



Submission to the Portfolio Committee on
Justice and Constitutional Development:

Constitutional Fourteenth Amendment Bill

Constitutional Fifteenth Amendment Bill

General Laws Amendment Bill

FLOOR-CROSSING

INTRODUCTION:

The consideration of the three bills before the Portfolio Committee for Justice and Constitutional Development (henceforth “the Committee”) offers an important and timely opportunity for South Africans to reflect on the bedrock of the rule of law in South Africa, the Constitution of the Republic. In 2006 the Parliamentary Review of the Constitution will coincide with celebrating ten years of democracy in South Africa, framed by the Constitution of 1996. This submission on the part of IDASA aims to contribute to the debate and review of Floor-Crossing legislated in the Constitution through the Constitution of the Republic of South Africa Amendment Act 18 of 2002 and the Constitution of the Republic of South Africa Amendment Act 21 of 2002.

In 2006 this debate was brought into focus by the submission of a Private Members Bill aimed at scrapping floor-crossing forwarded under the auspices of a number of opposition parties, and President Thabo Mbeki’s comments in the house that the “parties in Parliament really should discuss [floor-crossing]” and “say whether the conditions which necessitated the institution of this legislation... have changed such as we then need to change the legislation”. Significantly, when asked whether the annual Parliamentary Constitutional Review might be one means of discussing the matter, the President responded that “we might want to take advantage of [the Review] to look at this”¹.

In 2005 Smuts Ngonyama, the Head of the African National Congress (ANC) Presidency in 2005, wrote in the Cape Times that “All floor-crossing and other electoral legislation is open to the normal Parliamentary review processes... Should any party or sector of society feel [they are unfair] they should initiate a review process”².

¹ http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_1935387,00.html

² *ANC Committed to Democratic System*. Cape Times, 8 September 2005.

The debate around floor-crossing is an important one, but one that has largely been framed in official discourse by political imperatives. The legislation before the committee offers a forum in which the pros and cons of the regime can be debated in a non-partisan manner. This submission aims to contribute to a balanced debate on the subject without fear or favour to any political party.

South Africa's system of democratic, representative governance as framed by our Constitution is a credible and legitimate system premised on one citizen, one vote. It came to pass after a long period of anti-colonial and anti-apartheid struggle. The founding provisions of The Constitution of the Republic of South Africa (1996) include the values of "Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of government, to ensure accountability, responsiveness and openness" (Chapter 1, 1(d)). Chapter 3 of the Constitution requires that all spheres of government must "provide effective, transparent, accountable and coherent government to the Republic as a whole" (41(c)). Chapters 4, 6 and 7 of the Constitution prescribe the powers, duties and obligations of the three spheres of government in relation to ensuring participatory, transparent and accountable government. These prescriptions include the obligation on the part of Local Government to "provide democratic and accountable government for local communities", and "to encourage the involvement of community and community organisations in the matters of local government" (152 (a) and (e)).

This submission will argue that the system of floor-crossing in South Africa, in the context of a electoral system premised on proportional representation, has had the unintended effect of undermining the spirit of open, accountable, transparent and participatory democracy as prescribed by the Constitution of the Republic of South Africa.

The purpose and effect of the floor-crossing legislation is to permit the defection of members from the party under whose aegis they were elected, as well as the merger and subdivision of political parties at all levels of government.

Floor-crossing as a phenomenon connects to a number of broader, equally complex issues and debates relating to the principles of “representative”, “accountable” and “participatory” democracy, as prescribed by the South African Constitution; the merits of electoral systems (proportional representation, first-past-the-post, and mixed systems) and their application in a transitional South Africa; and the accountability of public representatives to their constituents, the voting public – to name just some of the intersections.

Floor-crossing is a feature of many so-called “established” and “developing” democracies. But such an observation can not serve as a justification of the regime, as practised in South Africa, in and of itself. One needs to examine each occurrence of floor-crossing according to the electoral system within which it is practiced and, in turn, its institutional manifestation and legal application where it occurs. This submission will assess floor-crossing as it has been legislated in South Africa.

Political Background

After the formalisation of the Constitution in 1996, floor-crossing was forbidden by the existence of an anti-defection clause embedded in the Constitution. The clause was included because the South African electoral system is a purely proportional one, except in local government where the system is a mix – proportional representation and directly elected ward councillors. It was felt at the time that permitting representatives to change parties would disturb the electoral balance chosen by the electorate.

The issue of floor-crossing came to a head with the original incarnation of the Democratic Alliance (Democratic Party + New National Party + Federal Alliance = DA) thrashed out in mid-2000, under the pressure of the looming local government elections. Due to the Constitutional anti-defection clause parties could not legally merge between elections, and as such the DA negotiations were pushed through in order for the two parental parties to be able to contest the December elections as one organisation.

Subsequent to the election the DA existed *legally* at the local level. At provincial and national level the three partners, the Democratic Party (DP), Federal Alliance (FA) and New National Party (NNP), remained legally separate – sitting separately in the legislatures; receiving separate allocations of public money, etc – but operated as one entity – caucusing together; voting as one, and so forth. In order for the DA to constitute itself as one party in these two spheres of government some form of floor-crossing would be necessary for the respective members to abandon their old incarnations and embrace their new identity. Alternatively the founding parties would have to wait for the next national and provincial poll in 2004 to formalise the relationship through the ballot box.

A bill to allow for floor-crossing started as a DA backed initiative. Veteran DP politician Colin Eglin was among those who as long ago as 1994 had championed crossing-the-floor traditions and the DA itself in 2001 submitted

proposals to Deputy President Jacob Zuma and the Speaker's Office on how best to lift the anti-defection clause.

At this stage the measure did not find favour with the ANC, as the DA political initiative was perceived within Alliance circles as the congealing of a race and class-based, right-wing political opposition³. In the aftermath of the NNP's withdrawal from the Democratic Alliance in 2001, the political gains potentially accruing to parties changed, and the ANC, together with the NNP, DA and FA, commonly foresaw potential gains to be accrued through the promulgation of floor-crossing legislation. ANC chairman Mosiuoa Lekota said that the ANC had been discussing the defection as a means "for some political realignment...and the break-up of racial power blocs"⁴.

The NNP leadership wished to extricate the party from the DA with the explicit intention of formalising alliances with the ANC at all levels of government. However the NNP was trapped in an alliance from which it could not legally withdraw until the 2005 elections at the local level.

The DP, NNP and FA's initial proposal to circumvent the anti-defection clause, now championed by the ANC, DP/DA, NNP and FA, instead of formalising the DA at the Provincial and National level, now had the potential to unravel the DA at the local level as NNP councillors elected on the DA ballot jumped ship to a reconstituted NNP. However, the DP continued to support the legislation due to the short term gains to be accrued at the Provincial and National levels where some disillusioned NNP representatives continued to promise alignment with the new DA.

However, the constitutional requirement of proportionality at local government level meant that the scrapping of the anti-defection clause at this tier of government would require a constitutional amendment. This raised the stakes of the whole issue, and brought into sharp focus the alleged political motivation behind the proposed amendment.

³ <http://www.anc.org.za/ancdocs/anctoday/2003/at13.htm#art1>

⁴ <http://www.suntimes.co.za/2001/10/28/news/news01.asp>

All members of the NNP and DP were elected to municipal councils as DA councillors and the lifting of the defection ban for a short period would allow those who wished to leave the alliance and serve as members of the NNP to do so. The alternative, the bills proponents argued, would be scores of municipal by-elections across the country.

Legislative Background

The politicisation of the process and the widespread perception in the public that the bill served the narrow expedient politics of self-serving representatives delayed the promulgation of the bill in the 2001 Parliamentary term. However in June 2002 three legislative amendments and one bill were tabled in Parliament to facilitate floor-crossing: the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (*“the Constitution Amendment Act”*); the Local Government: Municipal Structures Amendment Act 20 of 2002 (*“the Municipal Structures Amendment Act”*); the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (*“the Constitution Second Amendment Act”*); and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (*“the Membership Act”*).

The composite laws stated the following requirements for legal defection:

- The defector must be a member of the national or provincial or local government legislature
- The defection must represent not less than 10% of the total number of seats held by the party which the defector is leaving
- The defector must defect within the first 15 days in the second year following the date of an election of the legislature.

The result of defection:

- The seat held by the defector is considered that of the party to which the member defected. A party that had 5 seats by election results may end up with 20 by defection where the procedure has been correctly followed and the threshold has been met.
- Proportional representation in terms of which the allocation of seats to the Legislature or Council is made is to some degree distorted. It is possible for example for a party to lose membership of the Legislature where all members decide to defect to different political parties.

- Larger and more powerful parties are placed in a better position than minority parties because of the security that they offer by virtue of being the larger.
- Larger parties are effectively protected by the 10% threshold, as it requires a relatively large number of representatives to abscond before the defection can occur. In a small party, by contrast, a single defection could be sufficient for the window to open.

280 (or 86%) of the 320 members of Parliament present on the day the legislation came before the House voted in favour of the bills, passing them into law. The legislation was supported by the ANC, DP, and the NNP.

Constitutional Court Challenge

The passing of the four bills in Parliament was followed by an urgent application led by the United Democratic Movement (UDM) to the Constitutional Court challenging the constitutional validity of the legislation. The application (to which Idasa was Amicus Curiae) aimed to have the legislation set aside. Idasa's submission to the court argued that allowing for floor-crossing would undermine the representation of voters' interests as communicated through the proportional representation formula, in turn undermining the Constitutional principles of participatory and representative democracy. The UDM argued, amongst others that the legislation compromised the Constitutional requirement that the electoral system should allow for "*in general, proportional representation*". In addition it argued that smaller parties would be negatively affected by the legislation as it encouraged "cherry-picking" where larger parties offer more attractive positions to members of smaller parties and so lure them away from their party.

The Constitutional Court indicated that it would take a non-interventionist stance in the face of Constitutional Amendments that have been passed according to proper procedures. However, the Court held that there were certain technical deficiencies related to the legislation providing for floor-crossing at a national

and provincial level. This meant that Parliament was required to redraft such legislation and execute a constitutional amendment. The court further ruled that the first window period for crossing of the floor at local government level would go ahead on 8 October 2002.

FLOOR-CROSSING IN PRACTICE:

The immediate contradiction legislated through the promulgation of floor-crossing legislation is that South Africa's electoral systems are premised on proportional representation. Except in the ward component of the Local Government vote, South African citizens vote for parties not individuals. When representatives defect from one party to another, they distort the balance of representation dictated by citizens through the ballot box. Defection, moreover, is performed without recourse to the electorate who must wait up to four years to reassert accountability over the composition of the legislatures who govern them.

Floor-crossing thus attempted to force a square peg into a round hole by addressing a shortcoming in our electoral system. The composite unintended and systemic problems arising from floor-crossing far outweigh the intended benefits of the system as we shall see below.

Trends and Consequences

In total 1417 public representatives have crossed the floor in the five "windows of opportunity" since the inception of floor-crossing in 2002.⁵

- 55 Members of Parliament
- 60 Members of Provincial Legislatures
- 1302 Councillors

This has resulted in changes of administration in two provinces and in a plethora of municipalities.

⁵ In 2002 555 local government councillors crossed the floor; in 2003 23 Members of Parliament (MP) and 21 Members of Provincial Legislatures (MPL) crossed the floor; in 2005 25 MPs and 26 MPLs used the window of opportunity to defect to new or existing parties; and in 2007 7 MPs, 13 MPLs. Across two defection periods at local government level, an astonishing 1302 elected councillors defected from the parties they had been elected to serve.

The pattern of floor-crossing over the total period has generally resulted in the strengthening of the ruling party's representation to the detriment of the opposition. The coherency of opposition has not only been undermined by declining representation but by the further fragmentation of the opposition in legislatures. In total 17 new parties have been established at the National and Provincial level⁶. While all of these parties have not yet had the opportunity to compete in National elections, thus far only one, the Independent Democrats has been returned to either of these spheres of representation by citizens through the ballot box, calling into question the legitimacy of the other sixteen nascent political entities.

The South African system of representative democracy is premised on proportional representation (PR). Glenda Fick, Prof of Public Law at Wits University, has observed that "The South African electoral system is valued for its simplicity... its inclusivity (all votes count, there are no votes that are excluded) and its representivity (the electoral system is capable of accommodating a wide range of political parties and issues in a legislative body, thereby giving effect to multi-party democracy)"⁷. In national and provincial elections the total number of valid votes cast, constitutes 100% of the vote. Subsequent to elections, the votes accruing to each party are tallied proportionately, and seats are assigned accordingly in line with a formula for representation⁸.

When an individual MP crosses the floor it distorts the balance of representation as determined by citizens through the ballot box. Fick observed that "One

⁶ In 2003 the Independent Democrats, National Action (Nasionale Aksie), African Independent Movement, Alliance for Democracy and Prosperity, and the Peace and Justice Congress were formed in the National Assembly. The Peace and Development Party, Independent Democrats and New Labour were formed at the provincial level in 2003.

In 2005 the Federal Democrats, Progressive Independent Movement, United Party of South Africa, United Independent Front, and the National Democratic Convention were formed in the National Assembly. The United Independent Front, National Democratic Convention, the Christian Party, Alliance of Free Democrats, and the Federal Alliance were formed at a provincial level.

⁷ Fick, Glenda. "*Elections and Democracy: Is there free and fair selection of decision makers?*" in Calland, R. & Graham, P. (Eds). *Democracy in the Time of Mbeki*. (2005) Institute of Democracy: Cape Town

⁸ In the local sphere, a mixed PR and first past the post system is utilised.

difficulty presented by... South Africa's floor-crossing provisions [is to] permit the outcome of an election to be changed by the subsequent actions of individual members of the legislature between closed-list [proportional representation] elections. Such a system translates the electorate's preference for a particular party during the election into a number of seats. If politicians are subsequently able to change this number by crossing the floor, the political will of voters is flouted".⁹

In the National Assembly each of the 400 seats represents approximately 0.25% of the vote. In the 2004 elections 15,612,667 valid votes were cast in the National component of the election. Each seat thus accounted for the representation of 39,032 voters. Consequently it can be argued that the 25 MPs who crossed the floor in 2005, nullified the voter intention of 979,792 voters. These voters represented 6.25% of the valid votes cast in the 2004 election.

It should also be borne in mind that the MPs who crossed the floor in 2007 did so in the context of the second window of opportunity for the current Parliament, compounding the effects of the 2005 defection period. The 7 MPs who crossed the floor this year thus defied an additional 273,224 voters. The cumulative number of votes cast in the 2004 election that have been effectively torn up through defection now stands at 1,253,016 or 8% of the 2004 electorate. That is every 12th person in line at polling stations in 2004. It is a stunning and telling statistic. Many hundreds of thousands of other votes cast at the provincial and local level have been similarly violated.

At the local level, South African utilizes a mixed proportional representation and first past the post system. Ward councillors are directly elected by communities and are accountable to their communities at election time. If a ward councillor resigns mid-term, a by-election is held, retaining the electoral balance as dictated by voters. Absurdly, floor-crossing allows ward councillors to

⁹ Fick, G. *Op Cit.*

unilaterally change the representation accorded to their constituents without recourse to the will of the community through a by-election.

Opinion polls have shown consistently that the effects of floor-crossing do not channel public opinion. In other words, a 2% shift toward a party through floor-crossing does not necessarily reflect a concurrent shift in voter intention towards that party¹⁰.

Electoral performance can make a case for serious distortions in representation relative to the will of the electorate: the New National Party (NNP) effectively came off a base of zero in the 2002 local government floor-crossing window, and finished with representation of over 340 councillors. Yet this “increase” in representation coincided with the party’s most precipitous decline in support, as evidenced in the 2004 election results when the NNP lost 76.5% of the vote that had accrued to it in 1999.

The 2006 Local Government election results for Cape Town highlight further distortions in representation (the details of which are contained in the draft paper in your packets), but suffice to say that when held up to public scrutiny through the ballot box, the representative correction was significant. Equivalent distortions in representation are evidenced through elections data for other legislatures in all three spheres of government.

Public Money

Floor-crossing also has a substantive impact on the provision of public money to political parties through the Represented Political Parties fund as administered by the IEC.

The IEC formula for allocating funds (90% proportional, 10% equitable) is applied below. For the purpose of the exercise below a hypothetical sum of

¹⁰ See the Mail & Guardian article *South Africans are Disillusioned with Politics* at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=415>

R10million is dispersed through the fund according to the applicable formula in line with party affiliation in the National Assembly after the 2004 elections:

Equity: The equity allocation is divided among the provinces according to the proportion of seats that province has in relation to the total number of provincial seats. There are 430 seats in all nine legislatures; the Western Cape legislature which has 42 seats thus receives 9.767% ($42/430$) of the equity component of the fund to be disaggregated equitably between the parties represented in that legislature. In other words if R1m is to be distributed through the equity component of the formula, the Western Cape will receive R97, 674.42 which is then divided equitably among the parties represented in that chamber. This scenario is repeated across the other eight provinces. The equity component of the allocation formula does not take into account representation in the National Assembly.

Proportional: The proportional allocation is applied according to the total representation of each party across all nine provincial legislatures (430 seats) and the National Assembly (400 seats). For example the African Christian Democratic Party (ACDP) prior to floor-crossing in 2005 had 15 seats across the ten legislatures. The formula would assign the ACDP R18, 072.29 if R9m were allocated through the proportional component of the formula ($15/830 \times R9,000,000$).

In practice the current formula favours larger parties in the application of both the equitable and proportional components of the allocation. Parties with representation across a range provinces receive a larger sum of the equitable component of the fund than parties with regional representation. It is in this way that the ACDP receives 30% more of the equity transfer than the Independent Democrats (ID), despite the fact that the ID won more votes than the ACDP in the National component of the election. Similarly, the ACDP which had 8 MPLs in 6 legislatures prior to the floor-crossing window received a larger share of the equity transfer than the IFP who had 32 MPLs, but only in 2 legislatures. Parties with representation in the National Assembly but without any representation in the provinces (e.g. Azanian Peoples' Organisation - AZAPO) receive no money

through the equity transfer. Given that the proportional transfer weighs provincial *and* national seats equally, a party like AZAPO which received sufficient votes in the National component of the general election to garner a seat in the house (0.25% of representation, or 1/400, in the NA) receives 0.12% (1/830) of the proportional transfer, and none of the equity transfer.

Floor-crossing has further distorting effects on allocations under the current formula. The 2005 defection period resulted in a number of single member parties in both the national and provincial legislatures. The application of the equity component of the formula at provincial level means that single member parties in provincial legislatures receive larger shares of the total fund than single member parties in the National Assembly who, if they have no provincial representation, receive nothing from the equity transfer. The provincial bias of the equity component also means that a party like the United Independent Front which had 2 MPs in the National Assembly, but six MPLs across 4 provincial legislatures received a larger share of the total fund than the United Democratic Movement who have 6 MPs and 5 MPLs, but importantly only in two provinces.

The table in **APPENDIX 1** disaggregates the hypothetical dispersal of R10m through the fund as it would apply after the 2005 National and Provincial floor-crossing period.

The application of the formula shows significant distortions. One example is the fact that the Christian Party, a one person party in Mpumalanga (formed through the defection of the single representative of the Freedom Front Plus) that has never contested or won representation through an election, accrues more than three times the amount of money allocated to AZAPO, a party that won sufficient votes in the 2004 elections to win representation in the National Legislature.

Public money, in this way, is afforded to new parties formed through floor-crossing although these parties have not tested their ideas with the electorate. If citizens do not approve of new parties receiving public money, they must wait until the following election to vote them out their positions. In the interim

millions of rands of public money is arguably dispersed in a problematic and unaccountable manner¹¹.

Floor-crossing also exacts punitive costs to the public purse through the fragmentation and contingent proliferation of parties. Each new party formed through floor-crossing at National and Provincial level receives funds to support their legislative activity (administration, research, etc). The leaders of the new parties also receive higher salaries accorded to the status of “party leader”.

Public Opinion, Public Trust, Political Culture and Participation

10.3 Do you approve or disapprove of Parliamentary representatives leaving their political party and joining another party, also known as “floor crossing?”

	Black	Coloured	Indian	White	Total
Approve strongly	18	12	8	5	16
Approve somewhat	16	20	9	14	16
Disapprove somewhat	21	35	21	17	21
Disapprove strongly	41	27	58	57	42
Don't know	4	6	2	7	4
Refused	*	1	1	*	*

Source: http://www.washingtonpost.com/wp-srv/politics/polls/vault/stories/sapoll_10years.pdf

For all the reasons highlighted above, it is not surprisingly many citizens feel aggrieved by the system of floor-crossing as it is currently legislated in South Africa. A survey released by the Washington Post, Kaiser Family Foundation and Harvard University in 2004, asked citizens “Do you approve or disapprove of Parliamentary representatives leaving their political party and joining another party, also known as ‘floor crossing’?” Results indicated high levels of antipathy towards defection: 32% of respondents indicated “some” or a “strong” level of approval for floor-crossing. In contrast a total of 63% of respondents indicated “some” or “strong” disapproval of the regime. The largest group of respondents, 42% of the sample, disapproved “strongly”.

Data also suggests that floor-crossing reinforces perceptions of alienation among sections of the South African voting public. In 2004, turnout of voters in

¹¹ See <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=1681174> for additional opinion on this matter.

KwaZulu Natal and the Western Cape, the two provinces most effected by the 2003 national and provincial defection period, registered the lowest levels of voter turnout for polls across the country, 73.51% and 73.05% respectively.

When weighing up the advantages of exercising democratic citizenship with spending the morning in bed on Election Day, it must be tempting for supporters of smaller parties to veer for the latter when the net beneficiary of floor-crossing at all levels has been the ruling party at the expense, and fragmentation, of opposition *in toto*. The ANC, effectively protected by the clause requiring 10% of a caucus to cross before any individual may move, is yet to lose a national or provincial seat in any legislature through floor-crossing. Unsurprisingly, the system is perceived as unfair specifically by, but not limited to, opposition constituencies.

Voter apathy in the context of a PR system has a substantive effect on electoral outcomes. Voters impact on the result whether they vote or stay at home. If 2 people vote or if 20 million people vote, the sum of the votes is formulated into a 100% figure and divided up proportionately. When people stay at home they thus increase the proportional and representational “power” of every vote that *is* cast.

Party Politics

There is also an argument to be made that floor-crossing is bad for internal party politics in a number of ways. Political parties are generally formed by collectives of citizens who share common grievances and aspirations. These citizens band together and form a party to represent their interests, and elect leadership to advance their cause. These leaders are, in turn, accountable to their members, whom they represent and can be removed or rewarded according to the membership’s assessment of their performance. Parties then test their ideas and practices with the broader electorate to compete for representative office through democratic elections.

In the case of floor-crossing, the organic process of party formation is turned on its head. At the moment of the party's birth it has representation in a legislature or council, but no membership or grass-roots infrastructure. These structures and membership are then sought out and established through a top down inversion of established political practice.

The lack of leadership's accountability to existing structures can lead to petty squabbles and the entrenched of factionalism very soon after the establishment of a party. Access to state resources, through representation in office, can then lead to patronage politics asserting itself through the nascent structures in order to further the political cause and longevity of particular personalities and personality cults. The fractures and protracted court cases relating to formation of the National Democratic Convention (NADECO), the United Independent Movement (UIF), and, to a lesser extent, the Independent Democrats, are all a function of the perversion of party formation affected through floor-crossing.

The defection of disillusioned representatives through floor-crossing also affects existing and established political parties. The 2005 floor-crossing window saw, for example, the IFP, a party already in electoral decline, haemorrhage representation to the a new political entity, NADECO. Representatives who have left the IFP for NADECO have cited various reasons for their departure: from clashes with the leader, to a lack of vision on the part of the organisation.

The defection of these members from the IFP robbed that organisation of an important internal debate, and one with the potential to change or renew the organisation. Floor-crossing encourages disaffected members to withdraw from party disagreements, sucking the life-blood from the internal debates that drive political parties to remain relevant to the concerns, grievances and aspirations of citizens more generally.

The temptation to jump ship rather than engage one's colleagues in substantive debate appears to be an increasing reality in South African politics. This is unhealthy in the context of a developing political culture.

It is worth dwelling on the proliferation of smaller parties through floor-crossing for a moment in a more abstract manner: Every seat, in every representative forum represents the valid votes of citizens cast in the elections that underpin the entire edifice of democratic politics in this country. The representatives who occupy these seats constitute a community elected by South Africans, for South Africans, to realise the collective dreams and aspirations of our nation. Yet among them sit a small (but growing) group of people whose parties have never received a vote, or a mandate to represent anyone.

In another context and another time one might be tempted to term them petty dictators: self-appointed, unelected, beneficiaries of the public purse, masquerading under the guise of democracy, claiming the people's voice without a mandate, and representing citizens' interests as they see fit. Unfortunately this abstraction exists in our legislatures, with very real consequences.

CONCLUSION

It is our view that the system of floor-crossing as currently legislated in South Africa, within the context of an election system Constitutionally premised on proportional representation, runs contrary to the spirit of accountable, participatory and representative governance as articulated by the Constitution. While floor-crossing does not threaten the legitimacy of the democratic edifice in and of itself, it has introduced unhealthy and avoidable consequences to our developing democratic system and culture.

Opinion and electoral data highlight worrying trends that indicate the potential for public antipathy towards floor-crossing to reinforce voter apathy and perceptions of alienation within sections of the voting public.

In light of the evidence noted above, it would be prescient for the Committee to pass the legislation before them and restore the integrity of our electoral and representational systems.

That said this legislation should form part of a greater review for the Committee. In passing these three bills the Committee will essentially restore to our electoral system not only its integrity, but some of the faults that ostensibly informed the passing of the original legislation in 2002; namely, that individual representatives elected through the pure proportional, closed party list system, are beholden to their party's for their seat, and effectively can not vote on conscience. A greater review of our electoral system has the potential to revisit some of the weaknesses relating to the accountability of representatives to their constituents, and enhance South Africa's democratic edifice.

Glenda Fick notes that "Within a closed-list system [as currently legislated in South Africa], floor-crossing undermines the outcome of voting. It dilutes the electorate's expression of support for a particular political party, support expressed principally through the vote... this results in an anomalous and awkward arrangement. A way of addressing the anomaly would be to change the electoral system to one that sits less awkwardly with the constitutional

provisions while at the same time retains the benefits to democracy associated with the closed-list [proportional representation] system”.¹²

The Electoral Task Team (ETT)¹³ appointed by government to review the electoral system prior to the 2004 elections, recommended “a move to closed list [proportional representation] in multi member constituencies in time for the 2009” to “address the question of accountability... and establish a closer link between the voter and his/her representative”¹⁴. The advantages of the system proposed by the ETT was that it could proceed on the basis of existing demarcations, with a single ballot paper, retaining, in turn, many of the advantages, and simplicities inherent in our current electoral system. Moreover, the system proposed by the ETT could evolve over time, in line with the South African transition, for example to a second ballot paper, or to a strike out, or ranking system. The report is yet to be debated in Parliament. If adopted, the system proposed by the ETT would go some way towards addressing the anomalies thrown up at the intersection of the current floor-crossing regime and the electoral system as it is practised in contemporary South Africa.

Extending the electoral system currently legislated in the local sphere to the National and Provincial level, would similarly retain many of the advantages inherent to our current electoral regime, concurrently entrenching greater accountability of representatives to constituents, as well as allowing for accurate fluidity in representation as effected through by-elections. This would, however, require the scrapping or reform of floor-crossing as it is currently legislated.

South Africa has much to be proud of. The Constitution, now into its second decade of implementation, is the bedrock of a vibrant and effective democratic system. However, the evidence cited above raises serious concerns about unintended consequences arising from the First (Act 18 of 2002) and Second (Act 21 of 2002) Constitutional Amendment Acts. IDASA supports the passing of the legislation before the Committee, and would encourage all members of

¹² Fick, G. *Op Cit.*

¹³ <http://www.elections.org.za/papers/27/ETT.pdf>

¹⁴ Fick, G. *Op Cit.*

the Committee and the House to engage in the broader philosophical and theoretical issues that led us to this position. A long-term solution to the problems identified in our electoral system in the period 2000-02 that led to the passing of floor-crossing legislation, we would argue, can only be holistically addressed by twinning the Committee's current legislative process with a greater review of our electoral system. We would moreover, look forward to engaging with the Committee in any future deliberations on this subject.

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July 2008

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