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**EFFECT AND IMPACT OF ANTI-DEFECTION LAWS IN INDIA AND
IN A TRANSNATIONAL SETTING**

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Abstract

The phrase “Aaya Ram Gaya Ram” has been closely associated with defections in the Indian polity since the year 1967 when a member of the parliament changed his political parties thrice within 15 days. Defections or floor crossing, i.e., the switching of political parties is an age-old matter of debate. Defections from political parties were made illegal in India by the 52nd constitutional amendment passed by the Rajiv Gandhi administration. When this law was first introduced, the main concern was whether it violated the rights of the party members with respect to freedom of speech and expression. Or is it genuinely stabilizing the government by forbidding change in leadership? The newly passed legislation penalizes lawmakers for primarily two offences: first, willingly switching parties; and second, voting against party policy or in violation of the party whip. Additionally, this statute exempts members from defections if 2/3 of the members defect jointly, which only encourages horse-trading or wholesale defections of lawmakers. This paper will aim to address these issues, along with an analysis of the effectiveness of anti-defection laws in India after more than three decades of its implementation and a comparison to other international laws.

Arguing in favour of the 52nd amendment, Rajiv Gandhi said “This bill is the first step towards cleaning our public life,” in the Lok Sabha on 30th January 1985. The anti-defection bill was thereafter cleared and enacted (Dey, 2022). The main purpose was to preserve the stability of governments and insulate them from the defections of legislators. The need for such a bill was recognized only after the fourth general elections during which the defections in the country went unsparingly high. Moreover, defection was not motivated by ideological differences but instead, was incentivized by material benefits. The legislators are lured by offers of ministerial positions and personal benefits. More than 50% of the representatives switched sides at least once between 1967 and 1972. The credit for the introduction of the

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famous phrase ‘Aaya Ram Gaya Ram’ which is associated with defections goes to Gaya Lal who defected thrice within a fortnight in 1967 (Diwan, 1979). The anti-defection law states that any Member of Parliament (MP) or State legislature (MLA) would be disqualified from their office if they switch their allegiance voluntarily or if they voted on any motion contrary to the directions issued by their party. Even after its enforcement more than three decades ago, the anti-defection laws have been a matter of constant debate and discussion and the effectiveness of the same has been questioned time and again. Although the primary objective of the law was to combat the ‘evil of political defections’, it has hardly been able to achieve its objective. It has also largely undermined the role of a legislator in the parliament by snatching his voting autonomy and sabotaging political democracy. Briefly, the anti-defection laws have converted the legislators into mere agents of the party instead of a delegate of their constituency and motivated defection by encouraging horse-trading of legislators. The exception provided by the anti-defection law which states that if 2/3rd of the members of the party defect then they will be exempt from the liability only encourages mass defections. Keeping in mind the efficiency of anti-defection laws, this paper focuses on three major aspects of the anti-defection laws in India. Firstly, we will analyze the effect of the anti-defection laws on the autonomy of a legislator and examine whether his freedom of speech and expression and consequently the parliamentary democracy is encroached upon. Secondly, we will discuss how the laws were proposed to curb the political evil of corruption and how effective it has been.

Lastly, keeping in mind that defections are prevalent worldwide and have been used by legislators to form and retain governments, we will analyze the anti-defection laws of the UK, US, Singapore, Canada, and Australia and move forward with some suggestions that could be incorporated into the Indian Legislation to make the anti-defection laws more effective and efficient. With more than 19,500 languages, (PTI, 2018) the drafting committee of the Constitution of India chosen by limited suffrage provided its citizens with qualified representatives possessing absolute freedom of speech, i.e., Article 19(1) vis-à-vis Article 105 and 194 of the Constitution. The urge to conform to social enormity curtails freedom of speech more than any law ever can. Representatives i.e., MLA and MP ride the double-edged sword wherein they must conform with voters and the party. The voice of citizens has been qualified by colonial era rules like sedition which was in play until 2020 when the Supreme court of India put it in a coma. But when the members are restricted by developments like

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Schedule 10(2) of the constitution of India there is a serious threat to democracy. Thousands of citizens have been arrested for their dissent against the government which essentially stemmed down to a political party. According to BAGEHOT in the ENGLISH CONSTITUTION 'expressive function' is principal included with the functions of the House of Commons (Bradley, Ewing, 2010). Under the amendment, if a whip is issued by a party and the member abstains from voting or votes contrary to party discipline, he/she shall be disqualified unless condoned by the party. This exterminates the concept of a forum for ventilating the grievances of electorates (Smith, 1998). If an MP cannot freely exercise the freedom to take decisions on legislative policies, there is no incentive to put in the effort to understand the different policy choices and their outcomes. Then, the MP becomes just another number to be tallied by the party on any vote. Applying *A.R. Antulay v. R.S. Nayak*, the purpose of Anti-defection laws was to bring stability to the government, since after the election of 1967, INC realized 'Aaya Ram Gaya Ram' was injurious to public faith (*A.R. Antulay v. R.S. Nayak & Anr*, 1988). The law is based on the contention that the public votes for the party and its ideologies rather than a candidate.

The current trend as Vice president Hamid Ansari says is, "anti-defection applies only to save the government from no-confidence motion. It is the representative that knows the true realities of the electorate and the purpose of representative democracy is tarnished if the right to dissent is abolished (Gupta and Sharma, 2022).

India borrowed freedom of speech and expression from the US which refrained from establishing defection laws so as to prevent infringement (*Bond v. Floyd*, 1966). Schedule X is transplantation without amputation since it can be said that rules are established after deliberation of citizens' welfare while it is influenced by the top leaders. Interpretation of the Schedule shows that the party's stance is the member's stance and violation of the same will lead to disqualification (*Ram Chandra Prasad Singh v. Sharad Yadav*, 2020) In *Kihoto Hollohan v Zachillhu*, the apex court adopted a restricted view of direction i.e. (a) vote on motion of confidence or no confidence in the Government; (b) where the motion under consideration relates to a matter which is an integral policy and program of the political party (*Kihoto Hollohan v Zachillhu*, 1992). The applicability of clause (b) is so wide that there has not been one single definitive interpretation because all matters can be considered vital. The residuary voting powers would fall under the ambit of conscience voting. Under the Westminster system, conscience voting is described as a legislator's free will to vote on

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important and contentious matters without interference from the party. In countries where there is a lack of an official party line to follow, conscience voting is unimportant (Sinha and Kaur, 2019). However, in India, parties prefer to have control over important issues and allow legislators to have conscience voting on insignificant matters because it is assumed that a party is an association of people with common principles and ideologies and if the member is not in conformity with principles, he is defecting. We must consider that no person can agree to all principles owing to dynamic surroundings, apart from other non-incidental principles. Accruing to these esoteric issues, constitutional adjudications clearly indicate the need for deference. The introduction of the bill in houses before enforcement is for the members to comment, correct and discuss according to the needs of the people in their constituency.

If the members of houses do not have the power to dissent and have to agree to everything their Party dictates, the concept of parliament and representatives would collapse. Therefore, under no canon of construction can dissent be perceived as defection (Ghosh and Deb, 2021). Rather, dissent with ulterior motives must be considered defection (Khanna and Shah, 2022). Finally, the tapping authority of the freedom to speech must not be the speaker or chairman who himself/ herself is tainted with political bias. This is because the speaker is advised to judge on principles of natural justice but if he/she belongs to the party involved in the defection case, the matter would be in violation of natural justice (*Balchandra L. Jarkiholi v B.S. Yeddyurappa*, 2011). The primary motive must be to prevent party-hopping of legislators. If this can be done by giving them freedom of speech, it must be done so as to curtail the abhorrent corruption caused by defection. Paragraph 2(1)(b) of Schedule 10 gives us some insights into the aim to tackle the corruption that aids carpet-crossing. Defections in India are largely viewed as instances of disloyalty, further incentivized by bribery and corruption. The effectiveness of Paragraph 2(1)(b) is therefore questionable. Article 105(2) of the Indian constitution gives the members of parliament a clean chit in cases of malicious votes. In the case of *P.V. Narsimha Rao v State* it was held that because of the immunity provided by Art 105, a parliamentarian cannot be held liable on account of a vote cast in the parliament (*P.V. Narsimha Rao v. State*, 1998). This provision puts parliamentarians on a pedestal where the penal laws of the country cannot reach them just by the virtue of them being members of the parliament. The motive of penal laws is to create a fear of committing crimes, but this has ceded to the protection provided by article 105. However, the judgement also provides a relief that says a parliamentarian would be held liable if he receives cash for votes. This

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liability is decided by the parliament, playing the role of a watchdog. The legislators in our country are lured by rival parties who offer material benefits. The anti-defection laws, to curb bribery, simply increased the price of it and promoted the en masse trading of legislators. The exception that if more than 2/3rd members of a party defect, they will not be hit by disqualification, has no rationale and it appears to threaten the core of India's democracy which is supposed to be protected by this very law.

Rao argues that this law seems to be arbitrary and unreasonable to prohibit individual defections but allow group defections (*Balchandra L. Jarkiholi v B.S. Yeddyurappa*, 2011). Another argument proposed is that this law is laying down the *modus operandi* for the members who are willing to defect⁴ and the opposite party that is willing to buy off these legislators. An example of corruption in defection can be inferred from the committee report on the need for anti-defection law, which under the chairmanship of Home Minister YB Chavan (1969) mentioned that out of 210 legislators who defected from their parties, 116 were given ministerial positions in the new parties that they joined. This situation has hardly changed even after the introduction of the anti-defection laws.

Unlike India, countries such as the US, UK and Canada do not possess anti-defection laws but are still successful in maintaining the democracy that a parliament seeks. The next section of the paper will analyze exactly this aspect. Defection is known by different nomenclatures - 'floor-crossing', 'carpet-crossing', 'party-hopping', 'fence-sitting' and 'waka-jumping'. Certain countries have found defection threatening to the very stability of the government. Naturally, therefore, countries either have well-established customs, conventions and parliamentary practices or framed laws and rules to tackle the problem of defection (Bhatia, 2021). Currently, six countries (India, Pakistan, Bangladesh, Guyana, Sierra Leone and Zimbabwe) have laws mandating legislators to vote according to party diktat (Nikolenyi, 2016). Before we discuss the anti-defection laws of other countries, in detail, there are certain key similarities and differences between the anti-defection laws in India, UK, Canada, and US. Similarities being, all four countries prohibit elected representatives from defecting to another party, require defectors to resign from their current seat and expel such defectors from their party (Gupta, 2020). The resignation must be voluntary as held in *Thankamma v. Speaker* 1952. The differences are that defectors are automatically disqualified from their current office in India while they are only disqualified upon expulsion, in other countries. Secondly, 2/3rd

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defectors are required for disqualification of membership from the assembly while there is no strict process in the other countries (Guruvayurappan, 2021).

UNITED KINGDOM -

No specific law controls defections. Article 9 of the English Bill of Rights, 1689 guarantees the right to freedom of speech in the British Parliament so there is no bar on members changing their party affiliations. A defector or expelled member will not resign but will be made to sit separately from party members, as per the rules of the House of Commons. Meanwhile, members of the House of Lords are not elected but appointed and they hold their seats for life. 1/3rd of members are politically independent - 'cross-benchers'. To accommodate these crossbenchers, a person who has a seat in the House of Lords can take on and resign a whip, join and leave a party, at their discretion. Since this will have no effect on the composition of the House, there are no strict laws preventing it. The individual political parties may try to prevent their members from defecting but do not affect the Parliament (Malhotra, 2005).

UNITED STATES -

A legislator is urged to uphold party discipline and advance the party's goals and beliefs but on certain matters, he can vote without fearing a party whip. Along these lines, party distinctions get blurred on major parliamentary decisions; party control is limited. A legislator can vote against his own party without becoming a defector, although, subject to the party's decision he can face internal action. For example, in a vote to impeach former President, Donald Trump, seven members from his own party voted for his conviction, without facing legal repercussions. The premise of anti-defection in the US is that the legislator is accountable to voters, and the government is accountable to legislators (Garg, n.d.).

CANADA-

There is no legal or constitutional barrier that prohibits a legislator from floor-crossing. For every vote, a new whip is considered, and the Speaker is notified. So, in each new vote, he can defect and sit with another party. Although legislators have a political affiliation, they are not obligated to retain the party label throughout their tenure. Therefore, there is no need for resignation or re-election. However, this is seen as less than ideal.

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Usually, legislators are expected to act as united party caucuses so that the party as a whole can be held accountable. This will help parties gain the support and confidence of citizens (Janda, 2009).

AUSTRALIA –

The Australian Parliamentary Library says “crossing the floor” refers merely to voting with the opposition, not changing party affiliation (McKeown and Lundie, 2020). In Australia, parties exercise strong control over their members, causing defections to be rare and unproblematic. Additionally, legislators rarely vote against their party or resign. Therefore, there has never been a need for laws to govern defection. Furthermore, parties have internal agreements and rules established amongst themselves, a member changing his party allegiance can retain his seat. This is because members are elected as individual representatives of their constituencies, i.e., party membership is a personal preference (Sinha and Kaur, 2019).

SINGAPORE –

Parliament gets its power to decide the circumstances for disqualification from Article 48 of the Constitution. Such a decision by the Parliament is final. To curtail defection in the Parliament, an amendment to the Singapore State Constitution was passed in 1963 which said that the seat of a member would become vacant if he ceased to be a member of a party, resigned, or was expelled. Further, if a nominated member resigns or is expelled from his party, he will lose his seat in Parliament (Nikolenyi, 2022).

In conclusion, the current law suppresses the voice of legislators. This dulls out their accountability towards the people and government. Further, it doesn't take into consideration independent legislators or party members who want to become independent legislators. The law only prohibits floor-crossing but does nothing to punish those who do.

According to Yadav Limaye, “Parliamentary debates would become meaningless because the elected representatives would not be free to follow their conscience. Secondly, the institution of ‘whip’ would encourage the dictatorship of party leaders” (Nikolenyi and Shenhav, 2015). By prohibiting dissent, the anti-defection undermines the system of executive accountability to the legislature and gives the executive control over Parliament on all votes

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(Pande and Negi, n.d.) Lastly, anti-defection law curbed retail defections to a certain extent but paved the way for wholesale horse trading and hence failed to ensure stable governments. Therefore, legislators have found their way around these laws due to the oppressive conditions. This has led to destabilization of the Government, a rise of opposition parties, disloyalty, and corruption. If members can be bought out with money or benefits, it creates opportunistic politicians. However, the defection law can be improved if there is a maximum time limit of 3 months taken by the speaker to decide whether defection took place, (as proposed by the Kihoto judgement referred to above) Judicial Review is allowed to evaluate the matter of the law and stricter laws with harsher punishments are established. If countries without anti-defection laws can effectively curtail it and India, despite systematic establishment of laws several years ago, still cannot, it is time for the Indian Parliament to reflect on its laws and scrutinize it diligently. There is a dire need for the change of anti-defection laws.

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