

# The Impact of Floor Crossing on Party Systems and Representative Democracy

15 November 2006  
Vineyard Hotel, Cape Town  
South Africa

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ISBN: 978-0-9802543-4-1

Published by:  
Konrad-Adenauer-Stiftung  
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Dunkeld 2196  
Johannesburg  
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*Editing, DTP and production:* Tyrus Text and Design

*Printing:* Intrepid Printers (Pty) Limited

## Foreword

FLOOR-CROSSING LEGISLATION IN SOUTH AFRICA CAME INTO EFFECT IN 2002 AFTER A Constitutional Court ruling supporting its legality. The legislation was supported by 280 out of 324 MPs who voted – an 86% majority. However, much has changed since then: an overwhelming majority of ordinary South Africans, members of parliament (MPs) and political science experts are now opposed to floor crossing in this country. According to German political scientist Prof. Hans-Joachim Veen, floor crossing is ‘dysfunctional’ in a parliamentary system since it prevents parties in government and in opposition from acting as they should. After all, it is primarily the existence of a democratic culture with functioning parties, more than legal rules, that prevents MPs from crossing the floor.

Political parties, especially the smaller parties, have lost MPs and seats as a result of floor crossing. The United Democratic Movement rejected the floor-crossing legislation from the outset as an attack on the electoral system and indeed on constitutional democracy, while the Inkatha Freedom Party rejected floor crossing, believing that it disenfranchises voters by allowing politicians to ‘reallocate’ seats as they see fit. The Democratic Alliance initially supported the legislation but has since changed its stance. According to DA leader Tony Leon, the principle of floor crossing is not wrong; the current legislation is, however, a perversion of an original mandate proposed by the DA in 2000.

Floor crossing as it stands now leaves the electorate ‘out in the cold’ mainly because MPs do not consult with the electorate before deciding to defect. The system of floor crossing thus undermines participatory democracy and the accountability of politicians: on the one hand we have the MP who is substantially free and independent in his decisions and subject to his own conscious; on the other hand we have a political culture which may have a substantial influence on the political party system.

At the time of going to print, the Parliamentary Committee on Private Members’ Legislative Proposals and Special Petitions was investigating the implications of floor crossing on the country’s electoral system.

This seminar report is a compilation of the edited papers presented at the conference, ‘The Impact of Floor Crossing on Party Systems and Representative Democracy’, which was hosted jointly by the Konrad-Adenauer-Stiftung and EISA on 15 November 2006 in Cape Town.

The first two papers discuss floor crossing by looking at the German and Brazilian examples. The second section gives regional perspectives from Lesotho, Malawi, Zambia and South Africa. The presentations examine floor crossing in the respective

countries based on: the impact of floor crossing on the party system and electoral law; the impact of floor crossing on representative democracy; challenges and lessons learnt; and policy recommendations. The last section comprises statements by the parties that participated in the political parties' panel, namely the African National Congress, Democratic Alliance, Inkatha Freedom Party, Independent Democrats, African Christian Democratic Party and United Democratic Movement.

It is the hope of both KAS and EISA that this publication will be a useful resource for political leaders, MPs, civil society organisations, the media and academia.

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## List of abbreviations

ABC	All Basotho Convention
ACDP	African Christian Democratic Party
ANC	African National Congress
APRM	African Peer Review Mechanism
BCP	Basutholand Congress Party
BNP	Basotho National Party
CDU	Christian Democratic Union
CSU	Christian Social Union
Cosatu	Congress of South African Trade Unions
DA	Democratic Alliance
DP	Democratic Party
DPP	Democratic Progressive Party
ERTC	Electoral Reform Technical Committee
ETT	Electoral Task Team
FA	Federal Alliance
FDD	Forum for Democratic Development
FPTP	First-past-the-post
ID	Independent Democrats
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
KZN	KwaZulu-Natal
LCD	Lesotho Congress for Democracy
LPC	Lesotho Peoples' Congress
LWP	Lesotho Workers' Party
MCP	Malawi Congress Party
MEC	Member of the Executive Council
MFP	Marematlou Freedom Party
Mgode	Movement for Genuine Democracy
MMD	Movement for Multiparty Democracy
MMP	Mixed member proportional
MP	Member of parliament
Nadeco	National Democratic Convention
NCOP	National Council of Provinces
NDA	National Democratic Alliance
NDP	New Democratic Party
NEC	National executive committee

NGO	Non-governmental organisation
NIP	National Independence Party
NNP	New National Party
NPP	National Progressive Party
PAC	Pan Africanist Congress
PFD	Popular Front for Democracy
PR	Proportional representation
RP	Republican Party
SPD	Social Democratic Party
UDF	United Democratic Front
UDM	United Democratic Movement
UIF	United Independent Front
UNIP	United National Independence Party
UPND	United Party for National Development
ZCTU	Zambia Congress of Trade Unions

# Introduction: The setting

KHABELE MATLOSA AND VICTOR SHALE

## THE CONTEXT

Almost all the countries that constitute the Southern African Development Community (SADC) have undergone political transition away from mono-party authoritarian governance regimes; many of them have embraced a multiparty democratic dispensation. But although most SADC countries have undergone successful democratic transition, their party systems and representative democracy are yet to be institutionalised, nurtured and consolidated. This is testimony to the reality that starting a democratic process is easier than sustaining the democratic momentum by establishing and enhancing the requisite capacity of key democratic institutions, including political parties and parliaments.

The process of institutionalising, nurturing and consolidating democracy is both complex and onerous. The challenge goes beyond ensuring that multiparty elections are held every so often and that such elections are free and fair – in other words, democracy cannot be reduced to mere electioneering *per se*. Part of the challenge lies in how political institutions are able to constitute critical anchors for democratic culture and practice, and in particular how political parties and parliaments provide a solid institutional foundation for a working democracy.

This publication therefore focuses on how the phenomenon of floor crossing either enhances or inhibits the effectiveness of party systems and representative democracy in the process of consolidating democratic governance. The discussion on floor crossing and its impact on representative democracy has resonance globally, hence our effort to include Brazil and Germany as case studies. Within the regional context, this discussion is also relevant for the current efforts towards democratisation in Southern Africa and it is for this reason that the publication includes four SADC case studies namely Lesotho, Malawi, South Africa and Zambia. The focus further zeroes in on South Africa specifically, and to this end the analytic presentation on South Africa was supplemented by inputs from various political parties.

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While the choice of Germany was important to bring into the debate European experiences, Brazil was chosen as part of South–South exchange and experience learning. The selection of the four SADC countries is premised upon their varying electoral systems. Lesotho has operated a mixed member proportional (MMP) system since its 2002 general elections. Under conditions of MMP, floor crossing in parliament is permissible only in relation to MPs who were elected through the constituency-based ballot and not those elected through the party-list proportional representation (PR) compensatory mechanism. Both Malawi and Zambia have since their independence operated the first-past-the-post (FPTP) electoral system. Conventionally, the British-type FPTP system allows floor crossing as members of parliament (MPs) are considered individuals representing constituencies even if they belong to specific political parties. South Africa operates the PR system. Floor crossing in parliament is uncommon in countries using the PR system, the rationale being that PR would not be amenable to floor crossing as it is premised upon party lists rather than on individuals representing constituencies.

This publication is divided into four parts: following this introduction, the three subsequent parts look at the global, regional and political party perspectives *vis-à-vis* the impact of floor crossing on party systems and representative democracy.

PART I: THE IMPACT OF FLOOR CROSSING ON PARTY SYSTEMS AND REPRESENTATIVE DEMOCRACY: GLOBAL EXPERIENCES

**Part I** deals with the global experiences with reference to Brazil and Germany. Discussing the experiences of Germany in **Chapter 1**, Professor Veen indicates that although permissible, floor crossing in Germany is rare perhaps due to public opinion which sees this phenomenon as illegitimate. He concludes that floor crossing is democratically and morally problematic; it is dysfunctional in a parliamentary system if it restricts the parties in government and in opposition from acting as they should. Furthermore, floor crossing undermines the principles of efficiency, responsibility and transparency.

Discussing the Brazilian experience in **Chapter 2**, Dr Silvana Krause indicates that floor crossing is allowed in Brazil and has been a common feature of Brazilian politics particularly between 1946 and 1964. She states that due to political engineering and the country's history, the party system in Brazil is infested with problems of party fragmentation and change of party names, persistent congressional party defections and unstable representation of parties. Krause winds up her discussion with the conclusion that floor crossing creates a negative image of parties, distorts the meaning of political representation and undermines political accountability.

PART II: THE IMPACT OF FLOOR CROSSING ON PARTY SYSTEMS AND REPRESENTATIVE DEMOCRACY: REGIONAL PERSPECTIVES

**Part II** investigates the regional experiences with particular reference to Lesotho,

Malawi, Zambia and South Africa. This part begins with **Chapter 3** in which Dr Khabele Matlosa and Victor Shale discuss the impact of floor crossing in Lesotho where, following the electoral reform from FPTP to MMP, MPs who occupy their parliamentary seats through the FPTP component of the system are allowed to cross the floor, while MPs elected through the party-list PR component are not allowed to cross the floor of parliament. The authors invoke the notion of migration, arguing that floor crossing is tantamount to political migration propelled by push–pull factors. Some of the push factors prompting MPs to cross the floor include unacceptable conditions in their original parties. Some of the pull factors include the prospects for improved conditions and access to power that are perceived to prevail in the new party. Regardless of these factors, the authors argue, floor crossing tends to whittle away at the essence of representative democracy and fragments party systems.

Floor crossing in Lesotho is not new. Since adopting the FPTP system as part of the Westminster constitution upon its independence in 1966, the Lesotho National Assembly has occasionally seen floor crossing, albeit on a fairly small scale. However, the increased incidence of floor crossing since the democratic transition of 1993 – which witnessed a change of governance from military authoritarianism to the current multiparty democratic dispensation – is cause for concern, especially its impact on the party system and representative democracy.

While floor crossing can affect any party represented in the Lesotho National Assembly, a recent feature of this phenomenon is that the ruling parties have been the hardest hit due mainly to faction-fighting and splits (as a result of leadership battles). This political migration tends to occur whenever a general election is looming on the political horizon (for example, in 1997 ahead of the 1998 election; in 2001 ahead of the 2002 election; and in 2006 ahead of the 2007 election). Matlosa and Shale conclude that floor crossing is against the spirit of democratic consolidation and they recommend, among others, that given that Lesotho is currently undergoing parliamentary reform, the country has to consider how best to contain the adverse effects of floor crossing.

In **Chapter 4** Samson Lembani's discussion of the Malawian experience traces floor crossing back to the country's FPTP electoral system, which he asserts was adopted from Britain without any necessary evaluation of its merits and demerits. Owing to this, Lembani contends, Malawi is confronted with an array of problems, including among others a crisis of legitimacy of rulers, parliamentary paralysis, vote wastage and politics of regionalism. Lembani observes that on successive occasions, elections have been won by individuals and parties with the minority vote. This trend has rendered these winners vulnerable to a strong combined opposition, which can easily frustrate government. In circumventing this possibility the ruling party (government) has had to poach opposition legislators for their support, and in the process encouraging floor crossing in parliament. Lembani suggests that despite its disadvantages, the FPTP system has the potential to create a more responsive government and a more consensual legislative process. His recommendation is that

given the disabling features of the FPTP system, Malawi has to consider electoral reform to come up with a system that will promote and protect representative democracy.

Professor Jotham Momba begins **Chapter 5** with the contention that floor crossing, although a regular feature in most Commonwealth countries, has always presented these countries with a plethora of problems. He points out that floor crossing has been banned in Zambia since 1966, but given weak internal democracy floor crossing has persisted in this country despite the fact that it is not legally recognised. The consequence of floor crossing for the MPs is therefore that they lose their seats once they have crossed the floor. Momba says that after 1991, many floor crossers left the ruling party and joined the opposition or formed new parties. He indicates that to avoid losing seats, until 1993 MPs crossed the floor to become independents because the law did not require them to vacate seats if they were not joining opposition parties. The constitution has since been amended to prohibit this practice. Given the strictness of the law against floor crossing, Momba says that the ruling party has resorted to appointing opposition MPs to cabinet positions so that they could be part of the ruling party without having to cross the floor. This, he says, has been countered by the opposition parties by firing their MPs who accept such appointments, thus rendering the seats vacant. Momba concludes that although not legally recognised, floor crossing in Zambia has created much tension both within and across parties, and in addition it seems to be perpetuating the dominance of the ruling party.

In **Chapter 6** Professor Dirk Kotzé states that in the case of South Africa floor crossing is constitutionally enabled although there is ambiguity in the law with regard to its nature. For Kotzé the catalyst for floor crossing in South Africa was party political realignments. He contends that this was triggered by the ambitions of the New National Party (NNP) to form an alliance (albeit without losing its separate identity) with the Democratic Party (DP) and the Federal Alliance for purposes of the 2000 local government election. Following a fall out with its alliance partners, the NNP realigned itself with the African National Congress (ANC) against its former partners. The realignments were further entrenched by the enactment of legislation which allowed members of the three spheres of governance to realign without losing their seats. Kotzé highlights some of the legal battles that followed the passing of this law; some party leaders believed it was unconstitutional for MPs to cross the floor.

According to Kotzé, the South African experience has been such that the ruling ANC has benefited more from floor crossing in all spheres of governance, particularly at the local level. This, he suggests, is a tendency which has had the effect of reinforcing the already entrenched dominant party system syndrome in the country. Kotzé uses graphical examples to illustrate, for instance, that following the 2004 general elections the ruling ANC was able to increase its already massive electoral victory by 14 seats from a total of 279 to 293, while the main opposition party, the Democratic Alliance (DA), shed its electoral weight by three seats. Kotzé concludes that floor crossing in South Africa has had more impact at local than at national level.

## PART III: THE IMPACT OF FLOOR CROSSING ON PARTY SYSTEMS AND REPRESENTATIVE DEMOCRACY IN SOUTH AFRICA: VIEWS FROM POLITICAL PARTIES

**Part III** presents the views of six political parties referred to above. Advocate Michael Masutha of the ANC reiterated the ruling party's view that the debate around floor crossing has to be allowed at all levels of governance and outside. This position was stated succinctly by the ANC President Thabo Mbeki as far back as May 2006.<sup>1</sup> In his article on floor crossing, the ANC president acknowledges the fact that 'for some time now various opposition parties and others in our society have been raising objections to the practice of "floor crossing" by our elected representatives'.<sup>2</sup> President Mbeki also indicates that the majority of those opposed to floor crossing base their argument, *inter alia*, on the fact that 'this practice is undemocratic in that it shows disrespect for the will of the people as expressed in our regular democratic elections [...]. They also say that it serves to corrupt our political system, in that, allegedly, the ANC entices representatives from other parties by bribing them with positions in our movement and government'.<sup>3</sup>

Mbeki contextualises the debate by providing a brief historical overview of floor crossing in South Africa. To this end, he reminds us that floor crossing was initiated by the DP and the DA, and that when the floor-crossing legislation was tabled in parliament it was also supported by some opposition parties that were agitating for the absolute freedom of MPs to cross the floor, against the ANC's and Inkatha Freedom Party's (IFP) suggestion of a restricted floor crossing. According to Mbeki, the ANC debated the issue of floor crossing extensively before it was adopted, and within this debate two schools of thought were discernible. In relation to the first school of thought, President Mbeki reminds us that:

as the ANC debated the desirability or otherwise of the adoption of floor-crossing legislation, the point was made very strongly that such floor-crossing would undermine the will of the people. It was argued, correctly, that our movement had to adhere to the vision contained in the Freedom Charter that 'The People Shall Govern'.<sup>4</sup>

In respect of the second school of thought, Mbeki argues:

contrary to this, the point was equally strongly made that ours was a very young democracy. Inevitably there would be a fair degree of volatility and dynamism in terms of the social and political consciousness of many of our people. The point was made, for instance, that it would take some people time before they outgrew the negative and false perceptions of the ANC they had been fed by the apartheid regime.<sup>5</sup>

He concludes that in discussing floor crossing, stakeholders have to bear in mind the above historical overview of how it came about as well as the 'comments made by the Constitutional Court when considering the "floor-crossing" legislation in 2002'.<sup>6</sup>

Tony Leon of the DA points out that political parties in South Africa are currently bound by a common sentiment, namely, antipathy towards floor crossing. According to Leon, South African voters hate floor crossing because despite being a ‘good’ principle it has been abused by the ANC, which he alleges has patronised unprincipled opposition MPs.

Leon indicates that the DA’s initial position on floor crossing was that it was a desirable phenomenon which would deter party bosses from dominating public representatives. He states that the current position of the DA regarding floor crossing is that the system has been undermined due to a ‘split between principle and practice’. As far as the DA is concerned, floor crossing has led to opposition fragmentation and a distortion of party representation. Leon concludes that the DA supports the scrapping of the floor-crossing legislation, but until then the DA will continue to receive MPs who cross the floor from other parties so as to counter the ANC’s dominance.

Dr Mangosuthu Buthelezi of the IPF shares the DA’s sentiments regarding the floor-crossing legislation. He argues that floor crossing, which he also terms ‘crosstitution’, has led to voter disenchantment with the political process. Moreover, it has undermined democracy through its ‘check-book’ politics. Dr Buthelezi maintains that floor crossing is inimical to the country’s PR electoral system because MPs are elected through a party list and not as individuals. He opines that bigger parties use floor crossing to lure opposition members away from their parties enticing them with senior positions, and accuses the ANC of being the main culprit while its members are locked securely inside. Dr Buthelezi concludes that voters are opposed to floor crossing and maintains that it should not exist without electoral reform.

One of the strongest critics of floor crossing in South Africa, General Bantu Holomisa of the United Democratic Movement (UDM), states that the UDM has always been opposed to floor crossing and challenged the legislation in the Constitutional Court. Holomisa contends that there should be electoral reform so that a new model is developed to address the instability caused by floor crossing under the PR electoral system. Holomisa observes that voters should have a say in who governs the country and as such the electoral system should require MPs to seek a new mandate if they cross the floor – if this does not happen, the ruling party grows without the consent of the voters. The continuous loss of members to the ruling party is, according to the UDM leader, making opposition party office unattractive.

Lance Greyling of the Independent Democrats (ID) states that floor crossing manifests one of the distortions of South African multiparty democracy; he says that it is a mockery of the citizen’s vote. Again, floor crossing tarnishes the already vulnerable image of politicians who are often labelled as self-centered, manipulative individuals. Like all the other leaders mentioned in this publication, Greyling makes a strong case for the need to have electoral reform because the current electoral system does not allow the voters to air their views regarding the decisions of their representatives. He concurs with the view that floor crossing harms the smaller parties, particularly given that the parties do not only lose the seat but the resources

that go with that seat as well. The ID's position is that floor crossing has no place in South Africa's nascent democracy and it has to be done away with.

Steve Swart of the African Christian Democratic Party (ACDP) admits that his party initially supported floor crossing until it realised that this phenomenon presents a serious threat to the country's democracy. He attributes voter apathy to floor crossing. Swart accuses MPs who cross the floor of having scant regard for the party employees who suffer financially as a result of MPs' actions. The ACDP's position, according to Swart, is that a constitutional amendment is needed to provide for an anti-defection clause in the constitution.

#### CONCLUSION

All the contributions in this seminar report were aimed at probing the likely impact of floor crossing on the nurturing and consolidation of democratic governance. In particular, the contributions tease out the implications of floor crossing on some of the key political institutions upon which democracy ought to be predicated, namely political parties and legislatures. If this aim has been achieved herein then we would have made an important contribution to the debate which calls into question the wisdom of embracing floor crossing in Southern Africa in the context of the region's emerging and still fledgling democratic systems. The workshop held in Cape Town and this publication have thus contributed to the on-going debate regarding floor crossing and electoral reforms in South Africa.

#### ENDNOTES

- 1 See President Mbeki's statement, To cross or not to cross the floor, *ANC Today* 6(19), 19-25 May 2006.
- 2 Ibid, p 1.
- 3 Ibid.
- 4 Ibid, p 2.
- 5 Ibid.
- 6 Ibid, p 3.



The impact of floor crossing on party  
systems and representative democracy:  
Global experience



# Strong party system as a condition for representative democracy

HANS-JOACHIM VEEN

## INTRODUCTION

Comparative government studies regard Germany as a prime example of a country with a strong party system and a government system that is both stable and powerful in leadership. It is, however, arguable whether the current grand coalition of the Christian Democratic Union (CDU)/Christian Social Union (CSU) and Social Democratic Party (SPD) really has strong leadership skills. Powerful leadership does not necessarily come with a grand coalition, even more so if it is the result of elections in which neither party gained a victory but where both partners lost – as was the case in the most recent 2005 general elections in Germany. Nonetheless, it seems fair to refer to the German party system and the parliamentary government system as a successful model for the development of a parliamentary democracy.

Germany has travelled a long road to parliamentary democracy. A first attempt was made in Weimar in 1918, but it was inconsistent and half-hearted because the parties were not trusted with being capable of forming a government. They were therefore put up against a strong president who was more of a Kaiser in all but name than the guardian of a democratic constitution. The party system of the Weimar Republic was heavily divided and ideologically fragmented. It especially lacked an understanding of its governmental responsibilities – that is, the stable preservation of the government on the one hand, and responsible opposition on the other. Thus, anti-parliamentarian forces came to triumph, and from 1933 to 1945 the totalitarian National Socialist dictatorship was able to eradicate parties and parliaments.

## DEMOCRACY UNDER THE FEDERAL REPUBLIC

The constitution of the Federal Republic of Germany drew lessons from the failure of parties in the Weimar Republic. It explicitly identified political parties as key institutions in the development of an informed political opinion, and as parliamentary parties it entrusted them with the formation of the government and the

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election of the federal president (Article 63, German constitution). Furthermore, the parties themselves had learned their lessons after the collapse following the Second World War. They were conscious of their new role as fundamental representatives of democracy and as responsible forces of government.

In the newly formed Federal Republic it was clear from the onset that democracy in the modern mass culture could only be established with capable parties. It was also clear that the republic should be a representative democracy based on free elections, party competition, and an independent or representative mandate (Article 38, German constitution) guaranteed by the constitution, following the European parliamentary tradition. It was agreed that democratic rule and legitimacy should primarily be mediated through the parties. The character and quality of a democracy are, above all, determined by political parties, their democratic structure, and their political profile and performance.

#### THE ROLE OF PARTIES AND THE PARTY SYSTEM

The role of parties in the political system varies greatly, depending on whether they operate in a parliamentary or a presidential government. In contrast to a parliamentary government, political parties under a presidential system require a lot less unity, profile and ability to act and lead. In the former, however, the parliamentary parties must form a government and keep it in office, if possible, throughout the whole parliamentary term and with its own majority. In a parliamentary system governments are necessarily formed of one or more parties. The leadership ability of those governments significantly depends on whether strong and stable parties comprise and sustain them. This brings us to the question: What constitutes a strong and stable party system?

For one thing, it is the number of parties. A multiparty system normally leads to weak coalition governments, whereas a party system with three or four parties leads to governments with only one or two parties and a strong opposition, as is common in Germany. Such governments have the chance to be both stable and powerful. A party system with two, three or four parties is, as a rule, stronger than a multiparty system.

A second pillar of a strong party system is the quality and stability of the parties themselves. This quality and stability is determined by a number of factors, including:

- the make-up of the parties;
- the strength of their internal cohesion and programmatic profile;
- the structure and efficiency of the organisation;
- the vitality of their members;
- the identification of everyone with the party;

- their democratic structure from bottom to top, and from local to state level; and
- their internal and external (the media and the public) communication skills.

The German Party Law of 1967 – which is still in force, with the exception of financial matters – defines the public responsibilities of parties and states that their functions are to:

- exert an influence on public opinion;
- participate in political education;
- promote the political participation of citizens;
- raise a new generation of politicians and political leaders;
- recruit candidates for political offices;
- fill positions in parliament and government;
- take on political leadership and translate decisions into action in accordance with their political aims; and
- generate a lively connection between civil society and the state.

This is an extensive catalogue of responsibilities. In essence, however, political parties are responsible for the development of political alternatives, participation in elections and the filling of offices in parliament and government. They must also ensure that there is responsible leadership of the country, whether in government or in the opposition – opposition is vital for the functioning of democracy, and only jointly do they legitimate a representative democracy. Without a functioning opposition the political system tends to turn into an authoritarian one.

Political parties have a particularly active and responsible role in a parliamentary system because every government is a party government; therefore, the aim of every governing party has to be to keep the government in office over the whole parliamentary term. And the aim of every party in opposition is to form a critical alternative and to make clear that the responsibility for poor decisions is with the government.

An important element here is for political parties to have clear and well communicated platforms and opinions. Before a vote is held in parliament, political leaders are well advised to invest strongly in forming their party's stance on an issue. If this internal decision-making process is neglected it could have unintended results and could lead to the loss of party loyalty.

Another means of securing strong leadership in parliament is so-called party discipline – that is, the obligation to eventually vote in unison as a parliamentary party. In the German Parliamentary Law this rule is not laid down in writing; it is an unwritten rule among members of parliament (MPs) but one that the party leadership and government can rely on in most cases. Party discipline guarantees a stable majority, and in its absence government would be weak and unable to act. In addition, party discipline is necessary to achieve a division of labour within a parliamentary party. It ensures that all MPs follow the party's programme and vote in parliament accordingly to recommendations made by expert within the parliamentary party.

But according to German Parliamentary Law and the constitutional principle of the independent mandate, this cannot be enforced. After all, the MP is only responsible to his/her own conscience, which is a precondition for guaranteeing the right of free speech, freedom of conscience and freedom of decision making. Without the concept of independent mandate party leaders would be all-powerful and MPs would be faceless automatons.

However, in theory (and sometimes in practice) there is a tension between the independent mandate and party discipline. The independent mandate does not discount that MPs – due to reasons of efficiency and trust in their party leadership – voluntarily subject themselves to certain rules within parliament or within their party. As such, the independent mandate is a back-up for the MPs: it is the last resort in cases where an MP – due to matters of conscience or strong beliefs – can no longer go along with certain party decisions. Under these circumstances no MP can be deprived of the right to vote against his/her party. Although this seldom happens in a well working parliament, there have been cases where the party leadership has explicitly opened the voting process due to it being a matter of conscience. This was the case in Germany during the discussion about abortion where all parliamentary parties left it up to their members to vote according to their religious beliefs for or against the legal right to abort.

In general though, MPs will follow the party line given that the voting process is preceded by thorough and open discussions, at the end of which a common party policy is reached. As a rule, good political leaders need to be pragmatic and open to compromise, but where MPs feel that this is not the case the independent mandate in Germany does permit them to leave a parliamentary party or to cross the floor to another party.

#### FLOOR CROSSING

Although permissible, floor crossing has seldom happened in German parliamentary history; and where floor crossings have occurred they have been carried out without exception by members of smaller parties.

For example, Free Democratic Party MPs crossed the floor at the end of the 1960s and again in 1982 in disagreement with the party's change of coalition partner from

the CDU to the SPD, and from the SPD to the CDU respectively. But even those who did cross the floor due to their beliefs or because they disapproved of the government's course totalled no more than perhaps a dozen.

Public opinion in Germany does not favour floor crossing. MPs who cross the floor are seen to be contradicting the long-established rule of conduct for MPs in a developed parliamentary democracy; they are seen to be distorting the voting intention of citizens and are therefore viewed as being democratically illegitimate.

In Germany, 50% of MPs are elected in single-member constituencies and 50% are elected according to the principle of proportional representation (PR) following party lists. All MPs, including those directly voted for in their constituencies, are principally seen as representatives of the party that put them forward, following a lengthy nomination process. Voters therefore perceive an MP and his/her party as being one and the same and vote for them together.

This is why floor crossings are perceived as democratically illegitimate, although every elector knows that according to Article 38 of the German constitution MPs are 'representatives of the whole people, not bound by orders or instructions and responsible only to their conscience'.

During the past few years there have been a number of withdrawals from small right-wing parliamentary parties in some German state parliaments due to internal quarrelling. Those individuals have, however, remained in parliament as independent members (no party would have taken them on board anyway).

However, frequent floor crossing – as experienced in South Africa, for example – is, in my opinion, an indicator of a rudimentary party system with underdeveloped party loyalty, underdeveloped cohesion among members and party officials, and underdeveloped identification with the party. Frequent floor crossing can also be an indicator of poor elite recruitment within parties, or it may simply be a sign of the corruptibility of MPs, or all of the above.

#### HOW CAN PARTIES BE STRENGTHENED AND UNIFIED?

Some questions that come up in this regard, therefore, are: How can parties be strengthened and made more sustainable? How can a multitude of political actors create a unified party with whom one can identify and stand by loyally?

There are a number of equally important elements that make a party strong and keep it stable. The eight factors mentioned below are the ideal, and I am aware that in practice even long-established parties in Germany often fall short of this ideal.

- A party needs a core of voters that can be clearly identified. A party must define the groups of voters it wants to address before formulating its fundamental values and programmatic profile.
- A party needs to build up a blanket organisation and must bridge the divide between citizens and politicians.

- A party must have an active membership base from which future senior members are recruited and in order to secure finances that are independent of donations and state financing. Conversely, an active membership organisation should mean that members are able to participate and influence the party's political course and its leadership.
- Internal and external communication is vital. As such a party needs a well-established information system that serves all party officials and members, as well as ongoing communication with the media which is vital for reaching the public. In a modern democracy the media is the gatekeeper of the political system.
- A party needs to formulate a unique and specific programmatic profile that distinguishes it from other parties. The programme, as well as the work that goes into it, must promote member identification with the party. A party must therefore continuously update its party programme based on an objective analysis of the real issues of the day.
- A party must to be able to lead. This entails, on the one hand, the ability to appear as a united whole and, on the other hand, the ability to handle and even encourage heated intra-party debate. Unity is required, particularly before elections and during election campaigns as well as during parliamentary votes, but this needs to be preceded by open, lively debate.
- In order to remain strong a party needs to have a unifying force: this is key to the success and growth of a party. A party must therefore make a constant effort to enlarge its voter base and to attract new voters with different interests as well as young voters with other aims in life. In addition a party must stay constantly connect with its voters.
- Last but not least a party needs to be able to organise campaigns. It must be capable of effectively presenting important issues and its own profile; it must organise sound election campaigns with few topics and a clear message.

These are, very briefly, eight elements of a sustainable and successful party policy that have been translated into action in Germany with varying success.

#### PARTY CONCENTRATION

The party system in Germany has undergone an extraordinary process of concentration since the Second World War; this has taken place against the logic of Germany's modified proportional electoral system. While there were 11 parties in the first *Bundestag* of 1949, only six remained in the second *Bundestag* and only four parties were represented in parliament in the third *Bundestag* of 1957. These were

the two major parties, the CDU and SPD, with vote shares varying between 30% and 50%, and two small liberal and conservative parties respectively. Between 1961 and 1983, only three parties were represented in the German parliament and formed the German party system at the national level, namely the CDU and SPD (each securing about 40% of the vote) and one small liberal party. However, in 1983 the Greens were elected to parliament as the fourth party and in 1990 the post-communist Party of Democratic Socialism joined the other parties. Germany's current party system at national level therefore comprises five parties – the two major parties (the CDU and SPD) and three smaller parties (the Liberals, the Greens and the radical Left).

For many years now we have seen government in Germany formed by a so-called 'small coalition' between one of the major parties and a smaller party. By and large, these coalition governments have lasted the full parliamentary term of four years. However, the ideal state of a small coalition between one major and one small party which together have the majority is at present not possible. Since 2005 the two major parties have formed a 'grand coalition', but this is a sign of weakness rather than strength. Both parties obtained only about 35% of the vote in the 2005 general elections and were therefore unable to form a majority government with only one of the small parties – hence the grand coalition.

In future we may have to get used to government coalitions in Germany that comprise even three parties, thereby increasing the likelihood of governments that are unstable and weak in leadership – small parties often want to distinguish themselves and may therefore not abide to government discipline. Stable parliamentary politics in Germany may be a thing of the past because the bonding power of the major parties has slackened.

#### CONCLUSION

Nonetheless, the distinctive advantages of a parliamentary government system and its particular democratic quality still remain. This can be found, firstly, in the stability of government which can rely on a lasting majority in parliament, thereby combining legislative and executive competences. This combination is the 'efficient secret' of the parliamentary government system. And it is due to this 'efficient secret' that the most powerful head of government of the free world is the British prime minister and not the president of the United States.

In addition, a parliamentary government system ensures accountability both for those who govern and those who oppose. There is political clarity because it is unambiguous who has the governing responsibility, and those who do can be called to account during the next election – it is up to the voters to extend the government's term in office or to call upon the opposition to form a government. A parliamentary government system and the parties that function within it must therefore show efficiency, responsibility and democratic transparency. Importantly, parties themselves must be able to act. They must be strong, both internally and externally, and must have a clear profile which their MPs and officials identify with. These need

to be constant targets because it is the quality of the parties that determines the quality of the democracy.

Floor crossing is therefore not only democratically and morally problematic, it is also dysfunctional in a parliamentary system if it restricts the parties in government and in opposition from acting as they should. Floor crossing undermines the principles of efficiency, responsibility and transparency – after all, it is not so much legal rules that prevent MPs from floor crossing, but rather the existence of a democratic culture with functioning parties.

# The consequences for democracy of a weak party system: Party defections in Brazil<sup>1</sup>

SILVANA KRAUSE

## INTRODUCTION

This paper is in three parts: the first part outlines political parties in Brazil; the second part discusses some aspects of political engineering in the new democracy; and the third part examines the Brazilian presidential system and the electoral system – here, the intention is to emphasise the two central elements that contribute to the existence of weak parties in Brazil. The paper intends to answer the following questions:

- How and why is it possible for politicians in Brazil to defect and cross the floor to other political parties?
- Why do politicians desert their political parties in the new Brazilian democracy?
- What are the consequences of this on democracy in Brazil?

## AN OVERVIEW OF POLITICAL PARTIES IN THE NEW BRAZILIAN DEMOCRACY (AFTER 1985)

Despite 21 years (1985–2006) of democratic elections – five presidential elections (in 1989, 1994, 1998, 2002 and 2006), six governor and congressional elections (in 1986, 1990, 1994, 1998, 2002 and 2006) and six municipal elections – political parties and the party system in Brazil is still beset with problems. There is a well-documented disparity between the increase in the number of voters and the difficulties facing parties in fulfilling their political role in the new republic (*Nova República*).

The new democracy has increased electoral participation to such an extent that Brazil now has one of the biggest electorates in contemporary democracy. After 1985 illiterate citizens were given the right to vote<sup>2</sup> and in 1988 the voting age was dropped to 16 years. The size of the electorate has increased from 15.5 million in 1960 to 94.7 million in 1994, and from 115 million in 2002 to 126 million in 2006.<sup>3</sup>

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But some characteristics of the Brazilian party system have created difficulties for the development of the new democracy. One such feature is the large number of parties in the Chamber of Deputies.

Other negative aspects of the party system in this country include fragmentation, persistent congressional party defections, the constant changing of party names (fusions and new parties) and the unstable representation of parties. Table 1 shows that the number of parties in the Chamber of Deputies increased from five in 1982 to 17 in 1988. The number of parties stabilised in the 1990s from a high of 21 in 1990 to low of 15 in 1999. In the new millennium the lowest has been 13 in 2005, but increasing to the current 21 parties.

The large number of political parties would not be a problem if most of them had no power in the congress, but this is exactly the case. Worse still, there has been increased fragmentation in the party system<sup>4</sup> after the 1989 election: although the number of parties that existed between 1990 and 2006 has been relatively stable, there has been no decrease.

**Table 1: Number of parties in Chamber of Deputies (1982–1988)**

Year	1982	1983	1984	1985	1986	1987	1988
Parties	5	5	5	6	9	12	17
Effective parties	2.2	2.3	2.3	3.1	3.2	2.8	4.1

Source: Nicolau JM, *Multipartidarismo e democracia*. Rio de Janeiro: Fundação Getúlio Vargas, 1996, p 78.

List of parties in Chamber of Deputies: 31.05.1982; 30.04.1984; 28.03.1985; 02.03.1986; 24.11.1988. Figures for 1983 and 1987 calculated after the elected congress. Brazilian elections occurred in October and November, but legislators took their seats only at the beginning of the next year.

**Table 2: Number of parties in Chamber of Deputies (1989–1998)**

Year	1989	1990	1991	1992	1993	1994	1995	1998 <sup>a</sup>	1998 <sup>b</sup>
Parties	22	21	19	19	19	19	18	16	18
Effective parties	5.45	7.07	8.38	8.24	8.39	8.83	8.15	6.49	7.36

Sources: Nicolau, *op cit*. List of parties in Chamber of Deputies as of: 12.12.1989; 23.08.1993; 26.05.1994. *Folha de São Paulo*, 29 September 1998; 10 October 1998.

Figures for 1991 and 1995 were calculated after the new elected congress. The Brazilian elections occurred in October and November, but legislators took their seats only at the beginning of the next year. No information available for 1996 and 1997.

a Before 03.09.1998 election.

b After electoral results (elected in 1998 and assumed beginning 1999).

<b>Table 3: Number of parties in Chamber of Deputies (1999–2002)</b>								
Year	1999 <sup>a</sup>	1999 <sup>b</sup>	2000 <sup>c</sup>	2000 <sup>d</sup>	2001 <sup>e</sup>	2001 <sup>f</sup>	2002 <sup>g</sup>	2002 <sup>h</sup>
Parties	18	15	16	18	16	17	16	19
Effective parties	6.9	6.6	7.0	6.9	6.1	7.3	7.6	8.4

Source: Zero Hora, 3 February 1999; Folha de São Paulo, 15 May 2000, 25 August 2000); <[www.camara.gov.br](http://www.camara.gov.br)> (03.07.2001). List of parties in Chamber of Deputies (20.12.2001), Folha de São Paulo, 27 September 2002 and 10 October 2002.

a Three days after legislators elected in 1998 assumed their seats.  
b October 1999.  
c February 2000.  
d 25 August 2000.  
e 3 July 2001.  
f 20 December 2001.  
g 30 June 2002.  
h After electoral results (elected 06.10.2002 and assumed 01.02.2003).

<b>Table 4: Number of parties in Chamber of Deputies (2002–2006)</b>								
Year	2003	2003 <sup>a</sup>	2003 <sup>b</sup>	2004 <sup>c</sup>	2005 <sup>d</sup>	2005 <sup>e</sup>	2006 <sup>f</sup>	2006 <sup>g</sup>
Parties	16	15	16	15	13	15	16	21
Effective Parties	8.9	8.9	8.8	8.8	8.4	8.9	9.5	9.3

Source: <<http://www1.folha.uol.com.br/folha/brasil/>>

a Folha de São Paulo, 1 June 2003.  
b Folha de São Paulo, 28 September 2003.  
c Folha de São Paulo, 3 January 2004.  
d O Popular, 18 February 2005. Six legislators with no party affiliation.  
e Folha de São Paulo, 25 September 2005. Date in 23.09.2005. Ten legislators with no party affiliation.  
f Folha de São Paulo, 3 October 2006. Date in 3.10.2006. Four legislators with no party affiliation.  
g After electoral results in 01.10.2006. Assumed in 2007. Folha de São Paulo, 3 October 2006.

#### POLITICAL ENGINEERING AND ITS IMPACTS ON PARTIES IN BRAZIL

This section examines how political engineering has affected the political party landscape in Brazil. It must be stated, however, that the fragility of Brazilian political parties is not something new: although political engineering of the new democracy has played an important role, there are historical and cultural factors at play too.

Since 1837 Brazil has had eight different party systems<sup>5</sup> associated with the country's various political phases. It is, however, possible to establish some commonalities. Political parties in Brazil have traditionally been weak political institutions and have generally not played a central role in Brazilian politics. As organisations they have been more regional than national, with their levels of success

depending on the regional or local leaders and their approach towards public employment and the public budget. A weak party generally has no clear identity and is more focused on the personality of the party leader than on the party's programme. There is usually no social identification, although the parties are notoriously skewed in terms of division of wealth. It is common to hear the phrase in Brazil: 'I vote people, not parties.'

In contrast to events in other Latin American countries,<sup>6</sup> the political parties in Brazil did not survive for long and had difficulty in both resisting dictatorial periods and rising again in democratic periods. This institutional and cultural context should help in understanding the dynamics of the Brazilian party system.

Democracy returned to Brazil in 1985, after 21 years of military rule. This was preceded by a lengthy military initiative of 'political opening' (*abertura política*) from 1974–1982, and a further process of political transition (*processo de transição*) from 1982–1985. A civil government was indirectly elected in 1985, and legislators were elected one year later. The elected legislators elaborated a new democratic constitution which was promulgated in 1988.

After 18 years of constitutional rule, two main elements are contributing towards the weakness of political parties in Brazil: the presidential system and the electoral system.

#### THE BRAZILIAN PRESIDENTIAL SYSTEM

The presidential system in Brazil, which requires that the president of the country is directly elected, has resulted in electoral campaigns that concentrate on people and not on political parties. The five presidential campaigns of the new democracy display a voting profile for or against the incumbent government, with parties having a secondary role. For instance, the 1989 election winner, Fernando Collor, was anonymous until the election. One year before the election his PRN party had only 0.2% representation in congress, which increased to 8.2% in 1991.

The PSDB party of Fernando Henrique Cardoso – winner of the 1994 and 1998 presidential elections – also played a relatively insignificant role in the congress. In 1994 the PSDB had only 9.5% representation (12.1% after this election), and before the 1998 election the PSDB had 18.52% representation in the Brazilian congress (12.09% after this election).

Lula's presidential victories in 2002 and 2006 followed the same pattern. Lula's Worker's Party (PT) in 2002 had only 11.3% representation in the congress (17.7% after this election), and before the 2006 election it had 15.7% representation (16.11% after this election).

Two problems for political parties arise out of this presidential system. The first emanates from the electoral process itself in that the presidential candidate's party does not play a central role in the electoral campaign, particularly in the context of personality politics. This aspect makes it imperative for the candidate to create relationships and social networks other than those which exist for the party. But this

can destabilise the party system since, in terms of an electoral strategy, people may create new parties in order to have a presidential candidate; or political leaders may change their party affiliation in order to be associated with another party that has a better chance of winning the presidential election.

The second problem is that coalitions among political leaders may supersede the interests of the parties. As such a presidential campaign may in fact debilitate the party of the president because an executive electoral victory does not necessarily translate into increased legislative power for the respective party. This is the case in Brazil.

The political coalitions created for presidential elections have not brought about consistency in terms of government support. In addition, the lack of party discipline means that politicians in the congress take their cue from a local and regional perspective, while their party's political position is secondary.

In this context, it is very difficult for the president to have a comfortable majority because, first, the coalition parties often do not have the majority of the votes and second, the parties lack discipline and cohesion in order to act together. Consequently, the president needs to do all it takes to get a majority in the congress, and in this regard the important dealers are not the parties.

The second dimension that contributes to the weakness of parties in Brazil is the constitutional powers of the president. In terms of the 1988 Constitution, the president has legislative decree power (*medidas provisórias*).<sup>7</sup> These reactive and proactive legislative powers give him an enormous amount of control over legislation. The president can veto (totally or partially) legislation emanating from the congress. In addition, there are exclusive presidential initiatives, for example, regulation of the public budget, as well as emergency presidential projects that shape the congressional agenda.

This concentration of power in the hands of the president serves to debilitate the political parties, while the president's legislative decree power means that parties are left to play a passive role.

Furthermore, the dependence of many members of congress on obtaining federal funds<sup>8</sup> almost guarantees the approval of presidential projects. In fact, the president has often utilised this as a way of guaranteeing a majority in the National Congress, encouraging, when it brings advantage, legislators to change their party affiliation.

This aspect is closely related to the nature of Brazilian federalism which brings political and financial autonomy to the federation members, especially the regional executive powers (the 27 governors). It is not by chance that the president offers governors additional funds, especially credit programmes, financing for social projects and public employment (for example, in the cabinet or in state companies). In fact in October 2005, one year before the election, five governors changed parties. One governor made the president's influence in this regard clear when he stated: 'President Lula demanded that I should go to [the] PTB.'<sup>9</sup> And offers can be made sweeter in electoral years – in 2006 President Lula promised a re-elected governor 1 billion reais.<sup>10</sup>

#### THE ELECTORAL SYSTEM

A second factor that contributes towards the weakness of political parties in Brazil's new democracy is the proportional electoral system for the legislature. Among the various features of the electoral system, the most important is the open-list system to elect deputies, whereby voters vote for a person and not a party. The open-list system makes political parties even weaker since electoral campaigns concentrate on single candidates. This aspect encourages disputes between candidates from the same party (political cannibalism) and motivates famous people to stand as candidates – people who do not necessarily have a link to a party and who only profit from the party (parachute candidate). Candidates are often more interested in their own survival than in how their parties do at the polls.

By contrast, electoral campaigns using the closed-list system concentrate more on ensuring that parties win a maximum number of seats in parliament/congress. In addition, it motivates political leaders to forge a career within their parties, thereby ensuring that they are higher up on the party list. The closed-list system also helps when it comes to having better control and transparency in terms of party funding. The financing of Brazilian parties is not derived exclusively from public funds, and a closed-list system should help to ensure that electoral campaign donations and expenses are more focused on the party and not on individuals.

#### PARTY DEFECTIONS IN BRAZIL SINCE 1985

The phenomenon of party defections (floor crossing) creates much instability in the legislature of any country. Table 5 illustrates the changing party affiliations in Brazil from 1985 – the new democracy.

#### HOW AND WHY IS IT POSSIBLE FOR POLITICIANS TO CROSS THE FLOOR?

There are two legal aspects that allow for floor crossing. First, is that the 1988 Constitution provides for the full liberty and autonomy to create, merge, incorporate and terminate political parties. The intention of this provision was to guarantee a free organisation of parties, but the consequence has been an unstable party system and the existence of parties that lack real representation in congress.

Second, the new party legislation makes a distinction between a member's party post and congressional mandate. Thus, if politicians desert a party they lose the positions they may have had by virtue of membership of the particular party they are quitting, but not the seat in the legislature. A politician may therefore desert his/her party if offered better incentives from another party: this can include advantages such as candidature in a future election or more time and visibility in electoral advertising.

However, under the closed-list electoral system that has been recommended as part of the political reform project, mandates belong to parties and not to deputies. This would allow for better party control over members of congress and should decrease the incidence of floor crossing.

**Table 5: Changing party affiliations in Chamber of Deputies, 1983–2006**

	<i>Legislature<sup>a</sup></i>											
	1983–1987		1987–1991		1991–1995		1995–1999 <sup>e</sup>		1999–2003		2003–2006 <sup>h</sup>	
	<i>N<sup>b</sup></i>	<i>%<sup>c</sup></i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
1st year	0	0.0	8	4.6	55	21.1	83	40.1	102	44.2	-	-
2nd year	0	0.0	71	40.8	48	18.4	29	14.0	33	14.3	-	-
3rd year	117	69.9	58	33.3	102	39.1	89	43.0	96	41.6	-	-
4th year	51	30.4	37	21.3	56	21.5	6	2.9	0	0.0	-	-
<b>Total no of party defections<sup>d</sup></b>	<b>168</b>	<b>100.2</b>	<b>174</b>	<b>100</b>	<b>261</b>	<b>100.1</b>	<b>207</b>	<b>100</b>	<b>231</b>	<b>100.1</b>	<b>281<sup>f</sup></b>	<b>-</b>
											<b>341<sup>g</sup></b>	<b>-</b>

Source: Melo CR, *Retirando as cadeiras do lugar. Migração partidária na Câmara dos Deputados (1985–2002)*. Belo Horizonte, Ed. UFMG, 2004, p 67. Folha de São Paulo, 25 September 2006.

a A legislative period is four years.  
b N = Number of party defections per year.  
c % = of changing party affiliations during the year.  
d Relative to Chamber of Deputies. A deputy can change affiliation more than once. The total number of seats in the Chamber of Deputies is currently 513.  
e After the promulgation of Law No. 9.096-95, art. 18, a candidate must have at least one year's affiliation with a party before holding a public seat. This should explain why the number of party defections in the fourth year of a legislature has decreased since 1995. The table shows a concentration of defections in the first and third year of a legislature. Politicians often change party affiliation more than once. Note that these figures show the total changes in congress.  
f Source: *Folha de São Paulo*. These dates are exact because the window period for floor crossing during the Lula government expired in September 2005. After this date there were no changes. Government Lula Election 6.10.2002 until 23.09.05  
g 01.02.2003 (beginning of new government) until 01.10.06. From Luis Nassif, *Agenda Brasil*, 1 October 2006.  
h There is no information regarding defections for each year.

## WHY DO POLITICIANS DEFECT IN THE NEW BRAZILIAN DEMOCRACY?

Floor crossing was common during the democratic period from 1946–1964, but it was not as prolific as that which has obtained in the new democracy. Although the legislation condones floor crossing it does not explain why party defections occur. But two possible phases can be identified when it comes to changing party affiliations in Brazil's new democracy.

The first phase was the opening up of the political space and the political

transition of the 1980s when the main political parties (PDT, PTB, PP, PFL, PT and PSDB) were created. In the second phase of defections, however, there has been no change in the political process.

Some researchers believe that defections in this second phase are not politically or ideologically based but are instead connected to the maximisation of electoral potential and opportunities.

There are three reasons, among others, why a politician in Brazil may change party affiliation:

- *Executive power:* Politicians may desert their parties in order to gain the support of the executive, and in this case they move to the president's party or to a party that comprises the government coalition. The goal here is to have easier access to public funds to meet their constituents' demands. In this context, defections will move in the opposite direction when the executive power loses popularity.
- *Political arrangement:* Politicians may cross the floor lured by the promise of candidature in a future regional election (mayor or governor) or for more visibility in electoral advertising. Big parties are usually more attractive, but it is interesting to see the migration to smaller parties too. Small parties have political appeal in that they allow for greater personal control and career advancement and because politicians are assured of good coverage in electoral advertising campaigns. In addition it is easier for politicians to have control of a small party when it comes to negotiating political alliances with big parties.
- *Political and institutional charges:* Politicians defect in order to obtain better positions in the congress or in a permanent congressional commission. These posts are distributed based on the percentage representation of each party in congress. However, this percentage is not calculated from the last election results, but from the make-up of congress the day before posts are decided. This may encourage politicians to change party affiliation because more congressional power brings more decision-making power regarding public funds, more media visibility and more influence.

#### CONSEQUENCES OF FLOOR CROSSING ON THE PARTY POLITICAL LANDSCAPE IN BRAZIL

- *Image:* Pragmatic defections create a negative image of both parties and politics, leading the public to believe that politicians are accountable only to government, that they do not act ethically and that they are driven by personal ambition.
- *Political representation:* Floor crossing distorts the meaning of political representation in a democracy. On the one hand politicians are seen to be violating the vote that elected them, while on the other hand floor crossing distorts the distribution of party power as if modifies election results.

- *Horizontal accountability*: Party defections breed distrust in political institutions and distort relations between voters and politicians. Parties may be rendered weak due to their losses, thereby foregoing their central political role. In the process citizens are weakened too, since the system of checks and balances is undermined and opportunities for political involvement and mediation are reduced to those of personal relationships only.

## NOTES

- 1 Translated from Portuguese by Marcelo Gross Villanova.
- 2 In 2006, 58.6% of Brazilian voters had not attended primary school. This explains voters' difficulty not only in understanding the electoral process but in choosing between the 29 registered parties. See <[www.tse.gov.br](http://www.tse.gov.br)>.
- 3 See <[www.tse.gov.br](http://www.tse.gov.br)>.
- 4 Counting of 'effective parties' by Laakso and Taagepera (1979). By Merkel's system classification (1997) for party system: Bi-party system: number of effective parties =  $1.5 \leq x \leq 2.5$ ; Moderate fragmented multiparty system: number of effective parties =  $2.5 \leq x \leq 5.1$ ; High fragmented multiparty system: number of effective parties =  $x > 5.1$ .
- 5 1. *Partido Liberal* and *Partido Conservador* in 19th century (1837–1889). 2. *Partidos Estaduais* without national parties in *República Velha* (1889–1930). 3. Several party configurations in 1934 Constitutional Assembly terminated in 1937, and the *Estado Novo* (1937–1945). 4. Multiparty system in a democratic regime (1945–1964). 5. Multiparty system under military authoritarian regime (1964–1965). 6. Bi-party system under military authoritarian regime (Arena and MDB) (1965–1979). 7. Multiparty system after party reforms under military authoritarian regime in 1979. New parties created: PT, PDT and PTB. Arena changes to PDS, and MDB changes to PMDB. 8. Fragmented multiparty system in the *Nova República* in 1985.
- 6 For instance, the cases of Argentina, Uruguay or Chile.
- 7 1988 Brazilian Constitution, Arts. 61, 62, 64, 66, 67, 84.
- 8 1988 Brazilian Constitution, Art. 84.
- 9 *Folha de São Paulo*, 1 November 2005.
- 10 *Folha de São Paulo*, 14 October 2006.



The impact of floor crossing on party  
systems and representative democracy:  
A regional perspective



# The case of Lesotho

KHABELE MATLOSA AND VICTOR SHALE

## INTRODUCTION

There is firm consensus in both academic and policy discourse that political parties are among the key political institutions that provide an anchor for a working representative democracy: representative democracy is surely unthinkable without political parties. However, if political parties are to add value to representative democracy they require, among other things, internal cohesion, democratic and visionary leadership, intra-party democracy and constructive management of internal conflicts, as well as mutually beneficial inter-party relations. Without the above virtues political parties on their own, and through the legislature, may not play their role effectively as agents of representative democracy.

This paper discusses the impact of floor crossing on party systems and representative democracy in Lesotho. The paper will focus mainly on the major floor-crossing developments (in 1997, 2001 and 2006) that have led to party breakaways and changes of government in parliament through the ‘political migration’ of politicians.

The notion of migration is invoked deliberately in this debate. Migration is often associated with human movements within countries or across countries. Within countries, migration involves the movement of people mainly from rural to urban areas, and across countries it involves the movement of people from less developed to relatively well-developed countries. At the heart of migration is the prospect for improved socio-economic conditions when one moves from a place of origin to a place of destination. This notion is invoked to suggest that a similar mindset is at play in floor crossing, or political migration, in legislatures – namely, that a politician or politicians move from one party to another with the hope that prospects for accessing state power are greater with the new rather than with the old party.

While floor crossing or political migration in and of itself is not necessarily undesirable in a democracy, if not well managed it accentuates the proliferation of parties – a trend that may have adverse effects upon already fragmented party systems

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and fledgling representative democracies, such as that prevailing in Lesotho. The discussion that follows explores how faction-fighting and splits in parties – which in turn lead to floor crossing in parliament – impact on Lesotho’s representative parliamentary democracy. Three distinct, albeit interrelated, arguments are made:

- Floor crossing (political migration) in Lesotho, although permissible constitutionally, undermines the country’s representative parliamentary democracy.
- Floor crossing (political migration) in Lesotho is also a clear manifestation of the country’s fragmented party system, which is not sufficiently robust for the institutionalisation of democracy. Floor crossing has therefore reinforced the fragility of Lesotho’s democracy since that country’s historic political transition of 1993.
- Given that floor crossing (political migration) is a feature of the constituency-based electoral system that Lesotho inherited from the British in 1966, it was assumed that this problem would be redressed with the reform of the electoral model towards more proportionality and the adoption of the mixed member proportional (MMP) system; however, recent developments suggest that this is not the case. In fact Lesotho’s current political crisis is marked more by fragmentation of the party system, which directly and indirectly destabilises parliament and other spheres of the governance realm.

Following these introductory remarks, a brief political context to the discussion on floor crossing and its impact on party systems and representative democracy is provided. The linkage between floor crossing and the electoral system is covered next, followed by a discussion on the linkage between floor crossing and the party system. The possible impact of floor crossing on parliament and representative democracy is then explored. Before concluding the paper, an outline is given of the immediate challenges posed by the 2006 floor crossing and the emergence of a new political party. The conclusion wraps up the debate and sums up the main observations.

#### THE POLITICAL SETTING

Lesotho is a parliamentary democracy with a dualistic governance system. In this system the government is headed by the prime minister, while the state is headed by the king. Lesotho therefore operates the Westminster political system whereby the prime minister is appointed by the king, on the advice of State Council, from a party with the majority of seats in parliament to become the Head of Government. The king himself remains the Head of State by virtue of his traditional hereditary status. In this way, Lesotho operates a fairly unique governance system that blends modern democratic systems with a traditional governance system – a rare hybrid system in Southern Africa.

Like all other countries, government in Lesotho operates through three main organs – the executive, the judiciary and the legislature – while the bureaucracy and the security establishment play supplementary and subsidiary roles. Typically, the executive tends to dominate the other organs of the state. For the purpose of this paper, focus will be on the legislature.

Lesotho has a bicameral parliament (i.e. the Upper House or Senate and the Lower House or National Assembly). The 33-member Senate (Upper House) is constituted through appointments made by the king on the advice of the prime minister. The majority of the appointees are principal chiefs from the country's 22 wards. The other 11 senators are appointed from distinguished members of the community. The 120-member National Assembly (Lower House) is the elected house. The main law-making organ of the state is the Lower House, while the Upper House holds it accountable and delays the passing of bills.

Although Lesotho is a parliamentary democracy, a prominent feature of the country's political landscape has been its political instability since gaining independence in 1966. While it is not the task of the present paper to investigate the factors behind the entrenched culture of instability in Lesotho, it is noted that in many ways this instability has tended to undermine the institutionalisation of Lesotho's democracy over time. Our interest is to explore the extent to which fragmentation and faction-fighting within political parties – especially those represented in parliament – tends to fan and fuel this instability.<sup>1</sup>

As will become clear in the discussion below, the politics of floor crossing in parliament has a dynamic interface with electoral systems and party systems. This is because an electoral system facilitates the formation of parliaments, and party systems determine the way political parties operate and interrelate both within and outside parliament.

#### THE ELECTORAL SYSTEM AND FLOOR CROSSING

Upon attaining political independence in 1966, Lesotho adopted the British Westminster system of governance including its plurality-majority electoral system. Through this system, a country is divided into constituencies and each constituency elects one representative to parliament. The winner of an election secures a victory on the basis of a simple plurality of votes, which is why the system is also often referred to as the first-past-the-post (FPTP), or the winner-takes-all, system.

Representatives are elected into parliament as individuals, even if endorsed by political parties, and they enter parliament as individuals representing their constituencies. It is this feature of the FPTP system that gives the members of parliament (MPs) the latitude to move (or migrate) from one party to another in parliament (cross the floor) as and when they deem fit. Such movement of MPs – although allowed by the constitution, permissible on the basis of the electoral system and governed by the parliamentary rules and regulations (Standing Orders) – tends to have other unintended consequences: it fragments the party system, destabilises

<i>Contestants</i>	<i>No. of votes</i>	<i>% of votes</i>	<i>No. of seats</i>
BCP	398,355	74.7	65
BNP	120,686	22.6	0
MFP	7,650	1.4	0
Other	6,287	1.2	0
<b>Total</b>	<b>532,978</b>	<b>100.0</b>	<b>65</b>

*Source: Matlosa K, Lesotho, in Lodge T, Kadima D & Pottie D (eds), Compendium of Elections in Southern Africa. Johannesburg: EISA, 2002.*

parliament, undermines the legitimacy and accountability of MPs, and, above all, denudes the political value of representative democracy.

The major floor crossing that shook Lesotho's political system under the FPTP electoral system happened in 1997 following a historic transition from military dictatorship to a multiparty democracy in 1993. The major political development that solidified the 1993 transition was the election of the same year. The outcome of the election was a landslide victory for the Basutoland Congress Party (BCP), as illustrated in Table 1. The BCP won all 65 constituencies and hence all the parliamentary seats in the National Assembly. All the other parties were left out in the cold even though they had collectively garnered about 25% of the total votes.

While this development may have come as good news to the winning BCP, which then formed a new government in a democratic dispensation, this political success came with political costs too. Not only did the new BCP government confront a plethora of challenges including conflicts with the security forces and the monarchy, but importantly for our discussion here, the party faced an internal menace: faction-fighting and power struggles. Thus, the political honeymoon for the newly elected BCP proved brutally ephemeral. Disagreements began to surface over the leadership of the party and the sharing of the spoils emanating from the control of the state. Consequently, tensions began to mount and the one-party parliament began to develop internal cracks as opposition emerged within the monolithic ruling party.

This internal feuding within the ruling party was not based upon any ideological or policy differences but rather on a leadership tussle involving the party bigwigs. The political tug-of-war between the factions within the BCP resulted in a rupture of the party. This development followed a special conference of the BCP organised by the party leader, Ntsu Mokhehle, who convened at the Cooperative College on 7 June 1997 attended by about 1,000 delegates from all the constituencies. According to the then party leader and prime minister, the main purpose of that conference was to deliberate on internal problems of the BCP, which had for over a year witnessed legal battles while preparations for the 1998 elections lagged far behind.<sup>2</sup> A decision was taken at that conference to establish a new party – a breakaway group from the ruling

BCP. This development culminated in the emergence of a splinter group known as the Lesotho Congress for Democracy (LCD).

Led by the prime minister, this newly established party enjoyed support of the majority of seats (40 MPs) in parliament and subsequently displaced the BCP (with 25 MPs), which had been catapulted into power by a popular vote. Much to the chagrin of the BCP, the new LCD constitutionally became the ruling party (simply on the basis of its numerical strength in parliament) and the BCP (despite the numerical strength conferred upon it by the 1993 election) was then declared the official opposition in parliament – a designation it publicly denounced.

The fact of the matter, however, is that the LCD became a *de facto* authority that constitutionally replaced the BCP government, despite allegations of a *coup d'état*. That is why the new government was a constitutionally constructed authority between 1997 and the 1998 election, even though it had not been put into power through a popular vote.

Announcing the formation of the LCD at a press conference held at the Parliament Buildings on 9 June 1997, the prime minister declared that:

since in this move we enjoy the support of a majority of MPs, there will be no change of government. Those who prefer to remain with the BCP, we wish them luck in their new role as official opposition in parliament. I request them to nominate the leader of the opposition and submit the name to the Speaker of Parliament, so that government is able to accord him/her the requisite privileges.<sup>3</sup>

Immediately after the press conference the speaker of the National Assembly followed the announcement of the prime minister and exhorted the BCP to nominate and submit the name of the leader of the opposition. A profound sense of political bitterness ensued as the BCP felt cheated and unfairly elbowed out of power by the new LCD. This political bitterness in part explains the political instability that followed, including the violent conflict that marked the 1998 election and its aftermath.

Thus, during the period between the establishment of the LCD and the general election in 1998, Lesotho's political landscape was marked by an enormous amount of political bitterness and tension among political parties. This landscape, which was mired by tension, set the stage for an election that would be followed by a deep-seated and violent conflict in 1998.

The LCD won the election overwhelmingly, and the popular choice seemed to legitimise the 1997 split of the BCP and the emergence of the LCD, which ultimately assumed the reins of power simply on the basis of a parliamentary majority. The outcome of the 1998 election is illustrated in Table 2 (*over page*).

The LCD won 61% of votes but secured 79 seats out of a total of 80. As was the case with the 1993 election, the 1998 election produced a near-one-party parliament. It was therefore not surprising when the BCP and other opposition parties, notably the Basotho National Party (BNP) and the Marematlou Freedom Party (MFP),

<i>Contestants</i>	<i>No. of votes</i>	<i>% of votes</i>	<i>No. of seats</i>
LCD	355,049	60.7	79
BNP	143,073	24.5	1
BCP	61,793	10.5	0
MFP	7,460	1.3	0
Other	16,244	2.9	0
<b>Total</b>	<b>584,740</b>	<b>100.0</b>	<b>80</b>

*Source: Matlosa K, Lesotho, in Lodge T, Kadima D & Pottie D (eds), Compendium of Elections in Southern Africa. Johannesburg: EISA, 2002.*

rejected the election outcome and resorted to political violence that nearly plunged the country into a civil war.

Again, as was the case with the post-1993 parliament, the LCD parliament was poised to experience internal problems especially relating to internal cohesion, faction-fighting and floor crossing (political migration) in parliament. The split in the LCD hardly five years after its formation was therefore not unexpected. Its deputy leader left the party and formed the Lesotho Peoples' Congress (LPC) in October 2001. The LPC was registered with the Law Office on 8 October 2001 and the existence of the party was formally announced in the National Assembly on 12 October 2001.

After being advised by a letter from the party's general secretary Shakhane Robong Mokhehle, a younger brother of Ntsu Mokhehle, that some members of the party were MPs, the speaker of the National Assembly requested those involved to cross the floor. A total of 27 MPs crossed the floor to join the LPC under the leadership of Kelebone Maope, former deputy prime minister and minister of Justice, Human Rights and Constitutional Affairs. The LPC then assumed the role of a political opposition in parliament.

After the floor crossing, the Speaker of the National Assembly made the following important observation:

Honourable Members, today we have reached a sad day for our democracy, although I am comforted by a sense of joy on your faces. As many of you know, floor-crossing in parliament often destabilises parliament as it is accompanied by a problem of accepting these new changes as well as ensuring cooperation among factions. Be that as it may, I truly and humbly appeal to every one of you that during these trying times, you be vigilant. Every one of you should remember that you are here in this House because of votes by the electorate; you were chosen among many contestants. The electorate chose you because they had trust in you given your understanding, compassion and appreciation of their problems. But above all you had shown trust in the eyes of the electorate.<sup>4</sup>

A year later, Lesotho reformed its electoral system abandoning the FPTP system and adopting the MMP system. The point to emphasise here is that when the Lesotho electoral system changed from FPTP to MMP in 2002, it was assumed that the country's election-related conflicts would subside and that the problem of floor crossing in parliament would be minimised. This has not been the case, as will become evident shortly.

Within the framework of the new MMP electoral system, the size of Lesotho's National Assembly was increased from 80 to 120 seats. Of the total seats, 80 are occupied through a constituency-based election (FPTP) and the additional 40 through the party-list proportional representation (PR) system. In this scheme of things, only MPs (80) elected through a constituency-based voting system can cross the floor in parliament, while those elected through a party-based list system (40) cannot cross the floor and still retain their seats.

In fact, the original intention of the Lesotho electoral designers was that following the 2002 election all subsequent elections would be organised on the basis of a 1:1 ratio of PR and FPTP seats in parliament. This had not yet been effected at the time of writing, as the ruling party seems to have developed cold feet regarding the matter.

#### THE PARTY SYSTEM AND FLOOR CROSSING

Conventionally, there are four types of party systems. The one-party system obtains where only one party (the ruling party) exists and dominates the political scene and no other party has any prospect of dislodging it from power. The two-party system (duopoly) prevails in a setting where two dominant parties exist and both stand a more equal chance of constituting a government than any other party. A dominant party system denotes a system in which even if a multiplicity of parties exist in a given country, only one party exercises such profound hegemony that it tends to reproduce itself as the ruling party over a long period of time in successive elections under conditions of fragmented, disjointed and enfeebled opposition parties. A multiparty system presupposes a political setting whereby many parties exist and all of them stand roughly equal chances of controlling state power. Looking at these four party systems, Lesotho does not fit neatly into any one of them due in large measure to the fact that the country's party system is generally marked by fragmentation. Both ruling and opposition parties alike tend to experience fragmentation through internal faction-fighting and splits.

Not only do parties in Lesotho lack a culture of cooperating and working closely together for mutual gain, but internally parties tend to engage in unending faction-fighting which undermines their organisational cohesion and institutional effectiveness. This problem is even more acute for parties represented in parliament. Parties in Lesotho generally lack intra-party democracy and thus when conflicts emerge within them these get resolved either through the courts of law or – if that route fails or is not seen as a viable prospect by the aggrieved factions – a party split is inevitable. This trend not only destabilises parties but tends to destabilise

<i>Main parties</i>	<i>No. of votes</i>	<i>% of votes</i>	<i>No. of seats</i>
LCD	304,316	54.8	79
BNP	124,234	22.4	21
BAC	16,095	2.9	3
BCP	14,584	2.7	3
LPC	32,046	5.8	5
NIP	30,346	5.5	5
LWP	7,788	1.4	1
MFP	6,890	1.2	1
PFD	6,330	1.1	1
NPP	3,985	0.7	1
<b>Total</b>	<b>554,386</b>	<b>100.0</b>	<b>120</b>

*Source: IEC, Results of the National Assembly Elections, 2002.*

parliament and generate uncertainty in the process of nurturing and consolidating the country's new-found democracy. Of all the country's major political parties, none has been spared faction-fighting and splits over the past decade since the country re-introduced multiparty democracy.

Since the 1997 split of the BCP leading to the formation of the LCD and the further split of the LCD leading to the formation of the LPC in 2001, other major faction-fighting within the LCD has recently caused political tremors within the ruling party. Following its overwhelming electoral victory in 2002 (as illustrated in Table 3), the ruling LCD has not been spared Lesotho's age-old political cancer of fragmentation.

As was the case with the emergence of the LCD in 1997 and the LPC in 2001, this latest development has occurred about a year in advance of a general election scheduled for mid-2007. Just days following Lesotho's celebration of its 40 years of independence on the 4 October 2006, Minister of Communications, Science and Technology, Motsoahae Thomas Thabane, announced his resignation as a Cabinet minister and as member of the ruling LCD. Given some tensions within the ruling party, especially following its annual general meeting where Thabane had not been elected to the national executive committee, the grapevine had it that he may form a party.

Indeed, the Speaker of parliament received a letter dated 10 October 2006 advising her that 'a new political party has been registered under the following name: All Basotho Convention. Some of the founding members of the said party are Members of the National Assembly'. Consequently, during the Thirteenth Meeting of the Sixth Parliament on 13 October 2006, 17 members of the LCD crossed the floor of parliament and joined the All Basotho Convention (ABC). They were joined by L.

**Table 4: Party representation in the Lesotho National Assembly following floor crossings**

<i>Parties</i>	<i>No. of seats following the 2002 elections</i>	<i>Number of seats following floor crossing</i>	<i>Gain/loss</i>
LCD	79	61	-17
BNP	21	21	0
ABC	...	18	+18
BAC	3	3	0
BCP	3	3	0
LPC	5	5	0
NIP	5	5	0
LWP	1	1	0
MFP	1	1	0
PFD	1	1	0
NPP	1	1	0

Tsehlana, MP for Mokhotlong Constituency No. 79, who had been expelled from the LCD in February 2004 but had not lost his seat in parliament, bringing to 18 the total number of ABC MPs who joined the opposition benches in parliament.

This development brought about a new opposition political party in parliament: with 18 MPs the ABC became the second largest opposition to the main opposition, the BNP, which had 21 MPs. The leader of the new ABC advanced a number of issues including the lack of implementation of agreed policies and corruption in the public sector. There is no gainsaying that uppermost in Thabane's decision to quit the LCD was the intensity of power struggles particularly around prospects for succession to the party leader and prime minister, Pakalitha Mosisili.

While before the latest floor crossing the configuration of political power in the National Assembly was such that the ruling LCD had 79 seats and the total opposition seats amounted to 51 parliamentary seats, the LCD was now left with 61 seats and the combined opposition seats amounted to 59 (*see Table 4*).

But does this development strengthen or further fragment Lesotho's party system? Does it enhance or inhibit the effectiveness of the legislature? And, ultimately, does it strengthen or weaken the country's representative democracy? It is to these fairly complex issues that the next section now turns.

#### IMPACT OF FLOOR CROSSING ON REPRESENTATIVE DEMOCRACY

It should be emphasised that politics in Lesotho tends to be characterised by the zero-sum nature of engagement of politicians across and within parties. This is explicable, in part, by reference to the country's poor resource endowment. The small, landlocked and impoverished Lesotho has always been mired by conflict-ridden politics, in part because the political elite perceive politics (through parties and the

legislature) as a license to access state resources. Given the bleak prospects for accumulation in the private sector, the state has become a major avenue for accumulation, which is why contestation for state power among the elite is so fierce and has generated protracted violent conflicts in the past. This helps us to pose an even bigger question: What are the prospects for building and sustaining representative democracy in poor countries that lack a sound economic base, such as Lesotho? This question is surely beyond the scope of our present discussion but should be placed at the back of our minds as we discuss dilemmas of representative democracy in Lesotho.

But explaining the problem in structuralist (socio-economic determinants) terms alone may not tell us the full story. It is important also to emphasise that besides these structural determinants, leadership plays a crucial role in political parties, the legislature and democracy. Democracy requires democrats as its agents: if leaders are democrats they are bound to embrace democratic ethos; if leaders are not democratic they are not likely to run parties in a democratic manner. And if parties are not run democratically, they are bound to experience unending in-fighting and conflicts that may not be managed constructively, resulting in fragmentation and splits. As the adage goes, democracy cannot exist without democrats.

Put somewhat differently, the state of political parties determines the success or otherwise of a parliament borne out of those parties. And Lesotho's fragmented party system and factional politics undermine the parties and adversely affect the legislature. The legacy of a one-party system during the heyday of BNP rule (especially from 1970–1986) and the era of a no-party system under the military regime (1986–1993) has left a fragmented party system characterised by a proliferation of weak parties. The ruling party's overwhelming majority in parliament has laid the ground for factionalism – a phenomenon that would be less prevalent if effective and strong opposition parties existed.

Needless to say, the emergence of such parties has not been influenced by ideological differences but rather by a struggle for power. This is well illustrated by Mahao<sup>5</sup> who shows that some members of the BCP made numerous attempts to oust the party leader. It is worth noting in this regard that all the major party splits and floor-crossing experiences in Lesotho have happened just prior to a general election, suggesting that power struggle is a major factor behind this trend. The combined effect of power struggles and the lack of intra-party democracy within political parties compounds their 'existential crisis' and helps us to understand better and to explain the splits and floor crossings.

Furthermore, floor crossing in Lesotho, as elsewhere, happens without the consent of the rank and file membership; some observers therefore perceive floor crossing as unfair and as a betrayal of the voters. Broadly, the impact of floor crossing on Lesotho's representative democracy can be identified at five levels.

First, floor-crossing changes the political complexion of the National Assembly and alters the outcome of general election results. This means that a general election result can easily be altered by elite pacts and the realignment of power in the National

Assembly. This explains why the LCD, which received 79 parliamentary seats following the 2002 general elections, now had only 61 seats.

Second, while a multiparty system is good for democracy it can result in the proliferation of small parties with strong leaders; and the proliferation of small and weak parties through floor crossing compounds the problem of a fragmented party system in emerging democracies such as Lesotho.

Third, when MPs cross the floor of parliament they are not compelled to consult their constituencies in advance. MPs are also not compelled to seek a new mandate after crossing the floor, thereby undermining the vertical accountability of MPs to the electorate. Interestingly, after the formation of the ABC the leadership of the new party organised a public rally at Ha Abia (Constituency No. 8) to introduce the party to the constituency which the party leader has been representing in parliament since the 2002 election under the LCD ticket. But the LCD leadership – including the party secretary general Mpho Malie and deputy leader, Lesao Lehohla – organised a public rally on the same day and in the same constituency, the aim of which was to explain to the electorate that their MP had reneged on his promises and had left them in the lurch.<sup>6</sup>

Fourth, a weakness of political parties in Lesotho – as in other emerging democracies in the region – is their lack of mutually reinforcing inter-party relations vis-à-vis cooperation and alliances, whereby their ideological and programmatic positions coincide and open avenues for inter-party unity. Only recently did three political parties in Lesotho – the Basutoland African Congress, BCP and LPC – come together to form an alliance known as the Alliance for Congress Parties aimed at contesting the 2007 elections under one banner. It is also possible that Lesotho's new MMP electoral model is having an effect on the proliferation of small parties. But while a feature of this model is that it encourages parties to form and proliferate, it also encourages party coalitions, power sharing and national unity governments.

Finally, if not well managed, floor crossing may undermine representative democracy: if the electorate elect MPs who after a while undermine that choice by switching political allegiances in parliament, the electorate may begin to feel that MPs are representing themselves and not the electorate, resulting in a legitimacy crisis for the MPs in the eyes of the electorate.

This trend may in turn result in declining public trust in MPs as well as in political parties. In fact, available data from recent Afrobarometer surveys suggest that public trust in political parties is declining in all Southern African Development Community countries, and that opposition parties are affected more in this regard than ruling parties.

#### THE IMMEDIATE CHALLENGES POSED BY THE 2006 FLOOR CROSSING

The political temperature in Lesotho seemed to be on the rise possibly due to the anxiety caused by the emergence of a new political player in the country. Undoubtedly, this development transformed the complexion of party representation

**Table 5: Lesotho National Assembly election results and seat allocation summary, February 2007**

Party	FPTP seats	% of FPTP seats	Total party (valid votes)	% of total party votes	Party's allocation of compensatory (PR) seats	Total no. of seats	% of PR seats + FPTP seats
All Basotho Convention	17	21.3	none	0.0	0	17	14.3
Alliance of Congress Parties	1	1.3	20,263	4.6	1	2	1.7
Basotho Batho Democratic Party	0	0.0	8,474	1.9	1	1	0.8
Basotho Congress Party	0	0.0	9,823	2.2	1	1	0.8
Basotho Democratic National Party	0	0.0	8,783	2.0	1	1	0.8
Basotho National Party	0	0.0	29,965	6.8	3	3	2.5
Lesotho Congress for Democracy	61	76.3	None	0.0	0	61	51.3
Lesotho Workers' Party	0	0.0	107,463	24.3	10	10	8.4
Marematlou Freedom Party	0	0.0	9,129	2.1	1	1	0.8
National Independence Party	0	0.0	229,602	51.8	21	21	17.6
New Lesotho Freedom Party	0	0.0	3,984	0.9	0	0	0.0
Popular Front for Democracy	0	0.0	15,477	3.5	1	1	0.8
<b>Total</b>	<b>79*</b>	<b>100</b>	<b>442,963</b>	<b>-</b>	<b>40</b>	<b>119</b>	<b>100</b>

Source: Independent Electoral Commission, Lesotho

\* Election postponed in Makhaleng Constituency due to death of one of the candidates. A fresh poll will be held in due course.

in parliament overnight, as demonstrated earlier. But other developments were also at play. Two of these are important. First, Lesotho is currently making plans to undergo the African Peer Review Mechanism (APRM) process. Through this self-assessment mechanism, Lesotho's governance architecture will be assessed in terms of robustness and any possible deficits that need redressing. There is no doubt that one of the major deficits of Lesotho's governance architecture is the fragmentation of its party system, which often destabilises government. This is likely to feature in the

APRM report as one of the weaknesses of Lesotho's new democracy. Following the signing of the Memorandum of Understanding between Lesotho and the APRM Secretariat which took place on 15 November 2006, the Lesotho APRM process led by Dr Chris Stals (a member of the APRM Panel of Eminent Persons) is now officially under way. The APRM process is expected to be completed by mid-2007. This is a sensitive process that requires political stability as it unfolds: if instability sets in, the whole APRM process is likely to be adversely affected. There is no gainsaying that intra-party instability may have the ripple effect of destabilising inter-party relations. If this is not well managed it may trigger political instability at a national level.

With the emergence of a new political party, the political environment was becoming increasingly electric by the day and the political space was highly contested. The reaction of Lesotho's main political actors, especially the ruling party, to the floor-crossing development and the subsequent emergence of the ABC created panic and uncertainty particularly for the ruling LCD. With the LCD's loss of 17 parliamentary seats and the likelihood of this loss translating into a loss of power at the constituency level, the party found it fit to evoke provisions of the constitution which provide for the dissolution of parliament and a call for snap elections so as to thwart the ABC from gaining ground.

The king dissolved parliament on 24 November 2006, and in terms of the constitution and the electoral law, an election has to be held within 90 days following the dissolution of parliament by the king. During its meeting of 29 November 2006, the State Council made a decision that the general election would be held on 17 February 2007. Although the opposition parties had earlier threatened to boycott this snap election, they later committed to take part in the poll despite challenges around adequate preparation time (voter registration, selection of candidates, candidate nomination, training of party agents, resource mobilisation, party campaigns, etc.). The election results are shown in table 5.

#### CONCLUSION

Political parties play a critical role in the functioning of representative democracy. For parties to play their rightful role in the nurturing and consolidation of democracy, they must exhibit a considerable degree of internal cohesion and institutional effectiveness, both of which are lacking in political parties in Lesotho. Consequently, Lesotho's party system is generally fragmented and parties are not stable. Both the ruling and opposition parties experience internal discord and disharmony marked by conflict and faction-fighting, and these often lead to splits.

When splits occur it is not only parties as political institutions key to democratic politics that suffer; other institutions suffer as well – including the legislature. The legislature is a key political institution for representative democracy wherein parties play an active role in the law-making process. But the legislature is only as good as its constituent parts (that is, MPs who are members of political parties). If the constituent parts are weak and fragmented, the legislature is bound to be adversely

affected. Faction-fighting within parties triggers break-aways and splits and the proliferation of parties through floor crossing in the legislature.

The major party splits to have occurred so far in Lesotho's new democratic dispensation have been in 1997 (with the emergence of the LCD due to the BCP split), in 2001 (with the emergence of the LPC due to a split within the LCD) and in 2006 (with emergence of the ABC from the LCD). In 1997, the then ruling BCP experienced a split which led to the formation of the LCD led by the then prime minister, Ntsu Mokhehle. In a parliament of 65 seats, all won by the BCP during the 1993 elections, about 40 BCP MPs crossed the floor and joined the newly established LCD. Given that the new LCD had a majority of MPs in parliament in relation to the then ruling BCP which was left with about 25 MPs, the former became a new government and the latter instantly became the main opposition in parliament.

The LCD suffered a split in 2001 when a new party, the LPC (under the leadership of the LCD's then deputy prime minister and minister of Justice, Human Rights and Constitutional Affairs, Kelebone Albert Mape) was formed and became one of the opposition parties in parliament following another major floor crossing. Out of a parliament of 65 MPs, 27 crossed the floor and joined the new LPC. The LCD suffered another major split in October 2006 when yet another new party emerged in parliament through floor crossing in the form of the ABC, led by former minister of Communications, Science and Technology, Motsoahae Thomas Thabane. Seventeen MPs crossed the floor and were joined another MP who had been expelled from the LCD in February 2004.

Two interesting common features of these floor-crossing developments in Lesotho are that, first, all of the floor crossings involved leadership squabbles and some degree of intra-party conflict and, second, they all happened in the run up to a national election (the 1997 floor crossing preceded the 1998 election; the 2001 floor crossing preceded the 2002 election; and the 2006 floor crossing preceded the 2007 election).

It is concluded that while floor crossing is permissible within Lesotho's constitutional framework and electoral system, it tends to further fragment Lesotho's party system and destabilise its parliamentary system, thereby undermining Lesotho's new-found representative democracy. While Prime Minister Pakalitha Mosisili has bemoaned the continuous splits within his ruling LCD (in 2001 and 2006), he exhibited confidence that the new parties did not pose an electoral threat to his party, arguing that the LCD would still win the 2007 general elections in the same way that the party won the 2002 general election following the 2001 split and floor crossing.<sup>7</sup>

Despite the 2007 election results as reflected in Table 5, there is no doubt that the emergence of a new party in parliament and the split of the ruling LCD weighed heavily on the nature of the configuration of power and the electoral contest, including the way the political wind will blow following the election itself.

#### RECOMMENDATIONS

The following four main recommendations flow from the discussion above. In

particular, these recommendations relate directly to the three main arguments raised in the paper around floor crossing and representative democracy, floor crossing and the party system, and floor crossing and the electoral system.

- It has been established in the discussion above that in many respects, floor crossing (political migration) may run counter to the deepening of representative democracy in Lesotho, in particular by destabilising parliaments. It is highly likely that one of the factors behind declining public trust in the legislature has to do with floor crossing. The National Assembly of Lesotho is currently undergoing a major transformation process through a Parliamentary Reform Committee. The reform process should, among other things, look into how best to contain the adverse effects of floor crossing on the legislature, guarding against loss of public trust in this democratic institution.
- The building and sustainability of a strong and durable party system depends in part upon resources that parties have both during and between elections. Political parties require a range of resources if they are to become effective agents of representative democracy, including human, technological, infrastructural and financial resources. Of all these, it is financial resources that parties need most. In this regard, it would be worthwhile for Lesotho to consider introducing public funding of parties represented in parliament in order to allow for their institutional development beyond merely election campaigning (as is the case presently). It is highly possible that lack of resources and the lure of resources elsewhere contribute towards intra-party factionalism, which leads to splits and floor crossing (political migration).
- It was also found that one of the major triggers for faction-fighting within parties, splits and ultimately floor crossing has to do with the lack of intra-party democracy and mechanisms for the constructive management of conflicts. Political parties in Lesotho need to make a deliberate effort to institutionalise internal democratic mechanisms as well as internal mechanisms for the constructive management of conflicts.
- Floor crossing in many ways subverts electoral systems and the mandates that the electorate give to MPs. In this way 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 constituency-based MPs by the electorate in cases where it is believed that the MP no longer lives up to the expectations of the constituency.

## NOTES

- 1 See Matlosa K & Sello C, *Parties and Political Development in Lesotho*. EISA Research Report No. 23, Johannesburg, 2005; Kadima D, Matlosa K & Shale V, *Enhancing the Effectiveness of Political Parties in the SADC Region through Public Outreach Programmes: Focus on Botswana, Lesotho, Namibia and Zambia*. EISA Research Report No. 29, Johannesburg, 2006.
- 2 See Hansard, Third Meeting-Second Session of Fourth Parliament, Monday, 9 June 2006.
- 3 Daily Hansard, Official Report of the Third Meeting-Second Session of Fourth Parliament, Monday, 9 June 1997.
- 4 Daily Hansard, Official Report of the Third Meeting-Second Session of the Fifth Parliament, Friday, 12 October 2001
- 5 Mahao N, Solving the structural and political crises in Lesotho, in Lambrechts K (ed), *Crisis in Lesotho: The Challenge of Managing Conflict in Southern Africa*. Johannesburg: Foundation for Global Dialogue (mimeo), 1999.
- 6 See *Mololi* 6(41), 26 October 2006; *Public Eye* 10(43), 27 October–2 November 2006.
- 7 See *Mololi*, *ibid.*

# The case of Malawi

SAMSON LEMBANI

## OVERVIEW

An ideal democratic system provides the institutional framework within and by which the interplay of various actors is constrained from arbitrary behaviour and structure incentives for compliance. This institutional framework includes, among others, the electoral system and the party system. Constitutions, statutes, acts of parliament and judicial rules establish the legitimate basis for democratic rules, penalties and incentives for the formation of governments and for the jurisdiction to rule. Broadly, laws define procedures for elections, including limits for exercising delegated authority, and they influence individual actions above personal interests and towards the collective good.<sup>1</sup>

Malawi inherited the British model first-past-the-post (FPTP) electoral system at independence in 1964. Hitherto, the country has held all its general elections under this system. A distinctive challenge of FPTP from other typologies is that it confers an electoral win based on a simple majority vote, whether in presidential or parliamentary elections. In Malawi as elsewhere, the system has therefore on successive occasions bequeathed the presidency to individuals and political parties with the minority share of the vote. This has undermined critical democratic tenets including legitimacy and delegated authority of the government(s) and its party. Further, all losing votes are wasted and this disenchanters voters since only the winning vote counts under this electoral system.

Owing to the combined majority of the opposition in parliament over the government's members of parliament (MPs), legislative confrontations heighten as the opposition can frustrate the government agenda. Conversely, where formalised post-election coalitions have been sabotaged or collapse for myriad reasons, the natural recourse of any government has been to lure individual legislators to lend their support to the executive. This support, which is secured and sustained in covert and overt form, has been deemed to constitute floor crossing.

This paper attempts to define floor crossing according to the constitution of Malawi while simultaneously explaining how floor crossing relates to representative

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democracy and the electoral system. The following points summarise major highlights of the analysis in this paper. First, the FPTP electoral system provides the lacuna, and therefore sanctions floor crossing. In this case, floor crossing is the dependant variable and not vice versa since the FPTP system permits it. From the voters' perspective, floor crossing weakens representative democracy since legislators can swap party allegiance, even against the will of the electorate, and this without the risk of being recalled. In this regard, the arbitrary repeal by MPs of the recall provision from the Malawi constitution runs contrary to the opinion of the majority of the electorate and the essence of representative democracy embodied in section 12(i-iv) of the Malawi constitution.

Second, and from the perspective of representative democracy, the FPTP system creates a *legally* accepted but *illegitimate* government by allowing for the formation of government with a simple majority. In terms of governance, this instigates legislative instability that may span the entire tenure of such a government. Similarly, all legislators who secure their seats with minority votes fall short of the legitimate mandate and representative authority of the majority of the electorate required by representative democracy.

Third, given the unsustainable coalitions among and between Malawi's political parties and the weak legal framework to constrain and regulate floor crossing, the latter has inherent incentives for the political survival of self-interested politicians at the expense of representative democracy.

Fourth and lastly, given limited intra-party democracy and increasing public disaffection with certain political parties, the FPTP system nevertheless allows for independent candidates who ideally would represent the electorate without the pressure of partisan interests; hence it strengthens representative democracy while weakening the party system. It must be noted, however, that as long as there are no ideological differences between the parties and the electoral law is unchanged, the transaction costs of floor crossing are nominal compared to the payoffs.

This paper argues that while the Republican Constitution of Malawi adopted in 1995 provides for representative government, multiparty democracy and separation of powers, the benefits of a genuine representative democracy have not been fully exploited. The historical background of the FPTP system and its inherent deficiencies, the weaknesses in the national constitution and the party law on the one hand, and the lack of distinct political party ideologies and the tenacious political culture of patronage and clientalism on the other, have promoted floor crossing – which in turn is undermining representative democracy in Malawi.

#### OUTLINE OF THE PAPER

This paper is prepared from a context of much, but less coherent, debate on the nature of relationship(s) between the party system, representative democracy and electoral law, and how the three aspects are mutually impacted upon by floor crossing. The relevance of the topic is therefore expected to transcend the conference

discussions by contributing towards the ongoing constitutional reform process in Malawi and elsewhere in the sub-region.

The underlying theoretical assumption is that floor crossing has a certain influence or effect on the party system, electoral law and representative democracy. What is unclear is whether this effect – assuming it exists – is generally negative or positive, and either way, what lessons can be drawn for policy recommendations.

The first section of the paper provides a brief background to Malawi's political party system. The second part presents Malawi's electoral system. The third segment gives a cursory theoretical reflection on the key elements of the term *representative democracy*, and how it relates to the *party system* and *electoral law*. The fourth section analyses and makes causal inferences of how floor crossing impacts on the party system, electoral law and representative democracy in Malawi. The last section summarises key challenges and lessons to be learnt, and makes policy recommendations.

#### HISTORICAL PERSPECTIVE OF THE PARTY SYSTEM IN MALAWI

Malawi, formerly called Nyasaland, is a unitary state based on British Common Law. Until 1961 it constituted part of the British colonial estate along with Zambia and Zimbabwe, referred to then as Northern and Southern Rhodesia respectively. Following the widespread public agitations against colonialism, unrest and the eventual collapse of the Federation in 1959, Malawi gained independence in 1964 and attained republican status in 1966. Although the April 1961 general elections were contested by three political parties,<sup>2</sup> the political plurality and parliamentary system were short-lived<sup>3</sup> as the Republican Constitution abolished multiparty politics in favour of the single-party rule of the Malawi Congress Party (MCP). The *de facto* one-party autocratic legacy and the life presidency of Dr Kamuzu Banda as Head of State proclaimed in 1971, lasted until 1993 when Malawians voted for multiparty democracy in a national referendum.

The MCP's procedures and the executive presidential system of government were structured in such a way that they sought to exert supreme control over government and the people. Dissent was illegalised, practically concealed and perceivably treasonous. Section 2 of the 1966 Republican Constitution reinforced this by stipulating that: 'the Nation and Government of Malawi would henceforth, be established upon the four cornerstones namely: Unity, Loyalty, Obedience and Discipline.'<sup>4</sup> Both the party and Republican Constitution gave Dr Banda absolute power to decide who could occupy political office and who could be elected for a given parliamentary constituency.<sup>5</sup> For example, in 1981 38 out of the 125 MPs were nominated by Dr Banda and had no legitimate constituency to represent.<sup>6</sup> Thus, the executive presidency fully controlled the legislature, while all other public institutions and officers strictly observed the 'four cornerstones'.

For more than 30 years, representative democracy was illusive and the single-party system reinforced party patronage. But at the zenith of MCP hegemony,

Year	Number of parties that contested general elections	Parties which secured seats in parliament	Independent candidates	Voter turnout (%)	Total no. of seats in parliament
1994	8	3	None	80.54	177
1999	11	3	4	93.76	193
2004	15	9	39	65.60	193

Source: Malawi Electoral Commission, various years, adapted by author.

Malawi was not spared from the global wave of democratisation of the early 1990s. Following the 1993 national referendum, and under the new political order established by the 1994 Constitution, the subsequent parliamentary and presidential general elections of 1994, 1999 and 2004 were contested by many political parties, as presented in Table 1.

However, although there has been increased participation by political parties in general elections since 1994, this trend has not corresponded with increased political choice for the voters based on ideological differentiation. Political competition is premised on personality cult. Due to poor electoral performance and their failure to win parliamentary seats, most political parties are disillusioned and disappear into political oblivion, only to resurface for the next election.<sup>7</sup> For instance, after the 2004 general elections three parties – the Movement for Genuine Democracy, National Democratic Alliance (NDA) and the Republican Party (RP) – were de-registered and are no longer officially represented in parliament. Furthermore, legacies reminiscent of the one-party era, including secrecy and patrimonialism, are still exhibited in the internal functioning of all parties. Increasing numbers of independent MPs partly signify limited intra-party democracy. The next section delves into the legality of representative democracy.

#### REPRESENTATIVE DEMOCRACY IN MALAWI – A LEGAL FRAMEWORK

As differentiated from direct democracy, representative democracy in this paper is defined as a contractual obligation agreed to between the contracting *principals* (electorate/voters) and the contracted *agents* (elected representatives including MPs and the president through the winning vote). This *principal-agent*<sup>8</sup> contract in a representative democracy can only be secured and guaranteed through mutually agreed on rules and procedures. The rules cater for monitoring and are incentive mechanisms that mitigate problems of shirking and renegeing by the agent in their pursuit of personal interests, due to information asymmetry.<sup>9</sup> Macintyre succinctly posits that party leaders can seldom renege on campaign promises if they are obliged

by rules to obtain the consent of other political actors.<sup>10</sup> Wolfgang Müller adds that rules affect parties in restricting their calculated options by effecting ‘the costs and benefits’ of alternative behaviours.<sup>11</sup>

The 1994 Constitution and the Political Parties (Registration and Regulation) Act of 1993 (amended in 1996) established Malawi’s multiparty democratic system of government. While the former provided for people’s political and civil rights, the latter created the legal framework regulating the registration of parties and their activities. Section 40(1)[a-d] of the constitution provides for the freedom to form, join and recruit members for a political party. As the main constitutional basis for a multiparty system in Malawi, the provision also guarantees eligible voters the freedom of political choice.

Akin to this is section 12(i-iv) of the Malawi constitution which underscores the essence of representative democracy, accentuating that all legal, political and executive authority is derived from the people of Malawi. This power can only be exercised as delegated authority, subject to the ‘sustained trust’ of the people and within a strictly specified period. *Sustained trust* is established and maintained through an accountable and transparent government and informed democratic choices. Section 67(1) guarantees this choice by stating that: ‘the National Assembly stands dissolved on 20 March in the fifth year after its election and general election for the next National Assembly must take place on the Tuesday of the third week of May that year.’<sup>12</sup> This is an explicit provision that allows the electorate to delegate their authority through an informed and democratic choice of voting for their legislative representatives once in every five years.

The constitution also sought to secure the trust of the people and the *principal-agent* contract by providing in section 64(1-3) procedures through which the people’s legislative representatives could be recalled. The first part of this provision states that: ‘every member of the National Assembly shall be liable to be recalled by his or her constituency in accordance with this section.’<sup>13</sup>

It is important to note that the sustained trust of the electorate in Malawi as a representative democracy is very remote from the *principals* in between elections. Constitutional amendments were, however, unequivocally effected to disarm the electorate. Ironically, while provisions are intact for the removal of the president and the vice president, judicial officers and other senior public officers, section 64 was entirely removed by a unanimous vote of MPs; and civic calls for its restoration are strongly resisted by both the opposition and government MPs. This undercuts the intent of representative democracy and makes floor crossing less risky even if it is against the expressed trust and interest of the people. An overview of the electoral law reveals related deficiencies.

#### THE MALAWI ELECTORAL LAW

In a representative democracy, an electoral system refers to the laws, rules, regulations and procedures by which voters exercise their democratic right and

<b>Table 2: Defining characteristics of the FPTP system</b>	
<i>Advantages</i>	<i>Disadvantages</i>
Clear choice between two main parties	Excludes minor parties
Ensures single party governments	Exaggerates electoral dominance of ruling parties
Gives rise to coherent parliamentary opposition	Problem of wasted votes which amounts to disenfranchisement
Allows floor crossing	Amenable to minority government problem
Links MP to constituency	Less conducive to women's participation
Allows independent candidates to contest elections	Open to manipulation of election boundaries

*Source: Matlosa K & Patel N, Towards Electoral System Reform in Malawi. Lilongwe: KAS, 2006, p 27, adapted by author.*

express their political preferences in an election. These institutional arrangements set eligibility criteria for both voters and election candidates and, most importantly, give the mathematical formula by which votes cast are converted into seats for office bearers in the legislature, local assembly or presidency.

The choice of an electoral system is in and of itself critical since the process of converting votes into seats in the legislature does in effect decide 'who is elected and which party gains power. Even with exactly the same number of votes for parties, one system might lead to a coalition government and another to a single party assuming majority control'.<sup>14</sup>

It is argued that the ultimate choice of an electoral system can only be optimal and legitimate if it is preceded by consensual, deliberate and broad-based public debate. In a representative democracy, an electoral system must provide for safeguards by which the electorate can hold their legislators accountable and responsive to public opinion. To achieve this the system must, among other key factors, provide for a more representative, legitimate, and inclusive parliament and government.

Weighed against the ideal facets of an electoral system discussed above, the FPTP system practiced in Malawi was inherited from the British colonial administration without any conscious and comparative debate to consider the merits and demerits thereof, or of alternative systems. Key features of FPTP are presented in Table 2.

Although the FPTP system is ideally designed to foster representative democracy and allow for independent candidates, in Malawi the system has been held to highlight the fragmentation of parties and has brought about a legitimacy crisis, parliamentary paralysis, vote wastage and regionalism.<sup>15</sup> It is intriguing to explore how this system relates to floor crossing.

## FLOOR CROSSING DEFINED

Section 65 of the Malawi constitution, as amended in 2001, defines floor crossing as the voluntary decision of an MP who resigns from the party on whose ticket he/she was elected into parliament, and 'joins another political party represented in the National Assembly, or has joined any other political party, or association, or organisation whose objectives or activities are political in nature'. The section then goes on to say that if an MP has crossed the floor his/her seat must be declared vacant

However, most civic groups and commentators note that the 2001 amendment was targeted at one influential founding member of the United Democratic Front (UDF), Brown Mpinganjira, who had resigned from the then ruling UDF and formed the NDA, which he conveniently called a *pressure group* before it was registered as a political party.

President Bingu wa Mutharika specifically urged stakeholders to the National Constitutional Review Conference to remove section 65 of the constitution arguing it contradicted section 32, which provides for personal freedoms to join an association of one's choice. But the president is against section 65 because he knows it will work against his government and the country as a whole given the minority government support in the opposition-dominated parliament. Most of the MPs supporting his government are serving cabinet ministers appointed from the two main opposition parties (the UDF and MCP). If section 65 is evoked and seats for these MPs are declared vacant, the government will face serious governing challenges. Section 65 is therefore a major threat to the Mutharika government.

Opposition parties, however, have insisted on the retention of section 65.<sup>16</sup> The immense interest of opposition parties to retain and invoke section 65 against those supporting the government is obvious. They contend that these defecting MPs were elected into parliament on their parties' (UDF and MCP) ticket and that they have betrayed the electorate and crossed the floor by virtue of either accepting cabinet positions or generally supporting the government. The opposition parties are asking the Speaker to declare the seats of the concerned MPs (about 85 by November 2006) vacant to allow for by-elections, and the opposition is confident they will retain the seats with new candidates.

President Mutharika's appeal to the Supreme Court for an alternative opinion to that of the lower court was granted in January 2006. As such, the Speaker's decision on the matter is likely to await the opinion of the Supreme Court.

Leaving the legality of the issues to the court's interpretation, this paper seeks to extend the scope of the above definition of floor crossing to include MPs who unilaterally dissolve their political parties (on whose ticket they were voted into parliament) and join other parties within or outside parliament. This is justified by the fact that in both the constitutional and the 'extended' definitions of floor crossing, and for purposes of this paper, what is at stake is the representative legitimacy of those who change their party allegiance. In a country with no tradition of regularly published and authentic political opinions polls, it is difficult to establish the varying patterns of legitimacy.

This paper contends that it is scientifically insufficient to define democratic legitimacy as an inheritance of jurisdiction derived merely from the attainment of an absolute majority of the vote. There are too many examples of governments that secure absolute parliamentary majorities under the FPTP system, but which soon become arrogant, inept and exploitative, and enact repressive laws that the electorate abhor. At that point, parties or (coalition) governments or opposition parties, including individuals in various parliamentary portfolio committees, cease to represent the aspirations, will and interests of the people. To the contrary, they abridge and forfeit the popular trust of the majority while their collective and individual conduct increasingly becomes reminiscent of parliamentary dictatorship.

On the other extreme, the FPTP system seems to be experimenting with political parties and individuals whose minority votes and lack of parliamentary majority render them meek as they succumb to the veto powers of the opposition. This has over time transformed into increased public attractiveness through the exercise of limited discretion, responsiveness to public opinion, taking credible decisions and fiscal discipline. The cases of Zambia in 2001 and Malawi after the 2004 general elections are classic examples of the increasing legitimacy of otherwise minority governments running conversely to the declining patterns on the combined legitimacy of the opposition parties. Thus, floor crossing corresponds to the increasing popularity of an erstwhile minority government.

In a related development, the Constitutional Court recently declared the presidential impeachment procedures, against which parliament sought to impeach President Mutharika, as null, void and inconsistent with rules of natural justice. However, more research is needed to establish drivers for the variations, reversals and shifting polarities of legitimacy and credibility either way, and how such factors relate to representative democracy. A brief assessment of the causes of floor crossing provides interesting insight.

#### *FACTORS INFLUENCING FLOOR CROSSING*

Citing Magolowondo, Kadima and Lembani observe that most politicians favour floor crossing, thereby betraying the trust of the electorate for the sake of personal interests other than the common good.<sup>17</sup> This observation is substantiated by the classic examples of political realignments which occurred soon after the 2004 general elections in Malawi. First was Gwanda Chakuamba, who deserted the opposition Mgwirizano Coalition to join the government alliance and his consequent unilateral dissolution of the RP. Next were about 25 independent MPs, who migrated to the UDF. Then came the unprecedented resignation of the state president from the UDF to form his Democratic Progressive Party (DPP), just before the massive exodus of UDF MPs to the government and the DPP. As if to crown this episode, Brown Mpinganjira (MP) disbanded the NDA and defected to the opposition UDF. Except for the state president, it has been alleged that the motivation of all the other defectors was intrinsically linked to personal gain. A detailed account of similar

trends which occurred outside parliament but across political camps would divert from the focus of this paper.

Beneath the intrinsic self-interested ambitions that characterise most of these political relocations lie the shrewd exploitation by the political actors of the weaknesses in the party law, electoral law and the national constitution. It is perceptible that at least in the short term, the payoffs of floor crossing are bigger than the personal or career costs of betraying the electorate, as discussed above. Ultimately, representative democracy is adversely affected. However, it would be simplistic to argue that floor crossing is based only on greed and institutional weaknesses external to parties. It is unequivocal that many other factors, including limited intra-party democracy and the enduring legacies of patronage, have been critical in influencing floor crossing in Malawi.

#### CONSEQUENCES OF FLOOR CROSSING ON ...

##### *... party system and electoral law*

These are both positive and negative. Positive in the sense that incidences of floor crossing have been placed on the public agenda, and that solutions to curtail illegal floor crossing will, it is hoped, soon be identified. Political parties have petitioned the Speaker of parliament to evoke his powers under section 65 to declare vacant constituencies for MPs who are deemed to have crossed the floor. Simultaneously, court injunctions have successfully been obtained by the defendants restraining the Speaker and have further sought the court's interpretation of the perceived unconstitutionality of section 65 and its disharmony with other fundamental political rights enshrined in the same constitution.<sup>18</sup>

Floor crossing has also revealed serious irregularities in the internal functioning of political parties and the internal institutional frameworks of political parties. These include irregular party conventions, manipulated party constitutions and the imposition of party leaders. It can only be speculated that the judicial verdicts coupled with the review and amendment of relevant statutes, constitutional provisions and acts of parliament, will incontestably define parameters for special conditions when floor crossing would be permissible and legitimised in favour of representative democracy.

On the negative side, floor crossing has tended to undermine the delegated authority of the people as provided in section 12 of the constitution. Floor crossing has also weakened party cohesion and has influenced certain constitutional amendments which are specifically targeted at certain personalities and not for the common good. Furthermore, floor crossing has disproportionately influenced the emergence of numerous political parties that provide no genuine ideological or policy alternative. And since the FPTP electoral law naturally encourages floor crossing, the challenge is more systemic and institutionalised. As a path dependent institution, the law is likely to be adapted, transformed and enforced in such ways that it will promote floor crossing as long as it yields more personal rewards.<sup>19</sup>

... *representative democracy*

As of July 2006, over 60 MPs were likely to lose their seats in parliament if the Constitutional Court had decided on the controversial section 65 case, but as of writing the final verdict has not yet been passed. Consequently, by-elections in 60 constituencies are on the cards. This paper will not analyse the economic implications of such a possible court ruling considering that Malawi's general and by-elections are substantially funded by donors. Similarly, it would be intriguing to assess the legal and other transaction costs associated with the court litigations on section 65, particularly to establish in whose interest such huge private and public resources are justified in the midst of competing social priorities. Both these issues fall beyond the scope of this paper.

It is possible, however, that these seats could be declared vacant with the holding of by-elections left in limbo indefinitely due to insufficient resources and the indifference of donors. Under such circumstances, representative democracy in Malawi would be greatly undermined. Even if by-elections were held but the voter turnout was insignificant due to voter apathy, what would be the legitimacy of the new MPs? It can be concluded that floor crossing as presently defined by section 65 (as amended in 2001) has far-reaching and unpredictable negative repercussions for representative democracy, political stability and the socio-economic standing of Malawi. At this juncture, it may be vital to extract lessons from the foregoing discussion.

#### CHALLENGES AND LESSONS

It is clear that an assessment of the historical evolution and countervailing factors to representative democracy are as important as it is to appreciate and analyse dynamics that are set in motion by each constitutional provision. It is also evident that the courts have been exploited to justify the held opinions of parliament over the executive and vice versa. In the end, however, these court cases establish one scenario: the winner and the loser. Ironically, even if the declared loser is the legislature or executive, the invisible but ultimate victim is representative democracy.

When constitutional provisions are arbitrarily amended against certain personalities, this is not done in the interest of the people or the system, but rather to secure personal or elite power. When legislative frameworks remain un-reviewed and have no enforcement mechanism, there are incentives to exploit inherent weaknesses by those otherwise delegated to do the opposite. It is apparent that the FPTP electoral system both in the post-independence and democratic Malawi has been applied inconsistently and conveniently to secure the ulterior political ends of the elite and not the electorate. This is manifested in the failure of the system to make elected representatives truly accountable to the people, and the ability of MPs to amend certain constitutional provisions with ease and enact laws against the expressed will of the people. With the removal of the recall provision, the electorate is demobilised and can only sanction the conduct of their MPs once in five years.

The party system is only as strong as its legal framework. Developments hitherto show that while the party law and the constitution permit the proliferation of political parties in Malawi, it is equally possible for one individual to unilaterally dissolve a political party without contravening any statutes or constitutional obligations. Besides, the system permits more parties which do not offer clear alternative ideological and policy choices. The party system is also prone to shirking and renegeing on political commitments, including floor crossing by elected representatives.

In a society where close to half the population is semi-literate and impoverished, constitutional guarantees like section 12(i-iv) exist but are hardly exercised by those they are meant to serve and protect – the people of Malawi. Floor crossing in section 65 is vague and wittingly defined to secure the specific political objectives of the elite and not to protect representative democracy. If this were not true, section 64 would not have been removed.

Finally, the provision for independent MPs is probably the only element in the present electoral system that seems to allow the electorate a small space to exercise their true political choice for candidates above and against the will of the party elite. Representative democracy as a tested project in Malawi has therefore been bewildered and hijacked by the vague and unenforceable party law, inherent weaknesses in the electoral system and, not least, floor crossing. It is evident from the foregoing that floor crossing does not affect the electoral system but vice versa.

#### SUMMARY AND CONCLUSION

It must be conceded that this paper does not provide an academically balanced analysis of the impact of floor crossing on the party system, electoral law and representative democracy. While upholding scientific seriousness, the paper is deliberately structured not to meet strict scientific exactitudes. Nevertheless, an attempt was made to devote sufficient attention to the phenomena under discussion, taking into account the realities in Malawi.

The challenges posed by floor crossing on representative democracy, the party system and electoral law are not uniform or mutually exclusive. Although the FPTP system creates a minority government it is also a blessing in disguise. It has the potential to create a responsive government and a more consensual legislative process, notwithstanding its attendant governance challenges and the possible paralysis of government business. Where there is limited intra-party democracy and a high incidence of imposed candidates, the introduction of independent candidates can help to preserve the interests of the electorate.

But given the deficiencies and non enforceability of party law, the multiparty system in Malawi has offered the electorate limited alternative political and policy choices due to the lack of distinctive ideologies among and between political parties. Conversely, the constitution, party system and electoral law offer high pay-offs to elected representatives who renege and cross the floor; and this without any social or

legal constraints and consequences, at least in the short term. Elected representatives have the unencumbered discretion to join and terminate coalitions and dissolve a political party. Representative democracy under the FPTP and multiparty system is best described as a tried option but an unfulfilled agenda. A couple of policy recommendations are worth consideration.

#### POLICY RECOMMENDATIONS

The following non-prescriptive policy recommendations are drawn from the discussion in the paper, which has substantially been informed by the personal observations and analysis of the author.

- The ongoing debate on the reform of Malawi's electoral system should examine critically why FPTP fails to link elected representatives to their electorate (the scrapping of the recall provision should be re-examined in this regard). This assessment must extend to factors related to Malawi's political culture. Available options must include whether the system can be retried after it is rid of disabling elements, or if it can deliver better if modified and fused with elements of other electoral systems to protect representative democracy.
- Relevant legislation, including the Presidential and Parliamentary Elections Act and the national constitution, must institutionalise pre- and post-election party coalitions given that no single party is able to get an absolute parliamentary majority. This will minimise incidences of floor crossing and will enhance the party system.
- The Political Parties (Registration and Regulation) Act must be reviewed as a matter of urgency, particularly to entrench intra-party democracy, constrain the discretion of individual party leaders and secure compliance to the act to protect representative democracy at the party level.
- The ongoing constitutional review must secure the implementation and enforceability of representative democracy as stipulated in section 12, and must clearly isolate specific incidences under which floor crossing is permissible and in the best interest of the people.

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  - 18 In October 2005 and under section 89(1)(h), President Mutharika asked the High Court to determine the constitutionality of section 65(1) and the Presidential Impeachment Procedures adopted by parliament.
  - 19 One defining characteristic of institutions (including electoral laws) is that once they are adopted, they are adapted, reinforced and redesigned to endorse one form of results (i.e. floor crossing) and restrict another (i.e. recall of MPs). Potentially, both outcomes undermine representative democracy.



# The case of Zambia

JOTHAM C. MOMBA

## INTRODUCTION

Floor crossing is a 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.

In a number of Commonwealth countries there are no legal restrictions against floor crossing among MPs, and as such it is common behaviour in countries like the United Kingdom, Australia and Canada. In Australia, for example, 245 MPs had crossed the floor between 1950 and 2004, representing a total of 24% of MPs seated in parliament during that period.<sup>1</sup>

The practice of floor crossing, however, has not been universally accepted and has generated acrimonious debate in several countries, including some Commonwealth countries. In Canada, for example, the New Democratic Party (NDP) in 2004 moved an unsuccessful motion in the Canadian House of Commons to bar floor crossing. This was after a Federal MP had crossed the floor from the Liberal Party to the Conservatives (shortly after his party lost an election) and was appointed to a cabinet position in the Conservative Government – and this after 82% of voters in the Vancouver-Kingsway riding of British Columbia had not voted for the Conservatives. In April 2006, the NDP premier in Manitoba proposed barring floor crossing in the provincial legislature.<sup>2</sup> Canada's ethics commissioner, in apparent agreement with the sentiments of the NDP, said that 'this instance seems to have given citizens a sense that their vote [...] the cornerstone of our democratic system – was somehow devalued, if not betrayed'.<sup>3</sup>

In some countries, including Zambia, floor crossing is banned and MPs who cross the floor to another party are required to resign their seats. The practice of free floor crossing which existed in Zambia at the time of independence was barred in 1966 – barely two years after independence. This was largely a case of political expediency

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following the resignation of two MPs – one from the opposition African National Congress party and the other from the then ruling United National Independence Party (UNIP) – who subsequently joined a newly formed party, the United Party. The change was implemented through a constitutional amendment affecting then Article 65 of the constitution. The amendment required the insertion of the following new clause:

If notice in writing is given to the Speaker of the National Assembly, signed by a Member of the National Assembly who is recognised by the Speaker as being the leader of the Assembly of a particular party, alleging that an elected member of the Assembly:-

- (a) conducted his campaign for election to the National Assembly as a member of such party; and
- (b) has, since his election to the Assembly, ceased to be a member of such a party

the Speaker shall inform the Assembly of such allegations and shall furnish the Chief Justice with a copy of the Notice to him. [...] The Chief Justice shall appoint a tribunal to investigate the allegations contained in the Notice and shall report to the Speaker whether the tribunal finds the allegation to have been substantiated. [...] the Speaker shall inform the National Assembly of the Report made to him by the Tribunal; if the Tribunal has reported that it finds the allegations to have been substantiated, [it] shall require the elected Member of the Assembly to whom the allegations relate to vacate his seat in the Assembly.<sup>4</sup>

The provisions of this clause also provided for the right of the MP to which the allegations have been made to appear or to be represented at the tribunal. The provisions of this article were not intended to cover only those MPs who on their own defect from their political parties, but also those MPs who lose the membership of the party on whose ticket they were elected to the National Assembly on account of being expelled from their parties.

This clause was retained during the one-party era but was not used regularly. It was used, however, in 1979 against the secretary-general of the Zambia Congress of Trade Unions (ZCTU) who lost his seat when the party decided to expel him over the serious differences that existed during that period between the government and the labour movement under the leadership of the ZCTU.

#### FLOOR CROSSING IN ZAMBIA'S THIRD REPUBLIC

The clause barring floor crossing was retained in the Third Republic, which followed the re-introduction of multiparty politics in 1991. The 1991 clause retained the essence of the 1966 clause, but with minor modifications largely to take into account MPs who join a political party after being elected as independent candidates. Thus Article 71(2)(a) of the Zambian constitution provides that an MP loses his/her seat:

In the case of an elected Member, if he becomes a member of a political party other than the party of which he was an authorised candidate when he was elected to the National Assembly or, if having being an independent candidate, he joins a political party.

There have been several cases of defection in the Third Republic. During the Chiluba regime this was largely the result of MPs defecting from the ruling party to opposition parties, while during the Mwanawasa regime this was largely due to MPs joining the ruling party. Since its inception, however, there have been attempts to challenge the provisions of this clause by a number of sitting MPs who were asked to vacate their seats as a result of having ceased to be members of the parties under which they were elected to the National Assembly.

The first major case of floor crossing in the Third Republic was in August 1993 when a total of nine MPs left the ruling party to form the National Party. The nine included three former cabinet ministers and two former deputy ministers.<sup>5</sup> In line with the provisions of Article 72(2)(c), the nine MPs were informed by the Speaker of the National Assembly that following communication from the Movement for Multiparty Democracy's (MMD) national secretary to the effect that they were no longer members of the MMD, they had to vacate their parliamentary seats. Five of the MPs challenged the Speaker's decision to declare their seats vacant on the grounds that the clause did not make provision for MPs who did not join another political party but remained independent. They also argued that their exclusion from parliament was a violation of their fundamental human rights. The High Court ruled that an MP who resigns from a party whose ticket ushered him/her into parliament could resign and continue to be an MP as long as he/she does not join another political party.

Judge Ireen Mambilima, who passed the ruling, stated that due to various pronouncements by the five, including those to the effect that they would join the National Party, she was satisfied that the five were members of the National Party. She also pointed out that the application of Article 72(2)(c) in the case of the petitioners did not contravene their rights and freedoms, and it was justifiable in a multiparty society where a government was formed by a party with majority seats in parliament.<sup>6</sup>

The government appealed against the ruling of the Speaker in respect of the principle of an elected member resigning from his/her party to become an independent. Article 72(2)(c) of the constitution was subsequently amended to provide specifically for MPs who leave their party to become independents. The amended clause reads:

In the case of an elected member, if he becomes a member of a political party other than the party of which he was elected to the National Assembly, or if having been an independent candidate, he joins a political party or having been a member of a political party, he becomes an independent.

As indicated earlier, floor crossing continued even under the Mwanawasa regime and, as in the earlier cases, attempts were made by MPs affected by the provisions of this clause to circumvent their expulsions. The first instance of floor crossing during this period occurred when the new parliament elected in 2001 was electing the Speaker and Deputy Speaker of the National Assembly. Three opposition MPs – the United Party for National Development (UPND) MP for Mwanzi, the two Heritage Party MPs from the Kabwe and Bwacha constituencies respectively and the only independent MP – voted with the ruling party.<sup>7</sup> Following the decision of the UPND and the Heritage Party MPs to vote against their party positions on the matter, they were expelled from their political parties. The UPND MP challenged the decision to expel him stating that ‘if anybody attempts to expel me, I shall challenge that in Court because I am protected by Article 87 of the Republican Constitution and Section 3 of the National Assembly powers and privileges’.<sup>8</sup>

The three MPs from the two opposition political parties were, however, expelled from their respective political parties and joined the ruling MMD. They were subsequently re-elected on the MMD ticket, and one of the former Heritage members was appointed to a cabinet position while the former UPND member was appointed as a deputy minister.

The second instance of floor crossing under the Mwanawasa regime was a direct result of the decision by President Mwanawasa to appoint a number of opposition MPs to ministerial positions. A member of the Forum for Democratic Development (FDD) was appointed Minister of Commerce, a member of the Zambia Republican Party was appointed Minister of Local Government and six other opposition MPs were appointed as deputy ministers – two of these came from the FDD, two from the Heritage Party, and one each from the UPND and UNIP.<sup>9</sup> Mwanawasa made these appointments without entering into any formal agreements with the parties under which these MPs were elected to the National Assembly or consulting with the leaders of the affected opposition political parties. The president merely wrote to the leaders of the relevant parties to inform them of his decisions. The MMD chairman for Information and Publicity made it clear that the president wrote to the leaders of the affected political parties for their information only and out of courtesy and that the issue was not negotiable.<sup>10</sup>

The president and those who were appointed argued that the Republican Constitution empowers the president to appoint any MP to ministerial positions.<sup>11</sup> President Mwanawasa also argued that he was not obliged to listen to opposition political parties on the issue of appointing opposition MPs to ministerial positions because, in his view, MPs were the representatives of the people and not political parties.

Perhaps taking their cue from Mwanawasa, all those appointed declared that they would fight any attempts by their parties to block their appointments. For example, the MP from the UPND argued that no political party had any legal or constitutional right to discriminate against any of its members from being appointed to government positions. He vowed that nobody would force him out of the party for accepting a government position and was ready to go to court to defend his positions.<sup>12</sup> One of

the MPs from the Heritage Party, in justifying his acceptance of a position in the government, said:

As far as I am concerned I went to parliament to represent the people of my constituency who voted for me and not my party president or party constitution. If I accept a government position I do so on behalf of my electorate and do not deserve to be punished. The laws that make it impossible for me to accept a government position to me are the ones that need to be checked.<sup>13</sup>

The UPND subsequently succeeded in having their rebellious MP lose his seat after the party expelled him, but the FDD failed to have their MPs lose their seats in parliament even after they were expelled from the party. This followed a High Court ruling that the only party organ in the FDD that was mandated to expel a party member was the Party Convention. The FDD Party Convention that met in 2005 decided to expel the MPs who had accepted ministerial positions, except for one who had earlier been dropped from his deputy ministerial position and was ‘forgiven’ by the convention after he had apologised.<sup>14</sup> But the three expelled MPs continued to challenge their expulsions and by the time the National Assembly was dissolved for the 2006 general elections they had not vacated their parliamentary seats.

A similar situation prevailed regarding the Heritage Party which, despite expelling its MPs who had accepted ministerial positions without the party’s consent, continued to sit in parliament until 2006. The Zambia Republican Party also failed to expel its MP who had accepted a government appointment since the party’s national executive committee was unable to reach agreement on whether or not to expel the guilty MP.<sup>15</sup> Although UNIP strongly disapproved of the decision by some of its MPs to accept appointments by President Mwanawasa, the party took no steps to have these members expelled and they were therefore not asked to vacate their parliamentary seats. Due to the Mwanawasa tactics of enticing opposition MPs with job offers, the UPND subsequently lost five more of its members to the MMD.

Aware of the controversy that his action had generated, President Mwanawasa claimed that the argument that the appointed opposition MPs would cease to act as members of the opposition because they would not oppose the government in the House was invalid. Mwanawasa contended in this regard that the ‘tradition of the MMD National Executive Committee and Cabinet has been to allow divergence of views and reaching a consensus’.<sup>16</sup> However, whatever the arguments by those involved, the opposition MPs who had taken up ministerial positions had in fact crossed the floor and, in line with the principle of collective responsibility, would probably vote with the government in the National Assembly – which they consistently did throughout the period of their appointment.

of floor crossing has been condemned by many Zambians.<sup>17</sup> The argument, as Simutanyi states, is that floor crossing in Zambia has mostly been induced by the ruling party; this has largely worked to the detriment of an effective parliamentary opposition and has contributed towards a weak and unstable party system. Floor crossing is therefore seen as impacting negatively on the democratic process in Zambia.

The practice of floor crossing at the instigation of the ruling party tends to weaken opposition parties in a number of ways. First, it tends to reduce the numerical strength of opposition parties in the National Assembly.

During the second parliament of the Third Republic the ruling party failed to obtain an absolute majority in the National Assembly, with the result that several opposition MPs were encouraged to defect to the ruling party: the UPND lost seven MPs; the Zambia Republican Party lost its only MP; and the Heritage Party effectively lost its representation in the National Assembly when all its members were lured to join the government benches. President Mwanawasa stated on several occasions that if those whom he had appointed to ministerial positions were expelled, they would be adopted as MMD candidates. And considering the huge advantage that accrues to the ruling party during by-elections, which almost assures such MPs re-election, such an offer seemed extremely attractive to those opposition MPs who had been looking forward to ministerial appointments.<sup>18</sup>

In addition, in most cases those MPs who are lured to join the ruling party are among some of the most senior and able leaders of the opposition. In the UPND, for example, the party's national secretary, deputy national secretary and deputy national chairman were among some of the MPs who defected to the ruling party.

The manoeuvres by the ruling party could in the long run lead to the collapse of an effective opposition in the National Assembly. As Roger Chongwe, a once minister of Legal Affairs observed in his feature article in *The Post*, it appeared that the president's real objective in appointing opposition MPs to his government was to kill political pluralism in Zambia, and by so doing to achieve a one-party system without legislating for it. Indeed, several other organisations believe that the president's decision to appoint opposition MPs to government positions would kill the opposition.

Floor crossing – particularly that induced by the offer of jobs by the president – has also led to some intra-party instability. As pointed out by the UNIP vice-president when President Mwanawasa was openly offering ministerial positions to opposition MPs, the action was also aimed at dividing the opposition by causing a rift between those in favour and those against the appointments.

In the Zambia Republican Party, for example, there was a deep split between those members of the party's executive committee who supported the offer given to their only MP and those who opposed it. This split left the party permanently divided right up to the 2006 elections when the faction that had supported the appointment, together with the MP, formally joined the MMD (with the MP successfully re-contesting her seat under the MMD). Similar problems confronted both the FDD and

UNIP, with the repercussions much more serious for the former due to the large number of people who left the party after it lost the 2001 elections.

There is also a view among many stakeholders in the country that floor crossing is wasteful in the sense that money that could be used for development purposes is diverted to fund costly by-elections – and the ruling party has been said to spent huge amounts of money in order to win by-elections, particularly those in constituencies held by the opposition parties. The ZCTU and several other individual petitioners have articulated this view to the Electoral Reform Technical Committee (ERTC) which was appointed to review the electoral system in Zambia. The ZCTU has consistently made particular mention of this point whenever it has had an opportunity to comment on by-elections.

It is in the context of these and other perceived negative attributes of floor crossing that President Mwanawasa's decision in 2003 to induce defections of opposition MPs by luring them with offers of ministerial appointments received strong disapproval from opposition political parties, non-governmental organisations (NGOs) and the public alike.

The extent to which many Zambians were unhappy with floor crossing came out most vividly when petitioners to the ERTC were submitting their suggestions. All the political parties, church organisations, NGOs and individuals who gave evidence and commented on floor crossing expressed strong disapproval of the practice of MPs switching allegiances from the political party on whose ticket they were elected to another, and in the process causing by-elections. The concerns were strongest regarding defections of opposition MPs to the ruling party.

Several political parties, notably the UPND (then the major opposition party) and UNIP, all argued that MPs who cross the floor should be barred from contesting elections for the rest of the life of that parliament. This position was shared by major church organisations (such as the Council of Churches of Zambia, the Zambia Episcopal Conference, the Evangelical Fellowship of Zambia and the Hindu Association of Zambia) as well as the ZCTU (to which several trade unions are affiliated) and several NGOs (such as the Non-governmental Organisation Coordination Committee, the Zambia Civic Education Association, and the Southern African Centre for Conflict Resolution and Disputes). The Patriotic Front, the largest opposition party in the current National Assembly, suggested that MPs who cross the floor should be barred from contesting for at least a year, effectively suggesting that they should not be allowed to re-contest the same seat they had immediately lost after having defected.<sup>19</sup>

#### LESSONS LEARNT AND POLICY RECOMMENDATIONS

Although there is disagreement as to whether MPs who are expelled from their respective political parties should vacate their seats, there seems to be general consensus against those who cross the floor on their own accord – particularly those who defect to the ruling party under the lure of ministerial appointments and

'greener pastures'. This is due to the issue of intense party divisions caused by floor crossing and the fact that voters' preference for a candidate is largely determined by the party to which the candidate belongs. There is therefore no general objection to the provisions of Article 72(2)(c) of the constitution, especially in view of the fact that barring free floor crossing has somewhat strengthened the party system in Zambia by instilling some degree of discipline.

In fact the history of the multiparty system in Zambia shows that without this provision the opposition would be very weak at the end of every election. During the First Republic there were several defections to the ruling party by then opposition party, the African National Congress. This was largely due to the declared objective of the ruling party to introduce a one-party system through the electoral process rather than through legislation. However, the African National Congress maintained its presence in the National Assembly (that is, until the government decided to legislate the introduction of a one-party system) by winning by-elections and retaining those seats vacated by its members who had defected to the ruling party.

As discussed above there is still concern for the rights of MPs. The contention arises out of the fact that the provisions of Article 72(2)(c) have at times been used to intimidate MPs because the loss of a parliamentary seat is not restricted to those who cross or defect on their own, but extends to those who are expelled from their parties. In some instances, it is argued, an MP may have legitimate differences with his/her party. For example, the clause was used against MMD MPs who disagreed with Chiluba's attempt to amend the constitution in order to allow him to contest elections for a third time. The third-term bid was strongly opposed by opposition parties, civil society, several church organisations as well as major factions within the MMD (including those led by the MMD vice-president and the Zambian vice-president) and was eventually abandoned.

As the evidence given to the ERTC suggests, most Zambians tend to make a clear distinction between those MPs who lose their seats on account of defecting to another party (particularly the ruling party) and those who lose their seats on account of being expelled from their respective parties. While there is some hostility towards the former, there is some sympathy with the latter, suggesting that the two scenarios should be treated differently.

In reaction to the serious concerns raised by petitioners, the ERTC has recommended that strong measures be taken against those MPs who cause by-elections through floor crossing, while at the same time taking measures to ensure that those who are expelled by their political parties are not expelled unfairly or in the course of their legitimate parliamentary duties. The ERTC has therefore proposed, on the one hand, that:

A Member of Parliament who resigns from the party on whose ticket he or she became a constituency Member of Parliament should lose his or her seat and should not be allowed to stand for election to Parliament for the duration of the life of that Parliament from which he or she resigned.

On the other hand, in order to protect an MP who may have been unfairly treated by his/her political party the ERTC has suggested that:

A Member of Parliament who is expelled or suspended by the Party on whose ticket he or she became a Constituency based Member of Parliament should not lose his or her seat, unless his or her expulsion is endorsed by a Tribunal appointed by the Chief Justice that finds the reasons for expulsion do not infringe upon the Member of Parliament's rights and privileges provided and protected by the National Assembly (Powers and Privileges) Act [...] or are not unfair, vindictive, frivolous, vexatious, unsound or unlawful.

It seems that self-interest is one of the main motivations for joining political parties in Zambia; many individuals who contest National Assembly elections look forward to ministerial appointments. Indeed, a number of party leaders and leaders of NGOs interviewed in 2005 thought that defections to the ruling party had weakened opposition political parties in the country and that these defections were motivated by self-interest. This view seems to be supported by the large number of opposition MPs who have defected to the ruling party (most of whom were allowed to re-contest their seats under the MMD ticket and won) and were appointed to ministerial positions. In view of this apparent motivation for seeking parliamentary seats it may be necessary to revisit the recommendations of the Constitutional Review Commission, which suggested that government ministers be appointed from among persons who are not MPs. This is likely to reduce significantly the temptation to cross the floor.

And finally, in evidence to the ERTC cited earlier, a number of organisations and political parties have suggested that the proportional representation electoral system be introduced in Zambia since this system in general does not provide for floor crossing and would, it is hoped, bring an end to the expensive by-elections caused by defections.

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# The case of South Africa

DIRK KOTZÉ

## POLITICAL BACKGROUND AND RATIONALE

Floor crossing in legislatures in South Africa came to the fore in 1997 and again in 2002 as a result of changes in the party political landscape. Although floor crossing involves highly important principles of democracy and representation, the main rationale appears to be party political.

Before the party political context is sketched, two factors need to be taken into account in the assessment of the floor-crossing arrangement. First, floor crossing is constitutionally enabled in the sense that the South African constitution allows legislation to be adopted that can regulate floor crossing. Second, determinations about the South African electoral system allow for ambiguity regarding the constitutional and democratic nature of floor crossing. Section 46(1) of the 1996 Constitution stipulates that the electoral system should ‘result, in general, in proportional representation’.

The constitution’s transitional arrangements also stipulate that for the national and provincial general elections in 1994 and 1999 a rigid proportional representation (PR) system with fixed party lists would be used, but that this system should be reviewed before the 2004 general election. Although the Van Zyl Slabbert task team performed this task in the course of 2002, the African National Congress’s (ANC) preference for the status quo ultimately prevailed.

Complexity in the electoral system is added by the fact that the electoral system for local councils is a combination of rigid PR with fixed party lists (50% of the seats in a council) and directly elected representatives of territorially demarcated wards (the remaining 50% of seats). It approximates the German electoral system, though the directly elected councillors do not constitute part of a proportional allocation.

All the above factors enabled a resurgence of the floor-crossing issue, but its immediate catalyst was party political realignments – notably a cooperation agreement between the ANC and the New National Party (NNP). Its relevance is the following:

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Local government elections were held throughout South Africa on 5 December 2000. In anticipation of the election the NNP in the middle of 2000 decided to form an alliance with the liberal opposition party, the Democratic Party (DP) and the Federal Alliance (FA). The three parties jointly participated in the elections as the Democratic Alliance (DA), but they maintained their separate party identities in some respects having, for example, separate informal caucuses. The elected councillors were therefore DA representatives and not NNP or DP members of legislatures. At national and provincial levels, however, they continued as DP and NNP representatives because they had participated in the 1999 general election as those parties and not yet as the DA. The constitution also did not provide for the formation of new parties without the representatives losing their seats.

After the local elections in 2000 there was therefore a multiplicity of party identities: the NNP and DP, and the DA.

In the course of 2001 tensions between the two leadership formations in the DA resulted in a separation. At national and provincial levels the two parties went their separate ways: the NNP re-established itself while the DP continued as the DP/DA. At local level the dilemma for NNP councillors and supporters was that they were 'caught' in the DA and could not rejoin the NNP without losing their seats.

The next step in party realignment saw the ANC and NNP agreeing on formal cooperation. When the NNP left the DP in the DA, the ANC saw this as an opportunity to muster support against the DP/DA, especially in the Western Cape – which, together with KwaZulu-Natal were the only provinces not governed by the ANC at the time. However, due to the immobility of the NNP supporters in the DA, this agreement could not yet produce tangible results on the ground. Constitutional and legislative amendments were therefore required to enable floor crossing or a realignment of parties and representatives.

#### LEGAL AND CONSTITUTIONAL DIMENSIONS OF FLOOR CROSSING

In June 2002, parliament passed four acts aimed at allowing members of the three spheres of government to change their party allegiances and for parties to realign without losing their legislative seats. The new legislation involved:

- two amendments to the constitution, namely, Acts 18 and 21 of 2002;
- the Local Government: Municipal Structures Amendment Act 20 of 2002 (the Local Government Act); and
- the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (Loss or Retention of Membership Act).

The first constitutional amendment act and the Local Government Act dealt with arrangements at local government level. The second constitutional amendment act

and the Loss or Retention of Membership Act dealt with representatives in the national and provincial spheres.

Section 47(3) of the 1996 Constitution does not mention floor crossing as a ground for losing membership of the National Assembly in the national parliament. In this respect it differs from section 43(b) of the interim Constitution (1993), which stipulated that membership will be lost automatically in instances of floor crossing. However, Item 13 in Annexure A (Schedule 6: Transitional Arrangements) of the 1996 Constitution makes the following very important stipulation, which has become a focus of the legal/constitutional dimensions in the floor-crossing issue:

- 23A. (1) A person loses membership of a legislature to which this Schedule applies [National Assembly] if that person ceases to be a member of the party which nominated that person as a member of the legislature.
- (2) Despite subitem (1) any existing political party may at any time change its name.
- (3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed [...] to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be member of the party which nominated that member, to retain membership of such legislature.
- (4) An Act of Parliament referred to in subitem (3) may also provide for –
- (a) any existing party to merge with another party; or
  - (b) any party to subdivide into more than one party.

The Loss or Retention of Membership Act was meant to serve as the legislation envisioned in subitems (3) and (4). From the above it appears that the 1996 Constitution does not prohibit floor crossing at national and provincial levels indefinitely. The prohibition is rather for a limited and transitional period until legislation regarding floor crossing is adopted within a reasonable period after the new constitution has taken effect (for most parts, in February 1997).

#### CHALLENGES IN COURT AND NEW LEGISLATION

The four acts were challenged in the Cape High Court by the United Democratic Movement (UDM), a parliamentary political party led by Bantu Holomisa. (It was then the official opposition in the Eastern Cape and Limpopo provinces.) A judgement by the full Bench suspended the commencement and/or operation of the four acts pending a decision by the Constitutional Court.

The UDM applied for the acts to be declared unconstitutional and invalid, and was joined in its endeavour by three minority parties – the African Christian Democratic Party (ACDP), the Inkatha Freedom Party (IFP) and the Pan Africanist Congress of Azania (PAC) – as well as by KwaZulu-Natal premier, Lionel Mtshali. The ANC and the South African Local Government Association also joined the case,

but not in support of the UDM. Two non-governmental organisations participated in the case as ‘friends of the court’ (*amici curiae*).

Judgement by the Constitutional Court was handed down on 4 October 2002, referred to as *United Democratic Movement v President of the Republic of South Africa and others* (CCT23/02). This was followed by a second judgement on 19 November 2002, known as *African National Congress and others v United Democratic Movement and others* (CCT43/02).

The UDM’s main arguments against the floor-crossing provisions were that:

- they undermine the basic structure of the constitution: the right to vote [sec. 19(3)] and the PR system [sec. 46(1)(d)] were presented as relevant fundamental principles of the constitution that cannot be amended. (Note: The constitution was certified in 1996 by the Constitutional Court on the basis that it encapsulates all 34 Constitutional Principles agreed upon in 1993 – the Constitutional Principles were absolutely entrenched and therefore cannot be amended.)
- the amendments are inconsistent with the founding values of the constitution as stated in section 1. The UDM highlighted the values of a multiparty system and the rule of law as relevant in this respect. The UDM’s argument included the fact that this section can be amended only by a 75% majority in the National Assembly and six of the nine provinces in the National Council of Provinces (NCOP). (The UDM argued that the amendments were not adopted by these majorities.)
- the amendments are inconsistent with section 19(3) (‘Political rights’) in the constitution. The subsection reads:
  - ‘Every adult citizen has the right –
  - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.’

The UDM supported its argument by alleging that the legislation/amendments were examples of political expediency by the ANC. According to UDM leader Bantu Holomisa, the legislation offended the principles of legality and constitutionalism, citing the ‘extraordinary haste of enactment’ and that it was done to consolidate the ANC/NNP cooperation agreement in the Western Cape.

Moreover, Holomisa argued that the legislation was not adopted within a ‘reasonable period’ after the constitution took effect – for him, this meant before the 1999 general election.

University of Cape Town political scientist Prof. Robert Schrire argued on behalf of the respondents that there is always an inherent tension between the mandate of representatives and their own conscience, and therefore in their acting as delegates or as trustees. According to him, PR systems do not require that representatives ought to be bound by their electoral mandates. On the one hand, he mentioned the example

of Germany where representatives can either cross the floor or follow their own conscience when they are voting in the legislatures. On the other hand, other examples prohibit any floor crossing to prevent the possible ‘selling’ of votes. In Schrire’s view, the majority of countries with PR systems allow for floor crossing. For him, the essence of the issue is that legislative representation should reflect the support of the public and not of parties in terms of PR.

The Constitutional Court made the following judgement:

- The first constitutional amendment and the Local Government Act were not unconstitutional and invalid, and could therefore be implemented in the local government sphere.
- The Loss or Retention of Membership Act was inconsistent with the constitution and was invalid, partly because it was not adopted within a ‘reasonable period’ after the constitution’s commencement.
- In principle, floor crossing is not against South African constitutional values and principles.

As a result, floor crossing at local authority level was allowed between 8 and 24 October 2002, while the unconstitutional legislation went back to parliament. On 19 March 2003 a new constitutional amendment act became effective in which the Loss or Retention of Membership Act was repealed. It allowed for floor crossing at national and provincial levels between 21 March and 4 April 2003.

The floor-crossing provisions, as they apply at present, are summarised below.

#### SUMMARY OF PROVISIONS

- Floor crossing refers to:
  - individual representatives leaving one political party and joining another without losing their seats in the legislature;
  - a political party being divided, and when one part of it merges with another party; or
  - part of an existing party forming a new party on its own.
- A representative can cross the floor or a party can merge only once in a legislative term of five years between elections.
- Floor crossing will be possible only in the period 1–15 September in the 2nd and 4th year following an election. It is confined to a maximum of 15 days at a time.
- At least 10% of members within a single political party must indicate that they

wish to defect before any one of them can do so legally and with retention of their seats. For example, if party A has 40 members in parliament, at least four of them have to indicate their willingness to cross the floor before any one in that party can do so.

- No party can suspend or terminate the party membership of representatives to prevent them from floor crossing, or to influence them otherwise.
- A new or merged party that has not participated under its new name/identity in an election is regarded as a party for the purpose of representation in a legislature, but has to register as a political party within the prescribed period.

The speakers of the national and provincial legislatures are responsible for administering all floor crossings and their outcomes. In the case of local authorities, floor crossings are recorded by the Independent Electoral Commission.

The legislation provides for a transitional or first implementation arrangement. Therefore, it allowed for floor crossing during a period of 15 days commencing immediately after the Act took effect (that is, between 21 March and 4 April 2003) instead of the September window period. The 10% minimum quota was also waived for this first phase, but thereafter the above-mentioned stipulations apply.

#### FOCUS POINTS OF FLOOR CROSSING

Floor crossing was most prevalent in the two provinces not governed by the ANC at the time – that is, the Western Cape and KwaZulu-Natal. Moreover, DA-governed local authorities in the Western Cape (notably the Cape Town Metropolitan Council) also attracted special attention.

In the 1999 Western Cape provincial election the ANC received the highest (though not yet an absolute majority) electoral support (42.9%); however, a pre-election agreement between the NNP (40.5%) and the DP (11.9%) resulted in an NNP/DP coalition government. The ANC was understandably annoyed at being politically out-manoeuvred. Hence, ANC control of the Western Cape – for long the NNP's hinterland – became a prime objective.

Similarly, in the KwaZulu-Natal election in 1999 no party received an absolute majority. An agreement between the ANC and IFP national leaderships, however, ensured not only an oversized coalition government at national level but also a provincial coalition government. After the election, control over the provincial premiership became a major bone of contention between the two parties. Hence, the ANC provincial leadership wanted to strengthen their position by searching for possible gains from the IFP ranks.

Almost 30 local authorities in the Western Cape were controlled by the DA. Floor crossing created an opportunity for NNP supporters in these local councils to return to the NNP, and together with the ANC, form new local governments. The DA's role

as critical opposition of the ANC, and the new acrimony between it and the NNP, was an additional motivation to wrestle power from the DA at local level.

#### EMPIRICAL RESULTS OF THE FLOOR CROSSING

##### NATIONAL LEVEL

Table 1 shows the outcome in the National Assembly of the March/April 2003 and September 2005 floor crossings at national level, compared with the results of the 1999 and 2004 general elections.

<b>Table 1: South African National Assembly, 1999–2005 (400 members)</b>				
	<i>1999 election</i>	<i>5 April 2003 floor crossing</i>	<i>2004 election</i>	<i>15 September 2005 floor crossing</i>
ANC	266	275	279	293
DP/DA	38	46	50	47
IFP	34	31	28	23
NNP	28	20	7	0
ACDP	6	7	7	4
UDM	14	4	9	6
FF+	3	3	4	4
UCDP	3	3	3	3
PAC	3	2	3	3
FA	2	2	-	-
MF	1	1	2	2
Azapo	1	1	1	1
ID	-	1	7	5

*Source: Compiled from IEC sources, including <<http://www.elections.org.za/Library1.asp?KSId=13&iKid=3>>.*

##### PROVINCIAL LEVEL

As already mentioned, the provincial results in the Western Cape and KwaZulu-Natal drew significant attention. Table 2 (*over page*) shows the results in the Western Cape in 2003.

Well before implementation of the floor-crossing arrangement, the ANC/NNP cooperation agreement determined that in a future ANC/NNP provincial government the NNP would retain the premiership but that the ANC would receive important executive council (provincial cabinet) portfolios. A consultative council for the two parties was also envisioned. With the floor crossings, the ANC increased its representation to an absolute majority, while the NNP lost significant support.

**Table 2: Results of the 2003 floor crossing compared with the 1999 election results in the Western Cape Province (42 members)**

Party	1999		2003 Floor crossing		
	Seats	%	Seats	Gain/Loss	%
ANC	18	42.9	22	+4	52.4
NNP	17	40.5	10	-7	23.8
DP/DA	5	11.9	7	+2	16.7
ACDP	1	2.4	2	+1	4.8
UDM	1	2.4	0	-1	0
New Labour Party	0	0	1	+1	2.4

However, the ANC honoured its agreement and NNP leader Marthinus van Schalkwyk continued as provincial premier.

In KwaZulu-Natal, unease between the two coalition parties continued after the floor crossings. The IFP provincial leadership perceived floor crossing from the start as an attempt by the ANC to take over the premiership from the IFP. IFP premier Lionel Mtshali therefore retaliated by dismissing two ANC members of the executive council (MECs) – including the ANC provincial leader, S’bu Ndebele – and replacing them with DA members. The results of the 2003 floor crossing in KwaZulu-Natal are shown in Table 3.

The table shows that neither the IFP nor the ANC could secure an absolute majority. It is impossible to constitute any government other than an ANC/IFP coalition, and regular interventions are required by the ANC and IFP national leaders in order to stabilise the tenuous situation in the province.

**Table 3: Results of the 2003 floor crossing compared with the 1999 election results in KwaZulu-Natal Province (80 members)**

Party	1999		2003 Floor crossing		
	Seats	%	Seats	Gain/Loss	%
ANC	32	40.00	35	+3	43.75
IFP	34	42.50	32	-2	40.00
DP/DA	7	8.75	6	-1	7.50
NNP	3	3.75	2	-1	2.50
Minority Front	2	2.50	2	0	2.50
ACDP	1	1.25	1	0	1.25
UDM	1	1.25	1	0	1.25
Peace and Development Party	0	0.00	1	+1	1.25

<b>Table 4: Results of the 2003 floor crossing compared with the 1999 election results in Gauteng Province (80 members)</b>					
<i>Party</i>	<i>1999</i>		<i>2003 Floor crossing</i>		
	<i>Seats</i>	<i>%</i>	<i>Seats</i>	<i>Gain/Loss</i>	<i>%</i>
ANC	50	62.50	50	0	62.50
DP/DA	13	16.25	13	0	16.25
IFP	3	3.75	3	0	3.75
NNP	3	3.75	3	0	3.75
ACDP	1	1.25	1	0	1.25
FA	1	1.25	0	-1	0.00
UDM	1	1.25	1	0	1.25
ID	0	0.00	1	+1	1.25
Herstigte Nasionale Party	0	0.00	1	+1	1.25
Freedom Front	1	1.25	0	-1	0.00

<b>Table 5: Results of the 2003 floor crossing compared with the 1999 election results in the Eastern Cape Province (63 members)</b>					
<i>Party</i>	<i>1999</i>		<i>2003 Floor crossing</i>		
	<i>Seats</i>	<i>%</i>	<i>Seats</i>	<i>Gain/Loss</i>	<i>%</i>
ANC	50	62.50	50	0	62.50
ANC	47	74.6	47	0	74.6
DP/DA	4	6.3	5	+1	7.9
UDM	9	14.3	9	0	14.3
NNP	2	3.2	1	-1	1.6
PAC	1	1.6	1	0	1.6

Mobility between all the parties in the province was marginal and therefore did not have a major impact on the political situation there. Only 5% of the representatives made use of the floor-crossing opportunity.

The remaining seven provinces have been mostly unaffected by floor crossings. The situation in Gauteng and the Eastern Cape, for example, illustrates these marginal effects (*see tables 4 and 5*).

#### LOCAL LEVEL

Changes in the sphere of local authorities followed a similar pattern. Centre stage was occupied by the relationship between the NNP and DA, and the possible mobility between their representatives.

The affect of floor crossing in 2002 at local level is summarised per province in the Table 6.

The following observations can be made about floor crossings at local level: only 22 local councils were affected by the floor crossing, which means that about 11.7% of all the councils in the country were affected by it. In terms of councillors, about 555 out of a total of about 2,400 were involved (some 23%). (See Table 7.)

In comparative terms, this means that local councils were more affected by the

<b>Table 6: Floor crossing at municipal level in South Africa, 2002</b>											
	Eastern Cape	Free State	Gau- teng	KwaZulu Natal	Mpuma- langa	Northern Cape	Limpopo	Western Cape	North West	<b>Total</b>	<b>%</b>
<b>Total no of councils</b>	20	17	14	29	18	27	17	28	18	<b>188</b>	
<b>Affected councils</b>	2			3		3		14		<b>22</b>	11.7
<b>Ruling parties:</b>											
ANC	+1			+2		+2		+11		<b>+16</b>	8.5
DA	-2					-3		-11		<b>-16</b>	8.5
NNP	+1						+2			<b>+3</b>	1.6
IFP				-1						<b>-1</b>	0.5
UDM											
ANC/NNP						+1				<b>+1</b>	
ANC/DA								-4		<b>-4</b>	
ANC/IFP											
ANC/IFP/DA				-1						<b>-1</b>	
ANC/DA/NNP								+1		<b>+1</b>	
<i>Source: Compiled from IEC, &lt;www.elections.org.za/papers/24/DominatingPrtyRpt.xls&gt;</i>											

<b>Table 7: Gains/losses of councillors in 2002 municipal level floor crossing</b>		
<i>Party</i>	<i>Gains</i>	<i>Losses</i>
ANC	128 (from: DA 51)	16 (to: IFP 7, DA 3, UDM 5)
DA	17	417 (to: ANC 51, NNP 340)
NNP	354 (from: DA 340)	

floor crossing than the national (6%) or most of the provincial legislatures (KwaZulu-Natal 5%; Gauteng 2.5%; Eastern Cape 2.8%; but the Western Cape 19%).

- Local councils in only four provinces were affected by floor crossing. The Western Cape was most affected, with half of all the councils experiencing some fluctuations.
- The biggest gainer in floor crossing at local level was the ANC/NNP coalition governments, which took control of about 20 councils. The biggest loser in the process was the DA, which lost control of 16 councils. The IFP was remarkably insulated from the process: it lost only two councils – one controlled solely by itself, and another in coalition with the ANC.
- The Cape Town Metropolitan Council was one of the most prominent arenas of floor crossing (*see Table 8*). As a result of this, the DA lost control of the council, and in accordance with the ANC/NNP cooperation agreement the ANC took control of the executive mayorship and the NNP took the position of speaker. However, the DA – in coalition with seven small parties – reclaimed control of the Metro in the 2006 municipal elections.

**Table 8: Effects of floor crossing in the Cape Town Metropolitan Council, 2002**

Party	Before	After	Gain/loss
ANC	77	80	+3
NNP		32	+32
DA	113	77	-36

#### IMPACT OF FLOOR CROSSING ON THE PARTY SYSTEM

Most analysts characterise South Africa's party system as a single-dominant party system<sup>1</sup> or as a weak, two-party system. Utilising a PR, closed-list electoral system, the expectation was that a proliferation of political parties would occur. It is true that more than 160 parties are currently registered with the Independent Electoral Commission<sup>2</sup> but most of these are local parties or community organisations. Less than half of them have ever registered for an election.

One of the main questions regarding floor crossing is how it can influence the party system. Some argue that floor crossing favours the larger parties to the detriment of smaller ones. The dominant party – the ANC – has increased its majority in each of the three general elections (252 MPs in 1994; 266 in 1999; 279 in 2004). The two floor crossings in 2003 and 2005 followed the same trend: 275 to 293. The ANC's gains by means of floor crossing were therefore not artificial and did not influence the party system. Instead, they maintained a direct correlation with the electoral trend.

The second largest party and official opposition – the DA – experienced a similar trend. Except for the floor crossing in 2005, the DA has seen increasing support since

the 1999 general elections. The floor crossing in September 2008 and the general election in 2009 will be important barometers of the DA's future.

In general, the two largest parties (the ANC and DA) have so far benefited most from floor crossing; but such advantage is in line with their electoral performances and therefore does not distort or influence the party system. The main losers in floor crossings have been the medium-size parties: the IFP, NNP, ACDP and UDM. Since 1999 both the IFP and NNP have gradually lost electoral support and seats during the floor crossings. However, the trend has been consistent with their electoral losses and floor crossing has therefore not distorted the party system at this level either. The ANC and DA were the main beneficiaries of these losses.

The UDM has been a poor performer in floor crossing, but in the subsequent general election (2004) recovered some of its losses. The ACDP gained a seat in the first floor crossing (2003) but lost two in the second floor crossing (2005). It also lost a seat in the 2004 general election. Floor crossing is therefore certainly affecting the party system negatively in the cases of the UDM and ACDP. Their future representation as parties in parliament is not clear, with their gains and losses indicating uncertainty among their supporters and representatives about the future of these parties, but floor crossing cannot be blamed for their predicament.

Ironically, the smallest parties – which would arguably be the most vulnerable – are the most immune to floor crossing. The Freedom Front Plus, United Christian Democratic Party, Federal Alliance, Minority Front and Azapo have not been affected in terms of either gains or losses by the two floor crossings.

A second possible influence of floor crossing on the party system is that it can cause a proliferation of new parties. Five new parties emerged in parliament with the floor crossing in 2003 and three new parties emerged with the 2005 floor crossing. Of these parties, only the Independent Democrats survived the 2004 general election. The floor crossing in 2008 and the general election in 2009 will provide an indication of whether this is a systemic trend. At this early stage, however, it might be possible to argue that floor crossing does not cause a proliferation of new parties and that most new parties are unlikely to survive general elections. It can therefore be concluded that in relation to new parties, floor crossing causes only a temporary distortion in the party system.

A third possible influence of floor crossing on the party system is that it might negatively affect the mandate given to parties and elected representatives. In other words, it ostensibly encourages individual opportunism and distorts the proportional distribution of electoral preferences articulated by the voters. The 10% minimum threshold of party members allowed to cross the floor is a natural barrier for opportunistic floor crossing, especially in the bigger parties. In 2003 only 5.5% of the MPs were involved in floor crossing, with the number increasing slightly to 6.25% in 2005. Both percentages are low and therefore cannot substantially influence the party system in parliament. However, floor crossing has a more significant influence on public perceptions than on the party system itself and, as mentioned, these fluctuations are felt mainly by medium-size parties and not by the main components of the party system.

The party system at municipal level is differently affected by floor crossing. Although there is insufficient experience from which to draw scientifically based conclusions about floor crossing at local level, certain observations are possible.

One such observation is that the Western Cape was the centre of attention in the 2002 floor crossing with 50% of the councils being affected by it. If, however, the province is ignored for a moment, only 5% of municipal councils would have been affected by floor crossing.

From the perspective of the party system, the relevance of this scenario is that floor crossing can be used to accomplish wider political objectives, such as a realignment between political parties. In such an instance floor crossing does not instigate the realignment, but it serves as a convenient tool between elections to do so. Such dynamics are unlikely to be present at each instance of floor crossing. Where a ruling party has a very small majority or where it governs in a coalition, floor crossing has the potential to change the government. The Western Cape and Cape Town have been prone to such a scenario. This is one instance where floor crossing does have a direct and significant impact on the party system, but that effect has been limited in scope so far.

An interesting question about floor crossing at local level is whether the two electoral systems used at this level (PR representatives plus ward representatives) have a different impact on floor crossing. Does floor crossing have a greater affect on PR (list) councillors or on ward councillors? Table 9 shows the percentage of defections in each category in municipal councils by province. Three patterns appear from this:

1. Eastern Cape and Limpopo: 9% wards; 86% PR.
2. Mpumalanga, Northern Cape and North West: 29% wards; 65% PR.
3. Gauteng, KwaZulu-Natal and Western Cape: 39% wards; 54% PR.

	<i>Ward representatives (%)</i>	<i>PR representatives (%)</i>
Eastern Cape	8.8	88.2
Free State	22.9	66.6
Gauteng	41.9	52.7
KwaZulu-Natal	38.7	56.5
Mpumalanga	28.6	61.9
Northern Cape	29.2	64.6
Limpopo	9.5	85.7
North West	30.0	68.0
Western Cape	38.1	49.7

These patterns coincide with the levels of socio-economic development in the provinces: pattern 1 is represented in the 'poor' provinces and pattern 3 is represented in the 'rich' provinces. The data shows that there is a higher incidence of floor crossing in the wards in the rich provinces than in the poor provinces. In the poor provinces, floor crossing occurs mainly among PR councillors.

It is difficult to find an explanation for this phenomenon, although a direct positive correlation seems to exist between provincial socio-economic indicators and support for the ANC. As such, ANC support is solid in the Eastern Cape and Limpopo, while its support is more volatile in the Western Cape and KwaZulu-Natal. The ANC is generally not affected by floor-crossing losses. However, Gauteng, which has strong ANC support but high levels of ward defections, does not support this line of argument.

A general conclusion about this point is that PR representatives are more inclined to floor crossing than ward councillors, and a change in the electoral system in any of the three spheres of government might therefore also have an effect on floor crossing.

#### CONCLUSION

Floor crossing as a political strategy has had the most significant impact at local government level, followed by the provincial level, while appearing to be least significant at the national level. (In future this dynamic might be quite different.) Furthermore, floor crossing appears to be most relevant for the moment for politics at provincial and local levels in the Western Cape, Eastern Cape, Northern Cape and KwaZulu-Natal, with the Western Cape most affected by floor crossings at both spheres of government.

The results of floor crossing have indicated that the NNP was a net loser in the process. It suggested already in 2003 that the ANC had a better chance of winning the Western Cape in 2004 than at any time previously. (The provincial results confirmed these expectations.) In KwaZulu-Natal, however, the same tendency cannot be derived from the floor-crossing dynamics, suggesting that the ANC-IFP duality will probably continue for the foreseeable future.

#### NOTES

- 1 Giliomee H & Simkins C (eds), *The Awkward Embrace: One-Party Domination and Democracy*. Cape Town: Tafelberg, 1999, pp 15-18; Southall R & Daniel J, The state of parties post-election 2004: ANC dominance and opposition enfeeblement, in Daniel J, Southall R & Lutchman J (ed), *State of the Nation: South Africa 2004-2005*. Cape Town: HSRC Press, 2005, pp 34-35.
- 2 Independent Electoral Commission, <[http://www.elections.org.za/Registered\\_Parties/Selection\\_Party.asp](http://www.elections.org.za/Registered_Parties/Selection_Party.asp)>.

The impact of floor crossing on party  
systems and representative democracy  
in South Africa:  
Views from political parties



# African National Congress

## TO CROSS OR NOT TO CROSS THE FLOOR!

EARLIER THIS MONTH, on 8 May, our parliament convened in a Joint Sitting to celebrate the 10th anniversary of the adoption of our constitution. Such is the importance of our country's basic law, that we should use the next 12 months to popularise the constitution among the masses of our people, to improve our collective understanding of both the rights and the obligations that arise from the constitution.

This includes the moral base on which the constitution rests, which includes respect for life, for the dignity and the rights of every citizen, the right of the people to govern, and the resolution of differences and contradictions among the people by peaceful means.

This should also provide an opportunity for our parliament, our political parties and our country as a whole to discuss whatever constitutional amendments might be deemed necessary, further to deepen our democracy and otherwise improve the functioning of the democratic order, consistent with the fundamental principles entrenched in our constitution.

In this context, for some time now various opposition parties and others in our society have been raising objections to the practice of 'floor crossing' by our elected representatives. Among other things, these argue that this practice is undemocratic in that it shows disrespect for the will of the people as expressed in our regular democratic elections.

They also say that it serves to corrupt our political system, in that, allegedly, the ANC entices representatives from other parties by bribing them with positions in our movement and government.

In the course of this debate, which is partly informed by the objective to broaden general opposition to our movement, some find it easy deliberately to misrepresent the positions of our movement, seeking to entrench the view that so great is our hunger for power that we are quite ready to weaken or compromise our democracy to strengthen our hold on state power.

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This is the official ANC statement on floor crossing written by **President Thabo Mbeki**, which appeared in *ANC Today* 6(19), 19–25 May 2006.

These accusers seem to suffer from a degree of amnesia about the origins of the legislative interventions that created the possibility to ‘cross the floor’, and the issues that were debated leading to these interventions. In particular, we must remind our readers that the push for the adoption of the ‘floor crossing’ legislation came from the then Democratic Party (DP) and the DA.

In its 2002 judgement regarding the ‘floor crossing’ legislation, the Constitutional Court said, among other things:

The legislation was supported by 280 of the 324 members who voted – an 86% majority. Those voting in favour included not only members of the ANC and the NNP, but also members of the DP...

It also appears from the (parliamentary) report that a number of representatives of the political parties, including the DP, the NNP, the PAC and the ACDP, argued for an absolute freedom to cross the floor. The ANC and the IFP seem to have been the only parties in favour of the restrictions on defections imposed by item 23A (of the constitution).

We discussed the ‘floor crossing’ issue in a ‘Letter from the President’ published in *ANC Today* 4(38), of the week 24–30 September, 2004. We would now like to recall what we said in this letter.

The two-week period allowing local government councillors to ‘cross the floor’ to other parties or form new political organisations also fell within this same month of September. Many councillors therefore took this opportunity to change their various affiliations, joining or forming other parties or political organisations.

Our constitution, adopted in 1996, provided for the adoption of legislation that would regulate such floor crossing. Those who negotiated our constitution, the Constitutional Assembly itself, as well as the Constitutional Court, not only found nothing wrong with the phenomenon of ‘crossing the floor’, but also thought it might be necessary.

Not too long after the constitution was adopted, some of the opposition parties started agitating for the passage of the floor crossing legislation allowed by the constitution. Recently our Deputy President, Jacob Zuma, told the story of how the then Democratic Party (DP) had approached and shown him draft legislation it had prepared, to speed up the adoption of the floor crossing legislation.

The ANC engaged in a protracted internal debate about this matter, seeking to arrive at what it would consider to be the best outcome for our democracy and country.

Then, as now, our electoral system governing the election of the members of the national and provincial legislatures is characterised by the two features of party lists and proportional representation.

Because of this, the number of representatives each party has in these legislatures reflects the level of support each of the parties enjoys among the people.

As the ANC debated the desirability or otherwise of the adoption of the floor crossing legislation, the point was made very strongly that such floor crossing would undermine the will of the people. It was argued, correctly, that our movement had to adhere to the vision contained in the Freedom Charter, that 'The People Shall Govern'.

Accordingly the point was made that, at all times, the number of party representatives in the legislatures should reflect the strength of the party as indicated in democratic elections. Inevitably the floor crossing would therefore breach the principle and practice that the people shall govern, resulting in some parties having a disproportionately larger representation, or vice versa.

Contrary to this, the point was equally strongly made that ours was a very young democracy. Inevitably there would be a fair degree of volatility and dynamism in terms of the social and political consciousness of many of our people. The point was made, for instance, that it would take some people time before they outgrew the negative and false perceptions of the ANC they had been fed by the apartheid regime.

Those perceptions had been part of the body of 'white fears' which our movement deliberately and consciously addressed in the period before and after 1994. It was therefore argued that it would take time for these fears to disappear, as essentially white South Africa came to understand that it had nothing to fear from democracy, non-racism and our liberation movement.

Nevertheless, it was clear that these attitudes would necessarily change, as those who had fears in the past experienced the security provided by a democratic and non-racial South Africa. As a consequence of that experience, they might, naturally, change their political affiliation even between the set election years.

These arguments were advanced to make the point that our political system should show sufficient flexibility, taking into account the reality of the volatility and dynamism of the evolving situation in our country. It was said that it would be incorrect to seek to freeze people's views for whole periods of five years, allowing for no political evolution except at five-year intervals.

In itself, such insistence on a relatively static system might result in a system of representation that would not be congruent with evolving popular opinion. In this regard, the point was also made that even supporters of the ANC, who had come into the movement because of their opposition to apartheid, might now want to move to other parties on the basis that these provided them with a different ideological home of their choice.

Thus ANC members could very well find themselves attracted to Liberal, Christian Democratic or other parties, reflecting similar sentiment among sections of the masses that had been happy to follow the leadership of the ANC

during the struggle against apartheid. The argument was presented that it would be incorrect to frustrate such natural evolution, on the basis of a proposition that the evolving political consciousness should only be allowed to manifest itself and make an impact on society once every five years.

Nevertheless, despite this argument, it was also felt that the legislation we should propose, that would enable such new consciousness to be reflected in our legislatures, should be 'restrictive' rather than 'permissive'. Thus, while enabling people to 'cross the floor', it would set various conditions that would make such crossing somewhat difficult rather than easy.

This, it was argued, would restrict, limit and contain the possibility to ignore the will of the people, and discourage floor crossing that might be occasioned more by selfish interests rather than genuine political evolution on the part of the representatives.

Of course, inherent in all this, was the argument in favour of the exercise of the freedoms of thought, expression and association by the representatives themselves. Despite the fact of their election on the basis of their party political platform, we considered it wrong that these representatives should be denied such freedom, such that they would not have the possibility to adopt different political positions.

In this regard, it was thought important that people should not be obliged to stay as members of parties long after they had outgrown the understanding that had made them to join these parties. Therefore the fact that they might lose their seats in the legislatures would have to be dealt with, so that it does not become an obstacle to our country's political evolution.

On this basis we decided that such representatives should be allowed to cross the floor with their seats. This would free them from having to stay in organisations they felt they had outgrown, simply to preserve their membership of the legislatures.

Perhaps the biggest and most dramatic evidence of the evolution of political thought in our country has been demonstrated by the fortunes of the former Democratic Party and New National Party (NNP). In the first instance this led to them to decide to merge and form the Democratic Alliance (DA). This, in reality, is what caused the DP to approach the Deputy President as Leader of Government Business, arguing for the floor crossing legislation that would enable the DP and the NNP to form the DA.

Of course the DA did not last for very long because yet another political shift was taking place or was making itself felt. The NNP, the former party of apartheid, found that it could not successfully merge with the DP, because it had come to believe unequivocally in a non-racial democracy. On the other hand, the DP, the party of liberal democracy, had become the home of the forces and ideas that sought to resist the entrenchment of a truly democratic and non-racial society, for whom the NP had originally provided a home.

The DP was correct to have approached the Deputy President with regard to

the floor crossing legislation. It would have been incorrect to allow the absence of such legislation to distort the natural political evolution in our country, which prompted the formation of the DA, by blocking the emerging sentiments about party affiliation from finding their organisational expression. All this is also fundamental to the exercise of the freedoms we have already mentioned.

With regard to the foregoing, in 1998, a parliamentary multi-party ad-hoc committee established to consider the issue of 'floor crossing' said:

The basic argument for this approach (in favour of a qualified freedom to 'cross the floor'), is that during the term of the legislature there can be significant shifts in public opinion which do not warrant fresh elections, but which have to be represented in the legislature. By allowing groups of MPs to 'cross the floor' these shifts of opinion may be reflected in the legislature. Also, genuine differences of interpretation on what mandate the electorate gave a party, and how to implement it, can lead to splits in the party, and this should be allowed expression by way of 'crossing the floor'. 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'.

As our political parties continue to discuss the issue of 'floor crossing' in a structured manner, as we have suggested, they will have to take into account the observations we have reported above. They will also have to consider the comments made by the Constitutional Court when it considered the 'floor crossing' legislation in 2002.

The Court said:

The legislation accommodates mid-term shifts in political allegiances. Hence the 10% threshold. Bearing in mind that the purpose of the legislation is to accommodate mid-term shifts in political allegiances and the limited term for which a defecting member will remain a member of the legislature it seems to us to be neither irrational nor inconsistent with multi-party democracy to provide that the seat should be regarded as the seat of the new party for the remainder of that member's term. In the result the objection to the four Acts on the grounds that they are inconsistent with the founding values (of the Constitution) and the Bill of Rights must fail.

We trust that all our parties and other stakeholders will discuss the issue of 'floor crossing' with the sense of responsibility with which the ANC considered this matter, as reflected in the comments we made in *ANC Today* in 2004, as reported above.



# Democratic Alliance

TONY LEON

## INTRODUCTION: MULTIPARTY COOPERATION TO END FLOOR CROSSING

Floor crossing is an issue of vital importance to all democratically minded South Africans at this critical juncture in our politics – whatever else may divide our electorate at this time they are united around one common sentiment: a loud and universal loathing of floor crossing. Indeed, the antipathy towards floor crossing is shared by a number of opposition parties, and it is a heartening development that we can come together and share strategies in the spirit of multiparty cooperation.

This cooperation has already borne fruit. In June 2006 a number of the parties represented here today came together on a public platform at a very successful multiparty rally to articulate our joint opposition to floor crossing. I hope this sense of cooperation will continue, as I firmly believe it is in the interest of all parties to work together to end this practice.

Let's be blunt. Voters hate floor crossing because a valuable principle has been perverted in practice by the African National Congress (ANC). Instead of strengthening democracy, floor crossing has weakened it by betraying the will of the people. The practice alters the outcome of elections without consulting the electorate – plain and simple.

## THE DA'S ORIGINAL POSITION: FLOOR CROSSING AND THE WILL OF THE VOTERS

It is true that the Democratic Alliance (DA) was not always opposed to floor crossing. The DA originally supported the idea believing that under the proportional representation (PR) system used for national and provincial elections, floor crossing would weaken the hold of party bosses over public representatives.

The DA also believed that public representatives should, in principle, be allowed to join another party if they believed that their party was not delivering on its original mandate to the voters. Indeed, principled defection from one party to another can relieve political logjams – such as when voters feel let down by a party changing direction.

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**Tony Leon** is leader of the Democratic Alliance.

A good example of this was offered in Tafelsig, Cape Town, in June 2006. After the local elections in March, the victorious Independent Democrats (ID) councillor, Sheval Arendse, was disenchanted by his party's decision to ally itself with the ANC – against the express wishes of ID voters. Accordingly, he crossed the floor to the DA. Arendse then did the honourable thing and resigned in order to test the will of his electors in a by-election. He received a resounding mandate, winning by more than a two-thirds margin for the DA. Councillor Arendse's defection thus clearly reflected the voters' sense of betrayal by the ID.

In a ward-based voting system, therefore, floor crossing if deployed with conscience and precision remains an accurate barometer of public feeling. It was with such a sentiment in mind that in 1994, Colin Eglin of the then Democratic Party (DP) submitted a Private Member's Bill which sought to delete the clause from the constitution disallowing public representatives from switching parties while retaining their seats. The DP believed the anti-defection clause would result in representatives being seen as agents of parties, rather than the people.

This legislation was not supported by the ANC, as it was originally against floor crossing due to fears that it might prompt a split in the Tripartite Alliance. It was only after former New National Party (NNP) leader Marthinus van Schalkwyk abandoned the DA that the ANC began to see floor crossing as a tool to poach public representatives from the opposition and seize power in provinces and municipalities which had voted the DA into office.

#### FLOOR-CROSSING LEGISLATION AND THE DA'S WOULD-BE SAFEGUARDS

In principle, then, the DA originally supported floor crossing as a possible means to test voters' wishes. Yet, as instigated by the ANC the current legislation has had the exact opposite outcome – it is a perversion of an original mandate. This split between practice and principle has undermined a system which might have benefitted the voters of South Africa.

In 2000 the DA proposed legislation aimed, firstly, at making it possible for existing parties to merge. It also provided for floor crossing by individual members, but with built-in safeguards to protect the public interest as members elected by a PR rather than a constituency system do not have an original mandate from the voters.

The DA's memorandum at the time stipulated that the 'resignation of members from political parties must occur in an ordered and regulated manner to ensure [...] the wishes of the voters are not frustrated'. In order to achieve this, the first safeguard stipulated that the Independent Electoral Commission would need to be satisfied that the party which nominated a defecting representative had deviated significantly from 'the policy and principles on which that member was elected'. However, that safeguard was removed by the ANC and does not appear in any current legislation.

A second safeguard suggested by the DA was also distorted. This was the requirement that if representatives intended forming a new political formation, at least 10% of a party's members would have to agree to defect. The ANC rewrote

this, introducing the 10% clause as the requirement for all floor crossing – whether to form a new party or to join an existing one. This was the first of many instances where the ANC sought to pervert the intentions of floor crossing to suit its own partisan agenda.

#### HOW THE FLOOR-CROSSING LEGISLATION FAVOURS THE RULING PARTY

The end result of this deliberate distortion of the original way the DA intended floor crossing to be implemented is that floor crossing has been legislated in a way that unfairly favours the ruling party. Put simply, it is easier for politicians from smaller parties to cross to the ANC and harder for ANC representatives to join smaller parties. This means that floor crossing has been largely one way – from the smaller opposition parties to the ANC. In parliament, at least 29 ANC MPs – 10% of that party's caucus – would have to agree to cross the floor; for smaller formations, it is often possible for just one person to cross and still meet the requirement.

The original legislative intent behind the notion of floor crossing has been undermined in practice by the ANC – which has also managed to turn floor crossing into the worst kind of cheque-book politics. The ruling party has been able to dangle patronage and perks before unprincipled members of opposition parties, and effectively to buy representatives against the wishes of the voters.

Indeed, the pressure that the ruling party puts on black opposition representatives is a classic double-bind: members are openly taunted, while privately offered handsome incentives to join the ANC. For example, a DA MP was offered a deputy ministership by the Minister of Defence as an inducement to cross; happily, the MP refused. It is revealing that of the 32 NNP representatives in the Cape Town City Council who crossed to the ANC in 2002, 28 were rewarded with top posts, earning more than ordinary councillors' annual packages.

Floor crossing has also led to a dangerous fragmentation of the opposition, which only benefits the ruling party and disadvantages opposition voters. This fragmentation has come about as there is considerable financial reward attached to an MP who crosses the floor to form his own party, thus becoming a party leader. In terms of the current legislation, any such formation – regardless of any evidence of electoral support – would entitle the said MP to an immediate salary increase of R50,000 a year, as well as an extra R200,000 a year for support staff.

Furthermore, floor crossing leads to gross distortions in party representation, which again can be totally at odds with voters' sentiments. In 2002, after the NNP crossed to the ANC in the Western Cape legislature, their combined representation was 78.6% – which effectively handed the province to the ruling party.

That this result was completely out of step with the electorate was demonstrated at the first opportunity voters had at the polls to express themselves. In 2004, the NNP/ANC tally fell to less than half that amount – a clear illustration of voters' deep antipathy towards floor crossing and the artificially skewed balance of power it fosters.

## RESULT: DILUTION OF OPPOSITION

It is no wonder that – unhindered by the safeguards suggested by the DA in 2000 – unprincipled public representatives have turned defection into a circus. At the close of the defection period, no less than five new parties had been created in the National Assembly – many mere one-man bands whose popular support has never been tested by the voters.

Furthermore, it is depressing to see what floor crossing actually does to the political efficacy of the so-called ‘crosstitutes’. Several DA MPs who joined the ANC in 2005 were rising stars in the DA, leading national debates on policy and making names and careers for themselves. Since joining the ANC, however, they have fallen foul of the deadening hand of conformity that typifies the leading party. They have done nothing. They have fallen silent. They are only allowed to speak when the ruling party wants to attack the opposition. And so crossing the floor was an act of self-destruction, cutting short several political careers once bright with potential.

It is for these reasons that the DA has changed its attitude towards floor crossing: a sound principle has been undermined in practice, thanks to the ANC’s skewed legislation.

## ACTION NOW: DA SUPPORTS MULTIPARTY CALLS FOR THE LEGISLATION TO BE SCRAPPED

With pressure from the public and opposition parties, the DA is confident that the ANC will see reason and agree to repeal this legislation. For our part, the DA will continue to do everything possible to have this legislation scrapped. We have previously submitted a Private Members’ Bill to this effect, and we will now support the IFP’s bill which seeks similar ends. Ultimately, there are encouraging signs that reason will prevail.

President Mbeki has adopted a pragmatic attitude: in May, in response to a question I posed to him in parliament, he endorsed a review of the legislation. We trust his open-mindedness will be replicated by ANC representatives in parliament.

The DA firmly believes that all parties in opposition have a vested interest in working together to scrap the undemocratic, discredited and unpopular practice of floor crossing. We must not allow the ruling party any more leeway to divide us. Moreover, until the current legislation is changed, the DA will continue to accept representatives from other parties who cross the floor as it is in the interests of democracy that the ANC is prevented from becoming more dominant than it already is.

By cooperating on this vital question, we in opposition respond to the urgent appeal of the voters across South Africa – and we strengthen the cause of accountability, transparency and good governance, which should be the hallmark of our young democracy.

# Inkatha Freedom Party

MANGOSUTHU BUTHELEZI

## CROSSTITUTION

I used the term ‘crosstitution’ with others in response to the introduction of floor-crossing legislation in 2002. This legislation, I believe, was the most undemocratic piece of legislation – and there are some strong legislative contenders – to have been passed since 1994.

The legislation stands as a totem of the African National Congress’s (ANC) hegemonic impulse and poses a dangerous threat to our political system. Designed primarily to end the marriage between the New National Party and the Democratic Party, the legislation envisaged the removal of opposition party coalitions from office in the two provinces (the Western Cape and KwaZulu-Natal) that were then outside the orbit of ANC control.

Sadly, I recall that the legislation was originally supported by the Democratic Alliance (DA), which now recognises that it is fundamentally flawed.

Since its introduction, floor crossing has deepened the electorate’s disenchantment with the political process; has brought into question the value of voting at all; and, generally, has undermined multiparty democracy. The rotten fruits of floor crossing have been cheque-book politics and the fragmentation of an already weak opposition. Until this year, the opposition’s divided response must have looked pathetic.

During the 10-year celebration of the adoption of the new South African constitution earlier this year, I said that in order to practise liberty a nation must have a critical mass of individuals who truly grasp it. Well-constructed institutions and well-crafted texts do not of themselves ensure democracy and freedom. In the view of the foregoing arguments, floor crossing is snuffing out the lights of liberty and freedom.

## FLOOR CROSSING IS INIMICAL WITH OUR ELECTORAL SYSTEM

Floor crossing has been the source of much controversy since its introduction in

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**Dr Mangosuthu Buthelezi** is president of the Inkatha Freedom Party.

2002, with many political parties – the Inkatha Freedom Party (IFP) most consistently – arguing that the exercise disenfranchises voters by effectively allowing politicians to ‘reallocate’ votes as they see fit.

Floor crossing is particularly controversial because South African members of parliament (MPs) are elected by proportional representation (PR) and are nominated by political parties on a party list before a general election. Voters therefore vote for a political party rather than for an individual MP. However, floor crossing allows for MPs to change parties, leading to accusations that the process undermines the choices made by the electorate.

#### FLOOR CROSSING REWARDS ONLY THE RULING PARTY AND IS DESTROYING MULTIPARTYISM

Generally speaking, the ruling ANC has benefited the most from this system since floor crossing encourages ‘cherry-picking’ whereby larger parties offer more attractive positions to members of smaller parties and so lure them away from their party. The system is designed to ensure that only members of smaller parties can cross the floor while those of the largest party, the ANC, are firmly locked inside.

In 2005 five members of the IFP stole the votes given to the party the previous year: four MPs went to the National Democratic Convention (Nadeco) (a party which had never been tested at the ballot box) and one went to the DA, despite the IFP having an anti-defection agreement with that party. Interestingly, Nadeco’s modest result this year would not have returned one member in a general election. This leads to absurdity.

In a party with up to nine members, one may cross the floor as one pleases while in a party such as the IFP, floor crossing requires the conspiracy of at least three people. However, in order to cross the floor from the ANC, as many as 28 people must conspire to do so at the same time without being caught in the conspiracy before the window of opportunity opens. This makes it impossible for ANC members to cross the floor. One cannot but notice that floor crossing is therefore a one-way street aimed at either disintegrating the opposition into smaller components or creating havoc in its ranks.

#### EMPIRICAL EVIDENCE – VOTERS ARE AGAINST FLOOR CROSSING

There is also ample empirical evidence that floor crossing discourages voters from taking part in elections. According to a survey conducted by the Human Sciences Research Council most South Africans view floor crossing as a wasted vote.

The survey was conducted among 5,000 participants throughout the country in the run-up to the 2006 local government elections and the intention was to determine the state of political culture with respect to voting behaviour in South Africa.

Half of the survey respondents stated that floor crossing discourages people from voting and about 46% stated that it meant that they had wasted their vote. Less than a third (31%) indicated that floor crossing was a true reflection of a real democracy.

## NO FLOOR CROSSING WITHOUT ELECTORAL REFORM

Apart from this survey, many IFP members have repeatedly stated that as long as this legislation is on the statute books they will not vote. And while the ‘free choice’ and ‘constitutional rights’ of parliamentarians is frequently evoked, the ‘free choice’ of the voters who elected them in the first place has been completely expunged from the political discourse.

It cannot be overemphasised that there is no link between the constituency and representatives in South Africa’s present electoral system. If members want to express their freedom of expression and association they are free to resign and stand for election at the next poll under their new party banner.

The IFP cannot see how floor crossing can be separated from electoral reform because the two are fused together. The legislation should have been enacted within the context of wider electoral reform so that members can cross the floor with the moral legitimacy that they are accountable and directly linked to the electorate who put them there.

That is one of the primary reasons why I, as the Minister of Home Affairs in 2002 established the Electoral Task Team (ETT) chaired by Dr Frederik van Zyl Slabbert. The ETT recommended a mixed system with a constituency element and PR. The time is now ripe to implement the ETT’s recommendations. Failure to do so might signal that we are moving closer to a system of government that is both wicket keeper and umpire – and which in future may be prepared to move the wicket every time the bowling gets a bit rough.

Having said that, there are indications that the ruling party is now amenable to considering the abandonment of this undemocratic constitutional amendment, but it cannot be amended without the ANC’s support and blessing.



# United Democratic Movement

BANTU HOLOMISA

## INTRODUCTION

The United Democratic Movement (UDM) rejected the floor-crossing legislation from the outset and saw it as an attack upon the electoral system, and indeed on constitutional democracy. The UDM's track record in this regard is well-documented and the party in fact took the matter all the way to the Constitutional Court. The UDM therefore believes that the electoral system in South Africa is in desperate need of reform. Two major factors have highlighted this need: first, the disturbing allegations levelled against a leading candidate for South Africa's presidency; and second, the nauseating opportunism of floor crossing.

Electoral reform is necessary to introduce greater accountability into South African politics. The current low levels of accountability have led to the abuse of power and to a strong decline in citizens' trust in participatory democracy. Many voters when called upon to vote and participate more actively in our democracy are rightfully asking: 'Why bother?'

The UDM is campaigning for separate elections where voters can directly elect the president of the country as well as an electoral system that includes constituencies.

## DIRECTLY ELECTED PRESIDENT

As early as 2004 certain members of the Tripartite Alliance declared that Jacob Zuma would become president of the country irrespective of the outcome of the Shaik court trial. It is for this reason that the time has arrived for South Africans to review the electoral system, which currently makes the president of the country accountable to his or her party and not directly to the voters.

We must campaign for electoral reform so that the election of the state president can happen in the public domain, instead of being confined to the African National Congress (ANC). The essence of democracy is that all citizens should have a say in who governs them, rather than leaving this decision to an exclusive group of individuals with their own personal agendas that have nothing to do with the national interest.

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**Bantu Holomisa** is leader of the United Democratic Movement.

## CONSTITUENCY-BASED ELECTIONS

Floor crossing has created instability in South African politics. Under the current system the ruling party will increasingly become the only beneficiary. This begs the question of whether the ANC is truly interested in the concept of multiparty democracy as enshrined in the constitution, or whether it is more interested in amassing power at all costs.

What disturbs many people is that the ruling party has flatly refused to introduce a constituency-based electoral system, which would increase the accountability of public representatives. Under such a system floor crossings would trigger by-elections, thereby giving the electorate the opportunity to endorse or reject such defections. It would greatly reduce the current system of manipulation and cheque-book politics.

It is high time that the majority report released by the Van Zyl Slabbert Electoral Task Team (ETT) is approved by Cabinet, in order for our electoral system to become more accountable.

It is ironic to read in the newspapers now that Kader Asmal vetoed the findings of the ETT report. It is people like him who would have had no hope of being elected, because they can barely find their supporters in the passenger seats of their own cars. Their political survival depends on manipulating the party list system.

When public representatives are forced to campaign on individual tickets, voters will have a greater say in who represents them. I dare say that voters would not re-elect a Minister of Health who has delayed HIV/AIDS treatment, preferring to focus on a strange salad of garlic, olive oil and African potatoes. Voters would struggle to support candidates of the Youth League who do little to improve the plight of the youth, but use government tenders to enrich themselves.

There is a rising chorus of commentators complaining about the tasteless spectacle of floor crossing. Even former supporters, such as the Democratic Alliance (DA), have had a sudden attack of conscience. Recently President Mbeki also expressed willingness in parliament for this debate to be reopened, and we hear now that senior ANC parliamentarians are of the view that public participation on this matter is required. The irony is that if they had truly listened to the views of the public at large, floor crossing would never have been introduced in the first place. These newly reformed commentators won't like to hear it, but we told you so.

From the outset the UDM argued that floor crossing should only happen in an electoral system with constituencies, where each defection triggers a by-election. But alas, the ruling party and the official opposition cast principles aside, calculating how much they stood to gain before enthusiastically colluding to force constitutional amendments through parliament. The ANC, which officially opposed floor crossing in 1998, changed its mind because it could gain more than the voters trusted them with. Meanwhile, the DA now suddenly disagrees with floor crossing and wants amendments. One wonders: is this latest decision based on principle, or perhaps rather on calculations that potential losses now outweigh potential gains?

The reality is that floor crossing was introduced too soon in the development of

South Africa's democracy. The direct and inevitable result was that the ruling party grew at the expense of the opposition and without the consent of the voters. The long-term effect is to drain the opposition of human and financial resources and make opposition political office as unattractive as possible. Smaller parties have to reinvest in human resources while simultaneously facing financial constraints as a result of defections. Opposition voters quickly become disenchanted and demoralised, and potential principled dissent within the ruling party is severely curtailed because of the harsh prospects outside the ruling party. This causes a snowball-effect, which has been documented wherever floor crossing has been introduced. This is an inevitable result of the floor-crossing law and has nothing to do with 'the correctness of party policies', as the ANC would have us believe. If their policies were so correct why did the electorate not give them those public representatives in the first place? The implication of their statement is that the electorate is too stupid to understand ANC policies, but people who abandon their electoral promises are – which perfectly mirrors that famous argument of future power-abusers as described in the book *Animal Farm*: 'All animals are equal, but some are more equal than others.'

The UDM also warned that implied and actual promises of jobs and patronage would inevitably occur. Again, the international evidence for this is extensive: the ruling party will always be in a better position to offer good jobs and perks, and the ruling party will naturally exploit this advantage to poach opposition public representatives.

The UDM specifically raised these concerns during its efforts to block the floor-crossing law. However, many of the hypocrites who now lament defection purposely misconstrued the UDM's principled stance as self-concern. This illustrates how easily a correct argument can be dismissed because it does not emanate from a big party – and that is exactly why the plurality of viable parties must be protected in a democracy.

The danger of a one-party state is on the horizon precisely because the original intention of the South African constitution to allow for a variety of party political choices has now been undermined to benefit the ruling party. The last party that can make any comment about this danger is the official opposition, which helped the ANC to set the precedent of amending the constitution for pure political expediency in the first place.

The ruling party would never have adopted this law if it did not stand to gain. If the party should ever catch a whiff of viable internal dissent, the floor-crossing legislation would be amended faster than you can say 'opportunism'. For instance, what would happen when Congress of South African Trade Unions (Cosatu) and ANC MPs who do not have overwhelming 'nationalist' agendas wake up and smell the illusion of internal democracy in the ANC?

Ironically, the ANC's new sleeping partner, the New National Party (NNP), is very enthusiastic about consolidating the 'nationalist' core of the ANC and marginalising the pro-worker and social democratic groups in the Tripartite Alliance. Of course, Cosatu would deny any such possibility at this stage, but Cosatu has stated

that it was never consulted about the NNP marriage, which motivated the entire sordid floor-crossing exercise in the first place. No doubt, should such a scenario present itself, the ANC would be the first to argue that the choice of the electorate should be respected. One senses that the South African Communist Party's recent registration as a political party has already sent some in the ANC running to press the panic buttons. The succession battle has shaken the ANC's belief in its own infallibility and imperviousness to floor crossing.

#### OTHER NECESSARY ELECTORAL REFORMS

It is important to view all of these matters within the context of electoral reform in general. It is pointless to remove the cancer of floor crossing if other distortions within the electoral system remain. Two of the most glaring problems that directly benefit the ruling party are unregulated party funding and the composition of the Independent Electoral Commission (IEC).

As far as the IEC is concerned, we must recognise that internationally such bodies are composed at board level of representatives from, and who are endorsed by, all political parties. In the current South African situation, however, the ruling party uses its parliamentary majority to nominate the candidates that it prefers. Also at administrative level we must question the wisdom of Cosatu members being used as electoral officials throughout the electoral process, when Cosatu is unashamedly aligned to a political party contesting elections.

With regard to the question of political party funding, we are seeing increasing scandals about the ruling party and the millions that it receives in clandestine manner from dubious sources. These strange transactions involve government tenders and taxpayers' money as well as the exploitation of national resources. We need to regulate party funding to prevent a situation where the ruling party, the government, and indeed the country, is up for sale to the highest bidder. We are behind best international practice and urgently need to debate the manner and form of party funding. Questions that require answering include the following: Should our multiparty democracy be funded by the private sector or by the taxpayer? Is foreign funding acceptable? Is proportional funding encouraging the disproportionate growth of the ruling party? And is the process ring-fenced by government tenders?

# Independent Democrats

LANCE GREYLING

## INTRODUCTION

The Independent Democrats (ID) maintains that the debate over floor crossing needs to be placed within the wider context of electoral and party funding reform in South Africa.

Floor crossing is simply one of the most visible manifestations of a variety of issues that are currently distorting this country's multiparty democracy. The public is rightfully outraged by this practice, with many citizens expressing the view that it makes a mockery of their vote. This is based on the fact that a politician who is voted in under a certain party banner is allowed simply to take those party votes and cross to another party without any immediate electoral repercussions.

## FLOOR CROSSING AND THE ELECTORAL SYSTEM

The detrimental effects of floor crossing are exacerbated by South Africa's particular type of electoral system, namely strict proportional representation (PR). This means that a politician is not directly elected by a constituency but is indirectly elected utilising a party list. The voting public therefore has no way of tangibly expressing their agreement or disagreement with a particular representative's decision to move from one party to another.

In addition, the current electoral system does not allow for a representative's accountability to a specific voting constituency, as members of parliament (MPs) owe their allegiance and seat in the legislature to their political party.

The ID therefore maintains that South Africa's electoral system should be changed in accordance with the Van Zyl Slabbert Electoral Task Team's recommendations. This system would include a mix of PR and constituency-based electoral systems. Within such a mixed system floor crossing could possibly be considered, but only if it means that MPs who cross the floor fight a by-election in order to receive a mandate from their electorate for their change of party allegiance.

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**Lance Greyling** is chief whip of the Independent Democrats.

## FLOOR CROSSING AND SMALLER PARTIES

Currently, floor crossing is particularly damaging to the smaller parties in parliament due to the unfair clause in the legislation which stipulates that 10% of a party's caucus must agree to cross the floor in order for one representative to be allowed to do so. In effect this means that for a party with less than 10 members in a particular legislature, all of its members are entitled to cross. A larger party like the ANC, however, is protected by the fact that in the national parliament, for instance, at least 30 of its MPs would have to cross before one of its members is allowed to defect. This is one of the reasons why smaller parties are so adversely affected during floor-crossing periods.

Unfortunately the losses sustained by parties during these periods are compounded by the media unjustifiably implying that these defections are a sign of decreasing voter support. In politics, public perceptions play a significant role and it is clear that an exodus of public representatives from a certain party undermines that party's ability to prove its strength to the voting public.

These defections also have a very tangible negative effect on political parties: not only do parties lose a representative in the legislature, they also lose all the financial resources that go with that particular seat.

The ID believes that it is grossly unfair for a representative to take the financial allocations that go with a parliamentary seat to another political party – these financial allocations are based on a party's standing with the electorate and it is wrong to punish a party financially for a representative's choice to defect to another party. In many instances parties are forced to close constituency offices and retrench staff because of a member's decision to cross the floor. This in turn undermines South Africa's multiparty democracy and increases the financially precarious position that many smaller parties have to contend with.

## THE AFFECT OF FLOOR CROSSING ON POLITICAL PARTIES

It is also the ID's belief that the floor-crossing legislation adds an unnecessary destabilising element to a political party, not only during the window period but outside of it as well. Often public representatives who are supposed to be leaders in their respective parties choose to bide their time until the next floor-crossing period rather than play a constructive role in dealing with what they perceive to be the internal problems of their party. But it is a betrayal of your own party members to simply opt out of your organisation rather than deal with the fundamental problems afflicting it. Floor crossing also breeds suspicion among representatives and encourages devious behaviour on the part of political parties and politicians. This in turn reinforces the negative public perception that politicians are manipulative individuals who are only interested in their own self interest and not in serving the needs of the voters.

It is also clear that floor crossing dilutes the ideological bases of political parties. The one rationale often quoted in defence of floor crossing is that public

representatives should be allowed to move their political home if they believe that their original party has shifted from its own political ideology.

It is apparent, however, that the majority of members who cross the floor do not do so for ideological but rather for personal reasons. We have witnessed the spectacle of many MPs moving to political parties where they clearly do not share the same ideological beliefs. This consequently dilutes the ideological thrusts of political parties and undermines the level of cross-party debate.

Ultimately, though, it would be wrong to judge any public representative's personal decision with regard to floor crossing: it is a decision that MPs are unfortunately currently forced to confront and it is up to them to justify their choice to their leaders, voters and (to my mind most importantly of all) to their fellow party members.

#### CONCLUSION

The floor-crossing window period is an extremely destabilising and stressful time for both political parties and public representatives. It is characterised by deception, betrayal and a loss of faith and trust in former party colleagues. It is the ID's belief that public representatives, political parties and the voting public should not be subjected to such periods and that floor crossing has no place in our fragile multiparty democracy.

We should at this stage be considering ways to strengthen South Africa's systems of democracy and enhance the voting public's faith in them. The ID maintains that in order to achieve this we should do away with the current form of floor crossing and should institute substantial reforms to our electoral and party funding systems. Only in this way can we truly build a stable multiparty democracy system that is directly accountable to the voting public's interests.



# African Christian Democratic Party

STEVE SWART

## INTRODUCTION

This year marks the 10th anniversary of South Africa's new constitution. It is therefore appropriate to assess the impact on our fledgling democracy of legislation allowing floor crossing. A disgruntled voter, Gary, expressed himself as follows in a letter to the editor in a local magazine.<sup>1</sup>

I will not exercise my vote again until the right of floor crossing ends. I gag at the thought of supporting a party's principles only to find those political insects betraying my trust and sliding into the soiled sheets of another party that offers them a greater chance of thieving from the public purse or a bigger discount on a better Mercedes. My disgust for South African politics is fast approaching the gall I felt for the 'witbaas' politics of the past.

These are strong words, but they are indicative of the public's general feeling of outrage at floor crossing.

## A GREAT THREAT

The African Christian Democratic Party (ACDP) believes that floor crossing is one of the greatest threats to South Africa's multiparty democracy and that the constitution must be amended to introduce an anti-defection provision. However, before the ACDP is accused of being sanctimonious, I must concede at the outset that the party initially supported floor crossing when a parliamentary committee considered the concept in 1998. The ACDP subsequently realised the error of its ways and opposed the proposed package of laws intended to permit floor crossing.<sup>2</sup> The ACDP also participated in the partially successful Constitutional Court challenge in 2002.<sup>3</sup>

In a proportional list system such as ours, citizens vote primarily for the party of their choice and its leader rather than for the candidates on the party list 'whom the vast majority of voters do not know'.<sup>4</sup> It is a cardinal principle of the proportional

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**Steve Swart** is an African Christian Democratic Party MP.

representation (PR) system that elected members vacate their seats when they resign from their party or lose their party membership. This system, according to the Independent Electoral Commission, ‘ensures that the will of the people, as expressed in an election, cannot be negated and substituted by the will of an individual, or a group of individuals’.<sup>5</sup> This principle is, however, effectively negated by floor crossing.

The Constitutional Court<sup>6</sup> in its Certification judgement (albeit prior to the subsequent Constitutional Court decision allowing floor crossing) identified three important functions of the anti-defection clause:

- The clause promotes accountability of members to the electorate: ‘It obliges members of a party, who are elected by virtue of the inclusion of their names on the party’s list, to remain loyal to that party. That meets the expectation of voters who gave their support to the party.’
- The clause ‘can act as an additional check on legislators who are accountable not only to the electorate and the Legislature, but also to their parties’.
- The clause is supportive of multiparty democracy: ‘It prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate.’

However, that which the Constitutional Court warned against has in fact happened: the African National Congress (ANC) has enticed members from various opposition parties to join its ranks, resulting in a huge ANC majority in the National Assembly that is clearly not a reflection of the views of the voters.

The Constitutional Court stated that the main reasons for the inclusion of the clause disallowing floor crossing was to secure a more stable government and to avoid corruption in legislatures. Instead we have seen widespread instability at local government level, particularly following floor crossing. Rumours abound of representatives being offered incentives, financial or otherwise, to cross the floor.

In terms of international experience it is interesting to note that after endemic defections in the Indian legislatures which resulted in political instability, a qualified anti-defection clause was added. The Supreme Court of India upheld the constitutionality of these provisions as their object was to strengthen Indian parliamentary democracy by curbing unethical defections.

The Indian court stated that ‘the underlying premise in declaring an individual act of defection as forbidden is that the lure of office or money could be presumed to have prevailed’.<sup>7</sup>

As mentioned above, the ACDP joined the United Democratic Movement (UDM), the Inkatha Freedom Party (IFP) and others in the successful Constitutional Court

challenge to the floor-crossing legislation. While we won the battle, we lost the war as the ANC amended the constitution in order to bypass the Court's findings and to allow floor crossing.

When the legislation was being considered I stated in parliament that 'while the ACDP appreciates that the first window period intended to deal with the problem facing the [Democratic Alliance] on a local government level, it is undeniable that the majority party will benefit the most from this legislation'.

The 10% threshold, albeit not applied in the first window period, makes it nigh impossible for any one national ANC member of parliament (MP) to defect unless he/she is joined by some 27 others. It is significant that Local Government Portfolio Committee chairman, ANC MP Yunus Carrim, in a most frank and honest manner admitted at the time that legislation allowing floor crossing was being considered that it 'does substantially benefit the majority party'.

This has been made patently clear during the floor-crossing periods, with the ANC embarking on a feeding frenzy upon smaller parties. After the floor-crossing period in 2004, the ANC received an additional 330 councillors nationwide, mostly from the now defunct New National Party. During the 2005 floor crossing at national level, the ANC gained a substantial number of MPs. This is clearly not a true reflection of the views of the electorate and seriously threatens our multiparty democracy.

All parties represented here today have suffered as a result of floor crossing, and the voters are undoubtedly outraged at the political shenanigans exhibited during floor-crossing periods where the lure of office or financial incentives has prevailed.

#### VOTER APATHY

Floor crossing has also contributed significantly to voter apathy. How many of our party canvassers have been told by voters that it is useless to vote when people can cross the floor?

A recent survey conducted by the Human Sciences Research Council on South African voter participation in elections found that:

Floor crossing seems to be a voting deterrent and the majority of respondents were against floor crossing. In particular, the Western Cape, Free State and Northern Cape respondents as well as the high LSM respondents and the Coloured, White and Indian/Asian [respondents] were opposed to floor crossing.

#### OTHER CONSEQUENCES

While the Constitutional Matters Amendment Act, 2005 sought to lessen the negative effects of floor crossing there are still a number of unintended consequences. The act amends both the Public Funding of Represented Political parties Act, 1997 as well as the Determination of Delegates (National Council of Provinces) Act, 1998.

There are severe financial implications for parties who lose public representatives. Floor crossers show scant regard for employees; parties have to still carry employment and rental contracts. While this amendment act sought to address certain of these issues, the situation is still untenable. I am sure all parties represented here today will agree that they have lost substantial Independent Electoral Commission and parliamentary funding due to the loss of public representatives, most of whom have gone to an already bloated ANC.

Insofar as the amendment to the Determination of Delegates (National Council of Provinces) Act, 1998 is concerned, a further constitutional amendment is necessary to address the consequences of Schedule 3 Part B section 3 to the constitution, which states as follows:

3. If the competing surpluses envisaged in item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties, including any merged party as contemplated in section 61(2)(b), *with the same surplus in sequence of votes recorded*, starting with the party or merged party which recorded the highest number of votes, including combined votes in the case of a merged party, during the last election for the provincial legislature concerned, but if any of the parties with the same surplus –

- (a) came into existence on account of changes of party membership or subdivision of parties within that legislature as contemplated in section 61(2)(b); and
- (b) did not participate in the last election for the provincial legislature concerned

*the legislature must allocate the undistributed delegates in the delegation to the party or parties with the same surplus in a manner which is consistent with democracy.*<sup>8</sup>

As many may be aware, the ACDP had to compete with the newly formed United Independent Front (UIF) for a Western Cape National Council of Provinces' seat following the last floor-crossing period. A similar situation prevailed for other parties in other provinces. The provincial law advisers recommended to the Speaker that the ACDP should receive the seat as it had a proven support base and had been in existence since 1993. The ANC initially agreed with this advice, and then inexplicably did an about turn by promising the seat to the newly formed UIF party because its policies were, in its words, 'more in line with the ANC'. The ANC decided who should receive this seat as the clause – 'in a manner which is consistent with democracy' – was interpreted to mean a sitting of the provincial legislature, where the ANC enjoyed a majority.

The situation was ludicrous: the UIF had not even been registered and comprised two members of the provincial legislature who had defected from the Independent

Democrats and the UDM respectively. How could its policies at that stage be compared to that of the ACDP? A constitutional amendment is therefore required to deal with this inequitable state of affairs in order to ensure that in future cases parties compete on the basis of votes obtained at the last election, thereby excluding newly formed parties.

In fact, Justice and Constitutional Development Portfolio Committee chairperson Fatima Chohan referred to this lacuna in a speech on 23 August 2005:

It seems to me that there should be no reason why the formula in the Constitution should not be amended to reflect both these extremes that arise during floor crossing. As it stands now it does take into account the one extreme, i.e. that of merged parties, but it doesn't take cognisance of the possibility of brand new parties that emerge for the first time during a crossing period. This is then a matter that the department should also consider at an appropriate time.

Another unintended consequence of floor crossing is the sudden plethora of new parties in parliament, with individual floor-crossers suddenly becoming leaders of one-man parties – with significant financial implications for the taxpayer.

#### CONCLUSION

It is clear that floor crossing threatens our multiparty democracy and that the legislation is stacked against smaller parties. During presidential question time earlier this year, I asked President Mbeki to at least reconsider the 10% threshold which unfairly benefits the ANC, stating that:

Whilst the ACDP appreciates that members crossing the floor may have sincere issues of conscience, the unfortunate part is that floor-crossing further ingrains negative public perceptions of politicians as self-seeking opportunists who do not display backbone, consistency and discipline that voters value and expect from public representatives. The challenge will be for all members to change that perception by becoming true representatives of the people who elected us by serving their needs and not our own.

The ACDP thus supports the IFP's Private Members' Bill which seeks to amend the constitution to disallow floor crossing. The party also challenges other political parties who are serious about opposing floor crossing not to accept representatives who cross the floor. While we appreciate that this may not be politically expedient, it is undoubtedly the right thing to do to avoid being accused of hypocrisy.

Let us stand together and mobilise the overwhelming public sentiment against floor crossing; and let us support and protect multiparty democracy by bringing floor crossing to an end through the introduction of an anti-defection clause in South Africa's constitution.

## NOTES

- 1 *You magazine*, 16 February 2006.
- 2 Steven Swart, parliamentary debate, 'Evaluating the impact of floor-crossing on our democratic system', 12 September 2005.
- 3 *UDM (ACDP and others intervening) v President of the Republic of South Africa and others*, 2003 (1) SA 488 (CC) decided on 4 October 2002.
- 4 Independent Electoral Commission submission to the Justice Portfolio Committee opposing floor-crossing, p. 2.
- 5 *Ibid.*
- 6 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 4 SA 744 (CC), as quoted by Steytler in his submission to the Justice Portfolio Committee.
- 7 *Kihota v Zachilhu* 1993 SC 412.
- 8 Emphasis added.

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## Conference programme

**08:30**      **Registration**

Facilitator: Denis Kadima, EISA

**09:00**      **Opening remarks**  
*Dr Werner Boehler, Konrad Adenauer Foundation*

### **IMPACT OF FLOOR CROSSING ON PARTY SYSTEMS AND REPRESENTATIVE DEMOCRACY: GLOBAL EXPERIENCE**

**09:15**      **Strong party system as a condition for representative democracy**  
*Prof. Dr Hans-Joachim Veen, University of Trier, Germany*

**09:35**      **Weak party system and its consequence on parliamentary democracy**  
*Prof. Dr Silvana Krause, Federal University of Goiana, Brazil*

**10:55**      **Discussion**

**11:15**      **Tea/Coffee**

### **IMPACT OF FLOOR CROSSING ON PARTY SYSTEMS AND REPRESENTATIVE DEMOCRACY IN SOUTH AFRICA: POLITICAL PARTIES' PANEL**

**11:30**      **Facilitator: Dr Somadoda Fikeni, (National Heritage Council)**

**Panellists:**      Representatives of ANC, DA, IFP, UDM, ID and ACDP

Michael Masutha, ANC  
Tony Leon, Leader of DA

Dr Mangosuthu Buthelezi, President of IFP  
Bantu Holomisa, Leader of UDM  
Lance Greying, ID  
Steve Swart, ACDP

12:30      **Discussion**

13:30      **Lunch**

**IMPACT OF FLOOR CROSSING ON PARTY SYSTEMS AND  
REPRESENTATIVE DEMOCRACY: A REGIONAL PERSPECTIVE**

Facilitator: Tim Hughes, SAIIA

14:30      **The case of South Africa**  
*Prof Dirk Kotze, UNISA*

14:50      **The case of Lesotho**  
*Dr Khabele Matlosa and Victor Shale, EISA*

15:10      **A case of Malawi**  
*Samson Lembani, KAS (Malawi)*

15:30      **A case of Zambia**  
*Prof Jotham Momba, University of Zambia*

15:50      **Tea/Coffee**

16:05      **Discussion**

17:30      **Closing remarks**  
*Dr Werner Boehler, Konrad Adenauer Foundation*  
*Denis Kadima, EISA*

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- Labour Legislation under the Spotlight, 19 May 1995, Parliament, Cape Town
- Key Issues for a New System of Local Government, 29-30 May 1995, University of Pretoria
- Aspects of Constitutional Development in South Africa: The First Working Draft of the Final Constitution, 16-17 November 1995, Aventura Aldam, Ventersburg

### 1996

- Aspects of the Debate on the Draft of the New South African Constitution Dated 22 April 1996, 24-26 April 1996, Holiday Inn Garden Court, Umtata
- Policy Aspects of Local Government in South Africa, 20-21 May 1996, Senate Chambers, University of Pretoria
- How to Make Your First Million as a Female Entrepreneur, 4-5 November 1996, Holiday Inn Crowne Plaza, Johannesburg

### 1997

- Contextualising Civic Education in a Socio-Economic and Political Framework, 6 March 1997, Johannesburg
- Future Challenges for Local Government in the 21st Century, 3-5 June 1997, Conference Chamber, University of Pretoria
- Unifying Businesswomen Worldwide, 11-16 October 1997, Cape Sun Intercontinental Hotel, Cape Town
- Traditional Leadership in Southern Africa, 16-18 April 1997, Holiday Inn Garden Court, Umtata
- Constitution and Law, 31 October 1997, Faculty of Law, Potchefstroom University for Christian Higher Education

### 1998

- Young Women Entrepreneurs for Change: Leadership for the New Millennium, 23-26 February 1998, President Hotel, Bantry Bay, Cape Town
- The Constitutional Protection of Multiculturalism, 9-10 May 1998, HSRC, Pretoria
- Building a Culture of Democratic Education in a Young Democracy, 21-24 July 1998, Education Building, University of Stellenbosch
- International Conference on Political Violence in South Africa, 29-31 July 1998, Holiday Inn Garden Court, Umtata
- Europe and South Africa: A Productive Partnership into the Next Millennium, 1-2 October 1998, Rand Afrikaans University, Johannesburg
- Constitution and Law II, 30 October 1998, L J du Plessis Building, Faculty of Law, Potchefstroom University for Christian Higher Education

## 1999

- Subnational Constitutional Governance, 16-18 March 1999, *St George's Hotel, Rietvlei Dam, Pretoria*
- Economic Policy Dialogue: Business Meets Politics, *Johannesburg, South Africa 1998/1999*
- South African Business and the European Union in the Context of the New Trade and Development Agreement, 18 June 1999, *Rand Afrikaans University, Johannesburg*
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