

THE POWER TO NEGOTIATE: EXAMINING MANDATING PROCEDURES IN THE NATIONAL COUNCIL OF PROVINCES AND THEIR IMPACT ON LEGISLATION AND OTHER PARLIAMENTARY PROCESSES

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CHAPTER 1

INTRODUCTION

[T]he House that we have been building for many years has now been...completed. On examination it would appear that it has been built according to our specifications. It would also appear that it has many rooms to accommodate all of us. The question that has to be asked is whether this House will be able to withstand the heat of the Free State, the floods of Natal, the biting winter weather of the Transvaal. Will it withstand the Cape's storms? I have no doubt that it will. I am very optimistic. — Bulelani Ngcuka, 6 February 1997¹

The National Council of Provinces (NCOP) was inaugurated on 6 February 1997 as a second House or chamber of the Parliament of South Africa. With its launch it was hoped that the NCOP established by the final Constitution ('the Constitution')² would provide a stronger link between Parliament and the provinces than its predecessor, the Senate, which had existed under the Interim Constitution.³ The NCOP consistently emphasised in the Fourth Parliament that it was not prepared to be a mere 'rubber stamp' of legislation transmitted to it by the National Assembly (NA). The NCOP would therefore be expected to act as a house of review and carefully scrutinise s 75 bills passed by the first chamber, the NA. The political leadership of the NCOP of the Fifth Parliament that was established in July 2014, indicated that it would be 'business unusual' for the NCOP in its quest to improve its image and work.

The NCOP was created to enhance the participation of provinces in the legislative processes of the national Parliament. In terms of s 42(4) of the Constitution, the NCOP 'represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum

¹ *Debates of the National Council of Provinces (Hansard)* First Session — Second Parliament 6 February to 21 November 1997 vol 13 col 10. Address by Bulelani Ngcuka on accepting his nomination as Deputy Chairperson of the NCOP on 6 February 1997.

² Constitution of the Republic of South Africa, 1996.

³ Republic of South Africa Constitution Act 110 of 1983.

for public consideration of issues affecting the provinces'. The NCOP also plays a role in maintaining intergovernmental relations among the three spheres of government created in the Constitution, namely the local, provincial and national spheres. Having all three spheres of government represented in the same chamber allows it to address conflicts, as all three viewpoints must be considered in the legislative process.⁴

In terms of s 44(1)(b) of the Constitution, the NCOP has the power to (i) 'participate in amending the Constitution in accordance with section 74'; (ii) 'pass [s 76 bills dealing with provincial or concurrent competences]' and 'any other matter [allowed] by the Constitution...' and (iii) consider s 75 legislation that has been 'passed by the National Assembly'.

The consideration and passing of legislation affecting provinces is possibly the NCOP's most important role. Because of its mandate to represent provincial interests, the NCOP has more influence over bills affecting provinces, ie s 76 bills and those constitutional amendment bills in terms of s 74 that require the approval of the NCOP to be passed.⁵ The NCOP's legislative powers in respect of bills affecting provinces are intended to ensure that the consideration of provincial interests in the national legislative processes of Parliament is given more than mere lip service. Whereas the NA can pass s 75 legislation not affecting provinces with or without the NCOP's approval, it cannot do so in respect of bills affecting provinces. The NCOP's legislative power in respect of s 76 bills is formidable enough to stop the passage of a s 74 or s 76 bill in some instances, if it is rejected by six provinces (in the case of a s 74 bill) or five provinces (in the case of a s 76 bill) of the nine provinces voting in the NCOP. This is because the mediation procedures the Constitution provides to resolve disagreements between the NA and the NCOP on such a bill, tips the scale in the NCOP's favour if it was introduced in the NCOP.⁶ If

⁴ Parliament of the Republic of South Africa *The National Council of Provinces. Perspectives on the first ten years* (2008) at 18.

⁵ Not all constitutional amendments require the NCOP's approval as I discuss later in the chapter.

⁶ Mediation and the role of the Mediation Committee are discussed more fully in later chapters of the study.

the NA wants to pass a bill rejected by provinces, it can only do so with a two-thirds majority vote of NA members.

The Constitution requires provincial voices to be heard. Each province has one vote in respect of ss 74 and 76 bills affecting provinces which require the support of six and five provinces, respectively, to be passed by the NCOP.

To ensure that politicians in the NCOP that are based in Cape Town maintain their connections with the provinces they represent and do not make unilateral decisions on their behalf, the Constitution requires a provincial legislature to convey its decision on a bill or a question before the NCOP in the form of a mandate. It confers the mandate on its provincial delegation to authorise the delegation to act or make decisions on the province's⁷ behalf in the NCOP. A mandate can be open and give wide discretion to the delegation or it can be specific, eg to negotiate within specified perimeters for a province's position on or proposed amendments to be included in a bill⁸, or to vote (or abstain from voting) in favour of or against a bill or a question in the NCOP plenary.

Mandates are required for s 76 bills and constitutional amendments in terms of s 74(1)(b), (2)(b), (3)(b) and (8). Section 65 of the Constitution required the enactment of legislation to provide a uniform procedure to govern the mandating process. The Mandating Procedures of Provinces Act 52 of 2008, ('the MPPA') gives effect to s 65. It regulates the manner in which the voices of provinces must be taken into account in especially the consideration of bills affecting provinces, and sets out a uniform mandating procedure in this regard. A provincial legislature committee can confer a negotiating 'mandate' on a special or permanent delegate to negotiate in the NCOP committee for amendments a province may want to propose in respect of a s 76 bill. When it comes to voting on a s 74 or s 76 bill, the mandate or authority to vote in the NCOP on the province's behalf must be conferred on the

⁷ The terms 'province' and 'provincial legislature' are used interchangeably in the study.

⁸ In terms of current practice s 74 bills altering provincial boundaries cannot be amended — I discuss this situation in Chapter 5.

provincial delegation (as opposed to a single delegate) at a sitting of the provincial legislature. The head of the delegation (the Premier or other nominated person) casts the vote in the NCOP on the province's behalf.

Mandates are also required in respect of money bills in terms of the Money Bills Amendment Procedure and Related Matters Act 9 of 2009. However, this falls outside the scope of this study, the focus of which is the mandating processes concerning ss 74 and 76 bills.

In terms of the MPPA and current practices in Parliament, obtaining provincial mandates comprises a multi-stage process. It requires co-ordination between the NCOP and provinces, and also that provinces must consult the public (usually through public hearings) on proposed legislation which must inform the initial position or views on a bill. Provincial legislatures authorise or mandate their provincial delegations to take the provincial legislature's position (negotiating mandate, often accompanied by proposed amendments) to the NCOP select committee where they will negotiate with other provinces or provincial delegations on their positions or views and how the bill should be amended to accommodate those views. This is the testing ground to determine whether provinces (and not the NCOP *per se*) can accommodate the needs of other provinces. The NCOP provides a forum where provinces can communicate their positions informed by their unique challenges — evoked by Ngcuka's reference to the 'heat of the Free State, the 'floods of Natal' and the 'Cape's storms'. The bill agreed to during negotiations is sent back to the provincial legislatures to indicate to the NCOP select committee in their final mandates whether or not they will support the bill in the NCOP plenary. The select committee records provinces' final mandates — provinces do not actually vote on the bill in the select committee. Provinces next prepare voting mandates (the final step in the mandating process) which instruct the heads of the provincial delegations how to vote in the NCOP plenary. Up to this stage provinces still have an opportunity to change their mandates. After the NCOP passes a ss 74 or 76 bill with the requisite number of votes, it is transmitted to the NA for consideration of NCOP amendments (in reality provinces' amendments).

Over the years the NCOP has been the subject of numerous internal and scholarly reviews and introspection to determine whether it has lived up to expectations and has fulfilled its mandate to represent the provinces in Parliament. This study focuses on the participation of provinces in the legislative processes. It confirms many of the challenges and shortcomings pointed out in past studies. Nowhere is this more evident or more important than in the passage of national legislation affecting provinces directly. The study examines past and current practices and also examines the political influence on NCOP decisions and processes flowing from the control of the majority party, the African National Congress (ANC), of both the NCOP and eight of the nine provinces. The case studies in Chapter 4 in particular are used to consider how practices or processes would need to change should the political landscape change in future. For example, if the margin between the ruling party and opposition parties in the NCOP were smaller, it would be more difficult to obtain a supporting vote of five or six provinces on bills affecting provinces in the NCOP, meaning that a longer negotiating period and thus a longer legislative cycle would be needed to accommodate the process for provinces to agree on the contents of bills affecting provinces.

The study points out a number of stages in the mandating process that can possibly be strengthened, as well as a number of shortcomings that can be fixed. It explores provincial participation and examines (a) how and (b) to what extent negotiating mandates of the respective provinces are taken into account in the legislative processes of Parliament in selected ss 74 and 76 bills. The study also evaluates to what extent current systems, processes, rules and legislation give effect to the will of provinces, as an expression of the views emanating from provincial public participation. As public input only *informs*, and cannot *prescribe* (my emphasis), the provincial legislature's position on a bill, the study discusses provincial participation in this context, and not public participation *per se*.

In order to place the NCOP's role in perspective, Chapter 2 provides a brief overview of the historic background and evolution of the Parliament of South Africa, dating back to the Parliament of the Union of South Africa in 1910. Chapter

2 touches on the Senate that was reintroduced in 1994 as the forerunner of the NCOP, and then gives an overview of the constitutional and legislative framework from which the NCOP derives its mandate. The Constitution created three distinctive, interdependent and interrelated spheres of government and the NCOP plays an important role in maintaining cooperative governance or intergovernmental relations (IGR). The NCOP's role in IGR follows the German model, 'emphasizing concurrency, provincial delivery of national policies, and provincial representation at the center'.⁹ Chapter 2 also briefly compares the mandating processes of the NCOP and the second chamber of the German Federal Republic, the *Bundesrat*.

The subsequent chapters focus on selected aspects of the mandating process. Chapter 3 is a short chapter on the MPPA itself. It critically discusses the Act and its objectives, and how it fits into the constitutional role of the NCOP. The Chapter examines in which ways the Act helps or hinders the mandating processes, with reference to the processes followed in the Traditional Courts Bill 2012 (TCB 2012) and views gathered from various participants in the legislative process.¹⁰ It explains certain challenges and questions around mandating processes that emerged during the processing of the TCB 2012. Chapter 3 observes that the MPPA has not addressed the inherent challenges of the mandating process, including ensuring (a) adequate and meaningful public participation and (b) providing mechanisms to address an *impasse* during negotiations and ensure a clear outcome: an amended, unchanged or rejected bill. The discussion also highlights the internal conflicts that delegates face as legislators representing provinces, but also as members of political parties under strict discipline to adhere to instructions on their parties' position(s) on particular bills.

⁹ Richard Simeon and Christina Murray 'Multi-Sphere Governance in South Africa: An Interim Assessment' (2001) 31 *Publius* at 65.

¹⁰ Interviews were conducted with different role players representing the target groups including the executive (members of the provincial cabinet) and the legislature (presiding officers, ordinary Members and relevant staff of the NCOP and the provincial legislatures), as well as national government officials involved in selected bills.

In terms of NCOP Rule 240,¹¹ a six-week legislative period applies to the processing of s 76 bills in the NCOP which can be extended by the Chairperson of the NCOP. However, the Rules do not clearly define when this extension should end, and when the situation should be re-evaluated. The MPPA also does not contain any provisions that clarify whether such a bill is exempted from lapsing if it is not passed at the end of an annual session, and the Council (NCOP) does not revive it at the first sitting in the ensuing session. Chapter 3 concludes by recommending a review of the MPPA and the Rules of the NCOP with a view to amending them to (a) insert new provisions or rules or (b) amend existing ones to address the challenges identified.

Chapter 4 examines the mandates required in respect of s 76 bills by way of case studies (in two different sectors involving two different NCOP committees), viz the 2007 and 2013 National Environmental Management (Coastal Management) Bills and the TCB 2012. The discussion on the TCB elaborates some of the issues raised in Chapter 3 regarding the challenges in the mandating process. However, more focus is given to the provincial public consultation requirement in s 118 of the Constitution. The Chapter considers whether a province's or the NCOP's public consultation can remedy a department's flawed, failed or inadequate public engagement on proposed legislation, and whether or not such a bill should be referred back to the department for proper public consultation.

The Coastal Management Bill was processed in 2007, before the enactment of the MPPA. The discussion of this bill considers the steps taken by the national department to consult with the electorate and relevant stakeholders. It illustrates the extent to which public consultation, which took place over a period of seven years, can and should be meaningful — it assisted in developing the policy which ensured stakeholder buy-in from the start. The bill was widely accepted and mandating processes ensured that the interests of especially the four coastal provinces were taken into consideration. The case study is an example of a s 76 bill that affects only

¹¹ Parliament of South Africa (2012) *Rules of the National Council of Provinces* 9 ed March 2008.

certain provinces directly which raises interesting and important questions on the role of provinces in the mandating process if they are not directly affected by a bill: are they expected to hold public consultations, develop negotiating mandates and participate in negotiations, and how does this impact on the negotiating power of directly-affected provinces? The discussion looks at what steps affected provinces can take to assist their cause(s) to ensure they maximise and benefit from negotiations, and raise their concerns about unfunded mandates in a way that ensure other provinces support their positions on, or proposed amendments in respect of, such bills.

Chapter 5 discusses the mandating procedures for s 74 bills (bills amending the Constitution). It refers to the Constitution Twelfth Amendment Act of 2005 ('the Twelfth Amendment'), and the Constitutional Court (CC) challenge to the Twelfth Amendment and parts of the Cross-boundary Municipalities Laws and Repeal Related Matters Act 23 of 2005 in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* ('Merafong').¹² The legislation sought to eliminate cross-boundary municipalities and, consequently, alter provincial boundaries. In terms of s 74 of the Constitution, a province's approval, in the form of a mandate, is required for constitutional amendment bills that seek to alter provincial boundaries. In *Merafong* the CC held that notwithstanding the importance of public consultation and public opinion in informing a provincial legislature's mandate, the legislature can change its mandate under certain circumstances without reverting to the public. The discussion supports the CC's views in this regard, but at the same time argues for a different approach, including informing the public about the legislature's intention to change its mandate and the reasons for that decision.

Chapter 5 also considers the question whether s 74(3) and (8) allow for amendments in the NCOP of a Constitutional Amendment Bill that alters provincial boundaries. The discussion explores pronouncements of the CC on this issue and argues that amendments are allowed. The Chapter concludes that this issue requires

¹² CCT 41/07 [2008] ZACC 10.

further refinement and clarification in legislation and the Rules of Parliament, and proposes various options for consideration.

Chapter 6 concludes the study and summarises its findings regarding the extent to which the (a) NCOP gives effect to its constitutional mandate to represent provincial interests in national legislative processes and (b) provinces themselves enhance their participation in the passing of national legislation that affect them and decision-making in the NCOP. The NCOP processes fewer ss 74 and 76 bills that affect provinces directly compared to s 75 bills that do not affect provinces. For the most part the NCOP functions as a house of review of legislation transmitted by the NA in respect of most s 75 bills it processes. This underscores the NCOP's determination not to simply 'rubber stamp' legislation passed by the NA.

Chapter 6 summarises the challenges that emerged in mandating processes in practice — either due to specified gaps in the MPPA, NCOP Rules, the Joint Rules of Parliament and/or the Constitution, or because of a misinterpretation of their application. The Chapter lists the recommendations made in the study, including possible amendments to the MPPA, the Joint Rules of Parliament¹³ and the NCOP Rules to bring about the desired change(s) to (a) enhance mandating procedures in the NCOP and (b) enable provinces to have a more meaningful impact on the legislative and other Parliamentary processes affecting provinces.

¹³ Parliament of the Republic of South Africa Joint Rules of Parliament (2011) 6 ed 29 June 2011. Available at <http://www.parliament.gov.za/content/JOINT%20RULES%20A5~1.pdf>. Accessed on 6 October 2015.

CHAPTER 2

1. Introduction

The NCOP owes its life, in part, to the problems that besieged its predecessor, the Senate. At the time of its dissolution, the Senate had evolved from the Westminster model of an upper chamber representing the elite, to a second chamber representing the interests of provinces. As a ‘new institution’, the NCOP ‘did not have an exact replica in the Senate or any other second chamber. This uniqueness has posed challenges to persons who seek to definitely elaborate its exact nature and function’.¹⁴ The discussion of the historic background and the constitutional and legislative mandate of the NCOP in this Chapter provides some context to the NCOP. This is not an analytical chapter, but an account of the history of the NCOP and the way it works under the Constitution. Because the German second chamber, the *Bundesrat*, bears closest resemblance to the NCOP and influenced its design, I include a short description of mandating processes in the *Bundesrat* compared to the NCOP.

2. Historic Background: The nature and evolution of the South African Parliament

The evolution of the Senate, the forerunner to the NCOP, is intrinsically linked to the evolution of Parliament. The discussion starts in 1910 when South Africa became a Union. The Union’s founding Constitution formally established a bi-cameral Parliament and the evolution of the Parliament, and particularly its Senate, can be linked to major political developments leading up to South Africa’s attainment of democracy in 1994.

¹⁴ Naledi Pandor ‘Remarks by Minister of Science and Technology, Naledi Pandor, MP at the NCOP workshop for the 2014 Parliament, 1 July 2014’. Unpublished. Pandor was the Chairperson of the NCOP between 1999 and 2004.

2.1 *Bi-cameral Parliament 1910 to 1982*

The Union of South Africa was established on 31 May 1910 even though South Africa only gained independence from its colonial ruler, Great Britain, in 1931 through the Statute of Westminster. At the time of Union, the four colonies (Cape, Transvaal, Orange River and Natal) had their own administrations, courts, parliaments and treasuries¹⁵ which favoured their white population of predominantly British and Dutch descent over ‘non-whites’.

The unification of the four colonies was first discussed at the Pretoria Conference that met in 1908 to discuss railway tariffs between the different colonies. Delegates resolved to hold a National Convention for the purpose of drafting a constitution for the Union. Although the argument for a Union was primarily racially motivated (‘the white population, if united under one government, [would be] strong enough to deal with any danger [posed by blacks]’¹⁶), it was acknowledged that separate administrations made the government ‘inefficient, cumbrous, and expensive’.¹⁷ The National Convention met in October 1908 until February 1909. The issue of voting rights for non-whites was a contentious one. In the Free State and Transvaal non-whites were not allowed to vote at all, whereas they had limited voting rights in the Cape and Natal. At the time, voting rights in the Cape and Natal colonies were ‘qualified by property and education requirements [and] the voters roll in the Cape...incorporated Africans and coloureds [which] by 1910...represented 15% of the electorate’.¹⁸ In Natal only six Africans were eligible to vote, and only those Asians who had qualified to vote by 1893 could vote in national parliamentary elections. Asians who qualified after 1893 could participate in municipal and provincial elections. Despite opposition from the Free State and Transvaal, the Cape and Natal scored a minor victory in forging an agreement to not only retain the ‘non-white’ franchise in their colonies, but also to ensure their

¹⁵ RH Brand *The Union of South Africa* (1909) at 29.

¹⁶ Brand *op cit* note 15 at 29.

¹⁷ Brand *ibid* at 29.

¹⁸ T Lodge ‘South Africa’ in *Compendium of Elections in Southern Africa* (2002) T Lodge, D Kadima & D Pottie (eds) EISA South Africa at 292.

protection in the Union Constitution. The voting rights of blacks and coloureds in the Cape and Natal colonies were entrenched in the Union Constitution by the requirement that coloured and black voters could only be removed from the voters roll with a two-thirds majority in both houses of Parliament sitting jointly.¹⁹ The Union's Constitution, the South Africa Act of 1909, was later adopted by each colony's Parliament after considerable amendments. A referendum was held in June 1909 in which only whites participated and voted in favour of the Union and the adoption of the Union Constitution.

The Union Constitution established a new Parliament that consisted of the Senate (upper chamber) comprising indirectly-elected members, and the House of Assembly (lower chamber) comprising directly-elected members.²⁰ The former Cape and Natal colonies were predominantly British colonies: Natal had maintained 'British methods and ideals'²¹, while the Cape Colony alone had had a 'parliamentary tradition'.²² This may explain the British influence of bi-cameralism, parliamentary sovereignty and the executive's accountability to Parliament²³ in the Union Parliament. However, its supremacy was subject to limitations imposed by the Statute of Westminster which entrenched certain provisions in the Union Constitution, for example the voting rights of coloureds.²⁴ Changes to these entrenched provisions could only be passed by a majority of the two Houses of Parliament sitting jointly.

In addition, the composition of Parliament could not be tampered with for a specified period as both chambers were 'for the first period of their existence...constituted on...a provincial basis'.²⁵ This was a major concession made

¹⁹ Section 35 of the South Africa Act of 1909.

²⁰ T Rapoo 'In poor voice: NCOP's weakness flows from the Westminster system' (2001) 22 *Centre for Policy Studies Policy Brief*, available at <http://www.cps.org.za/22.htm>, accessed on 11 October 2012.

²¹ Brand *ibid* at 38.

²² Brand *ibid* at 55.

²³ D Anckar 'Westminster Lilliputs? Parliaments in former small British colonies' (2007) 60 (4) *Parliamentary Affairs* at 641.

²⁴ I discuss the attempts by the NP government to change the voting rights of coloureds in the 1950s in more detail later in the Chapter.

²⁵ Brand *ibid* at 44.

‘to secure the acceptance of a constitution unitary in its nature although apparently federal in some of its aspects’.²⁶ Considering South Africa’s turbulent political history that unfolded over the next decades until the Constitutional crisis in the 1950s over the government’s attempts to tamper with the coloured vote, these entrenched constitutional safeguards provided the only remedy with which the Courts could uphold the voting rights of coloureds.

Despite its name, the Union of South Africa was a ‘divided state’ because ‘the Constitution granted the white minority parliamentary democracy [but] subjugated the majority of black South Africans to autocratic administrative rule’²⁷ or ‘tribal authority’.²⁸ Parliament passed the Native Administration Act 38 of 1927, which allowed for the substitution, by proclamation, of individual black land ownership with ‘communal tenure’. Because voter eligibility in the Cape was based on the value of individual property ownership, this Act effectively meant that blacks would no longer be able to qualify as voters in the Cape.²⁹ The validity of the Native Administration Act was challenged in court in 1929 as a veiled attempt by the Union government to interfere with the Cape franchise.³⁰ The Appellate Division, however, upheld the validity of this Act on the grounds that ‘interference with property rights [could] not be construed as an alteration of the qualification of voters’.³¹ A few years later, in 1936, Parliament passed the Representation of Natives Act 12 of 1936, with a two-thirds majority of both houses of Parliament sitting jointly as required by s 35(1) of the South Africa Act of 1909. The Representation of Natives Act removed blacks in the Cape from the common voters roll and placed them on a separate voters roll.³²

²⁶ Brand *ibid* at 63.

²⁷ I Currie and J de Waal (contributing eds) ‘A constitutional history of South Africa’ (2001) P De Vos, Govender, K & Klug, H (contributors) *The new Constitutional and Administrative Law Volume 1: Constitutional Law* at 51.

²⁸ Currie and Waal *op cit* note 27 at 52.

²⁹ Currie and Waal *ibid* at 53.

³⁰ *R v Ndobe* 1930 AD 484.

³¹ *R v Ndobe* *supra* at 496.

³² Currie and Waal *ibid* at 54. Blacks in the Cape could only elect three white representatives’ to represent them in the Assembly, and elect (through a system of indirect representation) four white senators to represent them in the Senate.

The Union government next set its sights on the entrenched Cape coloured vote. According to s 35(1) of the South Africa Act, an amendment to change the voting rights of coloureds in the Cape could only be passed by a two-thirds majority of both houses of Parliament sitting jointly.³³ This clause presented a challenge for the National Party (NP) that came into power in 1948 as it did not hold a two-thirds majority in Parliament. The NP's attempts during the 1950s to bypass the requirements of s 35 in order to pass the Separate Representation of Voters Act 46 of 1951, which removed coloureds from the ordinary voters roll to a separate voters roll, plunged South Africa into a constitutional crisis.³⁴ The Appellate Division struck down this Act as it had been passed with an ordinary majority and not a two-thirds majority, rejecting the argument that it previously followed in *Ndlwana v Hofmeyr*³⁵ that the Statute of Westminster had impliedly repealed the entrenched clauses in the South Africa Act³⁶ and that the Union Parliament could therefore enact laws as it saw fit.³⁷ The Court held that while the Union Parliament was undeniably supreme, it was bound by the relevant provisions of the South Africa Act of 1909, and that the 'Court is competent to enquire whether, regard being had to the provisions of sec. 35, an Act of Parliament has been validly passed'.³⁸

The NP retaliated by establishing Parliament as a High Court. In terms of the High Court of Parliament Act 35 of 1952, the two houses of Parliament sitting jointly could overrule the Appellate Division if it invalidated Acts of Parliament. But, the Appellate Division struck down this Act in 1952.³⁹ The NP next inflated the size of the Senate in 1955⁴⁰ by passing the Senate Act 53 of 1955, which increased the number of NP-nominated Senators⁴¹ to ensure it would obtain a two-thirds

³³ Christopher Forsyth *In Danger for their talents: A study of the Appellate Division of the Supreme Court of South Africa from 1950–80* (1985) at 70.

³⁴ The NP government recognised four main race groups and afforded each group different rights and privileges according to their hierarchy status. In order of most privileged to the least recognised were first 'whites' or 'Europeans' who were born in South Africa but deemed to be of European descent. Next were the non-white groups, namely 'coloureds' who were regarded as mixed race, followed by Indians (those of Indian descent), and last were 'blacks', previously also referred to in legislation as 'natives'.

³⁵ *Ndlwana v Hofmeyr* NO 1937 AD 229.

³⁶ Sections 35 and 152 of the Union of South Africa Act of 1909.

³⁷ *Harris and others v Minister of the Interior and another* 1952 (2) SA 428 (A).

³⁸ *Harris* supra p55 at para D.

³⁹ *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A).

⁴⁰ Forsyth *op cit* note 33.

⁴¹ The Senate Act 53 of 1955, increased the number of Senators.

majority in a joint sitting of Parliament. It also increased the number of Appellate judges with predominantly NP supporters⁴² through a process known as ‘court-packing’.⁴³ This paved the way for Parliament to pass the South Africa Act Amendment Act 9 of 1956, in terms of which the voting rights of coloureds could be altered by a simple majority.⁴⁴ Subsequently, in 1957, the Separate Representation of Voters Act 46 of 1951, which had been struck down by the Appellate Division in 1952, was revived and passed by Parliament with an ordinary majority. When the validity of this Act was again challenged in *Collins v Minister of Interior*⁴⁵ the ‘NP-packed’⁴⁶ Appellate Division upheld it.⁴⁷

The executive’s interference in the 1950s with the Senate’s powers, function and composition tarnished the Senate’s image beyond repair. As a second chamber it had become ineffective and meaningless, and therefore dispensable. It reviewed legislation passed by the first chamber as a mere formality and existed to ensure government had a sufficient majority to pass racially unjust laws. This state of affairs continued when South Africa became a Republic in 1961,⁴⁸ as it retained the bi-cameral Parliament. It was only in 1980 that the NP government under P W Botha abolished the Senate through the Republic of South Africa Constitution Fifth

⁴² The Appellate Division Quorum Act 27 of 1955, increased the number of Appellate judges from six to eleven and required a quorum of eleven judges to adjudicate on the validity of Acts of Parliament. According to B Beinard ‘The South African Appeal Court and Judicial Review’ (1958) 21(6) *MLR* at 600, the government wanted ‘legal certainty’ about Parliament’s powers due to the divergence between *Ndlwana v Hofmeyr* and the coloured vote case. It believed that only a larger court than the one that adjudicated such matters in the past could do so.

⁴³ Enrique Petracchi *To defer or to defy: judicial control in insecure environments* (unpublished dissertation, Vanderbilt, nd) available at <http://etd.library.vanderbilt.edu/available/etd-12072007-145535/unrestricted/DISSERTMANACSA PART2.pdf>, accessed on 16 September 2015. The executive can influence the decisions of the courts by ‘replacing recalcitrant judges with more reliable agents. They can also increase the size of the court and then name loyalists to the judiciary’ at 259.

⁴⁴ BJ Liebenberg ‘The National Party in power’ (1986) in CFJ Muller (ed) *Five Hundred Years A history of South Africa* 5 ed 480–481.

⁴⁵ 1957 (1) SA 552 (A). Ten of the eleven judges of the court (only Schreiner J dissented) held that the Act had been passed in accordance with the procedural requirement of the 1909 Constitution.

⁴⁶ Forsyth *ibid*.

⁴⁷ The judiciary and the courts were heavily criticised for their role in upholding unjust laws and their complicity with the NP government. Forsyth *supra* comments eg that the judiciary could have opposed the validity of unjust laws on the basis of the common law and the Westminster principle of Parliamentary sovereignty on the grounds of fairness.

⁴⁸ A referendum was held in 1960 in which the majority voted in support of South Africa becoming a Republic. This was done through the enactment of the Republic of South Africa Constitution Act 32 of 1961.

Amendment Act 110 of 1980. Section 24 of this Act provided for Parliament to consist of the State President and the House of Assembly, while s 102 established a President's Council (PC), an advisory body with no legislative powers.

2.2 Tri-cameral Parliament 1983 to 1993

In 1980 a parliamentary select committee considered constitutional reforms recommended by the Theron Commission that was appointed in 1977 to improve the situation of coloureds.⁴⁹ The Theron Commission had advocated for the abolition of the Westminster system, whereupon the select committee recommended the creation of a tri-cameral parliament to include limited representation of coloureds and Indians, but still exclude blacks. Blacks were not allowed to participate in elections or to be represented in Parliament. The Republic of South Africa Constitution Act 110 of 1983, created three 'lower' houses of Parliament with equal powers, respectively representing whites, coloureds and Indians. The largest chamber, the House of Assembly, represented whites and consisted of 185 white members. The House of Representatives represented coloured voters and consisted of 85 representatives. The House of Delegates was the smallest chamber and consisted of 45 Indian delegates representing Indians. Despite wide opposition by the anti-tri-cameral Parliament campaign, the majority of whites voted in favour of the constitutional reforms and the establishment of a tri-cameral Parliament in a Referendum on 2 November 1983. The tri-cameral Parliament was subsequently inaugurated in 1985. In terms of s 6(4) of the 1983 Constitution, the State President became the head of state with the same powers and functions that he had as Prime Minister 'immediately before the commencement of this Act...by way of prerogative'. Cabinet members were drawn from all three houses of the tri-cameral Parliament, while PC members would be elected proportionally by the three houses.⁵⁰

⁴⁹ South African History Online 'Tricameral Parliament' available at <http://www.sahistory.org.za/archive/tricameral-parliament>, accessed on 11 May 2015.

⁵⁰ South African History Online (2015) *op cit* note 49.

These constitutional reforms made the executive State President more powerful and weakened Parliament. Coloured and Indian representation in the tri-cameral Parliament was ‘largely cosmetic, as real political power would remain concentrated in the House of Assembly, and, by extension, in the hands of the [w]hite minority’.⁵¹ As the PC was only an advisory body to the President, the President was not bound by its recommendations. Furthermore, South Africa’s policy of racial segregation and the exclusion of blacks from the PC endowed its constitutional recommendations with ‘no more value than oxygen administered to a corpse’.⁵²

2.3. Reintroduction of the Senate in 1994

The 1980s were marked by increasing popular resistance among black South Africans to the oppressive, undemocratic NP government under PW Botha. The latter retaliated by violently dispersing peaceful protests, killing and arresting liberation movement leaders with the use of the army and the police force. The ANC embarked on an armed struggle to ‘make apartheid unworkable and [the] country ungovernable’.⁵³ This, and the growing international condemnation of the apartheid state, forced the NP government to enter into negotiations with the liberation movement for a peaceful settlement. This started with *inter alia* the release of certain political prisoners by the new NP president FW de Klerk in 1989, followed by the release of former President Nelson Mandela in 1990. The 1990s thus ushered in a period of ‘transition and negotiation’.⁵⁴ The ruling NP and the African National Congress (ANC) were the main negotiators during protracted negotiations for a democratic dispensation in South Africa. South Africa’s first democratic elections were held in 1994, four years after Mandela’s release.

⁵¹ South African History Online (2015) *ibid*.

⁵² Republic of South Africa *Hansard* (1981) President’s Council 1st session 6 February 1981 col 39–49 Inaugural address by P T Poovalingam on 6 February 1981.

⁵³ L Segal and S Cort *One Law, One Nation. The making of the South African Constitution* (2011) at 42.

⁵⁴ South African History Online ‘Transition and negotiation, 1990–1994’ available at <http://www.sahistory.org.za/transition-and-negotiation-1990-1994>, accessed on 31 July 2015.

An Interim Constitution (IC), the Constitution of the Republic of South Africa Act 200 of 1993, was adopted in 1993 and came into force on 27 April 1994, the day of the 1994 elections.⁵⁵ The IC established new provinces,⁵⁶ increasing the number of provinces from four to nine.

The IC also reintroduced the Senate as a second chamber of Parliament. According to Mandela who became the first President of the democratic South Africa, the reintroduced Senate had two broad objectives. It had to (a) represent provincial interests in the national Parliament and (b) facilitate co-operative governance by (i) ‘embody[ing] the unity of South Africa and its people’, (ii) giving expression to the ‘interdependence of provinces’, (iii) playing a role in the Constitution-making process, (iv) initiating national legislation and (v) playing a ‘crucial role in the composition of the judicial bodies in general and the CC in particular’.⁵⁷ Senators were not accountable to provincial legislatures and the IC did not clearly define the Senate’s liaison with the provinces.⁵⁸ This contributed to the Senate being criticised for inadequately representing provincial interests, not providing a link or communication with provinces, and duplicating the work of the Assembly.⁵⁹ Parties consequently agreed to replace the Senate, but it was only after further protracted negotiations and a multi-party visit to Germany in 1995, that its replacement was defined in the final Constitution concluded in 1996.⁶⁰

⁵⁵ The ANC and NP were also the main negotiators for the drafting of a final Constitution which was adopted in 1996.

⁵⁶ Section 124(1) establishment the provinces as follows: (a) Eastern Cape; (b) Eastern Transvaal; (c) Natal (the name later changed to KwaZulu/Natal in terms of the Constitution of the Republic of South Africa Amendment Act 2 of 1994); (d) Northern Cape; (e) Northern Transvaal; (f) North West; (g) Orange Free State; (h) Pretoria-Witwatersrand-Vereeniging; and (i) Western Cape.

⁵⁷ *Senate Hansard* 1994: 1012 N R Mandela Debate on the President’s Budget Vote in the Senate 14 September 1994 cited in M L Brandt *From the Senate to the NCOP: A description of the Composition and Working of South Africa’s Second Chamber* (unpublished Masters of Philosophy in Political Management thesis University of Stellenbosch 2001) at 7.

⁵⁸ *The National Council of Provinces Perspectives on the first ten years op cit* note 4 at 11.

⁵⁹ *The National Council of Provinces Perspectives on the first ten years ibid* at 18.

⁶⁰ *Ibid.*

2.4 *Inception of the NCOP as a second chamber in 1997*

Section 42 of the Constitution establishes the NCOP as Parliament's second chamber. The launch of the NCOP in 1997 embodied an agreement providing for direct representation of provincial interests at the national legislative level.⁶¹ Compared to the Senate, the NCOP is no chip off the old block. Its design is based on the *Bundesrat* of the Federal Republic of Germany, albeit with distinct differences. The South African constitution-drafters, in exploring different options for a new second chamber for a democratic South Africa post 1994, found the German system of federalism to be the most suitable for South Africa's proposed regions or provinces.⁶² In Germany most powers are concurrent, and on many matters the individual *länder* execute laws adopted at the federal level and the *länder* participate directly in the federal government through the *Bundesrat*, the German second chamber.⁶³ The *Bundesrat* resembles closely what South Africa envisaged for its second chamber — a national council representing regional or provincial interests — thus, the National Council of Provinces. What appealed to South Africa was Germany's 'division of power between arms and spheres of government [wherein] the Federation (or national government) and the Länder (comparable with South Africa's provinces) should work within a mutual checks-and-balances system but also practice mutual co-operation and consideration'.⁶⁴ Because South Africa adopted a system of semi-autonomous provinces and 'a strong emphasis on the need for co-operation between the various spheres of government', the NCOP, like the *Bundesrat*, was designed as 'an institutional arrangement which promoted co-operation rather than competition between national and sub-national

⁶¹ According to Murray (1998) quoted in Brandt *op cit* note 57, the establishment of provinces and a system of co-operative governance was agreed on to accommodate parties that wanted a federal system of government. This illustrates the idea of a national government or unitary state with federal tendencies because provinces enjoy a limited amount of autonomy.

⁶² Prior to 1994 South Africa followed a system of government with centralised power. By contrast, in a federal government system like Germany, power is distributed more evenly among autonomous federal states (regions or *länder*) and is not centralised in a national government.

⁶³ Konrad Reuter *The Bundesrat and the federal state system. The Federal Council of the Federal Republic of Germany* (2009) 14 ed at 52.

⁶⁴ *The National Council of Provinces. Perspectives on the first ten years* *ibid* at 17.

government'.⁶⁵ NCOP members are politicians nominated by provincial legislatures, which strengthens the link between the NCOP and provinces.

Below is a brief overview of the mandate of the NCOP, its membership, legislative and veto powers, voting in the NCOP and its role in co-operative governance or intergovernmental relations (IGR).

3. Overview of the NCOP

3.1 *Mandate*

The NCOP is the forum through which the provinces participate in legislation and other decisions of the national government. The NCOP must, in terms of s 42(4) of the Constitution, ensure that provincial interests are taken into account in the national sphere of government. It gives effect to this mandate by participating in the national legislative process and providing a national forum for public consideration of issues affecting provinces. The NCOP's constitutional mandate, in simple terms, is to (a) represent provincial interests in the national sphere of government (including in the passage of legislation);⁶⁶ (b) participate in amending the Constitution;⁶⁷ (c) approve and oversee (i) provincial intervention in municipalities⁶⁸ and (ii) national intervention in provinces;⁶⁹ and (d) mediate between the local, provincial and national spheres of government.⁷⁰ The Constitution also allows a delegation from organised local government to participate in the NCOP but not to vote. The NCOP was designed to have close links with the provinces (the equivalent of the *länder* in Germany) and its representation of provincial interests emulates the German model. The extent to which it does so is explored in later chapters in the

⁶⁵ *Ibid.*

⁶⁶ Section 42 of the Constitution.

⁶⁷ S 74.

⁶⁸ S 139.

⁶⁹ S 100.

⁷⁰ Chapter 3.

study. The NCOP's role as mediator in IGR to prevent conflict between the different spheres of government is also taken from the German model.

3.1.1 Co-operative Government

The NCOP's role in IGR has been described as the 'glue that holds the nation together'.⁷¹ This is an exaggeration because it implies poor cooperation or worse, a continuous state of conflict, between the different spheres of government and credits the NCOP with ensuring that they work together in harmony. Nonetheless, the NCOP has an important mediation role in IGR that helps it to ease conflict between the different spheres of government which is taken from the German model. The NCOP is the forum through which provinces participate directly in the national legislative process. It also, to some extent, allows for local government's views to be represented although local government cannot vote on decisions in the NCOP. The NCOP thus has close links with both provinces and local government. Through the NCOP's oversight role, provinces are able to hold national government accountable. At the same time the NCOP must ensure that provinces and local government implement national laws. Through its powers in respect of interventions by (a) national government in the administration of a province in terms of s 100 or (b) provincial government in that of a local government in terms of s 139 of the Constitution, the NCOP is able to play a mediation role to prevent conflict and foster co-operation between the different spheres of government.

The South African Constitution mirrors the German Basic Law's division of power among the different spheres of government and the system of co-operative governance. Section 40(1) states that the 'government is constituted as national, provincial and local spheres of government that are distinctive, interdependent and interrelated'. The reference to 'sphere' as opposed to 'level' of government indicates that all three spheres are equal.⁷² Each sphere must respect each other's

⁷¹ *The National Council of Provinces. Perspectives on the first ten years* *ibid* at 19.

⁷² Christina Murray 'NCOP: Stepchild of the Bundesrat' (1999) *50 Jahre Herrenchieser Verfassungskonvent 'Zur Struktur des deutschen Federalismus (herausgegeben vom Bundesrat 1999)* 262–278.

autonomy. Any encroachment by another sphere is strictly governed by the Constitution, with the NCOP acting as watchdog in this regard. Section 41 sets out the ‘rules of engagement’ governing the relationship between each sphere and all organs of state with an emphasis on, *inter alia*, mutual respect for each sphere’s autonomy, co-operation and the peaceful settlement of disputes without resorting to legal action.⁷³

Chapter 3 of the Constitution consists of only two sections, namely ss 40 and 41. Chapter 3 makes no reference to the NCOP, nor does it expressly assign to it a role in co-operative government. Nevertheless, the NCOP’s role in IGR is embedded in its role assigned by s 42(4), particularly its representation of provincial interests and role in the national legislative process, described earlier.

The composition of the NCOP’s delegation of provincial politicians and provincial executives (in addition to the participation of local government in the NCOP) underscores its central role in IGR. The NCOP’s representation of ‘the provincial perspective within the national Parliament’, embodies or gives ‘concrete expression of the commitment to co-operative government’.⁷⁴ This follows the German model, ‘emphasizing concurrency, provincial delivery of national policies, and provincial representation at the center’.⁷⁵ Former NCOP Chairperson, Naledi Pandor, ascribes the relatively few inter-governmental conflicts in South Africa to the fact that the NCOP allows all spheres of government to express their views.⁷⁶ While she may exaggerate, the NCOP does play a role in ensuring co-operation and communication between the different spheres of government.

⁷³ Chapter 3 of the Constitution emphasises co-operation, consultation and co-ordination.

⁷⁴ Murray *op cit* note 72.

⁷⁵ Pandor (2014) *ibid* quoting Simeon and Murray *op cit* note 9.

⁷⁶ Parliament of the Republic of South Africa *ibid* at 21.

3.2 *Membership and provincial representation*

The NCOP consists of 90 members and its membership is based on proportional representation. According to s 60 of the Constitution, each of the nine provinces is represented in the NCOP by a 10-member delegation appointed by the provincial legislatures. Each delegation comprises four special delegates (headed by the Premier of the province)⁷⁷ and six permanent delegates appointed in terms of s 61(2) of the Constitution. The NCOP's delegation thus consists of both provincial politicians (permanent and special delegates who are members of the legislatures) and executives who are members of the provincial cabinet (MECs).

The NCOP is a forum through which provinces participate in the national legislative processes of Parliament. Over the years a practice has developed for permanent delegates to be nominated by provincial legislatures. Permanent delegates must thus be eligible to be members of the provincial legislature.

Whereas special delegates retain their seats in the provincial legislature, a member of a provincial legislature appointed as a permanent delegate to the NCOP loses his or her seat in the provincial legislature. Section 62(3) of the Constitution states that:

Permanent delegates are appointed for a term that expires... immediately before the first sitting of a provincial legislature after its next election; or... on the day before the appointment of permanent delegates in accordance with section 61(2)(b)(ii) [ie party nominations] takes effect.

Although they no longer hold seats in the provincial legislatures, permanent delegates are usually the ones who brief their respective provinces on s 74 and s 76 bills. They also attend the first official sitting of the provincial legislature at the start

⁷⁷ Or his or her nominee.

of the parliamentary session. In this way NCOP members maintain links with their provinces.

3.3 *Legislative powers*

Provincial legislative authority is vested in provincial legislatures.⁷⁸ As semi-autonomous units, provinces can legislate on matters in which they have concurrent and exclusive legislative competence. In exercising its legislative powers a provincial legislature may ‘consider, pass, amend or reject’ legislation (including provincial constitutions) on matters within functional areas listed in schedules 4 and 5 of the Constitution and matters ‘expressly assigned to the province by national legislation’.⁷⁹ It can also ‘initiate or prepare legislation, except money bills’.⁸⁰ Concurrent legislative power in South Africa means that provincial and national legislation on the same matter can co-exist. However, s 146 of the Constitution provides that national legislation takes precedence over provincial legislation if it is,

aimed at preventing unreasonable action by a province that...is prejudicial to the economic, health or security interests of another province or the country as a whole; or...impedes the implementation of national economic policy.

National legislative authority is vested in Parliament by virtue of s 43 of the Constitution. In particular the NCOP has the power in terms of s 44(1)(b) of the Constitution,

- (i) to participate in amending the Constitution in accordance with section 74;
- (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any matter required by the Constitution to be passed in accordance with section 76; and
- (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

⁷⁸ Ss 43(b) and 104.

⁷⁹ S 104.

⁸⁰ S 114(1).

The Constitution distinguishes between three types of bills that the NCOP must consider and which affect provinces in varying degrees. Section 75 bills are ‘ordinary’ bills that do not amend the Constitution and do not affect provinces.⁸¹ The NCOP has limited influence over these bills and can only make non-binding suggestions to the NA about possible amendments to such bills. It is therefore logical for s 75 bills to be introduced in the NA because it can override amendments proposed by the NCOP. The latter typically only reviews s 75 bills transmitted by the NA. Nonetheless, the Fourth Parliament has listed legislation, including the Protection of State Information Bill of 2012 (one of the case studies in Chapter 4), in which the NA accepted amendments proposed by the NCOP.

Under s 74 bills amending the Constitution require the affirmative vote of six provinces in order to be passed by the NCOP. Not all constitutional amendment bills require the NCOP’s approval, however. Bills that (a) amend s 1 and s 74(1) of the Constitution or (b) do not affect provinces (ie the amendment does not relate to a matter that affects the NCOP, change provincial boundaries, powers, functions or institutions or amend a provision that deals specifically with a provincial matter), do not require NCOP approval to be passed.

Constitutional amendments like the alteration of provincial boundaries require the approval of affected provinces. In terms of s 74(8) such a province must approve the proposed amendment in order for the NCOP (and thus Parliament) to pass such a provision.⁸² Should an affected province withhold approval, it vetoes such amendment (and not the whole bill) from being passed. Although a province’s veto power is insufficient to stop a constitutional amendment bill from being passed by the NCOP if the majority of provinces vote in favour thereof, the affected province can stop the proposed provincial boundary change from being passed if it objects to such boundary change.

⁸¹ Parliament of the Republic of South Africa *National Assembly Guide to Procedure* (2004) at 173.

⁸² Ss 74(3) and 74(8).

The NCOP has more influence over s 76 bills that affect provinces and constitutional amendments in terms of s 74 of the Constitution, than over ordinary legislation in terms of s 75. Because certain s 74 and s 76 bills affect provinces directly, the Constitution gives provincial legislatures a say in their adoption through the system of provincial mandates. Under s 65 of the Constitution provinces must vote on certain questions before the NCOP. Questions include bills. A province will thus confer a mandate or authority on their provincial delegations which tells them how to vote on the province's behalf. Each province has one vote which is cast by the head of the provincial delegation in the NCOP. Delegates do not vote as individuals on s 76 and s 74 bills. As noted in Chapter 1, voting in the NCOP is preceded by an elaborate mandating process during which the provinces conduct public consultation, develop negotiating mandates for amendments they wish to include in s 76 bills, followed by final and voting mandates to instruct the head of the delegation how to vote in the Council — all within a strictly defined timeframe in a six-week period in terms of NCOP Rule 240.⁸³

Typically the six-week legislative cycle is divided as follows: In week one the national department responsible for the bill briefs the permanent delegates in the NCOP select committee. The NCOP then refers the bill to the provincial legislatures. In week two provincial legislatures prepare for public hearings on the bill which are held in week three. Following public hearings, provincial legislatures prepare their negotiating mandates in week three. The select committee schedules a negotiating meeting with provincial delegations in week four to discuss the negotiating mandates of the provinces and the amended or unchanged bill flowing from this process is returned to the provinces. Provincial legislatures prepare final mandates in week five. The select committee next considers final mandates before the NCOP plenary scheduled for week six.

⁸³ *Rules of the National Council of Provinces op cit* note 11. Under certain circumstances the Chairperson of the NCOP can extend the legislative period when requested by the chairperson of a select committee dealing with a s 76 bill. It is very rare for NCOP Committees to request extensions to finalise legislation beyond the six-week legislative period.

3.4 *Voting*

As noted above, voting in the NCOP depends on the type of legislation or decision before it. Voting in respect of s 75 bills is by the individual delegate representing his or her party. The outcome of the process is determined by the numerical strength of the majority party in the NCOP. In respect of s 74 and s 76 bills, votes are cast on behalf of provinces. Each province has one vote and questions before the NCOP are agreed to when at least five out of nine provinces vote in favour of the question, or six provinces vote in favour of a constitutional amendment bill in terms of s 74.⁸⁴

3.5 *Mediation*

Sometimes the NA and the NCOP cannot agree on a bill. Because the NA's override over s 76 bills that were introduced in the NA can only come into effect after mediation if there is still no agreement on the bill and if two-thirds of NA members vote in favour of such a bill, the NA must consider the NCOP's proposed amendments of such bills. The Constitution provides for a Mediation Committee as a mechanism to end an *impasse* on a s 76 bill. The two houses are required to submit the bill to mediation in an attempt to reach consensus on which version of a bill to pass, if necessary a new version.

A Mediation Committee, in terms of s 78, consists of 18 members, half from each chamber. NA members are proportionally represented in terms of their parties' numerical strength in the NA, while the NCOP is represented by 'one delegate from each provincial delegation...designated by the delegation'. Section 78(2) provides that the Mediation Committee 'agree[s] on a version of a Bill, or decide[s] a question, when that version, or one side of the question, is supported by — (a) at least five of the representatives of the [NA]; and (b) at least five of the representatives of the [NCOP]'.

⁸⁴ Section 65(1) of the Constitution deals with decisions of the Council.

Mediation can be described as ‘negotiation’⁸⁵ and is intended to assist the two chambers to come to an agreement over the disputed bill. The Constitution does not define the term mediation, nor does it describe the process of mediation, but lists the different options available to the respective chambers. The Mediation Committee must attempt to resolve the *impasse* within 30 days of the bill’s referral to it. Should the Mediation Committee not reach agreement within the prescribed 30 days, the bill lapses in terms of s 78(2)(e) if it was introduced in the NCOP. If the bill was introduced in the NA, the NA has an override and can pass its own version of the bill with a vote of two-thirds of its members.⁸⁶ Because provinces are unlikely to agree to the NA version and *vice versa*, the Mediation Committee will probably agree on a new version of the bill.⁸⁷ If it does not, the bill lapses if it was introduced in the NCOP. This outcome seems the most unlikely of all in respect of a bill that has the support of provinces provided it is amended according to their wishes. It is unlikely that the NCOP would revive the same bill as it would simply end up in the Mediation Committee again on the same issue(s). Should the bill not be revived and the executive reintroduces the bill in Parliament without the changes provinces wanted, provinces will most likely reject the bill again and the NCOP will not be able to pass the bill.

4. Comparative overview of the German *Bundesrat* and the NCOP

Resonating strongly in both the NCOP and the *Bundesrat*’s mandates is their representation of, and link with, the provinces (or regions in the case of the *Bundesrat*) which is intended to bring the NCOP/national legislature closer to the people and make it more responsive. Nonetheless, despite the *Bundesrat* being the

⁸⁵ Merriam Webster Dictionary ‘mediation’ available at <http://www.merriam-webster.com/dictionary/mediation>, accessed on 3 June 2014.

⁸⁶ The Fourth Parliament referred few bills to mediation compared to the number of bills processed annually during its term. Interestingly, the Constitution provides for the NA, and not the NCOP, to have an override in respect of certain s76 bills affecting provinces. I consider this and whether provinces should have a veto power in respect of such bills, in Chapter 2.

⁸⁷ The outcome of mediation processes followed in respect of the Mandating Procedures of Provinces Bill [B8D–2007] was that the National Assembly passed a new or mediated version of the bill which was later enacted as the Mandating Procedures of Provinces Act 52 of 2008.

NCOP's closest relative, the NCOP's deviation from it in certain respects has earned it the title of 'stepchild of the *Bundesrat*'.⁸⁸

One of the main differences between the NCOP and the *Bundesrat* lies in their membership. *Bundesrat* members are *länd* government officials acting on political instructions from the *länd* executives, whereas NCOP members are mainly politicians nominated by the provincial legislatures and who are required to act in terms of a decision of the provincial legislature on the most important matters before them. The NCOP's representation of the provinces compares favourably with *länder* representation in the *Bundesrat*. Both chambers play significant roles in IGR to ensure respect for the autonomy of the various spheres of government in their interaction with each other. The scrutiny of legislation is possibly the main function of the second chambers.⁸⁹ Whereas both chambers have significant influence over legislation that affects the regions directly, the *Bundesrat*'s strength and status is most evident in the veto power it has over certain types of legislation. In contrast, the NCOP does not have a veto over any legislation. It may block certain constitutional amendments and individual affected provinces (and not the NCOP itself) have a veto power over constitutional amendments that propose changes to their boundaries and other matters to which they object. Concerning those constitutional amendments in which provinces have a veto and interventions in terms of ss 100 and 139 of the Constitution in which the NCOP has an absolute veto, the NCOP's power *vis à viz* the executive is significant. In particular, in respect of bills affecting provinces, it is very unlikely that the NA will pass a bill that provinces do not support.

Below I briefly compare selected aspects of the *länder* and provincial participation in mandating procedures in respect of legislation and decisions in the *Bundesrat* and the NCOP.

⁸⁸ Murray (1999) *ibid*.

⁸⁹ Meg Russell *Reforming the House of Lords: Lessons from Overseas* (2000) at 120.

4.1 *Mandating and decision-making*

(a) *Ordinary bills affecting länder and provinces*

The key difference between the NCOP and the *Bundesrat* is that regional participation in the NCOP is legislature-driven due to the participation of provincial legislatures, whereas in the *Bundesrat* it is executive-driven as its members are representatives of *länd* executives who are predominantly bureaucrats.

Mandating processes in the NCOP are designed to ensure that provinces participate in decision-making on national legislation and matters that affect them directly, and in constitutional amendments that seek to change their provincial boundaries or competences assigned to provinces by the Constitution. The provincial legislature conveys its decision to other provinces in the NCOP in a negotiating mandate conferred on its provincial delegation. This allows provinces to first negotiate around issues raised in their respective mandates (informed by public input obtained) and if possible, agree on eg the amendments to be made on a s 76 bill before a final decision is made. The outcome of the negotiations are referred back to the provincial legislatures for a final decision or voting mandate which the province will cast in the NCOP plenary. In this context the politicians in the provincial legislature makes decisions on behalf of the provincial executives and negotiations are essentially between provincial politicians.

The German *Bundesrat*, on the other hand, is mainly composed of *länd* executives (not politicians) which means they input directly on matters and bills that affect *länder*. *Bundesrat* members are government officials acting on political instructions, whereas NCOP members are politicians nominated by the provincial legislatures. The *Bundesrat*, like the NCOP, has more influence over legislation and issues that affect the *länder*. The *länder* have a say in all federal legislation and with an absolute majority of their votes they can veto those laws which affect *länder* competences and which require the *Bundesrat's* approval. The *Bundesrat* has an

absolute veto over federal consent bills⁹⁰ as they cannot be passed without its approval.⁹¹ The NCOP, similarly, has more influence over s 76 bills that affect provinces (the South African equivalent of consent bills) and constitutional amendments in terms of s 74 of the Constitution than over other bills, but the NA (first chamber) can override the NCOP on all bills other than constitutional amendments. Affected provinces (not the NCOP itself) have a limited veto in respect of constitutional amendment bills that propose changes to their provincial boundaries and certain other matters. The NCOP does, however, have an absolute veto in respect of interventions in terms of ss 100 and 139 of the Constitution, although this power relates to the executive and not legislative powers.

The *Bundesrat* legislative process also allows for *länder* to negotiate on issues and bills that affect them. Because the *Bundesrat* is a ‘constitutional body of the federation’ consisting of representatives of the federal states, as well as a ‘body’ of the federal legislative tier consisting of ‘members of the executive bodies [of federal states]’,⁹² negotiations are essentially between executives representing the *länd* and national spheres of government. *Länd* participation in federal legislation through the *Bundesrat* is ‘an element of vertical interlocking politics in German federalism’ and also ‘constitutes the institutional base for intense cooperation among the [l]änder determined to prepare decisions on federal bills’.⁹³ Almost half of the legislation the *Bundesrat* deals with are federal bills.⁹⁴ Draft government or federal bills (including money bills) must first be introduced in the *Bundesrat* which has ‘the first say’ on such bills.⁹⁵ Federal bills are divided into consent bills (bills that cannot become law

⁹⁰ Consent bills typically specify the (a) division of responsibility between the federation and the *länder* regarding their legislative, administrative and judicial competences, (b) sharing of tax revenue between the federation and the *länder* and (c) determination of the administrative procedures that *länder* authorities must apply to implement federal bills.

⁹¹ Reuter *ibid* at 53. In a legislative emergency when the *Bundestag* has not been dissolved, but cannot function and legislate on its own and has no confidence in the Federal Chancellor, the *Bundesrat* constitutes a ‘reserve of legality’ for the *Bundestag*, which allows it to enact laws of the federal government.

⁹² Reuter *op cit* note 63 at 11.

⁹³ Arthur Benz ‘Intergovernmental Relations in German Federalism — joint decision-making and the dynamics of horizontal cooperation’ (nd) at 5, available at <http://www.forumfed.org/libdocs/2009/2009-03-27-Zaragoza-Benz.pdf>, accessed on 17 September 2015.

⁹⁴ Benz *op cit* note 93 at 5.

⁹⁵ In terms of art 76 of the Basic Law. German constitutional reforms in 2006 expanded the legislative competences of the *länder* and consequently almost halved the number of federal or consent bills that require *Bundesrat* consent.

without *Bundesrat* approval) and objection bills. The latter do not require *Bundesrat* consent, but may not be passed if the *Bundesrat* objects to the bill with a two-thirds majority and the *Bundestag*, the first chamber, is unable to override the *Bundesrat*'s decision with a two-thirds majority vote. The *Bundesrat* acts as co-decision-maker with the *Bundestag* in respect of consent bills that seek to *inter alia* modify the Basic Law, affect *länder* finances, and the organisational and administrative autonomy of *länder*.⁹⁶

Negotiations on such bills are therefore 'decisive' in order to agree on policies and also to 'make arrangements to prevent unintended effects of voting to occur', ie to ensure the votes cast on behalf of a land is unanimous.⁹⁷ Where a *länd* is governed by a coalition for example, it is advisable that they abstain from voting if its cabinet cannot agree on a matter referred to the *Bundesrat* for a decision.⁹⁸ Requiring decisions on bills to be made in both the *länd* administration and in the *Bundesrat* helps to facilitate agreement between coalition partners forming a *länd* government and reduce dissent among the *länder*.⁹⁹ Recommendations flowing from the various groups and committees are referred to the plenary in order for the *länd* governments to decide on their vote in the *Bundesrat*. In contrast, voting mandates to be cast in the NCOP plenary are prepared by provincial legislatures. In Germany, decisions on *länder* voting are 'coordinated between federal and [l]änder levels of the parties' after which 'envoys of the [l]änder at the federal level, i.e. special ministers of federal affairs, negotiate on the expected votes' — sometimes informal meetings continue until the *Bundestag* plenary by which time voting on a decision on a federal bill is merely a formality.¹⁰⁰

⁹⁶ Reuter *ibid* at 40.

⁹⁷ Benz *ibid* at 5.

⁹⁸ A *länd*'s votes on a bill must be unanimous in order to be valid. During voting on a new immigration bill in the *Bundesrat* in 2002 the Minister (a Social Democrat) voted in favour of the bill, while the Deputy Premier (a Conservative) voted against the bill on behalf of Brandenburg which was governed by a coalition of the two parties. Voting had to be repeated due to this irregularity. After the second round of voting the President of the *Bundesrat* ruled that Brandenburg had voted in favour of the bill.⁹⁸ The German Constitutional Court later declared the legislation invalid because Brandenburg's vote on the bill had not been unanimous and was therefore inconsistent with art 78 of the Basic Law.

⁹⁹ Benz *ibid*.

¹⁰⁰ Benz *ibid* at 6.

The NCOP has a six-week legislative cycle to process and pass bills affecting provinces, while the *Bundesrat* has six weeks to submit an opinion or recommendation on draft federal legislation. In certain cases a deadline of three weeks (for urgent bills), or nine weeks (for bills amending the Basic Law) applies.¹⁰¹ The *Bundesrat* can reject, propose amendments, additions or alternative solutions, or state that it has ‘no objections’ to draft federal bills. If it rejects a draft federal bill in its entirety, the federal government rarely submits such a bill to the *Bundestag*.¹⁰²

(b) *Constitutional amendments affecting länder and provincial boundaries*

In Germany, a constitutional amendment that proposes changes to *länder* boundaries requires a majority vote in a referendum in the affected *länder*¹⁰³ and the agreement of the *Bundestag*.¹⁰⁴ By contrast, provincial boundary changes in South Africa require a constitutional amendment bill in terms of s 74 of the Constitution which can only be passed by the NA if the affected province(s) agree to the boundary change and six provinces vote in favour of it in the NCOP. The requirement for a referendum in Germany shows that *länder* boundary changes require a wider or a higher standard of approval compared to South Africa which only requires the agreement of the provincial legislature of the affected province. In both countries, however, the regions (and not the national legislature) have the final say on regional or provincial boundary changes.

The NCOP has no role in the passing of constitutional amendments that do not (a) amend s 1 and s 74(1) of the Constitution or (b) do not affect provinces (ie the amendment does not relate to a matter that affects the NCOP, changes provincial boundaries, powers, functions or institutions or amend a provision that deals specifically with a provincial matter). ‘[I]f the proposed amendment is not an

¹⁰¹ Reuter *ibid*. The *Bundesrat*’s checks-and-balances role is manifested particularly clearly in this context.

¹⁰² Reuter *ibid* at 35.

¹⁰³ Article 29(3) of the Basic Law.

¹⁰⁴ Article 29(2) of the Basic Law.

amendment that is required to be passed by the Council'¹⁰⁵ details thereof must be submitted to the Council for a public debate. In Germany, amendments to the Basic Law require the supporting votes of two-thirds of *Bundestag* and two-thirds of *Bundesrat* members.¹⁰⁶ Constitutional amendments 'affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20'¹⁰⁷ are not allowed, ie provisions pertaining to human rights and human dignity and Germany's constitutional order as a democratic and social federal state.

5. Conclusion

The South African Parliament's second chamber, the NCOP, has evolved significantly from a Westminster upper house that represented the white elite to a second chamber that is not only more representative of a democratic South Africa, but also represents provincial interests in the national Parliament. The NP-packed Senate of the 1950s had played a central role in passing unjust laws and the government's attempts to remove coloureds from the common voters' role as a result of which South Africa narrowly avoided a constitutional crisis, severely dented the Senate's reputation.

The NCOP is based on the *Bundesrat* but with distinct differences. Both chambers represent the regions (provinces and *länder*) but the NCOP's membership comprises politicians while the *Bundesrat* are run by *länd* executives (mainly government officials). This difference affects how decisions are made on especially bills that affect the *länder* and provinces. *Länd* executives are responsible for implementing legislation and can input directly, whereas NCOP delegates need to consult with the provincial executives and get public input on bills that provinces must implement. The NCOP's elaborate mandating process to obtain provincial mandates and decisions on bills arguably 'makes NCOP processes extraordinarily

¹⁰⁵ S 74(5)(c).

¹⁰⁶ Art 79(2).

¹⁰⁷ Art 79(3).

complex¹⁰⁸ compared to the *Bundesrat*'s processes. This complexity and the different routes prescribed for ss 74, 75 and 76 bills in the NCOP, further distinguish the NCOP from the *Bundesrat*.¹⁰⁹

‘[A] fundamental purpose of the Constitution [is] to bind the provinces into national government, to see them as spheres within a single whole, rather than as autonomous, independent entities’.¹¹⁰ The NCOP was designed to represent provinces at the national level and to play a mediating role between the different spheres of government. To this end it has certain characteristics and processes that might be considered elaborate or even excessive compared to the *Bundesrat*. Nonetheless, mandating procedures requiring mandates from the provincial legislatures were considered necessary ‘add-ons’ to strengthen our democracy considering South Africa’s turbulent political history and the unique requirements for its new democracy post 1994. Because of the system of semi-autonomous provinces, mandating requires provincial participation (including public participation) in the NCOP in respect of national legislation affecting provinces and were intended to enhance democracy — that is why the Constitution requires in s 70(2)(b) that the NCOP rules and orders ‘must provide for...the participation of all the provinces in [NCOP] proceedings in a manner consistent with democracy’. This, and other aspects of the mandating process, are discussed in more detail in the next chapter dealing with the MPPA.

¹⁰⁸ Murray (1999) *ibid*.

¹⁰⁹ According to Murray (1999) *ibid* the procedure in terms of which s 75 and s 76 legislation follows different routes through the NCOP introduced a complication not encountered in the *Bundesrat* process. Similarly, the constitutional emphasis on public participation in legislative processes in every sphere of government (including provincial legislatures, the NA and the NCOP) also makes demands on the NCOP not envisaged by the *Bundesrat*. The NCOP’s involvement in constitutional amendments is limited, in contrast to the role of the *Bundesrat*.

¹¹⁰ Christina Murray and Richard Simeon ‘From paper to practice: the National Council of Provinces after its first year’ (1999) 14 *SAPR/PL* at 98.

CHAPTER 3

THE MANDATING PROCEDURES OF PROVINCES ACT 52 OF 2008

1. Introduction

Section 65(2) of the Constitution requires an ‘Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, [to] provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf’. This provision speaks to the heart of provincial participation in the NCOP. Provincial legislatures must mandate or instruct their provincial delegations during the legislative process regarding which amendments to propose and, finally, whether or not to vote in support of a bill before the NCOP. Until the Act was passed, item 21(5) of Schedule 6 of the Constitution provided transitional arrangements which specified that provinces could use their Standing Rules to confer mandates on their delegations to the NCOP.

The Act required by s 65(2) of the Constitution was finally adopted in 2008 as the Mandating Procedures of Provinces Act 52 of 2008 (MPPA), and was assented to in 2009. The MPPA regulates the manner in which the voices of provinces are to be taken into account in Parliament’s legislative processes in the consideration of s 74 and s 76 bills that affect provinces.

In this Chapter I provide an overview of the mandating processes in terms of the MPPA. I briefly set out the MPPA’s objectives and certain requirements in respect of mandates and explain how it fits into the constitutional role of the NCOP. Where relevant, I also refer to applicable provisions in the Constitution and the NCOP Rules. The discussion of the MPPA serves as an introduction to the case studies in Chapter 4 in which I illustrate some of the challenges encountered in the mandating processes in practice, and suggest possible solutions in instances where the MPPA is

either silent or does not address an issue adequately. I do not draw conclusions on the MPPA's effectiveness in addressing current and past challenges concerning mandates in this Chapter — I do so in Chapter 4.

2. Objectives of the MPPA

According to its Long Title, the MPPA was enacted to give effect to s 65(2) of the Constitution and 'to provide for matters incidental thereto'. The Preamble states that the MPPA was enacted because,

Parliament and the provincial legislatures recognise[d] the need for uniformity amongst the provinces in respect of the procedure for the conferring of authority by a provincial legislature on its delegation to the National Council of Provinces to cast a vote on behalf of that legislature.

The Minutes of the Select Committee on Security and Constitutional Affairs that dealt with the Mandating Procedures of Provinces Bill [B8F-2007] ('mandating bill'), show that the challenges at the time were mostly administrative in nature.¹¹¹ They could have been remedied through, for example, improved co-ordination and communication between the NCOP and provinces.¹¹² Possibly, amendments to the NCOP Rules could also have addressed challenges like the late submission of mandates, incorrect version of bills stated in mandates and confusion regarding when a provincial legislature committee or a full sitting of the house could confer authority. The introduction of the mandating bill in 2007 was most likely triggered by a realisation that s 21(1) of the Constitution required mandating legislation to be enacted 'within a reasonable period of the date the new Constitution took effect', whereas ten years had passed since the Constitution's commencement in 1997.

¹¹¹ Parliamentary Monitoring Group 'Security and Constitutional Affairs Select committee Draft Legislation on Provincial Mandates: Briefing' 8 August 2006, available at <https://pmg.org.za/committee-meeting/7152/>, accessed on 16 September 2015.

¹¹² The terms 'province' and 'provincial legislature' are used interchangeably in this chapter. Unless otherwise stated, a reference to a province must be construed as a reference to a provincial legislature.

Prior to the MPPA each province's mandating procedures were set out in their Standing Rules.¹¹³ When the mandating bill was considered in the NCOP, the Eastern Cape insisted that there should be no 'interference' with provinces and that their own rules should not be discarded.¹¹⁴ None of the other provinces were concerned about their own procedures being regulated as the MPPA would 'augment' their Standing Rules and provide a broad framework to ensure that provinces observed their own 'constitutionally compliant internal arrangements', and fill any existing legislative gaps.¹¹⁵ Nonetheless, some provinces had to change their practices to adhere to the uniform mandating procedures. After its enactment, provincial legislatures included the MPPA's provisions in their Standing Rules.

The MPPA specifies which information must appear on final mandates submitted to the Council. It determines that certain mandates require a committee of the provincial legislature to confer authority, whereas authority for final mandates which indicate how the provincial delegation will vote in the NCOP, must be conferred by the provincial legislature sitting in plenary.

3. Mandates

In simple terms a mandate is the authority a provincial legislature gives to its provincial delegation to act on its behalf in the NCOP, whether to negotiate, propose amendments or vote on a bill affecting provinces¹¹⁶ or a question before the NCOP. A mandate can be 'open' and give the delegation wide discretion to act; or limited (for example, to negotiate within specified parameters). A mandate can also be specific to a particular bill or question before the NCOP. This is most often the case when the provincial delegation is given specific instructions regarding which amendments the province wants effected in a bill in the NCOP select committee, and how the province will vote in the NCOP plenary when the bill is passed. The

¹¹³ Item 21(5) Sch 6 of the Constitution.

¹¹⁴ Parliamentary Monitoring Group *op cit* note 111.

¹¹⁵ Parliamentary Monitoring Group *ibid*.

¹¹⁶ Unless otherwise indicated, the reference to a 'bill' in the context of this chapter is a reference to a s 74 or s 76 bill.

MPPA's requirement that negotiating mandates conform to Schedule 1 and that final mandates conform to Schedule 2 of the MPPA indicates that mandates on bills affecting provinces must be in writing.¹¹⁷ Arguably, a mandate on any other question before the NCOP listed in s 65 of the Constitution (for example the election of the NCOP Chairperson or the revival of a bill) need not be in writing as only so-called voting mandates would be required.

3.1 Steps in the mandating process

As I discuss in Chapter 1, the mandating process involves multiple stages and requires that provinces conduct public consultations on bills before they develop and confer mandates on their provincial delegations to the NCOP. I also mention the importance of the negotiating mandate stage which is the litmus test of the extent provinces want to, and can, accommodate each other's unique and diverse needs and/or interests in bills affecting provinces. The final mandate indicates to the NCOP select committee whether a province will vote in support of the bill or against the bill, or abstain from voting in the NCOP plenary. Notwithstanding the submission of final mandates, provinces can reconsider their mandates as the next and final step requires provinces to submit voting mandates which the head of the provincial delegation casts on behalf of the province in the NCOP plenary.

3.2 Types of mandates defined in the MPPA

Section 1 of the MPPA distinguishes between four types of mandates, namely 'legislative', 'negotiating', 'final' and 'voting' mandates. Section 1 must be read together with s 3 of the MPPA which prescribes what 'uniform' information must appear on a final mandate in order for it to be valid. In essence mandates must conform to the formats set out in Sch 1 and 2 of the MPPA. The different types of mandates listed in the table below correspond to the various stages of the mandating process that must be concluded within a six-week legislative period prescribed by

¹¹⁷ Section 3 of the MPPA.

NCOP Rule 240. Thus ‘negotiating’ mandates apply during the negotiations phase in the NCOP select committee, while ‘voting’ mandates are required to cast the provincial legislature’s vote on a bill or a question before the NCOP during the NCOP plenary.

Table 1

Mandate type	Description ito section 1 of the MPPA	Conferred by	Legislative cycle stage¹¹⁸
Negotiating mandate	Sets out the parameters for negotiations in the NCOP committee. Can be specific (eg propose specific amendments) or ‘open’ (give wide discretion to the provincial delegation).	Provincial legislature committee.	Week 3
Final mandate	A mandate presented to the relevant NCOP committee indicating how the provincial legislature intends to vote on the bill in the NCOP plenary.	Provincial legislature in plenary.	Week 5
Voting mandate	Instructs the provincial delegation to vote in favour of or against the bill, or abstain from voting in the NCOP plenary. ¹¹⁹	Provincial legislature in plenary.	Week 6
Legislative mandate	General term covering both ‘negotiating’ and ‘final’ mandates, possibly including ‘voting’ mandates. In addition to s 74 and s 76 bills, legislative mandates are required for the election of the Chairperson and Deputy Chairperson of the NCOP and decisions of the Mediation Committee.	Provincial legislature committee / provincial legislature in plenary.	Week 3 Week 5 Week 6

¹¹⁸ The applicable stages or weeks in the legislative cycle are not always adhered to. In addition to the Parliamentary calendar and/or programme the days when a committee or the legislature sits also affects in which week the various mandates are dealt with.

¹¹⁹ The NCOP Rules are silent on whether a voting mandate can instruct a province to introduce an amendment in plenary — considering that legislation is processed in committees and that the plenary in reality considers the committee’s report on a bill (which would recommend the adoption or in rare cases rejection of the bill), a province would possibly need to bring a motion for the Rules to be suspended in order to allow the bill to be referred back to the committee for consideration of the proposed amendment only. After this the bill would need to be placed back on the Order Paper for provinces to vote on it in the NCOP plenary.

The following sections explain the types of mandates applicable to ss 74 and 76 bills affecting provinces, as mandating procedures in the NCOP most often concern such bills.

3.2.1 Negotiating mandates

The MPPA groups ‘negotiating’ and ‘final’ mandates together under ‘legislative’ mandates. The first type of mandate required in the mandating process is the ‘negotiating’ mandate which s 1 of the MPPA defines as:

[T]he conferral of authority by a committee designated by a provincial legislature on its provincial delegation to the NCOP of parameters for negotiation when the relevant NCOP select committee considers a [b]ill after tabling and before consideration of final mandates, and may include proposed amendments to the [b]ill.

Negotiating mandates do not require a full sitting of the provincial legislature to be valid. Some provinces¹²⁰ set out very specific instructions in their negotiating mandates on how their delegates must negotiate, what the MPPA describes as the ‘parameters for negotiation’. They may also include the proposed wording for proposed amendments to a bill. Sometimes provinces instruct their delegations to abstain from negotiating. As noted above, some negotiating mandates are ‘open’. Following negotiations, the amended bill or unchanged bill flowing from the negotiations process is sent to provinces to consider and prepare final mandates.

¹²⁰ ‘Province’ and ‘provincial legislature’ are used interchangeably in this chapter as a provincial legislature’s mandate represents the views of the public representatives in the provincial legislature.

3.2.2 *Final mandates*

The MPPA defines a ‘final mandate’ as the ‘conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a [b]ill or prior to voting thereon in an NCOP [p]lenary’¹²¹ (an ordinary sitting of the NCOP). Whereas a ‘final’ mandate usually indicates how the provincial legislature intends to vote on the bill during the NCOP plenary, the word ‘final’ is possibly misleading or misplaced as the next and final stage in the passage of the bill through the NCOP also requires a mandate. Under the Act this last (final) mandate is referred to as the ‘voting mandate’. It is possible for a province to change its mind and confer a voting mandate that is different from its final mandate.

3.2.3 *Voting mandates*

After the select committee adopts the bill with a supporting vote of five or six provinces (depending on whether it is a s 74 or a s 76 bill) , the bill is referred to the Council to be passed. For the bill to be adopted, provinces must submit a ‘voting’ mandate to the Council. A ‘voting mandate’ is defined as ‘the conferral of authority by a provincial legislature on the head of its provincial delegation to the NCOP to cast a vote on a [b]ill in an NCOP plenary’. A voting mandate instructs the provincial delegation to vote in favour of or against the bill, or abstain from voting in the NCOP plenary. In terms of s 4 of the MPPA, ‘[a] Premier of a province’ (the head of the delegation in terms of s 60(3) of the Constitution) ‘or a delegate of a provincial delegation to the NCOP designated by the Premier, must cast the vote on behalf of a provincial legislature’.

¹²¹ Section 1 of the MPPA.

3.2.4 Legislative mandates

The MPPA unnecessarily and confusingly distinguishes between ‘voting’ mandates which concern the final vote on a bill in the plenary of the NCOP, and ‘legislative’ mandates which refers to questions before the NCOP, which also includes bills. A legislative mandate is defined in s 1 as,

the conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote on a question contemplated in— (a) section 64 of the Constitution [questions concerning the election of the Chairperson and Deputy Chairperson of the Council]; (b) section 74 of the Constitution [constitutional amendments affecting provinces]; (c) section 76 of the Constitution [ordinary legislation affecting provinces]; or (d) section 78 of the Constitution [the Mediation Committee].

It is unclear whether the legislative drafters intended for a legislative mandate to be broader than a voting mandate (ie cover all mandates), or whether it was careless drafting, because there is no substantive difference between legislative and voting mandates. Questions in terms of s 65 include bills. In addition ‘legislative’ and ‘voting’ mandates both instruct the provincial delegation how to vote in the NCOP plenary.

4. Implementing provincial participation in the NCOP

In terms of the MPPA provinces must submit both negotiating and final mandates in respect of s 74 and s 76 bills. This forces *all* provinces to participate in *all* of the mandating processes (my emphasis), even those that are not directly affected by eg a constitutional amendment bill that proposes that a specific province change its provincial boundary. Even when a province intends to abstain from voting in the NCOP it must confer a voting mandate on its delegation to instruct it not to vote during the NCOP plenary. This requires, in my view correctly, that all provinces attend the NCOP plenary and means that they cannot simply boycott proceedings.

Regarding the submission of voting mandates to the Council in terms of s 8(1) of the MPPA, s 8(2) provides that if a province decides not to change its vote after the consideration of final mandates in the select committee, then the provincial delegation to the NCOP *must* (my emphasis) table the province's final mandate in the NCOP plenary as its voting mandate. Provinces can reconsider their mandates and change their votes right up to the voting stage in the Council, as long as these are submitted to the Council on time. In such an event the province usually makes a Declaration of Vote in terms of NCOP Rule 71.¹²² This is a short statement that the designated delegate makes in the Council plenary to explain that the province changed its vote and why the 'final' and 'voting' mandates are different. A Declaration of Vote is done before the commencement of voting in the NCOP chamber.

The provision in the NCOP Rules for a province to change its mandate, right up to voting in the Council, is extremely important and useful for provinces, considering the tight time-frames that govern the mandating process. The NCOP's six-week legislative cycle effectively allows for only one negotiating meeting. NCOP and provincial politicians often have insufficient time to debate matters in depth, take opposing or different views expressed during negotiations back to their own provinces and return to the NCOP with further instructions from their provinces. The conferral of a new final or voting mandate is sometimes delayed because provincial legislatures sit in plenary on different days of the week which sometimes coincide with the plenary scheduled in the NCOP. Thus, allowing provinces to submit a new mandate, even at the eleventh hour, ensures that provinces with latter sittings, for example, can still participate in voting in the NCOP plenary. In this way the NCOP accommodates the unique challenges and needs of the different provinces. It also ensures that negotiating meetings, in particular, are not mere formalities to comply with the Constitution and the MPPA, but are intended for provinces to have meaningful interaction with one another on issues that affect them. The Declaration of Vote also ensures that a province can explain the reasons for its change of heart which is likely to have occurred only after careful

¹²² *Rules of the National Council of Provinces ibid.*

consideration of the issues. Notwithstanding the views a province may have had on a bill, nothing is settled until its vote is cast in the Council.

5. Selected issues relating to mandating procedures in terms of the MPPA

5.1 Ambiguous distinction between mandate types

As I note above, there is some ambiguity in how the MPPA defines the different types of mandates, and in some respects the MPPA unnecessarily distinguishes between them. For example, the differences between ‘mandate’ and ‘final mandate’, as well as between ‘final’ and ‘voting’ mandates are not clear and appear to be superfluous.

Section 1 of the MPPA defines ‘mandates’ as the ‘conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote in compliance with the requirements under section 3’. Although conferral by a committee of a provincial legislature is technically also conferral by the provincial legislature as the provincial legislature’s rules authorise its committees to act on its behalf, in my view the requirement for a conferral of a final mandate during plenary introduces a stricter voting requirement (compared to the conferral of a negotiating mandate by a committee of the legislature). In addition, the definition of ‘mandate’ is not strictly correct as the term refers broadly to the four types of mandates defined in the MPPA which, as I mentioned previously, are in some instances conferred by a committee of the provincial legislature and in other instances during a plenary of the provincial legislature. Mandates are also required for negotiations which do not involve voting.

5.2 Final mandates are restricted to provincial vote

Final mandates can only indicate whether a province says ‘yes’ or ‘no’ to a bill or will abstain from voting on the bill. In theory there is nothing that prevents

provinces from proposing further amendments in their final mandates. Because the MPPA must give effect to s 65(2) of the Constitution, it cannot and does not place limitations on the final mandate phase — to do so would be unconstitutional as this would restrict provinces’ ability to use the NCOP plenary as a forum in which to debate provincial views. The MPPA prescribes (in my view the *minimum* (my emphasis)) requirements for final mandates to be valid — authority must be conferred by the provincial legislature sitting in plenary and the information required on the prescribed format in the MPPA schedule confirms this. However, the NCOP’s six-week legislative cycle (and not the MPPA) limits further opportunity for provinces to engage on the bill beyond one negotiating meeting. Various provincial and NCOP role players have complained that the final mandate phase in the NCOP committee is too mechanical.¹²³ While the Rules of Parliament can set limits, the CC held in 2013 in *Mazibuko v Sisulu and Another*,¹²⁴ with reference to its majority judgement in *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly*,¹²⁵ that, in prescribing a procedure for an envisaged process set out in the Constitution, the NA Rules cannot ‘thwart or frustrate the steps and thereby negate a constitutional entitlement’.¹²⁶ In my view the principle applies equally to the NCOP — therefore its facilitative processes and rules that set legislative time-frames should facilitate, and not render ineffective, provinces’ right to participate fully in the NCOP’s legislative processes.

5.3 The impact of the legislative cycle on mandating and decision-making

I discuss in Chapter 2 that the six-week legislative time-frame applicable to s 76 bills and the provision for its extension is prescribed by NCOP Rule 240, and not the MPPA itself. Providing for an extension is an administrative process in terms of which the Chairperson of the select committee writes to the Chairperson of the NCOP setting out the reasons why an extension is requested.

¹²³ Anonymous *ibid*.

¹²⁴ (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

¹²⁵ [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).

¹²⁶ Para 60.

While it would have been acceptable for a ‘uniform procedure’ to include a time-frame, it is commendable that the MPPA does not prescribe a time-frame for completing the mandating process — it would make the process very rigid if the Act dictated every single step. As it is, strict adherence to this cycle and the NCOP Rules sometimes result in a very ‘mechanical’ process. The short legislative period places tremendous pressure on provinces and the NCOP to finalise legislation. This, in turn, impacts on the effectiveness of the mandating process and the extent to which provinces participate in the NCOP’s legislative processes.

The start of the various stages of the six-week legislative cycle has implications for the calculation of the time available for provinces to conduct public hearings and how many negotiating meetings can take place. Provincial legislatures sit once a week. This can sometimes delay matters in the NCOP process as voting or final mandates must be conferred during a plenary of the provincial legislature. According to a NCOP committee secretary, the inclusion of the Council plenary in the sixth week ‘effectively steal[s] a week away from public participation’.¹²⁷

If provinces insisted on more time for public consultations and negotiations, most bills affecting provinces could not be processed within six weeks, meaning more extensions would be required. Effectively, the six-week legislative cycle allows for only one negotiating meeting. This means that the ‘permanent delegate has to sit in [the negotiating] meeting and fight tooth and nail to get what he wants for his province, because once that meeting is finished [negotiations are] finished’.¹²⁸ There simply is not enough time, without taking time away from public participation in the provinces (one week in terms of this cycle), for the select committee to consider negotiating mandates beyond that first negotiating meeting. The MPPA compels the select committee to produce a ‘C’ list of amendments and a D-version of the bill incorporating the amendments soon after the negotiating

¹²⁷ Asgar Bawa Committee Secretary: Select Committee on Land and Mineral Resources, interviewed on 28 August 2013.

¹²⁸ Asgar Bawa *ibid.*

mandate meeting, as provincial legislatures need to consider the text of the amended bill and the committee report in order to confer final mandates in its weekly plenary.

Because the NCOP must ensure its committees finalise legislation timeously it would not be feasible to abolish the legislative cycle. Ideally, the cycle should be extended in consultation with provinces and the NA to a period long enough to allow provinces to consult properly and develop mandates, and also allow enough time in the NCOP and the NA to process the bill without creating bottlenecks.¹²⁹ The NA's Second Term Programme dated 14 May 2015, reflects a proposal for an eight-week legislative cycle for bills affecting provinces. However, by 17 October 2015 the NCOP Rules had not been amended in order for this to become effective.

Apart from to the NCOP's programme, the number of bills transmitted to the NCOP by the NA which must be dealt with by fewer NCOP committees and NCOP delegates compared to their counterparts in the NA, impact significantly on the time available for serious deliberation on bills. NCOP committees are clustered, often overseeing four or more departments. This means that four or more NA portfolio committees can refer bills to a single select committee for processing at one time. An NCOP Rule 243 extension has limited scope if an NCOP committee that is inundated with bills from various NA committees is pressed for time because it is near the end of an annual legislative cycle or, as was the case in 2014, the end of the term of a Parliament.¹³⁰ The Fourth Parliament's Select Committee on Security and Constitutional Development eg processed 37 bills (including six s 76 bills) during its term.¹³¹ In February 2014 and March 2014 alone, it processed four s 76 bills.¹³² Thus, in two months it adopted almost half of the s 76 bills it had adopted on

¹²⁹ Parliament of South Africa 'Parliamentary Programme 2015 Second Term as agreed by the NA Programme Committee on 14 May 2015' at 5.

¹³⁰ This also places enormous pressure on the provincial legislatures and delegates who must juggle between different bills and dart between provinces and the NCOP; and between committee meetings and NCOP plenaries.

¹³¹ Parliament of South Africa 'Legacy Report of the Select Committee on Security and Constitutional Development (June 2009 – March 2014)' *Announcements Tablings and Committee Reports* 38 Sixth Session Fourth Parliament (2014) 2353–2369.

¹³² Negotiations were held on all four bills, but only three went through to final mandates meetings. The Committee could not proceed beyond the February negotiating mandate meeting due to the fact that the NCOP did not revive the bill at its first session on 18 February 2014.

average during its entire term from June 2009 to 28 March 2014. While it is unlikely that most NCOP committees would experience such extreme pressure to process bills affecting provinces in such a short space of time, the example illustrates that it can happen in practice and that mechanisms need to be put in place to prepare for this kind of eventualities. In addition to extending the legislative period applicable to such bills, broader political interventions should also be considered, eg an agreement with the Leader of government business or Cabinet on the maximum number of ss 76 and 74 bills and the dates by which they must be introduced in Parliament in a term or year.

The negotiating stage presents a unique opportunity for provinces to participate in the NCOP's mandating processes with actual leverage. This is unfortunately also the stage that is perhaps the most neglected — partly because of the tight legislative cycle and partly because provinces have not fully realised their power to bring about a desired outcome provided they use negotiations optimally. The aim of negotiations is for provinces to agree on proposed amendments to bills affecting provinces. To unleash the full potential of negotiations, the mandating process should be sufficiently flexible and allow enough time for provinces to reach consensus. Conversely, a rigid approach in dealing with negotiating mandates will limit and frustrate the process, instead of taking it forward.

In the discussion below I illustrate how the MPPA's silence on some of the aspects of negotiations have contributed to the rigidity in the negotiating process which, in turn, have limited provinces' potential to influence negotiations to their advantage.

5.4 *The impact of a rigid negotiating process on provincial participation*

(a) *The MPPA (in my view correctly) does not prescribe how the negotiating process must unfold.*

Effective negotiations presuppose a consistent and correct application and interpretation of the applicable constitutional provisions and NCOP Rules and depend on the political will of role players. Inconsistent and incorrect application of the NCOP Rules and the Constitution has led to certain specific challenges, some of them unforeseen. For example, the provision in the Constitution that a decision in the NCOP is decided when five provinces vote in favour thereof, was strictly and in my view, incorrectly, applied in the context of a negotiating meeting on the Traditional Courts Bill 2012 that was held on 12 February 2014.¹³³ As a result, no real negotiations were possible and the meeting was adjourned soon after it started, having accomplished nothing. The Select Committee expected the majority of five provinces to either support or reject the bill in their mandates in terms of s 65 of the Constitution which really should only apply to voting in the NCOP plenary. However, the negotiating meeting deadlocked because four provinces rejected the bill while four were in favour of the bill with proposed amendments; and one (KwaZulu-Natal) abstained from voting. No real negotiations could take place as provinces were unwilling to shift their positions on the bill and a quorum of seven provinces notwithstanding, the meeting had to adjourn as it could not comply with the Select Committee's expectation and/or interpretation that a majority of five provinces needed to vote in favour of the bill with proposed amendments or reject the bill.

¹³³ Parliamentary Monitoring Group 'Meeting of the Select Committee on Security and Constitutional Development. Traditional Courts Bill [B1-2012]: consideration of negotiating mandates' 12 February 2014, available at <http://www.pmg.org.za/report/20140212-traditional-courts-bill-b1-2012-consideration-negotiating-mandates>, accessed on 24 April 2015.

- (b) *The MPPA does not clarify whether or not provinces that oppose a bill may refuse to propose amendments and may abstain from negotiations.*

If a mandate does not expressly state that a province opposes a bill, the logical conclusion is that it supports the bill. The province should then indicate whether or not its support is subject to proposed amendments. Technically speaking, the difference between a mandate that opposes a bill with proposed amendments and one that supports a bill subject to amendments is cosmetic, as both want the bill to be amended. In instances where a provincial delegation has an open mandate it would be possible for a delegation to change its position on a bill or a specific amendment during the course of negotiations without the need to revert to the province. Ideally, a negotiating mandate should propose amendments, but also give the delegation enough discretion to accommodate other provinces' views if so persuaded during negotiations. After the meeting, if time allows, the province can be engaged further on possibly changing its position on a bill. Because the six-week legislative cycle does not allow for more than one negotiating meeting, provinces that support the bill but do not agree to the proposed amendments are forced to either oppose the bill or abstain from voting. This is clearly not ideal. A longer legislative period would at least afford such provinces another opportunity to negotiate before submitting final mandates. Should South Africa's political landscape change in the future to the extent that the ANC no longer control the majority of provinces, for example, the legislative period will likely need to be extended to allow sufficient time to traverse diverse provincial and national views, as well as diverse party-political views. Should this happen the Rules of Parliament can easily be amended to provide for changing political needs.

- (c) *The MPPA does not require five provinces to vote in favour of a proposed amendment during negotiations.*

This could be left until provinces vote on the final list of amendments on the bill, in other words the final mandate. If one considers that the negotiating mandates merely set out the parameters of negotiations, then delegations should have quite a lot of

scope within which to work. Ideally, delegations should determine the process of negotiations. What approach must be followed in instances where more than one province propose amendments on the same clause but with different wording and/or emphasis? Forcing delegations to reject the proposals of another province on clauses or issues that were not proposed by their own provinces could give rise to unintended consequences. Provinces will in any event indicate in their final and voting mandates whether or not they support an amended bill. Alternatively, consideration should be given to holding another round of negotiations if most provinces insist on this, even if it means extending the legislative cycle. For practical reasons, if it emerges in a negotiating meeting that provinces can agree on a new provision or a proposed amendment that would require careful drafting to ensure it is consistent with the rest of the bill and the Constitution, there should be an opportunity for it to be professionally drafted (usually by the department) and returned to the select committee for consideration or further deliberation if necessary — the same process followed by NA committees when amending bills.

An effective negotiating meeting requires an effective and decisive chairperson to steer discussions, try and prevent a deadlock, and make decisions. Deadlocks are sometimes unavoidable because delegations negotiate within the perimeters determined by their respective provinces. Whether a ‘deadlock’ is sufficient to derail real negotiations is also a matter of interpretation. All efforts should be made to try and end the deadlock, including finding political solutions outside the negotiating meeting in order to get provinces to agree. An unresolved deadlock in respect of a bill could result in a rejected or lapsed bill.

5.5 Decisions to revive a bill

In terms of NCOP Rule 238(1), a bill lapses if the Council has not passed the bill when it rises on the last sitting day in an annual session. The bill may, however, be reinstated on the Order Paper during the next ensuing session by way of a resolution of the Council.

Should provinces play a more defined role in the decision whether or not to revive a bill; and should this be done by way of mandate? Provinces, in terms of s 76 of the Constitution, have a right to participate in the NCOP's legislative process. In terms of s 65(1)(b) of the Constitution all questions in the NCOP are decided when five provinces vote in favour thereof. At first glance a vote by a province on a question whether a bill should be revived would require a mandate from provinces. The MPPA is silent regarding mandates when the NCOP has to decide on a question to revive a bill. The mandates covered by the MPPA concern certain questions only — the revival of bills (including bills affecting provinces) is excluded from this list.

In terms of current practice, the Chief Whip of the Council brings a draft motion before Council in terms of NCOP Rule 74(b) that states that any member of the Council may propose a draft resolution for approval as a resolution of the Council. The Council can pass the resolution with a majority of votes of members in the Council. The decision to revive a bill is thus a political decision which is given effect to by the NCOP's programming committee and administration. According to an NCOP Table staff member:

Section 65 should be read in conjunction with the Mandating Procedures of Provinces Act, which list instances when mandates are required from provinces...[S]ince the Act does not require mandates for the revival of bills, delegation heads will vote without necessarily submitting a "mandate". Usually a list of bills that the NCOP intends to revive will be forwarded to provinces in advance. Once revived the bill is still going to go through the legislative process. Therefore, provinces would still pronounce themselves on the bill.¹³⁴

I disagree with this view because the NCOP's approach appears to be based on (a) the MPPA's omission of questions regarding the revival of bills from the list of questions requiring mandates, (b) the provision in the Constitution that the NCOP can regulate its own business, and (c) an incorrect interpretation of s 65 of the Constitution. The practice followed to revive bills in the NCOP is clearly wrong as s 65(1) states that '[e]xcept where the Constitution provides otherwise...each province has one vote, which is cast on behalf of the province by the head of its delegation'

¹³⁴ Benny Nonyane NCOP Procedural Adviser, e-mail correspondence dated 15 January 2015.

— ie a vote directed by the province in its mandate. The only exception to this provision (when a mandate is not required) is in s 75(2) which states that ‘[w]hen the [NCOP] votes on a question in terms of [s 75], section 65 does not apply, instead...each delegate in a provincial delegation has one vote [and] the question is decided by a majority of the votes cast’.¹³⁵ A vote according to a province’s direction requires a mandate (written or otherwise). This means the MPPA must be ‘read in conjunction with’ s 65 of the Constitution, and not *vice versa*, as the MPPA must give effect to s 65. Thus, all questions before the NCOP (except those concerning s 75 bills) require mandates and should be voted on by the provincial delegations on behalf of provinces, not individuals.

A mandate regarding the revival of a bill can be ‘open’ and need not be specific to the issue, and does not need to be in writing. The delegation must act within the authority that the provincial legislature confers on it, and a provincial legislature can confer an open mandate on its delegation and allow it to decide how to vote on certain questions before the NCOP (except votes to pass s 74 and s 76 bills which require specific mandates under the MPPA). In the case of open mandates the leader of the delegation would, however, need to consult other members in the delegation concerning how to vote. This means that a province can also not mandate the leader of the delegation alone to decide without consulting the rest of the delegation, because s 60(1) of the Constitution specifically refers to ‘a single delegation from each province consisting of ten delegates’ and not an individual. In the same manner that the validity of legislation or decisions of the NCOP can be challenged in court for not complying with the technical or procedural requirements set out in the Constitution, a mandate conferred on a provincial delegation would also be invalid if eg the composition of the delegation does not comply with the specifics set out in the Constitution.

¹³⁵ Although voting on international agreements do not require mandates ito NCOP Rule 73A(1), the head of the provincial delegation casts a vote on behalf of the province which is, strictly speaking, done according to the instruction or authority (and thus the mandate) of the province.

6. Conclusion

During the workshop on the implementation of the NCOP in 1996, the then Minister of Provincial and Local Government, Valli Moosa, indicated that the idea of promoting provincial interests during the mandating process was to ensure that the debate takes place in the provinces at all times. In this chapter I allude to some of the implementation challenges of the MPPA and their impact on provincial participation in the NCOP's legislative processes. The case studies in Chapter 4 provide a more detailed illustration of the practical implementation of the MPPA and evaluate if, and to what extent, the Act has improved provincial participation.

CHAPTER 4

CASE STUDIES

1. Introduction

Earlier chapters allude to the shortcomings of the mandating procedures. In this chapter I illustrate some of the challenges encountered in practice by way of case studies. I also suggest possible solutions in instances where the MPPA is either silent on specific issues, or does not address them adequately; and, finally, I reflect on the participation of provinces in the mandating process.

Three of the four case studies concern s 76 bills and one concerns a s 75 bill:

(i) The Traditional Courts Bill [B1-2012] ('TCB') fell under s 76. It was processed after the enactment of the MPPA and dealt with customary law and practice, which the Constitution lists in Schedule 4¹³⁶ and thus is covered by s 76(3). The TCB discussion considers, among other things, the requirement of adequate public consultation, the value and purpose of the NCOP's public consultation and its impact on provincial mandates. The negotiations on this bill were problematic due to the incorrect interpretation of voting requirements in the NCOP (perhaps driven by party interests) which led to undue tension and delay in processing the bill when voting in the select committee reached a stalemate. The MPPA is silent on how a committee should proceed when negotiations reach a stalemate and there is no decisive vote to either accept or reject the bill. I consider the implication of this for voting in the NCOP.

(ii) In the second s 76 bill case study, the Legal Practice Bill [B20D-2012] ('LPB'), I discuss the provision in NCOP Rule 63 for a minority view in the committee report

¹³⁶ Under Part A of Sch 4.

and a Declaration of Vote prior to voting on a question before the Council.¹³⁷ These provisions are important and useful for provinces, especially where bills affect provinces, to ensure that their voices are heard throughout the legislative process in the NCOP.¹³⁸ I also consider the role of opposition delegates in the mandating process.

(iii) The National Environmental Management Act (Integrated Coastal Management) Amendment Bill [B40B-2007] ('Coastal Management Bill') (s 76) discussion illustrates selected challenges before the enactment of the MPPA. It also illustrates how consulting provinces from the policy development phase can ensure their buy-in and contribute to a relatively smooth mandating process. Although the Constitution spells out that provinces directly affected by a bill must be consulted, the Constitution and the MPPA are silent on the participation of provinces not directly affected by s 74 or s 76 bills. The Coastal Management Bill concerned only the four provinces with coastal lines, namely the Eastern Cape, Western Cape, Northern Cape and KwaZulu-Natal (KZN). I consider the role of the unaffected provinces in respect of holding public hearings and developing mandates on the bill.

(iv) The final case study, the Protection of State Information Bill [B6B-2010], concerns a s 75 bill. It is included here to provide an opportunity to reflect on how much time the NCOP devotes to processing bills that do not 'concern provinces' from a constitutional perspective. This is important in light of the challenges presented by the legislative cycle applicable to s 74 and s 76 bills.

¹³⁷ *Rules of the National Council of Provinces* *ibid.*

¹³⁸ Plenaries attract a wider audience than committee meetings and are often also broadcast on television to a much wider audience outside of Parliament. Thus a province's Declaration of Vote in plenary ensures the electorate at large are informed of this view and also contributes to enhancing provincial participation in the NCOP. Nevertheless, due to the ANC dominance over eight of the nine provinces, 'ultimately only the vote of the majority party is cast when legislation is considered...it remains to be seen whether the notion of the NCOP in terms of composition can enhance co-operative government and guarantee sufficient representation of provincial interests' (M Wittneben 'The role of the National Council of Provinces within the framework of co-operative government in South Africa. A legal analysis with special regard to the role of the Bundesrat in Germany' (2002) 35 *Verfassung und recht in übersee* (VRU) at 260).

The next sections present the case studies in more detail.

2. The Traditional Courts Bill [B1-2012] ('TCB')

The Constitution lists customary law and practice under Part A of Schedule 4 as one of the concurrent national and provincial functional areas. Thus national legislation concerning it falls under s 76. Currently traditional courts are governed by ss 11 and 20 of the Black Administration Act 38 of 1927 ('BAA').¹³⁹ The TCB was introduced in 2012 to provide for legislation on traditional courts as the relevant sections of the BAA were, at the time, being kept alive by a 'sunset clause' that was to expire on 30 December 2012.¹⁴⁰ The Chairperson of the Select Committee on Security and Constitutional Development introduced the TCB in the NCOP as a s 76(3)¹⁴¹ bill as the Constitution allows for certain bills to be introduced in the NCOP.

The TCB emanated from the Justice Department's 2008 'Policy Framework on the Traditional Justice System under the Constitution'¹⁴² ('policy framework'). It would regulate traditional courts, give effect to the policy initiatives enunciated in the policy framework;¹⁴³ and give effect to the Traditional Leadership and Governance Framework Act 41 of 2003, which 'enjoin[ed] the Department...to

¹³⁹ Christa Rautenbach 'Therapeutic jurisprudence in the customary courts of South Africa: (traditional authority courts as therapeutic agents): notes and comments' (2005) *SAJHR* 21 (2) at 327.

¹⁴⁰ In November 2012 Parliament passed the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act, 2012 that extended the operation of the BAA until such time as legislation on traditional courts is enacted. The amendment Act came into operation 28 December 2012.

¹⁴¹ This includes bills that fall within the functional areas listed in Schedule 4 or that provide for legislation that requires provincial mandates, the participation of local government, recognises the powers of the Public Protector to investigate matters involving the state in any sphere of government; and legislation that promote the principles and policy relating to public administration, the Public Service Commission and the public service.

¹⁴² Department of Justice and Constitutional Development 'Policy Framework on the Traditional Justice System under the Constitution' available at http://www.justice.gov.za/legislation/tradcourts/2008_tradcourts_pfrmw.pdf, accessed on 16 September 2015

¹⁴³ Department of Justice and Constitutional Development 'Report to the Portfolio Committee on Justice and Constitutional Development re: The Traditional Courts Bill, 2008' 31 August 2009 available at http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/DOJ_report_2009.pdf, accessed on 16 September 2015.

allocate roles and responsibilities to the institution of traditional leadership in the administration of justice'.¹⁴⁴ But the bill quickly attracted opposition. Women's organisations, including the Alliance for Rural Democracy ('the Alliance') comprising a number of women's organisations and academia,¹⁴⁵ argued that the bill was incompatible with living customary law (which secures women's rights). They also maintained that there had been a lack of, or inadequate, consultation with rural women who would be most affected by the bill. Several individuals (including the Minister of Women, Children and Persons with Disabilities) and civil society organisations called for the TCB's withdrawal. While no provinces specifically called for the bill's withdrawal, some expressed doubt that it would achieve its objectives.¹⁴⁶ The Eastern Cape believed the bill was 'fundamentally flawed and no amount of amendments [would] be able to remedy the Bill'.¹⁴⁷ The North West communities wanted the bill to be 'done away with'.¹⁴⁸ Gauteng found 'inherent challenges'¹⁴⁹ with some of the provisions of the bill, while the Eastern Cape thought that the bill '[did] not create any form of uniformity and [left] the process at the discretion of each traditional court to determine the content of the law'.¹⁵⁰

Notwithstanding the six week-legislative cycle prescribed in NCOP Rule 240, as explained in Chapter 3, a committee may, in terms of NCOP Rule 240(3), request the Chairperson of the NCOP for an extension of the time limit to deal with a bill. The Select Committee was granted an extension until 30 December 2012. Its delay in dealing with negotiating mandates drew much criticism. As the Justice Minister showed no intention of withdrawing the bill and the Committee could not withdraw the bill without obtaining provincial mandates to that effect, the Committee had to

¹⁴⁴ Policy Framework at 40.

¹⁴⁵ The Legal Resources Centre (LRC) represented the Alliance.

¹⁴⁶ The Free State's negotiating mandate was in favour of the bill and did not refer to the issue of consultation or the SALRC bill and recommendations. The mandate did, however, raise issues relating to equality and constitutionality in dealing with individual clauses.

¹⁴⁷ Eastern Cape Provincial Legislature (2012) Traditional Courts Bill [B1-2012] Negotiating Mandate 23 May 2012 at 1.

¹⁴⁸ North West Provincial Legislature (2012) Traditional Courts Bill [B1-2012] Negotiating Mandate 16 and 18 May 2012. The province, however, submitted a new mandate in 2013 in support of the bill.

¹⁴⁹ Gauteng Provincial Legislature (2012) Traditional Courts Bill [B1-2012] Negotiating Mandate 18 May 2012 at 3.

¹⁵⁰ Eastern Cape Provincial Legislature (2012) Traditional Courts Bill [B1-2012] Negotiating Mandate 23 May 2012 at 2.

continue processing the bill. Section 65(1)(b) of the Constitution provides that at least five provinces must vote in favour of a question to be decided in the NCOP. Provinces submitted their written negotiating mandates prior to the negotiating meeting. Four provinces had rejected the bill in their negotiating mandates, one province (Mpumalanga) requested an extension in order to hold public consultations, while the remaining four supported the bill but proposed amendments. This meant that a negotiating mandate meeting was required. Thereafter provinces were expected to submit final mandates that either unequivocally rejected or supported the bill.

2.1 Public participation on the TCB

According to s 118 of the Constitution, provincial legislatures must consult the public in respect of bills affecting provinces. The outcome of such public participation is intended to inform the content of mandates conferred on provincial delegations. Gauteng had consulted with local government and included the views of the Gauteng Department of Local Government and Housing in its negotiating mandate.¹⁵¹ Organisations like the Land Access Movement of South Africa, the Legal Resources Centre and the Law, Race and Gender Unit of the University of Cape Town made presentations or submissions in more than one province, as well as to the NCOP. Non-governmental and women's organisations thus maximised their input and influence on the negotiating mandates conferred by provincial legislatures.

The provincial legislatures' public consultations notwithstanding, criticism against the department's lack of public consultation continued to surface. It is important that a department also hold public consultations. Legislation is based on policy. Policy-making, according to s 85 of the Constitution, is the prerogative of the executive authority which is vested in the President¹⁵² and which he exercises

¹⁵¹ Gauteng Provincial Legislature (2012) Traditional Courts Bill [B1–2012] Negotiating Mandate 18 May 2012 at 15.

¹⁵² S 85(1).

together with other members of the Cabinet.¹⁵³ This includes ‘developing and implementing national policy’¹⁵⁴ and ‘preparing and initiating legislation’.¹⁵⁵ In South Africa most legislation is introduced by the executive. According to s 195 of the Constitution the ‘[b]asic values and principles governing public administration’ includes that (a) ‘[p]eople’s needs must be responded to, and the public must be encouraged to participate in policy-making’¹⁵⁶ and (b) ‘[t]ransparency must be fostered by providing the public with timely, accessible and accurate information’.¹⁵⁷ Section 195(2) makes it clear that these principles apply to all spheres of government and organs of state, while s 195(3) requires national legislation to ‘ensure the promotion of the values and principles listed in subsection (1)’. It is therefore important for a department to consult the electorate before introducing a bill in Parliament, lest it end up being rejected. Apart from ensuring that more people are made aware of policies and legislation, the emphasis or ‘function’ of the executive’s public consultation is to test whether its policies reflected in proposed legislation is acceptable to the electorate. If not, it means the department must go back to the drawing board before introducing such a bill in Parliament.

In the case of the TCB, the department admitted on 24 October 2012 that its consultation on the bill had been inadequate. This raises another question: whether the public participation processes of a provincial legislature and/or the NCOP can correct a department’s flawed or inadequate consultation process, or whether the NCOP is obliged to prevent such a bill from being passed. There is possibly no legal answer to this. The CC has confirmed that due to the separation of powers it cannot dictate to Parliament how to deal with its constitutional obligations in dealing with bills, including how it conducts public consultations required by s 59 and s 72(1).¹⁵⁸

¹⁵³ S 85(2).

¹⁵⁴ S 85(2)(b).

¹⁵⁵ S 85(2)(d).

¹⁵⁶ S 195(1)(e).

¹⁵⁷ S 195(1)(g).

¹⁵⁸ In *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) the CC, in respect of the unconstitutionality of legislation passed by Parliament, pointed out that it could not ‘[instruct] Parliament which of a range of constitutional policy choices it should make in addressing that unconstitutionality’ at par 108.

Parliament can send bills back to departments for more consultation, if necessary. Departments are free to consult as they see fit, provided consultation is adequate and complies with the values and principles listed in s 195 of the Constitution. Further, once Cabinet has approved a bill, provinces are unlikely to reject it or send it back — whether for political or technical reasons. Because of the governing party's majority in the provincial legislatures, ANC delegates in the NCOP and provincial legislatures will understandably be reluctant to oppose legislation developed at national level in the light of party discipline expected from ANC members dealing with a bill. This is not peculiar to the ANC or to South Africa — the same would apply to most, if not all, governing parties in other democracies. For example, a study of party discipline in Germany between 1990 and 2000 (after the unification of East and West Germany) found that politicians from both sides voted according to 'pro-party norms' and that this 'party voting agreement in [*länd*] parliaments cause[d] substantive policy outcomes to vary across the [*länder*] according to the partisanship of the legislative majority rather than along east-west lines, even on issues where MPs' values differ[ed] greatly in east and west'.¹⁵⁹

Secondly, on the technical aspects of a bill — provinces are reluctant to send legislation back to the executive, even where provinces or the public raised concerns that the department failed to deal with certain aspects in the bill or that its public consultation had been flawed and required considerable revisions to the bill. The NCOP and provinces' stance on the TCB illustrates this. To remedy the department's flawed public participation on the TCB meant that the bill would have needed extensive amendments, tantamount to rewriting the bill. For the NCOP to fix the bill the NCOP and provinces would have had to extend their own public consultations quite considerably. The tight legislative cycle applicable to s 76 bills and the relative rigidity of the mandating process, however, made extending public participation very unlikely.

¹⁵⁹ Louise K. Davidson–Schmich 'The Development of Party Discipline in New Parliaments: Eastern German State Legislatures 1990–2000' (2003) 9(4) *The Journal of Legislative Studies* at 100.

2.2 *Government's consultation on the bill*

The Department did not consult the people who would be most affected by the bill, in particular women in rural areas. Apart from a national Conference of Magistrates that the department hosted in 2007 and that was attended by more than 500 delegates (including members of the judiciary, judicial officers and ministers), the department held seven consultative workshops with the national and provincial houses of traditional leaders in 2007 and 2009. It also consulted the South African Local Government Association, the South African Human Rights Commission, the Commission on Gender Equality, magistrates and prosecutors.¹⁶⁰ Considering that South Africa had 14.5 million people living under traditional authorities according to the 2011 Census,¹⁶¹ the Department's consultation was clearly inadequate. Not only did it not consult the majority of the people living under customary law that were directly affected by the bill, but its consultation focused on those who would administer or adjudicate the bill — the traditional leaders and the judiciary.

The adverse reaction to the TCB showed that when consultation is lacking or inadequate the result is a flawed and unacceptable bill. The TCB contents showed a glaring ignorance of, or disregard for, the way living customary law was practiced in traditional communities, and flouted constitutional principles like the separation of powers and the right to a fair trial.

Provinces criticised the department for singling out traditional leaders as the key stakeholder to consult on the bill. The 'lack of consultation at the conceptual stage of the Bill [had] been raised at most of the public hearings held by the Eastern

¹⁶⁰ Traditional Courts Bill [B1–2012] 'Memorandum on the objects of the Traditional Courts Bill, 2012' at 18.

¹⁶¹ South African Government News Agency 'Over 14m South Africans live under traditional authorities' *SA News newsletter* 2 ed. 17 January 2013. In terms of the 2011 Census results released on 17 January 2013, Limpopo has approximately 59.2 percent people living under tribal authorities, followed by Mpumalanga (47.3 percent), the Eastern Cape (44.4 percent) and KwaZulu–Natal (43.7 percent). In Gauteng 0.9 percent of the people live under tribal authorities, in the Free State 11 percent and the Northern Cape 11.9 percent.

Cape Legislature'.¹⁶² The Free State would have preferred translations of the bill in 'official languages accessible to traditional communities'.¹⁶³ The Western Cape's consultation had been 'impeded by the fact that the Bill was only issued in English...a language that is not understood by the majority of people who would be affected by the Bill'. Communities were unaware that the bill had also been printed in isiXhosa.¹⁶⁴ In addition, 'the process of consultation did not allow communities the opportunity to substantially engage with the provisions and possible implications of the Bill'.¹⁶⁵

The department had hoped that the NCOP would widen consultations on the bill. However, the NCOP and provinces' lack of capacity (including financial capacity) and constrained time-frames ruled out extended public consultations. The Constitution expects both the executive and the legislature to conduct public consultations. It would set an undesirable precedent if departments were to pass on their public consultation responsibilities by 'riding' on the NCOP processes that must necessarily follow the introduction of s 76 bills. At the most, the NCOP's public consultation processes are meant to augment the department's consultation processes. The principle of co-operative governance and co-operation between the different spheres of government obliges the national department to consult/co-operate with the provincial governments. It could have given effect to this principle by bringing provincial departments on board which could in turn have involved local government structures to conduct grass roots consultation with eg rural women. This would have built on the basis of multi-level government aimed at deepening democracy and bringing government closer to the people, in addition to being responsive to the needs of the people according to s 195(e) of the Constitution.

¹⁶² Eastern Cape Provincial Legislature (2012) Traditional Courts Bill [B1–2012] Negotiating Mandate 23 May 2012 at 10.

¹⁶³ Free State Legislature (2012) Traditional Courts Bill [B1–2012] Negotiating Mandate 24 May 2012.

¹⁶⁴ The TCB was printed in 2008 under the title 'Umthetho oyilwayo weenkundla zemveli'.

¹⁶⁵ Western Cape Provincial Parliament (2012) Traditional Courts Bill [B1–2012] Negotiating Mandate 15 May 2012. Annexure A at 1.

2.3 *NCOP's role in widening public participation*

Some provinces had complained about the limited time they had to conduct public consultations. In recognition of this and the criticism over the department's inadequate public consultation on the bill, the Select Committee decided to hold its own public hearings on the TCB. This was despite the fact that provinces had already begun to submit negotiating mandates. The Select Committee believed that s 72(1) of the Constitution which states that the NCOP must '(a) facilitate public involvement in the legislative and other processes of the Council and its committees', was wide enough to allow for this.¹⁶⁶ Public hearings were held at Parliament in Cape Town between 18 and 21 September 2012. The Report on the public hearings and submissions was sent to provinces in order for them to consider the new information gathered. Provinces could thus amend their mandates or submit fresh ones as the NCOP had not yet considered them. Nevertheless, some provinces like the Eastern Cape chose not to amend or submit new negotiating mandates. It is not clear to what extent other provinces considered the input from the NCOP's public hearings as the negotiating mandates did not specifically refer to the NCOP public consultation. Possibly, no 'new' information came out of this process as the same organisations who called for the TCB's withdrawal and those who made submissions to the NCOP also made similar submissions in the different provinces during the provincial public consultations.

The Select Committee next discussed the bill in 2013. As provinces' negotiating mandates still showed no clear direction on the fate of the bill, the Acting Chairperson announced that the Committee would not deal with mandates. He requested provinces to hold additional public hearings and to clarify ambiguous mandates. The Alliance saw this development as '[s]talling debate on provincial mandates' which, it concluded, had been a 'default response' of the Select Committee for almost two years. The Alliance felt that the motivation behind the

¹⁶⁶ Parliament of South Africa 'Minutes of the Select Committee on Security and Constitutional Development' 15 August 2012.

request was to ‘consult until [the public] change[d] its mind’.¹⁶⁷ Additional public hearings were planned, for example, in the North West where 95 per cent of the 2050 people that had attended public hearings had rejected the bill.¹⁶⁸

Procedurally speaking, a provincial committee can reconsider and amend its mandate without further public consultations. Nevertheless, provinces agreed to the request as some welcomed more consultation on the bill. The North West, Free State and Mpumalanga held additional public hearings. The Western Cape, Gauteng and Eastern Cape felt their public consultations had been adequate and did not amend their mandates. KZN’s amended mandate opted to abstain from negotiations, in other words it would not participate or vote in the negotiating meeting. The North West changed its mandate to vote in favour of the bill.¹⁶⁹ This was a wide departure from the previous mandate in which the ‘community at large’ called for the bill to be ‘done away with’.¹⁷⁰ Mpumalanga too changed its mandate to support the bill after additional public consultations. These U-turns on the TCB strengthened the perception that additional public hearings were intended to change provinces’ minds on the bill.

Limited as the NCOP and provincial consultations were, they had reached more communities than the department. Despite the negative perceptions about its request that provinces hold additional public hearings, the NCOP had contributed to deepening democracy, and widened and increased public participation on the TCB. Nevertheless, consultation with a few thousand people in nine provinces on a matter that affects the daily life of many South Africans in diverse communities, remains grossly inadequate.¹⁷¹ For the most part, the negotiating mandates tended to reflect the views of those consulted — this was particularly clear in the initial negotiating

¹⁶⁷ Alliance for Rural Democracy ‘NCOP again ignores rural voices on Traditional Courts Bill: A case of “we’ll consult until we change your minds”?’ *Custom Contested* 21 November 2013.

¹⁶⁸ North West Provincial Legislature (2012) Traditional Courts Bill [B1–2012] Negotiating Mandate 16 and 18 May 2012.

¹⁶⁹ North West Provincial Legislature (2013) Traditional Courts Bill [B1–2012] Negotiating mandate 21 November 2013.

¹⁷⁰ North West Provincial Legislature (2012) *op cit* note 148.

¹⁷¹ This total would possibly be adequate in other bills dealing with specialised or specific matters affecting only certain sectors of the electorate.

mandates that rejected the bill and the reasons for that. Some provinces like Mpumalanga and the North West changed their mandates to support the bill after holding additional public hearings. While these provinces complied with the technical requirement to hold public consultations in order to develop their new negotiating mandates, it shows that the mandating process can be politically manipulated to achieve a desired outcome — the electorate can be persuaded to accept a bill that they previously rejected, in other words ‘consult’ until people change their minds. If provinces that rejected the bill stuck to their positions the TCB could not be passed. In this way the mandates, combined with a requirement of public hearings, can provide a democratic brake on autocratic action by the rejection of unacceptable legislation. As it were, through the otherwise democratic process of additional public consultations, provinces who ended up supporting the TCB inadvertently legitimised autocratic action. However, if done properly and with the right motivations, the diverse outcomes of discussions held in nine different provinces on the same bill cannot be predicted or easily manipulated, and thus legislation will not reflect the national view only. This is what Valli Moosa had in mind — that the promotion of provincial interests during the mandating process is to ensure that the debate takes place in the provinces at all times.

2.4 Voting stalemate

As discussed under voting mandates in the previous Chapter, s 65(1)(b) of the Constitution stipulates that all questions (except s 75 bills in respect of which delegates vote as individuals, and constitutional amendments bills in terms of s 74 which require an affirmative vote of six provinces to be passed) before the Council are agreed to when at least five provinces out of nine vote in favour of the question. Questions include ss 76 and 74 bills before the Council. The Select Committee interpreted the application of s 65 in respect of the TCB to mean that it needed the supporting vote of five provinces to be passed. This incorrect interpretation of voting requirements (possibly motivated by party interests) led to unnecessary delays and agonising over the TCB and made the mandating process unnecessarily cumbersome. The negotiating meeting on the bill that convened on 11 February

2014 (before the Council's first plenary in 2014) was presented with a stalemate — negotiating mandates indicated that four provinces rejected the bill, four were in favour of the bill with proposed amendments; and one (KZN) abstained. Because of the opposition to the bill, the Select Committee incorrectly expected five provinces to reject the bill in their mandates. This brought unnecessary rigidity to the mandating process. Provinces attempted to vote on proposed amendments, but despite a quorum of seven provinces, the meeting could not achieve a majority of five provinces to vote in favour of proposed amendments.

Although the question whether to accept or reject the TCB outright was not directly put, a rejection of proposed amendments by those provinces who made this a condition for approving the bill meant they essentially rejected the bill. Due to the mechanical way in which provincial negotiating mandates were dealt with, the negotiating meeting could not resolve the stalemate. Logically, one would have assumed that because the TCB did not get the required support from provinces, it could not be passed. Because of the stalemate, and in the absence of five provinces supporting the bill according to the Select Committee's expectation, the only other option left was to allow the bill to lapse. No further meetings were held on the TCB after 11 February 2014, leaving the matter unresolved as the bill lapsed soon thereafter.¹⁷²

2.5 Concluding remarks on the TCB

The mandating procedures followed in the TCB elicited robust discussion in the legislatures and in the public domain. Because of provinces' interest in this bill, the NCOP and provinces' public consultation were carefully scrutinised and the delays in dealing with provincial mandates (what the public perceived as delaying tactics) came under heavy criticism due to inadequate public consultation and wide-spread

¹⁷² Stakeholders may have been confused about whether the TCB lapsed at the end of 2012 or the end of 2013. In terms of NCOP Rule 238(1), a bill lapses if the Council has not passed the bill when it rises on the last sitting day in an annual session. The bill may, however, be reinstated on the Order Paper during the next ensuing session by way of a resolution of the Council. As the Council did not revive the bill at its first sitting in 2014, the TCB lapsed at the end of the 2013 calendar year.

opposition to the bill. Four provinces (three of them ANC-governed) rejected the TCB, while four others wanted extensive amendments before they would accept the bill. The Alliance noted that it was unusual for ANC-governed provinces that rejected the TCB to break rank in this manner. This is a positive sign for provincial participation in the legislative process. South Africa's 'constitutional democracy' includes the principles of 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness' — commitment to these principles 'shows that our constitutional democracy is not only representative but also contains participatory elements'.¹⁷³ Furthermore, the multiple levels of government are required to co-operate rather than compete with each other. Ideally national government should consult provinces in order to get their buy-in on national legislation they must implement.¹⁷⁴ It is therefore encouraging that, given the opportunity, provinces can boldly raise their concerns, indicate whether or not proposed legislation is acceptable to them, and specify how national government can make offending provisions more acceptable to provinces.

The NCOP's processing of the bill also casts the spotlight on the conduct of the permanent delegates in the Select Committee, especially the ANC delegates, who did not want to break rank. Had the Select Committee dealt with the initial mandates purely on the basis of those received, the result would have been a rejected bill. Thetja Mofokeng, the Chairperson of the Select Committee on Security and Constitutional Development, was interviewed in connection with this study in 2013. He reflects on the tension between what provinces may want, what the party wants and the tension caused by being a member of a political party on the one hand, and being a member of a parliamentary committee tasked with processing legislation that does not enjoy the support of everyone:

¹⁷³ Ngobo J in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC), at para 111.

¹⁷⁴ Although provinces did not raise funding as a concern in the TCB, this is an important aspect as it relates directly to the ability of provinces to implement national legislation and 'unfunded mandates', and why it is important to listen to provinces. In the case of the CMB, for example, KZN was concerned about funding to implement the bill. While the bill referred to income-generating opportunities, it did not specify or attempt to allocate such funding to local, provincial or national government. Nevertheless, provinces and local government had agreed on their responsibilities and functions when the CMB was developed. This possibly explains why KZN voted in favour of the bill, despite its funding concerns.

[T]he Executive, most of them are party leaders and in some instances, whatever the provinces may feel, the final word would be what the party wants.... There is delay in finalising [the TCB] because [even] in the provinces [where] the ANC is the majority... there is no consensus... the mandates we have received, they are conflicting and some are in conflict with the policy of the organisation. So, in most cases we are expected to pass the laws that are consistent with the Constitution, but at the same time reflect the party policy.¹⁷⁵

Possibly stakeholders (including the Justice Minister and ANC delegates) could have tried to reach consensus beforehand on the best way to deal with the bill in Parliament. Members of Parliament are under strict party discipline and the centralised control of the ANC means that it is hard (and rare) for provinces to step out of line. The manner in which the Select Committee dealt with the TCB confirms observations by Murray *et al* that permanent delegates in the NCOP were often out of touch with provinces, forgot that they represented provinces in s 76 bills, and acted as party representatives instead.¹⁷⁶ The Committee erred in its desire to ensure that the outcome of the bill would be laid at provinces' door — provinces had to indicate whether or not they rejected the bill or wanted the bill withdrawn, as opposed to the Committee taking such a decision. In this way ANC members would not be at odds with senior party members of the executive responsible for the bill in the event that the bill was rejected or withdrawn. ANC domination also showed in the extent to which party interests came into play during the processing of the bill. Because governing parties run the risk of losing support in future elections should they pass legislation that the electorate opposes, an early indication from the public that legislation is unacceptable allows them to remedy the situation — either withdraw the bill or amend the bill in line with public opinion. The long time it took before the TCB eventually lapsed shows that the ANC does not, however, always see public opposition to a bill in a positive light.

The implication of the NCOP's processing of the TCB for the mandating process generally, is that the requirement of a mandate in addition to public

¹⁷⁵ Thetja Mofokeng (2013) Chairperson of the Select Committee on Security and Constitutional Development 2009 to 2014.

¹⁷⁶ Christina Murray, Yoni Hoffman–Wanderer & Karla Saller *NCOP Second Term 1999–2004: A review* (2004) at 70.

participation threw a spanner in the departmental works. The hard lesson learnt from the processing of the TCB is that the department must do proper consultation in provinces with affected groups and levels of government *before* introducing a bill that affects provinces in Parliament. Notwithstanding Mofokeng's views quoted above, the requirements of co-operative governance mean that the national department must engage fully with provincial governments and provincial legislatures in the policy-making and legislative process as they have a say over such matters — they cannot simply be ignored or steamrolled. Ideally these issues are settled before a matter gets to Parliament.

The NCOP would otherwise need to bend over backwards to amend a bill that emanates from a flawed departmental public consultation process, in addition to extending its own public consultation period beyond the already tight legislative time-frame. Considering that the NCOP's and/or the provincial legislatures' public consultation must merely augment the department's own public consultation processes, the legislature should not try to fix such a bill, but rather send it back to the department to do proper consultation. The public or provinces cannot be ignored and the involvement of provincial legislatures (as opposed to provincial executives in the German *Bundesrat* model) in the legislative process is intended to ensure this. Even though this is not often evident because of the ANC's dominance in the legislatures, the TCB case study shows that it does sometimes occur.

3. The Legal Practice Bill [B20D-2012]

The LPB was classified as a s 76 bill because some of its provisions dealt with trade and consumer protection, which are two of the functional areas of concurrent national and provincial legislative competence listed in Schedule 4 to the Constitution. The bill proposed the establishment of the South African Legal Practice Council to regulate the affairs of legal practitioners (both advocates and attorneys) nationally, as well as Provincial Councils.¹⁷⁷ Currently each province has

¹⁷⁷ Long Title.

its own Bar Council and Law Society to regulate advocates and attorneys in that province. These are autonomous bodies with their own assets and fiduciary responsibilities. The establishment of the Provincial Councils had implications for existing provincial bar councils and law societies as they would need to be dissolved and their assets disposed of.

The Western Cape was the only province that opposed the bill, regarding it as fusion of the attorneys and advocates professions in disguise. The main focus of the discussion of the LPB in this chapter, however, concerns the provision in the NCOP Rules for the minority view in a committee to be included in its report, and a Declaration of Vote in the Council to explain a province's vote. In this section I also briefly consider the reason for the inclusion of minority parties in NCOP delegations, and the political dynamics at play when the delegate delivering a provincial mandate on a s 76 bill is not a member of the majority party in the conferring provincial legislature.

NCOP Rule 102(4) provides that the committee report must reflect the minority view. The Committee may not, however, produce a minority report. This provision also applies to provinces that hold a different view to other provinces on, eg a s 76 bill. During the consideration of final mandates on the LPB, the Western Cape delegate read the province's Declaration of Vote¹⁷⁸ into the record and requested that the committee report reflect this minority view.¹⁷⁹ The Western Cape's Declaration of Vote was also read in the Council prior to the commencement of voting in the Council.¹⁸⁰

In theory it would be possible for any province to make a Declaration of Vote, whether or not it supports a bill and irrespective of its initial indication during the

¹⁷⁸ NCOP Rule 71 *ibid.*

¹⁷⁹ Parliamentary Monitoring Group 'NCOP Security and Justice Legal Practice Bill [B20D–2012]: final mandates' available at <https://pmg.org.za/committee-meeting/17035/>, accessed on 16 September 2015.

¹⁸⁰ *Unrevised Hansard National Council of Provinces* Declarations of Vote: Mr J M Bekker 5 March 2014 Take 33 at 24–25.

mandating processes in the select committee of how it will vote in the NCOP plenary. For example, if a province changed its vote prior to voting in the Council, the head of the delegation or his or her nominee, would indicate in a Declaration of Vote that the provincial legislature has (a) reconvened, (b) rescinded its original mandate and (c) conferred a new binding mandate according to which he or she must vote in the Council.

At a national preparatory meeting for the NCOP's inception held at Parliament in September 1996 between the Speaker of the National Assembly (Frene Ginwala), the President of the Senate (Kobie Coetsee) and representatives of the nine provinces and local government, it was decided that '[m]inority parties [would] participate fully in the committees of the provincial legislatures and the NCOP, and in the process of formulating provincial mandates'.¹⁸¹ NCOP delegations are appointed on the basis of proportional representation reflecting the political parties' numerical strength in the respective provincial legislatures. As members of an NCOP select committee must have a representative for each province, it is possible for a member of a minority party in the NCOP to represent a province in which the majority party in the provincial legislature is a different party.

The Mpumalanga negotiating mandate on the LPB was presented by the Democratic Alliance (DA) delegate. The DA was the opposition in the Mpumalanga legislature and held different views to the province's view presented in the mandate.¹⁸² Because the mandating process is essentially intended to garner provincial views it leaves little or no scope for any real role for minority views, apart from those provided in NCOP Rules 71 and 102(4) discussed earlier. Where the opposition holds a different view on a matter, the committee may take this into consideration, and may even accommodate such view. However, a committee decision technically reflects the vote of the majority of its (predominantly ANC) members.

¹⁸¹ *The National Council of Provinces. Perspectives on the first ten years* (2008) *ibid* at 24.

¹⁸² Mpumalanga Provincial Legislature (2014). Negotiating mandate on the Legal Practice Bill.

Members of the opposition can convey their parties' views on a s 76 bill when the provincial legislature sits in plenary to confer a final or voting mandate on its provincial delegation and also during the debate in the NCOP plenary preceding the voting on the bill. Because the Western Cape is ruled by the opposition, the provincial view is also that of the official opposition in Parliament, the DA. The latter often differs from the ANC's views on bills, hence the Western Cape's Declaration of Vote on the LPB. However, when opposition party members form part of provincial delegations, they deliver mandates on behalf of the province and not their parties. During mandating procedures this applies to both special and permanent delegates, and irrespective of whether the delegate briefs or takes part in discussions in the NCOP committee or in the provincial legislature committee on the bill. Nothing of course, prevents an opposition party delegate to indicate that the view expressed in the mandate itself is different from his or her party's views and to also present the party's views to the NCOP committee which must take this into account.

The LPB case study illustrates that party politics influence mandating processes, necessitating a fine balance between individual and party views on the one hand, and the provincial view on the other hand. Although delegates represent provinces when they deliver a mandate on a s 76 bill, it can become tricky when the delegate is from a different party than the majority party in the conferring provincial legislature. I mentioned earlier that NCOP Rule 102(4) requires a committee report to also reflect the minority view. Thus, although provinces in control of minority parties (or minority parties themselves) may not be able to stop the NCOP from passing a bill they oppose, the inclusion of the minority view in the committee report and the opportunity to make a Declaration of Vote in the NCOP plenary ensure their views are heard and considered throughout the mandating process.

4. The National Environmental Management: Integrated Coastal Management Bill [B40B-2007] ('the Coastal Management Bill')

The Coastal Management Bill sought to address the challenges experienced in coastal provinces which included erosion, storm damage, flooding and pollution which had been caused by, among other things, fragmented and 'sectoral' planning and decision-making.¹⁸³

The bill set out the responsibilities of national, provincial and local government in managing the coast. Future planning and decision-making would be through integrated planning and decision-making by a National Coastal Management Committee (NCC) in conjunction with Provincial Coastal Committees (PCCs) and Municipal Coastal Committees (MCCs).¹⁸⁴ Provincial governments were required to *inter alia* develop provincial environmental implementation plans, monitor compliance and intervene when implementation plans were not complied with. The Coastal Management Bill (CMB) placed obligations on municipalities to ensure access to the coast. It also allowed the Minister of Environmental Affairs and Tourism to expropriate privately-owned land and re-demarcate it as coastal public property.

4.1 *Issues affecting provinces raised in mandates*

The issue of adequate funding to implement a bill is extremely important as it relates to provincial executives' interests and their ability to fulfil their legislative obligations. This was one of the relatively few province-specific issues affecting the four coastal provinces that were raised in the negotiating mandates and during deliberations on the bill in the NCOP. The small number of issues raised were possibly due to the department's extensive consultations on, and the integrated

¹⁸³ Department of Environmental Affairs and Tourism 'Integrated Coastal Management Bill 15 August 2007' available at <https://pmg.org.za/committee-meeting/9017/>, accessed 16 September 2015.

¹⁸⁴ Parliamentary Monitoring Group Minutes Land and Environmental Affairs Portfolio Committee 'Integrated Coastal Management Bill: Department briefing' 15 August 2007 available at <https://pmg.org.za/committee-meeting/9017/>, accessed 16 September 2015.

approach taken in, the bill. The CMB was aligned with both the White Paper on Environmental Management Policy for South Africa ('EP') of 1998 and the Constitution, leaving perhaps little or no room for potential areas of contestation arising from issues that could affect provinces. In this model, the NCOP, as a public forum in which to raise provincial issues, serves as a kind of stopgap or safety net to 'catch' important provincial concerns that may have been overlooked or ignored. For example, KZN raised valid funding concerns regarding the implementation of the CMB as it was directly affected by the bill. Surprisingly, these concerns were ignored. As a province directly affected by the CMB the KZN's presence at the negotiating meeting in the NCOP was crucial to ensure its concerns were addressed and that its delegation push for the adoption of its proposed amendments to the bill. Although it sent through a list of proposed amendments, the KZN's representative was inexplicably absent during negotiations to fight for what the province wanted. In my view the CMB negotiating meeting should not have proceeded as the quorum requirement for bills affecting certain provinces only cannot be met if a directly-affected province is not represented. Because the other provinces were not as vested in the issues the KZN wanted the bill to address, it is perhaps not unsurprising that the KZN's proposed amendments were not adopted during negotiations. It is precisely for this reason that provinces directly affected by a bill must ensure their representatives attend negotiating mandate meetings — sending a list of proposed amendments to the NCOP does not guarantee that the amendments will be considered, let alone adopted. The NCOP Rules too could possibly be amended to ensure the presence and effective participation of directly-affected provinces in negotiations, similar to the higher standard of participation the Constitution requires in respect of constitutional amendments that affect the provincial boundaries of certain provinces only.

Apart from extending negotiations to ensure issues raised by directly-affected provinces are adequately addressed, affected provinces should also proactively lobby other provinces' support for their views or positions on bills affecting them. Thus, where there had been inadequate public consultation on a bill or where provincial concerns were largely ignored, the NCOP is unable to effectively play its role as a 'public' forum in which to address provincial issues.

4.2 *Provinces not directly affected by a s 74 or s 76 bill*

The MPPA is silent on the participation of provinces not directly affected by s 74 or s 76 bills. In practice such provinces need not conduct public consultation. This must be viewed in light of the Constitutional Court's pronouncement on public participation in *Doctors for Life v The Speaker of the National Assembly*¹⁸⁵ that '[t]he obligation to facilitate public involvement was a material part of the law-making process and was a requirement of manner and form. Failure to comply with this obligation rendered the resulting legislation invalid'.¹⁸⁶ In *Doctors for Life* the CC was approached to declare invalid four health sector acts¹⁸⁷ because the NCOP and the provincial legislatures had failed to comply with their constitutional obligations to facilitate public involvement in their legislative processes as contemplated in s 72(1)(a) and s 118(1)(a) of the Constitution. The CC found no evidence,

that the NCOP had held public hearings or invited written representations on any of the [b]ills. Insofar as the provincial legislatures were concerned, some but not all of the provinces had held hearings in respect of some but not all of the [b]ills. Some provincial legislatures had considered written representations that had been submitted to the National Assembly but it was not clear...whether any of them had invited new or supplementary representations from the public.¹⁸⁸

While it had been 'reasonable' for the NCOP to decide to hold public hearings in the provinces, provinces were obliged to hold such hearings and NCOP members had to attend or had to be given 'access to the reports of those proceedings'.¹⁸⁹ An evaluation of the public participation processes followed in respect of each contested bill showed that very few provinces held public hearings. The CC held that, consequently, the NCOP's failure to hold public hearings was unreasonable and that

¹⁸⁵ (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

¹⁸⁶ Paras 207–209 at 489C–G.

¹⁸⁷ Choice on Termination of Pregnancy Amendment Act 38 of 2004; Dental Technicians Amendment Act 24 of 2004; Sterilisation Amendment Act 3 of 2005; Traditional Health Practitioners Act 35 of 2004.

¹⁸⁸ Para 154 at 476F – G.

¹⁸⁹ Paragraph 164 at 478E.

it ‘did not comply with its obligation to facilitate public involvement...as required by s 72(1)(a)’.

In the present case study only two of the inland provinces elected to hold public hearings on the CMB. If the *Doctors for Life* decision is followed the NCOP would have had to hold public hearings to make up for this shortfall. In *Doctors for Life* the contested legislation affected all provinces, whereas only four coastal provinces were directly affected by the CMB. In my view the requirement to hold public hearings in affected provinces only is in line with the CC’s decision in *Matatiele 2*¹⁹⁰ which concerned the validity of a constitutional amendment that affected certain provinces only. In *Matatiele 2* the Court held that s 74(8) of the Constitution applied¹⁹¹ and that the NCOP could not pass the bill or the relevant amendment without the approval of the legislatures of the affected provinces. The affected provincial legislatures were thus obliged to facilitate public involvement as required by s 118(1)(a) of the Constitution. The CC reiterated the importance of public participation which it previously expounded in *Doctors for Life* as the Constitution ‘calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State’ and also ‘requires institutional co-operation and communication between national and provincial legislatures’ as institutionalised in the NCOP.¹⁹²

While voting in the NCOP plenary decides the fate of a bill, the final or voting mandate must be informed by views and decisions (including public opinion) prior to this. The purpose of public hearings is thus to ensure that the legislature, in developing its mandate, also considers public input and does not merely hold public hearings to comply with technical constitutional requirements. Regarding the development of mandates in respect of the CMB, however, the responsibilities of non-affected provinces were not clear. The North West did not submit a negotiation or final mandate, and its delegate did not attend the negotiating meeting in the

¹⁹⁰ *Matatiele Municipality and Others v President of the RSA and Others* (No 2) 2007 (6) SA 477 (CC) (2007 (1) BCLR 47).

¹⁹¹ Para 21.

¹⁹² Paras 40–41.

NCOP.¹⁹³ Gauteng did not receive any written or oral submissions on the bill. It supported the bill but did not propose amendments. Limpopo, Free State and Mpumalanga submitted both negotiating and final mandates.

Although the quorum of five provinces required by s65(1)(b) of the Constitution does not apply to committees, it would seriously hamper negotiations (and thus the entire mandating process) if provinces not directly affected by a s 74 or s 76 bill were absent from negotiating and final mandate meetings and failed to participate in any of the mandating processes. The presence of the four provinces that were directly affected by the CMB at, and their participation in, these meetings were crucial.

As mentioned before, adequate funding to implement a bill relates to provincial executives' interests and their ability to fulfil their legislative obligations. As implementation of the CMB would be phased in, provinces were expected to plan around the different deliverables and time-frames. KZN had raised some valid concerns which should have been given more consideration. This would perhaps have prevented the need for the 2013 amendment bill to deal with some of the issues that had been raised in 2007. Further negotiating meetings would have allowed KZN to insist that more consideration was given to its concerns.

4.3 Concluding remarks on the CMB

The CMB is a good example of a bill that was properly consulted from the conception or policy-development phase. It illustrates that proper consultation ensures a relatively smooth mandating process. The processing of the CMB, however, also raised questions concerning the role of provinces not directly affected by a bill and the mandating procedures governing their participation. In addition, it

¹⁹³ Parliamentary Monitoring Group 'Minutes of the Select Committee on Land and Environmental affairs. National Environmental Management: Integrated Coastal Management Bill [B40C-2007]: final mandates' 2 September 2008, available at <https://pmg.org.za/committee-meeting/9578/>, accessed on 16 September 2015. Some delegates regarded the absence of the North West as an 'abdication of responsibility'.

considers what proactive steps directly-affected provinces can take to ensure their concerns and/or views are given proper consideration in the NCOP. In the CMB case study, KZN's concerns about funding to implement the bill were ignored. There is, however, no indication that KZN employed other means to advance its concerns besides the formal mandating processes, eg by lobbying other provinces' support. In addition, KZN should have ensured that its representative was present during negotiations to fight for all its proposals to be included. If necessary, the province could have asked for the negotiating meeting to be postponed. In order for negotiations to succeed all provincial negotiators must be present. The KZN's proposals were not included in the 2007 bill because it was absent from the negotiations in the NCOP, whereas other provinces were there to protect their own interests. At the time of the CMB's processing the NCOP was still a relatively young institution. Even seasoned NCOP and provincial delegates did not fully grasp the technical aspects of the mandating procedures and the need for provinces to be proactive and ensure they have their own strategies in place to advance their own provincial interests and not expect the NCOP alone to do this — the NCOP merely provides a forum or platform in which provinces can have frank discussions around issues that affect them and come to an agreement about the best way to address those issues. The NCOP can then be used effectively as an institution to enforce or mediate agreements that provinces conclude among themselves.

5. Protection of State Information Bill [B6B-2010]

During the term of the Fourth Parliament from June 2009 to March 2014,¹⁹⁴ s 75 bills continued to form the bulk of legislation the NCOP processed. How much time and effort should the NCOP devote to bills that do not concern provinces? This is important in light of the challenges presented by the six-week legislative cycle applicable to bills that affect provinces directly.

¹⁹⁴ Parliament's Bills Office statistics show that Parliament passed 48 bills in 2013 of which 10 were s76, six were s77 and 32 were s74 bills.

The processing of the Protection of State Information Bill in the NCOP attracted much public attention due to certain controversial provisions in the bill. The bill was widely opposed due to the restrictions it would place on the right to freedom of speech. It classified certain categories of information as state information and proposed severe penalties for those found in possession of classified information. This held severe implications for journalists in particular. They would not be able to publish classified state information in the public interest and rely on a ‘public interest defence’, as the bill did not contain one.

The bill was passed by the NA with most of the contentious clauses intact. Due to the public interest in the bill, the NCOP House Chairperson was appointed to chair the Ad Hoc Committee on the bill. The legislative cycle in the NCOP was extended a few times, and the NCOP also held public hearings in all nine provinces between 31 January 2012 and March 2012. This was very uncommon for the NCOP as it usually only plays a reviewing role in respect of s 75 bills, considering the ability of the NA to override any amendments proposed by the NCOP.

Nevertheless, the extensive and protracted deliberations on the bill, while not strictly necessary, allowed the NCOP to amend the bill more extensively than was possible in the NA by the time it was passed.¹⁹⁵ The NCOP provided the ANC (a) with an opportunity to restore public confidence in the organisation and reconsider its unwillingness to amend some of the controversial clauses in the bill that had elicited widespread public opposition during the NA process; and (b) a second chance to address concerns over the bill’s constitutionality. The preoccupation with the bill, however, diverted attention away from provincial interests and bills that affected provinces directly.¹⁹⁶ Other committee meetings (for example the Select Committee on Cooperative Governance and Traditional Affairs which is often inundated with s 139 interventions in municipalities) and the NCOP’s overall legislative programme took a back seat to the Ad Hoc Committee programme. When they attended public hearings, delegates could not meet in other committees

¹⁹⁵ The ANC delegates however stopped short of including a public interest defence in the bill. The NA accepted the NCOP’s amendments when the bill was transmitted back to the NA.

¹⁹⁶ See also Murray *et al* at 70.

on which they served and could not fulfil their responsibilities in respect of other legislation before the NCOP. Media attention on the bill briefly cast a spotlight on the NCOP and its delegates — some meetings were broadcast, and individual delegates and parties were interviewed regarding developments and their views on the bill — also unusual for a s 75 bill before the NCOP.

The uneasy relationship between party and provincial politics in the NCOP, as well as the ANC's dominance and discipline over its members on the one hand, and the opposition parties' opposition to the bill on the other hand, were clear during the processing of the Protection of State Information Bill. The ruling party wanted the bill to be passed and the NCOP was used to sort out some of the controversy that had marked its passage through the NA.

Some may argue that the role and effectiveness of the NCOP should be measured against the role that it should play in promoting provincial interests and processing bills that actually affect provinces. Viewed strictly through the lens of provincial interests, the NCOP deserves the criticism over its 'failure...to assert itself as a house that truly serves provincial needs'¹⁹⁷ when the Protection of State Information Bill was processed in 2012. Possibly, the NCOP should have restricted itself to reviewing the bill, given the NA's power to override NCOP amendments in s 75 bills.¹⁹⁸ Perhaps the NA's acceptance of the NCOP's amendments in this bill did not justify the energy, time, money and political will expended that should rightfully have been invested in processing s 74 and s 76 bills that actually concern provinces. Nevertheless, the Constitution gives the NCOP a role in reviewing s 75 bills, thus acting as a kind of second safety valve to catch issues not adequately dealt with by the first chamber. In the case of the Protection of State Information Bill the NCOP was acting as a traditional Westminster-style second chamber — a house of review. In reality it went beyond mere review due to the time and effort to conduct country-wide public hearings and the extensive amendments effected in the NCOP which was also unusual. The end result was a bill that was more constitutionally compliant

¹⁹⁷ Murray *et al* at 70.

¹⁹⁸ The NA accepted the NCOP's amendments because the ANC had agreed in caucus on the extent of concessions and thus the extent of amendments.

and thus more acceptable to the electorate, as the NCOP was able to get political parties to listen to public opinion and each other, and work through their differences in order to amend the contentious provisions of the bill. Arguably, the NCOP would represent provincial interests much more effectively if it could get provinces to come together in the same way, to negotiate and agree on how best to deal with contentious s 74 and s 76 bills like the TCB discussed earlier.

6. Conclusion

The NCOP was designed to give a voice to provinces in the legislative and other processes of Parliament. However, the extent to which it gives effect to this Constitutional prerogative varies in practice as the case studies illustrate.

The discussion of the TCB shows that the departmental consulting processes were clearly inadequate which resulted in a poor bill that faced much resistance. The bill eventually lapsed but only after a painfully protracted process in the NCOP. This was initially partly because of the tight legislative time-frame which was later extended. Other factors that played a role were the relative rigidity of the mandating process (especially negotiations) and the interpretation of the voting requirement in s 65 of the Constitution. The MPPA does not address these challenges in the mandating process — including ensuring adequate and meaningful public participation and mechanisms to address an *impasse* during negotiations to ensure a clear outcome — whether an amended, unchanged, or a rejected bill. The *impasse* could have been addressed at a political level: the fact that it was not either points to an unwillingness by politicians to make more use of such mechanisms, or a lack of sophistication or maturity in current politics.

In contrast, the CMB was widely accepted by the public due to the thorough seven-year public consultation process — from the development of the policy to the introduction of the bill in Parliament. Nevertheless, the CMB case study also points to a need to clarify the roles of provinces not directly affected by s 74 or s 76 bills. The quorum of five provinces required by s 65(1)(b) of the Constitution does not

apply to committees. However, it would make negotiations and the entire mandating process more effective if provinces not directly affected by a s 74 or s 76 bill were compelled to be present at, and participate in, negotiating and final mandate meetings. Such a provision can be inserted in the MPPA and/or in the Rules of the NCOP. Compelling full participation by all provinces will allow affected provinces to lobby the support of other provinces regarding proposed amendments or support for the bill as a whole. This will ensure that voting mandates cast in plenary not only comply with s 65 as a mere technicality, but are informed by real consideration and understanding of the views of the provinces that are actually affected by the bill.

Departments must consult the electorate before introducing bills in order to comply with their own consultation requirements under s 195 of the Constitution. In this way the NCOP and provinces' consultation can augment the departmental consultation process. While this might assist in processing bills within the current legislative time-frame, the legislative cycle should nevertheless be extended.

The six-week legislative cycle prescribed in the NCOP rules, and not the MPPA itself, limits the time available for public consultation. Requesting extensions in terms of NCOP Rule 240(3) on s 76 bills is not a feasible solution — a more practical and realistic legislative cycle is needed that would enable provinces to participate more meaningfully in the legislative and other processes of Parliament.

The Protection of State Information Bill case study shows that the NCOP has a role to play in reviewing controversial s 75 bills and can help to release some of the tension surrounding such bills. This, however, comes at a cost and will require a major commitment of precious time and human and financial resources to eg hold extensive public hearings throughout the country.

In instances where the NCOP Rules, the Joint Rules of Parliament¹⁹⁹ and the MPPA are silent or inadequate to address some of the challenges raised in the case studies,

¹⁹⁹ *Op cit* note 13.

it would be desirable to review and amend them. However, as I point out earlier, some challenges need political solutions which require parties in the NCOP and the provincial legislatures to come together with a common goal to discuss challenges and develop real solutions. In some instances provinces themselves are to blame for not maximising their input on bills before the NCOP. Nothing prevents a province from, eg arranging public hearings on bills about which they receive early notice. Provinces directly affected by a bill must ensure their representatives are present at negotiating mandate meetings — the CMB case study shows that sending a list of proposed amendments to the NCOP is simply not enough.

CHAPTER 5

ALTERATION OF PROVINCIAL BOUNDARIES: MANDATING PROCESSES FOLLOWED FOR THE CONSTITUTION TWELFTH AMENDMENT BILL, 2005, AFFECTING MERAUFONG CITY CROSS-BOUNDARY LOCAL MUNICIPALITY

1. Introduction

Chapter 3 briefly discusses the MPPA, which provides a uniform mandating procedure for provincial participation in the NCOP on issues and bills that affect them. Chapter 4 illustrates various challenges in the mandating processes for s 76 bills through case studies. Chapter 4 also notes instances where the MPPA is either silent or fails adequately to address specified challenges. In this Chapter I discuss various aspects and challenges in the mandating procedures concerning constitutional amendment bills that propose changes to provincial boundaries in terms of s 74(3)(b)(ii) of the Constitution. The case study in this chapter is the Constitution Twelfth Amendment Bill, 2005 ('Twelfth Amendment') which was passed by the NCOP prior to the enactment of the MPPA. Its validity was later challenged in the Constitutional Court (CC) in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* ('Merafong').²⁰⁰ Of interest is how the mandating processes unfolded in the NCOP, and the pronouncements of the CC regarding a province's power to veto a proposed provincial boundary change, the public involvement requirement and a provincial legislature's right to change its mandate, and whether constitutional amendment bills that alter provincial boundaries can be amended after they are introduced. The MPPA does not expressly address these issues.

First, I briefly consider the applicable constitutional and legislative framework, and the problematic concept of cross-boundary municipalities which

²⁰⁰ CCT 41/07 [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008).

triggered the Twelfth Amendment. Second, is a brief discussion of the facts of the *Merafong* case and the reasons for the CC challenge to the decision of the Gauteng Provincial Legislature (GPL) to support the change to Gauteng's provincial boundary proposed by the Twelfth Amendment. Next, I discuss how the CC dealt with the questions whether the GPL's decision to support the Twelfth Amendment had been rational and whether it had complied with the public involvement requirement in terms of s 118 of the Constitution. Last, I discuss Van der Westhuizen J's conclusion in *Merafong* that a constitutional amendment bill altering provincial boundaries cannot be amended and explain why I disagree with this view.

I argue that the Constitution and the applicable rules of Parliament did not explicitly rule out the amendment of constitutional amendment bills altering provincial boundaries and that an interpretation of the relevant provisions should have favoured the enhancement of provinces' participation by allowing them to amend such constitutional amendment bills in the NCOP. Further, the CC's decisions in *Mazibuko*²⁰¹ and *Oriani-Ambrosini*²⁰² (mentioned in earlier chapters), also support the notion that the Rules of Parliament must give effect to the constitutional right of provinces to participate (through the NCOP) in amending the Constitution, especially constitutional amendment bills that affect provinces.

2. Constitutional and legal framework governing constitutional amendments

Section 74 of the Constitution states that only certain constitutional amendments require the assent of the NCOP. It must be involved when amendments relate to (a) the Preamble or s 74(1) of the Constitution, (b) Chapter 2 (Bill of Rights) and (c) a matter that (i) affects the Council (NCOP), (ii) alters provincial boundaries, powers, functions or institutions, or (iii) amends a provision that deals specifically with a

²⁰¹ *Supra.*

²⁰² *Supra.*

provincial matter. These constitutional amendments can be passed only if a majority of six provinces vote in favour of them in the NCOP.²⁰³

Section 74(8) provides that if a bill ‘referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the [NCOP] may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned’. Provinces must therefore participate fully in the processing of such constitutional amendment bills. Section 70(2)(b) of the Constitution provides that the NCOP ‘must provide for...the participation of [*all the provinces*] in its proceedings in a manner consistent with democracy’ (my emphasis). This does not mean all provinces, but at the very least directly-affected provinces, must participate fully. Furthermore, participation in the context of constitutional amendment bills does not mean the processing of the amendment, but rather whether the provincial legislatures of the affected provinces agree to the provincial boundary change and by implication to the proposed constitutional amendment. This provision goes to the heart of the NCOP’s mandate to represent the interests of provinces.

The Twelfth Amendment was a constitutional amendment bill to which s 74(8) of the Constitution applied as it proposed changes to the provincial boundaries of Gauteng and the North West. It was introduced to give effect to the resolution to eliminate cross-boundary municipalities that fell within two provinces, by redrawing the provincial boundaries of the affected provinces. In terms of s 74(8) the NCOP could only pass the bill or proposed provincial boundary changes with the approval of the legislatures of Gauteng and the North West.

As the Twelfth Amendment was introduced in Parliament prior to the adoption of the MPPA, the provincial legislatures applied their own Standing Rules and prevailing practices to develop and convey their mandates to the NCOP. This

²⁰³ In terms of s 74(3) a constitutional amendment that does not deal with the Preamble, s 74(1) or the Bill of Rights ‘may be amended by a Bill passed (a) by the [NA] with a supporting vote of at least two-thirds of its members; and (b) also by the [NCOP] with a supporting vote of at least six provinces’.

did not impact the form or validity of mandates *per se*. If the provincial legislature did not approve the constitutional amendment, such amendment would be invalid. The mandate was merely an instrument to convey the provincial legislature's decision to the NCOP. The report of the committee that dealt with the bill in the provincial legislature contained details of the public participation that informed the provincial legislature's decision. This indicated that the public participation in the affected provinces complied with s 118 of the Constitution as set out in *Matatiele* 2.²⁰⁴

The general practice in respect of constitutional amendment bills altering provincial boundaries in terms of s 74(8) is for the affected provincial legislature to adopt a resolution to (a) either support or reject the proposed boundary change and (b) support or reject the entire bill or that part of the bill that does not affect the province's boundary. This ensures adherence to s 74(8) of the Constitution. The mandate reflects the decision taken by the provincial legislature and instructs the head of the provincial delegation to the NCOP how to vote on the bill in the NCOP. However, as was done by the GPL, the provincial legislature's decision can also be conveyed to the NCOP in a letter from the provincial legislature's Speaker referring to, or accompanied by, a report of the meeting at which the provincial legislature approved the amendment. The report distinguishes it from 'ordinary mandates' and relates specifically to the provincial legislature's decision required in terms s 74(8) of the Constitution.

The MPPA does not deal with constitutional amendments in terms of the legislative procedures specifically. The emphasis in the MPPA is about the format of the mandate and what information must appear on it. In terms of s 1(b) of the MPPA, legislative mandates are required for constitutional amendments and these mandates must contain certain specified information. Section 7 of the MPPA requires both negotiating and final mandates for bills referred to in s 74(1)(b), (2)(b), (3)(b) and (8) of the Constitution. As I mentioned earlier, the provisions of the MPPA do not address some of the challenges that emerged during the mandating

²⁰⁴ *Supra*.

processes in the NCOP concerning the Twelfth Amendment. I discuss these in more detail later in this chapter.

When NCOP approval is not required in terms of s 74(3)(b), because ‘the amendment does not concern sections 1 and Chapter 2 and does not relate to a matter that affects the council, province or provincial boundaries, powers, functions or institutions’, the NA’s report on the amendment is submitted to the NCOP in order for it to hold a public debate. However, the Constitution does not require the NCOP to vote on the report or the bill.²⁰⁵

3. Merafong City Cross-Boundary Local Municipality (‘Merafong City’)

The Twelfth Amendment was introduced in 2005 to give effect to a 2002 resolution of the President’s Coordinating Council to dissolve cross-boundary municipalities and review provincial boundaries. Cross-boundary municipalities had been established even though the Constitution was silent on this. A constitutional amendment, the Constitution Third Amendment Act of 1998 (‘Third Amendment’), was consequently enacted to expressly allow for the establishment of cross-boundary municipalities.²⁰⁶

In hindsight cross-boundary municipalities were ill-conceived. Not surprisingly, by 2002, the concept of cross-boundary municipalities proved to be unworkable.²⁰⁷ Many cross-boundary municipalities experienced ‘numerous problems’²⁰⁸ in their administrations because of the extra complication of having two provinces involved in the affairs of the same municipality (something not foreseen by the drafters of the Act nor the political principals who approved the establishment of cross-boundary municipalities). The only options were to change

²⁰⁵ S 74(5)(c).

²⁰⁶ The Third Amendment came into force on 30 October 1998.

²⁰⁷ J Sindane ‘Intergovernmental relations: a provincial perspective — Mpumalanga Province’ (2003) *dplg Research Bulletin* Department of Provincial and Local Government at 12.

²⁰⁸ ‘Memorandum on the Objects of the Constitution Twelfth Amendment Bill’ Constitution Twelfth Amendment Bill [B 33B–2005] at p6.

municipal demarcations or change provincial boundaries so that municipalities did not extend over provincial boundaries. In terms of s 74(8) of the Constitution, the latter option would require a constitutional amendment. The Twelfth Amendment was proposed to do this (ie amend provincial boundaries so that no municipalities spanned two provinces), and in addition, repeal those sections of the Constitution referring to cross-boundary municipalities.²⁰⁹ But, as noted above, the NCOP could only pass a proposed provincial boundary change with the approval of affected provinces (in this instance Gauteng and the North West), effectively giving them a veto power.

By 2005 there were sixteen cross-boundary municipalities, including Merafong City.²¹⁰ In terms of the Twelfth Amendment²¹¹ the boundary between Gauteng and the North West would be redrawn so that Gauteng no longer included a part of the municipality of Merafong — thus Merafong would be incorporated entirely into the North West and excluded from Gauteng.²¹²

The veto power of a province in a constitutional amendment bill is not ‘pervasive and all-powerful’²¹³ so as to affect the whole bill, but merely extends to those provisions that affect a province directly. The GPL’s negotiating mandate²¹⁴ did not support the proposed boundary change as Merafong City residents wanted the municipality to form part of Gauteng.²¹⁵ Thus, if it vetoed the proposed

²⁰⁹ Memorandum on the Objects of the Constitution Twelfth Amendment Bill of 2005.

²¹⁰ The Redetermination of the Boundaries of Cross-boundary Municipalities Acts 69 of 2000 and Act 6 of 2005, authorised the redetermination of the boundaries of certain cross-boundary municipalities.

²¹¹ *Merafong Community and Others v Chairperson of the Independent Electoral Commission and Others* (5673/06) [2006] ZAGPHC 23 (16 March 2006). Reasons for order and order for costs.

²¹² Map No 5 of Schedule 1 to Notice 1998 of 2005 under the Province of North West cited in Nyathi, L (2008) 102–110.

²¹³ *Merafong* at para 183.

²¹⁴ Parliamentary Monitoring Group ‘Minutes Security and Constitutional Affairs Select Committee 30 November 2005 Constitution Twelfth Amendment Bill: Negotiating Mandates’ available at <https://pmg.org.za/committee-meeting/5953/>, accessed on 7 October 2015.

²¹⁵ The GPL supported the dissolution of cross-boundary municipalities ‘in principle’, and wanted Merafong to be included in the West Rand District Municipality in Gauteng. It recommended that the NCOP amend Schedule 1A of the Twelfth Amendment Bill to provide for this.

provisions,²¹⁶ the boundary between Gauteng and the North West would remain unchanged. The largest part of Merafong City already fell within Gauteng, while the smaller southern part fell within the North West. The GPL proposed an amendment to Schedule 1A of the Twelfth Amendment to include Merafong totally within Gauteng. Essentially the GPL rejected that section of the Twelfth Amendment that affected Gauteng's provincial boundary and proposed that it be amended to reflect an alternative boundary change. However, the GPL did not reject the rest of the bill.

The GPL was informed in the NCOP that it could not propose amendments to a constitutional amendment bill. As a result it presented a final mandate in support of the whole bill, including the contentious boundary change that it had initially opposed.²¹⁷ The GPL voted in favour of the bill and the provincial boundary change in the NCOP. This decision, however, was taken without reverting to the Merafong community that had opposed the bill.²¹⁸

The Twelfth Amendment was consequently passed unanimously by the NCOP. The Merafong Demarcation Forum thereafter questioned the GPL's support of the Twelfth Amendment and challenged the validity of its enactment in the CC. The Court had to consider (a)(i) whether and (ii) when a legislature can change its mandate and (b) whether the GPL had a duty to inform the Merafong community about its changed mandate and the reasons.

²¹⁶ *Merafong* at para 180.

²¹⁷ The final voting mandate in which the GPL decided to support the Twelfth Amendment and the proposed boundary change was debated and adopted by the GPL on 6 December 2005, and a letter to that effect was submitted to the Chairperson of the NCOP on the same date. See *Merafong* para 38.

²¹⁸ Parliamentary Monitoring Group 'Minutes Security and Constitutional Affairs Select Committee 12 December 2005 Constitution Twelfth Amendment Bill: Final Mandates; Suspension of Magistrates' available at <http://www.pmg.org.za/minutes/20051211-constitution-twelfth-amendment-bill-final-mandates-suspension-magistrates>. Accessed on 16 September 2015.

4. Validity of the enactment of the Twelfth Amendment

The *Merafong* case was brought on two grounds, namely (i) that by failing to revert to the Merafong community before adopting its final mandate, the GPL did not comply with its constitutional obligation to facilitate public involvement in its processes leading up to the adoption of the Twelfth Amendment in the NCOP; and (ii) the GPL did not exercise its legislative powers rationally when it voted in support of the relevant parts of the bill, thus rendering the Twelfth Amendment and the Repeal of Cross Boundary Municipalities Law and Related Matters Act, unconstitutional and therefore invalid.

4.1 Public involvement

In *Doctors for Life*, the CC held that for a provincial legislature to discharge its duty to consult under s 118 of the Constitution, its decision about the nature of the consultation must be reasonable and rational. An important element in *Merafong* concerns the role and substance of this duty and the degree to which the NCOP represents provincial, compared to party political, interests.

Merafong residents considered themselves more part of Gauteng than the North West. They perceived services to be better in Gauteng, especially in relation to water and sanitation and the expanded public works programme. The vast majority were opposed to the proposal to incorporate Merafong City entirely into the North West. They also felt that there were no substantive and compelling reasons for the proposed re-demarcation. The GPL had developed its negotiating mandate in line with the community's rejection of Merafong City's proposed incorporation into North West. According to Sachs J its failure to go back to the people of Merafong to explain its change of position violated the constitutional goals associated with participatory democracy, including (a) conditions necessary to pass laws that are widely accepted and effective in practice, (b) strengthening the

legitimacy of legislation in the eyes of the people, and (c) acting as a ‘counterweight to secret lobbying and influence-peddling’.²¹⁹

The Court agreed that public consultation must be meaningful and not mere lip service or a public relations (‘PR’) exercise. It evaluated the requirement in s 118 of the Constitution that the legislature must facilitate public involvement, by asking ‘whether the legislature had done what was reasonable in the circumstances’. It concluded that although unreasonable, ‘the failure of the [GPL] to report back to the Merafong community when the Gauteng delegates realised that they were unable to fulfil their mandate and amend the bill in the NCOP did not rise to the level of unreasonableness that would result in the invalidity of the Twelfth Amendment (which was otherwise properly passed by Parliament)’.²²⁰

Sachs J dissented. He believed that more intense consultation was required due to the unique nature of the legislation in respect of which the province could veto those provisions that altered its provincial boundaries.²²¹ The reasons provided by the GPL for its change of heart were not communicated to the people of Merafong. In Sachs J’s view the GPL, due to its ‘arms-length democracy’, had fallen short of completing its constitutional duty to facilitate public involvement, despite the initial public input that had informed its negotiating mandate.²²²

4.2 Was the GPL’s decision rational?

The rationality standard requires that the exercise of public power must not be arbitrary or based on ‘naked preferences’ — there must be a link ‘between the means adopted by the legislature and the end sought to be achieved’.²²³ The legislature only needed to show that its conduct had a justifiable ‘rationally

²¹⁹ Sachs J at para 292.

²²⁰ Van der Westhuizen J at paras 55–56.

²²¹ Para 295.

²²² Para 301.

²²³ Van der Westhuizen J at para 62.

objective basis' which served a 'legitimate public purpose'.²²⁴ The GPL decided to change its final mandate to vote in support of the boundary change in the Twelfth Amendment after it was informed that (a) the province's negotiating mandate could not propose amendments to the constitutional amendment bill and (b) the province had to indicate (i) whether it voted in favour of or rejected (vetoed) those provisions in the bill that affected Gauteng province only and (ii) whether or not it approved the rest of the bill.

NCOP Rule 219(i) provides that a select committee 'may...present an amendment [b]ill'.²²⁵ The legal advice given in the NCOP, however, was that:

[T]he NCOP's power to amend extended to every part of the [b]ill except the part where only the provincial legislatures had the right to say 'no'. Provincial legislatures were voting on only the parts that effected their specific boundary or border [—] legislatures did not have the power to amend but only a veto power....The NCOP was not allowed to propose amendments since there might be conflicting amendments [and] there was no way...to determine which amendment was more valid. In order to diffuse this conflict, while still not taking away autonomy from the provinces, the provisions said that the province had the right to decline a particular process relating to that province. If the province wanted to bring changes afterwards another constitutional amendment would have to be proposed at a later stage to try and incorporate those concerns.²²⁶

The GPL consequently concluded that it could only vote 'yes' or 'no' to the proposed boundary change. It decided to support the proposed boundary change and the rest of the bill, possibly persuaded by the views that it would defeat the objective to abolish cross-boundary municipalities and delay the upcoming 2006 local government elections if the bill was not passed; and that not supporting the boundary change and the rest of the bill would leave a constitutional vacuum if consequently the bill was not passed by the NCOP. Under these circumstances the decision to change the mandate appeared rational, albeit based on a misinterpretation of the relevant constitutional and legislative provisions.

²²⁴ Van der Westhuizen J at para 63.

²²⁵ *Rules of the National Council of Provinces* *ibid*.

²²⁶ Parliamentary Monitoring Group 'Minutes Security and Constitutional Affairs Select Committee 30 November 2005 Constitution Twelfth Amendment Bill: Negotiating Mandates' *op cit* note 214.

Moseneke DCJ²²⁷ in a dissenting judgement thought that the GPL's change of heart had been 'swayed' by a 'belated consideration of the implications of not supporting the bill' and a misunderstanding of its powers under the Constitution regarding voting and mandating processes. Its decision,

was not taken to pursue a legitimate governmental purpose but to prevent consequences which, at best, were imaginary. [The] legislative conduct of the provincial legislature in the exercise of its power and duty under s 74(8) of the Constitution [was thus] irrational and inconsistent with the Constitution.²²⁸

In Moseneke DCJ's view, the GPL's decision to approve the Twelfth Amendment was invalid and its consequent adoption of the Cross-Boundary Municipality Laws Repeal and Related Matters Act was inconsistent with the Constitution to that extent.

Van der Westhuizen J for the majority (in my view, correctly) found that the extent of the GPL's irrationality did not render the Acts invalid because the legislature did not exercise its powers irrationally in arriving at its decision. The decision was only taken after it had debated the issue and once the relevant committee had explained its change of position. As the GPL's support of the bill in the NCOP was not irrational, the Court dismissed the application to declare the Acts invalid.

5. Can a provincial legislature change its mandate without reverting to the community?

The CC considered whether a provincial legislature can change its mandate without reverting to the community it previously consulted. Did it have a duty to inform the affected community why it changed its mandate? As the Rules of Parliament allow a province to change its vote right up to voting in the NCOP plenary, one can accept that a mandate can be changed. Of concern is the community's interest and

²²⁷ *Merafong* at para 191.

²²⁸ *Supra*.

influence in the contents of a mandate. Whose decision is it anyway — the provincial legislature or the electorate who inform the legislature’s mandate on how it must vote? Van der Westhuizen J concludes that there is ‘no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of the Government’.²²⁹ The policy in this instance was the Government’s objective to abolish cross-boundary municipalities. Merafong City refused to be relocated, but the public opinion on the bill notwithstanding, the GPL was within its right to change its mandate as long as there was a rational explanation. I agree that the public opinion informs, but cannot dictate, the provincial voting mandate in respect of a bill.

6. Can a constitutional amendment bill altering a provincial boundary be amended?

The GPL’s decision to support the Twelfth Amendment in the NCOP was triggered by the view given in the NCOP that a constitutional amendment bill altering a provincial boundary cannot be amended. In my argument below I set out why I disagree with this view. I argue that the Constitution does not explicitly rule out amendment of such bills, and that the Court in *Merafong* failed to take into account that Parliament’s Joint Rules²³⁰ and NCOP Rules specifically provide for provincial delegations to propose amendments to s 74 bills in the NCOP. In terms of NCOP Rule 219(i) the NCOP committee dealing with the bill ‘may...present an amendment [b]ill’. Therefore, the mandating procedure in the NCOP which is designed to enhance provincial participation in the legislative process, should allow enough time for consideration and decision-making in the NCOP of affected provinces’ proposed amendments to constitutional amendment bills in general, and of constitutional amendment bills altering provincial boundaries in particular. As such, the interpretation and implementation of the relevant provisions should favour the enhancement of provinces’ participation, including in amending constitutional amendment bills altering provincial boundaries.

²²⁹ Para 50.

²³⁰ *Ibid.*

The GPL's proposed amendments to the Twelfth Amendment bill were not accepted in the NCOP on the grounds that the Constitution and the Rules of Parliament did not allow for the amendment of such constitutional amendment bills.

In *Merafong*, Van der Westhuizen J briefly considers the question whether constitutional amendment bills altering provincial boundaries can be amended. In his view, the GPL had been correctly advised that it could not propose an amendment to the Constitution Twelfth Amendment Bill as:

[Section] 74 does not provide for substantive amendments in the NCOP and for referral back to the National Assembly to consider those amendments. Although the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned. The reason is of course the mandated nature of the process. Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.²³¹

I disagree with Van der Westhuizen J's conclusion as his reasons strengthen, rather than invalidate, an interpretation that allows for constitutional amendment bills altering provincial boundaries to be amended. Viewed in the light of the text of the Constitution, and NCOP Rule 219(i), it is clear that provision is made in both the NCOP and Joint Rules for provinces' participation in amending constitutional amendment bills. Van der Westhuizen J incorrectly fuses the issue of amending constitutional amendment bills with that of provincial approval of provincial boundary changes. He also ignores the significance of, and the requirements governing, the different mandating phases in the NCOP. Provincial approval conveyed in the mandate before the NCOP is not necessarily final. Because a provincial legislature can change its mandate right up to the time it will vote on the bill in the Council — any changes in the mandate can be conveyed to the NCOP by the head of the delegation that will cast the province's vote in the Council. The

²³¹ Para 81.

NCOP thus needs evidence that the provincial legislature approved the boundary change, irrespective of the wording of the mandate.

I turn now to briefly look at the text of s 74 and the approach of the CC when interpreting constitutional provisions.

The text of the Constitution and the intention of the legislature

Prior to the existence of the NCOP, the Senate was the second chamber of Parliament that had to protect provincial interests. Section 61 of the IC²³² provided that bills,

affecting the boundaries or the exercise or performance of the powers and the functions of the provinces shall be deemed not to be passed unless passed separately by both Houses and, in the case of a [b]ill, other than a bill [amending the constitution] affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, unless also approved by a majority of the province or provinces in question in the Senate.²³³

Although the veto in s 74 of the final Constitution compared with IC 61 shows a ‘diminution in the power which is enjoyed by an individual province or provinces’ in the new text (NT), this is to be weighed against the context of the provision in NT 41(1) which provided ‘constitutional protection against national legislation or executive conduct which discriminates against a particular province or provinces’.²³⁴

²³² Constitution of the Republic of South Africa Act 200 of 1993.

²³³ Section 62(1) of the IC provided that in order for bills amending the Constitution to be passed, it had to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two thirds of the total number of members of both Houses. In addition, s 62(2) required that constitutional amendment bills that amended the ‘boundaries and legislative and executive competences of a province’ could not be amended ‘without the consent of a relevant provincial legislature’.

²³⁴ Certification of the Constitution of the Republic of South Africa, 1996.

According to Kate O' Regan, the text of the South African Constitution matters 'both because of its 'provenance and...its content' as it is the 'product of full and careful negotiation'.²³⁵ It is also important to note that the constitutional principles contained in the IC against which the NT had to be evaluated were 'flags that indicate[d] the political tensions of the time; perhaps...most notable in relation to the question of provincial powers'.²³⁶ In her view:

The task of interpretation is...to ensure that the structures and relationships created by the Constitution work as a coherent whole...and any particular text must contribute to this whole [and] acknowledge that South Africa's history and circumstances provide important context in construing specific provisions. The concern with context, however, deliberately seeks to eschew consideration of political controversy.²³⁷

Section 68 of the Constitution, which deals with the powers of the NCOP under Chapter 4 of the Constitution, states that '[i]n exercising its legislative power, the [NCOP] may (a) consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter' which includes bills amending the Constitution.

When considering the Court's decision against the role and the powers the Constitution assigns to the NCOP in the legislative processes of Parliament, including its participation in amending the Constitution, I agree with Bishop that 'the Court was wrong to conclude that provincial delegations cannot propose amendments to section 74 bills in the NCOP'.²³⁸ Bishop argues that the reasons provided by Van der Westhuizen J namely, that '(a) section 74, unlike sections 75 and 76, does not mention amendments; (b) the NCOP procedure is a mandated one; and (c) rule 174(3) provides a special procedure for section 74(8) bills' are all 'technically correct', but 'wrong' because 'each of the three rationales leaves a great

²³⁵ Kate O' Regan 'Text Matters. Some reflections on the forging of a new constitutional jurisprudence in South Africa' (2012) 75(1) *MLR* at 10.

²³⁶ O' Regan *op cit* note 235 at 12.

²³⁷ O' Regan *ibid* at 15.

²³⁸ Michael Bishop 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* at 345.

deal out'. First, while it is true that the Constitution is silent on amending s 74 bills altering provincial boundaries, 'it does not explicitly prohibit them'. Bishop questions whether there is 'any underlying principle supporting [the Court's] reading'²³⁹ that the Constitution's silence on the issue means that it prohibits the amendment of constitutional amendment bills. In his view, such an interpretation:

[D]oes not serve to enhance any form of democracy. The inability to propose amendments severely restricts the ability of delegations to the NCOP to listen to each other. A delegation may be aware of the concerns of other provinces, but if it cannot respond by supporting a change to the legislation that they are considering, the scope of the Constitution and the legislative process (and any subsequent court proceedings) to accommodate those concerns all but disappears. The only option is the unattractive one of rejecting a bill altogether. This prospect is uninviting when most legislation contains a large range of uncontested provisions, or when the legislation has, for good reason, been fast-tracked.²⁴⁰

Secondly, the CC's argument that the mandated nature of the NCOP procedure supports the conclusion that amendments of constitutional bills altering provincial boundaries are prohibited is not clearly explained and seems to be concerned with the time factor in the legislative cycle. Van der Westhuizen J notes that the GPL's negotiating mandate was never considered by a full sitting of the legislature. This was, however, the standard practice regarding negotiating mandates which, in the GPL, were conferred by its Portfolio Committee acting on behalf of the provincial legislature. In terms of the applicable Standing Rules of the GPL, the Portfolio Committee had the requisite authority to confer a negotiating mandate on its representative in the NCOP on behalf of the GPL. Contrary to viewing the mandating procedures in the NCOP as an impediment or restriction on a province's ability to propose amendments to a constitutional amendment bill, the mandating process is designed to enhance provincial participation in the legislative process — it is precisely because of the mandated nature of the NCOP that proposing amendments to a constitutional amendment bill altering provincial boundaries should be possible. Of importance was that authority for the final voting mandate, in

²³⁹ Bishop *op cit* note 238 at 346.

²⁴⁰ Bishop *ibid* at 346.

which the GPL decided to support the Twelfth Amendment and the proposed provincial boundary change, was properly conferred.²⁴¹

Section 65(1) of the Constitution ‘makes a mandated vote the *default mechanism* for all decisions in the NCOP’,²⁴² except for s 75 bills that do not affect the provinces. According to Bishop the Constitution:

[E]xplicitly contemplates the possibility of amendment within that mandated structure for other bills, and the Joint Rules explain how that occurs. Is there any reason why amendment would be practical for other bills, but not constitutional amendments? Absolutely none. If anything, amendments to our basic law require greater deliberation, participation and more effective representation than ordinary legislation. Those goods are exactly what prohibition of amendment denies.²⁴³

He concludes that the Constitution ‘leaves it up to the various legislative bodies — the NA, the NCOP and the various provincial legislatures — to decide how to deal with amendments to section 74 bills’.²⁴⁴ However, in *Merafong* the Court failed to take into account that the Joint Rules²⁴⁵ and NCOP Rules make specific provision for provincial delegations to propose amendments to s 74 bills in the NCOP, what Bishop regards as ‘the most glaring omission in the Court’s reasoning’. NCOP Rule 219(i)²⁴⁶ provides that a select committee ‘may...present an amendment [b]ill’ in respect of a s 74 amendment bill referred to it (interestingly, neither the CC in *Merafong* nor Bishop refer to this rule). In terms of NCOP Rule 224(1)(a)²⁴⁷ a member may place amendments to a s 74 bill on the Order Paper after the bill has been placed on the Order Paper (ie scheduled for plenary in the Council), but before the Council makes a decision on the bill. NCOP Rules 224, 225 and 228 further expound which amendments can be made, how they must be made, and the procedure to follow after amendment. Parliament’s Joint Rules 176 to 179 set out the same procedure; and here Bishop observes that ‘referral to a mediation

²⁴¹ *Merafong* at para 38.

²⁴² Bishop *ibid* at 346.

²⁴³ At 346.

²⁴⁴ At 346.

²⁴⁵ 175(b) to 180.

²⁴⁶ *Rules of the National Council of Provinces* 9 ed (2008) *ibid*.

²⁴⁷ *Ibid*.

committee [is] virtually identical to the procedure followed for any other bill'. The Standing Rules of the GPL do not directly deal with the issue of proposing constitutional amendments but also do not appear to prohibit the GPL from mandating its delegation to propose such an amendment.

In *Merafong*, the Court concludes that amending s 74(8) bills differs from amending other s 74 bills. Bishop does not find any support for the suggestion that there is a difference between s 74(8) bills and other s 74 bills; or that Joint Rule 174(3) deals exclusively with s 74(8) bills so that the other rules mentioned above do not apply to s 74(8). In his opinion (a) the CC's reasoning applies to all s 74 bills and there is nothing in the rules that suggest that s 74(8) bills can be amended by veto only while other s 74 bills can be amended in the normal manner, and (b) there is no 'principled reason' to treat the two sections differently.²⁴⁸ Further, Rule 174(3) is 'not at all concerned with the power to propose amendments but with the consequences of exercising the [s] 74(8) veto *without amendment*. Amendments for *all* [s] 74 bills are covered by the detailed procedure in the subsequent rules'.²⁴⁹

Bishop is of the view that, while it is true that it is likely that amendments to s 74 bills in the NCOP will be proposed, only in extremely rare cases, '*Merafong* suggests that the Court does not understand the vital role the ability to react meaningfully to the opinions of others — to listen — must play in any participatory or deliberative process'.²⁵⁰

7. Conclusion

The NCOP cannot pass s 74 amendments without the approval of the provincial legislature or legislatures of the affected province or provinces. The NCOP's mandate to ensure provincial interests are taken into account in the legislative processes of Parliament must be examined, as *Merafong* illustrates, against the

²⁴⁸ At 347.

²⁴⁹ *Ibid.*

²⁵⁰ At 347.

requirements of public involvement. These must not be mere ‘PR exercises’, but meaningful and continuous in order to apprise citizens of developments that might require them to reconsider their mandates, a rational link between the legislation and objectives the executive wants to achieve.

While the majority of the CC held that the legislature is not bound by the mandate previously given if the decision to change its mandate is rational, I prefer the judgement by Sachs J that a failure to revert to the affected community will render such a mandate constitutionally invalid as it does not comply with the requirement of meaningful public consultation — Merafong residents were not given the chance to say how they feel about the GPL’s change of mandate prior to it being changed and after it was changed.

Should ss 74(3) and (8) of the Constitution allow for amendments in the NCOP of a constitutional amendment bill that alter provincial boundaries or any other matter that concerns provinces in terms of s 74(3)(b)? This may require further refinement and clarification in legislation and the rules of Parliament. The NCOP rules in particular must give effect to the constitutional requirement that provinces must be involved in the legislative processes of Parliament. In 2013 the CC held in *Mazibuko v Sisulu and Another*,²⁵¹ with reference to its majority judgement in *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly*,²⁵² that although the rules of Parliament may prescribe a procedure for an envisaged process set out in the Constitution, they cannot ‘thwart or frustrate the steps and thereby negate a constitutional entitlement’.²⁵³ The NA rules were consequently amended to give effect to this judgment. Although both cases concerned the NA rules and the rights of NA Members, I would argue that the same principle applies to the NCOP. The NCOP’s processes and rules relating to constitutional amendment bills must give effect to a province’s constitutional right to participate fully in their processing, and not render such right ineffective. The NCOP rules or its practices cannot expressly

²⁵¹ (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013).

²⁵² [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).

²⁵³ Para 60.

or by omission exclude a province from proposing amendments to constitutional amendment bills altering provincial boundaries. If the rules and processes do not facilitate provinces' effective involvement in amending such constitutional amendment bills, then they must be amended.

The mandating procedures leading up to the adoption of the Twelfth Amendment took place prior to the MPPA coming into force. It is, however, unlikely that the Court would have come to a different conclusion on this matter had this Act been applicable to the Twelfth Amendment also. Why allow for negotiating mandates and a negotiating meeting if amendments by provinces will not be considered? What would delegates then be 'negotiating' about? The reasons provided by the Court and the state law advisor during the NCOP's negotiating meeting are not convincing. It does not make sense to give a province a veto right to reject a proposal affecting it directly, whereas an amendment (possibly requiring the executive to compromise if possible), would be less severe. Considering that the province directly affected by the proposed amendment can veto that provision anyway, it would not require other provinces to consider its proposed amendment(s). This weakens the argument that other provinces would not have had sufficient notice of the affected province's proposed amendment(s) to obtain mandates in respect of such amendment(s).

In addition to its veto power, an affected province also has the 'power to cause the severance of the part of the [constitutional amendment] that affect[s] its boundaries'.²⁵⁴ Strictly speaking this is an amendment that is referred to the NA for action. Where an affected province vetoes a proposed change to its boundary, the NCOP is in fact saying that it passes the constitutional amendment bill minus the contentious clause:

[T]he part related to the boundaries of that province must be severed from the [b]ill and lapses. The rest of the [b]ill may be proceeded with. However, the severance requires an amendment...and the [b]ill must be referred back to the

²⁵⁴ Van der Westhuizen J at para 102.

National Assembly for that amendment to be made. The amendment referred to here is the formal amendment that is required for the severance.²⁵⁵

The above situation applies not only to provincial boundary changes. All constitutional amendments referred to in s 74(3)(b) that affect provinces would invoke s 74(8). The purpose of s 74(8) is to prevent the majority in the NCOP passing legislation that could damage one or more provinces.

The NCOP's power to amend constitutional amendment bills in terms of NCOP Rule 219(i) applies generally to *all* s 74 bills (my emphasis) — there is no justification to exclude such power from bills altering provincial boundaries. Nevertheless, it could help to (a) expressly spell out in the MPPA, NCOP Rules and the Joint Rules of Parliament that constitutional amendment bills altering provincial boundaries, contain questions affecting the Council or change the functions or powers of provinces in the Rules of Parliament and in the MPPA can be amended and (b) amend the Rules of Parliament and the MPPA to make it a requirement that constitutional amendment bills dealing with the issues covered under s 74(3)(b) cannot deal with any other issues except 'subordinate matter[s] incidental to' a provincial boundary change.²⁵⁶ This would simplify the process considerably. In this way, if a province rejects the proposal, it rejects the whole bill. Should it propose an amendment, then the financial, fiscal and other implications must be discussed with relevant stakeholders and departments — the onus must be on the department to show why the proposed constitutional amendment cannot be accepted. The amendments must then be referred to the NA for consideration and if they are rejected by the NA, the bill must be sent for mediation.

²⁵⁵ Van der Westhuizen J at para 80.

²⁵⁶ Similar to the exceptions relating to money bills in s 77(2) of the Constitution.

CHAPTER 6

CONCLUSION

1. Introduction

South Africa's current second chamber, the NCOP, bears no resemblance to its forerunners. It is unlike both the Westminster-type Senate that existed under the Union that represented the elite, and the inflated Senate of the 1950s that represented the white minority and was complicit in upholding racially unjust laws until 1980 when it was abolished. The Senate was revived in 1993 under the IC. It had a mandate to represent provinces, but did so poorly.

In 1994, South Africa became a democracy with a government system containing both unitary and federal elements due to the establishment of nine semi-autonomous provinces and a central national government. The Senate was due for a complete overhaul. The drafters of the final Constitution were inspired by the German model with its division of power between the federation or national sphere of government and the *länder* (autonomous regions or states comparable with South Africa's semi-autonomous provinces) in which they co-operate and hold each other accountable without encroaching on each other's autonomy. *Länder* are represented in the *Bundesrat*, the second chamber of the Federal Republic of Germany. Because most powers are concurrent in Germany the *länder* participate directly in the federal government through the *Bundesrat* in the passage of federal legislation they must implement. The German model was adapted to suit South Africa's unique needs and thus the NCOP differs from the *Bundesrat* in significant ways, foremost being that the NCOP members are politicians drawn from the provincial legislatures compared to the *länd* executives (mainly government officials) in the *Bundesrat*.

The optimism Bulelani Ngcuka²⁵⁷ expressed at the NCOP's launch in 1997 that it would succeed in representing provinces effectively in the national Parliament was accompanied by a realisation that this would be no easy task, given the prevailing circumstances and unique challenges in each province. An examination of provincial participation²⁵⁸ in the NCOP, almost two decades on, reveals a number of interesting findings in how the NCOP gives effect to its Constitutional mandate to represent provincial interests in the national legislative processes of Parliament, and how effectively provinces themselves participate in these processes, particularly on bills and issues that affect provinces directly.

The NCOP has more influence over bills that affect provinces directly, ie s 76 bills and constitutional amendment bills under s 74, compared to ordinary s 75 bills that do not affect provinces. The mechanism through which provinces participate in the processing of such bills and decisions is the mandating system. Whereas mandating procedures existed under the IC and in the 1996 Constitution, the MPPA itself was enacted fairly recently, in 2008. The MPPA provides 'a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf' as required by s 65(2) of the Constitution.

The study's examination of mandating procedures before and after the MPPA's enactment shows that in some respects the MPPA is either silent on certain issues/challenges (summarised below) or fail to address them adequately. In other instances the Constitution and the NCOP Rules do not provide guidance on how to deal with challenges that arise in practice. Some challenges and practices concerning eg the revival of s 76 bills emerged because of a misinterpretation of applicable provisions in the MPPA and the Constitution, influenced by the tight legislative time-frame of six weeks applicable to bills affecting provinces.

²⁵⁷ *Ibid.*

²⁵⁸ In this context public participation refers to the process of obtain public opinion to inform the provincial legislature's position on a bill.

Provincial participation is at the heart of the mandating process and the negotiations phase is when provinces have the ideal opportunity to articulate their unique challenges and negotiate with one another on how the contents of bills should be amended to address their unique needs, or influence the outcome of a decision on other matters that affect them that require the approval of provinces in the NCOP plenary. Negotiations, if used optimally, can be a very powerful tool for provinces to sway opinions and decisions in their favour (in addition to voting in the NCOP plenary).

2. Challenges

The study shows that the MPPA has not addressed the inherent challenges of the mandating process, including ensuring adequate and meaningful public participation and mechanisms to end a deadlock during negotiations. Below I list selected challenges discussed in the preceding chapters about mandating processes in particular and provincial participation in general.

2.1 MPPA-related challenges

(a) Ambiguous distinction between mandate types

Chapter 3 notes a certain amount of ambiguity in the MPPA's definitions of, and unnecessary distinctions between, different types of mandates. The differences between mandate types are unclear and unnecessary. In addition, there is no substantive difference between mandates required for voting on bills and questions, as the latter include bills and both types instruct the provincial delegation how to vote in the NCOP plenary.

(b) The MPPA is silent on how to end a deadlock during negotiations

The TCB case study illustrates the MPPA's silence on how to deal with a deadlock during negotiations and there is no decisive vote to either accept or reject a bill. The absence of guidelines to clarify (i) how the negotiating process must unfold; (ii) whether or not provinces that oppose a bill may refuse to propose amendments and may abstain from negotiations and (iii) whether or not five provinces are required to vote in favour of a proposed amendment during negotiations, have contributed to the rigidity in the negotiating process and consequently restricted provinces' potential to influence negotiations to their advantage. Ironically, the fact that the MPPA does not dictate the entire negotiating process has contributed to the rigidity in the process and uncertainty regarding the approach to be followed in instances where more than one province propose amendments on the same clause but with different wording and/or emphasis. As an unintended consequence, the rigidity can force delegates to reject the proposals of another province even though their own provinces did not make any proposals on the same matter.

(c) The MPPA is silent on the participation of provinces not directly affected by s 74 or s 76 bills

In practice provinces not directly affected by s 74 or s 76 bills need not conduct public consultation. It would, however, seriously hamper negotiations and the mandating process if such provinces do not (i) attend negotiating and final mandate meetings and (ii) participate in any of the mandating processes, including the constitutional requirement to consult the public in the processing of bills. The Coastal Management Bill (CMB) case study illustrates that while the presence at, and participation in, negotiations of the four provinces directly affected by the CMB were crucial, the participation of unaffected provinces were equally important as they had the power to influence the decisions on the bill by eg supporting a specific provision to address a specific issue or an amendment to the bill proposed by an affected province.

(d) *The MPPA is silent on the lapsing of 'extended' bills*

The MPPA does not specify whether a s 76 bill, the processing of which was extended beyond the six-week legislative time-frame in terms of NCOP Rule 240, is exempted from lapsing if it is not passed at the end of an annual session, and the Council does not revive it at the first sitting in the ensuing session.

(e) *The MPPA is silent regarding a decision to revive a bill*

A question concerning the revival of bills is not included in the MPPA's list of questions in terms of s 65 of the Constitution that requires provinces to vote on all decisions. This omission has contributed to the NCOP's current incorrect practice in terms of which individual delegates (and not provincial delegations) vote on a question concerning the revival of bills affecting provinces.

(f) *The MPPA does not expressly address issues about (i) a province's power to veto a proposed provincial boundary change, (ii) the public involvement requirement, (iii) a provincial legislature's right to change its mandate and (iv) whether constitutional amendment bills altering provincial boundaries can be amended in the NCOP.*

The MPPA has not addressed the said challenges that the Constitutional Court had to consider in *Merafong* when it had to decide the validity of the Twelfth Amendment in 2005. It is, however, debateable whether the MPPA should address the above issues or whether it is best left to be addressed in the NCOP Rules and the Joint Rules of Parliament. Getting the NA to agree to such a provision in the MPPA and the Joint Rules of Parliament might not be too difficult, considering that NCOP Rule 219(i) already allows for the amendment of s 74 bills. Because negotiating mandates and negotiating meetings are required in respect of constitutional amendment bills, provinces directly affected by proposed provincial boundary changes should be allowed to propose amendments — this is better than the

alternative to reject and therefore veto that provision in the bill (albeit not the entire bill).

The above challenges are exacerbated by certain practices in the NCOP, including the manner in which relevant provisions in the NCOP Rules and the Constitution are interpreted by the NCOP and provinces alike, as listed below.

2.2 Provincial participation challenges

Provinces have yet to fully appreciate the potential of, and engage in, negotiations. The negotiating meeting is arguably the most neglected phase in the mandating process because provinces that are directly affected by a bill (a) do not always send their delegations to negotiating meetings and (b) are not proactive in lobbying other provinces' support (i) over their concerns about eg unfunded mandates in the implementation of bills or (ii) for proposed amendments to bills (illustrated in the CMB case study).

2.3 Incorrect application / interpretation of the Constitution and applicable NCOP Rules

- (a) The voting requirement for a majority of five or six provinces to vote in favour of a bill in order to be passed by the NCOP (ito s 65 of the Constitution) was incorrectly applied in the context of a negotiating meeting on the TCB.
- (b) There are no clear guidelines in the Rules or the Constitution concerning the role in the mandating process of provinces not directly affected by a bill, whether or not they must conduct public consultations, develop negotiating mandates and participate in negotiations.
- (c) The practical implication of the six-week legislative period prescribed in NCOP Rule 240 means that only one negotiating meeting is possible which severely impacts on provinces' ability to have meaningful discussions about, and reach agreement on, bills and issues that require their approval.

- (d) The NCOP Rules do not clearly define when the six-week legislative period applicable to the processing of s 76 bills can be extended by the Chairperson of the NCOP in terms of NCOP Rule 240, when this extension should end, and when the situation should be re-evaluated. Coupled with this is the MPPA's silence on whether such a bill is exempted from lapsing if it is not passed at the end of an annual session, and the Council does not revive it at the first sitting in the ensuing session. With controversial bills like the TCB in which public consultation was inadequate and which some provinces rejected, the lack of clarity on whether the bill lapsed or was still required to be processed contributed to the bill languishing before the NCOP Select Committee for two years.
- (e) In terms of current practice, constitutional amendment bills altering provincial boundaries cannot be amended in the NCOP although the applicable constitutional provisions do not explicitly prohibit this and NCOP Rule 219(i) allows for the amendment of all s 74 bills.

2.4 NCOP delegates' performance in the political context

The desire of NCOP delegates to conform to party-political views on, and expectations about, the outcome of controversial bills can sometimes result in a rigid or stalled negotiations process. The TCB case study illustrates some of the tension delegates experience in this regard.

3. Recommendations

Addressing the above challenges and enhancing the participation of provinces in the legislative and other processes in the NCOP, especially in mandating procedures, will require (a) amendment of formal NCOP rules and legislation, (b) changes to certain current practices and (c) political solutions / interventions by parties in the NCOP and the provincial legislatures to first, acknowledge that challenges exist and secondly, discuss challenges and seek practical and lasting solutions.

(a) *Legislative period*

Currently NCOP Rule 240(1) provides that ss76, 74(1), (2) and (3) bills ‘should be dealt with in a manner that will ensure provinces have sufficient time to consider the bill and confer mandates’. According to NCOP Rule 240(2) ‘[d]epending on the substance of the [b]ill, the period may not exceed six weeks’.

An amendment of NCOP Rule 240 should, however, not be prescriptive and should allow for an extended period to process a bill if eg the bill is complex, there is a lot of public interest in the bill, and/or provinces request more time to process the bill and conduct public consultations, *viz*:

- (i) Extend the legislative time-frame in NCOP Rule 240 in consultation with provinces and the NA to a period long enough to allow provinces to consult properly and develop mandates, and also allow enough time in the NCOP and the NA to process the bill without creating bottlenecks. One option is for provinces to agree to the adoption of the proposal in the NA’s Second Term Programme (dated 14 May 2015) for an eight-week legislative cycle for bills affecting provinces.²⁵⁹
- (ii) Amend the current wording of NCOP Rule 240(1) and insert a reference to public consultation, eg ‘All section 76, 74(1), (2) and (3) bills should be dealt with in a manner that will ensure provinces have sufficient time to conduct public consultations, consider the bill and confer mandates’.
- (iii) Amend NCOP Rule 240(2) as follows: ‘Depending on the substance of the bill, the period may not exceed eight weeks’.
- (iv) Insert a new sub-rule NCOP 240(3) to provide exceptions to the eight-week legislative period, eg: ‘The eight-week legislative period may be extended by

²⁵⁹ On 17 October 2015 this proposal has not yet become effective.

the Select Committee dealing with the bill based on any of the following considerations, if (i) the subject matter of the bill is complex, (ii) the bill is of significant public interest, (iii) a province or provinces request more time to conduct public consultations, (iv) provinces are unable to conclude negotiations and require additional negotiating meetings and /or (v) it is in the public interest to extend the legislative period’.

- (v) Invoke Item 3 under Chapter 1 of the NCOP Rules that provides that ‘[t]he Council may by resolution dispense with or suspend a provision of these Rules for a specific period or purpose’. This provision is most often used in practice when it is necessary to fast-track a bill. However, it can also be applied to the legislative period in respect of bills affecting provinces if eg more time is needed to consult the public on or process a bill.
- (vi) Parliament should seek an agreement with the Leader of government business or Cabinet on the (i) maximum number of and (ii) dates by which ss 76 and 74 bills must be introduced in Parliament per term or year.

(b) *Amendment of constitutional amendment bills altering provincial boundaries*

- (i) Expressly provide in the NCOP Rules, the Joint Rules of Parliament and the MPPA that the NCOP’s power to amend s 74 bills in terms of NCOP Rule 219(i) also applies to constitutional amendment bills that alter provincial boundaries and that negotiating mandates can propose amendments to such bills.
- (ii) Amend NCOP Rules 227 and 228, Joint Rules 174, 176, 177, 179 and 180, and insert a new section in the MPPA to specify that NCOP amendments to s 74 bills that alter provincial boundaries must be referred to the NA for consideration. If the amendments are rejected by the NA, the bill must be sent for mediation. If the Mediation Committee cannot make a decision within a specified time the bill lapses.

- (iii) Amend the NCOP Rules, the Joint Rules of Parliament and the MPPA to clarify that constitutional amendment bills that alter provincial boundaries, contain questions affecting the Council or change the functions or powers of provinces cannot deal with other issues except ancillary or incidental matters. This will simplify the mandating and voting process so that if a province rejects the proposal, it rejects the whole bill.

(c) *Provincial participation*

- (i) Provinces must maximise their input on bills and should proactively arrange public consultations on bills about which they receive early notice.
- (ii) The CMB case study highlights the need to clarify the roles of provinces not directly affected by s 74 or s 76 bills. Insert a provision in the MPPA and/or the NCOP Rules to (aa) compel all provinces to attend and participate in negotiating and final mandate meetings, (bb) allow provinces to lobby each other's support provinces for the bill or proposed amendments to the bill, and (cc) provide a mechanism to end deadlocks during negotiations.
- (iii) Provinces directly affected by a bill must ensure that, in addition to a list of proposed amendments, their representatives are present at the negotiating mandate meeting.
- (iv) Change the current practice in the NCOP to allow provinces to cast votes per province regarding a question to revive a bill affecting provinces.
- (v) Invoke Items 1 and 2 under Chapter 1 of the NCOP Rules for '[t]he Chairperson of the Council [to] give a ruling or make a rule on a matter for which [the] Rules do not provide' until the Rules Committee can make a decision on it.

The requirement of provincial mandates to deliver and give effect to the decisions of provincial legislatures (on behalf of provinces) is intended to enhance democracy. The Rules of Parliament, NCOP practices and the MPPA must thus enhance

provincial participation in the NCOP to ensure it happens ‘in a manner consistent with democracy’.²⁶⁰ Mandating procedures, if used optimally, can showcase provincial participation at its best. The study provides a glimpse of an effective mandating process and provincial participation in the discussion of the CMB that was properly consulted and widely accepted, whereas the TCB 2012 was rejected by some provinces because consultation on the bill had been inadequate. The study reveals certain challenges in the mandating process. They are, however, not insurmountable and the recommendations provide some guidance on how they can be addressed through proposed changes to the MPPA, the NCOP Rules and the Joint Rules of Parliament, and certain NCOP practices. Despite the challenges and shortcomings, the NCOP has shown remarkable resilience and has made some strides to improve provincial participation in its processes. If implemented the recommend changes will greatly improve provinces’ experience in and their ability to use mandating procedures to their advantage — and by extension enhance the NCOP’s ability to fulfil its mandate to effectively promote provincial interests in the national sphere.

²⁶⁰ *Ibid.*

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