Floor Crossing And Elective Office: Freedom Of Choice Or Betrayal Of Trust? – The Case Of Botswana

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ABSTRACT

The world over, countries are grappling with how they can improve their democratic, governance and electoral systems. One of the foremost problems confronting them, especially countries using the first-past-the-post electoral system, is floor crossing. This article examines the arguments advanced in favour of, and those against, floor crossing. It appears that floor crossing is a concern, and most prevalent, in developing countries which are nascent democracies. This article maintains that there should be a balance between the interests of the representative who wants to cross the floor and those of his or her erstwhile party, and the electorate. Such a balance can only be achieved if the electoral system allows a defector to relinquish his or her seat so that there is a fresh election which effectively rejects or endorses his or his defection.

1. INTRODUCTION

Floor crossing or anti - defection laws have been vilified by some as being inimical to constitutional provisions relating to freedom of association, freedom of expression and the right to freely make political choices. It has further been argued that mature and stable democracies have left the matter of defections in the hands of political parties, since it is essentially a political problem. However, some have maintained that defections are a grave challenge to parliamentary democracy, particularly in a nascent democracy, as they can be used to change a government, thereby subverting the will of the people. They therefore view anti-defection laws as promoting ethical behaviour, accountability and integrity in politics. This is a problem that Botswana has had to confront for a long time, but with no one political party maintaining a very clear, principled and philosophical orientation. Depending on who is defecting, and from which party, politicians always switch sides in either their condemnation or acclamation.

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2. THE CONSTITUTION OF BOTSWANA

The issue of floor-crossing is framed by some people as an affirmation of the right to freely affiliate, as well as to enjoy the freedom to express one's own views. At the other end of the spectrum is the view that such rights cannot be untrammelled, since their exercise vitiates the will of the people expressed clearly through the ballot box. It is therefore important to mediate between these two, very strong view-points in order to see if a balanced middle ground cannot be attained.

Section 12 (1) of the Constitution provides:

> "Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any persons or class of persons) and freedom from interference with his or her correspondence."

For its part, section 13(1) of the Constitution states:

> "Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests."

Section 15(1) of the Constitution reads as follows:

> "Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect."

In turn, section 15(3) defines "discriminatory" in this manner:

> "In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political

opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

It is important to bear these constitutional provisions in mind as any discussion on floor-crossing invokes a debate around whether a defector does not enjoy freedom of choice and association. A related question is with regard to whether any defection tramples upon the wishes of the voters, as expressed through the ballot box; and therefore only the rights of the defector are paramount. Thus, in order to avoid any laws that appear to discriminate against either the defector or the voters, this article recommends that there should be a half-way house in which both sides attain a satisfactory outcome.

3. DEFINITION

Floor crossing has generally been associated with two phenomena: first, where a legislator crosses the floor (the aisle) to go and vote with the party on the opposite side in defiance of his or her own party's position on that particular point, or secondly, where a legislator decamps from the political party which enabled him or her to win political office to join a different political party, thus depriving his or her party of that seat.
Since floor crossing has the potential to have a disruptive influence in a parliamentary democracy, it is apposite to consider a number of definitions.

"Floor crossing is regular phenomenon in many Commonwealth countries. In its most original sense, floor crossing is the act whereby a member of parliament (MP) from either the government or opposition benches physically leaves his/her seat and votes with another party. The MP also leaves the party to which he/she was affiliated when he/she was elected to the legislative body and joins another party represented in parliament."[1]

1 Jotham C. Momba: *The case of Zambia* (in Konrad-Adenauer-Stiftung Seminar Report on *The Impact of Floor Crossing on Party Systems and Representative Democracy)*, March 2007 (www.kas.de/wf/doc.kas_11847-1522-2-30.pdf?070914092715)

Historically, in some democracies if a legislator wanted to vote with a party on the opposite side of the aisle they had to "literally cross the floor to get to the other lobby".[2]

This was therefore referred to as floor crossing.

Majola, Saptoe and Silkstone note:

> "In politics, the term 'crossing the floor' can mean either to vote against party lines, especially where this is considered unusual or controversial, or to describe a member who leaves their party entirely and joins the opposite side of the House, such as leaving an opposition party to support the government (or vice versa), or even leaving one opposition party to join another. In Canada, for example, the term "crossing the floor" is used exclusively to refer to switching parties, which occurs occasionally at both the federal and provincial levels." [3]

The High Court of the State of Jammu & Kashmir in India observed in *Mian Bashir Ahmad and Etc. vs State of J & K And Ors*[4] at paragraph 57:

> "Political defections - - leaving one political party and joining another - - usually resorted to topple a Government in power, became order of the day and posed a grave challenge to the successful functioning of parliamentary democracy in the country. Such defections in some States assumed such alarming proportions that leaders of public opinion, jurists and parliamentarians felt that if this evil was not checked, it would pose a serious threat to the survival of parliamentary democracy in the country. The choice was either to prevent defection by law or to insist on the political parties to agree to a common code of conduct which would make it obligatory for the political parties not to confer any benefit on an individual defector. It was generally felt that defections were not a legal problem but related to political ethics. *There was still another school of thought which felt that since in a parliamentary democracy political sovereign is the public, it is the public which should have the right to recall a legislator, who defected and with whose defection the*

2 X Majola, E Saptoe & C Silkstone: *Floor Crossing: Germany, United Kingdom, Canada, Brazil, Lesotho and Kenya*-January 2007 at foot note 2, page 2 (https://studylib.net/doc/8609273/research-document-on-floor-crossing-germany- - united --kingdom)

3 ibid.

4 *Mian Bashir Ahmad and Etc vs State of J & K And Ors* AIR 1982 J & K 26.

constituency was unhappy." (sic) (emphasis added)

The question then is whether the defection or floor crossing of a legislator can ever be to the benefit of the voters, or it is simply to the best, and personal, interests of the defector? This is considered further below. Floor crossing is referred to by different names, depending on the jurisdiction within which it is taking place. As illustrated above in the *Mian Bashir Ahmad* case, it can be referred to as "defection". In other instances it is referred to as "party switching"[5], "change of party affiliation" or "switched party affiliation"[6] ,"political migration"[7] ,"change party allegiance"[8], or, as Janda has indicated, it can also be known as ""carpet-crossing", "party – hopping" "dispute" and "waka [canoe] –jumping"".[9] These numerous names show very clearly that this is a global phenomenon, and not one that is found only on the African continent.

In this article all this will be referred to as defection, narrowly referring to where an elected representative, be it in parliament or the legislature, or at the local government level (the council), physically leaves one party after the elections, to join another party, yet remaining with the seat he or she won whilst with the former party.

4. JURISDICTIONS WITH ANTI-DEFECTION LAWS

In an effort to combat defections, some countries have included in their constitutions or other laws, provisions which prohibit defections, and then elaborately set out what will happen if an elected member defects. It has been observed that defection "affects the democratic process because it distorts party discipline and public confidence for reasons only entailing political and personal gains of politicians and parliamentarians."[10] This is supported by Janda, who writes that: "So legislators might be tempted to vote for themselves, defecting

5 Scott Desposato: *Party Switching and Democratization in Brazil*, March 29, 1997 at p 1 (lasa.international.pitt.edu/lasa97/desposato.pdf)

6 Timothy P. Nokken & Keith T. Poole: *Congressional Party Defection in American History*, November 2002 (voteview.org/pdf/nokken_poole.pdf)

7 Khabele Matlosa & Victor Shale: *Impact of Floor Crossing on Party Systems and Representative Democracy: The Case of Lesotho*, November 2006 (unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan031784.pdf)

8 *African National Congress v United Democratic Movement and Others (Krog and Others Intervening)* [2002] ZACC 24 (http://www.saflii.org/za/cases/ZACC/2002/24.html)

9 Kenneth Janda: *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments*, Santiago, Chile, July 12-16, 2009 at p.1 (janda.org/bio/parties/papers/Janda%20(2009b).pdf)

10 Transparency Maldives: *Baseline Research on Floor Crossing in the Maldives*, April 2015, p.2

to another party for personal gain. Against this temptation, governments may enact anti-defection laws in order to promote party stability."[11] However, anti-defection laws are viewed as being unnecessary in mature, well developed western democracies since they "view floor crossing not as a detriment to party politics but an occurrence pertaining to democratic process".[12] Janda notes that "[i]n sum, laws that ban party defections are more common in nascent democracies than in established democracies."[13]

Owing to the apprehension that if left unchecked and controlled, defections might be a danger to democracy and respect for the will of the people, about forty (40) countries[14] in the world have legal provisions in their constitutions which provide that legislators who defect will automatically lose their seats. Twenty three (23) of those countries are from the African continent. In Article 59 of its Constitution, Belize in Central America has included the following provisions:

> "(1) Every member of the House of Representatives shall vacate his seat in the House at the next dissolution of the National Assembly after his election.
> (2) A member of the House of Representatives shall also vacate his seat in the House –
> …
> (e) if, having been a candidate of a political party and elected to the House of Representatives as a candidate of that political party, he resigns from the political party or crosses the floor."[15]

Until recently, Botswana did not have anti – defection laws. The only other Commonwealth countries in Africa which did not have anti-defection laws in 2011 were Mauritius and the Kingdom of Eswatini.[16] The fifteen (15)

11 supra, n. 9, p.6
12 supra ,n.10, p.3
13 Kenneth Janda: *Laws Against Party Switching, Defecting, or Floor- Crossing in National Parliaments* (The Legal Regulation of Political Parties, Working Paper 2, August 2009) at p.5 (www.partylaw.leidenuniv.nl/uploads/wp0209.pdf)
14 Banglanews24.com: *Anti floor-crossing clauses: Protective or destructive to democracy?*p.1 (http.www.banglanews24.com./open-forum/article/33479/*Anti-floor-crossing-clauses-Protective or destructive-to-democracy*). See also Nikolenyi (n. 16, p.11).
15 supra, n.13, p.3
16 Csaba Nikolenyi: *Constitutional Sources of Party Cohesion: Anti-Defection Laws Around the World*, 2011 at p.14 (https:www.uio.no/english/research /interfaculty-research-areas/democracy/news-and-events/events/seminars/2011/papers-roma-2011/Rome-Nikolenyi.pdf)

Commonwealth countries in Africa which had anti - defection provisions in their constitutions in 2011 were: the Gambia, Ghana, Kenya, Malawi, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leone, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.[17]

In Botswana, parliament passed motions on anti – defection measures in 1975 and 1998[18], but these never translated into legislation. In 2010, the issue of floor crossing was again raised, especially since some members of the ruling Botswana Democratic Party (BDP) were on the verge of leaving it to form a new political party.[19] The debate was again rekindled in 2012 when some BDP members of parliament left to form the Botswana Movement for Democracy (BMD)[20], and in 2016 Dingake observed that "the defection issue is still topical like it was in the late 1990s."[21] Earlier, in 2012, Motswagole had noted that "commendable comment has been sufficiently made on the now mature debate on floor crossing".[22]

On the 17th July 2020, in a Government Gazette Extraordinary (Vol VIII, No 75), the Minister for Presidential Affairs, Governance and Public Administration Mr Kabo Morwaeng, published Bill No. 14 of 2020 to amend the Constitution. The Bill is intended to render the seat of any Member of Parliament, elected or specially elected by Parliament, vacant in the event that such a member defects or crosses the floor to join another political party. Simultaneously, the Minister of Local Government and Rural Development, Mr Eric Mothibi Molale, published Bill No. 15 of 2020 seeking to amend the Local Government Act (Cap. 40:01), also to ensure that the seat of any councillor who defects or crosses the floor is rendered vacant.

As has already been shown, a number of scholars and researchers have located the debate about defection at a country's level of development of its democratic processes. This is a true but not entirely accurate statement. In the Malawi case of *In the Matter of the Question of the Crossing the Floor*

17 ibid, p. 33
18 supra, n. 16, p.14
19 Bame Piet, Mmegionline , 6 May 2010 (http://www.mmegi.bw/index.php?sid=1&aid=2162&dir=2010/May/Thursday6/)
20 Kabo Motswagole: *Floor Crossing; Facts and the Law*, 16 April 2012 (http://www.sundaystandard.info/floor-crossing-facts-and-law). Also P.T.Tlhagwane: *Floor-crossing is unprincipled*, 27 April 2012. (http://www.mmegi.bw/index.php?sid=2&aid=546&dir=2012/April/Friday27)
21 Michael Dingake: *Political defection, not illegal, but is wrong?* (http://www.mmegi.bw/index.php?aid=61958&dir=2016/august/02)
22 supra, n.20

by Members of the National Assembly[23] concerning the constitutionality of constitutional provisions barring the defection of members of parliament, the Supreme Court of Malawi found such provisions to be constitutional. It said:

> "Upon analysis, we would agree with the submission made by counsel representing the Friends of the Court that section 65(1) has nothing to do, really, with the rights in section 33. Rather, section 65(1) is about the political right of a member of the National Assembly, like any other person, to join a political party and to freely make political choices as provided in section 40. As we have just observed the rights in section 40 are derogable and can, therefore, be limited or restricted.
>
> …
>
> To start with, the limitation placed upon a member of the National Assembly who voluntarily ceased to be a member of the political party that sponsored him or her to the National Assembly and joins another political party is a limitation that is prescribed by law, namely section 65(1) itself. In our view that limitation or restriction is reasonable. It is trite that the large majority of members of the National Assembly are sponsored by political parties and voted for on political party lines. As counsel for the Friends of the court put it, if section 65(1) was abolished that would allow or promote lack of accountability and integrity as that would allow persons to stand for election on the ticket of one political party, utilise all the resources of that party, be voted into office as a member of the National Assembly representing that party and then soon thereafter change political parties. Indeed the electorate might feel cheated by such conduct on the part of the member of the National Assembly, so too would the sponsoring political party."[24] (sic)

The palpable anger when there is a defection by a legislator arises from the fact that both the voters and the legislator's previous political party feel used and cheated by the defector. The trust that the voters invested in their choice of representative then seems to have been betrayed, if not outright violated.

23 *In the Matter of the Question of the Crossing the Floor by Members of the National Assembly ((Presidential Reference Appeal No.44 of 2006*)) [2007] MWSC 1 (15 June 2007).

24 https://www.malawilii.org/mw/judgment/supreme-court-appeal/2007/1

The Constitutional Court of South Africa in *United Democratic Movement v The President of the Republic of South Africa and Others* observed at paragraph 34:

"But even in constituency – based elections, there is a close link between party membership and election to a legislature and a member who defects to another party during the life of a legislature is equally open to the accusation that he or she has betrayed the voters."[25]

At paragraph 45 the Constitutional Court of South Africa further noted that :

> "The applicants contend that in the conditions prevailing in South Africa an anti – defection provision is essential to promote multi – party democracy. This so they contend is because we are a new and fragile democracy…".

The common thread among third world, developing countries is that their multi – party democracies are young, nascent and fragile and therefore the State must intervene to control the behaviour of the legislators on behalf of their parties. As a result, most anti – defection provisions are found in the developing world, although they are most pronounced in those countries which are members of the Commonwealth[26], ostensibly because of the Westminster system of first – past – the - post (FPTP)[27], or winner – takes – all, which a majority of them inherited at independence and then retained. Nikolenyi has stated that:

25 www.saflii.org/za/cases/ZACC/2002/21.rtf (*United Democratic Movement v The President of the Republic of South Africa and Others* (Case CCT23/02)).

26 The Supreme Court of Malawi at n. 23 above lists India, Singapore, Ghana, Nigeria, Uganda, Kenya, Tanzania, Zambia and Zimbabwe. Nikolenyi at n.16 above, page 8 lists Belize, Namibia, Nigeria, Seychelles, Sierra Leone, Singapore and Zimbabwe. Zimbabwe is included although it is currently not a member of the Commonwealth. For specific provisions, see some of these at Janda, n. 13, supra, p.3,Table 1.

27 supra, n. 2, p.2 where it is stated that: "First –Past –The – Post (FPTP) is the name usually given to the voting system used in the United Kingdom for general elections to the House of Commons. The term was coined as an analogy to horse racing, where the winner of the race is the first to pass a particular point on the track (in this case a plurality of votes), after which all other runners automatically and completely lose (that is, the payoff is 'winner – take – all'). Thus, the winning candidate must receive the largest number of votes in their favour. This system of voting is based on each area of the country (constituency) being represented by a single member. The candidate with the most votes in each constituency becomes its MP."

> "The largest concentration of the states with constitutionally enshrined anti –defection laws is found in Africa. Of the 40 cases with such provisions 24 are situated in Africa, almost all of them (16/24) are current and former members or candidates for membership in the Commonwealth of Nations."[28]

Some African members of the Commonwealth, like Cameroon and Lesotho[29], have not incorporated anti – defection provisions in their constitutions, but they are provided for in separate legislation. This then translates into eighteen (18) African countries which are members of the Commonwealth that have anti – defection clauses. Out of the twenty – four (24) African countries mentioned above, eight (8) are outside the Commonwealth, but also have anti – defection provisions in their constitutions. These are: Angola, Burkina Faso, Cape Verde, Congo – Brazzaville, the Democratic Republic of Congo (DRC), Gabon, Niger and Senegal.[30]

In other regions, the Asia – Pacific region has a number of countries which have anti – defection provisions in their constitutions. Some of them are Commonwealth members, such as Bangladesh, Fiji, India, Pakistan, Papua New Guinea, Singapore and Sri Lanka. Nepal and Thailand also have such provisions.[31] Other Commonwealth countries either have continuing debates on such provisions, or experimented with them and then abandoned them. Samoa enacted such non – constitutional legislation in 2005.[32] New Zealand, in spite of its level of development, enacted the Electoral Integrity Amendment Act in 2001 on an experimental basis.[33] As the law had a sunset clause, when it expired in 2005 the Solicitor – General of New Zealand advised that it "infringed on the

28 supra, n.16, p.13 . In Malawi and Zambia such provisions were the subject of court cases in *In the matter of the Question of the Crossing the Floor by Members of the National Assembly ((Presidential Reference Appeal* No.44 of 2006)) (*supra*, n.23) and *Lumina and Mwiinga v The Attorney - General* (1990 - 1992) Z.R. 47 (S.C.) respectively. See also Bethel Ihugba & Alfred Charles: *Legality of Defection and Implications for Democratic Consolidation in Nigeria*, NILDS' Department of Democratic Studies' Brief 2018/VOL.2 (https://nilds.gov.ng/themes/nils/newnils/dds_ib/2.pdf) discussing section 68 of the Constitution of the Federal Republic of Nigeria; and also Sandrine Perrot: *Partisan defections in contemporary Uganda: the micro-dynamics of hegemonic party-building*, Journal of Eastern African Studies, 2016 Vol.10, No.4, 713-728. In Uganda, anti-defection provisions are contained in Article 83 of the 1995 Constitution of the Republic of Uganda (as amended in 2005), and were considered in *George Owor v Attorney-General & Anor* (Constitutional Petition No.38 of 2010; [2011] UGCC 1).

29 ibid.

30 supra, n.16, p.14

31 ibid. See also Sabbir Ahmed: *Article 70 of the Constitution of Bangladesh: Implications for the Process of Democratisation*, BIISS Journal, Vol.31, No.1, January 2010: 1-13.

32 supra, n.16, p.14

33 ibid.

constitutional freedoms of expression and association"[34], and it was therefore abandoned.

Australia, the Solomon Islands and Vanuatu have debated anti – defection measures, but these have not been adopted.[35] Canada, a developed country but also a member of the Commonwealth, debated anti – defection measures in 2004, but the motion calling for them to be instituted was defeated in the Canadian House of Commons.[36]

South Africa and Lesotho are members of the Commonwealth, and they have adopted anti – defection measures. But they do not use an FPTP system. This then begs the question whether it is the FPTP system itself which is inherently unsuitable for new, emerging democracies with multiple political parties, such that extra measures have to be put in place to stabilise political parties in parliament, or the problem might just simply lie in the political dynamics of such nations. This is not a question that can be answered in this article, but might be a subject of further research.

In the Americas and the Caribbean, four (4) Commonwealth countries (Antigua and Barbuda, Belize, Guyana and Trinidad and Tobago) have anti – defection legislation, even though it is noted that " there is a relatively large number of additional Commonwealth states in the Americas and the Caribbean that do not have anti defection articles in their constitutions".[37] Panama, a non – Commonwealth country in the Americas, also has anti – defection provisions.

In 2010, only Portugal in Western Europe, and Ukraine in Eastern Europe, had anti – defection provisions.[38] In Spain, political parties themselves "have used other means to keep their parliamentarians loyal such as the *Pact against floor crossing*",[39] and the "*Pacto antitransfuguismo*".[40] In the Middle East the State of Israel is the only one with an anti – defection measure in its constitution.[41]

34 supra, n. 13, p. 20
35 supra, n. 16, p. 15
36 supra, n. 1, p. 61
37 supra, n. 16, p. 15. In Guyana the anti –defection provisions are found in Article 156 of the Constitution, and they were subject of a court case in *Ram v Attorney-General and Others and Other Appeals* [2019] CCJ 10 (AJ); (Guyana) [2019] 4 LRC 554. Guyana uses the proportional representation system, and not the FPTP system.
38 supra, n.16, p. 16
39 ibid.
40 European Commission for Democracy through Law (Venice Commission) *Report on the Imperative Mandate and Similar Practices* (Study No. 488/2008)(Strasbourg, 16 June 2009) p. 7, para. 22 (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)027-e)
41 supra, n. 16, p. 17. See also Csaba Nikolenyi : *Keeping Parties Together? The Evolution of Israel's Anti-*

Possibly due to different value systems, or simply because of dissimilarities in legal systems, different jurisdictions have arrived at diametrically opposed outcomes on what are essentially similar laws when they are challenged before the courts. Therefore, even though the Supreme Court of Malawi found the anti – defection provisions to be reasonable and consistent with the constitution[42], the Constitutional Court of Serbia found such a measure to be unconstitutional as "termination of membership in a political party cannot be ground for revoking an elected deputy's mandate".[43] In the *United Democratic Movement* case, the Constitutional Court of South Africa affirmed the right to defect when at paragraph 53 it said that "[t]he contention that an anti – defection provision is an essential adjunct to the proportional representation system contemplated by the Constitution, and that the repeal of the provision to permit defection without loss of membership of a legislature is inconsistent with the multi – party system of democratic government contemplated by section 1(d), must therefore be rejected."[44] The Court did however acknowledge the right of the legislature to regulate defections amongst its members, and it said at paragraph 58:

> "It is, however, beyond doubt that the subject matter – i.e. the retention and loss of membership – is a legitimate purpose in respect of which Parliament has the power to legislate and pass constitutional amendments."

Generally, although defections do occur in major western democracies, they have found it inherently undesirable to control the scourge of defections through legislation. For them, it is an essential right that is available to an elected representative. However, in most of these countries the system is undergirded by a very strong two party system with dichotomous ideological clarity, and a near certainty that a defector will lose the next election. Janda writes:

> "Established democracies value the freedom of individual parliamentary members to switch parties. They regard switching parties as compatible

Defection Law, Polish Political Science Yearbook, Vol. 47 (2) (2018), pp.188-200.

42 supra, n. 23

43 supra, n. 16, p. 17

44 supra, n. 23

> with democratic values and see anti – defection laws as infringements on political freedoms. … But even in the United States, there is virtually no support for preventing members of Congress from switching parties."[45]

Commenting on the American two party system, it has been said that "[o]ne view for this is because of a solid two party system developed in the US. Solid two – party structure means there is solid and stable voter confidence in the supporting party. There are higher chances for legislators to sustain support to gain votes for re – election."[46] (sic) A similar point is made by Nikolenyi. Referring to the work of Golobiewski, it is said "he reported weak degrees of party cohesion in most one – party American states, but strong ones in states with two – party competition."[47]

It has been observed further that:

> "It would appear that attitudes towards floor crossing are largely determined by the history and nature of politics of the country concerned. In some countries, the practice of floor crossing is seen as being dysfunctional, hurting efficiency, responsibility and transparency – in short, generally undermining representative democracy (for example, Germany has a strong and stable party system, and, as such, floor crossing seldom occurs)."[48]

In stable two party systems in mature, western democracies the real risk for a defector is that he or she will lose the right to represent the new party during the primary elections or selection stage, or during general elections. Miners has said:

> "Nowadays in Britain, Western Europe, the developed Commonwealth and Japan, political parties are disciplined formations, voting together with admirable cohesion, and desertion to the enemy is as rare as on the field of battle, and as little likely to lead to honour and preferment. In

45 supra, n. 13, p. 21
46 supra, n. 10, p. 21
47 supra, n. 16, p. 10
48 supra, n. 2, p. 16

> Britain only three M.P.'s have crossed the floor in the last 26 years and they all lost their seats at the next general election."[49]

This point has been buttressed this way:

> "The impact of floor crossing for the individual parliamentarian and for parties also varies considerably from one country to another. While the law might permit floor crossing, parliamentarians who cross the floor frequently find themselves without a seat at the next election (as has tended to happen in the United Kingdom and Germany)."[50]

In essence, therefore, in stable two party political systems in western democracies the voters are very vigilant and mature, and they mete out punishment to defectors during elections. In spite of this, defections still occur in such systems. Although defections are rare in the United States, it has been reported that between 1799 and 1995 there were thirty eight (38) in the one hundred (100) member Senate, and between 1795 and 1999 there were one hundred and sixty (160) defections in the four hundred and thirty five (435) House of Representatives.[51] In Australia there were two hundred and forty five (245) defections in the Federal Parliament between 1950 and 2004.[52] Brazil, which allows defections, experienced the defection of thirty percent (30%) of deputies between 1986 and 1994,[53]while between 1991 and 1995 one hundred and eighty two (182) deputies defected.[54] In Italy, "about one fourth of the members of the Italian lower house switched parties at least once during the 1996 – 2001 legislature".[55]

5. WEAKNESSES OF ANTI – DEFECTION LAWS

This section assesses the utility of anti-defection laws.

49 N. J. Miners: *Floor Crossing and Pork – Barrel Politics* in New Nations, p. 11, in Parliamentary Affairs, Volume 25, Issue 1, January 1971 (https://academic.oup.com/pa/article-abstract/25/1/11/1408097?redirectedFrom=PDF)
50 supra, n. 2, p.16
51 supra, n.6, p.8
52 supra, n. 1, p. 61
53 supra, n. 5, p. 1
54 ibid., p. 4
55 William B. Heller and Carol Mershon: *Introduction: Legislative Party Switching, Parties, and Party Systems*, July 2008 at p. 7 (https://www.williambheller.com/uploads/3/8/0/6/38062831/cho1final.pdf)

5.1 Anti – defection laws are anti – democratic

"In the world today, it is difficult to find a country that is as anti – party as Brazil, both in theory and in practice. Politicians refer to the parties as *party for rent.* They change party freely and frequently, vote against their membership, and refuse to accept any form of party discipline, under the allegation that one cannot interfere in their freedom to represent their constituents."[56]

The proponents of the right of elected representatives to defect, or to vote against their own parties, maintain that this is an exercise of freedom, and right, to choose, associate, and express themselves. This then causes tension with the rights of parties to maintain party cohesion and discipline, forcing the State to introduce anti – defection laws in order to ensure that there is stability and, for some, integrity and accountability in the political system.

It has been observed that: "Many politicians see switching of party membership by legislators as a constitutional right which should not be hindered or restricted."[57] However, courts, particularly in younger democracies, have affirmed the right of parliaments to enact anti – defection legislation, even if in some way it abridges the rights of elected representatives.

In the Matter of the Question of the Crossing the Floor by Members of the National Assembly, the Supreme Court of Malawi found that there is nothing wrong in anyone joining a party of her or his choice, and that this right has to be protected. The court determined, however, that once elected as a representative in the National Assembly, the rights to freely switch political allegiance from one party to another "are derogable, and can, therefore, be limited or restricted."

In sum, the right to freely make political choices is not absolute. It can be restricted or limited by parliament. This is the essence of what the Constitutional Court of South Africa noted in the *United Democratic Movement* case, when it said that"the retention and loss of membership – is a legitimate purpose of which Parliament has the power to legislate and pass constitutional amendments."

In the *Mian Bashir Ahmad* case, the Acting Chief Justice of the Jammu & Kashmir High Court said at paragraphs 29 and 30:

56 supra, n.5, p.2
57 supra, n. 10, p. 25

"29. …His argument is that the impugned section abridges the petitioners' right to withdraw his membership of the political party to which he belongs and, so viewed, it restricts his freedom of dissociation which is an integral part of the freedom of association guaranteed under Article 19(1)(c). To me, it appears the argument is not well conceived. The impugned section does not prevent the petitioner from withdrawing his membership of a political party but it only lays down that he shall not continue as a legislator if he withdraws his membership of the political party to which he is attached. Thus, what the impugned section really does is that it takes away the right to continue as a member of the Legislature. Viewed in this light, the impugned section cannot be invalidated. For, there is no fundamental right in any person to continue as a member of the Legislature. The right to stand as a candidate for the election and the right to continue as a member after such election is a statutory right which can be validly and reasonably taken away by statute.

30. Even if it is taken that the impugned section restricts the right of the petitioner to withdraw his membership of a political party, the restriction cannot be treated as a fetter on his right of dissociation assuming that such right is an alienable part of right of association guaranteed under Article 19(1)(c). I say so both on principle and authority. It will be noticed that the impugned section nowhere compels a person to become a member of any political party. He is entitled to join or not any political party at his choice. If he once joins it, he is entitled to withdraw his membership at his choice and the only impediment in his way is the fact of being a member of the Legislature. Until he continues to be a member of the Legislature, he cannot resign the membership of his party without being prepared to forgo such membership. This might create a difficulty in the matter of a person being able to resign the membership of a political party, but that does not mean that there is an absolute restriction on his right of resignation. Accordingly it cannot be said that the impugned section interferes with the right of association guaranteed to the petitioner under Article 19(1)(c)." (sic)

Evidently, the court's view was that in being required to relinquish his or her seat in the legislature when an elected representative defects from the party which took him or her to parliament does not infringe any of their fundamental freedoms or rights. They still retain their right to choose a party of their liking. But if parliament has enacted an anti – defection law, then it is this statutory law that is used to bar such a person from parliament. This, the court said, has nothing to do with such a representative's fundamental rights and freedoms. Their right to choose remains undisturbed and secure. This is akin to saying that for you to join a particular scheme you should be a member of a club, but if you leave the club of which you were a member when you joined then your membership is automatically terminated, irrespective of whether you switched to another club. However, you can still apply to rejoin the scheme under the new club. On this reasoning, the anti – defection laws invest enormous power in political parties.

5.2 Anti – defection laws strengthen party leaders

One of the most trenchant criticisms of anti – defection laws is that they are used as accessories to transgressions committed by party leaders, as they use such laws to control their members. In short, anti – defection laws are used by lazy, corrupt and autocratic party bosses to bludgeon their parties' elected representatives, when such representatives raise genuine concerns regarding moral, ethical and ideological issues. In this regard, the State is accused of being a hand – maiden in the deeds, or misdeeds, of party leaders as it is the one that sanctions such laws.

It was noted in the *Mian Bashir Ahmad* case at paragraph 71:

> "The said clause does incalculable harm to the functioning of parliamentary democracy as the legislators are virtually told that after the elections they would become "soulless and conscienceless entities" and would have to be driven like dumb cattle in whichever direction the political party to which they belong chooses to drive them, irrespective of their own conscience or commitment to the constituency which had returned them to the legislature. It appears to me that by the impugned legislation the interest of the recognised political parties is put above

> the conscience of a legislator and the interest of the Constituency he represents. Of course, there cannot be any two opinions about the fact that to vote against one's party's direction, may be the worst dereliction from political norms. However, the answer to that lies in taking disciplinary action against the defaulting member under the party's own constitution, which may even amount to the expulsion of the member concerned. The answer is not to enforce party discipline through law." (sic)

The Inter – Parliamentary Union has observed:

> "The risk of loss of the mandate as a result of MPs' decisions to change party ranks also plays an important role in consolidating political parties. However, one can wonder whether it is the task of the State and its law to guarantee party loyalty. Nationalizing political parties is always a dangerous interference in the organization of society and the necessary spontaneity of the political process.
>
> …
>
> The law should therefore not become a protector of political parties at the expense of the independence of democratically elected parliamentarians who strive to carry out their mandates honestly and in good faith."[58]

According to a former President of the Republic of South Africa, such spontaneity brings vibrancy to the political process, which would be spoiled by party bosses if they had total control through anti – defection laws. Answering a question in the National Assembly of South Africa on the 18th May 2006 he said:

> "The ability to cross the floor also curtails the power of the party bosses, and makes for a more vibrant political atmosphere. In short, greater democracy and representivity is made possible through a qualified freedom to cross the floor."[59]

58 Zdzislaw Kedzia and Agata Hauser: *The impact of political party control over the exercise of the parliamentary mandate* (Inter-Parliamentary Union) at p. 17 (archive.ipu.org/conf-e/129/control-study.pdf)

59 Department: International Relations and Cooperation, Republic of South Africa: *Floor Crossing by Members of Parliament* (http://www.dirco.gov.za/docs/2006pq/pqp9.htm)

Janda states:

> "Outlawing party defections increases the power of party leaders, for members of parliament cannot protest their leaders' decisions by threatening to leave the party."[60]

This argument presupposes that legislators should be free to defect, but that an anti – defection law frustrates such freedom. Dingake notes:

> "The problem with party politics is that voters don't always appreciate internal political party democracy. When leader(s) deviate from party ideology or policy, members are perfectly entitled to differ or leave the party, since the party would be deviant and not the original party, one joined. … Under the circumstances, defectors are right to break with the leadership/ party which no longer identified with the founding principles and policies of the party."[61] (sic)

5.3 Cohesion of political parties

Those who support anti – defection laws argue that they instil stronger party cohesion, and hence stability in elected governments. Opponents of such laws hold the view that the State is used to prop up such party cohesion, and that the State should not be used to play a role of this nature.

Janda explains:

> "The *sotto voce* expectation is that banning party defections would increase the power of party leaders. This might provide for more centralised (and thus more coherent) party policy and greater cohesion among party members in parliamentary voting."[62]

In the *United Democratic Movement* case, the Constitutional Court of South Africa observed at paragraph 60:

60 supra, n.13, p. 13
61 supra, n. 21
62 supra, n. 13, p.16

> "This identifies two of the main objections to floor crossing – lack of stability and the possibility of corruption."

It has been noted that:

> "Of course, party defections that occur on a large scale obviously have governmental implications."[63]

It is such large scale defections which unsettle leaderships and parliaments in nascent democracies, and in turn force parliaments to pass anti-defection laws, on the apprehension that parties which did not achieve a mandate at the elections to govern, may end up being majority parties through defections. This is what puts the State on the horns of a dilemma in new and emerging democracies. Some parliaments have gone to the extent of inserting anti – defection provisions in their constitutions, effectively cementing party cohesion at the parliamentary level.

Nikolenyi has said:

> "Compared to these international variables, anti – switching and anti – defection laws ought to exert a far more immediate and direct impact on party unity. For instance, party unity may be constitutionally guaranteed if party defections are banned outright."[64]

1.1 Is expulsion tantamount to defection?

In some jurisdictions the expulsion of a legislator from their political party is treated as defection. Therefore, if the punishment for defection is a loss of a parliamentary seat or other elective seat, then in such an instance the legislator loses his or her seat.

It has been explained that:

63 supra, n.9, p.8.
64 supra, n. 16, p.11

> "Political parties usually shape the behavior of their members by adopting internal party rules. Arguably, the most draconian rule is expulsion from the party. Because this sanction has little effect on a person who threatens to leave the party anyway, internal party rules are ineffective in producing parliamentary cohesion when members are willing to defect rather than submit to party discipline. In this case, politicians can seek help from another quarter, the state, by enacting governmental laws that ban party defections. Typically, such laws cost the defector or switcher his or her parliamentary seat upon "crossing the floor" and leaving the party."[65]

An observation has been made that in Zambia the electorate is sympathetic to legislators who lose their seats through expulsion, as opposed to typical defectors.[66] Nevertheless, Heller and Mershon are of the view that expulsion is a necessary outcome from the behaviour of politicians, which they must foresee.

"Another variant of involuntary moves might seem to come in the form of expulsions; yet since elected politicians can be assumed to exercise some degree of foresight, it is reasonable to view expulsions as in essence stemming from voluntary choice."[67]

As the above assessment has shown, anti-defection laws are viewed dimly because they are seen as anti-democratic; as instruments that are used by party leaders to strengthen their hold within their parties; and also used as glue that coheres political parties. It is thus helpful to explore what a political mandate itself entails.

6. MANDATE

In order for a political party to govern the Republic of Botswana, or an individual to represent a constituency or ward, they need to secure a mandate from the people, who are also sometimes referred to as the sovereign. Such a mandate is procured through general elections, or in the case of constituencies or wards, this can be through by-elections. After elections, a party that is represented in

65 supra, n. 13, p.14
66 supra, n. 1, p.68
67 supra, n. 55, p.13

the legislature or a council chamber wishes to retain all its representatives, so that as far as possible it can execute its elections manifesto and the mandate it has received from the electorate. The defection of a representative is therefore devastating. The question then is: is the representative representing the interests of (a) the party; (b) the constituency or ward; (c) the nation as a whole; or (d) his or her own interests? At any rate, is there any remedy available to any of these interests, if they are aggrieved?

In the fore-cited *United Democratic Movement* case, the Constitutional Court of South Africa said at paragraphs 31 and 32:

> "[31] There is a tension between the expectation of voters and the conduct of members elected to represent them. Once elected, members of the legislature are free to take decisions, and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign.
> [32] It is often said that the freedom of elected representatives to take decisions contrary to the will of the party to which they belong is an essential element of democracy." (emphasis added)

At paragraphs 49 and 50 the Constitutional Court said:

> "[49] Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.
> [50] The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems. … Persons who voted … may feel betrayed by such a decision, but they cannot contend that the change infringed their rights … Their remedy comes at the time of the next election when they decide how to cast their votes." (emphasis added)

Matlosa and Shale have said:

> "… when MPs cross the floor of parliament they are not compelled to consult their constituencies in advance and neither are the MPs compelled to seek a new mandate after crossing the floor. This situation undermines the vertical accountability of MPs to the electorate."[68]

It has also been observed that:

> "This indicates that floor crossing may very well discourage the advancement of political parties as parliamentarians, despite being elected with a party affiliation, have the power to act independently of party rules as their mandate is driven by their own political ambitions rather than the advancement of their political parties – or even, by extension, their constituents. In fact, 66 per cent of interviewees believe that supporting or honouring the principles and interests of constituents is not a deciding factor in parliamentarians' decision to cross the floor."[69] (sic)

Clearly, elected representatives generally feel that once they are elected at a general election they have a mandate to act according to their own conscience only, and the voters may either reject them or re-elect them at the next election. But two types of mandates have been identified, being imperative mandate and free mandate, or free and independent mandate.

6.1 Imperative Mandate

The imperative mandate is rooted in Roman law.[70] Classically, it posits that the mandate of a representative is derived "from the theory of popular sovereignty which meant that powers derived from the workers (the proletariat)"[71], as it was practised in the Soviet Union. Essentially, the mandate or the will of the people is an instruction which can neither be deviated from, discarded, countermanded, varied, nor withdrawn from. It has been stated that with the imperative mandate:

68 supra, n. 7, p.11
69 supra, n 10, p.33
70 supra, n 40, p.2, para. 4
71 ibid, p.3, para.10

> "Deputies from these towns were equipped with clear and detailed instructions according to the motives of the session. They were not free for departing from these. As a rule, towns required their deputies to take oaths neither to vary from their instructions, nor to overstep their mandates and this act was officially sanctioned by a public notary."[72] (sic)

The criticism levelled against the imperative mandate is that it leaves an elected representative with no conscience of his or her own, to be able to listen to a debate and the different views offered, and respond in the best interests of the nation and not just a small enclave in it. In this sense, it is seen as inimical to liberal democracy.

6.2 Free Mandate

This is also referred to as the free and independent mandate, parliamentary mandate, as well as representative mandate. Its strongest proponent was Edmund Burke (1729-1797), who, in November 1774, was elected to the British House of Commons as a member of parliament for Bristol. After his election, Burke gave a speech and said, among other things:

> "Certainly, Gentlemen, it ought to be the happiness and glory of a Representative, to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But, his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you; to any man, or to any sett of men living. These he does not derive from your pleasure; no, nor from the Law and the Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your Representative owes you, not his industry only, but

72 ibid, p.2, para.4

his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion.

…

But Government and Legislation are matters of reason and judgement, and not of inclination; and, what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?

To deliver an opinion, is the right of all men; that of Constituents is a weighty and respectable opinion, which a Representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *Mandates* issued, which the Member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgement and conscience; those are things utterly unknown to the laws of this land, and which arise from a fundamental Mistake of the whole order and tenour of our Constitution.

Parliament is not a *Congress* of Ambassadors from different and hostile interests; which interests each must maintain, as an Agent and Advocate, against other Agents and Advocates; but Parliament is a *deliberative* Assembly of *one* nation, with *one* Interest, that of the whole; where, not local Purposes, not local Prejudices ought to guide, but the general Good, resulting from the general Reason of the whole. You chuse a member indeed; but when you have chosen him, he is not a Member of Bristol, but he is a Member of *Parliament*. If the local Constituent should have an Interest, or should form an hasty Opinion, evidently opposite to the real good of the rest of the Community, the Member for that place ought to be as far, as any other, from any endeavour to give it effect."[73](sic)

The passage from Burke has been reproduced *in extenso* because it is the genesis of modern day thinking about the right to defection or floor crossing under the banner of free mandate in a liberal, representative democracy. Burke argued that elected representatives should rely on their own conscience, instead of being controlled by their constituents or any other person or body, who do not have the benefit of listening to deliberations by other legislators. Secondly,

73 Francis Canavan: *Select Works of Edmund Burke – Miscellaneous Writings* (Indianapolis: Liberty Fund,1999) (http://oll.libertyfund.org/Home3/EBook.php?recordID=0005.04)
The spelling used in the above quotation is consistent with 18th century orthography.

it was his view that once elected, a legislator becomes a member of parliament, and not a member of his or her constituency, and therefore they should concern themselves with national and not constituency issues only.

Referring to a German constitutional provision, Majola, Saptoe and Silkstone have written:

> "It also provides that Members represent the whole people, and are not bound by orders or instructions, but are responsible only to their conscience. This principle is referred to as the constitutional principle of independent mandate, and permits withdrawal from a parliamentary party or the floor crossing to another parliamentary party."[74]

Miners makes the point more forcefully:

> "In most democracies an M.P. is under no constitutional obligation to honour the promises he made during his electoral campaign. If he chooses to abandon his party, renege on his commitments, cross the floor, found his own political party or become an Independent the voters are impotent to discipline him until the next election, when they can refuse to re-elect him; provided of course he decides to stand again."[75]

In essence, the free mandate or the independent mandate permits an elected representative to follow his or her conscience only. The free mandate appears to betray the sanctity of the vote, and thereby encouraging a betrayal of the voters.

7. SANCTITY OF THE VOTE

It is to be assumed that when a voter casts his or her vote this is after careful consideration of the issues that have been canvassed, the candidates and their political parties, and deep reflection and soul- searching. For in Botswana, the opportunity will only avail itself after five (5) years, unless in the intervening

74 supra, n 2, p.8
75 supra, n 49, p.11

period there is a by-election. Such a vote is therefore a declaration of trust in a political party and its candidates – that it will emerge as the governing party, or at the very least as the counterpoise to the governing party but providing a compelling, viable alternative. If such trust is betrayed by the defection of an elected representative or representatives then there is anger, despair, disillusionment and helplessness amongst the voters. They in turn see the political and electoral systems as a charade, which has no meaningful impact in their lives.

It has been noted:

> "In 2008, the South African parliament put a definitive end to the practice of party – switching at all levels of government. The practice had always been controversial. Mangosuthu Buthelezi, leader of the Inkatha Freedom Party, claimed that floor-crossing 'robs the political system of all honour, holding political parties hostage by rendering them unable to discipline their own members'… Buthelezi further claimed that the practice allowed for 'the emergence of careerists, self-serving politicians, which are a very strange breed because they do not honour the sanctity of the vote cast in the ballot box'".[76]

Such a culture sometimes erodes trust in the elected representative personally, as well as confidence in the electoral system generally. Defections may therefore be used to undermine a governing party, resulting in a party that lost elections assuming power and taking over the government. This is aided by the fact that defecting elected representatives are not obliged to consult their constituents beforehand. It has been observed that:

> "… when MPs cross the floor of parliament they are not compelled to consult their constituencies in advance and neither are the MPs compelled to seek a new mandate after crossing the floor. This situation undermines the vertical accountability of MPs to the electorate."[77]

In such circumstances those who voted for the defecting member

76 Eric McLaughlin: *Electoral Regimes and party-switching: Floor-crossing in South Africa's local legislatures* (2011), at p.14 (citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1005.2777&rep=rep1)
77 supra, n 7, p.11

feel neglected and betrayed. In mature, established liberal and representative democracies the voters have to wait for the elected representative's term to come to an end before they can express their confidence in him or her at the general elections, or vote for another person.

It has been said:

> "While the law might permit floor crossing, parliamentarians who cross the floor frequently find themselves without a seat at the next election (as has tended to happen in the United Kingdom and in Germany)."[78]

The same point has been made with respect to Lesotho:

> "Since elected MPs represent their constituencies, the observation in the Lesotho polity is that post the floor crossing, their constituency support is not always guaranteed."[79]

In Botswana, if such defectors lose at the next election it is said that they have been "punished by the voters". But even if there is such retribution, the question still lingers as to whether this sufficiently compensates for the time they were represented by a person they did not want. The solution has to lie in interrupting a defector's stay in their position, until they gain a fresh mandate on the basis of her or his new policies and principles, or the election of a new representative.

8. SUBVERSION OF THE WILL OF THE PEOPLE

Since a political party is at the epicentre of the electoral system, it is from the pool of such parties that voters are offered the right to choose a party to govern the country's affairs. This is a sacred right, which in some countries was secured through the spilling of blood, while in some it was the ultimate sacrifice – the loss of life. The bestowal of trust and confidence in an elected representative

78 supra, n 2, p.16

79 Dimpho Motsamai: *Lesotho May 26 General Elections: The Damaging Effects of Floor-crossing and Simmering Hostilities* (Institute for Security Studies (ISS Africa)), March 2012 at p.3 (https://issafrica.org/iss-today/lesotho-may-26-general-elections-the-damaging-effects-of-floor-crossing-and-simmering-hostilities)

should therefore be reciprocated by the representative going back to the voters if he or she feels that defection is the only remaining option that he or she has.

It is universally accepted that at its core democracy is about the governed freely choosing those who will govern them, or as President Abraham Lincoln of the United States, inspired by John Wycliffe's 1384 prologue to his translation of the Bible[80], said in his Gettysburg address in 1863 that in the United States "democracy is government of the people, by the people, for the people, shall not perish from the earth" under God.

Therefore, if election results represent the will of the people, when elected representatives defect from, or to, a governing or other party without consulting their voters and gaining their consent, are the voters still being governed by those that they chose?

Mr Slumber Tsogwane (currently the Vice President of the Republic of Botswana), when debating the issue of floor crossing or defection in Parliament in 2012, had his sentiments captured this way:

> "Prior to this, Slumber Tsogwane, the Boteti North MP, had stood up to support the constitutional amendment. He said that floor crossing was not a new issue, adding that floor crossing disturbs the balance of power and could collapse governments.
>
> He said that it was extremely unfair for the voter whose rights he felt were being trampled upon by those who crossed the floor to join a rival party despite being voted on a different ticket. Tsogwane said that there was a need to think about the interest of the electorates, hence his support for a bye-election once an MP crosses the floor to join another political party."[81] (sic)

Since in nascent democracies two party systems are not yet entrenched,

80 James A. Langley: *Who coined 'government of the people, by the people, for the people'?* The Washington Post, 31st March 2017 (Letters to the Editor) (https://www.washingtonpost.com/opinions/who-coined-government-of-the-people-by-the-people-for-the-people/201703/31/12fc465a-Ofd5-11e7-aa57-2ca1b05c41b8_story.html?utm_term=Ocb517b59eOb)

81 Oliver Modise: *Debate on Floor Crossing Deferred*, Sunday Standard, 9th April 2012 (http://www.sundaystandard.info/debate-floor-crossing-deferred)

the multiplicity of parties offers legislators ample opportunity to defect, although ruling parties tend to be the biggest beneficiaries.[82] It has been said:

> "It is sometimes argued that floor-crossing violates the will of the voters and their right to choose between the candidates of one particular party. Voters do in fact rather elect candidates on the basis of party affiliation than on the basis of pure candidate preferences in most of the cases. The representatives should therefore not be free to choose party membership by themselves without regard to the voters."[83]

If elected representatives hop from one party to the next without any consequences visited upon them, then this debases the very basis of democracy - the will of the people – and the only person who ultimately benefits is the defector himself or herself. The court in the *Mian Bashir Ahmad* case adverted its mind to this issue and said at paragraph 171:

> "A political party, it has next been stated, taking part in the elections puts up its candidates to secure the mandate of the electorate for the party and its programmes and not for a candidate in his individual capacity. The candidate put up by a party at an election in effect represents to the electorate that he would support the party and its programme and also that he would abide by the decisions of the majority of the party once such decisions were taken. A person whose own views about political, social and other matters would be at variance with those of a particular party it need not and would not agree to set him up as a candidate for that party. It has been admitted that a member of a party has a right to canvas for his views within the party but once a decision has been taken by the party the duty of the member concerned was to support the decision. If a member would be disinclined to accept the views of the party on a particular line of action he was entitled to do so, but in that case he had to relinquish his seat from the Assembly and seek a fresh election." (sic)

82 Zibani Maundeni and Batlang Seabo: *Management and Mismanagement of Factionalism in Political Parties in Botswana*, 1962-2013, Botswana Notes and Records, Volume 45, p.29 (journals.ub.bw/index.php/bnr/article/viewFile/394/155)

83 ACE Project: *The Electoral Knowledge Network – Parties and Candidates*, p.4 (http://aceproject.org/ace-en/topics/pc/pcd/pcd03)

Political parties provide candidates under their brand names, machinery, networking capability, support staff, material resources, party platforms, manifestoes and policies to ensure that they are elected. This provides the basis for the view that voters generally vote for political parties and not candidates, otherwise individuals could simply stand as independent candidates. It has been observed:

> "It is however very difficult to accept the argument that a law imposing an obligation on a political defector to vacate his legislative seat won under the platform of his former party, is an abridgement of his right to resign from a political party. This is because the law does not prevent him from resigning from one political party and joining another. All the law requires is that after resignation, such politician should vacate his seat for a by-election. The law does not provide for an automatic vesting of the parliamentary seat in the defector's former political party to be filled in by it anyway it wants. All it does is to create a vacancy to be filled in through another election in which the defector's new party may contest, either by fielding him or by fielding another candidate. Under a parliamentary system of government where the stability of an elected government rests heavily on the majority it has in the Legislature, this approach to the problem of political defection is fair enough. It is fair to the political party from which the defector has resigned and the support of which might have been very critical to the success of the defector in winning the election in the first place. It is also fair to the electorate in the sense that if the motivation behind the election of the politician in question was the programmed of his party and not his personality, a chance is now given to the electorate again to elect candidate of the same party. It is also reasonable."[84] (sic)

However, the greatest dangers of defection in nascent democracies are (a) loss of trust and confidence in the electoral system by voters; (b) the diminution of integrity and accountability in the electoral and political systems; and (c) the

84 Rabiu Sani Shatsari and Kamal Halili Hasssan: *Constitutional Protection of Freedom of Association for Trade Union Purposes*: The Malayan Law Journal Articles, Volume 1, 2007 at p.9 (www.vodppl.upm.edu.my/uploads.docs/dce5634_1298966107.pdf)

impact of such defections on political party representation in parliament, for example, and the consequent stability of a government if they affect a governing party. These are what has prompted some authorities to call for the installation of mechanisms to control defections.

Matlosa and Shale have observed:

> "Finally, if not well managed, floor-crossing may undermine representative democracy in that if the electorate keep electing MPs who after a while would undermine that choice by switching political allegiances in parliament, the electorate may feel that the MPs tend to represent themselves. This situation may generate a legitimate crisis for the MPs in the eyes of the electorate. This trend, may, in turn, result in declining public trust in the MPs and the parties."[85]

Once such mistrust entrenches itself in the electorate it might also affect the functioning of other State institutions and become an existential threat to democratic legitimacy and the State itself. The question therefore would be: in considering measures to curb the scourge of defections, is it a balance in favour of the interests of the defector or defectors, or the stability, or even the very existence of the State itself? The court in the *Mian Bashir Ahmad* case said at paragraph 39:

> "These passages and more so, the material, which I have already adverted to, bear ample testimony to the fact that political defections in our country pose a serious threat to the functioning of parliamentary democracy and the stability of the representative Govts. in our country and it is not in dispute that the prevention and eradication of such defection is an objective worth striving for. Our State, acting through its legislative body, has taken a lead in achieving this objective. Section 24(G) was written in the election law of the State because our Legislature knew from history that transfer of allegiance from one party to another tends to destroy the stability in the Government and to degrade public life. They also knew that the stability was too sacred, too holy, to permit

85 supra, n. 7, p.11

unhallowed perversion by change of loyalties." (sic)

In crafting the law on defections, given the possibility of their being used to destabilise, and even remove, an elected government, it is of vital importance that the electorate is consulted through referenda so that it also has its own direct input. Otherwise, leaving such an important choice to be made by the elected representatives themselves is simply empowering them to protect their own self-interests.

9. SELF - INTEREST OF ELECTED REPRESENTATIVES

It has been strongly contended that when elected representatives defect it is all about furthering, and even feathering, their own interests and nests; and that such defections have absolutely nothing to with the lot of those they represent, or the governed. This is because when representatives defect they generally do not consult their constituents in advance. Appointments to higher office might be a lure, as Janda notes, "legislators might be tempted to vote for themselves, defecting to another party for personal gain. Against this temptation, governments may enact anti-defection laws in order to promote party stability."[86]

In the *Mian Bashir Ahmad* case it was said at paragraph 35:

> "The object and purpose of the impugned section is to curb the evil of political defections which are induced by the lure for position, power and other forms of corruption."

The same point has been made by Motswagole, when he says "[f]loor – crossing practices have historically fostered bribery and corruption when parties try to convince other Members of Parliament to switch parties."[87]

It is this perception of corruption in defections that galvanizes the view that it is all about the selfish interests of politicians, and that politics is indeed a dirty game. This then reinforces the view that those who enter politics do so only to further their own interests, and that voters are simply their stepping

86 supra, n. 9, p.6
87 supra, n. 20

stones. It has been observed that:

> "In third world country, democracy has not been institutionalized yet. Political parties do not run their activities according to ideology and morality. Politicians are not committed to their ideology rather they use their political power for self-interest."[88](sic)

Hug and Wuest have said that "[c]onsequently, the motivations for switching MPs may be related to vote - , office – or policy – seeking."[89] Evidently, there is no mention of either the voters or the constituency in such motivations. It could of course be argued that in the context of a free, independent mandate the ultimate priority is the whole nation and not just the constituency. However, in an FPTP system the constituency is the bedrock of elective office, and therefore should always be a central consideration in any decision to defect.

With empirical backing, it has been said:

> "In particular, the contributors to this volume agree on the centrality of legislator ambition and changes of party affiliation. Together, the available theoretical models and empirical findings (including contributions to this volume) highlight office perks, policy influence, and electoral advantage as motives for "jumping ship" … Hence, switching not only is widespread but also is the product of strategic behaviour, of a calculus of cost and benefit on the part of the individual legislator who faces incentives and constraints in her institutional environment …"[90]

In the event, defectors simply appear mercenary in both purpose and intent.

10. REMEDY

In nascent democracies, defections are viewed as cancerous to the political

88 supra, n. 14, p.1

89 Simon Hug and Reto Wuest: *Ideological positions of party switchers*, Department de science politique et relations internationales, Universite de Geneve, April 2011 at p.4 (www.unige.ch/ses/spo/static/simonhug/ipops/ECPR_Hug-Wuest.2011.pdf)

90 supra, n. 55, p.15

system, as they can result in a change of government without going through an election. In mature democracies like the United States of America "it has mostly been seen as part of exercising democratic freedom".[91]

It is extremely difficult to conjure up a perfect remedy for defections. The reasons for, and circumstances contributing to, defections are a cocktail of personal interests, corruption, fierce ambition and oppressive intra party dynamics. The cornerstone of representative democracy and the fulfilment of the obligations of elected representatives is that once elected they should freely make their own decisions, and if necessary, defy their political party positions. As the Constitutional Court of South Africa noted at paragraph 32 in the *United Democratic Movement* case:

> "It is often said that the freedom of elected representatives to take decisions contrary to the will of the party to which they belong is an essential element of democracy."

In the event that their party does not permit an elected representative to differ with a party position, this may lead to the defection of such representative. At paragraph 50 of the *United Democratic Movement* case the Constitutional Court of South Africa again said, as has already been referred to above:

> "[50] The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems. … Persons who voted for that party may feel *betrayed* by such a decision, but they cannot contend that the change infringed their rights … *Their remedy comes at the time of the next election when they decide how to cast their votes*." (emphasis added)

The election seems to be the ultimate remedy for voters when an elected representative appears to betray them, and adopts positions inimical to their interests. It has been strongly noted that: "An MP's mandate is irrevocable – the voters have only one instrument for holding the MP accountable and that is the next election."[92]

A no-confidence vote is available to members of the National Assembly

91 supra, n. 10, p.22
92 supra, n. 58, p.5

in the event that they no longer have confidence in the President and her or his executive. However, this is a limited remedy as it is only given to members of the National Assembly, and not directly to the voters. Another remedy, which is used in some democracies, is the right to recall an elected representative. Both are considered below.

10.1 No-Confidence

The executive branch in Botswana is sustained through the support of members of parliament. In an analogous situation, it has been observed:

> "In contrast, a key feature of the parliamentary system is that the executive branch of government depends on the direct or indirect support of the parliament, often expressed through a vote of confidence."[93]

In the event that the members of parliament, being the elected representatives, succeed in a vote of no-confidence in the government, then the executive cannot continue to occupy office. At that point the people would have withdrawn their mandate through their elected representatives.

The Constitution of Botswana at section 92 states:

> "If the National Assembly at any time passes a resolution supported by a majority of all the Members of the Assembly who are entitled to vote declaring that it has no confidence in the Government of Botswana, Parliament shall stand dissolved on the fourth day following the day on which such resolution was passed, unless the President earlier resigns his or her office or dissolves Parliament."

In essence, if elected representatives no longer have confidence in the President then parliament can dissolve itself by operation of law, or the President may resign, or he or she may dissolve parliament and call for new elections to seek a fresh mandate. There are two perspectives in this which are germane to the present discussion. First, in dissolving parliament a President can call elections

93 supra, n. 2, p.3

to seek a fresh mandate. Should elected representatives similarly resign their seats when they defect so that they can seek a fresh mandate? Second, should members of parliament who have so defected be allowed to have a say in the collapsing of a government or in the formation of a new government without they themselves having sought a fresh mandate after their defection? In other words, do they have such moral authority unless they themselves have sought a fresh mandate from the voters?

The holding of fresh elections serves as a confirmation of confidence, or a lack of it, in elected representatives. In turn, this strengthens the bond between such representatives and those that are governed, thereby strengthening the democratic process. The country should not countenance a situation where the voters find themselves being ruled by people they have not given the mandate to govern, simply because they have hopped from one party to another.

10.2 Recall

The idea of a recall is inextricably linked to the calling of fresh elections. It has been noted that:

> "Recall is a characteristically American institution. It is a procedure that allows citizens to remove and replace a public official before the end of a term of office."[94]

It is a political mechanism that can be used when voters feel that their representative is neglecting them and their constituency, is no longer following the mandate of his or her party and its programmes, or has simply betrayed their trust and they no longer have confidence in him or her. In particular, a recall can afford a representative the chance to stand again, and test whether he or she can be voted back into office.[95] Zick has said:

> "Recall proceedings have from time to time been contemplated or initiated by disappointed constituents wishing to remove Members of Congress who have in the voters' view breached the public trust."[96]

94 supra, n. 40, p.5

95 Pete Mills: *Real Recall: A blueprint for recall in the UK*, Unlock Democracy, London, United Kingdom (242408349-Real-Recall-a-blueprint-for-recall-in-the-UK.pdf)

96 Timothy Zick: *The Consent of the Governed: Recall of United States Senators*, William & Mary School Scholarship Repository, Faculty Publications, Paper 817, (1999) at p.569

As advocated for in different jurisdictions, recall presents itself in different shades. Some people have argued for narrower recall, pointing out that it is a weapon that can be used by those who have lost elections and their sympathisers to harass the victors. On the other hand, some people see recall as an instrument that should be used, especially in Westminster systems of government, to hold elected representatives accountable to their constituents. Therefore, Mills has explained:

> "Full recall represents a safety valve, which would come into play when the MP-constituent relationship has broken down and voters have lost confidence in their MP. There are a number of circumstances in which full recall would empower voters to hold MPs to account: not just misconduct, but failure to represent constituents, switching party and breaking election promises."[97]

At its core, recall affords an elected representative the opportunity to confirm that the voters still have trust in him or her, while for the voters it is either a chance to repose their trust in the impugned representative, or to elect a new person. This really is the gist of the matter: that the governed should have a say on who governs them, not only at the time of general elections but also when they feel that their elected representatives have abandoned their mandate. It has been said:

> "While deviations from that party-based mandate can be legitimated on the basis of the other roles an MP must play, changing party altogether is more difficult to justify to constituents. If constituents elect an MP as a member of one party, it is unlikely, though not impossible, that they would have chosen to elect that MP had they been standing for a different party. The PCRC poll found that 52% of voters believed that an MP should be subject to recall for changing party between elections. Crossing the floor is rarely a decision that is taken in consultation with constituents, as the nature of party competition in Westminster necessitates the secrecy of the back-room deal. After the fact, the MP who crosses the floor may argue that their change in party

97 supra, n.95, p.10

> is consistent with their mandate as an MP, yet the fact that few MPs who switch party remain to face re-election in the same constituency suggests that they are unwilling to test this argument."[98]

The mechanics of a recall need to be carefully worked out and calibrated, especially the threshold triggering a recall, and the resultant by-election. However, as an instrument of accountability the recall is critical to have on the statute book, as it becomes a constant reminder to the elected representatives about the power that the governed possess. Zick has noted:

> "Cronin concluded, 'the recall has been mainly used to weed out incompetent, arbitrary, or corrupt officials. It is a positive device reminding officials that they are temporary agents of the public they serve.'"[99]

Defections cause a lot of rancour, acrimony and the use of emotive language, as a result of the feelings that voters invest when they elect their representatives and their parties. This has resulted in the saying in the vernacular that defectors are tantamount to thieves and fraudsters who have stolen the peoples' vote. The thread of accountability gets lost in the process since, if the defection occurs early in the representative's five (5) year term, the voters are stuck with him or her until the next general elections. As a rule, defections do not occur close to the next elections, as this would be vivid and fresh in voters' memories. These early defections therefore mean that for the remainder of the term the constituents are represented by someone whose mandate they did not endorse, as they would have chosen them under a different political party and its platform. Matlosa and Shale have said:

> "Floor – Crossing (political migration) in many ways subverts systems and the mandates that the electorate give to the MPs and in this manner, it runs counter to the expected vertical accountability of MPs to their constituencies (i.e. the electorate). In order to institutionalise vertical accountability as an important ingredient of representative democracy, Lesotho needs to consider a constitutional provision for *recall* of the

98 supra, n. 95, p.12
99 supra, n. 96,p. 606

> constituency-based MPs by the electorate, in cases where there a feeling that the MP no longer lives up to the expectation of the constituency."[100] (sic) (emphasis added)

It is therefore very important to achieve a balance such that at all times an elected representative is accountable to the governed, and at the same time he or she is not imprisoned in a political party they are no longer comfortable with. This can only be achieved if defectors know that their defection may trigger a recall process, and a resultant by-election in which they may or may not seek a fresh mandate from the voters under their new party, as the case maybe. This would induce and engender accountability, integrity and confidence in the political system.

11. CONCLUSION

Defection or floor crossing is an explosive mix of rights and obligations, where the exercise of the right to defect by an elected representative is perceived by the voters as a betrayal. In that mix there are issues of personal interests and ambition, greed and corruption, as well as oppressive intra-party rules and dynamics, and sometimes autocratic party leaders. While in mature, Western democracies which mainly have two dominant parties defections are rare, and at any rate are seen as an exercise of democratic rights, in nascent democracies defections can be existential threats to representative democracy and the State itself, leading to a change in government through means and processes not mandated by the electorate. This is particularly pronounced in fledgling democracies which use the Westminster FPTP system. However, the use of legislation to deal with defections is interpreted in some quarters as the involvement of the State in intra-party squabbles and more often than not siding with party leaders, thereby eviscerating the rights of defecting representatives.

There is therefore a need to find a balance which respects the rights of the governed, and those of elected representatives who want to defect. In the continuing efforts to refine and strengthen Botswana's representative democracy, the mechanism of recall is a tool that can be picked from the shed, and polished for use in this regard. It would compel a defector to resign her or

100 supra, n. 7, p.15

his seat immediately after defecting, followed by a by-election during which she or he can present himself or herself before the voters, and the voters can then ratify his or her move through a vote or reject it. This would be a combination of an affirmation of confidence in the elected representative or a lack of it (in which case she or he will lose the seat), and a right of recall. In doing so, all vested interests are satisfied: the voters get to have their say as to whether they still want the defector to continue representing them; the defector seeks to get a fresh mandate from the voters through a vote, to indicate their confidence; and the party which the defector has joined is offered the opportunity to fully stand behind her or him during the by-election process; whilst the party that has been abandoned also gets the chance to show that the defector is not suitable to represent the electorate.

In doing so, the Constitution is not amended *willy-nilly* to undermine the will of the people, and the sanctity of their vote. The Constitution should have a very clear provision to this effect, which can only be changed through a referendum and not by a simple majority in parliament. Such a change would give the voters the power at every stage to determine who should govern, instead of leaving such power in the hands of those who only want to perpetuate their stay in elective office.

However, any defector, until she or he has shown through a by-election that voters still repose trust and confidence in her or him after such defection, should not be allowed to participate in any process indicating confidence in the President or the executive (like the one prescribed in section 92 of the Constitution), or other leadership position like in the councils, as doing so is simply mercenary. Therefore, the Constitution should compel every politician who holds elective office to go through a by-election after they defect.