

## PREVENTING DEFECTION IN INDIA

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### ABSTRACT

*This practice of 'party hopping' is not only unjust to voters, but it also deprives fairly elected representatives of the ability to operate without fear of being thrown out of their post because another member of their political party chooses to switch loyalties in favor of a more prominent role or for advantages, which may be monetary or a promise to get some work done in exchange. The reason why Indian governments are so unstable and volatile is because of this very unethical and corrupt behavior. Political parties have been known to use radical tactics, such as relocating MLAs to a hotel or resort to keep them from jumping ship when they have to prove their majority in the Legislative Assembly.*

### Introduction

Anti-defection legislation have recently been in the headlines for a variety of reasons, including the fact that several MLAs and MPs from throughout the nation have either started or been accused of defection under the Anti-Defection Act, 1985. The Anti-Defection Act of 1985 was enacted in response to a number of incidents that led to a change in state governments. To fully comprehend the objective of anti-defection legislation, we must first understand why it was adopted in the first place. Changing political sides is not a new notion, but it is becoming more common. We used the Westminster system of democratic representation to develop the Constitution, which Britain used to form its legislature. The leader of the government is chosen by a majority of the legislature. This is essentially the definition of democracy as envisioned by the framers of the Constitution. Legislators' commitment to their constituents is prioritised. It's worth noting that the Constituent Assembly did not recognise the party system when the Constitution was first drafted.

Multiple groups within the Congress party began to form after Nehru era, as did increasing representation of opposing parties. Furthermore, India went through the most chaotic era of Emergency, which put the Indian constitution and parliament to the test. Floor crossing became a prevalent problem for both parties in the 1970s, when any member unexpectedly changed his or her attitude right before a vote in parliament, most likely owing to monetary incentives.

In India, this trend of switching parties has been dubbed "Aaya Ram Gaya Ram" by the media. It gained popularity after a MLA from Haryana, Gaya Lal, switched political parties three times in a matter of hours, leaving the Indian National Congress (INC) to join the United Front Coalition and then returning to the INC. Birendra Singh, a senior Congress politician, held a press conference to announce his return, saying, "Gaya Ram ab aaya Ram," which translates to "Ram departed, Ram returned." When another leader, Mr. Bhajan Lal, who formed government with the Janata Party after the Legislative Assembly Elections in Haryana in 1980, but decided to join the Indian National Congress when Mrs. Indira Gandhi won the Lok Sabha Elections a year later, this quote was quickly popularised by the media and is still used whenever a member of a political party switches allegiance.<sup>1</sup>

This drew the attention of all political parties in Parliament, resulting in the unanimous acceptance of a motion to establish a committee to examine and report on Defection. The 32nd Constitutional Amendment Bill was promulgated in response to the Commission's recommendations, which suggested barring legislators who have defected from continuing their ministerial responsibilities. With the dissolution of the Lok Sabha, the 32nd Amendment Bill lapsed. Following this attempt, the 48th Constitutional Amendment Bill was introduced before the Parliament, for the same time period and under the same conditions as the statute that had been provided under 32nd Amendment Bill.<sup>2</sup> Mr. Rajiv Gandhi used his majority in Parliament to pass the 52nd Amendment Bill, which added the Tenth Schedule to the Indian Constitution, to end the practice of switching parties and create a stable government that respects the will of the people who may have elected their representatives based on their political party affiliation. The 1985 Anti-Defection Act was enacted in order to discourage 'party hopping.'

## Anti-Defection Laws

### Historical Background

With the 52nd Amendment to the Constitution of India being enacted in 1985, the anti-defection law is enshrined in the 10th Schedule ('Schedule X'). As many defections occurred in one year as there were in the four Lok Sabha prior to it, which prompted India to pass this law. Political parties were to be stabilized with the amendment by prohibiting floor crossings in parliament and strengthen parliamentary practice. The primary effect of such a constitutional measure was to prevent parliamentarians elected under the symbol of a political party from later

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<sup>1</sup> Himanshu Shekhar, 'How Haryana gave the term 'Aaya Ram Gaya Ram to India politics' (*IndiaTV News*, 10 October 2019) < <https://www.indiatvnews.com/elections/haryana-assembly-polls-2019-how-haryana-gave-the-term-aaya-ram-gaya-ram-to-indian-politics-555590> >

<sup>2</sup> S. Sanal Kumar, 'Anti-Defection Laws in India: Its flaws and its falls' (*Bar and Bench*, 01 August 2019) < <https://www.barandbench.com/columns/anti-defection-laws-in-india-its-flaws-and-its-falls> >

choosing to leave the party or to change their party affiliation. As for independent members of Parliament, they are liable upon joining a political party after being elected.<sup>3</sup>

Former Prime Minister Rajiv Gandhi once said that the democratic process is determined by the platform on which we are elected. We will be cheating the voter if we change our platform, so we should go back to the voter and let them decide on our new platform.<sup>4</sup> Political defections are described as a "evil" that must be dealt with in order to maintain the foundations of democracy in the country, according to the Statement and Objects of the Constitution (52nd Amendment) Act, 1985<sup>5</sup>. The act aims to put an end to this political evil that has existed for decades within the Indian political system. Use of such strong words depicts Political Defections as an act which is innately against the values and spirit of democracy. Although the intention of legislature was to eliminate this immoral act, the Anti-Defection laws has been criticized by various authors and Constitutional law experts as it crushes the freedom of speech and expression of the elected members of the Houses of Parliament and State legislative assemblies.

### Functioning of the Act

The Act empowers the presiding officer of any legislative body i.e the Chairman or the Speaker to disqualify any member of such legislative assembly or council on the ground of defection. As per the 1985 Act, Defection can be of two kinds; i. When a member of a political party voluntarily renounces his membership of the party from which he was elected as a member of that house, or ii. if such member refuses to vote or votes against the direction issued by his 'original political party'. MLAs or MPs who leave the party will be disqualified and forfeit their membership if they do so.

According to the Indian law on defection, safety measures are provided so that neither the government nor the opposition are subject to instability caused by changes in allegiances. The anti-defection laws may, however, be valued more by political party leaders for a more sinister reason - ensuring control of their members. Advocates tend not to mention this effect.<sup>6</sup>

### Purpose of Anti-Defection Laws

Defection is the sabotage of election mandates by politicians who are voted under one group's banner but later find it much more advantageous to switch to some other attributable to the temptation of cabinet slots or monetary gains. Representatives who alter their party allegiance or join a party after being elected on party policies or as independents betray the trust of voters. For

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<sup>3</sup> Kartik Khanna and Dhvani Shah, '*Anti-Defection Law; a death Knell for Parliamentary dissent?*' (2012) 5 NUJS L. Rev. 103

<sup>4</sup> Dr. Pardeep Kumar, '*Politics of Defection in Indian Political System*', (2016) 5 Journal of Global research & Analysis 138

<sup>5</sup> Constitution (52nd Amendment) Act, 1985 < <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-fifty-second-amendment-act-1985>>

<sup>6</sup> G.C. Malhotra, '*Anti-Defection Law in India and the Commonwealth*' (2005) Metropolitan Book Co. Pvt. Ltd., New Delhi

most contests, the majority is more influenced by the candidate's political identity than by his or her personal reputation. A defector should be supposed to seek a new mandate from the voters in order to be fair to the electorate.<sup>7</sup>

This practise of 'party hopping' is not only unjust to voters, but it also deprives fairly elected representatives of the ability to operate without fear of being thrown out of their post because another member of their political party chooses to switch loyalties in favour of a more prominent role or for advantages, which may be monetary or a promise to get some work done in exchange. The reason why Indian governments are so unstable and volatile is because of this very unethical and corrupt behaviour. Political parties have been known to use radical tactics, such as relocating MLAs to a hotel or resort to keep them from jumping ship when they have to prove their majority in the Legislative Assembly.

As a result of defections, legislators engage in horse-trading, clearly counteracting the mandate of a democratic setup. Money is often offered to legislators as a means of luring them away from their positions. Accepting money for doing any act in the House is regarded as unethical. Money always plays a large role in legislators' decisions, as evidenced by the Cash for Query incident that happened in 2005. Parliamentarians accepted money from stakeholders and raised questions in Parliament apparently in the interests of those who donated.<sup>8</sup>

#### Criticism of the existing Anti- Defection Legislation

By demanding absolute loyalty in voting, party leaders rob legislators of any voice (dissenting opinions). This makes frustrated legislators seek an exit from the party<sup>9</sup>. In 2020, Member of Legislative Assembly of Rajasthan and a senior leader of the Indian National Congress, Mr. Sachin Pilot filed a case in the High Court of Rajasthan questioning the validity of Sec. 2 (1) (a) of the Anti-Defection Act, 1985. Mr. Pilot argued that merely disagreeing with the leadership of a Party cannot amount to Defection. The Supreme Court bench headed by Justice Arun Mishra while hearing the matter agreed with Mr. Pilot's contention and rightly pointed out– “Can a person elected by people not express his dissent? Voice of dissent cannot be suppressed. In a democracy, can somebody be shut down like this?”<sup>10</sup>

Prior to the Constitution (91<sup>st</sup> Amendment) Act, 2003, the Anti-Defection laws established method for exempting legislators from infractions. Only if one-third of a party's members quit, MLAs or party leaders/members, can get around the anti-defection statute under the omitted paragraph of the Tenth Schedule. This reflects positively on the intention of the Parliament while

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<sup>7</sup> P.M. Kamath, 'Politics of Defection in India in the 1980s', (1985 25 Asian Survey 1039-1054

<sup>8</sup> S. Sanal Kumar, 'Anti-Defection Laws in India: Its flaws and its falls' (*Bar and Bench*, 01 August 2019) <<https://www.barandbench.com/columns/anti-defection-laws-in-india-its-flaws-and-its-falls>>

<sup>9</sup> Rajen Subramanian, 'Developing and Testing a theory of Legislative Party Fragmentation', (2008) University of Wisconsin-Madison

<sup>10</sup> Ashutosh Tripathi, 'A mini win for Sachin Pilot in Supreme Court, over to HC tomorrow', (*Hindustan Times*, 23 July 2020)

laying down the principles of Anti-Defection, was to create a set of rules in order to do away with this corrupt and immoral practice of defection while at the same time protecting legitimate cases of dissent within these political groups.

The Freedom to vote, which is granted by the Constitution under Article 105 to elected representatives in the house, is so sacred that even a court of law cannot dispute or intervene in the debate over any vote in the house. How can members of the House be held accountable for voting on any matter to a political group that is not a constitutional entity when they are immune from any proceedings in any court that is a constitutional authority? In spite of the appalling performance of the Indian legislature, civil society agents and the media have not been unaware. The low attendance and participation of the members of the house are being blamed on the members' declining interest in legislative affairs. Individual parliamentarians' value has been diminished because they do not engage in parliamentary affairs on a regular basis. As a consequence, Paragraph 2(1)(b) reduces the need for debate significantly. In light of the fact that members of one party are effectively ordered to vote in a certain manner, a legislator has no incentive to even consider a position contrary to that decided by the party leadership.<sup>11</sup>

A vote, according to Merriam-Webster, is a formal statement of opinion or will in reaction to a proposed resolution, particularly one provided as a signal of acceptance or disapproval of a proposal, motion, or political candidate. As a result, voting is a means of expression, and freedom of speech of Members of Parliament is protected by the Constitution under Article 105(1) and Article 105(2) which provides for the Powers, Privileges, and Immunities of Parliament and its Members.

In order to make the Defection laws more efficient, the Presiding officer needs to play a fair and proactive role in order to maintain the sanctity of the Parliament and Legislative Assemblies of respective states, but since the Chairman/Speaker is also a member of the Political Party in which is power so he/she feels obligated to agree with the senior leadership or the majority opinion of the Political party itself. The Anti-Defection Act does not provide for any time period for deciding any disqualification plea and the decision is usually based on the whims and fancies of the Speaker/Chairman which might be influenced by the leaders of his political party.

#### Judicial Pronouncements with respect to the Anti-Defection Laws

One of the landmark decisions given by the apex court of India in regard to Anti-Defection laws is *Kihoto Hollohan v Zachillhu* and others. By a majority decision, the Constitution Bench found that unprincipled and unethical political defections must be limited, and legislators' freedom of expression might be fairly limited for the greater good of the country. Legislators who ran and won elections on the basis of their political party's practices and initiatives are not allowed to cross the floor in the middle of the government's tenure. Substantial political defection added to

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<sup>11</sup> Kartik Khanna and Dhvani Shah, 'Anti-Defection Law; a death Knell for Parliamentary dissent?' (2012) 5 NUJS L. Rev. 103

the political instability, which in turn poses a danger to democracy, making the notion of democracy a laughingstock at times.<sup>12</sup>

The court while deciding the matter also declared the power of Presiding officer in adjudicating the cases of disqualification as Constitutional but such decision cannot be immune to the Court's power of Judicial review therefore paragraph 7 of the Tenth Schedule of the Constitution is invalid which put up a bar upon jurisdiction of Courts in the matters of disqualification. In *Sri Rajendra Singh Rana versus Swami Prasad Maurya & Ors*<sup>13</sup>, the Supreme Court's constitutional bench made this issue quite obvious. While progress has been achieved, the judiciary is mostly powerless in the pre-decisional stage since it was not given a defined role in the anti-defection legislation. As a result, court involvement hasn't always been an efficient way of settling anti-defection matters quickly.<sup>14</sup>

The *Kihoto Hollohan* decision emphasised the need of providing incentives for MPs to debate. This capacity becomes particularly important when a member chooses to express a viewpoint that differs from that of his party.<sup>15</sup>

In *Ravi. S. Naik v Union of India and others*<sup>16</sup>, the Supreme Court ruled that voluntarily resigning from a legislative body does not always imply that the representative must legally resign, and that this might be inferred from the conduct of the member too.

In line with Vice-President M. Venkaiah Naidu's view, a member who got elected to a political party based on its policies and manifestos, but publicly criticized it, is deemed to have voluntarily left the party. Janata Dal (U) leader Sharad Yadav was disqualified for voluntarily relinquishing his party membership by the Vice President. Yadav's petition challenging his disqualification has not been decided by the Delhi High Court. During this time, the Supreme Court upheld the Delhi High Court's decision to deny an application by the respondent to place additional evidence regarding Yadav's conduct following his disqualification from the Rajya Sabha. The respondent (Ram Chandra Prasad Singh) sought that the High Court consider Yadav's joining of another political party as evidence against him.<sup>17</sup>

The Supreme Court in *Balchandra L Jarkiholi & Ors vs B.S.Yeddyurappa*<sup>18</sup> however, overturned the Karnataka Speaker's ruling dismissing 11 BJP MLAs in 2011. These MLAs had petitioned the Governor, claiming that they had withdrew their support for Yeddyurappa's administration because he was unscrupulous and had lost the public faith. The Supreme Court had highlighted,

<sup>12</sup> *Kihoto Hollohan v Zachillhu and others*, (1992) Supp (2) SCC 651

<sup>13</sup> *Sri Rajendra Singh Rana versus Swami Prasad Maurya & Ors* (1992) 2 SCC 651

<sup>14</sup> K. Vijayata Bhaskara Reddy, '*Sabotage of Anti-Defection Law in Telangana*' (12 December 2015) 50 EPW 24-27

<sup>15</sup> Kartik Khanna and Dhvani Shah, '*Anti-Defection Law; a death Knell for Parliamentary dissent?*' (2012) 5 NUJS L. Rev. 103

<sup>16</sup> *Ravi S. Naik And Sanjay Bandekar vs Union Of India And Others* AIR 1994 SC 1558

<sup>17</sup> V. Venkatesan, '*Anti-Defection law in the context of the Rajasthan Political Crisis*', (Bar and Bench, 23 July 2020)

<sup>18</sup> *Balchandra L Jarkiholi & Ors vs B.S.Yeddyurappa* [2011] 10 S.C.R. 877

among other things, that the MLAs had remained to be representatives of the Bhartiya Janta Party (BJP), but were only opposed to Yeddyurappa.<sup>19</sup>

The Tenth Schedule does not talk about the political members that have been expelled from a Party. The Supreme Court in *G. Vishwanathan v Speaker, Tamil Nadu Legislative Assembly* was of the view that the members who have expelled by their political parties will not be considered to be defectors. The ‘unattached’ member Political party will continue to be member of the Party that set him up as a candidate for election.<sup>20</sup>

## Conclusion and Suggestions

Despite different judicial pronouncements by the Supreme Court of India the position regarding the laws of anti-defection remains unclear. Obvious cases of defection still go unpunished if they favour the political party while members of the political party who oppose the senior leadership are silenced by threatening them with the provisions of the Anti-Defection Act, 1985. The Tenth Schedule needs to be amended in order to put an end to its misuse, further the law has become just a tool to assert dominance and lost its original purpose which was to do away with the inherent corrupt practices while floor switching.

Anti-Defection law must be used sparingly in cases where the votes of Legislator determine crucial decisions within their respective houses for instance no-confidence motions and budgets as proposed by a Member of Parliament Manish Tewari to limit the scope of Paragraph 2 (1) (b) by allowing disqualification only when a Member votes against a whip issued for motions listed below:

- “(i) Motion expressing confidence or want of confidence in the Council of Ministers
- (ii) Motion for an adjournment of the business of the House
- (iii) Motion in respect of financial matters as enumerated in Articles 113 to 116 (both inclusive and Articles 203 to 205 (both inclusive)
- (iv) Money Bill”<sup>21</sup>

One of the major issues with the current Anti-defection provisions is that judicial institutions have no authority before any decision of disqualification has been made final by the Presiding officer. The President or the Governor of the respective state should decide on disqualification of a member based on the suggestions made by either the Supreme Court and High Courts or the

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<sup>19</sup> Apoorva Mandhani, ‘Here’s what the anti-defection law challenged by Sachin Pilot in Rajasthan HC says’, (*The Print*, 24 July 2020)

<sup>20</sup> *G. Vishwanathan v Speaker, Tamil Nadu Legislative Assembly*, 1996 AIR 1060

<sup>21</sup> Kartik Khanna and Dhvani Shah, ‘*Anti-Defection Law; a death Knell for Parliamentary dissent?*’ (2012) 5 NUJS L. Rev. 103

Election Commission. Similar amendments have also been suggested by National Commission to Review the Working of the Constitution (NCRWC) and the Law Commission in its report<sup>22</sup>.

Provisions for establishing intra-party democracy in a political party are missing from the current legal structure. The Representation of People Act will need to be amended in order to make political party leadership elections more democratic. The Constitution should be modified to include a clause that only a breach of a political party's whip issued in the context of intra-party democracy will result in a legislator's disqualification. A major requirement is for the Representation of Peoples Act to be amended so that a political party can be recognized. A clause in the Act that only recognises parties that use intra-party democracy to choose their leaders may help to democratise the party hierarchy.

Analyzing existing legislation in terms of entitlements and safeguards reveals a plethora of opportunities for future development. A balance can be established between the groups' and lawmakers' divergent interests by adjusting their entitlements. By identifying current rights and safeguards, we may develop alternatives that are more in line with the anti-defection laws' goals.<sup>23</sup>



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<sup>22</sup> Roshni Sinha and Prachi Kaur, 'Anti-Defection Law: Intent and Impact' 2019 PRS Legislative Research <[https://prsindia.org/files/parliament/discussion\\_papers/Anti-Defection%20Law%20Intent%20and%20Impact\\_0.pdf](https://prsindia.org/files/parliament/discussion_papers/Anti-Defection%20Law%20Intent%20and%20Impact_0.pdf)>

<sup>23</sup> Darsan Guruvayurappam, 'rethinking Defection: An Analysis of Anti-Defection laws in India' (2021)

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