

How India's anti-defection law facilitates defection

Two major lacunae in the law's provisions have reduced it to a paper tiger.

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Representational image | A session of the Lok Sabha in progress | PTI File Photo

Recent political developments have left many questioning the efficacy of India's anti-defection law, which is part of the Tenth Schedule of the Constitution. Two major lacunae in its provisions have reduced it to a paper tiger.

The first concerns mergers.

According to Paragraph 4 of the Tenth Schedule, disqualification on grounds of defection is made to not be attracted in case of "merger" between political parties. Sub-paragraph (1) of Paragraph 4 states that a merger can only take place when the "original political party" merges with another political party, and per sub-paragraph (2), a merger of original party will be deemed to have taken place only if two-thirds of its "legislature party" members have agreed to the merger.

The problem here lies in whether sub-paragraphs (1) and (2) of Paragraph 4 must be read conjunctively or disjunctively. If read conjunctively, the original political party must first merge into another party before its legislative position is even taken into consideration. A merger merely effected by its elected members in the Legislature, without the original political party merging, should then still attract disqualification notwithstanding they are two-thirds of the legislative strength in the House. However, it is not how it has been read routinely by Courts in India.

For example, in 2019, 10 MLAs out of the 15 member-strong Congress Legislature Party defected to the BJP in Goa. These 10 MLAs claimed to be two-thirds of the Congress legislative party in the Goan Assembly. The Speaker dismissed disqualification petitions against the defectors citing a valid merger between the Congress and BJP legislature parties. The Speaker's decision came up for challenge in *Girish Chodankar vs Speaker, Goa Legislative Assembly* (2022) before the Bombay High Court. The Court held that a "deemed merger" between the two parties had occurred since the 10 Congress MLAs comprised two-thirds of their legislature party. This was despite the fact that there was no factual merger of the Congress and BJP parties at the national level.

Paragraph 4(2) begins with the expression "for the purposes of sub-paragraph (1)". However, the court in its judgement only looked at sub-paragraph 2 of Paragraph 4, which is not parallel with the full content and context of Paragraph 4. Going by this judgement, the defecting members will be considered the original party, which precisely was the case in Maharashtra's Shiv Sena split in 2022 and NCP split in 2023 besides the recent TMC split in West Bengal in 2026, none of which involved a merger. Given the line of decisions from *Kihoto Hollohan vs Zachillhu* (1992) to *Subhash Desai vs Principal Secretary, Governor of Maharashtra* (2023), which have held the Speaker to be final authority in deciding questions of defection, political prejudice has resulted in rebel groups circumventing disqualification while evading merger requirements too.

The second lacunae relates to the timeline for the Speaker's decision.

In *Kihoto Hollohan*, Paragraph 6 of the Tenth Schedule granting finality of order of Speaker/Chairman was held valid. A major omission of the judgement is non-prescription of a timeline to take decisions on the question of disqualification. In practice, a partisan Speaker let defection petitions languish until the end of the Assembly's term.

In *Nabam Rebia vs Deputy Speaker (2016)*, the SC held that a Speaker cannot decide on the disqualification when there is a pending no-confidence motion against them.

This created a vacuum for mischief by defectors and was exploited in Maharashtra's Shiv Sena split in 2022 when rebel camp MLAs moved a no-confidence motion against the then speaker of the legislative assembly, paralysing him from deciding on their disqualifications. The government was soon toppled and the newly elected speaker, owing to lack of a constitutional deadline for concluding disqualification proceedings, deferred his decision. Finally, SC stepped in. It vindicated the election of the new speaker and reaffirmed that disqualification of rebel MLAs was entirely up to the new speaker of the assembly. Subsequently, a deadline was set by SC for the speaker to decide on the petitions.

It is not difficult to see how the two lacunae play into each other. Given a partisan chairman/speaker is not constitutionally bound to decide individual disqualifications anytime sooner, he can wait till an opposition party loses two-thirds of their legislative party strength, thereby breaching the threshold to officially constitute a merger or, even better, label the rebel bloc to be the 'original party'.

In case the two-thirds numbers become difficult to achieve, the recalcitrant legislators may cleverly claim before the speaker to have never left their original party and circumvent defection, as happened in Telangana in March 2026. Even otherwise, they can resign and return to assembly through bye-

elections. Unless overhauled, the anti-defection law is expected to facilitate defections now more than it ever did.

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