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Evaluating the policy role of South African Parliament: A case of tobacco control policy

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A minor dissertation submitted in partial fulfillment of the requirements for the award of the degree of

MASTER OF PHILOSOPHY IN PUBLIC POLICY

In the Department of Political Studies

Faculty of Humanities

UNIVERSITY OF CAPE TOWN

September 2009

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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ABSTRACT

Following the global spread of the principles of constitutional democracy, scholars of comparative legislative behaviour have routinely pointed to the declining role of the legislature, emphasising the growth of executive power in the Western world. More recently, even researchers of African comparative legislatures have alluded to institutionally weak legislatures in Africa, with fewer authors optimistic about its growth. Those that have explored the behavioural characteristics of a single case legislature of South Africa have not been much more hopeful, regularly asserting that Parliament performs a limited role in shaping public policy by 'rubber stamping' executive-initiated legislation; that the 'arena' type of Parliament does not adequately represent the interests of the people since it is unable to influence the outcome of government policy; and that the oversight function is only performed with respect to the passage of executive-initiated legislation rather than overseeing the implementation of government policy.

Using the case of tobacco control policy development in South Africa, this paper has tested the above behavioural characteristics by assessing the chronological history of the legislature's interaction with tobacco control policy, including the parliamentary processes leading up to the acquiesce of legislation.

In the history of tobacco control legislation since its advent in 1993, three Acts can be identified intended to limit the tobacco-related burden of disease. The first Act was passed in 1993 by the apartheid 'legislature' which restricted smoking in enclosed public areas, and prohibited the sale of cigarettes to children under 16. Intended to significantly strengthen the apartheid era legislation, the new democratically elected ANC government passed the highly controversial second piece of legislation in 1999, which fearlessly banned all forms of tobacco advertising and promotions, and imposed further restrictions on smoking in public places. Following the active involvement of the Ministry of Health in the policy formulation (and subsequent ratification in June 2003) of the WHO global tobacco control treaty known as the Framework Convention on Tobacco Control (FCTC), South Africa passed the third Act in January 2009, which was intended to align the domestic legislation with that of the international FCTC, and simultaneously close loopholes in the previous Act exploited by the tobacco industry. The most recent Act which, inter alia, places restrictions on tobacco

company sponsorships; prohibits the sale of tobacco products to and by persons under the age of 18; and restricts the placement of vending machines was freshly promulgated by President Zuma in late August 2009.

During the legislature's consideration of the 1999 Act over a short time span of less than a year, the author concludes that the enactment was tantamount to an executive-initiated 'rubber stamp' given its inability to adequately transform the policy proposal from different sources into law and influence the outcome of government policy, pointing to its institutional weakness. Having said that, the author suggests that the consideration of the 2008 Act over a lengthy period of five years witnessed a legislature performing a far more active role in the policy process, most notably, having been instrumental (and successful) in challenging the executive's proposal which excluded provinces from the policy development process, which are constitutionally responsible for the policy development (and implementation) of some of the substantive aspects of this tobacco control legislation. Suggesting that the legislature has performed a role as a 'policy agent', and pointing to other observable instances of legislative assertion and engagements with interest groups outside of the executive, the author posits that the legislature is likely strengthening despite an executive force with policy monopoly, nonetheless, bringing the executive-legislature power balance not necessarily near, but somewhat closer to equilibrium.

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Appendix 1: Legislative History

Appendix 2: South Africa's compliance with WHO FCTC

Appendix 3: South Africa's status in the legislative procedure

University of Cape Town

- ALP** African Legislatures Project [a project of the DARU programme at the CSSR at UCT]
- ACDP** African Christian Democratic Party [political party]
- AFReC** Applied Fiscal Research Centre [private company associated with UCT]
- ANC** African National Congress [political party]
- ARTH** Association for the Reduction of Tobacco-related Harm [South African NGO]
- AsgiSA** Accelerated Shared Growth Initiative of South Africa [macroeconomic strategy]
- BATSA** British American Tobacco South Africa [company]
- CANSA** Cancer Association of South Africa
- COP** Conference of Parties [to the WHO FCTC]
- CSSR** Centre for Social Science Research [social science research unit at UCT]
- DA** Democratic Alliance [political party]
- DARU** Democracy in Africa Research Unit [of the CSSR at UCT]
- D-G** Director-General [administrative head of government department in South Africa]
- DoA** Department of Agriculture [South Africa]
- DoH** National Department of Health [South Africa]
- DSD** National Department of Social Development [South Africa]
- DTI** Department of Trade and Industry [South Africa]
- ENR** Estimates of National Revenue [of the National Treasury of South Africa]
- ETS** Environmental Tobacco Smoke [reference to second hand smoke]
- EU** European Union [political and economic union representing European countries]
- IFP** Inkatha Freedom Party [political party]
- FCA** Framework Convention Alliance [to the WHO FCTC]
- FCTC** Framework Convention for Tobacco Control
- FICA** Financial Intelligence Centre Act [South Africa]
- GEAR** Growth, Employment and Redistribution [macroeconomic strategy for South Africa]

- HEU** Health Economics Unit [of the University of Cape Town]
- IGWG** Intergovernmental Working Group [of the WHO FCTC]
- INB** Intergovernmental Negotiating Body [of the WHO FCTC]
- JRC** Joint Rules Committee
- JTI** Japan Tobacco International [company]
- NCAS** National Council Against Smoking [NGO]
- NDC** National Democratic Convention [political party]
- NNP** New National Party [political party]
- MP** Member of Parliament [often referred to as a 'Member']
- MPL** Member of the Provincial Legislature
- MRC** Medical Research Council [research advisory institution for the Department of Health]
- NA** National Assembly [lower House of Parliament]
- NCOP** National Council of Provinces [upper House of Parliament]
- PC** Portfolio Committee [name of committees in the National Assembly]
- PCH** Portfolio Committee on Health [health sector committee in the National Assembly]
- PFMA** Public Finance Management Act [of South Africa]
- PMG** Parliamentary Monitoring Group [South African NGO]
- PMI-SA** Phillip Morris International South Africa [company]
- RDP** Reconstruction and Development Programme [microeconomic strategy South Africa]
- SAMA** South African Medical Association
- SAMJ** South African Medical Journal
- SARS** South African Revenue Services [national revenue collections agency]
- SC** Select Committee [name of committees in the NCOP]
- SCSS** Select Committee on Social Services [social services sector committee in the NCOP]
- S75** Section 75 [of the Constitution: reference to the manner in which a Bill is classified]

S76 Section 76 [of the Constitution: reference to the manner in which a Bill is classified]

TISA Tobacco Institute of South Africa [organisation representing non-commercial interests of tobacco manufacturers and tobacco growers]

UCT University of Cape Town [academic]

UN United Nations

WHO World Health Organization [global health arm of the United Nations]

University of Cape Town

CHAPTER 1: INTRODUCTION

1.1 The roles of legislatures in constitutional democracies: comparative literature

From as early as 1970, and following the global spread of the principles of constitutional democracy, scholars' (mostly of comparative legislative research) have questioned the declining role of the legislature globally, highlighting the growth of executive power throughout the Western world (Crick 1970:1; Loewenberg 1972:5; Lees & Shaw 1979:vii; Murray and Nijzink 2002:15; Butler 2004:95; Calland 2006:86; Butler 2007:43). The declining role of the legislature is equally asserted in the case of Africa. Following a resurgence of democracy on the continent and increased academic interest in African parliament, more recent literature (citing Thomas and Sissokho 2005; Burnell 2002; Burnell 2003) indicates that legislative studies relating to Africa routinely point to the institutional weakness and the limited decision making role of legislatures in Africa (Nijzink, Mozaffar and Azevedo 2006:3). Fomunyoh (2008:4), however, provides a far more optimistic perspective, asserting that some progress has been made after the third wave of democratization in Africa in the 1990's with legislatures across the continent developing additional capacity to craft legislation, conduct oversight of the executive branch of government and represent citizen interests, despite human and financial resource constraints. Though most scholars' have emphasised the 'declining' role of the legislature, it appears as though little agreement existed (at least amongst early scholars) regarding the specific functions of the legislature.

In an attempt to delimit the study of legislatures and identify its functions, Loewenberg (1972:6) identifies a clear distinction between the terms 'parliament' and 'legislature', asserting that the term 'legislature' (derived from the word 'legislate') alludes to its law making function from the United States experience, whilst 'parliament' (based on its derivation from the word 'parler' meaning 'to talk') brings to mind the deliberative function, originating in the medieval assemblies of Europe.

For the purposes of this investigation, both these terms shall be used interchangeably, since a large majority of authors' do not draw such a distinction, and refer to the same political institution when using these terms. However, at least the common functions of this institution shall be clearly identified. In order to obtain clarity, the use of the term 'parliament' or 'legislature' shall refer to "a predominately elected body of people that acts collegially and that has at least the formal, but not necessarily exclusive, power to enact laws binding on all members of a specific geopolitical entity" (Mezey 1979:6).

Whilst Packenham (1970) suggests that there is little consensus on the functions that legislatures perform in Western societies since 'there are no functional delimitations to the activities of a legislature', more recent comparative literature on legislatures has attempted to respond to such an assertion and construct the behavioural activities of the legislature (Mezey 1979; Barkan 2008:125); the former based on the experiences of a broad sample of sixty legislatures (eight of which are in Africa, excluding South Africa) skewed towards the United States and European experiences (Mezey 1979), and almost 30 years later, the latter based on the experiences of legislative development amongst a more focused and limited sample of six African countries, including Benin, Ghana, Kenya, Senegal, Uganda and significantly, South Africa (Barkan 2008:125).

1.2. The three basic functions common to all democratic legislatures

Consistent with the Barkan (2008:125) typology of legislative behaviour (except for a fourth additional construct expressly relating to 'constituency service' which other scholars have included under 'representation' below), the African Legislatures Project (ALP)¹ appropriately identifies the three basic functions common to all democratic legislatures, which include the following:

1. **Law making** - the extent to which the legislature participates in the making of public policy by initiating or amending laws;
2. **Representation** - the extent of civil society input into the legislative process, and the degree to which MPs represent and serve their constituents and;
3. **Oversight** - the extent to which legislatures oversee the implementation of the national budget and ensure financial accountability of public funds.

(ALP 2009)

1.3. The policy role: a framework for evaluation

Loewenberg (1972:8-10) draws important conceptual distinctions between the 'role' and the 'functions' of the legislature, asserting that legislative 'roles' refer to the expected legislative behaviour, whereas the legislative 'functions' tends to study actual legislative behaviour and its consequences for a political system. For the purposes of this paper, we shall adopt this distinction.

Tangential to the typology in the previous section characterising common legislative functions, Mezey (1979:7) also identifies 'representation' and 'oversight' as functions of the legislature, however, does not explicitly label the 'law making' function of parliament, but rather has a broader view of the 'law making' function described by most other authors. Instead, the author refers to a 'policy making' function, placing greater emphasis on the 'policy making' activity of the legislature as the essential legislative function. Nonetheless, the author equally alludes to the law making function by describing this 'policy making' function as the invention and 'enactment' of public policy.

Though there are trivial variations in the perspectives of scholars regarding their explicit reference to whether legislatures perform a policy related role (however they choose to label it), there is consensus about the fact that legislatures may perform a role in the public policy process be it through the 'law making' (Barkan 2008:125; ALP 2009) function or the 'policy making' (Mezey 1979:7) function.

¹ The African Legislatures Project (ALP) is a collaborative project between the Centre for Social Science Research (CSSR) at the University of Cape Town and the Center for Legislative Studies at Bridgewater State College in the United States. Based on a sample of 43 sub-Saharan African countries where a legislature currently exists, the project, amongst other objectives, seeks to understand how and why African legislatures function as they do and identifies up to 400 variables that contributes to legislative performance. For further information visit <http://www.cssr.uct.ac.za/daru/projects#alp>

In Barkan's (2008:125) description of the detailed mechanics of the 'law making', 'representation' and 'oversight' functions of the legislature, a policy related role of the legislature appears to traverse all three functions, as emphasised below:

1. Law making function

To pass legislation at two levels:

- a) To pass laws (in some cases rubber stamping legislation handed down by the executive)
- b) To 'shape public policy' by crafting legislation (in partnership with or independent of the executive)

2. Representation function

The institutional mechanism through which societies make representative governance real on a day-to-day basis, where competing interests articulate and 'seek to advance their various objectives in the policy-making process' through the legislature.

3. Oversight function

To exercise oversight of the executive branch ensuring that 'policies agreed upon and passed into law are in fact implemented by the state'.

Barkan (2008:125)

Though the ALP (2009) also identifies the policy related role of the 'law making' function, it is noteworthy that Barkan (2008:125) additionally describes the legislative behaviour as one which is an executive initiated 'rubber stamp' in some instances, and importantly, points out that the shaping of public policy through the crafting of legislation can happen independently, or in a collaborative manner and hence, the policy role of which could be regarded as a 'partnership role' between the executive and the legislature.

Regarding the 'representation' function, both Barkan (2008:125) and the ALP (2009) emphasise the representative nature of the legislature (and the fact that MPs represent the people or societies through their constituencies). More significantly, the civil society input in the legislative process is equally highlighted, with Barkan (2008:125) in effect accentuating parliament's role as 'an agent' or mediator amongst competing interests in the policy making process.

From the perspective of 'oversight' as a common function of the legislature, both Barkan (2008:125) and the ALP (2009) effectively highlight a 'policy management' role performed by the legislature by emphasising the fact that policies agreed upon and passed into law (including that which relates to public finance specifically underlined by ALP 2009) are implemented by the executive.

For the purposes of this paper, and based on the fact that Mezey (1979) comparative analysis of legislative functions (despite a broader sample) tends to have a bias toward United States and European experiences, Barkan's (2008:125) rich and detailed characterisation of legislative behaviour in Africa (which includes South Africa in the sample), including the 'law making', 'representation' and 'oversight' functions, provides an appropriate framework

for evaluating the policy related role of the South African legislature, especially since the author's description of legislative functions implicitly traverses the possible policy roles of the legislature.

1.4. The perceived policy role of the South African legislature

Having considered an appropriate framework for evaluating the policy related role of the South African legislature, it would be useful to additionally assess whether Parliament's perceived role of its functions also includes a policy related role. This shall be assessed by briefly surveying official parliamentary information regarding its functions available online.

Based on the provisions of the Constitution of the Republic of South Africa (Act 108 of 1996)², the functions of Parliament detailed in a document entitled 'A beginner's guide to Parliament' are summarised as follows:

1. Passes legislation (or laws)
2. Scrutinise and oversee executive action (keep oversight of the executive and organs of state)
3. Facilitate public participation and involvement in legislative and other processes
4. To participate in, promote and oversee co-operative government
5. To engage and participate in international relations (participate in regional, continental and international bodies)

(Parliament 2009)

Although it is not the intention of this dissertation to evaluate the alignment of the South African legislature's perceived role with that of the functions identified by scholars in the legislative arena *per se*, what is most obvious is that Parliament acknowledges the three basic functions common to democratic legislatures, however, additionally regards 'co-operative government' and 'international participation' as its legislative responsibilities.

A perusal of the official parliamentary document perhaps emphasises Parliament's role as it relates to policy implementation with reference to 'co-operative government' with the executive. This function includes discharging certain statutory functions as prescribed by legislation, the appointment of public office bearers (mostly relating to institutions supporting democracy as entrenched by Chapter 9 on the Constitution), and approving instruments such as international agreements (Parliament 2009).

However, with the exception of a 'policy partnership' role as described above in the context of 'cooperative government', it does not appear that Parliament (at least not as per the document text) perceives the role of 'policy agent' or 'policy manager' implicitly identified by Barkan (2008:125).

Whilst the above functions envisaged by Parliament indicate what its perceived policy role is, the behaviour of the South African legislature need not be necessarily congruent with the normative order outlined above by the institution or by scholars.

² For more information regarding the constitutional provisions for Parliament, see Chapter 4 (Pages 42-82) of the Constitution (Constitution 1996).

1.5. Legislative behaviour in South Africa: a policy perspective

Though Barkan (2008:125) and the ALP have achieved much in developing typologies of legislative behaviour in Africa; Nijzink, Mozaffar and Azevedo (2006:3), having surveyed a limited but increasing number of literary sources specifically relating to the South African Parliament (citing Nijzink 2001; Murray and Nijzink 2003; Harvey 2002; Nijzink and Piombo 2005; Habib and Herzenberg 2005; Barkan 2005), suggest that the South African Parliament might be different in some respects to other African legislatures.

Within the broad framework of the common functions of Parliament outlined above (Barkan 2008:125; ALP 2009), the behavioral dimension of the legislature shall be explored within the boundaries of South Africa, particularly from the perspective of policy.

Offering rich insights into the behavioural mechanics of the South African legislature, a number of authors' (Murray and Nijzink 2002:73; Piombo & Nijzink 2006:66; Barkan 2005:5) contend that legislatures effectively have a limited responsibility for making laws (which is consistent with the way Parliament envisages its role as discussed above: 'to pass laws'). Many authors' suggest that laws are presented and drafted by the executive and presented to the legislature for approval. Implicit in this view is the fact that the initiative in the formulation of public policy lies primarily with the executive (Piombo & Nijzink 2006:66), with the legislature performing a limited role (if any) in what some scholars refer to as 'shaping public policy' (Piombo and Nijzink: 2006:72; Barkan 2008:125). This characterisation of executive initiated legislation in South Africa has commonly been dubbed as 'rubber stamping' (Butler 2004:95; Barkan 2005:5). It would seem that the legislature itself acknowledges having such an institutional weakness (or the perception of such a weakness) by expressing an interest in changing its perception as a 'rubber stamping' legislature in a recent Parliamentary Speakers Forum seminar intended to strengthen the legislative sector (Parliament 2009). On the contrary, others have had a more optimistic attitude towards the legislature, acknowledging that progress has been made, with the legislature transforming in the last decade from one that is merely a rubber stamp of the executive branch of government to a 'vibrant place of work' (Calland 1999:1; Fumonyoh 2008:5). Specifically acknowledging a policy related role performed in the NA and with reference to committees, others have suggested that some parliamentary committees have performed a 'very active role in developing new legislation in crucial policy areas' (Murray and Nijzink 2002:131).

Adding to the knowledge regarding a policy making role of committees, albeit with respect to the 'representation' function, Piombo and Nijzink (2006:68) suggest that the most important role of a portfolio committee is to gather the information that is needed to take informed decisions about public policy and to develop expertise in the relevant policy area. Concerning the actual policy behaviour of Parliament in reality, the authors' suggest that it could be classified as an 'arena'³ type of legislature, in the sense that it has mainly served as a public forum to debate government policy, rather than influence the outcome of government policy.

³ Making reference to a Polsby (1990) construct which classifies legislatures as 'transformative' on the one end or 'arena' on the other end of a continuum, Piombo and Nijzink (2006:71) classify the South African legislature as having a limited transformative capacity as it lacks the independent capacity to 'transform' and mould proposals from different sources into law, making it more of an 'arena' Parliament which merely 'questions and debates' government policy, rather than influencing its outcome.

With regards to the 'oversight' function, it is asserted that MPs are well aware of their obligation to hold the executive accountable for the implementation of legislation and policy. However, it is suggested that the emphasis in conducting oversight tends to fall on the phase in which legislation is passed (law making function), with less attention being paid to the way in which policies and laws are implemented (Murray and Nijzink 2002:88).

1.6. The motivation and scope: Policy role and tobacco control policy

Although a large majority of scholars have pointed to the declining role of the legislature in South Africa and its subordination to executive power, it is clear that not all are necessarily in agreement, with some expressing their optimism regarding the strengthening of the legislature.

More specifically, it is apparent that there are contradictions in the views of authors regarding whether legislatures perform a role in law making or 'shaping public policy'. Regarding the policy related behaviour relating to the 'representation' and 'oversight' functions, it would appear as though there are a limited number of literature sources, and hence, less of a discrepancy amongst authors exists.

Nevertheless, it is the intention of this dissertation to test the above behavioural characteristics of the South African legislature as it relates to its 'policy' role holistically across the legislative functions. This shall add to the existing body of knowledge regarding the policy related legislative behaviour in South Africa and in so doing, explore whether the legislature is a declining or strengthening institution.

The motivation and interest in tobacco control policy as a case originates from the fact that the development of tobacco control policy in South Africa (as discussed in detail in Chapter 4 and 5 when considering the history of tobacco control policy development) has taken a considerable amount of time. The legislative enactment of the most recent Tobacco Products Control Amendment Act (2008) happened over a lengthy period of 5 years, whilst the previous legislative enactment of the Tobacco Products Control Amendment Act (1999) happened over a short time span of a year (see Appendix 1: Legislative History). Thus, this paper seeks to explore whether such a lengthy time lapse in the latter instance is the result of the legislature having been active in the policy making process by performing a policy role, and if so, through which of its legislative functions.

As Murray and Nijzink (2002:131) postulate, Parliament has played 'an active role in developing new legislation in crucial policy areas', although it is not certain whether tobacco control is in fact one of those 'crucial' policy areas. Whilst it is possible that the policy related role performed by Parliament might vary across policy sectors, the scope of this research shall be limited to tobacco control policy within the public health sector.

This shall be evaluated using the single case of the South Africa legislature, and consider its interaction (especially the committees since they 'deal with the details of legislation and policy issues') (Piombo and Nijzink 2006:69) with tobacco control policy since the middle of 1993 when the first tobacco control legislation was initiated (RSA 1993), just before the advent of South Africa's constitutional democracy in 1994.

1.7. Hypothesis

Contrary to the assertion of a legislature in the decline, this dissertation posits that Parliament has played an active role in the policy making process as it relates to tobacco control policy, particularly as it relates to its consideration of the Tobacco Products Control Amendment Act (2008) during the 3rd Parliament.

1.8. Research Objectives

The primary objective of the research is to evaluate the extent to which the South African Parliament has performed its policy role in the execution of its legislative functions, using the case of tobacco control policy development.

More specifically, the research objectives include:

- Exploring the global development of tobacco control policy and the WHO FCTC
- Exploring South Africa's domestic implementation of the WHO FCTC, before becoming a signatory and after
- Identifying the key policy issues and actors that enter the tobacco control policy space domestically
- Exploring the history of tobacco control policy development within the executive
- Identifying the key policy issues and actors (spheres of government; national ministries or departments) that enter the policy space from the perspective of the executive
- Exploring the history of tobacco control policy from a legislative perspective
- Assessing the extent to which the legislature performs a policy role in the tobacco control policy development process
- Evaluating whether the tobacco control policy development process has contributed to an institutional strengthening or weakening of the legislature

1.9. Methodology and research design

Given the qualitative nature of this topic and its research objectives, employing a quantitative methodology (such as interviewing MPs using a standard questionnaire as an instrument) will have methodological limitations in that answers to questions would need to be provided categorically, the quality of which shall be insufficient to achieve the objectives of this dissertation.

Hence, a qualitative research methodology primarily consisting of secondary research has been adopted in order to achieve the research objectives.

1.9.1 Primary Research

Whilst the use of any anecdotal evidence in the form of observations shall not have a bearing on the output of this research, it should be noted that the author has observed, and written minutes for the public hearings and deliberations of the Portfolio Committee on Health (PCH) in the National Assembly (NA) relating to the Tobacco Products Control Bill (2008) during the 3rd Parliament as a 'Parliamentary Monitor' for the Parliamentary Monitoring Group (PMG). Additionally, as an academic observer, the author has attended the 3rd Meeting of the Conference of Parties (COP3) to the global WHO FCTC treaty hosted by South Africa in November 2008.

1.9.2 Secondary Research

The outcome of this research is informed by a systematic review of secondary research sources, consisting of published literature, policy documents (primarily WHO and that of South African government sources) and official Parliamentary information sources.

In addition, a detailed evaluation of PMG reports of committee meetings (including the Health Portfolio Committee and Social Services Select Committee) relating to the consideration of tobacco control policy amendments in 1998, 2007 and 2008 was conducted, most of the findings of which are documented in Chapter 3 whilst identifying key policy issues and actors that have an interest in the tobacco control policy development process.

1.10. Limitations

This paper is not intended to provide a critical analysis of the technical aspects of tobacco control policy or its substantive content, but rather to view tobacco control policy holistically and from an institutional (rather than procedural) perspective through a legislative lens within the context of South Africa's constitutional democracy. Thus, assessing some of the processes that have taken place during the deliberations of the Tobacco Products Control Amendment Bills may be necessary for the express purpose of determining to what extent Parliament may have been active in the policy making process by performing its legislative functions, if at all. The analysis of these processes shall be considered in depth, and is to a large extent, limited to deliberations by both committees in the National Assembly (the Portfolio Committee on Health) and the National Council of Provinces (the Select Committee on Social Services).

1.11. Research ethics

Where necessary, the actors and academics that were approached for information sources were briefed regarding the purpose of the research through official communication. All parties that have provided supervision and inputs for this dissertation shall be expressly acknowledged.

1.12. Structure of the thesis

This thesis consists of 6 Chapters. Chapter 2 aims to provide a review of the literature as it relates to tobacco control policy development at the international level, providing a historical account of its development in the global public health arena, some of its policy prescriptions, and contextualising South Africa's status in implementing its commitment to the first ever global public health treaty, known as the WHO Framework Convention on Tobacco Control (FCTC). This is evaluated through a content analysis of two pieces of South African legislation, compared with policy prescriptions laid down by the global treaty (see Appendix 2).

Beyond the global regulatory framework, Chapter 3 intends to identify the key policy issues and actors that enter the fray in developing tobacco control policy globally, but particularly in South Africa, attempting to understand the motives and dynamics of various interest groups in shaping tobacco control policy. This is assessed through a systematic content analysis of the policy inputs received during public participation processes in Parliament in 1999, 2007 and 2008 respectively.

Chapter 4 plans to isolate the executive as a variable, and view this tobacco control policy development process primarily from the perspective of government, identifying key policies issues and actors (specific government ministries or departments) that have an interest in this policy at the national level, and to a lesser extent, explore the potential policy related roles of government at the provincial and local levels.

Chapter 5 intends to isolate the legislature as a variable, and view this policy development process primarily from the perspective of Parliament through its legislative history. Thus, this chapter aims to assess the functions that Parliament has performed *de facto* in order to evaluate specifically whether this institution has performed a policy role *vis a vis* tobacco control policy.

Chapter 6 synthesises the discussion presented in previous chapters in answering the research objectives, and discusses some of the possible implications for executive-legislative relations in South Africa. This shall assist the author to understand the possible reasons for the legislature having performed a policy role (or not) in relation to the development of tobacco control policy. The concluding chapter also aims to identify possible avenues for future research.

CHAPTER 2: WHO FCTC - THE GLOBAL TOBACCO CONTROL POLICY FRAMEWORK

2.1. Tobacco control policy

Global empirical evidence (based on WHO and UN sources) estimates that the largest majority of people (4.9 million) die each year from tobacco-related illness, when compared with the number of annual mortalities from AIDS (3.1 million), diarrhoeal diseases (2.1 million), violence (1.6 million), tuberculosis (nearly 2 million), road injuries (1.2 million) and malaria (1 million) (Chapman 2007:3).

'Tobacco control' is a term that is commonly used by public health officials, government, members of civil society, academics, and less frequently, by the tobacco industry; at both international and domestic levels; who advance strategies aimed at reducing the consumption of tobacco products, and consequently, the global burden of disease that is attributed to tobacco use. The strategies advanced by tobacco control advocates, more often than not, include regulating the tobacco industry. More information regarding other non-regulatory tobacco control strategies used shall be discussed in further detail when assessing the policy issues and actors involved in the tobacco control policy development process in Chapter 3.

The question of tobacco use being harmful to the health is very rarely disputed any longer, particularly following the infamous 1964 'surgeon general' report which concluded that smoking was causally related to lung cancer (Saloojee 2000:433; Kagan and Nelson 2001:19, Rabin and Sugarman 2001:3). Subsequently, Guindon and Boisclair (2003:1) point out that more than 70,000 scientific articles link smoking, a form of tobacco use, with a pervasive range of health problems. Despite the fact that tobacco use is highly correlated with health hazards, Rabin and Sugarman (2001:3) maintain that there is a lack of any discernable support for an absolute prohibition on the sale and consumption of tobacco products.

This may be explained a host of factors, including national experiences (albeit limited to the US) with the failure of alcohol prohibition in the early twentieth century (Rabin and Sugarman 2001:4); the normative commitment to freedom of choice (Rabin and Sugarman 2001:4); the dependency of many governments on the tax revenue generated by the tobacco industry (the magnitude of such revenues is revealed in Chapter 4 under the discussion on the National Treasury), or the power of tobacco industry lobby groups, which is, naturally, a more frequently cited explanation amongst tobacco control advocates (some of which include government) (Saloojee 2000:430; Yach 2009).

Not surprisingly, however, there is consensus amongst scholars of tobacco control that a *laissez-faire* attitude towards tobacco, and by extension, the tobacco industry, would *not* achieve the desired outcome of reducing the global burden of disease, and that governmental intervention to control tobacco use is not only a legitimate strategy, but essential (Sugarman 2001:245; Chapman 2007:25; WHO 2008; Yach 2009). Whilst this may have been the envisaged response amongst public health scholars to the growing worldwide epidemic of tobacco-related diseases *de jure*, Chapman (2007:3) makes a strong case regarding the failure to create a sense of urgency for a *de facto* response amongst policy makers, the media and the public, which is blamed on poor public health advocacy.

2.2. Rationale for the WHO FCTC

The perceived lack of efficacy amongst national and local governments as sources of official tobacco control policies, as well as the consequences of globalization (including the growing economic and political power of international tobacco companies and the growing cross-border peril exemplified by cigarette smuggling) resulted in calls for the formal regulation of tobacco on a global basis. Taking the policy lead, the World Health Organization (WHO) launched a major effort as early as 1993 intended to culminate in the adoption of an international tobacco control treaty (Sugarman 2001:245; WHO 2008).

Ten years later, such a vision has translated into reality, following the unanimous adoption by 147 member countries of an international treaty known as the WHO Framework Convention on Tobacco Control (FCTC) at the 56th World Health Assembly (WHA) in Geneva, Switzerland, since 16 June 2003, after four years of intergovernmental negotiations. To date, a total of 166 member countries having ratified the treaty, legally binding the committed member states to the FCTC (WHO 2009).

The Tobacco Free Initiative (TFI) Secretariat of the WHO was formed with the express purpose of minimising the global tobacco burden by “providing global policy leadership in promoting the WHO FCTC; encouraging countries to adhere to its principles; and supporting them in their efforts to implement tobacco control measures based on its provisions.” Thus, it would appear that the TFI Secretariat (and WHO) have a policy management role of the FCTC, and hence, tobacco control policy globally.

Whilst the WHO FCTC has been touted as one of the most widely embraced treaties in the history of the United Nations, such an achievement in obtaining consensus amongst the many member countries with their varying interests was not without challenges. The power of the global tobacco industry lobby has regularly been cited as a major barrier to the formulation of this first ever global public health treaty (WHO 2008; Yach 2009). Initially conceptualised by Dr Ruth Roemer (USA), the idea of an international treaty was supported very early by Dr Judith Mackay (Hong Kong) and more significantly, a group of African tobacco control advocates led by the then Chairperson for the All Africa Tobacco Control Conference (1993), Dr Derek Yach, a South African former executive director of the WHO, who headed up the TFI Secretariat under the auspices of the WHO Director General (WHO 2008).

The support amongst a group of African and Asian tobacco control advocates may have been explained by the growing awareness and belief amongst public health officials regarding the increasing shift in the geography of tobacco consumption in the form of smoking from the developed industrialised world to the developing world, not excluding Africa. It is currently estimated that 82% of the world’s tobacco smokers live in developing countries (Shafey et al. 2003:7; Lokshin & Beegle 2006), with other tobacco control scholars maintaining that the use of tobacco in Africa has been relatively uncommon until approximately a decade ago when “Africa became a prime target for transnational tobacco companies market expansion activities” (Oluwafemi 2003:27).

2.3. Policy prescriptions of the WHO FCTC

Whilst this paper is not intended to evaluate the merits or demerits of the technical aspects of tobacco control policy, outlining the broad policy prescriptions of such a global legal instrument as the WHO FCTC is relevant to contextualise which issues have been points of contention amongst various interest groups (discussed in detail in Chapter 3), which sometimes may have had the net effect of delaying the policy formulation of such a global treaty, not to mention its domestic implementation.

At the 1st session of the Conference of the Parties to the WHO FCTC (COP1) in February 2006, a guide to the domestic implementation of the FCTC was presented to all Parties to the treaty, which is further testimony of the policy management responsibility that the TFI accepts. More recently, it appears as though the Framework Convention Alliance (FCA) made up of over 350 mostly non-governmental organizations globally, specifically performs a 'watchdog function' for the FCTC and shares such a policy oversight responsibility with the WHO globally (FCA 2009)⁴.

The universal strategic 'action plan' of the FCTC outlined the domestic recommendations for implementing key tobacco control measures, which are detailed below:

- Ban tobacco advertising, promotions and sponsorship no later than 5 years after entry into force (Article 13)
- Within 3 years of entry into force, require government approved rotating health warnings on tobacco packaging that: cover at least 30% and preferably 50% of the principal display areas (e.g. front and back), (which) may include pictures or pictograms, and must be in the principle language or languages of the Party (Article 11)
- Ban the use of misleading and deceptive terms (such as "light," "mild," "low tar") no later than 3 years after entry into force (Article 11)
- Protect people from second-hand smoke. In practice this will require banning smoking in all indoor workplaces and public places (Article 8)
- Increase tobacco taxes and ban or restrict the sale of duty-free tobacco products (Article 6)
- Require all tobacco packages and packets to bear a clear distinction of origin and final destination market, in order to discourage smuggling (Article 15)
- Include tobacco cessation services in national health programmes (Article 14)
- Ban the distribution of free tobacco products (Article 16.2)

(WHO 2006)

In the case of South Africa, it was the intention of the Department of Health to align its domestic tobacco control policy with the FCTC, and hence implement its commitment domestically to such a global treaty, spurring the legislative amendments in late 2003 which culminated in the Tobacco Products Control Amendment Act (2008).

⁴ For a less legal text of the policy prescriptions outlined in the 'Domestic Guide to the implementation of the WHO FCTC' agreed to at COP1, see the FCA (2006) at <http://www.legco.gov.hk/vr04-05/english/bc/bc61/papers/bc610210cb2-1066-1e.pdf> version.

2.4. South Africa's implementation of the WHO FCTC

In order to assess South Africa's implementation of the WHO FCTC, a detailed analysis was conducted prior to South Africa becoming a signatory to the WHO FCTC on the 16 June 2003 (RSA 2003), and after as indicated in Appendix 2. Specifically, the policy content of the tobacco control legislation prior to 2003 (Tobacco Products Control Amendment Act, 1999) and the policy content of the legislation after 2003 (Tobacco Products Control Amendment Act, 2008) has been compared with the policy prescriptions of the 'domestic guideline for the implementation of the WHO FCTC' outlined above.

Prior to the signing the global public health treaty, South Africa would have already partially complied with Article 13 relating to advertising, promotions and sponsorship by banning advertising only (RSA 1999:8). After becoming a signatory to the FCTC, South Africa has fully complied with Article 13, having additionally banned tobacco promotions and sponsorship (RSA 2009:6).

Regarding Article 11 which makes provisions for the packaging and labelling of tobacco products, South Africa partially complied with the prescript by passing regulations mandating 'strong, prominent, rotating health warnings on tobacco products' (Saloojee 2000:434) before assenting the global treaty, and after, has prepared for further compliance by empowering the Minister of Health to regulate on the format of information on the packaging, including pictorials. Specifically, the use of 'misleading and deceptive terms' (such as "light", "mild" and "low tar") has seen South Africa complying fully with the global policy after becoming a signatory (RSA 2009:8). In addition, it banned the free distribution of tobacco products as early as 1999, fully complying with the Article 16.2 of the FCTC.

Regarding protections introduced by the global instrument to protect people from second hand smoke (including smoking in indoor workplaces and public places) (Article 8), South Africa complied fully with this policy prescript (for which it became infamous in 1999 as discussed in Chapter 4) prior to becoming a signatory (RSA 1999:6).

With reference to taxation on tobacco products, South Africa has consistently since 1994 had a progressive excise taxation policy towards tobacco, thus implementing this aspect of Article 6 before becoming an FCTC signatory. However, it has failed to comply with regards to banning or restricting the duty free sale of tobacco products.

Other aspects where South Africa has failed to comply (before or after being a signatory) include efforts introduced to minimise the illicit trade in tobacco products (Article 15) and include tobacco cessation services in the national health programmes (Article 12) (RSA 1999; RSA 2009).

In the final analysis, it would seem that South Africa has demonstrated remarkable leadership by introducing legislative amendments with many of the provisions of the FCTC prior to adopting it (advertising, packaging, free distribution, tobacco taxation and smoking in public places) and after (promotions, sponsorship, empowering the Minister with further powers to regulate).

2.5. Conclusions

It would seem that global tobacco control policy advocates have achieved much in adopting a regulatory approach globally to tobacco control despite the power of tobacco industry forces against such a public health treaty.

Culminating in the formulation of a global public health treaty to control the tobacco epidemic, the WHO FCTC outlines a series of fairly stringent policy prescriptions for signatories of the treaty to adopt domestically, the consequences of which is likely to be far reaching for multinational tobacco corporations.

South Africa's widespread implementation of the WHO FCTC domestically prior to ratifying the treaty is perhaps an indicator of the political commitment South Africa has towards tobacco (discussed in further depth in Chapter 4). More importantly, the extensive implementation of a large majority of the FCTC policy prescripts prior to becoming a signatory (many of which are highly controversial as will be explored in Chapter 3) appeared to take less than a year during the 1st Parliament (1994-1999), whilst the domestic implementation of the fewer policy provisions after becoming a signatory to the global instrument has taken almost the whole duration of the sitting of the 3rd Parliament (2004-2009).

Is the legislature perhaps playing a more active role in the policy making process in the 3rd Parliament compared to the 1st Parliament?

This chapter has largely discussed the global regulatory approach towards tobacco control, in which some policy issues have been identified at the global level. Chapter 3 shall discuss a number of other policy options that are used as instruments of tobacco control policy, and in so doing, shall clearly delineate the policy issues and policy actors that might be unique to the South African tobacco control policy space.

CHAPTER 3: KEY POLICY ISSUES AND ACTORS IN THE TOBACCO CONTROL POLICY DEVELOPMENT PROCESS

3.1. A broad framework for identifying policy issues

Scholars of tobacco control policy implicitly identify a host of policy options or strategies that are used to control the tobacco epidemic, which are summarised as follows:

1. **Regulatory strategy** (Sugarman 2001: 245 discussed in Chapter 2)
2. **Tobacco product taxation** (Chaloupka et al. 2001:39; Van Walbeek 2005)
3. **Marketing constraints** (Slade 2001: 72; Chapman 2007:174)
4. **Tobacco harm reduction (including smoking cessation)** (Warner 2001:111; Chapman 2007:78)
5. **Checks on youth access** (Rigotti 2001: 143; Chapman 2007:150)
6. **Tobacco litigation** (Rabin 2001: 176)
7. **Curbs on second hand smoke** (Jacobson and Zapawa 2001: 207; Chapman 2007:153)
8. **Public health advocacy** (Chapman 2007:27)

Whilst this Chapter does not intend to discuss the efficacy of the tobacco control policy instruments identified above, it does provide an appropriate framework for identifying the likely issues placed on the agenda in the tobacco control policy development process, and hence, a theoretical skeleton for identifying the possible actors that are likely to emerge within the realm of tobacco control policy development.

3.2. Identifying important actors in the South African tobacco control policy space

In order to limit the scope and relevance of the above policy instruments to policy issues and actors that may be unique to the South African policy making context, a detailed analysis of the policy inputs received during the public participation processes informs the findings of this chapter. Given that the executive and legislature as actors in the policy making process are discussed at length in Chapter 4 and Chapter 5 respectively, this chapter is limited to exploring interest groups primarily residing in the policy space outside of these separate constitutional powers.

It is at this juncture in the policy making process that 'policy deliberation' (Mezey 1979:48) has occurred, where the merits and demerits of alternative proposals are discussed and debated, and amendments to formal government proposals considered.

Such deliberations took place primarily through public participation processes (which is also consistent with Parliament's constitutional obligations as entrenched by Section 42(2) and Section 59) (Constitution 1996), whereby Parliament has evidently performed part of its 'representation' function by providing a forum for 'competing interests to articulate and advance their various objectives in the policy making process' (Barkan 2008:125). However, to what extent MPs 'represent and serve' (ALP 2009) the interest of their constituents is less certain.

Throughout the legislative history of tobacco control policy development (1993-2009) discussed in detail in Chapter 5 (see also Appendix 1: Legislative History), three sets of public hearings relating to tobacco control policy have taken place in the legislature; all after the ANC-led government came into power 1994. The first set of public hearings occurred in 1998 culminating in the enactment of the Tobacco Products Control Amendment Bill (Act 12 of 1999) which was intended to strengthen apartheid era tobacco legislation (RSA 2007). The latter two sets of public hearings arose in 2007 (as part of the Section 75 procedure not affecting provinces) and 2008 (as part of the Section 76 procedure affecting Provinces) respectively (Sabinet Law 2008)⁵. The intention of the latter tobacco control policy amendments was to align the legislation with the WHO FCTC treaty obligations (as discussed in Chapter 2) and to “close loopholes in the Act exploited by the tobacco industry” (RSA 2003:14).

Having conducted a detailed analysis of all of the public participation policy inputs based on the Parliamentary Monitoring Group (PMG) reports (PMG 1998, PMG 1999, PMG 2007, PMG 2008), the actors that have participated in all three public hearing processes (some of whom have participated repeatedly) have been specifically identified, by issue, broadly within the framework of the tobacco control policy instruments outlined above. Significantly, an overwhelming number of actors participated in these public hearings (51 in 1998; 69 in 2007),⁶ highlighting the broad range of interest groups that these tobacco control policy amendments have attracted. Where role players have provided their inputs regarding this policy development beyond the policy issues identified by the policy framework above, they have been mentioned additionally.

3.3. A regulatory tobacco control strategy

Much of this tobacco control strategy has been discussed in Chapter 2 (Sugarman 2001:245) at the global (WHO) level. In order to implement South Africa’s commitment to the international public health treaty and consistent with the global tobacco control approach, South Africa can be regarded as adopting a regulatory approach domestically, by embarking on a legislative process (both before and after becoming a signatory) to amend tobacco control policy.

Through the domestic public hearings, a host of stakeholders raised objections to aspects of the proposed legislation that ‘empowered the Minister of Health to regulate’. These stakeholders included the Tobacco Institute of South Africa (TISA)⁷, Phillip Morris South Africa (PMI-SA), the Swedish Match Company and British American Tobacco South Africa

⁵ In the Chapter on Lawmaking, Murray and Nijzink (2002:75) emphasise that the National Assembly (NA), which is represented by members nationally, has the primary responsibility for Section 75 Bills. The authors’ add that national legislation dealing with matters of concurrent responsibility of both the national and provincial spheres of government are classified as Section 76 Bills. Chapter 4 discusses the implication of such a classification on provincial executives, whilst Chapter 5 discusses in depth the legislative mechanism behind which Bills are classified as Section 75 and Section 76 Bills. Appendix 3 also diagrammatically illustrates the Parliamentary procedures for Section 75 and Section 76 Bills, and how public hearings fit into the process.

⁶ These figures are minimum estimates based on a stakeholder count from Parliamentary Monitoring Group (PMG 1999; PMG 2006; PMG 2007; PMG 2008) Public Hearing reports relating to the Bill. In some cases, interest groups have participated in public hearing sessions repeatedly.

⁷ The Tobacco Institute of South Africa (TISA) regards themselves as a ‘non-commercial’ organisation that represents the common interests of tobacco product manufacturers and tobacco growers (TISA 2003).

(BATSAs). One opposition party (DA) also questioned whether the Ministry had the capacity to regulate if given such a power through the legislation. It would seem that the very first apartheid era tobacco control legislation (1993) empowered the Minister of Health to pass regulations regarding the sale and advertising of tobacco products, including prescriptions on the labeling of tobacco packaging (RSA 1993:1).

A number of MPs (primarily ANC) reminded those objecting to the Minister having the power to pass regulations that such regulations were in place since 1993, and that the latest legislative amendments sought to extend the Minister's power to regulate in certain policy areas. Surprisingly, one tobacco manufacturer supported the proposal for the Minister to have the executive power to 'regulate' as a result of a lack of patience to withstand yet another time consuming parliamentary process to amend legislation, however, suggested that consultations take place directly between the Department of Health, the tobacco industry and other stakeholders (PMG 2008).

Such a discussion regarding whether the legislation should empower the Minister to regulate in certain policy areas no doubt has a direct bearing on executive-legislature relations, the actors of which fall outside the scope of this chapter (see Chapter 4 and 5). Nevertheless, it is clear that primarily tobacco industry interest groups dominate the policy space relating to the Minister's regulatory powers, perhaps for fear of the possible unilateral regulations that could have an adverse impact on their business.

3.4. Tobacco product taxation

Rooted in the theory of economics, tobacco tax policy is an approach that is intended to influence the consumer demand of tobacco products through a price effect. It is assumed that an increase in government raised taxes on tobacco products, which is intended to be passed on to the consumer, shall influence consumer behavior and result (in theory) in a reduction in the consumption of tobacco products in society (Rabin & Sugarman 2001:5).

Whilst such a policy option aimed at influencing consumer behavior may have noble intent, not all consumers respond to price increases in the desired ways. Some pay more for tobacco products with less money to spend on other non-tobacco products. Since smoking has become disproportionately a lower income activity, poorer people who continue to smoke would bear the heaviest burden of a tax increase (Rabin & Sugarman 2001:5).

During the public hearings relating to the Tobacco Products Control Amendment Act (2008), the Health Economics Unit (HEU) of the University of Cape Town (UCT) identified the merits of tobacco taxation as a policy instrument, consistently arguing empirically that the increased prices of tobacco products as a result of taxation raised by excise duty resulted in a decrease in the total number of cigarettes sold, albeit a more marginal decrease in the total number of cigarettes consumed. The Medical Research Council (MRC), a government research institution of the Department of Health, also maintained that cigarette consumption has dropped consistently between 1993 and 2003, which is "testament to the effectiveness of the country's tobacco control policies" (PMG 1998).

Countering arguments consistently advanced by the Tobacco Institute of Southern Africa (TISA) that increasing excise taxation on tobacco products has not reduced consumption since it has ignored the unintended consequences of the illicit trade of cigarettes (estimated

by TISA to be 20 million cartons of 20 pack cigarettes per annum) which Article 15 of the WHO FCTC also seeks to address (see Appendix 2), UCT's HEU maintains that the tobacco industry should be blamed equally (with government) for the consequences of the illicit trade of cigarettes, since price increases of products were partly the result of the tobacco industry's own pricing policy of increasing the real retail price of cigarettes by much more than the real increase in the level of cigarette excise tax, which Van Walbeek (2005:86) has empirically demonstrated between 1990 and 2004. Not denying the existence of illicit trade, the UCT's HEU emphasized that such increases in the illicit trade of tobacco products were more as a result of an increase in organized crime (PMG 1998). Van Walbeek (2005:85) further maintains that the tobacco industry has an interest in exaggerating the threat of cigarette smuggling in order to minimize tax increases, and by implication, maximize company profits.

The most obvious party with an interest in tobacco product taxation would be government, as represented by its revenue collections agency (SARS) and the Department of Finance, otherwise known as National Treasury. Consistent with the WHO FCTC Guidelines (Article 6), the South African government continues to have a progressive excise tax regime with regards to tobacco products (Van Walbeek 2005:184), prior to becoming a signatory to the Treaty and after. As indicated in section 3.3 above, the interests of the executive (including National Treasury) shall be dealt with in depth in Chapter 4.

Those parties outside of the executive and legislature with an interest in tobacco product taxation as a policy instrument clearly include tobacco companies (as represented by TISA), academic institutions (UCT's HEU) and research institutions (MRC).

3.5. Marketing constraints

Also rooted in the theory of economics, marketing constraints, such as tobacco advertising controls, assumes that such constraints, be it through voluntary industry self-regulation or imposed by legislation, shall influence consumer behavior by limiting the demand for tobacco products, and hence, in theory, reduce the consumption of tobacco products in the society. This model assumes that the demand for tobacco products is shaped by the persuasive powers of advertising and promotions. Rabin and Sugarman (2001:6) caution against pushing tobacco advertising policies too far, maintaining that excessive controls on marketing efforts of tobacco companies can run afoul of the "commercial speech" protections, albeit with reference to the American Constitution.

Prior to becoming a signatory to the WHO FCTC, South Africa received much attention for its stringent enactment of the Tobacco Products Control Amendment Act (Act 12 of 1999) (Business Times 1999). It was this piece of legislation that banned all forms of tobacco advertising and promotions, and placed restrictions on tobacco sponsorship (Saloojee 2000:434; Blecher 2006:123; Asare 2009:102).

With reference to the marketing constraints proposed by the tobacco legislation amendments prior to its enactment, a number of public role players drew clear distinctions between 'advertising and promotions' and 'sponsorship', and its implications for tobacco control policy. For this reason, these marketing constraints are discussed separately below.

CHAPTER 3: KEY POLICY ISSUES AND ACTORS IN THE TOBACCO CONTROL POLICY DEVELOPMENT PROCESS**3.5.1. Advertising and promotions**

Consistent with Rabin and Sugarman's (2001:6) prediction based on the US experience and following South Africa's historical adoption of the 1993 Constitution, a significant number of role players were extremely vocal regarding the unconstitutionality of the Bill, asserting that people should have the right to freedom of expression through communication (advertising), with others emphasizing their right to smoke (UCT department's of Business Science and Economics, Witwaterstrand University Business Department, Lowveld Golden Leaf, Cinemark, Ad Agencies, an attorney representing 229 tobacco industry workers, Robertsons Foods, Council for Apostolic and Zion Churches in South Africa, Independent Newspapers Cape, Potgieterusse Tabakkooperasie, Stellenbosch University Law Faculty) (PMG 1998).

Members of the public, particularly those who would experience a direct (negative) business impact as a result of the legislation, emphasized the huge losses such a piece of legislation shall have in terms of employment and the economy (Ad Agencies, Independent Newspapers Cape, Food & Allied Workers Union, Federated Hospitality Association of Southern Africa, Corporation for Economic Research, Cinemark, Attorney representing 229 workers, Tobacco Vending Machine Association) (PMG 1998; PMG 2007).

Asserting that advertising did not influence consumers' decision to smoke, but rather led to brand choice amongst those who have already decided to smoke, academic institutions (University of Cape Town's departments' of Business Science and Economics, University of Witwaterstrand Department of Business Economics), tobacco industry players (British American Tobacco) and individual role players (Dehram Swart) were in agreement about the non-existence of a causal relationship between advertising and tobacco consumption (PMG 1998, PMG 2007).

Whilst the Tobacco Institute of South Africa (TISA) were against a total ban on advertising, they did support restrictions on advertising for the benefit of youth (see section 3.7 below for a detailed discussion on tobacco control for youth), and provided some very specific proposals, such as banning advertisements in publications having an adult readership of less than 75%; not allowing outdoor advertising (billboards) of tobacco products to be within 400 metres from schools; and raising the legal age of smoking to 18 years.

Those that were more vocal about their support of the Bill in principle were equally skeptical about whether an advertising ban would translate into reduced consumption of tobacco, particularly within the context of a developing country such as South Africa. These groups advocated that an educational campaign about the dangers of tobacco use would be more beneficial, particularly amongst the poor and less educated in society (Cinemark, University of North West) (PMG 1998).

In full support of restrictions on advertising and promotions contained in the Bill, members of civil society (National Council Against Smoking, Cancer Association of South Africa, Medical Research Council, Cape Town No Tobacco Forum, Democratic Nursing Organisation of South Africa, UCT's Applied Fiscal Research Centre, Reference Group for Health Promotion for Schools in the Western Cape, UCT's Graduate School of Business) provided their input regarding why they believed such restrictions were necessary to reduce tobacco consumption, and improve the health of the nation, with some emphasizing the

minimal impact that it shall have on the tobacco industry and the economy (PMG 1998, PMG 2007, PMG 2008).

Regarding restraints on advertising and promotions proposed by the Bill, a host of actors evidently have an interest in tobacco control policy development. The actors appear to be dominated by a range of business interest groups, including advertising agencies, media owners, business associations, academic departments teaching business and research organizations promoting business. Other interested actors included anti-tobacco advocacy groups, academic and research institutions, a trade union and a legal representative.

3.5.2. Sponsorship

Those that drew clear distinctions between ‘advertising and promotions’ and ‘sponsorship’ were of the view that sponsorship was a greater cause for concern as it promoted smoking amongst youth through the branding and coverage tobacco companies receive at events (Reference Group for Health Promotion for Schools in the Western Cape, Dehram Swart, UCT’s Graduate School of Business, Department of Health) (PMG 1998, PMG 2007, PMG 2008).

Similarly, those that were more directly affected by a possible ban on sponsorship from tobacco companies advanced their views regarding the benefits of sport sponsorship, such as its contribution to the development of young sports talent in South Africa and its contribution to making sports more internationally competitive (Associated Printing, Food & Allied Workers Union, Ocean Action, Castle Premier Soccer League). Concerned about the sustainability of sport, one group in particular urged a phased out allowance of tobacco sponsors in order to ensure adequate time was given to replace sport sponsors (Castle Premier Soccer League) (PMG 1998, PMG 2007, PMG 2008). Interestingly, the final Act took consideration of this, and was amended to read: “The Minister may prescribe exemptions for unintended consequences or the phasing out of existing sponsorship or contractual obligations.” (RSA 2009: 6)

During the more recent public hearings relating to the Tobacco Products Control Amendment Bill (2008), and in response to a proposal that a manufacturer of a tobacco product could not make any charitable contribution or sponsorship “unless it was anonymous”, a civil society role player active in tobacco harm reduction (discussed in the next section) raised the importance of transparency, highlighting the fact that business could not be conducted by keeping the identity of the donors secret (ARTH). Based on its contradiction with financial regulations in South Africa (FICA), other more obvious stakeholders (including tobacco industry manufacturers BATSA, PMI and JTI) raised objections to the anonymity of sponsorship in certain instances, including as it related to Corporate Social Investment (CSI) (PMG 2008). The final Act took consideration of this sensitivity, and was amended to read: “A manufacturer or importer of a tobacco product may make a charitable financial contribution or sponsorship, provided that such contribution or sponsorship is not for the purpose of advertisement” (RSA 2009:6).

Regarding the restraint on sponsorship as a tobacco control marketing strategy, sport related organizations and civil society actors (presumably beneficiaries of tobacco sponsorship), as well as tobacco industry companies (the sponsors) appear to equally express an interest in this policy issue.

3.6. Tobacco harm reduction (including smoking cessation)

Adopting the approach of 'harm reduction' used extensively in Europe for addressing illegal drug use, some have argued that such a policy option is equally appropriate for legal drugs (including tobacco) also, as long as the policies adopted yield "more good than harm". Harm reduction proponents urge that public health attention should also be given to smokers' for whom cessation seems beyond reach, at least for the present. The use of alternative devices for delivery of nicotine (like the patch, gum or smokeless tobacco known as 'snus'), combined with substantially reduced smoking, serves as examples of how harm reduction might be achieved. Although, from years of experience with alcohol and drugs, tobacco control authors believe that not all strongly addicted smokers' will be responsive to these techniques of quitting, or smoking less (Warner 2001:111; Chapman 2007:78).

Whilst marketing constraints (discussed in the previous section 3.5) dominated the agenda of the Parliamentary public hearings relating to Tobacco Products Control Act (1999), harm reduction and smoking cessation freshly appeared on the agenda during the latter set of public hearings relating to the Tobacco Products Control Act (2008). This is most likely explained by the fact that smoking cessation (although not 'harm reduction' *per se*) is recognised as a means to facilitate a decrease in tobacco consumption in the WHO Guidelines for the domestic implementation of the FCTC, and that the 2008 legislation is intended to be aligned with the WHO FCTC. The Department of Health, however, reported that no provisions have been made in the legislation to include national health programmes for smoking cessation (outlined by Article 12 of the WHO FCTC), though it was emphasized that some resource provision had been made for smoking cessation through the human resources programme of the Department of Health's 2007/08-2009/10 budget (PMG 2007).

Emphasising their support of the regulations, BATSA maintained that 'harm reduction' was an established public health priority, citing other product categories in which such a policy approach was adopted, including condom distribution, regulation of fat content in foods, healthier food options, safety glass and air bags in motor vehicles. Urging the Parliamentary committee to support harm reduction and give South Africa the opportunity to take the lead in the world by regulating tobacco harm reduction, BATSA highlighted the number of possible strategies for reducing tobacco harm, including lower tar and nicotine intake, reducing the number of smokers, eliminating under age consumption, limiting public exposure to Environmental Tobacco Smoke (ETS), and alternative methods of nicotine ingestion such as Swedish-styled snus (PMG 2008), which BATSA has incidentally begun testing in the South Africa market since 2007 as indicated by a Parliamentary study tour report (Parliament 2009:10).

Much of the discussion was dominated by snus, a 'smokeless' tobacco product promoted as being "up to 98%" (Swedish Match Company) safer than smoking cigarettes (PMG 1998; PMG 2007). Based on the successful case of Sweden (as the highest snus consumers in the world), the Swedish company boasted that the Swedes are in 'good health' with the lowest lung cancer mortality rate, and the second lowest oral cancer levels in the European Union (EU). Differentiating 'snus' from 'American snuff' and 'South African nasal snuff', the Swedish Match Company further maintained that switching to snus helped smokers to quit (implicitly identifying their product as a 'harm reduction' modality), and that Sweden was the only country in the western world that had reached the WHO's goal of reducing the percentage of smokers in the adult population to below 20%. The Swedish Match Company

urged the special recognition of snus by distinguishing between ‘smoking tobacco’ and ‘non smoking tobacco’ in the definition of ‘tobacco product’ in the legislation (PMG 2007). However, it would seem that such suggestions were in vain, and not factored into the final Tobacco Products Control Amendment Act (2008) (RSA 2009).

Whilst tobacco companies presented what appeared to be relatively new knowledge to MP’s regarding the alleged harm reduction benefits of snus, it was no doubt met with much resistance from various quarters, including academic and medical professionals and an anti-tobacco advocacy group (Karolinska University Hospital-Stockholm, University of Pretoria, National Council Against Smoking). Though most acknowledged that snus was healthier than a cigarette smoke, it was emphasized that it was not harmless. The medical sources of concern raised included the fact that snus is more addictive than cigarettes, had an increased risk for cardiovascular disease and diabetes, negative health effects on the fetus of pregnant mothers and contributed to poor oral and dental health. Others suggested that snus was a product development response by tobacco companies to expand its market, in response to the declining cigarette market, under the pretext of “an aid to cease smoking”. Emphasising the inclusivity of snus in the definition of a ‘tobacco product’ in the Bill and countering the proposal of the Swedish Match company to differentiate between ‘smoking tobacco’ and ‘non smoking tobacco’ in the legislation, Advocate Patricia Lambert, special advisor to the Minister of Health and one of the drafters of the WHO FCTC as Chair of an Intergovernmental Working Group (IGWG) at the First Conference of Parties (COP1) to the WHO FCTC (discussed in further depth in Chapter 4), maintained that youth were particularly susceptible to snus addiction since its odourless nature made it difficult for parents to detect (PMG 2008).

Expressing full support of government’s regulation of a harmful legal substance such as tobacco, another South African based civil society organization focused on tobacco harm reduction (Association for the Reduction of Tobacco-related Harm) emphasized that tobacco was one of the most abused substances in South Africa, affecting the most vulnerable sectors of the population, including minors, low socio-economic status groups and the homeless, who are often exposed to and involved in gangs. Having presented their programmes in such vulnerable communities, ARTH suggested that part of their harm reduction approach was to reduce harm by facilitating the development of sport and recreational activities, providing alternatives to substances such as tobacco for the vulnerable in society, and in so doing, to promote healthy lifestyles (PMG 2008). In Chapter 5, this organization is discussed in further depth having facilitated international Parliamentary study tours with MPs and tobacco industry representatives to Sweden and Brazil respectively.

From the perspective of ‘harm reduction’ as a tobacco control policy instrument, it appears as though tobacco business interests (perhaps for whom such a strategy presents a market opportunity), health related academic and research organizations and civil society advocacy groups (one of which specifically advocates ‘harm reduction’, although without promoting an alternative product *per se*) were equally interested in this relatively recent policy issue to emerge in the South African tobacco control policy domain.

3.7. Checks on youth access

Based in empirical evidence which suggests a high proportion of adult smokers began as children, such a policy intervention is intended to be a supply side intervention regarding the distribution of tobacco products amongst youth (such as banning the sale of tobacco products to minors, and bans or restrictions on cigarette vending machines) based on the notion that the harder cigarettes are to obtain, the fewer of them shall smoke (Rabin & Sugarman 2001:7)

An overwhelming number of participants in the Parliamentary public hearing processes, including many from the tobacco industry, civil society, schools, academic institutions were vocal about protecting the youth (Alexander Sinton High School, ARTH, UCT's Graduate School of Business, Tobacco Vending Machine Association, TISA), with some having very specific proposals regarding the marketing constraints (see TISA in section 3.5.1 above) limiting youth exposure to tobacco advertising.

Given that the Tobacco Products Control Amendment Act (2008) had intentions to prohibit cigarette vending machines in order to prevent youth access (consistent with Article 16 of the FCTC), Soul City Institute for Health & Development Communication were the only role-players to support this proposal specifically, with the Tobacco Vending Machine Association highlighting the fact that most children did not purchase cigarettes from vending machines, as they were located in licensed premises where the prices of cigarettes was substantially higher. The Tobacco Machine Vending Association further highlighted the economic consequences of banning vending machines, including the loss of jobs, the business losses machine vendors shall experience, and the lack of compensation for redundant machines.

Following the public hearings, the revised legislation did not ban the sale of tobacco products from vending machines, however, the restrictions that were imposed by the 1999 legislation which limited vending machines to outlets which are accessible to persons above the legal minimum smoking age remained (RSA 2009:10).

The latest revisions have also prohibited the sale of tobacco products to and by persons under the age of 18 based on the WHO FCTC domestic implementation guideline (Article 16), from the previous prohibition age of 16 (RSA 2009:2)

Youth access to tobacco as a key policy issue elicited interest from a range of stakeholders, most of who appeared to support such interventions to protect youth. The interested actors included business interest groups (dominated by the vending machine association), civil society groups, academic institutions and a school.

3.8. Tobacco litigation

Tobacco litigation is a strategy used by individual smokers, groups of smokers' and in some cases, third party reimbursement efforts such as payors of smokers' medical costs, and non-smokers' for exposure related harm from tobacco use, seeking financial compensation from the tobacco the industry (Rabin and Sugarman 2001:8).

During the Parliamentary public hearings relating to the tobacco control legislation, very little was mentioned regarding tobacco litigation. In response to a question posed to BATSA about a court case emanating from the marketing of cigarettes to children during Parliamentary

public hearings, BATSA clarified that no such litigation was brought against any of the BAT companies, and asserted that BATSA had no intentions of marketing cigarettes to children.

Regarding tobacco litigation as a tobacco control strategy, it would seem that predominately tobacco companies would have an interest in taking precautionary measures (such as informing their customers' of the dangers) to prevent litigation from individuals and groups.

3.9. Curbs on second hand smoke

Curbs on second hand smoke refers to regulatory initiatives, typically motivated by 'clean indoor air advocates', aimed at protecting non-smokers from the involuntary tobacco related harm caused by other secondary smokers, which are often realized through the continuing proliferation of restrictions on smoking in the workplace and public places of recreation and commerce (Rabin and Sugarman 2001:8).

The stringent legislation enacted in 1999 (discussed above in section 3.5 relating to marketing constraints) also banned smoking in public places. Such a ban was intended to curb second hand smoke for the benefit of the non-smoker, resulting in South Africa's effective and full compliance with Article 8 of the WHO FCTC relating to exposure to secondary tobacco smoke prior to its assent (see Appendix 2 and Chapter 2).

Referring to it as Environmental Tobacco Smoke (ETS), many role players were particularly vocal about such curbs which protected the rights of non-smokers (Keith Gretton-ETS Expert, National Council Against Smoking, Clothing Bargaining Council Healthcare Fund, SAMA) (PMG 1998; PMG 2008).

Others, particularly those in the hospitality and tourism sectors, were more cognisant of the negative economic impact such a ban would have on their workers and businesses⁸ (Food and Allied Workers Union, Federated Hospitality Association of Southern Africa, Ocean Action, International Hotel & Restaurant Association) (PMG 1998).

Regarding ETS as a tobacco control policy instrument specifically, it is apparent that trade unions (whose perceive a threat of job losses of their members) and businesses in the hospitality and tourism sectors (since they also perceive a loss of their smoking clientele) are key role players who have a primary interest in this aspect of tobacco control policy development.

⁸ For a detailed study on the effect of the Tobacco Products Control Act (1999) on South African restaurant revenues, see Blecher (2006) in the South African Journal of Economics and Van Walbeek et al. (2007) in the South African Medical Journal.

3.10. Public health advocacy

Public health advocacy is described as a broad process that seeks to bridge the gaps between what is being implemented to effect change, and the stakeholders involved in the process of bringing about change. With regards to tobacco control, the author maintains that issues need to be placed and maintained prominently on the public and political agendas, eroding barriers to the adoption and implementation of policies, and counteracting the efforts of interest groups who stand to lose from the implementation of good public health policy (Chapman 2007:25).

No doubt, it could be argued that the Parliamentary public participation processes provided an ideal platform through which to advance the public health agenda relating to tobacco control, since it is a *prêt-à-porter* forum made up of stakeholders involved in the process of bringing about a particular policy change. The public participation processes relating to tobacco control policy amendments attracted a host of public health advocates (HEU, MRC, NCAS, CANSA, SAMA, Reference Group for Health Promotion, Soul City, AFReC, ARTH, hospitals and universities), many of whom placed a range of public health related tobacco issues firmly on the agenda. However, whether it 'eroded barriers to the adoption of good public health policy' is less clear. It would seem that the efforts of public health advocates were countered by a general domination of business interest groups in the policy space, including tobacco industry actors.

3.11. Conclusion

It is noteworthy that, with the exception of youth (only the vending machine association had a business interest) and tobacco product taxation (for whom the tobacco industry perhaps benefits from by increasing profit margins concurrently with tax increases), almost every single other policy issue discussed above appears to have been dominated by business interests. Those policy issues that were specifically dominated by tobacco business interests include sponsorship, harm reduction and to a lesser extent, advertising and promotions.

What is even more interesting is the fact that the specific policy issues raised (with the exception of the definition of a 'tobacco product' to include 'smokeless' tobacco discussed in section 3.6) predominantly by business interests were acceded to by the Portfolio Committee on Health, two instances of which related to sponsorship (see section 3.5.2). In the first instance, the legislation was amended somewhat to take into consideration the impact such legislation may have on those currently receiving tobacco sponsorship, particularly relating to sports, to allow sufficient time to replace tobacco sponsors. In the second instance, the proposed legislation was revised regarding the anonymity of donors to suggest that tobacco companies may make charitable contributions, as long as it was not for the purposes of advertisement, which was specifically acceded to. In the third and final instance, the vending machine association seemingly prevented the legislation from prohibiting the sale of tobacco products through vending machines completely.

From the perspective of the 'lawmaking' function of the legislature identified by Barkan (2008:125) in Chapter 1, it is evident that Parliament acted as an agent and performed a role in shaping public policy by crafting legislation. In addition, and based on the fact that the Director-General of the Department of Health did not appear to identify a problem with the initial wording relating to the anonymity of sponsors (by suggesting that it did not contradict

with FICA), it is likely that such a 'crafting of legislation' in at least one instance happened independently of the executive. Perhaps this is an early indicator of a legislature that is strengthening, and becoming less subservient to executive domination.

Regarding the amendment that the legislature appeared to not accede to relating to revising the definition of a 'tobacco product', perhaps this was understandable, especially given the suspicious perception of the 'tobacco industry' successfully advanced by anti-tobacco activists during the public hearings (and throughout the process of formulating the WHO FCTC). MPs may have found great difficulty (regardless of the merits or demerits of the argument) in acceding to the request of a tobacco company claiming that their new tobacco product will help smokers to quit.

Aside from the policy issues that were identified in this chapter (largely aligned with the theoretical framework of tobacco control instruments), a more general policy issue that surfaced repeatedly during the public participation process was that relating to policy implementation.

With reference to the poor implementation of the 1999 tobacco control legislation by health officials, particularly as it relates to law enforcement, some policy actors legitimately questioned the capacity of the Department of Health to implement the more cumbersome 2008 legislation (Afrikaansehandelsinstituut, Independent Councillor). Additionally, an MP (ANC), suggesting that the sale of 'loose' or single cigarettes introduced by the 1999 legislation was poorly enforced (especially as it relates to youth access), the MP questioned the Department of Health regarding how it planned to improve such enforcement (PMG 1998; PMG 2007). Though such an issue of policy implementation would have a bearing on the provincial government, and to a larger extent on the local sphere of government (who are responsible for law enforcement as it relates to tobacco through 'health inspectors' and 'port health officials') (RSA 2003:16), this shall be further explored in the next chapter on the executive. Nevertheless, the public participation forum perhaps gave MPs an opportunity to perform their 'oversight' function regarding the implementation of existing policy, and hence, an opportunity to provide policy inputs regarding the development of new policy.

With reference to the 'representation' function identified by Barkan (2008:125), this chapter confirms that there can be little doubt that the legislature has in fact executed such a function, and in doing so, it has effectively performed a policy role as a mediator or 'policy agent' for interest groups competing in the policy space.

CHAPTER 4: TOBACCO CONTROL POLICY IN THE SOUTH AFRICAN EXECUTIVE

4.1. The executive authority entrenched by the Constitution

With reference to Chapter 5 (Section 85) of the Constitution and the executive authority of the republic being vested in the President and his Cabinet, the following functions of the executive can be explicitly identified:

- a. implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- b. developing and implementing national policy;
- c. co-ordinating the functions of state departments and administrations;
- d. preparing and initiating legislation; and
- e. performing any other executive function provided for in the Constitution or in national legislation.

(Constitution of South Africa, 1996)

Considering the above functions as a framework for analysis of the executive, it would seem that (b), (c) and (d) are most relevant as it relates to policy development.

4.2. National sphere of government: tobacco control policy development

4.2.1. Tobacco control policy before 1994

There is widespread consensus amongst most authors who have written about tobacco control policy in South Africa that the period preceding the incoming ANC government in 1994 was largely characterised as lacking in the realm of tobacco control policy in South Africa, with some authors portraying such a lack of interest in public health as one of the crimes of the apartheid regime (Asare 2009:101; Yach 2009; Van Walbeek 2005, Saloojee 2000:433).

That tobacco corporate interest groups played a role in the policy machinery (or implicitly, lack of a role in any tobacco control policy process) was evident based on the intimate relationship that existed between the apartheid state and Afrikaner business from as early as 1948. Most significantly, the largest tobacco industry player (known then as the Rembrandt Group company, which today, is merged with BATSA) was regarded as a critical force in collusion with the apartheid regime. Based on Rembrandt's report submitted to the Truth and Reconciliation Commission after 1994, the then Chief Executive Officer, Johan Rupert, acknowledged that Rembrandt benefitted and operated in an unjust system for over 40 years, but further added that they also 'managed to end it' (SAPA 1997). Hence, it is not surprising that most authors concede that the tobacco industry had a greater influence over government policy, and that matters such as the state revenue from the tobacco industry took far greater precedence over any health concerns relating to the hazards of tobacco use (Asare 2009, Yach 2009, Van Walbeek 2005, Saloojee 2000:437).

Highlighting some preventative measures that were taken by South Africa prior to 1990, Saloojee (2000:433) points out that ‘popular prevention’ activities, including low key educational programmes like the production of posters and pamphlets, and other “cosmetic but inconsequential activities, which served as a smokescreen for politicians afraid to take meaningful action but who want to be seen to be doing something” were undertaken, but emphasized the absence of ‘unpopular prevention’ strategies such as “legislation, taking on major industries, and political battles,” with the only exceptions at the time being a ban on smoking in cinemas and on domestic air flights.

With the growing pressure from the public health fraternity regarding tobacco control, including campaigns by anti-tobacco lobby groups and calls by opposition parties in the National Assembly for the Nationalist government to be more stringent on tobacco consumption (see Chapter 5 for a more detailed discussion), Asare (2009:101) reports that in 1991, the apartheid government had a dramatic change in their position with respect to tobacco. The Health Minister of the then ruling National Party, Rina Venter, introduced the first piece of legislation (the Control of Smoking and Advertising of Tobacco Products) as a draft Bill in the National Assembly. Whilst some opposition to the spirit of the legislation did exist amongst a fellow cabinet Minister for Agriculture, as well as the Tobacco Institute for South Africa (TISA) (introduced and discussed in Chapter 3), this Bill was passed in the National Assembly in June 1993 as the Tobacco Products Control Act (1993), which marked the birth of a tobacco control policy for South Africa (Blecher 2006:123) soon before the country’s inaugural democratic election. Significantly, however, the 1993 Act included a section empowering the Minister of Health to pass regulations (discussed in Chapter 3) relating to the Act (RSA 1993:1).

4.2.2. The ANC’s health policy: A policy formulated with WHO support

Setting the political tone for the incoming ANC led Ministry of Health, the symbiotic relationship between the tobacco industry and the apartheid state prior to 1994 may explain why Van Walbeek (2004) maintains that the ANC led government after 1994 took a particularly strong approach against tobacco.

Post apartheid South Africa’s national health policy was conceived by the ANC prior to the party emerging victorious in South Africa’s first democratic election in 1994, culminating in the ANC health policy document entitled ‘A National Health Plan for South Africa’ and significantly, formulated with the technical support of UN agencies, including the WHO and UNICEF (ANC National Health Plan 1994). This early engagement no doubt set the foundation for a positive working relationship between public health policy makers (including the ANC) at the domestic level and public health policy makers at a global (WHO) level.

Placing tobacco equally on the agenda with ‘alcohol abuse’ and ‘unhealthy eating habits’ under a broader programme for Non-Communicable Diseases (NCDs), the ANC’s ‘National Health Plan’ formulated prior to 1994 makes reference to tobacco (smoking) as follows, and in relation to the negative effect on the economy:

“An increasingly large number of South Africans suffer and die from non-communicable diseases (NCDs), and this has an important negative effect on the South African economy. These include diseases related to personal behaviours - such as alcohol abuse, smoking and unhealthy eating habits as well as those associated with contamination of the environment and food chain by chemical and radioactive substances. Both unhealthy personal behaviours and environmental pollution are ultimately rooted in the way the economy and society are organised, and it will require fundamental structural changes for a reduction in their prevalence to be achieved.”

(ANC National Health Plan, 1994)

Given that this national policy framework is intended to have a specific health agenda, it is evident that it additionally (and perhaps, more importantly) had an economic agenda, consistent with the macroeconomic policy framework (GEAR) later adopted in 1996 (see discussion under Ministry of Finance below).

4.2.3. Tobacco control policy after 1994

With tobacco already being placed on the agenda at the political party (ANC) level, the incoming Minister of Health during the first democratic Mandela-led administration, Dr Nkosazana Dlamini-Zuma, empowered by her apartheid predecessor to pass regulations ‘immediately gave teeth to the 1993 Act’ mandating ‘strong, prominent, rotating health warnings on tobacco packaging and advertisements. Furthermore, setting South Africa apart from most other countries, the packaging additionally identified the benefits of smoking cessation and included a telephone number for those seeking advice on quitting (Saloojee 2000:434).

Soon afterwards, the Minister participated at the 10th World Conference on Tobacco and Health in Beijing in August 1997, at which time the formulating of the WHO FCTC was already placed on the agenda. Less than a year later, as an extension of the Beijing meeting, the South African Health Ministry hosted an ‘International Conference on the Economics of Tobacco Control’ attended by WHO and World Bank officials from twenty-five countries in Cape Town in February 1998, where the Ministry specifically invited international delegates to generate policy proposals for tobacco control in South Africa (RSA 1998).

Maintaining the political momentum and presumably having received fresh policy inputs, the Minister initiated amendments to the 1993 tobacco control legislation with public hearings taking place in late 1998, culminating in the adoption of the Tobacco Products Control Act (1999) less than a year later. The purpose of the legislative amendments was to reduce the smoking prevalence and ‘close loopholes in the 1993 legislation that were exploited by the tobacco industry’ (Asare 2009:102). Regarded at the time as having one of the most stringent anti-smoking legislation in the world (Business Times 1999), it was this piece of legislation in particular which banned all forms of tobacco advertising and placed restrictions on smoking in public places (RSA 1999) that South Africa had become renowned for amongst the public health fraternity, albeit somewhat notorious amongst the tobacco industry and

some business sectors affected by the legislation (Saloojee 2000:436; Blecher 2006:123; Van Walbeek et al. 2007:208).

South Africa's second democratic elections in April 1999 witnessed the ANC come into power with an overwhelming majority for the second time, although signalled the end of Dlamini-Zuma's tenure as Health Minister, with the incoming Mbeki presidency appointing Dr Manto Tshabalala-Msimang as the new Health Minister.

4.2.4. ANC-led government begins WHO FCTC negotiations

Evidently, the formulation of a national health policy framework for South Africa and the hosting of the 'International Conference on the Economics of Tobacco Control' was not the first time that the ANC-led government were proactive in engaging public health policy makers at the global level.

Riding on the success and reputation of the tough 1999 legislation enacted in South Africa, the Ministry of Health, well aware of the global tobacco control policy development process, soon afterward began official negotiations (and lobbying perhaps) with the WHO through the WHO's institutional mechanism known as the Intergovernmental Negotiating Body (INB) in the latter part of 2000 (Polity 2006), represented by the Minister's special advisor Advocate Patricia Lambert. This forum (INB) was formed by the Director-General of the WHO, with South Africa being selected as one of the 7 countries (including Australia, India, Islamic Republic of Iran, Turkey, United States and Brazil) to form the Bureau, with Brazil selected to Chair the forum. The mandate of such an intergovernmental forum was to conduct public hearings on a global scale amongst the public health community, tobacco industry players and farmers' groups relating to what was then the draft FCTC text (FCA 2009). Such a situation in which South Africa would have 'Vice Chaired' some of the INB meetings as a diplomatic member of the Bureau no doubt placed South Africa in a more powerful position, presumably with preferential access (compared with other WHO member governments' which did not form part of the Bureau) to the policy formulation of the global text.

With South Africa being one of the first countries to sign the global public health treaty on the 16 June 2003 (RSA 2003), it would seem that the Ministry of Health were eager to begin the domestic implementation of the global tobacco control policy framework.

4.2.5. South Africa begins domestic implementation of WHO FCTC

As discussed in Chapter 2, South Africa has implemented a wide range of policy prescriptions outlined by the WHO FCTC prior to becoming a signatory to the treaty.

A few months following South Africa's ratification of the FCTC in October 2003, the Health Minister issues notice of intent to table the Tobacco Products Control Amendment Bill (2004) the following year and invites interested parties to submit comments within a month.

This time, the intended purpose of the amendment to the legislation reported by the Department of Health was to (a) comply with WHO FCTC treaty obligations; (b) close loopholes in the Act ⁹ and (c) strengthen the Act so as to better protect and promote public health (RSA 2003).

Some of these amendments included policy issues relating to the production and manufacture of tobacco (control ingredients and emissions, to establish manufacturing standards); the marketing of tobacco (strengthening the prohibitions on advertising, the promotion and sponsorship; public health warnings by introducing a picture-based warning, and amend the packaging to remove misleading descriptions); the distribution of tobacco (sales to minors, internet and postal sales, free distribution and vending machines); and making provisions for an enforcement mechanism (increasing the fines for non-compliance with the Act) (PMG 2006).

Given the breadth and depth of changes that were proposed, it is not surprising that the Department of Health received well over 2000 submissions with comments relating to the amendments in response to its invitation (RSA 2003).

Following the ANC's recurring victory in South Africa's third democratic elections in April 2004, the Minister's health portfolio was retained under an Mbeki-led presidency for a second term. Over the duration of a year, the Department of Health briefed committees (Portfolio Committee on Health and Select Committee on Social Services) regarding South Africa's adoption of the WHO FCTC and urged the committees to also support South Africa's commitment to the WHO FCTC by ratifying it. Having succeeded in obtaining the adoption of the WHO FCTC from both committees by March 2005, the Department presented a proposal to the legislature of the draft Tobacco Products Control Amendment Bill (2006) more than a year later in June 2006 (Appendix 1).

It was at this critical moment that it seemed a decision was made to split the Tobacco Products Control Amendment Bill into a Section 75 and Section 76 Bill, (discussed in section 4.3 below) relating to provincial executives, bringing about a significant delay in the passage of the Bill.

With the effective completion of the parliamentary process by 18 November 2008 (except for the official Presidential assent), the Ministry of Health would have been well placed to report on its domestic implementation of the WHO FCTC, especially considering its hosting of the 3rd Meeting of the Conference of Parties (COP3) to the WHO FCTC over this period (17-22 November 2008) in Durban. At the closing of the 3rd Meeting, it became known that South Africa (as represented by the Ministry of Health, though the Departmental Head closed the conference) is expected to Chair the Fourth Meeting of the Conference of Parties (COP4) to be held in Uruguay in 2010, which may be an early indicator of the power the executive has been gaining from the perspective of tobacco control policy.

After much interaction with the legislature in the form of briefing sessions by the Department of Health in the National Assembly and the National Council of Provinces (see Appendix 1: Legislative history), and responses to Public Hearings; the lengthy, almost 6 year process of

⁹ Unlike in the final Act, earlier versions of the Tobacco Bill were worded as follows: 'close loopholes in the Act exploited by the tobacco industry' (RSA 2006:7)

enacting the most recent amended legislation relating to tobacco control policy had been completed. By January 2009, soon after the 'recall' of Mbeki as state President by the ANC party (suggesting the effective power of the party over the executive presidency), the interim appointed executive President Kgalema Motlanthe assented the Tobacco Products Control Amendment Act (2008). Paving the way for the executive to implement the national policy, the incoming executive President Jacob Zuma brought the law into effect just over 6 months after its assent by promulgating the Act on the 21 August 2009 (Sabinet Law 2009). Interestingly, in both case of the 1993 and 1999 legislation, the Act was promulgated two years hence (in 1995 and 2001) respectively in order to give the tobacco industry and businesses in the hospitality industry more time to comply (Van Walbeek et al. 2007:208 Asare 2009:102).

It is clear that the assent of the Tobacco Control Amendment Bill (2008) has not happened as speedily as the 1999 Act, which took less than a year to pass.

Within the framework provided by the Constitution in section 4.1 above, much of the discussion thus far has considered the history of tobacco control policy development (function (b)) set against a political backdrop of the ANC and its early engagement with public health policy makers at the international level. The discussion has further revealed that the executive (and Ministry of Health specifically) has performed function (d) by preparing and initiating legislation relating to tobacco control policy.

4.2.6. The interests of ministries and departments in tobacco control policy development

With reference to function (c) provided by the Constitution framework in section 4.1 above, the discussion in the following section shall focus explicitly on the executive's authority to coordinate the functions of state departments and administrations.

Calland (2006:69) describes the demarcation between ministries and departments, the effect of which creates two centres of power (those around the Minister and those around the Department or D-G), as one of the distinct features of the South African governance system.

Within the context of the traditional politics-administration dichotomy, Mafunisa (2003:98) emphasises the impracticality of such a separation of ministries and departments in the South African governmental system, suggesting that it does not exist in reality with the public service is expected to embrace the policy agenda of the governing party, and draw the public service into politics.

The lack of this clear separation of roles is evidenced by the most recent WHO meeting (a forum of mostly Health Ministers who are signatories to the WHO FCTC) hosted by South Africa, where the departmental head (D-G) of Health, Thami Mseleku, appeared to be representing the Minister of Health (see section 4.2.5 above).

Nevertheless, it would seem that exploring the role of ministries and departments separately would not be feasible given the lack of such a political-administrative distinction in reality. Hence this section explores the interests of ministries or departments, as it may be the case, which have an interest in tobacco control policy development or implementation (either individually or through interdepartmental coordination).

Although the scope of this paper is largely focused on policy development aspects of tobacco control, assessing the policy implementation of various ministries or departments provides a mechanism for eliciting the key policy issues and ministries or departments that may have an interest in tobacco control policy development across the spheres of government.

(a) The Ministry of Health

It is clear from the above policy development process that the most significant ministry or department within the executive is that of Health, being the chief ministry to drive this policy development in South Africa through the legislature on three occasions (1993, 1998 and 2004). Whilst 1993 may have been prior to South Africa's inception of a constitutional democracy, it is clear that this ministry has been performing one of its executive functions of initiating legislation. It is also not surprising that the Ministry of Health has driven this process considering the inclusion of tobacco in the 1994 ANC Health Plan. The power that is concentrated within this Ministry (and Department) from the perspective of tobacco control policy is worthy of mention, especially considering its policy engagements at the international level.

Outside of the context of the executive interaction with the legislature within the framework of a constitutional democracy, if we consider the interaction of the Department of Health (DoH) at an administrative level (horizontally, at the national level), it is clear that the Department has demonstrated extensive interdepartmental coordination with the Department of Education (DoE), the Department of Social Development (DoSD), National Treasury and the Department of Trade and Industry (DTI), amongst other departments, which may also be an indicator of the tobacco control policy monopoly that the Ministry of Health possesses.

(b) The Department of Education (DoE)

Government's implementation plan of 2008 under the comprehensive healthcare programme intended to "promote health and reduce non-communicable diseases and unnatural causes of death" within the Social Cluster (one of five administrative structures, focused on health and social matters, intended to facilitate greater cross-sectoral collaboration amongst government departments at a national and provincial level) included a tobacco prevention project, which was intended to be implemented with the output of reaching 1500 health promoting schools by March 2009 in partnership with the Department of Education (RSA 2008). Had such an objective been outcomes based (albeit more difficult to measure quantitatively), the measurable objective that the two collaborating departments may have considered is a target for the number of school learners that they have prevented from beginning to smoke.

(c) The Department of Social Development (DoSD)

Institutionalized as a statutory body in terms of the Prevention and Treatment of Drug Dependency Act (Act No. 20 of 1992), the Central Drug Authority (CDA) is an agency of the Department of Social Development (DoSD), which maintains that it coordinates with the Department of Health (DoH) to reduce the drug demand and harm caused by psychoactive drugs, including tobacco. It further maintains that the DoSD supports the DoH with national awareness campaigns, support for treatment centres and emphasizes its support for the Department of Health's most recent amendment bill introduced in Parliament, intended to further strengthen tobacco control legislation.

As we discovered in Chapter 3, the Department of Health consulted with the Ministry of Finance in the process of initiating the tobacco control legislation. Given the fact that little implementation on the part of the executive (whether specifically earmarked for health related purposes or not) can be done without the necessary resources, the Ministry of Finance remains a critical and powerful government department having a stake in the tobacco control policy development process, particularly as it relates to the economics of tobacco control policy.

(d) National Treasury

Considering the 1994 ANC Health Policy under the programme for 'Non-Communicable Diseases', it seems evident that tobacco is an issue that has been relatively higher on the health agenda of the ANC (consistent with the assertion of other authors' above) compared with other 'personal behaviours' mentioned, such as alcohol abuse and unhealthy eating habits. This is witnessed by the apparently more severe treatment of tobacco based on a specific reference to state revenue for health being raised "immediately from an increase in the excise on tobacco, which will have an added benefit of reducing consumption." The policy document additionally states that "further studies were required to assess more fully the health impact of increasing duties on alcohol" (ANC National Health Plan 1994). Given that the economics of tobacco control (including excise duty) was identified a particularly controversial issue under the tobacco product taxation discussion in Chapter 3, it is not surprising that the largest source of estimated revenue generated for the state is from excise taxation is consistently (at least for the last 3 years) attributable to 'cigarettes and cigarette tobacco' (R9.6 billion Estimates of National Revenue for the 2009/10 tax year) (RSA 2009; RSA 2008; RSA 2007) when compared with other product categories subjected to excise taxation (such as beer, wine, spirits, pipe tobacco and cigars, petroleum products and neighbouring countries revenue).

That the Ministry of Finance's primary motive being the raising of revenue from the tobacco industry (and expediently the decline of tobacco consumption) is reinforced by Yach (2009) in his emphasis of the lack of an empirical or an economic basis of determining the optimal price level for excise tax having previously consulted with the Commissioner of Tax and Excise in the Ministry of Finance. Instead, Yach (2009) maintains that the final price is determined by the Ministry of Finance in consultation with the tobacco industry regarding the price level that they (the industry) are able to tolerate. Furthermore, Yach (2009) emphasises the importance of illustrating the benefits to the fiscus of imposing excise taxation in order to minimise the opposition to the Ministry of Finance, which is no doubt an indication of the lack of an evidence based approach to policy making to achieve the intended health outcome (driven by the Department of Health at the domestic level and WHO at the global level) of minimising the burden of tobacco related disease.

Fortunately for the Ministry of Finance, more recent empirical evidence conducted by the Health Economics Unit of the University of Cape Town (who also shared their positions during Parliamentary public hearings relating to the tobacco bill both in 1998 and 2007 as discussed in Chapter 3) regarding the economics of tobacco control in South Africa indicates that increases in tobacco excise tax "does not place an unjustified economic burden on the poor," countering arguments made by those interest groups (primarily industry associated) who argue against increases in tobacco excise taxation (Van Walbeek 2005).

Whilst such empirical evidence has become available more recently to support the Ministry of Finance's progressive excise taxation policy towards tobacco since 1994, it appears as though the revenue raising potential of the Ministry of Finance, at least initially, was taken into greater consideration rather than any empirical evidence assessing the possible merits or demerits of such a policy instrument of excise taxation for tobacco control.

This is not entirely surprising, given South Africa's shift in economic policy from a microeconomic and domestic focused policy (RDP) to a more macroeconomic and external orientated strategy (GEAR and AsgiSA) pursuing economic growth first, followed by redistribution. The adoption of such a macroeconomic framework resulted in a series of tax reforms, not excluding excise tax and tobacco.

That such a tax reform exercise is more of a political and ideological one (and not necessarily empirical), and consistent with the macroeconomic policy at the national level (not to mention aligned with the global policy relating to tobacco excise taxation at the WHO level outlined in the implementation guidelines in the FCTC) is made unequivocally clear from an address by the Minister of Finance to a conference regarding the 'South African Tax Reform Experience since 1994' at the time (Manuel 2002), stating that "the new Government had to strategically maximise the revenue raising instruments at its disposal in order to address the huge backlogs in social and infrastructure service provision to the previously disadvantaged communities." The Minister further highlighted the role that taxes have played in the government's successful fiscal stabilization programme, and the progress that has been achieved in reducing the budget deficit, most of which was inherited by the apartheid legacy (Mbeki 2002).

Given that the South African government is active in facilitating the import and export of tobacco related products, it is expected that the role of trade may be a factor having an impact on this policy development process.

(e) The Department of Trade and Industry (DTI)

Consistent with the national macroeconomic framework, the South African Department of Trade and Industry (DTI), whose mandate is to facilitate growth in the South African economy through trade, including raising the level of exports as one of its strategic objectives in the medium term (presumably in order to achieve a positive trade balance), tracks trade statistics by country and sector with South Africa. If one considers the only category from their trade database relating to tobacco products entitled 'Tobacco and Manufactured Tobacco Substitutes', the balance of trade has fluctuated between the period 2004 – 2008, having had a negative trade balance where imports have exceeded exports in 2004, with the period 2005 – 2007 (inclusive) witnessing a positive trade balance (the highest trade balance being R608 million in 2006), declining again into a negative trade balance in 2008. Additionally, in 2007, this category's balance of trade was ranked as the 17th out of a total of 99 categories, drastically dropping to a ranking of 42nd by 2008 (RSA 2009).

Given that the mandate of the DTI is to facilitate export driven growth in the economy (which presumably would not exclude tobacco), one would expect that there would be an interest in the tobacco control policy development process, particularly regarding limitations introduced in the most recent Tobacco Products Control Act (2008) relating to the production and

manufacture of tobacco products, restrictions of which may dissuade tobacco industry multinational investors from setting up production facilities in South Africa, and hence, minimise export led growth in the country from this sector. Though the specific content of the consultation has not been made explicit, the Department of Health has expressed its referral to the DTI regarding the initiated legislation in Parliament (RSA 2008).

(f) South African Revenue Services (SARS)

Constituted as a public sector enterprise in terms of the Public Finance Management Act (No.1 of 1999) and SARS Act (No.34 of 1997), SARS remains an organ of state in the public administration, however is technically not regarded as a government department, acting as an institution outside of the public service. As an agency of government being primarily responsible for tax collection, although closely associated with the Ministry of Finance with its Commissioner ultimately reporting to the Finance Minister, SARS has been hailed for its impeccable record regarding tax collection, which includes customs and excise tax. No doubt, SARS would have an interest in the trade of goods, not excluding tobacco exports and imports, and the collection of excise taxes from tobacco manufacturers. Though international travellers are allowed to purchase a restricted quantity of tobacco products duty free (which is consistent with FCTC guidelines for restricting duty free sale on tobacco products) when entering the country, the purchase of tobacco becomes liable for customs tax which SARS would also be responsible for collecting. Whilst SARS may have an interest in tobacco control policy and the effect that such policy changes may have on its collection mandate, it is unlikely that SARS would be interested in influencing the tobacco control policy making process directly, without the support and leadership of the Ministry of Finance.

In addition to interdepartmental coordination within the national sphere of government discussed in this section, it would seem that engagement has also taken place outside of national government with the private sector on matters relating to tobacco control policy. In the form of a Public Private Partnership (PPP), government's national revenue collections agency (SARS) has formed a partnership with an organisation representing the interests of the tobacco industry (TISA) (introduced in chapter 3).

(g) SARS Tobacco Industry Forum

Within this discussion regarding trade of tobacco products, the issue of the illicit trade of tobacco products, which pro-industry groups usually regard as an unintended consequence of excise taxation, regularly finds its way to the public arena. Although portrayed with dubious credentials given its links with the apartheid government, and regarded as a grouping promoting the tobacco industry based on its tobacco business membership (Asare 2009:102), TISA has been regularly vocal in the public domain (including the public hearings relating to the proposed amendments to tobacco legislation discussed in Chapter 3) regarding the growth and extent of the illicit trade relating to tobacco products. Emphasizing the loss of tax revenue (estimated to be R1 billion per annum) from 'the sale of legitimate tobacco products, the revenue of which is essential for government services and achieving government's health objectives', it appears as though SARS has taken an interest in working together with TISA through the recently convened SARS Tobacco Industry Forum in 2006 (TISA 2006). Such a PPP working towards a common purpose of recovering lost revenue as it relates to the illicit trade of tobacco products may be an early indication of the beginning of a less adversarial relationship between government and the tobacco industry that has become apparent from

previous chapters.

(h) Other departments consulted by the Department of Health

Based on the other government departments (not mentioned above) that were consulted by the Department of Health prior to these policy amendments tabled in the legislature, it is apparent that the Department of Agriculture and Land Affairs (DoA), the Department of Justice and Constitutional Development (DoJ), the Department of Provincial and Local Government (DPLG), the Director of Public Prosecutions (DPP) and the South African Police Services (SAPS) also have an interest in this particular policy development process (RSA 2008:8).

Whilst the specific content of such a broad level of interdepartmental coordination by the Ministry of Health with these additional government departments relating to the Tobacco Bill is not explicit, it is likely that issues of agricultural sustainability (DoA), the constitutionality of the legislation (DoJ), intergovernmental relations relating to the implementation of the legislation (DPLG), and the enforceability of the legislation, and the capacity to enforce (DPP and SAPS) were discussed given the mandates and functions of the respective government departments.

4.3. Tobacco control policy: Executive authority of provinces

Regarding the function of the executive authority at the provincial sphere of government, it would seem that provincial executive have dual responsibilities relating to policy development and policy implementation as entrenched by Section 125(2) of the Constitution, stating that the executive authority of the province has a responsibility to 'develop and implement' provincial policy and to 'prepare and initiate provincial legislation' (Constitution 1996).

Although initially tabled in the NA (PCH) by the DoH as a piece of legislation which does not affect the provinces (Section 75 Bill) in September 2004 (briefly discussed in Section 3.2 and further discussed in chapter 5), it would seem that this was later challenged (by whom it is less certain) during the parliamentary procedure which considered the Tobacco Products Control Amendment Act (2008) on the basis that tobacco control policy issues that were being considered was a matter of 'joint' national and provincial competency. Although the DoH did consult a national government department (DPLG) dealing with provincial and local government matters, it is clear that the DoH did not have any intention of including provinces in the policy development process as indicated by the draft Bill at the time, which stated that 'there will be no implications as a result of the Bill forthcoming to any provinces' (RSA 2003:16).

By June 2006, following the advice given by Parliament's Joint Tagging Mechanism (JTM)¹⁰ officially mediating the outcome, which would have far reaching consequences on parliamentary procedure (see Appendix 3 for a diagrammatic illustration of Parliamentary procedures relating to Section 75 and Section 76 Bills, both processes of which would need to be adhered to), and hence, the time taken to enact, it was decided that the Bill should be divided into a Section 75 Bill (ordinary Bill not affecting provinces) and Section 76 Bill (ordinary Bill affecting provinces) (PMG 2006).

More specifically, the policy issues that were regarded as having joint national and provincial competence that were subsequently drafted into the Section 76 Bill dealt with issues such as advertising, labeling and sales to minors; which it seems provincial executives had a responsibility to implement (RSA 2007:8). Thus, the explicit consultation of provincial executives in the revision of tobacco control policy appeared to have been critical. Perhaps this is not surprising given that during the public hearings relating to this Bill, an ANC MP questioned the capacity of the DoH to implement new policy if the previous policy (referring to the sale of single cigarettes) was believed to be poorly enforced (discussed in Section 3.11). The idea that provincial executives would need to participate in the policy development process through the legislature is suggestive of the power that is concentrated within the executive at the national government level, and the possible 'top down' nature of policy development.

4.4. Local sphere of government: a role in the tobacco control policy development process?

In line with the Constitutional provision relating to the objective of local government (Section 152 of the Constitution), it would seem that local government primarily has a responsibility for the implementation of policy (Constitution 1996). Briefly discussed in section 3.11, the local sphere of government is primarily responsible for matters relating to law enforcement of tobacco control policy through 'health inspectors' and 'port health officials' (RSA 2003:16). Having said this, though it seems to reside outside of their constitutional mandate, municipalities may have had a contribution to make in the policy development process with regards to the enforceability of the legislation. Considering the fact that the DPLG was consulted by the DoH in consideration of this Bill, and an opportunity existed for municipalities to make submissions through provincial public hearings that took place during the Parliamentary procedure relating to the Section 76 Bill, perhaps these were adequate opportunities for the local sphere of government to express their interest or concerns in this tobacco control policy development process. Although an analysis of the provincial public hearings documentation does not seem to indicate whether municipalities took an interest in this piece of legislation (PMG 2008), it would seem that local government does have an interest in tobacco control policy development since some municipalities of the City of Cape Town local authority did have anti-smoking by-laws (RSA 2003: 14).

¹⁰ The Joint Tagging Mechanism (JTM) is a procedural committee in the legislature consisting of the political heads of the upper and lower houses (Speaker and Deputy Speaker of the National Assembly; and the Chairperson and Deputy Chairperson of the National Council of Provinces) who are advised by the administration's Parliamentary Law Advisors regarding the classification Bills in terms of the Constitution. The outcome of the JTM committee is decided upon by consensus (Sabinet Law 2008)

4.5. Conclusion

This chapter has illustrated that the South African executive has the potential to perform a tremendously powerful role in the formulation of tobacco control policy both at the international and domestic levels.

The knowledge acquired from such a global tobacco control policy formulation process has no doubt further strengthened the muscle of the executive in the formulation of domestic tobacco control policy. The Ministry of Health is clearly the most powerful executive force as it relates to tobacco control policy, having additionally initiated and drafted the domestic Tobacco Bill, thereby influencing domestic lawmaking. This gives credence to the assertion (from Chapter 1) that the legislature has a limited responsibility for making laws.

National Treasury can also be identified as a particularly powerful force within the executive given the magnitude of excise tax collections from tobacco, despite somewhat of a conflict in its revenue maximising objectives with the health related pursuit of the Ministry of Health, whose stated objective is to minimise the number of tobacco related deaths. Despite such an apparent tension, the Ministry of Health has not deterred from significantly advancing tobacco control policy within the executive.

Perhaps the preoccupation with policymaking at the global level has had the effect of the Health Ministry excluding the provincial sphere of government on the domestic front, intentionally or otherwise (discussed in further depth in Chapter 5).

Given the adversarial tone of relations between multinational tobacco companies and tobacco control policy makers at the global (WHO) level, it is likely that such a set of relations has filtered down to the South African level and is the status quo, particularly after apartheid. Given that 'engagement with the private sector' is regarded as one of the factors contributing to the relative muscle of the executive (Butler 2004:93), such a situation of a nominal engagement with tobacco business interests may have the effect of weakening executive power and strengthening legislative power as will be further explored in the next Chapter.

CHAPTER 5: THE ROLE OF THE LEGISLATURE IN SHAPING SOUTH AFRICA'S TOBACCO CONTROL POLICY

5.1. Legislative authority entrenched by the Constitution

With reference to Chapter 4 of the Constitution as a framework for analysis to identify Parliament's functions, it is evident that the primary function that can be identified is that of lawmaking. Chapter 4 (Section 37) clearly states:

The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution. (Constitution of South Africa, 1996)

It is not surprising that the above reference to the primary function of Parliament is highly clinical, being the legal text of the highest law of the land. In relation to a policy role, and based on a legal interpretation of the Constitution, Murray and Nijzink (2002:3) emphasise the normative function of legislatures as "institutions that oversee the development and implementation of policy."

However, from our introductory chapter, we have also learnt that legislative behaviour need not be congruent with normative expectations of this institution. Since the official Parliamentary source identified in the introductory chapter also does not identify any policy-making role explicitly as a function of Parliament *per se*, Chapter 1 has identified that the Barkan (2008:125) framework characterizing the legislative functions traverses the possible policy related roles of the legislature.

Whilst this paper is not intended to assess the legal, procedural or an analysis of the technical aspects of tobacco control legislation, placing the passage of this policy through the legislature within the context of its legislative history (see Appendix 1: Legislative History) is necessary in order to understand the policy role that Parliament may have performed in this policy development process. This history shall primarily be evaluated within the context of the legislative authority of the national sphere of government, and to a far lesser extent, the legislative authority of the provincial sphere of government.

5.2. History of tobacco control policy: a legislative perspective

The first piece of legislation to have been passed relating to tobacco, although by the apartheid government prior to the incoming ANC led government (see Chapter 4 for further discussion) was the Tobacco Products Control Act (1993), which was regarded by some as "modest in intent" (Saloojee 2000:434) but no doubt hailed as the first major achievement amongst the anti-tobacco lobby groups (Saloojee 2000:434; Asare 2009:101). Such an accomplishment is not entirely surprising, given the favourable attitude towards a regulatory tobacco control approach adopted by anti-tobacco lobby groups globally (as identified in Chapter 2) and in South Africa. What was surprising, however, was the fact that the apartheid legislature, regarded as one that primarily 'legitimised the executive's policies and actions for

a limited electorate' (Murray and Nijzink 2002:2), challenged the government of the day in the interest of public health.

It would seem the sudden change in the apartheid government's position regarding tobacco from one which was highly supportive of the industry was a result of campaigning by anti-tobacco lobby groups, and the opposition party in the National Assembly calling for the government to be stringent on tobacco consumption (Asare 2009:101).

Van Walbeek (2004) concurs with this position, maintaining that "academic research coupled with focused lobbying" had a major impact on this change in tobacco control policy in the 1990's. In fact, Saloojee (2000:433) asserts that the first call for comprehensive tobacco control policy measures by the South African Medical Journal (SAMJ) was ignored for almost three decades given the support and protection the domestic tobacco industry enjoyed, as discussed in Chapter 4.

Regarding the ability of the anti-tobacco lobby to influence opposition parties which only Asare (2009:101) expressly asserts, it would have been the first time that Parliament would have played a role in terms of influencing government policy relating to tobacco control. Given the obvious exclusion of masses of the population during the days of the tricameral parliament, the apartheid Parliament may not have been regarded as truly 'representative' of the people, but it nevertheless acted as an institutional vehicle through which interest groups (including anti tobacco lobby groups) were able to advance their objectives in the policy-making process. Whilst Murray and Nijzink (2002:2) acknowledge that some opposition parties attempted to use the legislature to expose some of the worst abuses of the apartheid regime, the fact that the legislature was used as an instrument to advance tobacco control policy is no doubt surprising, and may have been the exception, given the authors' assertion that the apartheid Parliament offered few opportunities for an honest and open examination of government policies and that the role of Parliament was to legitimize the executive's policies (and actions) for a limited electorate.

5.2.1. The 1st Parliament (1994-1999): Mandela returns Tobacco Bill to Parliament for reconsideration

Providing impetus to the regulatory approach advanced by anti-tobacco lobbyists as an effective tobacco control strategy (as discussed in Chapter 2), the first democratic Parliament (1994-1999) succeeded in amending the 1993 legislation, culminating in the Tobacco Products Control Act (1999). This, however, was preceded and informed (in theory) by a far more rigorous and formal process of Parliamentary public hearings relating to this amendment (the various submissions of which are discussed in Chapter 3 whilst identifying key policy issues and actors) convened by the Portfolio Committee on Health, consistent with the function of 'facilitating public participation' explicitly identified by official Parliamentary sources discussed in Chapter 1, and with what most authors refer to as 'representation' activities (Mezey 1979:48; Barkan 2008:125; ALP 2009).

Given that that the 1999 Act was intended to strengthen the 1993 Act and make provisions for the banning of all forms of advertising and promotions (including restrictions on sponsorship), such a proposed legislation at the time was met with fierce resistance (as discussed in Section 3.5.1), particularly amongst businesses advancing arguments of the dire economic consequences (including that of employment losses), and others questioning the

constitutionality of the legislation given that it would impinge on the right to freedom of expression.

Presumably the result of such opposition, the then President Mandela, having personally indicated his commitment to tobacco control policy as early as 1992 (Asare 2009:101), failed to assent the Bill following the completion of the legislature's public participation process and referred it back to the National Assembly through a letter addressed to the political head of Parliament (the Speaker). Although President Mandela suggested his 'satisfaction' with the Bill being within the parameters of constitutionality, the stated reasons for the reconsideration related to potential unintended consequences that might emanate from the way in which the terms 'organised activity' and 'public place' were defined that "may impinge on fundamental rights." Acknowledging the rarity with which Bills were sent back to the NA for reconsideration (which might seem apparent after observation of the lengthy procedural flow illustrated by Appendix 3), Mandela emphasized that the motive was to place the Bill on the 'firmest constitutional foundation' (PMG 1999).

In this particular example, it is evident that Parliament acted as an institutional vehicle through which interest groups were able to advance their respective agendas in the policy making process through the public participation facilitated by this institution. Consistent with Piombo and Nijzink (2006:73) characterization of South African as having an 'arena' Parliament based on the Polsby (1990) continuum (see section 1.5), it would seem as though the inputs or concerns raised by the respective interests were not taken into consideration by the legislature, thereby lacking the capacity to 'transform' proposals from different sources into law. Hence, the situation seemed to require the final intervention of the President as the executive head of South Africa (and political head of the ruling ANC party), which perhaps highlights the power that is concentrated in the executive.

The fact that this particular piece of legislation was reconsidered by the executive head, and effectively in favour of the inputs received by the public gives credence to the assertion that Parliament 'rubber stamps' the legislation handed down to it by the executive (Barkan 2005:5), for if the legislature had considered the inputs of the public and adapted the policy content consistent with the input of the public, the likelihood of the legislation being returned by the President to the National Assembly for reconsideration may have been far less. This may also be explained by the lack of skills of members in policy formation, and the poor research and analytical resources that Butler (2004: 95) describes, giving weight to the author's view that the legislature's influence over policy is "tangential at best." Aside from at the legislative level, the above situation illustrates a deeper problem in the executive power. As Nijzink and Piombo (2006: 69) attest, in many parliamentary systems, it would be "unthinkable that the Minister who takes political responsibility for a draft Bill is absent from committee deliberations," as in the case of South Africa. This might explain why there may have been a disjuncture between the President and Health Minister (at the Cabinet level) and the health officials (at the administrative level) regarding the points of contention in the legislation, and perhaps, the lack of a clear distinction of responsibilities within the executive of the political-administrative dichotomy, despite what Calland (2006:69) refers to as a 'curious' demarcation between ministries and departments (see Chapter 4).

Despite the reconsideration of this Bill in February 1999, the act was speedily passed by April 1999.

5.2.2. *The 2nd Parliament (1999-2004): Health Minister intends to align legislation with WHO FCTC*

The Second Parliament (1999-2004) did not appear to be as eventful as the first regarding tobacco control policy, however, what was significant was the notice issued by the Minister of Health before the end of the Second Parliament to amend the 1999 Act in order to align it with the global tobacco control public health treaty (WHO FCTC) that South Africa ratified on 16 June 2003 at the 56th World Health Assembly (WHA). This may explain why very little legislative activity took place at a domestic level whilst the Ministry of Health used this period to advance their policy agenda at a global level through a lengthy consultation process convened by the WHO with member countries in the formulation of the global tobacco control treaty from as early as 2000 (discussed in detail in Chapter 4).

5.2.3. *The 3rd Parliament (2004-2009): A flurry of legislative activity*

The early part of the 3rd Parliament (2004-2009) began with the Portfolio Committee on Health (PCH) in the National Assembly, and the Select Committee on Social Services (SCSS) in the NCOP being briefed by the Department of Health (DoH) regarding South Africa's signature of the WHO FCTC, urging the support of legislators in the ratification of this treaty.

(a) Parliament successfully challenges executive's proposal excluding provinces in the policy development process

Soon after the DoH succeeding in obtaining the commitment of the PCH and SCSS, it would seem that what might have appeared as a smooth ride of the Bill through the National Assembly was obstructed by a fundamental flaw: the lack of inclusion of provinces in the policy development process, or perhaps a convenient exclusion in the hope that the legislature would 'fast track'¹¹ the Bill? As discussed in section 4.3, the tabling of the Bill by the DoH as a Section 75 Bill was challenged (whether by legislators or through the lobbying by public interest groups, it is unclear) on the basis that aspects of the proposed legislation had implications for provinces. Following the completion of the JTM parliamentary procedure (discussed in depth in section 4.3), it was decided that the Bill be divided into a Section 75 Bill (ordinary Bill not affecting provinces) and a Section 76 Bill (ordinary Bill affecting provinces) in order to ensure that those aspects of the legislation having 'joint' national and provincial competency (advertising, labeling and sales to minors) adequately consulted the public through provincial legislatures.

With reference to Appendix 3, the implications of splitting the Bill into two pieces of legislation meant that two sets of complex legislative procedures would have had to be adhered to, one process for S75 and another for S76, with the latter requiring provincial public hearings to take place in all nine provincial legislatures in South Africa (Appendix 1). The net effect of such a decision effectively made by the legislature would have been a considerable delay in the assent of the Tobacco Products Control Amendment Bill (2008).

¹¹ Murray and Nijzink (2002:81) suggest that the frequency with which Bills are 'fast-tracked' has an impact on executive legislature relations, effectively impeding the lawmaking function of the legislature. The authors' further suggest that 'fast-tracking' is particularly problematic for the NCOP as it effectively excludes provincial participation.

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Conceivably, it is less surprising why the Bill took the DoH an entire duration of the sitting of Parliament (2004-2009) to enact.

Once the decision had been made by the legislature, it was the DoH that informed those participating in the public participation process for the Section 75 procedure that the Bill be split into two sections: S75 which deals with environmental issues regarded as a national competency; and S76 which deals with advertising, labeling and sales to and by minors, regarded as a joint competency between national and provincial governments (RSA 2007).

Why the Department of Health overlooked the fact that the legislation would have implications for provinces' begs the question of whether this was intentional on their part in order to 'fast track' the legislation, or whether they were expecting or hoping for a 'rubber stamp'. More importantly, it highlights the fact that the legislature (or an outside party which successfully lobbied the legislature as may have been the case) has performed a highly significant policy role in this process, acknowledging the fact that certain aspects of the legislation had provincial implications in terms of the Constitution, and influencing the outcome of the parliamentary process, and potentially, the content of the legislation. Perhaps it might also suggest that legislatures are strengthening institutionally, becoming less subservient to executive domination.

(b) Parliamentary study tours: Sweden (2007) and Brazil (2008)

Also taking place during the 3rd Parliament (2004-2009) and in the middle of the legislative process, members of Parliament across the political spectrum (ANC, DA, IFP, NDC, UDM) from both the NA (Portfolio Committee on Health) and NCOP (Select Committee on Social Services) and tobacco industry executives from BATSA participated in an international study tour to Sweden in July 2007 facilitated by a civil society actor active in the promotion of 'harm reduction' policies, ARTH (introduced and discussed in Section 3.6). Such a study tour to Sweden appeared to be a response to the apparent lack of knowledge of MPs relating to tobacco harm reduction following the public hearings, and the fact that Sweden's tobacco control policies occupied much of the agenda (see Swedish Match Company submission in Section 3.6¹²). The stated intentions of the tour was to study policy and oversight around tobacco-related harm reduction in Sweden (ARTH 2007), which as a country proudly boasts being one of the only in the western world to have reached the WHO's goal of reducing the percentage of adult smokers to below 20% (PMG 2007). In addition, the other stated objectives of the tour to Sweden were 'to bring back to South Africa global lessons regarding tobacco-related harm reduction in Sweden' and 'to promote dialogue and strengthen relations between government and the tobacco industry' (ARTH 2007).

Almost a year after the Parliamentary study tour to Sweden, and prior to the NCOP's consideration of the Bill, MP's participated in another Parliamentary study tour to Brazil, once again facilitated by ARTH in late July 2008 (ARTH 2008) consisting the MPs across the political spectrum (ANC, ACDP, DA) from the Portfolio Committee on Social Development in the NA. Only one ACDP MP concurrently sits on a committee that at the time was considering the Tobacco Products Control Amendment Bill (2008). As a civil

¹² As mentioned in Chapter 3 (Section 3.6), the Swedish Match company promotes 'smokeless tobacco' as a harm reduction modality, whose South African operations has recently been bought by Phillip Morris International (PMI) (Business Report 2009).

society stakeholder active in promoting 'harm reduction' policies, some of the stated objectives of the organization in the Brazil study tour brochure include 'equipping legislators with a global perspective on harm reduction modalities' and 'to regularly participate in public policy development relating to harm reduction, by facilitating the flow of information between stakeholder groups throughout complex legislative decision making processes' (ARTH 2008). Unlike the Parliamentary study tour to Sweden which sought to learn lessons specifically about tobacco related harm reduction, Parliament's report following its participation in the study tour to Brazil expressly indicates that its purpose was for the Portfolio Committee on Social Development to prepare to deal effectively with the Prevention and Treatment of Substance Abuse Bill (2008) that was being considered by the committee at the time (Parliament 2009).

With reference to the internal competition of political power between the Speaker of Parliament and MP's who desired strong committees institutionally, the special advisor to the then Speaker (Frene Ginwala until May 2004), Lawson Naidoo, suggested that 'committees want to go on international study tours every year, often without producing proper reports' (Calland 2006:90).

Since then, it is possible that committees have strengthened their institutional capacity as demonstrated by reports emanating from the Select Committee on Social Services (SCSS) and Portfolio Committee on Social Development following their study tours to Sweden and Brazil respectively (Parliament 2009).

More importantly, the fact that one such report emanating from SCSS following the participation of the study tour to Sweden suggests that "national policy makers should be prepared to engage on harm reduction strategies" (Parliament 2009) implies that members of Parliament were open to expertise and lessons available outside the executive. Highlighting the legitimacy of the WHO as the ultimate authority with regards to tobacco control policy, the Committee (SCSS) emphasized that countries can work together within the WHO to address issues of tobacco harm reduction (Parliament 2009). Some, however, were doubtful of a 'harm reduction' agenda, suggesting that such a study tour amounted to 'inappropriate industry influence on the policy process leading to the consideration of the Bill' (Business Day 2008). Perhaps this may have been the case, however, it seems less likely since such an allegation of 'undue influence' did not translate into action. The Tobacco Products Control Amendment Act (Act 63 of 2008) did not appear to have any references to harm reduction policy, modalities or products promoted by the industry actors (such as 'snus' or 'smokeless tobacco') in the final text (RSA 2009).

Similarly, the report of Portfolio Committee on Social Development following the study tour to Brazil indicated that the committee learnt 'important lessons from Brazilian best practices on dealing with substance abuse, amongst other social development programmes' is another instance which points to the fact that parliamentary committees are open to expertise and lessons available outside of the executive (Parliament 2009).

The above two examples strengthens Piombo and Nijzink (2006:69) assertion that parliamentary committees can act as a source of expertise outside the executive in order to perform the function (and constitutional responsibility) that Murray and Nijzink (2002:3) describe as 'overseeing the development of policy'. Whilst it is unclear whether the lessons learnt from MPs in Sweden had any final bearing on the legislation in reality, it is apparent

that in the absence of the poor research capacity in committees (Murray and Nijzink; Butler 2004:95), MPs were empowered with knowledge and experience relating to 'harm reduction' policy interventions to be able to oversee such a policy development process.

Perhaps this is yet another indicator of a legislature that is strengthening its muscle, and not succumbing to executive domination, let alone any domination from stakeholders outside of the executive.

(c) Executive-legislative relations: DoH and PCH

During an official session where the Department of Health (DoH) was scheduled to present their strategic plan and budget for 2008/09 – 2010/11 in March 2008 to the Portfolio Committee on Health (PCH) before the beginning of the Section 76 legislative process, an 'informal' briefing was made by the DoH regarding the Tobacco Products Control Amendment Bill. It would seem that the administrative head, the Director-General (D-G) of Health, Thami Mseleku, who Calland (2006:71) maintains is one of the few non-politically appointed D-G's, attempted to use the forum to advance the agenda of tobacco control policy. In summary, the D-G provided a background regarding the process, and stated that the necessary procedures relating to public consultations were satisfied by the DoH before the initiation of the Bill to Parliament, and that Parliament had subsequently separated the text of one Bill into two separate Bills (making reference to the legislature's decision to split the Bill into S75 and S76 discussed above). The D-G further reminded the PCH that the Minister of Health had urged Parliament to 'fast track' the legislative process.

In response to what appeared to have been an attempt to apply pressure upon the PCH for the 'fast tracking' of legislative procedures in order to speedily enact this legislation, the committee Chair, James Ngculu representing the ruling ANC, emphasized the importance of having a formal briefing session on this matter on a scheduled date, and of completing all parliamentary procedures. Furthermore, the Chair firmly maintained that the committee would not take 'short cuts' in order to avoid a repeat of the 'Termination of Pregnancy Bill', which was returned to the committee because of the failure of 'another house' to follow proper procedure (PMG 2008).

Regardless of the factors that might explain such legislative assertion (some of which may be political, although is less likely since Calland 2006:71 regards the D-G as a non-political civil servant), it is important to acknowledge that the above situation unlikely represents a legislature that is subordinate to executive domination. If anything, the diplomatic assertiveness demonstrated by the then Chair of the PCH is another indication of a legislature that is strengthening its muscle.

Such apparent pressure from the Department of Health to expedite the legislative process in the early part of 2008 may have been because South Africa (and implicitly the Ministry of Health) was the official host of the 3rd Conference of Parties to the WHO FCTC to be held in November 2008 (which would have included all member countries who are signatories to the WHO FCTC), and it would have been a suitable platform for South Africa (and the Ministry or Department) to boast the extent of the domestic implementation of this global public health policy (WHO 2008). Additionally, in anticipation of South Africa's fourth democratic elections, there may have been a fear that the incoming President after April 2009 could have hesitated to sign the Bill into law. Evidently, this has not been the case, with the Tobacco

Products Control Amendment Act (2008) being one of the fastest to be promulgated, in comparison to the previous two pieces of legislation (discussed in Chapter 4).

(d) Public participation complaint during the Section 76 process

With the legislative process (including the public participation) having been completed in January 2007 for Section 75 of the Bill, the planning for the Section 76 legislative procedure gained momentum in the latter part of March 2008 (Appendix 1), following the insistence of the Portfolio Committee Chair to follow the legislative procedures (PMG 2008). Presumably, the Chair had also developed an understanding of the high level of political will of the Department of Health to make progress regarding this particular piece of legislation.

Before the Section 76 legislative public participation process could actually begin, several letters of complaint were received by the PCH Chair from tobacco companies and their attorneys, mostly complaining about the fact that not enough time was given to the public to review, evaluate and submit comments from the date of the advertisement (which was also criticised for attempting to limit participation by appearing in only one national newspaper), to the date of the scheduled public hearings. In a separate letter from British American Tobacco (BATSA) to the PCH, in addition to a submission by a firm of attorneys on behalf of the 'tobacco industry', BATSA's strong words condemning the process, and pointing fingers at the DoH was articulated as follows:

"The Department of Health's contention that there has been any consultation with British American Tobacco with regard to the Tobacco Products Control Amendment Bill of 2008 is false. We have no option but to view this claim as supporting their stated objective to 'fast track' the bill."

Very eager to respond this assertion during this special briefing with the PCH, the Chair did not allow the DoH such an indulgence, firmly ruling that the committee was "the wrong platform for such a discussion." Refuting claims made by the tobacco industry, and seeking the guidance of the Parliamentary Legal Advisor, the Chairperson defended the committee and maintained that all compulsory legislative provisions had been adhered to, including the advertisement having been placed in more than one national newspaper, listing each newspaper where the advert was placed. Nevertheless, demonstrating leadership in a conciliatory fashion, and having sought agreement with all other political parties in advance of the special briefing, the Chair ruled that the time period for submissions from the members of the public would be extended to after the parliamentary recess, which the committee believed would give the public sufficient time to comment (PMG 2008).

It is worth mentioning that most of the content being dealt with in the Section 76 legislation (including advertising and trade of tobacco) would have had a significant bearing on the tobacco industry, and such a complaint lodged above is likely to have been an attempt to stymie the Section 76 legislative progress, and hence, delay the enactment of the Tobacco Products Control Amendment Bill before April 2009. This is even more plausible considering that the content of the Section 76 Bill had already been presented when there was an expectation of only one (Section 75) procedure, and comments were already received in that regard. If the likely intention of the 'tobacco industry' was to delay the Section 76 procedure as it seems it was, then the objective would have been successfully achieved by placing resources behind their legal firms to identify loopholes in the process. It would also support

the assertion that the legislature acts as an institutional mechanism for publics to advance their views (although in this case, directly, and not necessarily through their elected officials), highlighting the intermediary role that the legislature makes in the policy making process. Such a move by the tobacco industry may, however, have been successful at the expense of legislators, executives and more importantly the ruling party, at least for the next five years, further questioning the sincerity of the industry to tobacco control measures, and potentially paving the way for minimal dialogue and stricter regulations in the future.

Despite such mayhem demonstrated by the legislative process relating to tobacco control policy during the 3rd Parliament, the rest of the Section 76 process appears to have progressed relatively unobstructed, though the minutes of many of the provincial legislatures report that tobacco companies have additionally participated in provincial public hearings. Following the 'recall' of President Thabo Mbeki in September 2008 by the ruling ANC, the interim appointed President Kgalema Motlanthe took the responsibility of signing the Bill into law in January 2009, thus completing the parliamentary processes (both section 75 and 76 procedures) effectively over the duration of the full 3rd Parliament. More recently, the Act was promulgated by the newly appointed President Jacob Zuma on the 21 August 2009 (Sabinet Law 2009).

5.3. Conclusion

In the 1st Parliament, the passing of law could be characterised as more of a 'rubber stamp' attempt initially, which was later (upon return by the President for reconsideration) effectively crafted in partnership with the executive following grave concerns raised during the public participation process. The situation at the time also strengthens the assertion of the legislature being an 'arena' type Parliament, unable to transform the inputs from various sources into law, and hence unable to influence the outcome of government policy.

Demonstrating legislative leadership in splitting the Bill into two pieces of legislation (Section 75 not affecting provinces, and Section 76 affecting provinces) during the 3rd Parliament, the legislature was instrumental as a 'policy agent' by performing a role in "shaping public policy by crafting legislation," although it appeared to have been very much independent of the executive, perhaps as a result of their urgency to 'fast track' the legislation. This most significant occurrence, taking place during the 3rd Parliament, points to a legislature that did not surrender to pressure from the executive, and was able to influence the outcome of government policy through the effective inclusion of provinces in the policy development process.

Based on Murray and Nijzink (2002:3) view that portfolio committee can become a source of expertise outside of the executive, and having witnessed the possible learning that portfolio committee members may have derived after their participation in international study tours, it would seem appropriate to add another dimension to the Barkan (2008:125) framework known as 'knowledge'. Over time, and assuming a low rate of turnover of MPs assigned to committee sectors, it is likely that MPs shall perform a 'knowledge' function and develop an institutional memory on the administrative side, having had the benefit of experience relating to specific policy amendments and interacting with a broad range of public stakeholders, which shall no doubt empower the legislature to better oversee the formulation (and implementation) of policies as per their constitutional mandate.

**CHAPTER 5: THE ROLE OF THE *LEGISLATURE* IN SHAPING
SOUTH AFRICA'S TOBACCO CONTROL POLICY**

Whilst it is unclear whether such a 'knowledge' function has been explicitly performed in this instance, this Chapter has clearly illustrated that in the case of tobacco control policy development, the legislature has performed a 'representational' function following the series of public hearings convened during the 1st and 3rd Parliament respectively. More importantly, and from a policy perspective, it is evident that the legislature has progressively performed a more active role, particularly in the 3rd Parliament, by influencing the shaping of public policies through the crafting of legislation.

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CHAPTER 6: CONCLUSION

The aim of this thesis was to investigate the policy-related behavioural characteristics pointing to the decline of the South African legislature using the case of tobacco control policy development. Those suggesting a decline of the legislature regularly assert the limited role Parliament performs in shaping public policy by 'rubber stamping' executive-initiated legislation; that the 'arena' type of Parliament does not adequately represent the interests of the people since it is unable to influence the outcome of government policy; and that the oversight function is only performed with respect to the passage of executive-initiated legislation rather than overseeing the implementation of policy.

Whilst the consideration of both the 1999 Act and the 2008 Act point to the legislation being executive-initiated, it is evident that the legislature has performed a far more active role in shaping public policy through the 'crafting of legislation' when considering the 2008 Act, whereby the policy issues of contention amongst dominant business actors in at least three instances were acceded to by Parliament.

Regarding the representation function, the parliamentary process preceding the 1999 Act strongly supports the characterisation of an 'arena' type of Parliament unable to influence the outcome of government policy given that the Bill was sent back to the National Assembly for reconsideration. However, in the consideration of the 2008 Act, the opposite seems true with the legislature's successful challenge of the executive's proposal which excluded provinces in the policy development process, resulting in a transformation of the policy outcome to include provincial interests.

In the execution of the 'lawmaking' and 'representation' functions, both the above instances are clear indications of the active policy-related roles performed, particularly in the consideration of the 2008 Act during the 3rd Parliament. This supports the main argument that the legislature is in fact strengthening.

Although some factors may not have a direct bearing on policy roles or outcomes, it is likely that they have been contributing to the institutional strengthening of the legislature during the consideration of the more recent 2008 Act.

Firstly, the participation of MPs of the PCH and SCSS (both committees considering the legislation) in a Parliamentary 'study tour' to Sweden to learn about global lessons relating to tobacco-related 'harm reduction' policies to bring back to South Africa, and to strengthen relations between government and industry no doubt points to the fact that the legislature is far more open to sources of expertise outside of the executive than its executive unequal. By gaining such knowledge in various policy areas, this no doubt contributes to its institutional strengthening of the legislature. To some extent, it can be argued that the legislature has further performed an 'oversight' function through the participation of an international study tour, and in so doing, performed a 'policy management' role. However, this would be limited to the oversight of the policy development process, rather than overseeing the implementation of policy.

Secondly, and within the context of executive-legislature relations, it would seem that at least two observable instances of legislative assertiveness can be identified in the deliberations of the Bill. The first instance relates to an attempt by the DoH to apply pressure to the PCH to 'fast-track' the legislation; and the second instances relates to a very firm response to the DoH after accusations were made against the department by the 'tobacco industry'.

Nevertheless, these factors would need to be counterbalanced against those factors that contribute to the strengthening of executive power.

The executive's policy monopoly is demonstrated by its active role performed in the formulation of tobacco control policy both at the international and domestic level. South Africa's role as a member of the WHO institutional mechanism (Intergovernmental Negotiating Body) as appointed by the WHO Director-General in the early negotiations and drafting of the FCTC is also unequivocal. The knowledge acquired from such an intricate and complex global tobacco control policy formulation process as the WHO FCTC, not to mention from its domestic experience passing tobacco control regulations, and the initiation and drafting of domestic legislation has no doubt contributed significantly towards the strengthening of its executive muscles. Since private sector engagement *inter alia* is regarded as a variable which contributes to the strengthening of executive power, the only factor that may point to the weakening of the executive (and the possible strengthening of the legislature) is the apparently adversarial tone of relations between the post 1994 government and the tobacco industry observed throughout this paper, which is somewhat of an inversion from the symbiotic relationship the tobacco industry enjoyed with the apartheid government.

Against such sheer executive power, it would seem that the likely strengthening of the legislature may bring the executive-legislature power balance not necessarily near, but somewhat closer to equilibrium.

6.1. Areas for future research

- Oversight as a common function of Parliament: what role does it perform in the policy development of tobacco control policy
- A political analysis of executive-legislature relations using the case of tobacco control policy
- The role of interest groups in influencing tobacco control policy outcomes
- Evaluating the extent to which Parliamentary study tours of committees influence policy outcomes in the legislature: a case of tobacco control policy
- A comparative analysis of executive-legislature relations in the 1st Parliament and 3rd Parliament: the case of tobacco control policy
- A comparative analysis of SA tobacco control policy legislation: the 1999 Act and the 2008 Act
- An exploration of the factors that contribute to the strengthening of legislative power in SA: a case of tobacco policy

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Evaluating the policy role of South African Parliament: A case of tobacco control policy
Appendix 1: Legislative History of Tobacco Control Policy (1993-2009)

21 Aug 2009	Tobacco Products Control Amendment Act (2008) promulgated (signed into law by President)	
06 May 2009	OPENING OF THE FOURTH DEMOCRATIC PARLIAMENT	
13 Jan 2009	Parliamentary Process Complete: Tobacco Products Control Amendment Act (Act 63 of 2008) assented by President and published in Government Gazette (Government Gazette No. 31790 Notice 23)	
18 Nov 2008	Health Portfolio Committee: Adoption of NCOP Amendments to the Bill	NA
23 Sept 2008	Select Committee on Social Services discusses province's final mandates	NCOP
09 Sept 2008	Select Committee on Social Services discusses negotiating mandates & departmental responses	NCOP
27-29 Aug 2008	Limpopo Provincial legislature – Public hearings on the Bill	
26 Aug 2008	KZN Provincial legislature – Public hearings on the Bill	
25 Aug 2008	Northern Cape Provincial legislature – Public hearings (4) on the Bill	
20-27 Aug 2008	Mpumalanga Provincial legislature – Public hearings on the Bill (446 attended)	
19 Aug 2008	Gauteng Provincial legislature – Public hearings on the Bill	
18-21 Aug 2008	North-West Provincial legislature – Public hearings (4) on the Bill	
16 Aug 2008	Free State Provincial legislature – Public hearings on the Bill	
11-15 Aug 2008	Eastern Cape Provincial legislature – Public hearings on the Bill	
17 Jun 2008	Health Portfolio Committee: Adoption of Tobacco Products Control Amendment Bill	NA
10 Jun 2008	Health Portfolio Committee: Further deliberations on Tobacco Products Control Amendment Bill	NA
03 Jun 2008	Health Portfolio Committee: Further deliberations on Tobacco Products Control Amendment Bill	NA
20 May 2008	Health Portfolio Committee: Deliberations on Tobacco Products Control Amendment Bill	NA
13 May 2008	Health Portfolio Committee: Department of Health responses to public hearings	NA
07 May 2008	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
06 May 2008	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
18 Mar 2008	Health Portfolio Committee: Public participation complaint – Tobacco Products Control Amendment Bill	NA
11 Mar 2008	Department of Health briefs Health Portfolio Committee on Tobacco Products Control Amendment Bill	NA
08-14 July 2007	Legislators participate in Parliamentary Study Tour to Sweden	NA / NCOP
30 May 2007	Department of Health briefs Select Committee on Social Services on Bill	NCOP
13 Mar 2007	Health Portfolio Committee: Deliberation of Tobacco Products Control Amendment Bill	NA
06 Mar 2007	Health Portfolio Committee: Deliberation of Tobacco Products Control Amendment Bill	NA
31 Jan 2007	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
30 Jan 2007	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
24 Jan 2007	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
23 Jan 2007	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
31 Oct 2006	Health Portfolio Committee: Department of Health briefing and committee deliberations on proposed public hearings	NA

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17 Oct 2006	Health Portfolio Committee: Planning for public hearings on Tobacco Products Control Amendment Bill	NA
JTM (Joint Tagging Mechanism) of Parliament decides to split Bill into a Section 75 Bill (not affecting provinces) and into Section 76 Bill (affecting provinces)		
07 Jun 2006	Health Portfolio Committee: Department of Health briefing – Draft Tobacco Products Control Amendment Bill	NA
08 Mar 2005	Department of Health briefs Select Committee on Social Services to support SA commitment to WHO FCTC, succeeding in adoption	NCOP
22 Feb 2005	Department of Health briefs Health Portfolio Committee to ratify WHO FCTC	NA
24 Feb 2005	Department of Health briefs Select Committee on Social Services to ratify WHO FCTC	NCOP
10 Nov 2004	Health Portfolio Committee: Planning ratification of WHO FCTC	NA
14 Sep 2004	Department of Health briefs Health Portfolio Committee on Tobacco Products Control Amendment Bill	NA
21 May 2004	OPENING OF THE THIRD DEMOCRATIC PARLIAMENT	
17 Oct 2003	Minister of Health issues notice of intention to table the Tobacco Products Control Amendment Bill (2004) in Parliament in 2004, inviting interested parties to submit comments or make representations within one month (Government Gazette No. 25601 Notice 1513)	
16 June 2003	South Africa becomes signatory to WHO FCTC at 56 th World Health Assembly in Geneva	
29 Feb 2000	Joint meeting of Health Portfolio Committee & Select Committee on Social Services: Tobacco Products Control Amendment Act	NA & NCOP
25 June 1999	OPENING OF THE SECOND DEMOCRATIC PARLIAMENT	
23 Apr 1999	Tobacco Products Control Amendment Act (Act 12 of 1999) assented by President and published in Government Gazette (Government Gazette No, 19962 Notice 494)	
24 Feb 1999	Joint meeting of Health Portfolio Committee & Select Committee on Social Services: Voting of Tobacco Products Control Amendment Bill	NA & NCOP
23 Feb 1999	Joint meeting of Health Portfolio Committee & Select Committee on Social Services: Reconsideration of Tobacco Products Control Amendment Bill	NA & NCOP
22 Feb 1999	Health Portfolio Committee: Reconsideration on Tobacco Products Control Amendment Bill	NA
17 Feb 1999	Health Portfolio Committee: Reconsideration on Tobacco Products Control Amendment Bill (following Letter from President to Speaker regarding his reservations about the Bill)	NA
21 Oct 1998	Health Portfolio Committee: Discussion on Tobacco Products Control Amendment Bill	NA
20 Oct 1998	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
19 Oct 1998	Health Portfolio Committee: Public hearings on Tobacco Products Control Amendment Bill	NA
09 May 1994	OPENING OF THE FIRST DEMOCRATIC PARLIAMENT	
2 July 1993	Tobacco Products Control Act (Act 83 of 1993) assented by President and published in Government Gazette (Government Gazette No. 14916 Notice 1156)	

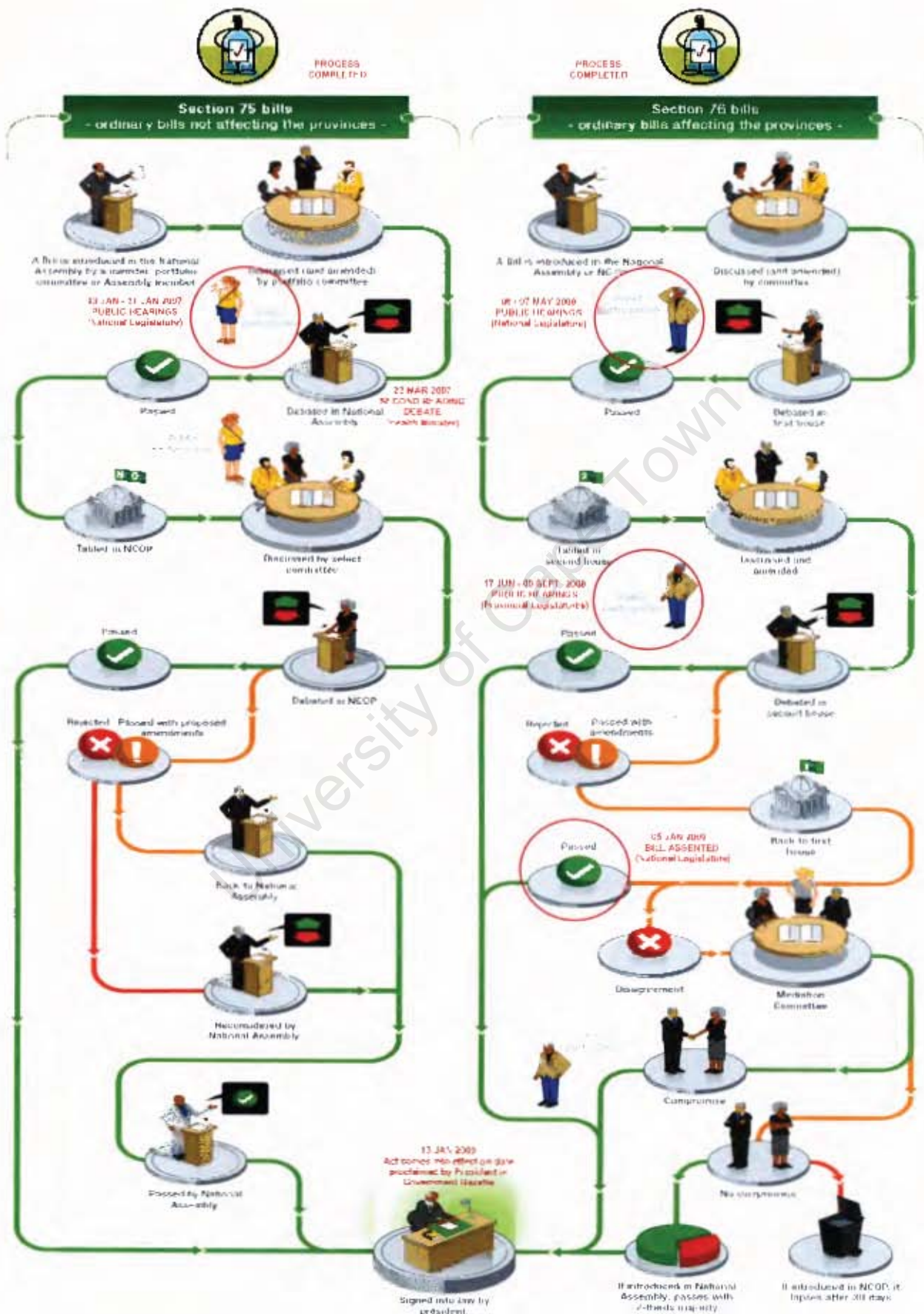
Sources: Parliamentary Monitoring Group (1998-2009). *Minutes of Portfolio Committee on Health and Select Committee on Social Services.*

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Ban tobacco advertising, promotions and sponsorship no later than 5 years after entry into force (Article 13)	Partial compliance (ban on tobacco advertising and promotions only)	Full compliance
Within 3 years of entry into force, require government approved rotating health warnings on tobacco packaging that: cover at least 30% and preferably 50% of the principal display areas (e.g. front and back), (which) may include pictures or pictograms, and must be in the principle language or languages of the Party (Article 11)	Partial compliance (Rotating health warning labels on packaging)	Partial compliance <ul style="list-style-type: none"> The Minister is empowered to regulate the format of information on packaging, including pictorials
Ban the use of misleading and deceptive terms (such as "light," "mild," "low tar") no later than 3 years after entry into force (Article 11)		Full compliance
Protect people from second-hand smoke. In practice this will require banning smoking in all indoor workplaces and public places (Article 8)	Full compliance	
Increase tobacco taxes and ban or restrict the sale of duty-free tobacco products (Article 6)	Partial compliance <ul style="list-style-type: none"> Except for restricting duty free tobacco products 	
Require all tobacco packages and packets to bear a clear distinction of origin and final destination market, in order to discourage smuggling (Article 15)		None
Include tobacco cessation services in national health programmes (Article 12)		None
Sales to minors (including complete prohibition of vending machines) (Article 16)	Partial compliance (vending machines restricted to venues not accessible to under 16)	Partial compliance (Minimal legal smoking age aligned with minor age 18; vending machines restricted to venues not accessible to under 18)
Ban the distribution of free tobacco products (Article 16.2)	Full compliance	

Sources: World Health Organization (2006). *A guide to the domestic implementation of the FCTC*. Available [06 June 2007]
 RSA (1999). *Tobacco Products Control Act (Act 12 of 1999)*. Available [17 Feb 2009]
 RSA (2009). *Tobacco Products Control Act (Act 63 of 2008)*. Available [17 Feb 2009]

Appendix 3: Legislative procedure & status of Tobacco Products Control Amendment Bill [B7D-2008]



SOURCES: Parliament of the Republic of South Africa (2008). *How Law is Made*
 Parliamentary Monitoring Group (2009) *Minutes of Health Portfolio Committee & Social Services Select Committee meetings*
 Sabine Legal Bill Tracker (2009). *Tobacco Products Control Amendment Bill [B7D-2008]*