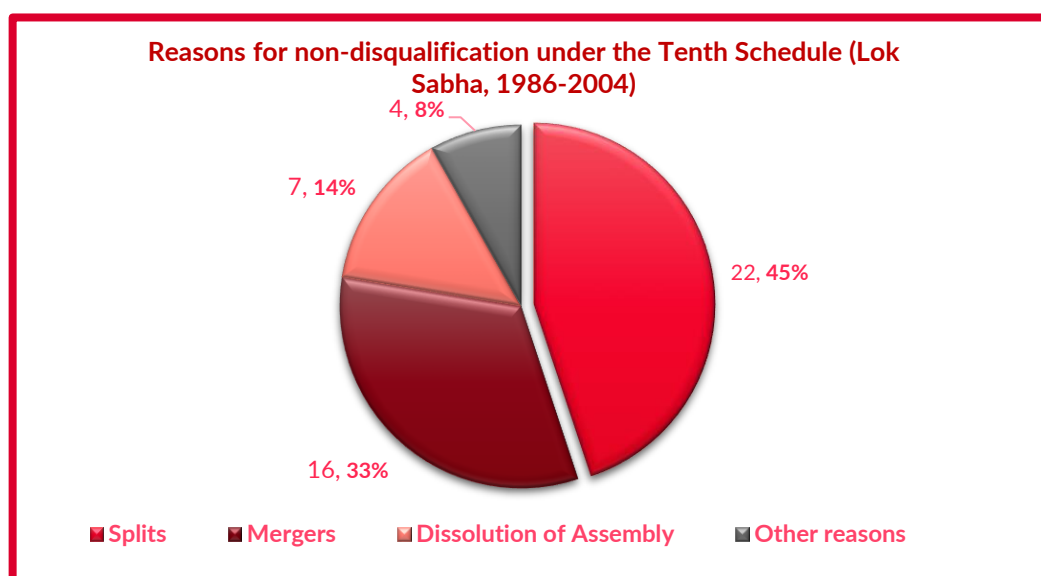
¹⁰¹ Miskin (n 63) 3.

It has often been argued that the Tenth Schedule may have arrested the practice of individual defections, but has facilitated defections by legislators in bulk.¹⁰² This can be attributed to the exemptions given to splits (in political parties) and mergers (between political parties) under the Tenth Schedule. The provision condoning splits in political parties was housed under Paragraph 3 of the Tenth Schedule. This provision exempted members from disqualification from a political party if at least one-third of the members of that political party formed a separate group.¹⁰³ Given its excessive misuse by parties who would muster enough number of legislators to engineer splits, the Constitution was amended in 2003 to omit Paragraph 3 of the Tenth Schedule, and do away with the split exemption.¹⁰⁴ In its Statement of Objects and Reasons, the Constitution (Ninety-first Amendment) Act, 2003 alludes to the destabilising effect of the split exemption on the government.¹⁰⁵

It is worth exploring what factors and factual situations prompted the deletion of the split exception. A few takeaways from a survey of decisions delivered by Speakers of the Lok Sabha between 1986-2004 can be useful for this purpose. Two of the most standout inferences from this survey are as follows:

- Out of the 55 decisions surveyed between 1986-2004, disqualification occurred in only **6 instances**.
- In the 49 instances where no legislator was disqualified, a split between parties was found to be the most prominent cause for non-disqualification.

Besides splits, the other reasons for non-disqualification are as mentioned below:



Reasons for non-disqualification of Lok Sabha MPs in petitions filed against them under the Tenth Schedule

¹⁰² The Hindu Bureau, 'Vice President Venkaiah Naidu bats for reform of anti-defection law' *The Hindu* (Bengaluru, 24 April 2022) <<https://www.thehindu.com/news/national/vice-president-m-venkaiah-naidu-bats-for-amending-anti-defection-law-to-plug-loopholes/article65351005.ece>> accessed 11 October 2023.

¹⁰³ Paragraph 3. Disqualification on ground of defection not to apply in case of split.—Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party,—

(a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground —

(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

¹⁰⁴ The Constitution (Ninety-first Amendment) Act, 2003.

¹⁰⁵ The Constitution (Ninety-first Amendment) Act, 2003, Statement of Objects and Reasons.

[**Note:** The 4 instances where disqualification did not occur because of other reasons include – *first*, petitioners' non-compliance with the mandatory provisions of the Members of Lok Sabha (Disqualification on Grounds of Defection) Rules, 1985;¹⁰⁶ *second*, petitioners' unwillingness to pursue the disqualification petition filed by them;¹⁰⁷ and *third*, the respondent resigning from the membership of the House before a petition under the Tenth Schedule was filed against them.¹⁰⁸]

As evident from the above, in **38** out of **49 instances** where disqualification did not occur, splits or mergers (or a combination of the two) emerged as dominant causes for MPs not being disqualified when a petition was filed against them under the Tenth Schedule. While the split exception has long gone, the exception given to mergers under Paragraph 4 continues to be in the Tenth Schedule. This is a cause of concern, given how often the merger exception is employed to facilitate bulk movements across the floor. In that case, the text of Paragraph 4 is worth delving into.

1. The Devil in the Detail – What the law would like to say

A lot of the concerns around rampant bulk defections can be attributed to the language of Paragraph 4, which has been reproduced below:

Disqualification on ground of defection not to apply in case of merger.—

*(1) A member of a House shall not be disqualified under subparagraph (1) of paragraph 2 where his **original political party merges with another political party** and he claims that he and any other members of his original political party—*

(a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or

(b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

*(2) For the purposes of sub-paragraph (1) of this paragraph, the **merger of the original political party** of a member of a House shall be **deemed** to have taken place if, and only if, **not less than two-thirds of the members of the legislature party concerned have agreed to such merger.***

Paragraph 4 has been criticised for its convoluted drafting.¹⁰⁹ Besides receiving academic criticism, the language of Paragraph 4 has remained bereft of a consistent interpretation across deciding authorities. The inconsistency is caused by lack of finality on how the two sub-paragraphs of Paragraph 4 are to be read – *conjunctively* or *disjunctively*. The choice of reading/interpretational technique – conjunctive or disjunctive – has a significant impact on the performance of the Tenth Schedule. Given this background, it is important to understand how these two kinds of readings work in practice. As will be seen, essentially, the concepts of legislature party and original political party come in use when mergers (and previously, splits) have to be effected.

¹⁰⁶ See, AIADMK Split Case (1988-99) in Malhotra (n 9) 136-140, and Krishna Marandi and Rajkishore Mahto Case (1992) in Malhotra (n 9) 177-178.

¹⁰⁷ See, Ajit Jumar Panja Case (2002) (1996) in Malhotra (n 9) 669.

¹⁰⁸ See, Malhotra (n 9) 669.

¹⁰⁹ PDT Achary, 'Time Is Ripe to Rewrite Parts of Anti-Defection Law Which Politicians Habitually Misuse' (*The Wire*, 23 June 2022) <<https://thewire.in/law/maharashtra-defection-law-shiv-sena>> accessed 6 October 2023 ('Achary').

Understanding “legislature party” and “original political party”

A “legislature party”¹¹⁰ means the group consisting of all members of a House for the time being belonging to one political party, whereas an “original political party”¹¹¹ means the political party to which a member belongs.

This can be understood via an example. After the 2017 Assembly elections in Goa, the INC won 17 seats. The 17 INC members who were elected and formed part of the Legislative Assembly (in Goa) constituted the ‘legislature party’. The original political party, in this case, is the INC to which all members of the party belong – those who form part of the Goa Assembly and those outside of it.

In *Subhash Desai v. Principal Secretary, Governor of Maharashtra*,¹¹² the Supreme Court has confirmed that ‘political party’ and ‘legislature party’ are not to be conflated.¹¹³ The independent existence of the legislature party is recognised under the Tenth Schedule for the purpose of presenting a defence to the actions of legislators which could otherwise have amounted to defection.¹¹⁴

One plausible manner in which Paragraph 4 can be interpreted is that a merger can take place only when the original political party merges with another political party (as per Paragraph 4(1)), **and** at least two-thirds of the members of the legislature party have agreed to this merger (Paragraph 4(2)). This would amount to reading Paragraphs 4(1) and 4(2) **conjunctively**.

But is that how the two sub-paragraphs of Paragraph 4 are read routinely? The use of Goa as an illustration to explain the concepts of an original political party and the legislature party is not coincidental. In 2019, 10 MLAs from the INC joined the BJP, which was in power in Goa.¹¹⁵ These 10 MLAs claimed to be two-thirds of the INC legislature party in Goa (the strength of the Congress stood at 15 MLAs¹¹⁶ at this point).¹¹⁷ Disqualification petitions were eventually filed against these MLAs, which were dismissed by the Speaker of the Goa Legislative Assembly. The Speaker held that the respondents did not invite disqualification citing a valid merger between the INC and BJP legislature parties.¹¹⁸ The order of the Speaker was challenged before the Goa Bench of the Bombay High Court, in *Girish Chodankar v. Speaker, Goa Legislative Assembly*.¹¹⁹

On 24 February 2022, the Bombay High Court held that the ten former members of the Congress Legislature Party in the Goa Legislative Assembly, who defected to the BJP, **did not** invite disqualification. The High Court held that since the ten Congress MLAs comprised two-thirds of the 15 member-strong Congress Legislature Party, there was a “*deemed merger*” between the two parties when these MLAs switched allegiance to BJP.

¹¹⁰ Tenth Schedule, Paragraph 1(b).

¹¹¹ Tenth Schedule, Paragraph 1(c).

¹¹² 2023 SCC OnLine SC 607.

¹¹³ 2023 SCC OnLine SC 607 [114].

¹¹⁴ 2023 SCC OnLine SC 607 [114]. The Supreme Court also held that the Tenth Schedule would become unworkable if ‘political party’ is read as ‘legislature party’.

¹¹⁵ Smita Nair, ‘Meanwhile, a Goa meltdown: 10 of 15 Congress MLAs join BJP’ *Indian Express* (Panjim, 11 July 2019) <<https://indianexpress.com/article/india/goa-meltdown-congress-mlas-join-bjp-pramod-sawant-kavlekar-karnataka-crisis-5824462/>> accessed 2 October 2023 (‘Nair’).

¹¹⁶ A succinct timeline of events depicting the changing numbers of MLAs in the Goa Legislative Assembly can be found in the opening paragraphs of *Girish Chodankar v. Speaker, Goa Legislative Assembly, 2022 SCC OnLine Bom 377* (‘*Girish Chodankar*’).

¹¹⁷ Nair (n 115).

¹¹⁸ The merger of the INC legislature party with the BJP has been recorded in the Goa Legislative Assembly Bulletin Part II No. 149, dated 10 July 2019. See, Goa Legislative Assembly, Bulletins Part II <https://www.goavidhansabha.gov.in/uploads/bulletin_part2/46_bulletin_BUL-II-149.pdf> accessed 15 November 2023.

¹¹⁹ *Girish Chodankar v. Speaker, Goa Legislative Assembly, 2022 SCC OnLine Bom 377*.

The Bombay High Court ruled that “sub-paragraph (2) of paragraph 4 of the Tenth Schedule operates in a field distinct and independent of sub-paragraph (1) of paragraph 4”¹²⁰ and that these two paragraphs are to be read **disjunctively**. As soon as two-thirds of the legislature party agree to merge with another political party, the merger is “**deemed**” to have taken place, even though, factually there is no merger of the political parties at the national level. The Court, thus, read a “deeming/legal fiction” under sub-paragraph (2), so as to indicate that a merger of two-third members of a legislature party can be deemed to be a merger of political parties, even if there is no actual merger of the original political party with another party.

Here, the use of the word “deemed” merits attention. The word “deemed”, when it is used in a law to create a legal fiction, gives an artificial construction to a word or a phrase used in a statute.¹²¹ Jurisprudence around the interpretation of deeming provisions mandates that the purpose with which they are used must be closely scrutinised. However, the word “deemed” may not always be used for the purpose of creating a fiction.¹²² In some cases, it may be used to include what is obvious or what is uncertain. In other cases, a deeming fiction may be used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. In each of these cases, “it would be a question as to with **what object the legislature has made such a deeming provision.**”¹²³

If the legislature was indeed creating a legal fiction under Paragraph 4(2) (by providing for deemed mergers between parties), what could have been its intention? The merger exception was created to save instances of principled coming together of political groups from disqualification under the anti-defection law, essentially to strike a compromise between the right of dissent and preserving party discipline.¹²⁴ In the absence of mergers of original political parties, the deeming fiction could, presumably, be used as a means to allow mergers of legislature parties. Presumably, and not conclusively, because parliamentary debates on the Tenth Schedule do not indicate any justification for why Paragraph 4 was crafted the way it was. However, a plain reading of Paragraph 4 would not sit well with this supposed purpose of a deeming fiction.

While in *Girish Chodankar* the Bombay High Court opted for a disjunctive reading, this cannot be considered a settled position regarding the interpretation of Paragraph 4. Decisions given by some Speakers have supported a reading of Paragraphs 4(1) and 4(2) which can be characterised as conjunctive. Between 1997-1998, petitions were filed against Charan Dass Shorewalla and Vinod Kumar Mariya, MLAs of the Haryana Assembly for voluntarily giving up membership of the Samata Party, their original political party. A key question that arose during those proceedings was whether the Tenth Schedule contemplates a situation where the original political party merges with another political party, but its legislature party remains a separate entity not influenced by the merger of the original political party?¹²⁵ The Speaker answered this question in the negative on the ground that “*When the Tenth Schedule speaks of split and merger contemplated by paras 3 and 4, it does not speak of split or merger in the Legislature Party but it speaks of split and merger in the original political party.*”¹²⁶ The Speaker arrived at this conclusion on the basis of a combined reading of Paragraphs 1(b) and 1(c) of the Tenth Schedule, which clarifies that the legislature party belongs to the political party, and the original political party in relation to a member of a House is the political party to which a member belongs for purposes of Paragraph 2(1).¹²⁷ These statements by the Speaker hint towards a conjunctive reading of Paragraphs 4(1) and 4(2) on the premise that a split or merger has to necessarily occur in original political parties, and not just in legislature parties. The legislature party, in and of itself, cannot be the only site of accepting or rejecting a split or merger.

¹²⁰ *Girish Chodankar v. Speaker, Goa Legislative Assembly*, 2022 SCC OnLine Bom 377, para 46.

¹²¹ *St. Aubyn v. Attorney General No. 2*, 1951 [UKHL] 3.

¹²² *Consolidated Coffee Ltd. v. Coffee Board*, (1980) 3 SCC 358.

¹²³ *Government of Andhra Pradesh v. H.E.H., The Nizam, Hyderabad*, (1996) 3 SCC 282.

¹²⁴ A.K. Sen during *Rajya Sabha Debates* (Parliament Secretariat) 31 January 1985 <https://rsdebate.nic.in/bitstream/123456789/346938/1/PD_132_31011985_9_p20_p170_27.pdf> accessed 6 October 2023. See, Shanthan Reddy, ‘Merger Exception to Defection - Obstacle or Facilitator’ (*Law and Other Things*, 21 January 2022) <https://lawandotherthings.com/merger-exception-to-defection-obstacle-or-facilitator/#_edn1> accessed 22 August 2023.

¹²⁵ Malhotra (n 9) 365.

¹²⁶ Malhotra (n 9) 368.

¹²⁷ Malhotra (n 9) 368.

Interestingly, in the case of the now deleted exception on splits, the Supreme Court had batted for a conjunctive reading of the two sub-paragraphs of Paragraph 3. In *Rajendra Singh Rana v. Swamy Prasad Maurya*,¹²⁸ the Supreme Court was faced with the request made by 37 MLAs of the Bahujan Samaj Party ('BSP') to recognise a formal split in the party. The Supreme Court categorically overruled the argument that a split in the original party need not be separately established if a split in the legislature party is shown.¹²⁹ Crucially, the Supreme Court held that "Acceptance of the argument that the legislators are wearing two hats, one as members of the original political party and the other as members of the legislature and it would be sufficient to show that one-third of the legislators have formed a separate group to infer a split or to postulate a split in the original party, would militate against the specific terms of para 3. That paragraph speaks of two requirements, one, a split in the original party and two, a group comprising of one-third of the legislators separating from the legislature party. By acceding to the two hat theory one of the limbs of para 3 would be made redundant or otiose..."¹³⁰

This view garnered support of certain High Courts as well. For instance, in the case of *Ram Bilas Sharma v. The Speaker, Haryana Vidhan Sabha*,¹³¹ the High Court of Punjab and Haryana held that in order to attract Paragraph 3, there needed to be a split in the original political party, and one-third members of the legislature party of that political party needed to constitute the group representing the splitting faction.¹³² It is only when these conditions were satisfied that the members of the splitting faction could not attract disqualification under Paragraph 2(1)(a) of the Tenth Schedule.¹³³ This observation was premised on the fact that a legislature party is not a separate entity, and is a wing of the original political party.¹³⁴ A split in only the legislature party was not ample ground to claim the protection available to splits under Paragraph 3.

However, no such observation exists in the context of the merger exception, and confusion looms large regarding its interpretation. In fact, the lack of judicial guidance on the interpretation of provisions concerning both splits and mergers is attributed as a reason for confusion and uncertainty in their working.¹³⁵ Queries about the correct interpretation of Paragraph 4 are repeatedly raised. For instance, in 2021, disqualification petitions were filed against 12 rebel INC MLAs of the Meghalaya Legislative Assembly for switching allegiance to the All-India Trinamool Congress ('TMC'). Given that the Assembly consisted of 17 INC MLAs in total, the Speaker held that the 12 MLAs constituted the required two-thirds to validly merge with the TMC (under Paragraph 4).¹³⁶ While politically this was considered to be a major setback for the Congress, concerns also persisted about the suitable interpretation of Paragraph 4.¹³⁷

On the face of it, Paragraph 4 contemplates a merger of the original political party with another party and not that of the legislature parties alone. Sub-paragraph (2) of paragraph 4 begins with the expression "for the purposes of sub-paragraph (1)" and ends with "agreed to **such** merger." The use of these expressions indicates that the deeming fiction under sub-paragraph (2) was created to give effect to the entire Paragraph 4. Thus, the correct meaning of Paragraph 4 can be understood only when both the sub-paragraphs are read conjunctively. A conjoint reading would inevitably mean that for a valid merger under Paragraph 4, an original political party has to first merge with another political party, and then two-thirds of the legislature party must support that merger. Having said that, what can be the potential practical implications of such a reading? Would original political parties with

¹²⁸ (2007) 4 SCC 270.

¹²⁹ *Rajendra Singh Rana v. Swamy Prasad Maurya*, (2007) 4 SCC 270, para 38.

¹³⁰ *Rajendra Singh Rana v. Swamy Prasad Maurya*, (2007) 4 SCC 270, para 38.

¹³¹ PLR (1997) 117 P&H 318 (FB).

¹³² PLR (1997) 117 P&H 318 (FB), para 5.

¹³³ PLR (1997) 117 P&H 318 (FB), para 5.

¹³⁴ PLR (1997) 117 P&H 318 (FB), para 5.

¹³⁵ Kashyap 2011 (n 21), Foreword by Soli Sorabjee.

¹³⁶ Bikash Singh, 'Meghalaya Speaker recognises merger of 12 members of Congress with AITC' *The Times of India* (Shillong, 24 December 2021) <<https://economictimes.indiatimes.com/news/politics-and-nation/meghalaya-speaker-recognises-merger-of-12-members-of-congress-with-the-aitc/articleshow/88468489.cms>> accessed 6 October 2023.

¹³⁷ 'Did Meghalaya Assembly Speaker ignore the ratio of the Supreme Court's Constitution bench while recognising the merger of 12 rebel Congress MLAs with TMC' *The Leaflet* (25 December 2021) <<https://theleaflet.in/did-meghalaya-assembly-speaker-ignore-the-ratio-of-the-supreme-courts-constitution-bench-while-recognising-the-merger-of-12-rebel-congress-mlas-with-tmc/>> accessed 6 October 2023. See also, Achary (n 109).

stark ideological differences be amenable to merging? This may not be entirely outside the realm of imagination given that it has happened in the past.¹³⁸ Simultaneously, given the politics of current times, stark differences in political parties' respective ideologies and deep-seated historical rivalries, it could be difficult to imagine how a merger (even if it is through a legal fiction) between major national or state-level parties would materialise in reality.

A disjunctive reading of the two sub-paragraphs, on the other hand, would empower legislature parties (irrespective of their strength in the House) to solely merge with another party, and thus, practically ease defection. More worryingly though, *Girish Chodankar* was hardly the first instance of a disjunctive reading of sub-paragraphs (1) and (2) of Paragraph 4, and this view has found support in previous decisions of the Punjab and Haryana High Court¹³⁹ and Gauhati High Court¹⁴⁰ (to name only a few).

Essentially, the working of Paragraph 4 remains contingent on how the two sub-paragraphs are read – conjunctively or disjunctively – and this, in turn, remains contingent on the discretion of the deciding authority. The convoluted language of Paragraph 4, and the absence of a principled approach to interpreting it have wreaked havoc on the Tenth Schedule. The following sub-part discusses certain practical issues that have emerged because of the working of the merger exception in the Tenth Schedule.

2. The Devil in the Detail – What the law ends up saying

a. *Mergers big and small*

In the micro-jurisdictions of Tuvalu and Nauru, where legislatures are of limited size, challenges to the existence of opposition parties have been posed by the operation of anti-defection laws.¹⁴¹ While this observation has been made in the context of foreign jurisdictions, its essence also resonates with the experience of the smaller state legislative assemblies in India. A disjunctive reading of the two sub-paragraphs of Paragraph 4 (as explained in the previous sub-part) makes defection easier in states with smaller legislative assemblies, where even a sole member may constitute a two-third majority to conveniently cross the floor within the bounds of Paragraph 4(2).

It is interesting to note that in 1985, when the anti-defection law was being discussed in Parliament, George Gilbert Swell, a former MP from Shillong and former Deputy Speaker of the Lok Sabha, expressed this exact concern. Swell alluded to the future of the smaller regional political parties while discussing the merger provision, and wondered as to what would happen to these parties if elected members in the House belonging to them were to merge with another political party.¹⁴² By doing so, they would abandon the organisational machinery of their original political party, but would not attract disqualification.¹⁴³ Because, smaller the strength of a legislature party, easier it would be to muster numbers for a valid merger.¹⁴⁴ With the passage of time, this is precisely what the merger provision has led to in practice.

Goa is a prominent example of this phenomenon, with a legislative assembly which, at present, consists of 40 MLAs. Goa's first assembly election was conducted in 1963 in what was then the Union territory of Goa, Daman and Diu, and the first legislative assembly was constituted in early 1964 with a total of 30 members.¹⁴⁵ The Maharashtrawadi Gomantak Party ('MGP') won 14 seats, which was the highest among all the contesting

¹³⁸ *Diwan* (n 30) 299.

¹³⁹ *Baljeet Singh Bhullar v. Speaker, Punjab Vidhan Sabha*, (PLR) 1997 117 P&H 367 (FB).

¹⁴⁰ *Speaker, Nagaland Legislative Assembly v. Imtilemba Sangtam*, (2015) 1 Gau LR 391.

¹⁴¹ *Morris* (n 50) 1215.

¹⁴² *Lok Sabha Debates*, vol. I, no. 11 (Parliament Secretariat) 30 January 1985 <https://eparlib.nic.in/bitstream/123456789/319/1/lsd_08_1_30-01-1985.pdf> accessed 6 October 2023.

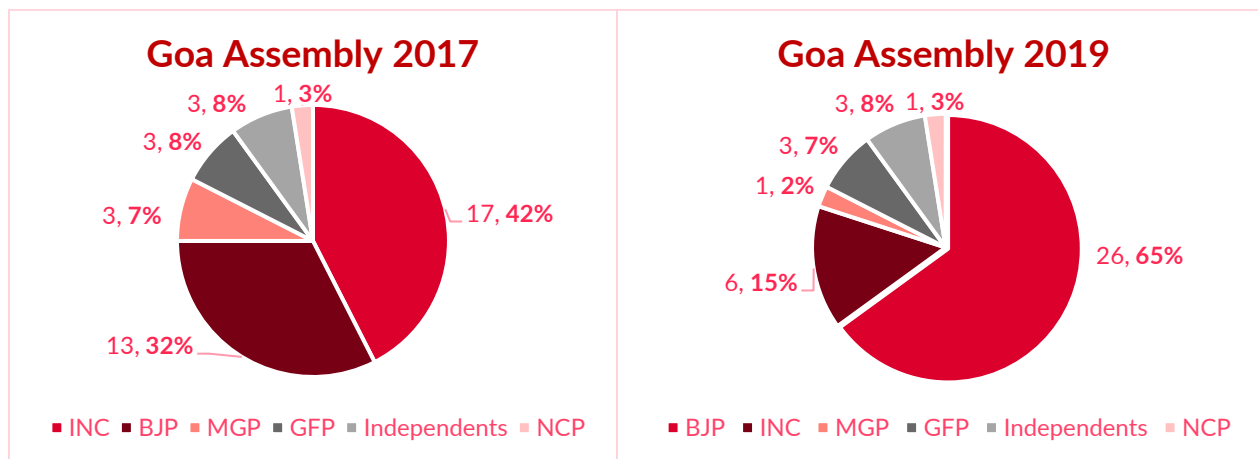
¹⁴³ *Lok Sabha Debates*, vol. I, no. 11 (Parliament Secretariat) 30 January 1985 <https://eparlib.nic.in/bitstream/123456789/319/1/lsd_08_1_30-01-1985.pdf> accessed 6 October 2023.

¹⁴⁴ *Lok Sabha Debates*, vol. I, no. 11 (Parliament Secretariat) 30 January 1985 <https://eparlib.nic.in/bitstream/123456789/319/1/lsd_08_1_30-01-1985.pdf> accessed 6 October 2023.

¹⁴⁵ 'Goa Legislative Assembly' (Government of Goa, 2023) <www.goavidhansabha.gov.in/> accessed 6 October 2023.

parties.¹⁴⁶ Goa's first Chief Minister, Shri Dayanand B. Bandodkar, belonged to the MGP. With passage of time, MGP's strength in the Goan Assembly reduced, with the party currently having 2 MLAs in a 40-member Assembly. Repeated defections to other political parties in the Goa Assembly could be cited as one of the reasons for MGP's dwindling strength.

The 2017 Assembly election in Goa resulted in a hung Assembly, but eventually culminated with the BJP forming the government with the support of the Goa Forward Party ('GFP'), the MGP, and two independent candidates.¹⁴⁷ Between 2017-2019, there was movement of MLAs from the INC and the MGP, to the BJP. The composition of the Goa Legislative Assembly changed rapidly, as can be seen from the charts below:



Changes in the composition of the Goa Legislative Assembly between 2017-2019¹⁴⁸

Mergers can be effected rather comfortably in small legislative assemblies. In fact, the Goa legislative assembly has been the victim of repeated defections since the 1970s, most of which availed the protection of the split and merger exceptions.¹⁴⁹ In fact, between 1990-2002, Goa had 13 Chief Ministers in three assemblies, with the number of defectors hitting the figure of 80.¹⁵⁰

Similar concerns can also be discerned in other relatively smaller legislative assemblies. A survey of 18 petitions filed before the Speaker of the Meghalaya Legislative Assembly under the Tenth Schedule revealed that disqualification occurred in 7 of them. The protection available to splits and mergers prevented disqualification in 10 of the remaining cases.¹⁵¹ Given the relatively small size of the legislative assembly, in several instances, only 1-2 MLAs sufficed for a valid split or merger to occur – in 2 cases of splits and 1 case of merger, a single member could claim either of these exemptions. Essentially, a single member was enough to split (into a new political party) or merge (with another party). In 2 instances, 2 MLAs sufficed to effectuate a valid split and a merger.

¹⁴⁶ 'Maharashtrawadi Gomantak Party: All you need to know about the kingmaker party in Goa' *The Indian Express* (11 March 2017) <<https://indianexpress.com/elections/goa-assembly-elections-2017/maharashtrawadi-gomantak-party-all-you-need-to-know-about-the-kingmaker-party-in-go/>> accessed 6 October 2023.

¹⁴⁷ Abhiram Ghadyalpatil, 'BJP's Manohar Parrikar to take oath as CM tomorrow' (*LiveMint.com*, 11 March 2017) <<https://www.livemint.com/Politics/peqaKhgfBr7zPoVmfl9RfM/Goa-election-results-2017-live-Counting-of-votes-to-begin-a.html>> accessed 10 November 2023.

¹⁴⁸ Information on Goa General Legislative Election 2017 sourced from the Election Commission of India. See, *Goa General Legislative Election 2017* <<https://eci.gov.in/files/file/3862-go-general-legislative-election-2017/>> accessed 10 November 2023.

¹⁴⁹ Marcus Mergulho, 'Goa's tryst with defections goes back over half a century' *The Times of India* (Panjim, 15 September 2022) <<https://timesofindia.indiatimes.com/city/goa/goas-tryst-with-defections-goes-back-over-half-a-century/articleshow/94211322.cms>> accessed 6 October 2023 ('Mergulho').

¹⁵⁰ Mergulho (n 149).

¹⁵¹ All these 10 cases were instances of a split in a political party, with the splitting faction eventually merging into another party. In other words, these were instances of what has been termed "split followed by merger" in this report in the next sub-part.

Small legislative assemblies remain particularly prone to unprincipled defections. In fact, Speaker (between March 2008-May 2009) Mr. Bindo M. Lanong of the Meghalaya Legislative Assembly pointed out in one of his decisions how political parties must find a solution to “*the menace of unprincipled undemocratic defection perpetuated particularly in small states.*”¹⁵² Lanong made this observation in a petition filed before him seeking disqualification of a MLA elected to the Assembly as an independent member, but who later joined the Nationalist Congress Party (‘NCP’). In fact, of the 18 petitions analysed from Meghalaya, 5 were in respect of independent MLAs who later joined a political party, and were eventually disqualified as per Paragraph 2(2) of the Tenth Schedule.

Three such instances occurred in quick succession between 8-9 April 2009, when Paul Lyngdoh, Ismail R. Marak, and Limison D. Sangma (all independent candidates) joined the INC, the United Democratic Party, and the NCP, respectively, after their election to the Assembly as independent candidates.¹⁵³ In the decision on the petition concerning disqualification of Limison D. Sangma, Speaker Lanong chided “*Sangma and similarly situated persons*” for making a “*mockery of the democratic system in small states like Meghalaya.*”¹⁵⁴

This issue of single members being able to give effect to splits and mergers is not peculiar to only small legislative assemblies. Even Uttar Pradesh, which is the biggest legislative assembly amongst all states, has witnessed splits brought about by 1-2 members. This has happened when the strength of a certain party’s legislature wing has dropped drastically, thereby reducing the number of MLAs required for a split or merger to occur. For instance, in 1994, the strength of the Communist Party of India (‘CPI’) in the Uttar Pradesh Legislative Assembly dropped to 3 members. Subsequently, a lone member Mitrasen Yadav could validly split from the CPI and form a new party, which in this case was called the Samatawadi Group (which merged with the Samajwadi Party soon after). In fact, in 24 out of the 68 decisions (~35% cases) delivered by Speakers of the Uttar Pradesh Legislative Assembly, valid splits or mergers were brought about by a single legislator, which means that the splitting or merging MLAs were not disqualified by the Speaker.

Evidently, in the time period surveyed, the Tenth Schedule was unable to arrest defections by lone members defecting, or where legislators defected in small groups.

b. The cycle of defections – “splits followed by mergers”

As indicated in **Part A** of this report, the working of the Tenth Schedule resulted in a drastic increase in the number of political parties in India, especially “tiny unrecognised parties”.¹⁵⁵ One of the reasons for that is the practical implication of the exemptions given to splits and mergers. In a bid to escape disqualification under the Tenth Schedule for switching party allegiance, legislators have been prone to mustering the required numbers and branching out into smaller factions.

As explained above, the lack of a principled interpretation of the merger exception has been the cause of bulk movement of legislators across state legislative assemblies. In recent years, *en bloc* defections have brought down democratically elected governments in Maharashtra, Madhya Pradesh,¹⁵⁶ Manipur,¹⁵⁷ Goa,¹⁵⁸ Arunachal

¹⁵² Kashyap 2011 (n 21) 818.

¹⁵³ Kashyap 2011 (n 21) 785-818.

¹⁵⁴ Kashyap 2011 (n 21) 785-818.

¹⁵⁵ Nikolenyi 2010 (n 93) 75-76.

¹⁵⁶ ‘Stealing a mandate: On Madhya Pradesh crisis’ *The Hindu* (23 March 2020) <<https://www.thehindu.com/opinion/editorial/stealing-a-mandate-the-hindu-editorial-on-madhya-pradesh-political-crisis/article31136885.ece>> accessed 5 September 2023.

¹⁵⁷ Pradip Phanjoubam, ‘The gross abuse of the Manipur mandate’ *The Hindu* (20 June 2020) <<https://www.thehindu.com/opinion/lead/the-gross-abuse-of-the-manipur-mandate/article31873142.ece>> accessed 12 September.

¹⁵⁸ ‘Curse of Goa: On Congress MLAs defection to BJP’ *The Hindu* (16 September 2022) <<https://www.thehindu.com/opinion/editorial/curse-of-go-the-hindu-editorial-on-congress-mlas-defection-to-bjp/article65895115.ece>> accessed 10 October 2023.

Pradesh,¹⁵⁹ and Karnataka.¹⁶⁰ Strictly speaking, it may be erroneous to label all of these instances as “defections”. In some of these instances, namely Goa and Karnataka, the MLAs who changed their party allegiance were not eventually disqualified. In fact, in Madhya Pradesh, no disqualification petition was filed against the MLAs who switched parties.

Quite evidently, then, the exceptions under the Tenth Schedule can be worked around to enable legislators to defect in groups. More interesting though was the combined use of both the split and merger exceptions, at least till the exemption given to splits remained in the Tenth Schedule. A survey of decisions delivered by Speakers of the Uttar Pradesh Legislative Assembly between 1990-2008 reveals a trend which can loosely be termed “splits followed by mergers”.

In instances where splits were followed by mergers, an elected legislator (or a group of legislators) separated from the political party they belonged to, and availed the exemption given to splits between political parties (by forming a group of one-third members of the legislature party). Thereafter, the entire group of splitting legislators merged with another party. Given that they would merge in full, they would obviously meet the threshold of two-third members required to effectuate a merger with another party. Some instances of this phenomenon in the Uttar Pradesh Legislative Assembly can be found below:

UTTAR PRADESH (1990-2008)				
Year	Name of MLA (+ number of MLAs they formed a group with)	Original Party	Split to form	Merged with
1994	Mitrasen Yadav	Communist Party of India	Samatawadi Group	Samajwadi Party
1994	Brahma Shankar Tripathi + 9	Janata Dal	Samata Party	Samajwadi Party
1994	Ashok Kumar Singh Chandel + 6	Janata Dal	Samata Group	Samajwadi Party
1994	Narendra Singh + 3	Janata Dal	Pragatisheel Janata Dal	Indian National Congress
1994	Tejpal Singh + 1	Janata Dal	Samata Group	Samajwadi Party
1994	Afzal Ansari	Bharatiya Communist Party	Samata Party	Samajwadi Party
2000	Rajaram Pandey + 3	Janata Dal	Janata Dal (Rajaram Pandey)	Lok Janshakti Party

¹⁵⁹ ‘With mass defection, Cong loses govt in Arunachal’ *The Hindu Business Line* (16 January 2018) <<https://www.thehindubusinessline.com/news/national/with-mass-defection-cong-loses-govt-in-arunachal/article64322736.ece>> accessed 01 October 2023.

¹⁶⁰ Vidhatri Rao, ‘The defectors’ gallery: Of 17 who helped BJP topple Cong-JD(S) govt, 14 survive ups and downs to get tickets’ *Indian Express* (New Delhi, 15 April 2023) <<https://indianexpress.com/article/political-pulse/the-defectors-gallery-bjp-power-karnataka-tickets-8556142/>> accessed 12 September 2023.

2001	Markandey Chand + 6	Janatantrik Bahujan Samaj Party	Janatantrik Bahujan Samaj Party (Markandey)	Lok Janshakti Party
2002	Rajaram Pandey	Lok Janshakti Party	Lok Janshakti Party (Rajaram Pandey)	Samata Party
2002	Shankhlal Manjhi	Janata Dal (U)	Manjhi Mahawar Shoshit Dal	Samajwadi Party
2003	Dinesh Singh + 7	Indian National Congress	Akhil Bharatiya Congress Party	Bahujan Samaj Party
2003	Shyam Narayan Tewari + 3	Akhil Bharatiya Congress Party	Ekta Party	Bahujan Samaj Party
2003	Mehboob Ali	Rashtriya Parivartan Dal	Rashtriya Alpsankhyak Party	Bahujan Samaj Party
2003	Surendra Singh + 1	Apna Dal	Vastavik Apna Dal	Bahujan Samaj Party
2003	Sanjay Garg	Janata Party	Ekta Party	Samajwadi Party
2003	Rajendra Singh Rana + 36	Bahujan Samaj Party	Loktantrik Bahujan Dal	Samajwadi Party
2003	Rajaram Pandey	Samata Party	Samata Party (Rajaram)	Samajwadi Party
2003	Ram Govind	Samajwadi Janata Party Rashtriya	Samajwadi Janata Party (Ram Govind)	Samajwadi Party
2003	Ateek Ahmad	Apna Dal	Apna Dal (A)	Samajwadi Party

Mentioned above are some instances of mergers which followed splits. For instance, in 1997, former MLA of the Uttar Pradesh Legislative Assembly, Late Mr. Rajaram Pandey gathered along with him three other members of the Janata Dal, and engineered a split in the party, to form the Janata Dal (Rajaram Pandey) faction. While hearing a disqualification petition against him, the Speaker of the Uttar Pradesh Legislative Assembly (Mr. Keshari Nath Tripathi), held this to be a valid split. Thereafter, Rajaram Pandey mustered the required number of MLAs to merge with the Lok Janshakti Party. This cycle was repeated thrice over, till Rajaram Pandey ended up in the Samajwadi Party in 2003, where he stayed till his demise in 2013.

It is important to briefly describe some political developments in Uttar Pradesh during the 1990s-early 2000s. Some of these splits and mergers occurred during the term of the 13th Uttar Pradesh Legislative Assembly, 1996-2002 ('13th Vidhan Sabha'). The 13th Vidhan Sabha was helmed by a coalition of the BJP and BSP, who mutually

arrived at an understanding that each party would hold the Chief Ministerial position for a six-month period on a rotational basis.¹⁶¹ When BJP's Kalyan Singh was the Chief Minister ('CM'), the BSP withdrew support from this coalition, forcing the incumbent CM to seek the confidence of the House.¹⁶² In fact, Rajaram Pandey's split from the Janata Dal resulted in the Janata Dal (Rajaram Pandey) faction, which eventually voted in favour of the BJP in the confidence motion.¹⁶³ More interestingly, 12 members of the BSP who were being led by Markandey Chand split from the party, and formed a separate faction called the Janatantrik Bahujan Samaj Party ('JBSP'). This faction also voted in favour of the motion of confidence moved by BJP's Kalyan Singh, and some of them were given ministerial positions in the state cabinet.¹⁶⁴ Disqualification petitions were filed against these members of the Uttar Pradesh Legislative Assembly in relation to the ground mentioned under Paragraph 2(1)(b) of the Tenth Schedule (voting against the direction of the party), but the Speaker eventually did not disqualify them.

This trend was also visible in the disqualification petitions filed before the Speaker of the Haryana Legislative Assembly between 1989-2011, as evident from the instances mentioned below:

HARYANA (1989-2011)				
Year	Name of MLA (+ number of MLAs they formed a group with)	Original Party	Split to form	Merged with
1991	Khairati Lal Sharma + 2	Bharatiya Janata Party	Bharatiya Janata Party (K)	Indian National Congress
1991	Hari Singh Nalwa	Janata Dal	Janata Dal (H)	Indian National Congress
1993	Virendra Singh	Janata Dal	Janata Dal (V)	Indian National Congress
1999	Kartar Singh Bhadana + 16	Haryana Vikas Party	Haryana Vikas Party (Democratic)	Haryana Lok Dal (Rashtriya)

In many instances of this nature, splits and mergers happened in quick succession, and sometimes within the same day! For instance, the group comprising Kartar Singh Bhadana and 16 other MLAs split from the Haryana Vikas Party on 13 August 1999, and merged with the Haryana Lok Dal Rashtriya on 16 August 1999, within a matter of 3 days.¹⁶⁵ In a rather adroit utilisation of both exceptions, Mitrasen Yadav from the Uttar Pradesh Legislative Assembly split from the CPI on 4 March 1994, and merged with the Samajwadi Party on the same day.¹⁶⁶ This pattern was also witnessed in the Lok Sabha – Bhupathiraju Vijayakumar Raju split from the Telugu

¹⁶¹ Suman Ojha, 'Confidence Motion: An Emerging Trend in the Uttar Pradesh Legislature' (2010) 71(2) *The Indian Journal of Political Science* 525, 529 ('Ojha').

¹⁶² Ojha (n 161) 529.

¹⁶³ Ojha (n 161) 529-530.

¹⁶⁴ Ojha (n 161) 534.

¹⁶⁵ Malhotra (n 9) 709-710.

¹⁶⁶ Malhotra (n 9) 740, 743.

Desam Party ('TDP') to form the TDP (V) faction on 10 March 1992. Within a few months' time, on 24 August 1992, this faction merged with the Congress (I) Parliamentary Party.¹⁶⁷

Given how these movements across parties happened at quick intervals, it would be reasonable to say that they were not prompted by the ideological convictions of the MLA (or MP) concerned. It would, in fact, be rather worrying if elected legislators' ideologies were susceptible to change within such short periods of time. There is reason to believe that most (or all) of these movements were prompted by legislators' political motivations, and the split/merger exceptions came to their aid to legitimise these movements.

The breakup of national and/or state parties into factions named after the lead defector contributed to the mushrooming of small (and presumably unrecognised) political parties in India. As visible from the examples mentioned above, in several instances, the group of splitting legislators would form a faction which would carry the name of the legislator(s) who (presumably) prompted or led the group into splitting. Rajaram Pandey (from Uttar Pradesh), for instance, created factions of Janata Dal, Lok Janshakti Party, and Samata Party, which were named after him. This practice was visible in Haryana as well – the BJP (K) group was a faction headed by Khairati Lal Sharma who split from the BJP. Needless to say, disqualification did not occur in any case mentioned above despite some of these legislators shifting party allegiances multiple times.

Interestingly, the occurrence of the two recent splits in Maharashtra have brought forth a new practice which can be used to circumvent disqualification under the Tenth Schedule. This practice can be discerned in both the major splits that have recently occurred in Maharashtra (in the Shiv Sena and the NCP). In both these cases, a group mustered the required two-third majority of legislators in the legislature party, formed a separate faction, and then forged alliances with certain other parties to form or join the ruling coalition.

As is known, Paragraph 4 requires either a mandatory merger between two political parties or the creation of an altogether new group. In both the Shiv Sena and NCP splits, the splitting factions (led by Eknath Shinde and Ajit Pawar respectively), did not opt to either merge with an existing political party or establish a new one. Instead, each of the two factions claimed to be the original political party themselves, and formed an alternate government with other political parties.¹⁶⁸

With the deletion of splits, the only exemption available to bulk defectors under the Tenth Schedule is that of merger. In Maharashtra, there has not been a merger either between two original political parties (in this case, between any of the three parties – the BJP, the Shiv Sena or the NCP) or between legislature parties. Essentially, the political developments in Maharashtra cannot be brought within either a conjunctive or a disjunctive reading of the two sub-paragraphs of Paragraph 4. Based on the facts as we know them, neither of the two factions of the Shiv Sena or the NCP merged with the BJP in Maharashtra. Instead, the Eknath Shinde faction of the Shiv Sena formed an alliance with the BJP and formed government in Maharashtra, with Shinde as the Chief Minister.¹⁶⁹ The Ajit Pawar faction of the NCP also joined the Shinde government.¹⁷⁰ In neither of these cases, however, was there a merger within the strict sense of Paragraph 4.

This will be one of the concerns which factions of both Shiv Sena and NCP will have to contend with in the disqualification petitions that have been filed against them. After the split in the Shiv Sena, both the Shinde and the Uddhav Thackeray factions filed disqualification petitions against one another.¹⁷¹ Similar petitions were also

¹⁶⁷ Malhotra (n 9) 171, 172.

¹⁶⁸ Achary (n 109).

¹⁶⁹ Aryan Prakash, 'Eknath Shinde takes oath as Maharashtra CM, Devendra Fadnavis as his deputy' *Hindustan Times* (17 December 2022) <<https://www.hindustantimes.com/india-news/eknath-shinde-takes-oath-as-maharashtra-chief-minister-devendra-fadnavis-as-his-deputy-101656597041770.html>> accessed 11 November 2023.

¹⁷⁰ 'Ajit Pawar joins NDA govt, takes oath as Deputy CM of Maharashtra' *The Economic Times* (2 July 2023) <<https://economictimes.indiatimes.com/news/politics-and-nation/ncp-splits-ajit-pawar-to-join-nda-govt-take-oath-as-deputy-cm-of-maharashtra/articleshow/101431751.cms>> accessed 12 November 2023.

¹⁷¹ Shoumojit Banerjee, 'Sena vs Sena: Speaker begins hearing on disqualification petitions of rival factions' *The Hindu* (Pune, 14 September 2023) <www.thehindu.com/news/national/other-states/sena-vs-sena-speaker-begins-hearing-on-disqualification-petitions-of-rival-factions/article67308075.ece> accessed 13 November 2023.

filed by both factions of the NCP against each other.¹⁷² These petitions are still pending before the Speaker of the Maharashtra Legislative Assembly, Rahul Narwekar. The long-pending disqualification petitions prompted a three-judge bench of the Supreme Court to direct the Speaker to finish hearings against the splitting factions of the Shiv Sena and the NCP by 31st December 2023 and 31st January 2024, respectively.¹⁷³

To sum up, and as evident from the information presented above, the Tenth Schedule has not been able to arrest either single-member defections or defections by legislators in groups. What it has done instead is impinge on several constitutional values and principles, which is an aspect that **Part C** examines.

C. The Tenth Schedule from the prism of the Constitution

The electoral system of a country and the discourse around defection are interconnected.¹⁷⁴ Similar to sports, electoral politics is governed by a set of rules that allows the impartial election of a democratic government, and ensures that such government runs freely. These rules are generally laid down in the Constitution (and certain allied statutes), and cover aspects concerning the conduct of elections.

Defections as well as the anti-defection law have significant implications for the relationship between legislators, voters, and political parties. It is worthwhile to understand how the Constitution approaches this three-way relationship. To that end, this part encompasses a brief analysis of the form of government that India has adopted, how it has worked in practice, and what the anti-defection law means for the relationship between these three entities.

1. Relationship between legislators and constituents

In December 1946, a Constituent Assembly was put in place to deliberate and adopt a set of rules in the Constitution for the governance of the nation after Independence. Among other things, the Constituent Assembly agreed upon a democratic form of government with popular elections based on the First Past the Post ('FPTP') electoral system for electing people's representatives. The FPTP system followed in India, as well as in other democracies like the UK and Canada, is one of the simplest forms of electoral systems. In the FPTP system, each voter gets a single vote, and a candidate wins if they receive the highest number of votes polled in a constituency.¹⁷⁵

In this system, voters vote for the candidates as opposed to the political party.¹⁷⁶ The winning candidate need not secure a majority of the votes – instead, the candidate who is ahead of others and crosses the winning post first is declared the winner. The winning candidate, who usually belongs to a political party, represents the constituency in the Parliament or the state legislative assembly. Through this kind of electoral system, the candidate is recognised as the smallest unit of representation.¹⁷⁷

¹⁷² Faisal Malik, 'Speaker starts sending notices to both factions of NCP MLAs' *Hindustan Times* (Mumbai, 29 October 2023) <<https://www.hindustantimes.com/cities/mumbai-news/speaker-starts-sending-notices-to-both-factions-of-ncp-mlas-101698518683488.html>> accessed 12 November 2023.

¹⁷³ Advay Arora, 'Supreme Court directs Maharashtra Assembly Speaker to conclude disqualification proceedings of Shiv-Sena members by 31 December 2023' (*Supreme Court Observer*, 30 October 2023) <www.scobserver.in/journal/supreme-court-directs-maharashtra-assembly-speaker-to-conclude-disqualification-proceedings-of-shiv-sena-members-by-31-december-2023/> accessed 14 November 2023.

¹⁷⁴ Clemens Spieß and Malte Pehl, 'Floor Crossing and Nascent Democracies - A Neglected Aspect of Electoral Systems? The Current South African Debate in the Light of the Indian Experience' (2004) 37(2) *Law and Politics in Africa, Asia and Latin America* 204, 206.

¹⁷⁵ 255th LCI Report (n 14) 80.

¹⁷⁶ Sethia (n 94) 26.

¹⁷⁷ Sethia (n 94) 28. See, Ritwika Sharma and Mayuri Gupta, 'The Omnipresence of Political Parties in India's Democratic Landscape: Building a Case for Future Constitutionalisation' (2023) VII (2) *Comparative Constitutional Law and Administrative Law Journal* 30 <www.calj.in/archives> accessed 11 September 2023 ('Sharma and Gupta').

During the drafting of the Constitution, various electoral systems were debated by the Constituent Assembly. On 4 January 1949, during a discussion on what kind of electoral system was to be adopted, certain members of the Assembly including Kazi Syed Karimuddin,¹⁷⁸ K. T. Shah¹⁷⁹ and Mahboob Ali Baig Sahib Bahadur¹⁸⁰ lent support to a system of proportional representation over the FPTP system. In fact, Kazi Syed Karimuddin (representing the Central Provinces) sought to move an amendment to replace the FPTP system in single member constituencies, as proposed by the Draft Constitution,¹⁸¹ with 'a system of proportional representation with multi-member constituencies by means of cumulative vote.'¹⁸² He argued that the present system of FPTP was defective and created a 'tyranny of the majority',¹⁸³ and that the system of proportional representation was profoundly more democratic.¹⁸⁴

K. T. Shah (representing Bihar) moved an amendment that supported 'proportional representation through single transferable vote'¹⁸⁵ arguing that such a system would ensure greater reflection of popular will and a democratic government with diverse political voices.¹⁸⁶ Mahboob Ali Baig Sahib Bahadur (from Madras) also moved an amendment supporting proportional representation in the Constituent Assembly.¹⁸⁷ He argued that the system of proportional representation by single transferable vote will enable people and parties in the country, who hold views different from the majority party, to be represented in the legislatures.¹⁸⁸

However, these suggestions were opposed by many, including M. Ananthasayanam Ayyangar, who was elected from Madras.¹⁸⁹ He suggested that proportional representation by means of a single transferable vote was not practicable for India, given how it was administratively difficult to implement in constituencies with large populations. Additionally, the low literacy rates in India would add to unsuccessful implementation of the proportional representation system.¹⁹⁰ B. R. Ambedkar also opposed amendments to substitute FPTP with proportional representation. He was of the opinion that proportional representation presupposes literacy of the voters on a large scale, which India could not boast of at that time.¹⁹¹ Further, he argued that proportional representation was not suited to the parliamentary form of government laid down by the Constitution. He believed that the system of proportional representation could lead to fragmentation of the legislature into smaller

¹⁷⁸ Kazi Syed Karimuddin, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96060> accessed 12 June 2023.

¹⁷⁹ K.T. Shah, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96077> accessed 12 June 2023.

¹⁸⁰ Mahboob Ali Baig Sahib Bahadur, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96152> accessed 12 June 2023.

¹⁸¹ The Draft Constitution refers to the preliminary draft of the Constitution of India which was prepared by the Drafting Committee and was presented before the Constituent Assembly on 4 November 1947.

¹⁸² Kazi Syed Karimuddin, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96060> accessed 12 June 2023.

¹⁸³ Kazi Syed Karimuddin, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96060> accessed 12 June 2023.

¹⁸⁴ Kazi Syed Karimuddin, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96060> accessed 12 June 2023.

¹⁸⁵ K.T. Shah, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96077> accessed 15 June 2023.

¹⁸⁶ K.T. Shah, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96077> accessed 15 June 2023.

¹⁸⁷ Mahboob Ali Baig Sahib Bahadur, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96152> accessed 15 June 2023.

¹⁸⁸ Mahboob Ali Baig Sahib Bahadur, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96152> accessed 15 June 2023.

¹⁸⁹ M. Ananthasayanam Ayyangar, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96231> accessed 16 June 2023.

¹⁹⁰ M. Ananthasayanam Ayyangar, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96231> accessed 16 June 2023.

¹⁹¹ B.R. Ambedkar, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96240> accessed 16 June 2023.

groups, and cause instability of the government.¹⁹² Eventually, proposals to substitute FPTP with proportional representation were rejected. The Constituent Assembly agreed with the views favouring FPTP over proportional representation, and the former was eventually adopted through the Constitution.

In a way, the FPTP system connected the legislator to their electorate directly as the representative of the people in the legislature. However, it is well-known that most legislators in India are fielded as election candidates by a certain political party. Thus, attention should now be geared towards political parties which, undoubtedly, have a significant role to play in India's electoral system.

2. Relationship between legislators and political parties

Political parties have enjoyed prominence in India since before independence. In fact, the pre-independence elections to provincial assemblies, conducted in 1937 and 1946, were fought along party lines.¹⁹³ The members of the Constituent Assembly also belonged to different political parties, and were aware of the significance of political parties in a constitutional democracy.¹⁹⁴ The Constituent Assembly adopted a Westminster-style parliamentary government for India which merges the executive and legislative branches of the government. The executive remains directly accountable to the legislature, with the Prime Minister being directly elected by a majority in Parliament, the Prime Minister appointing their cabinet, and members of the cabinet being selected from among members of the legislature. Thus, a Westminster-style parliamentary government naturally facilitated a government based on parliamentary parties.¹⁹⁵

The Constituent Assembly was conscious of the relationship between the legislators and the political parties they belonged to. Political parties, thus, found several mentions in the debates of the Constituent Assembly. K. T. Shah, while throwing light on the influence exercised by political parties, suggested that the legislature in a Westminster-style parliamentary system is bound to be influenced by party reasons rather than by reasons of principle.¹⁹⁶ In the parliamentary form of government, the appointment of the executive is influenced by party ties where executive positions are distributed on party lines rather than appropriateness for an office.¹⁹⁷ Shibban Lal Saxena (from the United Provinces) agreed with Professor Shah's views on the influence exercised by political parties on the legislature. He pointed out that the legislature in a parliamentary system cannot be independent of the executive, but has to submit to it.¹⁹⁸

Despite this consciousness among the members of the Constituent Assembly, the original text of the Constitution was silent on political parties, and intra-party or party-government relationships. The existence of only three prominent political parties at the time, namely, the Congress, the All India Muslim League, and the All India Hindu Mahasabha is perhaps why the framers did not feel the need to have detailed prescriptions within the Constitution concerning parties.¹⁹⁹ The fragmentation that occurred within the Congress and the subsequent emergence of multiple political parties in the 1960s would have been difficult to anticipate at the time of framing of the Constitution. However, despite the absence of political parties from the Constitution, they remain a crucial vehicle in India's electoral system. Most legislators in India are fielded as party candidates, and run with the party's ideology and manifestoes while campaigning for and contesting elections.

Political parties occupy a unique position among both legislators as well as voters. Although primarily composed in a strictly private manner, parties serve significant public-facing purposes. They are not just a vehicle to win elections

¹⁹² B.R. Ambedkar, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96240> accessed 16 June 2023.

¹⁹³ Sethia (n 94) 16.

¹⁹⁴ Sethia (n 94) 16.

¹⁹⁵ Sethia (n 94) 16.

¹⁹⁶ K.T. Shah, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96077> accessed 15 June 2023.

¹⁹⁷ K.T. Shah, *Constituent Assembly of India Debates*, vol. 7, 4 January 1949 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-jan-1949/#96077> accessed 15 June 2023.

¹⁹⁸ Shibban Lal Saxena, *Constituent Assembly of India Debates*, vol. 7, 10 December 1948 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/10-dec-1948/#93807> accessed 11 June 2023.

¹⁹⁹ Avasthi (n 65) 6.

or to represent politically diverse views, but also form a vital bridge between the state and its citizens, coordinating between public opinion on one hand and the policies of the government on the other.²⁰⁰ For this, every political party maintains a robust local cadre which is responsible for maintaining a consistent level of engagement with the general public.²⁰¹

Political parties, both those in positions of power and those operating outside of it, play a crucial role in the governance and policy-making processes in India.²⁰² In a parliamentary system, the opposition is expected to be a vigilant watchdog, scrutinising governmental policies and decisions. This critical evaluation takes place not only within the parliamentary chambers but also extends beyond. By engaging in constructive criticism, the opposition effectively fulfils its duty of holding the government accountable for its actions.²⁰³

3. Tenth Schedule and the relationship between legislators, constituents, and political parties

The candidate might be the basic unit of representative democracy in India, but it is the political party that lends the required weight to the candidate to contest an election. The FPTP system creates a direct link between a candidate and a voter, making the former representatives in the legislature of all people in their constituency. One must remain mindful of the fact that a majority of candidates who run for office in parliamentary or assembly elections are fielded by a political party. Most candidates are members of a political party, and contest an election on the symbol and election manifesto of their respective parties. In the 17th Lok Sabha elections, for instance, only 4 independent candidates emerged as winners, while the rest of the winners were candidates fielded by a political party.²⁰⁴ Political parties enjoy direct control over the legislators, the legislative business, and the government, which is further compounded by the mandate and working of the Tenth Schedule.²⁰⁵

A *tripartite relationship* between the political party, the candidate (the legislator-in-waiting), and the voter can be imagined in the manner described below:

²⁰⁰ Sharma and Gupta (n 177) 42.

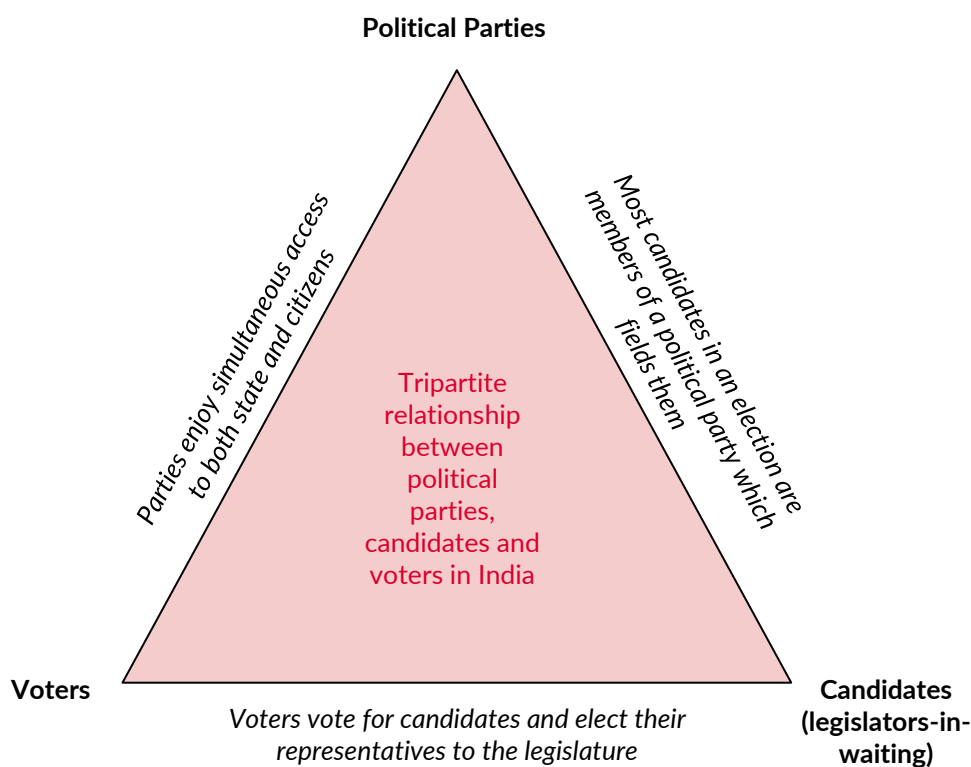
²⁰¹ Rahul Verma, 'Cadres of Political Parties: The Unsung Heroes of Democracy' *Outlook* (May 29, 2022), <<https://www.outlookindia.com/magazine/national/cadres-of-political-parties-the-unsung-heroes-of-democracy-magazine-191473>> accessed 16 October 2023.

²⁰² Sharma and Gupta (n 177) 30.

²⁰³ Devandra Kumar, 'Role of Opposition in a Parliamentary Democracy' (2014) 75(1) *Indian Journal of Political Science* 165-167.

²⁰⁴ 'Lok Sabha polls: Four independent candidates emerge victorious' *Business Standard* (23 May 2019) <https://www.business-standard.com/article/pti-stories/lok-sabha-polls-four-independent-candidates-emerge-victorious-119052302220_1.html> accessed 27 June 2023.

²⁰⁵ Bhatia (n 57) 308.



The tripartite relationship between political parties, candidates and voters

A parliamentary form of government was a conscious choice for India. Ambedkar's rationale for advocating a parliamentary system of government over a presidential system was the offer of more responsibility, even if not as much stability.²⁰⁶ In such a system, a periodic assessment of the government was to be done by the electorate during elections after every five years, while a more frequent assessment is done by the MPs or MLAs through questions, resolutions, no-confidence motions, adjournment motions and debates on addresses.²⁰⁷

However, the intentions of this system have come under stress after the enactment of the anti-defection law. The whip-driven anti-defection legislation has tied the legislators to their political parties and made it impossible for them to exercise their legislative autonomy in accordance with their conscience, common sense or the needs of the constituency. It is not only the autonomy of the legislator, but also the executive's accountability to the legislature that is undermined.

In the tripartite relationship mentioned above, it would be safe to say that political parties continue to remain largely unregulated by both the Constitution as well as other electoral laws. The subject of the Representation of the People Act, 1951 ('RP Act, 1951'), which broadly concerns the conduct of elections to the Parliament and state legislative assemblies, is the individual candidate.²⁰⁸ Some of the few provisions of the RP Act, 1951 which concern parties include the one on registration of political parties with the Election Commission of India ('ECI'),²⁰⁹ on the entitlement to accepting contributions,²¹⁰ and on the declaration of donations above Rs. 20,000.²¹¹ However, there are no provisions which can be used to enforce discipline within and among political parties.

²⁰⁶ B.R. Ambedkar, *Constituent Assembly of India Debates*, vol. 7, 4 November 1948 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-nov-1948/> accessed 6 October 1948.

²⁰⁷ B.R. Ambedkar, *Constituent Assembly of India Debates*, vol. 7, 4 November 1948 (*ConstitutionofIndia.net*) <www.constitutionofindia.net/debates/04-nov-1948/> accessed 6 October 1948.

²⁰⁸ For a more detailed discussion on what the RP Act, 1951 is concerned with, see Sharma and Gupta (n 177).

²⁰⁹ The Representation of the People Act, 1951, s 29A.

²¹⁰ The Representation of the People Act, 1951, s 29B.

²¹¹ The Representation of the People Act, 1951, s 29C.

The Tenth Schedule focuses on the disqualification of errant legislators. The mention of political parties under this law is in the specific context of ascertaining the membership of a legislator whose disqualification is sought.²¹² The law is meant to regulate the behaviour of legislators (and prevent an unprincipled change of party loyalty), and not that of political parties. More importantly, the anti-defection law marks a shift from the candidate-centred approach of Westminster-style parliamentary democracy under the Constitution to a party-centred approach to electoral democracy.²¹³ This party-centred approach has tied legislators to their party loyalties,²¹⁴ and power has been shifted from the individual legislator to the leadership of political parties.²¹⁵ While balancing the need to duly implement the Tenth Schedule with the freedom of speech of elected legislators, courts in India have given practical effect to this shift. For instance, in *Narsingh Rao Gurunath Patil v. Arun Gujarathi, Speaker*,²¹⁶ the Bombay High Court pointed out that a member's freedom of speech is not an absolute freedom.²¹⁷ Commenting on the exalted status of the party, the High Court held that members owe their presence in the legislative House to the political party to which they belong, and for a member to vote against the party suggests a "degree of unreliability" and "disloyalty".²¹⁸ To round off its comments, the Bombay High Court noted that "To join with others in abstaining or voting for other side smacks of conspiracy. For legislator whose party is in the Government, to vote against the Government is to vote against the party; to rebel against the Government is to leave the party."²¹⁹

Under the Tenth Schedule, an elected legislator is potentially subject to disqualification if they choose to cast their vote in opposition to the directives issued by their respective political party's whip. The prospect of disqualification of a legislator for toeing the party line can significantly hamper the ability of a legislator to exercise influence over proposed legislation.²²⁰ In fact, legislators' influence on their party even before a vote is recorded is greatly reduced, presumably because the legislator remains aware that any divergence from their party's stance can potentially lead to disqualification from the legislature. In the FPTP system, the legislator is expected to be the voice of the electorate in the legislature. In effect, and because of the system that the Tenth Schedule creates, the legislator has to remain cognizant of aligning with the views of the political party they belong to – which may or may not be fully aligned with the needs and demands of the electorate. The anti-defection law is believed to have crystallised a "party-controlled" instead of a parliamentary or "voter-focused" vision of democracy.²²¹ It has come to be a protectionist measure for political parties.²²²

Following the insertion of the Tenth Schedule into the constitutional framework, it is evident that the Constitution has acknowledged the authority of political parties in governing legislative affairs within Parliament and state legislatures. This has caused a perceived and an actual decline in the autonomy of legislators, as they have become increasingly beholden to the ideologies and stances espoused by their respective political parties. An oft-quoted instance of this was a vote in the Lok Sabha on 5 December 2012 on the introduction of 51% foreign direct investment in multi-brand retail. While all MPs belonging to the INC voted in favour of the policy, members of the BJP voted against it.²²³ In the context of the same vote, it was reported that both the government and the leading opposition party made attempts to convince the leaders of other parties to vote a certain way, but no such attempts were made to convince individual MPs.²²⁴ This indicated that once the party leaders are convinced, the rest of the

²¹² *VS Rama Devi and SK Mendiratta, How India Votes: Election Laws, Practice and Procedure.* (New Delhi, LexisNexis Butterworths Wadhwa 2013) 547.

²¹³ *Sethia* (n 94) 28.

²¹⁴ *Sethia* (n 94) 28.

²¹⁵ M.R. Madhavan, 'Legislature: Composition, Qualifications, and Disqualifications' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 281 ('Madhavan').

²¹⁶ (2003) 105(3) Bom LR 354.

²¹⁷ (2003) 105(3) Bom LR 354, para 67.

²¹⁸ (2003) 105(3) Bom LR 354, para 67.

²¹⁹ (2003) 105(3) Bom LR 354, para 67.

²²⁰ *Bhatia* (n 57).

²²¹ *Morris* (n 50) 1213. See also, *Miskin* (n 63).

²²² *Morris* (n 50) 1215.

²²³ 'FDI in retail vote: SP & BSP abstain, propel UPA to victory' *The Economic Times* (5 December 2012) <<https://economictimes.indiatimes.com/news/politics-and-nation/fdi-in-retail-vote-sp-bsp-abstain-propel-upa-to-victory/articleshow/17493058.cms?from=mdr>> accessed 6 October 2023.

²²⁴ This example has been cited in Madhavan (n 215) 281.

members would naturally follow the party line. In effect, the elected legislator now owes their primary duty to the political party over all other considerations.

More recently, the Eknath Shinde-led faction of the Shiv Sena issued notices to four MPs belonging to the Uddhav Thackeray-led group for remaining absent during the vote on the Nari Shakti Vandan Adhiniyam, 2023 (or the Women's Reservation Bill, 2023), which was passed earlier this year in a Special Session of Parliament.²²⁵ These MPs were asked to vote in favour of the Bill, and their absence from Parliament during the vote was deemed to be an insult to women!²²⁶ Individually, these MPs may not have been convinced of the merits of the Bill, but as members of a political party, their personal views seemed to matter little.

As it so happens, this is precisely what was feared in the context of the anti-defection law by some of its sceptics. Taking offence to a provision in the Constitution (Forty-eighth Amendment) Bill, 1978 outlawing cross voting by an elected legislator, renowned lawyer and jurist Nani A. Palkhivala emphatically remarked that it would be a great "insult" to MPs and MLAs if they were told that once they become members of a political party, they will have "no right to form judgment and no liberty to think for themselves."²²⁷ As individuals, they would become "soulless" and "conscienceless", driven solely by their political party in whichever direction it wishes.²²⁸

Legislators may or may not want to defend any principled position(s) they have, but the mere existence of Paragraph 2(1)(b) gives the impression of the individual's freedom being pitted against the dictates of the party. Given this particular understanding of this provision, it has been used by legislators to cross the floor in groups, often causing the downfall of democratically elected governments (something that this law was expected to protect against). In recent years, several state governments have witnessed political coups which have resulted from strategically orchestrated defections. Maharashtra, Madhya Pradesh, Manipur, Goa, Arunachal Pradesh, and Karnataka are notable instances where democratically elected governments have been overthrown by way of *en bloc* defections.

Having set out a thorough critique of the Tenth Schedule and the way in which it works (and perhaps, does not work), **Part D** puts forth some thoughts on potential reform.

D. Way Forward

1. Tweaking the Schedule

In some countries other than India, constraints and prohibitions on floor crossing in the legislature have been considered ineffective.²²⁹ In fact, jurisdictions such as South Africa and New Zealand have adopted anti-defection legislation, but eventually, such laws were repealed for being either outdated or unworkable.²³⁰ The efficacy of the anti-defection law in India, designed to curtail the occurrence of defections, has often been called into question due to its ineffectiveness. In a recent development, the Kerala High Court while observing that defections are a bane of Indian democracy, and the anti-defection law has failed to curb defections effectively, suggested imposition of financial penalties on defectors.²³¹ Needless to say, and while there are no immediate

²²⁵ Mrityunjay Bose, 'Shiv Sena issues notice to rival Sena MPs for abstaining from voting during the passing of Women's Reservation Bill' *Deccan Herald* (27 September 2023) <www.deccanherald.com/india/maharashtra/shiv-sena-issues-notice-to-rival-sena-mps-for-remaining-absent-during-voting-on-womens-reservation-bill-2703075> accessed 6 October 2023 ('Bose').

²²⁶ Bose (n 225).

²²⁷ As quoted in Diwan (n 30) 310.

²²⁸ As quoted in Diwan (n 30) 310.

²²⁹ Susan Booyesen, 'The Will of the Parties Versus the Will of the People? Defections, Elections and Alliances in South Africa' *Party Politics* (2006). See also, Miskin (n 63) who recommends against the outlawing of floor crossing in Australia.

²³⁰ Janda (n 11) 5. For a brief discussion on the anti-defection legislation in South Africa and New Zealand, see Miskin (n 63) 28-33.

²³¹ 'HC suggests prescribing heavy penalties for defection', *The Hindu* (Kochi, 06 November 2023) <www.thehindu.com/news/cities/Kochi/hc-suggests-prescribing-heavy-penalties-for-defection/article67504995.ece> accessed 6 November 2023.

proposals to amend the Tenth Schedule,²³² concerns persist over the utility and efficacy of an anti-defection law, especially when its drawbacks appear to surpass its advantages.

Additionally, defections have profound political ramifications. In that regard, it is pertinent to inquire whether the enactment of legislation, whether situated within the constitutional framework or external to it, represents the most efficacious approach to tackle this issue. Especially in light of the fact that India has witnessed defections since as long ago as 1937, perhaps the answer to the problem does not lie only in the text of the anti-defection law, but also within political dynamics more generally. Simply put, there is a need to look at comprehensive reform of the operational dynamics of political parties, rather than confining focus solely on the isolated act of floor-crossing.

At this point, it is beyond the remit of this report to comprehensively address issues of large-scale political party reform. However, assuming India's anti-defection law is meant to stay, there is merit in reiterating some of the recommendations that have already been proposed for reforming the Tenth Schedule. A brief overview of key proposals for reforming the Tenth Schedule is as follows:

SUMMARY OF RECOMMENDATIONS				
Recommended by	On grounds for disqualification under the Tenth Schedule	On curbing bulk defections	On deciding authority	Others
Law Commission of India [2015]	-	-	President in case of MPs and Governor in case of MLAs who shall act on the advice of the ECI	-
Second Administrative Reforms Commission [2007] ²³³	-	-	President in case of MPs and Governor in case of MLAs who shall act on the advice of the ECI	-
National Commission to Review the Working of the Constitution [2002] ²³⁴	-	Deletion of Paragraph 3 (splits in parties)	ECI	Amend the Tenth Schedule to provide that turncoat legislators (individuals and groups) must resign from their parliamentary or assembly seats and contest fresh elections Defectors should

²³² 'No proposal to amend anti-defection law: Govt in Lok Sabha', *The Economic Times* (28 July 2023) <<https://economictimes.indiatimes.com/news/politics-and-nation/no-proposal-to-amend-anti-defection-law-govt-in-lok-sabha/articleshow/102207727.cms>> accessed 5 November 2023.

²³³ Second Administrative Reforms Commission, *Ethics in Governance* (Fourth Report, Government of India 2007), para 2.1.3.2 <<https://darp.gov.in/sites/default/files/ethics4.pdf>> accessed 6 November 2023.

²³⁴ NCRWC Report (n 98), paras 4.18.1-4.18.2.

SUMMARY OF RECOMMENDATIONS				
Recommended by	On grounds for disqualification under the Tenth Schedule	On curbing bulk defections	On deciding authority	Others
				<p>be debarred to hold any public office of a Minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until, the next fresh elections (whichever is earlier)</p> <p>The vote cast by a defector to topple a government should be treated as invalid</p>
Law Commission of India [1999] ²³⁵	-	Deletion of Paragraph 3 (splits in political parties) and Paragraph 4 (mergers between political parties)	President in case of MPs and Governor in case of MLAs who shall act on the advice of the ECI	<p>Replace definition of 'original political party' with a definition of 'political party'</p> <p>Delete definition of 'legislature party'</p>
Committee on Electoral Reforms [1990] ²³⁶	Must be limited to (a) voluntary giving up by an elected member of their membership of the political party to which they belong, and (b) voting or abstention from voting by a member contrary to their party direction or whip	-	President in case of MPs and Governor in case of MLAs who shall act on the advice of the ECI	-

²³⁵ Law Commission of India, *Reform of the Electoral Laws* (170th Report, Ministry of Law and Justice, Government of India 1999), paras 3.4.1-3.4.7
<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082424.pdf> accessed 6 November 2023 ('170th LCI Report').

²³⁶ Committee on Electoral Reforms, *Report of the Committee on Electoral Reforms* (Ministry of Law and Justice, Government of India 1990) 60
<https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf> accessed 6 November 2023.

SUMMARY OF RECOMMENDATIONS				
Recommended by	On grounds for disqualification under the Tenth Schedule	On curbing bulk defections	On deciding authority	Others
	<p>only in respect of a motion of vote of confidence or a motion amounting to no-confidence or Money Bill or motion of vote of thanks to the President's address</p> <p>Nominated members of the House concerned should incur disqualification if they join any political party at any period of time</p>			

Some of the most urgent reforms which the Tenth Schedule requires are reiterated in this part. Currently, the most unworkable provision in the Tenth Schedule is Paragraph 4, or the merger exception. Much of this report is meant to advocate for the deletion of this paragraph from the Tenth Schedule. While meant to protect principled defections from one party to another, **Part B** reveals that this exception enables unethical floor crossing to escape the clutches of the Tenth Schedule. Paragraph 4 has ensured that the Tenth Schedule remains unable to arrest defections by groups as well as individual members. In fact, this exception has been consistently used as a free pass by legislators who claim to be losing out on their individual freedom of speech, but who in reality may want to switch parties for political gains. Given the form it is drafted in, and the manner in which it is interpreted and practised, it is best that Paragraph 4 of the Tenth Schedule be deleted.²³⁷

The operation of the anti-defection legislation in India has demonstrated the necessity of striking a delicate balance between cohesion within the party and the promotion of a diverse range of perspectives in politics. A critical suggestion in that regard that has come from several quarters,²³⁸ including from one of the Speakers themselves, is that cross-voting should be penalised not in all but only some cases. Former Lok Sabha Speaker Shivraj Patil, while deciding the petition filed in the Janata Dal split between 1992-1993 asked if it was necessary to ask MPs and MLAs to vote in a particular manner in all cases.²³⁹ Patil recommended that the Tenth Schedule must be modified to include a list of matters in which MPs and MLAs can be directed to vote in a certain manner. On such matters, parties can direct a certain way in which voting is meant to happen, while in the rest MPs and MLAs should remain free to vote in whichever manner they choose.²⁴⁰ This echoes the sentiment of a Private

²³⁷ See, Nikhil Parikshith, 'A case for removal of Paragraph 4 of the Tenth Schedule to the Constitution' (*The Leaflet.in*, 4 March 2022) <<https://theleaflet.in/a-case-for-removal-of-paragraph-4-of-the-tenth-schedule-to-the-constitution/>> accessed 6 October 2023.

²³⁸ Madhavan (n 215) 281; Sanyal (n 27). A Bill to this effect was also tabled by Congress MP Mr. Manish Tewari, referred to at n 241 below.

²³⁹ Kashyap 2011 (n 21) 286.

²⁴⁰ Kashyap 2011 (n 21) 286.

Members' Bill introduced in 2010 to amend the Tenth Schedule, which sought to apply the anti-defection law to only motions of confidence (or want of confidence) in the Council of Ministers, adjournment motions, motion in respect of financial matters, and Money Bills.²⁴¹ A motion of no-confidence can potentially lead to falling of the government, in case they lose.²⁴² It is hoped that if amended this way, the provisions of the Tenth Schedule would better align with the individual freedoms of legislators as well as Indian parliamentary democracy.²⁴³

A compelling issue that goes to the heart of the efficacy of the Tenth Schedule relates to the Speaker being the decision-making authority. The impartiality of the Speaker in deciding disqualification petitions under the Tenth Schedule has been repeatedly questioned.²⁴⁴ The Tenth Schedule does not mandate a time period within which Speakers are expected to decide disqualification petitions, though the Supreme Court has held that Speakers must decide within a reasonable period of time.²⁴⁵ Speakers have been chided for intentionally delaying hearings/proceedings under the Tenth Schedule, and not concluding such matters within a reasonable period of time. Recently, a three-judge bench of the Supreme Court expressed dissatisfaction with the Speaker of the Maharashtra Legislative Assembly for not laying down an appropriate time schedule, one which could result in a foreseeable conclusion in the disqualification proceedings.²⁴⁶ The Supreme Court's indictment came in the context of disqualification petitions filed against the Eknath Shinde and Ajit Pawar factions of the Shiv Sena and the NCP, respectively.²⁴⁷ While imposing strict timelines are a must, there is a larger case to be made for Speakers to be divested of the power to decide under the Tenth Schedule. Given that Speakers are themselves part of a political party, it may not be possible for them to completely abjure all party considerations while deciding petitions under the Tenth Schedule.²⁴⁸ Older policy recommendations have also hinted towards vesting the power to decide disqualification petitions under the Tenth Schedule with other institutions, such as the President or the Governor (as the case may be) acting on the advice of the ECI.²⁴⁹ Given how the office of the Governor itself remains the subject of constant scrutiny, perhaps the institution of the ECI (acting as an impartial tribunal) could be better suited to entertain disqualification petitions under the Tenth Schedule. This could lend a semblance of impartiality in the way these petitions are decided.

2. The larger picture

There is a larger point to be made in the context of regulation of political parties more generally, and not just in the context of individual floor crossing. Although political parties have emerged as pivots to democratic governance, they have remained largely unregulated in India. The insertion of the Tenth Schedule may have led to indirect constitutional recognition for political parties in India, but only with respect to the limited aspect of legislative floor crossing by individual legislators (or groups of legislators). As discussed in **Part C** of the report, the mention of political parties under the Tenth Schedule is in the specific context of ascertaining the

²⁴¹ This Bill was introduced by Congress MP Mr. Manish Tewari. It was called the Constitution (Amendment) Bill, 2010, and can be accessed here - <<http://164.100.47.4/billtexts/lbills/asintroduced/411ls.pdf>> accessed 6 October 2023.

²⁴² It is worth mentioning that in 2008, 6 Samajwadi Party MPs were disqualified by the then Lok Sabha Speaker Late Mr. Somnath Chatterjee for voting against the party whip, and against the motion of confidence moved by the Prime Minister. See, HT Correspondent, 'Samajwadi Party expels six MPs' *The Hindustan Times* (New Delhi, 25 July 2008) <www.hindustantimes.com/india/samajwadi-party-expels-six-mps/story-alvwCJ9JnbhUsz7JO9WCiO.html> accessed 8 November 2023. For the text of three of these decisions given by the Speaker (concerning MPs Jai Prakash, SP Singh Baghel and Afzal Ansari), see, Kashyap 2011 (n 21) 323, 325, 375.

²⁴³ This thought was expressed by Speaker Shivraj Patil as well in the verdict on Janata Party split. See, Kashyap 2011 (n 21) 286.

²⁴⁴ 255th LCI Report (n 14) 93-98.

²⁴⁵ *Keisham Meghachandra Singh v. The Hon'ble Speaker, Manipur Legislative Assembly*, 2020 SCC OnLine SC 55.

²⁴⁶ *Jayant Patil v. The Speaker, Maharashtra State Legislative Assembly*, WP (Civil) No. 1077/2023, Order dated 17 October 2023.

²⁴⁷ *Jayant Patil v. The Speaker, Maharashtra State Legislative Assembly*, WP (Civil) No. 1077/2023, Order dated 17 October 2023.

²⁴⁸ 255th LCI Report (n 14) para 5.19.2.

²⁴⁹ 255th LCI Report (n 14) para 5.20. See, paras 5.19.2-5.19.6 for other policy recommendations on who the deciding authority should be for petitions filed under the Tenth Schedule.

membership of a legislator whose disqualification is sought. The anti-defection law is, thus, meant to regulate the behaviour of legislators and not that of political parties.

Perhaps the pathway for reform of the anti-defection law should start with establishing certain constitutional principles which guide the working of political parties.²⁵⁰ Principles for working of parties can be enshrined in the Constitution, while detailed processes can be set out in the text of specific laws.²⁵¹ Broad principles such as democracy, representativeness, transparency, and integrity can inform the working of political parties.²⁵² Implementation of these principles can be brought about by relevant prescriptions in specific laws. This can ensure a more holistic approach for reform of political parties in India, which will hopefully serve as a kickstart for reform of the Tenth Schedule.

In the absence of a comprehensive legislative framework regulating the conduct of political parties, defections are often engineered on the premise of absence of inner-party democracy in the original political party of a turncoat legislator. The NCRWC Report has emphasised that electoral reforms cannot be effective without reforms in the political party system.²⁵³ Internal democracy within parties is an important plank on which reform of the political party system rests. As mentioned in an earlier part of the report, there is no statutory provision in India which can enforce internal democratic regulation of political parties.²⁵⁴ Section 29A concerns the registration of political parties with the ECI; sub-section (5) of section 29A broadly requires political parties to “bear true faith and allegiance to the Constitution of India”, and to “uphold the sovereignty, unity and integrity of India”.²⁵⁵ The ECI has prescribed guidelines and an application format for the registration of political parties under section 29A of the RP Act, 1951.²⁵⁶ According to these guidelines, an application for registration of a party must be accompanied by a copy of the party constitution (among other relevant documents).²⁵⁷ As the 255th LCI Report notes, these guidelines are silent on certain crucial aspects, such as candidate selection, the need to hold periodic internal elections for office bearers, and regulation of internal functioning of already registered parties.²⁵⁸ Further, there are no statutorily prescribed penalties for non-compliance with either the party’s own Constitution or the ECI’s guidelines.²⁵⁹ Effectively, despite their oversized role in representative democracy in India, there may not be sufficient means by which to hold political parties accountable for their acts or omissions.

To remedy this situation, the 255th LCI Report recommended the insertion of a standalone part in the RP Act, 1951 – Part IVC – which deals with regulation of political parties.²⁶⁰ This chapter is meant to provide statutory

²⁵⁰ Sharma and Gupta (n 177) 55.

²⁵¹ Sharma and Gupta (n 177) 54-55. See also, Law Commission of India, *Report on Electoral Reforms* (255th Report, Ministry of Law and Justice, Government of India 2015) para 5.19.2.

²⁵² Sharma and Gupta (n 177) 54-55.

²⁵³ NCRWC (n 98) para 4.29.

²⁵⁴ 255th LCI Report (n 14) para 3.8.

²⁵⁵ The Representation of the People Act, 1951, section 29A(5) – “*The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.*”

²⁵⁶ ‘Guidelines and Application Format for Registration of Political Parties under section 29A of the Representation of the People Act, 1951’ *Election Commission of India* <[https://eci.gov.in/uploads/monthly_2018_09/15754019_PoliticalPartiesRegistrationGuidelines\(English\)_pdf.7e6eae0a4c28d1f5e138b3ef762bb77](https://eci.gov.in/uploads/monthly_2018_09/15754019_PoliticalPartiesRegistrationGuidelines(English)_pdf.7e6eae0a4c28d1f5e138b3ef762bb77)> accessed 6 November 2023 (‘Registration Guidelines’).

²⁵⁷ Registration Guidelines, Guideline No. 3.

²⁵⁸ 255th LCI Report (n 14) para 3.11.

²⁵⁹ As per the Supreme Court’s judgment in *Indian National Congress (I) v. Institute of Social Welfare*, (2002) 5 SCC 685, para 41(2) – “*The Election Commission while exercising its power to register a political party under Section 29-A of the Act, acts quasi-judicially and decision rendered by it is a quasi-judicial order and once a political party is registered, no power of review having been conferred on the Election Commission, it has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration.*”

²⁶⁰ 255th LCI Report (n 14) 77-79. Prior to this, even the 170th LCI Report had hinted at the need for regulation by law of the “formation and functioning of political parties.” See, 170th LCI Report (n 235) para 3.1.2.

backing to several actions which political parties are expected to mandatorily perform (in the interest of greater internal democracy), such as framing a constitution, electing an executive committee (for the party), selecting candidates who are to contest elections to the Parliament or state assemblies, and conducting regular elections within the party at all levels.²⁶¹ Further, and as part of this proposal, the 255th LCI Report recommended granting the ECI powers to impose monetary penalty or withdraw the registration of a political party in case it fails to comply with any of the provisions of the proposed Part IVC.²⁶² These or similar statutory reforms can bolster internal democracy and transparency, which in turn can usher in greater financial and electoral accountability.²⁶³

While it would have been remiss to not allude to the need for better regulation of political parties, making detailed prescriptions (and recommendations) on that front is beyond the scope of this report. Older policy recommendations, including the ones made by the 255th LCI Report, can be crucial in guiding the reform of political parties and the political party system in India. There are enough and more legal solutions and reforms that could be proposed and implemented – what eventually will be required is the political will to make these reforms a reality.

²⁶¹ 255th LCI Report (n 14) 77-79, for sections 29L, 29M, 29O and 29P of the proposed Part IVC of the RP Act, 1951.

²⁶² 255th LCI Report (n 14) 79, for section 29Q of the RP Act, 1951.

²⁶³ 255th LCI Report (n 14) para 3.17.1.

www.vidhilegalpolicy.in

Vidhi Centre for Legal Policy
A-232, Defence Colony
New Delhi - 110024

011-43102767/43831699

vidhi@vidhilegalpolicy.in