Democracy and defections

Madhav Khosla* and Milan Vaishnav**

Within comparative constitutional law, there is an emerging consensus that political fragmentation has weakened political parties and hindered the functioning of legislative bodies. This article examines legal efforts to curb fragmentation in parliamentary systems by prohibiting floor crossing, or "defections"—a constitutional approach that concentrates power within party leaders. It conducts a detailed case study of India, exploring what is arguably the most extensive experiment in anti-defection law and its impact on accountability and representation. The article goes on to analyze similar laws in Israel and South Africa, highlighting the challenges of self-regulation. After evaluating the limitations of narrow anti-defection laws—such as the one in Pakistan—it proposes that the drawbacks of legislating party unity through formal defection regulation may prompt a reconsideration not only of legislatures but also political parties and political polarization. While some scholars have viewed attempts to stem fragmentation as a solution for limiting polarization, this article suggests the opposite: sharpening polarization, when coupled with norm-based internal party controls, may well tame the excesses of fragmentation, especially in non-programmatic multiparty systems. Although there are difficult tradeoffs here, as polarization can have independent (adverse) effects, the broader lessons of anti-defection laws deserve to be reckoned with. Ultimately, however, what the widespread adoption of anti-defection laws might primarily reveal is the nature of our faith—or lack thereof—in the promise of a certain form of parliamentary politics.

1. Introduction

When considering the functioning of democratic governments, one cannot but attend to the role of political parties.[1] "[T]he vitality of parties," Samuel Issacharoff observes,

* Professor of Law, Columbia Law School, New York, N.Y., United States. Email: mk3432@columbia.edu.
** Senior Fellow and Director, South Asia Program, Carnegie Endowment for International Peace, Washington, D.C., United States. Email: mvaishnav@ceip.org.
We are grateful to several colleagues and friends for their comments and criticism, and are especially thankful to Moeen Cheema, Jessica Bulman-Pozen, Richard H. Pildes, and participants at the Public Law Group Seminar, University College London.

[1] *See* Mark Tushnet & Bojan Bugarič, Power to the People: Constitutionalism in the Age of Populism 31–2 (2022). Parties have not always received due appreciation. *See* Nancy L. Rosenblum, On the Side of the Angels: An Appreciation of Parties and Partisanship 1–6 (2008).

"is essential to maintaining a system of political competition that, in turn, serves as the locus of accountability of governors to the governed."[2] Over time, scholars have come to appreciate how constitutional practice depends not only on the formal separation of authority between institutions but also on the distribution of political power among parties.[3] The study of democratic backsliding has further underlined the significance of parties, highlighting the collapse of traditional parties, the breakdown of party systems, and the rise of extremist groups.[4] Indeed, the centrality of political parties to constitutional design is borne out by Mark Tushnet's effort at taking seriously fourth-branch institutions on the ground that "the Montesquieuian tradition cannot provide sufficient guarantees for political democracy in a political world where political parties play central roles. . . ."[5]

One emerging point of consensus in this burgeoning literature is that political fragmentation threatens democratic government. As Richard Pildes has argued, the spread of authority across power centers, both within and outside the state, makes it challenging to produce effective government.[6] The United States is a commonly referenced example in this regard, with fragmentation undermining the functioning of Congress and even the most basic operations of government, such as passing a budget.[7] Political fragmentation has an external-facing component—the diffusion of power away from political parties—as well as an internal-facing component—the diffusion of power away from party leadership and toward individual members. In aggregate, fragmentation is thought to hamstring party leaders, who cannot enforce party discipline or control factions. For Pildes, "[t]he problem is not that we have parliamentary-like parties but that our parties are not parliamentary-like *enough*: party leaders are now unable to exert the kind of effective party leadership characteristic of parliamentary systems."[8] As he notes elsewhere, "structural changes in the practices and rules of democracy have caused the party leadership to lose the capacity to control and discipline factions within the party and individual members."[9] Similar arguments have been deployed to question the decentralization of power. Scholars have argued that, under the guise of enhancing democratic control of parties, devolution can weaken

[2] Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274, 276 (2001).

[3] *See* Daryl L. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311 (2006); Stephen Gardbaum, *Political Parties, Voting Systems, and the Separation of Powers*, 65 Am. J. Comp. L. 229 (2017).

[4] *See* Zsolt Enyedi, *Populist Polarization and Party System Institutionalization*, 63 Probs. Post-Communism 210 (2016); Kim Lane Scheppele, *The Party's Over*, *in* Constitutional Democracy in Crisis? 495 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds., 2018); Tom Gerald Daly & Brian Christopher Jones, *Parties Versus Democracy: Addressing Today's Political Party Threats to Democratic Rule*, 18 Int'l J. Const. L. 509 (2020). *See generally* David Landau, *Can Constitutions Fix Party System Breakdowns? A Skeptical View*, *in* Constitutionalism and a Right to Effective Government? 223, 223–4 (Vicki C. Jackson & Yasmin Dawood eds., 2022).

[5] Mark Tushnet, The New Fourth Branch: Institutions for Protecting Constitutional Democracy 3 (2021).

[6] Richard H. Pildes, *The Age of Political Fragmentation*, 32 J. Democracy 146 (2021); Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 Cal. L. Rev. 2051 (2022).

[7] *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804 (2014).

[8] *Id.* at 809. On internal fragmentation, see also Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 Houston L. Rev. 845 (2017).

[9] Richard H. Pildes, *Focus on Political Fragmentation, Not Polarization*, *in* Solutions to Political Polarization in America 146, 147 (Nathaniel Persily ed., 2015).

party control over decision-making, nominations, and candidate selection in ways that harm rather than further democratic accountability.[10]

The challenge persists globally across both parliamentary and presidential systems. As Isaacharoff notes: "In the political domain, fragmentation is a fact of life in all democratic countries."[11] Perhaps it should come as no surprise, then, that many democratic governments have tried to regulate parties in ways that recentralize power in the hands of party elites and mitigate fragmentation. Remarkably, an array of parliamentary democracies have experimented with constitutional provisions to curb, or completely ban, "defections"—the practice of floor crossing by a legislator during their term in office.[12] Such laws, as a study of such provisions in the South Pacific region recognizes, "preserve the relative positions of parties on election night for the duration of the parliamentary term and impose the sanction of disqualification on those who disturb that balance."[13] When viewed comparatively, anti-defection provisions can be judged along two dimensions: the definition of what constitutes a "defection," and the penalty that "defectors" are subject to. Of course, there are some systems in which there is no prohibition on defections. But where such provisions have been adopted, the central justification has been ensuring governmental stability. In parliamentary systems, defections can have serious consequences. Because power is not separated between the legislature and executive, as in presidential systems, party switching can make or break governments.[14] Such laws also draw on the idea that strong political parties are intrinsic to meaningful representation—they are necessary for voter preferences to be efficiently aggregated and translated into public policy.

This article considers legal efforts to curb floor crossing. Our primary case study is India, which likely has the most extensive experience with an anti-defection law and accounts for roughly one-fourth of the world's voters. Over the past decade, India has exhibited worrying signs of democratic decay, including of its representative branch of government.[15] Yet, if dysfunction in the United States and other Western democracies is at least partly driven by political fragmentation, India seems

[10] *See* Frances McCall Rosenbluth & Ian Shapiro, Responsible Parties: Saving Democracy from Itself (2018).

[11] Samuel Issacharoff, Democracy Unmoored: Populism and the Corruption of Popular Sovereignty 59 (2023).

[12] In this article, the terms "defections" and "floor crossing" are used interchangeably. In the literature, these terms have sometimes been used to suggest different ways legislators deviate from their party in the legislature.

[13] Caroline Morris, *Antidefection Laws in Three Small South Pacific Parliaments: A Cautionary Tale*, 20 Int'l J. Const. L. 1188, 1213 (2022).

[14] In presidential systems, there are typically no restrictions on defections, though a legislator's responsibilities may relate to their party membership. *See, e.g.*, Rules of the House of Representatives, 118th Cong., rule 10.5(b)(1) (Jan. 2023), https://ethics.house.gov/sites/ethics.house.gov/files/documents/118-House-Rules-Clerk.pdf. *See generally* Antoine Yoshinaka, Crossing the Aisle: Party Switching by U.S. Legislators in the Postwar Era (2015).

[15] On democratic backsliding in India, see Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party–State Fusion in India*, 14 Law & Ethics Hum. Rts. 49 (2020); Madhav Khosla & Milan Vaishnav, *The Three Faces of the Indian State*, 32 J. Democracy 111 (2021); Christophe Jaffrelot, Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy (2021); Pratap Bhanu Mehta, *Hindu Nationalism: From Ethnic Identity to Authoritarian Repression*, 10 Stud. in Indian Pol. 31 (2022); Ashutosh Varshney, *India's Democratic Longevity and Its Troubled Trajectory*, *in* Democracy in Hard Places 34, 34–72 (Scott Mainwaring & Tarek Masoud eds., 2022); Maya Tudor, *Why India's Democracy is Dying*, 34 J. Democracy 121 (2023). On the democratic radicalism of India's founding, see Madhav Khosla, India's Founding Moment: The Constitution of a Most Surprising Democracy (2020).

to suffer from a contrary affliction—changes in the constitutional framework have centralized parties and constrained legislator autonomy. Notably, this has occurred in a Westminster-style democracy, whose hallmark is that "the government's ministers are constitutionally responsible and accountable to Parliament."[16]

In Section 2 of this article, we offer a historical overview of defections and the ban on floor crossing in India. We then turn, in Section 3, to how the anti-defection law has impacted accountability and representation in India—often in less straightforward ways than is usually acknowledged. Section 4 addresses the challenge of regulating defections, drawing on both Indian and comparative experience. We first underline three workarounds that have emerged in the Indian context which capture how such legal attempts have often failed on even their own terms. We then turn to Israel and South Africa, where efforts at banning floor crossing reveal how such laws are vulnerable to self-dealing. These cases illustrate how, quite apart from the adverse impact of anti-defection laws on accountability and representation, their implementation implicates the classic problem of self-regulation. Section 4.3 explores the possibility of a moderate anti-defection law. A study of Pakistan's anti-defection schema, which is more limited than the version present in countries like India, suggests reasons for skepticism about even this possibility.

The effort at addressing floor crossing through legal controls on defections presents a new moment in the longer history of parliamentary government. In Section 5, we suggest that anti-defection laws offer us a new way to think not only about legislatures but also political parties and political polarization. The dynamics of creating and implementing such laws indicate that greater ideological separation between parties could mitigate some of the underlying drivers of party switching. Whereas Pildes posits that fragmentation poses a more direct threat to democracy than polarization, comparative experience suggests that greater polarization could possibly help remedy excessive fragmentation, especially in non-programmatic multiparty systems. To be sure, there are difficult tradeoffs here, as polarization can have an independent (adverse) effect on governmental capacity. However, the broader lessons of anti-defection laws deserve to be reckoned with—enforcing party discipline through legal means is immensely challenging. It tends to address only the symptoms, rather than the root causes, of party indiscipline, and can be detrimental, boosting legislative stability at the expense of the legislature's constitutive features. Ultimately, anti-defection laws may most revealingly indicate the degree of our faith—or lack thereof—in the promise of a certain form of parliamentary politics.

2. India's anti-defection law: A brief history

During the early years of the Indian republic, the Indian National Congress, the architect of the anti-colonial struggle, enjoyed considerable electoral appeal under the first Prime Minister, Jawaharlal Nehru. But the Congress's grip on power began to erode after

[16] Adam Tomkins, Public Law 4 (2003).

Nehru's death in 1964. This erosion reached an inflection point in 1967 when the party suffered significant losses in state elections and saw its vote share gradually decline in national polls under Prime Minister Indira Gandhi.[17] The piercing of the Congress Party's electoral fortunes triggered a period of political tumult that persisted for decades.[18]

When the Congress stood at the height of its power, it represented a diversity of interest groups, and political competition often transpired between factions within the Congress rather than between the Congress and the opposition.[19] Eventually tensions between the party's claims of representing a "rainbow coalition" of interests and the composition of its leadership (not to mention its policy priorities) became challenging to reconcile. This spawned the creation of dozens of regional or identity-based political parties—many led by disgruntled former Congress members. Growing political fragmentation prompted defections: opposition parties lured Congress legislators away from their party, and the Congress attempted to forestall would-be defectors or wean leaders away from rival parties in return. As one commentator noted, "It has been said that some defectors preferred to have breakfast with one party, lunch with another, and dinner with a third party on the same day."[20] While the Congress lost a critical number of state elections in 1967, the opposition often struggled to cobble together a working majority in the state assemblies.

As a result, independent legislators, and those who defected, enjoyed considerable power because they could readily make or break governments.[21] Fragmentation induced further fragmentation. As Adam Ziegfeld has argued, once individual legislators and smaller parties realized that they had bargaining power over post-election coalition formation, they exploited their position.[22] The organizational ethos of the Congress also rendered it vulnerable to widespread defections. As a big-tent party, the Congress was akin to a collection of influential groups as opposed to a cadre-based association with a disciplined, ideological rank-and-file membership.[23]

It was not this fact alone that precipitated mass defections. Notoriously, Indira Gandhi presided over the de-institutionalization of both the Congress Party and the Indian state more generally.[24] Apart from shifting political dynamics, rising election costs and illicit political financing furthered defections.[25] In 1969, Parliament

[17] Subhash C. Kashyap, *The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India*, 10 Asian Surv. 195, 195–6 (1970).

[18] Instances of defections were present, of course, even prior to 1967. *See* G. C. Malhotra, Anti-Defection Law in India and the Commonwealth 4–5 (2005).

[19] *See generally* James Manor, *How and Why Liberal and Representative Politics Emerged in India*, 38 Pol. Stud. 20, 28–32 (1990).

[20] P. M. Kamath, *Politics of Defection in India in the 1980s*, 25 Asian Surv. 1039, 1049 (1985).

[21] Paras Diwan, *Aya Ram Gaya Ram: The Politics of Defection*, 21 J. Indian L. Inst. 291, 304 (1979). *See also* Kashyap, *supra* note 17, at 196.

[22] Adam Ziegfeld, *Coalition Government and Party System Change: Explaining the Rise of Regional Political Parties in India*, 45 Comp. Pol. 69 (2012).

[23] *See* Myron Weiner, Party Building in a New Nation: The Indian National Congress (1967).

[24] *See* Christophe Jaffrelot and Pratinav Anil, India's First Dictatorship: The Emergency, 1975–1977 (2021).

[25] *See* Kamath, *supra* note 20, at 1048–9. *See also* E. Sridharan & Milan Vaishnav, *Political Finance in a Developing Country: The Case of India*, *in* Costs of Democracy: Political Finance in India 15 (Devesh Kapur & Milan Vaishnav eds., 2018).

banned corporate contributions to political parties, driving political funding underground.[26] Without a system of public financing of elections to fill the vacuum, under-the-table financing became rampant.[27] The threat of floor crossing allowed individual legislators to attract offers and counteroffers from both their party and those in the opposition.[28] This *quid pro quo*, where ministerial posts were traded for party loyalty, led to the ballooning size of ministries in several states.[29] In addition to these "carrots," incumbents also wielded coercive "sticks" in the form of enhanced regulatory scrutiny, tax investigations, and physical harassment.[30]

A split in the Congress Party in 1969 engendered a period of instability, where "political loyalties were openly bought and sold for power, position, and money," and where "more than half (52.4%) of the total state legislature had changed their political affiliation at least once."[31] As P. M. Kamath has identified, floor crossing followed a clear pattern. When the Congress enjoyed power at the center, elected representatives at the center and in the states would abandon their parties to join it. But when the Congress was relatively weak, its members would leave the party in droves.[32]

After the 1967 elections, the Congress explored legislative fixes to address defections. While these proposals never fructified, Parliament finally amended the Constitution in 1985, inserting a Tenth Schedule into the document. The amendment's Statement of Objects and Reasons declared that the "evil of political defections has been a matter of national concern," and that this scourge would, if left unaddressed, "undermine the very foundations of our democracy and the principles which sustain it."[33] According to one estimate, more than 2700 cases of floor crossing had occurred between 1967 and the passage of the Tenth Schedule.[34]

The amendment gave constitutional status to political parties. As per the Tenth Schedule, a legislator, in the national Parliament or state legislatures, will be disqualified if they vote against the instructions of their political party (the "party whip"). It was presumed that this change would not only curb bribery and corruption—the "horse trading" that takes place when legislators switch partisan affiliations in exchange for material and other inducements—but also provide for stable government. The measure also, clearly, has an impact on party discipline. Under the Tenth Schedule, if a party issues a whip and if an elected party member defies the whip that member stands disqualified from serving in the assembly. The only exception is if the party gives the member permission to defy the party whip or condones their behavior

[26] Companies Act, 1956, § 293A, No. 1, Acts of Parliament, 1956 (India) (authorizing corporations to make political contributions, was repealed).
[27] *See* Milan Vaishnav, When Crime Pays: Money and Muscle in Indian Politics 96–7 (2017).
[28] *See generally* Kashyap, *supra* note 17, at 202.
[29] *See* Diwan, *supra* note 21, at 300–4.
[30] *See* Kamath, *supra* note 20, at 1048–9.
[31] B. D. Dua, Presidential Rule in India, 1950–1974: A Study in Crisis Politics 247 (1979).
[32] Kamath, *supra* note 20, at 1041.
[33] *See* India Const., amended by Constitution (Fifty-Second Amendment) Act, Statement of Objects and Reasons (1985) (India).
[34] Robert L. Hardgrave Jr. & Stanley A. Kochanek, India: Government and Politics in a Developing Nation 295 (7th ed. 2008).

ex post. There are no constraints on the use of the whip (for instance, restricting its application to a crucial subset of votes).

Two further features of the Tenth Schedule bear mention. First, the decision to disqualify a member rests with the Speaker. Second, under the original amendment, if one-third of a party defied the whip but agreed to form a new party, such a split would not result in disqualification. In other words, the original law prohibited individual defections but allowed for collective defections if they were sufficiently large, under the premise that these likely represented genuine schisms within a party that transcended any one member or small group. In 2003, this provision was repealed because it seemed to encourage party divisions and penalty-free defections.[35] However, the amendment did not eliminate another exception that still exists: mergers. Under the Tenth Schedule, legislators are not disqualified if their party merges with another, provided that at least two-thirds of the party's legislative members consent to the merger.

Under the Tenth Schedule, "defection" is defined broadly to include anti-party activities that go beyond merely voting against the party whip. Regarding sanctions, the penalties for defectors are severe. If the speaker of the assembly determines a legislator has violated the Tenth Schedule, the latter is subject to immediate disqualification. The judiciary has endorsed the broad underpinnings of the law. In *Kihoto Hollohon*, the Supreme Court upheld the anti-defection law.[36] It described "[u]nprincipled defection[s]" to be "a political and social evil," one that the legislature rightly sought to tackle.[37] Though the Court limited the use of party whips to no-confidence votes or matters central to the party's program, the latter qualification effectively took away any meaningful limitation on their use.[38] The importance of political parties, rather than individual legislators, was crucial to the ruling. The Court felt that the freedom of members "to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it. . . ."[39] For the Court, it was party discipline rather than legislator autonomy which carried utmost significance.

3. Accountability and representation

The prohibition on floor crossing aimed to address political fragmentation and electoral horse trading. One consequence of the Indian law has been the concentration of power in the hands of party leaders. Scholars have recognized how the anti-defection law has altered the place of political parties within the legal schema. M. R. Madhavan, for example, points out that the law has "fundamentally changed the way of functioning of [India's] parliamentary democracy by shifting power away from the individual legislator to the leadership of political parties."[40] The change, another

[35] India Const., amended by Constitution (Ninety-First Amendment) Act (2003).
[36] Kihoto Hollohon v. Zachilhu, 1992 Supp (2) SCC 651.
[37] *Id.* at 686.
[38] *See id.* at 716.
[39] *Id.* at 682.
[40] M. R. Madhavan, *Legislature: Composition, Qualifications, and Disqualifications*, *in* The Oxford Handbook of the Indian Constitution 270, 281 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 2016).

scholar notes, has brought about a shift from a "candidate-centered" to a "party-centered" model of representation.[41] Though these scholars have rightly registered the new power of parties, the precise implications of the anti-defection law for representation and accountability remain underappreciated.

In parliamentary systems like India's, there is an intentional overlap between the legislature and executive that, as the South African Constitutional Court once noted, serves to provide "a singularly important check and balance on the exercise of executive power" and to make "the executive more directly answerable to the elected legislature."[42] Within this context, the impact of the anti-defection law on the legislature's ability to check the executive becomes apparent. Party leaders exert strict control over their legislators through the issuance of whips. Since the ruling party manages both the executive and the parliamentary voting behavior of its members, the legislative branch is effectively subordinated to the executive.

There are additional implications of the anti-defection law. For one, individual legislators who are beholden to the whims of party leaders have little incentive to dedicate themselves to their lawmaking duties or to their role in a deliberative assembly. Indeed, the costs of the Tenth Schedule on legislative deliberation and intra-party debate have been rightly noted.[43] The law diminishes the standing of legislators even before a vote is cast. In principle, legislators can introduce their own private bills, but such initiatives are infrequent and seldom successful.[44]

In some democracies, such as the United States, legislators enjoy subsidiary roles—such as chairing powerful congressional committees that give them considerable leverage vis-à-vis party bosses, not to mention individual notoriety.[45] In India, however, such influential subsidiary roles are not as prevalent. While there is an intricate legislative committee structure, committees' powers are limited for several reasons. First, an increasing number of bills introduced by the government are not referred to committees for deliberation.[46] Second, committees' recommendations are not binding; the government can choose whether and how to respond. Third, committees lack dedicated staff; unlike US congressional committees, which draw on a reservoir of subject matter expertise, parliamentary committees in India are staffed by members themselves. Finally, committee proceedings take place behind closed doors, limiting

[41] Aradhya Sethia, *Where's the Party? Towards a Constitutional Biography of Political Parties*, 3 Indian L. Rev. 1, 30 (2019).

[42] In Re Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) ¶ 111 (Sept. 6, 1996).

[43] *See* Udit Bhatia, *What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions*, 40 Law & Phil. 305 (2021); Udit Bhatia, *Cracking the Whip: The Deliberative Costs of Strict Party Discipline*, 23 Critical Rev. Int'l Soc. & Pol. Phil. 254 (2018). *See also* Sethia, *supra* note 41, at 30.

[44] *See* Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institution of Accountability* (U.N. Rsch. Inst. for Soc. Dev., Democracy, Governance, and Human Rights Programme Paper No. 23, Jan. 2006); M. R. Madhavan, *Parliament*, *in* Rethinking Public Institutions in India 67, 85 (Devesh Kapur, Pratap Bhanu Mehta, & Milan Vaishnav eds., 2017).

[45] On committees in the American system, see generally Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 Am. Pol. Sci. Rev. 85 (1987).

[46] *See Vital Stats: 70 Years of Parliament*, PRS Legislative Rsch. (May 13, 2022), https://prsindia.org/files/parliament/vital_stats/Vital%20Stats_70%20years%20of%20Parliament.pdf.

the degree to which members can use these deliberations to publicly pressure party leaders.[47]

These dynamics help explain why legislators have little investment in the legislative process. Consider, in this context, the significance of parliamentary privileges. Article 105 of India's Constitution guarantees legislators immunity from "any proceedings in any court in respect of anything said or any vote given" either in Parliament or a committee, as well as immunity "in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings."[48] Such protections are familiar in legislatures.[49] The Indian Supreme Court has regularly affirmed the freedom that legislators enjoy, and has interpreted the word "anything" in Article 105 to be "of the widest import" and "equivalent to everything."[50]

The combination of parliamentary privileges and the anti-defection law has created perverse incentives for legislators to engage in grandstanding and disruptive behavior. Ironically, obstruction becomes one of the few ways for individual legislators to make a name for themselves, as the strength of their policy prescriptions and legislative prowess matter little in a context where strong parties concentrate authority among a few key leaders.[51] Far from eliminating obstruction, strict party discipline may well encourage it; similarly, grandstanding becomes a strategy for legislators to attract attention.

The anti-defection law's party-centrism might help explain why legislators seek alternative channels to develop candidate-centric appeals. One feature within India's separation of powers framework, at both the central and state levels, is the presence of constituency development funds.[52] Consider the Member of Parliament Local Area Development Scheme (MPLADS) that empowers legislators to direct public money to local public works projects in their constituency.[53] According to program guidelines, each Member of Parliament (MP) is allocated INR 50 million (USD 625,000) to be spent during their five-year term in office, a figure that has repeatedly increased since the program's inception in 1993. In other words, the legislator—rather than a bureaucrat or local government agency—is the central figure in making spending decisions. Under the MPLADS scheme, an MP recommends local works for a particular district, and the project is then implemented by the relevant district authority.[54] The range of permissible projects is wide; common examples are culverts, bus shelters, and hand-pumps. Once

[47] *See generally* Madhavan, *supra* note 44, at 88–96.
[48] India Const. art. 105.
[49] *See* N. W. Barber, The United Kingdom Constitution: An Introduction 46–53 (2021).
[50] Tej Kiran Jain v. N. Sanjiva Reddy, (1970) 2 SCC 272, 274.
[51] *See* Tarunabh Khaitan, *The Real Price of Parliamentary Obstruction*, 642 Seminar (2013), https://india-seminar.com/2013/642/642_tarunabh_khaitan.htm; Ronojoy Sen, House of the People: Parliament and the Making of Indian Democracy 128 (2022).
[52] *See generally* Harry Blair, *Constituency Needs, Constitutional Propriety and Clientelist Patronage: Constituency Development Funds in India*, *in* Distributive Politics in Development Countries: Almost Pork 167 (Mark Baskin & Michael L. Mezey eds., 2014). The fiscal outlay for the MPLADS scheme is admittedly trivial in terms of the Government of India's annual budget. However, because funds are scarce and parliamentary constituencies are large, legislators devote significant time to constituency development projects.
[53] *See* Lok Sabha Deb. 558–62 (10th Series, Eighth Session, Tenth Lok Sabha, 1993).
[54] Ministry of Statistics and Programme Implementation, Government of India, Guidelines on Members of Parliament Local Area Development Scheme 6 (2016).

completed, the resulting infrastructure projects are overtly branded with the respective MP's name, which renders these projects highly visible and politically expedient.[55]

One can notice the interaction between such schemes and the anti-defection law. As their term ends, a legislator needs to face voters and highlight their performance in seeking re-election. Because of the anti-defection law, their work in the legislative chamber lacks not only visibility but also the clear attribution that might facilitate credit claiming. The ability of legislators to have a say in executive administration helps to remedy that, although such activities clearly blur the line between the two branches of government. The empirical literature confirms the tension between party centrism and legislators' desire to distinguish themselves through constituency development projects. One study finds that MPs in party strongholds are less motivated to cultivate individual reputations, and hence are less likely to exhaust their quota of local "pork" spending. In these strongholds, legislators can rely on the party label alone to win re-election.[56] This is not to say that partisan considerations do not influence legislator behavior in constituencies that are not partisan strongholds. Indeed, the evidence suggests that legislators deliver higher levels of "pork" to state assembly constituencies nested within their larger parliamentary constituency that are controlled by fellow co-partisans.[57]

The problem of attribution is further borne out by the reality of political funding. In India, the Representation of the People Act, 1951, allows political parties to accept contributions, with requirements as to the disclosure and source of funding.[58] Regarding expenditures, parties can spend an unlimited sum on election campaigns as long as such funds are used to propagate the party program and are not used for an individual candidate's campaign.[59] In contrast, the Act not only requires candidates to maintain accounts of all election spending between one's nomination and the election result but also places a limit on candidates' overall expenditure, contravention of which amounts to a "corrupt practice."[60] In other words, the regime is lopsided, with candidates subject to greater regulation than parties.

Party control of the funding machinery means that individual candidates must, then, still seek ways of raising funds for their own campaigns because they cannot be assured of party funds.[61] Candidates are incentivized, even compelled, to engage in intensive, individual-level fundraising which often involves the accumulation of illicit funds. Survey evidence from north India suggests that between two-thirds and seventy

[55] *See* Francesca R. Jensenius & Pradeep Chhibber, *Privileging One's Own? Voting Patterns and Politicized Spending in India*, 56 Comp. Pol. Stud. 503 (2023).

[56] *See* Philip Keefer and Stuti Khemani, *When Do Legislators Pass on Pork? The Role of Political Parties in Determining Legislator Effort*, 103 Am. Pol. Sci. Rev. 99 (2009). Of course, the strength of party–voter linkages in an electoral district also shapes a legislator's ability to switch parties. *See* Andrei Zhirnov and Mariam Mufti, *The Electoral Constraints on Inter-Party Mobility of Candidates*, 51 Comp. Pol. 519 (2019).

[57] *See* Anjali Thomas Bohlken, *Targeting Ordinary Voters or Political Elites? Why Pork Is Distributed Along Partisan Lines in India*, 62 Am. J. Pol. Sci. 796 (2018).

[58] Representation of the People Act, 1951, §§ 29B, 29C (India).

[59] *See id.* § 77(1).

[60] *Id.* §§ 77, 123. *See also* Conduct of Elections Rules, 1961, § 90 (India).

[61] This power was only increased by the "electoral bonds" scheme, which was eventually struck down by the Supreme Court in Association for Democratic Reforms v. Union of India, 2024 SCC Online SC 150. On the scheme, see Milan Vaishnav, *Political Finance in India*, *in* The Oxford Handbook of Indian Politics 349, 356 (E. Sridharan and Sumit Ganguly, eds., 2024).

percent of legislators could rely on some degree of party funding during elections; in contrast, nearly ninety percent relied on personal resources.[62] Importantly, legislators raise funds not only for elections but also for constituency service; their disbursement of these funds naturally only furthers their individual role.[63]

Considering this context, it is worth revisiting the consensus that the anti-defection law has involved a transition away from the individual legislator-oriented framework to one centered on the political party. Rather than having reduced the importance of individual legislators, the anti-defection law has altered the stage at which they matter. Specifically, the law has shifted their significance from the legislative arena to the electoral arena. Separately, one might say that the shift to a party-centric model is greater in legislatures where there is a neat division of power between two consolidated parties and one enjoys a clear majority. In situations of fragmented political authority, individual legislators may enjoy considerable power because defections can bring down the government relatively easily, and lawmakers might be willing to lose their seat and stand for re-election on the ticket of the party that they join.[64] This dynamic also helps explain why the Tenth Schedule has not curbed corruption. As we subsequently show, horse trading has not disappeared but has merely shifted form.

We should therefore resist the conclusion that individual legislators no longer matter under India's new parliamentary framework.[65] Similarly, one should resist concluding that the anti-defection law necessarily dilutes the expression of popular sovereignty.[66] It is true that, in thinking about *legislatures*, one often focuses on the role and activity of *legislators*.[67] But though an anti-defection law may involve strengthening the party, its impact on representation is not straightforward. One could develop an account of representation that underlines a basic point: when voters choose a candidate in an election, they do so recognizing that there is an overlap between the party and the individual, resulting in an *ex ante* binding of a representative. This was precisely the reasoning that the South African Constitutional Court recognized in the *In re Certification* decision when it observed that an "anti-defection clause can act as an additional check on legislators who become accountable, not only to the electorate and the legislature, but also to their party."[68] As per this vision, it is party switching rather than the banning of defections that dilutes representation.[69] Of course, how voters see such a

[62] *See* Jennifer Bussell, *Whose Money, Whose Influence? Multilevel Politics and Campaign Finance in India*, *in* Costs of Democracy: Political Finance in India, *supra* note 25, at 232, 232-272.

[63] On constituency service, see Jennifer Bussell, Clients and Constituents: Political Responsiveness in Patronage Democracies (2019).

[64] *See* Alok Prasanna Kumar, *Defecting from the Law*, 52 Econ. & Pol. Weekly 12 (2017).

[65] Such a view is often expressed in one form or another. *See, e.g.*, Sethia, *supra* note 41, at 30.

[66] For such a suggestion, see, e.g., Darsan Guruvayurappan, *Rethinking Defection: An Analysis of Anti-defection Laws in India*, 76 Parliamentary Aff. 443, 451 (2021).

[67] Consider, for example, Waldron's observation that legislatures "do not just assemble and vote," but rather "deliberate"—"that is, their members *talk* to one another about the measures they are considering." Jeremy Waldron, Law and Disagreement 69 (1999).

[68] *In Re Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96), ¶ 185.

[69] *See* M. V. Rajeev Gowda & Varun Santhosh, *Election Law in India*, *in* Routledge Handbook of Election Law 288, 297 (David Schultz & Jurij Toplak eds., 2023); William B. Heller and Carol Mershon, *Introduction: Legislative Party Switching, Parties, and Party Systems*, *in* Political Parties and Legislative Party Switching 3, 5 (William B. Heller & Carol Mershon eds., 2009).

candidate may shape our conclusions, but the broader point is that there are varying models of representation that can plausibly fit varying schemes.[70]

Though understanding the importance of legislators and the nature of representation is a complex matter, individuals clearly matter differently than they once did, and the mechanism of democratic accountability undoubtedly works differently than before. While an individual member does still matter, they no longer matter in their *individual* capacity as a legislator. They lack the freedom so commonly associated with legislators ever since Edmund Burke's Bristol address.[71] Their *individuality*, in other words, is traded in at the electoral stage. From the time they become members of a legislature, they matter only as an aggregate group.

What merits emphasizing is that because the *individuality* of the representative is only significant at the electoral stage, the representative is no longer accountable in their individual capacity in the legislative arena. That accountability only exists at the time of the representative's re-election. Under the new dynamic of democratic accountability, it is the political party that is accountable in the legislative arena. This means that we can no longer regard the lawmaker as a person who shares a certain relationship with the constituency that they are representing, quite simply because the identity of that individual lawmaker is stripped. The constituency in question is still being represented, but representation now takes a different form. It follows that there is a fundamental change in the legislature as well. Crudely put, the legislature as a body has become de-institutionalized, though it is crucial to specify how.[72]

In efficacy terms, anti-defection provisions can have a salutary effect on the effectiveness of the legislature, if such an outcome is measured narrowly by the number of bills passed. But its processes—say, for example, deliberation—no longer have normative significance.[73] However, the matter is not so simple. As constitutional theorists have emphasized, the quality of democratic government turns crucially on the quality of deliberation in the legislative domain. Across illiberal populist regimes, András Sajó notes, there is the creation of the "rationalized parliament [that] fails to exercise its supervisory role, and… embodies the proverbial three monkeys in one: see no evil, hear no evil, speak no evil."[74] "Without deliberation," Sajó points out in studying Hungary and Poland, "parliament becomes a legislative factory"; the emphasis is on "celerity" and on silencing all forms of debate and opposition.[75] In the Indian case, not only are fewer bills being referred to legislative committees but Parliament is also spending less time discussing them.[76] Second,

[70] On the representative power of political parties, see Michael Saward, The Representative Claim 126–37 (2010).

[71] *See* Edmund Burke, *Speech to the Electors of Bristol* [1774], *in* Burke's Politics: Selected Writings and Speeches 114, 114–16 (R. J. S. Hoffmann & P. Lavack eds., Alfred A. Knopf 1949).

[72] To link the anti-defection law to an overall assessment of the legislative branch, one would have to provide a thicker internal assessment of the institution—its rules and procedures, its committees and functioning, and so forth.

[73] On the normativity of legal institutions, see generally Alon Harel, Why Law Matters (2014).

[74] András Sajó, Ruling by Cheating: Governance in Illiberal Democracy 187 (2021). *See also* Jan-Werner Müller, Democracy Rules 105 (2021).

[75] Sajó, *supra* note 74, at 189.

[76] *See Vital Stats: Parliament functioning in Budget Session 2023*, PRS Legislative Rsch. (Apr. 6, 2023), https://prsindia.org/files/parliament/session_track/2023/vital_stats/Session_Vital-Stats_BS23.pdf.

under a strict anti-defection law, the legislature cannot hold the executive accountable in any meaningful sense; the majority party which populates the executive has every incentive to ensure that the legislature functions like a rubber stamp. Therefore, even if deliberative processes were to take place in a healthy manner, they no longer have a relationship to the outcomes that emerge, such as the promise of a speech having the power to change how an individual legislator may vote. Accountability is no longer mediated through the institutional processes of the legislature.[77]

4. Regulating defections?

We have thus far considered how the anti-defection law has reshaped parliamentary government in India. We now explore the challenges revealed by the workings of such laws.

4.1. India: A tale of three workarounds

In India, the operation of the anti-defection provisions in the Constitution has invited several legal disputes, mostly around the actions of the Speaker of the legislative chamber. These disputes have mainly centered on the conditions for disqualification, the validity of particular disqualifications, and the grounds for judicial review.[78] These controversies have been sharpest when the Speaker has delayed in acting on disqualification petitions, often as a political strategy. This strategy, facilitated by the politicization of the office of the Speaker, has been one means by which the bar against floor crossing has been blunted. Over time, the Supreme Court has become increasingly embroiled in cases involving undecided disqualification petitions. The Court has sought, if in a rather limited fashion, to direct the timely adjudication of such petitions by the Speaker, acknowledging that delays can render the anti-defection law ineffective because legislators can defy a party whip without consequence.[79]

More recently, a second innovative workaround has surfaced. In certain instances, lawmakers who intend to violate the party whip have chosen to resign their position before violating the party whip, thereby avoiding disqualification.[80] Such action

[77] This has all sorts of implications for the legislature's capacity to perform its non-law-making functions. For example, where anti-defection provisions prevail and Parliament is empowered to make judicial appointments, the interaction of the two potentially subjugates the judiciary to the executive. This issue was sharply revealed in Bangladesh, where the Sixteenth Amendment to the Constitution empowered Parliament to remove judges of the higher judiciary. *See* Advocate Asaduzzaman Siddiqui & Ors. v. Bangladesh & Ors., Writ Petition No. 9989 of 2014, High Court Division, Sup. Ct. (May 5, 2016) (Bangl.).

[78] *See* Kashinath Jalmi v. Speaker, (1993) 2 SCC 703; Ravi S. Naik v. Union of India, 1994 Supp (2) SCC 641; G. Viswanathan v. Speaker, (1996) 2 SCC 535; Jagjit Singh v. State of Haryana, (2006) 11 SCC 1; Rajendra Singh Rana v. Swami Prasad Maurya, (2007) 4 SCC 270; Amar Singh v. Union of India, (2011) 1 SCC 210; Amar Singh v. Union of India, (2017) 13 SCC 222; Nabam Rebia v. Deputy Speaker, (2016) 8 SCC 1; Keisham Meghachandra Singh v. Speaker, (2021) 16 SCC 503; Kshetrimayum Biren Singh v. Speaker, (2022) 2 SCC 759.

[79] *See* Keisham Meghachandra Singh v. Speaker, (2021) 16 SCC 503.

[80] In certain cases, legislators have resigned *after* committing acts that violate the party whip. For instance, in the state of Manipur in 2020, six Congress legislators defied a whip and refused to attend the assembly to participate in a no-confidence vote. After their absence undermined their

brings down the size of the assembly, altering the math needed to prove a numerical majority. Any legislator who chooses to resign can contest fresh by-elections for their seat; and, if their preferred government retains power, they can be inducted into the executive.[81] In attempting to regain their seat in the assembly, the resigning candidate often receives the financial and political support of the party to which they are effectively defecting—and the candidate is often promised a role in government upon being re-elected.[82] Such voluntary resignations were originally unanticipated because the price of resignation is high: one loses membership of the legislature. It was not envisaged, however, that the precise nature of political competition would render this a viable alternative.

In May 2023, an Indian Supreme Court verdict, *Subhash Desai*, threw into sharp relief a third method for bringing down a government.[83] Here, a contest arose over which faction was the authentic representative of the state ruling party. In essence, two different factions within a political party effectively split and both claimed to be the "real" political party (with each asserting the privilege of using its name, symbol, and so forth).[84] The dissident faction issued a notice for the removal of the Deputy Speaker of the Maharashtra State Legislative Assembly under the Constitution (the speakership was vacant at the time).[85] The Deputy Speaker in turn filed disqualification petitions against the dissenting members, who approached the Court, arguing that the Deputy Speaker must give more notice for disqualification petitions—and that, even then, the Deputy Speaker could not act on those petitions until the notice for his removal was itself addressed. This plea relied on the prior holding of the Court in *Nabam Rebia*, which held that a Speaker could not decide disqualification petitions while a decision on the notice for the Speaker's removal was pending.[86] In response, the Court issued an interim order allowing the dissident faction more time to respond to the Deputy Speaker's notice.[87] Meanwhile, the leader of the opposition approached the Governor—an appointee of the central government, who once belonged to the same state opposition party—to argue that the government had lost the confidence of

party's attempts to oust the sitting government, the legislators resigned before defection proceedings could commence. *See* Chakshu Roy, *Politicians Have Become Adept at Using and Bypassing the Anti-Defection Law*, Indian Express (Aug. 13, 2020), https://indianexpress.com/article/opinion/columns/rajasthan-manipur-biren-singh-kalraj-mishra-ashok-gehlot-sachin-pilot-6552301/.

81 This is captured, for example, by the facts in Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly, (2020) 2 SCC 595. Here, the Court clarified that if a legislator commits acts that violate the whip *before* resigning, the Speaker/Chairperson can reject that resignation and pursue formal disqualification. What this means in practice is that a legislator who wishes to resign but is formally disqualified can contest by-elections but cannot be a member in the executive. A legislator who resigns without disqualification is eligible for an executive office.

82 *See id.*

83 Subhash Desai v. Governor of Maharashtra, 2023 SCC Online SC 607.

84 The issue was complicated by the role of the Election Commission, which is empowered to decide who should be allotted the party's original name and symbol. *See* In Re: Dispute Relating to Shiv Sena under Paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968, Dispute Case No. 01/2022 (Election Commission of India) (Feb. 17, 2023).

85 *See* India Const., art. 179(c).

86 *Nabam Rebia*, (2016) 8 SCC 1.

87 Eknathrao Sambhaji Shinde v. Deputy Speaker, Maharashtra State Legislative Assembly, W.P. 19161/2022 (June 27, 2022).

a majority of assembly members. In response, the Governor asked the Chief Minister to prove his majority on the floor, a decision that the Court refused to stay. Without a working majority, the Chief Minister resigned, and the leader of the dissident faction was sworn in as the new Chief Minister.

The Supreme Court's judgment refused to restore the *status quo ante* in which the original Chief Minister occupied the post, despite finding fault with the actions taken by several actors involved in the saga. The Court ruled that it is the job of the political party—not the legislative party—to appoint the whip and the leader of the party in the assembly. In so doing, the Court rejected the dissident faction's contention that the legislative party could make its own appointments over the objection of the political party's leadership. The Court also observed that because the "split" provision in the Tenth Schedule was removed in 2003, it could not serve as a recourse for elected members facing disqualification proceedings. In other words, the dissident faction could not simply anoint itself the rightful owners of the party, disguising what was effectively a party split. Moreover, the Court ruled that the Governor was not justified in requesting the original Chief Minister prove his majority on the floor, stating he "had no objective material on the basis of which he could doubt the confidence of the incumbent government."[88] What the Court did not say is that it had refused to stay those proceedings, resting on the fact that the eventual outcome would always be subject to review (and, thus, reversible). As regards *Nabam Rebia*, the Court referred the question in this prior case—on when a Speaker can decide disqualification petitions—to a larger bench, acknowledging that the decision "is prone to be misused by defecting [members of the legislative assembly], whose consequent disqualification under the Tenth Schedule can be avoided by disabling the Speaker."[89]

In short, the Supreme Court ruled that the dissident faction claimed ownership of the political party to circumvent the repealed split exception. The Deputy Speaker was rendered powerless because of the motion filed against him by the dissident group. The Governor, for his part, should not have ordered a trust vote. Yet, despite these missteps, the Court refused to reinstate the original Chief Minister on the grounds that he had resigned.[90] Even though the original Chief Minister refused to participate in a trust vote that should not have taken place and was precipitated by maneuvers meant to circumvent the Tenth Schedule, the Court refused to rectify the wrong. The facts in the *Subhash Desai* case offer a startling account of how the anti-defection law can be undermined. The case also turns the question of defections into an existential matter involving the identity and ownership of parties.

4.2. Self-dealing and self-regulation: Israel and South Africa

The comparative evidence from two other longstanding democracies—Israel and South Africa—further highlights the challenge in regulating defections. In Israel, Parliament repeatedly amended the law to suit changing political circumstances. In

[88] *Subhash Desai*, 2023 SCC Online SC 607, ¶ 197.
[89] *Id.* ¶ 39.
[90] *Id.* ¶ 217.

South Africa, where defections were once formally prohibited, the dominant party altered the rules to allow for defections under certain circumstances. Once its project of constructing political hegemony was over, it repealed the new laws. Both cases illuminate the potential that anti-defection laws carry for self-dealing and manipulating political currents.

Israel's tryst with regulating floor crossing began in 1991, when an unstable National Unity government and shifting party loyalties led to laws to enforce party unity.[91] Now, a Member of the Knesset (MK) who left their party but did not quit the House could not be included in the candidate list in the forthcoming election of any party represented in the legislature. However, the defecting MK could participate in elections if they joined (or formed) a different political party. The change left some space for good faith disagreements—if a MK voted against their party on the question of confidence, it would constitute a defection only if the MK received a material reward. This exception sought to balance legislator agency and government stability. Under the new law, party splits were exempted from penalties if they involved the defection of at least one-third of the party's elected MKs.[92] Further, no agreement regarding candidate lists for upcoming elections could be finalized more than 90 days in advance of the election date. The law also limited certain kinds of arrangements. For instance, a defecting MK could not be appointed as a cabinet minister or deputy minister.

What is striking in Israel's case are the amendments to these 1991 changes. In almost every instance, the amendments provided an expedient solution to a discrete political scenario. In 1994, an amendment stipulated that any MK who splits from their party to set up a new party (under conditions already recognized in the law) would be exempted from the ban on cabinet appointment. This move was driven by the Rabin government's desire to secure the defection of a three-member breakaway faction from an opposition party.[93] In 2001, the Knesset passed an amendment to the 1973 Party Funding Law that denied any state funding to splinter parties—including those that met the requirements of a legal split under the law—in the first two years of a newly elected parliament.[94] In 2004, an amendment allowed a single member of a 3-MK party faction to break away without penalty if the member disagreed with the merger of the existing party of which they are a member with another party. This move was a product of the Sharon government's desire to secure one member of a 3-MK breakaway faction who differed with his faction's desire to merge with the Labor Party. While this rogue faction member met the one-third split requirement provisioned by the law, the law required that a legal split involve *at least* two members.[95]

[91] Israel's anti-defection provisions aimed to discourage "kalanterism," the Israeli term for politicians changing parties in return for material benefits. Csaba Nikolenyi, *The End of* Kalanterism*? Defections and Government Instability in the Knesset*, 25 Israel Stud. 95, 96 (2020).

[92] Assaf Shapra, *Joint Lists in Israeli Politics*, *in* The Elections in Israel: 2019–2021 at 213, 219 (Michal Shamir & Gideon Rahat, eds., 2022).

[93] Csaba Nikolenyi, *Keeping Parties Together? The Evolution of Israel's Anti-Defection Law*, 47 Polish Pol. Sci. Y.B. 188, 197 (2018). *See also* Csaba Nikolenyi, Party Switching in Israel: A Historical and Comparative Analysis 46 (2023).

[94] *Id.* at 49.

[95] Nikolenyi, *supra* note 93, at 198.

The third change, in 2009, allowed a minimum of seven MKs to split from their party without incurring any anti-defection penalties. It further authorized an approved splinter party to receive state funding so long as the party split took place after the third month of the Knesset's term.[96] Here, the precipitating event was one MK's decision to lead a group that sought to break away from Kadima and join the Likud-led coalition. An amendment was needed so that this move would not violate the law's split provisions.[97] This 2009 change was short-lived and was rescinded in 2014. Even during its passage, it prompted allegations of political opportunism. In 2021, the ruling alliance again adjusted the threshold at which MKs could leave their party without incurring penalties, lowering the bar to four MKs.[98] However, this move was undone by the Netanyahu government, reverting to the one-third rule with a two-MK threshold.[99]

The later amendments substantially differ from the original 1991 provisions. As Csaba Nikolenyi notes, if the original provisions aimed to promote government stability by disincentivizing defections, subsequent changes encouraged defections to stabilize government.[100] The original law created a narrow set of conditions under which floor crossing was possible. But the later amendments widened the possibilities for defection to achieve the same objective. For our purposes, what bears emphasizing is how, when political circumstances dictated, the government repeatedly amended the law to further its machinations.[101]

South Africa offers a strikingly similar narrative. Here, the ban on floor crossing was conveniently dropped for political reasons, only to be reintroduced to suit new circumstances. As James Fowkes points out, the prohibition on floor crossing was negotiated as part of South Africa's transitional constitution and was later incorporated into its 1996 post-apartheid Constitution.[102] However, the latter also stipulated that a simple majority of Parliament could choose to reverse this once the text was adopted, indicating that its inclusion was not seen as permanent.[103] "The provision," Samuel Issacharoff observes, "was an express subject of negotiations in the transition from apartheid, reflecting fears that the likely parliamentary majority of the African National Congress could be used to woo minority legislators and over-concentrate

[96] Csaba Nikolenyi, *Party Switching in Israel: Understanding the Split of the Labor Party in 2011*, 6 Contemp. Rev. Middle E. 408, 414 (2019); Ofer Koenig, *The Mofaz Law: What Is It and Why?*, Isr. Democracy Inst. (Jul. 26, 2009), www.idi.org.il/articles/1630.

[97] *See* Nikolenyi, *supra* note 93, at 198.

[98] Nikolenyi, Party Switching in Israel, *supra* note 93, at 165–6; Assaf Shapira, *The Amendment to the Bill Allowing a Faction to Split would Help Reduce the Political Fragmentation*, Isr. Democracy Inst. (Dec. 22, 2022), https://en.idi.org.il/articles/46767.

[99] Carrie Keller-Lynn, *5th Knesset Passes First Law, Making It Harder for MKs to Break from Their Factions*, Times of Isr. (Dec. 19, 2022), www.timesofisrael.com/liveblog_entry/25th-knesset-passes-first-law-making-it-harder-for-mks-to-break-from-their-factions/.

[100] Nikolenyi, *supra* note 91, at 97. *See also* Csaba Nikolenyi, *Changing Patterns of Party Unity in the Knesset: The Consequences of the Israeli Anti-Defection Law*, 25 Party Pol. 712 (2019).

[101] Despite the opportunistic changes, as Nikolenyi notes, Israel's anti-defection provisions did succeed in preventing future governments from collapsing. *See* Csaba Nikolenyi, *Government Termination and Anti-defection Laws in Parliamentary Democracies*, 45 W. Eur. Pol. 638, 650 (2022).

[102] S. Afr. Const. Item 13, Annexure A, Schedule 6 (1996).

[103] James Fowkes, Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa 219 (2016).

political power."[104] In *In re Certification*, the Constitutional Court noted that the argument in support of the anti-defection provision was that such a law would "secure a more stable government and [] avoid corruption in legislatures".[105]

In the late 1990s, two opposition parties—the Democratic Party (DP) and the New National Party (NNP)—created an opposition formation known as the Democratic Alliance (DA). The alliance posed a threat, especially in the Western Cape Province, to the ruling African National Congress (ANC). To head off this emerging threat, the ANC made distinct overtures to the NNP, hoping to precipitate the implosion of the emerging DA.[106] Eventually, the ANC realized that the only formal way to absorb members of the NNP into its fold, and thereby fracture the DA, was to create a legal avenue for NNP representatives to defect.[107]

In 2002, Parliament enacted legislation to authorize defections. This move was controversial not simply because it departed from the vision of the 1993 and 1996 constitutions but also because South Africa possesses a closed-list, proportional representation (PR) electoral design. In such a system, voters select parties rather than candidates, thereby raising special concern when floor crossing impacts seat distribution. With the change, Parliament permitted defections by creating two fifteen-day windows per elected term during which locally elected councilors could change their partisan affiliations without losing their seats in local-level bodies.[108] This was subsequently extended to the national and provincial levels.[109] Defections were permissible only if they involved a minimum of ten percent of a party's representatives, making defection a collective enterprise.

The floor crossing that ensued allowed the ANC to protect its pole position in the party system. The ten percent threshold virtually guaranteed that large parties like the ANC would be untouched by the defection provisions but smaller parties would become ripe targets for absorption by bigger ones. In addition, the timing of the "defection windows" was left to the discretion of the president, further reinforcing the ANC's powers.[110] While defections were not the basis of the ANC's dominance, they did strengthen the party's numbers in national, provincial, and local assemblies.[111]

[104] Samuel Issacharoff, *Judging Democracy's Boundaries*, *in* Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy 150, 156 (Guy-Uriel E. Charles, Heather K. Gerken, & Michael S. Kang, eds., 2011).

[105] *In Re Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96), ¶182.

[106] Susan Booysen, The African National Congress and the Regeneration of Political Power 271 (2011).

[107] Nkopodi Patrick Kanego Masemola, *Floor-Crossing and Its Political Consequences in South Africa* 1, 5 (Electoral Inst. for Sustainable Democracy Occasional Papers, 2007), www.eisa.org/wp-content/uploads/2023/05/occasional-paper-2007-floor-crossing-and-its-political-consequencies-in-south-africa.pdf.

[108] *See* S. Afr. Const., First Amendment Act of 1997; Local Government: Municipal Structures Amendment Act of 2002 (S. Afr.).

[109] *See* S. Afr. Const., Second Amendment Act of 2002; Loss or Retention of Membership of National and Provincial Legislatures Act No. 22 of 2002 (S. Afr.). *See also* Issacharoff, *supra* note 104, at 157–8; S. Afr. Const., Tenth Amendment Act of 2003.

[110] Amanda Gouws & Paul Mitchell, *South Africa: One Party Dominance Despite Perfect Proportionality*, *in* The Politics of Electoral Systems 353, 364 (Michael Gallagher & Paul Mitchell, eds., 2005).

[111] Susan Booysen, *The Will of the Parties verses the Will of the People? Defections, Elections and Alliances in South Africa*, 12 Party Pol. 727, 742 (2006). Whereas Booysen sees floor crossing as central to the construction of the ANC's hegemony, Fowkes argues that the ANC's dominance was not the primary product of the lifting of the ban on defections. Fowkes, *supra* note 103, at 228.

Susan Booysen's analysis confirms that, in the years following the passage of the abovementioned changes, there was a rush of defections, especially away from smaller opposition parties and toward larger ruling and opposition parties.[112] However, it is worth highlighting that the rollback of South Africa's constitutional ban on floor crossing received broad, cross-partisan support. As Fowkes notes, Parliament overwhelmingly supported the amendments, with various parties seeing distinct political benefits for their own side.[113]

When the South African Constitutional Court assessed the constitutionality of the 2002 amendments, it was confronted with the general argument that anti-defection provisions protect the system of PR, and that their removal undermines political competition. But it was also faced with a more specific argument, linked to the South African circumstance: it was suggested that, in a "new and fragile democracy," where the ANC was dominant, permitting floor crossing would "attract members from other parties by offering them inducements to cross the floor" and thereby "weaken multiparty democracy."[114] In broad terms, the Court decided not to enter the political fray. It upheld the 2002 changes, holding that, as a general matter, allowing defections was not inconsistent with a system of proportional representation; and that with regard to the specificities of South Africa, the parliamentary regulation of defections was not inconsistent with democracy—even if the change disproportionately impacted smaller political parties.[115] Perhaps the Court's thinking was shaped, as Fowkes argues, by the implicit recognition that the practice of floor crossing was not highly distortionary in the South African case.[116]

In 2008, resentment over defections, both inside parties as well as among the public, began to grow. From the ANC's perspective, defections had by this time largely achieved their goal. They had consolidated the party's legislative majorities by attracting floor crossers from a variety of smaller parties. Even some within the ANC expressed concern over defections, perceiving the practice as a threat to the party's tradition of party discipline and hierarchical leadership.[117] In the same way that Parliament permitted defections when political circumstances encouraged the exploitation of floor crossing, in 2008 it eliminated defections across all tiers of government and restored the 1996 Constitution's original stance.[118] In the end, the defection provisions were a maneuver to consolidate a governing majority. Once that majority was built, the ruling party turned its back on them.

In representative democracies, the legislature typically has control over its processes. The review of internal actions by external institutions, like courts, is limited. The

[112] Booysen, *supra* note 111, at 739–42.
[113] Fowkes, *supra* note 103, at 221.
[114] United Democratic Movement v. President of the Republic of South Africa, 2002 (CCT 23/02) ¶ 45 (Oct. 4, 2002).
[115] *Id.* ¶¶ 34–5, 47.
[116] Fowkes, *supra* note 103, at 232.
[117] *Id.* at 223.
[118] *See* S. Afr. Const., Fourteenth Amendment Act of 2008; S. Afr. Const., Fifteenth Amendment Act of 2008.

upshot of this is that the provisions prohibiting floor crossing must be interpreted and enforced by the very actors who stand to gain or lose from such floor crossing. One can observe how this problem has manifested across jurisdictions. In *Subhash Desai*, the dissident faction recognized that it could neutralize the Deputy Speaker, who was entrusted with adjudicating disqualification petitions, and rely on a pliant Governor who would fill in the decision-making vacuum and allow it to stake claim to the government without contravening the anti-defection law. In Israel, Parliament repeatedly amended the country's floor-crossing provisions to solve a series of immediate political crises. In so doing, it demonstrated that the country's anti-defection law could be modified to suit the ruling party's agenda. In South Africa, the country's post-apartheid constitution strictly outlawed defections. But the emerging dominant party loosened anti-defection laws to aid its efforts to build a lasting governing majority. As soon as it succeeded in establishing hegemony, the ruling party reverted to the *status quo ante*. In these latter two cases, the law was not sidestepped, as in India, but instead changed to deliver politically desirable outcomes.

Israel and South Africa are interesting examples because, unlike India, their legislatures follow the PR system. Though the case for laws against floor crossing does seem stronger in PR systems, serious concerns with such laws nonetheless remain.[119] In such systems, the autonomy of the legislator is still vital, and courts have often acknowledged this.[120] A fine example is the *United Democratic Case*, where the South African Constitutional Court—in considering whether the Speaker had the authority to conduct a no-confidence motion on a secret ballot—observed that, though parties were "important players" in a PR system, "nowhere does the supreme law provide for [members of Parliament] to swear allegiance to their political parties."[121] The Court

[119] The case would also turn on the specific system of PR that is adopted. In the case of Israel, for example, the case in favor of an anti-defection law seems strongest as there are no territorial constituencies. As such, individual legislators do not, as a matter of electoral design, have a specific relationship to particular geographical regions. A vote is cast in favor of a political party that then determines legislators based on a closed list. In South Africa, there is a PR system whereas the National Council of Provinces adopts a mixed representation system. The system in the National Assembly was previously a pure PR system without territorial constituencies. This was struck down by the Constitutional Court on the grounds that it required persons to become elected only through membership in a political party—thereby disallowing independent candidates. New National Movement NPC v. President of the Republic of South Africa, 2020 CCT (110/19) (11 Jun. 2020). Given that half of the National Assembly now contains "regional seats," the relationship between legislators and territories is strengthened in the Assembly, and of course the (indirectly elected) representatives of the National Council of Provinces bear a territorial relationship with their province.

[120] Scholars of New Zealand, where an anti-defection law was enacted first in 2001 and then in 2018, have repeatedly underlined this. *See, e.g.*, Andrew Geddis, *Proportional Representation, "Party Hopping" and the Limits of Electoral Regulation: A Cautionary Tale from New Zealand*, 35 Common L. World Rev. 24, 41–6 (2006); Caroline Morris, *Party-hopping Déjà Vu: Changing Politics, Changing Law in New Zealand 1999–2018*, 29 Pub. L. Rev. 206, 221 (2018). With respect to the question of PR design noted above, New Zealand's mixed-member proportional system contains an important territorial element—voters cast an "electoral vote" for a candidate in a specific constituency. There is a separate "party vote" that is cast for parties that are contesting the listed positions.

[121] United Democratic Movement v. Speaker of the National Assembly, 2017 (CCT 89/17) ¶ 79 (June 22, 2017).

further noted that "in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail."[122]

We can therefore notice how, apart from the cost to legislator autonomy, the self-regulation that a successful anti-defection regime demands is hard to achieve. The trouble with greater external oversight is that it can only come at the cost of considerable rebalancing of the separation of powers. In her study of New Zealand, which contains an anti-defection law in the context of a somewhat complex PR system, Caroline Morris points out that an anti-defection law unsettles the traditional authority granted to legislatures over their members "by creating an opportunity for courts to decide whether a representative's conduct has met the requirements for disturbing party proportionality (and what that means) and should be deemed unworthy of continued parliamentary membership, or whether the party leader has complied with the statutory terms for exclusion."[123] For effective external oversight of an anti-defection regime, the power granted to courts would have to be still greater.

4.3. A limited defection law?

Thus far, we have offered a skeptical perspective on anti-defection laws. But there is one possibility that remains to be considered: a limited version of such a law. In the Indian case, legislators are required to vote as per their party's direction; Israel, South Africa, and New Zealand each differ on the extent to which they allow legislators to vote independently.[124] Let us for the sake of argument construct a case for a tailored anti-defection law that applies only to no-confidence motions. One could claim that when one is elected, one is at least partly elected *qua* a member of a political party. Elections are, one might say, elections of governments rather than merely individuals. This argument acknowledges the principle of legislative autonomy—which is why the anti-defection law is not broad—but it also acknowledges the need for party discipline. One draws the line when it comes to the survival of government. Without

[122] *Id.*

[123] Morris, *supra* note 120, at 216.

[124] In South Africa, a person "ceases to be a permanent delegate" in Parliament if they "cease. . . to be a member of the party that nominated that person and is recalled by that party." S. Afr. Const. § 62(4) (1996). *See also* General Laws (Loss of Membership of National Assembly, Provincial Legislature or Municipal Council) Amendment Act No. 55 of 2008 (S. Afr.). In 2017, the Constitutional Court, as noted above, observed that legislators had the independence to depart from the views of their party. *United Democratic Movement*, 2017 (CCT 89/17), ¶79. The position, however, does not seem to be entirely clear. On one reading of Section 62(4), the matter might turn on what the constitutions of the relevant political parties allow. Under the African National Congress Constitution, for example, there are strict requirements for members to follow party orders. Afr. Nat'l Cong. Const. rules 5.4, 25.17.3 (2017). In Israel, the matter appears more straightforward, and legislators are free to vote independently of their party whip (this applies even in no-confidence motions, unless there is a *quid pro quo* involved). Basic Law: The Knesset, s. 6a(b) 1958, SH No. 69 (Isr.). In New Zealand, the matter seems to depend on whether, following a vote that departs from the mandated party line, the party leader submits a formal statement to the Speaker claiming that the member has distorted the political party representation; this submission requires two-thirds parliamentary support. Electoral Act 1993, ss 55A–E (N.Z.).

such a limitation, the argument might go, there will be no party government but only floating coalitions of individuals.

This possibility is not merely hypothetical. Pakistan—a parliamentary system with the first-past-the-post system—provides a useful example. The history of anti-defection measures in Pakistan dates back to the early 1960s, but the most significant move occurred soon after Nawaz Sharif's Pakistan Muslim League (Nawaz) came to power in 1996. The motivation to bar floor crossing, through the Fourteenth Amendment to Pakistan's 1973 Constitution, was of a piece with the dynamics that we have noted in Israel and South Africa. Sharif's main goal was to protect his parliamentary support; he aimed "to insulate himself."[125] The anti-defection provision, Article 63A, was noticeably broad, and barred *inter alia* a vote against the directions issued by one's party. In *Wukala Mahaz Barai Tahafaz Dastoor*, the Pakistan Supreme Court upheld the provision.[126] "The impugned Article," the Court noted, "will bring stability in the polity of the country as it will be instrumental in eradicating [the] cancerous vice of floor-crossing."[127]

The provision was amended by the Legal Framework Order, 2002, and later by the Eighteenth Amendment, leading to its present narrow version.[128] The grounds under which defections are now impermissible are limited to leaving one's party, voting against one's party in confidence/no-confidence motions, or voting against one's party in the case of money bills. This third restriction is presumably a corollary of the second one, as a government cannot survive without budgetary approval. For advocates of such a schema, the problem is broad anti-defection laws rather than such laws per se. Some critics of strict anti-defection laws have suggested that a moderate law of the kind in Pakistan can protect legislator autonomy.[129]

There are, however, reasons to be skeptical. By limiting defections to crucial matters, one weakens Parliament's power to hold the executive accountable. When it comes to a genuine test, the executive is not answerable to Parliament; the ultimate tool of accountability is taken away. Such an approach moves us closer to a presidential form of government, as the legislature has little power to remove the government. As a recent United Kingdom House of Commons report put it, the "principle of maintaining the confidence of the legislature" is a "constitutive feature of parliamentary democracy because it ensures that the executive is accountable to the legislature."[130]

[125] Sadaf Aziz, The Constitution of Pakistan: A Contextual Analysis 111 (2018). *See also* Moeen Cheema, Courting Constitutionalism: The Politics of Public Law and Judicial Review in Pakistan 156–61 (2021).

[126] Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, PLD 1998 SC 1263.

[127] *Id.* ¶ 13.

[128] The amendment was upheld in District Bar Association, Rawalpindi v. Federation of Pakistan, PLD 2015 SC 401.

[129] In India, for example, multiple private member's bills have been introduced in Parliament to this effect. *See, e.g.*, Constitution (Amendment) Bill, 2019, Bill No. 30 of 2019 (India) (introduced by Vikas Mahatme, Rajya Sabha); Constitution (Amendment) Bill, 2019, Bill No. 289) (India) (introduced by Manish Tewari, Lok Sabha). Scholars have also made similar suggestions. *See, e.g.*, M. Ehteshamul Bari & Pritam Dey, *The Anti-Defection Provision Contained in the Constitution of Bangladesh, 1972, and Its Adverse Impact on Parliamentary Democracy: A Case for Reform*, 37 Wis. Int'l L.J. 469, 508–10 (2020).

[130] House of Commons, The Role of Parliament in the UK Constitution Interim Report: The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011 at 6 (2018).

The significance of no-confidence motions has been recognized across parliamentary systems. Consider the South African *Mazibuko* case, which dealt with the rules and processes governing such motions. In unpacking how such "a motion. . . plays an important role in giving effect to the checks and balances element of our separation-of-powers doctrine,"[131] the Constitutional Court observed that a no-confidence motion "affords the Assembly a vital power and duty to scrutinize and oversee executive action" and "is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance."[132]

This argument is a powerful one, but Pakistan's experience captures the challenges of a narrow anti-defection law in a still further way. Consider the recent 2022 no-confidence motion against then-Prime Minister Imran Khan.[133] Here, the opposition attempted to convince members of Khan's own party—Pakistan Tehreek-e-Insaf (PTI)—to defect and join a no-confidence motion. These overtures, in turn, encouraged defections from the PTI's coalition partners. When a vote took place, the ruling coalition lacked the requisite numbers and the government fell. What is important for our purposes is the presidential reference filed before the Supreme Court of Pakistan. This reference raised the question of whether, in a trust vote, the votes of the defecting members should be counted. A bare reading of Article 63A suggests that when a legislator votes against their party in a no-confidence motion, it constitutes a defection and thereby invites disqualification. The question before the Court was whether the votes cast in such an instance should be counted as part of the opposition numbers against the government of the day, or should be disregarded.

The Supreme Court pursued the latter track.[134] The practice of defections, it observed, undermined the rights of political parties and political competition. "[D]efections," it noted, "badly damage and can fatally compromise. . . the "healthy" operating of political parties in all aspects. . . [and] are a near absolute negation" of the rights that parties enjoy.[135] For the Court, Article 63A was to be interpreted in light of a system of party government and the overall goal of addressing defections. In doing so, it concluded that a vote in a no-confidence motion that contravenes a party direction would not be counted. This was the only way to end the "'market place' for defectors."[136] As far as the dissenting opinions were concerned, it was somewhat preposterous to claim that a person could suffer the consequences of defecting—by losing

[131] Mazibuko v. Sisulu, 2012 (CCT 115/12) ¶ 21 (Aug. 27, 2013).
[132] *Id.* ¶¶ 43–4. In subsequent decisions, the Constitutional Court has reiterated this position. *See United Democratic Movement*, 2017 (CCT 89/17), ¶¶ 43–4, 85.
[133] We omit, for reasons of space, some of the finer details in this episode. *See* Mariam Mufti, *Pakistan in 2022*, 63 Asian Surv. 213, 216–17 (2023).
[134] As it happens, the dissident members of Khan's own party did not in fact vote in the trust vote, but the government nonetheless fell because Khan's coalition partners withdrew their support. The similar issue, of whether defecting votes should be counted, did, however, subsequently arise in the Punjab Assembly. *See* Chaudhary Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab, Lahore, PLD 2022 SC 678 (Pak.); Chaudhary Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab, Lahore, PLD 2023 SC 539 (Pak.).
[135] Sup. Ct. Bar Ass'n v. Federation of Pakistan, PLD 2023 SC 42, ¶ 84 (Pak.).
[136] *Id.* ¶ 93.

their membership of the legislature—without their vote even being counted; such a view was seen to violate the elementary right of legislators to vote as they wish and accept the penalties that follow.

This episode exposes the dilemmas inherent in even a moderate anti-defection law. If, under such a law, a defecting member's votes are counted—which seems to be their basic right as a legislator—the law has not solved the problem that it had been enacted to address, namely government stability. The government of the day can still be brought down because members can defect from their party.[137] This was not anticipated in the first instance because, as we observed in the Indian case, the viability of the by-election workaround—in which a legislator would be willing to be disqualified and then contest a by-election with the support of the ruling government—was not foreseen.[138] And given the fact that this process involves multiple steps—a decision by the Speaker of the House, a ruling of the electoral commission, and so forth—the inherent delays mean that the electorate will not have an occasion to penalize the defector with immediate effect.

If, on the other hand, the votes of the defecting members are not counted, then these members can no longer perform their accountability role *qua* legislators. In such a scenario, the defector will have no reason to vote against their party in a no-confidence motion—and they will therefore not defect. In effect, this approach does away with defections once and for all, largely securing governments for their complete term and thereby removing executive accountability to the legislature. Indeed, as Pakistan's Supreme Court put it, the lone answer to defections is one that "deals (as it were) a deathblow to this evil and menace in all its manifestations."[139] But, it does away with the problem of defections by doing away, in large measure, with the possibility of a no-confidence motion. The primary situation in which a no-confidence motion can succeed under such circumstances is where a ruling party forms a government with the support of a coalition party (or parties), and the partner party chooses to withdraw support.[140] (The coalition partner will have to retract support in entirety—individual members of this party cannot individually withdraw support because they too cannot defect from their party.) The upshot is that a no-confidence motion is much harder than would ordinarily be the case in a situation where the ruling party has a majority, and the avenues for dissent are largely ruled out. This is an especially serious problem in situations where party leaders enjoy unhindered authority. In a system

[137] There is no doubt that this problem may be acute in Pakistan where there are extra-constitutional pressures on the democratic system, most notably the military. In such a situation, the emphasis is on strengthening weak parties and constructing a self-reliant party system.

[138] *See* Mariam Mufti, *Factionalism and Indiscipline in Pakistan's Political Party System*, *in* Pakistan's Democratic Transition: Change and Persistence 60, 66 (Ishtiaq Ahmad & Adnan Rafiq ed., 2017). On the by-election workaround in the Indian case, see *supra* note 81 and accompanying text.

[139] *Sup. Ct. Bar Ass'n*, PLD 2023 SC 42, ¶ 84.

[140] Of course, abstentions may also make such motions successful under a narrow set of cases. In situations where abstentions within the ruling party make a no-confidence motion successful, the abstaining members cannot vote for the opposition to bring them into power because their votes are not counted. Therefore, this situation will result in a fresh election rather than an immediate shift in power from the ruling party to the opposition (as would have been the case had the votes of the defecting members been counted).

without intra-party democracy, the only path to exercise voice either within the party or in the legislature would be to resign from the party and form a new party.[141]

5. Addressing defections

If making the prohibition on floor crossing work is challenging—and if such a prohibition has serious implications for the institutional character of the assembly—how might we address the scourge of defections? One tempting suggestion is to stringently regulate the internal governance of parties. In countries that prohibit floor crossing, "decision-making power within parties [should]," the argument goes, "be distributed widely across multiple persons."[142] The rationale here is straightforward. Because, for all practical purposes, parties have substituted the legislature, we should conceive of them as having a kind of "legislative status."[143] Therefore, if we choose to have anti-defection laws, then our regulatory framework should be responsive to parties enjoying a very different status from the one that is conceived in a standard parliamentary system. In the new system, we cannot grant the party autonomy to determine its internal processes and procedures.

Across the world, the regulation of parties—ranging from financial-reporting obligations to requiring parties to be internally democratic—is on the rise.[144] In India, the regulatory focus has been limited to accounting and transparency rules regarding party contributions and expenses.[145] Though India's Central Information Commission (CIC) has required parties to publicly disclose their tax and wealth returns, such disclosures are not subject to third-party scrutiny.[146] The Election Commission, for its part, issues transparency guidelines to political parties, but these do not have statutory authority. As result, parties face no threat of sanction for non-compliance.[147]

Given these realities, the dissatisfaction with the regulatory regime in India is understandable.[148] India's parties are largely autocratic in their functioning, often controlled by a single individual or family with no meaningful process of internal elections, party primaries, or intra-party contestation.[149] A party seeking formal

[141] This suggests, of course, that the system that one adopts will in part depend on how it is embedded within other institutional features.

[142] Bhatia, *What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions*, *supra* note 43, at 306.

[143] *Id.*

[144] *See* Tom Ginsburg & Mila Versteeg, *The Constitutionalization of Democracy*, 34 J. Democracy 36, 36 (2023).

[145] *See* Election Commission of India, Doc. No. 76/PPEMS/Transparency/2013 (Aug. 29, 2014).

[146] *See* Common Cause (A Registered Soc'y) v. Union of India, (1996) 2 SCC 752; Ass'n for Democratic Reforms v. Chief Comm'r of Income Tax-XI, New Delhi, CIC/AT/A/2007/01029 (Apr. 29, 2008).

[147] In 2013, the CIC ruled that political parties were subject to the Right to Information Act, 2005, which empowers citizens to obtain details of the operations and finances of public authorities. India's national parties refused to comply with the CIC's orders. Lacking enforcement powers, the CIC issued a ruling of noncompliance, lamenting that it was "unable to get [parties] to function [as public authorities]." Subhash Chandra Agrawal v. Indian Nat'l Cong., CIC/CC/C2015/000182 (Mar. 16, 2015). Over time, various proposals have been mooted to enhance party regulation. *See* Law Comm'n of India, Report No. 255: Electoral Reforms ¶¶ 2.28.7–2.28.16 (2015) [hereinafter Law Comm'n of India, Report No. 255]; Election Commission of India, Proposed Electoral Reforms 39–42 (2016).

[148] For an emphasis on the regulatory void, see Sethia, *supra* note 41, at 30–1.

[149] *See* Adam Michael Auerbach et al., *Rethinking the Study of Electoral Politics in the Developing World: Reflections on the Indian Case*, 20 Persp. Pol. 250, 256–9 (2022).

recognition by the Election Commission must submit details of its officeholders and membership, and a copy of the party's bylaws.[150] However, there is little additional scrutiny. Furthermore, even if the Election Commission determines that a party is in contravention of its bylaws, the Election Commission can only deregister a party under very narrow circumstances—if the party obtains its registration fraudulently; if the very existence of the party is deemed unlawful; or if the party takes actions that vitiate its bylaws.[151]

The call to regulate political parties as we might regulate legislatures—because they are the "new" legislatures—seems compelling. It has, after all, been argued that democratic backsliding should "be understood as a political party problem," and that "parties and party leaders occupying an ill-defined space on the political spectrum between the center and extreme. . . now present a much greater threat to democratic governance than overtly antidemocratic fringe outfits. . . ."[152] There are good reasons to require parties to submit to more rigorous financial disclosure and auditing norms, especially to the degree that political parties receive explicit (or implicit) state subsidies, which is the case for most democracies. Indeed, Ingrid van Biezen argues that in many advanced industrialized democracies, political parties have evolved from voluntary private associations to entities akin to public utilities whereby the state provides public financing in exchange for extensive regulatory scrutiny.[153]

Yet, beyond questions of funding, the temptation to regulate the internal functioning of parties—regulation that can potentially deliver the accountability that we desire in a world of anti-defection laws—should be resisted. The effort to make the political party an institution of the state is likely to undermine both the idea of a party, which enables all kinds of civic participation, and the idea of state institutions, whose public character comes with distinct characteristics. In cautioning against all parties being subject to the same internal governance rules, Issacharoff rightly points out that "[a]ny requirement that parties have open and democratic internal structures would put at risk ideological and religious parties that may be organized around certain fixed principles not amenable to internal majoritarian override. . . the need for pluralist competition in a democratic society does not necessarily require the same pluralist competition within all of the contending parties."[154]

The case of the United Kingdom provides us with possibilities for how parties might assert a degree of control that avoids the risks of fragmentation without undermining the agency of individual legislators. A singular feature of political party organization and regulation in the United Kingdom is the extent to which systems are informal and norm-based, rather than reliant on legal or external enforcement. Here, the key systems for party control are internal structures built around "party whips." The use

[150] Representation of the People Act § 29A (1951) (India).
[151] Indian Nat'l Cong. (I) v. Inst. of Soc. Welfare, (2002) 5 SCC 685. India's Law Commission has recommended that the Election Commission be given greater authority to deregister parties. *See* Law Comm'n of India, Report No. 255, *supra* note 148, ¶¶ 3.17.1–3.17.4.
[152] Daly & Jones, *supra* note 4, at 510–11.
[153] *See* Ingrid van Biezen, *Political Parties as Public Utilities*, 10 Party Pol. 701 (2004).
[154] Samuel Issacharoff, *Fragile Democracies*, 120 Harv. L. Rev. 1405, 1462 (2007). On party regulation, see generally Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 Current Legal Probs. 73 (2020).

of "whips" in the plural form refers to MPs that possess the role of the "whip" and whose job it is to preside over the whipping process. References to "the whip" refer to a written directive issued by a party to its MPs instructing them how to vote.[155] The significance of a given vote is illustrated by how many times it is "underlined": a "one-line whip" means MPs are requested but not formally required to vote; a "two-line whip" signifies that attendance is necessary; and a "three-line whip" means that MPs' attendance is "essential." In the latter case, an MP's request to miss a vote is unlikely to be granted.[156]

Parties do not always issue a "whip" (in this context, providing a direction for voting) for all votes. There are so-called "free votes," in which MPs can vote with their conscience. Compared to other jurisdictions, party disunity and vocal backbenchers are tolerated, and are in fact common features of the British system. This allowance may be due to party discipline being driven internally by party whips, rather than being externally required. However, if MPs disobey strict party instructions—such as defying a "three-line whip"—they can be penalized. For instance, they might be denied a promotion within the party or, in extreme cases, even be expelled from their parliamentary party. Unlike in harsh anti-defection regimes, dissenting MPs need not vacate their seat, and in fact there are instances where the whip (and, thereby, party membership) is restored to disloyal legislators later in the parliamentary term.[157]

The United Kingdom system of whips is not perfect. For instance, there are no clear rules governing the power exercised by MPs serving as party whips, which bestows them with significant discretion. Some observers argue that the practice can function as a thinly veiled form of blackmail in which party bosses threaten rank-and-file members to ensure they vote the "right way."[158] However, the broader system of internal regulation and control offers an alternative to the externally imposed rules that anti-defection jurisdictions have relied on—an alternative that merits far greater attention in countries that have turned to anti-defection laws, even if such an alternative has functioned with mixed effect.

If party regulation is a worthy enterprise but only in a limited sense, how else might we address defections? One clue to thinking about the problem of defections in contemporary democracies lies in providing some historical texture to the matter. Within the history of parliamentary government, arguably the most important instance of cabinet instability was the decade of the 1760s in Britain during the reign of George III. At the time, the question of patronage, where votes were traded in for offices, assumed great importance. In the debate over whether patronage was a form of corruption or instead a defensible means of solidifying majority support within the assembly, Edmund Burke's intervention merits revisiting. As William Selinger has

[155] Paeony Tingay et al., *Whips: What Is Their Role?*, Inst. of Gov't (Mar. 6, 2019), www.instituteforgovernment.org.uk/article/explainer/whips-what-their-role.

[156] *Id.*

[157] Tabitha Troughton, Cracking the Whip: The UK's Party Control System (2023).

[158] *See* Patrick Wintour, *The Discreet Art of Whipping: What Are the Limits for Parliament's Enforcers?*, The Guardian (Jan. 21, 2022), www.theguardian.com/politics/2022/jan/21/the-discreet-art-of-whipping-what-are-the-limits-for-parliaments-enforcers.

shown, Burke's tolerance of patronage was linked to his account of political parties. "Because of the loyalty of parliamentary representatives to their respective parties," Selinger notes, "Burke believed that they could not be bribed to support just any ministry."[159]

According to Burke, one could avoid seeing patronage as a form of corruption because of the bond that representatives would possess with their parties. Indeed, political parties that made such attachments possible were a kind of check on patronage, precisely because party members may seek offices when their party was in power but would form a strong opposition when their party was out of power.[160] A political party was, Burke stated, "a body of men united, for promoting by their joint endeavors in the national interest, upon some particular principle in which they are all agreed."[161] Within such a conception of parliamentary politics, the attachment that a legislator had to their party is precisely what would prevent that person from crossing the floor. The person would still be inclined to seek offices within the government, but their ambition for power would be tempered by their ideological commitments.

Burke's effort to understand the constant cycling between parliamentary governments in the 1760s made him conclude that the solution to corruption and instability lay in the entrenchment of party ideology. Recovering this orientation casts fresh light on extant narratives surrounding polarization. Interestingly, a more polarized politics may well hold the promise of reducing defections because switching sides is more costly—it requires jettisoning one's commitments. For Burke, party attachment and party competition were, in a way, mutually constitutive. The politics of ideology enabled the creation of not only more parties but parties that were fundamentally distinct. Such a politics could temper floor crossing, which was simply the politics of pure numbers.

There is, in our time, a burgeoning literature on the rise in political polarization.[162] This literature finds that citizens in many democratic settings are increasingly retreating into their own corners, disagreeing with and even demonizing their fellow citizens who affiliate with their political opponents. While there is some empirical data to show that political polarization is increasing in many contexts, it is not a universal phenomenon.[163] In contemporary India, polarization seems to have intensified over the past decade as the rise of the Bharatiya Janata Party (BJP) and Hindu nationalist sentiment has sharpened political divides.[164] Traditionally, politics in India has been seen as largely devoid of ideological difference. Recent work has questioned this

[159] William Selinger, Parliamentarism: From Burke to Weber 71 (2019).
[160] *Id.* at 72–3.
[161] Edmund Burke, *Thoughts on the Present Discontents* [1784], *in* 1 Selected Works of Edmund Burke 69, 150 (E. J. Payne & Francis Canavan ed., Alfred A. Knopf 1999).
[162] *See, e.g.*, Thomas Carothers & Andrew O'Donohue, Democracies Divided: The Global Challenge of Political Polarization (2019); Noam Gidron, James Adams & Will Horne, American Affective Polarization in Comparative Perspective (2020).
[163] *See generally* Levi Boxell, Matthew Gentzkow, & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization*, 106 Rev. Econ. Stat. 557 (2024).
[164] *See* Niranjan Sahoo, *Mounting Majoritarianism and Political Polarization in India*, *in* Political Polarization in South and Southeast Asia Old Divisions, New Dangers 9 (Thomas Carothers & Andrew O'Donohue eds., 2020).

conventional wisdom, arguing that ideology does motivate politics, but not along the typical left-right spectrum common in the West. Rather, ideological debates in India occur along two axes: the "politics of statism" (the extent to which the state regulates society) and the "politics of recognition" (the degree to which the state recognizes group differences).[165] But in many respects, the ideological battle lines in India are not that sharply drawn.[166] Evidence from Indian elections suggests that, among political candidates, switching between the BJP and Congress is not verboten. In state assembly elections between 1984 (the first year the BJP contested national polls) and 2023, there were 616 candidates that switched affiliation from one national party to the other.[167] More recently, there have been several high-profile instances of senior Congress leaders abandoning their party to join the ranks of the BJP, their supposed ideological rival.[168] Both historically and at present, India's political system is often understood as a dominant party democracy rather than a polarized one with fierce contestation between political parties espousing contrasting ideologies.[169] Perhaps this fact may shed some light on India's experience with floor crossing.

Considering party attachments in the context of defections provides some perspective on the ongoing reflections on polarization among legal scholars. In the United States, there is a clear sense that constitutional politics has become increasingly ideological.[170] Here, one major concern has been legislative performance and the basic ability of Congress to carry out its functions.[171] The worries over ineffective government have merit, but, as the politics of defections shows, the alternative may not be a smooth legislative arena and a community with shared norms and equal respect. It may be a space where power and corruption—rather than principles and beliefs—constitute political struggle. As we have observed, both floor crossing and the resistance to it appeal to a certain vision of representation. For those against defections, horse trading undermines the people's mandate. Defectors, on the other hand, claim to be democrats in a different way—they are, after all, carving out a new majority. In fact, evidence from survey experiments suggests that dissent—in the eyes of some

[165] Pradeep K. Chhibber & Rahul Verma, Ideology and Identity: The Changing Party Systems of India (2018).

[166] While the feelings of Indian survey respondents toward the BJP are highly predictive of ideology, their feelings toward the Congress Party are not strongly correlated with their ideological placement. See Nicholas Haas & Rajeshwari Majumdar, *Characterizing Ideology in India* (working paper) (draft on file with authors).

[167] The period from 1984 to 2019 saw eighty-six instances of candidates switching between the two parties in national elections. In forty-one cases, the candidate moved from the BJP to the Congress while the reverse occurred in forty-five cases. While such shifts were relatively rare in the earlier elections, they are more common now: fifteen such switchers participated in the 2019 general election. *See TCPD Individual Incumbency Dataset, 1962-current*, Trivedi Ctr. for Pol. Data, Ashoka Univ., https://lokdhaba.ashoka.edu.in/pct/home.html.

[168] *See* Editorial, *Congress Defection: Prominent Faces Who Quit and the Laws Around It*, Outlook (Feb. 16, 2022), www.outlookindia.com/national/congress-defection-prominent-faces-who-quit-and-laws-around-it-news-182640.

[169] *See* K. C. Suri, *Emergence of BJP's Dominance and Its Durability*, 56 Econ. & Pol. Weekly 56 (2021).

[170] *See* David E. Pozen, Eric L. Talley, & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 Cornell L. Rev. 1 (2019).

[171] *See* Nolan McCarty, *Polarization and the Changing American Constitutional System*, *in* Can America Govern Itself? 301 (Frances E. Lee & Nolan McCarty eds., 2019).

voters—can actually be a sign of a legislator's integrity and trustworthiness, further enhancing their popularity even though their behavior comes at the cost of party unity.[172]

A more polarized political life with real ideological commitments may well alter the political and personal incentives in choosing between these two alternatives. And while the Burkean aspiration cannot in the end work with one-party domination, political competition may well both enable and be enabled by more rather than less ideology.[173] Furthermore, there is evidence to suggest that sharp political competition—especially bipolar competition where parties are arrayed in two distinct blocs, often a sign of political polarization—can also engender higher levels of political accountability in democratic societies. Bipolarity clarifies voters' choices and limits the range of possible winning coalitions incumbents can form to remain in power.[174]

Beyond the question of ideology and ideologically oriented parties, this brief discussion raises the question of why anti-defection laws have come to be attractive across various jurisdictions. What might the flourishing of such laws reveal about the longer history of representative government? The challenge of ensuring the accountability of the government to the legislature and facilitating stable, effective governance dates to the beginnings of parliamentarism. However, for classical theorists of parliamentarism, laws against floor crossing would have seemed incongruous with the very idea of a representative assembly. The anti-defection parliamentary model innovates on the traditional Westminster one. What anti-defection laws do is allow political parties and leaders to control political currents. The changes in such laws at different moments, as seen in Israel and South Africa, represent a similar orientation. There is no doubt that such laws make some parties stronger at the cost of others, thereby mitigating certain kinds of political forces.[175] Fundamentally, however, such laws may well underscore a dissatisfaction with parliamentary politics. For those who seek to ban floor crossing, the rules of representative democracy require a certain moderation of politics.

6. Conclusion

In this article, we have sought to underscore the altered character of parliamentary government in contemporary times, and to highlight several features of anti-defection laws, from their presence across a range of jurisdictions to their impact on accountability and representation to their workings in practice. There is much attention today

[172] *See* Rosie Campbell et al., *Legislator Dissent as a Valence Signal*, 49 Brit. J. Pol. Sci. 105 (2019). *But see* Philip Cowley & Resul Umit, *Legislator Dissent Does Not Affect Electoral Outcomes*, 53 Brit. J. Pol. Sci. 789 (2023).

[173] Unsurprisingly, political scientists have highlighted the role of ideological costs in shaping the choice to switch parties. *See* Elad Klein, *Explaining Legislative Party Switching in Advanced and New Democracies*, 27 Party Pol. 329 (2021).

[174] *See* Christopher Kam et al., *The Electoral System, the Party System and Accountability in Parliamentary Government*, 114 Am. Pol. Sci. Rev. 744 (2020).

[175] *See* Jon Fraenkel, *Party-Hopping in the Southern Hemisphere*, 64 Pol. Sci. 106 (2012).

on the weakening of institutions associated with constitutional democracy.[176] Among these institutions, the declining performance of legislatures has been stark.[177] The factors driving the evolution of legislatures and their functioning are both local and global, and comparative research is only at a preliminary stage of disentangling them. A deeper understanding of floor crossing and its regulation is indispensable to this understanding—and to appreciating the move towards presidentialism in parliamentary states. Reexamined a generation later, Bruce Ackerman's critique that presidential government "predisposes the system to a politics of personality" has transcended the traditional presidential–parliamentary distinction.[178] But the collapse of this distinction, when recognized, is rarely seen through the lens of anti-defections laws.[179]

We conclude by recognizing that an emerging question in comparative constitutionalism is whether the principal threat to representative government is political polarization or political fragmentation. On the one hand, polarization impacts the effective functioning of legislatures, thereby allowing other constitutional actors to fill the vacuum which upsets the balance of authority.[180] Polarization also reduces citizens' trust in government, especially when their favored party is out of power, which in turn decreases the likelihood of compromise.[181] Yet, as Pildes has shown, the intensity of polarization in the United States often obscures the extent of political fragmentation.[182] If one accepts that polarization is a feature of political parties that is likely to persist for the foreseeable future and that polarization's principal harm is in undermining effective governance, as Pildes does, then perhaps focusing instead on addressing fragmentation in a way that can enhance governmental authority makes sense.

In this article, however, we have gestured toward a different perspective. The Indian context suggests that, especially in non-programmatic multiparty systems, increasing political polarization might help to remedy excessive fragmentation. Over time, as political competition in India has grown, the choices available to voters on paper have expanded exponentially. Yet, as scholars have observed, the deepening of robust multiparty competition "has not led to greater and more meaningful political choices for the citizen."[183] Because parties have not sufficiently distinguished themselves on the basis of distinct ideologies or programmatic agendas, voters have encountered a growing menu of options without a corresponding increase in meaningful choices. Pildes is certainly correct when he writes that "stronger parties—or parties stronger in certain dimensions—might be the most effective vehicle" for dealing with legislative dysfunction.[184] This helps explains why, in countries like India, there is so much fluidity between parties, and why defections, in spirit if not in name, are all too alive and well.

[176] *See* Wojciech Sadurski, A Pandemic of Populists 48–82 (2022).
[177] *See* Issacharoff, *supra* note 11, at 46.
[178] Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 657 (2000).
[179] *See, e.g.*, Bernard Manin, The Principles of Representative Government 220–1 (1997).
[180] Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Cal. L. Rev. 273 (2011).
[181] *See* Marc J. Hetherington & Thomas J. Rudolph, Why Washington Won't Work: Polarization, Political Trust, and the Governing Crisis (2015).
[182] Richard H. Pildes, *Political Fragmentation in Democracies of the West*, 37 BYU J. Pub. L. 209 (2023).
[183] Yogendra Yadav & Suhas Palshikar, *Ten Theses on State Politics in India*, 591 Seminar (2008), www.india-seminar.com/2008/591/591_y_yadav_&_s_palshkar.htm (last accessed 7 July 2023).
[184] Pildes, *supra* note 9, at 147.